

Art Law Gallery

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Fairey's Use

Last year's Presidential election was historic on many accounts. Both campaigns saw an unprecedented turnout, as Americans from all walks of life came out in record numbers in support to their candidate of choice. Controversial artist Shepard Fairey, whose work includes "street art, commercial art and design, as well as fine art seen in galleries and museums all over the world," was one of these Americans. (Complaint, *Fairey v. The Associated Press*, 09-cv-01123, U.S. District Court, Southern District of New York, at ¶ 9). Fairey's "Hope" and "Progress" posters depicting President Barack Obama became symbols of the Obama campaign and its grassroots support. The image became a familiar sight on the morning commute, adorning cars' bumpers and back windows. A special version of the poster was created for President Obama's inauguration and another version of Fairey's Obama work now hangs in the Smithsonian Institution's National Portrait Gallery in Washington DC.

Yet Fairey's iconic image of President Obama is now under attack. The Associated Press claims that Fairey's Obama works infringe its copyright in the photograph on which the works are based. Fairey admits that he used a photograph, taken by Mannie Garcia at the National Press Club in April 2006, as a "visual reference" in creating his depiction of Obama (Complaint, at ¶ 18). The Associated Press, which claims to own the copyright to Garcia's photograph, contends that Fairey's works are unauthorized copies of that photograph. The Associated Press has allegedly demanded that Fairey enter into a licensing agreement covering his works (Complaint, at ¶ 37).

In response to the Associated Press' claims, Fairey filed suit in the Southern District of New York, seeking a declaratory judgment that, inter alia, his works do not infringe any copyrights held by the Associated Press, and are protected under the fair use doctrine (Complaint, at ¶ 2). In his complaint, Fairey maintains that he "transformed the literal depiction contained in the Garcia photograph into a stunning, abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message that has no analogue in the original photograph" (Complaint, at ¶ 18). This allegation goes to establish a key element in the fair use analysis - a transformative use (*See Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994)).

The fair use doctrine, codified in 17 U.S.C. section 107, provides that "the fair use of a copyrighted work, including such use by reproduction in copies. . .for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

research, is not an infringement of copyright" (17 U.S.C. § 107). Section 107 goes on to list the factors to be taken into account when determining whether a work is considered a protected fair use. These factors include: (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. The Supreme Court has noted that "the four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright" (*Campbell*, 510 U.S. 569 at 578).

Whether Fairey's Obama works are protected by the fair use doctrine will depend on the court's analysis of these four fair use factors. Indeed, the fair use analysis is fact intensive and must be performed on a case-by-case basis. Artists who make transformative uses out of preexisting works will want to pay particular attention to the outcome of this case. However, the court's ultimate fair use determination will have reaching implications for the art world, as street art and graphic art continues to find its way into museums and galleries around the globe.