

**Fair Use:
Shepard Fairey vs the Associated Press**

By

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Picture from New York Daily News

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Visual artist Shepard Fairey is currently suing, and is being counter-sued by, the Associated Press (AP) over the interpretation of Fair Use and Copyright. This case is being closely watched, as its outcome will arguably have an enormous impact on creative culture. At the same time, and in the same case, both Fairey and the AP are fighting for the rights of ownership, during a time when legal and ethical ownership are questionable and nebulous issues. Importantly, both sides of the argument in this case present philosophical, ideological and legal issues regarding the use of creative material.

Over the past year, Fairey has gained popularity and notoriety by fighting for the rights of artists who currently rely on fair use of imagery in order to make new creative work. Fairey used a photographic image of then-presidential candidate Barack Obama taken by AP photographer Mannie Garcia to create the now legendary image of Obama above the word Hope. Fairey used Garcia's image without obtaining permission from the AP, claiming Fair Use protection. The court cases now in progress are seeking to sort out whether Fairey was within the law when he used the AP photograph without seeking permission.

Outside this legal battle, Fairey's Obama Hope poster has arguably become one of the most recognizable political images in contemporary American culture and has the potential to become part of political and cultural history. What will happen to this legacy if Fairey loses his argument? The case further poses the questions: How and when can artists claim fair use if their material source is managed and restricted by a third party at all times? How will artists continue to use shared source material if that material is under

lock and key? And, what happens to the creator or publisher's rights if Fairey is given the freedom to use anything he wants?

In the end, the primary issue of this case is: who in fact owns a creative work? Is it the artist, the business counting on ownership for its own wealth, or the shared culture that has a stake in producing the image? These are the questions that will have to be worked out and they will not be easy to answer. Shepard Fairey's encounter with the Associated Press continues to unfold and displays the current flaws within the scope and interpretation of the law but Fairey wishes this argument to become one that brings a kind of freedom of use to artists. Fairey starts off his explanation of this litigation on his website by saying, "I am fighting the AP to protect the rights of all artists, especially those with a desire to make art with social commentary. This is about artistic freedom and basic rights of free expression, which need to be available to all, whether they have money and lawyers or not." (obeygiant.com, accessed 11/27/2009) An at the same time, this court case uncovers the developing discussions on what fair use is and how copyright laws can be refined, changed, or restricted in the United States.

Shepard Fairey calls himself a street artist, one who exhibits his own creative work in the everyday public spaces, sometimes illegally. In many cases street artists use the public atmosphere and locations to display or create works of art, stemming mostly from political or social critics. By using various methods, materials, and disciplines such as graffiti, spray paint, temporary public performance, ephemeral sculpture, and poster art, these street artists use the found space, or public structure as a starting point in which to carry out a critique. Some street artists use stencils that were created beforehand, while other street artists create their work spontaneously on site. Shepard Fairey's

approach to street art encompasses all of these forms of creation, but he is known more for his use of stencils and posters, which he attaches to public spaces using wheat paste, a temporary adhesive. By wheat pasting his posters and spray-painting his stencils, Fairey can contribute to the public discussion about art and popular culture using repetition on a large scale with great immediacy. Terri Ciccone from *The Bostonists* comments on the style and reach of Shepard Fairey work throughout the streets of Boston MA saying, “His vibrant red, black and white political posters have taken up residence in Chinatown, Cambridge, and Fenway knock your socks off when you see them in person. His collages of Andréa the Giant swirl in front of your eyes, and his women in headscarves stare you down and dare you to challenge their desire for peace.” (accessed 10/22/09) However, the public display of his work has often led to legal troubles. During his lifetime Fairey, has been arrested 13 times due to the nature the creation of his work. The last time Fairey was arrested for illegally defaming a public area was February 7, 2009. Fairey was arrested for this offence on his way to the premiere for his one-person show at the Institute of Contemporary Art in Boston.

Street art has a history of pushing the boundaries of the appropriation with popular imagery. Fairey is no exception. Much of his work has included appropriated images of pop culture images and figures, including his signature image of professional wrestler Andre the Giant (as noted in the preceding paragraph.) Fairey also collaborates with other artists on creative projects including music disc covers, books, benefits, and posters. One of Fairey’s long time collaborators is Zach Sciacca, know as DJ Z Trip. Zach Sciacca is known as a founding member for the mash-up movements where music recordings are appropriated to create now songs. In 2008 Fairey worked with

collaborator Z-trip once again on “a series of shows in support of then-presidential candidate Barack Obama entitled *Party For Change*.” (Wikipedia) Both Fairey and Sciacca rely on fair use protection within their creative practices and encourage other artists to challenge the notions of “property” in order to allow for free and open creation of works of art.

