



## ESSAY

# The Criminally Complicated Copyright Questions about Trump's Mugshot

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## Introduction

On August 24, 2023, former President Donald Trump surrendered himself at the Fulton County jail in Georgia, where he was booked on thirteen felony counts and photographed for a “mugshot.”<sup>1</sup> In the former President’s Mugshot, he is dressed in a navy blue suit jacket, crisp white shirt, and red tie.<sup>2</sup> He is posed against a light gray background, his face is gently angled to one side with his chin slightly tucked, his mouth forming a pout, and his eyes staring intently at the camera.<sup>3</sup> The image of Trump captured in his Mugshot—the first ever mugshot of a United States president<sup>4</sup>—quickly went viral and started trending on social media and news outlets. Scholars and journalists have called the Mugshot “the de facto picture of the year” and “a symbol of either equality under the law or the abuse of it,” and proclaimed it to “be forever part of the iconography of being alive in this time.”<sup>5</sup>

Law enforcement in the United States has been taking mugshots of arrestees since the 1850s.<sup>6</sup> Mugshots provide law enforcement with a

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1. Vanessa Friedman, *A Trump Mug Shot for History*, N.Y. TIMES (Aug. 25, 2023), <https://perma.cc/72NN-X5WJ>; Melissa Quinn, Caitlin Yilek, Nikole Killion, *Trump Surrenders at Fulton County Jail in Georgia Election Case*, CBS NEWS (Aug. 25, 2023, 7:55 PM EDT), <https://perma.cc/BF9S-HWPP>.
2. Jonathan J. Cooper, *One Image, One Face, One American Moment: The Donald Trump Mug Shot*, ASSOCIATED PRESS (Aug. 25, 2023, 1:53 PM PST), <https://perma.cc/XV37-62T3>.
3. *Id.*
4. Brian Bennett & Nik Popli, *Here Is Trump's Mug Shot, the First Ever of a Former President*, TIME (Aug. 24, 2023, 8:55 PM EDT), <https://perma.cc/BK4G-P8A9>.
5. Friedman, *supra* note 1; Cooper, *supra* note 2.
6. Maria Cramer, *The Mug Shot, a Crime Story Staple, Is Dropped by Some Newsrooms and Police*, N.Y. TIMES (July 3, 2020), <https://perma.cc/R3SE-YQPY>.

photographic record of an arrestee to help victims, investigators, and the public identify them. A typical mugshot will show the front and side views of an arrestee, with their face clearly visible and in focus.<sup>7</sup> For the front-view photograph, the arrestee looks straight at the camera; for the side-view photograph, the arrestee turns their head to the side. The background of the photograph is generally plain and neutral to avoid distracting from the arrestee's face.<sup>8</sup> The lighting of the photograph highlights distinctive features or marks on the arrestee and is even and consistent to avoid shadows or glare on their face. Over the years, certain mugshots have become symbols of activism or government abuse of power, such as the iconic mugshots of Martin Luther King Jr., John Lewis, and Jane Fonda.<sup>9</sup> Other mugshots have been used to imply guilt and shame, and they have been criticized for prejudicing arrestees or fostering racial stereotypes.<sup>10</sup> Because of these concerns, some police departments have stopped making mugshots publicly available.<sup>11</sup>

Instead of hiding or burying his Mugshot, Trump's campaign capitalized on the opportunity. In addition to sharing the Mugshot on Trump's fundraising site to solicit donations,<sup>12</sup> Trump's campaign also began marketing merchandise emblazoned with the Mugshot, including t-shirts and sweatshirts, coffee mugs, posters, vinyl decals and bumper stickers, and beer koozies.<sup>13</sup> Sometimes the Mugshot appears in black and white, other times in color.<sup>14</sup> On some merchandise, the Mugshot seems to have been altered in a multicolor stylized stencil design, reminiscent of Shepherd Fairey's iconic "Hope" image of former President Barack Obama during his 2008 campaign.<sup>15</sup> Usually, the merchandise includes the election year "2024" or the words "NEVER SURRENDER!" underneath or in the bottom corner of the Mugshot.<sup>16</sup>

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7. Colin Harding, *M Is for . . . Mug Shots, the Criminal Identification Portrait*, SCI. & MEDIA MUSEUM (Nov. 13, 2023), <https://perma.cc/XZ8K-59RS>.

