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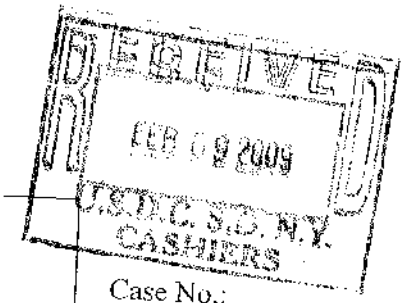

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Plaintiffs,

-against-

THE ASSOCIATED PRESS,

Defendant.

Case No.:

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART, INC., Plaintiffs, -against- THE ASSOCIATED PRESS, Defendant.	Case No.: **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF** **DEMAND FOR JURY TRIAL**

Plaintiffs Shepard Fairey ("Fairey") and Obey Giant Art, Inc. ("Obey Giant") (collectively "Plaintiffs"), by and through their attorneys, bring this action and allege against Defendant The Associated Press ("AP") as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

1. This is a civil action for declaratory and injunctive relief to vindicate the rights of visual artist Shepard Fairey and Obey Giant in connection with the series of iconic works Fairey created to support the candidacy of President Barack Obama. Fairey's work became a ubiquitous symbol of Obama's historic presidential campaign and stood as powerful symbols of Obama's grassroots support.

2. The AP has asserted that Fairey's work – one piece of which now hangs in the Smithsonian Institution's National Portrait Gallery in Washington D.C. – infringes the AP's copyrights in a photograph that was apparently taken by photographer Mannie Garcia, which depicts Obama at a panel discussion at the National Press Club in April 2006 with actor George Clooney. Fairey and Obey Giant bring this action to clarify the rights of the parties, and to refute the AP's baseless assertions of copyright infringement finally and definitively. Fairey and Obey Giant seek a declaratory judgment holding Fairey's works do not infringe any copyrights held by Defendant AP and are protected by the Fair Use Doctrine. Fairey and Obey Giant also seek an injunction enjoining Defendant AP and its agents from asserting its copyrights against Fairey, Obey Giant, or any other party in possession of the works at issue.

PARTIES

3. Plaintiff Shepard Fairey ("Fairey") is an individual residing in Los Angeles, California, and a renowned visual artist.

4. Plaintiff Obey Giant Art, Inc. ("Obey Giant") is a California Corporation

located in Los Angeles, California, through which Fairey distributes his work. Obey Giant is owned by Plaintiff Fairey and his wife, Amanda Fairey.

5. Defendant The Associated Press ("AP") is a New York corporation with its headquarters and principal place of business in New York, New York. The AP is one of the largest news organizations in the world.

JURISDICTION AND VENUE

6. This action arises under the copyright laws of the United States, 17 U.S.C. §§ 101, *et seq.* The Court has subject matter jurisdiction over this claim pursuant to 28 U.S.C. § 1331 and 1338, and the Declaratory Judgment Act, 28 U.S.C. § 2254.

7. This Court has personal jurisdiction over Defendant AP because it conducts regular business from its headquarters in New York City, and is a domicile of New York.

8. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §§ 1391(b) and 1400(a).

FACTUAL ALLEGATIONS

Shepard Fairey And The Obama Works

9. Plaintiff Shepard Fairey is a renowned visual artist who lives and works in Los Angeles, California. Fairey's work focuses on social and political subjects, frequently dealing in current events. Fairey's illustrations are created in a variety of media, including screen prints and stencil painting. Fairey's work takes a variety of forms, including street art, commercial art and design, as well as fine art seen in galleries and museums all over the world. Fairey distributes his work through Obey Giant, a company he and his wife Amanda Fairey own together.

10. A large body of Fairey's work questions and criticizes Presidents, politicians and world leaders, past and present. Some of his best-known work involves his "Obey" campaign, through which Fairey urges the observer to question obedience to social commands and the political status quo.

11. Fairey's work has gained steadily in prominence, both in the U.S. and abroad. On February 6, 2009, the Institute for Contemporary Art / Boston opened a twenty-year retrospective of his work – *Shepard Fairey: Supply and Demand*. Exhibition curator Pedro Alonzo explains, "The content of Fairey's work is a call to action about hierarchies and abuses of power, politics and the commodification of culture. Fairey is committed to creating work that has meaning for his audience-by using familiar cultural iconography that people can relate to and by constantly bringing his work into the public sphere." According to Jill Medvedow, Director of the ICA / Boston, Fairey's "integration of design, popular culture, and politics places him in the current of artistic and cultural forces that shape our world today."

