

ART OF ROCK AND ROLL

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CHAPTER 2

ART OF ROCK AND ROLL

I. INTRODUCTION

Visual imagery has played a part in the promotion and presentation of rock music for about as long as rock and roll has been around. Concert posters and handbills, print ads, wardrobe and stage sets, album covers, box sets and other packaging all play a part in fashioning a recognizable identity for a band and generating interest in both product and live performances. This article will focus predominantly on posters, and some of the legal issues associated with their creation and commodification.

A powerful poster is capable of not only publicizing an upcoming concert but also, in exceptional cases, of taking on a life of its own as an iconic commemorative trophy. Since at least the 1960s some rock and roll 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 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. 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 transplanted Texan 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.

Secondly, and 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. And graphic design software by Adobe, Corel, Xara, and others has made it easier for neophytes to try their hand at designing posters themselves. It is not uncommon for posters designed on computers and offered as signed and numbered limited-edition screen prints by today's most popular rock artists to fetch almost as much as vintage posters from the '60s.



Poster by Seattle artist Jeff Kleinsmith for the bands Supersuckers, Hog Molly, and the Catheters. © 2001 Jeff Kleinsmith.

That posters can command such prices is understandable: Some rock posters are fifty 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 – counterfeits, fakes, pirated or bootlegged 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 venue 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 exit the venue.)



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

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 counterfeited 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 and sometimes questionable means, and 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 they could recoup some of their costs and the value of their time by selling them for more money somewhere down the line.

In the '90s, 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 venue on the night of the show without permission this arrangement 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 venues and bands, the prominent poster store ArtRock, for example, often hired artists to create designs for signed and numbered promotional prints which 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 fifty 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 venues have begun to insist on copyright assignment or work-made-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 art – the poster design itself.

II. 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.

A. 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 venue will appear on a poster, for obvious reasons. To the extent these are trademarks, their use should be authorized only by the trademark owners. If the poster was commissioned by the band and the venue, use of these marks reasonably may be understood to have been authorized.



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

Presumably a poster that brings an audience to a concert benefits both the band and the venue, which 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.



Detail from Spamarama poster by Jim Franklin that provoked a cease and desist letter from Hormel Foods. © 1990 Jim Franklin.

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 Spamarama. 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 displays of culinary fearlessness, and tempting concoctions such as the Spam Daiquiri), revelers giddy on alcohol and pork products purchased t-shirts featuring Spamarama 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 Spamarama would likely cause consumer confusion. If the Spamarama 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 Spamarama 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 non-infringing 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 Spamarama 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 Spamarama posters to the contrary, it's likely many people seeing them may have believed Hormel sponsored or endorsed the event.

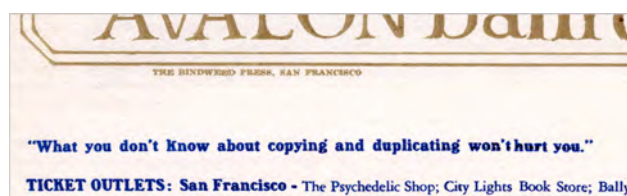
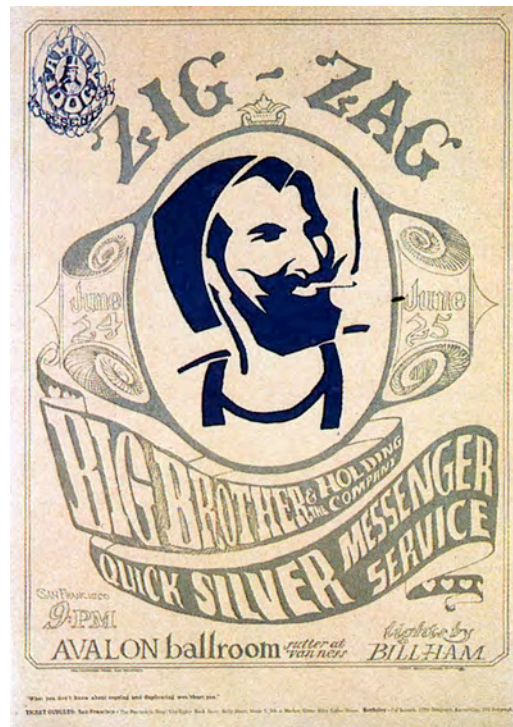
For its part, Hormel also might have alleged trademark dilution. Hormel actually claimed that both the depiction of its product in the "PATÉ PASSÉ?" illustration and the caption placed its product in a bad light and disparaged its mark. Hormel might have filed suit under the Texas anti-dilution statute and, if filing after January 1996, it probably would have asserted a federal dilution claim as well. If the court determined that the Spamarama 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)), non-commercial use of a mark is non-actionable, 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 Spamarama saga had a happy ending because the two sides came to an understanding, and until just a few years ago Spamarama 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 Spamarama not been responsible for such a large spike in Texas Spam sales each year.

