

In Defense of Fairey and Fair Use

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SUMMARY OF FAIREY LITIGATION TO DATE

In April 2006, Associated Press (“AP”) photographer Mannie Garcia took a photograph of then-Senator Barack Obama while Obama attended a conference honoring the work of George Clooney in Darfur.¹ Nearly two years later, artist Shepard Fairey created his Obama “Hope” poster.² After an informal accusation of copyright infringement by the AP, Fairey filed for declaratory judgment in the U.S. District Court for the Southern District of New York in February 2009. Fairey initially claimed that he used a photo of Clooney and Obama together as his source material and that his use was entitled to a declaratory judgment based on fair use.³ The AP responded, disputing Fairey’s claim of fair use and countersuing for copyright infringement, asserting that Fairey’s poster was no more than copying and the creation of a derivative work.⁴ The AP also contested that Fairey used an up-close headshot of Obama as his reference material rather than the photo of Obama with Clooney that he claimed to have used.⁵ The plot thickened when, in October 2009, Fairey admitted that he had, in fact, used the Obama photo the AP claimed was used. While Fairey insists this was a “mistake,” the AP has alleged spoliation and fabrication of evidence.⁶ U.S. District Court Judge Alvin K. Hellerstein has decided that the copyright infringement case will be tried on the merits, reserving the sanctions motions pertaining to the spoliation and fabrication allegations to be determined later.⁷ With this decision, Judge Hellerstein has set the stage for what may very well be a landmark decision in the fair use landscape.

ESTABLISHING COPYRIGHT INFRINGEMENT

A plaintiff establishes a prima facie case for copyright infringement by demonstrating ownership of a valid copyright and a copying of the work by the defendant.⁸ The element of copying requires that the plaintiff establish actual copying by direct or indirect evidence and that the copying amounts to improper appropriation.⁹ Before continuing, it is important to note that in the case at issue, there is a dispute as to whether the photographer, Garcia, or the AP owns the copyright. However, it is not disputed that a valid copyright exists and that either Garcia or the AP owns it. Moreover, Fairey has admitted to utilizing the headshot of Obama, taken by Garcia and published by the AP, as reference material for his Obama poster. Thus, a prima facie case for copyright infringement will be established once the copyright ownership issue is settled. Fairey asserts fair use as his defense.

ARGUMENT IN FAVOR OF FAIREY—LONG LIVE FAIR USE!

Fair Use and Its Elements

“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘To promote the Progress of Science and useful Arts.’”¹⁰ As Judge Leval remarked in his landmark law review article on the subject, “excessively broad protection would stifle, rather than advance, the [law’s] objective.”¹¹ Therefore, fair use should be perceived as an “integral part of copyright, whose observance is necessary to achieve the objectives of that law.”¹²

To date, the U.S. Supreme Court has issued two major opinions regarding fair use: *Harper & Row, Publishers, Inc. v. Nation Enterprises*¹³ and *Campbell v. Acuff-Rose Music, Inc.*¹⁴ These cases address the absolute extremes of fair use—*Harper & Row* addresses the verbatim copying of a portion of a nonfictional work,¹⁵ while in *Campbell*, the defendant took a small part, but arguably the heart, of a popular song and used it for parodic purposes.¹⁶ These two cases, while both landmarks in their own ways, have left many unanswered questions in the fair use landscape and a remarkable amount of room for lower courts to further muddy already complicated waters. *Fairey v. The Associated Press*, what has become known as the Obama Hope case, sits squarely in this maelstrom. It too has the possibility of becoming a landmark fair use decision, as Fairey asserts fair use as his defense against appropriation.

The Copyright Act of 1976 codified the fair use doctrine, describing four non-exclusive factors that must be considered in determining fair use. In determining whether the use of a work is fair, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is 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.¹⁷

“The ultimate test of fair use . . . is whether the copyright law’s goal of ‘promoting the Progress of Science and useful Arts’ would be better served by allowing the use than by preventing it.”¹⁸

FIRST FACTOR

The first factor in the fair use inquiry, as statutorily provided, is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁹

Is the Work Transformative?

