

**EXHIBIT B**  
**TO CROWTHER DECLARATION**  
**IN SUPPORT OF ONE 3 TWO, INC.'S**  
**MOTION IN LIMINE NO. 4**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**SHEPARD FAIREY and OBEY GIANT ART, INC.,**  
**Plaintiffs,**

v.

**THE ASSOCIATED PRESS,**  
**Defendant and Counterclaim**  
**Plaintiff,**

v.

**SHEPARD FAIREY, et al.**  
**Counterclaim Defendants**

**SUPPLEMENTAL EXPERT REPORT OF WILLIAM M. LANDES**  
**December 1, 2010**

**I. INTRODUCTION AND OVERVIEW**

1. I, William Landes, submitted an Expert Report in this matter on behalf of The AP on November 2, 2010.<sup>1</sup> This Supplemental Report incorporates the information and opinions that I offered in my November 2, 2010 Expert Report. Since submitting my Expert Report on November 2, 2010, I have reviewed the Rebuttal Expert Report of John C. Jarosz, dated November 2, 2010 (Mr. Jarosz's "Rebuttal Report"), in which Mr. Jarosz expands on the arguments and affirmative opinions he offered in his original Expert Report of October 1, 2010 (Mr. Jarosz's "Initial Report"). Because he did not express these arguments and opinions in his Initial Report, I had no opportunity to respond to them.<sup>2</sup> In this Supplemental Report, I respond

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1. Expert Report of William M. Landes, November 2, 2010, ¶54.
  2. Counsel for The AP informed me that, because Plaintiffs bear the burden on issues of fair use and apportionment, Mr. Jarosz should have fully disclosed his arguments and opinions with respect to those issues in his Initial Report, which I rebutted in my November 2, 2010 Expert Report. Because he did not do so, counsel asked me to submit this Supplemental Report addressing the additional arguments and affirmative opinions that Mr. Jarosz did not disclose in his Initial Report but instead offered, for the first time, in his Rebuttal Report.

to Mr. Jarosz's additional statements, in particular those regarding: i) the extent to which Mr. Fairey's Obama HOPE/PROGRESS Image, including the posters and merchandise bearing the image, were commercial works; ii) the economic consequences to The AP of Mr. Fairey's unauthorized use of The AP's Obama Image (the photograph that Mr. Fairey used to make the HOPE/PROGRESS Image); and iii) the amount of revenue earned by Mr. Fairey and his licensees' use of the Obama Image that should be apportioned to The AP.

2. I find that Mr. Jarosz's conclusions fail as a matter of economics, for the following reasons:

- As an economic matter, Mr. Jarosz is wrong that the "actual damages" to The AP for which Mr. Fairey should be held responsible should not include damages resulting from uses that Mr. Fairey authorized others to make of his graphic representation of The AP's Obama Image (the "HOPE/PROGRESS Image").<sup>3</sup> Moreover, the fact that Mr. Fairey granted numerous licenses of the HOPE/PROGRESS Image (effectively sublicensing The AP's Obama Image), which generated significant revenue for him and his companies, further demonstrates the commercial nature of Mr. Fairey's works.
- Mr. Jarosz miscalculates Mr. Fairey's profits resulting from the unauthorized use of the Obama Image, because he fails to account for the true commercial value of the works that Mr. Fairey either gave away or sold at artificially low prices;
- Mr. Jarosz's conclusion that the Obama Image contributed no more than 20 percent to the success of the various art works, clothing, and other merchandise that incorporated the HOPE/PROGRESS Image is arbitrary and without basis as a matter

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3. Jarosz Rebuttal Report ¶107 and footnote 131.

of economic analysis. Mr. Jarosz incorrectly ascribes to Mr. Fairey that part of the image's success attributable to the excitement generated by the Obama campaign and fails to include any indirect profits that Mr. Fairey reaped after 2008.

