

Geoffrey S. Stewart
 Meir Feder
 Chris J. Lopata
 Jones Day
 222 E. 41st Street
 New York, NY 10017-6702
 Telephone: (212) 326-3939
 Email: gstewart@jonesday.com

William W. Fisher III (admitted *pro hac vice*)
 1575 Massachusetts Avenue
 Cambridge, Massachusetts 02138
 Telephone: (617) 495-0957
 Email: tfisher@law.harvard.edu

Attorneys for Plaintiffs and Counterclaim Defendants

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 and STUDIO NUMBER ONE,
 INC. and ONE 3 TWO, INC. (d/b/a OBEY
 CLOTHING)

Counterclaim Defendants.

**ANSWER AND AFFIRMATIVE
 DEFENSES OF PLAINTIFFS
 AND COUNTERCLAIM
 DEFENDANTS SHEPARD
 FAIREY, OBEY GIANT ART
 INC., OBEY GIANT LLC, AND
 STUDIO NUMBER ONE, INC. TO
 THE ASSOCIATED PRESS'
 FIRST AMENDED ANSWER,
 AFFIRMATIVE DEFENSES AND
 COUNTERCLAIMS**

09-01123 (AKH)
 ECF Case

and

MANNIE GARCIA,

Defendant, Counterclaim
Plaintiff and Cross-claim
Plaintiff/Defendant,

v.

SHEPARD FAIREY and OBEY GIANT ART,
INC.,

Counterclaim Defendants.

and

THE ASSOCIATED PRESS,

Cross-claim
Plaintiff/Defendant.

Plaintiffs-Counterclaim Defendants Shepard Fairey and Obey Giant Art, Inc. and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc. by and through their attorneys, answer the First Amended Counterclaims of Defendant The Associated Press (“The AP”), dated November 12, 2009, as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

52. Deny ¶ 52, except admit that The AP has propounded Counterclaims and refer to that document for its entire contents and further aver that the definitions in the Counterclaims of “Counterclaim Defendants” and “Fairey” are overbroad and inconsistent.

53. Deny ¶ 53.

54. Deny ¶ 54, except admit that for a time period 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>.

55. Deny ¶ 55, except admit on information and belief that Obey Clothing manufactured and sold Obama Works and has earned revenue from those sales.

56. Deny ¶ 56.

57. Deny ¶ 57, except admit that Shepard Fairey and Obey Giant LLC earned revenues from the sale of Obama Clothing without the words “Hope” or “Progress.”

58. Deny ¶ 58, except admit that Plaintiffs filed a complaint and refer to that document for its entire contents and deny knowledge and information sufficient to form a belief as to the truth of allegations concerning unspecified reports.

59. Deny ¶ 59.

60. Deny ¶ 60.

61. Deny ¶ 61.

62. Deny ¶ 62.

63. Deny ¶ 63.

64. Deny ¶ 64, except admit that Shepard Fairey and Obey Giant Art Inc. filed this declaratory judgment action.

65. Deny ¶ 65, except admit that Shepard Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works and admit that The AP has asserted the instant counterclaims for damages and injunctive relief.

PARTIES

66. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 66, except admit The AP purports to be a New York not-for-profit corporation with its principal place of business at 450 West 33rd Street, New York, New York 10001, and claims that it is one of the largest news organizations in the world.

67. Deny ¶ 67, except admit that Shepard Fairey is a visual artist, graphic designer, merchandiser and business owner who resides in Los Angeles, California.

68. Admit ¶ 68 upon information and belief.

69. Admit ¶ 69.

70. Deny ¶ 70, except admit that Obey Giant LLC is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026.

71. Deny ¶ 71, except admit that Studio One is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026.

JURISDICTION AND VENUE

72. Deny ¶ 72, except admit that The AP purports to base jurisdiction for its counterclaims upon the authorities recited in ¶ 72.

73. Deny ¶ 73, except admit this Court has personal jurisdiction over Shepard Fairey, Obey Giant Art, Inc., Obey Giant LLC, and Studio Number One, Inc.

