

## REFLECTIONS ON THE HOPE POSTER CASE

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## I. INTRODUCTION

In January of 2008, Shepard Fairey used a photograph of Barack Obama as a reference work when creating what came to be known as the “Hope Poster.”<sup>1</sup> The Associated Press (“AP”), the owner of the copyright in the photograph, demanded compensation from Fairey, who had used the photograph without permission. When negotiations broke down, Fairey initiated litigation, seeking a declaratory judgment that he had not engaged in copyright infringement. Two years later, the parties settled the suit.

The authors of this Article were involved in the litigation in various ways. Fairey was one of the principals. Meir Feder, William Fisher, Edwin Fountain, and Geoffrey Stewart were among the lawyers who represented Fairey pro bono.<sup>2</sup> Frank Cost and Marita Sturken served as expert witnesses for Fairey.<sup>3</sup>

This Article sets forth the authors’ thoughts about the case. Although all of the authors believe that Fairey’s legal position was stronger than that of the AP, the purpose of the Article is not to defend that belief. Rather, the Article aspires to derive from the case some

1. See *infra* Figure 1.

2. They were joined by Professor John Palfrey of Harvard Law School and, at various stages of the case, by Jordan Gimbel, Damon Lewis, Chris Lopata, Alan Rabinowitz, Jennifer Schramm, Tim Solomon, Katherine Stern, and Miriam Weiler of Jones Day. Fisher and Palfrey were assisted by a remarkable group of Harvard Law School students — Martin Adams, Julian Burns, Emily Cox, Zachary Elsea, Philip Foust, Jonathan Gingerich, Colleen Hannigan, Katherine Hill, Amanda Jawad, Katie Kriegman, Iliana Ongun, Lina Peng, Vera Ranieri, Yael Resnick, Matthew Vittone, Ryan Ward, Miriam Weiler (before she joined Jones Day), David Wittenberg, and Jacob Wronski — and by two dedicated Harvard librarians — June Casey and Kim Dulin.

3. Other expert witnesses for Fairey included Professor Steven Shavell of Harvard Law School (who generously volunteered his time), Jeff Brandlin of Brandlin & Associates, and John Jarosz of the Analysis Group.

insights into the increasingly complex intersection of art, technology, and law.

Part II lays the foundation for the analysis by summarizing the facts of the case, the history of the litigation, and the arguments advanced by the two primary parties. Part III then offers a series of reflections.

## II. THE CASE

### *A. Facts<sup>4</sup>*

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."<sup>5</sup> 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.<sup>6</sup>

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.

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

5. 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.].

6. 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).

The AP is a “news cooperative, owned by its American newspaper and broadcast members.”<sup>7</sup> The AP has approximately 3,700 employees.<sup>8</sup> The primary objective of the AP, in its own words, is to provide “a truthful, unbiased report of the world’s happenings.”<sup>9</sup> 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.”<sup>10</sup>

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.<sup>11</sup>

Garcia is a member of the National Press Photographers Association (“NPPA”).<sup>12</sup> The NPPA’s Code of Ethics, to which Garcia adheres,<sup>13</sup> 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.”<sup>14</sup>

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.<sup>15</sup>

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

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

8. *Id.*

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

10. *Id.*

11. 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.].

12. Garcia 03/05/2010 Dep. Tr., *supra* note 11, at 39.

13. *Id.* at 116–21.

14. *NPPA Code of Ethics*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, [http://www.nppa.org/professional\\_development/business\\_practices/ethics.html](http://www.nppa.org/professional_development/business_practices/ethics.html) (last visited May 3, 2012).

15. Garcia 03/04/2010 Dep. Tr., *supra* note 11, at 29; Garcia 03/05/2010 Dep. Tr., *supra* note 11, at 127–28.

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 room in general) became crowded. The result was that Garcia had little freedom of movement.<sup>16</sup>

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.<sup>17</sup>

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.”<sup>18</sup> 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.<sup>19</sup>

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).<sup>20</sup> 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.<sup>21</sup>

Shortly after the event ended, Garcia reviewed the photographs he had taken and chose a subset of sixteen for submission to the AP. Be-

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16. Garcia 03/05/2010 Dep. Tr., *supra* note 11, at 150–51, 162–65, 167, 172–73, 175–76, 179–81.

17. *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].

18. Garcia 03/04/10 Dep. Tr., *supra* note 11, at 35; Garcia 03/05/10 Dep. Tr., *supra* note 11, at 68–69, 220, 222, 225, 242, 325, 335–36.

19. Garcia 03/05/10 Dep. Tr., *supra* note 11, at 184.

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

21. Garcia 03/04/10 Dep. Tr., *supra* note 11, at 37–39; Garcia 03/05/10 Dep. Tr., *supra* note 11, at 242.

fore 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.<sup>22</sup> When these adjustments were complete, Garcia transmitted the sixteen photographs to the AP via the Internet.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.”<sup>26</sup> 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

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22. Garcia 03/05/10 Dep. Tr., *supra* note 11, at 253–54.

23. *Id.* at 250–51, 328.

24. 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.

25. *Id.* at 63.

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

benefit [Obama's] campaign.”<sup>27</sup> 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 states that would hold Democratic primary elections on that day favored Senator Hillary Clinton.<sup>28</sup> 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.<sup>29</sup>

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 im-

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27. Fairey Dep. Tr., *supra* note 5, at 788.

28. 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).)

29. Fairey Dep. Tr., *supra* note 5, at 792.

ages 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 me to see the detail in Obama’s face sufficiently to do an illustration.”<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup>

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.

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30. *Id.* at 686–88, 797–98.

31. *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.

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

(3) Using the “lasso” tool in Photoshop, Fairey deleted the blurred image of an American flag in the background of the photograph.<sup>33</sup>

(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.”<sup>34</sup>

(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.<sup>35</sup>

(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 rubylith<sup>36</sup> film that would be the foundation for the final poster.<sup>37</sup>

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33. 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](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](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.

34. Fairey Dep. Tr., *supra* note 5, at 806.

35. 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.

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

37. 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 5, 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.

(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 more upright. Finally, he did "a good bit of tinkering" with the details of the four layers.<sup>38</sup>

(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.<sup>39</sup>

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38. *Id.* at 843–44.

39. 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

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.<sup>40</sup> The principal way Fairey sought to advance this goal was 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).<sup>41</sup> 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.<sup>42</sup>

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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.

40. 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 (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.

41. 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.

42. 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

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.

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."<sup>43</sup>

### *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.<sup>44</sup>

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times per day, in 90 restaurants from that date until the presidential election. Fairey Dep. Tr., *supra* note 5, at 855.

43. 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](http://www.huffingtonpost.com/2009/02/04/ap-accuses-shepard-fairey_n_164045.html).

44. 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,

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.<sup>45</sup> 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.<sup>46</sup>

Soon thereafter, the AP contacted Fairey's office and demanded compensation. Fairey offered to pay a customary license fee, but the 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,<sup>47</sup> 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 Boston<sup>48</sup> — 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.<sup>49</sup> Soon thereafter, the AP added OBEY Clothing, one of Fairey's licensees, as a defendant.<sup>50</sup>

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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>.

45. Garcia 03/05/10 Dep. Tr., *supra* note 11, at 337–39, 346.

46. 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](http://blogs.phillynews.com/inquirer/sceneonroad/2009/01/found_again_the_poster_source.html).

47. 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.

48. 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>.

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

50. 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 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.<sup>51</sup>

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 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.<sup>52</sup>

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.

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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.

51. Fairey Dep. Tr., supra note 5, 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.

52. 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).

*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.”<sup>53</sup> 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.<sup>54</sup>

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 AP<sup>55</sup> and (ii) that he used that photo as a reference work when creating the Hope Poster. The latter concession is sufficient to establish “actual copying,” as that phrase has been defined by the courts.<sup>56</sup> 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 Tele-*

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53. 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).

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

55. 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 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](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>.

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

*phone Services*,<sup>57</sup> the standard for copyright eligibility is low; “some minimal degree of creativity” is all that is necessary to give rise to a copyright.<sup>58</sup> 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*,<sup>59</sup> 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.”<sup>60</sup> Contemporary courts, aware of that fact, routinely shield even modestly creative photographs against unauthorized reproduction.<sup>61</sup>

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 photograph but not others, one must ascertain whether the portions taken fall inside or outside the zone of copyright protection.<sup>62</sup>

Fairey pointed out that only aspects of a photograph that are “original to the author” are entitled to protection.<sup>63</sup> 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.”<sup>64</sup> Finally, the photographer’s ability to capture the scene at a particular moment in time may reflect originality.<sup>65</sup>

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57. 499 U.S. 340 (1991).

58. *Id.* at 345.

59. 111 U.S. 53 (1884).

60. *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).

61. 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).

62. 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 53, § 8.01[D].

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

64. *Id.* at 452.

65. *Id.* at 452–53.

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.<sup>66</sup> An important application of this principle is the rule that the features of the face of a photographic subject are not protected.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> Such elements are known as *scènes à faire* — a phrase that, roughly translated, means “scenes which ‘must’ be done.”<sup>70</sup> Fairey pointed to some recent cases in the Southern District of New York that applied this well-established doctrine to exclude from copyright protection conventional ways of posing photographic subjects.<sup>71</sup>

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”

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66. See NIMMER, *supra* note 53, § 2.08[E][1] (“[C]opyright in [a] photograph conveys no rights over the subject matter conveyed in the photograph.”).

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

68. 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).

69. *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)).

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

71. 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 DiDato 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).

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."<sup>72</sup> Thus, even if Fairey were adjudged to have engaged in improper appropriation, 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.'"<sup>73</sup> 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."<sup>74</sup> The doctrine not only ensures that copyright law advances rather than frustrates the objectives of copyright law, it also ensures that

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72. 17 U.S.C. § 107 (2006).

73. *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).

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

copyright law does not encroach upon the freedom of expression protected by the First Amendment.<sup>75</sup>

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.<sup>76</sup>

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 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 space . . .<sup>77</sup>

Since *Campbell*, the Courts of Appeals have identified several contexts in which a defendant's use of a copyrighted work should be

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

76. 17 U.S.C. § 107 (2006).

77. 510 U.S. at 579 (citations omitted).

deemed “transformative.” One such setting is where the purpose of the defendant’s work is different from the purpose of the plaintiff’s work.<sup>78</sup> 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.”<sup>79</sup> 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.”<sup>80</sup> 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 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*.<sup>81</sup> 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.”<sup>82</sup> 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

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78. 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).

79. See AP’s *News Values and Principles*, *supra* note 9.

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

81. 467 F.3d 244 (2d Cir. 2006).

82. *Id.* at 248.

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,"<sup>83</sup> — 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.<sup>84</sup>

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 2004 Democratic National Convention speech decrying the false "red state/blue state" division of the country.<sup>85</sup>

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."<sup>86</sup> At one time, this issue loomed large in fair

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83. *Id.* at 252–53.

84. *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)).

85. 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 11, at 337.

86. 17 U.S.C. § 107(1) (2006).

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."<sup>87</sup> 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."<sup>88</sup> Currently, the Court of Appeals for the Second Circuit treats this issue as relevant, but of modest importance.<sup>89</sup> 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 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."<sup>90</sup>

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

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87. 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)).

88. 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 84, at 1126–28. The Supreme Court (noting Leval's skepticism) has left this issue open. *Campbell*, 510 U.S. at 585 n.18.

89. 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).

90. *Id.*

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.”<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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 work causes consumers to purchase fewer copies of the plaintiff’s work.<sup>94</sup> 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 pur-

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

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

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

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

chase 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.<sup>95</sup>

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.<sup>96</sup> 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.”<sup>97</sup> 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.<sup>98</sup>

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.

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

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95. Garcia 03/05/10 Dep. Tr., *supra* note 11, at 312–21.

96. 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).

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

98. 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)).

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.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup> 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 transformative, because he had employed it for precisely the purpose for which it was intended.

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99. AP Amended Answer ¶143.

100. 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 84, 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.").

101. 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).

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."<sup>102</sup> 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

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102. 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,<sup>103</sup> and have since been invoked in analogous copyright disputes.

### III. REFLECTIONS

#### *A. My Take (Shepard Fairey)*

##### 1. What I Was Trying To Achieve with the Hope Poster and How I Sought To Achieve It

When I decided to make a poster in support of Barack Obama, I knew my biggest challenge was to portray Obama as both an exciting progressive and a mainstream patriot with vision. I decided to make a portrait of Obama largely because I felt his power and sincerity as a speaker would create a positive association with his likeness. I wanted my image of Obama to fulfill the classic political archetype of a leader with vision, and I hoped such an image would make him feel immediately established, familiar, American, and presidential. I felt that Obama might face challenges based on his race and that it would be a good strategy to de-racialize the image by using red, white, and blue. I also was moved by Obama's 2004 speech at the Democratic conven-

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103. 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](http://www.boston.com/business/articles/2011/01/12/obama_hope_artist_and_ap_settle_copyright_claims).

tion in which he said that “there is not a liberal America and a conservative America — there is the United States of America.”<sup>104</sup> With Obama’s speech in mind, I thought a good way to convey the convergence of red states and blue states was to illustrate Obama with a shadow dividing his face down the middle with blue tones on one side and red on the other.

My other concern was to illustrate Obama as someone with vision and leadership. My historical inspiration was the well-known JFK portrait where he is posed in a three-quarters view looking slightly upward and out into the distance. The image of Lincoln on the five-dollar bill has a similar feel.

I set out to find a reference photo on the Internet that would fulfill my needs. It did not need to be an extraordinary photo in and of itself; it only needed to be a sufficient point of departure for what would become a stylized and idealized illustration of Obama. After several hours of searching for images on Google, I narrowed my potential reference images for my Obama illustration to six I liked. After experimenting in Photoshop with the images, I chose a favorite — a reference of Obama from a 2006 Darfur conference — and began digital preparation for my illustration.

Though I had found an image that fit my basic needs in terms of lighting and angle of gaze, I needed to digitally manipulate the image to improve some definition, to augment the lighting, and to separate the image into high-contrast layers that I could illustrate in red, white, and blue. The benefit of illustrating an image in a few colors is that the streamlined, high-contrast layers yield a very iconic image that looks like a two-dimensional statue. A statue — even a two-dimensional statue treatment — suggests to the viewer that the subject is noteworthy enough to have earned such depiction. It was important to me to portray Obama in this manner. The other benefit of a limited palette, flat-color illustration is that it would be easy to reproduce using screen printing, the technique I use for most of my art posters.

Once I had separated the shadows of the digitally treated Obama photo into four layers, I looked at those layers “comped up” as a sketch in Adobe Illustrator, a graphics program. The colors and shadows looked good enough as a sketch to begin illustrating them manually. I printed out each of my four layers and illustrated them separately using a graphic art and screen print film called “amberlith” or “rubylith.” Amberlith is an orange translucent film that peels away from an acetate backing. I taped the amberlith over my color separation print-outs and used the print-out as a guide to then cut my illustration with an X-Acto knife through just the orange layer. The print-out was a guide to maintaining the correct proportions of the image,

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104. Obama, *supra* note 26.

but I took liberties while illustrating to stylize and idealize the resulting image.

Once I had illustrated each layer, I scanned them back into the computer and composited the hand-illustrated layers in Illustrator. I further manipulated the illustration once it was in Illustrator, and it was at this stage that I added other graphic elements, such as the logo and typography, as I designed the final Obama poster composition.

I felt that Obama's biggest challenge as a candidate was appealing to Americans who may have seen him as too inexperienced, too unestablished, and too far outside the mainstream. I needed to make an iconic image that would appeal to the mainstream by invoking Obama's idealism and by using political and patriotic cues that would resonate; conversely, I wanted to style the portrait in a manner that was not typical or conservative. I thought it was important to portray Obama as unique so that he would appeal to, and energize, a progressive base that might be motivated to not only support Obama, but to also vocally encourage others to support him. By 2008, I had established myself as an outspoken artist with progressive political views, often questioning war, control, and authority. I knew that much of my existing audience was anti-establishment, and my greatest challenge in gaining their support was presenting Obama as someone who did not represent the status quo. I knew I could achieve this with an illustration that used the style and the colors — red and cream — that my audience associated with my work. My use of blue, however, was a nod to the patriotic red, white, and blue associated with the American flag and almost all mainstream American political campaign images. Additionally, I used the word "PROGRESS" to further the appeal to a progressive audience. I hoped that my audience would like the poster, read further about Obama as a result of my endorsement, and maybe even promote Obama through its own grassroots activism, using my poster as a tool. My history as a street artist appealed to much of my audience, and I easily applied the techniques of disseminating my art through posters, stickers, and free downloads of my imagery. Shortly after I made the Obama poster, I created a high-resolution black-and-white digital version of it for people to download from my website. Finding the right balance between mainstream and progressive appeal was one of my goals, but it succeeded to a far greater degree than I could have imagined. I was always confident that once an iconic symbol of Obama was established, it would become a meme that would continue to replicate and reinforce its message.

I worked diligently for two days in late January 2008, and once I was satisfied with the poster design and illustration I made 700 screen prints using the word "PROGRESS," releasing 350 for sale, and giving away or posting the other 350 prints. I used the money raised from the print sale to print 10,000 offset prints, which used the word

“HOPE” instead. Eventually, my associates and I printed 350,000 Hope Posters and 500,000 Hope stickers. I only sold 1400 Hope Posters. I also made a free digital download of the Obama image available to the public on my website.

I made the Hope Poster to support Obama. I wanted to break even on my costs, but I did not want to exploit the immense commercial potential of the Hope image because I thought that doing so might cause the public to question the sincerity of the image. I spent a tremendous amount of time and energy in 2008 promoting the Hope image through every platform at my disposal. The Hope image became an amazing grassroots phenomenon that I hope encourages people to believe in the power of art and activism.

## 2. Why Use a Photograph?

A writer asked me why I “didn’t just draw Obama from my imagination.” My response was that I needed my image to look like Obama, who is not an imaginary character. I know few people who could capture a convincing likeness of close friends or even their own family members from imagination or memory. I sometimes use my own family members as models, taking my own photos of them from which I illustrate them. VIVI LA REVOLUCION and COMMANDA are examples.<sup>105</sup> Were Obama a member of my family, I would have employed this technique.

This leads to the next question — Is illustrating from a photograph “cheating?” I studied art — specifically illustration — at one of the most prestigious art schools, the Rhode Island School of Design (“RISD”). At RISD I was taught to draw from life, to draw from photo references, and to appropriate and re-contextualize imagery. I learned that all of these techniques had historical precedents. Figures 8 through 10 in the Appendix contain some great examples of famous painters working from photo references that were not always their own.<sup>106</sup>

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105. See FAIREY, *supra* note 6, at 91–139.

