If the Copy Is an Artwork, Then What’s the Original?

By RANDY KENNEDY
Published: December 6, 2007

Correction Appended

Since the late 1970s, when Richard Prince became known as a pioneer of appropriation art — photographing other photographs, usually from magazine ads, then enlarging and exhibiting them in galleries — the question has always hovered just outside the frames: What do the photographers who took the original pictures think of these pictures of their pictures, apotheosized into art but without their names anywhere in sight?

Recently a successful commercial photographer from Chicago named Jim Krantz was in New York and paid a quick visit to the Solomon R. Guggenheim Museum, where Mr. Prince is having a well-regarded 30-year retrospective that continues through Jan. 9. But even before Mr. Krantz entered the museum’s spiral, he was stopped short by an image on a poster outside advertising the show, a rough-hewn close-up of a cowboy’s hat and outstretched arm.

Mr. Krantz knew it quite well. He had shot it in the late 1990s on a ranch in the small town of Albany, Tex., for a Marlboro advertisement. "Like anyone who knows his work," Mr. Krantz said of his picture in a telephone interview, "it’s like seeing yourself in a mirror." He did not investigate much further to see if any other photos hanging in the museum might be his own, but said of his visit that day, "When I left, I didn’t know if I should be proud, or if I looked like an idiot."

When Mr. Prince started reshooting ads, first prosaic ones of fountain pens and furniture sets and then more traditionally striking ones like those for Marlboro, he said he was trying to get at something he could not get at by creating his own images. He once compared the effect to the funny way that "certain records sound better when someone on the radio station plays them, than when we’re home alone and play the same records ourselves."

But he was not circumspect about what it meant or how it would be viewed. In a 1992 discussion at the Whitney Museum of American Art he said of rustling the Marlboro aesthetic: "No one was looking. This was a famous campaign. If you’re going to steal something, you know, you go to the bank."

People might not have been looking at the time, when his art was
An article in The Arts yesterday about the photographer Jim Krantz and his views on the use of some

not highly sought. But as his reputation and prices for his work rose steeply — one of the Marlboro pictures set an auction record for a photograph in 2005, selling for $1.2 million — they began to look, and Mr. Prince has spoken of receiving threats, some legal and some more physical in nature, from his unsuspecting lenders. He is said to have made a small payment in an out-of-court settlement with one photographer, Garry Gross, who took the original shot for one of Mr. Prince’s most notorious early borrowings, an image of a young unclothed Brooke Shields. (Mr. Prince declined to comment for this article, saying in an e-mail message only, “I never associated advertisements with having an author.”)

Mr. Krantz, who has shot ads for the United States Marine Corps and a long list of Fortune 500 companies including McDonald’s, Boeing and Federal Express, said he had no intention of seeking money from or suing Mr. Prince, whose borrowings seem to be protected by fair use exceptions to copyright law.

But with the exhibition now up at the Guggenheim — and the posters using his image on sale for $9.95 — he said he simply wanted viewers to know that “there are actually people behind these images, and I’m one of them.”

“I’m not a mean person, and I’m not a vindictive person,” he said. “I just want some recognition, and I want some understanding.”

Mr. Krantz, who retains the copyrights to most of his work, said he had been aware for several years that his work had been lifted by Mr. Prince, along with that of several other photographers who have shot Marlboro ads. But he said he did not think much about it, and said he had never talked with other Marlboro photographers about the issue.

“If imitation is a form of flattery, then I will accept the compliment,” he said.

But on one occasion a woman active in the art world visited his studio in Chicago, and, seeing a print of one of his pictures, Mr. Krantz recalled, “she said, ‘Oh, Richard Prince has a photograph just like that!’” And in 2003 Mr. Prince’s version of an image that Mr. Krantz shot for Marlboro — showing a mounted cowboy approaching a calf stranded in the snow — sold for $332,300 at Christie’s. Although the shot was blown up to heroic proportions, “there’s not a pixel, there’s not a grain that’s different,” he said. And so Mr. Krantz, whose Marlboro ads now appear mostly in Europe and Asia, began to grow angry.

He said that while he is primarily an advertising photographer, when he was growing up in Omaha, he did attend workshops with Ansel Adams. He studied graphic design and got into commercial photography, starting out in Omaha taking shots of toasters and pens and heating pads because that was where the work was. But he has long exhibited his own art photographs, recent examples of which show stark images of an empty prison as if seen through defaced or broken glass.

Mr. Krantz said he considered his ad work distinctive, not simply the kind of anonymous commercial imagery that he feels Mr. Prince considers it to be. “People hire me to do big American brands to help elevate their images to these kinds of iconic images,” he said.

