

One 3 Two's Notes on the AP's Complaint:

Dale M. Cendali
 Claudia Ray
 Brendan T. Kehoe
 KIRKLAND & ELLIS LLP
 601 Lexington Avenue
 New York, New York 10022
 Tel: (212) 446-4800
 Fax: (212) 446-4900
 dale.cendali@kirkland.com
 claudia.ray@kirkland.com
 brendan.kehoe@kirkland.com

GREEN SECTIONS: material believed to be out of the case, but which the AP refuses to remove

GREEN UNDERLINE: allegations regarding fair use, which the AP refuses to remove; One 3 Two believes these are still at issue

BLUE INTERLINEATIONS: admissions

RED INTERLINEATIONS: denials. Many are to allegations as to which One 3 Two has no personal knowledge and so cannot admit or deny, although it does not dispute them. One 3 Two also disputes certain allegations to the extent the AP has defined the term Fairey and Counterclaim Defendants to include One 3 Two, and makes allegations as to the conduct of Fairey or Counterclaim Defendants as to which One 3 Two took no part.

**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.

And

MANNIE GARCIA,

**Defendant, Counterclaim
 Plaintiff and Cross Claim**

Case No.: 09-1123 (AKH)

ECF Case

**THE ASSOCIATED PRESS'S FIRST
 AMENDED ANSWER, AFFIRMATIVE
 DEFENSES AND COUNTERCLAIMS**

Plaintiff/Defendant,
v.
**SHEPARD FAIREY AND OBEY GIANT
ART, INC.,**
Counterclaim Defendants,
And
THE ASSOCIATED PRESS,
**Cross Claim
Plaintiff/Defendant.**

Defendant, The Associated Press (hereinafter "The AP"), by and through its attorneys, Kirkland & Ellis LLP, hereby answers the Amended Complaint of Plaintiffs Shepard Fairey ("Fairey") and Obey Giant Art, Inc. ("Obey Giant Art") (collectively, "Plaintiffs"), in this action, dated October 16, 2009, as follows:

NATURE OF THE ACTION

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 1 of the Complaint and therefore denies the same, except admits that Plaintiffs have asserted claims for declaratory and injunctive relief.

2. Denies the allegations contained in ¶ 2 of the Complaint, except admits that The AP has asserted that Plaintiffs have created derivative works that infringe The AP's rights in and to one or more of its copyrighted works, and further admits that Plaintiffs have asserted claims for declaratory and injunctive relief which seek, among other things, a declaration that Plaintiffs have not infringed The AP's copyrights.

PARTIES

3. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 3 of the Complaint and therefore denies the same.

4. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 4 of the Complaint and therefore denies the same.

5. Denies the allegations contained in ¶ 5 of the Complaint, except admits that its principal place of business is located in New York, New York and further admits that it is one of the largest, oldest and most prominent news-gathering organizations in the world.

JURISDICTION AND VENUE

6. States that the allegations contained in ¶ 6 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that this Court has subject matter jurisdiction over Plaintiffs' claims.

7. States that the allegations contained in ¶ 7 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that this Court has personal jurisdiction over The AP.

8. States that the allegations contained in ¶ 8 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that venue is proper in this District.

FACTUAL ALLEGATIONS

9. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 9 of the Complaint and therefore denies the same.

10. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 10 of the Complaint and therefore denies the same.

11. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 11 of the Complaint and therefore denies the same.

12. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 12 of the Complaint and therefore denies the same.

13. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 13 of the Complaint and therefore denies the same.

14. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 14 of the Complaint and therefore denies the same, except admits that a photographer named Mannie Garcia was employed by The AP as a staff photographer in 2006, and further admits that Mr. Garcia took photographs of then-Senator, now-President Barack Obama (“President Obama”) at an event held at the National Press Club on April 27, 2006, while on assignment for The AP.

15. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 15 of the Complaint and therefore denies the same, except admits that among the photographs that Mr. Garcia took of President Obama at the National Press Club on April 27, 2006 was a photograph depicting President Obama looking up and to his left.

16. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 16 of the Complaint and therefore denies the same, except admits that Fairey has publicly stated that he has created various posters and other

merchandise depicting President Obama, which posters were based on a photograph for which The AP owns the copyright.

17. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 17 of the Complaint and therefore denies the same, except admits that Fairey has publicly stated that he has created various posters and other merchandise depicting President Obama, which posters were based on a photograph for which The AP owns the copyright.

18. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 18 of the Complaint and therefore denies the same, except admits that Fairey has publicly stated that he has created various posters and other merchandise depicting President Obama, which posters were based on a photograph for which The AP owns the copyright.

19. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 19 of the Complaint and therefore denies the same, except admits that Fairey has publicly stated that he has distributed various posters and other merchandise depicting President Obama, which posters were based on a photograph for which The AP owns the copyright.

20. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 20 of the Complaint and therefore denies the same.

21. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 21 of the Complaint and therefore denies the same.

22. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 22 of the Complaint and therefore denies the same.

23. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 23 of the Complaint and therefore denies the same.

24. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 24 of the Complaint and therefore denies the same, except admits that Fairey has publicly stated that he has created various works depicting President Obama based on a photograph for which The AP owns the copyright.

25. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 25 of the Complaint and therefore denies the same.

26. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 26 of the Complaint and therefore denies the same, except admits that President Obama was elected on November 4, 2008.

27. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 27 of the Complaint and therefore denies the same.

28. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 28 of the Complaint and therefore denies the same.

29. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 29 of the Complaint and therefore denies the same, except admits that Fairey has publicly stated that he has created various posters that were based on a photograph for which The AP owns the copyright.

30. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 30 of the Complaint and therefore denies the same, except admits that an individual named James Danziger has posted material on the Internet

discussing Plaintiffs' posters depicting President Obama and the works owned by The AP on which such posters were based.

31. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 31 of the Complaint and therefore denies the same, except admits that an individual named Michael Cramer has posted material on the Internet discussing Plaintiffs' posters speculating as to the source of the images depicted in Plaintiffs' posters of President Obama.

32. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 32 of the Complaint and therefore denies the same, except admits that Mr. Danziger has posted material on the Internet discussing Plaintiffs' posters speculating as to the source of the images depicted in Plaintiffs' posters of President Obama.

33. Denies knowledge or information sufficient to form a belief as to the allegations contained in ¶ 33 of the Complaint and therefore denies the same, except admits that an individual named Tom Gralish has posted material on the Internet discussing Plaintiffs' posters speculating as to the source of the images depicted in Plaintiffs' posters of President Obama.

34. Denies the allegations contained in ¶ 35 of the Complaint, except admits that on or about January 29, 2009, The AP attempted to contact Fairey regarding his unauthorized use of its photographs in creating Plaintiffs' posters depicting President Obama.

35. Denies the allegations contained in ¶ 36 of the Complaint, except admits that on January 29, 2009 in-house counsel for The AP telephoned Fairey's studio

but was unable to speak with him, and further admits that an individual claiming to represent Fairey called The AP's in-house counsel on January 30, 2009, during which call The AP's in-house counsel informed Fairey's representative that The AP was aware that a third-party had used technology to determine the source of the photo used to create *Obama Hope*, which was owned by The AP. Further admits that The AP told Fairey's representative that it expected Fairey to provide attribution and compensation for the use of the photo consistent with The AP's licensing practices.

36. Denies the allegations contained in ¶ 37 of the Complaint, except admits that on or about February 3, 2009 in-house counsel for The AP spoke with Plaintiffs' counsel, during which conversation Plaintiffs' counsel proposed a standstill agreement until February 6, 2009 to discuss a license agreement and The AP readily agreed to the proposal.

37. Denies the allegations contained in ¶ 38 of the Complaint, except admits that on February 4, 2009, The AP's news department independently prepared and transmitted a news article with the headline "AP alleges copyright infringement of Obama image" and refers the Court to that news article, which document speaks for itself.

38. Denies the allegations contained in ¶ 39 of the Complaint, except admits that The AP's news department independently prepared and transmitted the February 4, 2009 news article entitled "AP alleges copyright infringement of Obama image," which document speaks for itself.

39. Denies the allegations contained in ¶ 40 of the Complaint, except admits that The AP's in-house counsel sent an e-mail to Plaintiffs' counsel on February

6, 2009, after Plaintiffs' counsel failed to respond to earlier communications stating that while The AP preferred an amicable resolution, it intended to file suit on Tuesday, February 10, 2009 if the parties were unable to resolve matters before then.

FIRST CAUSE OF ACTION

40. Repeats and realleges each and every response to ¶¶ 1-40 above as if fully set forth herein.

41. States that the allegations contained in ¶ 42 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that there is a dispute between the parties as to whether the various unauthorized posters created by Plaintiffs using The AP's copyrighted photograph infringe The AP's rights in and to such photograph.

42. Denies the allegations contained in ¶ 43 of the Complaint.

SECOND CAUSE OF ACTION

43. Repeats and realleges each and every response to ¶¶ 1-43 above as if fully set forth herein.

44. States that the allegations contained in ¶ 45 of the Complaint are conclusions of law as to which no responsive pleading is necessary, but that to the extent any response is required, admits that there is a dispute between the parties as to whether the various unauthorized posters created by Plaintiffs using The AP's copyrighted photograph infringe The AP's rights in and to such photograph and are not fair use.

45. Denies the allegations contained in ¶ 46 of the Complaint.

46. Denies the allegations contained in ¶ 47 of the Complaint, except admits that prior to Plaintiffs' creation of their posters, The AP had published photographs of President Obama which were taken by Mr. Garcia.

47. Denies the allegations contained in ¶ 48 of the Complaint.

48. Denies the allegations contained in ¶ 49 of the Complaint.

49. Denies the allegations contained in ¶ 50 of the Complaint.

DEFENDANT'S AFFIRMATIVE DEFENSES

FIRST DEFENSE

50. The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

51. Plaintiffs' claims are barred in whole or in part by the doctrines of estoppel and unclean hands.

DEFENDANT'S COUNTERCLAIMS

NATURE OF THE ACTION AND RELIEF SOUGHT

52. The AP's claims arise out of Plaintiffs' and Counterclaim Defendants' willful and blatant violation of The AP's copyright in a photograph of President Obama, taken by The AP staff photographer Mannie Garcia in April 2006 (the "Obama Photo"). Counterclaim Defendants have used the Obama Photo without The AP's consent in violation of the Copyright Act of 1976, as amended. Namely, Shepard Fairey, Obey Giant Art, Inc., Obey Giant LLC, Studio Number One, Inc., and One 3 Two, Inc. (d/b/a Obey Clothing) ("Obey Clothing") (all counterclaim defendants together, "Counterclaim Defendants" or "Fairey"), fully aware that the Obama Photo was