12. By the fall of 2007, Fairey had become a strong supporter of then Presidential candidate Barack Obama. Fairey wanted to express his support for Obama –and the message of hope, change and progress Obama stood for – through his artwork, but did not want to do so unless the Obama campaign was comfortable with his contribution.

13. After receiving encouragement from the Obama campaign in January 2008, Fairey began working on his concept shortly before the February 5 "Super Tuesday" elections – the day upon which 24 states held primary elections and caucuses. Fairey then began creating the first in what would become a series of works designed to capture the optimism and inspiration created by Obama's candidacy (the "Obama Works"), through which Fairey hoped to compel further support for Obama.

14. In conceiving and planning his work, Fairey came across a photograph of then Senator Obama taken at the National Press Club in April 2006 during an event at which he appeared with actor George Clooney to speak about the humanitarian crisis in the Darfur region of Africa. Fairey is informed and believes, and on that basis alleges, that a photographer named Mannie Garcia took this photograph (the "Garcia Photograph"). A reproduction of the Garcia Photograph is attached to this Complaint as Exhibit A.

15. The Garcia Photograph was snapped as Clooney watched Obama listen to another speaker, and depicts Obama looking up and to his left under the lights shining down on the panelists, with Clooney seated to Obama's right. The Garcia Photograph has, at various times, been attributed to both Garcia and Defendant AP.

16. The first work in the series of Obama Works Fairey created was a screen-print poster that came to be known as *Obama Progress*. It is an abstracted graphic rendition of Obama gazing up and to the viewer's right, colored in a palette of red, white, and blue with the word "progress" in capital letters beneath the image of Obama. A reproduction of *Obama Progress* is attached to this Complaint as Exhibit B.

17. Days later, Fairey created another poster utilizing the same illustration as *Obama Progress*, using an offset printing process and replacing the word "progress" with "hope" at the bottom of the poster. This poster became known as *Obama Hope*. A reproduction of *Obama Hope* is attached to this Complaint as Exhibit C.

18. In creating the illustration of Obama used in *Obama Progress* and *Obama Hope*, Fairey used the Garcia Photograph as a visual reference. Fairey transformed the literal depiction contained in the Garcia Photograph into a stunning, abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message that has no

analogue in the original photograph. While the evident purpose of the Garcia Photograph is to document the events that took place at the National Press Club that day in April 2006, the evident purpose of both *Obama Progress* and *Obama Hope* is to inspire, convince and convey the power of Obama's ideals, as well as his potential as a leader, through graphic metaphor. By evoking stylized propaganda posters more often associated with autocrats and dictators, Fairey at once portrays the inevitability of Obama's triumph, while suggesting qualities of wisdom and vision that pull viewers willingly into Obama's message of hope, progress and change.

19. Fairey first began distributing *Obama Hope* and *Obama Progress* in late January 2008 and early February 2008. The power of Fairey's imagery was recognized immediately by many, including Obama himself. In a February 22, 2008 letter to Fairey, Obama thanked Fairey for his contribution to Obama's campaign. In that letter, Obama remarked that "[t]he political messages involved in your work have encouraged Americans to believe they can help change the stauts quo. . . . Your images have a profound effect on people, whether seen in a gallery or on a stop sign."

20. Initially, Fairey sold 350 *Obama Progress* posters through Obey Giant for $45 each. Fairey and Obey Giant used the money received from those initial sales to print *Obama Hope* posters, and began selling those for $45 as well.

21. *Obama Progress* and *Obama Hope* were immediate hits. People who bought *Obama Progress* began selling copies on eBay almost immediately for thousands of dollars. Fairey continued to print more copies of *Obama Progress* and *Obama Hope*, but continued to sell them for only $45.

22. The demand for *Obama Hope* quickly became overwhelming. Fairey continued to pour the money he received from the sale of his posters into printing more posters, and distributing nearly all of them for free. By Election Day, Fairey and Obey Giant had sold approximately 4,000 posters, but used the proceeds from those sales to distribute nearly 300,000 additional posters for free.

23. By the summer of 2008, *Obama Hope* had become a ubiquitous symbol of Obama's candidacy, and a pervasive presence across America. Fairey's illustration of Obama appeared on signs, buttons and stickers displayed by millions of supporters in every corner of the country. *Obama Hope* was the icon and visual embodiment of the unprecedented grassroots support Obama had harnessed. *Obama Hope* had thus become the symbol of one of the most remarkable candidates in modern history.

