

PUBLIC VERSIONUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKSHEPARD FAIREY AND OBEY GIANT
ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim
Plaintiff,

v.

SHEPARD FAIREY, OBEY GIANT ART,
INC., OBEY GIANT LLC, STUDIO
NUMBER ONE, INC., and ONE 3 TWO,
INC. (d/b/a OBEY CLOTHING),

Counterclaim Defendants.

ECF

Case No. 09-01123 (AKH)

**COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S STATEMENT
PURSUANT TO LOCAL RULE 56.1**

Pursuant to Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York and Rule 56 of the Federal Rules of Civil Procedure, Counterclaim Defendant One 3 Two, Inc. ("One 3 Two") sets forth the following material facts as to which there is no genuine issue to be tried, in support of its Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment on Counterclaimant the Associated Press's (the "AP") First Counterclaim for Copyright Infringement, the Second Counterclaim for Contributory Infringement, the Third Counterclaim for Declaratory Relief, and the Fourth Counterclaim for Violation of the Digital Millennium Copyright Act ("DMCA"), and for partial summary judgment of the AP's claim for indirect profits.

1. One 3 Two has a contractual relationship with the artist Shepard Fairey whereby One 3 Two is the exclusive licensee for apparel of Fairey's company, Obey Giant, LLC ("Obey Giant"). [Declaration of Christopher Broders ("Broders Decl."), ¶¶ 3-4, Exs. B & C; Ex. P (Deposition of Christopher Broders ("Broders Depo."), at 31:2-7); Ex. O (Deposition of Shepard Fairey ("Fairey Depo."), at 54:15-56:6).¹]

2. Obey Giant and One 3 Two negotiated a written exclusive license agreement that has been amended several times. [Broders Decl., ¶¶ 2-4, Exs. A, B & C.]

3. Neither Shepard Fairey, nor any other person who holds an interest in the companies that manage his work, now has or has ever held an interest in One 3 Two. [Broders Decl., ¶ 5; Ex. N (Deposition of Regan Donald Juncal ("Juncal Depo."), at 43:21-25); Ex. P (Broders Depo., at 29:9-11); Ex. O (Fairey Depo., at 55:7-12).]

4. One 3 Two is owned by Christopher Broders, R. Donald Juncal, Eric Singer, Mike Ternosky, Steve McIlgren and Dale Moody. [Broders Decl., ¶ 5.]

5. None of the owners of One 3 Two has any financial stake in Shepard Fairey's companies. [Broders Decl., ¶ 5; Ex. P (Broders Depo., at 27:7-9).]

6. One 3 Two is now based in Irvine California, and was previously based in Santa Ana, California. [Declaration of Regan Donald Juncal ("Juncal Decl."), ¶ 2.]

7. One 3 Two sells clothing and other merchandise and, pursuant to its license agreement with Obey Giant, pays royalties to Fairey. [Broders Decl., ¶¶ 2 & 6, Ex. B, ¶ 6; Ex. O (Fairey Depo. at 55:10-12).]

¹ Unless otherwise noted, all excerpts of deposition transcripts and exhibits referenced herein are attached to the Declaration of Robyn C. Crowther ("Crowther Decl.") filed concurrently herewith.

8. One 3 Two does not supervise or control the creation of any of Shepard Fairey's designs, and did not supervise or control Shepard Fairey's creation of the image at issue in this lawsuit. [Broders Decl., ¶ 6.]

9. While One 3 Two was originally formed primarily to create t-shirts and sweatshirts bearing Shepard Fairey's graphics, from its very first season onward its products have also included substantial sportswear lines that do not include Fairey's designs and its products have expanded over time. [Juncal Decl., ¶ 3; Broders Decl., ¶ 2; Ex. N (Juncal Depo. at 43:18-20).]

10. Between 2008 and the present, One 3 Two has had a broad product line that includes accessories, hats, handbags, jewelry and sportswear items. [Juncal Decl., ¶ 3, Ex. H.]

11. The design at issue in this litigation, referenced as the "Obama Image," was created by Shepard Fairey in January 2008. [Exs. I, J, & O (Fairey Depo. at 194-195); Amended Complaint for Declaratory Judgment and Injunctive Relief filed on November 13, 2009, ¶¶ 13 & 19.]

12. Fairey used a photograph taken by photographer Mannic Garcia, and owned by the AP (the "Garcia Photo"), as a visual reference to create the Obama Image. [Exs. K & O (Fairey Depo. at 30:3-21, 31:8-23).]

13. One 3 Two first received a copy of the Obama Image for the purpose of placing it on apparel on or about February 28, 2008. [Broders Decl., ¶ 9, Ex. D; Ex. O (Fairey Depo. at 638:4-17).]

14. One 3 Two never received a copy of or otherwise accessed the Garcia Photo. [Broders Decl., ¶ 10; Juncal Decl., ¶ 6; Ex. N (Juncal Depo. at 66:25-67:10).]

15. One 3 Two produced and/or sold t-shirts and other merchandise with the Obama Image (the “Obama Merchandise”) without making changes to the Obama Image aside from subtle alterations of sizing and typography. [Broders Decl., ¶ 11; Ex. N (Juncal Depo. at 88:9-22); Ex. P (Broders Depo. at 45:5-18).]