DENIED AS TO ONE 3 TWO, BUT ADMIT THAT ONE 3 TWO SOLD CLOTHING BEARING IMAGE OF OBAMA THAT HAD BEEN PROVIDED TO IT BY FAIREY. THIS CLOTHING SHALL BE REFERRED TO AS OBAMA CLOTHING.

a copyrighted image, misappropriated The AP's rights in that image by developing a series of posters and other merchandise based on the Obama Photo (the "Infringing Works") and selling such merchandise through various distribution channels.

53. The Infringing Works copy all the distinctive and unequivocally recognizable elements of the Obama Photo in their entire detail, retaining the heart and essence of The AP's photo, including but not limited to its patriotic theme. As the following side-by-side comparison illustrates, the striking similarity between The AP's copyrighted image (displayed below on the left) of President Obama and the poster that Fairey made based on that image (displayed below on the right) is patently obvious:

DENIED.



The AP's Obama Photo

Fairey's Infringing Work

A true and correct copy of this side-by-side comparison is attached as **Exhibit A**.

54. While Counterclaim Defendants have attempted to cloak their actions in the guise of politics and art, there is no doubt that they are profiting handsomely from their misappropriation. As just one of myriad examples of Counterclaim Defendants' commercialization of the Infringing Works, Obey Giant Art's Web site <http://www.obeygiant.com/store> sells a \$60 sweatshirt (depicted below)

DENIED.

bearing an image derived from the Obama Photo, in blatant disregard of The AP's rights, although it appears that Obey Giant Art removed the sweatshirt from its Web site after The AP filed its original Answer, Affirmative Defenses, and Counterclaims ("Counterclaims") on March 11, 2009.



55. In addition, upon information and belief, Obey Clothing has manufactured and sold hundreds of thousands of infringing T-shirts and related items, earning revenues from the Infringing Works.

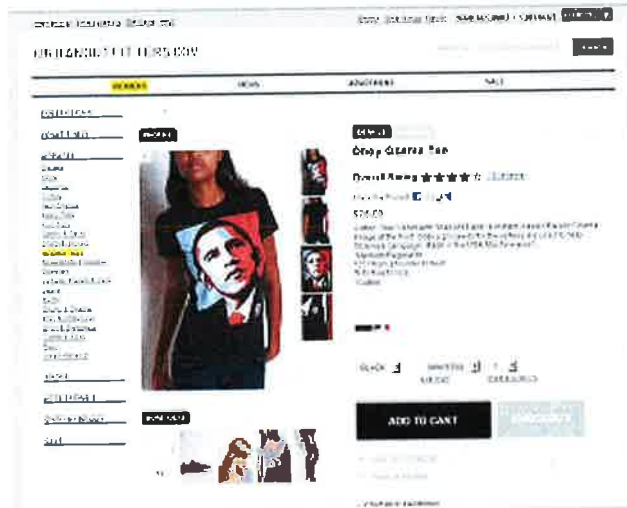
ADMIT THAT
ONE 3 TWO
HAS SOLD
OBAMA
CLOTHING
AND EARNED
REVENUES.

56. The following images depict Counterclaim Defendants' infringing T-shirts — yet another example of the commercial nature of the Infringing Works:



57. Moreover, upon information and belief, Counterclaim Defendants have authorized and made revenues and royalties from the sale of T-shirts bearing only the infringing image of President Obama without the words “Hope” or “Progress.”

ADMIT THAT ONE 3 TWO SOLD OBAMA CLOTHING WITHOUT THE WORDS HOPE OR PROGRESS AND EARNED REVENUES FROM THOSE SALES.



58. Nowhere in Fairey’s Complaint for a declaratory judgment and other relief does it mention that Counterclaim Defendants have made, and continue to make, substantial revenue from the Infringing Works. According to published reports, however, as of September 2008 alone, Counterclaim Defendants’ profits from the reproduction and distribution of the Infringing Works had already exceeded \$400,000. Upon information and belief, in the intervening months, and with the publicity generated by this lawsuit, Plaintiffs’ profits from the reproduction, distribution and sale of copies of the Infringing Works have far exceeded the level they had reached in September 2008.

DENY

59. Fairey could have selected from any one of countless images of President Obama in making his posters and other merchandise, or simply drawn him from life or taken his own photograph to use for his posters and other merchandise. Instead, Fairey was drawn to the unique qualities of this particular photograph, made distinctive by Mr. Garcia’s creative and artistic input, including (1) his deliberate selection of a

DENY.

specific moment in time to capture President Obama's expression; (2) his choice in using a particular type of lens and light for optimal impact; and (3) his careful and unique composition of the photograph. These facts, combined with Mr. Garcia's experience, skill and judgment, resulted in the creation of a distinctive image of a unique moment and expression of President Obama.

