Dale M. Cendali
Claudia Ray
Brendan T. Kehoe
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: (212) 446-4800
Fax: (212) 446-4900

Michael F. Williams
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200

Attorneys for the Associated Press

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 MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE OF FAIR USE, PURPOSE, AND INTENT UNDER FRE 402, 403, AND THE "LAW OF THE CASE" DOCTRINE

The Associated Press (the "AP") respectfully moves to exclude argument, testimony and evidence relating to One 3 Two, Inc.'s ("Obey Clothing") fair use defense, including its alleged "charitable," "philanthropic," or "political" purpose in selling the Obama Merchandise, under Federal Rules of Evidence 402, 403, and the "law of the case" doctrine.

I. INTRODUCTION

Obey Clothing has indicated that it will argue at trial, as it did on summary judgment, that it had a political or charitable purpose in selling the Obama Merchandise, and that it will offer Shepard Fairey as a witness at trial regarding Mr. Fairey's purported political purpose in making the Obama Image. But this is a red herring that serves no purpose other than to confuse the jury and unduly prejudice the AP. Although Obey Clothing might have argued that evidence of purpose was relevant to the commercial use prong of the first fair use factor, given the Court's decision granting the AP's motion for summary judgment on Obey Clothing's fair use defense, any argument, testimony, or evidence regarding Obey Clothing's or Mr. Fairey's purpose is irrelevant and inadmissible under Rule 402. In addition, pursuant to the "law of the case" doctrine, any evidence regarding fair use should be excluded because the Court has already dismissed the defense and Obey Clothing should not be allowed to relitigate the issues at trial.

In any event, Obey Clothing's efforts to introduce evidence of Mr. Fairey's intent is doubly irrelevant because whatever Mr. Fairey's purpose may have been in making the Obama Image has no bearing whatsoever on Obey Clothing's intent in selling t-shirts. By focusing on Mr. Fairey, it is clear that Obey Clothing is attempting to play on the sympathies of the jury in a State that voted heavily for Mr. Obama and portray itself as helping Mr. Obama's campaign. Because any such argument, evidence or testimony is simply irrelevant to the issues of

substantial similarity, liability under the DMCA, and the AP's actual damages, it should be excluded.

Moreover, Obey Clothing's claimed "philanthropic" purpose is simply not true, as it is undisputed that the t-shirt company earned more than $2.2 million in revenue directly from the sale of the Obama Merchandise, as well as millions of dollars in indirect revenue, and that the profits from the Obama Merchandise were distributed directly to Obey Clothing's owners rather than being donated to charity or to any other entity. In fact, there is not one scintilla of evidence that Obey Clothing ever donated any money to Mr. Obama's presidential campaign or to charity. Thus, any testimony, evidence or argument to the contrary would be highly prejudicial under Rule 403 in that it might tend to portray Obey Clothing as charitable or altruistic, when it was not. On these facts, exclusion of Obey Clothing's proffered testimony regarding purpose is warranted.

II. ARGUMENT

Under FRE 402, "[e]vidence which is not relevant is not admissible." Even relevant evidence may be excluded under FRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Fed. R. Ev. 403; see also Beyar v. NYC Fire Dep't, 310 Fed. Appx. 417, 418 (2d Cir. 2008) (affirming exclusion of evidence where the risk of prejudice outweighed its probative value); Ty Inc. v. Softbelly's Inc., No. 00 C 5230, 2006 WL 5111124, at *13-14 (N.D. Ill. Apr. 7, 2006) (excluding evidence of charitable contributions under Rule 403 because the limited probative value was outweighed by the significant threat of prejudice to the moving party).

Here, evidence of Obey Clothing's and Mr. Fairey's political or charitable purpose is only relevant, if at all, under the first factor of the fair use analysis, which considers the nature

and purpose of the infringing use. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994). Because the issues of fair use are out of the case, however, any argument, testimony or evidence regarding Obey Clothing's or Mr. Fairey's purpose is not relevant and thus is inadmissible under FRE 402. Unlike fair use, the remaining liability issues in the case — substantial similarity and the DMCA claim — do not turn on evidence of the infringer's purpose. See, e.g., Bryant v. Europadisk, Ltd., No. 07 Civ 3050 (WGY), 2009 WL 1059777, at *5 (S.D.N.Y. Apr. 15, 2009) (copyright infringement is a strict liability offense and plaintiff "need not prove wrongful intent or culpability in order to prevail") (citation omitted)); See Propet USA, Inc. v. Shugart, No. C06-0186-MAT, 2007 WL 4376201, at *4 (W.D. Wash. Dec. 13, 2007) (intent or knowledge only relevant to whether copyright management information had been removed).

