

# **EXHIBIT A**

## **TO THE AP'S MOTION IN LIMINE NO. 3 TO EXCLUDE EVIDENCE OF FAIREY'S USE OF RUBYLITH AND FOR AN ADVERSE INFERENCE**

<p style="text-align: center;">1</p> <p style="text-align: center;">S. Fairey UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK -----X SHEPARD FAIREY and OBEY GIANT ART, INC., Plaintiffs, v. Civil Action No. 09-01123(AKH) THE ASSOCIATED PRESS, Defendant and Counterclaim Plaintiff, v. SHEPARD FAIREY, OBEY GIANT ART, INC., OBEY GIANT LLC and STUDIO NUMBER ONE, INC. Counterclaim Defendants. and MANNIE GARCIA, Defendant, Counterclaim Plaintiff and Cross Claim Plaintiff/Defendant, vs. SHEPARD FAIREY and OBEY GIANT ART, INC., Counterclaim Defendants, and THE ASSOCIATED PRESS, Cross Claim Plaintiff/Defendant -----X FRANK SHEPARD FAIREY New York, New York Tuesday, March 16, 2010 Reported by: Steven Neil Cohen, RPR Job No. 308009</p>	<p style="text-align: center;">3</p> <p style="text-align: center;">S. Fairey APPEARANCES</p> <p>1 2 3 4 JONES DAY 5 51 Louisiana Avenue N.W. 6 Washington, D.C. 20001-2113 7 Attorneys for Plaintiff 8 BY: GEOFFREY S. STEWART, ESQ. 9 MEIR FEDER, ESQ. 10 11 KIRKLAND &amp; ELLIS LLP 12 601 Lexington Avenue 13 New York, New York 10022 14 Attorneys for Defendant 15 BY: DALE CENDALI, ESQ. 16 BRENDAN T. KEHOE, ESQ. 17 BLAIR A. SILVER, ESQ. 18 19 CALDWELL LESLIE &amp; PROCTOR, ESQS. 20 1000 Wilshire Boulevard 21 Suite 600 22 Los Angeles, California 90017 23 Attorneys for Counterclaim 24 Defendant 132 Inc. 25 BY: ROBYN D. CROWTHER, ESQ.</p>
<p style="text-align: center;">2</p> <p>1 S. Fairey 2 March 16, 2010 3 10:01 a.m. 4 5 Videotaped Deposition of FRANK 6 SHEPARD FAIREY, taken by Defendant, pursuant 7 to notice, at the offices of Kirkland &amp; 8 Ellis LLP, 601 Lexington Avenue, New York, 9 New York, before Steven Neil Cohen, a 10 Registered Professional Reporter and Notary 11 Public of the State of New York. 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: center;">4</p> <p>1 S. Fairey 2 KILE GOEKJIAN REED &amp; McMANUS PLLC 3 1200 New Hampshire Avenue NW 4 Suite 570 5 Washington, DC 20036 6 Attorneys for Manny Garcia 7 BY: BRADFORD E. KILE, ESQ. 8 9 LANKLER SIFFERT &amp; WHOL LLP 10 500 Fifth Avenue 11 New York, New York 10110-3398 12 Attorneys for Shepard Fairey 13 BY: DANIEL M. GITNER, ESQ. 14 ABIGAIL E. ROSEN, ESQ. 15 16 ALSO PRESENT: William Fisher 17 Laura Malone 18 Karen I. Kaiser 19 Ryan Ward 20 Derwin Dume, Videographer 21 22 23 24 25</p>



<p style="text-align: center;">229</p> <p>1 S. Fairey</p> <p>2 51 seconds to have created --</p> <p>3 A. No --</p> <p>4 Q. Let me finish.</p> <p>5 A. Sorry.</p> <p>6 Q. -- to create exhibits -- excuse</p> <p>7 me, pages 8 through 14 of Exhibit 30?</p> <p>8 MR. FEDER: Objection.</p> <p>9 THE WITNESS: Well, it appears</p> <p>10 that digital evidence, no.</p> <p>11 I do recall that a couple of my</p> <p>12 employees were around while I was</p> <p>13 working on this during that day so it is</p> <p>14 possible that one of them would</p> <p>15 remember -- have a better idea of how</p> <p>16 long they thought I worked on it.</p> <p>17 But my recollection was at least a</p> <p>18 couple hours to get to -- from the</p> <p>19 PhotoShop tinkering phase to the bitmap</p> <p>20 phase.</p> <p>21 BY MS. CENDALI:</p> <p>22 Q. What were the names of your</p> <p>23 employees that you say saw you working on</p> <p>24 this?</p> <p>25 A. A guy named Ernesto Yerena was</p>	<p style="text-align: center;">231</p> <p>1 S. Fairey</p> <p>2 Q. She didn't see you actually</p> <p>3 working on making the poster?</p> <p>4 A. I think she saw near the end of</p> <p>5 the process when I was actually working on</p> <p>6 it in Illustrator.</p> <p>7 Q. She didn't see you working on it</p> <p>8 earlier than that?</p> <p>9 A. No, she didn't.</p> <p>10 Q. Then turning to page 15 of the</p> <p>11 exhibit, is this an e-mail from you to Yosi</p> <p>12 at January 23, 2008 at 8:40 p.m. and two</p> <p>13 seconds?</p> <p>14 A. Yes, it is.</p> <p>15 Q. And in that e-mail if you turn to</p> <p>16 page 16, did you e-mail to him the rough cut</p> <p>17 of what became the progress poster?</p> <p>18 A. Yes. I e-mailed him this colored</p> <p>19 version that basically consisted of just</p> <p>20 dropping the bitmaps into Illustrator and</p> <p>21 colorizing them and I was sending that to</p> <p>22 him for his thoughts.</p> <p>23 Q. So this rough cut was finished and</p> <p>24 sent to Mr. -- sent to Yosi at 8:40 p.m. and</p> <p>25 two seconds; is that right?</p>
