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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)

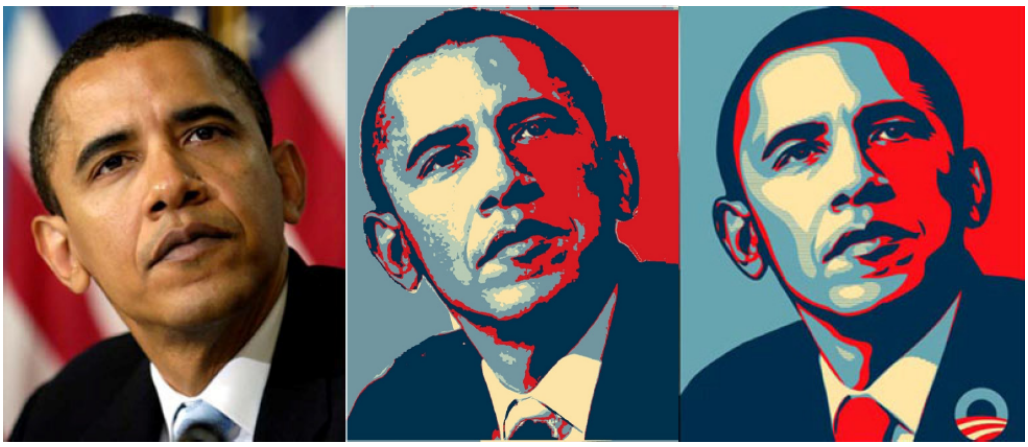
ECF Case

THE ASSOCIATED PRESS'S MOTION IN LIMINE NO. 3 TO EXCLUDE EVIDENCE OF FAIREY'S USE OF RUBYLITH AND FOR AN ADVERSE INFERENCE

The Associated Press ("AP") respectfully moves (i) to bar One 3 Two, Inc. d/b/a Obey Clothing ("Obey Clothing") from presenting any evidence, argument, or testimony about Shepard Fairey's alleged use of the material known as "Rubylith" when he made an image of then-Senator Barack Obama (the "Obama Image") using the AP's copyrighted photo, and (ii) for an adverse inference, based on Mr. Fairey's admitted fabrication and spoliation in this case, that he did not use Rubylith, and instead used an all-digital process to make the Obama Image.

I. INTRODUCTION

Obey Clothing intends to call Mr. Fairey, a close associate and friend of Obey Clothing, at trial, and he apparently has agreed to testify voluntarily on behalf of Obey Clothing as a friendly witness. It is highly likely that Mr. Fairey's presence will skew the trial away from Obey Clothing's conduct as a t-shirt maker, instead focusing on Mr. Fairey's conduct. In particular, Obey Clothing apparently intends to elicit testimony from Mr. Fairey about his alleged use of Rubylith (a thin, translucent, amber-tinted film that is attached to a clear plastic sheet commonly used in screen-printing) in making the Obama Image. As this Court is well aware, Mr. Fairey admittedly misrepresented to the AP and this Court which photograph he used to create the Obama Image, deleted electronic files that would have revealed the true source image, and then fabricated documents to make it appear that he had used the so-called "Clooney Photo." A remaining aspect of Mr. Fairey's spoliation is whether he used Rubylith in making the Obama Image. Mr. Fairey admits making the so-called "rough-cut" of the Obama Image in Adobe Photoshop on his computer, using a digital copy of the Obama Photo. (Exhibit **A**, Fairey Dep. Vol I. 232:3-8.) He then smoothed the rough cut to make the final image:



There is no dispute that this final smoothing step could either be done entirely electronically using the so-called "live-trace" function of Adobe Illustrator on the computer, or by using Rubylith, which involves using an X-Acto knife to trace the source image by hand. However, as Mr. Fairey has admitted, if he had in fact used Rubylith as he claims, he must have scanned the resulting images onto his computer in order to create the final digital file:

> Q. But it is true that if you had made Rubyliths and then used those Rubyliths to make the final progress poster, there should have been a scan of those Rubyliths at some point in the computer, right?
>
> A. Yes. There would have to be.

