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COPYRIGHT LAW AND THE VISUAL ARTS: *FAIREY V. AP*

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I. Introduction

Shepard Fairey is a prominent figure in the world of visual modern art known for his creation of controversial works of political and social commentary.[1] To support Barack Obama's presidential campaign in 2008, Fairey created the "Obama Hope" and "Obama Progress" posters,[2] which became widely recognizable throughout the historic campaign.[3] While the posters generated a great deal of positive favor for Barack Obama's presidential candidacy, the effect of the posters on the artist who created them did not generate such a favorable result.[4] Upon discovering that The Associated Press ("AP") owned the rights to the reference photograph used in the posters, the AP claimed that Fairey's posters infringed its copyright.[5] Fairey maintains that the incorporation of the photograph into the posters constitutes a fair use and that the posters were not created in violation of any valid copyright held by the AP.[6]

This essay examines the status of the recent copyright infringement litigation in *Shepard Fairey, et al. v. The Associated Press*, and analyzes the issues in the context of the fair use factors enumerated in the Copyright Act of 1976 ("Copyright Act" or "Act").[7] Part II sets the stage by reviewing copyright law and its application to the visual arts. Part III then details the lawsuit's factual and procedural background. Finally, Part IV applies the four fair use factors to the case.

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[1] Randy Kennedy, *Artist Sues the AP Over Obama Image*, N.Y. TIMES ART & DESIGN, Feb. 9, 2009, *available at* http://www.nytimes.com/2009/02/10/arts/design/10fair.html?scp=5&sq=randy%20kennedy%20shepard%20fairey&st=cse.

[2] Complaint for Declaratory Judgment and Injunctive Relief at 4, Shepard Fairey & Obey Giant Art, Inc. v. The Associated Press, (S.D.N.Y 2009) (No. 09-01123).

[3] *See* Kennedy, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Copyright Act of 1976, 17 U.S.C. § 106 (2006).

II. Copyright Law and the Visual Arts

Modern copyright law is one of the primary channels through which intellectual property rights are protected. While originally intended to protect literary materials,[8] copyright law has since been expanded to cover a wide variety of original works, including "pictorial, graphic, and sculptural works."[9] It is derived from a provision of the U. S. Constitution granting Congress the authority "to promote the Progress of Science and useful Arts" by conferring upon artists "the exclusive Right to their respective Writings."[10] Enacted in 1976, the Copyright Act[11] grants holders of copyrights exclusive rights[12] to "original works of authorship fixed in any tangible medium of expression."[13] The Act attempts to balance owners' exclusive rights against the rights of others to copy and use such materials.[14]

A cause of action for infringement arises when an individual or entity misappropriates a copyright owner's protected material.[15] To succeed in an infringement action, the claimant must show both ownership of the copyright and copying by the defendant.[16] Congress has deemed certain enumerated purposes to be automatically non-infringing.[17] In addition to these *per se* exceptions, alleged infringers may also defend their use under the fair use doctrine. When raised in an infringement action, the Copyright Act mandates application of four statutory fair use factors.[18] While not exclusive, these factors are intended to guide courts' discretion within the framework of each individual case.[19] As an "equitable rule of reason,"[20] the fair use doctrine encourages flexible judicial inquiries conducted on a case-by-case basis, and thus is unencumbered by bright-line rules.[21]

The application of copyright law to the visual arts has proven to be especially challenging for courts and individuals alike.[22] Although the Copyright Act expressly includes "pictorial" works within its scope,[23] courts have long struggled to analogize literary works to artistic