Similarly, the unauthorized use of the cigarette-papers trademark Zig-Zag in the 1960s may have been forgiven because it was good for business. It appears that the rolling papers 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 the company saw the mark's use on the poster as enhancing the cachet of its product among a significant segment of the '60s rolling-papers 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 they are not authorized to use. Ordinarily it simply isn't smart to include a trademark on a poster without permission.



Poster popularly known as "Zig-Zag Man" advertising a show by Big Brother and Quicksilver Messenger Service. Artwork by Stanley Mouse and Alton Kelley. © 1967, 1984, 1994 Rhino Entertainment Company. Used with permission. All rights reserved.

B. 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 or she 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. This is no less true when someone reproduces without permission the original work of a poster artist as when a poster artist makes unauthorized use of someone else's work in a poster.

In one fairly unusual case, a Seattle poster design studio called Modern Dog brought a copyright infringement action against Target Corporation and Disney. *Modern Dog Design Co. v. Target Corp. et al.*, No. 2:11-cv-01816 (W.D.Wash. filed Oct. 28, 2011). The studio owners, Mike Strassburger and Robynne Raye, had published a book in 2008 called *MODERN DOG: 20 Years of Poster Art*. The book featured drawings of dogs – sixty-nine “Dogs We Know” and sixty-seven “Dogs We Don't Know” – on the front and back inside covers, respectively.

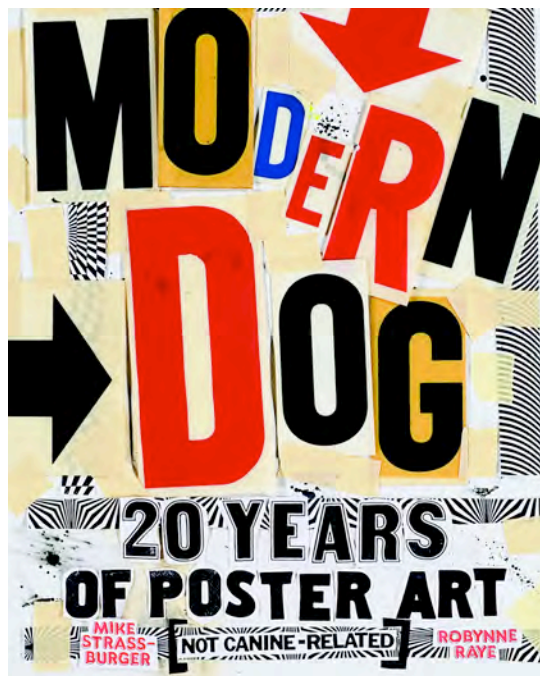
Modern Dog alleged in its 2011 complaint that Target and its supplier, in conjunction with Disney, copied at least twenty-six of the dog drawings and reproduced them on a shirt marketed to young girls who were fans of the TV movie *High School Musical* and its spin-offs. Modern Dog provided the court with side-by-side comparisons of its own dog images and the approximately two dozen allegedly infringing images. As an expert witness, Modern Dog brought in the same graphic design professor who had testified for the Associated Press in the “Hope” poster case (*Fairey v. Associated Press*, No. 09 Civ. 1123 (S.D.N.Y. 2010)).

