

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic to the left of the firm's name. The name "astrachan gunst thomas" is written in a lowercase, sans-serif font, with "astrachan" and "thomas" in a darker blue and "gunst" in a lighter blue.

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IS FAIREY'S USE FAIR?

By: James B. Astrachan

The artist, Shepard Fairey, has caused quite a dust-up in the worlds of copyright law and newspaper photographers. Fairey, it seems, used a photograph of Barack Obama, taken by Associated Press photographer Mannie Garcia, as the basis for his Obama campaign HOPE and PROGRESS posters. The AP is said to have threatened a copyright infringement suit and Fairey, represented by a gaggle of Stamford University Law School pro bono lawyers, filed a preemptive action in New York seeking a ruling that his use of the Garcia photo was fair and not infringing. Not surprisingly, the AP countersued for copyright infringement.

Both the declaratory judgment action and the counterclaim for infringement read as if they were written by public relations counsel and not legal counsel, so the facts are a little difficult to discern. But these allegations stand out from the hype.

In 2006, prior to his campaign for president, Obama took part in a panel discussion with actor George Clooney at the National Press Club. Photographer Garcia attended and took a photograph of Obama while he looked slightly upward and sideways. Fairey claims Garcia merely "snapped" the photo. Garcia retorts, "I was on my knees, I'm down low, and I'm just trying to make a nice clean headshot. And I'm waiting, I'm looking at the eyes...there's a focus and I want the background to be a little soft. I wanted a shallow depth of field. I'm looking and waiting."

Fairey claims he used Garcia's photo as a "visual reference", and that he transformed the literal depiction contained in the Garcia photo into a "stunning, abstracted and idealized visual image that creates a powerful new meaning and conveys a radically different message that has no analogue in the [Garcia photo]." The AP asserts that Fairey's work copied all of the distinctive elements of the photo in their entire detail – that the two works are essentially the same.

Fairey sold his poster at \$45 per, and used the proceeds to print additional posters. The poster, using Fairey's altered image morphed into additional posters and

the Fairey art ended up in the National Gallery. Fairey claims he gave away 300,000 posters, but according to the AP, he earned more than \$400,000 as of September 2008 from the sale of items emblazoned with his depiction of the photo – including \$60 sweatshirts. Fairey, the AP claims, is an entrepreneurial artist who knows how to make big bucks on the backs of others' works. The AP also asserts he has a long history of using others' photos to create his "art" and of protecting his IP against infringement by others.

Fairey claims that under the copyright laws he is entitled to use Garcia's photo to create his posters because his use was a fair use. As a fallback defense, he asserts by innuendo that Garcia's newspaper photo is not worthy of copyright protection because it merely records an event, is factual and is not highly creative. "Highly creative," however, is not a requirement for copyright, which protects works of authorship and only requires a modicum of originality.

In its counterclaim for infringement, the AP asserts that its photographers create photos by employing highly creative skills. They take into account angles, lighting, depth, background, scale, focus, timing, selection of subject, lens, color and emotion.

And although Fairey asserts that he transformed the Garcia photo of Obama into a new work, the AP asserts that Fairey's works "do not alter the distinctive characteristics that make the [Garcia] photo so striking...". The AP asserts, "All recognizable elements [in Garcia's photo] remain completely and unmistakably intact in [Fairey's work], including the slant of President Obama's head, and his gaze and expression; the contrast, focus, and depth of field of the photograph; as well as the shadow lines created by the lighting in the original photo."

The parties have marked their territories, and the case raises two primary issues. The first is whether Garcia's photo is a proper subject of copyright protection. This is a slam dunk for the AP, as there will be no doubt whatsoever that it is protectable. It is original and creative and many, many cases have held photographs protectable, while the only case that holds otherwise dealt with the exact reproduction of art by photography. The second issue is whether Fairey's use is a fair use, and a defense to copyright infringement. This is the more difficult question, but I'm betting against Fairey.