106. These images are drawn from Antonio Martínez Ron, *Famous Painters Copied Photographs*, FOGONAZOS (Nov. 6, 2006, 12:02 AM), [http://www.fogonazos.es/2006/11/famous-painters-copied-photographs\\_06.html](http://www.fogonazos.es/2006/11/famous-painters-copied-photographs_06.html). See also *Galería: Paul Gauguin*, UNIVERSIDAD DE SEVILLA, <http://www.aloj.us.es/galba/MONOGRAFICOS/LOFOTOGRAFICO/POSTIMPRESIONISTAS/Gauguin.htm> (last visited May 3, 2012); *Galería: Paul Cézanne*, UNIVERSIDAD DE SEVILLA, <http://www.aloj.us.es/galba/MONOGRAFICOS/LOFOTOGRAFICO/POSTIMPRESIONISTAS/Cezanne.htm> (last visited May 3, 2012); *Galería: Toulouse-Lautrec*, UNIVERSIDAD DE SEVILLA, <http://www.aloj.us.es/galba/MONOGRAFICOS/LOFOTOGRAFICO/POSTIMPRESIONISTAS/Lautrec.htm> (last visited May 3, 2012); *Galería: Vincent van Gogh*, UNIVERSIDAD DE SEVILLA, <http://www.aloj.us.es/galba/MONOGRAFICOS/LOFOTOGRAFICO/POSTIMPRESIONISTAS/Vincent.htm> (last visited May 3, 2012).

This case has raised many issues, including the use of references in art. Some of my earlier works have been attacked by some as plagiarism. I think reference is an important part of communication, and it has been common practice in the art world. When I flipped through the November 2008 Christie's auction house catalog, I found many pieces that are based on reference or appropriation. Most are selling for over \$100,000. Some are cleverer than others, but these are all works that are being taken very seriously at auction.<sup>107</sup>

Appropriation is well established in art. It is used by artists for a variety of reasons. Sometimes appropriation is practical, because it is more efficient and expedient to utilize something pre-existing, but usually appropriation is more about commenting on a well-known subject. Appropriation uses something as a reference point, and its perceived meaning usually evolves with transformative input. In some cases, appropriation is political, in the sense that using an image without permission is irreverent and thus amplifies an antagonistic conceptual transformation to the original work imposed by the artist. The cultures that inspire me creatively — punk rock, skateboarding, and streetwear (graphics-heavy casual fashion) — all rely heavily on appropriation art, both because they are irreverent cultures, questioning the status quo, and because they are cultures with a rapid metabolism and throw-away mentality. Though appropriation is accepted and pervasive to the point of being standard practice, my use of an appropriated reference for the Obama poster was not political in the spirit of the cultures from which I emerged. In fact, compared with the standards and practices in youth culture and the graphic design world, I thought I was being respectful in my technique and reverent toward my subject with the Hope Poster.

I have a few feelings on appropriation. Before the invention of photography, one of art's main goals was to translate reality into a two-dimensional representation. After photography, realism in art became less emphasized, and the number of possible aesthetic directions in which art could go in expanded dramatically. Printing disseminated images and photos far and wide created a more global culture of reference points. The Internet has further democratized both awareness of and access to images. Where a painting was once a singular, precious object, now facsimiles can be accessed and generated in seconds with a computer and printer. In short, images are abundant and easy to access, and building upon existing images has become part of the visual language. As long as appropriation is aesthetically and conceptually transformative, I do not think it should be seen as a

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107. Shepard Fairey, *The AP, Obama, & Referencing*, HUFF POST MEDIA (March 26, 2009, 12:18 PM), [http://www.huffingtonpost.com/shepard-fairey/the-ap-obama-referencing\\_b\\_179562.html#reference1](http://www.huffingtonpost.com/shepard-fairey/the-ap-obama-referencing_b_179562.html#reference1) (giving examples from Christie's auction of artwork that copied other images).

copyright violation. By contrast, I do not believe in reproducing an image verbatim in a manner that does not advance the creative dialogue, and that may harm the market of the original.

There are many different ideas about what makes something “art.” Some people think artists receive inspiration in their dreams — imagining images in their heads that they then pour out onto canvas. In reality, I think most artists learn to draw and paint by observing, or, to be less generous, by copying things. Artists must learn techniques to translate images in the way they desire. Most artists and art teachers I know have very open-minded views about making art. Whichever technique best yields a powerful and inspired result is the one an artist should choose. Artists have always utilized tools to aid them in making art. As technology has progressed, they have used tools and techniques such as the camera obscura, photography, printmaking, and digital media in order to make extraordinary images. There is always a backlash against new approaches to art-making from purists who view art technique through a romantic nostalgia. I believe any art-making technique is legitimate if it delivers extraordinary and powerful results.

### 3. Why I Did Not Obtain a License

I intended no disrespect to photographer Mannie Garcia, but I did not think I needed permission to make an art piece using a reference photo. From the beginning, I openly acknowledged that my illustration of Obama was based on a reference photograph. But the photograph is just a starting point. The illustration transforms it aesthetically in its stylization and idealization, and the poster has an altogether different purpose than the photograph does.

The AP photo I used as a reference, which I found out much later was taken by Garcia, was a news photo that showed Barack Obama attending a 2006 panel on the genocide in Darfur. My Obama posters with captions of “HOPE” and “PROGRESS” were obviously not intended to report the news. I created them to generate support for Obama; the point was to capture and synthesize the qualities that made him a leader. The point of the poster is to convince and inspire. It is a political statement. My Obama poster does not compete with the intent of, or the market for, the reference photo. In fact, the argument has been made that the reference photo would have faded into obscurity if it were not for my poster, which became so culturally pervasive. The Garcia photo is now more famous and valuable than it ever would have been prior to the creation of my poster. With this factor in mind, it is not surprising that a gallery in New York City is now selling prints of the Garcia photo for \$1200 each. As I understand it, Garcia himself did not even realize the poster was created referenc-

ing his photo until it was pointed out to him a full year after the poster came into existence.

I did not create the Obama poster for financial gain. The poster was created to promote Obama for president, and the revenue from poster sales was re-invested in more posters, flyers, stickers, etc., and donated to charity and to the Obama campaign. A free download of the Obama image was available on my website, which should provide further evidence of the desire to disseminate the image, not to benefit financially.

I am very saddened to see many people try to demean my Obama poster as being “stolen” or that I “cheated” because I used a photo. As far as the idea of the image being “stolen,” I would love to have the clout to command portrait sittings from world leaders, but that is not an option for me and for most artists. For many artists, even licensing an image is not financially feasible. Should artistic commentary featuring world leaders be stifled because of copyright of the reference images, even when the final artistic product has new intent and meaning? Reference is critical to communication, and, in my opinion, reference as a part of social commentary should not be stifled.

I always believe in copyright when it serves to protect a work from a verbatim reproduction that could harm the market of the original. I do not download music illegally because I believe the musicians deserve to be paid for their creations. I would not be using the music in a transformative way, and therefore I should pay for it. There are circumstances that I think fall into more of a grey area of whether or not a license is required. When working from references, I consider the intent of the original image, how creative the original is, and, most importantly, how much I will be transforming the reference aesthetically and conceptually. I also take into account the circumstances under which the original image was created.

All of these considerations for me weighed in favor of licensing the “Palestinian Woman” image even though my “Palestinian Woman” art piece used the same techniques as the Hope Poster, which I consider fair use. Copies of the original photo and my own image are set forth in Figure 11 in the Appendix. Ironically, I licensed the photo from the AP itself prior to my dispute with the AP over the Hope Poster.

The Palestinian woman photo, in my opinion, intended to portray the anxiety created by living on the border between Palestine and Israel. My intention artistically was to amplify the perceived message rather than diverge from it. I also felt that the reference image was carefully, if not artistically composed. Additionally, I thought the effort and risk involved in creating a photograph in a dangerous part of the world should be respected and rewarded. I doubt very strongly that my “Palestinian Woman” image would have harmed the market

for the original photo, but I still felt the photo involved a great amount of creative input. I have a set of criteria for what I think should be licensed, but there are many subjective areas when it comes to how to interpret the law. I work with photographers frequently and compensate them even if I could use their images as references under the fair use doctrine. Though my artwork may be transformative enough to avoid a license, I enjoy working with photographers, and the collaborative experience is something I find far more valuable than the money I could save by not working directly with a photographer.

#### 4. Why Litigate — and Why Settle?

I entered into this litigation hoping 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 or not they have money and lawyers. I created the Obama image as a grassroots tool, solely to help Obama get elected president. The image worked due to many complex variables. If I could do it all over again, I would not change anything about the process, because that could have changed the outcome. I am glad to endure legal headaches if that is the tradeoff required for Obama to have been elected president.

I believed that if the AP won their case, every artistic depiction of Obama (or any other politician) based on a photo reference that was not licensed would be rendered illegal. An extensive collection of such depictions may be found in the book *Art for Obama*.<sup>108</sup>

I also think art that is critical of leaders — art that neither the subject nor the photographer approves of — needs to be a legal form of expression. I think the image I made of George W. Bush, based on his official presidential portrait, is a perfect example.<sup>109</sup>

Ultimately, I chose to settle the case rather than fight it until the end for a variety of reasons. Though I believed the principles of the case were strong, I was very concerned that my spoliation had harmed my credibility in a way that would taint the case regardless of the fact that the spoliation occurred later and did not change the principles of the Hope Poster case. I was also concerned that the judge and potentially the jury would not have a sufficiently sophisticated understanding of either art or copyright law to judge in my favor. In my experience, the average person believes that whenever something references something else, even only partially, it constitutes copyright infringement. Though I had complete faith in my legal team, I was not sure if I wanted my fate, or that of fair use, in the hands of a jury that

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108. ART FOR OBAMA: DESIGNING MANIFEST HOPE AND THE CAMPAIGN FOR CHANGE (Shepard Fairey & Jennifer Gross eds., 2009).

109. See *infra* Figure 12.

might view copyright so simplistically. Also, the AP's calculus for the legal fees and damages it sought to collect from me was quite daunting. The figure would have completely bankrupted me. Though the settlement was costly for me, I could retain my legal position and manage the settlement financially without destabilizing my business affairs. The risk of being bankrupted and harming the fair use principles I was fighting to protect for all artists seemed too great. The settlement would be difficult financially, and a philosophical concession, but it would be survivable. I have greater means than most artists, and though I fought the case to protect my rights, I fought it especially to protect less successful artists' rights to create without fear of corporate bullying. The settlement is disheartening because I capitulated to the powerful forces from which I wish to protect artists. The case was also very stressful for my family and co-workers. I did not want to subject my family and close companions to the emotional trauma of a trial.

*B. The Obama Hope Poster as Image Icon (Marita Sturken)*

The Hope Poster that Shepard Fairey created in 2008 has taken its place within the history of copyright debates. Its most lasting impact will be its influence as a political poster, a phenomenon that will likely prove a significant moment in the history of images of American patriotism. The poster stands for several intersecting aspects of American culture and politics: President Barack Obama's election and popularity, the grassroots interest in Obama's 2008 political campaign, popular political figures in general, and political power.

In their study of iconic photographs, Robert Hariman and John Lucaites state that iconic photographic images are "widely recognized and remembered, are understood to be representations of historically significant events, activate strong emotional identification or response, and are reproduced across a range of media, genres, or topics."<sup>110</sup>

The Hope Poster's extraordinary trajectory into American public life and the vast number of remakes, parodies, and knock-offs that it has generated demonstrate its iconic status. This iconic status is derived from its transformation of the recognizable conventions of a political pose (of a politician appearing thoughtful, inspirational, and leader-like) through a set of image techniques that is emblematic of contemporary artistic and popular styles and now associated with Shepard Fairey in particular. The moment that the Hope Poster was placed on the walls of the National Portrait Gallery of the Smithsonian Institution, where it sits among traditional portraits of American pres-

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110. ROBERT HARIAN & JOHN LOUIS LUCAITES, NO CAPTION NEEDED: ICONIC PHOTOGRAPHS, PUBLIC CULTURE, AND LIBERAL DEMOCRACY 27 (2007).

idents, it signaled a new kind of aesthetic of American political culture.

As a scholar of visual culture I had written about Shepard Fairey and the Hope Poster as an emblem of contemporary art styles and cultural entrepreneurship before I was asked to be an expert witness in this case.<sup>111</sup> I am interested in the ways that image codes and styles can move across different social arenas, from art to consumerism to news, and the Hope Poster provides a particularly rich example of an image that has circulated and been remade in ways that are revealing of contemporary tensions between cultural arenas and social values. I thus had formed an opinion about the poster's meaning and its social value before I took part in the case, and what I learned in the course of being an expert witness only affirmed my opinion.

It is not incidental to Shepard Fairey's reputation and influence as an artist that he began as a street artist, creating work that was intended to be in dialogue with the visual urban terrain of the street, from advertisements to graffiti to skateboard culture. Fairey began his career by stenciling OBEY Giant graphics in urban environments. This interest in the street situates Fairey's work within the legacy of 1980s art, which incorporated the work of street artists such as Keith Haring and Jean-Michel Basquiat into the art world. However, in Fairey's work this interest is combined with a savvy contemporary engagement with branding and cultural entrepreneurship. That he integrates art, design, and street art together with running a company that produces a branded line of clothing makes him, to a certain extent, emblematic of contemporary culture's ability to mix branding, art, entrepreneurship, and fashion.

Fairey's aesthetic can be defined in many ways as an "aesthetic of the derivative." While the term "derivative" has a specific legal meaning, I do not mean the term in a legal sense. Fairey's work has consistently deployed strategies of borrowing historical styles, riffing off previous art styles, signaling image codes, and playing off conventional poses. He has, for instance, created a significant number of works that play off the codes of historical political posters. He produced a series of posters of political figures such as Angela Davis, Che Guevara, and Vladimir Lenin (as well as posters of cultural figures like Sid Vicious, Jimi Hendrix, and Bob Marley) using a mix of historical poster styles. While the Hope Poster is different from Fairey's previous work in that he engages with a current (rather than historical) political figure, the piece follows directly from Fairey's

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111. See MARITA STURKEN & LISA CARTWRIGHT, PRACTICES OF LOOKING: AN INTRODUCTION TO VISUAL CULTURE, 227–29 (2d ed. 2009); Sarah Banet-Weiser & Marita Sturken, *The Politics of Commerce: Shepard Fairey and the New Cultural Entrepreneurship*, in BLOWING UP THE BRAND 263 (Melissa Aronczyk & Devon Powers eds., 2010); Marita Sturken, *The New Aesthetics of Patriotism*, 8 J. VISUAL CULTURE 168 (2009) [hereinafter Sturken, *New Aesthetics*].

particular aesthetic of mixed historical styles, evocation of posters, and bold graphic design.

It is important to situate the Hope Poster in relation to the lineages of modern art — in particular, in relation to the history of appropriation of photographic images, media images, and aesthetic styles in art. Appropriation in art — which can be defined as the transformative borrowing of forms, styles, objects, texts, and images into a new work — gains its cultural power through retaining certain aspects of the original thing borrowed in order to create a new meaning. There is a deep history of appropriation in modern art, which finds its origins in avant-garde aims at the turn of the century to rethink the role of art. Thus, Marcel Duchamp appropriated common everyday objects, such as a bicycle wheel and a urinal, and put them on display as art in order to make a statement about the meaning of art itself. Many modern artists, such as the Cubists and later pop artists, borrowed from popular culture and objects of everyday life in order to play with form and to explore art as an integrated mode of everyday life and consumer culture. This kind of appropriation, which extends to photo collage and the incorporation of photographs, media images, newspapers, and found objects into art (such as Robert Rauschenberg's famous "combines" of the 1960s which integrated a bed, a tire, and other objects into paintings) creates meaning specifically through the act of referencing another material object or work. This is crucial to the aim of appropriation as an art technique — the work must create a layered set of self-referential meanings. Thus, a painting by Roy Lichtenstein that remakes a comic strip is not intended to replicate that comic strip, but to comment upon it (offering an affectionate critique of the idealized world of comic strips and its place in commercial popular culture) by appropriating it. As I will discuss further in the context of the more recent postmodern art style, referencing and borrowing have become even more central to art-making.

The artist whose work forms the most obvious antecedent to Shepard Fairey's work is Andy Warhol, who is arguably one of the most influential artists of modern art. Warhol's oeuvre transcended the relationship of art and popular culture in ways that have had a lasting cultural influence, and one can see his influence on Fairey's use of media images, his silk-screen techniques, his use of color, and his preference for creating multiple copies in the poster format.<sup>112</sup> Warhol incorporated brands, logos, news and publicity photographs, and consumer products into his art — and then transformed them using visual techniques such as overlays of saturated color, collage, and repetition.

Warhol produced a large number of works in the 1960s that used a bold screen-printing technique to screen color into photographic

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112. Marco Livingstone, *Do It Yourself: Notes on Warhol's Techniques*, in ANDY WARHOL: A RETROSPECTIVE 63 (Kynaston McShine ed., 1989).

news images (of car crashes, disasters, and race riots), often in repetitive formats. He later became famous for his color screen prints of famous people, first as cultural icons (such as Elvis Presley), and then as commissioned “vanity” portraits. One of Warhol’s most well-known celebrity portraits was of Marilyn Monroe, of whom he produced a number of diptych images shortly after her death in 1962. Using a publicity still of Monroe as his original source, Warhol printed color fields into Monroe’s image and then repeated it across the canvas. This serial printing was a means to evoke celebrity as a form of mass production.

Warhol’s work deliberately pushed at the boundaries of definitions of art in such now-famous pieces as his painting *Campbell’s Soup Cans* and his pile of Brillo boxes. Repetition and redundancy were key features of Warhol’s portraits of celebrities and appropriations of news images. The poster aesthetic was implied by his large color silk-screens in which repetition of images across the canvas evoked the mechanical reproduction of the image, mass culture, consumerism, and the pleasures of abundance and excess. All of these qualities of his work form an important lineage leading to the work of Shepard Fairey.