In its defense, Target et al. argued essentially that Modern Dog could not demonstrate infringement of protectable expression because there are only so many ways to draw a dog. Target advanced the dubious proposition that “if two artists do line drawings of the same breed of dog, the drawings will inevitably look the same.” Def's Mot. Sum. J., *Modern Dog v. Target*, No. 2:11-cv-01816 at 7.

The case settled in early 2014. The Modern Dog case is atypical – for many reasons – but particularly

because it involved a small studio with limited resources going after three powerful corporations for infringing its copyright. Often it's more common to find an artist in the crosshairs of a corporation, or in jeopardy of being so. This is no doubt due in part to a lack of understanding about copyright law among some artists, and also to the grossly lopsided power disparity between ordinary artists and large companies.

It is tempting for artists to incorporate popular images in their work if they wish to capture the attention of the public. In some instances this may be because it's easier than creating something original, but more often artists will use a familiar image as a convenient shorthand way to make a point, or for comic effect, or just because they believe people are more comfortable with the familiar. At any rate, the vast panorama of rock and roll posters as a whole is replete with recycled images.



Cover of poster art book containing images its authors claimed were infringed by Target and Disney. © 2008 Modern Dog Design Co.

In a 2004 book featuring over 1800 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 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 fifty 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 "Skeleton 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.



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

The Neuman-esque face used by Kelley and Mouse is one of the many variations of that mug which 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 had allowed 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 "Skeleton and Roses." Artwork by Stanley Mouse and Alton Kelley. © 1967, 1984, 1994 Rhino Entertainment Company. Used with permission. All rights reserved.

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 Music, Inc.*, 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 fair use: the mistaken assumption that every clever, thought-provoking or

humorous use of a work will qualify as a parody for copyright purposes. Traditionally, for a parody to be considered a fair use, it 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,” help illustrate this point. In *Leibovitz v. Paramount Pictures Corp.*, the 2nd Circuit held that it was a fair use for a movie advertisement 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 (2d Cir. 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 parodic aim directly at Leibovitz’s photo.



Poster popularly known as “Expansion” advertising a Family Dog show in Denver. Artwork by Stanley Mouse and Alton Kelley. © 1967, 1984, 1994 Rhino Entertainment Company. Used with permission. All rights reserved.

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 was deemed not 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 then for an artist hoping to avail himself of the parody fair-use exception for using another party’s work without permission is to ensure 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. Yet, despite the benefit of taking this customary and conservative approach, there are cases we will look at in Section III that suggest such caution no longer may be necessary.

C. 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 venue acting on behalf of the performer, it may be reasonable to believe 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 from a painting without the golfer’s permission, 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.

As it balanced 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 their economic value from the fame of the Three Stooges.

In another case, rapper 50 Cent recently won on his right-of-publicity and copyright claims against Lee "Q" Odenat and the video website worldstarhiphop. The site had used, without permission, images of 50 Cent and copyright-protected photos of other members of his hip-hop group. Finding that the defendants had used 50 Cent's likeness for purposes of trade within the state of New York and without consent, the federal district court judge granted plaintiffs' motion for summary judgment as to the New York right-of-publicity claims. The summary judgment motion for copyright infringement was granted; for trademark-related claims the motion was denied. *Jackson v. Odenat*, No. 09 Civ. 5583 (S.D.N.Y. March 24, 2014).

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 used as advertisements prior to it.

D. Can Commissioned Art Still 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 was 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.

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 of it. 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.



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.

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).

Although Arminski had been commissioned to do the posters not directly by the bands themselves but by the promoters, this was the same sort of arrangement that had been 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 website of 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 over \$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. 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. As another affirmative defense, Arminski might have invoked the doctrine of estoppel by acquiescence.

