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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART,  
 INC.,

Plaintiffs,

-against-

THE ASSOCIATED PRESS and MANNIE  
 GARCIA,

Defendants,

-against-

SHEPARD FAIREY, OBEY GIANT ART, INC.,  
 OBEY GIANT LLC and STUDIO NUMBER ONE,  
 INC.

Counterclaim Defendants.

Case No.: 09-01123 (AKH)  
 ECF Case

**ANSWER, AFFIRMATIVE  
 DEFENSES AND  
 COUNTERCLAIMS OF  
 PLAINTIFFS AND  
 COUNTERCLAIM  
 DEFENDANTS**

Plaintiffs-Counterclaim Defendants Shepard Fairey (“Fairey”) and Obey Giant Art, Inc. and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc. by and through their attorneys, hereby answer the Counterclaims of Defendant-Intervenor Mannie Garcia (hereinafter “Garcia”), dated July 23, 2009, as follows:

**NATURE OF THE ACTION AND RELIEF SOUGHT**

53. Deny the allegations contained in ¶ 53 of Garcia’s Counterclaims.

54. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 54 of Garcia’s Counterclaims and on that basis deny the same.

55. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 55 of Garcia’s Counterclaims and on that basis deny the same.

56. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 56 of Garcia’s Counterclaims and on that basis deny the same.

57. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 57 of Garcia’s Counterclaims and on that basis deny the same.

58. Deny the allegations contained in ¶ 58 of Garcia’s Counterclaims.

59. Deny the allegations contained in ¶ 59 of Garcia’s Counterclaims.

60. Deny the allegations contained in ¶ 60 of Garcia’s Counterclaims.

61. State that the allegations contained in ¶ 61 of Garcia’s Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same, except admit that The Associated Press (“The AP”) claims it owns the copyright in the photograph referenced in ¶ 61.

62. State that the allegations contained in ¶ 62 of Garcia’s Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to

the extent any response is required deny the same.

63. Deny the allegations contained in ¶ 63 of Garcia's Counterclaims.

64. Deny the allegations contained in ¶ 64 of Garcia's Counterclaims.

65. Deny the allegations contained in ¶ 65 of Garcia's Counterclaims, except admit that Obey Giant Art Inc. offered for sale a sweatshirt bearing the "Obama Hope" illustration for \$60 at the Web site <<http://www.obeygiant.com/store>>.

66. Deny the allegations contained in ¶ 66 of Garcia's Counterclaims.

67. Deny the allegations contained in ¶ 67 of Garcia's Counterclaims.

68. Deny the allegations contained in ¶ 68 of Garcia's Counterclaims.

69. Deny the allegations contained in ¶ 69 of Garcia's Counterclaims.

### **PARTIES**

70. Admit the allegations contained in ¶ 70 of Garcia's Counterclaims.

71. Deny the allegations contained in ¶ 71 of Garcia's Counterclaims, except admit that Shepard Fairey is a visual artist, graphic designer, merchandiser and business owner who resides in Los Angeles, California.

72. Admit the allegations contained in ¶ 72 of Garcia's Counterclaims.

73. Deny the allegations contained in ¶ 73 of Garcia's Counterclaims, except admit that Obey Giant LLC is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026.

74. Deny the allegations contained in ¶ 74 of Garcia's Counterclaims, except admit that Studio Number One, Inc. is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026.

75. Deny information or knowledge sufficient to form a belief as to the

allegations contained in ¶ 75 of Garcia's Counterclaims and on that basis deny the same.

**JURISDICTION AND VENUE**

76. State that the allegations contained in ¶ 76 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, admits this Court has subject matter jurisdiction over Garcia's First and Second claims.

77. State that the allegations contained in ¶ 77 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required admit this Court has personal jurisdiction over Plaintiffs and Counterclaim Defendants.

78. State that the allegations contained in ¶ 78 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required admit that this Court has personal jurisdiction over The AP.

79. State that the allegations contained in ¶ 79 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required admit venue is proper in this district.

**FACTUAL BACKGROUND**

80. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 80 of Garcia's Counterclaims and on that basis deny the same.

81. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 81 of Garcia's Counterclaims and on that basis deny the same.

82. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 82 of Garcia's Counterclaims and on that basis deny the same.