Furthermore, the "law of the case" doctrine should bar Obey Clothing from relitigating the fair use issues that have already been decided against it. See In re Worldcom, Inc., 386 B.R. 496, 499, 505 (Bankr. S.D.N.Y. 2008) (excluding all evidence and testimony relating to issues decided by the court's prior rulings under the law of the case doctrine); Branch v. Ogilvy & Mather, Inc., 765 F. Supp. 819, 823 (S.D.N.Y. 1990) (denying defendant's motion in limine challenging the copyrightability of the plaintiff's cookbook because its prior denial of defendant's summary judgment motion on that point was binding at trial under the "law of the case" doctrine); see also United Linen Wholesale, LLC v. The N.W. Co., No. 2:06-cv-5934 (DMC) (MF), 2010 WL 3724519, at *4-5 (D.N.J. Sept. 13, 2010) (granting plaintiffs' motion in limine precluding defendant from re-arguing facts in support of its statute of frauds defense where that defense had previously been rejected on summary judgment). Applying the law of the case doctrine here, it is clear that Obey Clothing should be barred from presenting argument,

testimony or evidence of its political or charitable purpose, which it had asserted as part of its unsuccessful fair use defense. Branch, 765 F. Supp. at 823; In re Worldcom, Inc., 386 B.R. at 505; United Linen Wholesale, LLC, 2010 WL 3724519, at *4-5.

Finally, even if such evidence were relevant, its slight probative value is substantially outweighed by the risk of prejudice to the AP and confusion to the jury. Beyar, 310 Fed. Appx. at 418; Ty Inc., 2006 WL 5111124, at *13-14. For example, in Ty Inc. v. Softbelly's, Inc., the court granted the motion in limine to exclude evidence that "Beanie-Babies"-maker, Ty Inc., had donated to charity a significant amount of its proceeds from the sale of its Beanie Babies. The court determined that the "limited probative value" of the evidence was outweighed by "the potential for the jury to decide the case based on an improper reason. Id. at *13. Given the volume of Ty's sales, the amount of promotion that it had done, and that its reputation was based on other factors, the court excluded the proffered evidence of charitable contribution. Id.

Similarly, here, Obey Clothing's evidence of "donations" should be excluded. It is undisputed that Obey Clothing earned more than $2 million in gross revenue from the Obama Merchandise, at least $500,000 in net profits,[1] and millions of dollars in indirect revenue, and that it did not contribute any of that money to Mr. Obama's campaign or a charitable organization. All Obey Clothing points to is $161,000 in in-kind giveaways, which it classifies as deductions offsetting its revenues. But more than half — or $87,000 — of those claimed deductions did not even involve the Obama Merchandise, and Obey Clothing's own damages expert concludes that they were unrelated to the infringement. (See Exhibit **A**, Expert Report of Mark Hair ¶ 33 ("Obama Special Projects"), Ex. 7-C.) The remaining $74,000 in deductions

[1] Obey Clothing's own damages expert admits to profits of at least $500,000. At trial, AP intends to show that its actual profits were significantly higher.

consists of nothing more than (i) magazine ads for the Obama Merchandise, (ii) ads on flyers and postcards for the Obama Merchandise, and (iii) in-store display ads for the Obama Merchandise — all of which are traditional marketing expenditures that were used to promote the sale of t-shirts and Obey Clothing's brand as a whole.[2] (Id.) Thus, any such argument that the $161,000 was for a charitable or political purpose is simply not supported by the evidence and should be excluded as misleading and unduly prejudicial. Beyar, 310 Fed. Appx. at 418; Ty Inc., 2006 WL 5111124, at *13-14. Moreover, it would highly prejudicial to the jury's determination of the relevant facts if Obey Clothing were allowed to give the impression that it donated to charity, when it did not. See Ty Inc., 2006 WL 5111124, at *13-14.

III. CONCLUSION

For the reasons stated above, the AP respectfully requests that the Court exclude the testimony and related documentary evidence of Obey Clothing's fair use defense, including its alleged "charitable," "philanthropic," or "political" purpose in selling the Obama Merchandise, under Federal Rules of Evidence 402, 403, and the "law of the case" doctrine.

[2] To the extent that Obey Clothing attempts to prove the expenses were offset, the AP concedes that they are relevant for that narrow purpose, which the AP will challenge on its cross-examination of Obey Clothing's damages expert.

Date: February 25, 2011

Respectfully submitted,

/s/ Dale M. Cendali

Dale M. Cendali
Claudia Ray
Brendan T. Kehoe
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: 212-446-4800
Fax: 212-446-4900
Dale.cendali@kirkland.com
Claudia.ray@kirkland.com
Brendan.kehoe@kirkland.com

Michael F. Williams
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200
Michael.williams@kirkland.com

Attorneys for Plaintiff/Counterclaim Defendant
THE ASSOCIATED PRESS