60. The Infringing Works do not alter any of the distinctive characteristics that make the Obama Photo so striking — from the selection of subject matter, to the composition, to the exacting details of the photo. All the recognizable elements remain completely and unmistakably intact in the Infringing Works, including the angle and slant of President Obama's head, and his gaze and expression; the contrast, focus, and depth of field of the photograph; as well as the shadow lines created by the lighting in the original photo. Fairey even used the red, white and blue flag imagery that Mr. Garcia worked to capture in the background of The AP's photo. Fairey has done nothing that would excuse his blatant copying of, and creation of derivative works based on, the Obama Photo without first obtaining a license to use that photograph from The AP and agreeing to provide attribution to Mr. Garcia.

DENY.

61. As is detailed below, Fairey's use of The AP's Obama Photo without notice, credit or compensation to the copyright owner is part and parcel of his willful practice of ignoring the property rights of others for his own commercial advancement. As is also detailed below, Fairey's practice contrasts dramatically with his aggressive and hypocritical enforcement against others of his own intellectual property rights. This highlights Fairey's knowing willfulness here and shows that his use of The AP's Obama Photo is anything but fair.

DENY.

62. Simply put, the fair use doctrine cannot be contorted to permit Fairey to wholly replicate a photographer's prescient photograph and exploit it for his own commercial benefit in utter disregard of The AP's long-established licensing program, which provides needed revenue to support The AP's not-for-profit mission of reporting the news as well as funding The AP's charitable efforts.

DENY.

63. Licensing is an important source of revenue for content creators, be they news or entertainment companies. This is especially true for The AP and particularly in these difficult times. As a news agency, licensing of content is fundamental to The AP's existence. The rule of law that Fairey argues here essentially would permit someone to take and commercialize a content owner's property without attribution or reasonable compensation, undermining the long-established practice of using such revenue streams to support the ongoing creation of new content.

DENY.

64. To create such a rule harming content owners is unnecessary as licensing programs already exist that strike a fair balance between the rights of the original content owner and the newcomer who wishes to use existing content to make a derivative work. Here, The AP had made every effort amicably to enter into a license and avoid litigation but, as detailed below, in the midst of discussions Fairey jumped the gun and filed this lawsuit anticipatorily in an attempt to gain a procedural advantage.

DENY.

65. In light of Counterclaim Defendants' willful, unauthorized use of The AP's Obama Photo, The AP has no choice but to assert claims for damages and injunctive relief based on Counterclaim Defendants' copyright infringement under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, and violation of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202, as well as a declaratory judgment pursuant

DENY.

to 28 U.S.C. §§ 2201 and 2202 that Counterclaim Defendants have no copyrights in the Infringing Works.

PARTIES

66. Counterclaim Plaintiff The AP is a New York not-for-profit corporation with its principal place of business at 450 West 33rd Street, New York, New York 10001. The AP is one of the largest and oldest news organizations in the world, serving as a source of news content in all formats — text, photos, graphics, audio, video and multimedia.

DENY

67. Counterclaim Defendant Shepard Fairey is an individual who resides at 1331 West Sunset Boulevard, Los Angeles, California 90026. He is an artist, graphic designer, merchandiser and business owner.

68. Counterclaim Defendant Obey Clothing is a California corporation located at 2313 Susan Street, Santa Ana, California 92704. Upon information and belief, Obey Clothing is the exclusive licensee of Obey Giant LLC for the use of Fairey's trademarks and designs on clothing.

ADMIT.

69. Counterclaim Defendant Obey Giant Art is a California corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026. Obey Giant Art engages in the business of selling and distributing Fairey's artwork, graphic designs and merchandise.

70. Counterclaim Defendant Obey Giant LLC is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026. Upon information and belief, Obey Giant LLC engages in the business of selling and distributing Fairey's artwork, graphic designs and merchandise.

71. Counterclaim Defendant Studio Number One, Inc. (“Studio One”) is a California corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026. Upon information and belief, Studio One engages in the business of corporate brand identity and manages the Obey® and Shepard Fairey brands, as well as distributing Fairey’s artwork, graphic designs and merchandise.

JURISDICTION AND VENUE

72. This action asserts counterclaims arising under the Copyright Act, 17 U.S.C. § 101 et seq., and the DMCA, 17 U.S.C. § 1202. This Court has federal question jurisdiction over The AP’s counterclaims pursuant to 28 U.S.C. §§ 1331, 1338(a) and 1338(b) and subject matter jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. This Court also has subject matter jurisdiction over The AP’s state law claims pursuant to the principles of pendant jurisdiction under 28 U.S.C. § 1367(a).

ADMIT

73. Upon information and belief, this Court has personal jurisdiction over all Counterclaim Defendants because they have committed tortious acts outside New York causing injury within the State of New York, regularly solicit business in New York, and derive substantial revenue from interstate commerce. Upon information and belief, this Court also has personal jurisdiction over all Counterclaim Defendants because they transact business in New York. Additionally, this Court has personal jurisdiction over Obey Clothing because it contracts to supply goods or services in New York. Further, this Court has personal jurisdiction over Fairey and Obey Giant Art because they have chosen to avail themselves of the laws and protections of this Court and The AP’s

ADMIT

claims arise from the same series of operative facts that Fairey and Obey Giant Art allege.

74. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and **ADMIT.**
(d).