83. Deny the allegations contained in ¶ 83 of Garcia's Counterclaims.

84. State that the allegations contained in ¶ 84 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

85. State that the allegations contained in ¶ 85 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

86. Deny the allegations contained in ¶ 86 of Garcia's Counterclaims.

87. State that the allegations contained in ¶ 87 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same, except admit that Obey Giant Art, Inc. registered the copyright in the Obama Hope (Reg. No. VA0001651318), Obama Progress (Reg. No. VA 0001651319) and Obama Change (Reg. No. VA0001651320) works by Fairey.

88. Admit that Fairey and Obey Giant Art Inc. identify in the Complaint the photograph Fairey used as a visual reference to create the Obama Works, which is the photograph attached as Exhibit C to The AP's Answer and Counterclaims (what The AP and Garcia label the "Clooney Photo"). State that the remaining allegations contained in ¶ 88 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

89. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 89 of Garcia's Counterclaims and on that basis deny the same.

90. Deny information or knowledge sufficient to form a belief as to the

allegations contained in ¶ 90 of Garcia's Counterclaims and on that basis deny the same.

**FIRST COUNTERCLAIM – COPYRIGHT INFRINGEMENT**

91. Repeat and reallege each and every response to ¶¶ 53 to 90 above as if fully set forth herein.

92. State that the allegations contained in ¶ 92 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

93. State that the allegations contained in ¶ 93 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

**SECOND COUNTERCLAIM — CONTRIBUTORY COPYRIGHT INFRINGEMENT**

94. Repeat and reallege each and every response to ¶¶ 53 to 93 above as if fully set forth herein.

95. State that the allegations contained in ¶ 95 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

96. Deny the allegations contained in ¶ 96 of Garcia's Counterclaims.

97. State that the allegations contained in ¶ 97 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

98. State that the allegations contained in ¶ 98 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

99. State that the allegations contained in ¶ 99 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

**THIRD COUNTERCLAIM — DECLARATORY JUDGMENT**

100. Repeat and reallege each and every response to ¶¶ 53 to 99 above as if fully set forth herein.

101. Deny information or knowledge sufficient to form a belief as to the allegations regarding The AP's copyright registrations contained in ¶ 101 of Garcia's Counterclaims and on that basis deny the same. Deny the remaining allegations of ¶ 101.

102. Deny the allegations contained in ¶ 102 of Garcia's Counterclaims, except admit that Obey Giant Art, Inc. registered the copyright in the Obama Hope (Reg. No. VA0001651318), Obama Progress (Reg. No. VA 0001651319), and Obama Change (Reg. No. VA0001651320) works.

103. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 103 of Garcia's Counterclaims and on that basis deny the same.

104. State that the allegations contained in ¶ 104 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

105. State that the allegations contained in ¶ 105 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required denies that there is a justiciable controversy between Plaintiffs and Counterclaim Defendants on the one hand, and The AP or Garcia on the other, regarding The AP's and/or Garcia's right to use the Obama Photo they assert a copyright in.

106. State that the allegations contained in ¶ 106 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny a declaration is necessary and appropriate against Plaintiffs and Counterclaim Defendants to affirm The AP or Garcia's right to continue to make use of the Obama Photo.

107. State that the allegations contained in ¶ 107 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

108. State that the allegations contained in ¶ 108 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

#### **PRAYER FOR RELIEF**

109. Repeat and reallege each and every response to ¶¶ 53 to 108 above as if fully set forth herein. Deny Garcia is entitled to any relief whatsoever.

#### **COUNTERCLAIM-DEFENDANTS' AFFIRMATIVE DEFENSES**

##### **FIRST DEFENSE**

1. Intervenor-Defendant's counterclaims are barred because the alleged infringement is a non-infringing fair use as set forth in 17 U.S.C. § 107 and the common law.

##### **SECOND DEFENSE**

2. Intervenor-Defendant's counterclaims are barred in whole or in part by the First Amendment of the United States Constitution.



### **THIRD DEFENSE**

3. Intervenor-Defendant's alleged copyright registration is invalid or unenforceable due to the failure to comply with the requirements of Title 17 of the United States Code.

### **FOURTH DEFENSE**

4. Intervenor-Defendant's counterclaims are barred in whole or in part by the equitable doctrine of judicial estoppel.

### **FIFTH DEFENSE**

5. Any damages and profits sought by Intervenor-Defendant are limited, in whole or in part, pursuant to 17 U.S.C. §504(b) and exclude deductible expenses and any elements of profit attributable to factors other than the alleged infringement of Intervenor-Defendant's copyrighted work.

