

## A PHOTO FINISH? COPYRIGHT AND SHEPARD FAIREY'S USE OF A NEWS PHOTO IMAGE OF THE PRESIDENT

Shelly Rosenfeld\*\*

*Most importantly, 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.*<sup>1</sup>

—Shepard Fairey

*The journalism that AP and other organizations produce is vital to democracy. To continue to provide it, news organizations must protect their intellectual property rights as vigorously as they have historically fought to protect the First Amendment.*<sup>2</sup>

—Press Release, Associated Press

### INTRODUCTION

During the 2008 campaign, an image featuring then-presidential candidate Barack Obama's photo became the subject of a legal dispute that continued long after the election ended. Amidst the presidential debates, another debate was brewing—between a famous visual artist, Shepard Fairey, and a major newsgathering agency, the Associated Press (AP). An AP photographer, Mannie Garcia, took the picture of the presidential hopeful, which Fairey popularized on posters that he emblazoned with the word “Hope.” Once it was determined that Fairey had used AP photographer Mannie Garcia's image of presidential candidate Obama in his posters, the issue in *Fairey v. Associated Press* was whether Fairey's use of the photo constituted “fair use,” an affirmative defense under the Copyright Act.<sup>3</sup> If so, Fairey's “fair use” would excuse the copyright

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\* Member, California State Bar; LL.M. 2011, UCLA Law School; J.D. 2010, University of California, Hastings College of the Law; Masters of Science in Journalism, 2004, Northwestern University; Bachelor of Arts, Political Science, Mass Communications, 2003, University of California, Berkeley.

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1. Shepard Fairey, *The AP, Obama, & Referencing*, HUFFINGTON POST (Mar. 26, 2009, 12:18 PM), [http://www.huffingtonpost.com/shepard-fairey/the-ap-obama-referencing\\_b\\_179562.html](http://www.huffingtonpost.com/shepard-fairey/the-ap-obama-referencing_b_179562.html).

2. Press Release, Assoc. Press, Associated Press Defends Lawsuit Brought by Shepard Fairey over Obama Poster (Mar. 11, 2009), available at [http://www.ap.org/pages/about/press\\_releases/pr\\_031109.html](http://www.ap.org/pages/about/press_releases/pr_031109.html) (quoting Tom Curley, President and CEO of Associated Press).

3. Complaint at 1, *Fairey v. Assoc. Press*, No. 09 Civ. 01123 (S.D.N.Y. Feb. 9, 2009), 2009

infringement and Fairey would not have to pay. If not, Fairey would be liable for copyright infringement and would likely have to pay damages.

Although Fairey settled the lawsuit with the AP in January 2011,<sup>4</sup> another lawsuit was still pending—that of the AP against Fairey’s clothing company, “Obey Clothing” and other clothing stores (Urban Outfitters, Nordstrom, and Zumiez) for copyright infringement.<sup>5</sup> The parties, however, settled their claims in March 2011.<sup>6</sup> In the settlement agreements, the parties explicitly stated that they still maintain their legal positions in the case.<sup>7</sup> Thus, the dispute about whether Fairey’s use of the photo constituted fair use has never been resolved. Although the settlement agreement stated that the AP and Obey Clothing agreed to share future profits from sales of the Obama image on merchandise,<sup>8</sup> the underlying issue is still very much alive. The case between Fairey and the AP is certainly timely and addresses copyright in the context of news photos. This issue will continue to be relevant given that President Obama is the likely Democratic candidate for the 2012 presidential election, and it is certainly possible that other businesses will seek to capitalize on Garcia’s photo. Not only may businesses seek to capitalize on this image, but the Obama campaign itself may look to exploit the image, because the image became so iconic in the 2008 election.

Moreover, as opposed to prior case law concerning appropriation of art, this set of facts incorporates new media. “It has become especially important in an era when digital technology allows artists to, with the press of a few buttons, use other people’s finished products as raw material for new works.”<sup>9</sup> Fair use case law can certainly be applied to cases in the digital area. The best way to predict the outcome of the AP suit against

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WL 319564; 17 U.S.C. § 107 (2006) (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”).

4. The settlement agreement between Fairey and the AP included the provision that Fairey will first obtain a license from the AP if he would like to incorporate an AP photo in his art. Press Release, Assoc. Press, Obama ‘HOPE’ Artist and AP Settle Copyright Claims (Jan. 12, 2011), available at [http://www.ap.org/pages/about/whatsnew/wn\\_011211a.html](http://www.ap.org/pages/about/whatsnew/wn_011211a.html).

5. Larry Neumeister, *AP Sues Urban Outfitters, Nordstrom Over Obama ‘Hope’ Poster Use*, HUFFINGTON POST (Mar. 11, 2011, 6:46 PM), [http://www.huffingtonpost.com/2011/03/11/ap-urban-obama\\_n\\_834785.html](http://www.huffingtonpost.com/2011/03/11/ap-urban-obama_n_834785.html).

