

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.

ECF

Case No. 09-01123 (AKH)

**COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S MOTION IN LIMINE NO. 5 TO
EXCLUDE EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES**

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I. INTRODUCTION

One 3 Two, Inc. d/b/a Obey Clothing (“One 3 Two”) was brought into this lawsuit months after it was filed for using what One 3 Two believed to be a non-infringing work created by Shepard Fairey. In an attempt to avoid future litigation, One 3 Two has since changed its practices with regard to its review of the works provided to it by Fairey and his company, as well as other artists, out of an abundance of caution. One 3 Two’s actions to avoid future litigation¹ constitute subsequent remedial measures, and any evidence regarding this conduct is inadmissible at trial. Fed. R. Evid. 407. This evidence is also irrelevant and prejudicial. Fed. R. Evid. 402 and 403. Specifically, any business practices implemented by One 3 Two after this lawsuit was filed have no bearing whatsoever to the core issues of this case: whether to the layperson the Obama Image is substantially similar to the Garcia Photo, and whether One 3 Two is liable under the Digital Millenium Copyright Act (“DMCA”) for alleged removal of copyright management. Moreover, evidence of subsequent remedial measures is more prejudicial than probative because the jury could impermissibly interpret evidence of subsequent remedial measures as evidence that One 3 Two’s conduct was infringing. Accordingly, to the extent the AP seeks to introduce evidence of subsequent remedial measures, that evidence should be excluded pursuant to Federal Rules of Evidence 402, 403 and 407.

¹ At this time, the Parties have not exchanged pretrial disclosures so One 3 Two cannot identify which trial exhibits are inadmissible. The basis for this Motion is the AP’s inappropriate reliance on such evidence in its Opposition to One 3 Two’s Motion for Summary Judgment. One 3 Two will amend and supplement this Motion, as appropriate, once it ascertains trial exhibits and evidence proposed by the AP.

II. EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES SHOULD BE EXCLUDED

A. Evidence of Subsequent Remedial Measures Is Not Admissible to Prove Culpable Conduct

As a general rule, subsequent remedial measures are not admissible to prove that a defendant engaged in culpable conduct. Fed. R. Evid. 407;² *see Haney v. Miller's Launch, Inc.*, No. 08-CV-5225, 2010 WL 4716625 *3 (E.D.N.Y. Nov. 15, 2010) (excluding evidence of system-wide changes made following an accident and stating that “[e]vidence of this subsequent remedial measure will not go to the jury”). Changes in a defendant’s policies and practices following an incident are subsequent remedial measures. *See, e.g., Luera v. Snyder*, 599 F. Supp. 1459, 1463 (D.C. Colo. 1984) (holding that “proposed testimony of changes made in police department policies after the incident is not admissible because of the public policy of encouraging subsequent remedial measures”).

In its Opposition to One 3 Two’s Motion for Summary Judgment, the AP relied on evidence pertaining to One 3 Two’s new practice of requiring artists to provide One 3 Two with the reference material underlying the artwork they provide to One 3 Two for use on merchandise. *See, e.g.*, Exhibits 77-78 of the Declaration of Brendan Kehoe filed in Opposition to One 3 Two’s Motion for Summary Judgment. Prior to this litigation, One 3 Two trusted that the artists it worked with, including Shepard Fairey, obtained the proper clearances relating to the reference materials it used. After the commencement of this litigation, and out of an abundance of caution,

² Rule 407 provides in relevant part: “When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent [remedial] measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction.”

One 3 Two implemented new practices requiring artists to provide reference materials to One 3 Two. These practices, as well as any other practices One 3 Two implemented following the filing of this lawsuit in an attempt to avoid future litigation, are subsequent remedial measures that are not admissible to prove culpable conduct. Fed. R. Evid. 407.

B. Evidence of Subsequent Remedial Measures Is Irrelevant and Prejudicial

Evidence of subsequent remedial measures is also irrelevant and prejudicial under the circumstances here. Evidence is relevant if it has “any tendency to make the . . . determination of the action more [or less] probable than it would be without the evidence.” Fed. R. Evid. 401. “Evidence which is not relevant is not admissible.” Fed. R. Evid. 402. Even relevant evidence will not be admissible, however, if the “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *See* Fed. R. Evid. 403.

Notably, the only issues left for trial are substantial similarity between two images and One 3 Two’s liability under the DMCA. Any subsequent remedial measures that One 3 Two may have taken involve conduct that occurred well after any copyright or DMCA infringement allegedly took place and accordingly do not have “any tendency to make the . . . determination of [these claims] more [or less] probable than it would be without the evidence.” *See* Fed. R. Evid. 401. Even if the evidence were relevant, it should be excluded because it is more prejudicial than probative and likely to confuse the jury. Specifically, the jury could impermissibly interpret evidence of subsequent remedial measures as evidence that One 3 Two’s conduct was infringing. Fed. R. Evid. 403. Accordingly, any evidence of subsequent remedial measures should be excluded.

III. CONCLUSION

For the reasons stated herein, the Court should exclude all evidence and argument at trial relating to any actions that could be deemed subsequent remedial measures taken by One 3 Two after the filing of this lawsuit.

Dated February 25, 2011
Los Angeles, California

Respectfully Submitted,

By: /s/ Robyn C. Crowther

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