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[8] Willajeane F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After* Rogers v. Koons, 59 BROOK. L. REV. 373, 411 (1993).
[9] 17 U.S.C. § 102(a)(5).
[10] U.S. CONST. art. I § 8, cl. 8.
[11] 17 U.S.C. §§ 101-805.
[12] 17 U.S.C. § 106.
[13] 17 U.S.C. § 102.
[14] *See* Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 245 (2d Cir. 1983) (courts must "strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected by infringement").
[15] *Id.* at § 501.
[16] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).
[17] 17 U.S.C. § 107 (identifying various purposes as *per se* non-infringing uses, including "criticism, comment, news reporting, teaching, . . . scholarship, or research").
[18] *Id.*
[19] *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 577-78 (1994).
[20] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (explaining that the fair use doctrine is based on the concept of "reasonableness").
[21] *E.g.*, *Campbell*, 510 U.S. at 577; Blanch v. Koons, 396 F.Supp.2d 476, 479-80 (S.D.N.Y. 2005) (stating that assessment of the fair use factors is an "open-ended and context-sensitive inquiry").
[22] McLean, *supra* note 8, at 383.
[23] 17 U.S.C. § 102(a)(5).

images.[24] Since only the original, stylistic aspects of a work are protectable,[25] courts are uniquely positioned to determine the particular boundaries which define the various elements of original expression. In doing so, courts aim to "strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected by infringement."[26]

Some look to style to inform this inquiry, defined as "a quality that gives distinctive excellence to something (as artistic expression) and that consists (especially) in the appropriateness and the choiceness of the elements (as subject, medium, form) combined and the individualization imparted by the method of combining."[27] Nonetheless, it is inherently difficult to isolate the independent elements of an image which are attributable to one particular artist as opposed to those elements which merely depict factual subject matter. Thus, this process requires judges, many of whom lack artistic expertise, to make value judgments by attempting to parse the various elements of a work in order to determine which deserve protection and which should stay in the public domain. As may be expected, judges have not always articulated consistent principles, and thus, jurisdictions have frequently come to widely differing conclusions when confronted with such disputes.[28] For example, some courts isolate the artistic (and thus, protectable) elements of a work before engaging in a fair use analysis, while other courts consider the work as a whole.[29] Complicating this task is the dearth of case law to clarify these issues because many of these conflicts are settled outside of court.

The clash between art and law also emerges from the postmodern art movement and, in particular, the trend towards artistic appropriation, an artistic technique whereby artists reference and expand upon elements from others' works in order to create new images and foster new understandings.[30] Proponents of this movement maintain that "absolute novelty is an impossibility," such that "*all* works are necessarily derivative."[31] The use of preexisting images for inspiration creates a logical tension between the First Amendment value of free speech with the need to safeguard individual ownership rights.

III. Factual and Procedural Background

In manifestation of his support for Barack Obama's 2008 presidential campaign, Plaintiff Shepard Fairey created several campaign posters depicting the presidential candidate's likeness

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[24] Judith B. Prowda, *Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts*, 19 COLUM. J.L. & ARTS 269 (1995).
[25] 17 U.S.C. § 102(b). *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 217 (1954).
[26] Warner Bros. v. Am. Broad Cos., 720 F.2d 231, 245 (2d Cir. 1983).
[27] Webster's Third International Dictionary 2271 (1986).
[28] *See* H.R. Rep. No. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, 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."). *But see* Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (describing fair use as "the most troublesome [issue] in the whole of copyright.").
[29] *See* Steinberg v. Columbia Pictures Indus., Inc., 663 F.Supp. 706 (1987).
[30] McLean, *supra* not 8, at 385 (describing appropriation as the "artistic technique in which artists copy/borrow/quote elements from another's work").
[31] *Id.* (emphasis in original).

and containing various inspirational phrases.[32] These posters, which were in Fairey's signature, modern style, consisted of a "pensive Barack Obama looking upward, as if to the future, splashed in a Warholesque red, white, and blue and underlined with the caption HOPE [or PROGRESS]."[33] Initially, Fairey claimed that the reference image was one taken at a 2006 National Press Club panel on the crisis in Darfur, captured by photographer Mannie Garcia while on assignment for the Associated Press.[34] Thereafter, Garcia asserted ownership rights to the reference photograph, alleging that he was neither an employee of the AP nor did he assign the rights to the photograph to the AP.[35]