74. Admit that venue is properly lain in this district.

FACTUAL BACKGROUND

75. Deny information or knowledge sufficient to form a belief as to ¶ 75, except admit The AP purports to be a not-for-profit corporation and claims that it is one of the largest news organizations in the world.

76. Deny information or knowledge sufficient to form a belief as to ¶ 76.

77. Deny information or knowledge sufficient to form a belief as to ¶ 77.

78. Deny information or knowledge sufficient to form a belief as to ¶ 78.

79. Deny information or knowledge sufficient to form a belief as to ¶ 79.

80. Deny information or knowledge sufficient to form a belief as to ¶ 80.

81. Deny information or knowledge sufficient to form a belief as to ¶ 81.

82. Deny information or knowledge sufficient to form a belief as to ¶ 82.

83. Deny information or knowledge sufficient to form a belief as to ¶ 83.

84. Deny information or knowledge sufficient to form a belief as to ¶ 84.

85. Deny information or knowledge sufficient to form a belief as to ¶ 85.

86. Deny information or knowledge sufficient to form a belief as to ¶ 86.

87. Deny information or knowledge sufficient to form a belief as to ¶ 87.

88. Deny information or knowledge sufficient to form a belief as to ¶ 88.

89. Deny information or knowledge sufficient to form a belief as to ¶ 89.

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

91. Deny information or knowledge sufficient to form a belief as to ¶ 91.

92. Deny information or knowledge sufficient to form a belief as to ¶ 92, except admit that The AP has licensed content to customers.

93. Deny information or knowledge sufficient to form a belief as to ¶ 93, except admit that The AP licenses photos via the Internet.

94. Deny information or knowledge sufficient to form a belief as to ¶ 94, except admit that The AP has licensed content to customers.

95. Deny information or knowledge sufficient to form a belief as to ¶ 95.

96. Deny information or knowledge sufficient to form a belief as to ¶ 96, except admit that Mr. Garcia covered an event in April 2006 at the National Press Club that was attended by George Clooney and Senators Brownback and Obama.

97. Deny information or knowledge sufficient to form a belief as ¶ 97.

98. Deny ¶ 98, except admit that The AP purports to hold a copyright registration, Registration No. VA 1-356-885, in an automated database of hundreds of Associated Press news photographs and admit that the photograph shown in ¶ 98 and attached as Exhibit B, is a photograph of President Barack Obama and deny information or knowledge sufficient to form a belief as to the remaining allegations of ¶ 98.

99. Deny ¶ 99, except admit that National Public Radio broadcast an interview of Mannie Garcia, which is available at <http://www.npr.org/templates/story/story.php?storyId=101184444>.

100. Deny ¶ 100, except admit that Shepard Fairey is a visual artist, graphic designer and business owner who has used pre-existing works as visual references to create new artistic works; admit that in 1989 Shepard Fairey created an illustration of Andre the Giant which has been displayed in public areas across the country, including New York,

Boston, Providence and San Diego; and admit that Shepard Fairey has registered the mark Obey® with the United States Patent and Trademark Office, with the registration numbers 2632359, 2762299 and 3282078.

101. Deny ¶ 101, except admit that Shepard Fairey has been arrested for his street art more than a dozen times, most recently in Boston on two outstanding warrants on February 6, 2009.

102. Deny ¶ 102.

103. Deny ¶ 103, except admit that the photograph on the left in ¶ 103 is entitled “Black Panther” and was taken by Pirkle Jones in 1968, admit that the illustration on the right in ¶ 103 was created by Shepard Fairey, and admit that Shepard Fairey did not license “Black Panther” from Mr. Jones, but deny he was under any obligation to do so.

104. Deny ¶ 104, except admit that the work on the left in ¶ 104 is a poster by Rene Mederos and admit that Shepard Fairey paid a royalty to the Mederos estate.

105. Deny ¶ 105, except admit that Rupert Garcia created a silkscreen print titled *Down with the Whiteness* (shown on the left in ¶ 105), admit that Shepard Fairey created the illustration shown on the right in ¶ 105, and admit that Shepard Fairey did not license the print titled *Down with the Whiteness* from Mr. Garcia, but deny he was under any obligation to do so.

