

Case Study on Fair Use and Fair Dealing: The Hope Poster Litigation

Set forth below is an excerpt from William Fisher et al, "Reflections on the Hope Poster Case," 25 *Harvard Journal of Law and Technology* 244 (2012).

*A. Facts*¹

Shepard Fairey is a graphic artist. He received his formal training at the Rhode Island School of Design, where he took several courses in photography and screen printing. After graduating, he worked as a screen printer, designer, and illustrator. He divided his time between graphic design projects commissioned by clients and his own art, deriving most of his income from the former. For several years, he struggled financially. In recent years, however, he has been able to support himself through his work as an artist. Today, he is a part owner of three businesses that have grown out of his work: Obey Giant Art, Inc., which distributes Fairey's graphic art; Obey Giant LLC, which licenses Fairey's art for use on apparel and merchandise; and Studio Number One, a commercial graphic design firm. Together, these companies have approximately fifteen employees.

Much of Fairey's art has been characterized by two related traits. First, it has a distinctive aesthetic, which Fairey has described as a "bold iconic style that is based on stylizing and idealizing images."² Second, since approximately 1990, much of Fairey's art has been overtly political in character. Many of his images criticize, typically through caricature, prominent politicians; others explore the power of propaganda; others celebrate musicians or counterculture figures; others advance causes, such as environmentalism or privacy protection.³

Fairey sometimes licenses his designs to third parties. One of those licensees, OBEY Clothing, Inc., applies Fairey's artwork to sweatshirts, t-shirts, coffee mugs, and so forth. Fairey typically receives from OBEY Clothing a royalty of 4.5% of the gross revenues generated through sales of those goods.

The AP is a "news cooperative, owned by its American newspaper and broadcast members."⁴ The AP has approximately 3,700 em-

1. The source for factual assertions made in this Part that are not otherwise attributed is Shepard Fairey.

2. Transcript of Deposition of Shepard Fairey at 783–84, *Shepard Fairey v. Associated Press*, No. 09-01123 (S.D.N.Y. 2010) [hereinafter *Fairey Dep. Tr.*].

3. Samples of Fairey's work can be found on the Obey Giant website, *see* OBEY GIANT — WORLDWIDE PROPAGANDA DELIVERY, <http://obeygiant.com> (last visited May 3, 2012), and in SHEPARD FAIREY, *OBEY: SUPPLY & DEMAND, THE ART OF SHEPARD FAIREY* (2006).

4. *About Us*, ASSOCIATED PRESS, <http://www.ap.org/company/about-us> (last visited May 3, 2012).

ployees.⁵ The primary objective of the AP, in its own words, is to provide “a truthful, unbiased report of the world’s happenings.”⁶ In keeping with that broad statement of principle, the AP states as a fundamental value that “AP pictures must always tell the truth. We do not alter or digitally manipulate the content of a photograph in any way.”⁷

Mannie Garcia is a professional photojournalist who has worked for a variety of wire services. In April 2006, he was working for the AP. Through his work with wire services, Garcia has been able to acquire so-called “hard credentials,” which enable him to cover news events at the White House, Congress, the Pentagon, and other restricted venues.⁸

Garcia is a member of the National Press Photographers Association (“NPPA”).⁹ The NPPA’s Code of Ethics, to which Garcia adheres,¹⁰ enjoins members to “[b]e accurate and comprehensive in the representation of subjects,” not to “intentionally contribute to, alter, or seek to alter or influence events,” and to “[a]void political, civic and business involvements or other employment that compromise or give the appearance of compromising one’s own journalistic independence.”¹¹

On April 27, 2006, the AP assigned Garcia to cover a news conference at the National Press Club in Washington, D.C. The subject was “George Clooney’s recent trip to Darfur, Africa.” Clooney was to be joined by two United States senators: Sam Brownback and Barack Obama.¹²

Garcia arrived at the National Press Club function room where the event was to be held shortly before noon. The lighting of the room — primarily incandescent overhead lighting — had already been set. Garcia brought some of his own strobes, but did not use them. Soon after he arrived, he performed a light check to ensure that the white balance of his camera was accurate. He then identified and occupied what he considered the best position in the sector of the room that had been reserved for photographers. Other photographers subsequently took up positions around him, until the sector (and the

5. *Id.*

6. *AP News Values and Principles*, ASSOCIATED PRESS, <http://www.ap.org/company/news-values> (last visited May 3, 2012).

7. *Id.*

8. Transcript of 03/04/2010 Deposition of Mannie Garcia at 16–19, 25–27, Shepard Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010) [hereinafter Garcia 03/04/2010 Dep. Tr.]; Transcript of 03/05/2010 Deposition of Mannie Garcia at 23–24, 26, 31–34, 37–40, Shepard Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010) [hereinafter Garcia 03/05/2010 Dep. Tr.].

9. Garcia 03/05/2010 Dep. Tr., *supra* note 8, at 39.

10. *Id.* at 116–21.

11. *NPPA Code of Ethics*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, http://www.nppa.org/professional_development/business_practices/ethics.html (last visited May 3, 2012).

12. Garcia 03/04/2010 Dep. Tr., *supra* note 8, at 29; Garcia 03/05/2010 Dep. Tr., *supra* note 8, at 127–28.

room in general) became crowded. The result was that Garcia had little freedom of movement.¹³

After Garcia and the other photographers had taken up their positions, Clooney, Brownback, and Obama entered the room, sat behind a table located on a dais along one side of the room, and began speaking. During the next fifty-five minutes, Garcia took a total of 251 photos. While most were of Clooney alone or included Clooney and one or both of the senators, thirty-nine focused on Obama.¹⁴

Garcia later described his purpose in taking the photographs of Obama in various ways: he was trying to make “the best possible photograph of this guy”; he was trying to capture the “personality” or “essence” of Obama; he sought to create a “classic portrait”; he was “just trying to make a nice, clean head shot.”¹⁵ Despite these variations, on one issue Garcia was consistent: he insisted that he was not attempting in any way to advance Obama’s political ambitions.¹⁶

Two of the photographs taken by Garcia at the Darfur event were to prove important. At 12:41:38 p.m., he took a photograph of Obama alone (the “Garcia Obama” photograph). Forty-nine seconds later, he took a photograph that included both Clooney and Obama (the “Garcia Clooney” photograph).¹⁷ In taking these photos, Garcia made four creative choices. First, he adjusted his own position slightly so that the American flag was located behind Obama’s head. Second, he crouched down to accentuate the impression that Obama was looking upwards. Third, when taking the Obama photo, he selected a lens aperture that would blur the background and thus create a shallow depth of field. Fourth, he selected moments when his subjects assumed positions and expressions that, in Garcia’s judgment, were especially attractive.¹⁸

Shortly after the event ended, Garcia reviewed the photographs he had taken and chose a subset of sixteen for submission to the AP. Before he submitted them, Garcia edited the photographs in minor respects. In particular, he modified the Garcia Obama photograph in the following ways: he “cropped” it (specifically, by removing “a little bit of the . . . shoulder and some of the stars at the top”); he “resized” it; he did a “little bit [of] color adjusting” in order to “make sure . . . that the color was representative of what the person . . . looked like”; and he added a caption.¹⁹ When these adjustments were complete, Garcia

13. Garcia 03/05/2010 Dep. Tr., *supra* note 8, at 150–51, 162–65, 167, 172–73, 175–76, 179–81.

14. *Id.* at 173; Garcia Exhibit 101 to Transcript of 03/05/2010 Deposition of Mannie Garcia, Shepard Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010) (on file with author Fisher) [hereinafter Garcia Exhibit 101].

15. Garcia 03/04/10 Dep. Tr., *supra* note 8, at 35; Garcia 03/05/10 Dep. Tr., *supra* note 8, at 68–69, 220, 222, 225, 242, 325, 335–36.