24. Fairey's work had become such a prominent symbol of the Obama campaign that he was asked to participate in an art exhibition held in Denver during the Democratic National Convention, entitled "Manifest Hope." For this show, Fairey created another piece to capture the emotions of hope, change and progress that were drawing millions of Americans to support Obama. This piece was titled *Obama Hope Mural*. It used the same illustration of Obama contained in the *Obama Hope* poster but combined it with additional visual elements that augmented the existing message of support for Obama by referencing elements from Fairey's previous bodies of work. A reproduction of the *Obama Hope Mural* is attached to this Complaint as Exhibit D.

25. As the presidential campaign headed into its final phases, *Obama Hope* was as pervasive as ever, and continued to be the defining visual symbol that united Obama supporters across the country, and around the world.

26. On November 4, 2008, the historic candidacy of Barack Obama reached its end upon his election to become President of the United States of America. Following the election, President-Elect Obama's inaugural committee contacted Fairey and asked him to create an official poster commemorating the inauguration. In response, Fairey created another work, entitled *Be The Change*. In it, the same illustration of Obama featured in *Obama Hope* is placed in the upper middle portion of the print, with images of the U.S. Capitol and the White House flanking Obama, and a cheering crowd beneath him. A reproduction of *Be The Change* is attached to this Complaint as Exhibit E.

27. Immediately following the election, Moveon.org released a poster commemorating Obama's election, entitled *Yes We Did*, which Fairey created. *Yes We Did* features the illustration of Obama from *Obama Hope* in the upper center of the poster with additional visual elements designed to celebrate the occasion of Obama's victory. A reproduction of *Yes We Did* is attached to this Complaint as Exhibit F.

28. On January 17, 2009, Fairey's work in support of Obama reached its culmination. On that day, a large-format, hand-stenciled collage incorporating the illustration of Obama from the *Obama Hope* poster along with other visual material (the "*Obama Hope Stencil Collage*") was unveiled to the public as the newest addition to the Smithsonian Institution's National Portrait Gallery in Washington D.C. A reproduction of the *Obama Hope Stencil Collage* is attached to this Complaint as Exhibit G.

Speculation About Fairey's Obama Works

29. In a February 2008 interview about the *Obama Hope* poster, Fairey explained he used an AP photograph as a visual reference in creating the poster, but did not identify the photo specifically.

30. As the *Obama Hope* poster became the icon of Obama's candidacy, people began speculating publicly about which specific photograph Fairey used as a visual reference. Photojournalist and blogger James Danziger started looking for the photograph in the fall of 2008.

31. Following Obama's election victory, as the inauguration date approached, the speculation began to intensify. On January 14, 2009, blogger Michael Cramer suggested and purported to demonstrate the *Obama Hope* poster was based on a photograph appearing on Time Magazine's website and originally attributed to Jonathan Daniel of Getty Images.

32. Danziger eventually determined the photograph from the Time Magazine website was misattributed, and was actually taken by Reuters photographer Jim Young at a 2007 Senate confirmation hearing. Danziger then concluded the Young photograph was the photograph Fairey used in creating the *Obama Hope* poster, suggesting the Jim Young photograph, which shows Obama looking to his right, had been "flipped" and "re-oriented" so that Obama appeared to look to his left.

33. Shortly after that, photographer Tom Gralish suggested Cramer and Danziger were both wrong. In a blog entry dated January 23, 2009, Gralish concluded the mystery had been solved. According to him, the photograph Fairey used was a tightly cropped shot of Obama taken by Mannie Garcia at the same April 2006 event at the National Press Club where he snapped the Garcia Photograph.

34. In fact, none of the above were correct. The photograph Fairey had actually used as a visual reference in creating *Obama Hope* was not the tightly-cropped photograph Gralish identified. Fairey had actually used the Garcia Photograph (Exhibit A)which included both Obama and actor George Clooney in the frame.

The AP's Allegaions Of Infringement And Demands For Money

35. Shortly after Gralish and others concluded that Fairey used an AP photograph in the creation of *Obama Hope*, the AP attempted to contact Fairey.

36. On or around January 29, 2009, an attorney for the AP phoned Shepard Fairey's production studio. A representative for Fairey returned the call on January 30, 2009. During that call, the AP's attorney explained the AP had special technology to detect the source of the photo used to create *Obama Hope*. The AP's attorney stated the AP owned the rights to the photograph Fairey used to create *Obama Hope,* demanded payment for Fairey's use of the AP photo, and stated the AP expected to be paid a portion of any money Fairey might make from his work.

37. On February 3, 2009, counsel for Shepard Fairey contacted the AP's counsel by telephone. During that conversation, the AP reiterated its view that Fairey's work infringed the AP's rights, and explained that if Fairey did not negotiate a license, the AP would file suit against Fairey.

38. On February 4, 2009, the AP published a story, the headline of which was "AP alleges copyright infringement of Obama image." A copy of that story is attached to this Complaint as Exhibit H.

