

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, OBEY GIANT ART,
INC., OBEY GIANT LLC, STUDIO
NUMBER ONE, INC., and ONE 3 TWO,
INC. (d/b/a OBEY CLOTHING),

Counterclaim Defendants.

ECF

Case No. 09-01123 (AKH)

**COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S OPPOSITION TO
COUNTERCLAIMANT THE ASSOCIATED PRESS'S MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

The Associated Press (“AP”) does not hold a monopoly over the newsworthy events it documents. By its assertion of copyright infringement in this case, the AP seeks to establish that it can prevent artists and commentators from using the ideas in the AP’s news coverage. That argument is antithetical to the First Amendment values that copyright laws are intended to preserve, and it must be rejected.

In its Motion for Summary Judgment filed on January 7, 2011, Defendant One 3 Two, Inc. d/b/a Obey Clothing (“One 3 Two”) explained that it is a clothing manufacturer—not a photographer, artist, or news-gathering organization. One 3 Two finds itself in the middle of this copyright lawsuit primarily because the AP views One 3 Two as a deep pocket, and not because One 3 Two is a necessary party to the principled dispute regarding the scope of the fair use doctrine that led artist Shepard Fairey and the AP to assert their claims against one another. In its corresponding Motion for Summary Judgment, the AP nonetheless asserts the “principles” it sought to establish by its claims against Fairey, perhaps in the hope that its position will be more appealing when a clothing licensee, rather than the artist himself (with whom the AP recently settled) advances the countervailing position.

The AP’s Motion is full of hyperbole and exaggeration. According to the AP, the t-shirts sold by One 3 Two threaten not just the AP’s (new) business model, but the future of news-gathering activities as a whole. Memorandum of Law in Support of the AP’s Motion for Summary Judgment Against One 3 Two, Inc. d/b/a Obey Clothing (“AP Mot.”) at 57-63.

On the other hand, it is neither hyperbole nor exaggeration to say that the AP’s position jeopardizes the rights at the very core of the First Amendment and subjugates them to the AP’s desire to generate revenue from the campaign speech of others. With Fairey no longer an active

defendant in the case, One 3 Two is consequently the only, albeit reluctant, party able to demonstrate the significant risks to the First Amendment that are inherent in the AP's position.

One 3 Two does not dispute the value of copyright laws, their contribution to the protection of First Amendment values, or the AP's right to police and assert its copyrights in appropriate circumstances. It has long been recognized, however, that copyright laws must be balanced against the First Amendment rights to free speech and the value that new ideas, even when developed in response to or as a result of old ideas, contribute to the public discourse:

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.

Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (citations omitted). The AP's assertion of copyright in this case implicates both of those important limitations. First, the AP's infringement arguments would essentially allow the AP to assert copyright's monopoly over the idea of an image of Barack Obama as a wise, confident and visionary leader, not just the way in which that idea is expressed in a particular photograph. Second, the AP's weighing of the various factors of the fair use defense would essentially eliminate that defense altogether when artists or writers or speakers reference copyrighted work to make political statements about current events. This reading would lead to absurd results, including a finding that there is more First Amendment value in a rap parody of the pop song "Pretty Woman"¹ than in advocating for a candidate to become the first African-American president of the United States.

¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (2 Live Crew's version of Roy Orbison's song "Pretty Woman" was parody that could be fair use.)

The AP would prefer to ignore the First Amendment implications of its lawsuit and instead claim that the case is only about the money that One 3 Two has “wrongfully” earned. Accusations of greed go both ways, however. Despite enjoying the First Amendment’s shield for its own news reporting, the AP is putting its own bottom line above the expressive rights of One 3 Two, and any other artist or company who might wish to use a news photograph to make a political statement. This is particularly alarming given that the AP (notwithstanding its “non-profit” status) admits that it has created a highly successful business for the purposes of putting a price on the use of millions of news photographs in its archives, and currently generates more than ██████████ in revenues each year from its image-licensing business. A ruling for the AP in this case may very well result in the AP’s unchecked control over millions of news images that should be entitled to only “thin” copyright protection and which, in any case, artists and activists should be able to use freely for transformative purposes.

Setting aside these greater policy issues that are at stake, this Court must deny the AP’s motion for a much simpler reason: The AP has not established its claims as a matter of law. On the issue of infringement, One 3 Two and the AP have filed cross-motions for summary judgment, indicating that both parties believe the issue rests on facts that are not in dispute and can be decided as a matter of law. The AP’s Motion, however, depends in large part on expert *opinion*, which is insufficient to establish an undisputed *fact*. The facts underlying the AP’s fair use arguments are similarly and materially disputed, which disputes cannot be resolved at this stage of the litigation. The AP’s Motion must therefore be denied.

II. SUMMARY OF ARGUMENT

As the Court is now well-aware, this case arises out of two depictions of Barack Obama: The first is a photograph taken by photographer Mannie Garcia and as to which the AP owns the

copyright and which is referenced as the “Garcia Photo.” The second is the illustrated, stylized image created by Fairey during Obama’s 2008 Presidential campaign which is referenced as the “Obama Image.” The AP asserts that the Obama Image, which Fairey licensed to One 3 Two to display on apparel and other merchandise (the “Obama Merchandise”), infringes the copyright on the Garcia Photo and asks the Court to find infringement as a matter of law and to summarily reject One 3 Two’s fair use defense.

The AP has failed to provide the Court with a record of undisputed facts that would permit the Court to hold One 3 Two liable for infringement. In order to find infringement, the Court must first determine which, if any, elements of the Garcia Photo are protected by the copyright the AP holds. Those protectible elements necessarily *do not* include the depiction of Barack Obama. They are limited to the creative choices made by the photographer when he took the shot. The record establishes that Garcia made very few creative choices whatsoever, and that the elements that the Garcia Photo shares with the Obama Image are all outside of copyright’s protection because they are either ideas that cannot be copyrighted (such as the posing of a political figure in a conventional manner to convey wisdom, leadership and vision), or *scenes à faire* that naturally flow from that idea. The AP’s failure to analyze and compare the works once those unprotectible elements are removed is fatal to its claim.

Further undermining the AP’s argument is the absence of any discussion of the dominant test for copyright infringement involving photographs in the Second Circuit—the “total concept and feel” test. The total concept and feel of the Garcia Photo is of a news photograph realistically documenting then-Senator Obama’s appearance at a press conference in 2006. The total concept and feel of the Obama Image is a stylized, illustrated campaign poster supporting the bid of a particular person to become the President of the United States. They are not at all,

much less substantially, similar. In an effort to avoid this conclusion, the AP relies on testimony and opinions from its paid experts, again side-stepping the relevant legal inquiry, which is whether the undisputed facts establish that lay observers would conclude that the works are substantially similar. Each of the flaws in the AP's position provides an independent basis to deny its motion.

Even if the Court were to find that the AP had established copyright infringement, the motion must still be denied because the facts relating to One 3 Two's fair use defense are hotly contested and because the law does not support the AP's position. The AP's arguments rest upon testimony from Garcia and Fairey regarding their intent in and process of creating their respective works, and the evidence establishes material disputes relating to both issues. For example, disputes exist with respect to (1) Garcia's purpose in taking the photograph of Obama; (2) whether Fairey "copied" the Garcia Photo verbatim; and (3) Fairey's purpose in creating the Obama Image. One 3 Two's Response to the AP's Rule 56.1 Statement of Undisputed Facts ("Resp. to AP SUF") Nos. 76, 114, and 118. An overarching dispute exists as to the credibility of any of Garcia's testimony on which the AP relies, given his admission to this Court that he spoliated evidence and then lied about in his deposition.

Then, relying on these disputed facts among others, the AP mis-analyzes whether the Obama Image transformed the Garcia Photo that Fairey used as a visual reference, exaggerates how much of the photograph is used in the image, mischaracterizes the purposes of the two works and considers the wrong market for purposes of evaluating the claimed harm. Most importantly, the AP glosses over the implications its position has for the First Amendment, which is reason enough to reject its claims.

III. STATEMENT OF FACTS

One 3 Two has a radically different story to tell about the creation and purpose of the Garcia Photo and the Obama Image, leading to the conclusion that Fairey’s political statement, and One 3 Two’s propagation of the same, is at the core of expression that the Copyright Act—and, in particular, the fair use defense—intends to protect. The story begins in 2006, years before then-Senator Obama’s presidential aspirations became apparent.

A. Mannie Garcia Sought to “Get a Clean Headshot” of then-Senator Obama at a Panel Discussion on Darfur

It is revisionist history to claim that Mannie Garcia set out on April 27, 2006 to take an idealized political portrait of then-Senator Obama. Rather, he was a photojournalist on a regular news-gathering job.

On that day, Garcia had an assignment from the AP to cover a news conference at the National Press Club in Washington D.C., scheduled for 12:15 p.m. on April 27, 2006. Resp. to AP SUF No. 76. The subject of the news conference was the actor George Clooney’s recent trip to Darfur. *Id.* United States Senators Sam Brownback and Barack Obama were scheduled to attend the news conference with Clooney. *Id.* The press conference was one of four assignments that Garcia covered on April 27, 2006. *Id.*

The National Press Club function room where the press conference was held is small—roughly 50 feet long and 20 feet wide. Resp. to AP SUF No. 76. The speakers’ table was set up along one of the long walls of the function room. *Id.* Garcia had no control over the lighting in the function room, which was primarily lit by incandescent overhead lighting. *Id.* Garcia brought some of his own strobes but did not use them. *Id.*

Garcia identified and occupied what he considered the “best position” in the sector of the function room that had been reserved for photographers. Resp. to AP SUF No. 76. Other photographers subsequently took up positions around Garcia, until his sector (and the room in general) became very crowded, in large part due to the excitement caused by Clooney’s presence. *Id.* Garcia had little freedom of movement from his position because he was limited by a red “velvet cord” in front of him—marking the limit of the photographers’ sector—and by photographers behind and on both sides of him. *Id.* Garcia and the other photographers were “all on [their] knees or sitting down low” in front of the speakers’ table. *Id.* After Garcia and the other photographers had taken up their positions, Clooney, Brownback, and Obama entered the room and sat in seats that Garcia did not know in advance. *Id.*

The Darfur news conference lasted approximately 55 minutes. Resp. to AP SUF No. 76. Garcia took a total of 251 photos during the Darfur news conference, the majority of which focused on Clooney alone or Clooney and one or more of the senators. *Id.* Fifty of the 251 photos focus primarily or exclusively on Obama. *Id.* At the time of the Darfur news conference, then-Senator Obama had not yet announced his presidential ambitions. *Id.*

At 12:41:38 p.m., Garcia took a photograph of Obama alone which would become the Garcia Photo. Resp. to AP SUF No. 76. When taking this picture, Garcia had no control over Obama’s pose or appearance, but claims that he did make several creative choices:

- a. He adjusted his position slightly so that the American flag was located behind Obama’s head;

- b. He crouched down to accentuate the impression that Obama was looking “out;”² and
- c. When taking the Obama photo, he selected a lens aperture that would blur the background and thus create a shallow depth of field. *Id.*

Garcia has described his purpose in taking the photographs of Obama as follows: He was trying to make a “very good photograph,” or “the best possible photograph of this guy;” he was trying to capture the “personality” or “essence” of Obama; he was trying to create a “classic portrait;” he was trying to take “basically a clean headshot.” Resp. to AP SUF No. 76. In taking the Garcia Photo, Garcia has consistently said he was not attempting to advance Obama’s political ambitions. *Id.* Garcia interprets the National Press Photographers Association (NPPA) Code of Ethics as forbidding him to select or alter a photograph for the purpose of promoting a particular political candidate. *Id.*

A member of the NPPA, Garcia has always followed the NPPA Code of Ethics. Resp. to AP SUF No. 76. In Garcia’s opinion, the Code of Ethics forbids him from “posing” a photographic subject. *Id.* The Code of Ethics also forbids him from editing a photograph in any way that would “manipulate” the subject matter “in any way that can mislead viewers or misrepresent subjects.” *Id.* In his judgment, cropping and color correction are permissible only if they produce an image that is “no less accurate” than the original. *Id.*

² Since Garcia was already “sitting down low,” [Resp. to AP’s SUF No. 76], it is unclear whether this choice was due to creativity or necessity.