106. Deny ¶ 106, except admit that the image shown on the left in ¶ 106 is a photograph by a Swiss photographer and that Shepard Fairey created the illustration shown on the right in ¶ 106, and admit that Shepard Fairey did not license the photograph shown on the left in ¶ 106, but deny he was under any obligation to do so.

107. Deny ¶ 107, except admit that Austrian artist Koloman Moser’s image

is pictured on the left in ¶ 107, admit that Shepard Fairey created the illustration shown on the right in ¶ 107, and admit that Shepard Fairey did not obtain a license from the Moser estate for this image, but deny he was under any obligation to do so.

108. Deny ¶ 108, except admit that Edward Nachtrieb's photograph is pictured on the left in ¶ 108, admit that Shepard Fairey created the illustration shown on the right in ¶ 108, and admit that Shepard Fairey did not obtain a license for this image, but deny he was under any obligation to do so.

109. Deny ¶ 109, except admit that Shepard Fairey created the design for the product in the image shown on the right in ¶ 109 entitled "2006 Obey Design" and the illustration shown on the bottom right in ¶ 109 entitled "1996 Fairey Print."

110. Deny ¶ 110.

111. Deny ¶ 111.

112. Deny ¶ 112, except admit that since 1999 Shepard Fairey has filed nine trademark applications, five of which have been abandoned, and now has four active trademark registrations in the words "OBEY" "DISOBEY" and the "OBEY®" logo.

113. Deny ¶ 113, except admit that Shepard Fairey and Obey Giant Art Inc. have registered intellectual property rights to their works.

114. Deny ¶ 114, except admit that the website at ObeyGiant.com allows visitors to download for free certain Shepard Fairey trademarks and images, and that this website contains an "All Rights Reserved" copyright notice on each page.

115. Deny ¶ 115, except admit that Shepard Fairey allowed the free download of the "Obama Hope" poster and image from his website and refer to that website for its entire contents.

116. Deny ¶ 116, except admit that representatives for Shepard Fairey sent Baxter Orr cease-and-desist letters in April 2008 in connection with Orr's commercial use of Shepard Fairey's trademarks and logo and admit that Orr's work, titled "Protect Yourself – Obey Giant" is displayed on the right of ¶ 116 and Shepard Fairey's illustration titled "Obey Giant" is displayed on the left of ¶ 116.

117. Deny ¶ 117, except admit that Shepard Fairey's representative sent an e-mail to Orr on April 3, 2008 and refer to that document for its entire contents.

118. Deny ¶ 118, except admit that Shepard Fairey's representative sent an e-mail to Orr on April 3, 2008 and refer to that document for its entire contents.

119. Deny ¶ 119, except admit that Shepard Fairey's representative sent an e-mail to Orr on April 3, 2008 and refer to that document for its entire contents.

120. Deny ¶ 120, except admit that Shepard Fairey's representative sent an e-mail to Orr on April 3, 2008 and refer to that document for its entire contents.

121. Deny ¶ 121.

122. Deny ¶ 122, except admit that Shepard Fairey's representative sent a second communication to Orr, and refer to that document for its entire contents.

123. Deny ¶ 123, except admit that Shepard Fairey's representative sent a second communication to Orr, and refer to that document for its entire contents.

124. Deny ¶ 124, except admit that Shepard Fairey's representative sent a second communication to Orr, and refer to that document for its entire contents.

125. Deny ¶ 125, except admit that Shepard Fairey's representative sent a second communication to Orr, and refer to that document for its entire contents.

126. Deny ¶ 126, except admit that in February 2009 representatives of Obey

Art sent a takedown request to CafePress.com, which was facilitating the sale by the proprietors of <http://www.steelerbaby.com/> of t-shirts bearing the Obey trademarked name; that when Shepard Fairey learned his representative sent the takedown notice, he requested that his representative withdraw it; that Obey Art's representative rescinded the takedown notice sent to CafePress.com; and that the items remain for sale on <http://www.steelerbaby.com/> through the CafePress store.

