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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant/Counterclaim Plaintiff,

v.

SHEPARD FAIREY, et al.,

Counterclaim Defendants,

And

MANNIE GARCIA,

Defendant, Counterclaim Plaintiff & Cross Claim Plaintiff/Defendant,

v.

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Counterclaim Defendants,

And

THE ASSOCIATED PRESS,

Cross Claim Plaintiff/Defendant.

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

ECF Case

THE ASSOCIATED PRESS'S OPPOSITION TO ONE 3 TWO, INC.'S MOTION IN LIMINE NO. 3 TO PRECLUDE THE USE OF ALTERED IMAGES AT TRIAL

I. INTRODUCTION

At trial, The Associated Press (the "AP") intends to show the jury the uncanny similarities between the dimensions, shapes, gazes, angles, proportions and layout between the AP's photograph of then-Senator Obama (the "Obama Photo") and the image copied from the Obama Photo by Mr. Fairey (the "Obama Image") that was used on merchandise sold by One 3 Two, Inc. d/b/a Obey Clothing ("Obey Clothing"). To do this, the AP intends to show the jury the original photograph as well as a slightly cropped version showing the core of the Obama Photo copied by Mr. Fairey. The AP also intends to show each of the versions of that Obama Image that Obey Clothing used on its merchandise. This is the very same comparison that the AP used at oral argument on its motion for summary judgment.

Through its Motion *in Limine* No. 3, Obey Clothing seeks to prevent the AP from using this damning comparison by claiming that the AP's analysis is misleading and is therefore unfairly prejudicial. Obey Clothing's argument is not well-taken. Because the AP intends to admit the full Obama Photo into evidence as well as the full Obama Image and each version of that image used by Obey Clothing, the jury will not be misled. Instead, the jury will be able to view the Obama Photo and the Obama Image as they appeared in the marketplace as well as with the aid of a comparison that leaves no question about the substantial similarity between them. Such a comparison may be prejudicial, but it is appropriately, not unfairly, so. Obey Clothing's motion should be denied.

II. ARGUMENT

Federal Rule of Evidence 403 bars otherwise relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 403 (emphasis added). This is a high standard, as virtually all evidence

is prejudicial in some respect to the opposing party. "Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be unfair." Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164, 174 (2d Cir. 2000) (emphasis in original). The AP's use of a slightly cropped or zoomed-in version of the Obama Photo, in addition to the original version of the Obama Photo, simply does not reach this threshold.

First, Obey Clothing's professed concern about jury confusion is unfounded. The AP will introduce into evidence a full copy of the Obama Photo, the Obama Image, and examples of Obey Clothing's merchandise bearing the different variations of that image. The jury will see each of these images, in their entirety, to compare for substantial similarity.

Second, Obey Clothing's arguments are wholly disingenuous because it argued on summary judgment that the relevant comparison to the "unaltered" Obama Photo is the full-size version of Mr. Fairey's *Progress* poster that was put out by Mr. Fairey—but Obey Clothing did not sell the poster. Instead, it sold millions of dollars in t-shirts and hooded sweatshirts, examples of which are depicted above. Moreover, most of the infringing merchandise sold by Obey Clothing did not even bear the word "Progress," but instead bore a cropped version of the Obama Image similar to the one in the AP's comparison.

Third, Obey Clothing's motion also misses the mark because all AP is attempting to show is a comparison of the Obama Photo without a tiny sliver of background at the top that Mr. Fairey admittedly removed when he first copied the Obama Photo and made the Obama Image. By removing that portion, the AP is simply zeroing in on the portion of the photograph that Mr. copied to make the Obama Image, which is wholly appropriate in assessing the similarities, or differences, between the two works. At trial, the AP intends to compare these images in the very same way it did during the summary judgment oral argument. Such a comparison is especially important to show how closely the Obama Photo and the Obama Image overlap—and exactly what portion of the Obama Photo was stolen from the AP:

Such illustrative aids are commonly used at trial to highlight similarities between infringing works. See, e.g. MCA, Inc. v. Wilson, 425 F. Supp. 443, 449, 451 (S.D.N.Y. 1976) (considering comparison charts helpful in illustrating similarities in finding copying and copyright infringement). Obey Clothing obviously seeks to preclude such use in this case because the comparison readily demonstrates to an ordinary observer the substantial similarity between the works.

Fourth, the AP is not aware of any authority holding that the side-by-side comparison depicted above is in any way improper. To the contrary, the comparison would obviously be useful to the trier of fact. Moreover, the cases cited by Obey Clothing are not to the contrary as they all deal with a different factual situation in which the copyrighted work was taken out of context and significantly rearranged and edited, which has not occurred here.[1] For example, in Feder v. Videotrip Corp., the court did not hold that the "line by line," out of order, comparison was inadmissible as Obey Clothing misleadingly implies; instead, the portion cited by Obey Clothing is simply a quotation by the Feder court from the defendant's reply brief, which the court used to summarize the defendant's arguments, not the court's ruling. (OC Mot. 1, 5.) See 697 F. Supp. 1165, 1171 (D. Colo. 1988). In its own ruling, the Feder court did not exclude the evidence, instead considering it as presented, "[keeping] in mind that an average observer would not be exposed to [the Exhibits as presented], but rather the works as they appeared in the public." Feder, 697 F. Supp. at 1171.

The other cases cited by Obey Clothing are similarly not on point and do not rule on the admissibility of evidence at trial. In Walker v. Time Life Films, Inc., the court denied a request to consider an "earlier version of a screenplay" as a substitute for the version that was actually at issue, which the court held was unreliable for purposes of summary judgment. 615 F. Supp. 430, 434 (S.D.N.Y. 1985). In Arnstein v. Twentieth Century Fox Film Corp., the court noted the incontrovertible proposition that substantial similarity cannot be shown by extensive manipulation of a musical score alone, but contrary to Obey Clothing's suggestion, did not rule

[1] Kargo Gobal, Inc. v. Advance Magazine Publ's, Inc., is wholly inapposite for a different reason—it is a trademark, not a copyright case, and involved the admissibility of an expert's consumer survey that was based on a faulty methodology. No. 06 Civ. 550, 2007 WL 2258688, at *10 (S.D.N.Y. Aug. 6, 2007). It thus has no bearing on the issues raised in Obey Clothing's motion.

on the admissibility of any particular evidence. 52 F. Supp. 114, 115 (S.D.N.Y. 1943). In Warner Bros. Inc. v. ABC, Inc., the court held that a plaintiff could not show substantial similarity only by comparing the accused work to an altered sequence or construction of plaintiff's work, but did not rule on the admissibility of such a comparison for illustrative purposes. 654 F.2d 204, 211 (2d Cir. 1981). Thus, none of Obey Clothing's cases support its motion to exclude.

III. CONCLUSION

The AP fully intends to show the actual Obama Photo and the actual Obama Image to the jury. The AP also intends to use a slightly cropped or zoomed-in version of the Obama Photo to show the jury how and what was copied and the undeniable similarities between the Obama Photo and the Obama Image used on Obey clothing. With the actual Obama Photo and Obama Image in evidence, the jury cannot reasonably be confused and, accordingly, as set forth above, the Court should deny Obey Clothing's Motion *in Limine* No. 3.

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Respectfully submitted,

/s/ Dale M. Cendali

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