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 recouping 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 which they are obligated to protect; but suing a graphic artist for attempting to recoup what it cost him to produce an apparently authorized advertisement 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 opined 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.



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.

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 which 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.

III. OWNERSHIP OF THE ART

A. Posters as Protectible Intellectual Property

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. Corroborating this, the experts at San Francisco's SF Rock Posters shop report seeing 1966 "Skeleton and Roses" posters by Kelley and Mouse command up to \$9,000 each. As much as \$20,000 has changed hands for a Jefferson Airplane FD-1, popularly known as "Tribal Stomp" and considered the first poster in the Family Dog numbered series. A few years ago one Bay Area aficionado advertised his combined collection of Family Dog (1966-1969) and Fillmore West (1966-1972) posters for \$750,000.

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 disputes with venues and bands over trademark or right of publicity issues.

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 the lower courts which 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.

B. Contracts with Venues and Bands

Given that rock poster designs and the rights therein can be very valuable, ownership of those rights occasionally have 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, this 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 January 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 language in their agreements that makes it clear a non-employee artist is assigning to them all right, title and interest in the work the artist is being hired to create. If the artist is a regular employee, the work he creates within the scope of his employment is automatically owned by the employer as work made for hire. Some agreements will include a provision that purports to classify a non-employee artist's creation as a work made for hire. If the creation is a poster, however, it is unlikely a work-made-for-hire provision would be enforceable because a poster ordinarily would not fit within the list of statutorily enumerated work-made-for-hire categories. 17 U.S.C. § 101.

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 venues 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 freestanding or preexisting 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 associated with the poster design. A poster is meant to advertise a specific concert at a particular venue 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 venue trademarks that the artist has no rights to (except in those unfathomably rare instances where the poster artist is also the only performer advertised and the owner of the venue and its trademarks). The party commissioning the poster and more than likely drafting the agreement (the venue or band, or possibly the record label) would be in a much better position than the artist to guarantee that the band and venue 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 likely that in most cases, even today, when a poster artist is commissioned to create a poster there is absolutely no discussion of 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 they own the copyright in any poster they commission, by virtue solely of paying for its design and printing. They even may assume that's true if, as happens frequently these days, the artist is not actually paid anything to design and print the poster, but compensated solely with permission to sell some of the posters.

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 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. Recently one popular band cut an exclusive deal with a design studio in Austin for all of the posters the band would need over the course of a year.

The studio agreed to create a different design for each stop on the band's tour. Each design was to feature the artists' interpretation of a specific lyric by the band. The simple agreement set out how many posters were to be printed for each show, who would get them, and how any money from sales would be split. The agreement didn't address who would own the copyrights.

C. Third Party Acquisition of Rights

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 and roll art and a desire that the posters be seen and enjoyed by as many people as possible. 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. Within the last fifteen years, however, in addition to all the other twists complicating the intricate and ever-evolving choreography between artists, bands and promoters, new suitors have dropped in on their decades-old dance.

Just a few years after Chet Helms passed away in 2005, Rhino Entertainment and the Warner Music Group acquired worldwide rights to his highly-prized Family Dog line of posters. Some of the most popular images were reprinted, including Zig-Zag Man and Skeleton and Roses. Today signed and numbered limited edition lithograph prints of these are available from Rhino online. As to the other preeminent San Francisco poster series, another entity purchased the rights to almost all the Fillmore posters.

The late legendary rock impresario Bill Graham put on thousands of shows and commissioned thousands of rock posters and handbills for the Fillmore and other venues beginning in the mid '60s. Currently, however, the rights to almost all of the posters commissioned by Graham are owned neither by the poster artists who created them, nor by the musicians featured on them, nor by any company ever affiliated with Graham.

In 1995 the executor of Graham's estate orchestrated the sale of his organization to a handful of key employees, who in turn sold it to a Wall Street banker from whom it was purchased by an enormous media conglomerate. In 2002 the conglomerate sold that portion of the business known as the Bill Graham Archives (BGA) to a Minnesota company for approximately \$5.5 million. The deal included what

was in essence a quitclaim 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.