16. Garcia 03/05/10 Dep. Tr., *supra* note 8, at 184.

17. Garcia Exhibit 101, *supra* note 14, at 164, 169.

18. Garcia 03/04/10 Dep. Tr., *supra* note 8, at 37–39; Garcia 03/05/10 Dep. Tr., *supra* note 8, at 242.

19. Garcia 03/05/10 Dep. Tr., *supra* note 8, at 253–54.

transmitted the sixteen photographs to the AP via the Internet.²⁰ The versions of the Garcia Obama and Garcia Clooney photographs that he transmitted are set forth in Figures 2 and 3 in the Appendix.

AP received the photographs on the afternoon of April 27, 2006. An AP photo editor checked and may have supplemented the metadata accompanying them but did not alter the content of the photos. The photographs were then “pushed” to all of the roughly 3500 newspapers and other organizations that subscribe to the AP’s PhotoStream service. The copies of the photos distributed in this fashion did not contain watermarks.²¹

Some of the newspapers that received the photos then published one or more of them in connection with news stories concerning the press conference. The Garcia Obama photograph was published at least once by an AP member newspaper — specifically, in connection with an article pertaining to elections in Ohio.²² For the most part, however, the photos disappeared from public view.

Fairey encountered Garcia’s photographs via a circuitous route. The tale began in October of 2004 when he watched the television broadcast of Barack Obama’s speech at the Democratic National Convention. Fairey was impressed by Obama’s expressed desire for people to put aside partisan bickering — a desire distilled in his famous statement, “there is not a liberal America and a conservative America — there is the United States of America.”²³ In the ensuing months, Fairey’s respect for Obama grew. In particular, he admired Obama’s early opposition to the war in Iraq.

Fairey was pleased when, in early 2007, Obama announced his candidacy for President of the United States. In October of 2007, Fairey decided to help promote Obama’s candidacy. He donated money to Obama’s campaign. More importantly, he resolved “to make art, some sort of poster, and an image that could be used however it could benefit [Obama’s] campaign.”²⁴ Fairey worried, however, that his own iconoclastic reputation could be problematic. Accordingly, instead of commencing work on the poster immediately, he asked Yosi Sergant, a friend of Fairey’s who was loosely affiliated with the Obama campaign, to ask the campaign managers whether Fairey’s aid would be appreciated. It took some time for Sergant to obtain the necessary clearance. Finally, on January 22, 2008, Sergant called Fairey to indicate that the campaign had given “the green light.”

At that time, Obama’s candidacy appeared to be in trouble. “Super Tuesday” was fourteen days away. The polls in several of the

20. *Id.* at 250–51, 328.

21. Transcript of Deposition of Jim Gerberich, Director of Operations and Customer Support for the AP, *Shepard Fairey v. Associated Press*, No. 09-01123 (S.D.N.Y. 2010) at 50, 98, 121.

22. *Id.* at 63.

23. Barack Obama, Keynote Address at the Democratic National Convention (July 27, 2004).

24. Fairey Dep. Tr., *supra* note 2, at 788.

states that would hold Democratic primary elections on that day favored Senator Hillary Clinton.²⁵ It was widely believed that, if Clinton did as well as the polls predicted, Obama's campaign would be fatally wounded. Accordingly, Fairey concluded that, if he wished to provide Obama material assistance, he would have to do so quickly. He began working on the poster on the evening of January 22, and spent most of his time on it for the next two days.

Fairey's primary objective was to depict Obama in a way that would increase his chances of winning both the Democratic nomination and the general election. To that end, he aspired to create an "iconic" image of Obama. In his own words:

I wanted it to be a portrait that was political in nature and that would deracialize Mr. Obama [by using] a red, white, and blue color palette that was patriotic. I also wanted to capture a pose in Mr. Obama that was a classic political pose, something that would elevate him to iconic status in the vein of people who had [preceded] him and were held in high regard in politics.²⁶

Fairey believed the "classic political pose" is the "three-quarters view," in which the subject is not turned directly toward the viewer's eyes but is instead gazing upward and to the side. To create the poster he had in mind, Fairey believed that he needed a photograph that depicted Obama in this pose that Fairey could use as a reference work. Fairey did not possess such a photograph himself, so he located one on the Internet. During the evening of January 22, using his laptop computer, Fairey used the Google Images search engine to hunt for publicly available photographic portraits of Obama. A search for images pertaining to "Obama" or "Barack Obama" generated hundreds of thousands of results, displayed in the form of "thumbnail" images. Of that number, Fairey examined approximately two hundred. From that group, Fairey selected between six and eight finalists. Among those finalists was a copy of the Garcia Clooney photograph.

Fairey next began "playing" with some of these finalists using his Photoshop program. Specifically, he converted them from color format to black-and-white format, and then began to adjust their contrast levels to ascertain whether they might be suitable as the starting point for the poster he had in mind. One of the images he considered was the Garcia Clooney photograph, but he soon stopped working on it because he discovered that "it was low resolution and would not allow

25. See AZnomad, *New Super Tuesday Polls Favor Hillary (AZ, NJ, CA, NY)*, DAILY KOS (Jan. 23, 2008, 9:25 AM), [http://www.dailykos.com/story/2008/01/23/441706/-New-Super-Tuesday-Polls-Favor-Hillary-\(AZ,-NJ,-CA,-NY\)](http://www.dailykos.com/story/2008/01/23/441706/-New-Super-Tuesday-Polls-Favor-Hillary-(AZ,-NJ,-CA,-NY)).

26. Fairey Dep. Tr., *supra* note 2, at 792.

me to see the detail in Obama’s face sufficiently to do an illustration.”²⁷

Fairey stopped work late on the evening of January 22 without having completed the search process. He resumed work at his office on the morning of January 23 — this time using the desktop computer in his office. He once again employed the Google Images search engine to hunt for appropriate photographs. During that process, he tried to find a higher resolution image of the image he had seen the previous night of Obama with Clooney. One of the images he located was a copy of the Garcia Obama photograph. When he discovered the Garcia Obama photograph, Fairey believed that it was a “crop” of the Garcia Clooney photograph.²⁸

After he located the Garcia Obama photograph and “dragged” it into his Adobe Photoshop program, Fairey continued to experiment with some of the finalists. In the course of that experimentation, he saved some of the finalists — as well as an altered version of one of them — to the server at his office.²⁹

After experimenting with them for a bit, Fairey concluded that the photo that best suited his purposes was the Garcia Obama photograph. He then commenced a creative process that occupied most of his time for two days and that eventually produced the Hope Poster. The principal steps in this process were as follows:

- (1) He used Photoshop to convert the color version of the image into a “grayscale” (i.e., black-and-white) version.
- (2) He cropped the image. Specifically, he removed the section of the photo above the top edge of Obama’s head.
- (3) Using the “lasso” tool in Photoshop, Fairey deleted the blurred image of an American flag in the background of the photograph.³⁰

27. *Id.* at 686–88, 797–98.

28. *Id.* at 375. In other words, he believed that the Garcia Clooney photograph and the Garcia Obama photograph were identical except for the fact that Mr. Clooney’s face had been excised from the latter. Much later, it became evident that the Garcia Obama photograph is a separate photograph — taken by Garcia at the same event from the same angle forty-nine seconds earlier. But Fairey, who had not saved a copy of the Garcia Clooney photograph and thus was relying only on his recollection of the image, did not realize this.

29. Copies of the images he saved are set forth in Figure 4.

30. When these three initial steps were complete, Fairey saved the modified image for the first time. When doing so, he retained the filename of the version of the Garcia Obama photograph that he originally found on the Internet: “image_3655004.jpg.” A version of the photograph bearing that filename was available in January 2008 on Photobucket. PHOTOBUCKET, http://i29.photobucket.com/albums/c290/trebor007/image_3655004.jpg (last visited May 3, 2012); *see also Wayback Machine*, INTERNET ARCHIVE, http://wayback.archive.org/web/*/http://i29.photobucket.com/albums/c290/trebor007/image_3655004.jpg (last visited May 3, 2012) (demonstrating that the photo was available in January 2008). This particular version of the photograph does not identify the owner of the copyright in the photo and does not contain any metadata. The AP was unable to identify any version of the photograph available on the Internet in January 2008 that either identified the copyright owner or contained metadata. Nevertheless, the AP persisted throughout the ensuing litigation in claiming that Fairey had violated the Digital Millennium Copyright Act by intentionally removing copyright management information from the source image. Because this claim was not central to the litigation, we will not discuss it further here.