(Fairey Dep. Vol. I 254:14 - 254:19.) Although the AP repeatedly requested the production of any such files, and Fairey insisted that a diligent search for any such had been conducted (and despite the fact that many files from this same period that Mr. Fairey deliberately sought to destroy were later recovered), no such scan files have ever been produced in this case. (Fairey Dep. Vol I. 253:1-256:23.)

The use of an all-digital process is consistent with Mr. Fairey's pre-litigation statements, where he talked about having completed the image in "one-day" and made no mention of Rubylith. (See, e.g., Exhibit **B**, Fairey Dep. Ex. 17; Exhibit **C**, Fairey Dep. Ex. 16.) The only evidence connecting Rubylith with the Obama Image in any way—a composite work hanging in

the National Portrait Gallery—cannot be tied to any particular time period and could easily have been made after the creation of the poster, as Mr. Fairey's own expert, Prof. Frank Cost, readily admits. (Exhibit **D**, Cost Dep. 230:11-16.) In fact, in March 2009, more than a year after Mr. Fairey made the Obama Image, one of his assistants created replica Rubylith sheets specifically for production to the AP in this litigation. (See Exhibit **E**, FAIREY667; Fairey Dep. Vol I 246:11-250:17.) All of the evidence points to the use of an all-digital process and that Mr. Fairey could (and did) create the Rubylith sheets after, not before, he created the Obama Image.

Any argument, testimony or evidence that Mr. Fairey actually used Rubylith should be excluded as both irrelevant and prejudicial. Obey Clothing appears to be seeking to confuse and mislead the jury into believing that Mr. Fairey made the Obama Image by employing substantial hand work. Even if he actually used Rubylith, and there is no evidence of that other than Mr. Fairey's own uncorroborated testimony, it is wholly irrelevant to the question of whether the Obama Image infringes the Obama Photo given the Supreme Court's holding in Feist Publ'n, Inc. v. Rural Tel. Serv. Co. that the effort, or "sweat of the brow," that may have been involved in creating a work is irrelevant to the issue of infringement. See 499 U.S. 340, 355-56, 360 (1991). Allowing such irrelevant evidence would be unduly prejudicial to the AP and a waste of the Court's and the parties' resources, as it would tend to suggest to a jury that any sweat-of-the-brow effort is entitled to some weight, when it clearly is not entitled to any weight. Id. at 355-56, 360.

To the extent the Court is inclined to admit such argument, testimony or evidence, however, Mr. Fairey's conduct warrants an adverse inference that Mr. Fairey used an all-digitial process, and did not use Rubylith, in making the Obama Image. See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 470 (S.D.N.Y.

2010) ("[W]hen a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true." (citation omitted)).

II. ARGUMENT

A. Any Evidence, Testimony or Argument Related to Mr. Fairey's Use of Rubylith Would be Irrelevant and Prejudicial

Because argument, testimony or evidence related to Mr. Fairey's alleged use of Rubylith would be irrelevant to these proceedings, prejudicial to The AP, and likely to confuse and mislead the jury and waste the Court's, the jury's, and the parties' time, it should be excluded.

Whether or not Mr. Fairey traced the Obama Photo by hand using Rubylith or on the computer using Adobe Illustrator is wholly irrelevant and inadmissible. See Fed. R. Evid. ("FRE") 402 ("Evidence which is not relevant is not admissible"). The remaining legal issue in this case is whether the Obama Photo is substantially similar to Obama Image. (D.I. 199 at 1.) The substantial similarity test focuses on the end result, not the means. See SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) (quoting Rockford Map Publ'r, Inc. v. Directory Servs. Co., 768 F.2d 145, 147 (7th Cir. 1985) (J. Easterbrook)) ("The copyright laws protect the work, not the amount of effort expended. . . . The input is irrelevant."). The particular process whereby Mr. Fairey copied the Obama Photo — completely digitally or partially digitally and partially using Rubylith — is totally irrelevant because copyright law simply does not take into account "sweat of the brow." Feist, 499 U.S. at 359-60 (1991); see also SHL Imaging, Inc., 117 F. Supp. 2d at 311. Mr. Fairey's testimony about his alleged use of Rubylith is wholly irrelevant to the remaining issues in the case, i.e., substantial similarity between the Obama Image and the Obama Photo, and thus is inadmissible under Rule 402.