Warhol can be situated within the history of modern art, yet his work forms a bridge to contemporary art styles that are considered to be postmodern. Postmodern style in both art and popular culture is characterized by a self-conscious kind of meta-communication (works that are about their status as works, conversations about the conversation itself, etc.), referencing/quoting, pastiche (borrowing and mixing different styles from history), and an integration of art with popular culture. Much postmodern art (which begins in the 1980s but could arguably date back to the 1920s) is defined by its derivative and appropriative quality, one that involves playing off the codes of previous art styles and previous works of art. Postmodern style is thus defined in part as a style that is always pointing to previous styles of imaging.

Appropriation techniques have reached new conceptual levels in the context of postmodern art. The term “appropriation art” is thus used for those works that comment on questions of authorship through appropriation. Most famous of these is Sherrie Levine’s 1981 work *After Walker Evans*, in which she copied well-known photographs by Walker Evans and displayed the copies as her own work.<sup>113</sup> Such works are defined as appropriation art since they directly comment on issues of authenticity, ownership, and reproducibility.

Importantly, the Obama Hope Poster appropriates a photograph to make its meaning, and this situates it within a particular tradition of artists incorporating photographs into their work. For instance, Robert

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113. See Sherrie Levine, *After Walker Evans*, AFTERWALKEREVANS.COM, <http://www.afterwalkerevans.com> (last visited May 3, 2012).

Rauschenberg integrated news photographs into many paintings, often using a typical Abstract Expressionist brushstroke effect to transform the images. Notably, Rauschenberg created a series of silkscreen prints about John F. Kennedy (that presage the Obama Hope Poster) that use news photographs in order to convey the meaning of Kennedy as a popular media figure, as well a sense of the immediacy of information culture and the power of the photograph to evoke history.<sup>114</sup>

The range of techniques that modern artists have used to transform photographs varies significantly, though these works share a sensibility of engagement with the world of news, politics, and the immediacy of the photograph. Some of these artists, like Rauschenberg, transform images by incorporating them into collages; others use color but do not change the image forms dramatically; still others break the images down to the point where they are barely recognizable, remaining only as a trace. Some artists transform images while inserting them whole into their own art works. Barbara Kruger, for instance, has a signature style of enlarged news images with bold phrases splashed across them on red bands. Kruger does not rework the images, but rather obscures parts of them and transforms them through text that operates through irony and critique.

The fact that Shepard Fairey used the outline of a photographic image in making his poster of Obama was absolutely crucial to its effect. The poster image gains its power from the political pose translated through the graphic indication, broken down to mere elements, of a photograph. Its very trace signals immediacy, media content, and the real; a drawing of Obama's face would not have had the same effect. It is also crucial in this case that the original photograph has been stripped down and reduced to two factors: the conventional photographic pose and the graphic trace that signals a photograph.

Of all of Fairey's work, the Hope Poster has had the most influence, visibility, and cultural circulation. As I have noted, the Hope Poster gains its power from its combination of conventional and unconventional elements, from the recognizable depiction of Obama in a conventional political pose that is transformed through visual techniques, colorization, pastiche, and referencing. The Hope Poster deploys a set of conventions that have been replicated for decades, if not centuries, in the images of politicians. Well-known semiotician Roland Barthes wrote that the political photograph offers a particular kind of constructed intimacy for the viewer that transports political discourse from policy to a "socio-moral status." Thus, Barthes argued, the electoral photograph functions like a mirror to the viewer and "offers to the voter his own likeness, but clarified, exalted, superbly ele-

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114. See STURKEN & CARTWRIGHT, *supra* note 111, at 227–29 (discussing the Rauschenberg image and its relation to Fairey's poster).

vated into a type” through which the viewer is “invited to elect himself.”<sup>115</sup>

In the original Mannie Garcia photograph and in the poster, Barack Obama is turned to the side, looking out seemingly above the crowd and toward an imagined horizon. The pose is a convention that creates the image of a figure who is thoughtful and pensive, tangible and accessible, yet above the crowd. Like many generic poses, it can thus be seen as conjuring a set of contradictory meanings — the leader is powerful and formal yet accessible. There are three key aspects to this traditional political pose: a three-quarters pose, a view from below, and a gaze toward the horizon.

The three-quarters pose signifies a certain power to the person being depicted, in that they look away from the viewer with a gaze that does not acknowledge their presence. This convention has a long history in the history of portraiture, specifically in political portraiture — even becoming the dominant pose for U.S. presidents on U.S. currency.<sup>116</sup> While this is by no means the only pose we see of politicians, its repetition is notable. Both the view from below, which has a long history as a convention to create images of powerful people, and the gaze toward a horizon add to the three-quarters turn to create this recognizable political pose. In semiotic terms, the pose forms a sign that connotes leadership, inspiration, and forward-thinking — someone who is looking toward an imagined future. It is worth noting that contemporary politicians are depicted quite often in informal poses (though these may be orchestrated to look informal), yet the Hope Poster makes a point of referring to the more formalized traditional image of a political leader; it is deliberately situating Obama within the particular political iconography of this pose, rather than within the broader and more accessible political image available to viewers today.

It is precisely the way in which the poster visually transforms this traditional political pose of then-Senator Barack Obama — while allowing viewers to recognize its convention — that gives this poster its iconic power. Fairey used particular visual techniques to transform the photograph into a poster, specifically through deconstructing the image, and adding textures, colorization, and text. While I learned more after being involved in this case about how Fairey actually created these effects, I read the visual effect without knowing the precise techniques — in other words, the image itself signals its transformation. The photograph is stripped down to its bare outline, evoking at a graphic level the trace of a photographic image and the contours

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115. ROLAND BARTHES, *MYTHOLOGIES* 91–92 (Annette Lavers trans., 1972).

116. See SUSAN KISMARIC, *AMERICAN POLITICIANS: PHOTOGRAPHS FROM 1843 TO 1993* 75–81 (1994); VICKI GOLDBERG, *THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES* 75 (1991).

of Obama's face. The striated lines that shape the contours of Obama's face evoke the texture of newsprint and a long tradition of graphic posters that were produced with traditional printing presses, from Soviet political posters to other forms of cheaply produced posters for political causes around the world. In particular, this effect deploys the visual style of graphic poster design used by the Bolshevik agitprop artists of the 1920s in the wake of the 1917 Russian Revolution, giving the work a sense of political urgency. This style evokes a political immediacy and message.

In the poster, Obama's face, neck, and clothing are transformed into shapes in a way that evokes traditional silkscreen printing. Here again a longer tradition of political art is evoked, as well as the modern art style of screening color into black-and-white images. This photo-to-silkscreen technique has the effect of reducing the image (in this case, the shape of Obama's face) to an elemental yet recognizable set of outlines. This technique has been deployed by artists from Warhol onwards as a means to conjure the meaning of popular printing, the power of image reproduction and repetition, and the power of celebrity.

The color of the poster is a key feature in its meaning and its iconic status. The color palette plays off the traditional American patriotic colors of red, white, and blue. The red is slightly more orange than a typical patriotic red, the blue is lighter and grayer in tone, and the white is a kind of yellow off-white. Fairey has made this color palette a signature of his style (the off-white tone is predominant in many of his works), and has used it in a number of images since the Hope Poster. It is also a key feature of the many knock-offs and parodies of the Hope Poster. The crucial feature of this off-color palette is that it *references rather than replicates* the traditional red, white, and blue colors of the American flag and other objects of U.S. patriotism. Thus, viewers of the Hope Poster can recognize that the colors play with the traditional palette. This potentially has the effect of evoking a certain ambivalence toward traditional and conventional forms of American patriotism, and in the case of the Obama campaign poster, had the effect of signaling something different about this particular political candidate.

Finally the Obama Hope Poster combines image and text — a simple aspect of its status as a political poster that is very important not only to its transformative status but to its political message. The word "HOPE" is boldly presented on the poster in size, font (a sans-serif, straightforward, modern style) and color. The blue color of the HOPE text connects it to the overall color palette of the poster. The size is emphatic, and the fact that the capital letters are situated squarely at the bottom of the frame draws again on the visual legacies of Soviet and leftist poster techniques. The word "hope" directs the

meaning of the image in crucial ways as viewers are invited to create a correlation between the image of Obama's face and his gaze off screen and the concept of hope. As the many parodies of this image demonstrate, other words can easily transform the picture into other meanings.

Most pertinent to an interpretation of the Fairey Obama poster is the way it creates meaning through referencing. As I have discussed, the poster refers to Soviet agitprop art styles, the newsprint of political posters in general, the Warholesque silkscreen effect of evoking popular culture and celebrity, and the traditional color scheme of American patriotic images and objects. For such an image, the reference to other images, styles, and objects is the primary message, one that demands relatively complex readings from viewers. This situates the Hope Poster, and much of Fairey's work in general, in the context of remix culture that proliferates today via the Internet, digital media, YouTube culture, hip-hop music forms, and a whole array of cultural engagements that remake, mash-up, parody, and borrow other cultural forms and references.

One of the key features of the pastiche-postmodern style of referencing and quoting is that it defines a particular kind of viewer, one who is accustomed to reading images as references and citations, and who recognizes the styles of media and popular culture. While the Hope Poster deploys the conventions of celebrity and political affirmation in its image of a leader looking off toward an imagined horizon, it effectively recodes its political image in a way that addresses viewers adept at reading references as a key feature of style. In other words, it addresses viewers who can recognize that these are the conventions of the typical political pose, who recognize the style of the pose at the same time that they see Obama (in the same way that a viewer of *The Daily Show* recognizes the codes of television news that are the object of its parodies). Every element of the Hope Poster signals a reference through its style, and these all address a viewer who can read the image as one that plays with image conventions rather than replicating them. Thus, the image plays with the idea of a political poster at the same time that it presents an inspiring image of this particular politician. This kind of dual position — playing with the style while simultaneously asserting a direct message through it — is a central feature of postmodern style. In other words, the poster signals to the viewer the codes of the political poster, but still advocates for its candidate.

That not all viewers would read the references in the poster to their full extent does not mean that they have any less power. Today's viewers (many of whom grew up watching *Sesame Street* episodes, Pixar animated films, and *The Simpsons*, all of which deploy referencing as a style) recognize the knowing position of an image text that

references other sources and styles, even if they might be unaware of the actual original source.

The Hope Poster has been phenomenally popular, spawning not only many imitators but also a significant number of second-generation references. It is clear that it is the poster, not the original photograph, which has engendered and encouraged this cultural response and production. In signaling the original Hope Poster, most of these knock-offs are deploying a second level of meaning that connects to its status as a political image and as a political poster. In other words, most of the knock-offs use the color of the original, its silk-screen print effect, the three-quarter pose, or some combination of the three elements to reference it.<sup>117</sup>

The first references to the original Hope Poster were made by Shepard Fairey himself, as he produced several additional posters of Obama, including a Vote poster for the campaign, and an inauguration poster that depicted the new president in a new pose, within a triangular frame. He also produced a *Time Magazine* Person of the Year cover and a *Rolling Stone Magazine* cover, both of which used different images of the president and referred back to the Hope Poster. In the *Time* cover, Obama retains the political pose, looking off to an imagined horizon on his right, and is imaged in the same color scheme but against a textured background of symbols.<sup>118</sup> In the *Rolling Stone* cover, the color palette is referenced rather than directly replicated, and laid over the presidential seal. It is a more circumspect image, more potentially cautious in its representation of Obama — a fact underscored by its text: “bold action or compromise?”<sup>119</sup>

The broader group of remakes and knock-offs of the Hope Poster began to circulate as the poster gained in visibility and reached significant heights in the final months and immediate aftermath of the election. These remakes can be categorized into several different groups:

1. The original Hope Poster has produced a significant number of knock-off images and objects (in the form of T-shirts, ties, and other curios), as well as remakes that are inspired to reference the original in homage. Most of these knock-offs aim to capitalize on replicating the original poster for consumer purposes; others just use it humorously.<sup>120</sup>

2. Parodies of the Obama poster have proliferated in circles that are in opposition to the President and his policies. These usually deploy the essential elements of the original poster (color palette, screen

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117. See Randy Kennedy, *Obama's Face (That's Him?) Rules the Web*, N.Y. TIMES, May 31, 2009, at A1.

118. See *Person of the Year: Barack Obama*, TIME (Dec. 29, 2008), <http://www.time.com/time/covers/0,16641,20081229,00.html>.

119. See *Shepherd [sic] Fairey for Rolling Stone*, HYPEBEAST (Aug. 6, 2009), <http://hypebeast.com/2009/08/shepherd-fairey-for-rolling-stone>.

120. See *infra* Figure 13.

printing effect, position of text) with new text in order to rework the positive meaning of the original image into one of critique. In some of these, Fairey's original image is preserved intact.<sup>121</sup> In others, Fairey's image is modified.<sup>122</sup>

3. The poster has spawned remake images of other political leaders, from Sarah Palin to French President Nicolas Sarkozy. Some of these celebrate the leader in question; others mock him or her. In all, the use of Fairey's signature color palette is used to reference the power of the original poster.<sup>123</sup>

4. References to the Hope Poster include charged images of people whose lives have impacted those of others. For instance, during the 2009 upheavals protesting the Iranian election, images of the young woman Neda Agha-Soltan, whose on-camera death turned her into a martyr of the struggle, were remade in the style of Fairey's poster and circulated on the Internet. Many used a green palette, which had become associated with the Iranian resistance movement, within the textured screen print effect of the Fairey poster.<sup>124</sup>

5. Evidence that the Fairey poster has finally come to stand in for all political posters of impact is evident in the parodies by political comedians, including Jon Stewart and Stephen Colbert in their October 2010 rally on the Washington Mall to "restore sanity" (a play off a previous Glenn Beck rally to "restore honor"). For instance, the Stephen Colbert parody deliberately remakes the Hope Poster while turning its color palette into something more jarring and electric in order to convey Colbert's political persona. The reference to the Hope Poster thus provides a shorthand for Colbert's joke, allowing him to signal his character's association with political power. With their signature knowing style, Stewart and Colbert thus create a layered meaning in these references — they refer in humor not only to the original poster but also its iconic status, its inevitability as a reference.<sup>125</sup>

This inevitability leads me to my final point, which is that the power of the Obama Hope poster is precisely that it has been transformative of American political culture.<sup>126</sup> Its influence cannot be underestimated, and this influence is the most profound argument that can be made for the poster's distinction from the original photograph. While the postmodern style of referencing and playing with image codes proliferates in popular culture and art, it has, until quite recently, been largely absent in conventional American political culture. Most political posters and campaign imagery have remained strictly conventional. Indeed much of American patriotic imagery can easily

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121. See *infra* Figures 14–15.

122. See *infra* Figure 16.

123. See *infra* Figure 17.

124. See *infra* Figure 18.

125. See *infra* Figure 19.

126. See Sturken, *New Aesthetics*, *supra* note 111, at 168–72.

be characterized as kitsch — evoking simplistic modes of sentiment and un-ironic demonstrations of political affiliation. The poster is clearly an effective affirmation of the then-candidate and his message of hope and change, yet its aesthetic of referencing and image-play also creates an ironic subtext. By contrast, the history of patriotic, nation-affirming images in the United States has consisted of decidedly un-ironic embraces of U.S. exceptionalism, power, and deployments of a mythic culture of American innocence.<sup>127</sup>

The contemporary pastiche aesthetic of the Hope Poster resonated with a broad swath of the American public (many of them younger people) that had never felt addressed by the aesthetic of typical patriotic images and political posters. In my opinion, this image is a harbinger of a shift in the aesthetic of American patriotism, from traditional and conventional patriotic images (many kitsch, all un-ironic) to images that engage in play and irony. It remains to be seen whether this will be a temporary trend or more permanent one. The image speaks to younger generations of viewers for whom such an appropriative aesthetic is the norm, and likely signals the potential for ironic, playful images to coexist within the image culture of U.S. politics and patriotic culture along with more conventional images.

The Hope Poster happened to resonate for viewers because its timing was right politically, culturally, and technologically. Such a response and resonance is difficult to predict beforehand because the factors that go into it are manifold and complex. Iconic images are not easily created, and almost never by design. They emerge from complex sets of social, cultural, and political factors that can change over time. I cannot define all of the social and historical reasons why the Hope Poster became an icon at this particular historical moment, but I am confident in stating that its iconic status in the history of American political iconography is assured. While the original photograph was conventional and generic, the Hope Poster transformed it into something significantly unique, original, and culturally significant.

This poster did create hope. The fact that this hope could not be sustained by one individual, no matter how powerful, in the current morass of American politics, may be one reason why its meaning has been so easily hijacked and redeployed in ways that counter its original intent. Yet, as such, it has formed a vital component in American public culture at this moment in history.

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127. See generally MARITA STURKEN, *TOURISTS OF HISTORY: MEMORY, KITSCH, AND CONSUMERISM FROM OKLAHOMA CITY TO GROUND ZERO* (2007).

*C. The Evolving Role of the Camera and Photography in the Making  
of Transformative Art (Frank Cost)*

By downloading a copy of Mannie Garcia's head shot of Barack Obama to use as a reference image for the Hope Poster, Shepard Fairey was making use of the digital resources that have become essential to the creative process in the visual arts. To better understand why Fairey was inclined to follow the path he did to create the Obama posters, it is helpful to consider this case in light of the long history of the use of cameras and photography in the creation of pictorial art. This history can be divided into four generations of camera-based technology:

1. Cameras before photography;
2. Photographic processes;
3. Photographic halftone reproduction in print mass media;
4. Digital photography and Internet distribution.

Prior to the invention of the camera, a pictorial artist had only three sources of reference for the creation of new work: the natural world, memory, and the work of previous artists. If an artist worked from memory or by direct observation of the natural world, the work was considered original. If the work of previous artists was used as a reference, the work was considered a copy. Part of the training of young artists has been and continues to be the careful copying of the work of other artists, and techniques of copying have been employed in the reproduction of originals for commercial purposes since ancient times. Copies that are intended to be completely faithful to the originals are distinct from copies that depart intentionally from the originals to alter the original message. Literal copying has always been viewed as a craft,<sup>128</sup> whereas interpretive copying can be the basis for new original work.<sup>129</sup>

An artist producing original pictorial work from memory or by direct observation must rely upon a learned ability to transform an image visualized in the mind into material form on a two-dimensional surface. The authorial connection between the artist and the work is direct and unambiguous. When an optical device such as a camera is employed as an aid to visualization, this connection is weakened.

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128. An extreme modern example is the copy oil painting industry that has emerged in the village of Dafen near Shenzhen in southern China. See James Fallows *Workshop of the World, Fine Arts Division*, THE ATLANTIC (Dec. 19, 2007, 4:08 AM), <http://www.theatlantic.com/technology/archive/2007/12/workshop-of-the-world-fine-arts-division/7859>.