6. Press Release, Assoc. Press, The Associated Press and Obey Clothing Settle Copyright Infringement Suit (Mar. 16, 2011), available at [http://www.ap.org/pages/about/pressreleases/pr\\_031611b.html](http://www.ap.org/pages/about/pressreleases/pr_031611b.html).

7. Basil Katz, *Artist and News Wire Settle Obama Portrait Suit*, REUTERS, Jan. 12, 2011, <http://www.reuters.com/article/2011/01/12/us-obama-portrait-settlement-idUSTRE70B66 R20110112>.

8. Assoc. Press, *supra* note 6.

9. Editorial, *A Poster Child for Fair Use: In a Surprise Move, Shepard Fairey Settles with the Associated Press over the Obama ‘Hope’ Poster*, L.A. TIMES, Jan. 17, 2011, <http://articles.latimes.com/2011/jan/17/opinion/la-ed-fairey-20110117>.

Fairey's company is to understand how the court might have ruled in the original case—that of the AP against Fairey personally.

This Essay will explore whether Fairey's use of the AP Photographer's photo constituted "fair use" and will analyze how the relevant fair use cases would bear on the present case. The AP originally asked to be credited and to receive compensation.<sup>10</sup> First, I will introduce and explain the fair use four-factor approach laid out in section 107 of the Copyright Act. Second, I will discuss how fair use case law, such as *Rogers v. Koons*, *Campbell v. Acuff-Rose Music, Inc.*, *Harper & Row Publishers, Inc. v. Nation Enterprises*, *Dr. Seuss Enterprises v. Penguin Books*, *Leibovitz v. Paramount Pictures Corp.*, enhances our understanding of these factors. Finally, this Essay will analyze the Obama Hope Poster case in the context of the four factors and arrive at a conclusion based on case law and public policy.

#### I. WHETHER CASE LAW WOULD MAKE THE IMAGE "A POSTER CHILD FOR FAIR USE"<sup>11</sup>

Fair use is an affirmative defense against copyright infringement.<sup>12</sup> A court may rule that the person does not violate another's exclusive rights in their work granted by the Copyright Act if the alleged infringer uses the work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."<sup>13</sup> Section 107 of the Copyright Act sets forth four factors that courts must balance in order to evaluate whether a work would be considered fair use:

- (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.<sup>14</sup>

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10. Assoc. Press, *supra* note 2.

11. Editorial, *supra* note 9.

12. Copyright Act § 107, 17 U.S.C. § 107 (2006).

13. *Id.*

14. *Id.*

Copyright scholar Tim Wu has, in his article, *Is There "Hope" for Shepard Fairey?*, outlined additional categories that courts and legislatures have traditionally declared to be "fair use," including: "Quotations of reasonable length," "Parody (but not satire)," "Use in news reporting," "Time-shifting (recording TV for later viewing)," "Thumbnailing (resizing) for image search engines," "Reverse-engineering for a new operating platform (figuring out what you need to do to write a game that works on a Sony Playstation)," and "Limited copying for classroom or educational use."<sup>15</sup>

#### A. Photo-Copying?

Case law involving the fair use affirmative defense incorporates analysis of these four factors. In *Rogers v. Koons*, the Second Circuit Court of Appeals held that an artist who copied from a photo could be liable for infringement when there was no need to imitate the photo for parody purposes.<sup>16</sup> Thus, the court ruled in favor of the photographer. Art Rogers was a professional photographer who took a picture of his friends holding their puppies, aptly titled "Puppies."<sup>17</sup> Rogers used his professional judgment and skill to create the photograph.<sup>18</sup> Jeff Koons, an artist, in preparation for his "Banality Show,"<sup>19</sup> removed the section that featured Rogers's copyright and proceeded to have his artists use the photo as a subject for his sculpture.<sup>20</sup> Koons raised the affirmative defense of fair use, alleging that his sculptures were a parody of the photo.<sup>21</sup> He claimed that

he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.<sup>22</sup>

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15. Tim Wu, *Is There "Hope" for Shepard Fairey?*, SLATE (Oct. 21, 2009, 4:47 PM), <http://www.slate.com/id/2233152/>.

16. *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 305.

21. *Id.* at 309.

22. *Id.* at 309.

The court did not find fair use, however, because he could have achieved the purpose of the sculpture without copying the specific image.<sup>23</sup> “If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer’s claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense.”<sup>24</sup>

Koons, much like Fairey, was a famous artist.<sup>25</sup> According to the court, the fact that Koons tore off the section that stated Rogers’s copyright showed bad faith and displayed that the purpose and character of the use likely was commercial, rather than to elevate the public discourse.<sup>26</sup> Similarly, the fact that Fairey had, ironically, sued others in the past for copyright infringement, and in the present case, sued the AP for a declaratory judgment asking the court to approve his use of the AP’s image, shows a for-profit motive, rather than merely expressing a contribution to the political dialogue about a presidential candidate. The “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.’”<sup>27</sup> Moreover, Koons admitted that he intentionally copied the copyrighted photo, much like Fairey eventually admitted that he copied Garcia’s photo, after first hiding that fact.<sup>28</sup>

While Koons took the image from the photo and directed his artists to make sculptures out of it,<sup>29</sup> Fairey put the image on posters, and later, through his Obey Clothing company, put the image on merchandise. The AP has claimed that for a year and a half starting from March 2008, Obey Clothing sold more than 200,000 items with the Obama Hope Poster image based on Garcia’s photo.<sup>30</sup> Obey Clothing sold merchandise with the image from the poster, much as Koons made hundreds of thousands of dollars from selling his sculptures. Both artists profited from their infringement. Thus, under the *Koons* analysis, the AP would likely prevail against Fairey’s claim of fair use.