**II. AS A MATTER OF ECONOMICS, MR. FAIREY SHOULD BE HELD RESPONSIBLE FOR HIS LICENSING OR AUTHORIZATION OF WORKS BASED ON THE OBAMA IMAGE.**

3. Mr. Jarosz's conclusion that Mr. Fairey should not be held responsible for the licenses he granted of the unauthorized works is incorrect from an economic standpoint. This is because the commercial impact on The AP of Mr. Fairey's unauthorized use of the Obama Image as the basis for his HOPE/PROGRESS Image is the same, regardless of whether he chose to produce and distribute works based on the HOPE/PROGRESS Image himself or to authorize others to do so. That is, all of these unauthorized works were substitutes for work that The AP could have licensed and from which it could have derived revenue. In addition, Mr. Fairey is responsible from an economic standpoint for any unauthorized use of the Obama Image that he caused or to which he contributed, whether directly (by licensing the HOPE/PROGRESS Image) or indirectly (through unauthorized use of the HOPE/PROGRESS Image by others).

4. Further, Mr. Jarosz's assertion that Mr. Fairey is not responsible for the damages resulting from his authorization of others to reproduce or make unauthorized uses of the Obama Image would undermine the economic rationale for copyright by making it more difficult for a party to prevent unauthorized uses of its copyrighted work. For example, in Tab 4 of his Rebuttal Report, Mr. Jarosz identifies more than 40 users of the image that Mr. Fairey licensed. Requiring The AP to pursue a copyright infringement suit against each of these users authorized by Mr. Fairey in order to recoup The AP's copyright infringement damages would substantially increase The AP's cost of enforcing its copyright. In the extreme, The AP would have to file a

case against each of the hundreds or thousands of individuals who downloaded the image for free from Mr. Fairey's website – if they could be identified in the first place. This would place a prohibitively costly burden on The AP and would significantly undermine The AP's ability to enforce its copyright. From an economic standpoint, it is more efficient to pursue the party that authorized the infringement, or provided the means to infringe the copyrighted work, than to pursue lawsuits against many infringers.

**III. MR. JAROSZ'S COMPUTATION OF DIRECT PROFITS IGNORES THE SIGNIFICANT COMMERCIAL VALUE OF THE WORKS THAT MR. FAIREY GAVE AWAY FOR FREE OR AT LOW PRICES.**

5. As a matter of economics, Mr. Jarosz errs in relying solely on accounting income and ignoring the actual economic value of the works distributed by Mr. Fairey in calculating the commercial value of the work to Mr. Fairey. The economic value of the works based on the HOPE/PROGRESS Image that Mr. Fairey distributed is the same, regardless of whether Mr. Fairey gave the works away, sold them for a high price, or sold them for an artificially low price. If he chose to give the works away or to charge a low price, he simply transferred that value to someone else. Similarly, if he chose to authorize others to use the HOPE/PROGRESS Image for free or for a low royalty, he also transferred the true value to someone else. Put differently, the uses of the works generated large economic benefits, even if Mr. Fairey chose to transfer that value to others rather than keep it for himself.

6. The evidence shows that the economic value of posters and prints displaying the HOPE/PROGRESS Image based on The AP's Obama Image is substantial. For example, the Artnet.com data on which I relied in my November 2, 2010 Expert Report shows that the HOPE/PROGRESS prints sold at auction for buyer-prices ranging from \$2,160 to \$6,875. In his Initial Report, Mr. Jarosz provided data indicating that several thousand posters and prints

displaying the HOPE/PROGRESS Images were sold on Ebay for average prices in excess of \$1,000 each.<sup>4</sup> Consequently, Mr. Fairey's use of The AP's Obama Image had substantially greater commercial value than is reflected in the below-market prices at which he and his licensees distributed the works. This commercial value was captured in the form of increased promotion and goodwill for Mr. Fairey and increased aftermarket sales opportunities for others. To take one example, I am informed that owners of Obey Clothing sold a copy of the Obama PROGRESS image on eBay in early 2009 for several thousand dollars.<sup>5</sup>