<p style="text-align: center;">230</p> <p>1 S. Fairey</p> <p>2 there and I believe Phil Lumbang was there,</p> <p>3 they shared an office with me but, yes --</p> <p>4 but -- and they don't work with me anymore</p> <p>5 but I could still ask them, I am still</p> <p>6 friends with them.</p> <p>7 Q. Did you list them on your initial</p> <p>8 disclosures of some people with knowledge as</p> <p>9 to the creation of the poster?</p> <p>10 A. Again I don't know but I know they</p> <p>11 have been brought up in a few discussions</p> <p>12 that I have had with -- first, with</p> <p>13 Mr. Falzone.</p> <p>14 MR. FEDER: Let's stop. We are</p> <p>15 getting into discussions with counsel.</p> <p>16 THE WITNESS: All right.</p> <p>17 BY MS. CENDALI:</p> <p>18 Q. Did Amanda see you doing any of</p> <p>19 this work?</p> <p>20 A. No. Amanda wasn't there when I</p> <p>21 was working on it.</p> <p>22 Q. So now, turning to page --</p> <p>23 A. Amanda did eventually see it</p> <p>24 further along than this but she didn't see</p> <p>25 this stage of it.</p>	<p style="text-align: center;">232</p> <p>1 S. Fairey</p> <p>2 A. Yes.</p> <p>3 Q. And at least so far through the</p> <p>4 time of this rough cut, everything that has</p> <p>5 been done in the creation of the HOPE and</p> <p>6 progress posters was done on the computer;</p> <p>7 is that right?</p> <p>8 A. Up to that point, yes.</p> <p>9 Q. And coloring was done using</p> <p>10 Illustrator on PhotoShop, right?</p> <p>11 A. The coloring was all done in</p> <p>12 Illustrator but once the bitmaps are</p> <p>13 imported into Illustrator it is an</p> <p>14 Illustrator file, it is not PhotoShop</p> <p>15 anymore.</p> <p>16 Q. Fair enough.</p> <p>17 In fact, if you turn to page 17 of</p> <p>18 the exhibit, does that reflect that you had</p> <p>19 created an Adobe Illustrator file on working</p> <p>20 on the poster?</p> <p>21 A. Yes, that is correct.</p> <p>22 Q. The create date of that file was</p> <p>23 8:08 p.m. and 42 seconds, is that right?</p> <p>24 A. Yes. That is the Illustrator file</p> <p>25 that this was jpeg'd from to send out.</p>



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<p style="text-align: center;">245</p> <p>1 S. Fairey 2 did he get the jpeg? 3 A. It looks like it was e-mailed but 4 it is possible that I just told him which 5 folder it was in and he grabbed it from the 6 folder because -- well, I don't remember but 7 we worked together in the same building 8 so -- 9 Q. Okay. So -- and page 20 of 10 Exhibit 30, that is the attachment, that is 11 the progress poster that you posted on your 12 web site, correct? 13 A. That's correct. 14 Q. On page 21 of Exhibit 30, 15 January 25, 2008 at 4:34 p.m. and 26 16 seconds, you are e-mailing your friend Yosi 17 the HOPE poster; is that right? 18 A. Yes, that is correct. 19 Q. And page 22 is the completed HOPE 20 poster, is that right? 21 A. Other than that very small hair 22 tweak that you wouldn't even be able to see 23 at this scale, yes. 24 Q. And then on page 23 of Exhibit 30 25 you are now e-mailing Amanda on January 25,</p>	<p style="text-align: center;">247</p> <p>1 S. Fairey 2 put in a frame and were in my Boston museum 3 show so there -- and I know that at some 4 point you guys were supposed to get photos 5 of the ones in the Boston show but for all 6 practical purposes they are identical to 7 each other. 8 Q. You said two of them are and I 9 think there is only three Rubyliths here and 10 I will represent to you that we only got 11 three. 12 A. Okay. 13 Q. So were there -- 14 A. Yes, that is a mistake. There is 15 four. 16 Q. There is four? 17 A. Yes. 18 Q. Do you know where the fourth 19 Rubylith is? 20 A. Well, I have -- I think I have all 21 these materials as hard copies still in my 22 office but the -- for whatever reason, the 23 second -- the second layer of -- down of the 24 Rubylith, if you look at the actual progress 25 poster where it goes from dark blue to red</p>