FACTUAL BACKGROUND

The AP

75. The AP is one of the oldest, largest and most highly-regarded news organizations in the world. Founded in 1846, today it operates as a not-for-profit membership cooperative that gathers and distributes to news outlets worldwide news and information that is informative, educational or otherwise of public interest. **DENY.**

76. To support its worldwide news mission, The AP employs approximately 3,800 people in approximately 240 locations around the globe, providing thousands of newspapers, radio stations, television stations, news agencies, Web services, government and corporate clients with high-quality news around the clock in the form of text, photos, graphics, audio and video. On any given day, The AP's content can reach more than half the world's population through its members and clients. **DENY.**

77. The AP must invest significant resources to create and deliver this enormous volume of consistently high-quality reports. The AP's journalists are actively engaged in gathering and reporting news, including textual, visual and audio materials. Access to information is crucial for these journalists, who must be present to the greatest extent possible at the moment when news occurs in order to capture it. This requires them to travel quickly to the places where news is expected to happen, overcoming many obstacles and enduring significant hardships and risks to make sure that they are in a **DENY.**

position to capture newsworthy events as they happen and transmit their original material immediately to an AP center for editing and distribution.

78. As a not-for-profit news cooperative, The AP applies any incidental profit to its news operations.

DENY.

79. The AP's commitment is not limited to time and money. Its reporters and photographers often put their lives in jeopardy to gain access to and report from dangerous and unstable regions of the world or areas affected by catastrophes and natural disasters. More than 30 AP journalists have lost their lives in the line of duty since the cooperative was established. In addition, in the last few years alone, nearly 20 AP journalists have been incarcerated or otherwise detained, and at least several more have been harassed, intimidated or beaten. Most recently, a photographer from The AP was imprisoned for two years without any formal legal charges because of his dramatic and poignant photographs of war.

DENY.

80. The AP's news gathering activities require it, often at great expense, to remain a strong advocate for the First Amendment and openness to public records in the United States and in other countries; to protect its journalists who have been detained or imprisoned in the course of their duties; and to provide both security to journalists stationed in conflict zones and comfort to their families.

DENY.

81. Each story that The AP reports, whether in text, visual, audio, or graphical form, represents and reflects the efforts of reporters on the ground. With intimate knowledge of their beats and sources, reporters spend many hours — if not weeks — getting their stories. In doing so, they benefit from The AP's international physical presence, as well as its freedom of information actions, transparent editorial

DENY.

standards, editorial checks and balances, and efforts that help to safeguard journalists from threats to their safety and defend journalists from incarceration. It is for all of these reasons that the public has come to rely upon The AP to inform it about the most significant events occurring around the world.

82. In addition to paying its journalists, photographers and videographers, The AP also must fund pension and other financial obligations for the men and women who have dedicated their lives, often for relatively modest financial remuneration, to informing the public. In order to help its staff and their family members cope with catastrophes, natural disasters and conflicts, The AP also supports The AP Emergency Relief Fund, which distributes grants to staffers and their families who are victims of tragedies such as Hurricane Katrina and the recent natural disaster in Myanmar. See <<http://www.ap.org/relieffund/>>. And for those AP journalists who have made the ultimate sacrifice in service of reporting the news, The AP also funds benefits to the families of those brave individuals who have fallen in the line of duty.

DENY.

83. As a not-for-profit news organization deeply rooted in American journalistic traditions, no institution has greater interest than The AP in preserving the rights of those who engage in free expression — including the right of journalists and photographers to earn a livelihood from the products of their skill, talent, hard work and dedication. The AP's commitment to these core ideals has not wavered with the passage of time, in the face of adversity, as a result of dramatic changes in technology or on account of changes in the law.

DENY.

The AP's Photography

84. The outstanding quality and significance of The AP's efforts has been recognized over the years with numerous awards, including 49 Pulitzer Prizes to

DENY.

date. Of these, 30 have been awarded to The AP for its photographic work. The AP has also earned myriad other awards for its photography. These awards reflect recognition within the photographic and journalism communities of the extent to which The AP's photographs have captured many significant moments in history in a way that words alone simply cannot, producing images that have become woven into our nation's cultural fabric.

85. The AP's photographers capture these iconic and newsworthy **DENY.** images through their thoughtful creative process, judgment and expertise. While photographing events, they carefully seek out those elements that might make a compelling photograph that also is relevant to the story at hand. Such elements include the choice of camera and lens, the timing and selection of subject matter, the angle, lighting and shadows, depth of field, color contrast, symmetry, scale and focus, as well as capturing peak action, emotion, or any number of other unique visual elements. It requires the creative talent and ability of the individual photographer to recognize these elements and find a way to create a compelling photograph.

86. The AP has a rich tradition of covering more than a century and a **DENY.** half of American politics. For example, The AP is one of the few contemporaneous sources of the text of Abraham Lincoln's Gettysburg Address. And The AP's photography is synonymous with some of America's most historic moments, often capturing highly original elements in otherwise familiar subjects. The AP Presidential Exhibit commemorates more than 80 iconic photographs of past U.S. Presidents and their families, including unforgettable photos of the Reagans, the Bushes (I and II), the Clintons, and the Obamas, among others. See <<http://www.ap.org/americanpresident/>>.

87. With respect to politicians, in particular, because they are photographed almost every day, it takes skill and imagination to photograph them in a way that captures and conveys a compelling story.

DENY.