16. One 3 Two first began to sell merchandise with the Obama Image on it in April 2008. [Broders Decl., ¶ 11.]

17. There is no evidence that Shepard Fairey ever told One 3 Two that he had stripped copyright management information from the photograph that he used as a visual reference to create the Obama Image and One 3 Two is not aware of any such conduct. [Juncal Decl., ¶ 6; Broders Decl., ¶ 10.]

18. Prior to this litigation, One 3 Two did not know which specific photograph Fairey referenced to create the Obama Image. [Juncal Decl., ¶ 6; Broders Decl., ¶ 10; Ex. N (Juncal Depo. at 73:6-24, 197:2-9); Ex. P (Broders Depo. at 51:20-22, 53:9-22); Ex. Q (Van Berckelaer Depo. at 263:17-264:11).]

19. The AP’s Code of Ethics forbid Mannie Garcia from creating the scene that is depicted in the Garcia Photo. [Ex. S (Deposition of Mannie Garcia, at 117:11-118:22).]

20. The experts agree that Barack Obama’s pose in the Garcia Photo is conventional. [Exs. U, ¶ 10 & V, ¶ 13.]

21. The AP’s claims against One 3 Two are based on the sales of t-shirts, sweatshirts and other items that included the Obama Image. [The AP’s First Amended Answer, Affirmative Defenses and Counterclaims filed on November 12, 2009, ¶¶ 55-57 & 189-212.]

22. The Preliminary Report of the AP's expert Kathleen Kedrowski quantified One 3 Two's indirect profits from the "unauthorized use" of the Garcia Photo at [REDACTED]. [Ex.T, ¶ 88 & Ex. D-3.]

23. Kedrowski did not have, or rely on, any consumer survey, public opinion poll or customer feedback information to establish why customers bought products from One 3 Two. [Ex. R (Deposition of Kathleen Kedrowski ("Kedrowski Depo."), Day 2, at 103:23-105:2).]

24. Kedrowski does not have substantial experience in the apparel industry. [Ex. R, (Kedrowski Depo., Day 2, at 160:3-162:17).]

25. Kedrowski testified that the basis for her conclusion that the fame of Shepard Fairey buoyed One 3 Two was that "the fame and notoriety was Mr. Fairey, but it was also the image, and the image is on the clothing sold by [One 3 Two.] So I believe that since the notoriety that is associated with the image itself – and if I remember Mr. Juncal's testimony, that this T-shirt should be the seminal one of the people, and if I remember right, or the seminal product that they sold, that's an example of testimony that I'm recalling now that supports the fact that they were receiving a benefit from being able to sell this merchandise." [Ex. R (Kedrowski Depo., Day 2, at 102:22-103:19).]

26. Kedrowski cites testimony of One 3 Two's accountant, Adam Van Berckelaer that (1) One 3 Two probably received more notoriety as a result of the Obama Merchandise, but that he didn't believe there was any dollar figure that could be placed on that notoriety, and (2) his personal opinion was that the Obama Merchandise probably increased awareness of One 3 Two somewhat, which may or may not cause people to buy the company's products, in support of her conclusion that One 3 Two's sales of the Obama Merchandise cause sales of other, non-related products. [Ex. T, ¶ 88E(i).]

27. All of the other facts Kedrowski cites to support her opinion that One 3 Two sold products that did not include the Obama Image as a result of One 3 Two's sales of the Obama Merchandise relate to benefits to Shepard Fairey or his companies, or One 3 Two's direct profits from the sales of the Obama Merchandise. [Ex. T, ¶ 88.]

28. Kedrowski offered only one mathematical calculation to determine the amount of indirect profits that One 3 Two gained as a result of sales of the Obama Merchandise, and that is her Compound Annual Growth Rate or "CAGR" analysis that appears at Exhibit D-3 to her preliminary report. [Ex. R (Kedrowski Depo., Day 1, at 257:19-25).]

29. Kedrowski's CAGR analysis compared One 3 Two's financial performance for the year 2007 to its performance in 2009, and calculated what rate would achieve that growth at a consistent rate over the two-year period. [Ex. R (Kedrowski Depo., Day 1, at 241:19-243:19); Ex. T, at Ex. D-3.]

30. According to Kedrowski, One 3 Two generated revenues not directly related to the Obama Merchandise in the total amount of ██████████ between 2006 and 2009, which Kedrowski calls One 3 Two's "residual revenues." [Ex. T, at Ex. D-3.]

31. To calculate the indirect profits One 3 Two received from the sales of the Obama Merchandise, Ms. Kedrowski multiplied the residual revenues by the CAGR she had calculated previously, the product of which was ██████████. [Ex. T, at Ex. D-3.]

32. Ms. Kedrowski conceded that it was an error to include revenues from 2006 and 2007, which preceded the creation of the Obama Image in January 2008, in her analysis. [Ex. R (Kedrowski Depo., Day 2, at 112:2-113:12).]

33. Despite the erroneous inclusion of the 2006 and 2007 data, Ms. Kedrowski did not change her opinion that the reasonable estimate of One 3 Two's indirect profits from the sales of the Obama Merchandise was [REDACTED]. [Ex. R (Kedrowski Depo., Day 2, at 112:2-113:12).]

Dated: January 6, 2011

Respectfully submitted,

Los Angeles, CA

By:

/s/

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