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23. *Id.* at 310.

24. *Id.*

25. *Id.* at 304.

26. *Id.* at 309.

27. Assoc. Press, *supra* note 2 (alteration in original).

28. Randy Kennedy, *Fight Over Obama ‘Hope’ Image Is Settled*, N.Y. TIMES ARTSBEAT BLOG (Jan. 12, 2011, 11:55 AM), <http://artsbeat.blogs.nytimes.com/2011/01/12/fight-over-obama-hope-image-is-settled/>.

29. Rogers, 960 F.2d at 305.

30. Larry Neumeister, *Shepard Fairey vs. AP Lawsuit Dropped*, HUFFINGTON POST (Jan. 11, 2011, 8:53 PM), [http://www.huffingtonpost.com/2011/01/12/shepard-fairey-ap-suit-dropped\\_n\\_807800.html](http://www.huffingtonpost.com/2011/01/12/shepard-fairey-ap-suit-dropped_n_807800.html).

*B. Parody*

*Pretty Woman, walking down the street,  
Pretty Woman, the kind I like to meet,  
Pretty Woman, I don't believe you, you're not the truth,  
No one could look as good as you  
Mercy*<sup>31</sup>

—Lyrics to Roy Orbison and William Dees's song, "Oh, Pretty Woman"

*Pretty woman walkin' down the street  
Pretty woman girl you look so sweet  
Pretty woman you bring me down to that knee  
Pretty woman you make me wanna beg please  
Oh, pretty woman*<sup>32</sup>

—Lyrics to 2 Live Crew's song, "Pretty Woman"

The dispute involving these two sets of lyrics, those from "Oh, Pretty Woman" and "Pretty Woman" got ugly when Acuff-Rose Music, Inc., which held the rights to "Oh, Pretty Woman" decided to sue 2 Live Crew for copyright infringement. 2 Live Crew notified Acuff-Rose that it was making the song and offered to pay for the song's use, but Acuff-Rose refused to give permission for its use.<sup>33</sup> In *Campbell v. Acuff-Rose Music, Inc.*,<sup>34</sup> the Supreme Court held that parody constitutes fair use under section 107 of the Copyright Act. While it is clear that there was a prima facie case of copyright infringement, fair use provides a safety net. In its analysis, the Court focused its discussion on the first factor of section 107, "the purpose and character of the use,"<sup>35</sup> that is, whether the purpose was to make a profit.

The issue in *Acuff-Rose* was to what extent the new work was "transformative," meaning that the new work adds "something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>36</sup> The Court determined that the "threshold question . . . is whether a parodic character may reasonably be perceived."<sup>37</sup> The Court ruled that parody was protected as fair use under section 107,

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31. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 app. at 594-95 (1994).

32. *Id.* app. at 595-96.

33. *Id.* at 572.

34. *Id.* app. at 594.

35. *Id.* at 578-85 (quoting 17 U.S.C. § 107(1) (2006)).

36. *Id.* at 579.

37. *Id.* at 582.

because it is transformative, much like “comment or criticism.”<sup>38</sup> The Court decided that 2 Live Crew’s song “reasonably could be perceived as commenting on . . . or criticizing [the original work].”<sup>39</sup> One interpretation has been that 2 Live Crew’s version “comment[ed] on the naïveté of the original of an earlier day, [rejecting] its sentiment that ignores the ugliness of street life and the debasement that it signifies.”<sup>40</sup> The second factor of the fair use analysis is a simple inquiry: whether the nature of the original copyrighted work is a creative expression or more like a recitation of facts.<sup>41</sup> The Court held that the second factor was not of much assistance in this case, or “ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”<sup>42</sup> It was undisputed that the nature of the original song, “Oh, Pretty Woman,” was creative expression.<sup>43</sup> Therefore, the second factor could not be used in support of fair use.

The Court determined that, when evaluating the third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole<sup>44</sup> . . . [was] reasonable in relation to the purpose of the copying.”<sup>45</sup> In making this determination, a court does not only consider the quantity of the original work taken, but also the quality, how much of the essence of the original copyrighted work was appropriated.<sup>46</sup> Even if 2 Live Crew’s copying of the original’s first line of lyrics and characteristic opening bass riff “may be said to go to the ‘heart’ of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim.”<sup>47</sup> While 2 Live Crew copied the first line of Roy Orbison’s song, the rest was very different. Thus, the Court held that the third factor weighed in favor of 2 Live Crew.<sup>48</sup>

Finally, the Court considered the fourth factor, the effect of the fair use upon the market of the copyrighted work and the market for derivative

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38. *Id.* at 579 (citing *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Elsmere Music, Inc. v. Nat’l Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff’d*, 623 F.2d 252 (2d Cir. 1980)).

