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Illustration (and ©) pitfalls

What's this all about?

Copyright in work 'inspired' by / based on work by a third party.

Barack Obama's re-election to a second term follows soon after the end of the Fairey saga, which concluded with a hefty 25,000 dollar fine and 300 hours community service for the artist Shephard Fairey.

For those who have not been following this background story to the 2008 presidential campaign, Shephard Fairey had used an Associated Press photograph to create the worldwide famous HOPE poster. Mr Fairey had sued AP in 2009 after it accused him of using one of their images for his artwork.

<http://tiny.cc/sc2oow>

The case was settled out of court (with the two parties agreeing to share rights and revenues from the merchandising of the poster), leaving those who were longing for a precedent to keep on longing.

Somewhat comically, Fairey had first denied basing his poster on any photograph then, under prosecution, claimed that it was based on a photo, but not AP's and then, having had that proved false, went on to claim that his was in any case an original work of art and was somehow exempt. Even more ludicrously, while all this was proceeding, Fairey saw fit to nonetheless make a claim of copyright infringement against another party who had likewise been 'inspired' by his poster to produce a work with a similar arrangement of image and typography, totally undermining his own argument and exposing him as one believing himself exempt from laws that should apply to others.

The sentence, from September 2012, has nothing to do with breach of copyright but follows a criminal charge to Mr. Fairey for trying to conceal evidence relating to his use of the image. In simple terms, he said he didn't use the AP photograph as a basis for his own artwork. But it was proven he had, and it didn't end well for him

Why should I care?

Although no new precedent has been set, the good old principle still applies: if you want to create an artwork using someone else's copyright material, whether it is for commercial or non-commercial purposes, you had better ask for permission first. "Fair Use" might help you get away with it in the USA, but concealing evidence is not a good idea!

Conclusion

Publishers commissioning artworks that resemble another work "but not quite" - please be advised: unless your illustrator is merely inspired by the principle behind the artwork without taking a substantial part of the expression, you will be in breach of copyright.

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Please call me on +44 20 7267 9990 if you would like to discuss any of the above

Richard Philpott

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