

To: Mock OSCCR of FYW

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RE: Shepard Fairey - Hope, Change, and Lawsuits

Introduction:

Shepard Fairey is a street artist and the creator of the OBEY clothing. Fairey was first recognized for his “Andre the Giant Has a Posse” campaign (Fig. 1), and then gained even more recognition for his “Hope” poster (Fig. 2), which became the symbol for President Barack Obama’s 2008 campaign.

In the famous “Hope Poster” Fairey featured a photo of Obama that had been taken by Associated Press photographer Mannie Garcia. In typical Fairey fashion, his final product was much less photo-like and instead featured the picture with a patriotic color scheme (see Fig. 2). Fairey failed to get permission from Associated Press before using the photo and as a result, was sued by AP for violating copyright laws in reference to appropriation. In response to contention from the Associated Press, Shepard Fairey sued the AP declaring that his poster was a fair use of the photograph and did not need appropriation. This first case was settled out of court in 2011, but during that case Shepard Fairey fabricated and destroyed evidence, which led to another case in 2012. Fairey plead guilty to these charge and in 2012, Fairey was sentenced to two years of probation, a \$25,000 fine and three-hundred hours of community service. Since the case on fair use was settled out of court, there was no ruling on whether it was fair use or not (Kennedy).

Fair-use in art was the main question raised by this case. Where is the distinction between another's work for fair-use and using another's work for personal distinction?



Figure 1. Obey Poster (Obeygiant.com).



Figure 2. Poster vs Original Photo (Associated Press).

Current Copyright Laws in the Art Community:

Section 106 of Copyright Law states that a copyright holder is the only person who has the right to “to reproduce the copyrighted work in copies or phonorecords” and “to prepare derivative works based upon the copyrighted work” (17). Section 107 of Copyright Law, however, states that if a person can prove that they have used the copyrighted work for certain limited purposes then it is not actually copyright infringement and is considered legal. The “Fair Use” law protects individuals using copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (19). Those who

have registered their copyright with the Copyright Office can receive much better compensation for copyright infringement compared to those who have not registered. Unregistered copyright owners are not entitled to the same financial “damages” and must prove that they have been negatively affected by the infringement that allegedly occurred, to receive any compensation (Feliciano).

Precedents and Previous Cases:

Rogers v. Koons was a case brought to court when Art Rogers sued Jeff Koons for making and selling a sculpture directly based off of one of Roger’s photographs without Rogers’ permission. The image in question pictured two individuals sitting on a bench with a row of puppies across their laps (fig 3.) and the sculpture depicted the same image, just in 3D and in color (Traub). Koons went on to sell these sculptures for more than \$300,000. The court voted in favor of Rogers and Koons was punished for copyright infringement (Feliciano). Even with the minor changes Koons had made when creating the sculpture, the court argued that Koons had copied Roger’s photo’s “charming and unique expression” (Traub). This case highlights a clear instance of copyright infringement defined by the courts. One artist used another artist’s work without permission and profited significantly and in the eyes of the law, this is illegal.

In another copyright case, the case of Mattel Inc. v. Walking Mt. Productions, Thomas Forsythe was sued by Mattel Incorporated for his “Food Chain Barbie” photos, which featured mostly nude Barbie dolls posed in a variety of odd contexts, such as in a toaster or in a martini glass (fig. 4). These photos, like much of Forsythe’s work, were intended to make statements about society and culture. Mattel claimed that Forsythe had violated copyright law but the courts ultimately disagreed and determined Forsythe’s use

of Barbies to be an example of Fair Use, making it completely legal. As mentioned earlier, Fair Use policy says it is okay to use other's work for the use of "commentary" and "criticism" and this is exactly what Forsythe had done (Copyright Law of the U.S.). This case set a precedent that copyrighted material can be used to create "parodies" and established a clear application of the "fair use" policy (Berkeley Technology).

Rogers v. Koons



Art Rogers - "Puppies"



Jeff Koons - "String of Puppies"



Figure 4. "Mellow Yellow" (Forsythe).

Figure 3. Rogers vs. Koons. (Rogers, Koons).

