

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

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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**

119. Fairey's letter went on to threaten the artist, stating, "I believe you have willfully infringed our rights under 17 U.S.C. Section 101 et. seq. and could be liable for statutory damages as high as \$150,000 as set forth in Section 504(c)(2) therein."

DENY.

120. The letter concluded by demanding that Orr either (1) destroy all copies of his *Protect Yourself* works, or (2) surrender them to Fairey's company. If Orr failed to comply, the letter threatened him with unspecified "further action."

DENY.

121. It is noteworthy that Fairey's letter to Orr could just as easily have been sent by The AP to Fairey in this case — if The AP had sent one, which it did not — regarding Fairey's use of The AP's Obama Photo. In fact, The AP's approach to Fairey's infringement was much more moderate and involved simply calling Fairey's representatives to discuss a reasonable license. The AP never demanded that Fairey "destroy" or "surrender" his work.

DENY.

122. Upon information and belief, when Orr apparently did not capitulate to Fairey's first demand letter, Fairey sent yet another letter to Orr. In this letter, Fairey's counsel went on to detail exactly how Orr's failure to obtain a license harmed Fairey and his related entities.

DENY.

One of the many factors contributing to the value and desirability of my Client's [defined in the letter as "Shepard Fairey and his related entities"] Intellectual Property is the limited licensed uses and his control over such uses. **Such exclusivity commands a significant premium over the designs supplied by the average designer. My Client has long required the purchase of a license in connection with a right to use its Intellectual Property on goods, services, advertising, and publicity.** My Client identifies the permitted uses in a License Agreement which accompanies each license granted. This agreement governs the use of the Intellectual Property. People and businesses seek out my Client and his distinctive artwork when they desire to have a certain look to their work and/or to appeal to a certain audience which favors my Client's work. My Client typically warrants that his licensees acquire exclusive rights in their licensed categories, and they expect my Client to pursue those who are

using the same or confusingly similar marks on their goods and services and thus diminishing the value of their licenses. Indeed, it is through clients and potential clients that your use came to my Client's attention.

(Emphasis added.)

123. In sharp contrast to Fairey's refusal here to obtain a license to use The AP's Obama Photo, Fairey's letter went on to detail at length not only the importance of licensing content from the owners of intellectual property, but also demanded that Orr agree to license Fairey's image:

You have not secured a license to use and distribute the Intellectual Property either for its own uses or in connection with its products and marketing. Specifically, your apparent unlicensed appropriation, use, copying, dilution, and distribution of the Intellectual Property for your financial benefit and any other uses, are each infringements and dilutions of my Client's valuable trademarks and copyrights. Be advised that your actions may violate both federal and state unfair competition and trademark laws.

(Emphasis added.)

124. The second letter went on to threaten Orr with the filing of a "complaint in the appropriate court" if the parties could not otherwise reach an agreement. The letter noted that "[u]nless and until we reach such an agreement, I must insist that you immediately cease and desist from all infringing uses of my Client's Intellectual Property," and that "[a]ll my Client's rights are expressly reserved."

125. What is even more striking about Fairey's hypocritical approach with respect to Orr, as compared to his position in this case, is that the second demand letter to Orr attempted to censor Orr from even telling anyone that Fairey was claiming infringement. As this letter demonstrates, Fairey is hardly a champion of the First Amendment. Under a seldom-invoked common-law copyright provision incorporated in

DENY.

DENY.

DENY.

the California Civil Code, Fairey's counsel then warned Orr to refrain from publishing any of Fairey's cease-and-desist letters:

Finally, I want to call your attention to California Civil Code § 985, which reads in part "Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law." Accordingly, I do not expect to see this letter in a public forum and you are not authorized to publish it, including (without limitation) by putting it on the Internet. This also applies to your posting of my Client's first cease and desist letter online. Demand is also made that you remove your public copies of my Client's correspondence.

126. In yet another example of Counterclaim Defendants' hypocritical approach to intellectual property rights that evidences Fairey's willfulness in using The AP's Obama Photo without a license, upon information and belief, just weeks before filing this lawsuit, Obey, Inc. sent online store CafePress.com a cease-and-desist letter asserting that certain merchandise offered for sale through the store infringed an Obey® trademark. Upon information and belief, CafePress.com had sold a blue-eyed kewpie doll clad in a knit black-and-gold uniform bearing the word "Obey," designed by a Pittsburgh-based graphic designer, which Fairey said infringed his trademark rights in the word "Obey."

DENY.

127. Upon information and belief, rather than deal with legal costs, the designer decided to remove the items from sale. Upon information and belief, in the three months before the items were withdrawn, the designer made less than \$70 for the sale of 16 items, 10 of which had "Obey" written on them.

DENY.

128. Upon information and belief, Fairey and his related entities routinely police and enforce Fairey's intellectual property rights. This hypocritical approach highlights the willfulness of his conduct, and also constitutes, *inter alia*, unclean

DENY.

hands that should also estop Fairey from claiming that his misappropriation of The AP's Obama Photo is fair use, free for him to take without having obtained a license.

Counterclaim Defendants' Infringement of Defendant's Copyright

129. Just as he has done time and time again, Fairey created the Infringing Works by misappropriating an image that belonged to someone else, in this case a photograph copyrighted by The AP. After processing The AP's Obama Photo through his computer, Fairey proceeded to create and distribute virtually identical copies of the Obama Photo as his own original creation without proper attribution to Mr. Garcia and without credit and fair compensation to The AP.