### **SIXTH DEFENSE**

6. Plaintiffs and Counterclaim Defendants have made no profit as a result of the complained of acts, including any profit under 17 U.S.C. §504(b) that is attributable to Intervenor-Defendant's allegedly infringed copyright.

### **SEVENTH DEFENSE**

7. Any statutory damages sought by Defendant pursuant to 17 U.S.C. §504(c) are limited, in whole or in part, because any alleged infringement was not committed willfully and Fairley was not aware and had no reason to believe that his acts constituted an infringement of copyright.

### **EIGHTH DEFENSE**

8. Intervenor-Defendant has failed to mitigate its purported damages and

recovery of damages, if any, must be reduced accordingly.

**SHEPARD FAIREY, OBEY GIANT ART, INC.,**  
**OBEY GIANT LLC AND STUDIO NUMBER ONE, INC.’S COUNTERCLAIMS**  
**AGAINST MANNIE GARCIA**

Plaintiffs Shepard Fairey (“Fairey”), Obey Giant Art, Inc. (“Obey Giant”) and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc., by and through their attorneys, bring the following counterclaims against Intervenor-Defendant Mannie Garcia (“Garcia”):

**NATURE OF THE ACTION AND RELIEF SOUGHT**

1. This is a civil action for declaratory and injunctive relief to vindicate the rights of visual artist Shepard Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. in connection with the series of iconic works Fairey created to support the candidacy of President Barack Obama. Fairey’s work became a ubiquitous symbol of Obama’s historic presidential campaign and stood as powerful symbols of Obama’s grassroots support.

2. The AP has asserted that Fairey’s work – one piece of which now hangs in the Smithsonian Institution’s National Portrait Gallery in Washington D.C. – infringes the copyrights in a photograph that was apparently taken by Intervenor-Defendant Garcia, which depicts Obama at a panel discussion at the National Press Club in April 2006. Garcia has asserted that Fairey’s work infringes his copyrights in the same photograph. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. bring this action to clarify the rights of the parties, and to refute the baseless assertions of copyright infringement by the AP and Garcia finally and definitively. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. seek a declaratory judgment holding Fairey’s works do not infringe any copyrights held by Defendant AP or Intervenor-Defendant Garcia and are protected by the Fair Use Doctrine. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. also seek an injunction enjoining

Defendant AP and its agents and Intervenor-Defendant Garcia and his agents from asserting its copyrights against Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. or any other party in possession of the works at issue.

### **PARTIES**

3. Plaintiff Shepard Fairey (“Fairey”) is an individual residing in Los Angeles, California, and a renowned visual artist.

4. Plaintiff Obey Giant Art, Inc. (“Obey Giant”) is a California Corporation located in Los Angeles, California, through which Fairey distributes his work. Obey Giant is owned by Plaintiff Fairey and his wife, Amanda Fairey.

5. Counterclaim Defendant Obey Giant LLC is a California Corporation located in Los Angeles, California owned in part by Plaintiff Fairey and his wife, Amanda Fairey.

6. Counterclaim Defendant Studio Number One, Inc. is a California Corporation located in Los Angeles, California, owned by Plaintiff Fairey and his wife, Amanda Fairey.

7. Intervenor-Defendant Mannie Garcia (“Garcia”) is an individual residing in Kensington, Maryland.

### **JURISDICTION AND VENUE**

8. This action arises under the copyright laws of the United States, 17 U.S.C. §§ 101, *et seq.* The Court has subject matter jurisdiction over this counterclaim pursuant to 28 U.S.C. § 1331 and 1338, and the Declaratory Judgment Act, 28 U.S.C. § 2254.

9. This Court has personal jurisdiction over Intervenor-Defendant Garcia because he has availed himself of the laws and protections of this Court by intervening in this

action voluntarily, and by filing in this case an Answer, Affirmative Defenses, Counterclaims and Cross Claims on July 23, 2009.

10. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §§ 1391(b) and 1400(a).

## **FACTUAL ALLEGATIONS**

### **Shepard Fairey And The Obama Works**

11. Plaintiff Shepard Fairey is a renowned visual artist who lives and works in Los Angeles, California. Fairey's work focuses on social and political subjects, frequently dealing in current events. Fairey's illustrations are created in a variety of media, including screen prints and stencil painting. Fairey's work takes a variety of forms, including street art, commercial art and design, as well as fine art seen in galleries and museums all over the world. Fairey distributes his work through Obey Giant, a company he and his wife Amanda Fairey own together.