B. *The AP “Pushed” the Garcia Photo to Members as Editorial Content*

Shortly after the Darfur news conference, Garcia reviewed the 251 photographs he had taken and, in a matter of minutes, selected sixteen for submission to the AP. Resp. to AP SUF No. 76. The Garcia Photo was among the sixteen photographs he submitted. *Id.*

Prior to transmitting the photographs to the AP, Garcia spent a few seconds editing them in minor respects. Resp. to AP SUF No. 76. Garcia edited the Garcia Photo by “cropp[ing]” it, removing “a little bit of the . . . shoulder and some of the stars at the top;” “resiz[ing]” it; and adjusting the color to “make sure . . . that the color was representative of what the person . . . looked like.” *Id.*

The AP received the Garcia Photo on the afternoon of April 27, 2006. [Ex. G³ (March 31, 2010 Deposition of Jim Gerberich (“Gerberich 03/31/10 Depo.”) at 50:4-13).] An AP photo editor checked the photograph, and may have supplemented the metadata, but did not alter the photograph’s content. [Ex. G (September 25, 2009 Deposition of Jim Gerberich (“Gerberich 09/25/09 Depo.”) at 44:25–46:25).] The Garcia Photo was then “pushed,” or distributed, to roughly 3,500 newspapers and organizations that subscribe to the AP’s photo-stream service. [Ex. G (Gerberich 03/31/10 Depo. at 98:9–100:21).] During the next few months, the Garcia Photo was published by at least one AP customer in connection with a news story concerning elections in Ohio. [*Id.* at 63:6-11.] There is no evidence that any AP customer sought to use the Garcia Photo in the manner that Fairey used the photograph, i.e., as a reference for a work of political expression and art. [Ex. QQ, Tabs 3 & 4.] In May 2006, the AP submitted a group registration to the Copyright Office in which it sought to obtain copyrights for all photographs

that were taken by AP personnel from March 1, 2006 to April 30, 2006. [Ex. J (Deposition of Laura Malone (“Malone Depo.”) at 150:1-153:1, 179:16-23 (estimating that the application covered as many as “tens of thousands” of photographs); Ex. K.] The Garcia Photo was one of the tens of thousands of photographs registered with that application. [Id.]

Since the Garcia Photo was taken, the AP has undertaken a massive overhaul of AP Images. First, the AP hired a sales manager who had worked at its competitor, Getty Images, to train the sales force to better utilize the AP’s vast number of photographs. [Ex. L (Deposition of Farah DeGrave (“DeGrave Depo.”) at 104:14-108:7 (discussing significant changes); Ex. M.] In particular, DeGrave worked to train the sales team to better recognize the strengths of AP Images: AP’s whole business model is selling . . . multiple images, hundreds, thousands of images, . . . for a reasonable price.” [Ex. L (DeGrave Depo. at 105:16-19).] DeGrave also helped AP Images establish a storefront presence on the Internet; until 2009 a client would have to telephone a representative to request to buy an image, and non-clients could not even access AP Images’ website to look for images until then. [Id. at 180:6-24, 183:20-184:16.]

As a second step, the AP created a new legal position to oversee and enforce the AP’s intellectual property rights. [Ex. J (Malone Depo. at 211:11-212:4).] This position was created in light of the AP’s concern that “the unauthorized use of photos by others without permission is a serious threat” to the AP’s bottom line. [Id. at 207:22-212:4.] AP Images currently generates more than ██████████ in revenues each year, with a handsome profit margin of 20 percent. [Ex. N (Deposition of Ken Dale (“Dale Depo.”) at 54:13-23 ██████████ in revenues in 2007), 56:13-18 ██████████ in 2008), 61:14-23 (either ██████████ or ██████████ in 2009), 58:21-

³ Unless otherwise noted, all excerpts of deposition transcripts and exhibits referenced herein are attached to the Declaration of Robyn C. Crowther in Opposition to the AP’s Motion (footnote continued)

59:19 (profit margin of about 20 percent, resulting in annual net profits of between [REDACTED] and [REDACTED].]

C. *Shepard Fairey Uses the Garcia Photo to Create the Iconic HOPE Poster to Support Barack Obama's Presidential Campaign*

In order to support the candidacy of then-Senator Barack Obama, Fairey decided in January 2008 to create an artistic image that would depict Obama in a manner that would increase his chances of winning the Democratic primary and the general election. [Ex. O (March 18, 2010 Deposition of Shephard Fairey (“Fairey 3/18/10 Depo.”) at 694:17-21, 788:10-14).] After obtaining permission from the Obama campaign to create such an image on January 22, 2008 [*id.* at 789:20-24], Fairey spent the next few days, until January 25, 2008, working frequently on what would eventually become the Obama Hope Image: an idealized portrait of a future leader in whom the country could believe, and hope. Resp. to AP SUF No. 96.

1. *Fairey Greatly Transformed Elements of the Garcia Photo to Create an Iconic Political Image*

Fairey first searched online to find a reference photograph with “a sort of wise looking into the distance feel and . . . a sort of three-quarter view” Resp. to AP SUF No. 96. The “three-quarter view” and “gaze towards the horizon” constitute “conventions and ideals in political portraiture.” *Id.* Fairey located approximately 200 potential reference photographs, which he narrowed to a pool of approximately six to eight “finalists,” each of which depicted Obama in the “three-quarters” pose. *Id.* Because Fairey was not a client of AP Images, he could not have browsed the AP Images website to look for a reference photograph. [Ex. L (DeGrave Depo. at 180:6-24, 183:20-184:16).] He also could not have purchased a license for any

for Summary Judgment (“Crowther Opp. Decl.”) filed concurrently herewith.

photograph on AP Images without first obtaining a quote from a sales representative. [*Id.*] Even then, because his use would be considered a “derivative work” by the AP, he would also have had to obtain the AP’s approval of the eventual image. [*Id.* at 92:1-24, 114:16-115:1.]

On January 23, 2008, Fairey experimented with each of the “finalists” in Adobe Photoshop by “play[ing] with the contrast of the image to see if when just converted to black-and-white all the areas go either solid white or solid black, whether I would begin to see the gist of an iconic image that I would then illustrate.” Resp. to AP SUF No. 96. Fairey concluded that the Garcia Photo yielded appropriate results so that it could serve as a reference. *Id.*

Fairey then took a number of steps to create the iconic Obama Image: He first converted the color version of the Garcia Photo into grayscale, and cropped the image. Resp. to AP SUF No. 114. He then took steps to make the resulting image more flattering, including brightening the areas of Obama’s chin and left eye, darkening his right ear, removing some unflattering highlights on his cheek and darkening his right cheek to create more definition. *Id.* Fairey eventually created six “bitmaps,” each of which would serve as a starting point for a layer of color in the final image. *Id.* He then selected four of the six bitmaps, assigned a color to each of them, and layered them in Adobe Illustrator to create a single composite sketch. *Id.*

Fairey printed out black-and-white copies of these bitmaps to use as a guide in his next step, which was to place them under sheets of Rubylith—a semi-transparent gelatin—and cut by hand the four images using an Exacto knife. Resp. to AP SUF No. 114. In cutting the Rubylith images, Fairey again sought to remove what he saw as imperfections in the Garcia Photo, given his goal of promoting Obama’s candidacy. *Id.* In particular, Fairey:

- a. Reshaped the outlines of both of Obama’s ears to make them appear smooth and more perfectly shaped;

- b. Adjusted the intersection of the hairline above both ears to reduce the effect of the ears protruding;
- c. Straightened the line of Obama's nose;
- d. Straightened the lines defining Obama's chin and neck;
- e. Extended the length of Obama's torso below the lower boundary in the Obama photograph;
- f. Smoothed and stylized Obama's hairline; and
- g. Added small trapezoidal highlights to each of Obama's eyes to give the effect of a glint of light in the eyes.

Id. In all, this process of hand-cutting Rubyliths took Fairey approximately five or six hours, starting on January 23, 2008 and finishing on January 24, 2008. *Id.*

On January 24, 2008, Fairey's assistant scanned the four Rubyliths into Photoshop, which Fairey then imported into a separate computer program, Adobe Illustrator. Resp. to AP SUF No. 114. Using the Illustrator program, Fairey aligned the four scanned Rubylith layers, reconciled imperfections in their edges, and added colors to each of the layers (light blue stripes to layer 1, solid light blue to layer 2, a shade of red known as Red Pantone No. 485 to layer 3, and dark blue to layer 4). *Id.* After adding the colors to the layers, Fairey cut back some of the edges of the layers corresponding to light colors to ensure that, if two layers were misaligned in the final version, the lower of the two layers would not be visible. *Id.* Fairey then added the background colors: light blue on the left of Obama, red on the right. *Id.* He further perfected the image, in keeping with his goal to promote Obama's candidacy, by:

- a. Changing the angle of Obama's head by approximately five degrees clockwise, making him more upright;

- b. Redrawing the line of Obama’s right shoulder to make it appear straighter;
- c. Straightening Obama’s left collar and shoulder lines; and
- d. Extending Obama’s tie to be longer than the tie in the Garcia Obama photograph. *Id.*

Fairey added a version of the Obama campaign emblem to Obama’s left lapel and added his distinctive “Obey” logo to the middle of the campaign emblem. Resp. to AP SUF No. 114. As a finishing touch, Fairey included the caption “PROGRESS” at the bottom of the image. *Id.* He later changed the caption to “HOPE,” after the Obama campaign expressed concern with the term “PROGRESS.” *Id.* To maximize the impact of the “Hope” caption, Fairey customized letters taken from the Futura font—making the “O” perfectly round, and stretching the other letters so that they were equal in width to the “O.” *Id.* On January 28, 2008, Fairey emailed the four files that would create the final version of the poster to two separate production houses (for lithography and for screen printing). *Id.*

2. Fairey’s Primary Objective in Creating the Obama Image Was to Make a Political Statement in Favor of Obama

Fairey’s primary objective in making and distributing copies of the Obama Image was to help Obama win the Democratic nomination for President and then the general election. Resp. to AP SUF No. 118. In keeping with this goal, Fairey gave away roughly 350 Progress Posters and 300,000 Hope Posters, and also allowed visitors to his website to download a free, high-resolution black-and-white version of the Progress Poster to make additional “pasters”—images meant to be printed out and posted by individuals. *Id.* Although Fairey sometimes charged for copies of the Hope Poster, his objective in doing so was merely to cover his out-of-pocket costs. *Id.* In an effort to cover the costs of producing the roughly 300,000 posters he gave away for

free, Fairey sold roughly 1,250 posters from his website—for a price of either \$45 or \$35 apiece. *Id.* Prof. William Landes, the AP’s expert on economics, concedes that the price of \$35 or \$45 that Shepard charged for copies of posters was dramatically below the market price for the posters, and that Shepard could have earned much more if he had raised the price. *Id.* Fairey’s goal in selling the Obama Images was not to earn a profit, but to break even. *Id.*

3. Others Used Derivatives of the Obama Image to Make Their Own Political Statements

Due to the popularity of the Obama Image, other people created derivatives of the Obama Image to make their own political statements. Examples of these derivatives are shown below:



[See Ex. W.]

D. One 3 Two, as Fairey’s Exclusive Licensee, Places the Obama Image on Apparel to Support Fairey’s Political Message

Initially, One 3 Two did not intend to use this design to create any merchandise.

Declaration of Regan Donald Juncal In Support of One 3 Two’s Motion for Summary Judgment

(“Juncal Decl.”), ¶ 5; [Ex. BB (March 22, 2010 Deposition of Regan Donald Juncal (“Juncal 03/23/10 Depo.”) at 79:23-80:16)]. While some of the founders of One 3 Two supported Barack Obama in his run for the presidency, they did not want to profit from his candidacy or create an appearance that they hoped to do so. Resp. to AP SUF No. 150. However, other apparel manufacturers began using the Obama Image for t-shirts, even though such use was in violation of One 3 Two’s exclusive license agreement with Obey Giant, and One 3 Two was asked by one of its largest customers—the retail store Urban Outfitters—to create t-shirts with the Obama Image for Urban Outfitters to sell. *Id.* After discussing the issue with Fairey and his companies, One 3 Two decided to create t-shirts and other items with the Obama Image (the “Obama Merchandise”) and to donate as much of the profits generated by the sales of that merchandise to support the Obama campaign. *Id.*

One 3 Two first received a copy of the Obama Image for the purpose of placing it on apparel on about February 28, 2008. One 3 Two’s Statement Pursuant to Local Rule 56.1 (“One 3 Two SUF”) No. 13. One 3 Two never received a copy of, nor did it ever have access to, the Garcia Photo. *Id.*, No. 14. On receiving the Obama Image, One 3 Two began producing the Obama Merchandise, and did not make any changes to the Obama Image aside from subtle changes relating to sizing and typography. *Id.*, No. 15. One 3 Two began to sell the t-shirts in April 2008. Declaration of Christopher Broders In Support of One 3 Two’s Motion for Summary Judgment (“Broders Decl.”), ¶ 11. Its last sale was on August 26, 2009 [Ex. EE]—just days after it first became involved in this litigation through its receipt of the AP’s third-party subpoena. [Crowther Opp. Decl., ¶ 46; Ex. UU.]

The AP has argued that sales of Obama Merchandise were substantial, and generated profits for One 3 Two. *See, e.g.*, The AP’s First Amended Answer, Affirmative Defenses, and

Counterclaims filed on November 12, 2009 (“FAC”), ¶ 55. While that is true, it is undisputed that One 3 Two intended from the outset to use as much of the profit it made on the Obama Merchandise to support Obama’s candidacy. Resp. to AP SUF No. 150. Between March and November 2008, One 3 Two used at least [REDACTED] of its profits from the Obama Merchandise for projects to promote Obama’s bid for the presidency. *Id.* These donations included creating window installations using the Obama Image, purchasing advertisements in magazines featuring the Obama Image, supplying funds for the creation of posters and stickers featuring the Obama Image, and giving away the Obama Merchandise at no cost. *Id.* In short, One 3 Two, like Fairey was trying to make a political statement, not a profit.