Analysis of Ethics:

Porter defines intertextuality as “the principle that all writing and speech-indeed, and signs-arise from a single network” (Porter p.34) In the case of Shepard Fairey’s Hope poster, the meaning of the poster was shaped by the meaning of the photograph, and could not have existed without it. Intertextuality is not frowned upon or considered unjust, it is instead inherent; “no text escapes intertext.”(Porter p.34) It is expected that new images and text will be influenced by what existed before them and there is indeed nothing wrong with that. We should draw from the world around us to create works that are modern and relevant. The Hope poster for Obama’s 2008 presidential campaign is a very clear example of intertextuality as the photograph gave rise to a historically significant piece of art. Fairey created the iconic campaign poster from a photo that already existed, thus furthering the idea that intertextuality is everywhere.

Shepard Fairey argued, “his use of the photo had a ‘transformative’ purpose and was protected under copyright law’s fair-use doctrine.”(Samborn) We agree with Fairey in this case, and see that his changes to the photo did indeed transform the original and drastically change the meaning. In fact, “Mannie Garcia took the AP photograph to document a news event. In contrast, Fairey’s transformative purpose was to ‘inspire, compel or convince’ others to see Obama’s leadership.”(Samborn) The blatant difference in purpose for these two artists justifies fair-use, and should in turn justify full rights in the case of Fairey’s repurposing.

Associated Press, however, made a counterclaim alleging, “that the poster does not ‘alter any of the distinctive characteristics that make the Obama photo so striking’.”(Samborn) While it is true that Fairey does not alter the photo itself, the

distinctive characteristics are not attributable to Garcia because “copyright ‘protection for candid, unposed shots of news events is thin’.”(Samborn) Garcia cannot claim a photo such as the candid of Obama as his own work when he did not stage the photo himself; “to be protected the photographer needs to add significant value to an image through, for example, the pose or the lighting.”(Samborn) Garcia did not add significant value to the image, and while the photo he took became iconic, “Obama’s face alone as an element in the AP image is not copyright protected” and does not give grounds for a lawsuit against Fairey. (Samborn)

Issues about whether or not the photo actually belonged to Mannie Garcia arose as the case unfolded, and a debate about Fairey’s right to fair-use also became a topic of conversation. We understand that by copyright law, Fairey had wrongfully used a photo, but by our own moral standards we believe he had the right to create a new piece. It is indeed true that, “Fairey, and others working with him, made significant contributions to the success of the Hope image that were independent of the copyrighted photograph,”(Fisher) thus making the Hope poster a work created, only using the photo as a starting point but building upon that with originality and new ideas. Shepard Fairey did not plagiarize the Associated Press photograph, but instead used intertext and altered meaning in order to produce a new, unique piece of art.

Assuming Shepard Fairey had not tried to cover up his mistakes by destroying evidence, he claims he would have justified his use of the Associated Press photograph as “fair.” In a letter to his supporters, Fairey claimed that he created his art with the intention of commenting on “the realities of the world” (Fairey). Arguing that his art was

created in an effort to stimulate discourse, rather than profit, suggests that Fairey may very well have been within his rights under the “Fair Use” law.

Recommended Course of Action:

It is important to focus on the case of plagiarism at hand, the use of the Associated Press photo, and not the issues that arose after the act was committed. Shepard Fairey should not be persecuted for plagiarism because he was altering the photo as well as “repurposing and adding value.”(Samborn) If candid or reproducible photos became available to artists they can create relevant work without the worry that a plagiarism suit would follow.

