The New Symbol of "Hope" for Fair Use

Shepard Fairey v. The Associated Press

By Jo-Na Williams

What happens when you take a picture of an iconic figure of our time, turn it into a piece of very popular and sought-after poster art from a well-known and highly controversial artist, and throw in a world-renowned news cooperative alleging copyright infringement? You have what is known as the Obama "Hope" poster case. This could be one of the most compelling cases to date on fair use and could quite possibly spark a great debate about copyright protection, the boundaries of the fair use defense when it comes to appropriation art, and the limit and liberties of creative freedom as a whole.

Last fall people all over the world recognized what quickly became the symbol of the 2008 Barack Obama presidential campaign. The poster was admittedly based on a photograph taken of President Obama (then senator from Illinois) at a 2006 conference honoring the work of George Clooney and his father in Darfur.[1] The poster, created by the artist Shepard Fairey, displayed then Senator Obama looking into the distance with shadings of red and blue on his face, which was placed above the word "Hope." It became the most popular and merchandised symbol of the Obama campaign—although not officially adopted by it. In the process, it ignited litigation and debate among lawyers, law students, professors, and all those interested in the scope and limitations of the fair use doctrine under copyright law. One can only "Hope" for an amicable resolution that leaves the law of copyright intact—but cases often reshape laws in ways that leave new unanswered questions for those seeking their protection.

Summary: *Shepard Fairey v. The Associated Press*

Shepard Fairey claimed to have conducted a simple Google search for pictures of President Barack Obama and to have discovered the photo taken by photographer Mannie Garcia.[2] After much speculation, many other photographers and artists sought to find the origins of the photo, which was then identified as a tightly cropped headshot of Obama looking up at one of the speakers on the panel at the 2006 conference. However, according to Fairey's complaint, although the photo was taken by Garcia, it was a photo that contained both Obama and George Clooney in the frame, not the one identified by the press.[3] Garcia was hired by The Associated Press (The AP) to take pictures of the conference with actor George Clooney and Senator Obama present. Fairey admittedly did not pay a license fee to The AP to use the photo.[4] According to the complaint, after the origin of the photo was confirmed, Fairey was contacted by The AP in January of 2009; The AP claimed ownership of the picture and alleging copyright infringement on any works that contained the piece.[5] The AP demanded that Fairey pay a license fee and a portion of any monies collected on the work directly to its foundation, The AP Emergency Relief Fund. It threatened a lawsuit against him if he failed to meet this demand.[6]

In February 2009, Fairey and his attorneys filed a preemptive lawsuit against The AP asking the court to grant a declaratory judgment of noninfringement based on the fair use doctrine and to grant injunctive relief to prevent The AP from asserting any further claims of copyright infringement against him.[7] Fairey asserted that he only used Garcia's photo for a highly transformative purpose in that he had "altered the original [and gave it a] new meaning, new expression and new message."[8] His attorneys alleged that Fairey only "used a portion of the photograph" and that that portion was "reasonable in light of Fairey's expressive purpose."[9] They further asserted that Fairey substantially enhanced the value of Garcia's photo and is therefore entitled to a declaratory judgment based on fair use.[10]

In a statement released by The AP, it claimed to be "disappointed by the surprise filing by Shepard Fairey and his company," and it stated that "the photo used in the poster was an AP photo and its use required permission from The AP."[11] Fairey claimed he brought suit because "[The AP] threatened to sue me. . . . I was happy to pay the original license fee, but they wanted damages."[12] Thus, The AP claims it is protecting the rights of photojournalism[13] while Fairey claims to seek to protect artists' creative freedoms.

The AP Fires Back: Its Answer and Countersuit

As a result of the suit filed against it, The AP countersued Fairey and his company alleging copyright infringement and seeking a declaratory judgment that Fairey has no copyrights in the work and that he had violated the rules of copyright and the Digital Millennium Copyright Act (DMCA).[14]

In The AP's answer to the complaint, it alleged that Fairey was willful in the "practice of ignoring the property rights of others for his own commercial advancement" and that he had an "utter disregard for the AP's long-established licensing program."[15]

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The AP then asserted that Fairey's defense of fair use, if granted, would permit anyone to take and commercially profit from content owners' property without reasonably compensating them or enabling them to maintain a system that creates revenue streams to support the lawful creation of new content.[16] The AP uses the revenues it receives from licensing content to fund programs and initiatives for photojournalists and new sources sponsored by them.