12. A large body of Fairey's work questions and criticizes Presidents, politicians and world leaders, past and present. Some of his best-known work involves his "Obey" campaign, through which Fairey urges the observer to question obedience to social commands and the political status quo.

13. Fairey's work has gained steadily in prominence, both in the U.S. and abroad. On February 6, 2009, the Institute for Contemporary Art / Boston opened a twenty-year retrospective of his work – *Shepard Fairey: Supply and Demand*. Exhibition curator Pedro Alonzo explains, "The content of Fairey's work is a call to action about hierarchies and abuses of power, politics and the commodification of culture. Fairey is committed to creating work that has meaning for his audience-by using familiar cultural iconography that people can relate to and

by constantly bringing his work into the public sphere.” According to Jill Medvedow, Director of the ICA / Boston, Fairey’s “integration of design, popular culture, and politics places him in the current of artistic and cultural forces that shape our world today.”

14. By the fall of 2007, Fairey had become a strong supporter of then Presidential candidate Barack Obama. Fairey wanted to express his support for Obama –and the message of hope, change and progress Obama stood for – through his artwork, but did not want to do so unless the Obama campaign was comfortable with his contribution.

15. After receiving encouragement from the Obama campaign in January 2008, Fairey began working on his concept shortly before the February 5 “Super Tuesday” elections – the day upon which 24 states held primary elections and caucuses. Fairey then began creating the first in what would become a series of works designed to capture the optimism and inspiration created by Obama’s candidacy (the “Obama Works”), through which Fairey hoped to compel further support for Obama.

16. In conceiving and planning his work, Fairey came across a photograph of then Senator Obama taken at the National Press Club in April 2006 during an event at which he appeared with actor George Clooney to speak about the humanitarian crisis in the Darfur region of Africa. Fairey is informed and believes, and on that basis alleges, that a photographer named Mannie Garcia took this photograph (the “Garcia Photograph”). A reproduction of the Garcia Photograph is attached as Exhibit A.

17. The Garcia Photograph was snapped as Clooney watched Obama listen to another speaker, and depicts Obama looking up and to his left under the lights shining down on the panelists, with Clooney seated to Obama’s right. The Garcia Photograph has, at various times, been attributed to both Intervenor-Defendant Garcia and Defendant AP.

18. The first work in the series of Obama Works Fairey created was a screen-print poster that came to be known as *Obama Progress*. It is an abstracted graphic rendition of Obama gazing up and to the viewer's right, colored in a palette of red, white, and blue with the word "progress" in capital letters beneath the image of Obama. A reproduction of *Obama Progress* is attached as Exhibit B.

19. Days later, Fairey created another poster utilizing the same illustration as *Obama Progress*, using an offset printing process and replacing the word "progress" with "hope" at the bottom of the poster. This poster became known as *Obama Hope*. A reproduction of *Obama Hope* is attached as Exhibit C.

20. In creating the illustration of Obama used in *Obama Progress* and *Obama Hope*, Fairey used the Garcia Photograph as a visual reference. Fairey transformed the literal depiction contained in the Garcia Photograph into a stunning, abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message that has no analogue in the original photograph. While the evident purpose of the Garcia Photograph is to document the events that took place at the National Press Club that day in April 2006, the evident purpose of both *Obama Progress* and *Obama Hope* is to inspire, convince and convey the power of Obama's ideals, as well as his potential as a leader, through graphic metaphor. By evoking stylized propaganda posters more often associated with autocrats and dictators, Fairey at once portrays the inevitability of Obama's triumph, while suggesting qualities of wisdom and vision that pull viewers willingly into Obama's message of hope, progress and change.

21. Fairey first began distributing *Obama Hope* and *Obama Progress* in late January 2008 and early February 2008. The power of Fairey's imagery was recognized immediately by many, including Obama himself. In a February 22, 2008 letter to Fairey, Obama

thanked Fairey for his contribution to Obama's campaign. In that letter, Obama remarked that "[t]he political messages involved in your work have encouraged Americans to believe they can help change the status quo. . . . Your images have a profound effect on people, whether seen in a gallery or on a stop sign."

22. Initially, Fairey sold 350 *Obama Progress* posters through Obey Giant for \$45 each. Fairey and Obey Giant used the money received from those initial sales to print *Obama Hope* posters, and began selling those for \$45 as well.