IV. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of any issue of material fact. *Cabell v. Sony Pictures Entertainment, Inc.*, 714 F. Supp. 2d 452, 457-58 (S.D.N.Y. 2010). “Materiality is determined by the governing substantive law”—which, in this case, is the Copyright Act. *Id.* at 458. At this stage of the proceedings, the court “must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought.” *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977) (internal citation omitted).

Regarding substantial similarity, the Second Circuit Court of Appeals has “repeatedly recognized that, in certain circumstances, it is entirely appropriate for a district court to resolve [substantial similarity] as a matter of law,” in cases like this one, where “the similarity between

two works concerns only non-copyrightable elements of the [copyright claimant's] work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar.” *Peter F. Gaito Architecture, LLC v. Simone Develop. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) (quoting *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983)). With respect to fair use, however, the “fact-driven nature of the fair use determination suggests that a district court should be cautious in granting Rule 56 motions,” *Wright v. Warner Books, Inc.*, 953 F.2d 731, 735 (2d Cir. 1991), and “summary judgment on the question of fair use has been the exception rather than the rule.” *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986). When the resolution of fair use will “require detailed findings of fact regarding matters about which there are genuine disputes,” summary judgment should be denied. *See Sarl Louis Feraud Intern v. Viewfinder Inc.*, 627 F. Supp. 2d 123, 125 (S.D.N.Y. 2008).

V. THE UNDISPUTED FACTS SHOW THAT THERE IS NO SUBSTANTIAL SIMILARITY BETWEEN THE GARCIA PHOTO AND THE OBAMA IMAGE

Both the AP and One 3 Two have moved for summary adjudication of the question of whether the Obama Image is “substantially similar” to the Garcia Photo, as is necessary for the AP to make its *prima facie* case of copyright infringement. Thus, and as contrasted with the fair use defense as to which significant factual disputes exist, both parties concede that the substantial similarity issue is appropriate for determination at this stage. The parties’ agreement ends there, however.

As set forth in One 3 Two’s Motion, no reasonable juror could conclude that One 3 Two is liable for copyright infringement because the Obama Image is not substantially similar to the *protectible* elements of the Garcia Photo. One 3 Two’s Motion for Summary Judgment (“One 3 Two Mot.”) at 14-21. Although the two works share some observable similarities, all of those

similarities relate to unprotectible elements. *Id.* at 16-20. Moreover, the “total concept and feel” of the two works—which the Second Circuit gives significant weight in determining substantial similarity—is entirely different. *Id.* at 20-21. Accordingly, summary judgment in favor of One 3 Two is appropriate.

In its own motion, the AP ignores clearly established law regarding the proper analysis of “substantial similarity,” as well as picks and chooses among facts. In particular, the AP completely disregards (1) that only certain elements of the Garcia Photo are protectible, *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 389 (S.D.N.Y. 2005); (2) the “total concept and feel” test, even though it is the “dominant standard” that the Second Circuit employs to determine substantial similarity, *Shine v. Childs*, 382 F. Supp. 2d 602, 612 (S.D.N.Y. 2005); and (3) that expert opinions are irrelevant for the determination of substantial similarity, since it should be considered from the perspective of the “ordinary observer.” *Id.* at 614. Moreover, the AP relies on inapposite case law where photographers made significant creative choices as to their subjects’ poses, while ignoring the material fact that the AP’s photographer, Garcia, did not have the freedom to do so. The AP’s decision to ignore the law and facts is not coincidental: Once these material distortions are corrected, no reasonable juror would find substantial similarity, and the Court should deny the AP’s motion on this ground.

A. *Fairey Did Not Copy Any of the Protectible Elements of the Garcia Photo*

It is not enough for the AP to state, without any analysis, that there is substantial similarity because the Obama Image shares some of the same elements (namely, Obama’s face) with the Garcia Photo. Instead, it is necessary to separate out what parts of the Garcia Photo are protectible, and then determine if Fairey copied those protectible elements. Once these unprotectible elements are removed from consideration, the only elements that remain are the

lighting, selection of the film and camera, background, perspective, shading and color of the Garcia Photo. No reasonable juror could find the Obama Image to have copied those elements.

1. Only Certain Elements of a Photograph May Be Entitled to Copyright Protection

In keeping with the purpose of the Copyright Act to protect creative expression, while still allowing the creation of new works, this District generally limits the elements of a photograph that are protectible to particular aspects that involve more creativity than simply capturing the essence of a subject. The protected elements are: (1) posing the subjects, (2) lighting, (3) angle, (4) selection of the film and camera, (5) evoking the desired expression, (6) background, (7) perspective, (8) shading, and (9) color. *See, e.g., Psihoyos v. The National Geographic Society*, 409 F. Supp. 2d 268, 275 n. 5 (S.D.N.Y. 2005) (listing elements); *Kaplan v. The Stock Market Photo Agency, Inc.*, 133 F. Supp. 2d 317, 323-27 (S.D.N.Y. 2001) (same). Even though these nine aspects *may* be entitled to copyright protection, courts are not willing to shield any of these aspects of a photograph that are not “original.” *See, e.g., Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (holding that plaintiff’s “selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereo-typed jellyfish form, considered together, lack the quantum of originality needed to merit copyright protection”). Moreover, where, as here, the majority of elements are unprotectible, copyright protection is “thin” and “protects against only virtually identical copying.” *Id.* at 812.

(a) Garcia Did Not Exercise Much Creative Control over the Shot

This District has generally determined that no protection is afforded if a photographer does not bring creativity to, or exercise creative control over, the shot. So, for instance, a photograph of a commonly observed cultural image is not entitled to protection. *See, e.g., Bill*

Diodato Photography, 388 F. Supp. 2d at 393 (holding that positioning of bottom portion of legs of a woman wearing high heels and sitting on toilet in bathroom stall with her toes pointed inward was “clearly not original” and finding that “such pose cannot be copyrighted”); *Psihoyos*, 409 F. Supp. 2d at 275 (S.D.N.Y. 2005) (stating that “a copyright in a photograph derives from ‘the photographer’s original conception of his subject, not the subject itself,’” and finding that photographer’s decision to use sand as background for photograph of fossil was unprotectible).

Similarly, courts are more willing to protect photographs where a photographer has exercised a great deal of control in setting up the eventual image that is captured. *See, e.g., Rogers v. Koons*, 960 F.2d 301, 307 (2d. Cir. 1992) (noting that photograph was “the product of plaintiff’s artistic creation” and the photographer’s “inventive efforts in posing the group for the photograph, taking the picture, and printing [the photograph] suffices to meet the original work of art criteria”); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005) (finding that the photographer’s “posing [a] man against the sky [] evidences originality in the creation of the subject” and that his “orchestration of the scene contributes additional originality in the creation of the subject”).

Here, the Garcia Photo is hardly an original shot: it is, as Garcia intended it, a “classic headshot” of a political leader. Resp. to AP SUF No. 76. Further, Garcia was unable to make many creative choices with regard to the shot. Significantly, Garcia did not pose Obama and indeed was forbidden to do so by the NPPA Code of Ethics. *Id.* Garcia admitted during his deposition that he had no control over Obama’s appearance, including no control over: (1) Obama’s attire, (2) where Obama sat; (3) Obama’s poses; (4) where Obama looked; (5) where Obama fixed his eyes; (6) how Obama set his mouth; or (7) how he turned his head. *Id.* The *only* creative choices that Garcia exercised were to (1) adjust his own position slightly so that the

American flag was located behind Obama’s head; (2) crouch down to accentuate the impression that Obama was looking “out;”⁴ and (3) select a lens aperture that would blur the background and thus create a shallow depth of field. *Id.* Notably, Fairey did not copy any of these “creative” elements.

In short, Garcia did not control the pose, attire, mood or expression of President Obama—all elements for which the AP improperly seeks copyright protection. Moreover, as explained below, any originality relating to elements flowing from Obama’s conventional pose and Garcia’s decision to portray Obama as looking “out,” is an unprotectible *scène à faire*.

(b) Obama’s Pose Is an Unprotectible *Scène à Faire*

Under the *scènes à faire* doctrine, elements of a photograph that “follow naturally from the work’s theme rather than from the author’s creativity” are similarly not protectible.

Psihoyos, 409 F. Supp. 2d at 274. Thus, a conventional “presidential” pose such as the one depicted in the Garcia Photo is an unprotectible *scène à faire*. *One 3 Two Mot.* at 17-19; *see, e.g., Bill Diodato Photography*, 388 F. Supp. 2d at 392-93.

Reece v. Island Treasures Art Gallery is instructive on this point. 468 F. Supp. 2d 1197 (D. Haw. 2006). In that case, a professional photographer sued an art gallery displaying a piece of stained-glass artwork the photographer claimed was an unauthorized copy of his photograph. *Id.* at 1199. Both the photograph and the artwork displayed a woman performing a hula on the beach. *Id.* In analyzing substantial similarity, the court concluded that “elements particular to the hula kahiko tradition are *scènes à faire*.” *Id.* at 1207. Specifically, the “ike motion” where “a dancer raises one hand out and the arm is bent at the elbow and the hand is open and placed

⁴ Since Garcia was already “sitting down low” [Resp. to AP’s SUF No. 76], it is unclear whether this choice was due to creativity or necessity.

behind the eye with the thumb facing downwards and the finger to show the seeing motion” and “the dancer’s hula kahiko dress” were unprotectible *scènes à faire*. *Id.* As in this case, there were undeniable similarities between the photograph and stained glass at issue in *Reece*:



[*See* Exs. KK, LL, MM.] And, as in this case, because those similarities emanated from non-protectible elements, there could be no finding of infringement. *Reece*, 468 F. Supp. 2d at 1209 (denying plaintiff’s motion for preliminary injunction after concluding that plaintiff had not established reasonable likelihood of success on merits of copyright infringement claim).

The AP does not dispute that the Garcia Photo depicts a conventional three-quarters pose. AP Mot. at 34 (citing testimony of Fairey’s art history expert that the Garcia Photo “uses classic political portraiture techniques”); [Ex. FF (Deposition of Laurie Dahlberg (“Dahlberg Depo.”) at 18:3-11) (“I believe it is Professor Sturken who used that term ‘classic political portrait,’ and I agree with her in this instance”), 23:4-17 (“The Kennedy photograph and the Korda photograph of Che, and this portrait bears a likeness to them in that it too is a shot of a person addressing the camera in a sort of similar fashion. And the fact that we know those other portraits well is part of

what helps us think of this as a classic.”)]. There are numerous examples of political leaders in this pose, a few examples of which are shown below:⁵

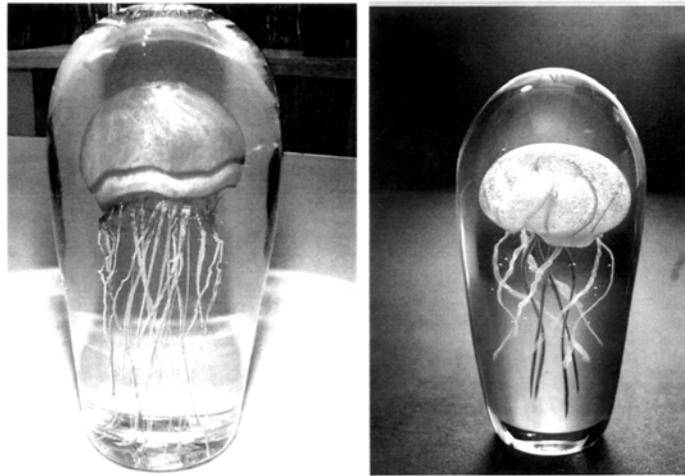


See One 3 Two Mot. at 18; One 3 Two SUF No. 20. The similarities between the Garcia Photo and the Obama Image that flow from this conventional pose are *scènes à faire* and are not sufficient to establish infringement.

The Ninth Circuit’s opinion in *Satava v. Lowry*, also reiterates the importance of separating protectible and unprotectible elements in light of the *scènes à faire* doctrine. 323 F.3d

⁵ These images are set forth in the Expert Report of Marita Sturken, Appendix at Figs. 23, 28, and 31, which is attached as Exhibit NN. Other examples can be found in the Appendix to her report.

805. In that case, an artist sued another artist for copyright infringement based on the alleged copying of his glass jellyfish sculpture, both of which are shown below:



In separating protectible from unprotectible elements, the Ninth Circuit explained:

[The plaintiff] may not prevent others from depicting jellyfish with tendril-like tentacles or rounded bells, because many jellyfish possess those body parts. He may not prevent others from depicting jellyfish in bright colors, because many jellyfish are brightly colored. He may not prevent others from depicting jellyfish swimming vertically, because jellyfish swim vertically in nature and often are depicted swimming vertically. . . . He may not prevent others from depicting jellyfish ‘almost filling the entire volume’ of the outer glass shroud, because such proportion is standard in glass-in-glass sculpture.