39. *Id.* at 583.

40. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998) (quoting *Acuff-Rose*, 510 U.S. at 583).

41. *Id.* at 155.

42. *Acuff-Rose*, 510 U.S. at 586.

43. *Id.*

44. *Id.* (quoting 17 U.S.C. § 107(3) (2006)).

45. *Id.* at 576, 586 (“[We] look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901))).

46. *Acuff-Rose*, 510 U.S. at 586–89.

47. *Id.* at 588.

48. *Id.* at 590.

works based upon the copyrighted work.<sup>49</sup> When examining what the market for derivative works really means, the Court stated that “there is no protectible derivative market for criticism.”<sup>50</sup> While there may be a market to license song parodies in general, the Court held that “[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”<sup>51</sup> Roy Orbison could not argue that he was going to market his song to those who would seek to criticize it. Thus, the Court ruled in favor of 2 Live Crew, saying their song was parody and protected under fair use.<sup>52</sup>

This is perhaps one of the keys to unlocking how a court would rule in the dispute between Fairey and the AP. Fairey’s work did not criticize the AP’s image. The AP owns the copyright to the Obama photo and owns the potential derivative use of the photo. In order to be a potential derivative use of the photo, however, it would have to be a use that the photographer would either license others to develop or develop himself. Thus, the issue is whether by creating the poster Fairey infringed that derivative use. In the present case, the AP’s own business model subsists from licensing revenues. “Every year, more than a million AP images are licensed by magazines, internet sites, TV shows, book publishers, merchandisers, and others.”<sup>53</sup> This shows that it is common for the AP to license photos for use on objects for sale. Since the AP licensed a copy of an AP photo of President Obama for use on a shopping bag,<sup>54</sup> it follows that the AP would have a market for licensing another AP photo of President Obama. Thus, the AP could successfully make the argument that Fairey had caused that news agency market harm.

Another example where a court found parody and thus applied the fair use affirmative defense involved the use of a photo. In *Leibovitz v. Paramount Pictures Corp.*, Annie Leibovitz, a world-renowned photographer, snapped a photo of actress Demi Moore, which appeared on the front cover of the magazine *Vanity Fair*.<sup>55</sup> The photo received great attention because Moore was featured naked and seven months pregnant. To attract attention to its movie, *Naked Gun 33 1/3: The Final Insult*, Paramount Pictures’ promotional poster had Leslie Nielsen’s face superimposed on a pregnant and naked woman’s body, and under the

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49. *Id.* at 590–94.

50. *Id.* at 592.

51. *Id.*

52. *Id.* at 594.

53. *FAQs: Protecting AP’s Intellectual Property*, ASSOC. PRESS, <http://www.ap.org/iprights/faq.html#10> (last visited Dec. 1, 2011).

54. *Id.*

55. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111 (2d Cir. 1998).



image, the poster stated, “DUE THIS MARCH.”<sup>56</sup> The image was quite clearly made to look as similar as possible to the Demi Moore piece. In other words, the whole point of the movie poster, which aimed to call attention to the comedic nature of the film, was to intentionally refer to the iconic photo.

The Second Circuit found the movie poster to be a parody and a case of fair use. For the first factor, the court took great pains to emphasize that what makes the second work a parody, or transformative, is not that it is different from the earlier work. In the *Naked Gun* case, the ad “differs in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think is the undue self-importance conveyed by the subject of the Leibovitz photograph.”<sup>57</sup> The court did consider the fact that the copying of the image was used for a commercial purpose, such as to attract potential moviegoers to see the film.<sup>58</sup> On balance, however, the court said that the first factor came out more strongly in favor of Paramount.<sup>59</sup> The first factor can be applied against *Fairey* in the dispute over the Obama Hope Poster, since the fact that the poster is different from the photo is not enough. Far from ridiculing the photo, the poster does not even comment on it. This is a relatively low threshold, given that the value of parody, at its minimum, is to refer to the original work to contrast the familiar with the different interpretation that the second work offers.

Leibovitz’s photo of Demi Moore is clearly creative expression, meeting the requirements of the second factor. The court did not find the second factor to serve as the guidepost in the case, “since parodies almost invariably copy publicly known, expressive works.”<sup>60</sup> Thus, on the second factor, Leibovitz prevailed. The third factor, the amount and significance of the portion copied of the copyrighted work, was challenging, since parody requires the “recognizable allusion to its object through distorted imitation.”<sup>61</sup> Another fact that weighed against Paramount Pictures was that the photographer took much of the expression of the photograph. Much like the Obama Hope Poster,

[t]he copying of elements, [such as posing of the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved]<sup>62</sup> carried out

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56. *Id.*

57. *Id.* at 114.

58. *Id.* at 115.

59. *Id.*

60. *Id.* at 113 (quoting *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 586 (1994)).

61. *Id.* at 114 (quoting *Acuff-Rose*, 510 U.S. at 588).