He has considered trying to correspond with Mr. Prince to complain more directly but said he felt it would probably do no good.

“At this point it’s been done, and it’s out there,” he said. “My whole issue with this, truly, is attribution and recognition. It’s an unusual thing to see an artist who doesn’t create his own work, and I don’t understand the frenzy around it.”

He added: “If I italicized ‘Moby-Dick,’ then would it be my book? I don’t know. But I don’t think so.”

Correction: December 7, 2007

An article in The Arts yesterday about the photographer Jim Krantz and his views on the use of some
AP alleges copyright infringement of Obama image

By HILLEL ITALIE
AP National Writer

NEW YORK (AP) — On buttons, posters and Web sites, the image was everywhere during last year's presidential campaign: 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.

Designed by Shepard Fairey, a Los-Angeles based street artist, the image has led to sales of hundreds of thousands of posters and stickers, and has become so much in demand that copies signed by Fairey have been purchased for thousands of dollars on eBay.

The image, Fairey has acknowledged, is based on an Associated Press photograph, taken in April 2006 by Mannie Garcia on assignment for the AP at the National Press Club in Washington.

The AP says it owns the copyright, and wants credit and compensation. Fairey disagrees.

"The Associated Press has determined that the photograph used in the poster is an AP photo and that its use required permission," the AP's director of media relations, Paul Colford, said in a statement. "AP safeguards its assets and looks at these events on a case-by-case basis. We have reached out to Mr. Fairey's attorney and are in discussions. We hope for an amicable solution."

"We believe fair use protects Shepard's right to do what he did here," says Fairey's lawyer, Anthony Falzone, executive director of the Fair Use Project at Stanford University and a lecturer at the Stanford Law School. "It wouldn't be appropriate to comment beyond that at this time because we are in discussions about this with the AP."

Fair use is a legal concept that allows exceptions to copyright law, based on, among other factors, how much of the original is used, what the new work is for and how the original is affected by the new work.

Legal experts offered differing views on the Obama image.

Jane Ginsburg, a Columbia University law professor who specializes in copyright cases, questioned whether Fairey has a valid fair-use claim and says that he should have at least credited the AP.

"What makes me uneasy is that it kind of suggests that anybody's photograph is fair game, even if it uses the entire image, and it remains recognizable, and it's not just used in a collage," Ginsburg said. "I think that's pretty radical."

Robin Gross, an intellectual property attorney who heads IP Justice, an international civil liberties organization, believes that Fairey had the right to use the photo, saying that he intended it for a political cause, not commercial use.

"Fairey's purpose of the use for the photo was political or civic, and this will certainly count in favor of the poster being a fair use," said Gross, based in San Francisco. "Nor will the poster diminish the value of the photo, if anything, it has increased the original photo's value beyond measure, another factor counting heavily in favor of fair use."

A longtime rebel with a history of breaking rules, Fairey has said he found the photograph using Google Images. He released the image on his Web site shortly after he created it, in early 2008, and made thousands of posters for the street.

As it caught on, supporters began downloading the image and distributing it at campaign events, while blogs and other Internet sites picked it up. Fairey has said that he did not receive any of the money raised.

A former Obama campaign official said they were well aware of the image based on the picture taken by Garcia, a temporary hire no longer with the AP, but never licensed it or used it officially. The Obama official asked not to be identified because no one was authorized anymore to speak on behalf of the campaign.

The image's fame did not end with the election.

It will be included this month at a Fairey exhibit at the Institute of Contemporary Art in Boston and a mixed-media stenciled collage version has been added to the permanent collection of the National Portrait Gallery in Washington.
"The continued use of the poster, regardless of whether it is for galleries or other distribution, is part of the discussion AP is having with Mr. Fairey’s representative," Colford said.

A New York Times book on the election, just published by Penguin Group (USA), includes the image. A Vermont-based publisher, Chelsea Green, also used it — credited solely to Fairey— as the cover for Robert Kuttner's "Obama's Challenge," an economic manifesto released in September. Chelsea Green President Margo Baldwin said that Fairey did not ask for money, only that the publisher make a donation to the National Endowment for the Arts.

"It's a wonderful piece of art, but I wish he had been more careful about the licensing of it," said Baldwin, who added that Chelsea Green gave $2,500 to the NEA.

Fairey also used the AP photograph for an image designed specially for the Obama inaugural committee, which charged anywhere from $100 for a poster to $500 for a poster signed by the artist.

Fairey has said that he first designed the image a year ago after he was encouraged by the Obama campaign to come up with some kind of artwork. Last spring, he showed a letter to The Washington Post that came from the candidate.