The idea of fair use in and of itself is not a law. Fair use falls under the Intellectual Property law as a doctrine of the United States Copyright law. In most, but not all, cases, fair use is generally interpreted as the use of source material without permission from the copyright owner for the purposes of commentary, criticism, news reporting, research, teaching or scholarship.

The problem with fair use provisions is that the law itself is unclear as to what exactly is and isn't regulated and protected by the copyright act of 1976. Fair use, like the copyright act, is currently left up to interpretation and brings with it a slew of misconceptions and misunderstandings. In fact, as Lawrence Lessig describes in his book titled *Free Culture*, the fair use of copyright law does not hold water in many cases and in fact is only a way to start the conversation on what can and cannot be used. Lessig states:

Fair use in America simply means the right to hire a lawyer to defend your right to create...Judges and lawyers can tell themselves that fair use provides adequate ‘breathing room’ between regulation by the law and the access the law should allow. But it is a measure of how out of touch our legal system has become that anyone actually believes this. The rules that publishers impose upon writers, the rules that film distributors impose upon filmmakers, the rules that newspapers impose on journalists these are the real laws governing creativity, and these rules have little relationship to the “law” wit which judges comfort themselves. (Lessig p 187)

Lessig interprets copyright and, more specifically, fair use as tools in which to confine creativity, especially for those who cannot afford a lawyer to challenge the increasing

discrepancies of use. Jonathan Lethem, in his article “The Ecstasy of Influence,” looks to the copyright issue as a way of managing intellectual property, while still acknowledging the problems behind it. Lethem states:

Copyright is revered by most established writers and artists as a birthright and bulwark, the source of nurture for their infinitely fragile practices in a rapacious world. Plagiarism and piracy, after all, are the monsters we working artists are taught to dread, as they roam the woods surrounding our tiny preserves of regard and remuneration...few of us question the contemporary construction of copyright. It is taken as a law, both in the sense of a universally recognized moral absolute...and as naturally inherent in our world...In fact, it is neither. Rather, copyright is an ongoing social negotiation, tenuously forged, endlessly revised, and imperfect in every incarnation. (Lethem, 63)

Both Lessig and Lethem, along with many of their peers, understand that copyright and fair use are both severely problematic in regards to defining what one can do with a creative work. This inherent nebulousness is why Fairey and the Associated Press have found themselves going back and forth in what seems to be a battle of legal jargon relating to Fairey’s use of an photograph over which the AP claims copyright protection.

One rule of thumb that is central to the current AP/Fairy litigation and is used to decide whether an artwork that contains appropriated imagery is lawful or not, is based on how transformed the source material has become. Has the artist transformed the original source material into a completely new and unique identity or has he or she simply mimicked or copied the original. To determine whether transformation has taken place, an understanding of social norms must also be taken into consideration. James Boyle, a leading expert on the problems and benefits of copyright law, asks for the legal framework to be constructed in a way to allow for social and cultural use to decide if these laws produce “appropriate” outcomes. As you may guess, defining current trends and how transformation takes shape is very hard to determine in the context of the law. In fact, one might come to different conclusions about the same case depending on the day,

the court, or the interpretation of the law. One also must be careful in trying to separate copyright infringement from fair use, which is why Fairey's case against the AP is crucial to current discussions on the topic of copyright use.

As James Boyle explains in the book *Shamans, Software, & Spleens*, there needs to be more emphasis on understanding the legal side of this argument where lawyers look to the social uses of the copyright. As Boyle explains:

First, the vision of law offered here is an expansive one, and the very expansiveness of the vision make it harder to slip into dogmatic reductionism. I take the position that to understand law fully, one must see it as much more than a collection of rules, or even a collection of social effects. Instead, law should be seen as a complex interpretive activity, a practice of encoding and decoding social meaning that merges imperceptible with rhetoric, ideology, 'common sense,' economic argument (of both highly theoretical and seat-of-the-pants kind), with social stereotype, narrative cliché and political theory of every level from high abstraction to civics class chant. (Boyle, 14)

In early 2008, Shepard Fairey created the Obama Hope poster as an expression of his own ideals, but he did not realize the importance and presence his image would bring to the national political discussion. During Fairey's collaboration with DJ Z-Trip for the *Party for Change* campaign, the Obama campaign staff, who had seen Fairey's already illustrated Obama Hope poster, asked the artist to put together a series of posters that could be used by the campaign that did not include the original Obama Hope image. When asked by reporter Terry Gross on NPR's Fresh Air how he came to make the Obama Hope poster and its connection to therefore the Obama presidential campaign Fairey responded:

The image was created just as a grass roots poster to be disseminated the way I normally get my posters out there which is just on the street and through viral means...It never became an official image of the Obama campaign. The Obama campaign liked that image but because it was being disseminated in some way illegal or bending the rules at least they could not get behind that poster." (Gross, Interview with Shepard Fairey Jan 20, 2009)

