Brian Cantor

Claire Filipek

Bonnie Malhotra

The Obama campaign’s iconic “Hope" poster used in 2008 was accredited to the artist Shepard Fairey. This “cartoonized” poster idealizes the potential presidential candidate as he stares off into this distance.  It uses patriotic colors and the phrase ‘hope’ in bold letters at the bottom of the image to create political propaganda praising Obama. The problem with this poster is that Fairey based it off of a picture of Obama initially taken by Mannie Garcia, a photographer for the Associated Press (AP).

The AP owns the copyright of the photograph and demanded compensation for the use of their photo as a reference for Fairey’s picture. When negotiations fell through, Fairey decided to battle the AP using “fair use” as his defense.  “Fair use” means a portion of copyrighted material can be used without permission of the copyright owner provided the use is fair and reasonable, does not substantially impair the value of the materials, and does not reduce the realistic profits expected by the owner.  As Fairey’s poster became more popular, the AP claimed that they lost potential revenue from his unapproved use of the photograph.  Fairey made a lot of money by printing the image on a variety of merchandise his clothing company, OBEY, sold.  Since the AP is a licensing agency, they make their money off of people using images such as the photograph taken of Obama. The problem lies in the fact that Fairey gave no attribution or compensation to Garcia for taking the picture.

It is arguable that Goldstein, author of *Copyright’s Highway: From Gutenberg to the Celestial Juke*, would have supported the Associated Press in their claim. He argues, “an author’s work is not only his property; it is the very embodiment of his personality” (Goldstein 20).  The photograph expresses the very embodiment of the photographer, and thus should be respected and acknowledged if that embodiment of his personality is going to be copied, distributed, or sold for personal gain. However, by posting the picture on the internet, the Associated Press allowed themselves to “expose it irretrievably to a potentially indeterminate degree of sampling, rearrangement, and recombination” (Goldstein 24). Since a computer allows you to digitally alter an original work to create something vastly different, an artist’s work that is posted online can be wrongly subjected distortion and plagiarism.

The internet is a public entity, however there is owned, intellectual property for everyone to view, but people can not use it and make money off of it.  It is acceptable that Fairey used the AP’s photograph as an inspiration for his poster, but he should have paid royalties to the Associated Press so Garcia could receive proper compensation for the photograph he copied.  Fairey put an artistic twist on someone else’s art, which should be allowed because that creates more, complex art.  The problem is that he made money off of the poster containing Garcia’s photograph.  There should be collaboration between artists to further artistic innovation, but the proper credit should be given to each individual artist and their work for the contribution they made to the ever changing field.

As Vaidhyanathan writes in his book, *Copyrights and Copywrongs*, copyrights are created for the purpose of furthering arts and sciences. Copyright law allows for transformative use under the “fair use” clause.  Vaidyanathan even argues that this determinant might be too stringent and subjective. Fairey’s original defense was that his work fell into this transformative use category because he gave the court evidence that he used a picture that included both George Clooney and Obama. Fairey discredited his case through this act however, later admitting that he actually used a close up image of Obama. While Fairey was not right in this action, could his use of the image still be transformative enough? The original image was used for a news story, while Fairey’s intention for the image was to create an iconic piece of political art. Fairey’s image, while based on the original AP photograph, employs a heavily stylized illustration effect creating a poster that looks similar to the style of propaganda in the 1950’s and very much unlike a news snapshot. Vaidyanathan would side with Fairey’s defense in this case because he believes that copyright law as it stands today is outdated.

Copyright law has traditionally been about 20 years behind any new technologies that emerge; “computer-created works challenge traditional copyright assumptions” (Goldstein 25) mainly because traditional copyright laws haven’t yet accounted for computer technology.  Current technology has created many problems for the existing copyright laws because the legislation does not take into account the existence of tablet computers, shared torrent files, and intellectual property on the internet.  Copyrighted material can now be copied indefinitely and distributed to many technological mediums.  The copyright law should be updated to deal with the technological advances that are being made so that they are in line with our current culture. Additionally, artists such as Fairey are constantly walking the very subjective line between “fair use” and copyright infringement.

Goldstein would argue that Shepard Fairey’s use was not “fair use” because “as new technological uses of copyrighted works emerge, lawmakers should be quick to extend copyright to encompass them”(Goldstein 202). In  the Williams & Wilkins vs. the United States case, the National Library of Medicine was found to be copying multiple medical journals without paying any royalties.  The Fairey case can be related to the Williams & Wilkins case because Fairey used technology to digitally alter, or copy the AP’s property and profited from it. Goldstein chose to put this case into his book because he wanted to show that “custom is important in fair use cases” and that copyright is not designed “to stop the flow of scientific [or artistic] information, but only to obtain fair compensation for the use of his property”(Goldstein 69-71). Fairey’s use of the photograph would have been perfectly legitimate if he had asked the Associated Press’ permission first because of his commercial intentions.

The Associated Press wanted Fairey to pay royalties for all copies of the picture sold.  Fairey did not want to do that, so he sued the Associated Press.  Then, the Associated Press countersued Fairey claiming that he committed a copyright violation by using an AP-owned image in his poster.  There was no clear argument for either side for the entirety of the case.  To make the trial even more confusing, Fairey changed his stance halfway through.  He began the trial by saying that he never used the photograph as an inspiration for the “Hope” poster.  As the trial progressed, he began to argue that “‘fair use’ allowed him to [use] the image and reinterpret it for artistic purposes” (Memmott).

The Fairey vs. Associated Press Court case was dismissed in January 2011 and the situation was settled outside of court. In settling the civil lawsuit, “The A.P. and Mr. Fairey [agreed] that ‘neither side surrenders its view of the law” (Kennedy). If Fairey had won his lawsuit then there could have been a new precedent allowing anyone to take and commercialize the content of an owner’s property. After all of the money that went into hiring lawyers and settling with the case, Fairey would have been wealthier if he had agreed to the AP’s original proposition.

Sometimes, it is necessary to sue an artist for copyright infringement, and when there is justifiable, concrete evidence present, the trial will go smoothly.  There was an added difficulty to this case compared to some other copyright trials; the two pieces of art in question were completely different forms of art and there were no set guidelines to follow in court pertaining to the existing copyright laws.  Fairey still prints the poster and uses the picture in his clothing line, but he shares the rights with  the Associated Press for using its photograph as an inspiration for his art. He "has agreed that he will not use another AP photo in his work without obtaining a license from the AP”(Kennedy). A precedent is still not set for a copyright case like this one because it was not settled in a court of law.  Copyright law still remains unclear and needs to be revised to serve as a better guideline to artists so that they know what is allowed to be copied, and what is not.

For this paper, I helped Claire research specific aspects of the case, and contributed to the Goldstein argument, analytically reading and quoting the text, and seeing where we could apply his argument in order to make it a strong supporting argument. I also brought up the idea of technology, and if we should include that in our essay because although it isn’t part of the prompt, technology played a huge role in our case. I then helped write the introduction, and the parts of the paper that specifically mention Goldstein, and why we believed he would support the AP in this case.

Sources

Kennedy, Randy. "Shepard Fairey and The A.P. Settle Legal Dispute." *New York Times* 12 Jan 2011, C2. Web. 20 Mar. 2013.

Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Jukebox*. Stanford: Stanford university Press, 1994. Print.

Memmott, Mark. "Shepard Fairey And AP Settle Copyright Dispute Over 'Hope' Poster." *NPR*. NPR, Jan. 2011. Web. 20 Mar. 2013.

Vaidhyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. New York: New York University Press, 2001. Print.