

Bill Graham Archives v. DK

Music Promotor's Archives vs. Publisher

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Bill Graham, music promotor, gained fame in 1960s San Francisco.

Graham influenced the evolution of the music scene of that era and beyond.

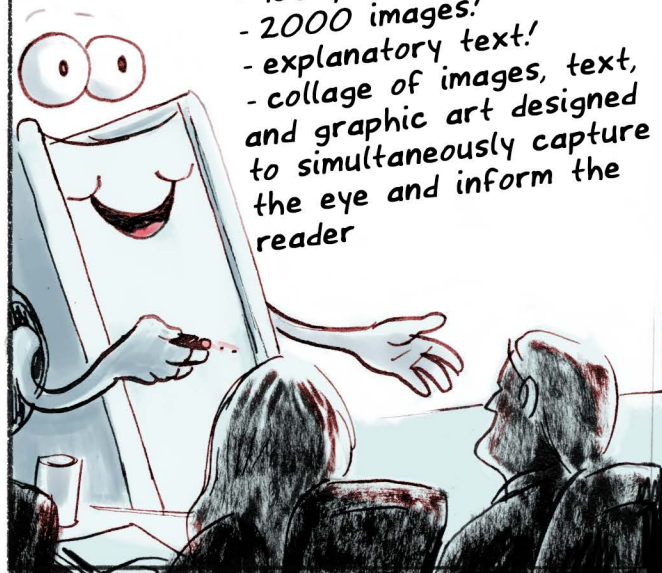
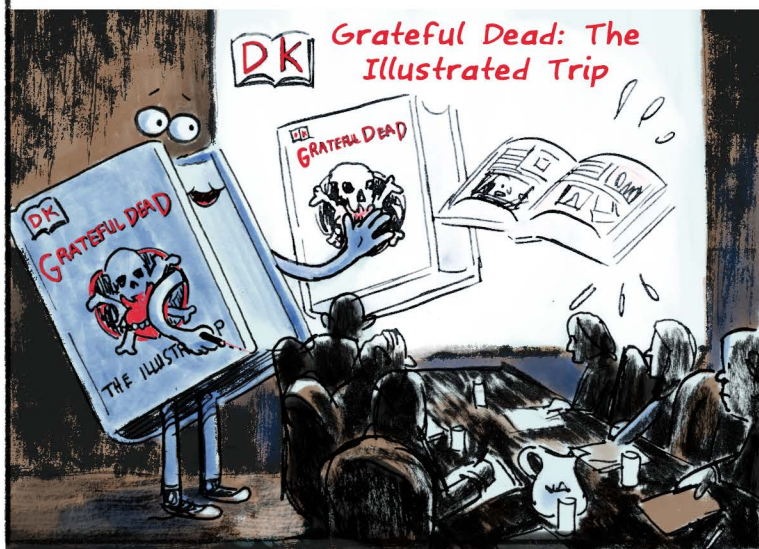
His archive boasts posters, tickets, and other ephemera from his various gigs.

In 2003, Dorling Kindersley Publishing (DK) contacted the Bill Graham Archives (BGA) seeking permission to use 7 poster images in a coffee table book about the "cultural history of the Grateful Dead."



Follow the Grateful Dead via an illustrated timeline, featuring:

- 480 pages!
- 2000 images!
- explanatory text!
- collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader



Several rounds of negotiation for licensed use failed.

No.

HEAD

ARCHIVE

DK used the images without permission.

BGA filed an infringement suit.

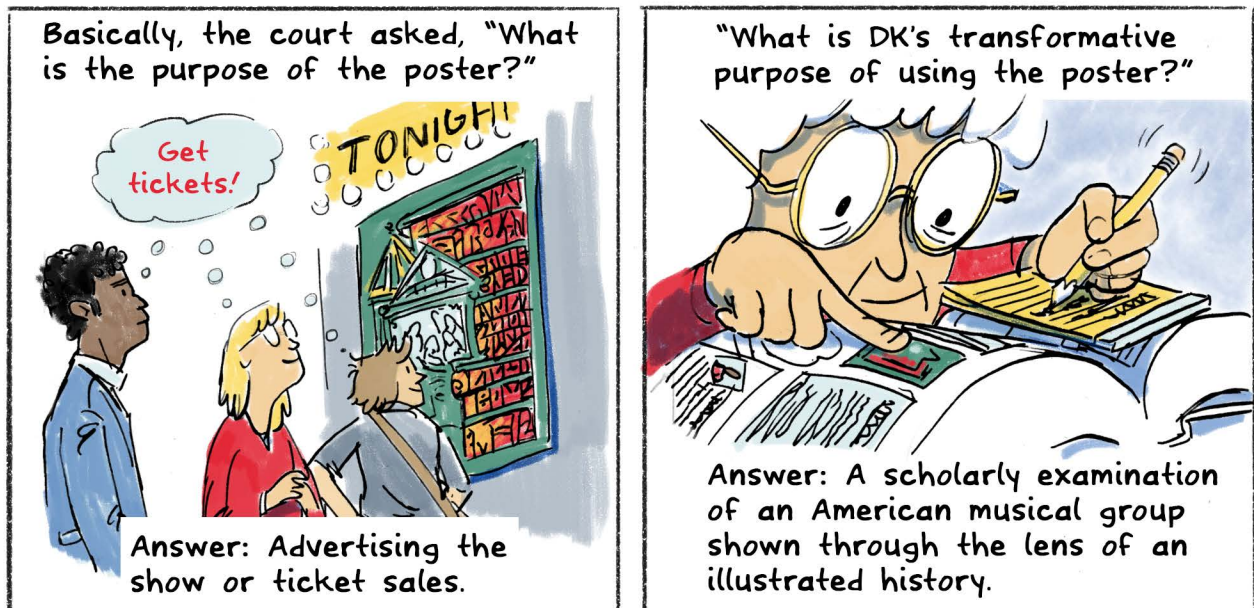
The district court decided in favor of DK in a summary judgment but BGA appealed the decision, so the case went to the Second Circuit Court of Appeals to be examined again.