**IV. MR. JAROSZ FAILS TO ADEQUATELY CALCULATE AND APPORTION DAMAGES RESULTING FROM THE INFRINGEMENT TO THE AP**

7. In his Initial Report, Mr. Jarosz offered an opinion regarding the extent to which Mr. Fairey's profits from the Obama HOPE/PROGRESS Image were "attributable" to The AP's Obama Image.<sup>6</sup> In his Rebuttal Report, Mr. Jarosz expands on his initial opinions and offers new evidence to support them, relying on an interview of third-party Yosi Sergant.<sup>7</sup> In particular, Mr. Jarosz now offers the opinion that Mr. Fairey's infringement of The AP's Obama Image contributed no more than 20 percent to the success of the various works based on the HOPE/PROGRESS Image. Because Mr. Jarosz did not offer that opinion in his Initial Report, I did not have an opportunity to respond to it in my November 2, 2010 Expert Report. I therefore respond to it here.

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4. Jarosz Initial Report, Tab 8.

5. OTT 017150; OTT 014678.

6. Jarosz Initial Report, at ¶ 4.

7. I am informed that Mr. Sergant was not identified as an individual with discoverable information on Plaintiffs' Initial Disclosures and that The AP therefore did not depose him.

8. Mr. Jarosz's new apportionment theory fails because he has not offered any economic evidence or analytic basis for his conclusion that Mr. Fairey's infringement of the Obama Image contributed no more than 20 percent to the success of the various works based on the HOPE/PROGRESS Image. As I understand Mr. Jarosz's theory, he simply asserts that five independent forces<sup>8</sup> contributed to the success of the HOPE/PROGRESS Image and related products – (1) The AP's Obama Image that Mr. Fairey used to make the HOPE/PROGRESS Image; (2) Mr. Fairey's prominence as an artist; (3) Mr. Fairey's creative imagery; (4) Mr. Fairey's promotional efforts that enabled the images to "go viral"; and (5) the success of Mr. Obama's campaign – and then arbitrarily attributes a 20 percent effect to each. In effect, he provides no basis for the opinion he offers.

9. In contrast, in my October 1, 2010 Expert Report, I offered a statistical analysis of the auction prices commanded by Mr. Fairey's works. Because all the works in the analysis were by Mr. Fairey, any effect of Mr. Fairey's prominence as an artist and/or creative imagery would be reflected in the prices of all these works. But my analysis showed that the auction prices of Mr. Fairey's works based on the Obama Image were more than 2.8 times the auction prices of his non-Obama-related work and more than 1.6 times the auction prices of his other Obama-related works, i.e., those based on images other than The AP's Obama Image. Since all the works in the latter comparison were based on Obama images and all were the product of Mr. Fairey's creative efforts, this result suggests that the AP's Obama Image, as the source for the

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8. I also question Mr. Jarosz's assessment that these are five *independent* effects, since two of the effects – Fairey's prominence as an artist and Fairey's creative input – are not independent of each other. Further, any effect of Fairey's promotional efforts on the economic value of the image is already accounted for in the sales and marketing costs.

HOPE/PROGRESS Image, contributed to the success of the HOPE/PROGRESS Image.<sup>9</sup> Mr. Fairey's own expert, Marita Sturken, testified in her deposition that The AP's Obama Image had expressive qualities that were significant for the message conveyed by the HOPE/PROGRESS Image, stating that it pictured Mr. Obama in a "presidential" and "visionary" way,<sup>10</sup> and that, unlike other photos that Mr. Fairey could have chosen, the Obama Image was an effective image to use on a campaign poster precisely because of these qualities.<sup>11</sup> Professor Sturken testified that The AP's Obama Image was one of the two components that in her opinion contributed to the success of the HOPE/PROGRESS Image.<sup>12</sup>