Post *Campbell*, it has become increasingly clear that the heart of the fair use inquiry lies in this first statutory factor, the determination of the purpose and character of the use.²⁰ The *Campbell* Court, drawing on Justice Story’s reference in *Folsom v. Marsh*,²¹ explained:

The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersedes the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message . . . , in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine’s guarantee of breathing space. . . .²²

The use of the original work as raw material “in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”²³

Fairey does not argue that his use was transformative solely because Garcia’s work is a photograph and his is a graphic illustration. Indeed, courts have declined to find transformative use when “the defendant has done no more than find a new way to exploit the creative virtues of the original work.”²⁴ However, Fairey does assert that his purposes in using the photograph taken by Garcia are acutely different from Garcia’s goals in creating it.

Indeed, Fairey’s position in the Obama case, from a fair use analysis standpoint, is synonymous with the artist Jeff Koons’ position in *Blanch v. Koons*.²⁵ In *Blanch*, a fashion photographer brought a copyright infringement action against visual artist Koons after Koons used her copyrighted photograph in a collage painting. Koons saw Blanch’s image in *Allure* magazine. He scanned the image and incorporated an altered version of it into his collage “Niagra.”²⁶ Koons’ objective was “not to repackaging Blanch’s ‘Silk Sandals,’ but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.’”²⁷ The court in *Blanch* noted that when the copyrighted work is used as “raw material” in development of specific communicative or creative goals, the use is transformative.²⁸ The court determined that the distinctly different objectives that Blanch had in creating, and Koons had in using, “Silk Sandals” confirmed the transformative nature of the use.²⁹

Similarly, Fairey’s objectives in his use of the Obama photograph are distinctly different from Garcia’s in taking the photograph. Garcia’s purpose as a photo journalist hired by the AP was clearly to document a newsworthy event. Fairey’s purpose, on the other hand, was to “inspire, convince, and convey the power of Obama’s ideals, as well as his potential as a leader, through graphic metaphor.”³⁰

The test for whether Fairey’s use of the Obama image is transformative is whether it “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with a

new expression, meaning, or message.”³¹ The court in *Blanch* noted that “the test almost perfectly” described Koons’ adaptation of “Silk Sandals,”

... with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects’ details and, crucially, their entirely different purpose and meaning. . . . We therefore conclude that the use in question was transformative.³²

There can be no doubt that Fairey’s use of the Obama image is similarly transformative. Fairey replaced the real colors with an evocatively patriotic blue and red color scheme; he completely eliminated the blurry background of the original image; he simplified all the details of Obama’s face and rendered the portrait in a highly stylized manner; and crucially, he infused his poster with an entirely different purpose and meaning than that of the photograph. The purpose of the photograph was to convey a newsworthy event and was taken in April 2006, long before Obama announced his candidacy for president.³³ Fairey’s poster, however, was intended to inspire and convey Obama’s presidential leadership potential. The success of Fairey’s intent is evidenced by the evolution of his poster into a symbol of the campaign and of hope. On the other hand, and notably, the photograph, which was available for nearly two years prior to the poster, never became such a symbol. As a result, it is clear that Fairey’s use of the image is transformative.

Purpose: Money Really Isn’t Everything

It is undisputed that Fairey made some profit from his Obama images. It is also undisputed whether the use in question is of a commercial nature, which is an explicit part of the first fair use factor.³⁴ However, the Supreme Court in *Campbell* rejected the concept that the commercial nature of a use could alone be a dispositive consideration.³⁵ The commercial nature of the secondary work is merely a subfactor of the first factor. “The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”³⁶ Finding a work substantially transformative properly allows the secondary commercial nature of the work to be discounted.³⁷ As discussed above, Fairey’s use is highly transformative and, as such, its secondary commercial nature should be deemed insignificant.