Furthermore, The AP claimed the picture that Fairey used to create the "Hope" poster was the headshot of President Obama taken at the conference and not the picture containing both President Obama and George Clooney in the frame.[17] Both photos were taken by Garcia. The AP then stated that instead of Fairey creating his own iconic image of the president, he elected to "free-ride" on Garcia's efforts and creative choices by copying the most "distinctive characteristics in their entirety . . . without giving credit to The AP."[18] It claimed that Fairey's contributions and "minimal changes" add nothing to the photo and that he simply engaged in nothing more than a computerized version of "paint by numbers."[19] The AP refused to acknowledge any artistic contribution to the image made by Fairey; rather, it claimed that he took a substantial portion of Garcia's work.[20]

The AP additionally claimed that Fairey has infringed on the rights of other copyright holders numerous times in his work and asserted that he has sent out many cease and desist orders to other artists so that they would license his work through his company. Yet, according to The AP, he did not want to obtain the proper license for the photo he obtained for creation of the "Hope" poster.[21]

The AP's answer includes four counterclaims against Fairey and his company. The AP seeks to recover against Fairey for copyright infringement; it claims he used the copyrighted photograph without permission. It also claims Fairey is responsible for contributory infringement on the basis that he "induces, encourages, and materially contributes" to the unauthorized use of the work by creating products bearing the work and continuously facilitates these infringements.[22]

The third counterclaim is for a declaratory judgment that the work based on the Garcia photo is an unauthorized derivative work and that Fairey's work constitutes an infringement of The AP's copyright. It claims that Fairey obtained his copyright registration for his "infringing" works through fraud and therefore his copyright is invalid and should be canceled.[23]

The fourth and final counterclaim alleged that Fairey violated the Digital Millennium Copyright Act. It states that Fairey willfully and intentionally removed any copyright management information from the photo.[24] It asserts that Fairey could reasonably have known that removing any copyright management information from the photo would conceal infringement in violation of the Copyright Act.[25] The AP seeks to recover monetary damages, stating that the profits generated from the "infringing" work now exceed $400,000.[26] According to The AP, allowing Fairey's defense of fair use would permit anyone to use the work of others to create derivative works without attribution to the original copyright owner. [*Editor's note: Since this article was written, Garcia intervened, stating that he was the copyright owner and that Fairey's use was infringing. In its answer, The AP has claimed Garcia was an employee.*]

To Use or Not to Use Fair Use: That Is the Question

The fair use defense, originally a judge-made rule, is codified in § 107 of the Copyright Act of 1976. The fair use defense recognizes that certain acts of infringement are permissible under certain circumstances; whether a use is fair is to be determined on a case-by-case basis. While this approach is more flexible than that of other countries that provide for express exceptions to copyright, it can be applied inconsistently. Its application can create much uncertainty for those seeking distinct and definitive rules.

U.S. copyright law defines fair use as a limitation on the exclusive rights of the copyright owner. The use or reproduction of a work is not infringing if used for purposes such as criticism, comment, news reporting, teaching (including the making of multiple copies for classroom use), scholarship, or research.[27] It further lists four factors that determine whether the fair use defense is applicable in any case. The four factors that determine fair use include (1) the purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[28]

The factors determining fair use require an analysis of law and fact in each case, so artists who rely on the art of others and those who make works based on user-generated content do not have any specific exemption under copyright and must establish that the use of others' work was justified in each case, without the benefit of clear rules. Fair use supporters often have asserted that the Copyright Act is too strict and therefore limits the creative freedoms needed in society to produce art based on other works, while proponents of the fair use doctrine want strict enforcement of the rules of copyright when their works are appropriated. But what happens to the artist and his or her creative freedom when subjected to litigation in which the fair use defense is not available? With the advent of Google, Facebook, MySpace, YouTube, and many other sites that encourage and heavily support user-generated content and make it readily available, more and more users are creating artwork based on these works. This artwork is technologically available for the taking, if not legally available. When is it necessary to seek permission from the owner of these works,

and when is the new work so different from the underlying work that it is no longer necessary to seek permission? The question of when the exclusive right to authorize a derivative work is infringed, or when the fair use defense is applicable, is the difficult question before the court in *Shepard Fairey v. The AP*. Many of these questions have "stumped" the most knowledgeable legal minds, and the two most famous fair use cases to date, *Campbell* (also known as *2 Live Crew*) and *Harper & Row*, have caused the Supreme Court to decide oppositely on the issue.