129. For example, many well-known paintings of Vincent Van Gogh were actually interpretive copies of works by other artists such as Eugène Delacroix and Jean-François Millet.

### 1. The Use of Cameras Before Photography

For centuries before the invention of photography, artists used cameras and optical devices of various designs to project views of the three-dimensional world onto two-dimensional surfaces to help them more accurately render their subjects. The camera obscura is a simple device consisting (in its most common form) of a box with a lens on one side, a mirror mounted at 45 degrees inside, and a ground-glass panel on top. The lens refracts light emanating from objects in the world in front of the camera and projects an image onto the ground glass. The fixed viewpoint of the lens yields an image with geometrically accurate perspective that can easily be traced onto a sheet of translucent paper.

With the aid of a camera obscura, the translation from three dimensions to two can be accomplished without specialized training of eye and hand. Even a person who “cannot draw” is capable of tracing the outlines of a scene projected onto the ground glass of a camera obscura to produce a rendering of a natural scene.

The use of a camera obscura altered the relationship between the artist and subject in two important ways. It introduced the notion of a stationary and singular (photographic) viewpoint, and it externalized the process of visualization. Before the camera existed it was necessary for all original pictorial art to be visualized in the mind of the artist before it was rendered. The camera introduced a mechanism to replace visualization. This removed visualization from the exclusive possession of the artist, since the act of tracing the projected image onto the ground glass of a camera obscura was not an act of original creation by imitation of nature, but one of simple copying. Thus, the use of a camera had the potential to compromise the authority of the artist by weakening the claim of originality.

The recent suggestion by David Hockney that some of the great old master painters such as Rembrandt and Vermeer used cameras as an aid to their drawing from nature<sup>130</sup> has caused much heated debate among scholars and critics.<sup>131</sup> The practice of using optical or photographic aids to drawing and painting has often been stigmatized as a form of “cheating” on the part of the artist. In most contemporary art schools one of the foundational skills still required of all students is to learn to draw from life without the use of a camera or photographs. There is an implied assumption in this requirement that drawing from life with the unaided eye is a higher road to the creation of art.

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130. DAVID HOCKNEY, SECRET KNOWLEDGE: REDISCOVERING THE LOST TECHNIQUES OF THE OLD MASTERS (2001).

131. See Frank Van Riper, *Hockney's 'Lucid' Bomb at the Art Establishment*, WASH. POST CAMERA WORKS, <http://www.washingtonpost.com/wp-srv/photo/essays/vanRiper/030220.htm> (last visited May 3, 2012) (providing a summary of the controversy surrounding the Hockney thesis).

The singular, stationary viewpoint of the camera also enabled the artist to produce images that were geometrically accurate. An image projected on the ground glass automatically incorporates realistic aspects of perspective and foreshortening that can be rendered by tracing, but which would be difficult to draw without the aid of a camera. After artists began using the camera obscura, geometric accuracy from a stationary viewpoint became an expected ingredient in any artwork that claimed faithfulness to reality. For this reason, the camera became indispensable to certain forms of pictorial artwork where faithfulness to reality is required.

## 2. Photographic Processes

Regardless of the truth in the controversy over which, if any, of the old masters used cameras and other optical tools to guide their work, there is no doubt that the camera is a useful aid to realistic drawing. In the 1830s two processes for automatically recording permanent images directly with a camera were invented independently. William Henry Fox Talbot's motivation for the invention of the negative/positive photographic process was his desire to find a way to fix images projected on the ground glass of a camera obscura. Simultaneous with Fox Talbot's invention, Louis-Jacques Daguerre invented another practical process for fixing an image in a camera obscura. Daguerre was also an artist looking for a way to capture images with a camera. His process produced a single image on a silver plate that could not be replicated, whereas Fox Talbot's process enabled multiple copies of an original image to be printed. This capability was quickly put to use by Fox Talbot with the publication of his work in a series of book installments entitled *The Pencil of Nature*, which incorporated actual photographic prints along with the text.<sup>132</sup>

The invention of photography enabled artists to escape the bounds of real time and space by making a record of a projected image of reality for later reference. One aspect of photographs that fascinated Fox Talbot and the first generation of photographers was their ability to capture a complete detailed record of a scene. They could not help but evaluate this capability in light of what it would require of an artist working manually to achieve the same result. Fox Talbot wrote,

One advantage of the discovery of the Photographic Art will be, that it will enable us to introduce into our pictures a multitude of minute details which add to the truth and reality of the representation, but which no artist would take the trouble to copy faithfully

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132. See WILLIAM HENRY FOX TALBOT, THE PENCIL OF NATURE (1844), available at <http://www.gutenberg.org/files/33447/33447-pdf.pdf>.

from nature. Contenting himself with a general effect, he would probably deem it beneath his genius to copy every accident of light and shade; nor could he do so indeed, without a disproportionate expenditure of time and trouble, which might be otherwise much better employed.<sup>133</sup>

Whereas the camera obscura mechanized the process of visualization, chemical photography could now mechanize the manual work of rendering, eliminating the time and labor required of the artist to produce a meticulously complete drawing.

During the first century after the invention of photography, the most significant improvements in the technology involved the ability to record images in shorter increments of time. The original processes of Fox Talbot and Daguerre were capable of recording vast amounts of detail,<sup>134</sup> but required long exposures that made it impossible to record subjects that were in motion. By 1878 Eadweard Muybridge was able to make photographs quickly enough to stop a horse in mid gallop,<sup>135</sup> and by the 1940s Harold Edgerton was making clear photographs of bullets frozen in flight.<sup>136</sup> Each improvement in the capability of photography extended the power of artists to visualize aspects of the natural world that were not visible to the naked eye.

Before the invention of the camera or photography the value of a work of art was almost entirely seen as having been created by the artist. The tools and materials of the trade such as brushes and canvases were not imbued with special powers of their own that contributed to this value. But the camera was different, because it played an active role in the production of the work. Technology was seen as the prime agent of photographic picture-making and the artist was seen as a mere operator of the equipment. Several decades would pass before it became conceivable that the value of a photograph could owe more to the creative work of a person than to the technology used to create it.

In addition to automating the process of drawing, photography also served as a substitute for visual memory. Photographs would preserve all of the detail of an original scene for later reference by the artist. This allowed artists to work while spatially and temporally re-

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133. TALBOT, *supra* note 132, at Plate X.

134. Julie Rehmeyer, *1848 Daguerreotypes Bring Middle America's Past to Life*, WIRED (July 9, 2010, 3:41 PM), [http://www.wired.com/magazine/2010/07/ff\\_daguerreotype\\_panorama](http://www.wired.com/magazine/2010/07/ff_daguerreotype_panorama) (providing an interactive demonstration of the astounding resolution of a daguerreotype from the mid-nineteenth century).

135. Before Muybridge made his photographs, it was not known whether all of the feet of a galloping horse were ever simultaneously off the ground. Muybridge's photographs proved that there was a point in the gallop where they were.

136. Harold Edgerton, *Iconic Images: Bullets and Blasts*, THE EDGERTON DIGITAL COLLECTIONS (EDC) PROJECT, <http://edgerton-digital-collections.org/galleries/iconic/bullets> (last visited May 3, 2012).

moved from their subjects. Artists could also use images made by other people as references for their own work, thus eliminating the need for direct personal vision. Each of these capabilities of photography expanded the possibilities for visual expression while reducing the amount of labor required of the artist.

It was not long after the invention of photography that photographers began using images formed individually in the camera to construct composite images in the darkroom. In 1857, Oscar C. Rejlander created an experimental composite photograph entitled *Two Ways of Life* that was hailed at the time as a masterpiece of photographic accomplishment, but for which Rejlander later felt compelled to apologize to the public.<sup>137</sup> Rejlander had intended his composite photograph to be merely a demonstration of capability, not a serious artistic work. The earliest attempt to make serious artwork using this compositing technique was by the Englishman Henry Peach Robinson. His sentimental composition, *Fading Away*, depicted a domestic scene of a dying woman attended by three members of her family. Each element in the composition was photographed separately and then combined in the darkroom into the final composition.

Since the time of Rejlander and Robinson, commercial photographers used the techniques of combining elements from different negatives as a basic tool of the trade. In portraiture, the face from one negative could be grafted onto the body of another.<sup>138</sup> In landscape photography, the white featureless sky in one photograph could be replaced by a dramatic sky from another. These techniques have survived to the present day, and are now far easier to accomplish with digital technology than they ever had been in the darkroom.

Illustrators working in traditional media have also employed photographic compositing as a way of introducing more credible levels of realism into their compositions. Norman Rockwell developed a technique whereby he would first produce all of the graphic elements of a new work photographically, and then use a device called a Balopticon to project the photographic images onto his canvas as guides to his drawing and painting.<sup>139</sup> Rockwell acknowledged two clear facts about the use of photography in the creation of his paintings. First, they enabled him to introduce a level of spontaneous naturalism into his work that was not possible when working from live models.<sup>140</sup>

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137. Oscar G. Rejlander, Remarks at the South London Photographic Society: An Apology for Art-Photography (Feb. 12, 1863).

138. An early example is a familiar portrait of Abraham Lincoln made in the 1860s by grafting Lincoln's head onto a heroically posed standing figure of John C. Calhoun. See WILLIAM J. MITCHELL, THE RECONFIGURED EYE 204–06 (1992).

139. See RON SCHICK, NORMAN ROCKWELL: BEHIND THE CAMERA (2009) (providing a complete explanation of Rockwell's use of photography as an integral part of his illustration process).

140. *Id.* at 18.

Second, many pictorial artists, and perhaps even Rockwell, viewed his use of photography as a “dishonorable crutch for lazy draftsmen.”<sup>141</sup>

This dialog between the acknowledgement that photographic techniques are essential to achieving a naturalistic faithfulness to reality and the suspicion that using a camera somehow compromises the artist’s claim of authorship or originality has been ongoing from the time of Rejlander and Peach Robinson to the present. The dialog was present in the legal suit that the AP brought against Shepard Fairey. On the one side, Fairey acknowledged that his vision for the poster required that he find a suitable photograph of Obama for a model. On the opposing side, Fairey’s use of the Garcia photograph compromised his claim of authorship and ownership of the final artwork.

### 3. Photographic Halftone Reproduction in Print Mass Media

The first photographers who made composites created each of the original photographic elements themselves. Eventually, artists began to use elements of photographs that were made by others in their work. Easy access to these kinds of sources only became possible with the introduction of technologies for the mass production and dissemination of photographic images. The first successful processes for the mechanical reproduction of photographs in printed media were developed in the 1880s. Before then, reproductions of photographs in print, such as the reproductions of Mathew Brady’s Civil War photographs printed in *Harper’s Magazine* in the 1860s, were actually made from hand-cut wood engravings modeled on the original photographic prints. In reality, Brady’s photographs reproduced in print were hand-drawn illustrations that used his photographs as reference images.<sup>142</sup>

The system for the creation and dissemination of photographic images that evolved during the first century after the invention of photography was based on advancements in photographic materials science and photo-mechanical printing technologies. By the 1920s, photographically rich print media were becoming common channels of visual mass communication. Photography had become firmly established in the public mind as the standard of visual credibility. The ubiquity and variety of printed photographs constituted a rich new ecosystem of visual reference materials from which artists could draw inspiration. It would only be a matter of time before some artists would begin to directly copy photographic elements from printed media into new works.

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141. *Id.*

142. A comprehensive history of the development of technologies for printed reproduction of photographs can be found in RICHARD BENSON, THE PRINTED PICTURE (2008).

The first wave of direct appropriation of photographic images made by others was both made possible and inspired by the rise of photographically illustrated print mass media after the First World War. Artists of the German Dada movement coined the term “photomontage” to describe work that contained appropriated photographic imagery. Images were clipped directly from the pages of illustrated magazines or posters and incorporated into new works that communicated radically different, even contrary, messages from the original sources. The mechanical process of cutting and pasting photographic images from their original printed contexts into new works anticipated techniques of appropriation and reuse that have become ubiquitous in the digital age. The essential difference between then and now is that today any artist with an Internet connection has instantaneous access to a vast repository of source imagery that can be copied and repurposed easily with a few clicks of the mouse.

There is an important distinction to be made between appropriating someone else’s work and presenting it in its original context as one’s own, and using the work in a new context that is different from the original. The former is universally considered to be little more than a form of theft, whereas the latter can sometimes be the basis for the highest forms of art. Artists have been testing this boundary for almost a century and continue to do so to the present. At the extreme end of this tradition, appropriation may involve the wholesale and exact copying of a pre-existing work and recasting of the work in a new context as a new and original work.<sup>143</sup> This is in effect what many people have done by relabeling the original Hope Poster image with words like “Hype,” “Socialist,” and “Liar.” Of course, it is unlikely that any of these appropriated and re-contextualized Shepard Fairey images will make their way beyond this paper into the canon of Western art.

#### 4. The Electronic Photograph

Elements of the contemporary Internet-based digital image ecosystem began to emerge almost a century ago, starting with the conversion of photographs into formats that could be transmitted by wire.

Until the second decade of the twentieth century, photographs could only be transported from one place to another as crafted or manufactured physical objects. The telegraphic transmission of a signal representing a photographic image was first demonstrated in the

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143. As an example, see Sherrie Levine’s body of work, *After Walker Evans*, where she presents a number of Evans’s most famous photographs reproduced literally but in an entirely new context. Levine, *supra* note 113.

first decade of the 1900s.<sup>144</sup> By the mid-1920s, the technology for scanning and transmitting photographs over telephone lines was introduced; it became commercially viable with the introduction of the AP wire photo service in the 1930s. To transmit a wire photo, an original photographic print was scanned on a rotating drum by a device that converted gray values in the photograph into an analog signal. This signal could be transmitted over telephone lines and reconstructed by a receiving device that interpreted the telephonic signal to modulate a light source and sequentially expose a piece of photographic paper on a rotating drum.

This process of scanning, transmission, and reconstruction opened the possibility of recording an electronic representation of an image that could be stored and later retrieved as data. But each subsequent retransmission of an analog image adds noise and degrades the quality of the image. So images stored in analog form depend upon physical media such as magnetic disks or tapes for distribution, and can only be displayed or reproduced using proprietary equipment. The analog wire photo service was a closed system that did not allow for electronic images to be used for purposes other than to reconstruct photographic prints at the receiving end.

It was not until images could be represented in digital form that they could easily be replicated and transmitted without degradation. Steven Sasson and Gareth Lloyd created the first fully integrated digital camera capable of taking a photograph and storing it in digital form in the laboratories of the Eastman Kodak Company in the mid-1970s.<sup>145</sup> The camera employed a charge-coupled device consisting of a two-dimensional array of 10,000 (100 by 100) photo-sensitive elements to produce a crude matrix of numbers representing a pattern of lightness values emanating from the photographed scene. This matrix of numbers was stored as a digital file on a magnetic tape cassette. This file could be stored in computer memory and manipulated by the computer as digital data.

A simulation of what this first digital camera would have been capable of recording, had it been used by Mannie Garcia to take his photograph of Barack Obama, is shown in Figure

Even at this extremely low resolution, the face is clearly that of Barack Obama, and one can well imagine that an artist looking for a reference image from which to derive a likeness of the president might find it useful.<sup>146</sup> Furthermore, it is likely that any casual observ-

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144. Association of Engineering Societies (U.S.), *Telectroscope*, 4 ENGINEERING INDEX 1105 (Henry Harrison Suplee & J. H. Cuntz eds., 1906) (crediting German physicist Arthur Korn with the first electronic transmission of a photographic image).

145. U.S. Patent No. 4,131,919 (filed May 20, 1977).

146. It is worth noting that Shepard Fairey used a relatively low-resolution version of Mannie Garcia's Obama photograph for his reference, and did not seek to find the original full resolution version upon which to model his artwork.

er would choose this crude photographic image over any non-photographic depiction of the same person, no matter what the resolution, if faithfulness to reality were the sole criterion for selection. This is because even at low resolution the photograph contains all of the correct biometrics of the face.

Based on an assumption that consumers would be satisfied with approximately two million pixels of image resolution, and by applying Moore's law (which postulates that the number of transistors that can be fit on an integrated circuit will double every two years),<sup>147</sup> Sasson predicted that digital photography would become a viable alternative to chemical-based photography approximately fifteen to twenty years after its invention.<sup>148</sup> By the beginning of the present century, digital cameras were reaching that threshold of resolution, and soon thereafter digital photography began to rapidly displace film photography in both consumer and professional markets.<sup>149</sup> For thirty years after the invention of the digital camera, the primary axis of improvement of the technology was in the number of megapixels of data that could be recorded. But we are fast approaching an end to the so called "megapixel war" because there are practical limits to the resolution needed to satisfy the human visual system.<sup>150</sup>

Even though the potential usefulness of digital images as references for artists was evident shortly after the invention of digital photography, it is only in the past decade that all of the elements have come together to create an Internet-based ecosystem that is making the collective photographic record of the world accessible and usable by artists as common reference material. The components of this ecosystem include:

- (a) Digital cameras;
- (b) Ubiquitous broadband connectivity;
- (c) Standardized digital image formats;
- (d) Photo databases and consumer photo sharing sites;
- (e) Image search;
- (f) Photo editing and manipulation tool sets.

Major search engines such as Google and Bing can deliver vast numbers of images of almost anything in the world to an artist in search of references. Once found, an image can be quickly downloaded and used as a starting point for the creation of derivative works.

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147. Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, 38 ELECTRONICS 114 (1965).

148. Laura Domela, *Interview with Steven Sasson, Inventor of the Digital Camera*, ELEC. ENG'G J. FRESH BYTES (Apr. 11, 2011, 2:49 PM), <http://www.techfocusmedia.com/archives/fresh-bytes/interview-with-steven-sasson-inventor-of-the-digital-camera>.

149. See *Digital Camera Timeline*, DIGITAL PHOTOGRAPHY REV., <http://www.dpreview.com/products/timeline> (last visited May 3, 2012) (providing comprehensive timeline of both consumer and professional digital cameras from 1994 to present).

150. See, e.g., Jean-Louis Gassée, *The End of Megapixel Wars*, MONDAY NOTE (Aug. 23, 2009, 9:45 AM), <http://www.mondaynote.com/2009/08/23/the-end-of-megapixel-wars>.