8. *See, e.g., id.*

9. Friedman, *supra* note 1.

10. *Id.*; Cramer, *supra* note 6.

11. *Id.*

12. *See* Cooper, *supra* note 2.

13. *Official Merchandise*, TRUMP: MAKE AMERICA GREAT AGAIN! 2024, <https://perma.cc/ATU2-GENH> (archived Feb. 11, 2024).

14. *Id.*

15. *Compare Trump Colorblock Black Cotton T-Shirt*, TRUMP: MAKE AMERICA GREAT AGAIN! 2024, <https://perma.cc/6BFM-25L3> (archived Feb. 11, 2024), *with Barack Obama "Hope" Poster*, ART INST. CHL, <https://perma.cc/A2K4-7ELY> (archived Feb. 4, 2024). Fairley's iconic image of former President Obama was taken from an Associated Press news article, not from a mugshot. Randy Kennedy, *Artist Sues the A.P. Over Obama Image*, N.Y. TIMES (Feb. 9, 2009), <https://perma.cc/T5LE-P6NS>.

16. *See Official Merchandise*, *supra* note 13.

However, the Trump campaign is not the only party who has attempted to profit off of the iconic photo. Third parties are also using Trump's Mugshot in various ways. Some are using the Mugshot to criticize him,<sup>17</sup> including in political campaign advertisements.<sup>18</sup> Other parties are using the Mugshot to sell merchandise, such as coffee mugs with Trump's booking number or a listing of Trump's indictments, shot glasses etched with the acronym F.A.F.O. ("fuck around and find out"), and other trivial items like throw pillows and even toilet paper rolls.<sup>19</sup>

Since it began using the Mugshot on campaign merchandise, Trump's team has threatened legal action against other parties seeking to profit off the ex-President's photograph. For example, one of Trump's senior advisors took to X (formerly known as Twitter) to warn any "campaign, PAC, [or] scammer" trying to "rais[e] money off the mugshot of @realDonaldTrump" that the Trump campaign would "COM[E] AFTER YOU[,] you will NOT SCAM DONORS."<sup>20</sup>

But under copyright law, who owns Trump's Mugshot? And who can legally use Trump's Mugshot? This Essay answers those questions in two parts: Part I determines who, if anyone, owns Trump's Mugshot by examining claims of authorship and originality in copyright photography, including whether subjects depicted in a photograph have rights to the work, whether mugshots meet the originality requirement of copyright when the purpose of a mugshot constrains creativity, and whether the photographer's status as a government employee makes Trump's Mugshot uncopyrightable under the government edicts doctrine. Part II analyzes who can legally use Trump's Mugshot by examining the Trump campaign's unauthorized uses of the Mugshot under free speech and political fair use and explores third parties' uses of the Mugshot under copyright fair use. In the process, this Essay explores complicated copyright concepts of authorship, originality, government edicts, free speech, and fair use.

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17. Sarakshi Rai, *Democrats Gloat Over Trump's Mug Shot: 'We Got You,'* THE HILL (Aug. 25, 2023, 10:50 AM ET), <https://perma.cc/6EC8-X567>.

18. Justin Green, *Trump's Mug Shot Used Against Him in GOP Primary,* AXIOS (Aug. 29, 2023), <https://perma.cc/UYS5-3KXJ>.

19. Lakshmi Varanasi, *Trump's Fans and Critics Alike Are Plastering His Mug Shot on Everything from Mugs to T-shirts. Here's a Roundup of the Merch Gold Mine,* INSIDER (Aug. 27, 2023, 1:58 PM PDT), <https://perma.cc/392N-C5AF>.

20. Chris LaCivita (@LaCivitaC), X (Aug. 24, 2023, 6:25 PM), <https://perma.cc/D7PD-37R9>; see also Margaret Hartmann, *Team Trump Threatens Fellow Peddlers of Unauthorized Mug Shot Merch,* N.Y. MAG.: INTELLIGENCER (Aug. 28, 2023), <https://perma.cc/TX6H-KWEU>.