(4) Fairey then used Photoshop to adjust this image in various ways to make the depiction of Obama more flattering. These changes included: “brightening areas of his chin so that it wouldn’t fill in as black, darkening his right ear, the viewer’s left, removing some of the highlights on his cheek that were unflattering, darkening his right cheek, which would be the viewer’s left, to create more definition.”³¹

(5) Fairey next used Photoshop to generate a set of bitmaps, each of which could provide the raw material for a “layer” of color in the final poster. To create each bitmap, Fairey converted a portion of the density range in the modified grayscale image to pure black or pure white. To produce layers that he found satisfactory, Fairey repeatedly altered the underlying image. This iterative process eventually produced the six images set forth in Figure 5 in the Appendix.

(6) Fairey selected four of the six bitmaps. He then used the Adobe Illustrator program to assign a particular color to each of them and then to integrate those four color layers into a composite sketch, meant to provide a rough idea of what the final poster might look like.³²

(7) Fairey next printed black-and-white paper copies of the four bitmaps he had employed to make the sketch. He then used those four printouts as guides when he cut, by hand, the four layers of rubylith³³ film that would be the foundation for the final poster.³⁴

(8) Fairey next asked one of his employees to scan the four rubyliths into Photoshop. Fairey then imported those four digital scans from Photoshop into Adobe Illustrator.

(9) Using Adobe Illustrator, Fairey made a series of adjustments to the four layers. He aligned the layers and reconciled the imperfections in their edges. He added colors to the layers: light-blue stripes to layer one; solid light blue to layer two; a shade of red known as Red Pantene #485 to layer three; and dark blue to layer four. He cut back some of the edges of the layers corresponding to the lighter colors (which he anticipated would be printed earlier in the screen-printing process) to ensure that, if two layers were slightly misaligned in the final version of the poster, the lower of the two layers would not be visible. He added colors to the background: light blue on the left, red on the right. He changed the angle of Obama’s head, making him

31. Fairey Dep. Tr., *supra* note 2, at 806.

32. Fairey e-mailed a copy of that sketch to Yosi Sergant, his liaison with the Obama campaign, to give Sergant a sense of where he was headed, but did not await Sergant’s reaction.

33. Rubylith is a type of masking film traditionally used in screen-printing.

34. For assistance when cutting the layers, Fairey used “a lamp with a bright light with a magnifying glass so that I can look through and when I make my marks, which are very delicate, I can see very clearly what I am doing.” Fairey Dep. Tr., *supra* note 2, at 837. Fairey had learned this particular technique when he studied screen printing with Professor Henry Ferreira at the Rhode Island School of Design, and Fairey had been employing it since 1988 to make many of his designs.

more upright. Finally, he did “a good bit of tinkering” with the details of the four layers.³⁵

(10) When the image was complete, Fairey added a version of the Obama campaign emblem (which incorporated Fairey’s own trademarked “Obey” image) to Obama’s left lapel and a logo to the bottom of the image. The purposes of the logo were to express Fairey’s own support for Obama and to induce viewers to associate Obama with a particular theme or mood. In the first version of the poster, the logo he supplied was “PROGRESS.” When the Obama campaign expressed concern that the term “progress” might have troublesome connotations, Fairey changed the logo to “HOPE.” To maximize the impact of the logo, he customized letters taken from the Futura font — making the “O” perfectly round and stretching the other letters so that they were equal in width to the “O.” He also removed the “Obey” image from the lapel emblem.

(11) Finally, Fairey e-mailed the four files that together would form the final version of the poster to two separate production houses: Heinz Weber (for offset lithography) and Superb Graphics (for screen printing).

Some of the stages in this creative process are revealed by the juxtaposed images contained in Figure 6 in the Appendix. On the left side of Figure 6 is a copy of Garcia’s Obama photo. On the right is the finished Hope Poster. In the center is a diagram, prepared by Frank Cost, indicating some of the adjustments that Fairey made when generating the poster. Below the images is a list of those adjustments, keyed to the center diagram.³⁶

As indicated above, Fairey’s primary objective in making and distributing copies of the Progress and Hope Posters was to help Obama win the Democratic nomination for President and then the general election.³⁷ The principal way Fairey sought to advance this goal was

35. *Id.* at 843–44.

36. The AP disputed Fairey’s account of the creative process by which he produced the poster. In its pleadings, the AP described the process as “a form of computerized ‘paint by numbers’ with The AP’s copyrighted image.” The Associated Press’s First Amended Answer, Affirmative Defenses and Counterclaims ¶ 134, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. Nov. 12, 2009) [hereinafter AP Amended Answer]. Michael Essl, the AP’s expert on graphic design, later retreated from this claim, conceding that he was not aware of any “filter” or other “automated process” that would have enabled Fairey to create the Hope Poster. Transcript of Deposition of Michael Essl at 236–37, *Shepard Fairey v. Associated Press*, No. 09-01123 (S.D.N.Y. 2010). However, Essl and the AP continued to attack Fairey’s testimony that he created the poster by hand-cutting rubylith films. Essl contended that he himself was able to create an approximation of the Hope Poster using an “all-digital process” that mimicked the traditional rubylith-based technique but performed all of the steps on the computer — and that, moreover, Essl was able to do so in only ninety minutes.

37. Although Fairey’s primary objective in managing the dissemination of the posters was to get Obama elected, he also occasionally authorized uses of the image for other philanthropic causes. For example, in July 2008, Fairey donated one of the fine art versions of the Hope Poster to the Rush Philanthropic New York City Arts Education Program for Underprivileged Kids. The Education Program sold the painting at an auction for \$108,000 — and then used the proceeds to support its arts education initiatives. Transcript of Deposition of Olivia Perches at 306, *Shepard Fairey v. Associated Press*, No. 09-01123

by donating copies of the posters to persons and organizations that he believed would help Obama get elected. A total of approximately 700 Progress Posters and 350,000 Hope Posters were produced in the course of the campaign. Fairey sold only a small percentage of the posters he produced (350 Progress Posters and 1,400 Hope Posters) and at modest prices (\$45 and \$35 each, respectively).³⁸ The rest were either distributed at campaign events or donated to campaign workers. Fairey also made available on his website a high-resolution black-and-white version of the Progress Poster, which visitors to the website could download for free to make their own “pasters.” In addition, he granted a free license to the organization Sticker Robot to produce and distribute, at cost, large numbers of stickers bearing the Hope Poster image. Finally, Fairey granted free nonexclusive licenses to other organizations, which authorized them to make and distribute the poster, so long as they were supporting Obama.³⁹

Fairey did, however, subsequently earn significant amounts of money from ancillary uses of the poster. OBEY Clothing paid Fairey approximately \$95,000 in royalties for OBEY Clothing’s use of the Hope Poster image on various forms of merchandise. (Although Fairey neither solicited nor expected this payment, he kept the money.) Fairey created four “fine art” versions of the poster, including the one now hanging in the National Portrait Gallery. Fairey also received a commission to incorporate the Hope image in a larger mural installed at the Democratic National Convention in Denver, as well as commissions from the Presidential Inauguration Committee and from MoveOn.org to use the Hope Poster image in various post-election celebratory posters and displays. All told, Fairey earned from the project roughly \$1 million, of which more than \$830,000 was due to Fairey’s sales of the fine art editions of the Hope Poster and his royalties from the mural and images commissioned by the Presidential Inauguration Committee and MoveOn.org.

