

EXHIBIT A
TO CROWTHER DECLARATION
IN SUPPORT OF ONE 3 TWO, INC.'S
MOTION IN LIMINE NO. 4
PART III

36. In addition to the specific errors in his analysis, Mr. Jarosz also fails to discuss other important topics that bear on the effect of Mr. Fairey's unauthorized use on The AP's financial returns. For example, in his expert report, Blake Sell offers reasons why The AP (and possibly Mr. Fairey) could have earned even more income had Mr. Fairey licensed instead of misappropriated the Obama Image. Mr. Sell opines that The AP would likely have been credited from the get-go for its contribution to the poster, which could have benefited The AP by, for example, spurring additional interest in other AP-owned Obama images by other potential licensees.³¹ Similarly, he also states that, had Fairey coordinated with The AP, The AP would have been able to implement a strategy to market the original photo as a complement to the Fairey poster right from the start, much as it ultimately scrambled to do after the Fairey misappropriation was discovered one year later.³² These considerations are central to factor four analysis, because they are further evidence of the economic harm caused by Mr. Fairey's choice to infringe rather than to license.

37. Even more important, as I have explained above, from an economic perspective factor four analysis considers not only the effect on the market for uses of the specific image at issue, but also the effect more generally were copying of this sort permissible. Protecting the original copyright owner's rights in uses of its copyrighted images is a critical component of the incentive-preserving effect of copyright protection. This is particularly true for works like the images that The AP has developed and preserved, where licenses for its photographs and rights to incorporate these photographs in derivative works are potentially a major source of the returns. Because, as in the case of the Obama Image, The AP cannot determine *ex ante* the

31. Expert Witness Report of Blake Pembroke Sell, November 2, 2010, ¶¶149-151.

32. *Id.*

likelihood or extent of any particular work's success, The AP's incentive and ability to invest in building and preserving its database of images and investing in enhanced access for users ultimately derives from its expectation that *some* of the works will be very successful, and the success of those works will compensate for the costs of The AP's efforts for the whole, the great majority of which will be less successful.

38. In the case of The AP, this is not a hypothetical argument. As I already have noted, The AP estimates that it adds 4,000 images to its database on a daily basis. However, relatively few images in the database succeed in generating substantial licensing revenues to The AP – the data I cited above show that only about 15 percent of the images were downloaded even once in 2009 and only 67 images were downloaded more than 200 times. Permitting unauthorized use of those very few images with the potential to generate revenues, like the Obama Image, would severely reduce the potential licensing fees that AP Image could hope to obtain and reduce, if not eliminate, its incentive to continue building its image licensing operations.

B. MR. JAROSZ IS WRONG TO CONCLUDE THAT MR. FAIREY'S USE OF THE OBAMA IMAGE WAS NOT COMMERCIAL.

39. Mr. Jarosz concludes that Mr. Fairey's objective in creating and distributing the Obama posters was "to support Obama's candidacy and his policies ..."³³ Mr. Jarosz claims that Mr. Fairey's actions, including his decision to give away many of the works and to offer others "at relatively low prices," support the conclusion that he did not create the image in pursuit of commercial gain.

40. But this argument is inconsistent with the fact that, though he surely supported President Obama's campaign, Mr. Fairey structured his use of the Obama Image as a commercial

33. Expert Report of John C. Jarosz, October 1, 2010, ¶113.

project and, I understand, generated over \$1,000,000 in revenue. In particular, when Mr. Fairey first released his Obama poster, he began selling copies on his website, www.obeygiant.com, for \$35 apiece. He quickly expanded his use to other products and merchandise, including t-shirts, hoodies, stickers, and artwork pieces, including one which sold for \$90,000.³⁴ In addition, when Mr. Fairey's offered the poster image as a download on his website, he reserved the commercial rights in the image for his own companies through purported copyrights in the image, posting the disclaimer "This downloadable image is not to be used for merchandise or any other profitable means and it is a copyrighted image of Shepard Fairey and OBEY GIANT ART."³⁵ His companies then proceeded to submit copyright applications for the poster image, and, while at the same time failing to disclose the Obama Image as the source material,³⁶ began to enforce purported copyrights in the image through cease-and-desist letters.³⁷