In this same interview Terry Gross asks Fairey if he would like to give a “shout out” to the photographer who took the image of Obama that Fairey used for the Obama Hope image. Fairey says about the photographer, “I actually don’t know who the photographer is. It was an Associated Press photo that I got off the Google [sic] and I actually still don’t know who took the photograph, they never approached me.” (Gross, Interview with Shepard Fairey Jan 20, 2009) At first Fairey denied knowing who took the photograph but when asked later about the photographers name he cited Mannie Garcia. The initial statement of denial would play an important role in later developments of the AP/Fairey litigation. In October 2009 Fairey recanted his original statements to suggest that he had destroyed original documents showing that he had taken the image for the Mannie Garcia Obama photograph and that he knew that the image he used was the one he was asked about by Terry Gross. In a February 26, 2009 interview with Terry Gross on NPR’s Fresh Air Gross asks even more direct questions to Fairey about his specific process in using the Garcia Photograph in which Fairey responds: “Well, unlike the photo that’s been circulation in the media, the photo that I used of Mannie’s was actually the one where both Obama and George Clooney are in the frame but it was shot a second before or after the one that’s been circulating.” (Gross, Interview with Shepard February 26, 2009)

After a threat from the AP in early February 2009 Fairey took a preemptive stance and sued the AP under the claim that the image falls under the Fair Use section of the copyright law which would allow Fairey to use the image. Therefore, since the image is covered by fair use, Fairey claims he owes the AP nothing in the form of payment or official acknowledgement. Fairey speaks to this in his second Terry Gross interview on

February 26th 2009. Fairey says he has the right to use the photograph under fair use by stating, “I’m claiming fair use on the grounds that this is an image that has been transformed graphically and maybe more significantly transformed in its intent.” (Gross, *Interview with Shepard*, February 26, 2009)

The AP responded to Fairey’s preemptive attack with their own attack saying that they were “disappointed by the surprise filing by Mr. Fairey and by his company, and by Mr. Fairey failure to recognize the rights of photographers and their works... AP was in the middle of a settlement discussions with Mr. Fairey attorney last week...The photography used in the poster in an AP photo and its use required permission from the AP.” (Gross, *Interview with Shepard*, February 26, 2009) The Associated Press filing suggests that the AP must regulate use of their image because they are a business that runs on revenue from images that they hold copyright on, which are sold to other sources like news and media. The AP wishes to continue to regulate these images as a way to stay in business. The AP states on their webpage in regards to the Shepard Fairey filing that:

In its countersuit, AP alleges that Mr. Fairey and his companies have used this photo in posters and other merchandise without permission from the AP. In its countersuit, AP asserts that Fairey’s unauthorized use of its photo is part and parcel of Fairey’s willful practice of ignoring the property rights of others for his own commercial advancement, and that the practice contrasts dramatically with his aggressive and hypocritical enforcement against others of his own intellectual property rights... P is a not-for-profit news cooperative. Revenue from licensing of AP’s rights to its content, across formats, is the fundamental source of funding for AP’s worldwide newsgathering and distribution operations. When a user licenses content from AP, it obtains permission to use AP content in a specific way. Thousands of organizations across the world license AP content for legitimate use in their businesses. When use is made of AP content without authorization, it undermines AP’s ability to support its news operations, and it disadvantages legitimate AP licensees. AP, like any other content creator, must protect its intellectual property rights against unauthorized exploitation. (Associated Press website, accessed 11/27/2009)

The AP believes that their images do not fall under fair use and, therefore, require recognition and payment from anyone who wishes to use an AP-copyrighted image without permission. In fact, the AP asserts that not even Mannie Garcia, who took the photograph, has ownership of this image since he was under contract at the time with the Associated Press. This did not stop Mannie Garcia, who also filled a lawsuit with the AP saying that he had ownership rights of the image. The AP quickly responded to Garcia by stating that he was not serving as a private photographer at the time the photograph was taken, but was acting as a representative of the Associated Press. The AP believes that Garcia had no standing to declare ownership over his photograph.

