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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT
ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim
Plaintiff,

v.

SHEPARD FAIREY, et al.,

Counterclaim Defendants

Case No.: 09 CIV 01123 (AKH)

ECF CASE

**THE ASSOCIATED PRESS'S
RULE 56.1 STATEMENT OF
UNDISPUTED FACTS IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT
AGAINST OBEY CLOTHING**

Pursuant to Local Rule 56.1 (a) and (d), Defendant and Counterclaim Plaintiff the Associated Press ("AP"), by and through its counsel, respectfully submits the following statement of material undisputed facts that support a grant of summary judgment on the AP's counterclaims One 3 Two, Inc., d/b/a Obey Clothing ("Obey Clothing") for direct and contributory copyright infringement, 17 U.S.C. §§ 101 *et seq.*

I. THE AP

1. The AP is a not-for-profit membership news cooperative founded in 1846 and owned by its 1,400 U.S. daily-newspaper members. Declaration of Ken Dale dated January 6, 2011 (“Dale Decl.”) ¶ 3.

2. The AP creates content and licenses and distributes it to news media outlets which in turn broadcast and publish the news. Dale Decl. ¶ 8.

3. With its headquarters in New York City, the AP employs approximately 3,600 people in approximately 300-plus locations around the world. Declaration of John David Ake dated January 6, 2011 (“Ake Decl.”) ¶ 3.

4. The AP maintains a bureau in all fifty states and has more bureaus internationally than any other U.S. news organization. Ake Decl. ¶ 5.

5. The AP is the only U.S. news organization today with a permanent presence in Pyongyang, North Korea and Port-au-Prince, Haiti, among others. AP is also the only U.S. news organization that maintains a full-service bureau in Kabul, Afghanistan. Though other news organizations have closed their bureaus in Kabul to focus on the war in Iraq, AP has not wavered in its commitment to cover the wars in both Iraq and Afghanistan despite the enormous costs required to do that. Ake Decl. ¶ 6.

6. The costs of the AP’s news operations are funded almost entirely through licensing content. Declaration of Brendan T. Kehoe dated January 6, 2011 (“Kehoe Decl.”) ¶ 2 Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:5-16:5 (“The Associated Press’ entire business model is licensing, 95 percent of our revenue comes from licensing content, whether that be images or video or text or multimedia graphics, whatever we produce . . .”)).

7. A primary source of the AP’s licensing revenue is the receipt of assessments paid by AP’s news-media-outlet owners, or members. Dale Decl. ¶ 10; Kehoe Decl. ¶ 3, Ex. 2 (The

AP's Consolidated Financial Statements, Years Ended December 2009 and 2008, at 6 ("The Company's primary source of revenue is from subscription contracts with newspapers, radio and television stations and internet news site providers.")).

8. Because of the financial difficulties facing the news industry, members have been unable to continue funding the monetary assessments that are used to operate the AP at the same level as they previously had. Dale Decl. ¶ 11.

9. The AP has developed AP Images, a photo-archive business, as a primary alternative source of revenue. Dale Decl. ¶ 14.

10. AP Images makes images available to its customers so that they can license them for myriad different uses, including but not limited to promotional, commercial, editorial, and educational uses, as well as for television and video. Declaration of Farah DeGrave dated January 6, 2011 ("DeGrave Decl.") ¶ 3; Kehoe Decl. ¶ 4, Ex. 3 (AP0005570 (listing "AP Images Sales by License Type")).

11. Through APIImages.com, customers can both browse and search the AP's entire archive of more than 8.6 million digitized photographs. DeGrave Decl. ¶ 4.

12. AP Images licenses its photos both to be used "as is" and for incorporation into derivative works. DeGrave Decl. ¶ 9.

13. AP Images licenses its photographs for use by political campaigns and to supporters of political candidates. DeGrave Decl. ¶ 13.

14. For example, the AP licensed a photograph of Mr. Obama to Flashbags for use as a derivative work on tote bags supporting Mr. Obama. DeGrave Decl. ¶ 13; Kehoe Decl. ¶ 5, Ex. 4 (AP0002615-16). The photograph of Mr. Obama that the AP licensed to Flashbags (left),

and Flashbags' licensed work based on that photograph (right), are shown below (DeGrave Decl. ¶ 13):



AP Photograph

Flashbags' Licensed Work

15. The AP has also licensed images to Obama for America for different uses. Kehoe Decl. ¶ 6, Ex. 5 (AP Sales Invoice #365768 (AP0010683-84)); (AP Sales Invoice #376361 (AP0010699-702)); (AP Sales Invoice #376452 (AP0010703-4)).

16. AP Images has specific sales representatives who handle licensing inquiries for campaign-related licensing. DeGrave Decl. ¶ 14; Kehoe Decl. ¶ 7, Ex. 6 (B. Sell Dep. (Feb. 12, 2010) 123:18-124:16).

17. AP Images also licenses images of political leaders for use in connection with advertising and marketing. DeGrave Decl. ¶ 15.

18. The AP licenses images of President Obama for a variety of purposes, including for editorial (such as magazine covers), merchandise (such as tote bags), and for advertising (such as for Apple Computer, Inc.). DeGrave Decl. ¶¶ 11, 13, 16.

19. AP's sales representatives customize each license to a commercial customer based on the particular characteristics of each customer's planned use and AP's pricing guidelines. Kehoe Decl. ¶ 8, Ex. 7 (F. DeGrave Dep. (Mar. 23, 2010) 29:5-30:20; 56:13-57:23; 61:18-65:7).

20. It is difficult, if not impossible, for the AP to determine which images will be successful in generating substantial revenues. The images that are successful are important as they help to fund the entire business. Declaration of James Gerberich dated January 8, 2011 (“Gerberich Decl.”) ¶ 9.

21. Over the past several years, the AP has dedicated significant resources to the creation and development of AP Images’ photo-licensing business, including the AP Images Web-based platform, located at APImages.com. Dale Decl. ¶ 16.

22. Specifically, to develop AP Images, the AP has made significant investment in personnel, technology, additional photo equipment, a reorganization of the company away from regional control of image sales, and the hiring of new managers and sales staff with experience and expertise in the business of image licensing. Dale Decl. ¶ 17.

23. Creating AP Images has involved substantial capital investments. From 2005 through 2010 the AP has invested \$7.6 million in capital in AP Images. Dale Decl. ¶ 18; Kehoe Decl. ¶ 9, Ex. 8 (AP0006810-38).

24. Since launching AP Images in 2005, the AP has sought to increase the amount of image content that is available for licensing. Ake Decl. ¶ 13.

25. To accomplish this, the AP has made a number of practical changes to ensure that the AP generates a steady stream of content for licensing through AP Images. Ake Decl. ¶ 14.