Fairey's posters became ubiquitous as the iconic symbol of Obama's historic presidential campaign.[36] Notably, the works have continued to receive acclaim in the aftermath of President Obama's election, as evidenced by the commission of the National Portrait Gallery of the Smithsonian Institution for a permanent display of Fairey's Obama-inspired works.[37] In response to the immense popularity of the posters, members of the public began to inquire as to the source of the reference photograph used by Shepard Fairey.[38] As soon as the Mannie Garcia photograph was identified, the AP contacted Fairey and related entities, requesting both compensation and attribution for the use of the Garcia image, to which Fairey readily declined.[39]

Settlement discussions ceased when Fairey filed a preemptive action against the AP in the United States District Court for the Southern District of New York, seeking a declaratory judgment stating that there was no copyright infringement and that any appropriation of the image constituted fair use.[40] In response, the AP promptly filed a Counterclaim against Fairey and related entities, asserting that Fairey's works do not qualify for the fair use affirmative defense, but rather amount to a violation of copyright and a threat to the integrity of the journalism profession.[41] Fairey's Answer to the Counterclaim asserted that the AP claims are barred by the equitable doctrine of unclean hands, meaning that the AP cannot in good faith continue this litigation when the AP itself frequently makes commercial use of the copyrighted materials of other artists.[42]

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[32] *See* Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants at 2, Shepard Fairey v. Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

[33] Hillel Itale, *AP wants credit for Fairey's Obama image,* THE BOSTON GLOBE, Feb. 5, 2009, *available at* http://www.boston.com/ae/media/articles/2009/02/05/ap_wants_credit_for_faireys_obama_image/.

[34] Complaint for Declaratory Judgment and Injunctive Relief at 3, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press, (S.D.N.Y 2009) (No. 09-01123).

[35] Randy Kennedy, *Rights to Obama Photo: Three Way Battle*, N.Y. TIMES, July 14, 2009, *available at* http://www.nytimes.com/2009/07/15/arts/design/15artsATHREEWAYBAT_BRF.html?scp=3&sq=shepard%20fairey%20mannie%20garcia&st=cse. The merits of Garcia's argument appear to be weak, however, an in-depth discussion of such is beyond the scope of this Comment.

[36] Kennedy, *supra* note 1.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Complaint for Declaratory Judgment and Injunctive Relief at 1, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press, (S.D.N.Y 2009) (No. 09-01123).

[41] *See* Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants at 2, Shepard Fairey v. Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

[42] *Id.* at 21.

Recent developments have exposed evidence that Fairey misidentified the source of the image in his original Complaint.[43] In fact, Fairey used an entirely different photograph taken by Mannie Garcia, which consisted solely of a headshot of Obama with the United States flag in the background, rather than the initially cited photograph that also included actor George Clooney.[44] In an unsuccessful attempt to conceal the true reference photograph, Fairey allegedly attempted to delete the electronic files used to create his works and delivered falsified documents to his counsel for production.[45] As a result, Fairey's original legal counsel withdrew from the case citing professional ethical obligations.[46] Further, the AP amended its Answer to assert additional claims against Fairey, including spoliation of evidence and fraud. Although Fairey subsequently retained new counsel, both Fairey and his former counsel maintain that while the indiscretion was regrettable, the posters still constitute fair use.[47]

Notably, Fairey is also currently embroiled in other legal disputes in relation to his art.[48] Fairey has been arrested on twelve other occasions and, shortly after filing suit, he was arrested on an outstanding warrant arising out of the unauthorized tagging of buildings.[49] The AP's reluctance to enter into settlement agreements may be due in part to the added clarity that is likely to result from adjudication of this controversy, as well as the AP's view that Fairey is a particularly unsympathetic opponent. In the court of public opinion, support for Fairey may have diminished in light of his checkered past and his recent admission that he lied to his own attorneys.[50] While the merits of the case still allow for a plausible fair use argument, the untruths Fairey perpetuated could potentially persuade a jury that the use was neither fair nor equitable.[51]