## I. Who Owns Trump's Mugshot?

Copyright law governs ownership of expressive works, such as photographs. To be copyrightable under U.S. copyright law, a work must be an original work of authorship fixed in a tangible medium of expression.<sup>21</sup> If a work meets that requirement, copyright automatically vests in the “author” of the work.<sup>22</sup> This Part explores who might be considered the “author” of a mugshot where both the photographer and the subject captured in the photograph may have contributed creative choices in the arrangement, composition, and expression of the mugshot. It also examines whether Trump's Mugshot is even copyrightable in the first instance given the general lack of creativity in mugshots and considering the photographer's status as a government official creating the work for a government entity. This Part concludes that rights to the Mugshot, if they exist at all, belong to Fulton County and its Sheriff's Office.

### A. Spoiler Alert: Trump Doesn't Own His Mugshot

In the United States, the author of a photograph owns the copyright to the photograph. Photography copyright in the United States can be traced back to the 1884 Supreme Court decision *Burrow-Giles Lithographic Co. v. Sarony*, in which the Court affirmed that the author of a photograph is the one who “represents, creates, or gives effect to the idea, fancy, or imagination.”<sup>23</sup> In the case of the photograph of Oscar Wilde in *Burrow-Giles*, the Court explained that the author was the photographer who “pos[ed] . . . Wilde in front of the camera, select[ed] and arrang[ed] the costume, draperies, and other various accessories in said photograph, arrang[ed] the subject so as to present graceful outlines, arrang[ed] and dispos[ed] the light and shade, suggest[ed] and evok[ed] the desired expression, and . . . produced the picture.”<sup>24</sup>

A photographer who chooses the subject, angle, lighting, composition, timing, and editing of the photograph, and who manifests those creative choices in their photography, is the author of the photograph and owns the copyright to their work. *Burrow-Giles* did not specifically address whether Oscar Wilde, the subject depicted in the photograph, may have joint ownership of the copyright due to his potential contributions in the choice of his attire, expression, or pose.<sup>25</sup> Nevertheless, most courts appear to interpret

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21. 17 U.S.C. § 102(a).

22. 17 U.S.C. § 201(a).

23. 111 U.S. 53, 61 (1884).

24. *Id.* at 60.

25. See Molly Torsen Stech, *Co-Authorship Between Photographers and Portrait Subjects*, 25 VAND. J. ENT. & TECH. L. 53, 62 n.33 (2023); Eva E. Subotnik, *The Author Was Not an* footnote continued on next page

*Burrow-Giles* as granting a copyright exclusively to the photographer who fixes a photograph in its tangible medium.<sup>26</sup> This interpretation has caused some conflict between subjects featured in fixed expressive works and their photographers, including recent disputes between celebrities and the paparazzi.<sup>27</sup> For instance, paparazzi have sued celebrities such as Jennifer Lopez, Ariana Grande, Khloe Kardashian, and Emily Ratajowski for copyright infringement for using or reposting photographs of themselves taken by the paparazzi.<sup>28</sup>

Subjects depicted in photographs can certainly make creative choices that contribute to the photographs, such as the subjects' choices of attire, expression, and pose. If the photo subject superintends the photograph and controls its arrangement, production, and fixation, authorship would vest in them.<sup>29</sup> However, in most other circumstances, including in many of the celebrity situations mentioned above, the photographer is the one to superintend the work and would therefore exclusively own the copyright under current applications of copyright's authorship and ownership rules.<sup>30</sup>

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*Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia*, 39 COLUM. J. L. & ARTS 449, 451 (2016) ("So, was Wilde a moldable piece of clay in Sarony's hands, or did he contribute more than that? Or as Jane Gaines asked in her treatment of the case, 'Why did the photographer, rather than the celebrity subject, emerge as the creator of the image?' It may be too late in the day to imagine the Court deeming Wilde *the* author of the photograph, but what about *an* author?" (quoting JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 73 (1991))); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 433-35 (2004) ("[I]t is difficult to imagine someone like Oscar Wilde, the self-proclaimed aesthete, who was so careful and deliberate in the construction of his celebrity persona, freely submitting to the whims of Napoleon Sarony. Specifically, his trademark look with his hand resting on his hand cannot be said to owe its origin to Sarony.").

26. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) ("[I]n *Burrow-Giles* the lithographer made a substantial copyrightable creative contribution, and so did the person who posed, Oscar Wilde, but the Court held that the photographer was the author.").
27. See Emma Perot, *The Conflict Between the Copyright of Paparazzi and the Right of Publicity of Celebrities*, 30 TEX. INTELL. PROP. L.J. 121, 123 (2021).
28. Mark Savage, *Dua Lipa Sued for Putting Paparazzi Photo of Herself on Instagram*, BBC NEWS (July 9, 2021, 2:32 PDT), <https://perma.cc/HW4R-8C2X>; Christopher Yasiejko, *Celebrities Are Sued for Posting Paparazzi Photos of Themselves*, BLOOMBERG (Oct. 15, 2021, 9:20 AM PDT), <https://perma.cc/95GQ-NM6Z>; Kelly-Leigh Cooper, *Why Celebrities Are Being Sued Over Images of Themselves*, BBC NEWS (Feb. 5, 2019, 5:23 PST), <https://perma.cc/ER7S-3BF7>. Other celebrities that have been accused of or sued for copyright infringement of this kind include Dua Lipa, Gigi Hadid, and Justin Bieber. Savage, *supra*.
29. See Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929, 957 (2019).
30. See *id.* at 957-59.

In some circumstances, this result can appear unfair. In her powerful essay, *Buying Myself Back*, model Emily Ratajkowski explained her personal experiences and feelings of helplessness when photographers, artists, and paparazzi own images of her, even where those images are taken and published without her consent: “I have learned that my image, my reflection, is not my own.”<sup>31</sup> Professor John Tehranian has similarly explored the unfairness, inequalities, and “uncomfortable implications . . . along gender, socioeconomic, and racial lines” when copyright vests solely in the person behind the lens.<sup>32</sup> On the other hand, granting authorship and copyright ownership to subjects depicted in works could create certain unintended consequences, such as allowing those subjects to control and potentially suppress works that are critical or unflattering, or discouraging the creation of certain genres of photographic works. Professors Eric Goldman and Jessica Silbey warned that these “mutant authorship-through-depiction claims” could “turn copyright on its head, stripping control of the work from the intended copyright owner and giving that control to the depicted person (or persons), who can use it to suppress the work.”<sup>33</sup> Additionally, if photographers were required to share authorship credit and copyright with any human subjects depicted in their works, they could be inclined to avoid them completely in favor of other subject matter, such as landscape, still life, animals, or other non-human genres, to ensure exclusive ownership rights.

Under current copyright case law, even though Trump may have contributed creative expression through his choice of attire and expression, Trump is not likely to have superintended the Mugshot and is therefore unlikely to be considered an author for copyright purposes. Instead, copyright to Trump’s Mugshot likely vests in the Fulton County Sheriff’s Office (the “Sheriff’s Office”) because the photographer is an employee of the Sheriff’s Office, and taking mugshots of arrestees is within that employee’s job description. The Mugshot is thus a work made for hire, meaning that authorship and the copyright would vest in the employer, the Fulton County Sheriff’s Office.<sup>34</sup> Consequently, Trump’s senior advisor’s threat to “COME AFTER” anyone who uses his Mugshot appears to be an empty threat, given

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31. Emily Ratajkowski, *Buying Myself Back: When Does a Model Own Her Own Image?*, THE CUT (Sept. 15, 2020), <https://perma.cc/P3KH-YKPZ>.

32. John Tehranian, *Copyright’s Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J. L. & GENDER 343, 347 (2018).

33. Goldman & Silbey, *supra* note 29, at 957-58. See generally Cathay Y. N. Smith, *Copyright Silencing*, 106 CORNELL L. REV. ONLINE 71 (2021) (describing instances where individuals have asserted copyright to photographs, videos, texts, and emails in order to suppress those works).

34. See 17 U.S.C. § 101 (defining a “work made for hire”); 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer . . . is considered the author . . .”).

that neither Trump nor his campaign have legal rights to the photograph under copyright law.<sup>35</sup>

B. Maybe No One Owns It?<sup>36</sup>

Even though the Sheriff's Office owns the copyright to Trump's Mugshot, there are two potential arguments that Trump's Mugshot (and official mugshots generally) may not be eligible for copyright and may be in the public domain: lack of originality and the government edicts doctrine.