323 F.3d at 811. While the court recognized that the artist made “some copyrightable contributions” such as “the distinctive curls of particular tendrils, the arrangement of certain hues, and the unique shape of jellyfishes’ bells,” the court ultimately concluded that the plaintiff possessed “only a thin copyright that protects against only virtually identical copying.” *Id.* at 812 (citing *Apple*, 35 F.3d at 1439 (“When the range of protectible expression is narrow, the appropriate standard for illicit copying is virtual identity.”)). The court further recognized that the scope of protection for “realistic

depictions of live animals” is narrow and that “we must be careful in copyright cases not to cheat the public domain.” *Id.* at 812-13.

Realistic depictions of political leaders must certainly share this “thin protection” if it applies to realistic depictions of anonymous and varied jellyfish. Thus, the AP cannot copyright Obama’s face, or how he naturally appeared that day. It also cannot copyright this classic political *scène à faire* of a leader turned at a conventional three-quarters pose or any of the ideas that naturally flow from that pose: Confidence, leadership, wisdom and vision. Accordingly, Obama’s pose and all elements of the Garcia Photo that are associated with that pose (mainly, the expression, demeanor, mood and angle) are unprotectible *scènes à faire*. See *Reece*, 468 F. Supp. 2d at 1207.

2. The AP Cites No Authority in Support of Its Attempt to Copyright Unoriginal and Unprotectible Elements

The cases relied upon by the AP to support its argument are inapposite, as each of the relevant cases involved situations where the photographer had exercised creative control in setting the scene or creating a pose. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (finding originality where photographer’s creative choices included posing subject, “selecting and arranging the costume, draperies, and other various accessories,” and controlling lighting and shading); *Campbell v. Koons*, No. 91-6055, 1993 WL 97381, at *2 (S.D.N.Y. April 1, 1993) (photographer rented farm and pig, chose subjects’ wardrobe, and posed subjects); *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) (photographer arranged frames to be photographed and employed lighting technique).

The primary case on which the AP relies, *Rogers v. Koons*, involved an extraordinary act of creation by the photographer Rogers, as the District Court recognized: Rogers “succeeded in

getting two adults and eight puppies to hold still long enough to produce a charming photograph.” 751 F. Supp. 474, 475 (S.D.N.Y. 1990). In affirming the District Court’s finding of substantial similarity, the Second Circuit noted that the defendant sculptor, Koons, gave an “explicit instruction” that Rogers’ photograph be copied, and the copying of “the poses, shading, and the expressions was stressed by Koons throughout the creation of the sculpture.” *Rogers v. Koons*, 960 F.2d 301 (2d. Cir. 1992). The Second Circuit concluded that Koons “used the identical expression of the idea *that Rogers created.*” *Id.* at 308 (emphasis added); *see also Mannion*, 377 F. Supp. 2d. at 453-54 (in interpreting *Rogers*, recognizing that Rogers’ creation of scene “played an essential role”). Here, Garcia indisputably did not set the scene, and his creative choices were significantly limited. Resp. to AP SUF No. 76. Accordingly, because any originality in the Garcia Photo does not stem from Garcia’s creation of the scene or subject, the AP’s reliance on *Rogers* is misplaced.⁶

⁶ The AP cites a number of other cases without applying them to the facts of this case. Several of those cases involve infringement claims based on exact reproductions of photographs that did not involve an analysis of substantial similarity of protectible elements and are therefore inapposite. *See Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916) (finding infringement where defendant’s lantern slide was an exact reproduction of the plaintiff’s photograph); *SHL Imaging*, 117 F. Supp. 2d at 311 (stating that the plaintiff was granted copyright protection of his photograph only for his “incremental contribution” and concluding that “practically, the plaintiff’s works are only protected from verbatim copying” which was “precisely what defendants did”); *Images Audio Visual Productions, Inc. v. Perini Building Co., Inc.*, 91 F. Supp. 2d 1075, 1080-87 (E.D. Mich. 2000) (the defendant used an exact copy of the plaintiff’s photograph and substantial similarity was not at issue); *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 144-46 (S.D.N.Y. 1968) (noting that the charcoal “sketches” were intended copies of the copyrighted film but granting summary judgment in favor of defendants because the defendants’ use was fair use). AP Mot. at 30-31. The AP’s reliance on *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) is also misplaced, as that case arose out of a defendant’s unauthorized copying of a comic strip character which involved a type of original creation not at issue here. AP Mot. at 32.

Finally, the cases from the early 1900s, which stand for the general proposition that a photograph is copyrightable, should be afforded little weight, given the substantial body of recent case law that provides a more useful framework for evaluating substantial similarity. *See*, (footnote continued)

3. The AP's Failure to Distinguish between Protectible and Unprotectible Elements Distorts Its Analysis

In analyzing substantial similarity, courts in this District “extract the unprotectible elements from [their] consideration and ask whether the protectible elements, standing alone, are substantially similar.” *Bill Diodato Photography*, 388 F. Supp. 2d at 390; *see also Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). One 3 Two Mot. at 15-19.

Ignoring this keystone of copyright law, the AP instead compares nearly all of the elements of the Garcia Photo to the Obama Image, without any analysis as to whether such elements are protectible. *See* AP Mot. at 33-34. The AP concludes that summary judgment is proper because the Garcia Photo and the Obama Image “portray the same pose, expression, demeanor, mood, attire, shading, lighting, red, white and blue coloring, angle, and cropping, as well as numerous other similarities.” *Id.* at 34. As an initial point, no ordinary lay observer would agree that the works share the same color scheme; and the shading, lighting and cropping are noticeably different.

The only remaining similarities that the AP cites are between unprotectible elements that should not be considered as part of the Court’s substantial similarity analysis. Because Garcia did not control Obama’s pose, attire, mood, or expression, those elements are unprotectible. In a similar case involving photographs of famed golfer Arnold Palmer, the District Court explained:

The idea of taking a portrait of Arnold Palmer is not protectible. Nor is the general pose in which he sits for the portrait. There are a limited number of positions in which one can sit to take a portrait; Straus has no monopoly on portraits of Arnold Palmer in which he sits upright and faces the camera.

e.g., Jewelers’ Circular Publ’g Co. v. Keystone Publ’g Co., 274 F. 932 (S.D.N.Y. 1921); *Pagano v. Besler Co.*, 234 F. 963 (2d Cir. 1916); *Edison v. Lubin*, 122 F. 240, 242 (3d Cir. 1903). AP Mot. at 30-31.

Straus v. DVC Worldwide, Inc., 484 F. Supp. 2d 620, 638 (S.D. Tex. 2007). Moreover, Obama’s pose, expression, mood, demeanor and angle are nothing more than conventional *scènes à faire*: the classic image of a leader in a conventional setting that served as Fairey’s starting point. The AP’s failure to distinguish between protectible and unprotectible elements distorts its analysis. *Telebrands Corp. v. Del Laboratories, Inc.*, 719 F. Supp. 2d 283, 294 (S.D.N.Y. 2010) (courts must “attempt to extract the unprotectible elements from [its] consideration and ask whether the protectible elements, standing alone, are substantially similar”). After taking this necessary step, no ordinary lay observer could find any substantial similarity between the protectible elements and the iconic Obama Image.

B. The AP Ignores the “Total Concept and Feel” Test, Which Is Central to the Substantial Similarity Analysis

Apparently recognizing the most significant difference between the Obama Image and the Garcia Photo, the AP ignores the “total concept and feel” test, which is a central component of the substantial similarity analysis in the Second Circuit. *Shine*, 382 F. Supp. 2d at 612 (“total concept and feel” is the “dominant standard used to evaluate substantial similarity between artistic works” in the Second Circuit); *see also Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 133 (2d. Cir. 2003); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001) (using the “total concept and feel” test to compare two quilt designs); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995) (applying “total concept and feel” test to compare designs on sweaters).

Given the AP’s predilection to cherry-pick the law and facts, it no doubt ignores this prevailing test because the “total concept and feel” of the two works at issue is so entirely different. *One 3 Two Mot.* at 20-21. The Garcia Photo is a classic headshot taken by a

newspaper photographer at a press conference; the Obama Image is an edgy, provocative piece of artwork that conveys a powerful political message that is characteristic of Fairey's street art. *See id.* at 20. The Obama Image has none of the detail that the Garcia Photo shows on Obama's face, Obama's suit, or the background. The poster entirely changes these details by transforming them into a stylized combination of red, cream, and blue. While the image of Obama is recognizable, the Obama Image makes Obama look better—more attractive, more heroic, and more presidential—than the “real-life” Garcia Photo. The realistic colors of the Garcia Photo are also in marked contrast to the stylized colors of the poster.

Accordingly, because no reasonable juror could find substantial similarity between the Obama Image and the Garcia Photo under the “total concept and feel” test, the AP cannot prevail on its Motion for Summary Judgment and summary judgment in favor of One 3 Two is appropriate. *See Kerr v. New Yorker Magazine, Inc.*, 63 F. Supp. 2d 320, 325-26 (S.D.N.Y. 1999) (granting summary judgment based on lack of substantial similarity where two images of a male figure with a skyline Mohawk had an entirely different “concept and feel” because one image was a pen and ink drawing with “a sketchy, edgy feel to it” and the other image had “cool colors and smooth lines” which gave “a more serene and thoughtful impression”); *see also Sheldon Abend Revocable Trust v. Spielberg*, No. 08 Civ. 7810, 2010 WL 3701343, *9 (S.D.N.Y. 2010).

C. The AP Improperly Relies on Expert Testimony in an Attempt to Establish Substantial Similarity

As is evident once one strips away the unprotectible elements of the Garcia Photo, and once one considers the “total concept and feel” of the Obama Image, no ordinary lay observer could conclude that there is substantial similarity between the two works. *See One 3 Two Mot.*

at 19-21. Nonetheless, in its attempt to bolster its case (which is otherwise unsupported by law or fact), the AP relies on conclusory statements and the testimony of its expert, Professor Laurie Dahlberg, and Fairey's expert, Professor Marita Sturken, purportedly to establish substantial similarity. AP Mot. at 33-34. The Second Circuit, however, "has long held that substantial similarity should be determined not with the help of or solely by experts in the relevant field, but from the perspective of the ordinary lay observer." *Shine*, 382 F. Supp. 2d at 614; *see also Sheldon Abend*, 2010 WL 3701343, at *10, n.4. For this reason, the AP's expert testimony about Fairey's purported reasons for selecting the Garcia Photo as a reference are also of no import, as they do not assist a lay observer in determining substantial similarity. AP Mot. at 34.

The AP's resorting to expert testimony is particularly telling since there is no need to do so: any lay observer (not paid by the AP) who compares the protectible elements of the Garcia Photo to the Obama Image will see that the Obama Image does not contain any of those elements and, in fact, Shepard Fairey transformed a routine headshot into an extraordinary piece of political expression. At a minimum, the inclusion of expert testimony establishes triable issues of fact: Professor Dahlberg has argued that the images are similar, while Professor Sturken has opined that they are not. [*Compare* Ex. NN (Sturken Expert Report, ¶ 42) ("The conventional political pose struck by Obama in the original Garcia photograph is transformed in the Fairey poster through several visual effects") with Ex. PP (Dahlberg Expert Report, ¶ 44) ("Mr. Fairey copied all of the characteristics that helped make the Garcia Photograph a compelling political portrait").] The AP's reliance on improper evidence, incorrect applications of the law, and inapposite cases highlights the weakness of its position. In sum, the AP has failed to show that it is entitled to judgment as a matter of law on this issue. The AP's Motion for Summary

Judgment should be denied, and for reasons stated in One 3 Two's Motion for Summary Judgment, judgment should be granted in favor of One 3 Two on the AP's infringement claims.

VI. THE AP DISTORTS THE LAW OF FAIR USE, AND THE FACTS OF THIS CASE, IN ITS BID FOR SUMMARY JUDGMENT

As set forth above, the Obama Image did not infringe any protectible elements of the Garcia Photo and, as a result, the AP cannot make its *prima facie* case of copyright infringement. Even if this Court were to find an issue of fact in this regard, however, One 3 Two has asserted a "fair use" defense which is inappropriate for summary judgment. *See Answer and Affirmative Defenses by Counterclaim Defendant One 3 Two, Inc. d/b/a Obey Clothing to the AP's First Amended Answer, Affirmative Defenses, and Counterclaims, Affirmative Defense No. 9.*⁷ The AP's arguments to the contrary misconstrue the current state of the copyright law in the Second Circuit and ignore glaring disputes of fact. The AP also glides over the fact that the speech at issue—One 3 Two's political expression—is entitled to First Amendment protection, and thus the application of the fair use doctrine must consider the important expressive interests at stake. In sum, the facts and law support that it is One 3 Two and not AP that prevails on the fair use defense. For purposes of this Motion, however, AP cannot prevail on summary judgment because at a minimum, triable issues of material fact exist on this issue.

⁷ Even if the Court were to grant the AP's motion in its entirety, this case would still proceed to trial because One 3 Two has set forth 18 additional affirmative defenses, none of which the AP moved to dismiss. *See FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994); *see also Cytec Industries, Inc. v. B.F. Goodrich Co.*, 232 F. Supp 821, 829-30 (S.D. Ohio 2002) (because plaintiff did not move on affirmative defenses in opening brief, defendant could raise those issues at trial).