127. Deny knowledge and information sufficient to form a belief as to ¶ 127.

128. Deny ¶ 128, except admit that under certain circumstances Obey Art enforces Shepard Fairey's intellectual property rights.

129. Deny ¶ 129.

130. Deny knowledge and information sufficient to form a belief as to ¶ 130.

131. Deny ¶ 131, except admit that Shepard Fairey has said at various times that he wanted to work from an appropriate image of Obama.

132. Deny ¶ 132, except admit that Shepard Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

133. Deny ¶ 133, except admit that Shepard Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

134. Deny ¶ 134.

135. Deny ¶ 135.

136. Deny ¶ 136.

137. Deny knowledge and information sufficient to form a belief as to the allegations contained in ¶ 137.

138. Deny ¶ 138.

139. Deny ¶ 139.

140. Deny ¶ 140, except admit that Shepard Fairey obtained the Obama Photo using Google Images and refer to Google's copyright policy for its entire contents.

141. Deny ¶ 141.

142. Deny ¶ 142.

143. Deny ¶ 143, 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 Shepard Fairey, and admit that copyright applications for “Hope,” “Progress,” and “Change” works do not identify the Obama Photo in the “Material Excluded” section of the application.

144. Deny ¶ 144, except admit that Shepard Fairey created the illustration of Obama contained in the Obama For America Campaign’s poster (displayed on the right in ¶ 144) after the Obama Campaign gave him the photograph and asked him to create an illustration, and admit that the Campaign gave David Turnley credit for the use of his photograph.

145. Admit ¶ 145.

146. Deny ¶ 146, except admit that the image entitled “The AP’s Photograph” in ¶ 146 was taken by Kevin Frayer and that Shepard Fairey created the illustration below the photograph in ¶ 146 after obtaining a license from The AP and refer to that document for its entire contents.

147. Deny ¶ 147, except admit upon information and belief that the photograph on the left in ¶ 147 was taken by Pablo Martinez Monsivais and admit that Shepard Fairey created the illustration on the right in ¶ 147 for the cover of *Rolling Stone*

magazine at its direction using the Monsivias photograph as a visual reference.

148. Deny ¶ 148, except deny knowledge and information sufficient to form a belief as to The AP's willingness to license the Obama Photo.

149. Deny ¶ 149.

150. Deny ¶ 150.

151. Deny ¶ 151, except deny information and knowledge sufficient to form a belief as to the allegations in ¶ 151 regarding steps The AP took to analyze the photo and admit that Shepard Fairey's representative contacted The AP's in-house counsel on or around January 30, 2009, and that during that conversation, The AP's attorney alleged that Shepard Fairey's work infringed an AP photograph and stated The AP wanted not only a licensing fee but also a percentage of all revenue generated by the Obama Works and that The AP's attorney stated The AP would donate the money to a fund for journalists.

152. Deny ¶ 152, except admit that on or about February 2, 2009, Shepard Fairey's former counsel responded to The AP's in-house counsel and informed her that Shepard Fairey's use was a fair use and that The AP's counsel disagreed and made clear that The AP wanted not only a licensing fee but a percentage of all revenue generated by the Obama Works.

153. Deny ¶ 153, except admit that on or about February 4, 2009, Shepard Fairey's former counsel contacted The AP's in-house counsel and the parties agreed not to initiate any lawsuit prior to Friday, February 6.

154. Deny ¶ 154, except admit that Shepard Fairey's former counsel received an email from The AP's in-house counsel at 11:53 a.m. (PST) on February 6, 2009, stating The AP would initiate suit against Shepard Fairey on Tuesday, February 10, 2009 at 2 p.m. in

the Southern District of New York if the matter were not resolved by then, and Shepard Fairey's former counsel did not call The AP's in-house counsel following receipt of that email.

