

The logo for Astrachan Gunst Thomas Rubin features a stylized, swirling blue graphic behind the firm's name. The name is written in a lowercase, sans-serif font, with 'astrachan gunst' in a lighter blue and 'thomas rubin' in a darker blue.

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What a Strange Trip It Will Be

By: James B. Astrachan

The phone rang and it was my bud on the other end of the line. He sounded down and confirmed his mental state when I inquired. "Let's meet for a drink, and I'll buy," I offered. Even that invite failed to elicit a change of tone.

We met at one of those funky Fells Point bars, taking a back booth to get out of the din so we could talk. We waited for someone to take our orders over small chit chat for a while until I realized the only way to get a drink would be to get it myself. I returned shortly to the table with two ales and put them down. "Okay, what's got you down?" I asked.

"Well, you know that for decades I have been fascinated by the work of an artist known for illustrating magazine covers and movie posters with gory monsters," he responded. "I've researched this guy from head to foot, and have followed the maturity of his art from his teens to his untimely death at age 53. He has a cult following, and there is very little I don't know about this guy. Call me obsessive, but I have spent a lot of time researching and writing a book about him and his work. I think I may have mentioned that to you last year."

"You did," I told him. "You said you were in the throes of an outline of something you wanted to put together and maybe publish."

He confessed that this was the work he had mentioned, and that over the years no one had really seen much of him because all his time was spent on research and the manuscript. Now, he told me the manuscript was done, and he had found an enthusiastic publisher.

"And this is what has made you bummed out?" I asked. "Seems to me you should be celebrating your good fortune."

A problem had arisen, he explained, and it was a problem he could not overcome. It appears someone at the publisher had contacted the owner of one of the magazines that the deceased artist had worked for. The idea behind the contact was to see whether the publisher could get a quote to endorse the book. The magazine's former owner asked the publisher's rep a series of questions that ended with "What art work is being used to illustrate the book?"

The response included identification of some of the art that had graced the covers of his magazine. The conversation went bad as he told the publisher's rep that he owned the art that was created for his covers and that if just one of his cover art was used without his permission, "He would own the publisher."

My friend added that the publisher had become frightened and told him that he could not use the art to illustrate the book. "With that admonishment, my project went out the window," he said. "I even spoke to my nephew, who as you know is a third year law student at an accredited law school, and he told me, 'the publisher was right in not letting me use the art. He'd get sued for copyright infringement.'"

"Feh", I replied.

"Feh? My life's in shambles and that's all you can say. Feh?"

"Look chum. As good lawyer as your nephew the law student is not, he missed the boat on this one. Ever hear of a little thing called fair use?"

I explained patiently that since the dawn of U.S. Copyright law there has been opportunity for a person like my bud to use the copyrighted work of another. This is because the purpose of expressed granting copyright to an author is to promote the progress of science and the useful arts. This doctrine was not codified in the later part of the 18th century, but was recognized as a judicial doctrine by the courts. Fair use was codified as a defense to copyright infringement in 1976. The idea behind fair use is to allow limited use of another's work for the benefit of the citizenry, often by transforming the original work into something new, or by using the work for comment or scholarship. The 1976 Act establishes 4 non-exclusive factors for courts to consider when deciding if a use is fair. I explained there are no bright line tests, and each case must be considered, the factors explored and the results analyzed.

"Okay," he replied. "Does that mean I have to get sued and go all the way through trial in order to establish my rights to use this art?"

"No," I told him. "First, suit is not a guaranty despite what has been threatened. And second, even though fair use is a mixed bag of fact and law, some of the circuits, including the one that the putative owner lives in recognizes that the issue of fair use can be resolved by summary judgment."

“Well, what about my ignoring his demands that I stop? Won’t that hurt my cause?”

“No, the U.S. Supreme Court has implicitly said that copying in the face of denial of a license is not a factor.”

I spoke of a couple of cases where art was used to illustrate texts, including one brought by the Archives of rock and roll impresario Bill Graham over the use of Grateful Dead posters he owned in a third party’s book about the Grateful Dead. In that case, I told my friend, the use was considered a fair use for a few reasons, perhaps the most important being that the illustrations in the book did not replace the need for the posters as display items, or expressions, and the chronological ordering of the posters in the book was transformative. My bud began to perk up.

“And this is not the only case,” I told him. “Recently, the same Circuit Court dealt with an issue similar to your case and the Graham Archives case and again found fair use when cover art was used to illustrate a book about the artist.” In that case the court quoted with approval a seminal law review authored by a member of its bench in which Judge Leval wrote that to be a fair use, the use must be productive and the work used in a manner different than the original. I explained to my friend that he would have no defense if he merely took the cover art and created posters or used the art to illustrate a new magazine. His intended use was so much different. In essence, he was writing a scholarly and transformative work that would not reduce the demand for the original art by anyone who wanted to display it or illustrate fiction. His work would be far different than the magazines on whose covers the work first appeared.

“So for this noble cause you will represent me for free?” he inquired. “Oy,” I thought. “I can see where this will end up”.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.