### 5. Conclusion

Shepard Fairey sought a suitable photograph of Barack Obama upon which to base his poster because the power of his message was dependent upon the fact that viewers of the finished work would identify the stylized subject as Barack Obama, and not as an artist's drawing of Barack Obama. The techniques for deriving graphically powerful portraits from original photographs that he first learned at RISD in the 1980s, and which he perfected over many years of subsequent practice, enabled him to successfully express his visual ideas. A photographic original provides a biometrically accurate model of a familiar face that can then be used as the framework for artwork. If Fairey had drawn Obama's face, no matter how skilled he might be as an artist, it would have been seen as a drawing of Obama, not as Obama himself. The only way his message could work was if viewers saw Obama himself on the final poster, and not a drawing of Obama.

Each new generation of camera-based technology adopted by pictorial artists has enabled new possibilities for transformative art by extending the limits of vision and visual imagination. The camera obscura enabled artists to mechanically reduce a natural scene to a geometrically accurate two-dimensional drawing by simply tracing the outlines of projected images on a ground-glass surface without the need for the visualization and drawing skills that had always been necessary before. Photography made it possible to capture and preserve a projected image in a camera without requiring any manual drawing or tracing. Mass reproduction of photographic images in print media provided artists with a rich library of material that could be used for reference or physical appropriation. Today, artists can access a vast repository of photographic images through the Internet, and easily appropriate them.

From the beginning, the camera has allowed pictorial artists to appropriate reference imagery from beyond their own direct experience and powers of visualization. As such, the camera has remained at the center of an evolving debate about the nature of authorship of artistic work. The camera obscura challenged the notion that a drawing was something that was formed first within the mind of the artist and then rendered directly by hand. Photography replaced the need for hand rendering with an automated process, radically reducing the amount of labor required to produce an image. Print dissemination of photographs made it possible to reference and appropriate imagery from an ever-growing repository of work produced by others. Digital photography and the Internet have made the repository instantly accessible, searchable, and usable for derivative works.

The photograph that Shepard Fairey used as a reference for his poster of Barack Obama was not a product of his own observation or

powers of visualization. Nor was it even a photograph he had taken himself. The originality of his work is not dependent upon these factors, but rather upon his ability to recognize a suitable image among the myriad of head shots that he could have used as a starting point to realize his ultimate vision. In a world where the public has easy access to a vast repository of photographic imagery from the time of Fox Talbot and Daguerre to the present, the most valuable powers of observation and visualization in the creation of new art are less dependent upon the ability to create new images than upon the ability to recognize and choose from among those that already exist.

*D. What's Wrong with the Copyright Regime (Meir Feder, Edwin Fountain & Geoffrey Stewart)*

The Hope Poster case illustrates how great a shortfall exists between the ambitious purposes of the fair use doctrine and the doctrine's limited utility in serving those purposes. Courts and commentators alike have emphasized that the protection of fair use is "thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'"<sup>151</sup> Fair use is understood to be "a fundamental policy of the copyright law,"<sup>152</sup> without which copyright would threaten to "stifle the very creativity which that law is designed to foster."<sup>153</sup> "Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process."<sup>154</sup> Indeed, the Supreme Court has suggested on more than one occasion that protection of fair use is required by the First Amendment.<sup>155</sup>

To fulfill these purposes, one would expect an incentive structure designed to encourage — or at least create a reasonably safe harbor for — fair use. Such attention to real-world incentives would seem particularly appropriate in that the entire notion of copyright is incentive-based: copyright protection exists precisely because of its presumed incentive effects in "motivat[ing] the creative activity of authors and inventors."<sup>156</sup> First Amendment implications of fair use

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

152. *Leval, supra* note 84, at 1135.

153. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks omitted).

154. *Leval, supra* note 84, at 1109.

155. *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) (describing fair use laws as "First Amendment accommodations" and "free speech safeguards"); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559–60 (1985).

156. *Harper & Row*, 471 U.S. at 545–46 (internal quotation marks omitted). This focus on incentives is evident in the Copyright Clause of the Constitution — which gives Congress the power to protect copyright as a means "[t]o promote the Progress of Science and useful Arts," U.S. CONST. art. I, § 8, cl. 8, and by the original British Statute of Anne, whose preamble states that it is "for the Encouragement of Learned Men to compose and write useful Books." Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.).

might increase that likelihood, given the particular sensitivity of First Amendment law to the ways in which potential liability can chill protected speech.<sup>157</sup> Yet in reality, a system of disincentives powerfully deters fair use — more powerfully, in fact, than the law deters most non-speech forms of tortious conduct.

Those disincentives include an uncertain and unusually fact-specific legal standard that provides no safe harbor for fair use;<sup>158</sup> potentially crushing litigation and discovery expenses; and an overtly punitive system of remedies — including fee shifting, disgorgement remedies, and statutory damages — that seems particularly incompatible with a doctrine ostensibly designed to protect and encourage fair use. As detailed below, the Hope Poster litigation illustrates how these provisions systematically favor plaintiffs (especially ones with deep pockets) and create untenable risks for defendants — even in a case involving a strong claim of fair use and a fair-use defendant with some resources and the benefit of *pro bono* representation.

In short, notwithstanding the lip service courts pay to the importance of fair use, the reality is that one using an existing work “as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — [i.e.,] the very type of activity that the fair use doctrine intends to protect for the enrichment of society”<sup>159</sup> — does so at one’s own peril, and with little assurance that one’s cultural contribution will not result in financial ruin.

### 1. Unpredictability

One of the major forces undermining the utility of fair use doctrine is the sheer unpredictability of the protection it offers. In other areas of the law, the courts readily recognize that uncertainty about the legal consequences of conduct will necessarily deter that conduct. The most prominent example is the “actual malice” rule of *New York Times Co. v. Sullivan*, which is premised on the recognition that without such a rule critics “may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”<sup>160</sup> Likewise, the qualified immunity doctrine protecting public officials permits liability only for violations of

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157. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (creating safe harbor for false statements about public officials made without actual malice).

158. See, e.g., William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1693 (“[T]he disarray of the doctrine impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly.”).

159. *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting Leval, *supra* note 84, at 1111).

160. 376 U.S. at 279.

“clearly established” law, in recognition of “the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”<sup>161</sup>

Those engaging in fair use face precisely the sort of uncertainty that these doctrines seek to avoid. Indeed, not only does copyright law contain no well-defined safe harbor for fair use, but the fair use doctrine is expressly structured as one that is multi-factored and case-specific and abjures hard-and-fast rules. The Supreme Court has termed it “an equitable rule of reason,”<sup>162</sup> meaning it is subject to all the vagaries and indefiniteness encompassed within the adjective “reasonable.” One leading treatise states that “[n]o copyright doctrine is less determinate than fair use,” and that fair use is “a fact-specific doctrine that aims to negotiate liability in situations too fine-grained for Congress to address specifically in the statute.”<sup>163</sup> It is “a quintessentially pragmatic doctrine that proceeds from case to case, with precedent, not theory, as its guide.”<sup>164</sup> The complexity and indeterminacy of the defense are reflected in the fact that the number of articles with “fair use” in its title from 1990 to 2005 was more than double the number of court opinions about fair use.<sup>165</sup>

One reason for the indeterminacy of the defense lies in the structure of the statute itself. Section 107 was intended to codify the common law of fair use.<sup>166</sup> It first attempts to define some contours for the defense by setting forth some representative types of use that presumptively qualify as fair, such as criticism, comment, news reporting, teaching, and the like.<sup>167</sup> It goes on to prescribe that in determining whether the use of a copyrighted work is a fair use, a court or jury must consider four factors:

- (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;

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161. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)) (alteration in the original) (internal quotation marks omitted).

162. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 n.31 (1984).

163. II GOLDSTEIN ON COPYRIGHT § 12.1, at 12:3 (3d ed., 2011 Supp.) [hereinafter GOLDSTEIN]; *see also Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (“Fair use is one of the most unsettled areas of the law.”).

164. GOLDSTEIN, *supra* note 163, at 12:5.

165. Barton Beebe, *An Empirical Study of U.S. Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 565 n.64 (2008).

166. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

167. 17 U.S.C. § 107 (2006).

- (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>168</sup>

The Supreme Court has identified the considerable play in the joints of the statutory characterization of fair use:

The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given . . . which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.<sup>169</sup>

Moreover, the four factors set forth by the court are not meant to be exclusive.<sup>170</sup>

The consequence of this statutory approach is that the task of ascertaining fair use “is not to be simplified with bright-line rules.”<sup>171</sup> Congress “eschewed a rigid, bright-line approach to fair use,”<sup>172</sup> and identified “various factors that enable a court to apply an ‘equitable rule of reason’ analysis to particular claims of infringement,”<sup>173</sup> one that calls for “a sensitive balancing of interests.”<sup>174</sup>

Courts and commentators have described the indeterminacy brought about by the statute:

Congress adopted three considerably inconsistent ways of doing nothing: simple reference to fair use, specification of what is fair use by illustrative examples, and prescription of nonexclusive “factors to be considered” in determining whether a particular use is fair. As Hercule Poirot observed about the murder

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168. *Id.*

169. *Campbell*, 510 U.S. at 577–78.

170. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

171. *Campbell*, 510 U.S. at 577; accord *Harper & Row*, 471 U.S. at 561.

172. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 n.31 (1984) (referring to the Senate Committee’s views as expressed in the Senate Report).

173. *Id.* at 448.

174. *Id.* at 455 n.40.

on the Orient Express, the problem is not that there are too few clues but that there are too many.<sup>175</sup>

Having grappled with the fair use doctrine in deciding two cases that were subsequently reversed on appeal, Judge Pierre Leval of the U.S. District Court for the Southern District of New York lamented:

Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the “purpose and character” of the secondary use. It gives no clues at all regarding the significance of “the nature of” the copyrighted work . . . [I]t provides no guidance for distinguishing between acceptable and excessive levels. Finally, although leaving open the possibility that other factors may bear on the question, the statute identifies none.<sup>176</sup>

Thus, the result of the 1976 Copyright Act, along with the Supreme Court decisions applying it, “has been, if anything, confusion compounded . . . [T]he statute merely made the common law’s uncertainties explicit.”<sup>177</sup>

Consequently, courts have emphasized the case-by-case nature of the fair use inquiry. As the Court held in *Sony*, “since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”<sup>178</sup> One of the authors of this Article previously noted the Court’s first two attempts to articulate the fair use doctrine in *Sony* and *Harper & Row*, lacked an “effort to prescribe a rule to govern future controversies. The consensus of the Court was that ‘fair use analysis must always be tailored to the individual case.’”<sup>179</sup> Judge Leval thus lamented that “neither the decisions that have applied [the fair use doctrine] for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives.”<sup>180</sup>

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175. See, e.g., Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1139 (1990) (footnotes omitted).

176. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990).

177. Weinreb, *supra* note 175, at 1137.

178. 464 U.S. at 449 n.31 (quoting H.R. REP. NO. 94-1476, at 65–66 (1976)); see also *id.* at 479–80 (Blackmun, J., dissenting) (“The inquiry is necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules.”); *Campbell*, 510 U.S. at 577 (“[T]he statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

179. Fisher, *supra* note 158, at 1668 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985)).

180. Leval, *supra* note 84, at 1105.

Because the fair use inquiry is not susceptible to clear rules but is to be made on a case-by-case basis, a copyright defendant faces the prospect of a jury trial, with all of the uncertainty that jury determinations entail.<sup>181</sup> In early cases applying the 1976 Copyright Act, courts indicated a presumption in favor of jury trials, deeming that the assessment of the four fair use factors under Section 107 “in a particular case is obviously a fact specific inquiry for which summary judgment is ill-suited.”<sup>182</sup>

Since these early cases, summary judgments have now become more prevalent.<sup>183</sup> However, predicting the outcome of a summary judgment motion (or cross-motions for summary judgment), as a copyright defendant must do when balancing the likelihood of success on the merits against the consequences of defeat, is no easy task. As Judge Leval observed:

Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace . . . . Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.<sup>184</sup>

Lower courts also often disregard Supreme Court precedent when deciding fair use.<sup>185</sup> As a consequence, “[t]he field is littered with the corpses of overturned opinions, like Judge Leval’s.”<sup>186</sup> Indeed, the difficulty in applying the four factors of Section 107 is illustrated by the fact that in each of the three Supreme Court decisions addressing fair use, the Court reversed a court of appeals, which had in turn reversed a district court’s application of the factors.<sup>187</sup>

The Hope Poster case helps to illustrate the uncertainty inherent in any fair use defense. Under Second Circuit precedent, particularly *Blanch v. Koons*,<sup>188</sup> Fairey had a strong case for prevailing on fair

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181. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 340 (1998) (indicating that as long as a material dispute of fact must be resolved in a copyright action, there is a constitutional right to a jury trial).

182. *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984); see also *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (stating that the four factors in Section 107 “raise essentially factual issues and . . . are normally questions for the jury”).

183. See *infra* note 194 and accompanying text.

184. Leval, *supra* note 84, at 1106–07.

185. See *Beebe*, *supra* note 165, at 572, 604–06.

186. Weinreb, *supra* note 175, at 1137.

187. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

188. 467 F.3d 244 (2d Cir. 2006).

use<sup>189</sup> as a matter of law — if not before the district court on summary judgment, then on appeal. But as noted above, courts themselves can be inconsistent and unpredictable in applying the fair use doctrine, which has been called “one of the most unsettled areas of the law.”<sup>190</sup> And in the *Fairey* case, the trial court stated in open court — before any summary judgment motions were filed — that it likely would not resolve the case on summary judgment, meaning that the validity of Fairey’s fair use defense, along with his other defenses, would be subject to all the uncertainties of a jury trial.

In addition to the uncertainties inherent in any jury trial, the multi-factor nature of the fair use determination would have made the outcome of a trial particularly difficult to predict. Fairey’s purpose in creating the Hope image was political; the image was intended as a campaign poster, and later was incorporated into larger works commissioned by the Presidential Inaugural Committee (“PIC”) and MoveOn.org, to be used in posters and stickers celebrating Obama’s victory and inauguration. But political purposes are not addressed by the statute, either in the preamble or in the four enumerated factors, leaving their treatment as fair use up to the decision of a jury. Fairey did not intend any commercial use of the image — anticipating that any proceeds of sales would be plowed back into paying for the cost of hundreds of thousands of posters to be distributed for free to Obama supporters — but months later he received considerable royalties from the PIC and MoveOn.org for his inauguration posters, as well as on sales of fine art versions of the image. The case law provides little guidance on the fair use analysis as it applies to a work that was initially undertaken for no commercial gain, but which subsequently yields unintended remunerative uses. The parties disputed vigorously how the portions of the Garcia photo used by Fairey — Obama’s likeness and the pose and expression captured by Garcia — should be treated under the third statutory factor (“the amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole”).<sup>191</sup> The fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,”<sup>192</sup> seemed to favor Fairey, since a New York gallery owner began selling fine art quality prints of the Garcia photo for upwards of \$1000 a copy after its linkage with the Hope Poster became known.

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189. As described in greater detail in Part II.C, fair use was not Fairey’s only defense to the AP’s infringement claim. In particular, the Hope image had taken little substantively from the Garcia photograph beyond the outlines of Barack Obama’s facial features, and even this fell squarely within the doctrine of *scènes à faire*. See *supra* Part II.C.

190. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996).

191. 17 U.S.C. § 107 (2006).

192. *Id.*

## 2. Jury Prejudice Against Copying and Copiers

In addition to the uncertainties inherent in the multi-factor fair use legal standard, another obstacle for assertions of fair use is that, as jury research and practical experience reveal, lay jurors instinctively dislike people who copy the work of others. Consequently, copyright defendants enter the courtroom under a cloud. Although the jury will be instructed that it is the plaintiff who bears the burden of going forward, videotaped deliberations of mock juries reveal that, as often as not, it is up to the defendant to prove he did not infringe. Obviously, this dynamic is worse in cases where the burden of proof shifts.

This prejudice can nullify principles that should maintain balance between the protection of expression and artistic creativity. In *Fairey v. Associated Press*, one important element of Fairey's defense was that his Hope Poster had, in fact, taken very little of the expressive content from Mannie Garcia's photograph of Barack Obama — mainly the outlines of Obama's face — and possibly none of the photograph's protected content.<sup>193</sup> Nevertheless, juxtaposition of the poster and the photograph made one look like a copy of the other. Jurors unwilling to go through the analytical steps the Copyright Act requires could readily find infringement even if Fairey's conduct was protected.

Judges often conclude that the level of analysis required in a copyright action is beyond the ken of lay jurors. It is possibly for this reason that a surprising number of copyright cases are decided on summary judgment.<sup>194</sup> Again, however, in the *Fairey* case, because the judge had informed the parties that he did not intend to resolve the case by summary judgment, the complex issues of fair use and protected content would have been decided by the jury.

## 3. Punitive and Asymmetrical Penalties

Perhaps the most troubling aspect of the legal regime applicable to fair use cases is the punitive, and potentially bankrupting, set of remedies to which a defendant — even one who has acted in the good-faith belief that his or her work qualified as a fair use — is subject if a fair use defense is unsuccessful. The Supreme Court has recognized that cases “raising reasonable contentions of fair use” are “worlds apart” from “most [copyright] infringements,” which are

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193. Cf. *Blanch*, 467 F.3d at 253 (“When, as here, the copyrighted work is used as ‘raw material,’ in the furtherance of distinct creative or communicative objectives, the use is transformative [and constitutes fair use.]”) (internal citations omitted).

194. Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 485 (2010).

“simple piracy,”<sup>195</sup> yet such cases of arguable fair use are subject to the same system of remedies designed to punish and deter “simple piracy.”<sup>196</sup> This system includes overlapping damages remedies that entitle plaintiffs to not only their own lost profits but also any additional profits received by the defendant, burden-shifting mechanisms that create presumptions of damages in favor of plaintiffs that defendants have the burden of disproving, the possibility of statutory damages when actual damages cannot be proved, and the possibility of attorneys’ fee awards that can far exceed the amount of damages.

#### *A. Damages and Remedies*

“The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work,”<sup>197</sup> which creates several incentives encouraging copyright holders to bring lawsuits. Foremost among these is the Act’s system for awarding damages. Section 504(b) of the Act permits the copyright owner “to recover the actual damages suffered by him or her as a result of the infringement.”<sup>198</sup> In addition to his damages, the owner may seek disgorgement of “any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”<sup>199</sup> Damages are typically measured by either the plaintiff’s lost sales as a result of the infringement (often calculated by reference to the infringer’s own sales, where the infringer directly competes with the plaintiff),<sup>200</sup> or by a hypothetical lost license fee, a royalty that the copyright holder would reasonably have expected to obtain from the infringer.<sup>201</sup> A third measure is the loss in market value of the copyrighted work caused by the infringement.<sup>202</sup> The copyright plaintiff need not prove damages with exact precision, and uncertain-

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195. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (internal quotation marks omitted).