88. Among The AP's many distinctive photographs are those covering political events and campaigns. One such example is Scott Applewhite's photograph (depicted below) of President Clinton, taken as he walked to a podium in the Rose Garden of the White House in 1998 to deliver a short statement about the then-impending impeachment inquiry. Although the photograph depicted a public figure in a public and familiar setting, and was covered by the White House Press Corps, Applewhite was able to capture in a single image the enormous impact of the Monica Lewinsky affair on President Clinton as a person as well as a politician. The President had just emerged into view from behind the pillars of the White House, his somber expression punctuated by the long shadows and his just-visible wedding band. It is a foreboding image of a Presidency nearly ended by the shadow of an extra-marital affair. Mr. Applewhite "spotted this angle as photographers were moved to a camera platform and then hung back from the pack waiting for the right moment as President Clinton moved towards [the] podium." See Brian Horton, Guide to Photojournalism 33 (2d ed. 2001).

DENY.



89. Another example of The AP's rich history of photographing presidents is shown in the photograph depicted below of former 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. The AP's Paul Vathis took this photograph, a photograph that transcends time, through the use of extraordinary skill, observation, planning and persistence. After the Press Secretary had declared no more pictures, and other photographers started packing their gear, Mr. Vathis observed the two presidents walking away. He quickly conceived the image in his mind and skillfully managed to take the shot through the legs of a Secret Service Agent.

DENY.



90. As these examples demonstrate, The AP's photographs speak to **DENY.** their audiences in a way that words simply cannot — by conveying visually a unique narrative captured at a specific moment in time.

Dependence on Licensing Revenue

91. The AP does not generate significant revenue from advertisers or **DENY.** sponsors. Nor does The AP have a large endowment, as do other large institutions such as museums, private universities or even law schools. As a not-for-profit, membership-based news cooperative, The AP depends for the support of its newsgathering and reporting mission on revenue earned by licensing the intellectual property rights in and to its content.

92. Because The AP's content is of such high quality and significance and its reports provide such essential information to the public at large, potential users of its content are prepared to pay, and do pay, fair consideration for the right to use The AP's works. A vast array of customers under a variety of commercial arrangements directly or indirectly license from The AP the right to access and use its content across a variety of media, genres, geographies and languages. Some of these customers have licensed rights in and to The AP's content for over a century.

DENY.

93. The AP distributes its licensed content through feeds, satellite transmissions, hosted platforms and other means, including, in the case of photography, via a digital photo archive housing more than 10 million images, all of which are readily available for licensing via the Internet. See < <http://www.apimages.com>>. The AP's digital archive is also authorized to license images that belong to third parties, acting as a repository for historic, cultural and other iconic photographs.

DENY.

94. Over the years, The AP has licensed its photographs not only to media organizations, but also to a wide range of commercial and non-commercial licensees seeking to incorporate The AP's photos into their work. The AP has licensed its photos to individuals for use in political campaigns and advertisements, and to publishers, graphic designers, merchandisers and others seeking to incorporate The AP's images into, among other things, books, posters, buttons, T-shirts and other merchandise. For example, The AP licensed rights to a photograph of President Obama from its digital photo archive for use on a tote bag.

DENY.



The AP Photo



Licensed Derivative Work

95. The AP is not unique in licensing images for use in advertising, artistic works and merchandise, including on tote bags, T-shirts, posters, prints, banners and the like. The talent, skill and effort required to create compelling still images has fostered a vibrant market for professional photography, one on which many photographers have come to rely for their livelihoods. In addition, many content providers, whether news or entertainment in nature, rely on this revenue to support their activities. The AP's licensing program not only allows it to continue operating its full scale, robust and dependable newsgathering services worldwide, but it enables The AP to pursue efforts protecting the First Amendment and guaranteeing public access to open government on the local, state and federal levels.

DENY.

The Obama Photo

96. On March 29, 2006, The AP hired Mr. Garcia as a full-time, salaried staff photographer. While working as a staff photographer in April 2006, Mr. Garcia covered an event at the National Press Club headlined by actor George Clooney, who spoke about his then-recent visit to war-torn Darfur and released video footage from his trip. The event was also attended by, among others, U.S. Senator Sam Brownback and then-Senator Barack Obama, long before he announced his candidacy for the

ADMIT.

Presidency. Senators Brownback and Obama had co-sponsored a bill, titled The Darfur Peace and Accountability Act, which sought to increase funding for peacekeeping operations in Sudan.

97. The focus of the contemporaneous coverage of the event — and indeed the headline and text of The AP’s story that day — was Clooney’s involvement with, and recent trip to, Darfur. Mr. Garcia, however, also focused on then-Senator Obama for several of his photographs, positioning himself in such a way that he was able to illustrate the charismatic junior Senator at a unique and expressive angle against the patriotic backdrop of the American flag.

DENY.

98. In one of the photographs he took that day, Mr. Garcia consciously and deliberately captured now-President Obama at a specific moment in time, one for which he had patiently waited. The unique composition, angle, center of focus, framing, and depth of field, along with the particular reflection of light, shadow lines and contrast, combined with the particular type of lens that Mr. Garcia used, created a unique image of President Obama, his head slanted slightly to the left, his chin lifted and his eyes fixed off into the distance. A true and correct copy of this photo (the “Obama Photo”) is shown below and attached hereto as **Exhibit B**:

DENY.