Any mention of the use of Rubylith should also be excluded because it may unfairly prejudice The AP. Under FRE 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, [or] waste of time." Here, any suggestion that Mr. Fairey hand-cut Rubylith sheets in making the Obama Image may suggest to the jury that he engaged in special artistic effort that is entitled to some weight, when it clearly is not. See Feist, 499 U.S. at 360-61. Given the total irrelevance of such effort to Mr. Fairey's own infringement, let alone to Obey Clothing's use of the Obama Image, the prejudice resulting from allowing such testimony, evidence and argument clearly dictates that it be excluded. And allowing such irrelevant, prejudicial evidence would clearly be a waste of the Court's and the parties' resources. FRE 403; see U.S. v. Schatzle, 901 F.2d 252, 256 (2d. Cir. 1990) (upholding the exclusion of evidence with limited relevance as a waste of time due to a possible mini-trial on a collateral issue).[1]

B. Mr. Fairey's Destruction of Evidence Supports An Adverse Inference That He Did Not Use Rubylith

Even if the Court were inclined to discount the irrelevant and prejudicial nature of any argument, testimony or evidence regarding Mr. Fairey's purported use of Rubylith, his deliberate destruction and fabrication of evidence regarding the making to the Obama Image clearly

[1] It is unclear whether Mr. Fairey will testify live at trial, although he apparently has agreed to do so if requested by Obey Clothing. The only evidence that any Rubylith was made prior the Obama Poster is Mr. Fairey's uncorroborated deposition testimony. Such an out of court statement is inadmissible hearsay under FRE 802. Given that (i) Mr. Fairey admittedly destroyed and fabricated documents about the making of the Obama Image, a process that necessarily includes his alleged use of Rubylith, and (ii) no documents have been produced corroborating his claim to have used Rubylith, his deposition testimony regarding the use of Rubylith is simply too unreliable to be admitted. See, e.g., Navision Shipping Co. A/S v. Dooyang Ltd., No. 08 civ. 10051 (LLS), 2009 WL 877630, at *3 (S.D.N.Y. Apr. 1, 2009) (slip copy) (holding hearsay newspaper account too unreliable to be used); see also S Indus., Inc. v. Stone Age Equip., Inc., 12 F. Supp. 2d 796, 818 (N.D. Ill. 1998) (holding statement that technically met exception to hearsay requirement was too unreliable to be relied on).

warrants an adverse inference that he did not actually use Rubylith as part of that process. See Pension Comm., 685 F. Supp. 2d at 470 (granting adverse inference for gross negligence).[2]

Although Mr. Fairey testified that he used Rubylith, he failed to produce any evidence supporting that assertion, including any evidence of digital scans of the Rubylith sheets that he admits must exist if Rubylith was used. (Fairey Dep. Vol. I 254:14 - 254:19.) The absence of any corroborating evidence, together with Mr. Fairey's inconsistent pre-litigation admissions that he made the Obama Image in less a day, and his willful destruction of documents relating to the making of the Obama Image, amply justify an adverse inference that he did not use Rubylith, but instead used an all-digital process. See Pension Comm., 685 F. Supp. 2d at 470 ("[W]hen a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true.").

III. CONCLUSION

For the reasons stated above, the Associated Press respectfully requests that the Court bar Obey Clothing from presenting evidence, argument, or testimony regarding Mr. Fairey's purported use of Rubylith or, to the extent it is allowed, grant The AP an adverse inference that Mr. Fairey did not use Rubylith, but instead using an all-digital process.

[2] While the Court in Pension Committee lays out a three-factor test involving control, state of mind, and relevance, relevance (and thereby prejudice) is presumed for the purposes of evaluating a sanction for spoliation where the spoliating party acts in bad faith, as Mr. Fairey has done here. 685 F. Supp. 2d at 468.

Date: February 25, 2011

Respectfully submitted,

/s/ Dale M. Cendali

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