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powerHouse Books, *The New York Times*, and Fair Use

In January 2016, the *New York Times* filed a copyright suit in the Southern District of New York against the publishing house powerHouse Books over the use of 64 thumbnail images used on the inside cover and end pages of a book titled *War is Beautiful: The New York Times Pictorial Guide to the Glamour of Armed Conflict*, written by David Shields. The case was settled out of court in June 2016, but not before the *New York Times* received substantial criticism for their pursuit of a copyright infringement lawsuit, as many believed the dispute to be an obvious case of fair use.¹ As the following analysis will demonstrate, the use of these images by powerHouse books does indeed fall under the realm of fair use, and as is the case for many other copyright lawsuits throughout United States history, it is likely that the *New York Times* had other motives when seeking to quash this book's publication.

The book itself, *War is Beautiful*, is an art book that collects and presents war photographs that appeared on the front page of the *Times*, focusing primarily on recent conflicts in the Middle East. In it, author David Shields argues a thesis that the *Times*' quietly encouraged these wars through an aestheticization of violence. The publisher's synopsis reads,

Anyone baffled by the willful American involvement in Iraq and Afghanistan can't help but see in this book how eagerly and invariably the Times led the way in making the case for these wars through the manipulation of its visuals... The photographs gathered in *War*

¹ Jeff John Roberts, "New York Times Settles Copyright Case Over Thumbnail War Photos," *Fortune*, 17 June 2016, <http://fortune.com/2016/06/17/new-york-times-settles-copyright-case/>

Is Beautiful, often beautiful and always artful, are filters of reality rather than the documentary journalism they purport to be.²

As this brief publicity blurb suggests, Shields' book unflinchingly criticizes the *New York Times*, which raises questions about the *Times*' motives in pursuing a copyright suit.

Although powerHouse and Shields licensed from the *Times* all photographs that appeared within the text of *War is Beautiful*, they did not license the use of 64 thumbnail-sized images of *NYT* front pages that appeared on the book's end pages. powerHouse argues that the use of these front page images on the end pages of *War is Beautiful* qualifies as fair use as the book is a work of criticism, and the front page thumbnail images help to contextualize the images within the scope of recent American history that Shields discusses throughout. Conversely, the *New York Times* argued that any fair use attempt by powerHouse was invalid, stating, "the front pages were used for decorative effect, not for any transformative purpose, which undercuts any claim of fair use."³

At the heart of this fair use dispute is the issue of transformation—did the collage of front page thumbnails transform the original materials enough for them to qualify as fair use? As the Center for Media & Social Impact argues, "transformative" does not have to take on a literal meaning, stating, "it need not be one that modifies or literally revises copyrighted material: uses that repurpose or recontextualize copyrighted content in order to present it to a new audience for

² "War Is Beautiful: The *New York Times* Pictorial Guide to the Glamour of Armed Conflict," *powerHouse Books*, Accessed 30 October 2016, <http://www.powerhousebooks.com/books/war-is-beautiful-the-i-new-york-times-i-pictorial-guide-to-the-glamour-of-armed-conflict/>

³ Jillian Steinhauer, "New York Times Sues PowerHouse Books for Copyright Infringement," *Hyperallergic*, 5 February 2016, <http://hyperallergic.com/273061/new-york-times-sues-powerhouse-books-for-copyright-infringement/>

a new purpose can qualify as well.”⁴ According to powerHouse, this use seeks to do just that—recontextualize these images to support Shields’ take on the *New York Times* photography and wartime coverage.⁵

In further determining whether or not powerHouse’s choice to utilize the *New York Times* cover thumbnails in the end pages of David Shields’ book, the four factors that contribute to a legitimate fair use claim must be evaluated. First, the purpose/character of the use—*War is Beautiful* was using these images to establish context within a work of criticism, which is covered under fair use. The second concerns the nature of the copyrighted work. In this case, the *New York Times* front pages are clearly copyrightable materials, so if powerHouse’s usage were deemed unfair, it would certainly qualify as infringement. Understanding this case in the context of the third factor becomes somewhat more complicated—while the entire front pages were used of these 64 issues of the *New York Times*, they were used as thumbnails on the end pages, thereby rendering them almost unreadable. Additionally, as they are removed from the greater context of the following pages within each issue, it seems extremely unlikely that a reader would be interested in viewing entire *NYT* articles in this context. Finally, the fourth factor—does powerHouse’s use of these images undermine the market value for these issues of the *New York Times*? While the *Times* does sell back issues, it again seems far-fetched that Shields’ book and specifically its uses of these thumbnail images would deprive the *Times* of any economic gain. This case evokes that of *Bill Graham Archives v. Dorling Kindersley, Ltd.*, where similar issues

⁴ “Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions,” *Center for Media & Social Impact*, 2014, 18-19, <http://cmsimpact.org/wp-content/uploads/2016/01/orphanworks-dec14.pdf>

⁵ Steinhauer.

were raised regarding the use of thumbnails in the context of a book.⁶ That use was deemed fair, and after weighing these four factors, it is clear that powerHouse's use of these thumbnail images within the end pages of their book was also fair use.

This case was settled out of court in June 2016, and the terms of the settlement are unknown. It seems as though the *New York Times* was unhappy with the book on a number of levels—not only does it blatantly criticize their coverage of recent Middle Eastern conflicts, but they were concerned about the subtitle (*The New York Times Pictorial Guide to the Glamour of Armed Conflict*) as well, believing that it could cause some confusion among buyers who may think it was published by the paper itself. This case was complicated further by a third-party lawsuit filed by powerHouse against Shields and his lawfirm, which argued that they did not properly counsel the publishing house on these terms of fair use. Since the first case was settled, it is unclear what became of this secondary suit.⁷ Ultimately however, the book remains for sale through powerHouse Books, and the criticism of the *New York Times* appears in it unfettered.

Part II

While we discussed several elements of Section 108 of United States Copyright Law that protect libraries and museums, there are of course possible scenarios that a film archive might encounter outside of this realm that would still fall under the umbrella of fair use. While this is perhaps an overly convoluted example, imagine a film archive decorated the interior of their office and/or collections space with images from various films within their collection (but whose

⁶ Michael L. Nepple, "Can you make an infringement claim over thumbnail images?" *Lexology*, 12 May 2016, <http://www.lexology.com/library/detail.aspx?g=c1316d66-d36d-4631-82cc-614a881bed3c>

⁷ Steinhauer.

copyright they do not own). If that same film archive were to shoot a video of their space to post online and those copyrighted images appeared in the background, there might be some concern over whether or not that use is fair. It would be, however, for a number of reasons—primarily that the video would be produced in a nonprofit education context, and the amount of copyrighted material used would be so slight (stills appearing the background of a video), that any infringement argument would be extremely weak.

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