23. *Obama Progress* and *Obama Hope* were immediate hits. People who bought *Obama Progress* began selling copies on eBay almost immediately for thousands of dollars. Fairey continued to print more copies of *Obama Progress* and *Obama Hope*, but continued to sell them for only \$45.

24. The demand for *Obama Hope* quickly became overwhelming. Fairey continued to pour the money he received from the sale of his posters into printing more posters, and distributing nearly all of them for free. By Election Day, Fairey and Obey Giant had sold approximately 4,000 posters, but used the proceeds from those sales to distribute nearly 300,000 additional posters for free.

25. By the summer of 2008, *Obama Hope* had become a ubiquitous symbol of Obama's candidacy, and a pervasive presence across America. Fairey's illustration of Obama appeared on signs, buttons and stickers displayed by millions of supporters in every corner of the country. *Obama Hope* was the icon and visual embodiment of the unprecedented grassroots support Obama had harnessed. *Obama Hope* had thus become the symbol of one of the most remarkable candidates in modern history.

26. Fairey's work had become such a prominent symbol of the Obama



campaign that he was asked to participate in an art exhibition held in Denver during the Democratic National Convention, entitled “Manifest Hope.” For this show, Fairey created another piece to capture the emotions of hope, change and progress that were drawing millions of Americans to support Obama. This piece was titled *Obama Hope Mural*. It used the same illustration of Obama contained in the *Obama Hope* poster but combined it with additional visual elements that augmented the existing message of support for Obama by referencing elements from Fairey’s previous bodies of work. A reproduction of the *Obama Hope Mural* is attached as Exhibit D.

27. As the presidential campaign headed into its final phases, *Obama Hope* was as pervasive as ever, and continued to be the defining visual symbol that united Obama supporters across the country, and around the world.

28. On November 4, 2008, the historic candidacy of Barack Obama reached its end upon his election to become President of the United States of America. Following the election, President-Elect Obama’s inaugural committee contacted Fairey and asked him to create an official poster commemorating the inauguration. In response, Fairey created another work, entitled *Be The Change*. In it, the same illustration of Obama featured in *Obama Hope* is placed in the upper middle portion of the print, with images of the U.S. Capitol and the White House flanking Obama, and a cheering crowd beneath him. A reproduction of *Be The Change* is attached as Exhibit E.

29. Immediately following the election, Moveon.org released a poster commemorating Obama’s election, entitled *Yes We Did*, which Fairey created. *Yes We Did* features the illustration of Obama from *Obama Hope* in the upper center of the poster with additional visual elements designed to celebrate the occasion of Obama’s victory. A

reproduction of *Yes We Did* is attached as Exhibit F.

30. On January 17, 2009, Fairey's work in support of Obama reached its culmination. On that day, a large-format, hand-stenciled collage incorporating the illustration of Obama from the *Obama Hope* poster along with other visual material (the "*Obama Hope Stencil Collage*") was unveiled to the public as the newest addition to the Smithsonian Institution's National Portrait Gallery in Washington D.C. A reproduction of the *Obama Hope Stencil Collage* is attached as Exhibit G.

### **Speculation About Fairey's Obama Works**

31. In a February 2008 interview about the *Obama Hope* poster, Fairey explained he used an AP photograph as a visual reference in creating the poster, but did not identify the photo specifically.

32. As the *Obama Hope* poster became the icon of Obama's candidacy, people began speculating publicly about which specific photograph Fairey used as a visual reference. Photojournalist and blogger James Danziger started looking for the photograph in the fall of 2008.

33. Following Obama's election victory, as the inauguration date approached, the speculation began to intensify. On January 14, 2009, blogger Michael Cramer suggested and purported to demonstrate the *Obama Hope* poster was based on a photograph appearing on Time Magazine's website and originally attributed to Jonathan Daniel of Getty Images.

34. Danziger eventually determined the photograph from the Time Magazine website was misattributed, and was actually taken by Reuters photographer Jim Young at a 2007 Senate confirmation hearing. Danziger then concluded the Young photograph was the photograph Fairey used in creating the *Obama Hope* poster, suggesting the Jim Young

photograph, which shows Obama looking to his right, had been “flipped” and “re-oriented” so that Obama appeared to look to his left.

35. Shortly after that, photographer Tom Galish suggested Cramer and Danziger were both wrong. In a blog entry dated January 23, 2009, Galish concluded the mystery had been solved. According to him, the photograph Fairey used was a tightly cropped shot of Obama taken by Intervenor-Defendant Garcia at the same April 2006 event at the National Press Club where he snapped the Garcia Photograph.