A. *One 3 Two Is Entitled to the Benefit of Fairey’s “Transformation” of the Garcia Photo into the Iconic Obama Image*

The AP attempts to differentiate One 3 Two from the artist, Shepard Fairey, who created the Obama Image, claiming that One 3 Two “added nothing of its own” to the Obama Image or the Garcia Photo and then contends that One 3 Two did not transform the photo for purposes of the fair use analysis. AP Mot. at 49. But One 3 Two, as Fairey’s exclusive licensee, was not *required* to add anything of its own in order to obtain any protections that Fairey could seek, such as the fair use defense. An exclusive licensee is entitled to all the “protections and remedies” afforded to the licensor under the Copyright Act. 17 U.S.C. § 201(d)(2) (“[t]he owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title”). In other words, One 3 Two stands in the licensor’s shoes for the purposes of determining what protections and remedies One 3 Two is entitled to under copyright law. *See, e.g., Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1447 (9th Cir. 1994). It is only fair to give One 3 Two this benefit. The AP concedes that the only actual copying of the Garcia Photo that occurred was done by Fairey (and not by One 3 Two). AP Mot. at 28 (conceding that it “must demonstrate that Obey Clothing (through Mr. Fairey) actually copied the Obama Photo”). It is undisputed that the only work One 3 Two copied was the Obama Image. If Fairey’s reference of the Garcia Photo in the Obama Image was fair use, the AP has no right to it that might be asserted against One 3 Two.

In deciding whether a use was “transformative” enough to establish a fair use defense, courts are less concerned with any physical changes that are made than with whether the work has somehow been “re-purposed.” *See* Section IV.B.1.a., *infra*. Accordingly, it is of no matter that Fairey, as opposed to One 3 Two, took a number of steps to physically change the

(unprotectible) elements of the Garcia Photo. The important question is whether the Obama Image served a different purpose or conveyed a different message, as it unquestionably did. If the AP's view were correct, every copyright claimant could do an end-run around the fair use defense by suing only third parties who lawfully reproduced the artists' images, but not the artist who originally transformed the image.

Accordingly, if this Court concludes that the Obama Image created by Fairey is entitled to the fair use defense, One 3 Two is entitled to the benefit of that ruling—regardless of whether One 3 Two's only actions consisted in “reproducing” the Obama Image on apparel. And because One 3 Two shared in Fairey's transformative purpose to send a strong political message in manufacturing and selling the Obama Merchandise, it shares in the benefit of the First Amendment values embodied in the fair use defense.

B. The “Fair Use” Defense Is Intended to Encourage Productive Uses of Copyrighted Material Such as the Obama Image

The Copyright Act permits, in certain circumstances, appropriation of protected expression notwithstanding copyright protection. The concept is embodied in 17 U.S.C. § 107 (“Section 107”) which states that the “fair use” of a copyrighted work does not infringe the copyright in that work. “The purpose of fair use is to create a limited exception to the individual's private property rights in his expression—rights conferred to encourage creativity—to promote certain productive uses of copyrighted material.” *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986). The fair use doctrine “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quotation omitted).

Whether a given use is fair is determined on a case-by-case basis within the context of four factors enumerated in Section 107: (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107; *see Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 560-61 (1985).

There is no bright-line rule for weighing these four statutory factors against each other, and no single factor is dispositive. *See Campbell*, 510 at 578. “The ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.” *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 141 (2d Cir. 1998) (internal citations and quotation marks omitted). In the context of summary judgment, these facts must be assessed in the light most favorable to defendant, as the non-moving party. *Sarl Louise Feraud Int’l*, 627 F. Supp. 2d 123, 126 (S.D.N.Y. 2008). Furthermore, “courts have often noted that, as a mixed question of law and fact, the issue of whether an alleged infringement constitutes fair use is usually unsuited to summary disposition.” *Byrne v. British Broadcasting Corp.*, 132 F. Supp. 2d 229, 233 (S.D.N.Y. 2001) (denying summary judgment motion due to disputed issues of material fact); *see also Ass’n of Am. Med. Colleges v. Cuomo*, 928 F.2d 519, 525-26 (2d Cir. 1991); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 323 (S.D.N.Y. 2002).

1. Factor One: Purpose and Character of the Use

The first factor, “the purpose and character of the use,” is the “heart of the fair use inquiry” in this Circuit. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (Leval, J.).

The AP correctly identifies the three components that are considered within this factor, but upends the law of this Circuit by focusing primarily on the bad faith and commerciality components, rather than the image’s “transformative” nature. In fact, the focus of this inquiry is “whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Campbell*, 510 U.S. at 579 (citations omitted). In particular,

[I]t is now established that uses which merely copy, repackage, republish, substitute for, encapsulate or appropriate the essence of copyrighted material are not transformative; whereas uses which “employ the quoted matter in a different manner or for a different purpose from the original” are transformative.

Hofheinz v. Discovery Communications, Inc., No. Civ. 3802, 2001 WL 1111970, at *4 (S.D.N.Y. 2001) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (hereinafter, “Leval”)). The issue of the “transformativeness” of a work forms the basis of the entire fair use analysis. *See On Davis*, 246 F.3d at 174-176. Where, as here, an artist greatly transforms the copyrighted work, the other elements of commerciality and bad faith are much less important. *Id.* at 174-175 (“The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”).

(a) The Obama Image Is Transformative

Courts have found a secondary use to be transformative when it is “plainly different from the original purpose for which [the copyrighted work] was created,” even where a secondary user has made an *exact* replication of a copyrighted image. *Sarl Louis*, 627 F. Supp. 2d at 128 (citing *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.2d 605, 609 (2d Cir. 2006) (exact

copies of Grateful Dead concert posters); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (fair use where exact copies of photographs were reproduced in thumbnail format on search engine); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003) (fair use where exact copies of artwork were reproduced in thumbnail format on search engine); *Nunez v. Carribbean Int'l News Corp.*, 235 F.3d 18, 22-23 (1st Cir. 2000) (fair use where exact copy of photograph of beauty pageant winner).

For instance, in the leading case of *Blanch v. Koons*, the Second Circuit considered another work by artist Jeff Koons: a painting commissioned for exhibition in a gallery. The Second Circuit concluded that Koons' use of an image of a woman's feet (adorned with bronze nail polish and fashionable sandals) had a much different purpose than that of the photographer, who used the image in a spread in a fashion magazine. 467 F.3d at 247. "Koons is, by his own undisputed description, using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media." *Id.* at 253. Accordingly because the "raw material" of the photograph was used "in furtherance of distinct creative or communicative objectives, the use was transformative." *Id.*; *see also Bill Graham Archives*, 448 F.3d at 609 (use of concert posters as "historical artifacts" in a biography was transformative); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998) (parody of a photograph in a movie poster was transformative).

As discussed above, the Obama Image is hardly an exact replication of the Garcia Photo, but instead so substantially transformed the protectible elements of the Garcia Photo that the AP cannot even establish a *prima facie* case of copyright infringement. *See Castle Rock*, 150 F.3d at

143 n. 9.⁸ Moreover, Shepard Fairey created, and One 3 Two disseminated, the Obama Image for a much different purpose than Garcia's purpose.

**(i) Fairey and One 3 Two Wanted to Support Obama's
Candidacy; the AP's Photographer Wanted a "Clean
Headshot"**

Fairey's primary objective in making and distributing copies of the Obama Image was to help Obama win the Democratic nomination for President and the general election. Resp. to AP SUF No. 118. In order to do so, in the days before the Super Tuesday primary (February 5, 2008), Fairey decided to create an artistic image that would depict Obama in such a way that would increase his chances of success by creating an idealized portrait of a future leader in whom the country could believe, and hope. [Ex.O (Fairey 3/18/10 Depo. at 694:17-21, 788:10-14).] Over three days in January 2008, Fairey located the Garcia Photo and significantly altered it in order to create the iconic Obama HOPE and Obama PROGRESS images. Resp. to AP SUF No. 114. The extensive steps that he took to create the Obama Image are described in greater detail in Section III.C.1, *supra*.

⁸ The cases on which the AP relies to argue that the Obama Image was not transformative involve situations where the defendant directly copied a work and then used it for the *same* purpose, as opposed to having made the significant changes that Fairey made to the Garcia Photo. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (use of poster replicating artwork used for same decorative purpose); *Schiffer Publi'g Ltd. v. Chronicle Books, LLC*, No. Civ. 03-4962, 2004 WL 2583817, at *11-12 (E.D.Pa. Nov. 12, 2004) (copied photographs of fabrics in a book about fabric patterns); *Ty, Inc. v. Publications Int'l, Ltd.*, 333 F. Supp. 2d 705 (N.D. Ill. 2004) (using photographs of almost every Beanie Baby in a collectors' guide marketed to collectors of Beanie Babies). The AP's analysis is based on its flawed claim that One 3 Two "copied" the Obama Image onto apparel. What One 3 Two "copied" was the Obama Image, not the Garcia Photo, and only if the AP can show that the Obama Image was not transformative but instead a derivative work of the Garcia Photo can it prevail. The appropriate analysis is the difference between the Garcia Photo and the image on the Obama Merchandise.

Fairey used portions of the photo as “raw material” to create something fundamentally different: a heroic and inspirational political campaign poster. The aesthetic of the Garcia Photo is realism, depicting the world as it is; the aesthetic of the Hope poster is idealism, describing the world as it could or should be. Each of the myriad changes that Fairey made to the underlying image was designed to advance that end. He used bold lines and colors to portray Obama in an idealized light. In addition, Fairey altered the representation of Obama in many ways in order to make it more “flattering.” He reduced the size of Obama’s right ear, raised his right shoulder, smoothed his hairline, and changed the shape of his mouth. He added a fleck of red to Obama’s right eye, giving it a “glint” and contributing to its “focus of gaze.” He defined Obama’s jaw line more sharply to make it appear “strong and refined.” *See* Resp. to AP SUF No. 114. Perhaps most importantly, he used a “red, white and blue color palette” both to “de-racialize” Obama and thus increase his chances of election in the racially polarized United States, and to allude to Obama’s 2004 Democratic National Convention speech decrying the false “red state/blue state” division of the country. [Ex. O (Fairey 03/18/2010 Depo. at 792:7-10, 870:12-21, 874:18-875:7, 878:17-879:15).] The cumulative effect of these changes was so dramatic that, although Mannie Garcia saw the Hope poster often during the Presidential campaign, he never realized that it was based upon his own photograph. [Ex. A (Garcia 03/05/2010 Depo. at 65:1-18, 339:5-340:4).]

After creating the Obama Image, Fairey then worked to distribute the Obama Image as widely as possible, by providing the image for free or at reduced costs, with the goal of “breaking even.” Resp. to AP SUF No. 114. Eventually, this distribution process included efforts by Fairey’s licensee, One 3 Two, to place the Obama Image on clothing. Initially, One 3 Two did not intend to produce merchandise displaying the Obama Image. While some of the

founders of One 3 Two supported Barack Obama in his run for the presidency, they did not want to profit from his candidacy or create an appearance that they hoped to do so. Resp. to AP SUF No. 150. After discussing the issue with Fairey and his companies, One 3 Two eventually decided to create t-shirts and other items with the Obama Image and to donate as much of the profits generated by the sales of that merchandise to support the Obama campaign. *Id.*

In stark contrast, Garcia took his photograph almost two years before Obama's run for the presidency, and did so at a press conference that was primarily about the actor George Clooney's trip to Darfur. Resp. to AP SUF No. 76. During the 55-minute news conference, Garcia took 251 photographs, the majority of which focused on Clooney alone, or with the other participants. *Id.*

As discussed above, when taking this picture, Garcia had no control over Obama's pose or appearance and made only very minor creative choices. Resp. to AP SUF No. 76. Although his deposition testimony was all over the map,⁹ it is clear that his primary purpose was to get a realistic, and good, shot of Obama. *Id.* He has also made clear that he did not, and could not ethically, take the photograph in order to promote Obama as a political candidate. *Id.* For example, Garcia testified:

Q: Was your -- were any of your photographs of Mr. Obama taken to assist him in a presidential campaign?

⁹ As this Court is aware, Garcia also admitted to spoliating evidence in this case. [Ex. WW.] His misconduct raises serious issues about his credibility, which can only be resolved by a trier of fact. *See Piesco v. Koch*, 12 F.3d 332, 343 (2d Cir. 1993) (court must make all credibility assessments *against* moving party, and summary judgment may be granted "only if a reasonable juror would have been *compelled* to accept the view of the moving party" notwithstanding the adverse credibility determinations). Given that it was the AP who discovered Garcia's evidentiary misconduct, its reliance on Garcia's self-serving testimony about (footnote continued)

A. No. They were not.

Q. Or to assist him in any political campaign?

A. From my perspective?

Q. Yes. From your perspective.

A. No.

[Ex. A (Garcia 03/05/10 Depo. at 184:13-21).]

