

EXHIBIT D

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

Frank Cost

November 18, 2010

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT
ART, INC.,
Plaintiffs,
vs. 1:09-CV-1123 (AKH)
THE ASSOCIATED PRESS,
Defendant/Counterclaim Plaintiff,
vs.
SHEPARD FAIREY, OBEY GIANT
ART, INC., OBEY GIANT LLC and
STUDIO NUMBER ONE, INC.,
Counterclaim Defendants.

VIDEOTAPED DEPOSITION OF FRANK COST
Thursday, November 18, 2010
10:26 a.m.

Reported by:
Joan Urzia

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November 18, 2010
10:26 a.m.
New York, New York

Videotaped Deposition of FRANK
COST, held at the offices of Kirkland &
Ellis, 601 Lexington Avenue, New York, New
York, pursuant to Notice, before Joan
Urzia, a Notary Public of the State of New
York.

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A P P E A R A N C E S: (Continued)

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(Via teleconference)

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ALSO PRESENT:
JOHN PROKO, Videographer
MIKE ESSL

<p>229</p> <p>1 F. Cost 2 this was created. 3 Q. Well, let's look back at the 4 testimony. 5 A. What's the purpose of this 6 duplicate? I don't get that. 7 Q. Well, I will tell you my 8 understanding based on the testimony is 9 that the duplicate was created to provide a 10 copy of the Rubylith to the AP because the 11 original was framed and hanging in a show? 12 A. It was an art show. 13 Q. Yeah? 14 MR. GIMBEL: Is there a question 15 that you have? 16 MS. RAY: I did have a question 17 which was: 18 BY MS. RAY: 19 Q. Did you see the existence of a 20 duplicate Rubylith affect your opinion as 21 to whether the image in figure 8 of your 22 report on the left was created before or 23 after the one on the right? 24 A. It doesn't change it at all. It 25 doesn't change it at all.</p>	<p>231</p> <p>1 F. Cost 2 Q. And that that is typical of the 3 kind of normal fine adjustments that the 4 artist would make to the Illustrator file 5 before printing, correct? 6 A. That is correct. 7 Q. Those differences could result 8 from the Rubylith having been created from 9 the Illustrator file, correct? 10 A. That is correct. 11 Q. Then in paragraph 25, you say 12 that, looking at the dark blue layer, which 13 as I understand it appears both on the 14 right in figure 8 in your report and also 15 is the image in figure 10 in your report, 16 that that dark blue layer shows the 17 characteristic edges of a Rubylith mask 18 that's cut with an exacto knife; is that 19 correct? 20 A. Right. 21 Q. But that dark blue layer itself 22 is not a Rubylith layer, correct? It's a 23 digital image? 24 A. The dark blue image was taken 25 from the Illustrator file. I basically</p>
<p>230</p> <p>1 F. Cost 2 Q. You don't have any proof, though, 3 as to which one was created first, correct? 4 MR. GIMBEL: Objection. Vague. 5 Which what? 6 BY MS. RAY: 7 Q. Which of the two images in figure 8 was created first, other than your 9 looking at them -- 10 A. I don't have proof. 11 Q. So it is at least theoretically 12 possible that the image on the left in 13 figure 8 was created first -- excuse me, on 14 the right in figure 8 was created before 15 the image on the left? 16 A. It is theoretically possible. 17 Q. Looking at your report on page 18 14, paragraph 24, you say that Mr. Fairey 19 modified certain features of the digital 20 scan of the Rubylith, correct? 21 A. I say that. 22 Q. And you say those modifications 23 are evident in the very subtle differences 24 in the contour of the edges. 25 A. Right.</p>	<p>232</p> <p>1 F. Cost 2 extracted it from the Illustrator file. 3 Q. And the Illustrator file is a 4 digital file, correct? 5 A. Right. 6 Q. So that dark blue layer itself is 7 a digital file? 8 A. That's right. 9 Q. And so it's fair that in the dark 10 blue layer what you're seeing is a digital 11 representation of an edge? 12 MR. GIMBEL: Objection. Vague. 13 BY MS. RAY: 14 Q. You're not looking at an actual 15 Rubylith edge, correct? 16 A. No, I'm looking at -- 17 Q. Assuming Rubylith was used. 18 A. Yeah, I'm looking at a digital 19 file. 20 Q. Okay. 21 So looking at the edge in figure 22 10, which is a digital file, that edge 23 could have also been accomplished in the 24 digital process, correct 25 A. Yes.</p>