36. In fact, none of the above were correct. The photograph Fairey had actually used as a visual reference in creating *Obama Hope* was not the tightly-cropped photograph Galish identified. Fairey had actually used the Garcia Photograph (Exhibit A), which included both Obama and actor George Clooney in the frame.

#### **The AP’s Allegations Of Infringement And Demands For Money**

37. Shortly after Galish and others concluded that Fairey used an AP photograph in the creation of *Obama Hope*, the AP attempted to contact Fairey.

38. On or around January 29, 2009, an attorney for the AP phoned Shepard Fairey’s production studio. A representative for Fairey returned the call on January 30, 2009. During that call, the AP’s attorney explained the AP had special technology to detect the source of the photo used to create *Obama Hope*. The AP’s attorney stated the AP owned the rights to the photograph Fairey used to create *Obama Hope*, demanded payment for Fairey’s use of the AP photo, and stated the AP expected to be paid a portion of any money Fairey might make from his work.

39. On February 3, 2009, counsel for Shepard Fairey contacted the AP’s counsel by telephone. During that conversation, the AP reiterated its view that Fairey’s work

infringed the AP's rights, and explained that if Fairey did not negotiate a license, the AP would file suit against Fairey.

40. On February 4, 2009, the AP published a story, the headline of which was "AP alleges copyright infringement of Obama image." A copy of that story is attached as Exhibit H.

41. According to the AP's February 4 story, AP spokesman Paul Colford declared "the Associated Press has determined that the photograph used in the poster is an AP photo and that its use required permission." While Colford noted the AP was discussing the matter with Fairey's attorney, the AP also made it clear the AP was not limiting its infringement allegations to any one work. The AP story noted that one copy of the *Obama Hope Stencil Collage* was hanging in the National Portrait Gallery and another copy would be included in the Fairey retrospective at the Institute of Contemporary Art / Boston. In regard to these works, Colford stated, "The continued use of the poster, regardless of whether it is for galleries or other distribution, is part of the discussion AP is having with Mr. Fairey's representative." Accordingly, the AP made it clear that it considers all works that incorporate the imagery of *Obama Hope* to be infringements of its copyrights, including the copy of the *Obama Hope Stencil Collage* hanging in the Smithsonian.

42. Two days later, the AP reiterated its threat to sue Fairey. In a February 6 email to Fairey's counsel, the AP's counsel stated that while the AP still wanted to resolve the dispute over Fairey's work amicably, the AP would nonetheless file suit on Tuesday, February 10, 2009 if the matter has not been resolved by then.

### **The Commencement And Pleading Of The Original Declaratory Relief Action**

43. On February 9, 2009, Fairey commenced this action against the AP by filing his original Complaint for declaratory relief.

44. On March 11, 2009, the AP filed its answer and counterclaims against Shepard Fairey, Obey Giant Art Inc., Obey Giant LLC, and Studio Number One, Inc. Fairey, Obey Giant Art Inc., Obey Giant LLC, and Studio Number One, Inc. filed an answer to the AP's claims on April 14, 2009.

### **Garcia's Allegations Of Infringement And Demands For Money**

45. In the weeks after this action commenced, Garcia commented on the pending litigation in several interviews with various members of the press. When asked about Fairey's Obama poster, Garcia admitted that he did not recognize his photograph of Obama as the photograph Fairey referenced to create his works. Garcia remarked that he thought Fairey's poster was a "cool" piece of work, he was honored and pleased the poster helped elect the first black U.S. President, and he was not angry with Fairey or interested in joining any lawsuits.

45. Then on February 24, 2009, Garcia's counsel sent a letter to Fairey's counsel notifying them that he was the lawful owner of the copyright in the Garcia Photograph and that he intended to enforce his rights against Fairey. Following this February 24 letter, counsel for Fairey discussed with counsel for Garcia the possibility of settling the potential claims Garcia asserted in his letter, and whether failing settlement, Garcia intended to intervene in this Action. Settlement discussion eventually proved unsuccessful, and Garcia's counsel did not specify whether Garcia would or would not intervene in the case during these discussions.