"Oh Pretty Woman" v. "Pretty Woman": The Supreme Court's Support of Fair Use in *2 Live Crew*

When *Campbell v. Acuff-Rose Music*[29] was decided, it sparked debate on the limitations of the fair use factors in their relation to parodies. While the fair use defense permits more taking of the original work in parodies than in other works that do not comment on the original, the decision in *Campbell* is used to defend fair use in cases other than parodies.

The rap group 2 Live Crew and its lead member, Luther Campbell, approached Acuff-Rose music and requested licensing rights to create a parody of Roy Orbison's song "Oh Pretty Woman," a song registered for copyright protection to which Acuff owned the rights.[30] When Acuff refused, 2 Live Crew created a parody anyway. Entitled "Pretty Woman," it sold 250,000 copies one year after it was released.[31]

Acuff then sued, asserting copyright infringement against 2 Live Crew. The use was fair, according to the district court, which ruled that 2 Live Crew had taken "no more than was necessary" to create the parody and that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original."[32]

On appeal, however, the court claimed that "too little emphasis" was placed on the commercial use of the parody at the district court level and the "blatant commercial purpose" prevented any finding for fair use.[33] The court asserted that 2 Live Crew had taken the "heart" of the original song and, in making the new work, had essentially taken too much.[34]

When this case came before the Supreme Court, although all fair use elements were analyzed, the Court's finding was based mostly on two particular elements of the defense: the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for, or value of, the copyrighted work.[35]

The First and Second Prongs: "Purpose and Character of the Use, Including Non-commercial Purposes" and "Nature of the Copyrighted Work"

Justice David H. Souter explained that the character of the work as a parody was not an issue and that, although the appeals court placed great emphasis on the commercial nature of the parody, the Supreme Court would only weigh this factor along with others in fair use decisions because the commercial nature of a work was not a definitive factor.[36] Furthermore, the Court ruled that if the new work is transformative in its use, less emphasis should be placed on the other factors. The Court did not analyze at great length the second prong, the nature of the work, since both lower courts had referenced the idea that parodies "most invariably copy publicly known, expressive works."[37]

The Third Prong: "The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole"

The Supreme Court ruled that the appeals court erred when it found that 2 Live Crew's use of Orbison's song was excessive. When creating a parody that takes aim at the original work, the parody must be able to "conjure up" enough of the original to make the object of the parody recognizable.[38] According to the Court, the 2 Live Crew song departed significantly in its lyrical and musical content, making the song it created more distinctive and less of a "verbatim" copying of the song.[39] The appeals court had found that 2 Live Crew used the "heart" of the song in its parody; this fact, however, did not render its use excessive, according to the Supreme Court.[40]

The Fourth Prong: "The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work"

The Supreme Court ruled that when a parody is transformative in its use, market harm will not be readily inferred.[41] Furthermore, the Court reasoned that 2 Live Crew's "Pretty Woman" would not affect the market for the original in a way that others would see the parody as a substitution for "Oh Pretty Woman."[42] The Supreme Court further reasoned that there was no evidence that the potential rap market was harmed in any way by 2 Live Crew's recording, although another rap group sought a license to create a rap derivative.[43] The Court ruled that the appeals court erred, and it reversed its ruling.

No Fair Use: *Harper & Row v. Nation Enterprises*

The case involving former President Gerald Ford's elusive memoirs was one that addressed the question of who controls the content when a work is first published or licensed. This case remains one of the most highly referenced cases in fair use litigation to date.

Ford had contracted with Harper & Row to publish his yet unwritten memoirs.[44] Harper & Row also received the exclusive rights to license prepublication excerpts of the book. It then licensed *Time* magazine the right to prepublish excerpts based on a payment schedule created in exchange for a promise of confidentiality about the fact that *Time* would be publishing the excerpt.[45] An unauthorized person obtained a copy of the memoirs and supplied it to *The Nation* magazine, which published 300 words verbatim of the memoir which had not appeared previously in any other publications.[46]

Harper & Row brought an action against *The Nation* for copyright infringement alleging that the former's prepublication rights were exclusive and *The Nation*'s unauthorized publication of the excerpt violated these rights.[47] *The Nation* relied on the affirmative defense of fair use.

The Supreme Court ruled that fair use was not available in this case for the following reasons.