FAIREY SIGNIFICANTLY ALTERED THE ORIGINAL WORK, AND BY DOING SO IMBUE IT WITH A DIFFERENT CHARACTER AND TRANSFORMATIVE PURPOSE.

Moreover, it cannot be said that Fairey’s economic gains from his Obama images were “to the exclusion of broader public benefits.”³⁸ “Notwithstanding the fact that artists are sometimes paid . . . , the public exhibition of art is widely and we think properly considered to ‘have value that benefits the broader public interest.’”³⁹ Fairey’s transformative and artistic use of Garcia and/or the AP’s image published by the AP clearly benefited the public, as evidenced by Democrats’ and disenfranchised Republicans’ enthusiastic embracing the work as a symbol of the Obama campaign.

Based on the foregoing, Fairey’s use is substantially transformative. As such, the secondary commercial nature of the work has little to no bearing on the analysis of the first factor and the weight of the first factor in Fairey’s favor.

SECOND FACTOR

“[T]he nature of the copyrighted work” is the second statutory factor.⁴⁰ It requires the “recognition that some works are closer to the core of intended copyright protection than

others, with the consequence that fair use is more difficult to establish when the former works are copied.⁴¹

Two types of distinctions as to the nature of the copyrighted work have emerged that have figured in the decisions evaluating the second factor: (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.⁴²

As noted, Garcia's photograph was published. Therefore, under the second of the two considerations, that fact favors Fairey.

Regarding the first consideration, despite the AP's contentions to the contrary, Garcia's photograph is more factual than creative. The AP contends that the photo is creative because of Garcia's selection of that particular moment to capture the president's expression, the type of lens and the light for optimal impact, and the total composition of the photograph.⁴³ In truth, though, Garcia had no creative control in directing Obama's facial expression; he just happened to be at the right place and time with a camera. Nor did Garcia have any control over the lighting at the press conference. Further, in an article published in the *New York Times*, Garcia stressed that he is not an artist, thereby calling into question the argument about his composition of the photograph being sufficiently creative. "I want to avoid calling myself an artistic photographer. . . ."⁴⁴

COPIES OF THE ORIGINAL PHOTO ARE NOW SOLD IN THE DANZIGER GALLERY—SUCH WAS NOT THE CASE PRIOR TO THE POPULARITY OF FAIREY'S POSTER.

While the photograph as a whole is sufficiently creative to receive copyright protection, the image simply depicts a newsworthy event, and thus its general publication throughout the United States favors fair use.⁴⁵

If it should be decided by the court that Garcia's photo possesses the "creative nature of artistic images" and, as such, the court weighs that determination in the favor of the copyright holder, "the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose."⁴⁶ As the court noted in *Blanch*, the second fair use factor has limited weight in such an analysis because Fairey used Garcia's work in a transformative manner. As such, the court would also find the second factor in Fairey's favor.

THIRD FACTOR

The third statutory factor bearing on fair use determination is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."⁴⁷ The transformative purpose of Fairey's use and the amount and substantiality of the use must be "explored, and the results weighed together."⁴⁸ The question is whether the amount and value of the original work used are reasonable in relation to Fairey's poster's transformative purpose.⁴⁹

As noted above, Fairey's purpose in using Garcia's image was to create a graphic image that would inspire and convey Obama's leadership qualities. The question is whether, once he chose to copy Garcia's work, he did so excessively—was the use "reasonable in relation to the purpose of the copying."⁵⁰ Weighing most heavily against Fairey is the fact that his poster is obviously based on Garcia's image—a side-by-side comparison makes

it clear that the positioning of Obama's head, the direction of his gaze, and the general scale of the composition are all the same. However, "[d]epending on the purpose, using a substantial portion of a work, or even the whole thing, may be permissible."⁵¹ Fairey has admitted to basing his poster on the image taken by Garcia and published by the AP, but he did not "simply copy the work verbatim with little added or changed."⁵² As discussed above, Fairey significantly altered the original work, and by doing so imbued it with a different character and transformative purpose. Therefore, the third factor should weigh in Fairey's favor.