155. Deny information and knowledge sufficient to form a belief as to ¶ 155.

156. Deny information and knowledge sufficient to form a belief as to ¶ 156, except admit that Shepard Fairey's former counsel received an email from The AP's in-house counsel at 11:53 a.m. (PST) stating The AP would initiate suit against Shepard Fairey on Tuesday, February 10, 2009 at 2 p.m. in the Southern District of New York if the matter were not resolved by then.

157. Deny ¶ 157, except admit that Shepard Fairey and Obey Giant Art. Inc. filed the instant lawsuit on Monday February 9, 2009, and counsel for Shepard Fairey and Obey Giant Art Inc. provided a courtesy copy of the complaint to The AP's in-house counsel by email at 7:43 a.m. (PST) that morning.

158. Deny ¶ 158, except admit that The AP filed counterclaims on March 11, 2009, and refer to that document for its entire contents.

159. Deny ¶ 159, except admit that George Clooney does not appear in the Obama Photo or the Obama Works.

160. Deny ¶ 160, except deny information and knowledge sufficient to form a belief as to the allegations in ¶ 160 regarding what Shepard Fairey did or did not say during unspecified interviews in 2008.

161. Deny ¶ 161, except admit that Shepard Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works, admit Shepard Fairey identified the wrong photograph in the original Complaint by mistake, admit that later

Shepard Fairey realized his mistake, but upon realizing his mistake, went on to misrepresent the photograph he used.

162. Deny information and knowledge sufficient to form a belief as to the allegations in ¶ 162 regarding what Shepard Fairey said during unspecified interviews and press statements about the creation of the Obama Works and deny the remaining allegations contained in ¶ 162, except admit that Shepard Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works, admit Shepard Fairey identified the wrong photograph in the original Complaint by mistake, admit that later Shepard Fairey realized his mistake, but upon realizing his mistake, went on to misrepresent the photograph he used.

163. Deny ¶ 163.

164. Deny ¶ 164.

165. Deny ¶ 165.

166. Deny ¶ 166.

167. Deny ¶ 167, except deny information and knowledge sufficient to form a belief as to the allegations in ¶ 167 regarding The AP's impressions of Plaintiffs' document production.

168. Deny ¶ 168 except deny information and knowledge sufficient to form a belief as to the allegations in ¶ 168 regarding The AP's analysis of the documents that Plaintiffs produced and the metadata associated with those documents and admit that The AP's counsel sent Plaintiffs' former counsel an email on October 1, 2009, and refer to that document for its entire contents.

169. Deny ¶ 169, except admit that Plaintiffs' former counsel sent The AP's

counsel a letter on October 9, 2009, and refer to that document for its entire contents.

170. Deny ¶ 170, except admit that Plaintiffs' former counsel sent The AP's counsel a letter on October 9, 2009, and refer to that document for its entire contents.

171. Deny ¶ 171, except further aver that Plaintiffs' former counsel searched file path locations other than the locations provided by counsel for The AP and found additional responsive documents in those other file path locations.

172. Deny ¶ 172, except admit that Plaintiffs filed a motion for leave to amend their pleadings on October 16, 2009, and refer to that document for its entire contents.

173. Deny ¶ 173.

174. Deny ¶ 174.

175. Deny ¶ 175, except admit that Plaintiffs filed a Complaint on February 9, 2009 and refer to that document for its entire contents.

176. Deny ¶ 176.

177. Deny ¶ 177, except admit that Plaintiffs' counsel filed a Motion For Substitution of Counsel on October 29, 2009.

178. Deny information and knowledge sufficient to form a belief as to the allegations in ¶ 178.

179. Deny ¶ 179, except admit that Shepard Fairey has built a marketing enterprise based on his designs.

180. Deny ¶ 180, except admit that merchandise covered by the Obey® and related trademarks can be purchased at <http://shop.obeyclothing.com> and <http://obeygiant.com>.

181. Deny ¶ 181, except admit that Shepard Fairey, Blkmarkt and Studio

Number One, Inc. have done work for Levi Strauss & Co., Mountain Dew, Universal Pictures, Express, Sunkist, Honda Civic, Dewars, Virgin Megastore, Guggenheim, Adidas and Motorola.