The AP holds a copyright registration, Registration No. VA 1-356-885, in the Obama Photo.

99. Mr. Garcia has described some of the elements that went into capturing the Obama Photo at the National Press Club that day, demonstrating the thought, craft, patience and judgment that he brought to bear on its creation: “I’m on my knees, I’m down low, and I’m just trying to make a nice, clean head shot. And I’m waiting. I’m looking at the eyes. I mean, sure, there’s focus, and I want the background to be a little bit soft. I wanted a shallow depth of field. I’m looking and waiting. I’m waiting for him to turn his head a little bit. I’m just patiently making a few pictures here and there, and I’m just looking for a moment when I think is right, and I’m taking some images as I’m going along, and then it happened. Boom, I was there. I was ready.” See Interview of Mannie Garcia on National Public Radio, February 26, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=101184444>.

DENY.

Fairey's History of Misappropriating the Works of Others

100. Fairey is an artist, graphic designer, merchandiser and business owner who has claimed to specialize in “referencing” pre-existing works to create, among other things, commercial works, including merchandise and posters, and to promote and sell his Obey®-branded products. Upon information and belief, his efforts began in the 1980s with an image of the late, famous wrestler, Andre the Giant (born André René Roussimoff, May 19, 1945). Fairey later adorned that image with his brand, Obey® (claimed subject matter of three trademark registrations filed with the United State Patent and Trademark Office, Registration Nos. 2632359, 2762299 and 3282078), and placed it, often illegally, in public spaces in communities across the country, including New York, Boston, Providence and San Diego.

DENY.

101. Further demonstrating Fairey's willful disregard for the property rights of others, upon information and belief, he has been arrested more than a dozen times for targeting communities with his graffiti, vandalism and related crimes, most recently in Boston on two outstanding warrants, just three days before filing this lawsuit.

DENY.

102. Upon information and belief, Fairey's merchandise is often based in whole or in great part on works misappropriated from other artists, designers and copyright owners. In fact, at a recent forum, Fairey admitted that he had a “long history” of copyright infringement. Though Fairey's remarks may have been somewhat tongue-in-cheek, they reflect a shared understanding by Fairey and his audience that Fairey misappropriates the works of others.

DENY.

103. As illustrated below, Fairey's willful pattern and practice is to repeatedly copy the works of other artists and photographers without providing, on information and belief, any credit, compensation or attribution to those authors. For

DENY.

instance, the photo below on the left, titled *Black Panther*, was taken by photographer Pirkle Jones in 1968, portraying a Panther at a political rally in Oakland, California. Below on the right is a poster produced by Fairey. It contains an image that is strikingly similar to the one created by Mr. Jones, who, upon information and belief, received no credit, compensation or attribution from Fairey for the use of his work.

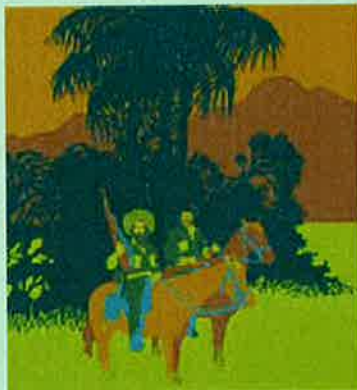


Pirkle Jones Photo

Fairey Poster

104. Fairey similarly misappropriated the work of Cuban poster artist Rene Mederos. In so doing, Fairey took a poster that Mr. Mederos created in 1972 and printed it on T-shirts, as shown in the two images below. Upon information and belief, Fairey failed to give Mr. Mederos any credit, compensation or attribution for the T-shirt prior to using Mr. Mederos's work.

DENY.



Mederos Poster



Fairey's T-shirts

105. In 1969, Rupert Garcia created a silkscreen print titled *Down with the Whiteness* (shown below on the left), which is featured in the permanent collection of the Fine Arts Museum of San Francisco. Fairey later misappropriated the image (shown below on the right) and, upon information and belief, simply kept the same graphic design and, using a computer graphics program, substituted the head on the image and replaced the text, without giving any credit, compensation or attribution to Mr. Garcia.

DENY.



Garcia's Work

Fairey's Work

106. Upon information and belief, yet another example of Fairey's unauthorized copying is shown below. Fairey misappropriated a Swiss photographer's image of a woman covering her ears (below on the left), creating an image that was almost identical to the original but for the omission of the original text and the addition of Fairey's "Obey" trademark and the phrase "Obey With Caution." As with his other works described above, upon information and belief, Fairey gave no credit, compensation or attribution to the original artist.

DENY.



Swiss Work



Fairey's Work

107. Fairey's copy-and-paste style is evidenced yet again in a poster he titled *Nouveau Black* (pictured below on the right), which, upon information and belief, strikingly takes directly from Austrian artist Koloman Moser's work, titled *Ver Sacrum* (1898) (pictured below on the left). Once again, on information and belief, Fairey took the original image in its entirety and gave no credit, compensation or attribution to the estate of the original artist.

DENY.



Moser's Work



Fairey's Work

108. More recently, upon information and belief, Fairey blatantly used a photograph taken by filmmaker and journalist Edward Nachtrieb (pictured below on the

DENY.

left) to create the work below (pictured on the right). Upon information and belief, Fairey gave no credit, compensation, or attribution to Mr. Nachtrieb for the use of his photograph.