DENY.

130. Upon information and belief, after months of Counterclaim Defendants' attempts to obscure the true source of the Infringing Works, a third party, using advanced image recognition technology that matches images based on their distinctive elements, determined in late January 2009 that the Infringing Works were unmistakably derived from the Obama Photo.

DENY.

131. Only then was Fairey forced to admit that he "came across" The AP's Obama Photo after doing searches on Google Images in January 2008 for images of President Obama. Fairey has said that he was looking for an image of Obama that was "Presidential," and in which Obama was "gazing off into the future, saying, 'I can guide you.'" That was exactly what Mr. Garcia had captured in the Obama Photo and exactly what Fairey took when he copied it.

DENY.

132. As his words demonstrate, Fairey deliberately chose to use The AP's Obama Photo because it captured the essence of what Fairey was looking for, due to the unique qualities imparted to it by the photographer's own creative input. In other words, although Fairey's Google search must have returned dozens, if not hundreds, of

DENY.

images available on the Internet, Fairey selected the Obama Photo — almost two years after the photograph was originally published — because of its transcendent qualities.

133. Upon information and belief, rather than simply contacting The AP and obtaining permission and a reasonable license, which would have been both easy and relatively inexpensive to do, Fairey proceeded to take all of the unique characteristics of the Obama Photo, copying those distinctive characteristics in their entirety, to create the Infringing Works, without any credit to The AP. Thus, rather than invest the effort to create his own iconic image, or to contact The AP to procure a reasonable license, Counterclaim Defendants elected to free-ride on Mr. Garcia's efforts and creative choices.

DENY.

134. Fairey's minimal changes to The AP's Obama Photo add nothing to the distinctive characteristics of Mr. Garcia's image. Rather, Fairey essentially has engaged in a form of computerized "paint by numbers" with The AP's copyrighted image — taking the work in its entirety. The amount and substantiality of Counterclaim Defendants' use is unmistakable — it is a wholesale copying of The AP photo.

DENY.

135. Counterclaim Defendants' use of the Obama Photo cannot be said to serve a different purpose than the original work, or transform the original image into a new expression. Like the creative works of countless of The AP's photographers, each of which convey a unique narrative, the Obama Photo conveys a defining impression of President Obama. The Infringing Works, in turn, convey only what was already present in the Obama Photo — indeed, not only the particular elements, but also the essence of the photo. On information and belief, it was exactly the distinctive qualities in the original that led Fairey to select the Obama Photo in the first place, as opposed to others

DENY.

he reviewed. Accordingly, the Infringing Works serve exactly the same character and purpose as the Obama Photo in communicating these evocative themes, regardless of whether the Infringing Works were used in a political campaign or sold as commercial merchandise.

136. Counterclaim Defendants' Infringing Works also cannot be characterized as commenting on or criticizing the Obama Photo. In fact, upon information and belief, Counterclaim Defendants failed to disclose The AP and the Obama Photo as the true source of the Infringing Works despite numerous opportunities to do so. Because Fairey never acknowledged The AP or Mr. Garcia as the source of the image, the public had no way of knowing what photo, if any, Fairey used in developing the Infringing Works. Accordingly, any claim that the Infringing Works "comment on" or engage in "criticism of" the Obama Photo or Mr. Garcia's viewpoint or skill is unsupported by the facts. Rather, Fairey's conduct was deliberately calculated to mislead the public as to the source of the distinctive and unequivocally identical elements of the Infringing Works — namely those that were copied in their entirety from the Obama Photo.

DENY.

137. As detailed above, news photography is an art form that requires skill, artistic judgment, dedication, countless hours of preparation and imagination. The AP's photographers document world events every day through a creative and painstaking journalistic process. Before The AP ever publishes a photograph, it first selects events for journalists to report on and capture, carefully chooses visual elements that will help create a compelling image, composes the relevant visual aspects of a story (based on

DENY.

experience, training and judgment), selects “the” image or images from multiple options and edits it to tell the full story.

138. Counterclaim Defendants’ unauthorized use of the Obama Photo has caused substantial impairment to the potential market for the original photo, namely, The AP’s ability to license its use to both commercial and non-commercial customers across all media, genres, geographies and languages. This strikes at the heart of The AP’s business and is particularly unfair competition in light of Counterclaim Defendants own enforcement efforts with Fairey’s intellectual property.

DENY.

Fairey’s and the Other Counterclaim Defendants’ Bad Faith Conduct

139. Fairey and his related entities have routinely engaged in bad faith conduct and practices related to their intellectual property rights and the Obama Photo in particular. This further highlights the willfulness of Fairey’s conduct and the lack of fair use.

DENY.