Mannie Garcia has even acknowledged that Fairey transformed his image and that the new Fairey image is something different and valid on its own. This statement from Garcia is a major plus in the legal battle for Fairey's lawyers. But, since the AP does not even recognize the photographer's input on the image that the AP regards as their own any statements of support from Garcia to Fairey is not included. Fairey describes the support from Garcia by saying:

My Obama poster does not compete with the intent of, or the market for the reference photo. In fact, the argument has been made that the reference photo would have faded into obscurity if it were not for my poster which became so culturally pervasive. The Garcia photo is now more famous and valuable than it ever would have been prior to the creation of my poster. With this factor in mind, it is not surprising, that a gallery in NYC is now selling the Garcia photo for \$1,200 each. As I understand it, Garcia himself did not even realize the poster was created referencing his photo until it was pointed out to him a full year after the poster came into existence. Mannie Garcia has stated in the press that he is an Obama supporter pleased with the poster result. (obeygiant.com, accessed 11/27/2009)



© 2006 Manny Garcia / The Associated Press
Picture from Wired.com

After the initial suit by Shepard Fairey in February 2009 and the countersuit by the Associated Press, Fairey acknowledged on his own volition on October 16th 2009 that he destroyed evidence that suggested he in fact had used the Garcia image knowingly. Fairey released a statement saying, ““In an attempt to conceal my mistake, I submitted false images and deleted other images. I sincerely apologize for my lapse in judgment and I take full responsibility for my actions which were mine alone. I am taking every step to correct the information and I regret I did not come forward sooner.”

(www.breitbart.com, accessed 11/26/2009) Why did Fairey continue to state that one image, the image of Obama and George Clooney was the original image for the poster than the singular image of Obama taken at the same time by the same photographer? For Fairey, the second image, the one depicting both Obama and Clooney, allowed Fairey to make the statement that he had transformed the image more graphically and that he had moved the head of Obama’s gaze and had changed certain parts of the image formally. With the singular image of Obama not including Clooney, Fairey would have had to

manipulate the image less. Because of Fairey's turn in fact his lawyers could not use the image as an example of a truly transformative image as it one did. Even then this did not matter for Fairey.

The new development in the case says two things about Fairey's knowledge of the subject. First, Fairey knew both the photographer's identity and what he was doing by stealing the image. Secondly, Fairey knew that he might have not manipulated the image as much as he should have in order for the image to be called "transformative." After Fairey acknowledged his so-called "mistake" the lawyers defending Fairey's litigation resigned from his counsel, leaving Fairey to find other representation. Lawrence Lessig, who has been advising Fairey during this litigation battle, has suggested this image is still transformative and therefore is still protected under fair use. Lessig states, "the significant issue in fair use cases is whether the image has been transformed from the original. If it has been "fundamentally transformed," he said "then it can be used under copyright law." (www.nytimes.com, accessed 11/27/2009) Fairey continues to suggest that the image used, the original Garcia photograph of Obama alone at the April 27, 2006, event at the National Press Club in Washington D.C., is still fair use and therefore his rights to use it is not changed even after the acknowledgement that he destroyed documentation to cover his process up.

Currently Fairey continues to uphold that he had the right to use the AP photography since he did transform the image, even acknowledging that this transformation did not go through the steps he once suggested. Fairey feels that the image has been removed from its original context and that it now has new meaning that he himself created with the changes to the photograph. Furthermore, Fairey's new

lawyers, and even his supporters, acknowledge that his mistake may have cost him a foot in the door with his argument. Fairey and his lawyers continue to defend that his argument is still the same. His former lawyer agrees, “we still believe, as strongly as ever, in the underlying fair use and expression issues of this case.” (www.nytimes.com, accessed 11/27/2009)

Shepard Fairey’s argument with the Associated Press is built out of the discrepancies and problems with increasing confusion over copyright law. Fairey, along with many of his contemporaries in the visual arts world, including me, the author, believe that transformative appropriation of source material is a clear example of protected fair use. Ironically enough, when others have tried to take his own work for their own use, Fairey has time and again used copyright ownership to halt any further dissemination of his own creations. Furthermore, the Associated Press continues to suggest that they are within their own rights to own and control this image, and that they require regulation which is also true and understandable. The one party left out of this discussion is the creator of the original image, Mannie Garcia. This is problematic and unjust.

New interpretations of copyright law are unfolding quickly, but what is interesting is watching the reactions of the parties included into the discussions on the definition of the law. What is fascinating is that neither the AP nor Fairey can legally say that they are right or wrong. They have up to this point only to rely on their own understanding and opinions about the correct interpretation of copyright law. This is very important to recognize. Fairey and the AP cannot concretely say that the other is without rights to defend or reject opposing opinions, which is why we continue to see two groups

on the two different sides of the fence with fair use. Even in my own interpretation of these cases constantly changes; while conducting research on this one case I found myself running from one fence to another. For now, there is no concrete way to come to a verdict on what falls under fair use. For now, we will only have to rely on how well we describe what we are trying to argue for. We must become knowledgeable about the law but more so we must remember what is going on in the moment outside the law. What we decide in the cases of copyright, and what fences we find ourselves on, will be closely watched over the next coming years. Therefore we must remember to look outside the law to what James Boyle calls “common sense” in order to define something as complex as copyright law. (Boyle 14) We need to remember that there is more than one party, and that we may even find ourselves confused and conflicted by the same thing over and over again.

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