<p style="text-align: center;">246</p> <p>1 S. Fairey 2 2008 at 9:23 p.m. and 4 seconds the 3 completed progress poster, is that right? 4 A. Well, yes. The jpeg of it, yes. 5 Q. You hadn't made any changes on it 6 from the time that you had sent it to -- 7 that Dan had sent it to be posted on the web 8 site, you were just informing Amanda that 9 you had done it? 10 A. Yes, exactly. 11 Q. Now, let's take a look at what has 12 been marked as Shepard Fairey Exhibit 31. 13 These I will tell you are copies 14 of Rubyliths that were produced to us in 15 discovery in this case. 16 Do you recognize those Rubyliths? 17 A. Yes, I do. 18 Q. What are they? 19 A. They are the material I was 20 explaining you to before, the red gelatin on 21 the clear acetate backing. 22 Q. Are these the actual Rubyliths 23 that you used to create the progress poster? 24 A. Two of them are. And the other 25 two are recuts because the originals were</p>	<p style="text-align: center;">248</p> <p>1 S. Fairey 2 to medium blue to the lighter blue, that is 3 really just made of a shading of the medium 4 blue, but four tonal gradations, the red -- 5 what would be equivalent of the red layer 6 for some reason is not here. And it was -- 7 I know it was produced but I don't know why 8 it is not here. 9 Q. Is the hair tweak, by the way, 10 that you were mentioning earlier on the 11 Rubylith? 12 A. No. That was part of -- that was 13 done in Illustrator and it would get 14 really -- I probably have to show you on a 15 computer but basically if you look at this 16 field of this color blue and the way it goes 17 underneath this red, there is a really small 18 piece of it sticking out that interrupted 19 this blue field that you would only see if 20 you zoomed in but would be very visible in a 21 large format poster. That was corrected in 22 Illustrator. 23 Q. For the record could you say what 24 page you were look at, what page of Exhibit 25 30 were you just referring to?</p>



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<p style="text-align: center;">249</p> <p>1 S. Fairey</p> <p>2 A. 25.</p> <p>3 Q. You were looking at the area above</p> <p>4 then Senator Obama's head on page 25. Okay.</p> <p>5 Now, again, going to Exhibit 31,</p> <p>6 though, the Rubylith collection, the first</p> <p>7 one on the top of the page was given to us</p> <p>8 in discovery and we were told that it was a</p> <p>9 duplicate of something that was hanging in</p> <p>10 your Boston show.</p> <p>11 A. Yes.</p> <p>12 Q. And so a duplicate was made for</p> <p>13 us. Did you make the duplicate?</p> <p>14 A. No. I had one of my assistants</p> <p>15 make it.</p> <p>16 Q. And we were told that the</p> <p>17 duplicate was made on March 26 of 2009?</p> <p>18 A. Yes.</p> <p>19 Q. Is that correct?</p> <p>20 A. That's correct.</p> <p>21 Q. Which of your assistants made it?</p> <p>22 A. Ernesto or Phil, I don't remember</p> <p>23 which one.</p> <p>24 Q. Do they still work for you?</p> <p>25 A. No. They don't but they are still</p>	<p style="text-align: center;">251</p> <p>1 S. Fairey</p> <p>2 Q. Is it -- I would assume that</p> <p>3 that -- that some amount of errors may come</p> <p>4 into that process?</p> <p>5 A. Yes. The two guys that work for</p> <p>6 me that I had taught those techniques, which</p> <p>7 aren't widely used techniques, had been</p> <p>8 working with me for a couple of years,</p> <p>9 actually about three years at that point.