

The Fairey Use Doctrine: A Present Battle in the Legal Wars Arising from Derivative Art

By Johnlee S. Curtis

Shepard Fairey, the artist who created the now-famous "HOPE" poster, a digitally-designed depiction of President Obama derived from a photograph taken by photographer Mannie Garcia and owned by the Associated Press (AP), has been embroiled in litigation on the issue of whether he violated the AP's copyright from his use of the photograph. The controversy centers on whether the Copyright Act's "fair use doctrine" applies to allow Fairey's use of the photograph. Pursuant to the fair use doctrine, if the use by the artist satisfies certain conditions, then the use (and the artist) is protected from liability for copyright infringement. Thus, an analysis of fair use as applied to photographic art requires a subjective critique of the art itself.

The landmark case on this topic arose when artist Jeff Koons culled an image produced for Allure magazine and taken by professional photographer Andrea Blanch, and used it in his work titled "Niagra" (from Koons' "Easyfun-Ethereal" collection of paintings). When Ms. Blanch sued Mr. Koons for copyright infringement, the court analyzed the facts according to the four factors provided in the Copyright Act, which are: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the market effects of the use on the copyrighted work. The court decided in favor of Mr. Koons. In support of its holding, the court opined that the four factors all weighed in Mr. Koons' favor because the artist's appropriation of the photograph was intended to be transformative; he used the photograph to comment on its social meaning rather than to exploit its creative virtues; the amount and substantiality of the portion of the photograph used was reasonable; and the use of the photograph did not cause harm to the potential market for or value of the copyrighted work. See *Andrea Blanch v. Jeff Koons, et. al.*, 485 F. Supp. 2d 516 2007 U.S. Dist. LEXIS 34121 (S.D.N.Y., May 09, 2007).

While this same four-factor test will be used to decide Mr. Fairey's case, there are some significant differences in the facts of his case. Specifically, Mr. Fairey's work is wholly derived from the copyrighted photograph, utilizes some of the creative virtues of the copyrighted photograph, and conveys a similar visual narrative as the copyrighted

photograph. However, while the original photo captured President Obama and George Clooney, Mr. Fairey's work repurposed only the portion of the photograph depicting President Obama. Further, Mr. Fairey edited the photograph with the purpose of transforming it into an iconic representation of President Obama. The extent of Mr. Fairey's transformative labors and the artistic elements of the original photograph will surely be examined closely. There is no copyright protection afforded to a face; it is only through the artistic elements of the photograph that protection attaches. In this situation, the artistic elements include the lighting, photographic lens used, and other elements of the work under the direct control and discretion of the photographer. While copyright protection for unposed shots of news events is not very strong, the resolution of the case is ultimately unpredictable.

The court faces a difficult task. On one hand, a broad application of the fair use doctrine to attributions of photographs could result in severe harm to the photography industry. On the other hand, to deny the protection of the fair use doctrine to works that are truly transformative could upend the very purpose of the Copyright Act: the promotion of the arts and creative endeavors. See 17 U.S.C.S. § 107(1). Judges and juries are rarely also art critics, yet are charged with a detailed comparison (and sometimes quite subtle critique) of visual works. Such is the unavoidable situation when the facts, which must be analyzed through the filter of the law, are works of art.

This type of battle pits an artist against a fellow artist. It also tests the scope and extent of the fair use doctrine, the use exception mediating the unintended effects of an exacting application of copyright law. In our common law system, the Fairey case has the potential to adjust the margins of the fair use doctrine. The result depends upon whether the court's reasoning will carve out greater leeway for the application of the fair use doctrine, or whether the case will narrow the legal path for use of copyrighted works in derivative art. ♦

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