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

The Minnesota company launched a website from which to sell its posters. It named the site Wolfgang's Vault as an esoteric reference to Bill Graham's real name, Wulf "Wolfgang" Grajonca, and presumably to add a patina of poster bona fides. BGA then, under the control of the Minnesota company and doing business as Wolfgang's Vault, began an injudiciously aggressive campaign to assert its newly-acquired poster muscle. It prohibited at least one independent rock-poster archive site, ClassicPosters.com, from displaying images of any BGA posters; the operator of the site then sold the domain name and trademark to someone else.

BGA also sent cease and desist letters to collectors and dealers who 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 to which he owned the rights. Possibly this was because he felt that as more people

were exposed to those posters and came to realize there was a thriving market for them, the more the posters and his rights in them were worth. By contrast, BGA threatened legal action against people attempting to sell posters on eBay based on the premise that the sellers had made copies of the posters and publicly displayed them, thus infringing BGA's exclusive rights.

Of course, legitimate owners of individual posters are free to sell their posters pursuant 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.

Not many poster dealers have the financial wherewithal to call BGA'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, BGA has nonetheless demanded that such a seller refrain from displaying any photographic images of the poster that's for sale.

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 an ongoing form of advertising.

Artists who've had the rights to their posters purchased by BGA have found those images withheld not just from archive websites 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 BGA declined to allow the authors to use any of the posters in which it claimed ownership.

In 2003, BGA 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). *aff'd*, 448 F.3d 605 (2d Cir. 2006). That year, Dorling Kindersley (DK) published *Grateful Dead: The Illustrated Trip*. As the title suggests, the book contains a wealth of visual images – more than 2000 photographs and reproductions of artwork. Among those 2000 images are a handful of reduced reproductions of posters the

copyrights of which presumably were included in the BGA intellectual property purchased by BGA.

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 BGA on DK's behalf. While not rebuffing the Grateful Dead outright, BGA said it would allow reproduction of the poster images in exchange for the band granting "permission to BGA to make CDs and DVDs out of concert footage in BGA's archives." *BGA v. DK*, 448 F.3d at 607.

Predictably, the Grateful Dead rejected that offer, and from then on DK dealt with BGA 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 September 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 August 12 and 13 performances by Jefferson Airplane and the Grateful Dead. BGA offered to license these images for \$2500 each.



After seeking \$2500 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.

On November 17, 2003, a representative of BGA sent DK two e-mails. The first stated, "you have included at least 3, if not more, images that we own and have the copyright to." The second threatened "if we do not have an agreement by close of business tomorrow, I will instruct [our attorneys] to take the most aggressive action possible." *BGA v. DK*, No. 03 Civ. 9507 at 3.

Approximately one week later, BGA made good on its threat by filing suit against DK for copyright infringement; BGA alleged that it owned the copyright in seven posters reproduced in the book and that DK included them without permission. For some reason BGA made no mention of the eighth poster in its complaint – Wes Wilson's 1966 Jefferson Airplane/Grateful Dead poster. In addition to an injunction, BGA 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 district court granted summary judgment in favor of DK. It found that the 1st factor weighed heavily in favor of finding fair use because the book is a biography of the band – a type of criticism, comment or research – that fits comfortably among the uses listed in the preamble to § 107 as examples of possible fair use. Additionally, 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 2nd factor weighed slightly against fair use; the posters are creative works but they had been previously published. And although it was undisputed DK had reproduced the posters in their entirety, the 3rd factor weighed in favor of fair use because each image was reduced to approximately fifteen 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 its "use was outside the ambit of lost licensing opportunities," the district court determined that the

4th 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 district court held that DK's use was non-infringing. *Id.* at 15.