182. Deny ¶ 182, except admit that Studio Number One, Inc. worked on a marketing campaign for Saks Fifth Avenue, which included the display of Studio Number One's designs.

183. Deny ¶ 183, except admit that Shepard Fairey and Obey Giant Art Inc. have registered intellectual property rights to their works.

184. Deny ¶ 184.

185. Deny ¶ 185.

186. Deny information or knowledge sufficient to form a belief as to ¶ 186, except admit that Shepard Fairey is free to establish a commercial, for-profit enterprise designed to make money from his work.

187. Deny ¶ 187.

188. Deny ¶ 188.

FIRST COUNTERCLAIM – COPYRIGHT INFRINGEMENT

189. Repeat and reallege each and every response to ¶¶ 52 to 188 above as if fully set forth herein.

190. Deny ¶ 190.

191. Deny ¶ 191.

SECOND COUNTERCLAIM — CONTRIBUTORY COPYRIGHT INFRINGEMENT

192. Repeat and reallege each and every response to ¶¶ 52 to 191 above as if fully set forth herein.

193. Deny ¶ 193.

194. Deny ¶ 194.

195. Deny ¶ 195.

196. Deny ¶ 196.

197. Deny ¶ 197.

THIRD COUNTERCLAIM — DECLARATORY JUDGMENT

198. Repeat and reallege each and every response to ¶¶ 52 to 197 above as if fully set forth herein.

199. Deny ¶ 199, 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.

200. Deny ¶ 200.

201. Deny ¶ 201.

202. Deny ¶ 202.

203. Deny ¶ 203.

204. Deny ¶ 204.

FOURTH COUNTERCLAIM — VIOLATION OF THE DMCA

205. Repeat and reallege each and every response to ¶¶ 52 to 204 above as if fully set forth herein.

206. Deny information and knowledge sufficient to form a belief as to the allegations contained in ¶ 206.

207. Deny ¶ 207.

208. Deny ¶ 208.

209. Deny ¶ 209.

210. Deny ¶ 210.

211. Deny ¶ 211.

212. Deny ¶ 212.

PRAYER FOR RELIEF

213. Repeat and reallege ¶¶ 52 to 212 and Deny ¶ 213.

COUNTERCLAIM-DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST DEFENSE

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

THIRD DEFENSE

3. 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. Defendant's counterclaims are barred in whole or in part by the equitable doctrine of unclean hands. Specifically, The AP claims copyright ownership in, and makes commercial use of, many photographs that consist almost entirely of copyrighted artwork of Fairey and other artists without permission. Copies of these photographs are offered for sale and licensed for use by The AP through its image licensing database available at <http://www.apimages.com>. These photographs include, but are by no means limited to, the following examples:

a. The AP's image database includes the following photograph of Fairey's *Obama Hope Mural*. The AP did not obtain a license to use Fairey's work in this photograph.



b. The AP has used the above photograph and the *Obama Hope Mural* to market its image licensing database, as illustrated by this screen shot of the home page taken on March 27, 2009 at approximately 3:50 p.m. (PST). The AP did not obtain a license to use Fairey's work in connection with the advertising and promotion of its image database.



c. The AP's image database includes the following photograph of Fairey's *Obama Hope* posters. The AP did not obtain a license to use Fairey's work in this photograph.



d. On January 7, 2009 The AP distributed a story entitled “Iconic Obama portrait headed to Smithsonian museum” by Brett Zongker. The AP's article included a photograph attributed to The AP, which depicted Fairey's *Obama Hope Stencil Collage* that now hangs in the National Portrait Gallery of the Smithsonian Institution. (A copy of the full article is attached as Exhibit A and available at <http://www.suntimes.com/entertainment/1366421,w-obama-portrait-smithsonian-hope-010709.article>.) The AP did not obtain a license to use Fairey's work in this photograph. As shown below, the photograph attributed to The AP consists of nothing more than a literal reproduction of Fairey's work.