The court consulted the traditional four factors of the fair use statute, but was also heavily influenced by previous decisions. The most notable case they referenced was *Campbell v. Acuff-Rose Music*, which exemplified the "transformative fair use" standard.

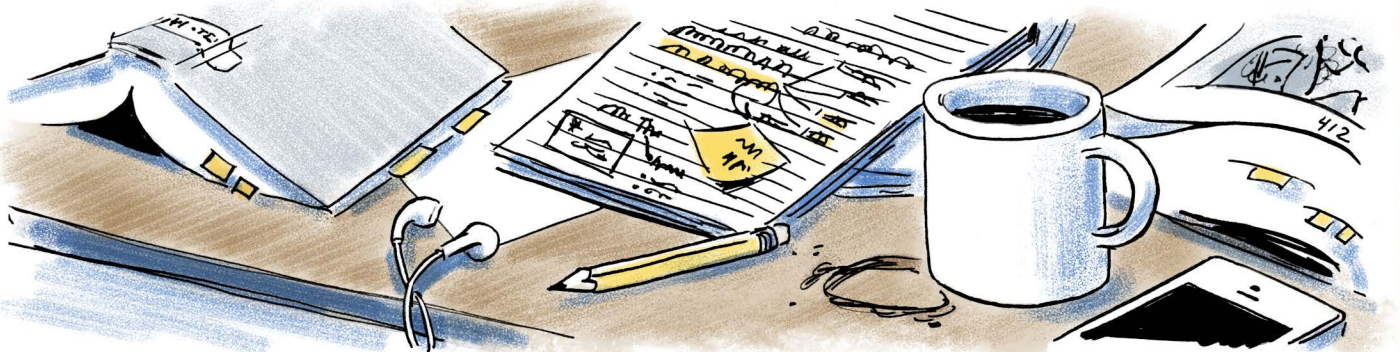
The Four Factors of Fair Use

Factor #1: Purpose and character of use

The court found that while DK's use of BGA's images was commercial, the BGA images were used as historical artifacts embedded as part of the Grateful Dead's narrative instead of their original purpose, concert promotion.



The court also noted that biographical use of copyrighted material is frequently supported as a fair use because it allows for "commentary, research, and criticism," as outlined in the preamble of the statute.



"[T]o further this collage effect, the images are displayed at angles and the original graphical artwork is designed to blend with the images and text...DK's layout ensure that the images...are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit the copyright artwork for commercial gain."



Factor #2: Nature of Copyrighted Work

The fact that the images weren't used in a creative capacity limited the court's consideration of this factor, but they ultimately decided that their artistic nature weighed against DK's use.



Factor #3: Amount and substantiality of the portion taken

The court found that even though the entire images were used, DK used thumbnails that neither substituted for the original nor were larger than necessary for their use to be considered fair.



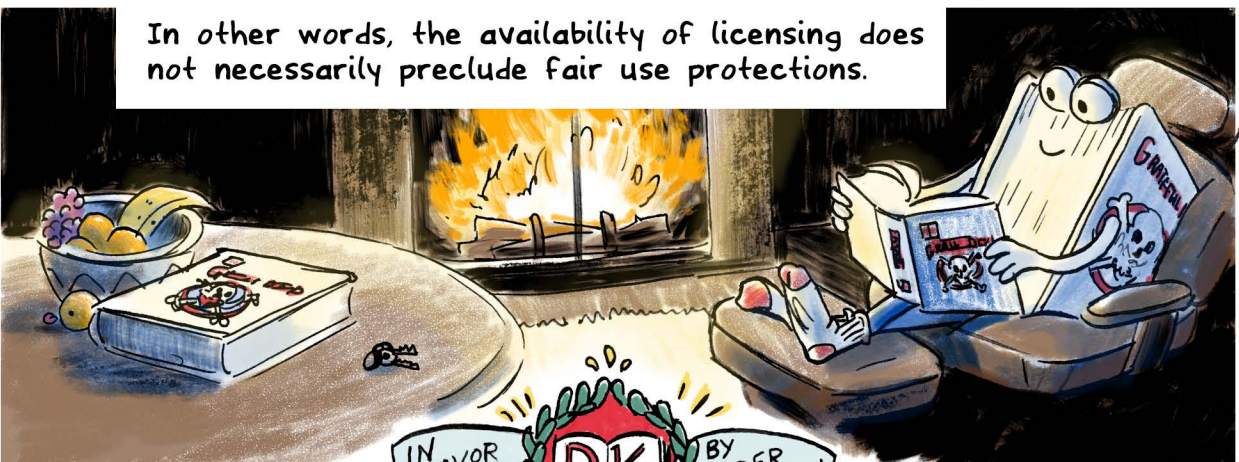
In basic terms, the court stated that DK had used the amount necessary to serve their scholarly transformative purpose. This definition is part of the very core of the transformative fair use analysis.



Factor #4: Effect of use upon the potential market

Last, the court determined that DK's use did not affect the market for BGA's poster sales, again because of their transformative use.

The present use did not supersede the market for the copyrighted work, nor did it serve as a substitute. Citing Campbell, the court stated that "a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images."



The Bill Graham Archives case helped clarify and carry the transformative fair use standard forward, and made it an important part of fair use jurisprudence to be harnessed and cited in future copyright cases.