Garcia’s description of his purposes is consistent with the NPPA Code of Ethics, which requires members to “[a]void political, civic and business involvements or other employment that compromise or give the appearance of compromising one’s own journalistic independence.” At his deposition, Garcia agreed that one implication of this code is that “it’s not appropriate for [me] as a photo journalist to select or alter a photograph for the purpose of promoting a particular political candidate.” [Ex. A (Garcia 03/05/10 Depo. at 188:8-16).] Given these purposes, it is simply not relevant—according to paid experts in this case—that the Garcia photo portrayed Obama in an “inspiring manner.” AP Mot. at 50. A photojournalist would obviously seek to get a good picture of his subject; that does not mean that he intended that photo to be used as what became an iconic campaign poster.

The AP claims that Garcia took the photo not to document the press conference, but because he knew that it would be added to the AP Images database and made available for licensing. AP Mot. at 50. That claim is neither supported by the evidence nor relevant. *See* Resp. to AP SUF No. 90. The AP’s database is not (and could not have intended the Garcia Photo to be) used to promote Obama’s political aspirations. The AP admits that its only interest

his purpose in taking the Garcia Photo is ironic at best. Garcia’s credibility itself establishes a triable issue such that summary judgment cannot be granted.

in the Garcia Photo was to include it among the millions of other images in its AP Images database, that could be used by its members primarily for editorial purposes. Separate Statement of Facts in Support of AP’s Motion for Summary Judgment Against One 3 Two (“AP SUF”) No. 91. Additionally, there is no evidence that a single AP customer sought to use the Garcia Photo in the manner that Fairey used the photograph, *i.e.*, as a reference for a work of political expression and art. *See id.*

(ii) The Obama Image Is Also a Distinctly Creative Political Expression

A simple visual comparison of the Garcia Photo with the Obama image shows that the Obama Image is much different than the photograph in more than one purpose. It is therefore not the case, as the AP argues, that the works have the “same expression.” AP Mot. at 51.

The Garcia Photo was meant to be, for the most part, a file photo. [Ex. G (Gerberich 09/25/09 Depo. at 129:17-130:15).] In contrast, the Obama Image is unquestionably a distinctively creative, artistic work. *See* August 22, 2010 Stipulation Regarding Chain of Custody of “Rubylith” Transparencies (the “Obama Hope” artwork has been on display in the Institute of Contemporary Art in Boston, the Andy Warhol Museum in Pittsburgh, and the Contemporary Arts Center in Cincinnati). [Ex. XX.] It was also intended to be widely disseminated—by poster, by sticker, and by apparel—so that people could support not just Presidential Candidate Obama, but also the “hope” for a better future for our country. By its very nature, the image presents a different visual aesthetic from the photograph and has a completely different character from the photograph. By its nature, it engages the viewer in a

dialogue which the viewer generally understands to have some educational or political characters and to contain at least one or more messages and meanings from the artist.¹⁰

The AP has argued that the fair use doctrine only extends to uses where an infringer “comments on” or creates a parody of the original. AP Mot. at 49. Accordingly, the AP argues that Fairey has admitted that he was not commenting on the Garcia Photo, or creating a parody of it, and thus this defense should be rejected. The Copyright Act is not so limited, nor should it be. *Harper & Row*, 471 U.S. at 561 (“This listing was not intended to be exhaustive or to single out any particular use as presumptively a ‘fair’ use.”). As *Campbell* orders, this Court should “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Campbell*, 510 U.S. at 577 (quotation omitted); *see also Leibovitz v. Paramount Pictures Corporation*, 948 F. Supp. 1214, 1223 (S.D.N.Y. 1996) (in determining whether fair use applied, looking to “the core purpose of copyright: to foster the creation and dissemination of the greatest number of creative works”). While Fairey agreed he was not commenting on the photo itself, he did testify that he was engaging in social commentary, and wanted to make a political statement. Resp. to AP SUF No. 118. These uses fall within the protective ambit of the fair use defense.

This precise issue was addressed Judge Stein of this District in *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008), in which John Lennon’s wife and sons sued the producers and directors of a movie, *Expelled*, that included a 15-second clip of the song “Imagine” without obtaining the Lennons’ permission. *Id.* at 316. The movie was a feature-

¹⁰ The strikingly artistic nature of the Obama Image is demonstrated by the many examples of artists who copied Fairey’s unique style in creating their own political and artistic expression. *See* Section III.C.3, *supra*; *see also* Ex. W. Many of these copycats featured persons (footnote continued)

length film that concerned the ongoing debate between proponents of intelligent design and the scientific theory of evolution, but which the producers conceded was produced for the purpose of earning a financial return for investors. *Id.* at 316-17. The 15-second excerpt of “Imagine” includes ten words from the song (“Nothing to kill or die for / And no religion too”), and plays immediately after excerpts in which several speakers indicate a hope that science “will eventually diminish religion’s role in society.” *Id.* at 317-18. The filmmakers’ use of “Imagine” was not to comment on, or parody, the famous song, but instead used the song “as ‘fodder’ for social commentary, altering it to further their distinct purpose.” *Id.* at 323. The Court concluded that this use, although a direct copy of the 15 seconds in question, was transformative “because they put the song to a different purpose, selected an excerpt containing ideas they wished to critique, paired the music and lyrics with images that contrast with the song’s utopian expression, and placed the excerpt in the context of a debate regarding the role of religion in public life.” *Id.* at 324.

As with the *Lennon* case, Fairey used (unprotectible) pieces of the Garcia Photo to create an image that would be part of a larger social commentary: supporting the candidacy of the man who would become the first African-American President of the United States and encouraging American citizens to dare to hope for a positive change in the country and in their lives. [Ex. O (Fairey 03/17/10 Depo. at 565:9-25, 788:4-14).] This political campaign speech is at the very core of the First Amendment values that both the Copyright Act and the fair use doctrine are intended to protect:

Discussion of public issues and debate on the qualifications of
candidates are integral to the operation of the system of

other than Obama and so necessarily could *not* have been copying any of the elements of the Garcia Photo.

government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484, (1957). Although First Amendment protections are not confined to “the exposition of ideas,” *Winters v. New York*, 333 U.S. 507, 510 (1948), “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates” *Mills v. Alabama*, 384 U.S. 214, 218, (1966). This no more than reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”

Buckley v. Valeo, 424 U.S. 1, 14-15 (1976).

The AP has also argued that One 3 Two could have “easily licensed” the Garcia Photo. AP Mot. at 53. The only evidence on which the AP relies appears to be a contract struck months later, in December 2008, between *Fairey* and the AP. See Resp. to AP SUF No. 70. There is no relevant evidence that One 3 Two would have thought to engage the AP in any such dialogue and, as is clear from the testimony of its principals, One 3 Two often relied on *Fairey* to obtain the proper licenses. *Id.*, No. 63.

(b) One 3 Two Did Not Have Primarily a Commercial Motive

Contrary to the AP’s skewed portrayal of the law, the commercial nature of a work takes on much less—even negligible—significance where the work is transformative. *On Davis*, 246 F.3d at 174-175 (quoting *Campbell*, 510 U.S. at 579); *Lennon*, 556 F. Supp. 2d at 322; *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 413 (S.D.N.Y. 1997).

If commerciality were to carry “presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit.” *Campbell*, 510 U.S. at 584 (internal citations omitted); *see also Blanch*, 467 F.3d at 253-55 (discounting commercial factor even though the artist Koons “made a substantial profit” given transformative nature of work). As the Second Circuit explained in *Castle Rock*, nearly all uses of copyrighted works that fall within the categories “criticism, comment, news reporting, teaching . . . , scholarship or research” are generally conducted for profit, and thus “[w]e do not give much weight to the fact that the secondary use was for commercial gain.” 150 F.3d at 140. Accordingly, that *Fairey and One 3 Two* both generated revenues—even significant revenues—from the sale of merchandise featuring the Obama Image is of little consequence. *Compare Lennon* 556 F.Supp.2d at 318 (film in question generated millions of dollars in direct revenue).

There are also significant factual disputes regarding whether *Fairey and One 3 Two* had a primary commercial purpose in the sale of Obama Merchandise. For instance, both *Fairey and One 3 Two* have testified that the primary purpose of distributing the Obama Merchandise was to make a political statement of support for President Obama, and that both *Fairey and One 3 Two* used profits to support Obama’s candidacy, to the extent they could do so in keeping with campaign finance laws. *Resp. to AP SUF Nos. 118, 150*. Given the popularity of the Obama Image, both *Fairey and One 3 Two* could have earned substantially more revenue had they sold

the goods at the price the market would bear. That they did not do so underscores that, for Fairey and One 3 Two, the Obama Merchandise was for a cause instead of a bottom line.¹¹

(c) Propriety of One 3 Two's Conduct

The third and final component of the first factor focuses on a defendant's bad faith. Like the "commercial motive" element, this consideration also is not dispositive and presents highly contested issues of fact.

"[W]hile the good or bad faith of a defendant should be considered, it generally contributes little to fair use analysis." *NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471, 479 n.2 (2d Cir. 2004); *see also Religious Tech. Ctr. v. Netcom on-Line Commun. Servs., Inc.*, 923 F. Supp. 1231, 1244 n.14 (N.D. Cal. 1995) (finding of bad faith cannot be considered dispositive); Leval at 1126 (fair use inquiry should focus not on the morality of the secondary user, but on whether work at issue is of the type that should be protected).¹² It is no surprise that the two cases on which the AP relies were decided before *Campbell* cast doubt on the propriety of considering bad faith in the fair use analysis. AP Mot. at 42-43 (*citing Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989)).

¹¹ The AP also relies on the deposition testimony of One 3 Two's accountant in claiming that One 3 Two enjoyed "indirect profits" as a result of the Obama Image. AP Mot. at 47. Even though this testimony is outside the scope of the accountant's designation as a Rule 30(b)(6) witness, and lacked foundation, this testimony appears to be the only actual "evidence" on which the AP bases its claim that One 3 Two enjoyed indirect profits. As set forth in One 3 Two's motion for summary judgment, that does not suffice.

¹² The AP has previously argued that Shepard Fairey should be prohibited from relying on the fair use defense as a result of his post-litigation conduct. The AP did not raise this argument as to One 3 Two, nor should it be permitted to do so. First, as Judge Leval has explained, equitable defenses, such as unclean hands, are inappropriate to prevent a defendant from relying on the fair use defense. Leval, at 1127 (explaining that fair use is not "a creature of equity" so equitable considerations are not pertinent). Second, there is no evidence that One 3 Two engaged in any post-litigation misconduct other than the purported acts of infringement.

In any case, the only evidence of “bad faith” that the AP puts forward is the claim that One 3 Two was aware (or should have been aware) that Fairey had used the Garcia Photo without permission. AP Mot. at 43-45. As a matter of law, such claims do not suffice. There is “no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith.” *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006). In *Blanch*, the Second Circuit concluded that bad faith was not established by the mere fact that the defendant, Jeff Koons (an appropriation artist like Fairey), did not seek permission to use a photograph in his transformative work. *Id.* In reaching this conclusion, the Court distinguished the very case law on which the AP relies as involving something *more* than merely using a copyrighted image without permission. *Id.* (citing *Harper & Row*, 471 U.S. at 562-63 (purloined manuscript)); *NXIVM Corp.*, 364 F.3d at 478 (breach of confidentiality agreement); *Rogers*, 960 F.2d at 309 (tearing off of copyright mark) (cited in AP Mot. at 42-43); *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (“total deletion of author’s name and substitution of the copier’s”) (cited in AP Mot. at 42-43).

There are also significant factual disputes with regard to what One 3 Two knew and believed. The AP cites several pieces of “evidence” to support One 3 Two’s culpable *mens rea*, including: (1) purported knowledge that Fairey had previously appropriated artwork without permission, (2) the “reverse indemnity provision” in the licensing agreement between Fairey’s company and One 3 Two, (3) inadmissible evidence of two settlements,¹³ (4) two vague and unrelated statements in emails that are taken out of context, and (5) that One 3 Two never gave any credit to the AP even after the lawsuit was filed. Each of these “facts” is highly contested,

¹³ One 3 Two is concurrently filing a motion to strike this and other evidence regarding settlements.

even assuming that they are supported by competent evidence. For instance, One 3 Two’s principals have testified that they operated under the assumption that, even if Fairey used reference photos from time to time without obtaining a license, his art was protected by the “fair use” defense. [Ex. BB (Juncal 03/23/10 Depo. at 99:5-102:13, 106:12-107:17; Juncal 08/26/10 Depo. at 348:19-22); Ex. CC (Deposition of Christopher Broders (“Broders Depo.”) at 101:15-102:3, 110:18-112:25, 121:17-122:11).] The few intellectual property disputes involving One 3 Two’s conduct primarily involved the publicity rights of celebrities—not the copyrighted work of a photographer,¹⁴ and Fairey *had* obtained the consent of the Obama campaign to make an image to support Obama’s candidacy. *See, e.g.*, Response to SUF No. 57.¹⁵

The AP also makes much of the fact that One 3 Two continued to sell Obama Merchandise after this lawsuit was filed. That is not evidence of bad faith. *Castle Rock*, 150 F.3d at 146 (“One factor that is of no relevance to the fair use equation, however, is defendants’ continued distribution of [the defendant’s work] after [plaintiff] notified defendants of its copyright infringement claim, because ‘[i]f the use is otherwise fair, then no permission need be sought or granted’” (quoting *Campbell*, 510 U.S. at 585 n. 18)). *Castle Rock* involved a defendant’s assertion of the fair use doctrine. Here, Fairey went on the offensive to assert his

¹⁴ Even if One 3 Two had been involved in previous disputes that directly involved the infringement of a copyrighted photograph, it would not matter. For instance, the Second Circuit concluded that Jeff Koons’ actions in the *Blanch* case fell within the fair use doctrine, even though he had several times actually been found *liable* in litigation for copyright infringement. *See Blanch*, 467 F.3d at 256 (concluding no bad faith even though Koons did not seek permission to use copyrighted photograph).