26. For example, Washington-based staff photographers are required to archive all of the images they create onto company-supplied external hard disks. Often the entire assignment is sent to AP Images where photo editors edit and transfer the images to AP Images’ archive of images. Under previous practice, many of the images were deleted when the camera recording disks were reused for the next assignment. Ake Decl. ¶ 14.

27. Another change is that AP emphasizes to its photographers that they should not only cover the news of the day, but should also look beyond the news of the day to create additional content for an unlimited variety of potential future licensing uses. Ake Decl. ¶ 15.

28. These efforts have increased the overall amount of content available through AP Images, which is able to offer content for licensing beyond what is used for AP's news-reporting operations. Ake Decl. ¶ 17.

29. The AP's annual cost of acquiring and producing its images was more than \$56 million in 2009 and more than \$247 million from 2006 through 2009. Dale Decl. ¶ 19; Kehoe Decl. ¶ 10, Ex. 9 (AP00011063).

30. According to the AP's estimates, AP Images adds more than 4,000 photographs a day to its photo-archive database, which today has approximately 8.6 million unique images Gerberich Decl. ¶¶ 4-5.

II. SHEPARD FAIREY AND HIS COMPANIES

31. Shepard Fairey is a graphic designer, artist, entrepreneur, merchandiser, and business owner. Docket # 54 (AP's First Amended Answer and Counterclaims dated Nov. 12, 2009, ¶ 67; Docket # 58 (Amended Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants dated Nov. 13, 2009, ¶ 67).

32. Mr. Fairey founded the "Obey" brand. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 53:18-54:18); Kehoe Decl. ¶ 12, Ex. 11 (Obey Clothing's website, <http://obeyclothing.com/#/history/>).

33. Mr. Fairey and his wife and business partner, Amanda Fairey, own the corporation Obey Giant Art, Inc. ("Obey Giant Art") and Studio Number One, a California-based graphic design firm. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 69:9-17; 71:24-72:10).

34. Obey Giant Art is a California corporation that engages in the business of selling and distributing Fairey's artwork and merchandise. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 72:22-75:19).

35. Obey Giant Art manages the website ObeyGiant.com and sells Mr. Fairey's screen prints and posters and other various products under the "Obey" trademark. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 72:19-75:19); Ex. 13 (Obey Giant's website, <http://obeygiant.com/store/>).

36. Mr. and Mrs. Fairey are also the majority owners, and their partner Justin McCormick is the minority owner, of Obey Giant Art LLC ("Obey Giant LLC"). Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 69:18-72:18).

37. Obey Giant LLC is a California limited liability corporation that owns trademark registrations for "Obey" and the "Obey" stylized logo (together, the "Obey Logo"). Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 75:20-76:16); Kehoe Decl. ¶ 15, Ex. 14 (Amended and Restated Trademark Licensing Agreement dated July 1, 2006, between Obey Giant LLC and One 3 Two, Inc., d/b/a Obey Clothing ("Trademark License Agreement") (FAIREY61283.001-3.036).

38. Obey Giant LLC exclusively licenses the Obey Logo to Obey Clothing for use on clothing pursuant to a Trademark Licensing Agreement. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 75:20-76:16).

39. Mr. Fairey has on numerous occasions used a pre-existing photograph or work to create one of his images. Kehoe Decl. ¶ 16, Ex. 15 (FAIREY104954 - FAIREY104983; FAIREY104988-104989); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. (Mar. 17, 2010) Exs. 102, 106, 107, 108, 110).

40. In a recent article, Mr. Fairey's expert, Professor Marita Sturken, points out that Mr. Fairey's style has been criticized as "too derivative" based on its "appropriative imaging techniques":

Shepard Fairey's struggles with the ownership of public spaces, which have resulted in his constant arrest, have also extended to his appropriative imaging techniques. In the art world, this has produced the criticism of his style as too derivative to be regarded museum-world status.

Kehoe Decl. ¶ 18, Ex. 17 (Sarah Banet-Weiser & Marita Sturken, *The Politics of Commerce: Shepard Fairey and the New Cultural Entrepreneurship*, in *Blowing Up the BRAND: Critical Perspectives on Promotional Culture* 263-283, 278 (Melissa Aronczyk & Devon Powers eds. 2010)).

III. OBEY CLOTHING

41. Obey Clothing is a California corporation that is the exclusive licensee of Obey Giant LLC for the use of the Obey Logo on apparel, and also distributes certain of Mr. Fairey's images on apparel. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

42. Obey Clothing is a privately-held company that is owned by the following individuals (with approximate ownership interests): Regan Donald ("Don") Juncal (33%), Christopher Broders (15%), Steve Mellgren (29%), Eric Singer (15%), Michael Ternosky (4%), Dale Moody (5%). Kehoe Decl. ¶ 19, Ex. 18 (D. Juncal Dep. (Mar. 23, 2010) 42:1-42:20).

43. Obey Clothing has long been associated with Mr. Fairey and his "Obey" brand. Kehoe Decl. ¶ 20, Ex. 19 (see Obey Clothing's website, <http://obeyclothing.com/#/family/> (listing Obey Giant "family")); Kehoe Decl. ¶ 12, Ex. 11 (see Obey Clothing's website, <http://obeyclothing.com/#/history/>).

44. Obey Clothing distributes and sells apparel and merchandise bearing Mr. Fairey's images to national retailers, such as Nordstrom's, Zumiez, and Urban Outfitters, as well as to other international retailers. Kehoe Decl. ¶ 21, Ex. 20 (see Obey Clothing's website, <http://obeyclothing.com/#/stockist/> (follow the "United States" and "International" hyperlinks for a list of major retailers)).

45. Obey Clothing also directly sells apparel and merchandise online through its website Obeyclothing.com. Kehoe Decl. ¶ 22, Ex. 21 (see Obey Clothing's website, <http://shop.obeyclothing.com/>).

46. In 2009, Obey Clothing earned [REDACTED] million in gross revenue. Kehoe Decl. ¶ 23, Ex. 22 (OTT0028254-59).

47. Obey Clothing pays to Obey Giant LLC a tiered royalty of up to [REDACTED] of net sales on merchandise and apparel bearing the Obey Logo and/or Mr. Fairey's images. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

48. Obey Clothing pays Obey Giant LLC a [REDACTED] marketing-and-consulting fee on all full-royalty sales. Kehoe Decl. ¶ 24, Ex. 23(A. Van Berckelaer Dep. (Mar. 11, 2010) 34:1-35:1).

49. Obey Clothing, **as licensee**, has agreed to indemnify Obey Giant LLC, **as licensor**, for the use of Mr. Fairey's artwork. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

50. The indemnity provision acknowledges that Mr. Fairey "occasionally incorporates into [his] art ... [the] **protectable intellectual property of a third party**." Id. (emphasis added).