41. Moreover, I understand that Counterclaim Defendant Obey Clothing, Mr. Fairey's exclusive licensee for clothing, made nearly \$2.3 million in revenue from its use of the Obama poster image on clothing and other merchandise that it sold throughout U.S. and abroad. And I understand that use involved a royalty of up to 5.5% flowing back to Mr. Fairey's company.³⁸ In Kathleen M. Kedrowski's Preliminary Expert Report, she finds that Mr. Fairey and his related

34. FAIREY119481

35. Deposition of Frank Shepard Fairey, March 17, 2010, Exhibit 87.

36. AP0000357 -364

37. FAIREY70265.001

38. FAIREY61283.001

entities made or authorized over 1.2 million copies of the Obama poster, generating over \$3.5 million dollars in revenue.³⁹

42. And, setting to one side the direct revenue Mr. Fairey's use of the Obama image generated, Mr. Jarosz's analysis of commercial benefit ignores the possible indirect economic benefits that Mr. Fairey realized and future revenues that Mr. Fairey may receive as a result of exploiting his use of the Obama Image to promote his career and generate future commercial projects.⁴⁰ Again, Kathleen M. Kedrowski's Preliminary Expert Report discusses these issues fully; I write here only to point out that Mr. Jarosz ignores these commercial gains, plus the direct financial gains discussed previously, despite their relevance to the question of commercial use.

43. Moreover, from an economic standpoint, Mr. Fairey's stated intent is irrelevant under factor four, since the effects of Mr. Fairey's actions was to impose a commercial harm on The AP. Mr. Fairey's use of the Obama Image was a typical advertising use. Advertising is an important source of AP Image's revenues – more than \$1.3 million in 2009⁴¹ – and an important part of the market in which it is trying to capture share: campaign advertising expenditures alone

39. The Preliminary Expert Report of Kathleen M. Kedrowski ("Kedrowski Preliminary Report"), October 1, 2010, at ¶16. Even Mr. Jarosz conceded that Mr. Fairey enjoyed significant financial benefit from his use of the Obama Image. "In all, Mr. Fairey appears to have received approximately \$851,848 in revenue associated with the sale of posters and other products based on the HOPE image since November 2008." Expert Report of John C. Jarosz, October 1, 2010, ¶46. [Footnote omitted]

40. Justin McCormack, who is an owner in one of Mr. Fairey's companies, unabashedly used the Obama work to promote Fairey in other ventures, describing him in one email as "best known for his Obama Hope image ..." McCormack 0000528. See also McCormack 000409, McCormack 000473. Kathleen M. Kedrowski also discusses the economic benefit to Mr. Fairey from the future profit he has secured as a result of the fame he has gained from the success of the works based on the Obama Image. Kedrowski Preliminary Report at ¶¶88-89.

41. AP0005570

in the United States exceeded \$2.6 billion in 2008.⁴² I understand that Mr. Sell explains in his report that the licensing of images for political campaigns is a market that The AP, and other content-providers, specifically target and cultivate.⁴³ Even if Mr. Fairey were not motivated by commercial returns – and the evidence strongly suggests that he was – his actions therefore had a commercial impact on The AP just the same. That is, The AP suffers the same harm whether someone takes an image and sells it profitably, or takes an image and in the end loses money because of a bad business strategy, or takes an image and gives it away benevolently. Thus, even if Mr. Fairey’s purposes were not commercial, factor four analysis would still deem his actions “commercial” in the relevant economic sense.

C. MR. JAROSZ’S INCORRECTLY CONCLUDES THAT THE OBAMA IMAGE MADE LITTLE CONTRIBUTION TO THE SUCCESS OF THE OBAMA POSTER

44. Mr. Jarosz concludes that “a Fairey Obama poster would have been highly successful regardless of the specific reference photo he used.”⁴⁴ He offers four reasons for this conclusion: (1) Mr. Fairey’s prominence; (2) Mr. Fairey’s imagery; (3) Mr. Fairey’s efforts that enabled the images to “go viral”; and (4) the success of Mr. Obama’s campaign. He reasons that, since these would have applied no matter what photograph Mr. Fairey used, the Obama Image actually contributed very little.

45. There are several problems with Mr. Jarosz’s reasoning. First, Mr. Jarosz fails to support his opinion with any analysis or concrete factual evidence.

42. Katherine Q. Seeley, “About \$2.6 billion Spent on Political Ads in 2008,” *The Caucus*, The Politics and Government Blog of the New York Times, December 2, 2008.