¹⁵ The AP argues, without evidence, that One 3 Two would “easily” have been able to get a license from the AP. As of January 2008, it was typically Fairey’s practice—not One 3 Two’s—to obtain any clearances that were necessary. Resp. to AP SUF No. 122. This evidence is also irrelevant. The case of licensing may be the test that the AP believes should govern the fair use inquiry, but it does not. And the only evidence cited by the AP is that of a license that (footnote continued)

right and initiated the action against the AP. It is not as though the AP initiated the suit and Fairey conceded that he had no defense. Also unlike in *Castle Rock*, the AP did not notify One 3 Two that the AP considered One 3 Two to be in any way involved until after August 19, 2009, when a third-party subpoena was served on the Company. [Crowther Opp. Decl., ¶ 46; Ex. UU.] Even then, there was no indication that the AP planned to sue One 3 Two until weeks later, in October 2009. In any case, One 3 Two shipped just one small order after service of the subpoena¹⁶ and has not sold any Obama Merchandise since that time. [Ex. EE.] One 3 Two acted in good faith in reliance on its belief that its use of the Obama Image is protected by the fair use defense, and its post-litigation sales are of no relevance to the fair use inquiry.

(d) There Are Many Triable Issues of Fact Relating to the First Factor of the Fair Use Defense

One 3 Two disputes many of the AP's key "material facts" with regard to this first factor of the fair use test, making summary judgment on this issue inappropriate. One 3 Two contends that Fairey and One 3 Two had a much different, transformative purpose when using the Obama Image than Garcia ever intended with his "classic headshot." Fairey and One 3 Two wanted to get Obama elected; Garcia wanted to be able to provide a realistic and clean photograph of then-Senator Obama that could accompany news stories in which he was involved. Although the other two factors are negligible in light of the transformative aspect of the Obama Image, significant factual disputes exist given the evidence (1) that commerce was not the primary

was obtained in *December 2008* (by Mrs. Fairey), long after One 3 Two had begun selling the Obama Merchandise. Resp. to AP SUF No. 122.

¹⁶ On August 26, 2009, One 3 Two shipped 481 "Yes We Did" T-shirts to one of its large retailers, Zumiez, for the price of \$4,810. [Ex. EE.]

purpose of either Fairey or One 3 Two, and (2) that both Fairey and One 3 Two operated under the assumption that Fairey's use of the Garcia Photo was protected by fair use.

2. Factor Two: The Nature of the Work that Was Copied

The second statutory factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2), “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” *Castle Rock*, 150 F.3d at 143 (quoting *Campbell*, 510 U.S. at 586). Courts typically look to two components: (1) the degree of creativity within the work, and (2) whether the work is published or unpublished. *See Stewart v. Abend*, 495 U.S. 207, 237 (1990) (creative works entitled to more protection than factual works); *Harper & Row*, 471 U.S. at 555 (unpublished works entitled to more protection than published works). The AP again picks and chooses the law, however, focusing on the first component while completely ignoring the second component that favors application of a fair use defense. As a result, when both components are considered, the factor is essentially a non-issue for the fair use determination.

(a) The Degree of Creativity in the Garcia Photo Is Minimal

Any work that is copyrightable must have some “extremely low” degree of originality or creativity. 17 U.S.C. § 102; *see also Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951). Accordingly, the question is not *whether* a work is creative, but the *degree* of creativity: “The more creative the primary work, the more protection it should be accorded from copying.” *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1050 (S.D.N.Y. 1994) (*citing Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142 (2d Cir. 1984); *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432 (S.D.N.Y. 1986)). For instance, photographs are “often ‘factual or informational in nature,’” though they can be deemed sufficiently creative to make the second

fair use factor weigh in favor of photographers. *See Baraban v. Time Warner, Inc.*, 54 U.S.P.Q.2d 1759, 1763 (S.D.N.Y. 2000) (photograph of woman and cow was creative due to the photographer's creative choices in posing the subjects).

The “nature” of the Garcia Photo, as with most photographs, is that it is composed of both factual elements (most obviously, the face of President Obama) and creative aspects (the few minimal choices that Garcia exercised). Accordingly, the Garcia Photo should be entitled to lesser protection than a more fanciful work. *See, e.g., Nunez v. Caribbean Int'l News*, 235 F.3d 18, 23 (1st Cir. 2000) (modeling portfolio photos not artistic representations but promotional material); *Los Angeles News Serv. v. KCAL-TV Channel*, 108 F.3d 1119, 1122 (9th Cir. 1997) (news video of police beating during Los Angeles riots “is informational and factual and news” and although “not without creative aspect in that it is the result of [the cameraman's] skills with a camera,” factor weighed in favor of fair use); *Monster Commun's v. Turner Broadcasting Syst., Inc.*, 935 F. Supp. 490, 494-95 (S.D.N.Y. 1996). While the AP claims that the Garcia Photo “has been recognized . . . as a highly expressive work,” AP Mot. at 5, the only apparent evidence to support this claim is testimony by the AP's expert. *See AP SUF Nos. 79-82*. Similarly, although the AP claims that the Garcia Photo was not merely a news photo, its own records show that the AP “pushed” the Garcia Photo to member services with a caption tying the photo to the Darfur news conference, that the photo was printed with that caption, and that it is AP Images' practice always to link a photograph to the news story it accompanied. *See Resp. to AP SUF Nos. 88, 90*.

This factor also should weigh less heavily, given that the “factual” aspect of the photograph is a portrait of President Obama. As Judge Kaplan explained, although photographic images may be as deserving of protection as purely fanciful creations:

[H]istory has its demands. There is a public interest in receiving information concerning the world in which we live. The more

newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information.

Monster Communications, 935 F. Supp. at 494. In January 2008, then-Senator Obama was positioned to be the first African-American to become President of the United States. His candidacy was history in the making, and both Fairey and One 3 Two wanted to support and be part of this significant moment. By creating and widely disseminating a powerful political image, Fairey helped to make that change happen. And One 3 Two, by distributing more than 2 million t-shirts and other merchandise featuring the Obama image (most of which was distributed for free, or at large discounts), spread the word. Fairey and One 3 Two wanted to support and celebrate the man and his policies, not the photograph that Garcia took of him.

(b) The Garcia Photo Has Been Repeatedly Published and Thus Is Entitled to Less Protection

Even if the Garcia Photo were determined to be creative rather than factual, this factor would still support a fair use defense given that the Garcia Photo has been published numerous times. “Publicly released works qualify for far less protection against fair use than do unpublished materials.” *Baraban*, 54 U.S.P.Q.2d at 1762 (finding second factor weighed in favor of fair use because photograph had been widely disseminated and the photographer was paid); *see also Hofheinz v. A&E Television Network*, 146 F. Supp. 2d 442, 447 (S.D.N.Y. 2001); *Byrne*, 132 F. Supp. 2d at 235. “Unpublished works are the favorite sons of factor two.” *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991).

Here, it is undisputed that the Garcia Photo was published numerous times since it was taken in April 2006. *See* SUF No. 91. Accordingly, this component weighs in favor of the fair use defense. Having been widely disseminated in the press (by the AP), the Garcia Photo

became available for comment, criticism, and the stimulation of new expression—whether political or artistic—as long as there was transformation of that image, and no market injury. Thus the Garcia Photo is hardly a “favorite son[] of factor two.” *Wright*, 953 F.2d at 737. As a result, this factor either favors fair use or, at worst, “is essentially neutral.” *Monster Communs.*, 935 F. Supp. at 495.

3. Factor Three: Amount and Substantiality of Portion of Original Work Used

Similarly, this third factor—the amount and substantiality of the work used—depends in good measure on an analysis of other factors, such as the purpose and character of the use. *Campbell*, 510 U.S. at 586. The “inquiry must focus upon whether ‘the extent of . . . copying is consistent with or more than necessary to further ‘the purposes and character of the use.’” *Castle Rock*, 150 F.3d at 144 (internal quotations omitted). “Even full reproduction may be protected by fair use in the right circumstances.” *Baraban*, 54 U.S.P.Q.2d at 1763 (finding third factor favored fair use even though defendants reproduced photograph with only slight modifications in size and being reproduced in black-and-white instead of color in light of purpose); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).

In making this determination, “what is relevant is the amount and substantiality of the copyrighted *expression* that has been used, not the factual content of the material in the copyrighted works.” *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987); *see, e.g., Blanch v. Koons*, 396 F. Supp. 2d 476, 482 (S.D.N.Y. 2005) (finding that “a woman’s legs, crossed at the ankle” was “not sufficiently original to deserve much copyright protection”). This

analysis “calls for thought not only about the quantity of the materials used, but about their quality and importance too.” *Campbell*, 510 U.S. at 587.

Relying almost exclusively (and inappropriately) on its experts, the AP suggests that this factor should be determined in its favor. In doing so, the AP completely blows over the requirement that the analysis focus on the protectible elements and simply assumes, without any support, that the Obama Image is a direct copy of the Garcia Photo. It is not; if one were to put the Garcia Photo in a color copier, the resulting copy would be very different from the stylized, iconic Obama Image. *See* Section IV., *supra*. Furthermore, at best, the AP presents factual issues that cannot be decided at this time.

4. Factor Four: The Effect on the Potential Market for the Garcia Photo

The fourth statutory factor examines “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). This factor “is aimed at the copier who attempts to usurp the demand for the original work.” *United States v. American Society of Composers, Authors and Publishers*, 599 F. Supp. 2d 415, 431(S.D.N.Y. 2009). “In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work.” *NXIVM Corp.*, 364 F.3d at 481-82 “Thus, this factor must be must be analyzed in light of whether the new use is ‘transformative’ or merely ‘supersedes the original.’” *American Society of Composers*, 599 F. Supp. 2d at 431; *see On Davis*, 246 F.3d at 176. This inquiry takes into account the harm to the market for both original and derivative uses, but only “traditional, reasonable, or likely to be developed markets” as opposed to “transformative” markets. *Bill Graham Archives*, 448 F.3d at 614.

Here, the AP does not argue that the Obama Merchandise usurped the demand for the Garcia Photo. Nor could it. Instead, it argues market harm relating to (1) its lost licensing fee for the Garcia Photo; (2) its ability to license the Garcia Photo for derivative works; and (3) the AP's business in general. Only the first two types of harm are considered by courts as part of the fourth factor, and the AP has failed to demonstrate that it suffered either type of harm in this case. Thus, in a last-ditch attempt to show market harm, the AP attempts to rewrite the law by trying to shift the focus of this factor from the market harm to the Garcia Photo to the harm to AP's licensing business in general. However, the focus of this factor is on the Garcia Photo, and not the AP, and the Court should not give credence to the AP's misstatement of the law. For the reasons explained below, the fourth factor should weigh in favor of One 3 Two.

(a) The AP's Potential Lost Licensing Fee from One 3 Two Should Not Impact the Court's Fair Use Analysis

Ignoring the central issue of market substitution, the AP first points to the lost licensing fee that it would have received had One 3 Two licensed the Garcia Photo, claiming that it was deprived of the "royalty fee" that it should have received from One 3 Two. AP Mot. at 48. The AP's potential lost licensing fee from One 3 Two should not impact the Court's fair use analysis, however. "Not every effect on potential licensing revenues enters the analysis under the fourth factor" because "a copyright holder can *always* assert some degree of adverse affect on its potential licensing revenues as a consequence of the secondary use at issue simply because the copyright holder has not been paid a fee to permit that particular use." *See American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929-30 & n. 17 (2d Cir. 1995) ("By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties." (citing *Leval* at 1124)); *see also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on*

Copyright, § 13.05[A][4]). Indeed, to accept the AP’s argument that any market harm based on the lost licensing fee from One 3 Two should weigh against fair use would result in a circular analysis, as the purpose of the fair use test is to determine whether One 3 Two would have been required to pay a licensing fee in the first instance, given the transformative nature of the Obama Image.¹⁷

(b) The Potential Derivative Market for the Garcia Photo Was Not Impacted by the Obama Merchandise

The AP has failed to show that the potential derivative market for the Garcia Photo was impacted by the Obama Merchandise. The AP argues that the market for derivative works of the Garcia Photo has been harmed because the Garcia Photo was “used in a derivative work without credit or compensation” it has “become unsuitable for use by others in similar derivative works because it is too closely associated with Mr. Fairey and Obey Clothing, who have appropriated it for themselves.” AP Mot. at 59. Neither the law nor the record in this case support the AP’s convoluted argument.