"Dear Shepard," the letter reads. "I would like to thank you for using your talent in support of my campaign. The political messages involved in your work have encouraged Americans to believe they can help change the status quo. Your images have a profound effect on people, whether seen in a gallery or on a stop sign."

At first, Obama's team just encouraged him to make an image, Fairey has said. But soon after he created it, a worker involved in the campaign asked if Fairey could make an image from a photo to which the campaign had rights.

"I donated an image to them, which they used. It was the one that said "Change" underneath it. And then later on I did another one that said "Vote" underneath it, that had Obama smiling," he said in a December 2008 interview with an underground photography Web site.

Associated Press writer Philip Elliott in Washington contributed to this report.

AP's Statement

** FILE ** A poster of President Barack Obama, right, by artist Shepard Fairey is shown for comparison with this April 27, 2008 file photo of then-Sen. Barack Obama by Associated Press photographer Mannie Garcia at the National Press Club in Washington. Fairey has acknowledged, the poster is based on the AP photograph. (AP Photo/Mannie Garcia/Shepard Fairey)
Artist Sues The A.P. Over Obama Image

By RANDY KENNEDY
Published: February 9, 2009

In a pre-emptive strike, the street artist Shepard Fairey filed a lawsuit on Monday against The Associated Press, asking a federal judge to declare that he is protected from copyright infringement claims in his use of a news photograph as the basis for a now ubiquitous campaign poster image of President Obama.

The suit was filed in federal court in Manhattan after The Associated Press said it had determined that it owned the image, which Mr. Fairey used for posters and stickers distributed grass-roots style last year during the election campaign. The photo, showing Mr. Obama at the National Press Club in April 2006, was taken for The A.P. by a freelance photographer, Mannie Garcia.

According to the suit, A.P. officials contacted Mr. Fairey’s studio late last month demanding payment for the use of the photo and a portion of any money he makes from it.

Mr. Fairey’s lawyers, including Anthony T. Falzone, the executive director of the Fair Use Project and a law lecturer at Stanford University, contend in the suit that Mr. Fairey used the photograph only as a reference and transformed it into a “stunning, abstracted and idealized visual image that created powerful new meaning and conveys a radically different message” from that of the shot Mr. Garcia took.

The suit asks the judge to declare that Mr. Fairey’s work is protected under fair-use exceptions to copyright law, which allow limited use of copyrighted materials for purposes like criticism or comment.

“Fairey did not do anything wrong,” said Julie A. Ahrens, associate director of the Fair Use Project and another of Mr. Fairey’s lawyers, in a statement on Monday. “He should not have to put up with misguided threats from The A.P.” Paul Colford, a spokesman for The A.P., said on Monday that the agency was “disappointed by the surprise filing by Shepard Fairey and his company and by Mr. Fairey’s failure to recognize the rights of photographers in their works.”

He added: “A.P. was in the middle of settlement discussions with Mr. Fairey’s attorney last week in order to resolve this amicably and make it clear that a settlement would benefit the A.P. Emergency Relief Fund, a charitable fund that supports A.P. journalists around the world who suffer personal loss from natural disasters and conflicts.”

Mr. Fairey, 38, has become one of the most visible practitioners of a guerrilla-style art that has grown...
out of the graffiti scene but has expanded beyond paint to include a wide variety of techniques and materials, producing works usually displayed illegally on buildings and signs.

Mr. Fairey decided to create the image on his own before contacting the Obama campaign, which welcomed it but never officially adopted it because of copyright concerns. Before the election, Mr. Fairey was best known for his fake-advertising stickers and posters, pasted in cities across the country, showing an ominous, abstracted image of the wrestler Andre the Giant along with the word "Obey."

Mr. Fairey is the focus of a retrospective that opened last week at the Institute of Contemporary Art in Boston. (In a development that was not much of a surprise, he was arrested there on Friday, accused of illegally pasting his work in places around Boston; he has pleaded not guilty.) A collaged work made by Mr. Fairey based on his Obama poster was acquired last month by the National Portrait Gallery in Washington, part of the Smithsonian Institution, and placed in its permanent collection.

After Mr. Obama’s victory, speculation increased about which picture had served as the basis for Mr. Fairey’s posters. In interviews the artist said that it was one he had found on the Internet. Bloggers, including the Manhattan gallery owner James Danziger, pursued several leads until, according to the lawsuit, Tom Gralish, a Pulitzer Prize-winning photographer for The Philadelphia Inquirer, helped track down a photo by Mr. Garcia that showed Mr. Obama sitting beside the actor George Clooney at a 2006 event about Darfur at the National Press Club.

