

1) Most Americans are probably familiar with the Obama “Hope” poster that became an iconic image of the 2008 presidential election. The artist, Shepard Fairey, used a photograph of Barack Obama as the basis of design, and was sued by the Associated Press for copyright infringement of that photograph, which was taken by A.P. photographer Mannie Garcia at an event in 2006.

Initially, Fairey and the A.P. disagreed over which photograph was actually used for the poster. Fairey claimed he had used a picture of Obama with George Clooney from the event, while A.P. claimed the photo was a solo, close-up shot of Obama. Fairey later conceded that the A.P. was correct, but he argued that his use of the photograph for the poster constituted fair use. Fairey made his argument in the “transformative” use of the A.P. photo, and he also claimed that he did not profit from the artwork. The A.P. disputed that claim, and also accused Fairey’s work of being derivative. Ultimately, Fairey and the Associate Press settled out of court, with both sides stating that they weren’t conceding to other’s view of the law. As per the agreement, the two parties now share the rights to the “Hope” image and any future sales in relation to it. Fairey did admit to sending the wrong photos and deleting others in an attempt to hide his actions, but that was handled in a separate court decision. Obey Clothing was also involved in a lawsuit for using the "Hope" image on their merchandise. This was also a separate lawsuit and resulted in a separate decision. As such, I will only focus on the factors of this case between Fairey and the Associated Press, as it would have been heard in court.

Of the four factors used to determine fair use, the purpose and character of the use is probably the most important in this case. I have no facts on whether or not Fairey did profit from the “Hope” image, though it is hard to believe he didn’t profit at all. However, Fairey is an artist, and his “Hope” image undoubtedly made something new out of the original photograph. Moreover, the poster became a huge symbol of the Obama campaign in what is considered a historic election. The overwhelming transformative nature of his work is a solid argument for fair use in this case.

The nature of the copyrighted work may also work in Fairey’s favor. The A.P. photo was published, which widens the scope of fair use, and although this is subjective, the A.P. photo is perhaps more factual than creative. The A.P. photographer simply took a photo of Obama to document his time at an event. Fairey, in choosing the photo, was looking for a useful image of Barack Obama as a template for his work, and he likely did not choose the photo for any of its unique qualities. The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, actually favors the A.P., since a side-by-side comparison of the photo and the poster makes it pretty obvious that Fairey used Garcia’s photo. However, this is not enough to argue that the work is derivative, and its transformative nature likely outweighs this issue.

Lastly is the issue of market value. There is no reason to believe that the “Hope” image took anything away from the original photograph. The A.P. tried to claim that the image did harm the potential market for Garcia’s photo, though that seems unlikely. The

“Hope” poster did not act as a substitute for the original photograph, and in fact, the existence of the image has given the original photo more attention than it had previously. In fact, the A.P. still has the right to license the photo, and copies of it have been sold in the Danziger Gallery in New York. It seems that Fairey’s use was not harmful to the value of the original photograph.

One could not have predicted how influential Fairey’s work would become, but fair use is also unpredictable and considered on a case-by-case basis. The “Hope” image is almost definitely a transformative work, in terms of the artwork itself, but also because the original photograph would never rise to the level of significance that the poster did. I do think Fairey could have won the case if it had gone through.

2) While archival institutions are limited to the number of copies they can make of a work, I wonder if a theatre wanted to use a portion of a published film from the archive, could a copy be made and borrowed? The theatre wants to project an excerpt of this rare film during a production, and they can't get it anywhere else. The archive wouldn't want to lend out one of its rare copies because the theatre personnel aren't equipped to handle the film by archival standards. If the theatre's production is free to the public, and the film is transformed as a part of the greater performance, then I think this copy could be made fairly. Even if the production is for profit, it may still qualify as fair use since only a portion of the film is used, the work is transformative, and it wouldn't harm the copyright owner or value of the original. It would make sense to me that this situation would be

a fair use.