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. 7 TO EXCLUDE UNRELATED COPYRIGHT CLAIMS AND SETTLEMENT EVIDENCE

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I. INTRODUCTION

One 3 Two, Inc. ("One 3 Two") moves *in limine* to preclude Plaintiff the Associated Press ("the AP") from mentioning or introducing evidence or argument[1] at trial relating to two unrelated claims of copyright infringement and settlements of those claims, involving Cuban artist Felix René Mederos and Bravado International Group Merchandising Services, Inc. This evidence is inadmissible for two principal reasons:

First, this evidence is irrelevant under Federal Rule of Evidence 402, as it pertains to copyrighted images that are not the subject of this litigation. Additionally, the Court's recent ruling granting the AP's motion for summary judgment on the issue of fair use confirms that such evidence would have no role in addressing the issues that will be tried to the jury.

Second, this evidence involves settlements and settlement communications, which under Federal Rule of Evidence 408, cannot be used to establish liability. The AP cannot use this evidence for any other purpose, as the only claims to be tried to the jury are issues of liability.

II. EVIDENCE REGARDING IRRELEVANT THIRD-PARTY CLAIMS AND SETTLEMENTS SHOULD BE EXCLUDED

A. Evidence Regarding Third-Party Claims Involving One 3 Two Are Irrelevant

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.

[1] At this time, the Parties have not exchanged pretrial disclosures, so One 3 Two cannot identify which trial exhibits are inadmissible as argued herein. The basis for this Motion is the AP's inappropriate use of such evidence in its Motion for Summary Judgment. One 3 Two raised these arguments in a Motion to Strike in connection with the summary judgment proceedings, and the Court did not rule on the merits of the motion, denying it as moot. One 3 Two will amend and supplement this Motion, as appropriate, once it ascertains trial exhibits and evidence proposed by the AP.

In its Motion for Summary Judgment, the AP relied on evidence pertaining to One 3 Two's use of copyrighted material entirely unrelated to the photograph of President Obama that is the center of this lawsuit. *See, e.g.*, Exhibits 27-32 of the Kehoe Declaration.[2] In particular, in support of its argument on fair use, the AP pointed to evidence involving copyright disputes and settlements between (1) Fairey and Cuban artist Felix René Mederos (*e.g.*, the "Cuban rider" t-shirts) and (2) Bravado and One 3 Two (*e.g.*, "The Clash" t-shirts). This evidence has never been legally or factually relevant to this litigation, and is doubly irrelevant in light of this Court's ruling granting the AP's Motion on the issue of fair use and eliminating that issue for trial. The issues that will be tried are whether the Garcia Photo and the Obama Image are substantially similar and whether there is liability for an alleged removal of copyright management information attached to the Garcia Photo. In sum, Exhibits 27-32 do not have "any tendency to make the . . . determination of [these claims] more [or less] probable than it would be without the evidence" and are therefore inadmissible. *See* Fed. R. Evid. 401.

B. Evidence Regarding Settlements with Third Parties Are Also Inadmissible under Federal Rule of Evidence 408(a)

Rule 408(a) excludes evidence of settlements and related communications when such evidence is used to prove liability for a claim. *See* Fed. R. Evid. 408(a). This rule applies to settlement discussions and agreements from unrelated litigation, including settlements involving parties not involved in the current litigation. *See Am. Soc'y of Composers v. Showtime/The Movie Channel*, 912 F.2d 563, 580 (2d Cir. 1990); *Hudspeth v. Comm'r of I.R.S.*, 914 F.2d 1207,

[2] Since the Court's ruling on the AP's Motion for Summary Judgment, the AP has withdrawn Exhibits 28 and 30 of the Kehoe Declaration.

1213-14 (9th Cir. 1990); *Abundis v. United States*, 15 Cl. Ct. 619 (1988). The purpose of Rule 408(a) is principally two-fold:

> (1) "[t]he evidence [of compromise] is irrelevant, since the offer may be motivated by desire for peace rather than from any concession of weakness of position;" (2) "[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes."

Hudspeth, 914 F.2d at 1213-14 (quoting Fed. R. Evid. 408 Advisory Committee's Notes).

The settlement of claims between Bravado and One 3 Two regarding copyrighted images not at issue in this case has no probative value for this case, particularly in light of the limited issues that remain for trial before the jury. As this Court is aware, the only issues to be tried before the jury are One 3 Two's liability under the Copyright Act and One 3 Two's liability under the Digital Millennium Copyright Act ("DMCA"). The only possible reason for the AP to rely on this settlement evidence would be to argue and mislead the jury that One 3 Two had copyright disputes in the past and settled them; and therefore there is infringement in the instant case. Argumentation or reliance on this evidence—however misplaced—would prejudice the jury to draw an inference against One 3 Two based on conduct unrelated to the issues of this case.[3] This is the very sort of argument that contravenes Rule 408 and its key underlying

[3] The evidence of copyright disputes and settlement between Fairey and Mederos, though not within the ambit of Rule 408, is also inadmissible on similar grounds. As stated above, Fairey's dispute and settlement with Mederos (both of whom are not parties to this lawsuit) over a different copyrighted work (not at issue in this litigation) has no bearing on the issues of One 3 Two's liability under the Copyright Act or the DMCA. Additionally, the potential prejudice against One 3 Two is high; a jury may unfairly and improperly impute Fairey's prior disputes to One 3 Two. *See also Am. Soc'y of Composers* 912 F.2d at 581 ("The implication of [the] policy [of Rule 408] is . . . [when the settlement evidence is] offered against a party who was not a (footnote continued)

policy—to protect litigants from having its "good-faith efforts to settle a [prior] dispute used against [them] in subsequent litigation." *See American Soc'y of Composers*, 912 F.2d at 580.

III. CONCLUSION

For the reasons stated herein, the Court should exclude all evidence and argument at trial relating to two unrelated claims of copyright infringement and settlements of those claims involving Cuban artist Felix René Mederos and Bravado International Group Merchandising Services, Inc.

Dated February 25, 2011
Los Angeles, California

Respectfully Submitted,

By: /s/ Robyn C. Crowther

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participant in the settlement discussions or agreement. . . . the Court must asses the degree of relevance and potential prejudice of the evidence in light of the particular circumstances of the case.") (internal citation omitted).