

EXHIBIT D

TO CROWTHER DECLARATION

IN SUPPORT OF ONE 3 TWO, INC.'S

MOTION IN LIMINE NO. 2

PART I OF IV

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Civil Action No. 09-01123(AKH)

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

**Expert Witness Report of
Blake Pembroke Sell**

CONFIDENTIAL: SUBJECT TO PROTECTIVE ORDER

**EXPERT REPORT OF
BLAKE PEMBROKE SELL**

I. INTRODUCTION

A. Qualifications

1. I am an independent management consultant, specializing in the photography industry and based in New York City. I have worked in the photography industry since 1977. Before becoming an independent consultant, I was a Director at Getty Images, the world's largest photo company with approximately \$1 billion in annual revenue. In that capacity I was responsible for, among other things, (1) evaluating and acquiring numerous photography and industry-related companies; (2) assessing and developing strategic partnerships; (3) managing relationships with strategic partners; (4) valuing the photo archives and other assets of potential partners and acquisition targets; (5) developing and exploiting new markets for Getty Images' extensive archive of images; (6) developing existing business units within the Getty Images infrastructure; (7) exploring and exploiting new business opportunities for Getty Images.
2. Prior to joining Getty Images, I was the senior executive at two international photo agencies, World Picture Network and SIPA Press. In both companies, I was the executive in charge of the editorial photography operations with responsibilities that evolved to include management of the sales force.
3. During my more than 30 years in the photo industry, I have worked for three major competitors of The Associated Press, including (i) two years at Getty Images, (ii) five years (1983-1988) as staff photographer and regional photo manager for United Press International, and (iii) 12 years (1989-1999) as regional manager, senior staff photographer, White House photographer, and senior on-site photo editor for Reuters. Early in my career, I worked for five years (1977-1983) as a staff photographer and photo editor for a daily newspaper in the Los Angeles area, the Pasadena Star-News.
4. Throughout my career, but particularly in the past 15 years, I have dealt extensively with licensing and copyright issues on a regular basis from the standpoint of the licensor

of images as part of the management team at entities that own substantial copyright portfolios.

5. I hold a Bachelor of Arts degree in Journalism from the University of Southern California.

B. Assignment by Counsel and Summary of Conclusions

6. I have been retained by Kirkland & Ellis LLP, counsel for The Associated Press, in regard to Civil Action No. 09-1123 (AKH) in the venue of the United States District Court for the Southern District of New York, to rebut the following aspects of the expert opinion of John Jarosz:

- (A) The Associated Press' purpose in creating the photograph of Barack Obama at issue in this case (the "Obama Photo" (Exhibit A)).
- (B) The Associated Press' licensing practices and the negotiations that The Associated Press would have entered into with Shepard Fairey with respect to a license to use the Obama Photo, had Mr. Fairey sought to license its use:
- (C) Aspects of the nature and magnitude of the harm to The Associated Press as a result of Shepard Fairey's unlicensed use of the Obama Photo, including that:

7. In general, I disagree with Mr. Jarosz' approach. Based on his report, it appears that his experience is in the area of economic consulting, including repeatedly testifying as an expert witness on economic issues. Mr. Jarosz does not claim to have any experience or background in news reporting, photojournalism, or photography licensing. His report makes unsupported, and unwarranted, assumptions about how these businesses work that are at odds with what I know to be the case based on my 30 years of experience in these areas. In short, the Jarosz Report reflects an artificial scenario that has no basis in reality.

C. Materials Considered

8. In formulating my expert opinions, I have reviewed the report written by Plaintiffs' expert, John C. Jarosz (the "Jarosz Report").

9. In reaching my conclusions regarding each of the expert reports, I also have considered additional sources, including deposition transcripts and documentary evidence

produced by the parties named in this litigation, and information publically available at the time of this report. The materials that I reviewed are set forth on Exhibit B to this report.

10. I have also relied on my own professional experience and judgment in the areas of news photography, image management and licensing based on more than 30 years of work experience in the photo industry.