1) Purpose of the use. According to the Court, *The Nation* sought to exploit the headline value of its purported infringement and make a "News Event" by being the first to publish the copyrighted material.[48] The Court further reasoned that *The Nation* had an intended purpose of intercepting the copyright holder's commercially valuable right of first publication by relinquishing verbatim words from the manuscript.[49]

2) Nature of the copyrighted work. The Court reasoned that the amount of expressive language that can be copied to disseminate factual information (that is not copyrighted) will vary from case to case.[50] However, *The Nation* went beyond this point when it took the "most expressive elements," exceeding what was necessary to disseminate the facts.[51]

3) Amount and substantiality of the portion used. The Court asserted that because a substantial portion of the work was copied verbatim, it was evidence of its qualitative value both to the copyright owner and to the infringer that sought to profit from the expression.[52] *The Nation* admittedly used the verbatim portion of the book because it embodied Ford's "distinctive expression" from some of the most "powerful passages" from the book.[53] This distinctive expression could be deemed the "heart" of the book, as it was termed in the 2 Live Crew case.

4) Effect on the market. The Supreme Court ruled that although a finding of potential harm is sufficient, actual harm to the market was found.[54] *Time*'s refusal to pay and the rescinding of its offer were direct effects of the infringement.[55] It was originally assured that no portion of the manuscript would be published before the release of the prepublication excerpt in the magazine.[56] Furthermore, when a reasonable probability exists of a causal connection between infringement and revenue loss, the burden properly shifts to the infringer to show there was no damage as a result of the infringement.[57] In this case, *The Nation* failed to rebut a showing of actual damage; therefore, it was found liable.[58]

This case became one of the key cases limiting the fair use defense and remains so today.

In Relation to *Fairey*: What "It All Boils Down To"

Purpose of the Use: Transformative versus Derivative

In a February 2009 interview on National Public Radio, Fairey claimed that his work was transformative in that it showed Obama as a leader and a force for change in our society.[59] He later distinguished his intent from Garcia's and objected to The AP's claim that his artistic methods are infringing.[60]

> [The AP is] calling into question the validity of my method of working as well as the hundreds if not thousands of other artists . . . working in a similar way . . . . [T]he meaning of their art pieces is completely different from the original intention of the source image and adds a new layer, a new value. It's transformative and I think it should be fair use.[61]

Whether Fairey's work is transformative lies at the heart of the fair use analysis the court must make in this case. The word *transformative* was first used by Pierre Leval in an article he wrote about fair use in 1990 for the *Harvard Law Review*.[62] *Transformative* must mean something more than just *change*. A work that merely changes another work may be nothing more than a derivative work, which is one based on a preexisting work. A derivative work may be an art reproduction or a work that is recast or adapted. To assert that a work is transformative based merely on intent may not be enough.

Although Garcia admittedly did not initially recognize that the source of the "Hope" poster was his own photo, he explained that he takes many photographs on an assignment and may not know which ones are published.[63] Therefore, it is arguable that the photo did not rise to the transformative level and that it is merely derivative. Moreover, the nature of the work is not being called into question. All parties agreed that an image by Garcia was used to create Fairey's work, and Fairey's work did not comment on or criticize the Garcia work as it would in a parody, but, rather, it adapted the photo in order to create another art work.

A finding of transformative intent such as that in the 2 Live Crew case, however, would support a fair use defense and also mean a victory for Fairey and others supportive of less stringent copyright rules and increased access to user-generated content on the Internet. According to John Melber, attorney and author, Fairey has a clear case for transformative intent. His deliberate artistic choice to simplify the original image, straighten the lines, distill the color motif, add the campaign logo and the "Hope" banner, etc., reflect an intent that deviates significantly from the original "journalistic" intent of covering the 2006 conference on Darfur.[64]

The AP strongly opposes Fairey's transformative analysis and maintains

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the work is merely derivative. It claims that Fairey's "Hope" poster did not serve a purpose different from that of the original work; it merely conveyed "what was already present in the Obama Photo."[65] Furthermore, The AP asserts that Fairey's work serves the same purpose as the Garcia photo; both serve the purpose of "communicating evocative themes" regardless of the way in which the works were ultimately used.[66]

Which Photo? A Matter of the Amount and Substantiality of the Portion Used

There is a dispute over which Garcia photo was used for the creation of Fairey's work, and the resolution of this dispute could arguably turn the case as transformative or derivative. In The AP's answer, it asserts that the photo used to create the "Hope" poster was the headshot of Obama at the conference.[67] The AP then asserts that Fairey took all the unique and distinctive characteristics in their entirety to create his work because it captured the "essence" without crediting The AP as the source of the photo.[68]

If the court determines that the photo used for the poster was the headshot described in The AP's counterclaim, The AP could make a stronger argument that Fairey used a substantial portion of the photo for his work, which would render a fair use argument more challenging. Applying *Harper & Row*, The AP could assert that Fairey took the most distinctive elements of the photo and copied them exactly to create the work, as *The Nation* took the most "powerful" portions of Ford's biography and published them verbatim in its magazine. In The AP's answer, it alleges that Fairey wanted a "free-ride on Mr. Garcia's efforts and creative choices"[69] by taking the photo in its entirety instead of creating his own "iconic" image.