39. According to the AP's February 4 story, AP spokesman Paul Colford declared "the Associated Press has determined that the photograph used in the poster is an AP photo and that its use required permission." While Colford noted the AP was discussing the matter with Fairey's attorney, the AP also made it clear the AP was not limiting its infringement allegations to any one work. The AP story noted that one copy of the *Obama Hope Stencil Collage* was hanging in the National Portrait Gallery and another copy would be included in the

Fairey retrospective at the Institute of Contemporary Art / Boston. In regard to these works, Colford stated, "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." Accordingly, the AP made it clear that it considers all works that incorporate the imagery of *Obama Hope* to be infringements of its copyrights, including the copy of the *Obama Hope Stencil Collage* hanging in the Smithsonian.

40. Two days later, the AP reiterated its threat to sue Fairey. In a February 6 email to Fairey's counsel, the AP's counsel stated that while the AP still wanted to resolve the dispute over Fairey's work amicably, the AP would nonetheless file suit on Tuesday, February 10, 2009 if the matter has not been resolved by then.

FIRST CAUSE OF ACTION

Declaratory Judgment – Non-Infringement

17 U.S.C. §§ 101, *et seq.*

41. Fairey and Obey Giant incorporate by reference the allegations in each of the proceeding paragraphs as if fully set forth in this paragraph.

42. An actual controversy exists as to whether the Obama Works (as identified in Exhibits B-G to this Complaint) infringe any copyright owned by the AP.

43. Even insofar as the AP owns the copyrights to the Garcia Photograph, the Obama Works do not infringe any of the exclusive rights secured by the Copyright Act. Fairey and Obey Giant are therefore entitled to a declaration that the Obama Works (as identified in Exhibits B-G to this Complaint) do not infringe any copyrights owned by the AP.

SECOND CAUSE OF ACTION

Declaratory Judgment – Fair Use

17 U.S.C. § 107

44. Fairey and Obey Giant incorporate by reference the allegations in each of the proceeding paragraphs as if fully set forth in this paragraph.

45. An actual controversy exists as to whether Fairey's use of any materials to which the AP holds copyrights is protected by the Fair Use Doctrine.

46. Fairey used the Garcia Photograph as a visual reference for a highly transformative purpose; Fairey altered the original with new meaning, new expression, and new messages; and Fairey did not create any of the Obama Works for the sake of commercial gain.

47. The Garcia Photograph had been published well before Fairey used it as a visual reference, and is a factual, not fictional or highly creative, work.

48. Fairey used only a portion of the Garcia Photograph, and the portion he used was reasonable in light of Fairey's expressive purpose.

49. Fairey's use of the Garcia Photograph imposed no significant or cognizable harm to the value of the Garcia Photograph or any market for it or any derivatives; on the contrary, Fairey has enhanced the value of the Garcia photograph beyond measure.

50. Fairey and Obey Giant are therefore entitled to a declaratory judgment that the use of the Garcia Photograph as a visual reference in creating the Obama Works (as identified in Exhibits B-G to this Complaint) is protected by the Fair Use Doctrine.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Fairey and Obey Giant request this Court to enter judgment:

1. Declaring that Fairey's Obama Works do not infringe any copyrights held by the AP;

2. Declaring that Fairey's use of the Garcia Photograph as a visual reference in creating the Obama Works is privileged under, and protected by, the Fair Use Doctrine;

3. Enjoining the AP, its agents, attorneys, and assigns from asserting copyrights against Fairey or Obey Giant in connection with any of the Obama Works;

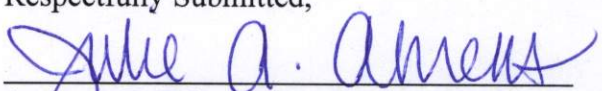
4. Enjoining the AP, its agents, attorneys, and assigns from asserting copyrights against any third party (including but not limited to the Smithsonian Institution and the Institute for Contemporary Art / Boston) that possesses, reproduces, distributes or displays any of the Obama Works;

5. Awarding Fairey and Obey Giant their reasonable attorneys' fees and costs; and

6. Awarding any other relief the Court deems just and proper.

DATED: February 9, 2009

Respectfully Submitted,



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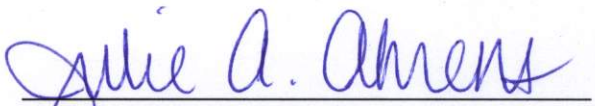
DEMAND FOR JURY TRIAL

Plaintiffs Shepard Fairey and Obey Giant demand a jury trial on all issues properly triable to a jury.

DATED: February 9, 2009.



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