II. BACKGROUND

A. The News Industry Today

11. The news industry is suffering from increasing financial pressure. There are 25 % fewer daily newspapers and 25% fewer newspaper subscribers than in 1940.¹ Twenty daily newspapers have shut down or stopped printing just since the Spring of 2007.² Newspaper readership in the United States is at its lowest level in seven decades.³ A recent article by the *Washington Post* describes the situation this way: "*The newest numbers on newspaper circulation ... paint a dismal picture for an industry already feeling the pressures of an advertising slump coupled with the worst business downturn since the Great Depression.*"⁴

12. Among those news outlets that have suffered a significant decline is United Press International, which was once a leading news wire service and fierce competitor to The Associated Press. It encountered significant financial difficulties in the 1980s and 1990s and was sold to News World Communications, an entity controlled by the Reverend Sung Myung Moon's Unification Church, in 2000.⁵

13. Following the sale of UPI, today there is no other United States-based news wire service that provides a comparable level of global coverage to The Associated Press.

¹ See <http://www.journalism.org/node/1134>.

² See <http://newspaperdeathwatch.com/>.

³ See <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html>.

⁴ Washingtonpost.com (<http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html>)

⁵ See <http://en.academic.ru/dic.nsf/enwiki/26948>.

14. The current state of the news industry is due to a number of causes. One is the current global economic condition. Another is clearly the Internet, which allows for broader access to content but poses very significant challenges for newspapers in terms of monetizing the content that they expend resources to create.

15. Although a majority of the newspapers in the United States have aggressively attempted to transition to Internet delivery, the difference in the amount of advertising revenue that newspapers receive from the same reader on the Internet as opposed to print advertising revenue is significant. A 2007 study of the *New York Times*' advertising revenue illustrates this point: although 90% of the total readers view *New York Times* content on the Internet, Internet advertising revenue accounts for only 10% of that newspaper's ad revenue.⁶

16. The Newspaper Association of America reported in March 2010 that total print newspaper advertising declined 28.6% in 2009.⁷ From a high of \$47.4 billion in 2005, the last year of positive ad growth, total print newspaper ad revenue has declined to \$24.8 billion in 2009.⁸ And online revenue is not replacing the lost print ad revenue, as the revenue from such ads remains small and is also declining in the current economic climate -- total online newspaper ads declined 11% in 2009, to \$2.7 billion from \$3.1 billion in 2008.⁹

17. The decline in ad revenue has been matched by sharp declines in newspaper circulation. In the six month period ending March 31, 2010, total circulation declined 8.7% as compared with the same period a year earlier.¹⁰ In the six month period ending

⁶ Publishing2.com: (<http://publishing2.com/2007/07/17/newspaper-online-vs-print-ad-revenue-the-10-problem/>)

⁷ See <http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx>.

⁸ Id.

⁹ Id.

¹⁰ See http://www.buffingtonpost.com/2010/04/26/newspaper-circulation-dow_n_551628.html;
<http://www.presort.com/2010/04/declining-newspaper-circulations-contribute-to-financial-woes-of-postal-service/>.

September 30, 2010, circulation declined 5% compared with the same period a year earlier.¹¹

18. The decline in the economic health of newspapers has affected the way that news is gathered. More and more United States news outlets have cut back on their newsgathering operations, including closing their domestic and foreign bureaus.

19. The *Washington Post*, for example, closed its last domestic bureaus in November 2009.¹² Similarly, many major U.S. newspapers, including the *Baltimore Sun*, *Boston Globe*, *Chicago Tribune*, *Newsday*, and the *Philadelphia Inquirer*, as well as magazines such as *Businessweek*, and *Time*, among others, have closed some or all of their U.S. and foreign bureaus.¹³

20. Nor have the difficulties facing the news industry been limited to print journalism. ABC News announced in February 2010 that it would close all of its bureaus worldwide, with the sole exception of Washington, D.C.¹⁴ CBS News and NBC News have closed bureaus and eliminated many journalists in the past few years.¹⁵ CNN has eliminated its Science and Environmental reporting and reduced its international bureaus.¹⁶ CNN now operates news-gathering bureaus in only 36 cities (or fewer due to recent cutbacks) across the world.¹⁷

¹¹ See <http://www.latimes.com/business/la-fi-newspaper-circulation-20101025,0,6144394.story>.

¹² Washingtonpost.com (<http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112403014.html>)

¹³ F (<http://www.globaljournalist.org/stories/2007/01/01/the-end-of-an-era/>)

¹⁴ Washingtonpost.com (<http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/02/abc-news-to-cut-half-its-domestic-correspondents-shut-down-all-bureaus-except-washington.html>)

¹⁵ www.mediabistro.com (http://www.mediabistro.com/tvnewser/cbs-news-london-bureau-cuts-staff_b33187)

¹⁶ www.broadcastingcable.com (http://www.broadcastingcable.com/article/116343-Ted_Turner_Chided_CNN_For_Cutbacks_In_Environmental_International_Coverage.php)

¹⁷ See <http://news.turner.com>.