IV. Application of the Fair Use Factors to the Present Controversy

A. Purpose and Character of the Use

The first factor in a fair use analysis considers the nature of the alleged infringement.[52] First, courts must determine whether the use was for commercial or non-commercial purposes.[53] Where used primarily to reap commercial gain, the Supreme Court has deemed the use

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[43] Liz Robbins, *Artist Admits Using Other Photo for Hope Poster*, N.Y. TIMES, Oct. 17, 2009, *available at* http://www.nytimes.com/2009/10/18/arts/design/18fairey.html?scp=3&sq=robbins%20fairey&st=cse.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Anthony Falzone, *Fair Use Project Withdrawn From Fairey Case; Hope Remains*, THE CENTER FOR INTERNET AND SOCIETY (Nov. 13, 2009), http://cyberlaw.stanford.edu/node/6353.
[48] Jay Lindsey, *Shepard Fairey Arrested in Boston*, Huffington Post, Feb. 7, 2009, *available at* http://www.huffingtonpost.com/2009/02/07/shepard-fairey-arrested=i_n_164872.html.
[49] *Id.*
[50] Hillel Italie & Joe Mandak, *Artist admits he used key AP photo for 'HOPE' poster*, USA TODAY, Oct. 17, 2009, *available at* http://www.usatoday.com/news/nation/2009-10-17-obama-hope-poster-lawsuit_N.htm.
[51] *Id.*
[52] 17 U.S.C. § 107(1). *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
[53] *E.g.*, *Harper & Row*, 471 U.S. at 562 (explaining that the question is "not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price").

presumptively unfair.[54] By contrast, courts are more likely to approve use for non-profit purposes. Courts also inquire into whether the use was transformative, such that the resulting work "adds something new [to the original], with a further purpose or different character, altering the first with new expression, meaning, or message."[55] For instance, if the secondary work serves an entirely different function than that of the original, this weighs in favor of a finding of fair use.[56] Where this factor is satisfied due to a high degree of transformation, courts tend to accord less importance to the remaining fair use factors.[57] The recognition of this factor reflects the social utility inherent in the promotion of the arts.

Some courts have emphasized the propriety, or lack thereof, of the alleged infringer's conduct when assessing this factor. The Second Circuit, in which the present controversy resides, gave substantial weight to the defendant's bad faith conduct in an infringement case rejecting the fair use defense.[58] The Court stated that "[k]nowing exploitation of a copyrighted work for personal gain militates against a finding of fair use."[59] By contrast, the U.S. District Court for the Southern District of New York recently held that "[e]ach case of alleged infringement involving different works must be decided on its own merits," and emphasized that the defendant's prior copyright infringements had no bearing on the controversy.[60] Thus, it is uncertain whether such bad faith conduct will be given weight in this dispute, particularly given the inconsistencies that have arisen within the jurisdiction.

In the present case, Fairey stresses his non-commercial objectives, claiming that he did not receive any profits from his reference to the original photograph. Specifically, Fairey argues that, despite initial sales of approximately 350 posters at a price of forty-five dollars each, any incoming revenue was merely used to print additional posters, which were then freely distributed to consumers.[61] The AP, however, produced evidence that Fairey has already reaped substantial profits from sales of the posters and other merchandise, noting that by September 2008 alone, proceeds had exceeded $400,000.[62]

The court will likely give substantial weight to these personal and monetary advantages. There is little doubt that Fairey has garnered quite a bit of recognition through distribution of his art, the resulting media attention, and this lawsuit itself. Regardless of any direct financial gains, Fairey's career has clearly been furthered by the creation of these posters. As such, it is likely

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[54] *Sony Corp.*, 464 U.S. at 449, 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright").