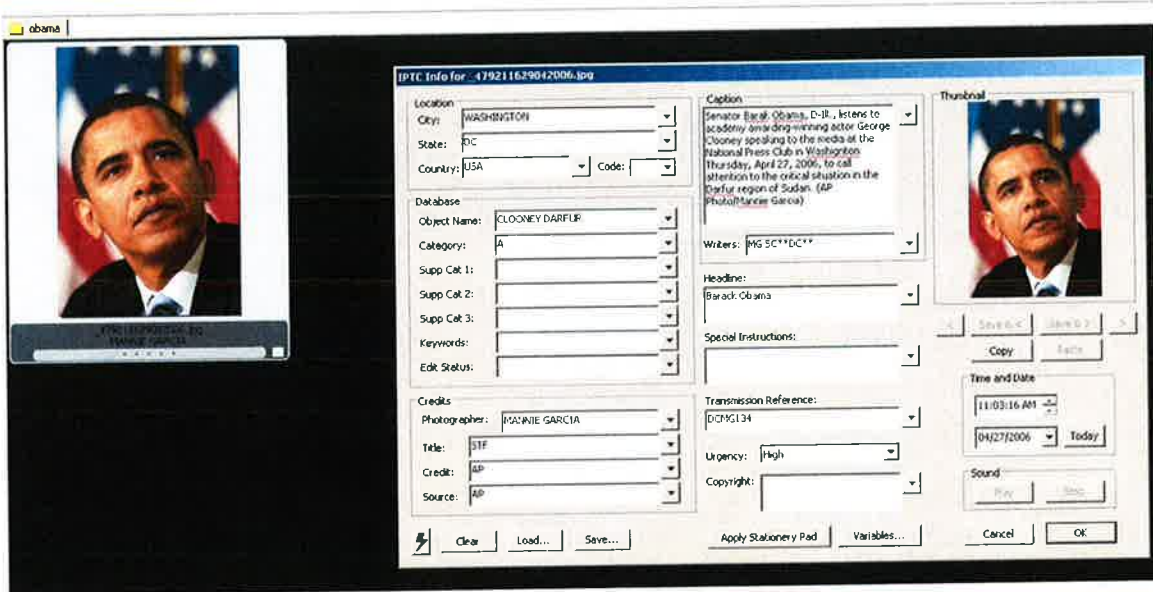
140. First, upon information and belief, Fairey took the Obama Photo from Google Images and, despite Google’s clear policy explicitly requiring users to obtain permission from copyright owners prior to use, he admittedly used the photo without ever bothering to obtain The AP’s permission or offering it any compensation.

DENY.

141. Second, notwithstanding Google’s clear copyright policy and Fairey’s sophisticated understanding of intellectual property rights, upon information and belief, Fairey stripped away the copyright management information, as defined in 17 U.S.C. § 1202(c). Upon information and belief, when the Obama Photo is downloaded through Google Images, it is accompanied by the copyright management information depicted below, which identifies The AP as the owner of the copyright in the work and Mr. Garcia as the photographer. Also upon information and belief, when Fairey

DENY.

downloaded the Obama Photo through Google Images, it bore this copyright management information, which he stripped from the image.



142. Third, as described above, Fairey himself has demonstrated by his own actions a sophisticated understanding of intellectual property licensing and enforcement and thus surely knew that he needed a license to use the Obama Photo and to credit The AP and Mr. Garcia for his use — yet he failed to do so.

DENY.

143. Fourth, upon information and belief, Fairey and his related entities defrauded the U.S. Copyright Office by failing to state in the application to register the copyright in the Infringing Works (Reg. Nos. VA0001651320, VA0001651318 and VA0001651319) that they were actually derivative works of The AP's Obama Photo. To obtain a copyright registration, applicants must disclose, and exclude from the registration application, any pre-existing material or material not owned by the applicant — i.e., applicants must disclose whether the work is wholly new or rather is a derivative work based on a pre-existing work. Upon information and belief, Fairey's copyright applications for the Infringing Works failed to identify the Obama Photo in the "Material

DENY.

Excluded” section of the applications even though Fairey is now forced to admit that his posters were derived from The AP’s Obama Photo. Fairey’s failure to properly identify his Infringing Works as derivative of the Obama Photo constitutes fraud on the Copyright Office, further demonstrating Fairey’s cavalier attitude towards the intellectual property rights of others and disregard for the copyright laws.

144. Fifth, upon information and belief, in at least one other instance involving circumstances nearly identical to those presented here, Fairey recognized that, contrary to his regular practice of misappropriating the works of others, he was required to obtain permission and give appropriate credit. Specifically, upon information and belief, Fairey obtained permission and gave credit to photographer David Turnley for the use of his photograph to create Fairey’s “VOTE” poster, which is pictured below.

DENY.



Turnley’s Photo



Fairey’s Licensed Work

145. Upon information and belief, Counterclaim Defendants did not distribute the “VOTE” poster virally nor did they sell merchandise incorporating Mr. Turnley’s photograph.

DENY.

146. Sixth, Fairey has licensed photographs from The AP in the past to make art prints and T-shirts, completely undermining his argument in this case that no

such license was needed to create the Infringing Works. Specifically, in December 2008, Fairey licensed the photograph below taken by AP photographer Kevin Frayer of a Palestinian woman peering out from a balcony as she watched Israeli authorities demolish a house in Jerusalem on Wednesday, November 5, 2008. The license granted Fairey the right to print up to 5000 T-shirts and 500 art prints bearing an illustration of the image, which is also pictured below.



The AP's Photograph



Fairey's Work Based on the Licensed AP Photograph

ADMIT THAT ONE 3 TWO SOLD TSHIRTS WITH THIS IMAGE ON IT BASED UPON A LICENSE OBTAINED BY FAIREY AND HIS COMPANIES.

