

learning from the headlines

IN THE NEWS

On the right, the AP's photo of Obama taken by Mannie Garcia in 2006.



On the left, Fairey's iconic poster of Obama, popularized during the 2008 campaign.

Artist Shepard Fairey and the nation's largest news wire service, The Associated Press (known as AP), are suing each other over who owns the right to use and sell a well-recognized image of President Obama.

The AP claims that Fairey is profiting from a 2006 photo by its photographer, Mannie Garcia, taken at the National Press Club. Fairey used the photograph as inspiration for his familiar "HOPE" poster, which became an unofficial symbol of the Obama presidential campaign.

Fairey claims that he simply used the AP photo "as a visual reference" and that his poster transforms the image in Garcia's picture into a brand-new work of art.

The U.S. Copyright Code gives the creator of a photograph (or any kind of creative work, including movies, books, articles and songs) – the legal right to limit how other people can use the photo.

think about

What would be the impact – positive and negative – of letting people legally sell creative works that are based on, or adapted from, other people's work? Should another filmmaker be able to make a sequel to James Cameron's film "Avatar" without his permission? How about selling a painting of characters from "Avatar"?

How much do you have to change someone else's photo before it becomes your own work of art? Would it be enough just to crop it differently?

Fairey says that he made the poster to support the Obama campaign, and that he gave away more than 300,000 copies of it free. Does that matter? Would the AP have a stronger case against him if he made millions of dollars selling the posters as a business?

The AP photographer, Mannie Diaz, was once involved in this legal dispute. He claimed that the photo was his property, not the AP's, so if Fairey must pay money to anyone, it should be him. When should an artist keep ownership of his work, and when is it fair for ownership to belong to the company that employs him?

terms to know

Copyright – A federal law that makes it illegal to reproduce, adapt, distribute or display a creative work without the owner's permission.

Plagiarism – Not related to copyright law. Plagiarism means claiming credit for work that isn't yours. Copyright infringement is taking someone else's work without permission, even if you give that person credit.

Fair use – A defense to copyright infringement, when only a limited amount of someone else's work is re-used, in a way that does not damage the commercial value of the original work.

Transformative use – An important factor in deciding whether a new use of someone else's work is fair. A use is "transformative" if it expresses a different meaning or message from the original.

A photograph, like any piece of creative work, becomes protected by copyright as soon as it is “fixed.” That means, as soon as the image is recorded in the photographer’s camera. The photo does not have to be registered with the U.S. Copyright Office or marked with the (c) copyright symbol to be legally protected.

When a photo is copyrighted, that means that the owner has the right to decide how other people use it. A wire service like The Associated Press makes its money by charging newspapers, magazines, broadcasters and websites a fee to use its photographs. So AP is very protective about making sure that people are not duplicating or re-selling its photos without paying.

Photos are protected by copyright even when they are placed on the Web in a way that makes it very easy to duplicate them. An owner does not give up his copyright just by displaying the photo on a website.

If a person is accused of violating copyright law (“copyright infringement”), he can defend himself by proving that he made a “fair use.” The federal copyright law recognizes a “fair use” defense to allow people to make limited use of other people’s creative work, as long as they add some new creative

value. Common examples of fair use are sampling a phrase from a popular song recording as part of a new song, or showing a brief clip from a movie to go along with a movie review.

To decide whether someone’s use of another person’s creative work is or isn’t a fair use, there are four points to consider:

(1) Who is the user? A nonprofit, journalistic, or educational use is more likely to be a fair use than a for-profit commercial use.

(2) What is being used? A highly creative piece of work – like a movie released in theatres – is more likely to be protected than an amateur cell-phone photo of a family pet.

(3) How much was used? If only a small “sample” is used – 20 seconds of a song, two lines from a poem – then the use is more likely to be fair. The user should use only what is necessary to make the point, and no more.

(4) How does the use affect the original? If the new user does something that is a substitute for the original – such as uploading five complete songs from a 10-song CD to a website – then the use will not be fair, because the new use will take away listeners (and potential buyers!) from the original.

why it matters

The AP-Shepard Fairey case may set new legal rules about how much creative investment must be added to “transform” someone else’s work into your own new piece of work.

The fact that the AP is fighting an expensive court battle over ownership of a single photograph shows that people can and do get in legal trouble for copying portions of other people’s work, especially a commercially valuable piece of property like a news service photo of a world-famous celebrity.

Many news organizations are getting more aggressive about protecting their writers’ and photographers’ work, now that it is so easy for other people to copy news content and make money by displaying it on the Web. The AP-Fairey case is part of a much bigger debate over when it is OK for websites to “borrow” material without permission and redistribute it.

for further reference

AP’s site portraying its side of the case:

<http://www.ap.org/iprights/fairey.html>

Fairey’s initial legal complaint against the AP:

<http://www.scribd.com/doc/11990547/Fairey-v-AP-Complaint>

SPLC’s guide to copyright:

<http://www.splc.org/knowyourrights/legalresearch.asp?id=32>

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