FOURTH FACTOR

The final statutory factor is "the effect of the use upon the potential market for or value of the copyrighted work."⁵³ "In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work."⁵⁴

The AP contends that Fairey's unauthorized use of the Obama photo has "caused substantial impairment to the potential market for the original photo, namely the AP's ability to license its use. . . ."⁵⁵ The truth, however, is that not only has Fairey's work not usurped the market for the original, but rather it has increased it. Copies of the original photo are now sold in the Danziger Gallery—such was not the case prior to the popularity of Fairey's poster.⁵⁶ A stylized poster is not a substitution for a realistic photograph. Moreover, while Fairey's failure to license the work from the AP does prevent the AP from collecting from Fairey's use, it in no way prevents the AP from licensing the work to others. "By definition, every fair use involves some loss of royalty revenue because the secondary user has not paid royalties."⁵⁷ Because Fairey's work uses the image published by the AP for transformative purposes, Fairey's poster cannot serve as a substitute for the original photograph; the poster is enjoyed for a different purpose. Therefore, Fairey's work is unlikely to serve as a market substitute for the Obama photograph and cause market harm.

Derivative Works

Courts must consider not only harm to the primary market for the original work,

but to "the current and potential market for derivative works."⁵³ Possible derivative uses "include only those that creators of original works would in general develop or license others to develop."⁵⁴

The AP asserts that Fairey's poster is a derivative work based on the Obama photograph.⁶⁰ However, a work is not derivative simply because it is based on a preexisting work. The law in the Second Circuit "has recognized that 'even when one work is based upon another, if the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work."⁶¹ In *Warner Bros. Entertainment Inc. v. RDR Books*, the court held that a lexicon based on the *Harry Potter* books was not a derivative work because the lexicon did not recast the material into another medium to retell the *Harry Potter*

story, but rather gave the copyrighted material another purpose. Subsequently, the lexicon no longer represented the original works of authorship.⁶² The court noted that "[t]his distinction is critical to the difference between derivative works, which are infringing, and works of fair use, which are permissible."⁶³ Therefore, transformative works, by their very nature, are not derivative; a derivative work may give an original a new mode of presentation, but it does not have transformative purposes.⁶⁴

Fairey's poster is similar to the lexicon in the *Harry Potter* case. While it is based on the Obama photograph, Fairey's image gives the copyrighted material a new purpose and is a transformative work. As such, the Fairey poster is not a derivative work. Because it is not a derivative work, if Fairey's work does compete with the original photograph, the competition is permissible because, as noted by the court in *Warner Bros.*, competition by a nonderivative work is permissible. Additionally, that court observed that "[t]he market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one."⁶⁵ Similarly, the market for Obama-related artwork does not become derivative simply because the AP seeks to license its photographs for such works.

Based on the foregoing, the fourth factor favors Fairey.

Bad Faith

In light of the recent revelation about the source of Fairey's image, where Fairey insists that he made a "mistake" in identifying the photo he used as reference, and while the AP calls Fairey's admission a fabrication and an attempt to destroy evidence, there is plenty of discussion of bad faith in this case.⁶⁶ Additionally, the AP alleges that Fairey acted in bad faith because, among other things, he failed to request a license to use the Obama

photograph, though he has requested at least one license for a similar purpose from other photographers in the past.⁶⁷

In terms of the fabrication and spoliation issues, U.S. District Court Judge Alvin K. Hellerstein called Fairey's admitted wrongdoing a "serious transgression," but he also stated that he wanted "this case to be decided on the merits."⁶⁸ As mentioned above, Judge Hellerstein reserved sanctions motions until the copyright infringement case is determined.⁶⁹

As for Fairey's failure to seek the AP's permission to use the Obama image, the court in *Blanch* noted that "[w]e are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith."⁷⁰ And as noted by the *Campbell* Court, "[i]f the use is otherwise fair, then no permission need be sought or granted."⁷¹

In light of that statement by the Supreme Court, it cannot be said that Fairey acted in bad faith by not seeking or obtaining permission to use the Obama image if the court finds that his use of the photo is fair.