First, “the market effect must be evaluated in light of whether the secondary use is transformative.” *On Davis*, 246 F.3d at 176 (citing *Campbell*, 510 U.S. at 591). As explained above in Section IV.B.1.a., the Obama Image is a transformative work, and One 3 Two’s use of the Obama Image on the Obama Merchandise was similarly transformative. The transformative nature of the Obama Merchandise weakens any claim of potential market harm relating to the

¹⁷ The AP’s reliance on *On Davis* is misplaced because that case involved a “market substitute” that actually harmed the market for the original work. 246 F.3d at 175-76. Since *On Gap* was decided, the Second Circuit has made clear that every fair use necessarily involves some loss of royalty, and that alone cannot constitute market harm. *Bill Graham Archives*, 448 F.3d at 614 (“we do not find a harm to [the plaintiff’s] license market merely because [the defendant] did not pay a fee for [the plaintiff’s] copyrighted images”).

use of the Garcia Photo for derivative works. *See Castle Rock*, 150 F.3d at 145 (“by the very nature of transformative endeavors, persons other than the copyright holder are undoubtedly better equipped, and more likely, to fill these particular market and intellectual niches”).

Next, “[o]nly an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable.” *American Geophysical Union*, 60 F.3d at 930. That a copyright holder has previously secured licenses does not make a market “traditional, reasonable, or likely to be developed.” *Bill Graham Archives*, 448 F.3d at 614.

Bill Graham involved facts analogous to this case and found in favor of the defendant. 448 F.3d 605. In that case, the plaintiff sued the defendant for printing reproductions of Grateful Dead posters in a book about the famous jam band without permission. *Id.* at 607. The Second Circuit examined whether the defendant’s use of those posters usurped the plaintiff’s potential to develop a derivative market. *Id.* at 614. The plaintiff argued that (1) fees were paid to other copyright owners for the use of their images in the defendant’s book and (2) it established a market for licensing images, and in this case expressed a willingness to license the images to the defendant. *Id.* The Court rejected both of these arguments because they did not show “impairment to a traditional, as opposed to a transformative market.” *Id.* The Second Circuit held that the defendant’s use of the plaintiff’s images was “transformatively different from their original expressive purpose.” *Id.*

Here, like the defendant in *Bill Graham*, One 3 Two’s use of the Obama Image on merchandise was transformative. *See* Section IV.B.1.a. Like the defendant in *Bill Graham*, the AP attempts to show market harm by arguing that One 3 Two paid for a license to use Fairey’s Palestinian Woman image (in the small amount of [REDACTED] and that it has an established market for licensing images. AP Mot. at 58-59; Declaration of Brendan Kehoe in Support of AP’s Motion

for Summary Judgment (“Kehoe Decl.”), Ex. 39. This Court should reject those arguments just as the Second Circuit did in *Bill Graham*.

This Court should similarly reject the AP’s attempts to establish market harm by speculating about the benefits the AP could have received if One 3 Two and Fairey had credited the AP. AP Mot. at 59-60. The AP’s business model is to offer *millions* of photographs at relatively low prices, and, according to the sworn testimony of an AP Images sales manager, “[n]o one image is more important than another image.” [Ex. L (DeGrave Depo. at 156:6-19).] Notably, the AP has not presented any evidence that it has lost any licensing opportunities for the Garcia Photo from any third parties based on One 3 Two’s use of the Obama Image.¹⁸ To the contrary, there is evidence that the presence in the market of the Obama Image caused more people to purchase the Garcia Photo, and led to the sale of dozens of fine prints of the Garcia Photo for as much as \$1,000 a piece. [Ex. HH (Deposition of James Danziger (“Danziger Depo.”) at 65:14-72:19).] For example, the Garcia Photo has been available for download through AP Images since April 2006. [Ex. G (Gerberich 09/25/09 Depo. at 144:25-146:10; Ex. QQ, Tabs 3 & 4.)] The download history of the Garcia Photo shows that the AP has earned more than double in downloads of the Garcia Photo than it did in the time period before the Obama Image was created. [Exs. H, I; Ex. QQ, Tab 3.] In addition, the AP also earned revenue through the sales of prints of the Garcia Photo sold by gallery owner James Danziger. These sales would not likely have occurred if not for the creation of the Obama Image. [Ex. HH (Danziger Depo. at 81:19-82:23).] The AP has failed to present evidence that the Obama Merchandise usurped a “traditional, reasonable, or likely to be developed market” of the Garcia Photo. *See Blanch*, 467

F.3d at 258 n. 9 (“[N]othing in the record here suggests that there was a derivative market for Blanch to tap into that is in any way related to Koons’ use of her work, even if she dearly wanted to.”).

**(c) The AP Misstates the Law in an Attempt to Improperly Shift
the Focus from the Garcia Photo to the AP Generally**

The AP significantly misstates the law relating to the fourth fair use factor in an attempt to improperly shift the focus from the Garcia Photo to the AP generally. Contrary to the AP’s assertion, courts *do not* consider “(iii) the harm to the *copyright owner* were the challenged use to become widespread.” AP Mot. at 57. Rather, as is evident from the cases cited by the AP in purported support of this statement, courts focus on the impact on the potential market for the *original copyrighted work* if the defendant’s conduct were to become widespread. *See Campbell*, 510 U.S. at 590 (courts consider “‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original”).¹⁹

¹⁸ The AP’s reliance on its expert, William Landes, to support its theory of market harm should not be considered, as explained in One 3 Two’s response to the AP’s Rule 56.1 Statement.

¹⁹ *See also Harper & Row*, 471 U.S. at 568 (“to negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work’”); *Princeton Univ. Press v. Mich. Doc. Serv.*, 99 F.3d 1381, 1386-87 (6th Cir. 1996) (“the Supreme Court has said, ‘one need only show that *if the challenged use should become widespread, it would adversely impact the potential market for the copyrighted work*’”); *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513, 549 (S.D.N.Y. 2008) (“the fourth factor examines ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original’”); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (2007) (in determining overall market impact, courts consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original”).

In apparent recognition of the lack of market harm to the Garcia Photo, the AP argues instead that the AP will suffer “serious consequences” as to *all* of its merchandise if One 3 Two’s actions became widespread. AP Mot. at 61. The AP’s concerns are almost certainly present in every case in which a corporation’s monopoly is challenged—it *is* easier to make money if no one else can have any use of its products without paying for it. That does not mean that those concerns are legitimate, or that they mean the fourth factor should be weighted against fair use or that they trump the First Amendment interests in promoting political speech. The very premise of fair use is that a copyright owner’s monopoly must be weighed against other important issues, such as allowing for expressions guaranteed by the First Amendment.

This Court should therefore not consider the harm to the AP in general (as opposed to the harm vis-à-vis the Garcia Photo). Should it do so, however, the AP also greatly overestimates the impact of a ruling in favor of One 3 Two. This is not a case where a defendant duplicated a copyrighted photograph without licensing the photograph from the AP. Rather, One 3 Two placed the Obama Image—a transformative work created by an artist using a thinly protected AP photograph only as a reference—onto apparel and sold merchandise to support President Obama’s candidacy. A finding that One 3 Two’s specific use of the Obama Image in this case was fair use would in no way undermine the AP’s entire licensing business. Accordingly, the fourth fair use factor should weigh in favor of One 3 Two.

5. Other Considerations: Protection of One 3 Two’s Political Expression

The four statutory fair use factors were not intended by Congress to be exhaustive. *See Harper & Row*, 471 U.S. at 560. That is particularly the case where, as here, important First Amendment rights are directly involved.

The fair use doctrine must be applied to prevent copyright law from violating the Constitution by ensuring that copyright owners are not able to use the exclusive rights created by section 106 of the statute to impede “scholarship,” “comment,” and “parody.” This case involves an aspect of freedom of expression even closer to the core of the First Amendment than the foregoing activities, and more so than any other published case on fair use: *One 3 Two’s* freedom of political expression. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 898 (2009) (“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))). Fairey’s primary objective in creating and distributing the Obama image was to promote the presidential candidacy of Barack Obama. *One 3 Two* propagated that image on apparel to support that same political message. If the fair use doctrine serves to reconcile copyright law with the First Amendment by preserving opportunities for “scholarship” and “parody” (from lampooning Jerry Falwell to remaking the song “Pretty Woman”), it surely it ought also be construed so as to preserve opportunities to make decisive interventions in elections.

The Second Circuit has recognized that the scope of the fair use doctrine should be expanded when the information at issue “relates to matters of high public concern.” *Consumer’s Union of United States v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983). *See also NRA v. Handgun Control Federation of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994); *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 11 F. Supp. 2d 329, 334 (S.D.N.Y. 1998) (urging that courts should look to whether the defendant’s work “aspires to serve broad public purposes” in fair use cases), *aff’d mem.*, 181 F.3d 83 (2d Cir. 1999). Plainly, the Obama Image relates to matters of high public concern and aspire to serve broad public purposes.

Should this Court determine that fair use does not extend to the political statements by One 3 Two, the repercussions will be vast. Most directly, such a ruling would penalize One 3 Two's expressive conduct.²⁰ A high-visibility judgment against One 3 Two would also have a massive chilling effect on artists with similar goals to send political messages, and companies such as One 3 Two who seek to support the messages. Less obvious but equally important, a ruling in the AP's favor could empower the AP to secure injunctions against and recover damages from many other persons and organizations who have built upon Fairey's poster. Since the public dissemination of the Obama image, it has been employed by many other politicians and commentators to make political statements of their own. Several of these second-generation posters used the image of Obama that Fairey created verbatim; they merely altered the caption. Here is just one example:



[Ex. W.]

Fairey has not objected to any of these uses of his creation; his consistent position is that the critics have a legal and moral right to make their comments. Indeed, many copycats have

²⁰ That One 3 Two is a corporation does not lessen its First Amendment rights, as recently confirmed in *Citizens United*. 130 S.Ct. at 900.
(footnote continued)

imitated Fairey's style. [Ex. W.] But the position taken by the AP would lead to a very different outcome. A well-settled rule in copyright law is that a person who reproduces a derivative work without permission violates the copyright in the original work as well as the copyright (if any) in the derivative work. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 223 (1990). Accordingly, since the AP contends that the Obama Image is an unauthorized derivative work of the Garcia Photo and is not excused by the fair use doctrine, the poster displayed by Glenn Beck (and many other similar posters) reproducing Fairey's image of Obama exactly would give the AP claims against Beck equal in strength to its claim against One 3 Two.²¹ After all, Beck's poster is no more (and no less) transformative of the Garcia Photo than is the Obama Image or the Obama Merchandise. In sum, if the AP prevails against One 3 Two, it could prevail in a suit against Beck and the hundreds of other individuals who have created works that contain the Obama Image. *See Ex. W; see also Section III.C.3, supra.*

A ruling for the AP in this case would give rise to a remarkably deep and wide threat to freedom of speech in its most powerful form: the ability to make substantive comments about politicians. The importance of avoiding that outcome strongly reinforces the above analysis of the four factors set forth in section 107: One 3 Two's conduct must be deemed fair. Indeed, it is hard to imagine a case that better fits the Supreme Court's distillation: "The fair use doctrine . . . 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that law is designed to foster.'" *Campbell*, 510 U.S. at 577 (quoting *Stewart*, 495 U.S. at 236).

²¹ Note that the three-year statute of limitations on suits for copyright infringement has not yet run. *See* 17 U.S.C. § 507(b) ("No civil action shall be maintained under the provisions of (footnote continued)

VII. CONCLUSION

This case falls squarely within the realm of expression that was not to be prohibited when the copyright laws were established. The Obama image is a powerful reference to the idea of conventional political leaders combined with the fact of Barack Obama's appearance juxtaposed with Fairey's style and explicit messages of hope and progress.

this title unless it is commenced within three years after the claim accrued.”). Thus, this issue is not academic.

The artistic and political commentary added to the public discourse in a way that the Garcia Photo never could. As such, the reference to the Garcia Photo infringed no copyrights and there are at least triable issues as to whether its use was fair. For all the foregoing reasons, One 3 Two respectfully requests that the Court deny the AP's motion for summary judgment in its entirety.

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Respectfully submitted,

By: _____ /s/

Robyn C. Crowther
Jeanne A. Fugate
Laurie C. Martindale
Caldwell Leslie & Proctor, PC
1000 Wilshire Boulevard, Suite 600
Los Angeles, California 90017-2463
Telephone: (213) 629-9040
Facsimile: (213) 629-9022
crowther@caldwell-leslie.com
fugate@caldwell-leslie.com
martindale@caldwell-leslie.com

Theresa Trzaskoma
Charles Michael
Brune & Richard LLP
One Battery Park Plaza, 34th Floor
New York, NY 10004
Telephone: (212) 668-1900
Facsimile: (212) 668-0315
ttrzaskoma@bruneandrichard.com
cmichael@bruneandrichard.com

*Counsel for Counterclaim Defendant
One 3 Two, Inc. (d/b/a Obey Clothing)*