147. Even more recently and prominently, Shepard Fairey used the Associated Press photograph pictured below on the left to create the August 2009 cover

DENY

design of *Rolling Stone* magazine, which is pictured below on the right. Upon information and belief, although Fairey has stated that he was provided with a photograph to use to create the cover design, he has failed to acknowledge that his design directly copied an AP photograph. Fortunately, third party Rolling Stone had properly licensed the photo from The AP and attributed it to AP staff photographer Pablo Martinez Monsivais on the inside cover of the magazine.



The AP's Photograph



Fairey's Licensed Illustration

148. These licenses demonstrate that Fairey fully comprehends when a license is needed to create a derivative work, such as with the images depicted above. Moreover, they demonstrate that Fairey was able to easily open an account with The AP in 2008, which he did to license the photo of the Palestinian woman. If Fairey had approached The AP for a license for the Obama Photo to create the Infringing Works, as he should have done, it would have been similarly easy for him to license.

DENY

149. There is no reason Fairey could not follow the proper procedure and license the Obama Photo, which he used to make the Infringing Works.

DENY.

150. Lastly, Fairey has engaged in bad faith conduct by jumping the gun and filing this lawsuit anticipatorily in order to gain a procedural advantage.

DENY.

151. As soon as The AP learned that the Obama Photo was the source of the Infringing Works, The AP conducted a thorough analysis of the nature and usage of the works before contacting Fairey and his representatives. In response to The AP's initial inquiry, Fairey's marketing representative contacted The AP's in-house counsel on January 30, 2009, who explained that the use of the Obama Photo in the Infringing Works required permission from The AP and, under The AP's standard licensing procedure, appropriate credit and attribution and the payment of a reasonable fee commensurate with the scope of Fairey's use of The AP's copyrighted work. The AP's in-house counsel made it clear from the outset that The AP wished to handle the discussion in an amicable manner and that any proceeds that The AP received as compensation for past use of the Obama Photo would be contributed to The AP Emergency Relief Fund.

DENY.

152. Fairey's outside counsel then contacted The AP on February 2, 2009 to assert that Fairey's use of the Obama Photo in the Infringing Works was a "fair use" and did not require permission from The AP. The AP's in-house counsel disagreed with Fairey's counsel, but again made it clear that The AP wished to resolve the matter amicably. Fairey's counsel requested more time to discuss the matter with his clients.

DENY

153. Fairey's counsel then contacted The AP's in-house counsel again on February 4, 2009, to request additional time — until Friday, February 6 — to discuss the matter with The AP. Fairey's counsel also proposed a standstill agreement, whereby the parties agreed not to initiate any lawsuit until they spoke on Friday. This proposal

DENY

surprised The AP, as it did not view the matter as anything other than a routine licensing discussion. Accordingly, The AP's in-house counsel readily agreed to the litigation standstill agreement proposed by Plaintiffs' counsel.

154. Unfortunately, Fairey's counsel never called The AP's in-house counsel on Friday, February 6th, nor did counsel make any further attempt to discuss a licensing arrangement.

DENY.

155. In the meantime, The AP was aware that, according to a 2006 press release, the stated mission of Fairey's counsel, the Stanford Fair Use Project, is to "defend 'fair use' rights in a digital environment through declaratory judgment actions." Therefore, The AP was concerned that Fairey had no intention of engaging in further discussions, but was instead likely to rush to file a declaratory judgment action against The AP in order to further Stanford Fair Use Project's mission. Upon information and belief, Fairey's counsel has done so at least on one prior occasion.

DENY.

156. This led The AP to grow even more concerned that Fairey was intentionally avoiding discussions and delaying so as to file an unwarranted complaint for declaratory relief. Only after Fairey's counsel engaged in further delay that Friday did The AP's in-house counsel reluctantly notify Fairey's counsel that if the matter was not amicably resolved, it would bring legal action against Fairey in the Southern District of New York on Tuesday afternoon, February 10, 2009. The AP's in-house counsel hoped that this would allow the parties sufficient time to resolve what it still believed at heart was a routine matter, of the sort that is normally resolved in a matter of days.

DENY.

157. However, upon information and belief, Fairey was stalling The AP while at the same time busily drafting the Complaint. Fairey's counsel ultimately

DENY.

reneged on the standstill agreement without ever discussing the matter again with The AP's in-house counsel and filed the instant lawsuit anticipatorily on Monday, February 9, 2009, without so much as a courtesy e-mail stating that they were planning to bring this action.

Fairey's Bad Faith Conduct in Filing the Complaint

158. The AP alleged in its March 11, 2009 Counterclaims that, in a further act of bad faith, Fairey and Obey Giant Art deliberately misrepresented the source of the Infringing Works in their Complaint. Specifically, upon information and belief, although Fairey was well aware that the Infringing Works were based on the Obama Photo, Fairey deliberately misidentified in the Complaint another photo taken by Mr. Garcia, which included an image of the actor George Clooney seated next to President Obama (the "Clooney Photo"), as the source of the Infringing Works. A true and correct copy of the Clooney Photo, attached hereto as **Exhibit C**, is pictured below along with images of the true Obama Photo and one of Fairey's Infringing Works.

DENY.