(S.D.N.Y. 2010). In October of 2008, a copy of the Hope Poster that Fairey had donated to Special Olympics South Carolina was auctioned off for \$1,100; all proceeds went to support the organization. *Id.* at 307. Later the same month, Fairey and Studio One donated copies of the Hope Poster to the organization Bake for Change. The proceeds from the subsequent sales of the posters went to the Obama campaign and to the campaign for “NO on Prop 8.” In Fairey’s judgment, each of these causes was consistent with the overall message of Obama’s campaign.

38. Fairey Dep. Tr. at 895. Potential customers were clamoring for additional copies of the Hope and Progress poster. Unsigned copies of the posters were being resold on eBay for well over \$1,000 each. *See, e.g., Obama Hope 08 Fairey — Offset*, EXPRESSO BEANS, <http://www.expressobeans.com/public/detail.php/97850> (last visited May 3, 2012). The persons selling copies of the posters on eBay received a total of roughly \$890,000 in revenue. Fairey received none of this money. He easily could have done so. Specifically, he could have mimicked the prices charged by the eBay resellers and kept for himself the large sum they were earning. Instead, he denounced their conduct as exploitative and parasitic — and did what he could to prevent it.

39. On one occasion, Fairey went even further. On February 22, 2008, Fairey paid the Jack-in-the-Box restaurant chain \$6,000 to run 30 seconds of still images of the poster 180 times per day, in 90 restaurants from that date until the presidential election. Fairey Dep. Tr., *supra* note 2, at 855.

The benefit the Hope Poster provided to Obama's presidential campaign was repeatedly acknowledged by the campaign's leaders, who frequently requested — and were given — permission to use the posters at campaign rallies. After Obama's victory, the presidential inaugural committee asked Fairey to create another work, entitled "Be The Change," which included the now-famous image of Obama in the Progress and Hope Posters, along with images of the U.S. Capitol and the White House. Perhaps the clearest indication of the significance of the posters came from Obama himself. On February 22, 2008, he wrote Fairey: "The political messages involved in your work have encouraged Americans to believe they can help change the status quo. Your images have a profound effect on people, whether seen in a gallery or on a stop sign."⁴⁰

B. Litigation

As indicated above, when Fairey first located the Garcia Obama photograph, he believed that it was a cropped version of the Garcia Clooney photograph. This misimpression persisted throughout 2008. It persisted in part because, until late January of 2009, Fairey did not know the source of the photographs.⁴¹

Toward the end of 2008, commentators began to speculate concerning the source of the photograph that Fairey had used as a reference work. One of these speculations was sufficiently convincing that it prompted Garcia to congratulate the Reuters photographer whom one commentator had identified as the source of the reference photo.⁴² But all proved unfounded. Finally, on January 21, 2009, a blogger named Tom Gralish for the first time correctly identified Garcia as the creator of the reference photo and the AP as the wire service for which Garcia was working at the time he took the photograph.⁴³

Soon thereafter, the AP contacted Fairey's office and demanded compensation. Fairey offered to pay a customary license fee, but the

40. See Hillel Italie, *AP Accuses Obama Artist Shepard Fairey of Copyright Infringement*, HUFFPOST POLITICS (Feb. 4, 2009, 10:39 PM), http://www.huffingtonpost.com/2009/02/04/ap-accuses-shepard-fairey_n_164045.html.

41. Because the setting of the Clooney photograph was plainly a photo opportunity of some kind, Fairey assumed that the photo came from the AP, the largest and best-known wire service. He expressed those assumptions to friends and to interviewers. For example, in an interview with Terry Gross, which was aired on National Public Radio on January 20, 2009, Fairey said,

You know, I actually don't know who the photographer is. It was an Associated Press photo that I got off of Google and I actually still don't know who took the photograph. They've never approached me. . . . I still don't know who it is, but I — whoever you are, thank you.

Mannie Garcia: *The Photo That Sparked 'Hope'*, NPR (Feb. 26, 2009), <http://www.npr.org/templates/story/story.php?storyId=101184444>.

42. Garcia 03/05/10 Dep. Tr., *supra* note 8, at 337–39, 346.

43. Tom Gralish, *Found — AGAIN — the Poster Source Photo*, SCENE ON THE ROAD (Jan. 21, 2009, 3:24 AM), http://blogs.phillynews.com/inquirer/sceneonroad/2009/01/found_again_the_poster_source.html.

AP insisted upon receiving a share of all of Fairey's revenue from the Hope Poster. Fairey retained as counsel the Stanford Fair Use Project,⁴⁴ which then began negotiating on his behalf with the AP.

Fairey himself paid little attention to these negotiations. He was preparing for his first solo exhibition — at the Institute for Contemporary Art in Boston⁴⁵ — and rarely checked his e-mail. When negotiations stalled and the AP threatened to file suit, Fairey's counsel quickly prepared a declaratory judgment complaint on his behalf. The complaint could be construed to suggest that the Garcia Obama photograph and the Garcia Clooney photograph were distinct and that Fairey had employed the latter, not the former. Fairey reviewed the complaint during a brief conference call but made no changes to it. The complaint was filed on February 9, 2009 — one day before the AP had indicated that it would file suit. On March 11, the AP filed an answer and counterclaims, which included a claim that Fairey had violated the Digital Millennium Copyright Act.⁴⁶ Soon thereafter, the AP added OBEY Clothing, one of Fairey's licensees, as a defendant.⁴⁷

A few days after the complaint was filed, while still in Boston, Fairey for the first time read some blog entries that demonstrated that the Obama photograph and the Clooney photograph were different, and argued that the Hope and Progress Posters more closely resembled the Obama photograph. Soon thereafter, he returned to Los Angeles, checked his files, and realized that the bloggers were right.⁴⁸

At that point, Fairey made what he acknowledges was an egregious error in judgment. He should have notified his counsel immediately. Had he done so, he and his counsel most likely would simply have amended his complaint. He did not do so. Instead, he decided to conceal his mistake. For the next eight months, he engaged in a cover-up. He failed to update people whom he had previously told, in good

44. The lead lawyer for the Stanford Fair Use Project was Anthony Falzone. He was assisted or advised by Julie Ahrens, Mark Lemley, and Joseph Gratz.

45. Press Release, The Inst. of Contemporary Art, First Museum Survey of Influential Street Artist Shepard Fairey Opens at the Institute of Contemporary Art/Boston (Oct. 27, 2008), available at <http://www.icaboston.org/about/pressreleases/shepard-fairey>.

46. The Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims ¶¶ 205–12, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. Nov. 12, 2009).

47. In several respects, OBEY Clothing stood apart from Fairey. First, OBEY Clothing retained separate counsel. Second, although the legal position of OBEY Clothing was similar to Fairey's, it was not identical. Finally, Fairey's settlement with the AP did not include a settlement of the AP's claim against OBEY Clothing. Roughly one month later, the AP and OBEY Clothing reached a separate settlement. See The Associated Press, *AP and Clothing Company Settle Copyright Dispute*, BLOOMBERG BUSINESSWEEK (Mar. 16, 2011), <http://www.businessweek.com/ap/financialnews/D9M0KEQG0.htm>. Because these differences are not relevant to the principal purpose of this Article, we will not discuss them further.

48. Fairey Dep. Tr., supra note 2, at 337–38. The AP contested Fairey's account of when and how he realized (a) that the Garcia Obama photograph was not, in fact, a cropped version of the Garcia Clooney photograph and (b) that he had used the former as his reference work rather than the latter. The AP argued that Fairey came to these realizations before the filing of his initial complaint and sought to conceal the true identity of the reference work in order to strengthen his legal position. AP Amended Answer ¶¶ 158–59.

faith, that the poster's reference work had been the Garcia Clooney photograph. He told many people that the reference work for the poster had been the Garcia Clooney photograph, even though he now knew that was untrue. He destroyed some documents and fabricated others in an effort to buttress his continued claim that the reference work had been the Garcia Clooney photograph.