[55] Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

[56] *See* Perfect 10, Inc. v. Amazon.Com, Inc., 503 F.3d 1146, 1165 (9th Cir. 2007); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) ("The use must be productive and must employ the quoted material in a different manner or for a different purpose from the original.").

[57] *Campbell*, 510 U.S. at 577.

[58] Rogers v. Koons, 960 F.2d 301, 309 (1992) (considering "whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer").

[59] *Id.*

[60] Blanch v. Koons, 396 F.Supp.2d 476, 482-83 (2005).

[61] *See* Complaint for Declaratory Judgment and Injunctive Relief at 5-6, Shepard Fairey & Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

[62] *See* Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants at 11, Shepard Fairey v. Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

that Fairey and related entities have reaped significant commercial gains and will continue to do so.

Recent disclosures of Fairey's attempts to conceal the true source of the photograph used, attempts to destroy relevant evidence, and falsification of court documents all evince Fairey's bad-faith conduct relating to the present proceedings. Since courts frame the inquiry as whether the defendant intended to exploit someone else's artistic value for personal gain,[63] rather than focusing on the fact of impropriety for its own sake, Fairey must prove that he genuinely intended to transform the Obama photograph into an original work of art. Fairey's lies as to the source of the image constitute *prima facie* evidence of bad faith, in that his efforts at concealment reveal that Fairey himself believed that he had exploited the artistic value of the Garcia photograph. Moreover, Fairey's actions have not only imposed economic and reputational harm on the AP and Garcia, but have also interfered with the proper administration of justice, disrupting the integrity and efficiency of the civil court system. Regardless of the law to be applied, these facts are unlikely to be viewed favorably in any court's evaluation. While this Court's earlier decision refused to consider alleged infringers' prior conduct,[64] the opinion did not specifically address the relevance of bad faith conduct occurring within the context of the case itself.[65] Since the fair use doctrine is grounded in principles of equity, it is likely that a reviewing court would accord great weight to such egregious conduct when balancing the competing interests at stake.

Fairey also claims that any use of the Garcia photograph was highly transformative. He argues that "the literal depiction contained in the photograph was transformed into an abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message."[66] Fairey argues that he aimed at conveying a powerful message entirely independent from the underlying factual content. Fairey's argument is supported by the recent Second Circuit decision in which it held that an artist's use of a photograph in creating a collage painting was transformative because the photo was "fodder for the collage's commentary on the mass media and not merely a repacking of an existing photo."[67] Although Fairey did not create a collage, his alterations to the photograph and his placement of the photograph in an entirely new medium served to transform the narrative meaning intended by Garcia into an iconic portrait to promote Obama's presidential campaign. On the other hand, the AP challenges these contentions by arguing that the decision to use this particular photograph reveals the absence of any transformative purpose, as Fairey failed to make any substantial alterations to the original photograph.[68]

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[63] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
[64] *Blanch*, 396 F.Supp.2d at 482-83.
[65] *Id.*
[66] Complaint at 1.
[67] Blanch v. Koons, 467 F.3d 244, 260 (2006).
[68] Answer at 13.

B. Nature of the Copyrighted Work

The second factor considers "any aspect of the nature of the copyrighted work that has rational bearing on whether its secondary use should be considered fair."[69] The Copyright Act provides owners with the right of first publication.[70] Thus, unpublished works receive greater judicial protection than those that are published.[71] A distinction is drawn between factual and creative works, such that creative works are entitled to greater protection from infringement.[72] The Supreme Court has described the elements of originality in a photograph as including "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."[73] By contrast, individuals are entitled to copy a substantially greater portion of factual works, as such copying advances the public benefits inherent in the free flow of information.[74] This also entails a determination as to whether the work "represented a substantial investment of time and labor made in anticipation of financial return."[75]