62. *Id.* at 116 (quoting *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992)).

to an extreme degree by the technique of digital computer enhancement, took more of the Leibovitz photograph than was minimally necessary to conjure it up.<sup>63</sup>

Certain elements in the original 2006 photo of Obama—the lighting, the angle, the posing, the camera and film that Garcia selected, and capturing the specific expression, as well as other techniques that the photographer used to capture that moment on film—are all part of what makes the photo copyrightable. Fairey, using his techniques, perhaps digital like in *Leibovitz*, took more of Garcia's photo than was needed to capture Obama's face for a poster.

For the last factor, the *Leibovitz* court stated that there was no market harm to Leibovitz's work.<sup>64</sup> In other words, the movie poster did not reduce the consumer demand for the Demi Moore photo or derivative works based on the photo. Leibovitz claimed that the market harm was that the Leslie Nielsen movie poster denied her the opportunity to collect a licensing fee for the use.<sup>65</sup> The court, however, determined that much like *Acuff-Rose's* statement, "there is no protectible derivative market for criticism."<sup>66</sup> Thus, Leibovitz was not entitled to any revenues because the criticism that the Nielsen poster image evoked was not a market that Leibovitz would have ever targeted.<sup>67</sup> Therefore, Paramount prevailed as to the fourth factor. Given that Paramount had a purpose of parody, the court found the use to be fair and Paramount won the case.

### C. Limits on Fair Use

If the following phrase, "One Knife? / Two Knife? / Red Knife / Dead Wife"<sup>68</sup> from the book, *The Cat NOT in the Hat! A Parody by Dr. Juice*, sounds familiar, it may be because the authors modeled it after, "One fish / two fish / red fish / blue fish," from the Dr. Seuss book, *The Cat in the Hat*.<sup>69</sup> The authors of the book discussing the O.J. Simpson trial in a Dr. Seuss-type writing style asserted a fair use defense, claiming that their work was a parody.<sup>70</sup> But the court in *Dr. Seuss Enterprises v. Penguin Books*, did not find that the O.J. Simpson book was a parody and referred to this

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63. *Id.* at 116.

64. *Id.*

65. *Id.* at 116–17.

66. *Acuff-Rose*, 510 U.S. at 592.

67. *Leibovitz*, 137 F.3d at 116 n.6.

68. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997).

69. *Id.*

70. *Id.* at 1399.

justification as “pure shtick.”<sup>71</sup> The court held that there was no parody because the O.J. Simpson tale did not make fun of Dr. Seuss’s book but rather used the style to get attention.<sup>72</sup>

For the first factor, the Ninth Circuit held that the O.J. Simpson version merely imitated the Dr. Seuss writing style and that the book’s text was in no way transformative. The court used examples of the book’s text, such as the following excerpt, to show that in fact the O.J. Simpson book was not criticizing Dr. Seuss’s writing technique or body of work.<sup>73</sup> Rather the book “broadly mimic[ked] Dr. Seuss’ characteristic style” in order to present the story behind the O.J. Simpson case:

A happy town  
Inside L.A.  
Where rich folks play  
The day away.  
But under the moon  
The 12th of June.  
Two victims flail  
Assault! Assail!  
Somebody will go to jail!<sup>74</sup>

Therefore, the first factor was not met, and the court ruled in favor of Dr. Seuss Enterprises.

Because the second factor is generally not dispositive in fair use cases, the court only briefly addressed the issue. The Ninth Circuit stated that Dr. Seuss’s book, *The Cat in the Hat*, had “the creativity, imagination and originality” that copyright law is designed to protect.<sup>75</sup> Thus, the court also ruled in favor of Dr. Seuss as to this factor. The entire purpose of the fair use defense in allowing one to quote from an existing work for a parody is so that the parody may comment on the earlier work, not that the second work would merely reap the benefits that the earlier work had sown. Thus, the court was not swayed by the reasons that the publishers offered for the third factor in the fair use defense analysis and also ruled in favor of Dr. Seuss Enterprises.<sup>76</sup>

Finally, the publishing company of the O.J. Simpson book did not offer counter-evidence to rebut the inference that there was market harm as a result of the non-transformative nature of the work. The court therefore

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71. *Id.* at 1403.

72. *Id.* at 1404–05.

73. *Id.* at 1401.

74. *Id.*

75. *Id.* at 1402.

76. *Id.*

sided with Dr. Seuss Enterprises on this factor, and Dr. Seuss Enterprises prevailed in the case.<sup>77</sup>

Much like prose in *The Cat NOT in the Hat! A Parody by Dr. Juice*, the Obama Hope Poster was not a parody of its source photograph. The Obama Hope Poster did not comment upon Garcia's original photograph. In fact, the AP has an even stronger case than Dr. Seuss's estate, because *The Cat NOT in the Hat!* copied Dr. Seuss's distinctive style but not the actual words, whereas Fairey incorporated Garcia's photo into his piece.