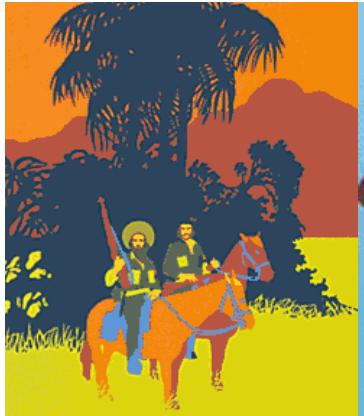
51. Pursuant to the terms of the Trademark License Agreement, Obey Clothing reproduces Mr. Fairey's designs, including those based on pre-existing works, on merchandise and apparel. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)); Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832).

52. Under the terms of the Obey Giant/Obey Clothing License Agreement, Obey Clothing distributes and sells through its regular wholesale and retail channels merchandise and apparel bearing reproductions of Mr. Fairey's designs, including those based on pre-existing works. Kehoe Decl. ¶ 26, Ex. 25 (Obey Clothing's website, <http://obeyclothing.com/news/?p=3292>); Kehoe Decl. ¶ 27, Ex. 26 (OTT027330-36).

IV. PRIOR THIRD PARTY CLAIMS AGAINST FAIREY AND OBEY CLOTHING

53. In July 2007, Mr. Fairey settled a dispute with the estate of Cuban poster artist Felix René Mederos regarding his unauthorized use a poster image by Mr. Mederos as a source image for a t-shirt that Fairey provided to Obey Clothing. Kehoe ¶ 28, Ex. 27 (FAIREY105177-79; FAIREY105206-208).

54. Mr. Fairey settled the Mederos dispute by paying compensation to the Mederos estate for the sale of t-shirts that were based on the Mederos image and produced by Obey Clothing. Kehoe ¶ 29, Ex. 28 (FAIREY105002-5003). Below is a copy of the Mederos image and the t-shirt put out by Obey Clothing:



Mederos Image



Obey Clothing T-shirt

55. Justin McCormack, co-owner with Shepard Fairey of Obey Giant LLC, warned Mr. Juncal in an October 2007 e-mail that, because of Mr. Fairey's use of pre-existing works, Obey Clothing needed to exercise independent judgment in deciding whether it was appropriate to use Mr. Fairey's designs on t-shirts:

At the end of the day, we must reiterate that not all of Shepard's art can translate to apparel and, in lieu of submitting t-shirt art for our approval, you need to use your own best / educated judgement [sic].

Kehoe ¶ 30, Ex. 29 (MCCORMACK000162-165).

56. Beginning at least as early as November 2006, Bravado International Group Merchandising Services, Inc. ("Bravado") asserted a series of claims against Fairey and Obey Clothing for the use of Bravado's intellectual property on Obey Clothing's merchandise. Kehoe Decl. ¶ 31, Ex. 30 (FAIREY119924-25).

57. Bravado asserted that images made by Mr. Fairey and Obey Clothing had infringed Bravado's intellectual property rights. Kehoe Decl. ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2010) 302:8-305:11); Kehoe Decl. ¶ 33, Ex. 32 (D. Juncal Dep.) (Aug. 26, 2010) Ex. 33, Ex. 34).

58. In September 2008, Obey Clothing entered into a settlement agreement with Bravado regarding its claims that Fairey and Obey Clothing had used Bravado's intellectual property on apparel. Kehoe ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2001) 333:1-25).

59. As part of the Bravado settlement, [REDACTED]

[REDACTED]. Kehoe ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2001) 335:4-24).

60. Don Juncal, one of Obey Clothing's owners, likened the settlement amount to a "cost of doing business." Kehoe ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2001) 335:4-336:17).

V. FAIREY'S AND OBEY CLOTHING'S PRIOR LICENSING OF PHOTOGRAPHS

61. In or around January 2008, Mr. Fairey secured rights for Obey Clothing to produce and sell t-shirts featuring Mr. Fairey's work based on Glen Friedman's photograph of Public Enemy. Kehoe Decl. ¶ 34, Ex. 33 (FAIREY78794-97 ("Note that we [Obey Clothing] have also agreed to the payment Shepard structured with Glen E. Friedman to cover the cost of the rights to use his picture of Public Enemy")); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 107:12-109:24).

62. In December 2007, Mrs. Fairey secured the right for Obey Clothing to produce and sell t-shirts featuring designs based on graffiti artist WK Interact's photographs. Kehoe Decl. ¶ 34, Ex. 33 (FAIREY78794-97).

63. Obey Clothing's principals understood that it needed to secure from photographers the rights to use their photographs in Obey Clothing's merchandising activities. Kehoe Decl. ¶ 36, Ex. 35 (OTT000191-93); Kehoe Decl. ¶ 37, Ex. 36 (FAIREY4000001-08).

64. In a January 4, 2008 e-mail to Chris Broders of Obey Clothing, Amanda Fairey, Mr. Fairey's wife and business partner, pointed out to Mr. Broders the need to execute "legal" agreements with the photographers whose images were incorporated in the designs and

merchandise that Obey Clothing offered, using as an example a Glen Friedman photograph of Public Enemy:

[W]e need something more “legal” for collab[oration]s like this . . . We also need to ALWAYS REMEMBER that we have to think of the “Personality (Public Enemy) Depicted in the photo”, [sic] the “Photographer” (Glen Friedman) and the “Artist” illustrating the the [sic] photo (in this case, Shepard).

Kehoe Decl. ¶ 37, Ex. 36 (FAIREY4000001-08) (original emphasis)).

65. In an October 9, 2008 e-mail soliciting the rights to use the likeness of Martin Luther King, Jr., Mr. Juncal assured a representative of the Martin Luther King Center that Obey Clothing was “well versed on the need to get clearance on photographs used from the photographers.” Kehoe Decl. ¶ 36, Ex. 35 (OTT000191-3).

66. Obey Clothing has itself entered into licensing agreements with various photographers. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832); Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35).

67. In October 2008, Obey Clothing entered into a license agreement with Al Rockoff to use Mr. Rockoff’s photographs and Mr. Fairey’s works based on the photographs on t-shirts and related merchandise. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832).

68. In October 2008, Obey Clothing entered into a license agreement with Martha Cooper to use Ms. Cooper’s photographs and Mr. Fairey’s works based on the photographs on t-shirts and related merchandise. Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 157:7-21).

69. In situations where Obey Clothing licensed the photos that Mr. Fairey used in making images for Obey Clothing’s apparel products, such as with Mr. Rockoff and Mr. Friedman, Obey Clothing also gave credit and/or attribution to the photographers. Kehoe Decl. ¶ 26, Ex. 25 (Obey Clothing’s website, <http://obeyclothing.com/news/?p=3292>); Kehoe Decl. ¶ 39,

Ex. 38 (Obeygiant.com, <http://obeygiant.com/headlines/obey-x-public-enemy-x-glen-e-friedman-x-clothing>).