</p> <p>10 So I -- you know, I guess it is</p> <p>11 like, you know, no two people are ever going</p> <p>12 to play the same guitar solo exactly alike</p> <p>13 but if you hear the recording and listen to</p> <p>14 it over and over, it is close, it is very</p> <p>15 close.</p> <p>16 Q. There is also the potential for</p> <p>17 human error?</p> <p>18 A. Yes. That is true. I can</p> <p>19 definitely not say definitively that this is</p> <p>20 identical -- identical in every single way</p> <p>21 to the one in the Boston museum but it would</p> <p>22 be very similar.</p> <p>23 Q. Okay. The Rubyliths -- the other</p> <p>24 two Rubyliths that we have here in Exhibit</p> <p>25 31, those were created at other end of the</p>
<p style="text-align: center;">250</p> <p>1 S. Fairey</p> <p>2 in the area.</p> <p>3 Q. So the top page of Exhibit 31,</p> <p>4 that was a recreated Rubylith to match the</p> <p>5 one in the Boston show; is that right?</p> <p>6 A. Yes. As closely as possible.</p> <p>7 Because this was -- this is basically</p> <p>8 created by taking that layer of the poster</p> <p>9 and then recutting it.</p> <p>10 So with the exception of changes</p> <p>11 that may have been made between the initial</p> <p>12 cut and the editing in Illustrator, it would</p> <p>13 be identical to it but -- and I -- the one</p> <p>14 in Boston is in a frame but to the naked eye</p> <p>15 I think it would be very, very similar. I</p> <p>16 think for the purpose of demonstrating the</p> <p>17 process it is virtually identical.</p> <p>18 Q. For someone like myself who has</p> <p>19 not done this before, you would take -- the</p> <p>20 way you went about recreating the Rubylith</p> <p>21 image on the first page of Exhibit 31 is,</p> <p>22 you made a computer printout of that layer</p> <p>23 in the poster and then you used that as a</p> <p>24 model to hand cut the Rubylith?</p> <p>25 A. Exactly, yes.</p>	<p style="text-align: center;">252</p> <p>1 S. Fairey</p> <p>2 spectrum. In other words, those are the</p> <p>3 Rubyliths that you created in order to make</p> <p>4 the poster to begin with, is that right?</p> <p>5 A. Yes, those are two of the original</p> <p>6 ones. When I -- I frequently frame the</p> <p>7 Rubyliths as basically the original</p> <p>8 illustration for pieces that I do but I</p> <p>9 don't because they are all orange they don't</p> <p>10 look good layered too deep so I only showed</p> <p>11 the top two layers in Boston but those</p> <p>12 bottom two are the actual original ones.</p> <p>13 Q. Okay. Then there is the fourth</p> <p>14 one that is at your studio somewhere?</p> <p>15 A. Yes. And I could be wrong but in</p> <p>16 the second round of document production,</p> <p>17 October 9, the original scans of the</p> <p>18 Rubyliths are probably in there but I can't</p> <p>19 say for sure.</p> <p>20 I am almost positive that I saw</p> <p>21 that those were produced. So all you would</p> <p>22 have to do is look at those scans which will</p> <p>23 have, you know, some sort of digital date</p> <p>24 around the 24th of January 2008 with these</p> <p>25 and you can see if they are accurate.</p>



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<p style="text-align: center;">253</p> <p>1 S. Fairey</p> <p>2 Q. So in order for -- and you hand</p> <p>3 cut these two, other two Rubyliths, the</p> <p>4 original ones yourself, you didn't have your</p> <p>5 assistant --</p> <p>6 A. That's right, yes.</p> <p>7 Q. For those two once you did it, you</p> <p>8 then scanned the four original Rubyliths</p> <p>9 into the computer and used that to create</p> <p>10 the digital file, right?</p> <p>11 A. Yes. I scanned those and then I</p> <p>12 converted those to -- from a PhotoShop file</p> <p>13 once they were imported into Illustrator</p> <p>14 into a Vector.</p> <p>15 Each layer was then Vector art so</p> <p>16 that allowed me to do another stage of</p> <p>17 editing but that was a -- you know, a very</p> <p>18 important step was doing the illustrations</p> <p>19 and rescanning them.