THE BERNIE SANDERS MEME KEEPS ON GIVING: ANALYZING THE COPYRIGHT AND RIGHT OF PUBLICITY ISSUES WHEN AN IMAGE GOES VIRAL

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Presumably everyone has now seen the viral meme featuring a photograph of Senator Bernie Sanders sitting by himself with his arms crossed wearing mittens at President Joe Biden's Inauguration. The meme places Sitting Bernie in literally thousands of different settings and has even launched dedicated meme generators.

Perhaps lost in all this is the fact that the original photograph is a copyrighted work owned by someone. That person is photojournalist Brendan Smialowski, who works for Agence France-Presse (AFP). You can obtain a license to use the work through Getty Images, but unless you have his permission, or your use qualifies as a permissible Fair Use, copying and republishing his work is copyright infringement.

Whether something qualifies as Fair Use depends on a balance of four discrete factors. But at its core, it requires some kind of ***transformative*** use - in other words, you have to use the original work in some other way, for some purpose that differs from the original. Recognized categories include satire, parody, commentary, review/criticism, education.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

Dr. Seuss Enterprises, L.P. v. ComicMix LLC

The 9th Circuit Ct. of Appeals recently addressed this issue in Dr. Seuss Enterprises, L.P. v. ComicMix LLC, a case involving a proposed book titled "*Oh The Places You'll Boldly Go*" - which was going to be a retelling of the Dr. Seuss classic but set in the Star Trek universe. The Dr. Seuss estate sued the authors for copyright infringement and the authors defended by arguing Fair Use - claiming that it was transformative to put Dr. Seuss's characters in outer space.

The 9th Cir. said no because the new work wasn't in any way "about" the original – it was just a clever copy. The court reminded us that ***Fair Use requires that the new work somehow comment on the original***.

#BerniesMittens Goes Viral

With the Bernie photograph, the original purpose was arguably to simply document that Bernie was at the inauguration (and maybe that he looked funny b/c he didn't dress up for the occasion).

The photographer has been quoted as saying the picture shows that:

> *"Senator Sanders is politically independent and I think he's probably personally independent, too. I think he's probably perfectly comfortable coming out there, sitting alone, holding his papers and then going back in to do the rest of his day."*

The individuals who first used Photoshop® to place him in all kinds of different locations and settings arguably weren't commenting on the picture itself, but perhaps they were because placing Bernie's proudly independent pose in so many different settings was a commentary on independence and shows that he's timeless, etc.

Once the meme took off, however, the fact of the meme itself also became newsworthy and worth commenting on - so all those articles and blogs commenting on the fact of the meme (like this one) can use the original photo at the heart of the meme. And all the individuals who are just having fun growing and sharing the meme are likely also protected by Fair Use for the same reasons.



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However, if you use someone else's copyrighted work to advertise or promote something, THAT is the purpose of your work, not commentary or any other permissible Fair Use.

So, if you're a business and you jokingly drop Bernie into a picture of your business as if he's there and post it on your Facebook page one time right now, you probably still have an argument that you're just enjoying and commenting or adding to the meme.

But what about businesses and brands using the meme to promote themselves? If you use it on your promotional posts or materials -e.g., "Bernie is first in line for our big sale!" - that's likely copyright infringement, not Fair Use. And the more often you repost your original meme post on your business page, the more it looks like your only purpose is to draw people to your business, and you'd likely lose any Fair Use protection you might otherwise have had.

This exact same set of issues exists with using all those other famous copyrighted images as Bernie's new resting place. It's also a violation of Bernie's right of publicity as a public figure to control the use of his name, likeness, image for advertising and promotional use. Without Bernie's permission, your use of that photograph in your advertising would subject you to a lawsuit from Bernie.

Bernie Sanders Meme-Inspired Apparel

Bernie himself using it for charity is the real interesting case. He doesn't have to ask himself for permission to use his image, so there's no Right of Publicity concern. But he doesn't have an unlimited right to use the photo just because it's a picture of him, because he doesn't own the copyright. Thus, the question is whether Bernie using it on sweatshirts to raise money for Meals on Wheels is advertising. What other permissible purpose could it be?

He doesn't alter the image or place it in any other setting. He's essentially using the entire essence of the work with no change at all - simply to sell sweatshirts. The fact that the money goes to a charity does NOT make it Fair Use - it's still a commercial use.



Bernie might argue that the fact that it's on a sweatshirt is itself a commentary on the original, but nothing about his picture on a sweatshirt transforms the original in any way (photographs get put on clothing all the time).

Right now, the photographer appears to be enjoying the notoriety that his picture is receiving, but

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when others start making real money using his photograph, he's likely to feel differently, and he would have a good case if he decides to pursue it. Of course, if he hasn't already filed for a copyright registration on the photo, he should get on that.

He might even come after Bernie for selling sweatshirts, but knowing Bernie, my guess is that he's already paid the photographer a license fee.

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