Fairey argues that the original photograph captured by Garcia only documented factual events,[76] and he emphasizes the widely disparate purposes of the two works.[77] Whereas the Garcia photograph served the factual purpose of informing the public of a newsworthy event, Fairey's posters were more creative. Due to the public interest in access to facts, particularly for news purposes, this factor must weigh in favor of fair use. He also points out that the photograph was published long before he appropriated the imagery, such that both the AP and Garcia had adequate opportunity to promote and display the original. The AP disagrees, contending that the Garcia photograph is in fact a creative work derived from Garcia's artistic skill and training, which permitted him to capture a unique moment in time through his deliberate choice of lens, lighting, composition, and angle.[78] The particular angle and tilt of Obama's head, the thoughtful expression, and the powerful symbolism of the United States flag in the background are original elements captured by Garcia. Further, these are the creative elements that led Fairey to choose this particular photograph in the first place, as demonstrated by the mere fact that Fairey selected the image long after its publication.[79]

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[69] 17 U.S.C. § 107(2). *See also* New Era Publ'ns Int'l APS v. Henry Holt & Co., 695 F.Supp. 1493, 1500 (S.D.N.Y. 1988).
[70] 17 U.S.C. § 106.
[71] *See* Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1078 (2d Cir. 1992).
[72] *See Harper & Row*, 471 U.S. at 562.
[73] *Burrow-Giles*, 111 U.S. at 60.
[74] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
[75] MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981). *See also Rogers*, 960 F.2d at 310 (holding that copying was not a fair use where original photographer invested substantial creative effort in the work).
[76] Complaint at 11.
[77] *Id.* at 5 ("While the evident purpose of the Garcia Photograph is to document the events that took place at the National Press Club . . . the evident purpose of [Fairey's works] is to inspire, convince, and convey the power of Obama's ideals, as well as his potential as a leader, through graphic metaphor.").
[78] Answer at 12-13.
[79] *Id.*

The court is likely to give significant weight to the AP's claims that Garcia's original photograph was creative, not factual. The Supreme Court has long recognized copyright protection for photographic works.[80] Inasmuch as copyrights may only issue for works possessing a sufficient degree of originality,[81] an existing copyright necessarily presumes such creativity. Moreover, there is little question that Garcia invested his time and energy into the creation of the original work and that he did so with an expectation of receiving financial benefits. On the other hand, Garcia's photograph had previously been published by the AP, a fact weighing in favor of a fair use finding.

C. Amount and Substantiality of Use

The third factor looks at the quantitative and qualitative degrees of copying and asks whether the taking was reasonable under the circumstances.[82] Courts look to both the portion of the copyrighted work used and the relative importance of the portion used in relation to the work as a whole.[83] Although relevant to a fair use determination, copying of an entire work does not automatically preclude a finding of fair use.[84] Rather, the central issue is "substantial similarity."[85]

One interpretation of qualitative evaluation is reflected in the "idea/expression dichotomy," under which only the underlying expression, not the idea, may be protected by copyright.[86] The Second Circuit has ruled that photographers cannot monopolize poses, but noted that the concept is increasingly blurry when dealing with the visual arts because the "conceptual distinction between idea and expression becomes almost impossible."[87] Since the visual elements in a photograph are difficult to parse, courts must choose between either protecting the whole image or none at all, thereby undermining the requisite balancing under the fair use doctrine. Moreover, the Second Circuit stressed that "[t]o criticize the work, the postmodern artist may need to use the entire image in order to engage effectively in . . . the cultural values it espouses."[88]

Fairey's primary argument is that he only used a portion of the original photograph, and any portion used was reasonable in light of his purpose.[89] By contrast, the AP claims that Fairey