Until October 2, 2009, Fairey told no one about this cover-up. On that date, one of Fairey's employees informed Fairey that he had discovered — on an old, recently reactivated hard drive — some documents relevant to this litigation. Fairey realized that those documents would expose the cover-up. Unwilling to enlist the employee in the cover-up, Fairey told him to disclose them. He then informed his wife, counsel, and the public at large of his misconduct.⁴⁹

These revelations made it necessary for his counsel to request to withdraw from the case — a request that Judge Hellerstein granted. A new team of lawyers, which included some of the authors of this Article, offered to step in. Each side then recruited expert witnesses and refined their substantive positions. Those positions are summarized below.

C. Arguments

To establish a *prima facie* case of copyright infringement, a plaintiff must show (i) that he owns a valid copyright in the work at issue; (ii) “that his work was actually copied” by the defendant; and (iii) “that the copying amounts to an improper or unlawful appropriation.”⁵⁰ If the plaintiff succeeds in establishing a *prima facie* case, the defendant can still avoid liability by demonstrating that his behavior was nevertheless justified by one of the limitations built into the copyright system, the most important of which is the fair use doctrine.⁵¹

The first two elements of a *prima facie* case were not contested in this case. Fairey conceded (i) that the copyright in the Garcia Obama photo is owned by the AP⁵² and (ii) that he used that photo as a refer-

49. See Shepard Fairey, *Statement on Associated Press Fair Use Case*, OBEY GIANT — WORLDWIDE PROPAGANDA DELIVERY, <http://obeygiant.com/headlines/associated-press-fair-use-case> (last visited May 3, 2012) (posting confession and apology on his website).

50. *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992) (internal quotation omitted). The second and third of these requirements are distinct. “Actual copying” is a term of art that encompasses situations in which “the defendant, in creating its work, used the plaintiff’s material as a model, template, or even inspiration.” 4 NIMMER ON COPYRIGHT § 13.01[B] (2011). “It is only after actual copying is established that one claiming infringement’ then proceeds to demonstrate that the copying was improper or unlawful by showing that the second work bears ‘substantial similarity’ to protected expression in the earlier work.” *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (citation omitted).

51. See *Castle Rock*, 150 F.3d at 141.

52. For several months after the initiation of litigation, ownership of the copyright in the Garcia Obama photo was contested. Garcia claimed that he held the copyright, while the AP claimed that Garcia had been working as an AP employee at the time he took it and therefore that the photo was a “work for hire,” the rights to which were held by the AP. This dispute was eventually resolved in favor of the AP for reasons unrelated to the themes of

ence work when creating the Hope Poster. The latter concession is sufficient to establish “actual copying,” as that phrase has been defined by the courts.⁵³ As to the third element of a prima facie case, however, Fairey contended that he did not take any protected expression from the Garcia Obama photo — and thus that his conduct did not constitute “improper appropriation.” In addition, Fairey contended that, even if he were deemed to have taken some protected expression, his behavior would qualify as a fair use. To prevail, the AP had to overcome both arguments.

1. Improper Appropriation

The position of the AP on the first issue was straightforward. As the Supreme Court made clear in *Feist Publications v. Rural Telephone Services*,⁵⁴ the standard for copyright eligibility is low; “some minimal degree of creativity” is all that is necessary to give rise to a copyright.⁵⁵ Photographs, the AP contended, easily satisfy that standard. Posed studio photographs, like the image of Oscar Wilde at issue in *Burrow-Giles Lithographic Co. v. Sarony*,⁵⁶ plainly do so. But even snapshots enjoy copyright protection. As Learned Hand pointed out long ago, “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”⁵⁷ Contemporary courts, aware of that fact, routinely shield even modestly creative photographs against unauthorized reproduction.⁵⁸

Against this doctrinal background, the AP argued, Fairey’s conduct was plainly improper. According to the AP, Garcia’s photograph was highly creative, containing many original features and depicting Obama heroically. Moreover, the AP argued, Fairey chose to use that photograph as his reference work precisely because of its most creative dimension: its presentation of Obama as presidential.

In response, Fairey acknowledged that photographs are copyrightable subject matter. However, he argued, not all aspects of photographs constitute “original expression” entitled to copyright protection. When, as in this case, a defendant copies some parts of a

this article. Fairey played no part in its resolution. See Erik Larson, *AP Has No Right to Obama ‘Hope’ Image, Photographer Tells Judge*, BLOOMBERG (July 13, 2009, 6:06 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVR_et119K.Q; Randy Kennedy, *Photographer Withdraws Lawsuit in Shepard Fairey Case*, N.Y. TIMES ARTS BEAT (Aug. 23, 2010, 5:59 PM), <http://artsbeat.blogs.nytimes.com/2010/08/23/photographer-withdraws-lawsuit-in-shepard-fairey-case>.

53. See NIMMER, *supra* note 50, § 13.01.

54. 499 U.S. 340 (1991).

55. *Id.* at 345.

56. 111 U.S. 53 (1884).

57. *Jewelers’ Circular Publ’g Co. v. Keystone Publ’g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921), *aff’d*, 281 F. 83 (2d Cir. 1922).

58. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 307–08 (2d Cir. 1992); *Images Audio Visual Prods. v. Perini Bldg. Co.*, 91 F. Supp. 2d 1075, 1084–85 (E.D. Mich. 2000).

photograph but not others, one must ascertain whether the portions taken fall inside or outside the zone of copyright protection.⁵⁹

Fairey pointed out that only aspects of a photograph that are “original to the author” are entitled to protection.⁶⁰ Such originality sometimes derives from the photographer’s construction of the scene he depicts — as, for example, in studio photographs of the sort at issue in *Sarony*. Originality can also often be found in the “rendition” of the scene — in other words, in the photographer’s choice of “angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc.”⁶¹ Finally, the photographer’s ability to capture the scene at a particular moment in time may reflect originality.⁶²

Two dimensions of photography are not entitled to protection. The first are facts. Features of the natural world captured in a photograph do not constitute copyrightable expression and thus may be copied freely by other artists.⁶³ An important application of this principle is the rule that the features of the face of a photographic subject are not protected.⁶⁴ This rule, Fairey argued, is an outgrowth of a fundamental precept of copyright law, known as the “idea/expression” or “fact/expression” distinction, which in turn is rooted in the constitutional basis of the copyright system.⁶⁵

The second unprotectable aspect of a photograph, Fairey argued, consists of conventional images or poses. A corollary of the idea/expression distinction is that “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic” are not protectable under copyright law.⁶⁶ Such elements are known as *scènes à faire* — a phrase that, roughly translated, means “scenes which ‘must’ be done.”⁶⁷ Fairey pointed to some recent cases in the Southern District of New York

59. As the leading commentator explains: “Even if the defendant has copied from the plaintiff’s copyrighted work, if the only material thus copied are those elements of plaintiff’s work that are not protectible, then the resulting copy will not constitute an infringement.” NIMMER, *supra* note 50, § 8.01[D].

60. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (quoting *Feist*, 499 U.S. at 348).

61. *Id.* at 452.

62. *Id.* at 452–53.

63. See NIMMER, *supra* note 50, § 2.08[E][1] (“[C]opyright in [a] photograph conveys no rights over the subject matter conveyed in the photograph.”).