A suggestion we agree with is that photographs should “become raw material vulnerable to extension and improvement through processes used by graphic designers.” (Johnson-Eilola, p. 376) In this case, the photograph taken by Mannie Garcia would become available to the graphic designer, Shepard Fairey. If this were to become standard practice, artists like Shepard Fairey would not be afraid to build upon, or alter the work around them, thus having the opportunity to create freely. By “giving artists more freedom to make creative uses of copyrighted materials”(Fisher) they will more effectively be able to express themselves. Cases like Shepard Fairey v. Associated Press should rule in favor of the artist simply creating something new and meaningful from an already existing work. It is fair to fine Fairey for his dishonesty in using the photo, but the photo should have been his to repurpose to begin with. Knowledgeable and trusted scholars such as Porter, “argued for an ethical middle ground that promotes file sharing and fair-use rather than surveillance and policing behaviors.” (Johnson-Eilola, p.378)

It is a shame that Shepard Fairey was wrongfully accused of Plagiarism when he was simply observing that “to create the Hope Poster, he needed access to a ‘headshot’ of Barack Obama that conformed to the conventional three-quarters pose.”(Fisher) Following through with this observation helped him to produce an iconic piece of art, and there is no reason to punish a man for success and innovation.

Works Cited

- Associated Press. "The Audacity of HOPE." *Daily Mail* [London] 25 Feb. 2012: n. pag. *Mail Online*. Web. 15 Oct. 2014. <<http://www.dailymail.co.uk/news/article-2106221/Shepard-Fairey-Artist-Obama-HOPE-poster-faces-6-months-jail-lying-image.html>>.)
- Berkeley Technology Law Journal. "Mattel Incorporated versus Walking Mountain Productions." *Berkeley Technology Law Journal* 20.1 (2005): 733. *Berkeley Law*. Web. 15 Oct. 2014. <<http://scholarship.law.berkeley.edu/>>. Copyright Law of the United States. 17 USC. Sec. 8. 1976 and Supp. 2010. *Copyright.gov*. Web. 15 Oct. 2014. <<http://www.copyright.gov/title17/>>.
- Copyright Law of the United States. 17 USC. Sec. 8. 1976 and Supp. 2010. *Copyright.gov*. Web. 15 Oct. 2014. <[http://www.copyright.gov/ title17/](http://www.copyright.gov/title17/)>.
- Fairey, Shepard. "An Important Message from Shepard Fairey." Letter. N.d. *Obey Giant*. Web. 14 Oct. 2014. <http://www.obeygiant.com/headlines/an-important-message-from-shepard-fairey>.
- Feliciano, Kristina. "Understanding copyright law." *American Artist* Sept. 1995: 62+. *Academic OneFile*. Web. 9 Oct. 2014.
- Fisher, William W., III, et al. "Reflections on the Hope Poster case." *Harvard Journal of Law & Technology* Spring 2012: 288+. *LegalTrac*. Web. 9 Oct. 2014.
- Forsythe, Tom. "Mellow Yellow." *Artsurdist*. Tom Forsythe, 2014. Web. 1 Nov. 2014. <<http://www.tomforsythe.com/photo-art.html>>.
- Johnson-Eilola, Johndan, and Stuart A. Selber. "Plagiarism, Originality, Assemblage." *Computers and Composition* 24.4 (2007): 375-403. Web.
- Kennedy, Randy. "Shepard Fairey Is Fined and Sentenced to Probation in 'Hope' Poster Case" *Artsbeat*. New York Times. 7 September 2012. Web. 9 October 2014.
- Koons, Jeffrey. *String of Puppies*. N.d. *O W & E*. Web. 1 Nov. 2014. <<http://www.owe.com/resources/legalities/30-jeff-koons-copyright-infringement/>>.

Obey Offset Poster. N.d. *ObeyGiant*. Web. 2 Nov. 2014.
<<http://obeygiant.com/store/product.php?productid=7>>.

Porter, James E. "Intertextuality and the Discourse Community." *Rhetoric Review* 5.1 (1986):34-47. Web.

Rogers, Art. *Puppies*. N.d. *O W & E*. Web. 1 Nov. 2014. <<http://www.owe.com/-resources/legalities/30-jeff-koons-copyright-infringement/>>.

Samborn, Hope V. "Hope for Copyright." *American Bar Association* (2009): n. pag. 2 May 2009.
Web.

Traub, James. "Art Rogers Vs. Jeff Koons." *The Design Observers Group*. Ed. Observer Omnimedia LLC. Observer Omnimedia, 2014. Web. 1 Nov. 2014.
<<http://designobserver.com/>>.