[80] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (establishing copyright protection for original photographs). *See Rogers*, 960 F.2d at 307 (acknowledging that photographers' works are "artistic creation[s]" because of the "unique expression of the subject matter captured in the photograph").
[81] 17 U.S.C. § 102.
[82] 17 U.S.C. § 107(3).
[83] *Rogers*, 960 F.2d at 310 (1992).
[84] *Sony Corp.*, 464 U.S. at 450.
[85] Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 245 (2d Cir. 1983). *See also* Comptone Co. v. Rayex Corp., 251 F.2d 487, 488 (2d Cir. 1958) ("[t]he copying need not be of every detail so long as the copy is substantially similar to the copyrighted work").
[86] *Rogers*, 960 F.2d at 310.
[87] *Id.* at 310-12 (explaining that "the complete photograph must be seen in order to experience its import").
[88] *Id.*
[89] *See* Complaint at 11.

misappropriated the entire work, while retaining "the heart and essence of the photo."[90] Thus, any degree of copying precludes a finding of fair use.[91]

Evaluation of this factor requires the Court to find the proper balance between the rights of the original copyright owner, the rights of the artist, and the resulting costs and benefits to society. While Fairey undoubtedly misappropriated the primary substantive content of the Garcia photograph, the determination as to which aspects of that photograph are protected and which are not is far from clear. Ultimately, this amounts to a policy judgment regarding whether Fairey appropriated more of the work than necessary to convey his message. The concern is that the boundaries of fair use would be diminished if artists can use others' works without crediting the copyright owner at all.

D. Effect of the Use on the Market

The Supreme Court has ruled that this factor[92] is "the single most important element of fair use."[93] Where the holder of the copyright can show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists,"[94] courts reject the fair use defense. No showing of actual harm is required.[95] Analysis focuses on three main inquiries: whether the infringing use decreases potential sales for the original work, whether the use interferes with the marketability of the original, and whether it fulfills the demand for the original.[96]

Fairey claims that he has not harmed the market for the original or any derivatives, but rather has actually enhanced the value of the original "beyond measure,"[97] noting that his works have substantially increased public demand for the original photograph. He points out that his works became so iconic that consumers sought to incorporate the original Garcia work into their collections.[98] The AP argues that Fairey's infringing use not only substantially impaired the market for the Garcia photograph, but widespread, continuing use will effectively undermine the AP's licensing program.[99]

V. Conclusion

In the milieu of the visual arts, many artist-creators often want to protect their creative expressions.[100] One court has explained that an artist should have the right "to protect his choice

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[90] Answer at 12-13.
[91] *Id.*
[92] 17 U.S.C. § 107(4).
[93] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).
[94] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (emphasis in original).
[95] *Id.*
[96] *E.g.*, Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155-56 (9th Cir. 1986). *See also Sony Corp.*, 464 U.S. at 451 (stating that harmful use may be shown by proof that "if [the use] should become widespread, it would adversely affect the potential market for the copyrighted work").
[97] Complaint at 11.
[98] *Id.* at 2.
[99] Answer at 39.
[100] Judith B. Prowda, *Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts*, 19 COLUM. J.L. & ARTS 269, 273 (1995).

of perspective and lay-out in a drawing, especially in conjunction with the overall concept and individual details."[101] It is relevant that "mass reproduction of a visual artist's work may diminish its value."[102] The present case involves two parties, both seeking to safeguard their creations at the expense of the other. There is no readily available conclusion as to which party possesses a greater entitlement or serves a weightier public interest, as both of these inquiries involve value judgments that cannot be answered by resort to doctrinal principles. Furthermore, both of these entities make substantial contributions to society, albeit in different ways.

Bad faith on Fairey's part may well shift chances of success in the AP's favor; however, due to the broad discretion given trial judges in applying the four fair use factors, it is difficult to predict the outcome of this controversy, as the ultimate conclusion will depend on a careful balancing between the competing interests at stake with the underlying purposes of modern copyright law. Moreover, the volatility of the litigation renders it likely that even more allegations and evidence may emerge, which may further reinforce the need for structured guidelines to guide both courts and parties.

[101] Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y. 1987).
[102] *Id.*