43. Expert Witness Report of Blake Pembroke Sell, November 2, 2010, ¶76.

44. Expert Report of John C. Jarosz, October 1, 2010, ¶131.

46. Second, whatever Obama photograph Mr. Fairey might have used instead of the Obama Image, Mr. Fairey would have had to obtain authorization to use that image, unless he chose to infringe, in which case the parties but not the substance of this litigation might have been different. If Mr. Jarosz's point is that Mr. Fairey's choices of other images would have limited the fee that The AP could have charged for an initial license, then it is simply a restatement of his earlier contention that The AP's initial licensing fees from Mr. Fairey would have been low – a contention I already have addressed.

47. Third, Mr. Fairey chose the particular image he did because he preferred it to the many others he considered. I understand that Professor Dahlberg's Expert Report analyzes the elements of the Obama Image that are also present in the Obama poster. In Professor Dahlberg's opinion, Mr. Fairey chose the Obama Image because it portrays the ideals that Mr. Obama championed during his 2008 presidential campaign, and that these characteristics ultimately contribute to the poster's success.⁴⁵

48. Fourth, in his report, Mr. Jarosz concludes that Mr. Fairey would have been willing to license the Obama Image, and The AP would have been willing to license it to him, for an initial fee of no more than \$3,000.⁴⁶ Therefore, his own reasoning leads to the conclusion that, in the but-for world absent the infringement, Mr. Fairey would have chosen the Obama Image over other images of Obama for his poster and, as a result, The AP would have shared in the success of this work.

49. I have performed an empirical analysis using hedonic regression analysis that quantitatively demonstrates the significance of the Obama Image to the overall economic value

45. Expert Report of Laurie Dahlberg, November 2, 2010, ¶5.

46. Expert Report of John C. Jarosz, October 1, 2010, ¶110.

of works based on this image. To do this, I analyzed auction prices reported for Mr. Fairey's works contained in the ArtNet.com auction database.⁴⁷ My analysis shows that Mr. Fairey's Obama-related works, including works based on the Obama Image, sold at auction for over 2.7 times that the auction price of his non-Obama-related work.

50. These findings result from my regression analysis of the prices of 91 works by Shepard Fairey sold at auction between 2008 and 2010, for which ArtNet provided a final price (equal to the hammer price plus the buyer's premium which typically is around 20 to 25 percent of the hammer price).⁴⁸ Of these 91 works, twelve were works based on the Obama Image and six were works based on Obama images other than the Obama photograph at issue in this case.⁴⁹

51. I used these data to perform a regression analysis that relates the auction prices (in logarithms) of the images to its characteristics. Regression analysis is a standard statistical tool that economists and other social scientists use to explore the relationship of a variable of interest, termed the "dependent" variable, to other variables of interest, termed the "independent variables". It is used in a variety of contexts, for example, to determine the extent to which individual personal characteristics, like education and job experience, are important factors in explaining the variation across individuals in earnings. When, as here, the dependent variable is the transaction price of an object and the independent variables are attributes of the object, the analysis is called a "hedonic analysis". Economists have used hedonic analysis to study, among

47. The ArtNet Fine Art and Design Price Database hold 3.8 million auction results on 182,000 artists and designers. The data goes back to 1985 and includes prices from 500 international auction houses. *ArtNet AG 2009 Annual Report*, p. 18.

48. Of the 133 works contained in database, three had yet to be auctioned and 32 were "bought in", i.e., did not meet their auction reserve price. For seven works (including the Obama poster), I could not determine the size of the edition.

49. Images based on Obama were less likely to be bought in than non-Obama images: 5 of 24, or 20%, Obama images were bought in as compared to 27 of 106, or 25%, non-Obama images.

other things, the determinants of the value of farmland and other real estate, rental prices, and automobile prices. Hedonic analysis is also a standard technique used to study art prices.⁵⁰

52. The characteristics, or independent variables, available for my analysis are the following: the “medium”, which I group into four categories or dummy variables – “mixed media”, “spraypaint”, “prints on paper” and “prints on other surfaces”; a dummy variable denoting whether the image is signed or not; the size of the edition (in logs); the number of images included in the lot that is auctioned (in logs); the physical size of the image in square inches (in logs); dummy variables denoting the year the image was auctioned; and a dummy variable indicating whether the image was an image of Mr. Obama.