Clooney Photo



Obama Photo



Obama Hope Poster

159. Upon information and belief, by misrepresenting the true source of the Infringing Works, Fairey has engaged in a misguided effort to argue that Fairey made more substantial changes to the photograph — i.e., that he at least had to crop it — than

DENY.

he actually did. But a simple comparison of the Clooney Photo to the Infringing Works and the Obama Photo makes clear to even the casual observer that Fairey used the Obama Photo, depicting President Obama sitting alone, as the basis for the Infringing Works. Moreover, it has been widely reported that third-party image recognition software has been used to determine that the Obama Photo was indeed the photo which Fairey used. Unlike the Clooney Photo, both the Obama Photo and the Infringing Works depict exactly the same close-up of President Obama, tightly framed with his head tilted at the same angle, with the same expression on his face and the same focus of his eyes, along with the same lighting and shading. Significantly, in both the Obama Photo and the Infringing Works, Mr. Clooney is nowhere to be seen.

160. Moreover, upon information and belief, when he was interviewed in 2008 about the Infringing Works, Fairey made no mention of cropping Clooney's image from the photograph that he downloaded from Google Images. Nor, upon information and belief, did Fairey make any mention of altering the angle at which President Obama's head was turned, the tilt of President Obama's head, the angle of his gaze, or the reflection of light, shadow lines, contrast, center of focus, framing, or the depth of field of the photograph. Thus, Fairey's misidentification of the Clooney Photo as the source for the Infringing Works can only be understood as a deliberate attempt to obscure the Obama Photo as the true source material for the Infringing Works and to minimize the nature and extent of Fairey's unauthorized copying of the Obama Photo.

DENY.

Fairey Has Now Admitted that He Fabricated and Destroyed Evidence to Cover Up the True Source Photo

161. The AP's allegations in its March 11, 2009 Counterclaims were wholly correct. Fairey has now admitted that he used the Obama Photo and not the

DENY.

Clooney Photo to create the Infringing Works. Moreover, Fairey has also admitted that he falsified evidence and destroyed or attempted to destroy documents in a brazen (but unsuccessful) attempt to cover up the true source photo. Fairey's wrongdoing constitutes a fraud upon the Court as it undermines the integrity of the judicial system, in particular the discovery process among the parties.

162. After filing the Complaint, Fairey also issued press statements and gave several interviews in which he insisted that "The AP is showing the wrong photo." Upon information and belief, Fairey was lying all along and has now been forced to admit that these statements were false, as were other statements that Fairey made describing how he cropped the picture of Clooney and then-Senator Obama and made other changes to create the *Hope* and *Progress* posters.

DENY.

163. Fairey's admissions go to the heart of his case as they demonstrate that Fairey brought this lawsuit for a declaratory judgment of "fair use" under false pretenses by lying about which AP photograph he used to create the Infringing Works.

DENY.

164. Upon information and belief, Fairey believed his misrepresentations would improve his chances of winning a favorable verdict. More specifically, upon information and belief, by claiming to have used the Clooney Photo, Fairey was attempting to argue that he made more changes to The AP's copyrighted image than he actually did (that he at least had to crop it) and that he took a less substantial portion of the original than he did in reality.

DENY.

165. In addition, upon information and belief, Fairey thought that a favorable outcome in this case would let him continue his practice of using other people's copyrighted works for profit without giving them credit, compensation, or attribution.

DENY.

Upon information and belief, Fairey believed his misrepresentations would also allow him and his companies to avoid financial liability for copyright infringement.

166. Fairey's lies were only discovered as a result of The AP's tireless and costly efforts throughout the discovery phase in this case, including pressing Fairey's counsel for documents regarding the creation of the posters, such as copies of any source images that Fairey used.

DENY.

167. Early in discovery, The AP realized that Fairey had produced only scant evidence relating to the creation of the Infringing Works and no electronic copies whatsoever of the source image. Throughout discovery and the course of numerous oral and written meet and confer discussions between the parties, The AP repeatedly requested the production of these highly relevant documents. In addition, The AP continually asked Fairey to be more transparent about what had been done to search for responsive documents, which was particularly important because it appeared that certain relevant documents related to the creation of the Infringing Works were missing from Fairey's document production.

DENY.

168. The AP also continued to analyze the documents that Fairey did produce and noticed in the documents' metadata the existence of certain filepaths on Fairey's network that may have contained additional responsive materials. On October 1, 2009, The AP sent Fairey an e-mail specifying these filepaths and asking Fairey to confirm whether they had been searched.

DENY.

169. Fairey did not respond to The AP's October 1st e-mail for over a week until, finally, on the evening of Friday, October 9, 2009 in a letter from Fairey's counsel, Fairey admitted that he had destroyed or attempted to destroy documents that

DENY.

would have revealed which image he actually used. Fairey also admitted that he created fake documents as part of his effort to conceal which photo was the source image, including hard copy printouts of an altered version of the Clooney Photo and fake stencil patterns of the *Hope* and *Progress* posters.

170. Specifically, the October 9th letter from Fairey's counsel admitted that:

DENY.

- (a) Fairey's Complaint wrongly asserted that Fairey used the Clooney Photo rather than the Obama Photo;
- (b) Fairey had deleted or attempted to delete documents after filing the Complaint, which documents showed that he used the Obama Photo and not the Clooney Photo;
- (c) Fairey falsified documents in an attempt to demonstrate that he used the Clooney Photo rather than the Obama Photo; and
- (d) Fairey's counsel had made inaccurate statements during discovery about the source of the Infringing Works, which, according to counsel, were believed to be accurate at the time such statements were made.