The Copyright Act does not define fair use, instead it provides four criteria to apply to determine whether the use is infringing or fair. The statute does not weigh the criteria and they are not intended to be exhaustive. Professor Nimmer sums it up pretty well when he states, "It may be that no more precise guide can be stated than Joseph McDonald's clever paraphrase of the Golden Rule 'Take not from such an extent and in such a manner that you would be resentful if they so took from you.'" Helpful as that may be, a court is still required to analyze each of the four factors found in 17

U.S.C. §107 and the court will do so in the Fairey/AP case. Mindful that the facts have not been fleshed out yet, here's how I evaluate the fair use factors.

Purpose and Character Use. Fairey's use was a mixture of for-profit and non-profit use. Fair use is generally but not always non commercial, and the Supreme Court cautions that a commercial purpose is not fatal to a finding of fair use. Fairey sold posters to make money to print more posters, and he claims he eventually gave away 300,000 posters in support of the Obama campaign. Noble perhaps, but the AP claims that Fairey's profits from the reproduction and distribution of the photo by September 2008, had exceeded \$400,000.

Literal reproduction of a work militates against a finding of fair use under this criteria. Helpful, but not wholly determinative, to a finding of fair use would be Fairey's creation of a new work using the Garcia photo. The evolution of a new, superseding work, from the original is called a productive or transformative use. The question the jury must answer is whether Fairey's poster merely supersedes the objects of Garcia's photo or adds something new with a further purpose or different character, altering Garcia's photo with new expression or different meaning. An example of a transformative use would be the rap version of the Ray Orbison song, "Pretty Woman" because it parodies the original. A finding of transformative use can blunt the adverse fact that Fairey commercialized the photo by making gobs of money. The jury will be asked to determine whether Fairey's poster adds value to Garcia's photo; whether Fairey has added enough of his own work to transform the photo into a new work; whether Fairey has transformed the raw material in the Garcia photo into a creation of new information, new aesthetics, new insights and understandings. It's hard for me to agree with Fairey's contention that his work is much different than Garcia's photo and that he added much to the photo besides an updated look and a word. But, Fairey is sure to rely heavily on a recent decision in the same circuit involving bad-boy artist Jeff Koons in which Koons lifted only legs from a fashion magazine ad and incorporated them into a large painting, changing color and scale. I don't think the court will agree that Fairey's use is as transformative as was Koons, and that he copied as little of the work as did Koons, but the court in Koons was impressed that the painting ended up in a museum and that he used elements from the copyrighted work to create new meaning.

And while a defendant's good motive for use, or a plaintiff's bad motive in blocking use, may favor the defendant, a license was offered by the AP and Fairey made lots of money. To me, this factor has one leg on the dock and one in the boat. Its heavily commercial nature doesn't favor Fairey, but it is not impossible that the court will consider Fairey's use transformative based on what it might consider "new aesthetics."

The Nature of the Work. Creative works are given more protection than non-creative works. Fiction versus fact. Fairey tries to make the case that news photos,

and Garcia's photo, are in particular, not creative, but the AP's 49 Pulitzer prizes for photography and the creative effort that Garcia expended blunt Fairey's argument. This factor weighs in favor of the AP.

The Amount and Substantiality of the Portion Used. Fairey may have omitted Mr. Clooney from his use of Garcia's photo, but it appears he took the heart and soul of the photo. This factor also weighs against Fairey.

Effect on AP's Market for the Photo. Some courts consider effect on the market the most critical factor. The AP claims to derive most of its revenue from licensing its work, and it offered Fairey a chance to obtain a license for the Garcia photo. He refused. The key question regarding this factor should be whether widespread conduct like Fairey's will have an adverse impact on AP's potential market for its photos? Likely, the AP usually licenses its photos for faithful reproduction and not transformative uses, so the market affected by Fairey's use of the photo is probably smaller than the AP's other markets. Still, the AP claims it licenses its photos for many purposes, and it remains to be seen whether AP has or could have a market in this genre, for if it does not, and it does not intend to, it is hard to see how the market for its photos has been harmed.

There are several troubling aspects of this case that militate in favor of the AP. They are the minor transformative nature of Fairey's work, his gross commercialization of the AP's work and his taking of the heart and soul of Garcia's photograph. If the court applies the liberal and flexible principals of equity, which is what it should do, it's hard to see a Fairey victory under these circumstances. Most fine artists will disagree, and root for Fairey. Property owners will root for the AP. Maybe the parties will settle, but if they do not, the view from the bench will be interesting.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.