70. On December 12, 2008, the AP licensed an image of a Palestinian woman to Amanda Fairey, the wife and business partner of Shepard Fairey, for use in a work made by Mr. Fairey. Kehoe Decl. ¶ 40, Ex. 39 (FAIREY69594-FAIREY69599).

71. Obey Clothing reproduced that image on t-shirts and merchandise. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 130:6-138:22); DeGrave Decl. ¶ 9.



AP Photograph

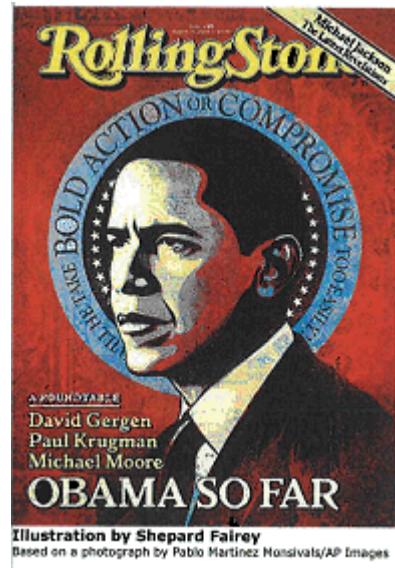


Fairey's Licensed Work



Obey Clothing's T-shirt

72. Mr. Fairey has also used AP photographs to make images of world leaders for the cover of *Rolling Stone* magazine. For example, Fairey used an AP image of Mr. Obama appearing in front of the presidential seal to make a derivative work based on the image, as pictured below. Farah Decl. ¶¶ 10, 11; Kehoe Decl. ¶ 41, Ex. 40 (AP0003209-10).



73. *Rolling Stone* obtained a license on behalf of Mr. Fairey to use the image. The licensed image was featured on the cover of the August 2009 issue of *Rolling Stone* magazine with the credit, "Based on a photograph by Pablo Martinez Monsivais/AP Images." Farah Decl.¶ 11.

74. *Rolling Stone* magazine's Italian edition also obtained a license from the AP for Mr. Fairey to use an AP photograph of Italian prime minister Silvio Berlusconi as the source image for the cover design of the magazine. The original source image and Mr. Fairey's licensed derivative design are pictured below.



VI. THE OBAMA PHOTOGRAPH

75. On April 27, 2006, AP staff photographer Mannie Garcia was assigned to cover a press conference about the conflict in Darfur at the National Press Club (“NPC”) in Washington, D.C. featuring Oscar-winning actor George Clooney and then-Senator Barack Obama. Kehoe Decl. ¶ 42, Ex. 41, (Garcia Dep. (Mar. 4, 2010), Ex. 52; Kehoe Decl. ¶ 43, Ex. 42 (Garcia Dep. (Mar. 4, 2010) 29:7-31:15; 219:8-19).

76. At the NPC event, Mr. Garcia made a portrait photograph of then-Senator Obama that pictured Mr. Obama gazing upward and to the right against the backdrop of the American flag (the “Obama Photo”). Kehoe Decl. ¶ 42, Ex. 41 (Garcia Dep. (Mar. 4, 2010) Ex. 4).

77. A true and correct copy of the Obama Photo is pictured below.



78. The AP owns a valid copyright registration, Registration No. VA-1-356-885, in the Obama Photo. Kehoe Decl. ¶ 54, Ex. 53 (AP0000082-95); Kehoe Decl. ¶ 48, Ex. 47 (Ltr. from W. Fisher and G. Stewart to J. Hellerstein dated December 22, 2010, 2 (“Fairey concedes that the Copyright in the [Obama Photo] is owned by the AP . . .”))

79. The elements present in the Obama Photo were the result of significant creative skill and judgment exercised by Mr. Garcia in capturing Mr. Obama’s expression, pose, and

other ideal qualities at a particular moment in time. Kehoe Decl. ¶ 44, Ex. 43(L. Dahlberg Dep. (Dec. 10, 2010) 17:9-18:20; 19:16-20:8; 25:2-27:5).

80. Mr. Garcia used effective political portraiture techniques in making Obama Photo, such as capturing Mr. Obama in a classic political pose to depict the then-junior Senator from Illinois in an inspiring, flattering way. Kehoe Decl. ¶ 45,; Ex. 44 (Sturken Dep. (Nov. 24, 2010); 45:20-46:24; 72:24-74:23; 106:13-110:8; 134:4-8).

81. Mr. Garcia portrayed Mr. Obama in the Obama Photo as appearing “presidential,” “thoughtful,” “serious,” and in a “flattering light.” Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 45:20-46:24 (“Q: Isn’t it true, Professor Sturken, that the moment in [time] Mr. Garcia selected to make the photograph of then Senator Obama helped to depict him in this presidential way? A: Yes.”); 50:9-53:6).

82. Mr. Garcia made creative choices with respect to framing the Obama Photo, the choice of lens, depth of field, moment in time he took the photograph, and Mr. Garcia’s positioning to make the Obama Photo. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 46:14-24; 50:25-53:6).

83. Mr. Garcia intended to make a “portrait” that would “capture the essence of Senator Obama.” Kehoe Decl. ¶ 43, Ex. 42 (Garcia Dep. (Mar. 4, 2010) 35:2-16).

84. Mr. Garcia described his process in making the Obama Photo:

I looked up and I saw, I saw a nice image, and it was — but I was — I had to get myself over, because the background was so — I didn’t like the background. Part of the flag was in it and part of the wall paper was in it, and I, I saw something. I just had to move my way over, and I did move my way over to the right a little bit. I changed the lens. I kept looking for an angle. I had made a couple of shots . . . and then all of a sudden it just happened. It was there. He moved himself. I moved myself into position. I waited for the eyes and then made it.

Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 35:20-36:19).

85. The moment in time that Mr. Garcia selected for making the Obama Photo was his creative decision. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 37:8-40:18).

86. Mr. Garcia also decided what equipment to use to make the Obama Photo. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 38:16-39:10 (“And so yes, I was able to take off a piece of glass and put on another one that suited the purpose for what I wanted.”)).

87. Mr. Garcia made creative decisions about the composition of the Obama Photo. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 39:15-40:4 (“With regard to the composition . . . I’m waiting on the subject to give me an expression, and then I lowered myself so that it would appear as if I’m looking up, I’m looking up to the subject so the subject looks as if they’re looking out.”)).