64. See, e.g., *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 638 (S.D. Tex. 2007).

65. In *Feist*, the Court noted:

The primary objective of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts.” Art. I, § 8, cl. 8. . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

499 U.S. at 349–50 (citations omitted).

66. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

67. *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945).

that applied this well-established doctrine to exclude from copyright protection conventional ways of posing photographic subjects.⁶⁸

When these principles are understood, Fairey contended, it became evident that he took no copyrightable expression whatsoever from the Garcia Obama photo. Of the three types of potentially protectable expression — composition, rendition, and timing — the first was not at issue, because Garcia had conceded that he did not pose Barack Obama or otherwise create the scene depicted in his photograph. Fairey acknowledged that some aspects of Garcia’s “rendition” of Obama were sufficiently original to be protected — and thus that making a verbatim copy of the Garcia photo would have constituted improper appropriation. However, he pointed out, he did not make an identical copy. Rather, he removed all elements of the photograph that the AP contended embody originality: the flag in the background, the realistic color scheme, the shallow depth of field, and the way in which the photograph is cropped. Finally, with respect to timing, Fairey again acknowledged that Garcia’s photo captured a moment in which Obama struck a pose similar to that typically used for depicting political leaders. Specifically, Garcia captured Obama in the so-called “three-quarters pose” that has long been conventional in American political portraiture. The convention in question becomes evident when one compares the Garcia photo with other famous portraits of Presidents. A representative sample is set forth in Figure 7 in the Appendix. The pose shared by these images, Fairey argued, is a classic *scène à faire* — and, consequently, is not protectable under copyright law.

Other than Obama’s pose, Fairey took only one thing from the Garcia photo: the shape of Obama’s face. But that, of course, is a fact — and thus is outside the zone of copyright protection.

2. Fair Use

Section 107 of the Copyright Act provides that, “[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”⁶⁹ Thus, even if Fairey were adjudged to have engaged in improper ap-

68. For instance, in one case, Judge Chin relied on the *scènes à faire* doctrine in ruling that the depiction of the bottom portion of the legs of a woman sitting on a toilet in a bathroom stall with her toes pointed inward was not protectable — partly because that pose had become conventional in fashion photography, and partly because it is a particularly effective way to display high-fashion shoes. *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 388, 392–93 (S.D.N.Y. 2005). Similarly, in another case, Judge Schwartz ruled that the depiction in a photograph of “a businessperson standing on the ledge or roof of a tall building looking down onto a car-lined street, [taken] from the viewpoint of the businessperson” is an unprotectable *scène à faire*, insofar as it is a conventional way of suggesting suicidal impulses. *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 320, 323 (S.D.N.Y. 2001).

69. 17 U.S.C. § 107 (2006).

propriation, he would escape liability if his conduct were deemed “fair.”

Fairey’s invocation of the fair use doctrine began by emphasizing the important role it plays in the copyright system. As the Supreme Court explained in 1994, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”⁷⁰ The fair use doctrine is critical to prevent “rigid application” of copyright law protections from “stifl[ing] the very creativity which that law is designed to foster.”⁷¹ The doctrine not only ensures that copyright law advances rather than frustrates the objectives of copyright law, it also ensures that copyright law does not encroach upon the freedom of expression protected by the First Amendment.⁷²

Fairey then turned to the (non-exhaustive) list of factors that section 107 identifies as relevant to the question of whether a particular use of copyrighted material should be excused:

- (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.⁷³

Fairey argued that the most important aspect of the first factor is the degree to which the defendant’s use “transformed” the plaintiff’s work. The centrality of this issue arises from the following passage in the 1994 decision of the Supreme Court in *Campbell v. Acuff-Rose Music*:

The central purpose of this investigation [into the purpose and character of the defendant’s use] is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first

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

71. *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

72. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

73. 17 U.S.C. § 107 (2006).

with new expression, meaning, or message; it asks, 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 works thus lie at the heart of the fair use doctrine’s guarantee of breathing space⁷⁴

Since *Campbell*, the Courts of Appeals have identified several contexts in which a defendant’s use of a copyrighted work should be deemed “transformative.” One such setting is where the purpose of the defendant’s work is different from the purpose of the plaintiff’s work.⁷⁵ This conception of “transformation,” Fairey argued, weighed strongly in his favor. Garcia’s aim had been to take a realistic portrait of then-Senator Obama. Indeed, the primary purpose of all of the AP’s photographs is (in the AP’s own words) to provide “a truthful, unbiased report of the world’s happenings.”⁷⁶ In keeping with that general commitment, Garcia had testified that he had no intention to promote Obama’s candidacy. By contrast, Fairey’s primary objective in creating the Hope Poster was to promote Obama’s candidacy.

Not only was his purpose different from that of Garcia and the AP, Fairey argued, but his purpose deserved the highest level of protection and respect. One of the functions of the fair use doctrine, as noted above, is to ensure that copyright law does not run afoul of the First Amendment. As the Supreme Court recently emphasized, “the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”⁷⁷ The Hope Poster, Fairey pointed out, lay at the center of that zone.

Another setting in which the Courts of Appeals since *Campbell* have found conduct to be transformative is where the defendant has

74. 510 U.S. at 579 (citations omitted).

75. Several recent opinions illustrate this principle. In one case, the plaintiff held the copyright for seven images used in advertising concerts by the musical group the Grateful Dead. The defendant, without permission, reprinted copies of those images in a “coffee table book” that recounted the history of the Grateful Dead. The Second Circuit upheld the District Court’s grant of summary judgment to the defendant, relying heavily on the fact that the purposes of the posters and the purpose of the book were different. “[E]ach of [the plaintiff’s] images fulfilled the dual purposes of artistic expression and promotion. . . . In contrast, [the defendant] used each of [the plaintiff’s] images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on [the book’s] timeline.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006). This difference in purpose, the court concluded, rendered the defendant’s activity “transformative,” despite the fact that the defendant’s book did not criticize or comment upon the posters. *Id.* at 609–10. Other recent decisions that rest upon the same principle include *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000), and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164–65 (9th Cir. 2007).

76. See *AP’s News Values and Principles*, *supra* note 6.

77. *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 898 (2010) (citations and internal quotation marks omitted).

added significant new material to the plaintiff's work and thereby altered its meaning. A good example is the Second Circuit's 2006 ruling in *Blanch v. Koons*.⁷⁸ The plaintiff in that case created a fashion photograph that "depict[ed] a woman's lower legs and feet, adorned with bronze nail polish and glittery Gucci sandals, resting on a man's lap in what appears to be a first-class airplane cabin."⁷⁹ The defendant, Jeff Koons, scanned the photograph into his computer, removed the background, and then incorporated substantial portions of the photograph into a collage. The Court of Appeals upheld a grant of summary judgment to Koons on fair use grounds. One of the bases of the court's ruling was that the two works had "sharply different objectives"⁸⁰ — invoking the same conception of transformation discussed above. But the court in *Blanch* also emphasized that Koons used the original photograph as "raw material" for his own creative project, holding broadly:

If the secondary use adds value to the original — if [copyrightable expression in the original work] is used as raw material, transformed 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.⁸¹

Fairey argued that the holding of *Blanch* was directly applicable to his own use of the Garcia Obama photo. He used portions of the photo as "raw material" to create something fundamentally different: a heroic and inspirational political portrait. The aesthetic of the Garcia Obama photo is realism, depicting the world as it is; the aesthetic of the Hope Poster is idealism, depicting the world as it could or should be. Each of the myriad changes that he made to the underlying image was designed to advance that end. He used bold lines and colors to portray Obama in an idealized light. In addition, to make the depiction of Obama more flattering, he reduced the size of Obama's right ear, raised his right shoulder, smoothed his hairline, and changed the shape of his mouth. He added a fleck of red to Obama's right eye, giving it a "glint" and contributing to its "focus of gaze." He defined Obama's jaw line more sharply to make it appear "strong and refined." Perhaps most importantly, he used a "red, white, and blue color palette" both to "deracialize" Obama and to allude to Obama's

78. 467 F.3d 244 (2d Cir. 2006).

79. *Id.* at 248.

80. *Id.* at 252–53.

81. *Id.* at 251–52 (alteration in original) (citing *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990))).