Fairey asserts that the image he used was in fact a Garcia photo, and from the same conference. However, he claims that he used the photo that originally included both Obama and George Clooney in the frame.[70] Fairey further claims that the portion he used was "reasonable" in light of Fairey's "expressive" purpose.[71] Applying the 2 Live Crew case, a more compelling argument could be made that although Fairey may have used a portion of the photo, his use was not excessive when compared to all the other elements in the photo (the desk, George Clooney, the flags, the podium, background, etc.). Fairey could assert that he altered the content of the picture and added so much of his own artistic elements that his use could not be considered excessive, just as 2 Live Crew's different lyrics and distinctive sounds did not amount to excessive use.

Many commentators have identified the photo used in Fairey's poster as the headshot image identified in The AP's complaint and image recognition technology has been used to overlay the two images. It appears, therefore, that this is the image used for the poster, and that creates a stronger argument for The AP.

The Poster's Effects on the Market for the Photo

In a statement made by Fairey to *The Huffington Post*, "The Garcia Photo is now more famous and valuable because of the creation of my poster."[72] Fairey alleges that the fact that James Danziger's gallery in New York City is now selling Obama photos signed by Garcia is proof that the market for the photo has been affected positively by Fairey's contribution.[73] Fairey claims he has not profited commercially because he placed the revenues back into the stream of commerce for more merchandise. Nevertheless, Fairey has generated monies from the sale of Obama "Hope" merchandise that have not been shared with The AP or Garcia. According to Fairey's complaint, however, he has caused no recognizable harm to the value of the Garcia photo or any market for it or any derivative works.[74]

The AP disagrees. According to its counterclaim, the value of the photo has been substantially harmed by the creation of the poster because The AP is effectively prevented from licensing the image for commercial and noncommercial use all over the world.[75] For a finding of "effect on the market," all The AP would have to prove is that the market for its photo, which includes the market for derivative works, was potentially harmed. A finding that Fairey gained commercially and that The AP suffered actual and potential losses would render the AP's argument more comparable to that of *Time* magazine and Harper & Row, and thus, more compelling.

One can argue that the "Hope" poster has increased the value of Garcia's piece, but the question would be, for whom? Neither Garcia nor The AP have received revenue from the poster or any of the initial licensing fees. However, Garcia is generating income from his sale of the Obama photo in the Danziger Gallery. Furthermore, one can argue that as a result of his popularity after he was correctly identified as the photographer, he has received and potentially will receive more photography work. The value of the work has arguably increased substantially.

Fairey and the Future of Copyright Law

This case could be critical to the future direction of copyright law. On the one hand, the concept of transformation may be strengthened and, with it, the case for fair use. On the other hand, if, with a simple software function, any photograph can be stylized and adapted to look like a painting or a graphic design, the right to authorize and license derivative works could be eviscerated.

Garcia claims to be disappointed to find out his photo was so easily procured from the Internet.[76] He has indicated that "[t]his part of the story is crucial to understand . . . [S]imply because it is on the Internet, doesn't mean that it's free for the taking and just because you can take it, doesn't mean it belongs to you."[77] This statement echoes the opinion of thousands of photographers, artists, and owners of copyrights. However, the question of where we draw the line between which uses are fair and which are not is not easy to answer, and until the law catch-

es up with the Internet, one will have to assume that the courts will continue to evaluate the issue of fair use on a case-by-case basis—unless the statute is amended to change the system.[78]

Endnotes

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66. *Id*.
67. *Id*. at 26.
68. *Id*. at 37.
69. *Id*.
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74. Complaint, *supra* note 3, at 11.
75. Answer, Afirmative Defenses and Counterclaims, *supra* note 14, at 39.
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78. For additional resources about the appropriation of art, please see the following cases: Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Blanch v. Koons, 467 F.3d 244, 247 (2d Cir. 2006); Gaylord v. United States, No. 06-539C, 2008 U.S. Claims LEXIS 357 (Ct. Cl. Dec. 16. 2008).