B. The Associated Press -- History and Background

21. I have been familiar with The Associated Press for decades. The Associated Press was established in 1846, and continues to operate to this day, as a not-for-profit news cooperative,¹⁸ owned by its 1,500 U.S. daily newspaper members.¹⁹ The Associated Press' member newspapers elect a board of directors that directs the organization.²⁰

22. The costs of The Associated Press' news operations are primarily funded through contributions, or "assessments," paid by its owners/members. As a not-for-profit news cooperative, any incidental profit that The Associated Press generates is applied to defraying the member assessments that its owner/member newspapers would otherwise pay.

23. As a news wire service, The Associated Press acts as a content creator and distributor to news media outlets that themselves actually broadcast and publish the news, such as Yahoo! News, and the *New York Times*.

24. The Associated Press today has more than 3,700 employees in 300 bureaus worldwide.²¹ It serves 1,700 newspapers and 5,000 radio and television outlets in the United States as well as numerous newspaper, radio and television subscribers internationally.²² According to The Associated Press' research, more than half of the world's population sees news from The Associated Press' wire service on any given day.²³

¹⁸ With the exception of a small number of specialty magazines and trade publications, community newspapers and National Public Radio, The Associated Press is the only not-for-profit media organization of its kind. See Harvard University: The Hauser Center for Nonprofit Organizations.

¹⁹ See <http://www.ap.org/pages/about/faq.html>.

²⁰ See <http://www.ap.org/pages/about/faq.html#2>.

²¹ See <http://www.ap.org/pages/about/about.html>.

²² See <http://www.ap.org/pages/about/faq.html#2>.

²³ AP.org (<http://www.ap.org/pages/about/faq.html>)

25. The Associated Press has won numerous awards over the years for its journalism, including 49 Pulitzer Prizes, more than any other news organization in the categories for which it competes.

26. The Associated Press has also won 30 Pulitzers for photography, more than any other news organization. Examples of the images that The Associated Press' photographers have made throughout its history include the following:

- Associated Press photographer Nick Ut's photograph, shown below, of a naked girl running down a Vietnam road after a napalm attack came to symbolize the Vietnam War's devastating impact on Vietnamese civilians.



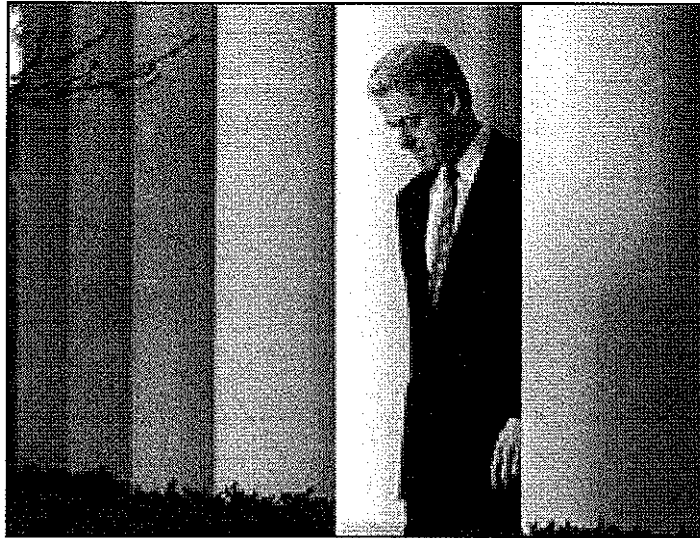
- Associated Press photographer Eddie Adams' photograph, shown below, of a man being executed on a Saigon street with a handgun to his head epitomized the brutality of the Vietnam War.