A copy of Fairey's counsel's October 9th letter is attached as **Exhibit D**.

171. In subsequent meet and confer discussions between Fairey and The AP, Fairey's counsel explained that The AP's October 1st e-mail had led Fairey's counsel to search the file locations provided by The AP for additional responsive documents, some of which they found. In other words, upon information and belief, if not for The

DENY.

AP's diligence in pressing Fairey to search for and produce responsive documents, the fraud upon the Court may never have been uncovered.

172. Most recently, on the evening of Friday, October 16, 2009, Fairey filed a motion for leave to amend the pleadings. Fairey's proposed amended pleadings admit that he used the Obama Photo rather than the Clooney Photo to create the Infringing Works. In addition, Fairey's motion states that "Fairey was apparently mistaken about the photograph he used when his original complaint for declaratory relief was filed on February 9, 2009." Further, it alleges that only after Fairey realized his "mistake" did he destroy or attempt to destroy relevant documents and fabricate new documents for his counsel to produce to The AP.

DENY.

173. The AP, however, doubts the veracity of Fairey's most recent allegations about any such "mistake." In essence, it appears that after being caught red-handed and admitting to fabricating and destroying evidence, upon information and belief, Fairey is now concocting another story to spin those bad acts in the best light possible. It is simply not credible that Fairey somehow forgot in January 2009 which source image he used to create the Infringing Works, which were completed only a year earlier in January 2008. It also strains credulity that an experienced graphic designer such as Shepard Fairey misremembered cropping George Clooney out of the source image and making other changes to create the Infringing Works when no such cropping or other changes were ever made.

DENY.

174. Fairey's claim of mistake is also suspect because before the Complaint was even filed, The AP spoke to Fairey's counsel and explained that the Infringing Works were based on the Obama Photo. In fact, Fairey's counsel never

DENY.

mentioned to The AP that Fairey believed he had used the Clooney Photo. Nevertheless, Fairey filed his claims apparently without first investigating the relevant records as one would have expected him to do, making the idea that he made a genuine “mistake” even more suspect.

175. As further evidence of Fairey’s most recent lies and misdirections, prior to filing this lawsuit, upon information and belief, Fairey never mentioned cropping George Clooney or making other alterations to the source image in his public statements or press interviews. Upon information and belief, only after Fairey falsely claimed in the Complaint that he used the Clooney Photo and attempted to cover up that false allegation by destroying and fabricating evidence did he say publicly that changes had to be made to the source photo when he created the *Hope* and *Progress* posters.

DENY.

176. Given that Fairey has already admitted lying about the true source image and fabricating documents to conceal those lies, it would not be surprising if Fairey’s most recent allegations also contain misrepresentations.

DENY.

177. Fairey’s counsel also recently notified The AP and Garcia that they intended to seek the Court’s leave to withdraw from their representation of Counterclaim Defendants. The AP intends to oppose any such request because, among other things, it would significantly prejudice The AP as it would take new counsel a substantial amount of time to come up to speed. It would also inevitably lead to additional expenses for The AP, a not-for-profit organization that has already been forced to incur substantial cost engaging in a discovery process that was made significantly more expensive by Fairey’s lies and spoliation and fabrication of evidence.

DENY.

178. The AP must also press forward with Fairey's counsel to determine, among other things, whether other relevant documents have been destroyed, fabricated, or otherwise not produced to The AP.

DENY.

Counterclaim Defendants' Sophisticated Merchandising and Marketing Enterprise

179. Counterclaim Defendants have built a sophisticated merchandising and viral marketing enterprise based on Fairey's designs, which in turn are often based on the artistic works of others. Upon information and belief, this fits perfectly with Fairey's commercial creed as a self-described "capital-embracing entrepreneur" who, according to published reports, specializes in marketing campaigns that "get alternative kids talking about mainstream brands."

ADMIT THAT ONE 3 TWO HAS BUILT A SOPHISTICATED MERCHANDISING AND VIRAL MARKETING ENTERPRISE.

180. In addition, much of the merchandise covered by the Obey® and related trademarks, including merchandise created from The AP's Obama Photo, can be purchased at <<http://shop.obeyclothing.com>> and <<http://obeygiant.com/>>, which, as one would expect of a sophisticated merchandising operation, has been optimized to allow Google search results to efficiently render access to different aspects of Counterclaim Defendants' Web sites. Counterclaim Defendants' graphic design and merchandising operations also extend to distributors and retailers, including Amazon.com.

ADMIT THAT MERCHANDISE CAN BE BOUGHT AT OBEYCLOTHING.COM AND THAT MERCHANDISE IS SOLD THROUGH DISTRIBUTORS AND RETAILERS.

181. Upon information and belief, Fairey and his related entities have created successful marketing campaigns for Levi Strauss & Co., Mountain Dew, Universal Pictures, Express, Sunkist, Honda Civic, Dewars, Virgin Megastore, Guggenheim, Adidas and Motorola, among many others.

DENY.