Further complicating the dispute, Mr. Garcia contends that he, not The Associated Press, owns the copyright for the photo, according to his contract with the A.P. at the time. In a telephone interview on Monday, Mr. Garcia said he was unsure how he would proceed now that the matter had landed in court. But he said he was very happy when he found out that his photo was the source of the poster image and that he still is.

“I don’t condone people taking things, just because they can, off the Internet,” Mr. Garcia said. “But in this case I think it’s a very unique situation.”

He added, “If you put all the legal stuff away, I'm so proud of the photograph and that Fairey did what he did artistically with it, and the effect it’s had.”

This article has been revised to reflect the following correction:

**Correction: February 12, 2009**

An article on Tuesday about a dispute between The Associated Press and the artist Shepard Fairey over his Barack Obama poster, which was based on a photograph taken for The A.P., misstated a title of one of Mr. Fairey’s lawyers, who teaches at the Stanford University Law School and is executive director of the Fair Use Project there. The lawyer, Anthony T. Falzone, is a lecturer at the law school, not a professor.
Artist Admits Using Other Photo for ‘Hope’ Poster

By LIZ ROBBINS
Published: October 17, 2009

Shepard Fairey, the artist whose “Hope” poster of Barack Obama became an iconic emblem of the presidential campaign, has admitted that he lied about which photograph from The Associated Press he used as his source, and that he then covered up evidence to substantiate his lie.

Mr. Fairey’s admission, which he made public on Friday, threw his legal battle with the news agency into disarray.

The A.P. claimed in January that Mr. Fairey owed it credit and compensation for using the photograph. But in February Mr. Fairey sued The A.P., seeking a declaratory judgment that the poster did not infringe on the agency’s copyrights and that he was entitled to the image under the “fair use” exception of the copyright law. The A.P. countersued in March, saying Mr. Fairey had misappropriated the photograph.

Mr. Fairey told the agency — and his own lawyers — that he had used a photograph from an April 27, 2006, event about Darfur at the National Press Club in Washington where Mr. Obama was seated next to the actor George Clooney. Instead, the photograph he used was from the same event, but was a solo image of Mr. Obama’s head, tilted in intense concentration.

Mr. Fairey admitted that in the initial months after the suit and countersuit were filed, he destroyed evidence and created false documents to cover up the real source. He said he had initially believed that The A.P was wrong about which photo he used, but later realized the agency was right.
“In an attempt to conceal my mistake, I submitted false images and deleted other images,” Mr. Fairey said in a statement, released on his Web site. “I sincerely apologize for my lapse in judgment, and I take full responsibility for my actions, which were mine alone.”

Mr. Fairey’s lawyers said they intended to withdraw when he could find new counsel.

“There are lots of reasons that it becomes difficult or effectively impossible for a lawyer to continue to represent a client in this situation,” Anthony Falzone, Mr. Fairey’s lawyer and the executive director of the Fair Use Project at Stanford University, said in a telephone interview Saturday. “We have informed The A.P.’s lawyers that we do intend to withdraw as counsel upon transition to new lawyers.”

Mr. Falzone called the disclosure “a very unfortunate situation.” But he added that regardless which photograph Mr. Fairey used, the copyright issues remained unchanged. “We still believe, as strongly as ever, in the underlying fair use and expression issues of this case,” he said.

Srinandan R. Kasi, The A.P.’s general counsel, released a statement Friday night that said: “Fairey’s lies about which photo was the source image were discovered after The A.P. had spent months asking Fairey’s counsel for documents regarding the creation of the posters, including copies of any source images that Fairey used.” Mr. Kasi said: “The A.P. intends to vigorously pursue its countersuit alleging that Fairey willfully infringed The AP’s copyright in the close-up photo of then-Senator Obama by using it without permission to create the Hope and Progress posters and related products, including T-shirts and sweatshirts that have led to substantial revenue.”

Mr. Kasi was not available for further comment.

Complicating the legal battle, the freelance photographer who took the photographs, Manny Garcia, filed court papers in July saying he was the one who owned the copyright of the 2006 photograph; Mr. Garcia’s assignment was to photograph Mr. Clooney, and he contended that he never assigned his copyright rights to The A.P.

Mr. Fairey said on his Web site that his lawyers sent a letter to The A.P. and to Mr. Garcia, informing them that he would amend his court pleadings.

Whether Mr. Fairey used a photograph that cropped Mr. Obama or an uncropped photograph that showed only him could be part of a number of factors used to determine fair use, said Larry Lessig, the director of the Edmond J. Safra Foundation Center for Ethics at Harvard University.