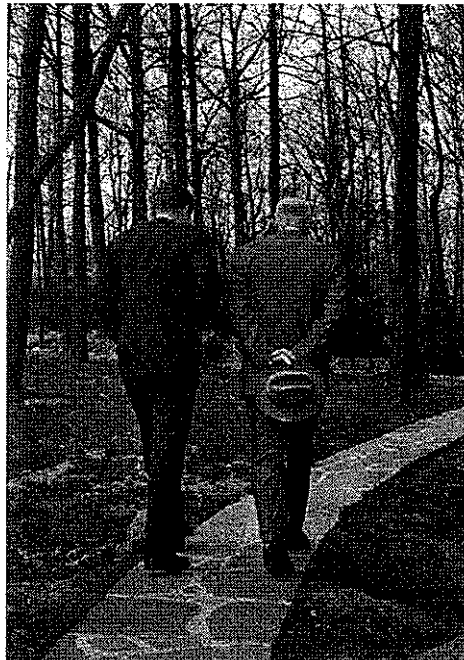
- Associated Press photographer Jeff Widener's photograph, shown below, of a lone protester halting a line of Chinese tanks in Tiananmen Square is now instantly recognized as a symbol of the Chinese struggle for civil liberties.



- Associated Press photographer Scott Applewhite's 1998 photograph of a solemn and somber Bill Clinton, shown below, captures the impact of the Monica Lewinsky scandal on the president and the nation in a single moment.



- Associated Press photographer Paul Vathis took the photograph below of Presidents John Kennedy and Dwight Eisenhower in Camp David as they walked away from a posed photo op to discuss problems created by the Bay of Pigs invasion.



- More recently, Associated Press photographer Charlie Riedel's disturbing picture of a bird coated in oil during the 2010 Gulf oil spill conveyed to viewers the reality of the incident.²⁴



27. The Associated Press today reports from 240 fully staffed bureaus around the world, providing news stories, feature stories, sports, weather, business reporting, entertainment news, video and still photographs to thousands of newspapers, radio stations, websites, corporate clients and television stations and networks.

28. For example, the overwhelming majority of the news on Yahoo! News comes from The Associated Press, as seen in Exhibits C and D to this report. In a random snapshot of Yahoo! News taken October 9, 2010, at 10:20 PM, 18 of the 26 news stories were provided by The Associated Press (69%), 17 of the 21 news photos were provided by The Associated Press (81%), and 1 of the 4 video reports was provided by The Associated Press (25%). Excluding six news stories in the user-selected local New York news window, 18 of the 20 U.S. news stories were provided by The Associated Press (90%).

29. One example of The Associated Press's in-depth coverage is its work on the 2010 Gulf oil spill. As The Associated Press states on its website:

²⁴ "You can never predict when a single photograph will transcend that day's front page and become an icon of an era. You just know it when it does. And in the case of the Gulf of Mexico oil spill, that picture arrived Thursday," stated former USA Today photo editor Matt Mendelsohn in an opinion column for AOLNews. See (http://www.ap.org/oil_spill/birds_60410.html). Said Mendelsohn, "Open Facebook, scroll through your friends' news feeds and the picture (Riedel's bird photo) pops up seemingly every other post. It's the lead picture in The Washington Post print edition, The Boston Globe online, and newspapers from the Press-Register of Mobile, Ala., to the Anchorage Daily News. The Huffington Post had it as a full-screen banner image, complete with the headline 'A Deed Most Fowl.'"

In May 2010. The Associated Press deployed more than 50 reporters, photographers and videographers to the scene of the worst oil spill in U.S. history. They supplemented nearly two dozen local AP journalists who have a deep understanding of the people, economics and environment of the affected states they live in and cover. In addition, another 200 journalists contributed to AP's reporting, from Alaska to Washington, D.C., and Havana to the Philippines.

The coverage has ranged from a team dedicated to reporting the environmental impact of the spill to a group of investigative journalists digging into the legal, business and policy aspects of the disaster.

"The Associated Press is committed to providing the breaking and in-depth news, in every format, that Americans and others need to stay informed about this unprecedented disaster and to understand its impact," said AP President Tom Curley. "It is a story without an end in sight, and we will follow it."

30. It is well known in the industry that reporters and photographers often work in dangerous locations, where they risk injury or death in the line of duty. The Associated Press' staff is no different in this respect. For example, in August 2009 award-winning Associated Press photographer Emilio Morenatti suffered the loss of his foot when the vehicle he was riding in ran over a bomb in the Afghanistan desert.²⁵

31. The Associated Press' Wall of Honor, found on its website²⁶ and in its New York newsroom, honors the many Associated Press journalists who have died in the line of duty while covering the most significant stories of their times. The first journalist listed is Mark Kellogg, who died on June 25, 1876, while covering General George Custer at the battle of Little Big Horn. Some of the most recent entries, from the last decade, honor Associated Press journalists who have died while covering the Iraq War.

