

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHEPARD FAIREY, et al.,

Plaintiffs,

-against-

THE ASSOCIATED PRESS, et al.,

Defendants.
----- X

SUMMARY ORDER

09 Civ. 1123 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On February 15, 2011, Third-Party Plaintiff the Associated Press (“AP”) and Third-Party Defendant One 3 Two, Inc., appeared for oral argument on their cross-motions for summary judgment. The AP sought summary judgment holding One 3 Two liable for copyright infringement and for offending the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201 *et seq.* One 3 Two sought summary judgment dismissing the AP’s claim of copyright infringement, its claim under the DMCA, and its claim for indirect profits under 17 U.S.C. § 504(b); the AP opposed the last of these on the basis that it calls for findings of fact. For the reasons provided on the record, I rule as follows.

The AP’s motion is denied in part and granted in part. Genuine issues of material fact exist on the issues (i) whether Shepard Fairey’s rendering of Barack Obama is “substantially similar” to the AP’s photograph; and (ii) whether One 3 Two is liable for a violation of the DMCA. I hold, however, that should the AP establish copyright infringement, One 3 Two does not have a basis to rebut the finding on the ground of fair use. I therefore grant the motion insofar as it seeks to pare the fair-use defense away from the case, but otherwise deny it.

One 3 Two's motion is denied. As stated, genuine issues of material fact exist on the issue whether Shepard Fairey created an image that infringes the AP's copyright, as well as on the issue whether One 3 Two, as Fairey's licensee via Obey Giant Art, LLC, is liable for infringement. Genuine issues of material fact also exist on the issues whether One 3 Two is liable for offending the DMCA, and whether One 3 Two is liable for indirect profits.

The parties shall appear for the previously scheduled final pretrial conference beginning 10:00am on March 16, 2011. By March 11, 2011, at 4:00pm EST, the parties shall submit any pretrial motions. Failure to submit a motion at that time shall constitute waiver. The parties' requested jury voir dire questions and charges are due at the beginning of the final pretrial conference.

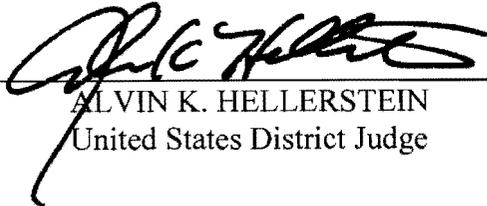
On a related note, the parties have sought to file certain submissions under seal, or alternatively to remove them from the record. Within one week of this Order, the parties shall submit a joint letter describing (i) which materials they wish to withdraw from the record and (ii) which things they would like to remain and be sealed. As to point (ii), the parties shall set forth justifications why any materials need to be sealed.

The pending motion to strike is denied as moot.

The Clerk shall terminate the motions (Doc. Nos. 147,148, and 190).

SO ORDERED

Dated: February 17, 2011
New York, New York


ALVIN K. HELLERSTEIN
United States District Judge