10. Furthermore, Mr. Jarosz inexplicably reserves the gains due to the success of Mr. Obama's campaign to Mr. Fairey himself. To explain, Mr. Jarosz posits that, to the extent the "dramatic success achieved by Mr. Obama in winning the 2008 Presidential Election" contributed to the success of works based on the HOPE/PROGRESS Image, the works might have been just as successful if Mr. Fairey had used a photo other than the Obama Image. He fails however to make the logical inference that, to the extent the Obama campaign contributed to the success of the works, the works might have been just as successful if done by an artist other than Mr. Fairey. That is, the success of Mr. Obama as a presidential candidate is an effect entirely independent of Mr. Fairey or his contributions to the HOPE/PROGRESS Image and related products. As an economic matter, the contribution to the success of the works by the Obama campaign is an unanticipated windfall. I explained in my November 2, 2010 Expert

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9. Mr. Fairey's art expert, Marita Sturken, testified at her deposition that the Obama Image is an important component of the success of the HOPE/PROGRESS Image. Deposition of Marita Sturken, Ph.D., November 24, 2010, pp 71-72.

10. Deposition of Marita Sturken, Ph.D., November 24, 2010, pp. 47-48, 62.

11. *Id.* at 49-50.

12. *Id.* at 71-72.



Report that, because it is not possible *ex ante* to determine which AP images will be successful in generating revenues, the economic returns from those few images that turn out to be successful provide The AP with the incentive to invest in creating the large portfolio of works in the first place.<sup>13</sup> Mr. Jarosz provides no basis for apportioning that entire windfall to Mr. Fairey and none to The AP.

11. Lastly, Mr. Jarosz also vastly understates the unjust gains to Mr. Fairey and his companies from the sale and licensing of the HOPE/PROGRESS Image. Specifically, the fame that Mr. Fairey and Obey Clothing achieved in connection with the products based on the HOPE/PROGRESS Image spurred interest in Mr. Fairey's and Obey Clothing's non-Obama works and led to engagements that might not have occurred in the but-for world. The profits on these engagements are considered "indirect profits" because they are a result of the infringement. Without any analytic or empirical basis for doing so, Mr. Jarosz computes Mr. Fairey's indirect profits only for the year 2008; he makes no effort to quantify the effect of that increased fame and notoriety on Mr. Fairey's future income and simply assumes there is none.<sup>14</sup> But that assumption is inconsistent with evidence that even today Mr. Fairey himself and his reputation as an artist are closely identified with the HOPE/PROGRESS Image.<sup>15</sup> For example, a short biography of Mr. Fairey found online states the following:

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13. Expert Report of William M. Landes, November 2, 2010, ¶18.

14. In his Rebuttal Report, Mr. Jarosz's assumes that "the impact of the Fairey Obama Image and the various Fairey Obama Works on sales of non-Obama products would have occurred entirely in 2008 ..." ¶189. This assumption is critical to the method that Mr. Jarosz uses to calculate the indirect profits.

15. Even as recently as in an October 10, 2010 article in the Los Angeles Times, Fairey was identified as "the rebellious street artist who skyrocketed to international fame in 2008 with his ubiquitous Obama 'Hope' poster." Jessica Gelt, "Showbiz's Newest Dynamic Duo", *Los Angeles Times*, October 18, 2010. <http://www.latimes.com/entertainment/news/la-et-fairey-brand-20101018,0,5759176.story>.

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It was in 2008 that Shepard Fairey gained fame with the large public when he created, illegitimately, the Obama Hope poster in red and blue colors. While this was not official promotion, Shepard Fairey claims that the Obama campaign did contact him to change the word PROGRESS, which was originally on the poster, to the word HOPE. Whilst they could not officially acknowledge the poster even there the campaign officials tries [sic] to make the most out of every initiative.

Since then everything has gone steep uphill for Fairey. He now displays in many museums of contemporary art and sells out his limited edition prints within minutes.<sup>16</sup>

12. Therefore, because Mr. Jarosz fails to consider evidence of this nature, his report grossly understates the nature of the commercial impact from Mr. Fairey's infringement on The AP.

*William M. Landes*

William M. Landes

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16. <http://ezinearticles.com/?Shepard-Fairey-Biography&id=2518955>. Another online biography describes him as the graphic artist who "shot to fame" as a result of the Hope poster. <http://www.who2.com/shepardfairey.html>