32. It is my understanding that The Associates Press has created an Emergency Relief Fund that distributes grants to staffers and their families who have been affected by disasters such as Hurricane Katrina and the recent natural disaster in Myanmar.²⁷

33. In sum, like the rest of the news industry, The Associated Press has also been affected by the current global economic downturn, the widespread availability of free

²⁵ See <http://blogs.sacbee.com/photos/2009/08/-kabul-ap----a.html>.

²⁶ See <http://www.ap.org/wallofhonor/index.html>.

²⁷ See <http://www.ap.org/relieffund/>.

content on the Internet, and the tough financial situation of its owners/members have all taken a toll on The Associated Press.

34. Because of the financial difficulties facing its owner/members as a result of these pressures, the members have been unable to continue funding the monetary assessments that are used to operate The Associated Press at the same level as they previously had. As a result, in April 2009 Dean Singleton, Chairman of The Associated Press, announced a further \$35 million decrease in assessments for 2010, on top of previous cuts,²⁸ which necessarily resulted in cuts in The Associated Press' operating budget.

C. The Creation and Development of AP Images

35. In light of the financial difficulties facing its owner/member newspapers, and the resulting cuts in member assessments, The Associated Press has had to increasingly rely on alternative sources of revenue in order to support its newsgathering operations.²⁹

36. In recent years, one of the main alternative sources has been AP Images, a division of The Associated Press that it promotes as the "essential source of editorial and creative photographs, videos, graphics and interactive for professional image buyers."³⁰

37. Over the past decade, The Associated Press has dedicated resources to developing its photo archive business as a steady and significant alternative revenue source, leveraging The Associated Press's vast archive of photographic images.³¹

38. Prior to the AP Images strategic initiative in 2005-2006, The Associated Press operated a standalone photo archive business called Wide World. There was no meaningful effort, however, to monetize the photographs that The Associated Press produced around the world, typically at great expense and often at great physical risk to

²⁸ PaidContent.org: AP Launching News Industry Campaign to Protect News Content (<http://paidcontent.org/article/419-ap-launching-newspaper-industry-campaign-to-protect-news-content/>)

²⁹ PaidContent.org: AP Launching News Industry Campaign to Protect News Content (<http://paidcontent.org/article/419-ap-launching-newspaper-industry-campaign-to-protect-news-content/>)

³⁰ AP Images website (<http://www.apimages.com/uns/splash/?url=about/default.html>)

³¹ AP Images Strategic Plan 2007-2009 (09b - AP0005572-5602), page 12.

Associated Press photographers.³² Wide World produced insignificant income relative to the overall operating expenses of The Associated Press and also relative to other players in the photo industry.³³

39. In approximately 2005 or 2006, The Associated Press shut down the Wide World photo archive and began the initial launch of AP Images as a standalone business and website.³⁴ The AP Images online database platform launched in late 2006 or early 2007.³⁵

40. A number of practical changes have since been made in order to ensure that The Associates Press' news operations generate a steady stream of content for licensing by AP Images. For example, Washington-based staff photographers are required to archive all of the images they create onto company-supplied external hard disks that are then stored in the Washington bureau for potential later use by AP Images, whereas previously all unused pictures were deleted and the camera recording disks were reused for the next assignment.³⁶

41. Today, the stored hard disks are sent to AP Images archive and the images are edited and transferred into the archive by a staff of editors.³⁷ The result is that AP Images is able to offer a vastly greater selection of images than those required by the wire service for subscription members, or previously made available to potential customers.³⁸

42. By creating and developing AP Images, The Associated Press sought to emulate the very successful licensing businesses developed by other industry leaders, including my

³² AP Images Strategic Plan 2007-2009 (AP0005572-5602), page 5.

³³ Interview with F. DeGrave, Oct. 1, 2010.

³⁴ See AP 2006 Annual Report, (AP0005908-5939, at AP0005926).

³⁵ J. Gerberich (Sept. 25, 2009) Tr. at 21:5-23:13.

³⁶ Interview with D. Ake, Sept. 28, 2010

³⁷ Interview with F. DeGrave, Oct. 1, 2010

³⁸ Interview with F. DeGrave, Oct. 1, 2010