88. Mr. Garcia intended at the NPC event to make photos of more than just the news of the day, which was Oscar-winning actor George Clooney’s appearance at the National Press Club in Washington, D.C. to discuss the humanitarian crisis in Darfur. Kehoe Decl. ¶ 43, Ex. 42, (Garcia Dep. (Mar. 4, 2010) 30:25-32:3 (Mr. Garcia testified that he went “beyond the specific event” he was covering, and worked “creatively” to capture additional images, such as the Obama Photo.).

89. Mr. Garcia was aware when he made the Obama Photo that it would be sent to the AP Images archive of photographs for later licensing and use by AP’s customers. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Dep. (Mar. 4, 2010) 34:1-9)).

90. While photos of George Clooney that were taken by Mannie Garcia at the NPC event covered the events of the day, Mr. Garcia’s Obama Photo was a portrait of Barack Obama that did not. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 57:1-25).

91. The Obama Photo has been used by the AP and its members and customers from the time it was made in 2006 through the present for stories unrelated to the April 27, 2006 NPC event, including stories on the following subjects:

- The African-American vote in Ohio in advance of the 2008 presidential campaign.
- Mr. Obama's five-nation tour of Africa in August 2006.
- Singer-songwriter Neil Young's song mentioning Mr. Obama in the lyrics in May 2006.

Kehoe Decl. ¶ 46, Ex. 45 (AP0000816; AP0000818; AP0000820; AP0011058 (tab one from the AP's download report showing the use of the Obama Photo by AP's customers)).

VII. SHEPARD FAIREY'S INFRINGEMENT OF THE AP'S COPYRIGHT IN THE OBAMA PHOTO

92. Mr. Fairey began discussing the possibility of making a poster for the Obama presidential campaign in October 2007. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 34:12-19 ("Q: When was the first time you had any discussions with anyone about the possibility of doing artwork for the campaign? A: The first time I think was in October of '07.")).

93. On January 22 or 23, 2008, Mr. Fairey searched on the Internet using Google Images, which is an Internet search engine for images, for a suitable photograph of Mr. Obama that Mr. Fairey could use to make a poster. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 46:22-47:13; 79:16-23; 156:10-13).

94. In a May 18, 2008 *Washington Post* interview, Mr. Fairey stated that he was looking for an image that portrayed Mr. Obama as "presidential." Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 119:19-120:8); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. Ex. 13);

Docket # 54 (Fairey's Amended Answer to Counterclaims (Nov. 12, 2009) ¶ 127). With regard to the source image, Mr. Fairey also stated in the interview:

I wanted strong, I wanted wise, but not intimidating . . . He is gazing off in to the future, saying "I can guide you."

Id.

95. Mr. Fairey testified about "what struck [him] about the photo":

But what struck me about the photo wasn't the context of Darfur panel in 2006. It was the way that Obama was looking the angle. There are a lot of different historic photos of people like John F. Kennedy, the famous Korda Che Guevara photo that have this feeling of the subject knowing what lies in the future, having some sort of wisdom, and it's a specific angle of the gaze, and that was really what struck me about the photo.

Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 140:20-141:11); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. Ex. 18).

96. Mr. Fairey testified that he reviewed approximately 200 images of Barack Obama before choosing the Obama Photo for its particular qualities. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 98:19-99:21).

97. Mr. Fairey testified that the Obama Photo was a "strong portrait." Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 162:15-163:26).

98. Fairey's visual studies expert, Professor Sturken, testified that the Obama Photo does not communicate, or report on, the 2006 press conference about Darfur attended by George Clooney. Kehoe Decl. ¶ 45, Ex. 44 (M. Sturken Dep. (Nov. 24, 2010) 57:10-25).

99. The images that Mr. Fairey considered but rejected as source images did not possess the qualities that Mr. Fairey was looking for. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 202:17-206:24).

100. Specifically, Mr. Fairey testified that he downloaded the following images to his computer, which he considered, but rejected, as possible source images. Id.



A



B



C



D

101. For example, Mr. Fairey testified that he rejected image **A** in paragraph 80 because Mr. Obama’s “mouth being open made him look a little bit unsure” and because Mr. Fairey “didn’t think it would work as well” as the Obama Photo. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 203:5-12).

102. Mr. Fairey also testified that he rejected image **B** in paragraph 80 because of the “same issue with his mouth being open and maybe how dark it is.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 204:18-205:3).

103. In addition, Mr. Fairey testified that he did not use image **C** in paragraph 80 because it did not portray Mr. Obama’s “demeanor” as well as the Obama Photo and because Mr. Obama “looked a little bit grumpy.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 205:4-24).

104. Regarding image **D** in paragraph 80, Mr. Fairey did not use that image “[m]ostly because of his mouth being open.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 206:5-14).

105. The images that Mr. Fairey considered, but rejected, for his poster were among the documents that he deleted in the course of this lawsuit. Kehoe Decl. ¶ 47, Ex. 46 (Ltr. from A. Falzone to D. Cendali et al. (Oct. 9, 2009) (Fairey’s amended pleadings “reflect that Plaintiffs no longer contend that the Clooney Photograph was used in the creation of the Obama Hope

poster. Nor do Plaintiffs deny that the Obama Photo was used in the creation of the Obama Hope poster.”).

106. Ultimately, Mr. Fairey chose the Obama Photo because it depicted Mr. Obama as “presidential,” “dignified,” “serious,” with a “sense of contemplation” and in a “flattering” way. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 103:22-104:13; 109:19-110:4; 138:24-139:13).

107. Another reason that Mr. Fairey chose the Obama Photo was because of the “way the light fell on Senator Obama’s face.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 104:23-105:17).

108. Professor Sturken, Fairey’s visual studies expert, testified that Mr. Garcia’s use of the three-quarter pose technique in the Obama Photo helps portray Mr. Obama as a “strong leader” and “connotes leadership, inspiration and forward-thinking,” which are also qualities that Mr. Fairey incorporated into the Obama Image. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 58:3-61:13).

109. Professor Sturken testified that Mr. Garcia’s decision to depict Mr. Obama gazing toward the horizon helps portray Mr. Obama as “someone who is visionary and forward-thinking, [and] a little bit above the crowd.” Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 51:7-62:8). The Obama Image also portrays these qualities. *Id.* (Sturken Dep. (Nov. 24, 2010) 62:3-62:13).

110. Professor Sturken testified that by showing Mr. Obama from below, Mr. Garcia helps portray Mr. Obama with “presence” and “as powerful,” which qualities are also conveyed in Mr. Fairey’s Obama Image. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 50:25-53:6).

111. Mr. Fairey admits that he downloaded the Obama Photo through Google Images and copied it to make the Obama Image. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 46:22-47:25; 79:16-23; Kehoe Decl. ¶ 48, Ex. 47 (Ltr. from W. Fisher and G. Stewart to J. Hellerstein dated December 22, 2010, at 2).