On appeal, the 2nd Circuit affirmed the holding of fair use after conducting a thorough review of the transformativeness issue, and determining that "DK's use of concert posters and tickets as historical artifacts of Grateful Dead performances is transformatively different from the original expressive purpose of BGA's copyrighted images." *BGA v. DK*, 448 F.3d at 615.



Photograph from Patrick Cariou's book *Yes Rasta* as shown in the 2nd Circuit opinion.

On a side note, since 2010, Bill Graham's two sons have been engaged in a suit for copyright infringement and conversion against BGA and the executor of their father's estate who facilitated BGA's acquisition of Graham's posters and intellectual property. Among other things, the sons charge that they were cheated out of their share of hundreds of poster copyrights and "The Fillmore" trademark, 100 complete sets of posters, and ten personal scrapbooks belonging to Graham. In December 2013 the district court's dismissal of the claims against BGA, and its striking of the complaint against the executor pursuant to California's Anti-SLAPP statute, was reversed in part by the Ninth Circuit, and remanded. *Graham-Sult*

v. Clainos, No. 11-16779, No. 12-15892, 2013 U.S. App. LEXIS 25725 (9th Cir. Dec. 27, 2013).



Collage painting by Richard Prince titled "Graduation" as shown in the 2nd Circuit opinion.

D. The Expansion of Transformative Fair Use

Two recent copyright cases that have cited and echoed the transformative fair-use analysis of *Bill Graham Archives v. Dorling Kindersley* and *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994) are *Cariou v. Prince*, 714 F.3d 694 (2d Cir.), cert. denied 134 S. Ct. 618 (2013) and *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013). The first case involved the unauthorized use of thirty photographs of Rastafarians, one of which was altered to suggest that the dreadlocked subject was playing an electric guitar. The second case dealt with the unauthorized incorporation of a street art poster into a band's video backdrop.

In *Cariou*, the 2nd Circuit held that, for the most part, appropriation artist Richard Prince's use of Patrick Cariou's photographs was fair. Prince had torn photographs out of Cariou's book *Yes Rasta* to create his 2007-2008 *Canal Zone* series of collages and paintings. He altered some of the photographs significantly but made more modest changes to others. When Cariou sued for copyright infringement Prince argued that his artworks were transformative of Cariou's photographs and thus fair use. 714 F.3d at 698.

The Southern District of New York rejected Prince's fair use defense and granted summary

judgment in favor of Cariou because it found that the artworks didn't critically comment on the photographs, and as such were not transformative. The 2nd Circuit reversed, however, noting that the "law imposes no requirement that a work comment on the original or its author in order to be transformative What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work." It found twenty-five of Prince's pieces transformative because they "manifest an entirely different aesthetic from Cariou's photographs." *Id.* at 706.

Nonetheless five of Prince's artworks did not differ enough from Cariou's photographs for the 2nd Circuit confidently to make a determination about their transformative nature. Among these five was a piece titled "Graduation." Prince had pasted onto the subject of the photograph a picture of an electric guitar and enlarged hands, and had painted "lozenges" over the subject's eyes and mouth – something he did to a number of Cariou's subjects. With regard to this piece, and the other four about which the court was unable to make a fair-use call, the case was remanded. *Id.* at 710-11. It settled in early 2014.

In the second case, *Seltzer v. Green Day*, the 9th Circuit held that it was fair for the band to use an image found on a street poster without obtaining the copyright owner's permission. Artist Dereck Seltzer had created the poster using a drawing he called "Scream Icon." He pasted copies of the poster and smaller adhesive-backed prints of the image on walls around Los Angeles.

A designer working for Green Day photographed the poster and made it the centerpiece of a roughly four-minute-long video for the band's song "East Jesus Nowhere." The video was played behind Green Day at approximately seventy concerts in 2009 and during the band's performance of the song at the MTV Video Music Awards. When Seltzer became aware that his art was being used he brought a copyright infringement suit against Green Day, the designer, and Warner Brothers Records.