Another limit upon fair use occurred when the Supreme Court held that the publication of portions of a work soon to be published does not constitute fair use. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, President Gerald Ford gave the rights to his memoirs, *A Time to Heal*, to Harper & Row Publishers, Inc. *Time Magazine* paid for a license to print a section of the book in its own magazine.<sup>78</sup> However, before *Time* had an opportunity to publish its review, *The Nation* magazine obtained a copy of the text and proceeded to write an article including an extensive quote from the section of the book on pardoning Nixon.<sup>79</sup> This led *Time* to cancel the agreement with the book's publisher.<sup>80</sup> The Supreme Court held that publishing a part of the book that was about to be published anyway was not fair use.<sup>81</sup> Stating that there is no "public figure exception to copyright,"<sup>82</sup> the Court focused on two factors of section 107, the purpose of the use and the effect on the market.

The second factor in determining whether an alleged copyright violation qualifies for the fair use exemption is "the nature of the copyrighted work."<sup>83</sup> The "nature" refers to whether the original work in question is predominantly a creative expression or simply a recitation of facts.<sup>84</sup> If an alleged copyright infringer copies facts, such as in the case of news reporting, then fair use can generally be successfully asserted.

All four factors, however, must be considered in making a determination in each case of alleged copyright infringement, and news reporting does not in and of itself represent an ironclad category of fair use in all situations. While the purpose of *The Nation's* use of the quotations was for the purposes of a news story, if the four-factor analysis is not met, then the news reporting does not allow the infringer to use the statutory

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77. *Id.* at 1403.

78. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542 (1985).

79. *Id.* at 543.

80. *Id.*

81. *Id.* at 554.

82. *Id.* at 560.

83. 17 U.S.C. § 107 (2006).

84. Rachael L. Shinoskie, *In Defense of Fairey and Fair Use*, 28 SPG ENT. & SPORTS LAW 16, 17-18 (2010).

defense of fair use to block infringement liability. “The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use ‘news report’ of the book.”<sup>85</sup> Publishing part of a book before it is being sold has a direct effect on the market, since if readers can read the juiciest parts before the book comes out, then it is bound to hurt sales for the original text. This relates to the Obama Hope Poster case because, “[a]ccording to [the AP’s] counterclaim, the value of the photo has been substantially harmed by the creation of the poster because the AP is effectively prevented from licensing the image for commercial and noncommercial use all over the world.”<sup>86</sup>

## II. THE AUDACITY OF THE HOPE POSTER

So how would a court evaluate the Obama Hope Poster? In consideration of factor one, the court would likely find the poster transformative. The AP photographer snapped the photo of Obama while at an event with actor George Clooney in 2006.<sup>87</sup> In 2009, Fairey asserted that the source photo for his poster was one featuring both Clooney and Obama.<sup>88</sup> Fairey later admitted, however, that his source photo was a different photo from that same event: a close-up photo featuring Obama only.<sup>89</sup> The purpose of that photo was to illustrate a news story, not for art. Fairey did not intend to make the poster for a news story. After all, Fairey took a photo from a news journalist and made it into a political poster. Those advancing the argument that the poster was transformative would argue that “[t]he poster that resulted was no longer a straightforward news photograph of Obama, but a stylized, blue pencil drawing that conveys an entirely different feel, a different Obama and which mimics the propaganda posters of the mid-20th century.”<sup>90</sup> The AP’s counterclaim in 2009, however, asserted that “[the poster does] not alter any of the distinctive characteristics that make the Obama photo so striking.”<sup>91</sup> The question remains whether there is anything redeeming about the use.

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85. *Harper & Row Publishers*, 471 U.S. at 557 (citing *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95–96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)).

86. Jo-Na Williams, *The New Symbol of ‘Hope’ For Fair Use: Shepard Fairey v. The Associated Press*, *LANDSLIDE*, Sept./Oct. 2009, at 55, 59.

87. Hope Viner Samborn, Opening Statement, *Hope for Copyright*, A.B.A.J., May 2009, at 11, available at [http://www.abajournal.com/magazine/article/hope\\_for\\_copyright](http://www.abajournal.com/magazine/article/hope_for_copyright).

88. Shinoskie, *supra* note 84, at 16.

89. *Id.*

90. Editorial, *supra* note 9.

91. Answer at 13, *Fairey v. Assoc. Press*, No. 09 Civ. 01123 (S.D.N.Y. Mar. 11, 2009), 2009 WL 648762.

Factor two is the nature of copyrighted work. The photo is an expressive work of authorship because the photo was taken by a photographer, and it has expression. Fairey said that he did not make the Obama Hope Poster for the purpose of making money but rather as a campaign poster to get Obama elected.<sup>92</sup> It is clear that Fairey did support Obama's election as president, and there is no reason to doubt that he used some revenue from the posters to create additional ones as well as to donate to the campaign. Perhaps Fairey's argument would be more convincing if he had worked with the campaign from the beginning. Or, for example, if he had created his own non-profit, the sole objective of which was to create and distribute promotional campaign materials to help Obama get elected. Instead, Fairey's artwork is exactly what is printed on merchandise for the Obey Clothing company.<sup>93</sup> Moreover, if Fairey was not interested in making money, why did he not initially agree to a licensing fee, and pay the AP some amount, to make sure to have no hurdles to make the photo into a poster, and then pay the rest of the proceeds to the Obama campaign?