46. On July 8, 2009, Garcia filed a motion to intervene in this litigation. The original parties to this action notified the Court they did not oppose Garcia's request, and the

Court granted Garcia's motion to intervene on July 23, 2009. In Intervenor-Defendant Garcia's Answer, Affirmative Defenses, Counterclaims and Cross Claims filed on July 23, 2009, he asserts three counterclaims against Fairey, Obey Giant Art Inc., Obey Giant LLC, and Studio Number One, Inc. Garcia claims he is the creator and registered copyright owner (Registration No. VA1-665-426) of the tightly cropped photograph of Obama, which Garcia alleges Fairey used to create the Obama Works. Garcia asserts claims for copyright infringement and contributory copyright infringement, and seeks a declaratory judgment that the copyright registrations in three of Fairey's works are invalid and should be cancelled.

### **FIRST CAUSE OF ACTION**

#### **Declaratory Judgment – Non-Infringement**

##### **17 U.S.C. §§ 101, *et seq.***

47. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. incorporate by reference the allegations in each of the proceeding paragraphs as if fully set forth in this paragraph.

48. An actual controversy exists as to whether the Obama Works (as identified in the attached Exhibits B-G) infringe any copyright owned by the AP or Garcia.

49. Regardless of whether the AP or Garcia owns the copyrights to the Garcia Photograph, the Obama Works do not infringe any of the exclusive rights secured by the Copyright Act. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. are therefore entitled to a declaration that the Obama Works (as identified in the attached Exhibits B-G) do not infringe any copyrights owned by the AP or Garcia.

## **SECOND CAUSE OF ACTION**

### **Declaratory Judgment – Fair Use**

#### **17 U.S.C. § 107**

50. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. incorporate by reference the allegations in each of the proceeding paragraphs as if fully set forth in this paragraph.

51. An actual controversy exists as to whether Fairey's use of any materials to which the AP or Garcia holds copyrights is protected by the Fair Use Doctrine.

52. Fairey used the Garcia Photograph as a visual reference for a highly transformative purpose; Fairey altered the original with new meaning, new expression, and new messages; and Fairey did not create any of the Obama Works for the sake of commercial gain.

53. The Garcia Photograph had been published well before Fairey used it as a visual reference, and is a factual, not fictional or highly creative, work.

54. Fairey used only a portion of the Garcia Photograph, and the portion he used was reasonable in light of Fairey's expressive purpose.

55. Fairey's use of the Garcia Photograph imposed no significant or cognizable harm to the value of the Garcia Photograph or any market for it or any derivatives; on the contrary, Fairey has enhanced the value of the Garcia photograph beyond measure.

56. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. are therefore entitled to a declaratory judgment that the use of the Garcia Photograph as a visual reference in creating the Obama Works (as identified in the attached Exhibits B-G) is protected by the Fair Use Doctrine.

**PRAYER FOR RELIEF**

WHEREFORE, Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. request this Court to enter judgment:

1. Declaring that Fairey's Obama Works do not infringe any copyrights held by the AP or Garcia;
2. Declaring that Fairey's use of the Garcia Photograph as a visual reference in creating the Obama Works is privileged under, and protected by, the Fair Use Doctrine;
3. Enjoining Garcia, his agents, attorneys, and assigns from asserting copyrights against Fairey, Obey Giant, Obey Giant LLC or Studio Number One, Inc. in connection with any of the Obama Works;
4. Enjoining Garcia, his agents, attorneys, and assigns from asserting copyrights against any third party (including but not limited to the Smithsonian Institution and the Institute for Contemporary Art / Boston) that possesses, reproduces, distributes or displays any of the Obama Works;
5. Awarding Fairey and Obey Giant their reasonable attorneys' fees and costs; and



6. Awarding any other relief the Court deems just and proper.

DATED: August 14, 2009

Respectfully Submitted,

/s/

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**DEMAND FOR JURY TRIAL**

Plaintiffs Shepard Fairey and Obey Giant, and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc. demand a jury trial on all issues properly triable to a jury.

DATED: August 14, 2009

Respectfully Submitted,

\_\_\_\_\_  
/s/

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# **EXHIBIT A**



# **EXHIBIT B**



**PROGRESS**

# **EXHIBIT C**



**HOPE**



# **EXHIBIT D**



OBAMA

VOTE!

VOTE!

VOTE!

# **EXHIBIT E**

**BE THE CHANGE**



**JANUARY 20TH 2009**

# **EXHIBIT F**

YES WE DID.