Determining that it was transformative fair use for Green Day to incorporate "Scream Icon" into its video backdrop, the district court granted summary judgment in favor of the defendants. Adding insult to injury, the court found that Seltzer's claims had been objectively unreasonable and it awarded Green Day over \$200,000 in attorney's fees.

On appeal, the 9th Circuit affirmed the holding of the lower court as to the infringement claim. It focused on each of the four fair-use factors in turn, and following *Campbell v. Acuff-Rose*, *Bill Graham Archives v. Dorling Kindersley*, and *Cariou v. Prince*, the appeals court applied a transformativeness analysis that would likely prove toxic to most any infringement

allegation. A "work is typically viewed as transformative as long as new expressive content or message is apparent. This is so even where – as here – the allegedly infringing work makes few physical changes to the original or fails to comment on the original." *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013). The principal modification Green Day had made to "Scream Icon" was spray painting a large red cross over the middle of the face.

As to the attorney's fees awarded to Green Day by the district court, the 9th Circuit vacated that award, explaining that the "transformation was far from obvious given Green Day's only slight alterations to the original." *Id.* at 1181.

For a poster artist who owns the rights to his own work, the implications of these recent cases might be troubling. An artist's ability to determine how his art is used would tend to be undermined by a broadening of the fair-use standard – by an overly generous understanding of what qualifies as "transformative." In view of this loss of control over his work, and the concomitant loss of licensing opportunities, it might be expected that an artist would be tempted to abandon such a labor-intensive, thankless, and poorly paid profession.



Drawing from a poster by Dereck Seltzer, titled "Scream Icon," that was used without permission in a Green Day video, as appended to the 9th Circuit opinion.

But creating rock posters has never been about getting rich – or about what's logical, rational, or predictable. Since the 1960s, the best posters have been born primarily out of the poster artists' passion for the

music. Because 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.

IV. CONCLUSION

Over the last fifty 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 merchandising or marketing machinery. Gone are the days when a promoter or venue could assume that because it commissioned a poster it owned the copyright. Today, bands, venues, 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 these reasons, each party connected to the creation and dissemination of rock posters should be mindful of the legal issues involved.

It goes without saying that when concert promoters book bands they should pay attention to the advertising and merch 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 promotional 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 landmark 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 rock posters they control. To the extent 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 vending rock and roll posters a viable business. Aside from the equities involved, it would be a shame to squander 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.

Where possible, artists should insist on written authorization to use marks, names, photos, and likenesses, and should clear with the bands and venues any arrangement for selling their posters themselves. To the extent attorneys 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.

Betraying perhaps a misunderstanding of copyright and trademark law, the line "What you don't

know about copying and duplicating won't hurt you" was added by Family Dog promoter Chet Helms to the 1966 Big Brother poster that used the Zig-Zag trademark without permission. It's not clear if he was hoping this would inoculate the Family Dog against an infringement action or if he was just whistling past the graveyard.

Whatever Helms intended, had the unauthorized Zig-Zag use occurred today he might not have needed to lose much sleep over it given the arguably new purpose to which the mark was put and the continued ascent of the transformative fair-use defense in infringement actions.

In a law journal article written before *Cariou* and *Seltzer*, the authors maintain that "[s]ince the Supreme Court's *Campbell* decision, it has been clear that 'transformative' uses of copyrighted materials are almost certain to be deemed fair." Fisher, William W., III, Fahey, Shepard, et al., *Reflections on the Hope Poster Case*, 25 Harv. J.L. & Tech. 244, 321 (2012).

They add that, of all the interpretations of what "transformative" means, the one most widely credited by courts today is that it simply means the defendant's work serves a different purpose than the underlying work. *Id.* at 322.

In light of this trend it would appear that those creating original rock and roll art will have an increasingly difficult time protecting it from unauthorized users. Today as never before it is incumbent on artists to acquire a basic awareness of the legal issues impacting their creative work. They and every other party involved in the creation of rock and roll art, or benefitting from it, should make an effort to appreciate the interests at stake.

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