



Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.
800 North Magnolia Avenue, Suite 1500
P.O. Box 2346 (ZIP 32802-2346)
Orlando, FL 32803

407-841-1200
407-423-1831 Fax
www.deanmead.com

Orlando
Fort Pierce
Viera

DAVID P. HATHAWAY
407-428-5124
dhathaway@deanmead.com

February 2010

What the Obama “Hope” Poster Teaches Us About Copyright Law

David P. Hathaway, Esq.

Before Barack Obama became president, there were posters showing his face in a lifelike artistic rendering. They had red, white and blue shading, and the campaign logo was shown as if it were a lapel pin over the word “hope” in all capital letters. Shepard Fairey was the artist who created the poster, but The Associated Press (“the AP”) owned the copyright in the photograph from which the poster was created. When the parties instituted litigation, the question was whether the poster was an infringement of the AP’s copyright in the photo.

Generally, copyright law protects artists, photographers, musicians, authors and performers from having others profit from their work, thereby incentivizing them to continue what they do. In fact, the creator of an original work (or his or her employer in some situations) owns a copyright in that work as soon as it is created. The copyright owner has the exclusive right to reproduce, perform, display or distribute copies of the work. He or she also has the exclusive right to make a derivative work, which is a new creation based on a pre-existing work, such as a movie based on a novel. The AP considered the “Hope” poster to be an unauthorized derivative work created by someone other than the copyright owner, which would constitute copyright infringement.

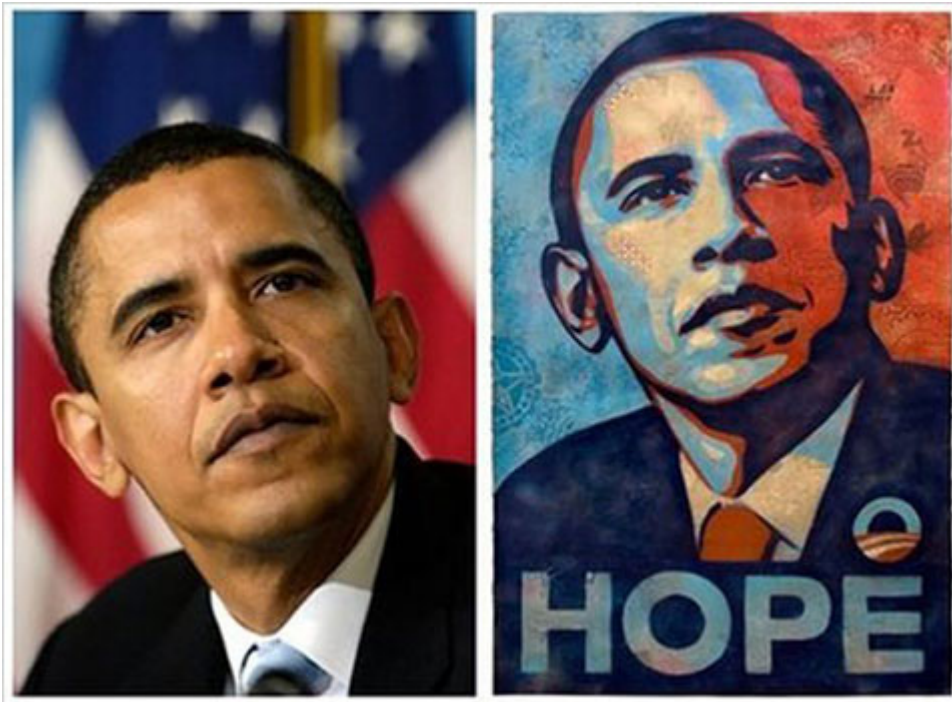
However, one of the exceptions to copyright infringement is the defense of fair use. The idea behind fair use is that copying should be allowed in certain limited situations where it would benefit society. For example, teachers, news reporters, researchers and critics are allowed to copy the works of others if their purpose is educational, and not competitive with the copyright owner. To determine whether the fair use defense applies, courts consider four factors: the purpose and character of the use (including whether it is commercial or educational), the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. Mr. Fairey argued that he made fair use of the AP photo when he created his poster.

Part of Fairey’s fair use argument was that he had taken only a portion of the AP photo when he made the poster, and that he had cropped out the image of George Clooney standing near Mr. Obama. However, the AP argued that the face on the poster was actually copied from a different photo, which was just a Barack Obama headshot without George Clooney. In a statement released October 16, 2009, Fairey admitted that he had in fact used the headshot rather than the

photo with George Clooney. This was a major admission, because earlier in the litigation, Fairey had gone so far as to submit false images and to delete other images when producing documents to the AP. His lawyers filed motions to withdraw from the case.

In any event, this case is a good illustration of both sides of the fair use argument. On the one hand, if artists could use and commercially profit from the work of news agencies without giving proper credit and paying reasonable compensation, then the agencies might lose their ability to license photos and maintain revenue streams to support their staff. On the other hand, artists should be given some leeway so that they can transform copyrighted works into entirely new works of art, such as making a parody of a famous song.

Dean Mead handles copyright disputes in commercial cases, such as the unauthorized copying of sales scripts and medical publications, as well as Internet cases involving the copying of websites and the unauthorized posting of photographs. If you have questions about copyright law as they relate to business, please call David Hathaway at 407-428-5124.



About the Author:

David Hathaway is a shareholder in Dean Mead's Litigation Department. He represents clients involved in disputes related to trademarks and intellectual property, wills and trusts, real estate, corporate issues and other business matters.

About Dean Mead:

Dean Mead is a commercial law firm that provides full-service legal representation to businesses and individuals throughout Florida. The firm has 47 lawyers practicing in Orlando, Fort Pierce and Viera.