112. In making the Obama Image, the image metadata indicates that Mr. Fairey was able to make a “rough cut” of the image in 71 minutes using Adobe Illustrator and Adobe Photoshop entirely on his computer. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 231:10-233:10); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. Ex. 30).

113. A copy of the “rough cut” of the Obama Image is shown below (Kehoe Decl. ¶ 49, Ex. 48 (FAIREY100436)):



114. Mr. Fairey copied the Obama Photo nearly verbatim. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 64:10-13; 157:21-24).

115. Mr. Fairey copied nearly verbatim all of the characteristics that helped make the Obama Photo a compelling political portrait, such as the photo’s pose, expression, angle, point of view, and composition. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 33:15-18;

33:7-12; 37:15-18; 39:23-40:6; 59:4-9; 64:10-13; 134:14-20; 137:21-25; 157:21-24); Kehoe Decl. ¶ 45, Ex. 44 (M. Sturken Dep. (Nov. 24, 2010) 106:13-110:8).

116. Mr. Fairey also copied the tiny, but important highlights, or twinkle, in Mr. Obama's left and right eyes in the Obama Photo when he made the Obama Image. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 27:2-25; 101:4-23).

117. All of the aesthetic qualities that are present in the Obama Photo — including the sense of Mr. Obama's vision, leadership, intelligence and thoughtfulness — were used by Fairey and Obey Clothing in the making the Obama Image. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 18:8-20; 26:4-27:25; 33:15-18; 36:7-12; 37:15-18; 93:13-97:23; 142:17-143:19).

118. Mr. Fairey testified that he was not trying to comment on or parody the Obama Photo in making the Obama Image. Kehoe Decl. ¶ 50, Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) 566:1-5 (“Q; But you weren't trying to parody or comment on the reference photo itself, right? A: That's correct.”)).

119. On January 30, 2008, Fairey began selling on obeygiant.com an initial run of 350 posters displaying the Obama Image (the “Obama Posters”) with the tagline “Progress,” at a price of \$45 per print. Kehoe Decl. ¶ 51, Ex. 50 (Obey Giant Art's website, <http://obeygiant.com/headlines/obama#more-627> (posted January 25, 2008)).

120. In total, Fairey alone sold, authorized, or gave away for promotional purposes over 958,407 products bearing the Obama Image, including approximately: (i) 103,826 posters, (ii) 175,250 posters; (iii) 12 artworks; (iv) 109,319 items of apparel; (v) 570,000 stickers; and (vi) an untold number of Internet downloads — all of which generated at least [REDACTED] in direct revenue for Fairey. Kehoe Decl. ¶ 52, Ex. 51 (“1. B&A Summary” and “3. Cash

Receipt _Summary" from excel file incorporated in Fairey's Second Supplement Responses to the AP's Interrogatories Nos. 19 and 20); Kehoe Decl. ¶ 53, Ex 52 (Excel and PDF files incorporated in Fairey's Second Supplement Responses to the AP's Interrogatory No. 21); Ex. Kehoe Decl. ¶ 56, 55 (FAIREY 110219-20); Kehoe Decl. ¶ 57, Ex. 56 (FAIREY110374-75).

121. The Obama Image put Mr. Fairey on the map in a new way. Kehoe Decl. ¶ 45, Ex. 44 (M. Sturken Dep. (Nov. 24, 2010) 183:17-184:6).

122. Fairey and Obey Clothing could have licensed the Obama Photo prior to using it. See F. Degrave Decl. ¶ 17.

123. All AP images, including the Obama Photo, are distributed or licensed to the AP's members and customers with a caption that identifies the AP as the copyright owner of the work and the name of the photographer who made the image. See Gerberich Decl. ¶ 10.

124. Mr. Fairey stated in a March 4, 2009 interview that:

[w]hen I found the image I recall that it said it was an AP photo which I have acknowledged but it didn't have a name of the photographer.

...

I think I remember it being AP because maybe there was a watermark on it or something. I can't remember exactly why I remember it was AP. But there was something that alerted me to the fact that it was an AP image.

Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. (Mar. 16, 2010) Ex. 26).

125. Mr. Fairey has claimed that he always thought that the source photo was an AP image. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 144:22-145:6).

126. Mr. Fairey did not publicly credit the AP as the copyright owner of the image until January 2009, shortly before filing the Complaint against the AP, amid public speculation regarding the identity of the source image. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16,

2010) 98:15-20 (Q: Isn't it true that there isn't a single news article that you can point me to from 2008 in which you identified that it was an AP photograph? A: Other than the — from 2008, not that I know of."))

127. On or around March 19, 2009, Mr. Fairey deleted from his computer the working, grayscale copy of the Obama Photo that he used to make the Obama Image. See Kehoe Decl. ¶ 50, Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) 390:10-395:12).

128. The original, unaltered copy of the Obama Photo that Mr. Fairey had downloaded through Google Images, and that Mr. Fairey had used to make the Obama Image, was never produced in this litigation. Kehoe Decl. ¶ 58, Ex. 57 (Answers and Objections of Fairey to AP's First Set of RFAs (May 3, 2010), Resp. Nos. 39-40).

129. From the filing of the Complaint on February 9, 2009, Mr. Fairey falsely claimed that the source image for the Obama Image was not the Obama Photo, but a photograph of George Clooney and Barack Obama that was taken by Mannie Garcia (the "Clooney Photo"). Docket # 1 ¶¶ 29-34. The Clooney Photo is pictured below:



Clooney Photo

130. Between approximately March 19, 2009 and March 26, 2009, Mr. Fairey destroyed, or attempted to destroy, and fabricated new documents to make it appear that he had

used the Clooney Photo rather than the Obama Photo to make the Obama Image. Kehoe Decl. ¶ 50, Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) (390:10-395:12)).

131. On October 1, 2009, counsel for the AP sent counsel for Fairey an e-mail identifying the file paths where it believed the original source material may have been located. Kehoe Decl. ¶ 59, Ex. 58 (Eml. from C. Ray to A. Falzone (Oct. 1, 2009)).

132. On October 9, 2009, Mr. Fairey admitted that he had used the Obama Photo, as the source image. Kehoe Decl. ¶ 47, Ex. 46 (Ltr. from A. Falzone to D. Cendali et al. (Oct. 9, 2009) (Fairey's amended pleadings "reflect that Plaintiffs no longer contend that the Clooney Photograph was used in the creation of the Obama Hope poster. Nor do Plaintiffs deny that the Obama Photo was used in the creation of the Obama Hope poster."))