53. Contrary to what Mr. Jarosz may assert in his report, any “Fairey effect” is held constant in this analysis, because all the works in the sample are works by Mr. Fairey, and thus a purported “Fairey effect” cannot explain the higher prices of the works based on images of Obama. My analysis further shows that, although Mr. Fairey’s other Obama-related works also sold for more than his non-Obama-related works, the difference was not statistically significant, and the other Obama-related works sold for substantially less than the works based on the Obama Image at issue in this case.

54. Because all Mr. Fairey’s works included in the regression analysis reflect both his stature as an artist and his particular creative use of graphic imagery, the analysis effectively holds the “Fairey contribution” constant. Consequently, if Mr. Fairey’s stature as an artist and creative contribution were the principal reasons for the success of the Obama poster, then one would expect to find no difference between the prices of the works based on the Obama Image

50. See, Landes, “Winning the Art Lottery: The Economic Returns to the Ganz Collection.” 66 *Recherches Economiques de Louvain* 111 (1999) and Ashenfelter & Graddy, “Art Auctions: A Survey of Empirical Studies,” CEPR Discussion Papers 3387, *C.E.P.R. Discussion Papers* (2002).

and the prices of other Fairey works with comparable characteristics (image size, edition size, etc.). Similarly, if Mr. Fairey's creative contribution was the principal reason for the success of the Obama poster, and the Obama Image made no contribution to the success of the works that Mr. Fairey based on it, then one would expect to find that the prices of those works were no higher than the prices of Fairey works based on other Obama images.

55. The results of the regression are shown in column 1 of Table 1 and show that Mr. Fairey's Obama works commanded auction prices that were on average almost 2.7 times the price of Mr. Fairey's other works.⁵¹ This result suggests that much of the success of the Obama posters was due not to his creative input, but to the general excitement caused by the Obama campaign.

56. I also estimated the separate price effects of the Obama Image in this lawsuit and other Shepard Fairey works based on other images of Obama. The results are shown in column 2 of Table 1. I find that the works that incorporated the Obama Image had prices that were on average 2.8 times the prices of his other (non-Obama) works, while the auction prices for the works based on other images of Obama were on average about 74 percent higher than the auction prices of his non-Obama works other things constant.⁵² Therefore, any "Obama" effect on prices appears to be due to the effect of the price of works based on the Obama Image in the lawsuit.⁵³

51. The price effect is calculated as the exponent of the coefficient. Thus a coefficient of 1.00 on the "Obama image" variable in column 1 of Table 1 translates into a price effect of 2.7 times the price of non-Obama images with otherwise comparable characteristics. The data and regression results are contained in the attached Appendix.

52. The regression coefficient for the Obama Image is statistically significant at a p-level <.0001. The regression coefficient for the other Obama images is not statistically significant.

53. Although the works based on the Obama Image command auction prices that are roughly 61 percent higher than the prices of the other Obama works, the difference between the two regression coefficients is only marginally statistically significant (p-level of 0.14, based on a one-tail test). As another test of the difference in the price effects of the two types of Obama images, I estimated the equations alternately dropping the observations for the works based on the Obama

Since all the works in this comparison were based on Obama images and all were the product of Mr. Fairey's creative efforts, this result suggests that the Obama Image contributed to the success of the Obama posters.

57. Mr. Jarosz also asserts that the particular success of the Obama poster based on the Obama Image might be the result of Mr. Fairey's marketing efforts. Put differently, the poster's success and the success of the associated merchandise was due to Mr. Fairey's promotion, not anything special in either the Obama Image or the poster created from it. Here again, however, Mr. Jarosz offers no evidence to support his assertion. And here again he fails to consider the commercial effect on The AP resulting from Mr. Fairey's giving away promotional copies of the poster image via his website, which could have substituted for consumer purchases.

58. The other point to consider relates to my earlier example of a motion picture company that makes a film based on a pre-existing book. The company's expenditures on promoting the film likely will increase the chances of the film's success. But the motion picture company cannot claim that it need not compensate the author because its marketing expenditures were an important component of the movie's success – copyright still law requires the producer to obtain permission and a license from the book's author.

IV. CONCLUSION

59. In short, Mr. Jarosz's conclusion that Mr. Fairey's reproduction of the Obama Image caused minimal financial harm to The AP is incorrect. The quantifiable loss to The AP

Image and the other Obama images. In the first test regression, which drops the observations for the works based on the Obama Image, the price effect of the other Obama-based works is not statistically significant (p-level of .60). In the second test regression, which drops the observations for the works based on the other Obama images, the price effect of the works based on the Obama Image is highly statistically significant (p-level <.0001).