The first argument that Trump's Mugshot may be uncopyrightable is its lack of originality required for copyright protection. To be copyrightable, a work must be an *original* work of authorship fixed in a tangible medium of expression.<sup>37</sup> While originality is the *sine qua non* of copyright, its threshold is low, requiring only that the work is independently created and exhibits a modicum of creativity.<sup>38</sup> The purpose of a mugshot is to accurately and objectively document the appearance of an individual at the time of their arrest. Therefore, the photographer of a mugshot is restricted from making many creative choices about composition, lighting, angles, or perspective that would render the photograph a unique expression of an idea. Instead, the process is standardized and designed to limit creativity: The subject is typically positioned in front of a plain backdrop, lit with straightforward and even lighting, and photographed at specific angles—from the front and from the side. One might argue that this lack of creative input by the photographer should render a mugshot unoriginal.<sup>39</sup> However, most courts find that “[a]lmost any photograph ‘may claim the necessary originality to support a

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35. See *supra* note 20 and accompanying text. Other areas of law that mugshots *could* implicate are state right of publicity and privacy laws or false endorsement claims brought under the Lanham Act. For example, a celebrity could potentially claim false endorsement under § 43(a) of the Lanham Act if their image is used in a way to imply that the celebrity endorses the product or service. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925-26 (6th Cir. 2003). In Trump's case, however, those claims are likely limited by the First Amendment due to the image being a “legitimate matter of public concern.” See, e.g., *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1352, 1357 (D. Colo. 2014) (dismissing a right of publicity claim against Public Advocate's unauthorized use of a couple's engagement photo because the use was noncommercial and reasonably related to a legitimate matter of public concern).

36. The “government edicts” analysis in this Subpart benefited from the discussion on the IPPROFS Listserv between September 4-5, 2023.

37. 17 U.S.C. § 102(a).

38. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345-46 (1991).

39. See *Bridgeman Art Libr., Ltd v. Corel Corp.*, 36 F. Supp. 2d 191, 195-97, 200 (S.D.N.Y. 1999) (affirming that exact photographic copies of public domain paintings were unoriginal because they did not involve independent creation or artistic expression).

copyright,”<sup>40</sup> including ordinary headshots or photographs of politicians.<sup>41</sup> Therefore, courts are likely to find a modicum of creativity in mugshots to meet the low threshold of originality for copyright.

The second argument that Trump’s Mugshot is uncopyrightable is that the government edicts doctrine may render it in the public domain.<sup>42</sup> The government edicts doctrine is a judicially created principle that holds that laws are generally not protected by copyright.<sup>43</sup> Under the doctrine, copyright cannot protect official texts produced by federal, state, or local government officials or entities in the exercise of their lawmaking function, including texts such as “legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.”<sup>44</sup> In *Georgia v. Public.Resource.Org*, the Supreme Court clarified the doctrine by rooting it in copyright’s authorship requirement, stating that, “[b]ecause judges are vested with the authority to make and interpret the law, they cannot be the ‘author’ of the works they prepare ‘in the discharge of their judicial duties.’”<sup>45</sup> The Court noted that the doctrine “applies both to binding works (such as opinions) and non-binding works (such as headnotes and syllabi),” but that it does not apply “to works created by government officials . . . who lack the authority to make or interpret the law, such as court reporters.”<sup>46</sup> Ultimately, the Court held that under the government edicts doctrine, statutory annotations in the Official Code of Georgia Annotated were in the public domain.<sup>47</sup>

Could mugshots fall under the same rule and, therefore, be in the public domain? On the one hand, mugshots are similar to annotations in certain respects: they are created by and for government entities who have the authority to enforce or interpret the law; they are associated with official records or documents; they are intended to serve a public function or interest;

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40. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (quoting 1 NIMMER ON COPYRIGHT § 2.08[E][1], at 2–129 (1990)).

41. See *Kienitz v. Scottie Nation LLC*, 766 F. 3d 756, 757-59 (7th Cir. 2014); *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1190-91 (N.D. Ill. 2015); *Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1057-59, (D. Mont. 2019); *Dhillon v. Does 1-10*, 2014 WL 722592, at \*1, \*3 (N.D. Cal. Feb. 25, 2014).

42. Works created by federal employees for the federal government are excluded from copyright. 17 U.S.C. § 105. Because Trump’s Mugshot was taken by the Sheriff’s Office, which is not a federal agency, this rule would not apply.

43. *Wheaton v. Peters*, 33 U.S. 591, 616 (1834); *Banks v. Manchester*, 128 U.S. 244, 253 (1888); *Callaghan v. Myers*, 128 U.S. 617, 647 (1888).