UNITED WE PROGRESS TOWARD A MORE PERFECT UNION



PEOPLE

POWERED

CHANGE

TOGETHER WE MADE HISTORY

NOVEMBER 4TH 2008



# **EXHIBIT G**



HOPE



# **EXHIBIT H**



A poster of President Barack Obama, right, by artist Shepard Fairey is shown for comparison with this April 27, 2006 file photo of then-Sen. Barack Obama by Associated Press photographer Manny Garcia at the National Press Club in Washington. Fairey has acknowledged, the poster is based on the AP photograph. (AP Photo/Manny Garcia/ Shepard Fairey)



## AP alleges copyright infringement of Obama image

By HILLEL ITALIE – 2 days ago

NEW YORK (AP) — On buttons, posters and Web sites, the image was everywhere during last year's presidential campaign: A pensive Barack Obama looking upward, as if to the future, splashed in a Warholesque red, white and blue and underlined with the caption HOPE.

Designed by Shepard Fairey, a Los-Angeles based street artist, the image has led to sales of hundreds of thousands of posters and stickers, has become so much in demand that copies signed by Fairey have been purchased for thousands of dollars on eBay.

The image, Fairey has acknowledged, is based on an Associated Press photograph, taken in April 2006 by Manny Garcia on assignment for the AP at the National Press Club in Washington.

The AP says it owns the copyright, and wants credit and compensation. Fairey disagrees.

"The Associated Press has determined that the photograph used in the poster is an AP photo and that its use required permission," the AP's director of media relations, Paul Colford, said in a statement.

"AP safeguards its assets and looks at these events on a case-by-case basis. We have reached out to Mr. Fairey's attorney and are in discussions. We hope for an amicable solution."

"We believe fair use protects Shepard's right to do what he did here," says Fairey's attorney, Anthony Falzone, executive director of the Fair Use Project at Stanford University and a lecturer at the Stanford Law School. "It wouldn't be appropriate to comment beyond that at this time because we are in discussions about this with the AP."

Fair use is a legal concept that allows exceptions to copyright law, based on, among other factors, how much of the original is used, what the new work is used for and how the original is affected by the new work.

A longtime rebel with a history of breaking rules, Fairey has said he found the photograph using Google Images. He released the image on his Web site shortly after he created it, in early 2008, and made thousands of posters for the street.

As it caught on, supporters began downloading the image and distributing it at campaign events, while blogs and other Internet sites picked it up. Fairey has said that he did not receive any of the money raised.

A former Obama campaign official said they were well aware of the image based on the picture taken by Garcia, a temporary hire no longer with the AP, but never licensed it or used it officially. The Obama official asked not to be identified because no one was authorized anymore to speak on behalf of the campaign.

The image's fame did not end with the election.

It will be included this month at a Fairey exhibit at the Institute of Contemporary Art in Boston and a mixed-media stenciled collage version has been added to the permanent collection of the National Portrait Gallery in Washington.

"The continued use of the poster, regardless of whether it is for galleries or other distribution, is part of the discussion AP is having with Mr. Fairey's representative," Colford said.

A New York Times book on the election, just published by Penguin Group (USA), includes the image. A Vermont-based publisher, Chelsea Green, also used it — credited solely to Fairey\_ as the cover for Robert Kuttner's "Obama's Challenge," an economic manifesto released in September. Chelsea Green president Margo Baldwin said that Fairey did not ask for money, only that the publisher make a donation to the National Endowment for the Arts.

"It's a wonderful piece of art, but I wish he had been more careful about the licensing of it," said Baldwin, who added that Chelsea Green gave \$2,500 to the NEA.

Fairey also used the AP photograph for an image designed specially for the Obama inaugural committee, which charged anywhere from \$100 for a poster to \$500 for a poster

signed by the artist.

Fairey has said that he first designed the image a year ago after he was encouraged by the Obama campaign to come up with some kind of artwork. Last spring, he showed a letter to The Washington Post that came from the candidate.

"Dear Shepard," the letter reads. "I would like to thank you for using your talent in support of my campaign. The political messages involved in your work have encouraged Americans to believe they can help change the status quo. Your images have a profound effect on people, whether seen in a gallery or on a stop sign."

At first, Obama's team just encouraged him to make an image, Fairey has said. But soon after he created it, a worker involved in the campaign asked if Fairey could make an image from a photo to which the campaign had rights.

"I donated an image to them, which they used. It was the one that said "Change" underneath it. And then later on I did another one that said "Vote" underneath it, that had Obama smiling," he said in a December 2008 interview with an underground photography Web site.

*Associated Press writer Philip Elliott in Washington contributed to this report.*