

Exhibit 46

**to the Declaration Of
Brendan T. Kehoe, Esq.
In Support Of The
Associated Press' Motion
For Summary Judgment**

Anthony T. Falzone
Executive Director
Fair Use Project
Center for Internet
and Society

Tel 650 736-9050
Fax 650-723-4426
falzone@stanford.edu

October 9, 2009

Dale M. Cendali
Kirkland & Ellis, LLP
601 Lexington Avenue
New York, NY 10022

George F. Carpinello
Boies, Schiller & Flexner, LLP
10 N. Pearl Street, 4th Floor
Albany, NY 12207

Bradford E. Kile
Kile, Goekjian, Reed & McMannus, PLLC
1200 New Hampshire Avenue, N.W., Suite 570
Washington, DC 20036

Re: *Fairey, et al. v. The Associated Press*
Case No.: 09-cv-1123 (AKH)

Dear Counsel:

On October 2, 2009, counsel for Plaintiffs and Counterclaim Defendants (“Plaintiffs”) learned new information relating to the identity of the photograph Mr. Fairey used as a reference to create the Obama Hope poster. In light of this new information, we advise you of the following:

First, we intend to amend our pleadings, including our initial complaint for declaratory judgment, our answer to the counterclaims alleged by The Associated Press (“The AP”), and our answer to the claims alleged by Mannie Garcia. We have attached the amendments we propose to this letter in red-line form as Exhibits A-C. These amendments 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. Please let us know if you will consent to these amendments.

Second, Plaintiffs no longer contend that the documents bearing Bates numbers FAIREY00669 through FAIREY00672 were used in the creation of the Obama Hope poster. We now understand that Mr. Fairey created these documents in 2009, after the original complaint was filed in this matter.

Third, we are producing to The AP additional documents bearing Bates numbers FAIREY104735 through FAIREY104766. We now understand that Mr. Fairey attempted to delete some or all of these documents at or around the same time he created the documents referenced in the paragraph above, but that he was unsuccessful in deleting all copies of them.

Fourth, we inform you that certain statements made to counsel for The AP in the course of meet and confer discussions that we understood to be accurate at the time now appear to have been inaccurate. On September 14, The AP was provided with Plaintiffs' portion of a draft letter to Judge Hellerstein (which was never submitted to the Court) concerning The AP's demands for additional information about files relating to the creation of the Obama Hope poster and the search Plaintiffs conducted for such files. That draft letter contained statements about the search Plaintiffs performed for such files, the non-existence of certain working files relating to the creation of the Obama illustration, and the circumstances surrounding the apparent deletion of those files. A September 8 email addressed some of these same subjects. Based on the new information we learned on October 2, those statements appear to have been inaccurate. Insofar as Plaintiffs or Plaintiffs' counsel made like statements during the course of other discussions on these subjects, it appears such statements were similarly inaccurate.

You may have questions about the issues raised in this letter. If you do, we suggest that we discuss how Plaintiffs might be able to address them in a way that minimizes expense and delay. Please contact us to discuss that possibility.

Sincerely yours,

Anthony T. Falzone/als
Anthony T. Falzone
Stanford Law School Center for Internet and Society

Joseph C. Gratz/als
Joseph C. Gratz
Durie Tangri LLP