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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. 5
 TO EXCLUDE EVIDENCE OF
 SUBSEQUENT REMEDIAL
 MEASURES**

The Associated Press (the “AP”) respectfully submits that this Court should deny One 3 Two, Inc., d/b/a Obey Clothing’s (“Obey Clothing’s”) Motion in Limine No. 5 to exclude evidence of its supposedly “new practice” of requiring artists to provide the reference materials underlying their artwork.

I. INTRODUCTION

In asking this Court to exclude plainly relevant evidence regarding Obey Clothing’s so-called “new practice” of obtaining source material from its artists, Obey Clothing blithely ignores well-established exceptions to the rule excluding evidence of subsequent remedial measures. As should be clear to anyone reading the plain text of Federal Rule of Evidence 407, the rule “does not require the exclusion of evidence of subsequent measures when offered for another purpose,” that is, a purpose other than proving the defendant’s culpable conduct. That exception clearly applies here. Evidence of Obey Clothing’s “new practice” of obtaining source material from its artists—Mr. Fairey included—is highly probative of the degree of control and supervision Obey Clothing exercises over its artists, which is directly relevant to establishing Obey Clothing’s vicarious liability under the Digital Millennium Copyright Act (“DMCA”). Because that disputed question of control is an issue separate and apart from whether Obey Clothing engaged in culpable conduct, such evidence is admissible under the plain text of Rule 407. See Fed. R. Evid. 407 (listing “proving . . . control” as a purpose for which evidence of subsequent remedial measures can be admitted). Moreover, Obey Clothing’s nebulous, conclusory allegations of unfair prejudice are wholly insufficient to warrant the exclusion of this highly probative evidence under Rule 403. In this context, unfairness would result only from permitting Obey Clothing to argue that it lacks the right and ability to control its artists’

infringing conduct, while simultaneously managing to exclude evidence demonstrating that it is doing exactly that.

II. ARGUMENT

A. Evidence Concerning Obey Clothing's Practice of Obtaining Source Material from its Artists is Admissible to Prove Obey Clothing's Control and Supervision of its Artists' Conduct.

As an initial matter, it is far from clear that Obey Clothing's alleged "new practice" of reviewing its artists' source material constitutes a "subsequent measure" of the kind implicated by Rule 407. But even assuming that it does, evidence of that "new practice" is clearly admissible in this case. Rule 407 does not mandate the exclusion of evidence concerning subsequent remedial measures for any and all purposes. Instead, the Rule excludes such evidence only when offered to prove, as relevant here, the defendant's "culpable conduct." Evidence of subsequent remedial measures is admissible when it is offered to prove a disputed issue other than the defendant's culpable conduct, such as to prove "ownership, control, or feasibility of precautionary measures." Fed. R. Evid. 407; see also Spencer v. Sea-Land Serv., Inc., No. 98 Civ. 2817 (DAB) (MHD), 1999 WL 619637, at *1 (S.D.N.Y. Aug. 16, 1999) (noting that evidence of subsequent remedial measures is "admissible for a variety of other reasons") (internal quotation omitted).

Evidence of Obey Clothing's "new" efforts to supervise its artists by requiring them to disclose their source material falls comfortably outside the scope of Rule 407's exclusion mandate. One of the remaining issues for trial is whether Obey Clothing is liable under the DMCA for removing the AP's copyright management information from the Obama Photo and then distributing the Obama Image knowing that such information had been removed. In addition to establishing Obey Clothing's direct liability under the statute, the AP also will seek to show that Obey Clothing is vicariously liable for Mr. Fairey's violation of the statute.

Establishing vicarious liability under the DMCA requires the AP to show, *inter alia*, that Obey Clothing had the right and ability to supervise Mr. Fairey's infringing conduct. *See, e.g., Gordon v. Nextel Commc'ns.*, 345 F.3d 922, 926 (6th Cir. 2003); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

Evidence of Obey Clothing's new practice of reviewing the source material underlying its artists' work is directly relevant to this disputed question of what degree of control Obey Clothing can exercise over its artists—including Mr. Fairey. That Obey Clothing now obtains and reviews its artists' source materials clearly demonstrates that Obey Clothing has the capacity to police its artists' infringing conduct and to refuse to distribute graphics and artwork that violate a third-party's intellectual property rights. It bears emphasis that Obey Clothing plainly intends to dispute this issue at trial. In support of its motion for summary judgment, one of its principals provided a sworn statement that: "One 3 Two does not supervise or control the creation of any of Fairey's designs, and did not supervise or control Fairey's creation of the image in question in this lawsuit, the Obama image," without disclosing that Obey Clothing does review the source images for the designs it uses on the merchandise it sells. (Decl. of C. Broders in Support of Countercl. Def. One 3 Two, Inc.'s Mot. for Summ. J. or in the Alternative, Part. Summ. J. ¶ 6 (Jan. 4, 2011).) Because evidence of Obey Clothing's current practice of reviewing source images is relevant to the "control" Obey Clothing has over its artists, it is clearly being "offered for another purpose" within the meaning of Rule 407 and is thus plainly admissible.

B. Evidence Concerning Obey Clothing's Practice of Obtaining Artists' Source Material is Highly Probative Evidence that Does Not Pose a Danger of Unfair Prejudice.

Federal Rule of Evidence 403 provides no better ground for excluding evidence concerning Obey Clothing's "new practice" of obtaining source material from its artists. "Because Rule 403 excludes relevant evidence, 'it is an extraordinary remedy that must be used

sparingly.’” Scotto v. L.I. R.R., No. 05 Civ. 4757 (PKL), 2007 WL 894332, at *2 (S.D.N.Y. Mar. 20, 2007) (quoting George v. Celotex Corp., 914 F.2d 26, 31 (2d Cir. 1990)). Obey Clothing has not offered any plausible argument for why it would suffer “unfair prejudice” from the admission of this evidence—much less prejudice that could be said to “substantially outweigh[]” its high probative value. Fed. R. Evid. 403 (emphases added).

There is nothing “unfair” about drawing the jury’s attention to the degree of supervision and control Obey Clothing exercises over its artists, as this issue is directly relevant to assessing Obey Clothing’s vicarious liability under the DMCA. See Scotto, 2007 WL 894332, at *4 (evidence is unfairly prejudicial “only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence.”) (internal quotation omitted). Moreover, Obey Clothing’s conclusory, single-sentence assertion that the jury “could impermissibly interpret” this evidence as bearing on the fact of infringement is hardly sufficient to establish a risk of unfair prejudice that is of such substantial weight to justify the “extraordinary remedy” of excluding relevant evidence. George, 914 F.2d at 31. Obey Clothing offers no reason as to why the jury would not (both as a matter of common sense and as instructed by the Court) understand this evidence for what it is—namely, evidence showing the Obey Clothing obviously has the capacity and authority to police its artists’ conduct.

III. CONCLUSION

For the reasons stated above, this Court should deny Obey Clothing’s motion *in limine* No. 5 to exclude evidence of its “new practice” of requiring artists to submit the reference material underlying the artwork they provide Obey Clothing for use on merchandise.

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Respectfully submitted,

/s/ Dale M. Cendali

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