182. It was reported recently that Counterclaim Defendants launched a successful marketing campaign for Saks Fifth Avenue, which displayed Fairey's designs

DENY.

in the store and on shopping bags, including images of the Infringing Works, which, upon information and belief, Fairey used to support his commercial efforts, as pictured below.



183. Moreover, as described above, Counterclaim Defendants regularly register intellectual property rights to their works and are quick to hunt down alleged infringers and assert their rights against third parties.

DENY.

Counterclaim Defendants' Commercial Exploitation of the Obama Photo

184. On information and belief, despite Counterclaim Defendants' bald assertions to the contrary, they have benefitted handsomely from The AP's Obama Photo by making commercial use of the Infringing Works. That Counterclaim Defendants may have reinvested profits in increasing production, as Counterclaim Defendants have alleged, does not diminish the commercial nature or overall profits of their Infringing Works.

ADMIT THAT ONE 3 TWO EARNED REVENUES ON OBAMA CLOTHING.

185. Upon information and belief, the success of Counterclaim Defendants' commercial enterprise is evidenced by the more-than \$400,000 in profits derived from the Infringing Works and the hundreds of thousands of Infringing Works already sold.

DENY.

The Harm to The AP

186. While Fairey is of course free to establish a commercial, for-profit enterprise designed to make money from his work, it is not fair for him to do so at the expense of others. As stated above, The AP derives most of its revenue from licensing photographs and other original content, which in turn is the primary source of funding for its current and future news operation and to meet its financial obligations to generations of past journalists. When third parties such as Counterclaim Defendants misappropriate The AP's photographs without compensation, credit or attribution, they undermine The AP's ability to pursue its First Amendment objectives, and the ability of visual journalists — as well as that of photographers and visual artists generally — to earn a fair livelihood.

DENY.

187. The equities of this lawsuit can be grasped by examining the parties involved, their conduct and the works involved. On the one hand, a commercially-minded designer and his for-profit companies have created hundreds of thousands of infringing copies of copyrighted works, have contributed to the viral distribution of these works, have fraudulently registered them with the U.S. Copyright Office as having been created solely based on their own work, and have profited handsomely from their activities. Those same entities now seek to avoid giving attribution to the photographer whose photograph they misappropriated and credit and compensation to the not-for-profit news organization who owns the copyright to the photograph.

DENY.

188. Moreover, Counterclaim Defendants absurdly suggest that it would be beneficial for The AP (or any photographer for that matter) for merchandisers to have free rein to copy a photographer's image and commercialize derivative works based on it

DENY.

without first obtaining the photographer's permission. To the contrary, if such activity were to become the norm it would undermine The AP's entire licensing program, ruining the livelihoods of the many hard-working photographers and other artists who rely on control of their intellectual property to make a living. It would also harm the interests of other content owners who rely on fair compensation for their work in order to support their creative endeavors.

FIRST COUNTERCLAIM — COPYRIGHT INFRINGEMENT

(17 U.S.C. § 101 et seq.)

189. The AP incorporates by reference ¶¶ 1-188 above as if fully set forth herein.

190. By the actions alleged above, Counterclaim Defendants have infringed and will continue to infringe The AP's copyright in the Obama Photo by using this original copyrighted photograph as a basis for the Infringing Works without permission.

DENY.

191. The AP is entitled to recover from Counterclaim Defendants the damages, including attorneys' fees, it has sustained and will sustain, and any gains, profits and advantages obtained by Counterclaim Defendants as a result of their acts of infringement alleged above. At present, the amount of such damages, gains, profits and advantages cannot be fully ascertained by The AP, but will be established according to proof at trial. The AP is also entitled to recover statutory damages for Fairey's willful infringement of their copyright.

DENY.

SECOND COUNTERCLAIM — CONTRIBUTORY
COPYRIGHT INFRINGEMENT
(17 U.S.C. § 101 et seq.)

192. The AP incorporates by reference ¶¶ 1-191 above as if fully set forth herein.

193. By the actions alleged above, Counterclaim Defendants have encouraged, assisted, induced, caused, and/or materially contributed to a vast number of actual or imminent copyright infringements of The AP's Obama Photo in violation of 17 U.S.C. §§ 106 and 501.

DENY.

194. Counterclaim Defendants know or have reason to know of the actual or imminent direct infringement of The AP's copyright in the Obama Photo. Indeed, Counterclaim Defendants actively promote the infringements through the purchase of products and merchandise bearing the Infringing Works, provide tools that are indispensable to these infringements, and continuously facilitate the infringements.

DENY.

195. The infringements of The AP's copyrighted works that Counterclaim Defendants encourage, assist, induce, cause and/or materially contribute to through the conduct described above is without The AP's consent and not otherwise permissible under the Copyright Act.

DENY.

196. The foregoing acts of infringement by Counterclaim Defendants have been willful, intentional, purposeful, and with indifference to The AP's rights.

DENY.

197. The AP is entitled to recover from Counterclaim Defendants the damages, including attorneys' fees, it has sustained and will sustain, and any gains, profits and advantages obtained by Counterclaim Defendants as a result of their acts of infringement alleged above. At present, the amount of such damages, gains, profits and

DENY.

advantages cannot be fully ascertained by The AP, but will be established according to proof at trial. The AP is also entitled to recover statutory damages for Fairey's willful infringement of its copyright.