VIII. OBEY CLOTHING'S KNOWING INFRINGEMENT OF THE AP'S COPYRIGHT

133. On February 20, 2008, less than a month after Fairey began selling Obama Image products, Don Juncal, the largest owner of Obey Clothing, e-mailed Mr. Fairey to inquire whether Fairey had the rights to use the Obama Image on t-shirts. Kehoe Decl. ¶ 60, Ex. 59 (OBCL00001-2).

134. In his February 20, 2008 e-mail, Mr. Juncal told Mr. Fairey that "[J]udging from the response to the [Obama Posters]" using the Obama Image on t-shirts "might be a good idea." Id.

135. In a reply e-mail, Ms. Perches of Obey Giant Art replied to Mr. Juncal that "[a]s much as we would like to, we cannot give you approval to do this for sale." Id.

136. In a February 26, 2008 e-mail, Mr. Juncal told Mr. Fairey that clothing distributor Upper Playground was selling t-shirts bearing the Obama Image with Mr. Fairey's permission and stating that "[t]his is unfortunate since we think this is the exact kind of thing OBEY

Clothing could get behind . . . [t]his does not just affect us, we have all of our accounts, our reps, and worldwide distributors to address with why this is not part of the OBEY program, but with a brand that hangs next to us in stores.” Id.

137. Shortly after Mr. Juncal’s February 26, 2008 e-mail, Mr. Fairey sent an electronic copy of the Obama Image to Obey Clothing so that it could begin producing t-shirts and other apparel bearing the Obama Image (the “Obama Merchandise”). Kehoe Decl. ¶ 35, Ex. 34 (D. Juncal Dep. (Mar. 23, 2010) 103:24-104:03); Kehoe Decl. ¶ 61, Ex. 60 (OTT0013734-35); Kehoe Decl. ¶ 62, Ex. 61 (OTT0027454).

138. In a March 25, 2008 e-mail, Mr. Juncal wrote to Mr. Fairey, copying Chris Broders and Romeo Trinidad, asking Mr. Fairey whether Obey Clothing should sell the Obama Merchandise and “run it until it stops,” stating that “[t]he concern is there are so many Obama tees out there that your tee should be the seminal one for the people.” Kehoe Decl. ¶ 63, Ex. 62 (OTT0026284).

139. In the March 25, 2008, e-mail, Mr. Juncal also told Mr. Fairey that:

[We are] concerned . . . that if we sold it to Urban [Outfitters] and the photographer came at Urban, that could open other legal issues.

Kehoe Decl. ¶ 63, Ex. 62 (OTT0026284).

140. By March 25, 2008, Mr. Juncal was aware of the risk that the owner of the rights in the source photo could assert a claim regarding the unauthorized use of the source photo in the Obama Image and on the Obama Merchandise. Kehoe Decl. ¶ 63, Ex. 62 (OTT0026284).

141. After March 25, 2008, Obey Clothing’s principals did not make any effort to determine whether Mr. Fairey or Obey Clothing had the right to use the Obama Photo as the source of the Obama Image in Obey Clothing’s production, distribution, and sale of the Obama

Merchandise. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 92:22-94:1; 95:4-15); Kehoe Decl. ¶ 19, Ex. 18 (D. Juncal Dep. (Mar. 23, 2010) 94:11-15).

142. Obey Clothing never made any further efforts prior to this lawsuit to identify who the photographer was who made the source image or who owned the copyright in the source image. Kehoe Decl. ¶ 19, Ex. 18 (D. Juncal Dep. (Mar. 23, 2010) 104:4-18; 1057:7-14); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 94:3-25).

143. Mr. Fairey gave Obey Clothing permission to produce Obama Merchandise beginning in March 2008. Kehoe Decl. ¶ 62, Ex. 61 (OTT0027454-56); Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

144. Starting in April 2008 and continuing through August 2009, Obey Clothing produced, distributed, and sold more than 233,800 units of apparel featuring the Obama Image. Kehoe Decl. ¶ 64, Ex. 63 (OTT028260-13)).

145. Examples of this apparel are set forth below:



146. Obey Clothing made approximately 35 different styles of the Obama Merchandise. Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 66, Ex. 65 (OTT00001).

147. Obey Clothing's Obama Merchandise styles included t-shirts that reproduced the Obama Image without any text — i.e., without the words "Hope" or "Progress." Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 67, Ex. 66 (OTT013765).

148. Obey Clothing's Obama Merchandise styles included t-shirts and hooded sweatshirts that reproduced the Obama Image without the Obama Image's text or its red-white-and-blue color scheme — i.e., styles that were in black and white and without the words "Hope" or "Progress." Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 68, Ex. 67 (OTT018910).

149. Obey Clothing's Obama Merchandise styles included t-shirts that reproduced, in both color and black and white, Mr. Fairey's *Yes We Did* illustration that he which made using the Obama Image after the 2008 presidential election. Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 69, Ex. 68 (OTT021318).

150. Obey Clothing's sales of the Obama Merchandise generated approximately [REDACTED] in revenue. Kehoe Decl. ¶ 64, Ex. 63 (OTT028260); Kehoe Decl. ¶ 66, Ex. 65 (OTT00001).

151. Approximately 70 percent of Obey Clothing's sales of Obama Merchandise, or [REDACTED], was based on black-and-white styles. Kehoe Decl. ¶ 66, Ex. 65 (OTT000001).

152. The sales and distribution of the Obama Merchandise increased awareness of Obey Clothing and the "Obey" brand. Kehoe Decl. ¶ 70, Ex. 69 (A. Van Berckelear Dep. (Aug. 26, 2010) 365:22-367:15); Kehoe Decl. ¶ 24, Ex. 23(A. Van Berckelear Dep. (Mar. 11, 2010) 257:10-22).

153. In 2008, Obey Clothing's owners received [REDACTED] distributions of profits, up from [REDACTED] in 2007. Kehoe Decl. ¶ 71, Ex. 70 (OTT028248-53); Kehoe Decl. ¶ 72, Ex. 71 (OTT028242-47).

154. In 2009, Obey Clothing owners received [REDACTED] distributions of profits. Kehoe Decl. ¶ 23, Ex. 22 (OTT028254-59).

155. Obey Clothing continued selling Obama Merchandise until August 2009, approximately six months after Fairey filed this action. Kehoe Decl. ¶ 64, Ex. 63 (OTT0028260-73).

156. Obey Clothing never sought a license from the AP for the sale or distribution of the Obama Merchandise. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 119:4-120:9).

157. Obey Clothing never sought a license for the Obama Photo. Id.

158. Obey Clothing never credited the AP or photographer Mannie Garcia as the author or owner of the source image. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 119:4-120:9); Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 73, Ex. 72 (OBCL00182-216).