</p> <p>20 Q. Mr. Fairey, I will represent to</p> <p>21 you that we looked very hard for the</p> <p>22 electronic files reflecting the scanning of</p> <p>23 these Rubyliths and we couldn't find them</p> <p>24 having been produced to us in discovery.</p> <p>25 Are you sure they exist?</p>	<p style="text-align: center;">255</p> <p>1 S. Fairey</p> <p>2 editing that I would have done in the Vector</p> <p>3 stage of the -- once they are converted to</p> <p>4 Vector -- the whole idea with Vector art is</p> <p>5 that it is editable, meaning that these are</p> <p>6 idealized and stylized the way I think they</p> <p>7 should be based on looking at them as</p> <p>8 separate layers.</p> <p>9 Once it is imported into</p> <p>10 Illustrator I have the power to make subtle</p> <p>11 or very dramatic changes from there because</p> <p>12 it is Vector art, it is editable.</p> <p>13 I think you would probably have to</p> <p>14 work as a graphic artist to know what I am</p> <p>15 talking about but this would be similar to</p> <p>16 but not necessarily identical to what is in</p> <p>17 file but it would be close.</p> <p>18 You would probably see</p> <p>19 idiosyncrasies in the Rubylith that would</p> <p>20 be, you know, slight -- very, very slight</p> <p>21 imperfections but a lot of time I try to fix</p> <p>22 those imperfections when I do my -- when I</p> <p>23 do my edits in Illustrator but there is</p> <p>24 always a little bit of an organic side to</p> <p>25 it.</p>
<p style="text-align: center;">254</p> <p>1 S. Fairey</p> <p>2 A. No. I am not sure they exist but</p> <p>3 I thought that I saw them in the batch of</p> <p>4 stuff that was produced but it is possible</p> <p>5 that they were -- had been not saved because</p> <p>6 they don't -- once this part has -- once</p> <p>7 these have gone into Illustrator, they will</p> <p>8 never be used in that stage again. So --</p> <p>9 but I thought I saw them but I could be</p> <p>10 confusing the scans of the actual physical</p> <p>11 Rubyliths with the -- that were done for the</p> <p>12 purpose of discovery with the original scans</p> <p>13 but I am not sure.</p> <p>14 Q. But it is true that if you had</p> <p>15 made Rubyliths and then used those Rubyliths</p> <p>16 to make the final progress poster, there</p> <p>17 should have been a scan of those Rubyliths</p> <p>18 at some point in the computer, right?</p> <p>19 A. Yes. There would have to be.</p> <p>20 Q. Is the Rubyliths here in Exhibit</p> <p>21 31, not the first page of it because that</p> <p>22 was the after the fact one, but the other</p> <p>23 ones should be identical to the layers of</p> <p>24 the final poster, right?</p> <p>25 A. Yes. Other than possible slight</p>	<p style="text-align: center;">256</p> <p>1 S. Fairey</p> <p>2 Q. Wouldn't there be then other</p> <p>3 digital files such as in Illustrator showing</p> <p>4 those edits from the Rubyliths?</p> <p>5 A. Well, yes, that is what the HOPE</p> <p>6 and the progress files are.</p> <p>7 Q. Right. But, in other words, if</p> <p>8 you scanned the Rubyliths in to the computer</p> <p>9 and then altered those scans and edited them</p> <p>10 in some way, shouldn't there be documents</p> <p>11 similar to the ones that we have been</p> <p>12 looking at in Exhibit 30 showing creation</p> <p>13 date and other metadata reflecting those</p> <p>14 edits?</p> <p>15 A. Well, those definitely existed and</p> <p>16 I am sure that -- I actually thought that</p> <p>17 you already had those from the second round</p> <p>18 of delivery of materials from October but,</p> <p>19 yes, they definitely existed at one point</p> <p>20 but that doesn't mean -- they might have --</p> <p>21 might not have been saved but they were not</p> <p>22 intentionally deleted as part of the</p> <p>23 spoliation like the other materials.</p> <p>24 Q. Let's take a look at what we will</p> <p>25 mark as Shepard Fairey 32 which is -- I will</p>



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