196. There is one statutory provision limiting the damages liability of “an infringer [who] believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use,” but the provision limits only statutory damages, and applies only to defendants who are employees or agents of certain nonprofit institutions. 17 U.S.C. § 504(c)(2) (2006 & Supp. IV 2010).

197. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 433 (1984).

198. 17 U.S.C. § 504(b) (2006).

199. *Id.*

200. See, e.g., *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 280–81 (6th Cir. 1988); *Stevens Linen Assocs. v. Mastercraft Corp.*, 656 F.2d 11, 15 (2d Cir. 1981); *Design Res., Inc. v. John Wolf Decorative Fabrics*, 229 U.S.P.Q. 418, 424 (S.D.N.Y. 1985); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 860 (S.D.N.Y. 1984).

201. See, e.g., *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708–09 (9th Cir. 2004) (upholding jury award of lost license fees).

202. See, e.g., *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988), *aff’d on other grounds sub nom. Stewart v. Abend*, 495 U.S. 207 (1990); *Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 827–28 (9th Cir. 1985); *Mfrs. Techs., Inc. v. Cams, Inc.*, 728 F. Supp. 75, 80 (D. Conn. 1989).

ties are resolved in favor of the plaintiff.<sup>203</sup> The copyright holder's damages and the infringer's profits are cumulative, not alternative,<sup>204</sup> except in cases where the infringer's profits constitute lost sales suffered by the holder.<sup>205</sup> And when these remedies fail, a copyright owner has available the backstop of statutory damages.<sup>206</sup>

One notable aspect of this remedial scheme is that it contains an unmistakably punitive component that goes beyond mere compensation. "Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act."<sup>207</sup> The disgorgement of the infringer's profits, as one court put it, thus "overlaps substantially with the goals of punitive damages awards."<sup>208</sup> While punitive remedies may be justified as a means of deterring copyright infringements that amount to blatant theft, applying the same system of penalties to cases of arguable fair use necessarily deters exercises of fair use.

Moreover, the Copyright Act and courts applying the Act have created various burden-shifting presumptions that heighten the risks to copyright defendants. In the case of the copyright holder's actual damages as measured by the infringer's sales, the infringer bears the burden of proving that the plaintiff would not have made the sales made by the defendant, absent the defendant's infringement — i.e., that the defendant would have made the sales by non-infringing means, or that some third competitor would have taken the defendant's sales.<sup>209</sup>

*Actual Damages.* In the Fairey case, the AP's actual damages were questionable. The AP did not contend that the Hope Poster took sales away from the AP's news photograph; a news editor looking for an image of the candidate to illustrate an article would not choose the Hope Poster — a stylized, non-realistic image of Obama — instead of the Garcia Obama photograph. To the contrary, the evidence was clear that Fairey's Hope image had increased the value of the Garcia

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203. Cf. *On Davis v. GAP, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001).

204. See *Eales v. Env'tl. Lifestyles, Inc.*, 958 F.2d 876, 880 (9th Cir. 1992) (plaintiff entitled to recover the fair market value of her architectural plans in addition to profits the infringer earned from sales of houses built from the infringing plans).

205. See, e.g., *Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983).

206. 17 U.S.C. § 504(c)(1) (2006).

207. H.R. REP. NO. 94-1476, at 161 (1976); see also *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 568–69 (7th Cir. 2003) (award of infringer's profits meant to deter would-be infringers).

208. *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007).

209. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985) ("[O]nce a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression."); *Stevens Linen Assocs. v. Mastercraft Corp.*, 656 F.2d 11, 15 (2d Cir. 1981).

Obama photograph and the AP's revenues from the photograph. The value of the Garcia photograph itself soared once its association with the Hope Poster was known, as evidenced by sales of fine art reproductions of the photograph, and the AP's licensing revenues for the photograph also increased.

Instead, the AP claimed as actual damages its lost license fees — the fees that it alleged Fairey would have paid the AP for his use of the Garcia Obama photo. The fee that the AP claimed that it would have obtained was more than ten times the highest fee the AP had ever charged for a single photograph. However, juries decide cases with the benefit of hindsight, and the AP could point out that the Hope image had become one of the most stunningly successful derivative uses of a news photo in recent memory.

*Fairey's Profits.* The heart of the AP's damages claim, however, was not the foregone licensing fee, but rather damages based on Fairey's own direct and indirect profits. As to direct profits, the AP sought to recover approximately \$1 million in gross revenues that Fairey gained from the Hope image, and another \$2.3 million earned by OBEY Clothing, the clothing firm under license to Fairey that sold T-shirts and sweatshirts displaying the Hope image. Moreover, the AP claimed it was entitled to revenues from Fairey's non-Hope images and work that the AP alleged were due to the increased public profile Fairey enjoyed from his association with the Hope image.

A more threatening weapon in the plaintiff's arsenal of remedies is the claim to the infringer's indirect profits. The Copyright Act's language broadly permitting recovery of "any profits of the infringer that are attributable to the infringement"<sup>210</sup> has been held to include profits not just on the sale of works that copy or incorporate the copyrighted work, but also profits that the infringer earns from other activities that were enhanced by the infringement. Thus, for instance, when a defendant uses copyrighted material in advertising, he may be liable for his profits on sale of the goods advertised, even though he did not earn a direct profit from the advertisement itself.<sup>211</sup>

While plaintiffs have had less success in proving indirect profits,<sup>212</sup> the *in terrorem* effect can be considerable. In the *Fairey* case, the AP sought not only to recover Fairey's direct revenues from the Hope image, but also claimed that it was entitled to the entire increase in Shepard Fairey's art sales after creation of the Hope image, as well as revenues of Fairey's commercial graphic design firm, Studio One, on the theory that Fairey's later success was attributable entirely to the

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210. 17 U.S.C. § 504(b) (2006) (emphasis added).

211. See, e.g., *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 712–14 (9th Cir. 2004); *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 797 (8th Cir. 2003).

212. E.g., *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 516–17 (4th Cir. 2003); *On Davis v. GAP, Inc.*, 246 F.3d 152, 160–61 (2d Cir. 2001).

increased public profile Fairey enjoyed as a result of the Hope image. The AP sought \$2.8 million in these indirect damages from Fairey, and another \$13.6 million in indirect profits from Obey Clothing (for a total damages claim of over \$20 million). While Fairey contended that there were significant conceptual and methodological flaws in The AP's claims, the prospect of such an extreme judgment had to be considered.

*Deductible expenses and apportionment.* In the ordinary course, a copyright defendant can offset against damages claims the expenses he incurred in creating and disseminating the accused work. But here again the Copyright Act incorporates a burden-shifting mechanism that increases the risks to copyright defendants. When proving the infringer's profits, the Copyright Act specifies that "the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."<sup>213</sup> If the infringer cannot prove his deductible expenses with reasonable certainty, then the copyright holder may recover the infringer's gross profits.<sup>214</sup> Proof of allocable indirect expenses can be a challenge for copyright defendants, and courts have scrutinized efforts to offset overhead expenses.<sup>215</sup> Some courts have held that defendants may not deduct overhead expenses when their infringement was willful.<sup>216</sup> Moreover, juries have been instructed that in calculating damages and the defendant's offsetting expenses, doubts should be resolved in favor of the copyright owner.<sup>217</sup>

The same burden-shifting rule would have applied to Fairey's argument that the AP should be entitled to recover only the value of the contribution of the Garcia photo to the success of the Hope Poster, but not the value of the contributions made by Fairey and others. Fairey, and others working with him, made significant contributions to the success of the Hope image that were independent of the copyrighted photograph, providing Fairey with a strong argument that much of the revenues he ultimately obtained from the image were "attributable to factors other than the copyrighted work" and thus not recoverable as

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213. 17 U.S.C. § 504(b) (2006).

214. *See, e.g.*, Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., 618 F.3d 417, 441 (4th Cir. 2010); *cf.* Russell v. Price, 612 F.2d 1123, 1131 (9th Cir. 1979) (applying the 1909 Copyright Act).

215. *See generally* Hamil Am., Inc. v. GFI, 193 F.3d 92, 106–07 (2d Cir. 1999); Taylor v. Meirick, 712 F.2d 1112, 1121 (7th Cir. 1983); Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 54 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940).

216. *See, e.g.*, Saxon v. Blann, 968 F.2d 676, 681 (8th Cir. 1992); Mfrs. Techs., Inc. v. Cams, Inc., 728 F. Supp. 75, 84 (D. Conn. 1989).

217. *See* Sygma Photo News, Inc. v. High Soc'y Magazine, Inc., 778 F.2d 89, 95 (2d Cir. 1985) ("Confronted with imprecision in the computation of expenses, the court should err on the side of guaranteeing the plaintiff a full recovery.").

damages by the AP.<sup>218</sup> Fairey's use of the Garcia Obama photo in creating the Hope image was a derivative use in that he did not copy the photograph verbatim, but rather eliminated some features of the photo (e.g., the flag in the background, the realistic lighting and coloring) and added elements of his own creation (e.g., the abstracted black-and-white contrast, the hand-crafted alterations to Obama's image, the unrealistic four-color scheme). The efforts of Fairey and others working with him to distribute the poster widely, along with Fairey's own established reputation as an artist, further contributed to the success of the poster. However, it was Fairey's burden to prove the proper apportionment. "With respect to apportionment of profits flowing from a copyright infringement . . . an infringer who commingles infringing and noninfringing elements 'must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party that all justly belongs to him.'"<sup>219</sup> In this case, the weighing of the relative contribution of the various elements is a matter more of judgment than of accounting, and would likely have devolved into a battle of experts.<sup>220</sup> And again, uncertainties in the apportionment exercise would be resolved in favor of the AP.<sup>221</sup>

The same burden-shifting provisions that apply in the case of awards of direct profits, with respect to deduction of expenses and apportionment of the effects of non-infringing factors, apply to indirect profits as well. Fairey would have had the task of disproving yet another negative, namely, that he would not have continued to enjoy professional success without the benefit of having created the *Hope* poster.

*Statutory Damages.* Finally, even if Fairey had been able to defeat the AP's efforts to recover its damages and Fairey's profits, the AP could fall back on statutory damages. When a copyright owner is unable to prove his actual damages or the infringer's profits, he may, "at any time before final judgment is rendered," elect to receive statutory damages instead, "in a sum of not less than \$750 or more than \$30,000 as the court considers just."<sup>222</sup>

Exposure to statutory damages is compounded by the fact that the Copyright Act gives the court discretion to quintuple the statutory damages, to as much as \$150,000 per infringement, in the event a defendant is found to have acted "willfully."<sup>223</sup> The Act does not define

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218. See 17 U.S.C. § 504(b) (2006); accord *Sheldon*, 309 U.S. at 396.

219. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985) (quoting *Sheldon*, 309 U.S. at 406).

220. See, e.g., *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 484 (6th Cir. 2007).

221. See *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1549 (9th Cir. 1989) ("In performing the apportionment, the benefit of the doubt must always be given to the plaintiff, not the defendant.").

222. 17 U.S.C. § 504(c)(1) (2006).

223. 17 U.S.C. § 504(c)(2) (2006 & Supp. IV 2010).

willfulness; in fact, the statute goes out of its way to ensure that the term remains ambiguous.<sup>224</sup> Nor have courts agreed upon a meaningful definition of the term. This uncertainty is yet another problem for copyright defendants, since courts have found defendants to be willful infringers even when the defendant raised a plausible, if ultimately unsuccessful, fair use defense.<sup>225</sup> As a consequence, jury verdicts can result in extremely high statutory damage awards that bear no relation to actual damages.<sup>226</sup>

#### 4. Fee Shifting

A final threat to a copyright defendant is the Copyright Act's attorney's fee-shifting provisions. Under the Act, the court has discretion to award costs of litigation to the prevailing party, including an award of a reasonable attorney's fee.<sup>227</sup> Some courts have held that there is a presumption in favor of awarding fees.<sup>228</sup> Moreover, some courts have held that when damages are small, the prevailing party should have a "presumptive entitlement" to an award of attorney's fees, on the rationale that absent a presumption in favor of fee awards in such cases, minor copyright infringements would "be in effect privileged, immune from legal redress."<sup>229</sup>

As a large and deep-pocketed litigant (with annual revenues in excess of \$700 million), the AP was able to fund an enormously expensive litigation effort. Thus, Fairey faced potentially more liability for attorney's fees than he risked in money damages.<sup>230</sup> Of course, the attorney's fee-shifting regime runs both ways — had Fairey prevailed at trial, he would have been entitled to have the AP pay his fees and expenses. Yet this result, too, is uneven, since the AP could readily have paid Fairey's attorney's fees, while Fairey faced personal bankruptcy if the AP prevailed.

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224. Cf. 17 U.S.C. § 504(c)(3)(B) (2006) ("Nothing in this paragraph limits what may be considered willful infringement under this subsection.")

225. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992) (characterizing artist as a willful infringer); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1543–45 (S.D.N.Y. 1991) (finding commercial photocopier of college course packets a willful infringer).

226. For instance, in a peer-to-peer music file-sharing case, actual damages were less than \$54 but the jury awarded the plaintiff record company \$222,000 against an individual defendant. *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008). See generally Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy In Need Of Reform*, 51 WM. & MARY L. REV. 439, 441–43 (2009) (cataloging numerous cases where copyright statutory damage awards were inconsistent and excessive).

227. 17 U.S.C. § 505 (2006).

228. See, e.g., *Eagle Servs. Corp. v. H20 Indus. Servs., Inc.*, 532 F.3d 620, 625 (7th Cir. 2008).

229. E.g., *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 610 (7th Cir. 2002).

230. See, e.g., *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 555 (9th Cir. 1996) (affirming award of \$1.37 million in attorney's fees).

As a consequence, Fairey and the AP faced asymmetric risks. To the AP, a loss would have meant that it had spent its legal fees in vain, would not recover damages, and would possibly be liable for Fairey's litigation expenses, all of which were minor risks to an organization owned by the largest media corporations in the world. To Fairey, a loss could have meant financial disaster, particularly since copyright damages (which are a form of tort) are in some circumstances not dischargeable even in personal bankruptcy.<sup>231</sup>

### 5. Conclusion

Trial lawyers frequently refer to the strength of their theories in terms of their percentage likelihood of success, instead of black-or-white truths, and then apply these percentages against the weight of the outcomes to assess overall litigation risk. Where, as here, the potential outcomes are asymmetrical, a large corporation with a relatively weak copyright case usually will have the litigation advantage against a smaller litigant, even when the smaller litigant has a strong case. Although the *Fairey* case raised novel and important issues of copyright law and free expression, especially at the boundaries of political expression and emerging art forms, none of those issues was resolved by the case, in large part because of the overwhelming risks Fairey would have assumed in order to litigate his *scène à faire* and fair use defenses to their conclusion. The *Fairey* case thus underscores how a statute that in theory balances competing interests fails to do so in practice. In the real world, copyright holders more often than not are large corporations or vested interests, and those with legitimate claims of fair use are the very creators of expression the Copyright Act was intended to protect. The Act's imprecision, overlapping and cumulative remedies, shifting of burdens of proof, and attorneys' fee-shifting regime mean that the real-life boundary for copyright infringement is not the one set forth theoretically in the Act, but instead is one that gives entrenched copyright interests greater leverage and unearned advantage than the words of the statute provide.

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231. Section 523(a)(6) of the Bankruptcy Code provides that an individual debtor may not discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (2006). However,

[t]he dischargeability standard in bankruptcy under Section 523(a)(6) does not correspond with the liability standards for determining willful patent infringement, copyright infringement or trademark infringement. A finding of willful copyright or other IP infringement will not necessarily provide a basis for establishing either the "willful" or "malicious" elements under the Bankruptcy Code. The legal standards are different.

J. T. Westermeier, Philip S. Warden & Ana N. Damonte, BANKRUPTCY ISSUES IN COPYRIGHT 2010, at 517, 546 (PLI Course Handbook Ser. No. 1022, 2010); *see also In re Barboza*, 545 F.3d 702, 712 (9th Cir. 2008) (holding finding of willful copyright infringement did not mean jury had found willful and malicious injury under bankruptcy code).

*E. How to Handle Appropriation Art (William Fisher)*

“Appropriation Art borrows images from popular culture, advertising, the mass media, and other artists and incorporates them into new works of art.”<sup>232</sup> In Part III.B, above, Professor Sturken examines the tradition of appropriation art in detail and, building on Fairey’s own account of his intentions and creative process, shows that the Hope Poster fits well within that tradition. In Part III.C, Professor Cost shows how technological changes have expanded opportunities for appropriation art and predicts that it will become increasingly common in the future.

In the past, a large proportion of the artists working within this tradition have not obtained licenses from the owners of the copyrights in the materials that they appropriate. With some frequency, those copyright owners have brought suit (or threatened to bring suit) against the artists. Sometimes the artists have prevailed.<sup>233</sup> More often, the copyright owners have prevailed.<sup>234</sup> Most often, the disputants, uncertain concerning their prospects and reluctant to bear the

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232. William M. Landes & Daniel B. Levine, *The Economic Analysis of Art Law*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 211, 217 (2006). For a similar definition — and many examples of appropriation art — see Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 220–21 (2007).

233. See, e.g., *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); cf. Geraldine Norman, *The Power of Borrowed Images*, ART & ANTIQUES, Mar. 1996, at 123, 127 (German court rejects claim against George Pusenkoff for his unauthorized use of a Newton photo).

234. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

In two cases decided since the settlement of the dispute over the Hope Poster, the plaintiffs have prevailed at the trial level. In March of 2011, the photographer Patrick Cariou was granted summary judgment in his copyright infringement suit against Richard Prince, arising out of Prince’s use in a collage of some of Cariou’s photos of Rastafarians in Jamaica. *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011). A month later, the photographer Glen Friedman (who, coincidentally, played a role in the Hope Poster case) similarly prevailed on summary judgment against Thierry Guetta (better known, from the movie “Exit through the Gift Shop,” as “Mr. Brainwash”), who had employed in various works of art a photo by Friedman of the hip-hop group, Run-DMC. *Friedman v. Guetta*, No. CV 10-00014 DDP (JCx), 2011 U.S. Dist. Lexis 66532 (C.D. Cal. May 27, 2011). Some of the images at issue in these two cases may be found at Charlotte Burns, *Patrick Cariou Wins Copyright Case Against Richard Prince and Gagosian*, THE ART NEWSPAPER (Mar. 21, 2011), <http://www.theartnewspaper.com/articles/Patrick+Cariou+wins+copyright+case+against+Richard+Prince+and+Gagosian/23387>; Cat Weaver, *Patrick Cariou Versus Richard Prince: Pick Your Side*, HYPERALLERGIC (Apr. 11, 2011), <http://hyperallergic.com/22424/cariou-prince-pick-side>; Rocky, *Thierry Guetta (Mr. Brainwash) Sued for Copyright Infringement Over Run-DMC Image*, SE7ENTHINY (Jan. 31, 2011), <http://se7enthinymedia.com/2011/01/31/thierry-guetta-mr-brainwash-sued-for-copyright-infringement-over-run-dmc-image>. It would be a mistake, however, to make too much of these decisions. Both involved sympathetic plaintiffs and unsympathetic defendants. And district court judges tend to be less moved by fair use defenses than are appellate court judges. See Beebe, *supra* note 165, at 575–81. Whether these rulings would survive if appealed is far from clear.

costs of litigation, have settled — typically because they were unable or unwilling to run the gauntlet described in detail by Meir Feder, Edwin Fountain, and Geoffrey Stewart in the preceding Section.<sup>235</sup> The dispute over the Hope Poster falls into the last of these three categories.

Had Fairey and the AP not settled, what would have happened? Procedurally, the answer is clear enough. There would have been a three-week trial. The loser at trial would almost certainly have appealed. Roughly two years later, the Court of Appeals for the Second Circuit would have decided the appeal. Most likely, that would have been the end of the matter.<sup>236</sup>

Who would have won in the end? The lawyers for the AP believe strongly that their client would have prevailed. The lawyers for Fairey acknowledge that the cloud generated by Fairey's admitted spoliation of evidence might have been sufficient to enable the AP to win at trial. However, we believe that the strength of Fairey's two substantive arguments (summarized in Part II.C), combined with the Second Circuit's recent receptivity to arguments of this sort, would have enabled Fairey to prevail on appeal.<sup>237</sup>

The truth is that no one knows for certain. The only thing that was apparent to both parties and all of their lawyers is that at least four years would have elapsed between the initiation of litigation and final resolution of the suit. During that period, the AP would have spent many millions of dollars on attorney's fees and litigation costs. Although Fairey would not have borne any attorney's fees, his litigation costs would have been large, and the drain on his time would have

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235. For example, Andy Warhol paid Patricia Caulfield \$6000 to settle a claim that he had improperly used one of Caulfield's photographs in *Flowers*, and Robert Rauschenberg paid the photographer Richard Beebe to resolve a similar suit. See E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1484–85 (1993); see also Sarah King, *Warhol Estate Sued Over Jackie Photo*, 85 ART IN AMERICA, Feb. 1997, at 27 (suit by Henri Dauman over Warhol's use of Dauman's photograph of Jackie Kennedy in Warhol's famous "Jackie" series of silkscreens).

236. The party that lost on appeal could of course have sought certiorari in the Supreme Court. But the dispute is sufficiently idiosyncratic that the Supreme Court would probably have declined to take the case.

237. The majority of intellectual property scholars who commented publicly on the case agreed that Fairey's substantive arguments were strong. See, e.g., WILLIAM F. PATRY, PATRY ON FAIR USE § 3:91, § 3:126 (2010); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 843 (2010); Ann Althouse, *Shepard Fairey Sues AP Before It Sues Him*, ALTHOUSE (Feb. 10, 2009, 6:59 AM), <http://althouse.blogspot.com/2009/02/shepard-fairey-sues-ap-before-it-sues.html>; Justin Hughes, *Election Copyright — You Press the Button, We Do the Rest*, THE MEDIA INST. (May 6, 2009), [http://www.mediainstitute.org/IPI/2009/050609\\_ElectionCopyright.php](http://www.mediainstitute.org/IPI/2009/050609_ElectionCopyright.php); Peter Jaszi, *Just When You Thought You'd Heard Enough About Shepard [sic] Fairey and the AP*, ©COLLECTANEA (Feb. 18, 2009, 4:15 PM), <http://www-apps.umuc.edu/blog/collectanea/2009/02/just-when-you-thought-youd-hea.html>; Sonia K. Katyal & Eduardo M. Peñalver, *Introducing the Altlaw: The Shepard Fairey Obama "Hope" Poster Controversy*, FINDLAW (Mar. 24, 2010), [http://writ.news.findlaw.com/commentary/20100324\\_katyal\\_penalver.html](http://writ.news.findlaw.com/commentary/20100324_katyal_penalver.html).

been heavy. Most importantly, he and his family would have lived for years with the knowledge that, had the AP won in the end, he would have been subject to potentially catastrophic liability in damages and fees. It is thus not surprising that both parties were disposed to settle rather than continue the fight.

I have long thought that the aspects of copyright law that give rise to debacles of this sort should be changed — specifically, by giving artists more freedom to make creative uses of copyrighted materials.<sup>238</sup> That conviction was the principal reason I became involved in this lawsuit. My involvement has further strengthened this conviction, but has also altered somewhat my sense of the kinds of adjustments to copyright law that would be both desirable and practicable.

This Part sets forth the current state of my reflections on this matter. Section 1 summarizes the bases for my view that appropriation artists should be given more room to operate. Section 2 presents and compares three ways in which that might be achieved.

### 1. Why Copyright Law Should Not Proscribe Appropriation Art.

Two independent considerations counsel against empowering copyright owners to prevent appropriation artists from making creative uses of the owners' materials without permission. The more conventional of the two is that granting copyright owners this entitlement would impair, rather than advance, the fundamental purpose of the copyright system: to increase public welfare by promoting the progress of science and the useful arts.<sup>239</sup>

To see how and why requires a brief review of the economic theory of copyright that, in recent years, has come to dominate both case law and legal scholarship in the United States. The copyright system, according to that theory, functions by granting to the creators of intellectual products exclusive rights sufficient to enable them to recoup the costs of creating their works and thereby offsets the hazard that such products will be produced at socially suboptimal levels. The theory acknowledges that the system has drawbacks. Most importantly, it prevents some socially beneficial uses of creative works. Accordingly, the theory urges that copyright owners be granted only rights whose social benefits, in terms of providing incentives for creativity in the future, exceed their social costs. Determining exactly what combination of entitlements would be ideal is impossible. Recognizing that, theorists who work in this vein urge legislatures and courts to abide by a more rough-and-ready guideline: grant to copyright owners entitlements that would enable them to earn rewards that are large in

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238. See Fisher, *supra* note 158, at 1768–69, 1782.

239. This conventional characterization of the purpose of the copyright system is typically traced to Article I, Section 8, Clause 8 of the U.S. Constitution.

comparison to the concomitant social costs, but deny to copyright owners entitlements that would enable them to earn rewards that are small in comparison to their social costs.<sup>240</sup>

The right to prevent appropriation artists from using copyrighted works without permission almost certainly falls into the latter of these categories. The frequency with which copyrighted works become fodder for appropriation art is very low, and in most instances in which it does occur, the artist is not able and willing to pay a large licensing fee. Consequently, the stimulus to creativity caused by granting copyright owners this right would be slight. On the other hand, the social costs of frustrating appropriation art would be large. Consumers, both individual and institutional, place high values on at least some works of this sort.<sup>241</sup> Depriving them of these works would thus incur serious welfare losses.

A seemingly powerful response to this argument is that the market could enable us to have our cake and eat it too. Copyright owners, given this entitlement, will not frustrate appropriation art; they will just charge the artists. Even if the fees they collect are modest and rare, they will add something to the incentives for creativity at the “primary” level. And if appropriation art is truly socially valuable, the artists should be able and willing to pay the fees. Consumers will thus not be deprived of the collages, diptychs, and mash-ups they seem to like.

Sadly, three factors, familiar to economists, will frustrate this apparent solution. First, some copyright owners believe that the uses of their works by appropriation artists are disrespectful; they are thus likely to refuse to grant licenses on any terms. Second, some appropriation artists, like parodists, are unable to collect from consumers payments that fairly reflect the pleasure that those consumers reap from their creations. Thus they cannot offer to copyright owners license fees commensurate with their social value. The result will be suboptimal production of appropriation art.<sup>242</sup> Third, appropriation artists often work quickly and spontaneously; they create their derivative works before asking permission. If, after creating their works,

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240. See generally William W. Fisher III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer, ed., 2001); Peter Menell & Susan Scotchmer, *Intellectual Property Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1473 (A. Mitchell Polinsky & Steven Shavell, eds., 2007); Fisher, *supra* note 158, at Part IV; Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1815 (1984).

241. A few examples: The collage by Jeffrey Koons at issue in *Blanch v. Koons* was valued at \$1M. 467 F.3d 244 (2d Cir. 2011). Another example is one of Andy Warhol’s depictions of Elvis, which recently sold at auction for \$100M. Andrew Johnson, *The \$100m Warhol*, INDEPENDENT (Nov. 29, 2009), <http://www.independent.co.uk/arts-entertainment/art/news/the-100m-warhol-1830661.html>.

242. This argument parallels Richard Posner’s justification for treating genuine parody as a fair use. See Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 69 (1992).

they seek licenses from the owners of the works they have used, the parties will be in a position of bilateral monopoly — a situation in which bargaining over a license fee is highly likely to break down.<sup>243</sup> The bottom line: if copyright owners have the power to block appropriation art, all too often they will exercise it, which in turn will generate social costs that exceed the social gains.

The second consideration is rooted in what may be described as the cultural theory of intellectual property, the nub of which is that the copyright system (along with many other systems of legal rules) can and should be shaped so as to cultivate a culture that provides as many persons as possible access to a rich and fulfilling life. Though far less influential in either the case law or legal scholarship than the utilitarian approach summarized above, this perspective seems to be gaining currency and deserves close attention.<sup>244</sup>

Two decades ago, I suggested why adoption of this approach should cause us to expand opportunities for creative engagement with cultural products:

Active interaction with one's cultural environment is good for the soul. A person living the good life would be a creator, not just a consumer, of works of the intellect. This is not to say that all passive uses of cultural artifacts are bad; even in utopia, people can be expected to listen to symphonies without playing along, to attend dramatic performances without mounting the stage, even to watch some television. But the proportion of active to passive activities in the lives of most Americans today is too low. Whitman's contention that, to realize the promise of democracy, to create and sustain a society in which people flourish, we must cultivate a new kind of "character" — one not only more "attentive," more capable of appreciating the texture of the surface of life, but also more energetic, more actively engaged in the production and transformation of "Culture" — is even more applicable to the United States of the 1980's than it was to the United States of the 1860's.

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243. Support for this prediction is provided by the facts of this case. *See supra* Part II.B.

244. For fuller elaborations of this approach, and the philosophic principles upon which it is based, see generally JULIE COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012); MADHAVI SUNDER, *IP: YOUTUBE, MYSPACE, OUR CULTURE* (forthcoming 2012); William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1446–72 (2010); Fisher, *supra* note 158, Part V.

. . . [Sensitivity to this concern] suggests that uses of copyrighted material that either constitute or facilitate creative engagement with intellectual products should be preferred to uses that neither constitute nor foster such engagement.

For two related reasons, [adoption of this guideline] would advance the utopian agenda. First, it would create more opportunities for Americans to become actively involved in shaping their culture, thereby increasing access to the good life. Second, by altering the relative ease with which Americans can engage in different sorts of activities — that is by making creative activities less expensive or more convenient and making noncreative activities more expensive or less convenient — the procedure would modify consumers' habits and eventually their desires, thereby enhancing not just their access to but also their appreciation of the good life.<sup>245</sup>

The implication of this guideline for appropriation art is straightforward: artists should be encouraged to use copyrighted materials in creative ways, both because that activity is good for them and because it models a way of relating to one's cultural environment that is good for all of us. Appropriation art should not be denigrated as a form of "cheating";<sup>246</sup> it should be celebrated. The law can and should contribute to the celebration.

## 2. Practicable Reforms

Immersion in the facts of this case and the pertinent case law has heightened my awareness of three alternative ways in which the aspects of copyright law that govern appropriation art might be improved. None of these adjustments would be revolutionary; they could be implemented by the judiciary without additional legislative authorization. Any of the three would help, but the pattern of decisions they would produce would be different.

The first of the three modifications would expand the set of materials — more precisely, the aspects of creative works — that are unprotected by copyright law, and thus give appropriation artists more raw materials to work with. The most natural way of implementing this strategy would be to extend the existing *scènes à faire* doctrine,

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245. See Fisher, *supra* note 158, at 1768–69 (footnotes omitted).

246. Compare *supra* Parts III.A.2 and III.C.1 (Shepard Fairey and Frank Cost discussing "cheating").

upon which Fairey sought to rely in the litigation. As indicated above, in its current form that doctrine withdraws copyright protection from “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”<sup>247</sup> Fairey argued that the so-called three-quarters pose that, as Professor Sturken shows, is prominent in American political portraiture, falls well within that traditional definition, and thus that Fairey’s preservation of that pose in the Hope Poster did not create even a *prima facie* case of infringement.

This doctrine could and should have shielded Fairey, but is likely to be of limited use to other appropriation artists, who frequently employ materials that could not plausibly be described as *scènes à faire*. However, underlying this doctrine are some general principles or impulses that, if generalized, could have much wider applicability.

The first such principle is that copyright protection extends only to works — or aspects of works — that are “original.” This principle is venerable and fundamental. For example, in *Burrow-Giles Lithographic Co. v. Sarony*,<sup>248</sup> the Supreme Court held that only “original intellectual conceptions of the author”<sup>249</sup> are shielded by copyright law, and thus that, to prevail in an infringement suit, the plaintiff must establish “the existence of those facts of originality, of intellectual production, of thought, and conception.”<sup>250</sup> In the *Feist* case, the Court, although strongly reiterating this principle, softened its application:

[T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display *some minimal level of creativity*.<sup>251</sup>

This minimalist interpretation of the originality requirement is not fixed in stone. The courts could easily turn the dial up a notch or two — moving copyright law slightly in the direction of patent law, which has a much more serious “inventive step” requirement. Specifically, they might reiterate the principle enunciated in *Burrow-Giles* —

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247. *Hoebling 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)).

248. 111 U.S. 53 (1884).

249. *Id.* at 58.

250. *Id.* at 59–60.

251. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 357 (1991) (emphasis added).

that copyright law shields only features that derive from “intellectual production, of thought, and conception.”<sup>252</sup> Taken seriously, this would have the effect of withdrawing copyright protection from a wide range of cultural products that are highly conventional or result from automated production methods. For example, snapshots — conventional representations of conventional subjects, made using digital cameras with “fully automatic” settings — might on this basis be deemed parts of the public domain.<sup>253</sup> That, in turn, would dramatically expand the set of materials available for nonpermissive use by appropriation artists.

The second principle, also lurking underneath the current *scènes à faire* doctrine, is that copyright protection does not extend to scarce materials — more specifically, to materials to which subsequent authors must have access in order to express themselves effectively. The clearest manifestation of this principle elsewhere in copyright law is the “merger” doctrine, the gist of which is that, when there is only one way of expressing a particular idea, then that unique form of expression is not protected.<sup>254</sup> Why? Because copyright law does not (and indeed could not constitutionally) proscribe one person’s use of an idea developed and promulgated by another person.<sup>255</sup> The merger doctrine has cousins elsewhere in intellectual property law — for example, in the rule that trademarks lose protection when they become “generic” and in the nominative-use defense in trademark law.

Applied to appropriation art, this “necessity” principle would withdraw copyright protection from kinds of materials that appropriation artists must employ in order to express themselves effectively. For example, as Fairey observed, to create the Hope Poster, he needed access to a “headshot” of Barack Obama that conformed to the conventional three-quarters pose. When he made the poster, all such publicly available headshots of Obama had been created by news agencies, which asserted copyrights in the photos. Fairey lacked the press credentials or time to take such a photo himself. More subtly, as Professor Sturken observes, an important component of the aesthetic effect that Fairey sought was allusion to the conventions of photo-

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252. 111 U.S. at 60.

253. This particular proposed reform would find support in the first of the two theories reviewed in the previous subsection. It is hard to imagine that the incentives to generate snapshots would be undermined by the absence of copyright protection for them. *See supra* Part III.D. Note that elimination of copyright protection for snapshots would not mean that all snapshots would be freely available for reuse by others. If the privacy or publicity rights of persons depicted in them would be impaired, permission would still be mandatory.

254. *See, e.g.*, BUC Int’l Corp. v. Int’l Yacht Council Ltd., 489 F.3d 1129, 1143 (11th Cir. 2007).

255. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (footnotes omitted) (“In addition to spurring the creation and publication of new expression, copyright law contains built-in First-Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection.”).

journalism. It was thus essential to his artistic and political project that he use a piece of photojournalism as a reference work. Necessity, in these two senses, justified Fairey's nonpermissive use of an AP photo. The same principle would have justified Andy Warhol's nonpermissive use of publicity photographs of Marilyn Monroe.

Though slightly different in scope, both of these ways of elaborating and extending the *scènes à faire* doctrine would give more latitude to appropriation artists by expanding the set of works available for their use. A quite different tack would focus, not on the set of raw materials, but on the act of appropriation. The doctrinal starting point for this approach would be, not *scènes à faire* and merger, but rather the fair-use doctrine. For the reasons set forth in Part II.C, Fairey had a strong argument that the existing fair-use doctrine privileged his behavior. However, the AP was correct in arguing that not all judicial interpretations of fair use pointed clearly in Fairey's favor. Moreover, other appropriation artists would find it harder than Fairey to prevail on a fair-use basis. If fair use is to function as an effective shield for appropriation art, it must be clarified. Fortunately, the necessary clarification would not be difficult. A practicable and sufficient reform would be firming up the meaning of "transformation."

Since the Supreme Court's *Campbell* decision, it has been clear that "transformative" uses of copyrighted materials are almost certain to be deemed fair.<sup>256</sup> Unfortunately, not all lower courts have agreed on what "transformative" means. Four roughly differentiated interpretations have emerged:

- (a) The narrowest interpretation limits the term to parodies.<sup>257</sup>
- (b) A slightly broader interpretation is that a defendant's work is transformative if and only if it in some way criticizes or comments upon the plaintiff's work.<sup>258</sup>
- (c) Some recent opinions have expressly or tacitly adopted a more expansive interpretation, under which a defendant's activity is deemed transformative if it is socially beneficial.<sup>259</sup>

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256. See Beebe, *supra* note 165, at 605 (footnotes omitted) (reporting that between 1978 and 2005, "each of the 13 circuit court opinions and 27 of the 29 district court opinions that found the defendant's use to be transformative also found it to be a fair use — and one of the two district court outliers was reversed on appeal").