THIRD COUNTERCLAIM — DECLARATORY JUDGMENT
(28 U.S.C. §§ 2201 and 2202)

198. The AP incorporates by reference ¶¶ 1-197 above as if fully set forth herein.

199. Counterclaim Defendants improperly obtained copyright registrations in three of the Infringing Works, which are unauthorized derivative works, Registration Nos. VA0001651320, VA0001651318, and VA0001651319 (the "Unauthorized Registrations"). Such conduct constitutes fraud on the U.S. Copyright Office as Counterclaim Defendants were required to disclose that their Unauthorized Registrations were based on Pre-Existing Materials.

200. As such, The AP requests that this Court declare that the Unauthorized Registrations were obtained through fraud, and thus not subject to copyright protection under 17 U.S.C. § 409, and order the U.S. Copyright Office to cancel the Unauthorized Registrations.

201. By reason of the foregoing, there now exists between the parties an actual and justiciable controversy concerning Counterclaim Defendants' and The AP's respective rights and obligation to the use of the Obama Photo, requiring declaratory relief.

202. The aforesaid declaration is necessary and appropriate at this time to affirm The AP's right to continue to make use of the Obama Photo.

203. The AP has no adequate remedy at law.

204. Accordingly, The AP seeks, pursuant to 28 U.S.C. §§ 2201 and 2202, a judgment from this Court that Counterclaim Defendants' copyright registration in the Infringing Works is invalid and should be cancelled.

FOURTH COUNTERCLAIM — VIOLATION OF THE DMCA
(17 U.S.C. § 1202)

205. The AP incorporates by reference ¶¶ 1-204 above as if fully set forth herein.

206. The AP includes a copyright notice line on all AP photographs that includes The AP's name and the name of The AP photographer who took the photograph. **DENY.**

207. The inclusion of The AP's name in all of its news reports is "copyright management information," as defined in 17 U.S.C. § 1202(c). **DENY.**

208. Upon information and belief, Fairey, without authority of The AP or the law, has intentionally removed and/or altered and has caused and induced others to remove and/or alter copyright management information from The AP's Obama Photo, including for use in the Infringing Works, and have thereafter distributed said works, having reasonable grounds to know that such acts will induce, enable, facilitate or conceal an infringement of copyright under Title 17, United States Code, in violation of 17 U.S.C. § 1202(b)(1) and (3). **DENY.**

209. Fairey's removal or alteration of copyright management information from The AP's Obama Photo, including for use in the Infringing Works, and subsequent distribution of the Infringing Works, as alleged above, was and is willful and intentional, and was and is executed with full knowledge of The AP's rights under copyright law, and in disregard of The AP's rights. **DENY.**

210. The AP is entitled to recover its actual damages suffered as a result of the violation and any profits of Fairey attributable to the violation and not taken into account in computing actual damages, or, at The AP's election, statutory damages pursuant to 17 U.S.C. § 1203(c). **DENY.**

211. The AP is entitled to recover costs and attorneys' fees from Counterclaim Defendants pursuant to 17 U.S.C. § 1203(b)(4) and (5). **DENY.**

212. Counterclaim Defendants' violations of 17 U.S.C. § 1202(b)(1) and (3) have caused, and, unless restrained by this Court, will continue to cause, irreparable injury to The AP not fully compensable in monetary damages. Pursuant to 17 U.S.C. § 1203(b)(1), The AP is entitled to a preliminary and permanent injunction enjoining Counterclaim Defendants from such further violations. **DENY.**

PRAYER FOR RELIEF

213. The AP incorporates by reference Paragraphs 1-212 as if set forth herein.

WHEREFORE, The AP requests:

(a) That the Complaint and each Count thereof be dismissed with prejudice;

(b) That the Court find that Counterclaim Defendants have infringed The AP's copyright in the Obama Photo; **DENY.**

(c) That the Court enter judgment for The AP against Counterclaim Defendants for Counterclaim Defendants' actual damages according to proof, and for any profits attributable to infringement. **DENY.**

of Counterclaim Defendants' intellectual property in accordance with proof;

- (d) That the Court enter judgment for The AP and against Counterclaim Defendants for statutory damages based upon their acts of infringement pursuant to the Copyright Act of 1976, 17 U.S.C. § 101, et seq.; **DENY.**
- (e) That the Court find that Counterclaim Defendants cannot assert copyright protection in any of the Infringing Works; **DENY.**
- (f) An award of three times the greater of
- (i) Counterclaim Defendants' damages for the wrongful acts of Counterclaim Defendants in an amount the Court deems appropriate, together with appropriate interest on such damages; or **DENY.**
- (ii) Counterclaim Defendants' profits in accordance with the accounting demanded in the preceding paragraph, pursuant to 15 U.S.C. § 1117, and **DENY.**
- (g) An award of Counterclaim Defendants' costs and disbursements of this action, including reasonable attorneys' fees, pursuant to 17 U.S.C. § 505 and 15 U.S.C. § 1117; **DENY.**
- (h) That the Court revise the caption of the litigation by the time of trial to place The AP in the position of the Plaintiff and Fairey and Obey Giant Art in the position of Counterclaim Defendants based on the anticipatory filing of the present action; and

- (i) That the Court grants such other, further, and different relief as the **DENY.**
Court deems just and proper.

Dated: November 11, 2009

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s/Dale Cendali

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