2004 Democratic National Convention speech decrying the false “red state/blue state” division of the country.⁸²

Although Fairey placed the greatest weight on the transformative character of his work, he acknowledged that two other aspects of the first fair use factor merited attention. The first is the degree to which the defendant’s activity is “of a commercial nature or is for nonprofit educational purposes.”⁸³ At one time, this issue loomed large in fair use jurisprudence. In *Campbell*, however, the Supreme Court ruled that the significance of this issue diminishes sharply when, as here, the defendant’s use is “transformative.”⁸⁴ Fairey argued that his use of the Garcia Obama photo should be considered primarily noncommercial. To be sure, he made a profit on the project. But he gave away hundreds of thousands of copies of the poster, while selling or licensing others at below-market prices. His principal goal, he insisted, was to promote Obama’s candidacy, while breaking even financially.

Finally, Fairey recognized that some courts consider — under the auspices of the first fair use factor — the degree to which the defendant, when gaining access to the plaintiff’s work, behaved in “good faith.”⁸⁵ Currently, the Court of Appeals for the Second Circuit treats this issue as relevant, but of modest importance.⁸⁶ Fairey acknowledged that his admitted spoliation of evidence might seem to count against him on this front. He argued, however, that his misconduct occurred long after he created the Hope image and thus did not retroactively alter the lawfulness of his behavior. Moreover, Judge Hellerstein had already made clear, in comments from the bench, that Fairey would be obliged to indemnify the AP for any increased attorney fees

82. The cumulative effect of these changes was so dramatic that, although Garcia saw the Hope Poster often during the presidential campaign, he never realized that it was based upon his own photograph. See Garcia 03/05/10 Dep. Tr., *supra* note 8, at 337.

83. 17 U.S.C. § 107(1) (2006).

84. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994); see also *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477–78 (2d Cir. 2004) (“The commercial objective of the secondary work is only a subfactor within the first factor. “[T]he 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.” (quoting *Campbell*, 510 U.S. at 579) (alteration in the original)).

85. *E.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562–63 (1985). Not all judges agree. Judge Leval, for example, has argued that the defendant’s good faith should be irrelevant to the fair use calculus. Leval, *supra* note 81, at 1126–28. The Supreme Court (noting Leval’s skepticism) has left this issue open. *Campbell*, 510 U.S. at 585 n.18.

86. In *NXIVM Corp. v. Ross Institute*, the court concluded:

[J]ust how much weight within the first factor should a court place on this subfactor of bad faith? . . . *Campbell* provides . . . support for the proposition that while the good or bad faith of a defendant generally should be considered, it generally contributes little to fair use analysis. . . . We believe this analysis further supports our conclusion that a *finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis*. The Court recognized the continuing relevance of *Harper & Row*, but clarified that the bad faith subfactor can be de-emphasized and will not be dispositive of the first factor or fair use.

364 F.3d 471, 478–79 n.2 (2d Cir. 2004) (emphasis added).

or litigation costs caused by his misconduct; altering the application of the fair use doctrine was thus not necessary to make the AP whole. Finally, the Second Circuit takes the position that a finding of bad faith, even if it were merited, would not be “dispositive of the first factor or fair use.”⁸⁷

Fairey dealt with the second and third fair use factors more summarily, because they seemed plainly to tilt in his favor. The foundation of the second factor is the principle 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.”⁸⁸ Specifically:

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.⁸⁹

On both dimensions, Fairey argued, his position was strong. The Garcia Obama photo, as a work of photojournalism, is plainly a “factual,” rather than a “creative” work, and the Garcia Obama photo had been “published” at the time Fairey used it as a reference work.

The third factor in the fair use calculus asks how much the defendant took of the plaintiff’s work. More specifically, it requires consideration of how much of the “original expression” contained in the plaintiff’s work the defendant took.⁹⁰ For the reasons discussed in the previous subsection, Fairey contended that he did not take *any* copyrightable expression from the Garcia Obama photo — and should prevail on that basis alone. But even if he were deemed to have taken some protectable material, he argued, the amount thereof would be modest.

The fourth and final fair use factor is the extent to which the defendant’s activity, if deemed fair, would adversely affect the market for the copyrighted work at issue in the case. Two kinds of harm are cognizable under this umbrella. The first consists of injury to an existing market for the copyrighted work. Harm of this sort arises when the defendant’s work serves as a “substitute” for the plaintiff’s work — and, as a result, where the creation and distribution of the defendant’s

87. *Id.*

88. *Campbell*, 510 U.S. at 586.

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

90. *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 546 (S.D.N.Y. 2008).

work causes consumers to purchase fewer copies of the plaintiff's work.⁹¹ With respect to this first type of harm, Fairey pointed out that the AP had not argued that "substitution" had occurred — i.e., that fewer people had purchased copies of the Garcia Obama photo because they found the Hope Poster more attractive. To the contrary, the presence in the market of the Hope Poster caused more people to purchase the Garcia Obama photo, not fewer, and led to the sale of dozens of fine art prints of the Garcia Obama photo for more than \$1000 apiece.⁹²

The second type of cognizable injury consists of impairments of the "potential market" for the copyrighted work the defendant is accused of infringing. This dimension of the fourth factor can be difficult to apply, because it is not always clear what economic opportunities count as potential markets. Plaintiffs sometimes argue that any group of people willing to pay for access to a copyrighted work constitutes a potential market for that work. This expansive interpretation, however, would cause the fourth factor always to tilt against a finding of fair use — a result plainly not intended by Congress.⁹³ To avoid this outcome, courts have confined the kinds of potential markets cognizable under the fourth factor in two respects. First, they have limited such markets to "traditional, reasonable, or likely to be developed markets."⁹⁴ Second, the courts have excluded from the set of cognizable potential markets those persons who wish to use the plaintiff's work in transformative ways.⁹⁵

Fairey contended that a ruling of the sort he sought in the case would not give rise to any injury to the AP of the sort recognized under factor four. He stressed that he did not suggest that he or anyone else is at liberty to make verbatim copies of AP photos. He sought only confirmation of his right to make *transformative* uses of published AP photos. Thus, the only potential market for the Garcia Obama photo that might be impaired by a ruling in his favor consisted of other artists interested in making similarly transformative uses of that photo. The inability to charge such persons, he contended, is precisely the kind of injury that the courts have excluded from consideration under section 107.

91. *See, e.g., Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002).

92. Garcia 03/05/10 Dep. Tr., *supra* note 8, at 312–21.

93. *See, e.g., Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929–30 & n.17 (2d Cir. 1994); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006).

94. *See Am. Geophysical Union*, 60 F.3d at 930.

95. *See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998); *see also id.* at 145 n.11 ("[B]y developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets." (emphasis added)); *Graham*, 448 F.3d at 615 ("[C]opyright owners may not preempt exploitation of transformative markets. . . . Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees." (first alteration in original) (citation and internal quotation marks omitted)).

The AP construed and then applied the statutory fair-use factors quite differently. With respect to factor one, the AP contended that three aspects of Fairey’s conduct should count against him. First, he had acted in bad faith. Second, the Hope Poster project was highly commercial. Third, his use of the Garcia Obama photograph was not transformative.

Evidence of Fairey’s bad faith, the AP argued, was manifold. He had removed, the AP argued, its copyright notice from the photo. In addition, until bloggers detected the source of the photo he had used as his reference work, Fairey failed to give appropriate credit to the photographer. When he registered the copyright in the Hope Poster, he did not comply with the Copyright Office’s requirement that he identify any pre-existing material not owned by the applicant.⁹⁶ Last but not least, the AP contended that Fairey had falsely asserted that he had employed the Garcia Clooney photo, rather than the Garcia Obama photo, as his reference work — and had fabricated evidence in support of that assertion.⁹⁷

Fairey’s commercial motivation, the AP argued, was equally plain. He had earned large amounts of money from the poster. He had even charged MoveOn.org and the Presidential Inauguration Committee substantial license fees when they sought permission to use the image in conjunction with the celebration of Obama’s election.