44. *Shyamkrishna Balganes, Authoring the Law*, 69 J. COPYRIGHT SOC’Y U.S.A. 353, 355 (2022) (quoting U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.6(C)(2) (3d ed. 2021)).

45. 140 S. Ct. 1498, 1507 (2020) (quoting *Banks*, 128 U.S. at 253).

46. *Id.* at 1507.

47. *Id.* at 1508-09.



and they do not reflect creativity on behalf of their creators. On the other hand, while mugshots are generally created by government officials and entities that may enforce the law, they are not created by officials who have the power to speak with the force of law in the way that judges and legislators do. Mugshots may be official records and intended to serve a public interest, but they certainly do not perform the same law-making functions as binding laws and legal opinions, or nonbinding annotations, headnotes, and syllabi. Applying the logic and reasoning of *Public.Resource.Org*, mugshots created by and for government entities probably do not fall under the government edicts doctrine. This would mean that Trump's Mugshot is likely protected by copyright and owned by the Sheriff's Office.<sup>48</sup>

## II. Who Can Use Trump's Mugshot?

Based on the forgoing discussion, if anyone owns the copyright to Trump's Mugshot, it is the Sheriff's Office. While the Sheriff's Office is unlikely to assert its copyright to the Mugshot against Trump or any third-party uses, what rights, if any, would Trump's campaign or other parties have to use the Mugshot on merchandise for sale? This Part answers that question by examining Trump's use of the Mugshot under a political fair use analysis and considering third-party uses under the Supreme Court's recent fair use opinion in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*. This Part concludes that fair use likely excuses both Trump's and third parties' uses of Trump's Mugshot.

### A. Can Trump and His Campaign Use the Mugshot?

As discussed above, subjects depicted in photographs are not typically considered their authors and therefore lack the right to reproduce them under copyright law. This means that, not only does Trump have no legal right to stop others from using the Mugshot, but Trump's reproduction of the Mugshot onto merchandise for sale could also violate the Sheriff's Office's exclusive rights under copyright law.

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48. The legal conclusion that copyright to the Mugshot would be owned by the Sheriff's Office and Georgia is supported by other copyright experts, such as Professors Betsy Rosenblatt and Susan Scafidi. Taylor Bruck, *Can You Legally Use Trump's Mugshot on Merchandise?*, SPECTRUM NEWS 1 (Aug. 25, 2023, 4:48 PM ET), <https://perma.cc/GRN3-2JJ9> (quoting Professor Betsy Rosenblatt); Vanessa Friedman, *The Dangerous Marketing of the Trump Mug Shot*, N.Y. TIMES (Aug. 29, 2023), <https://perma.cc/MBK6-UYKK> (quoting Professor Susan Scafidi); see also Amanda Creek, *Innocent Until Proven Posted: Regulating Online Mugshot Publication with Intellectual Property Law*, 30 J. INTELL. PROP. L. 112, 124 (2022) ("In the context of photographs taken by law enforcement during the booking process, the author of the mugshot photograph is the law enforcement agency.").

Even though Trump is a political figure and his use of the Mugshot may be in furtherance of his political campaign, copyright law does not automatically excuse unauthorized uses of protected works for political speech. Political and campaign speech may occupy a privileged space under the First Amendment,<sup>49</sup> but the Supreme Court has been clear that there is no separate political speech or public figure defense to copyright infringement.<sup>50</sup> Instead, a defendant with a “political speech” defense to a copyright infringement claim must rely on fair use.<sup>51</sup>

To determine whether an unauthorized use of a copyrighted work is fair use, courts examine and balance four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>52</sup> Under factor one, the purpose and character of the use: unauthorized uses that are noncommercial, do not share the same or similar purpose as the copyrighted work, or are commentary, criticism, or parody are more likely to be considered fair uses.<sup>53</sup> The second fair use factor considers the nature of the original copyrighted work, recognizing “that creative works are ‘closer to the core of intended copyright protection’ than informational and functional works.”<sup>54</sup> The third fair use factor, the amount and substantiality of the portion used, considers both the quantity and quality of the materials used. Generally, under this factor, the more a defendant uses from the copyrighted work, the less likely the

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49. Cathay Y. N. Smith, *Political Fair Use*, 62 WM. & MARY L. REV. 2003, 2009-11 (2021).

50. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-557, 560 (1985) (rejecting Nation Enterprises’ contention that “First Amendment values require a different rule . . . ‘when the information conveyed relates to matters of high public concern’” (quoting *Consumers Union of the U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983)).

51. *See, e.g., Peterman v. Republican Nat’l Comm.*, 369 F. Supp. 3d 1053, 1062 n.4 (D. Mont. 2019) (rejecting the RNC’s argument that “its use of the Work to further a political message is entitled to First Amendment protection above and beyond that built into the Copyright Act” and finding the fair use defense to be a “built-in First Amendment accommodation” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))); Smith, *supra* note 49, at 2011.

52. 17 U.S.C. § 107.

53. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1274-77 (2023).

54. *Henley v. DeVore*, 733 F.Supp. 2d 1144, 1151 (C.D. Cal. 2010).

use is considered fair use.<sup>55</sup> Finally, factor four considers the market harm that the unauthorized use might have on the original copyrighted work.<sup>56</sup>

In this case, the Trump campaign's unauthorized use of the Mugshot to promote and sell political campaign merchandise is likely to be excused under fair use. Even though unauthorized political uses of copyrighted works are not presumptively fair, research shows that courts are more likely to excuse unauthorized political uses of copyrighted works under fair use, especially if the original works are also political in nature.<sup>57</sup> Specifically, if an unauthorized use is political, and the nature of the copyrighted work is political, courts often ascribe a lack of market harm on the original copyrighted political work, and find the political use to be fair regardless of how much of the copyrighted work the defendant used.<sup>58</sup> The Trump campaign's use of the Mugshot on merchandise, emblazoned with slogans like "NEVER SURRENDER" or "2024," certainly appears to be political, but is the Mugshot itself political in nature? Mugshots document the appearance of an individual at the time of their arrest; they are not politically motivated. Nevertheless, the Mugshot—which depicts a former President and his arrest—has undoubtedly acquired a political meaning.<sup>59</sup> Under these circumstances, based on past case law on unauthorized political uses of political copyrighted works,<sup>60</sup> the Trump campaign's use of the Mugshot would likely be considered non-infringing political fair use.

### B. Can Anyone Use Trump's Mugshot?

Trump and his campaign's use of the Mugshot may be political fair use, but can *any* third party use the Mugshot? It depends. Specifically, it depends on the "purpose and character" of those third parties' uses.

To determine whether unauthorized uses of Trump's Mugshot are fair use, courts examine four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or

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55. Smith, *supra* note 49, at 2054 (citing *City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 5025839, at \*3 (C.D. Cal. Aug. 20, 2015)); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 959 (D.N.H. 1978).

56. Smith, *supra* note 49, at 2058 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

57. *See id.* at 2041-47, 2064 (summarizing a pattern in case law "in which courts overwhelmingly find fair use in cases arising from the unauthorized political uses of original copyrighted works if those copyrighted works have a political nature").

58. *See generally id.*

59. *See Cooper, supra* note 2.

60. Smith, *supra* note 49, at 2041-47 (surveying copyright fair use cases and finding that cases involving the unauthorized political use of a copyrighted political work are more likely to be considered fair use by courts).

value of the copyrighted work.<sup>61</sup> Factor two, the nature of the original work, would necessarily weigh in favor of fair use because the Mugshot is a factual and official record with limited creativity.<sup>62</sup> The third factor, the amount and substantiality of the portion used, will generally depend on how much of the Mugshot the third party used. In most cases, to identify Trump as the subject of the Mugshot, the third party's use is likely to almost always be the entire work. This factor would typically weigh against fair use, unless the purpose of the third party's use made it reasonable to use the entire work.<sup>63</sup> The fourth factor examines the effect on the potential market for or value of the original work. In this case, the effect would be negligible because the Sheriff's Office is not likely to use Trump's Mugshot on merchandise for sale, and it is also not likely to license or sell the Mugshot for financial gain.<sup>64</sup>

Therefore, whether a third party's use of Trump's Mugshot is fair would likely turn on the first factor: the purpose and character of the unauthorized use. This factor, which was the focus in *Warhol*, considers whether the unauthorized use was for nonprofit educational use or commercial use; whether the unauthorized use was for the same or substantially the same purpose as the original copyrighted work; and whether the unauthorized use was for the purpose of commentary, criticism, or parody.<sup>65</sup>

Third parties are using Trump's Mugshot in various ways.<sup>66</sup> Some of these third parties claim that their purpose for creating and selling the merchandise is to make a political statement, while others claim that their focus is to "capitaliz[e] on an unprecedented moment in the news cycle—and American history."<sup>67</sup> If a third party uses Trump's Mugshot to make a political statement, their use would likely be excused as copyright fair use for the reasons described in II.A. above. As for the other unauthorized uses of the Mugshot, even though some of them may be for nonprofit purposes, many are for commercial

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61. 17 U.S.C. § 107.