257. See, e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268–69 (11th Cir. 2001) (emphasizing the privileged status of parodies); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113 (2d Cir. 1998) (same); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997) (same).

258. See, e.g., Castle Rock Entm't, Inc., v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141–43 (2d Cir. 1998); Rogers v. Koons, 960 F.2d 301, 309–10 (2d Cir. 1992); Salinger v. Colting, 641 F. Supp. 2d 250, 256–63 (S.D.N.Y. 2009), *vacated on other grounds*, 607 F.3d 68, 83 (2d Cir. 2010); Lennon v. Premise Media Corp., 556 F. Supp. 2d 310, 322–23 (S.D.N.Y. 2008). In the *Salinger* case, the Second Circuit, on appeal, left open the question of whether "transformativeness" could be defined more broadly. See *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010).

- (d) Finally, in several recent cases, courts have taken the view that a defendant's work is transformative if its purpose is different from that of the plaintiff's work.<sup>260</sup>

Of these approaches, the fourth is currently the most widely accepted.<sup>261</sup> Although superior in many respects to the first and second of the approaches, it has two crucial defects. First, it is highly manipulable. Most works have many purposes, and those purposes can be described at various levels of generality. By picking one combination of purposes or levels, a tribunal can usually show the plaintiff's and defendant's goals to be the same. By picking another combination, a court can show them to be different.<sup>262</sup>

The Hope Poster provides an apt illustration of the problem. It is a work of fine art. (A version of it currently hangs in the National Portrait Gallery.) It is a political advertisement. (Other versions of it were

259. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819–20 (9th Cir. 2003) (finding the defendant's reproduction of the plaintiff's photographs to be "transformative" in part because the defendant's reproductions in "thumbnail" format "benefit the public by enhancing information-gathering techniques on the internet"); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 606 (9th Cir. 2000) (holding intermediate copying of software for the purposes of interoperability to be "modestly transformative" despite the fact that the "functions" of the plaintiff's and the defendant's products were the same, where the defendant's activity "creates a new platform, the personal computer, on which consumers can play games designed for the Sony PlayStation" and thus "affords opportunities for game play in new environments, specifically anywhere a Sony PlayStation console and television are not available, but a computer with a CD-ROM drive is"). In *Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the court explained:

Just as a "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one," a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.

*Id.* at 1165 (citation omitted).

260. See, e.g., *Gaylord v. United States*, 595 F.3d 1364, 1373 (Fed. Cir. 2010); *A.V. v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) ("The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work."); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609–10 (2d Cir. 2006) (discussed in Part II.C. of this Article); *Blanch v. Koons*, 467 F.3d 244, 252–53 (2d Cir. 2006); *Kelly*, 336 F.3d at 819–20 (finding the defendant's reproduction of the plaintiff's photographs to be "transformative" in part because the defendant's purpose was different from that of the plaintiff); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000).

In addition to these four primary interpretations, miscellaneous other threads can be found in the case law. For example, a few courts have suggested that transformativeness requires that the defendant add new material to the plaintiff's work. See, e.g., *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1241 (D. Colo. 2006). However, most courts reject this position.

261. See Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYRIGHT SOC'Y U.S.A. 309, 325 (2005) (documenting the popularity among courts of appeals of the different-purposes interpretation); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484–94 (2008) (arguing the same).

262. See Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 718–19 (2010).

plastered on stop signs and car bumpers, decorated campaign events, or were shown on video screens in Jack-in-the-Box restaurants). And it helps sell merchandise — sweatshirts, mugs, and so forth. Within its role as work of art, it is partly a manifestation of modernism — well within the tradition perhaps best exemplified by the work of Warhol. But it is also a manifestation of postmodernism; as Professor Sturken shows, it riffs on myriad traditions and conventions: Warhol himself, Soviet propaganda, patriotism, and so forth. As Fairey's own contribution to this Article makes clear, he had all of these purposes in mind when he created it.

The number of different objectives underlying the Hope Poster may perhaps be extreme, but most works of appropriation art sufficiently prominent to attract lawsuits will also have multiple purposes. Which one a court chooses to emphasize is likely to be decisive in determining whether the work passes muster under the fair-use doctrine.

Even if this defect could be overcome, the different-purposes interpretation of "transformative" would be poorly suited to providing a safe harbor for appropriation art. Sometimes, despite the ambiguities summarized above, the artist's goal will differ sharply from the goal of the creator of the plaintiff's work. The Hope Poster, we contended, is one such case — because both Garcia and the AP so emphatically professed a commitment to verisimilitude and renounced both artistry and partisanship. But often that will not be true. Examples of situations in which the plaintiff's and the defendant's goals were much more closely aligned would be the recent *Cariou* and *Friedman* cases and the first of the *Koons* cases.<sup>263</sup>

Both of these problems could be considerably mitigated if the courts adopted a more straightforward construction of the idea of "transformation": A defendant's work should be treated as transformative if and only if it is creative — somewhat more specifically, if it "either constitute[s] or facilitate[s] creative engagement with intellectual products."<sup>264</sup>

Adoption of this proposal would create a "safe harbor" within the fair-use doctrine analogous to the "physical-invasion" and "economic-wipeout" tests deployed by the Supreme Court to determine whether a regulation of private property goes so far as to constitute a "taking" within the meaning of the Fifth and Fourteenth Amendments. Like the fair-use doctrine, the takings doctrine ordinarily requires courts to consider several "factors" on an "ad-hoc" basis.<sup>265</sup> As a result, like the fair-use doctrine, it is notoriously unpredictable. Hoping to alleviate that unpredictability, the Supreme Court has identified a few circum-

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263. See *supra* text accompanying note 234.

264. See Fisher, *supra* note 158, at 1768.

265. See *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

stances, either of which, by itself, will render an uncompensated regulation unconstitutional: where the regulation at issue results in a “permanent physical occupation” of a piece of real property,<sup>266</sup> and where the regulation at issue “declares ‘off-limits’ all economically productive or beneficial uses of land [and] goes beyond what the relevant background principles [of traditional nuisance law] would dictate.”<sup>267</sup> Each of these rules has defects,<sup>268</sup> but both have the merit of creating reasonably well-defined zones in which landowners can be confident of their rights, and regulators know their obligations.<sup>269</sup> Redefinition of “transformative” as “creative” for the purposes of the fair-use doctrine would have a similar effect — carving out of the murk a zone of relative clarity.

Aside from a decrease in the notorious unpredictability of the doctrine (discussed in Part III.D.1), the proposed reform would have two main benefits. First, it would give expression to one of the central goals of the copyright system discussed above: encouraging and celebrating creative engagement with cultural products. Second, it would clearly and unequivocally privilege appropriation art.

It would not, of course, eliminate all difficult questions. Creativity is a matter of degree, and courts adopting the proposed redefinition of transformation would sometimes have to decide whether the amount of creativity embodied in a particular work is enough.<sup>270</sup> But at least a coherent objective would guide their inquiries.

The third and final way in which the courts might adjust copyright law in favor of appropriation art would be to expand and clarify their willingness to exempt from liability defendants whose nonpermissive uses of copyrighted materials result in substantial social benefits. As indicated above, courts already occasionally do this by declaring such socially beneficial activities to be “transformative.”

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266. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427–28 (1982).

267. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

268. See, e.g., William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1393–97 (1993).

269. Another doctrinal innovation of the same general sort was the adoption of the “rule” that a plaintiff’s failure to “stop and look” before crossing a railroad track constitutes contributory negligence. See *Balt. & Ohio R.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927). But cf. *Pokora v. Wabash R.R. Co.*, 292 U.S. 98, 106 (1934) (limiting the rule).

270. In the context of appropriation art, such hard problems would be rare. In other contexts, however, they would be more common. Perhaps the most troublesome would be questions involving the degree of creativity manifested by a motion-picture adaptation of a novel. A guideline that might help when addressing such questions would be that movies that retell in a different medium the same story told in the novel would be insufficiently creative to constitute fair uses, whereas movies that told different stories would be deemed fair. So, for example, the Harry Potter movies would require licenses, while *Apocalypse Now* would not (on the assumption that *Heart of Darkness* were still in copyright). Guidance in applying this criterion could be gleaned from the “pattern” test announced by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Many objections might be raised to this particular application of the principle, but they can and should be addressed at another time and in another place.

Examples include the creation of “thumbnail” versions of copyrighted photographs to facilitate the operation of image-based search engines and the verbatim reproduction of student essays in order to enhance the operation of a plagiarism detection tool.<sup>271</sup> Declaring such activities “transformative” may seem something of a stretch, but provides at least a colorable doctrinal peg on which to hang these results. A modest extension of this set of cases would be a declaration that appropriation art results in similar social benefits — and should enjoy similar immunity from copyright liability.

There are ample precedents for this approach. Most applications of the common law of nuisance, for example, include, as one “factor” in determining whether a landowner’s annoying use of property is permissible, the question of whether the use at issue is socially beneficial.<sup>272</sup> Many applications of the general negligence standard for unintentional injuries incorporate a similar inquiry.

On balance, however, this approach seems less promising than either of the two others discussed above. When a work of appropriation art contributed directly to a well-recognized and privileged public project, the approach would surely help the defendant. Once again, the Hope Poster, which figured prominently in a presidential election — one of the most highly valued projects in the American legal system — would get a strong boost. But most works of appropriation art have no such obvious social benefits. Their value is as art. Asking judges to privilege art pure and simple would be hazardous. It would run afoul the principle of aesthetic neutrality — which, though often skirted in practice,<sup>273</sup> remains an important part of the canon of copyright law.<sup>274</sup> More specifically, it would frequently require them to acknowledge the social value of postmodern works of art, a genre that many judges seem to loathe.<sup>275</sup> Accordingly, this option seems the least attractive of the three.

Which of the other two approaches would be best? An argument in favor of the first is that it would best approximate the principles that Fairey himself tries to abide by. For the reasons he discussed above, the type of material Fairey employs in his creations matters. Generic, conventional, and factual works (of which the Garcia Obama

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271. See *A.V. v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819–20 (9th Cir. 2003).

272. See, e.g., *Middlesex Co. v. McCue*, 21 N.E. 230, 231 (Mass. 1889).

273. See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 251 (1998).

274. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

275. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992) (“[Jeff Koons] is a controversial artist hailed by some as a ‘modern Michelangelo,’ while others find his art ‘truly offensive.’ A New York Times critic complained that ‘Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.’”).

photo is a clear example) should, in his judgment, be fair game for artists. By contrast, highly creative works (such as the photograph that he employed as a reference work when making his famous image of the Palestinian woman) deserve more respect. The first of the reform options would track this distinction. But, it should be emphasized, not all appropriation artists play by the same rules.

The second approach, by contrast, would have the most hortatory benefits. By declaring that creativity is especially deserving, it would enlist copyright law in the development and dissemination of a vision of human flourishing of the sort described above. In my view, that advantage should be decisive.

### 3. Conclusion

Some aspects of the story of the Hope Poster are uplifting. As Professor Cost shows, the process by which Fairey created and then rapidly disseminated the poster exemplifies the liberating potential of digital technologies. More subtly, it reveals the ways in which digital technologies, when married to traditional artistic techniques and wielded by a great artist, can generate extraordinary works and make them instantly available to global audiences. As Professor Sturken shows, the Hope Poster itself represents both an important democratization of the tradition of appropriation art and a breakthrough in political iconography. Its postmodern aesthetic places it many steps above the “kitsch” that characterizes almost all campaign imagery, at least in the United States. Finally, the extraordinary influence of the poster is testimony, not just to the remarkable mood of optimism that briefly characterized American politics in 2008, but to the capacity of the American electorate to embrace irony.

Unfortunately, the role played by law in this drama was pernicious. The litigation benefitted no one. Mannie Garcia, the photographer who took the photo that Fairey used as his reference work, came away with nothing. Fairey himself emerged battered and poorer. During the two years in which the fight continued, his artistic output was seriously curtailed. As a result, the public at large was deprived of the works that, undistracted, he would have generated. Even the AP lost money — spending vastly more in attorney’s fees than it reaped from the settlement.

The previous Section and this Section of the Article have sought to identify the dimensions of the legal system that contributed to this debacle. Reforms of the sorts we have sketched would reduce the frequency of similar breakdowns in the future. But until those reforms are adopted, we can only hope that copyright owners who find themselves in analogous positions will exercise more restraint and show more wisdom.

## IV. APPENDIX: FIGURES



Figure 1: The Hope Poster.



Figure 2: The Garcia Obama photo.



Figure 3: The Garcia Clooney photo.



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.

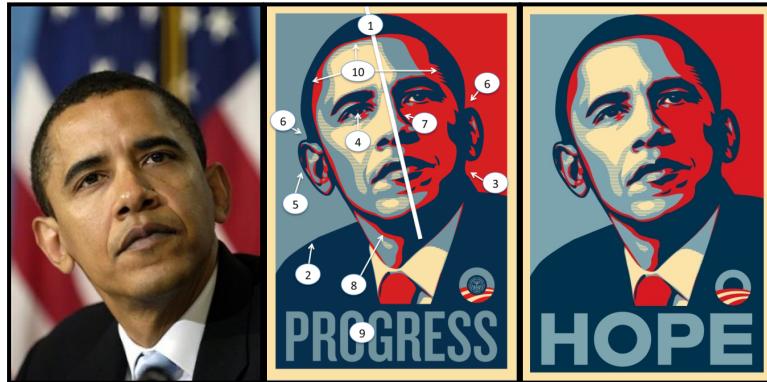


Figure 6: Modifications made to the Garcia Obama Photo in the process of creating the Hope Poster.

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.

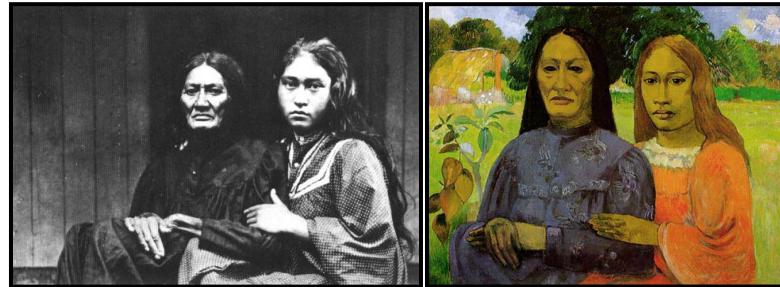


Figure 8: The image on the left is cropped from an 1890 photo by Henri Lemasson. On the right is Gauguin's *Mother and Daughter* (1902).

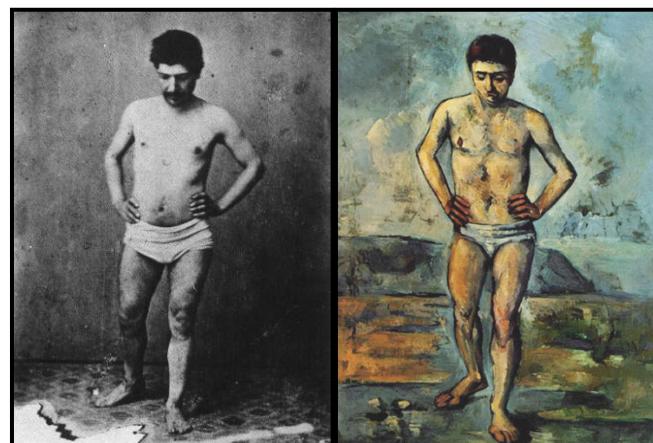


Figure 9: The image on the left is an unidentified reference photo. On the right is Cézanne's *Bather* (c. 1895).

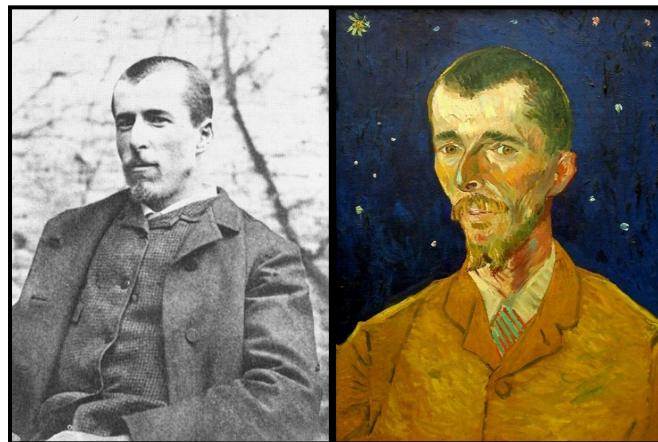


Figure 10: On the left is a reference photo of the painter Eugène Boch.  
On the right is Van Gogh's portrait of Boch (1888).



Figure 11: On the left is the Palestinian Woman photo. On the right is the image Fairey made, using the photo as a reference work.

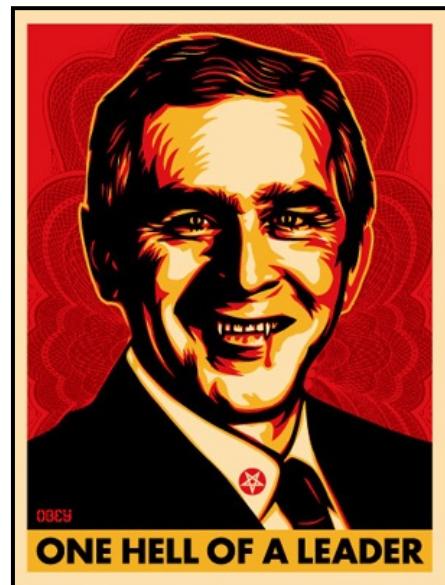


Figure 12: Fairey's George W. Bush image, based on the presidential portrait.



Figure 13: Examples of knock-offs of the Hope Poster.



Figure 14: Critical parodies of the Hope Poster where the original image is preserved.



Figure 15: Critical parody of the Hope Poster where the original image is preserved.



Figure 16: Critical parodies of the Hope Poster where the original image is changed.



Figure 17: Posters featuring other politicians made in the style of the Hope Poster.



Figure 18: Neda posters stylistically similar to the Hope Poster.



Figure 19: Hope Poster parodies made by political comedians.



Figure 20: A portion of the Garcia Obama Photo at a resolution of 100 by 100 pixels.