Finally, three circumstances undermined, the AP argued, Fairey’s contention that his activity had been transformative. First, some courts (including some panels of the Second Circuit) had limited that label to circumstances in which the defendant parodied or otherwise commented on the plaintiff’s work.⁹⁸ But Fairey had admitted that he had not sought to parody or comment on the Obama photo. Second, Fairey’s purpose in creating the poster was the same as Garcia’s purpose in making the photo — namely, to “capture the essence of Senator Obama.” Finally, the AP’s purpose in commissioning the photo had been to earn money by licensing it through the AP Images catalog. Fairey’s use of the photo should not be considered transforma-

96. AP Amended Answer ¶143.

97. At times, the AP made an even more categorical argument, suggesting that Fairey’s litigation misconduct should deprive him entirely of access to the fair use doctrine. The basis of this argument was the AP’s contention that fair use is an equitable doctrine and thus that Fairey’s “unclean hands” precluded him altogether from invoking it. In response, Fairey pointed to several sources suggesting that the AP had misunderstood the relevant history. See Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1268 n.48 (2006); Leval, *supra* note 81, at 1127 (“[T]he fair use doctrine did not arise out of equitable considerations. Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship.”); WILLIAM F. PATRY, PATRY ON FAIR USE § 1:4 (2011) (“Fair use is not an equitable doctrine or an equitable defense. As history reveals, it is a legal defense which may, and frequently is, decided by a jury, although like most issues, in appropriate cases it may be decided on summary judgment.”).

98. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 310–11 (2d Cir. 1992); *Salinger v. Colting*, 641 F. Supp. 2d 250, 257–58 (S.D.N.Y. 2009), *rev’d on other grounds*, 607 F.3d 68 (2d Cir. 2010).

tive, because he had employed it for precisely the purpose for which it was intended.

With respect to the second factor, the AP took issue with Fairey's characterization of the photo as primarily factual in nature, contending on the contrary that it was highly expressive and required substantial creative effort. Fairey's failure to acknowledge as much reflected the same arrogant attitude toward photography that Jeffrey Koons had shown when he cavalierly employed a photograph of a string of puppies as the basis for a sculpture that he subsequently entered into the "banality show."⁹⁹ Fairey's effort to invoke the fair use doctrine should be rejected, just as Koons' was.

With respect to the third factor, the AP argued that Fairey, like Koons when he relied upon the photo of the puppies, had copied Garcia's work in toto. All of the key aspects of the Obama photo, the AP claimed, appeared in the Hope Poster. Complex dissection of the two works was unnecessary and misleading; simply placing the two works side by side immediately made evident the amount of Fairey's wrongful appropriation.

Last but not least, the AP contended that excusing Fairey's behavior would cause the AP substantial injury that should count under the fourth statutory factor. Most obviously, the AP would be deprived of the license fees that it could have collected from Fairey himself. More broadly, the AP would be unable in the future to charge artists and others who wished to make use of other AP photos. The result would be a corrosion of the AP's revenue streams sufficiently deep to undermine its incentive to commission such photos in the first instance. This hazard was especially serious at the present moment, because the combination of the recession and the threat posed to traditional journalism created by the proliferation of free online news sources had recently caused the AP's member newspapers to reduce their contributions to the organization. If the AP were to survive, it claimed, it had to develop new revenue streams. One of the most promising of those potential streams was income from licensing of its photos. The conduct exemplified by Fairey's behavior, if unchecked, would frustrate that potential revenue stream — which may have serious attendant costs to the public at large.

D. Resolution

The litigation came to a head at the end of 2010. The prolonged (and expensive) discovery process was finally complete. The reports of all of the expert witnesses — as well as the corresponding rebuttal reports — had been submitted. All of the parties, key witnesses, and experts had been deposed. At Judge Hellerstein's request, the parties had submitted summaries of their legal arguments. The judge set a

99. *See Rogers*, 960 F.2d at 304, 310.

schedule for the briefing of cross motions for summary judgment — but also signaled his inclination not to grant summary judgment to either side. He instructed the parties to prepare for a three-week trial, which would begin in March of 2011.

In mid-January of 2011, the principal parties settled the dispute. The key provisions of the settlement were:

- Neither side surrenders its view of the law.
- Fairey agrees not to use another AP photo without obtaining a license from the AP.
- In the future, the parties will share the rights to make and distribute posters and merchandise bearing the Hope image.
- Fairey and the AP will collaborate in creating a new set of images based upon AP photos.

In addition, the parties agreed to financial terms that remain confidential.

The provisions of the settlement were widely reported,¹⁰⁰ and have since been invoked in analogous copyright disputes.

If the litigation over the Hope Poster had not been settled, how would the courts have resolved it? How should the courts have resolved it?

100. See, e.g., Randy Kennedy, *Shepard Fairey and The A.P. Settle Legal Dispute*, N.Y. TIMES, Jan. 13, 2011, at C2; Editorial, *A Poster Child for Fair Use*, L.A. TIMES, Jan. 17, 2011, at A14, available at <http://articles.latimes.com/2011/jan/17/opinion/la-ed-fairey-20110117>; *Barack Obama Artwork Case Settled*, BBC NEWS (Jan. 12, 2011, 12:55 PM), <http://www.bbc.co.uk/news/entertainment-arts-12170620>; Mark Memmott, *Shepard Fairey and AP Settle Copyright Dispute over 'Hope' Poster*, NPR (Jan. 11, 2011), <http://www.npr.org/blogs/thetwo-way/2011/01/12/132860606/shepard-fairey-and-ap-settle-copyright-dispute-over-hope-poster>; Larry Neumeister, *Obama 'HOPE' Artist and AP Settle Copyright Claims*, BOS. GLOBE (Jan. 12, 2011), http://www.boston.com/business/articles/2011/01/12/obama_hope_artist_and_ap_settle_copyright_claims.

IV. APPENDIX: FIGURES



Figure 1: The Hope Poster.



Figure 2: The Garcia Obama photo.



Figure 3: The Garcia Clooney photo.

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Figure 4: Various finalist photographs that were not selected as reference works for the Hope Poster.



Figure 5: The bitmaps Fairey produced while creating the layers.

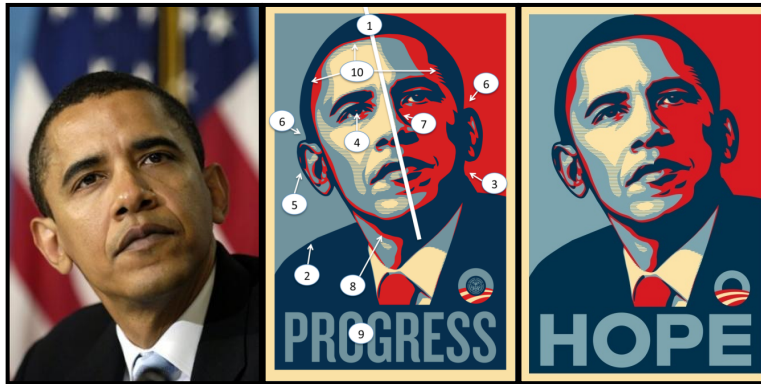


Figure 6: Modifications made to the Garcia Obama Photo in the process of creating the Hope Poster.

1. Rotation of the image by approximately five degrees in the clockwise direction.
2. Redrawing of Obama's right shoulder line to make it appear straighter.
3. Straightening of Obama's left collar and shoulder lines.
4. Addition of trapezoidal highlights in both eyes to give the effect of catching light in the eyes.
5. Redrawing the outlines of both ears to make them appear smooth and more perfectly shaped.
6. Adjusting the intersection of the hairline above both ears to reduce the protrusion of the ears.
7. Straightening the line of the nose.
8. Straightening the lines defining the chin and neck.
9. Extending the length of the torso below the lower boundary in the original photo.
10. Smoothing and stylizing the hairline.



Figure 7: Famous presidential portraits using the “three-quarters pose” juxtaposed with the Garcia Obama photograph.