62. See *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (explaining that fair use is more likely when the work is "factual" rather than "creative").

63. See *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1064 ("[T]he use of an entire image may be reasonable if a more limited use would not serve the defendant's intended purpose.").

64. See *id.* at 1065 ("It is unclear how the [photograph of a political candidate] could conceivably have any future commercial value to [the photographer]."). There is, unfortunately, a market for mugshots outside of government uses, as described in *Creek*, *supra* note 48, at 117. However, this market is not one with which the Sheriff's Office, the copyright owner of the Mugshot, is likely to engage.

65. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1274-75 (2023).

66. See *supra* notes 17-19 and accompanying text.

67. *Id.*

purposes, which weighs against fair use.<sup>68</sup> Nevertheless, none of these third-party uses appear to use the Mugshot for the same or a substantially similar purpose as the Sheriff's Office, which is to document the appearance of Trump at the time of his arrest. According to *Warhol*, this consideration would support fair use.<sup>69</sup> Similarly, these third-party uses of Trump's Mugshot could be considered as making a commentary, criticism, or parody of the Mugshot, further supporting fair use. Based on a preliminary analysis of these factors, it is likely that the described third-party uses of Trump's Mugshot, even if commercial, are likely to be non-infringing fair uses.

### Conclusion

Trump's Mugshot captures an unprecedented moment in American history. Its commercialization, commodification, and "encrapification"<sup>70</sup> on cheap knickknacks and souvenirs is also representative of American consumerism and our era's "cynicism of late capitalism."<sup>71</sup> Plastering symbols and slogans of social and cultural moments on cheap products serves to trivialize significant issues and "reduce a complex context to the status of a simplistic message."<sup>72</sup> Some have expressed concern with this behavior, warning that "in reducing big issues to the level of cheapish everyday stuff, both sides are also normalizing them. They are creating a situation in which we all get suckered into the idea that the current turmoil is a souvenir to be acquired and then stuck in a drawer, rather than confronted."<sup>73</sup> Others have taken a more light-hearted view of the commodification of this turbulent moment in history, explaining its ability to bring some levity to "this crazy period of politics."<sup>74</sup>

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68. *Warhol*, 143 S. Ct. at 1276-77.

69. *See id.* (clarifying factor one of fair use involves considering "whether the use of a copyrighted work has a further purpose or difference character . . . If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying").

70. "Encrapification" is a term coined by Professor Wendy A. Woloson to describe the process of turning meaningful cultural phenomena into "crap" for consumption, such as knickknacks, tchotchkes, keepsakes, souvenirs, and other gimmicks that might be momentarily attractive to consumers but are quickly discarded. *See* Current Affairs, *Why Do Americans Buy So Much CRAP? (w/ Wendy Woloson)*, PATREON (Nov. 30, 2022), <https://perma.cc/Y592-S3VN>; *see also* Friedman, *Dangerous Marketing*, *supra* note 48.

71. Friedman, *Dangerous Marketing*, *supra* note 48.

72. *Id.*

73. *Id.*

74. Varanasi, *supra* note 19.

Regardless, most commercialization of Trump's Mugshot is likely legal under copyright law. The only party who may have a copyright claim to Trump's Mugshot is the Sheriff's Office—not Trump. Though he cannot prevent third-party uses, Trump can reproduce the Mugshot on campaign merchandise under copyright's political fair use analysis. Similarly, third parties can use the Mugshot for fair uses, including reproducing it on merchandise to make a political commentary, to criticize Trump or his arrest, or to parody the image and its social context. In any case, the Sheriff's Office is unlikely to police any unauthorized uses of the Mugshot by Trump or third parties. Therefore, all should feel free to right-click, copy, paste, and "encrapify" away.