Fairey's enormous success with the "Obey Giant" poster and the fact that he created the "Obey Clothing" company proves that he knows the market value of his creations can be very lucrative. The fact that Fairey supported Obama's candidacy for president is not incongruent with the incentive to make money from the creation. Fairey has written that he would love to have the influence to get political leaders to agree to sit for him, and then he would not have to use a reference photo.<sup>94</sup> Given Fairey's notoriety, professed support for Obama's election campaign, and later collaboration with Obama's campaign staff, however, Fairey could have explored the option of having Obama sit down for a portrait once the election campaign began. While it might not be the same exact pose as the original photo, this is the price that Fairey might have to pay if he does not want to pay for the original photo itself.

Factor three is the amount taken relative to the whole. Based on the observation of the photo and of the Obama Hope Poster, it is visually apparent that Fairey utilized the entire image in his work. This is an issue that would likely have been extensively litigated. On the one hand, Fairey asserted that he did not need permission to use a photo as a source for his art.<sup>95</sup> On the other hand, the Obama Hope Poster copied many of the artistic elements that made Garcia's photograph of Obama unique, such as Obama's pose, angle, and lighting. These components, and others, such as

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92. Fairey, *supra* note 1.

93. Kari Hamanaka, *Clothes Maker Obey Expanding in Irvine*, ORANGE COUNTY BUS. J., Jan. 30, 2011, <http://www.ocbj.com/news/2011/jan/30/clothes-maker-obey-expanding-irvine/>.

94. Fairey, *supra* note 1.

95. *Id.*

the selection of the film and camera, were all the mechanisms that made the photo capture a distinctive moment of Obama's expression. Thus, Fairey's copying of the expressive elements of the photograph took more "than was minimally necessary to conjure it up."<sup>96</sup> In *Dr. Seuss Enterprises*, the court held that since *The Cat NOT in the Hat!* did not comment upon the original work, the work was not fair use. Using Dr. Seuss's stylistic devices, even without copying Dr. Seuss's specific text, was infringement.<sup>97</sup> In the Obama Hope Poster case, Fairey's poster did not comment upon the original photo, and he actually used the entire photo's image in his piece, so a court should rule in the AP's favor on this factor.

Factor four, "the effect of the use upon the potential market for or value of the copyrighted work"<sup>98</sup> not only refers to the harm to the market of the original work, such as the market for the photo, but also "[t]he market for potential derivative uses."<sup>99</sup> Derivative use "includes only those that creators of original works would in general develop or license others to develop."<sup>100</sup> For the purposes of the Obama Hope Poster case, this means that the AP, regardless of whether it actually would license the photo, would be able to protect its right to exclude another party, like Fairey, from using the photo without its permission. In general, the creator of an original work would be able to license it for use in artwork. Rachael L. Shinoskie argues that the controlling law for the Obama Hope Poster case ought to derive from *Warner Bros. Entertainment Inc. v. RDR Books*, the Harry Potter case.<sup>101</sup> In *Warner Bros.*, the court held that a dictionary of terms used in Harry Potter movies was not derivative, but rather transformative, because it did not act as a sequel or repeat of the movies but had an entirely different purpose.<sup>102</sup> Shinoskie's argument, however, does not consider the context of this specific set of facts. The photo was taken for the AP, which licenses its photos. That is the AP's business model: to provide for anticipated and unanticipated uses of its photos in the context of other creative activity.<sup>103</sup> The photo was not merely an end in itself; instead, the point is that it would be licensed to other entities for use at the same time. A clear case to decide in favor of Fairey paying a license fee to the AP would be if Fairey copied an AP photo and printed it on a T-shirt. It is also an easy case in the present situation, where Fairey used a photo from a licensing

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96. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998).

97. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

98. 17 U.S.C. § 107 (2006).

99. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

100. *Id.*

101. Shinoskie, *supra* note 84, at 19 (citing *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 n.17 (S.D.N.Y. 2008)).

102. *Id.*

103. *FAQs: Protecting AP's Intellectual Property*, *supra* note 53.

agency. Whether one uses the entire photo for a news story or for a poster, one should subscribe to the service or pay for the use of that particular photo.

In addition, Fairey argued that far from taking away a market for the AP photo, his conduct actually popularized a photo that no one would have otherwise cared about.<sup>104</sup> He stated that a New York City gallery is selling Garcia's photo for \$1,200.<sup>105</sup> Garcia is a freelance photographer, however, and does not work solely for himself. The AP hired Garcia to take photographs of the event where he snapped the now-famous photo. AP Images syndicates photos to nearly every paper in the country.<sup>106</sup> The AP makes money licensing images; that is its market. The way the AP model works is that, once in awhile, there is an image that hits the jackpot. Such a famous image is precisely so valuable for the prestige and financial windfall that it brings the AP—and that is what the AP was asking for: credit and compensation.