IX. FAIREY AND OBEY CLOTHING'S USE OF THE OBAMA PHOTOGRAPH HARMED THE AP

159. Over the past several years, the news industry has faced sharp declines in revenue, in large part due to the rise of on62line news. Ake Decl. ¶ 7.

160. Online news generates far less revenue than the printed news because the advertising rates for online news are much lower. Ake Decl. ¶ 7.

161. To adjust for declining revenue, U.S. news outlets have had to cut back on their newsgathering operations, including closing domestic and foreign bureaus. Ake Decl. ¶ 8.

162. The *Washington Post*, for example, closed its last domestic bureaus in November 2009. Similarly, many major U.S. newspapers, including the *Baltimore Sun*, the *Boston Globe*, the *Chicago Tribune*, *Newsday*, and the *Philadelphia Inquirer*, as well as magazines such as *BusinessWeek*, and *Time*, have closed some or all of their U.S. and foreign bureaus. Ake Decl. ¶ 9.

163. Thus, many news organizations depend on the AP's presence throughout the U.S. and around the world to report the news. Ake Decl. ¶ 10.

164. The AP has lost licensing revenue from Fairey's and Obey Clothing's unlicensed uses of the Obama Photo. Dale Decl. ¶¶ 21-22; Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:11-14:22 (The AP was harmed by "the fact that Mr. Fairey didn't pay a license fee to us for his copying and use of the photograph during the period that -- until now obviously. And obviously, all the merchandising and sales of various different items: posters, T-shirts."); Kehoe Decl. ¶ 74, Ex 73 (W. Landes Dep. (Dec. 8, 2010) 199:16-201:3 ("I think an additional consideration, which clearly is relevant in deciding whether licensing fees should be considered as part of the harm is whether, in fact, licensing is feasible, right. If you're an organization where the revenue primarily comes from licensing uses of your copyrighted images and you have an organization in place that facilitates that licensing, it's clear that the harm to you is, in fact, you would have got licensed this work."); 108:10-109:2 ("Mr. Fairey's unauthorized use of the Obama image cost the AP at a minimum the licensing fees it would have gotten from Mr. Fairey.")); 152:13-154:10 ("[T]he harm is from the unauthorized use of the Obama photo in the Shepard Fairey poster, even, you know, some of them involve unauthorized uses of the photo, where what was reproduced was simply the photo part of the Shepard Fairey poster without the words HOPE or PROGRESS."))

165. The AP has lost licensing opportunities from other potential customers as a result of Fairey and Obey Clothing's failure to credit the AP as the source image of the Obama Merchandise. Dale Decl. ¶ 23; Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:23-15:10; 33:14-34:4); Kehoe Decl. ¶ 7, Ex. 6 (B. Sell Dep. (Dec. 2, 2010) 201:5-21 ("Shepard Fairey said publicly that basically, you know, you need to license pictures, and he's got a federal

case here where he's trying to defend his not needing to license a picture. So the longer this continues, the more publicity he gets, it continues to be a perception that perhaps you don't need to license pictures from The Associated Press."); 203:6-17 ("Well, leave it as other people who will be -- as long as there is this perception -- as long as there is public perception that you don't need to license pictures, whether Shepard Fairey is saying it or whether somebody else is saying it, it's a damage to The Associated Press."); Kehoe Decl. ¶ 74, Ex. 73 (W. Landes Dep. (Dec. 8, 2010) 153:8-154:10 ("[S]ince [Mr. Fairey] didn't acknowledge that it was the Garcia photo at the outset, right, had he acknowledged . . . AP would have had an incentive to try to promote and market and they would have had the opportunity to promote and market during this interval of time where nobody could identify exactly where the photo had come from, right.").

166. The AP would have likely earned significant additional revenue if Fairey and Obey Clothing had licensed the Obama Photo and given the AP appropriate credit prior to this lawsuit. Dale Decl. ¶ 23; Kehoe Decl. ¶ 2, Ex. 1(K. Dale Dep. (Mar. 26, 2010) 14:23-15:10; 33:14-34:4); Kehoe Decl. ¶ 7, Ex. 6 (B. Sell Dep. (Dec. 2, 2010) 187:9-189:15 (noting distinct harms: First, "[i]t was a very widely circulated, widely known poster, very successful. It was appearing in a lot of places and getting a lot of attention. So the fact that The Associated Press photographer and The Associated Press had been connected to it would have had a benefit to The Associated Press." Second, "[t]here would have been -- there are different kinds of benefits, there's public relations benefits like appearing on the Terry Gross show and being connected to the show with a huge NPR audience, versus an editorial benefit which would have been specifically related to say the newspaper magazine industry being connected to the Shepard Fairey posters at an earlier time.").

167. The AP's market for derivative works of the Obama Photo was harmed by Fairey's and Obey Clothing's unlicensed use of the image. Kehoe Decl. ¶ 74, Ex. 73 (W. Landes Dep. (Dec. 8, 2010) 149:13-154:18 ("[T]he total harm includes all of the uses of the unauthorized uses of the Garcia photo that was included in the works created by or licensed by Fairey. . . . Of course, there are close to, you know, one million copies, which I would call works that were derivative from the Garcia photo."); 165:10-167:16 ("[T]he harm to the AP of permitting Mr. Fairey's unauthorized use extends beyond its effect on the revenues that the AP could have earned by licensing the Obama image alone."))

168. The market for AP Images portfolio of images would be harmed if the unauthorized use of AP Images were to become widespread. Kehoe Decl. ¶ 74, Ex. 73 (W. Landes Dep. (Dec. 8, 2010) 168:23-169:22; 172:15-175:9 ("[T]o the extent that people could use an AP image in T-shirts, posters, calendars and so forth without paying, and particularly if they took images that were particularly desirable, so that is a limit number of AP images, that could significantly reduce the licensing revenues AP would get and therefore reduce the incentive to maintain and continue to invest in developing the database and hiring photographers and so forth."); 186:16-187:24 ("[A] different or special kind of case because you're talking about an entire, the image database which is a collection of millions of images, and if you think of that as the product, right, which is something that is a very valuable product, even Shepard Fairey says how valuable it is to have all these photos at the AP image database, if you view that as the overall product, right, then clearly there is harm and injury to the overall product."))

169. The AP lost potential revenue-generating opportunities from third-party photographers who rely on AP as sales agent because such photographers may not have understood the "body of work that our archive collection contains[which] might have

diminished the possibilities of some third parties to say, Can you be our sales agent.” Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 15:11-16).

170. If everyone were allowed to download and use AP Images photos without compensating the AP, it would erode the AP Images business. Dale Decl. ¶ 25.

171. In his deposition, Mr. Fairey testified that he had a “potentially symbiotic relationship” with photographers. Kehoe Decl. ¶ 50; Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) 633:23-634:3).

Respectfully submitted by:

Dated: January 6, 2011

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