CONCLUSION

Having examined the statutory factors and balanced them with the purposes of copyright, it is evident that Fairey's use of the Obama image was fair. Fairey's use was highly transformative; he took an otherwise unmemorable photograph of then-Senator Obama as a senator and transformed it into an illustration that inspired a nation and became the symbol of a historic presidential campaign. Copyright's goal of "promoting the Progress of Science and useful Arts"⁷² is far better served by allowing Fairey's use than by preventing it. ♦

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ENDNOTES

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3. Jo-Na Williams, *The New Symbol of "Hope" for Fair Use: Shepard Fairey v. The Associated Press*, 2:1 LANDSLIDE 55 (Sept./Oct.2009).

4. Samborn, *supra* note 1.

5. First Amended Answer, Affirmative Defenses and Counterclaims at 11, *Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press*, No. 09-01123(AKH) (S.D.N.Y. Mar. 11, 2009).

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8. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

9. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998).

10. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST., art. I, § 8, cl. 8).

11. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L.REV. 1105, 1108 (1990).

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13. 471 U.S. 539 (1985).

14. 510 U.S. 569.

15. 471 U.S. 539.

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17. 17 U.S.C. § 107.

18. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (quoting U.S. CONST., art. I, § 8, cl. 8, and *Arca Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992) (alteration incorporated)).

19. 17 U.S.C. § 107(1).

20. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

21. 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

22. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

23. *Castle Rock*, 150 F.3d at 142 (quoting Leval, *supra* note 11, at 1111).

24. *Blanch*, 467 F.3d at 252.

25. *Id.*

26. *Id.* at 248.

27. *Id.* at 253 (quoting Leval, *supra* note 11, at 1111).

28. *Id.* at 253.

29. *Id.*

30. Amended Complaint for Declaratory Judgment and Injunctive Relief at 5, *Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press*, No. 09-01123(AKH) (S.D.N.Y. Oct. 16, 2009).

31. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

32. *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

33. First Amended Answer, Affirmative Defenses and Counterclaims, *supra* note 5, at 10.

34. 17 U.S.C. § 107(1).

35. *Campbell*, 510 U.S. at 584.

36. *Id.* at 579.

37. *Blanch*, 467 F.3d at 254.

38. *Id.* (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921-22 (2d Cir. 1994)).

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42. HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT*, § 15:52 (2006).

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46. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

47. 17 U.S.C. § 107(3).

48. *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 546 (S.D.N.Y. 2008) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994)).

49. *Id.*

50. *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) (quoting *Campbell*, 510 U.S. at 586).

51. *Warner Bros.*, 575 F. Supp. 2d at 548.

52. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003).

53. 17 U.S.C. § 107(4).

54. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir. 2004).

55. First Amended Answer, Affirmative Defenses and Counterclaims, *supra* note 5, at 43.

56. Williams, *supra* note 3, at 59.

57. Leval, *supra* note 11, at 1124.

58. *Twin Peaks Prods. Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1336, 1337 (2d Cir. 1993).

59. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

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61. *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 n.17 (S.D.N.Y. 2008) (quoting *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 117 (2d Cir. 2003)).

62. *Id.* at 539.

63. *Id.* n.18.

64. *Twin Peaks Prods. Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1336, 1375-76 (2d Cir. 1993).

65. *Warner Bros.*, 575 F. Supp. 2d at 550.

66. AP Press Release, *supra* note 6.

67. First Amended Answer, Affirmative Defenses and Counterclaims, *supra* note 5, at 43, 45.

68. Italie, *supra* note 7.

69. AP Statement, *AP Pleased the Court Considers Spoliation and Fabrication of Evidence Serious*, Nov. 10, 2009.

70. *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

71. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994).

72. U.S. CONST., art. I, § 8, cl. 8.