Copyright is about incentivizing creation and also sharing the product of that creation with the public.<sup>107</sup> Before this dispute, most people would not have known about Mannie Garcia. This photo may be the defining photo of his career. Most likely, readers of AP articles do not take more than a moment to glance at the photos accompanying a story. AP photographers snap many photos, most of which quickly fade into obscurity. If Fairey wanted to license the image, it would've been easy to do so because the AP is a licensing entity. The AP's counterclaim notes that "[l]icensing is an important source of revenue for content creators, be they news or entertainment companies. This is especially true for The AP and particularly in these difficult times. As a news agency, licensing of content is fundamental to The AP's existence."<sup>108</sup> If Fairey would have won the lawsuit, it "essentially would permit someone to take and commercialize a content owner's property without attribution or reasonable compensation, undermining the long-established practice of using such revenue streams to support the ongoing creation of new content."<sup>109</sup> A problem with Fairey winning in this case is that it would set a dangerous precedent:

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104. Fairey, *supra* note 1.

105. *Id.*

106. *FAQs: Protecting AP's Intellectual Property*, *supra* note 53.

107. Sarah Handwerger, *Shepard Fairey's Tale: A Missed Opportunity for Copyright Legislation*, RIGHTS PRO BLOG (Jan. 20, 2011, 11:56 AM), <http://blog.rightspro.com/2011/01/20/shepard-faireys-tale-a-missed-opportunity-for-copyright-legislation/>.

108. Answer, *supra* note 91, at 14.

109. *Id.*



When a commercial entity . . . gets something for nothing by using an AP photo without credit or compensation, it undermines the AP's ability to cover the news and devalues the work that our journalists do, often in dangerous locations where they may literally risk life and limb to cover a story.<sup>110</sup>

Section 106 of the Copyright Act spells out the exclusive rights that a copyright holder has: "to reproduce the copyrighted work," "to prepare derivative works based upon the copyrighted work," "to distribute copies . . . of the copyrighted work to the public," "to perform the copyrighted work publicly," "to display the copyrighted work publicly," and "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."<sup>111</sup> The Copyright Act only allows the copyright holder to have these exclusive rights, and anyone else who wants such access must get the permission of the copyright holder.<sup>112</sup> The AP is especially equipped to handle transferring such access through licenses. That is precisely their business model: to provide content for a business, usually a TV news network or newspaper. The AP would be equipped to grant a license to Fairey had he asked for it. Even if Fairey had paid a significant sum, he would have still made a large profit.

#### CONCLUSION

While fair use is of great importance as a counterbalance to copyright protection to allow for others to build upon the creativity of others, copyright law must also offer protections to creators in order to motivate their ability to create. Although courts are equipped with the four factors, adjudication on fair use matters is decided on a case-by-case basis. Here, for both legal and policy reasons, had the case proceeded to trial, a court would have been wise to rule in favor of the AP. Much like Koons instructed artists to create sculptures replicating the image in the photo and was found liable for infringement, Fairey also utilized Garcia's image on posters and then on Obey Clothing merchandise. In both cases, the purpose of the infringing work could have been achieved without the infringement. In contrast to *Acuff-Rose*'s holding that someone in Orbison's position would not have licensed others to develop a parody of his work, such as 2 Live Crew's "Pretty Woman," in the Obama Hope Poster case, licensing

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110. Janon Fisher, *'Hope' Poster Lawsuits Spring Eternal*, ADWEEK, Mar. 10, 2011, [http://www.adweek.com/aw/content\\_display/news/e3ib314536fdecabcee3d304647f1be8f53](http://www.adweek.com/aw/content_display/news/e3ib314536fdecabcee3d304647f1be8f53) (statement of AP spokesman Paul Colford).

111. 17 U.S.C. § 106 (2006).

112. *Id.*

agencies such as the AP have a market for the selling of licenses to use their photos and actually utilize this market. As opposed to the *Naked Gun 33 1/3: The Final Insult* poster in *Leibovitz*, which the court decided was fair use, and similar to *The Cat NOT in the Hat!* in *Dr. Seuss*, which the court decided was infringement, the Obama Hope Poster did not criticize or comment upon Garcia's photo. Similar to the extensive use of quotations in *Harper & Row Publishers*, which damaged the market for the Ford autobiography, the AP could make the case that the AP's ability to profit from licensing the image has been harmed by Fairey's actions and would be further harmed were Fairey's actions considered fair use and utilized by others to create similar works. These cases, which interpret and apply section 107 of the Copyright Act, demonstrate that the law should not allow an artist such as Fairey to avoid obtaining permission, giving credit, and paying for use of a photo from a news agency. The AP business model is built upon the licensing of news content and news photos to others, especially when a photo is to be used for a commercial purpose, or at least, the advertising for a political candidate.

Had Shepard Fairey paid a fee to the AP instead of to a lawyer, it seems that he could have obtained permission to use the photo. After all, Mannie Garcia has stated that he is a fan of Obama, and the AP would have likely welcomed the additional revenue and the press coverage that the use of the image would bring. The question really comes down to whose interest the law protects, between artist and photojournalist, as the above analysis sets forth, the photojournalist's interests are overriding, especially when the photojournalist works for a licensing non-profit news agency.