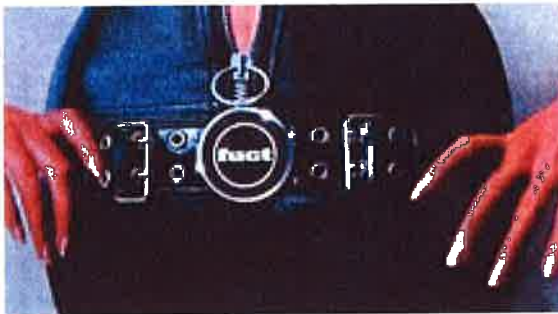


Nachtrieb's Photo

Fairey's Work

109. Upon information and belief, Fairey and his clothing brand, Obey Clothing, have even knocked off other clothing brands that cater to the same market of alternative-culture consumers. For example, Fairey and Obey Clothing have copied the influential fuct™ brand of clothing's logo and designs. Upon information and belief, Fairey has not given fuct™ credit or compensation for the use of its style and designs.

**ADMIT THAT
ONE 3 TWO
SOLD THE
PRODUCT
IN THE
IMAGE
TITLED
OBEY
DESIGN.**



1996 fuct™ Design



2006 Obey Design



1993 fuct™ T-shirt 1996 Fairey Print

110. Fairey's conduct over the years clearly evidences a willful practice and pattern of ignoring other's rights in and to their own works. Their work, it appears, is fair game for him to exploit commercially without so much as an acknowledgement.

DENY.

Counterclaim Defendants' Hypocritical Approach to Intellectual Property Rights

111. In a striking departure from the casual disregard that Fairey shows for the creative works of others, Counterclaim Defendants act hypocritically and aggressively when it comes to the protection of Fairey's works and enforcement against those who make use of them.

DENY.

112. For example, Counterclaim Defendants are quick to use the law to restrict others from using their materials and to preserve their exclusive use of Fairey's designs. Since the late 1990s, Fairey and his related entities have filed at least nine trademark applications, including for the words "SHEPARD FAIREY," "OBEY," and "DISOBEY" and the "OBEY®" design, with the United States Patent and Trademark Office, asserting ownership over those particular words and images. In other words, through these trademark registrations, Fairey seeks the legal right to prevent others from commercially using these words and phrases.

DENY.

113. In so doing, Fairey seeks to protect his commercial interests. For example, Fairey's current active trademark registrations cover a wide range of

DENY.

merchandise, including T-shirts, jackets, caps, knit shirts, woven shirts, pants, shorts, jackets, sweatshirts, sweaters, belts, scarves, beanies, hats, handbags, backpacks, wallets, leather key chains, stickers, posters, postcards and the like. With respect to the Obey® trademark (Registration No. 2632359), Fairey has filed a Section 15 Affidavit claiming “incontestable” rights in that word and design.

114. Counterclaim Defendants also demonstrate a sophisticated understanding of licensing and copyright protection — with respect to Fairey’s own works — contrasting sharply with Fairey’s repeated failure to obtain permission and a license to use other artists’ works. For example, the ObeyGiant.com Web site allows fans to download for free certain specific Fairey trademarks and images that promote his brands, but it does not allow visitors to download any of Fairey’s “Photographs,” “Fine Art,” or other items. In other words, Fairey restricts the copying of his own works, even including an “All Rights Reserved” copyright notice on every page of his Web site.

DENY.

115. The contrast between Fairey’s use of others’ works and his approach to copyright enforcement in his own works is further shown with respect to the very Infringing Works at issue in this case. During the 2008 presidential campaign, Fairey offered free licenses to download the “Obama Hope” poster from his website. See <<http://www.obeygiant.com/headlines/the-real-deal>>. However, the license was subject to several restrictions, including that the poster was “not to be used for merchandise or any other profitable means.” Further, Fairey’s Web site also warned that the poster was the “copyrighted image of Shepard Fairey and OBEY GIANT ART” and that all rights were “Reserved.”

DENY.

116. In keeping with Counterclaim Defendants' hypocritical approach to intellectual property rights, notwithstanding their misappropriation and commercialization of other creators' works for their own gain, they are quick to hunt down artists who they believe unlawfully use Fairey's intellectual property, without apparent regard to the principles of fair use that Counterclaim Defendants conveniently espouse in this case. For example, upon information and belief, in March and April 2008 Fairey and his related enterprises sent Texas-based artist Baxter Orr a series of cease-and-desist letters in connection with Orr's creation of a work that borrows from Fairey's Obey® image. Orr's work, titled *Protect Yourself* (bottom right), covered the face of Fairey's *Protect* (bottom left) with a surgeon's mask.

DENY.



Fairey's Protect

Orr's Protect Yourself

117. Fairey's first demand letter accused Orr of making "unauthorized use" of Fairey's "copyrighted work" and asserted that Orr's *Protect Yourself* poster infringed the copyright in Fairey's *Protect*. Fairey asserted that Orr's work was "essentially identical" to Fairey's.

DENY.

118. In the letter, Fairey further asserted that Orr had "neither asked nor received permission to use" Fairey's work, "nor to make or distribute copies, including electronic copies, of same."

DENY.