Mozilla Firefox
http://www.suntimes.com/entertainment/1366404_010709obamaportrait1.fullimage


SUN-TIMES NEWS GROUP



Detail of the signature portrait of Barack Obama, by Los Angeles street artist Shepard Fairey. (AP file)

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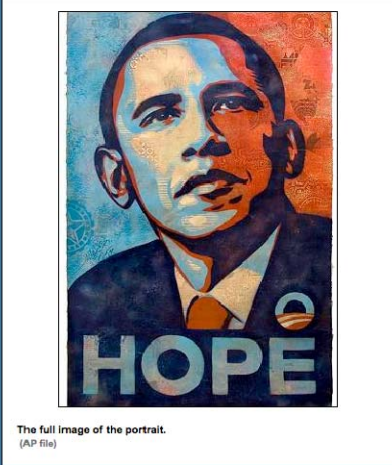



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http://www.suntimes.com/entertainment/1366405_010709obamaportrait2.fullimage

SUN-TIMES NEWS GROUP




The full image of the portrait.
 (AP file)

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Done

e. The AP's image database contains the following photograph of Jeff Koons' sculpture entitled *Ushering In Banality*. On information and belief, The AP did not obtain a license to use Koons' work in this photograph.



f. The AP's image database contains the following photograph of Banksy's *Sketch for Essex Road*. On information and belief, The AP did not obtain a license to use Banksy's work in this photograph.



g. The AP's image database contains the following photograph of George Segal's *The Diner*. On information and belief, The AP did not obtain a license to use Segal's work in this photograph.



h. The AP's image database contains the following photograph of Kerry James Marshall's *Den Mother*. On information and belief, The AP did not obtain a license to use Marshall's work in this photograph.



i. The AP's image database contains the following photograph of Banksy's *Di-Faced Notes*. On information and belief, The AP did not obtain a license to use Banksy's work in this photograph.



j. The AP's image database contains the following photograph of Jeff Koons' *Stacked*. On information and belief, The AP did not obtain a license to use Koons' work in this photograph.



k. The AP's image database contains the following photograph of Keith Haring's *Hope*. On information and belief, The AP did not obtain a license to use Haring's work in this photograph.



l. The AP's image database contains the following photograph of Ron Mueck's *Mask II*. On information and belief, The AP did not obtain a license to use Mueck's work in this photograph.



m. The AP's image database contains the following photograph of Banksy's *Untitled*. On information and belief, The AP did not obtain a license to use Banksy's work in this photograph.



5. The doctrine of unclean hands and basic principles of equity prohibit The AP from contending that Counterclaim Defendants' Obama Works infringe The AP's copyrights when The AP itself exploits the copyrighted work of Fairey and other artists without permission and in a manner that is far less transformative than the Obama Works, as illustrated but not limited to, the photographs listed above.

FIFTH DEFENSE

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

SIXTH DEFENSE

7. Any damages and profits sought by 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 Defendant's copyrighted work.

SEVENTH DEFENSE

8. 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

9. Defendant has failed to mitigate its purported damages and recovery of damages, if any, must be reduced accordingly.

NINTH DEFENSE

10. Defendant's counterclaims are barred in whole or in part because Plaintiffs and Counterclaim Defendants were not aware and had no reason to believe that their acts constituted a violation of 17 U.S.C. § 1202.

DATED: December 14, 2009

Respectfully Submitted,

/s/ Geoffrey S. Stewart

Geoffrey S. Stewart

Meir Feder

Chris J. Lopata

Jones Day

222 E. 41st Street

New York, NY 10017-6702

Telephone: (212) 326-3939

Email: gstewart@jonesday.com

William W. Fisher III

1575 Massachusetts Avenue

Cambridge, Massachusetts 02138

Telephone: (617) 495-0957

Email: tfisher@law.harvard.edu

*Attorneys for Plaintiffs and Counterclaim
Defendants*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel via the Court's ECF system.

JONES DAY

By: /s/ Geoffrey S. Stewart

Geoffrey S. Stewart
222 East 41st Street
New York, New York 10017-6702
(212) 326-3939