But Mr. Lessig, who said that he has been advising Mr. Fairey but is not representing him, added that the significant issue in fair use cases is whether the image has been transformed from the original. If it has been “fundamentally transformed,” he said, then it can be used under copyright law.

On his Web site, Mr. Fairey expressed remorse and admitted that his actions “may distract from what should be the real focus” of his case. He said, “I am taking every step to correct the information, and I regret I did not come forward sooner.”

Mr. Fairey has had a tumultuous year.

In addition to the continuing lawsuits with The A.P., he faced graffiti charges for plastering posters on public and private property in Boston. In July, he pleaded guilty and was fined $2,000 to pay for graffiti removal. Mr. Fairey had been arrested in Boston.
in February as he arrived at the Institute of Contemporary Art for the opening night party for a retrospective of his work.

On Saturday, Mr. Fairey was in Pittsburgh for the opening of the show “Supply and Demand: 20-Year Retrospective” at the Warhol Museum. A version of the familiar rendering of Mr. Obama was to be included in the show.

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Shepard Fairey, AP Settle Copyright Lawsuit

JANUARY 12, 2011

by David Walker

The Associated Press has settled its copyright infringement claim against artist Shepard Fairey on amicable terms, the wire service announced today. The settlement ends a nearly two-year court battle over Fairey's unauthorized use of an AP photo to create the iconic Obama Hope poster.

AP says Fairey has agreed to share with AP the rights to make posters and merchandise from the Hope image. That means some of the future revenues generated by the image will flow to AP.

The two sides have also agreed to collaborate on a series of images that Fairey will create based on AP photographs, the AP says. And, the wire service adds, "The parties have agreed to additional financial terms that will remain confidential."

As part of the agreement, neither side is giving up its legal position regarding the Obama Hope image. AP charged Fairey with copyright infringement for unauthorized use of the photograph, which was shot by AP photographer Mannie Garcia.

"The AP contended that Mr. Fairey copied all of the original, creative expression in the AP's photograph without crediting or compensating AP," the wire service said in its press release.

Fairey has asserted that he didn't appropriate copyrightable material from the AP's photo, and that even if he did, his use of the image was allowable as a fair use under copyright law.

Fairey's defense suffered a setback when he admitted in late 2009 that he had falsified evidence about which AP image he had appropriated. He said he had made a mistake about which image he had actually used, and tried to cover up
that mistake.

In reaching their settlement, both sides stuck to their legal positions, and issued face-saving statements. AP president and CEO Tom Curley said, "AP will continue to vigilantly protect its copyrighted photographs against wholesale copying and commercialization where there is no legitimate basis for asserting fair use."

For his part, Fairey said, "I respect the work of photographers, as well as recognize the need to preserve opportunities for other artists to make fair use of photographic images."

He added, "I look forward to working with photos provided by the AP's talented photographers." And, the AP press release notes, he has agreed not to use another AP photo in his work without permission.

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Shepard Fairey Pleads Guilty Over Obama ‘Hope’ Image

By BENJAMIN WEISER

Mannie Garcia/Associated Press The original photograph of Barack Obama and Shepard Fairey’s “Hope” poster.

The street artist Shepard Fairey, whose “Hope” campaign poster of Barack Obama became an enduring symbol of his last presidential campaign, pleaded guilty Friday to a charge stemming from his misconduct in trying to bolster claims in a lawsuit over which photograph had been used as a basis for the poster.

Mr. Fairey, 42, sued The Associated Press in 2009 after it contended he had infringed on the copyright of one of its photographs in creating the poster. Mr. Fairey had claimed in his suit that he had used a different photograph of Mr. Obama, but later admitted that he had been mistaken and had tried to conceal his mistake, by destroying documents and fabricating others.

“I was ashamed that I had done these things, and I knew I should have corrected my actions,” he said on Friday in Federal District Court in Manhattan. The legal dispute between Mr. Fairey and The A.P. has been settled.

Mr. Fairey, of Los Angeles, pleaded to one count of criminal contempt and could face up to six months in prison. A prosecutor, Daniel W. Levy, told the magistrate judge, Frank Maas, that the government was likely to seek some term of imprisonment for Mr. Fairey, who will be sentenced on July 16.

His lawyer, Daniel M. Gitner, said later that his client had “cooperated fully” with the government and took “full responsibility” for his actions.

Tom Curley, the president and chief executive of The A.P., issued a statement noting that Mr. Fairey had started the case with his lawsuit over copyright fair use issues, and added, “The A.P. hopes that some good may come of this, by alerting judges and parties to the possibility that fake evidence may exist.”