UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD 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)

MEMORANDUM OF LAW IN SUPPORT OF COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S MOTION IN LIMINE NO. 2 TO EXCLUDE THE OPINION OF THE ASSOCIATED PRESS'S DESIGNATED EXPERTS KATHLEEN KEDROWSKI AND BLAKE PEMBROKE SELL REGARDING THE AP'S HYPOTHETICAL LOST LICENSING FEE

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I. INTRODUCTION

Counterclaim Defendant One 3 Two, Inc. d/b/a Obey Clothing ("One 3 Two") respectfully requests that the Court preclude the Associated Press (the "AP") from offering at trial the testimony and reports of its designated experts, Kathleen M. Kedrowski and Blake Pembroke Sell, with respect to the AP's hypothetical lost licensing fee. Both Kedrowski's and Sell's opinions regarding the AP's hypothetical license fee are based on inadmissible evidence not reasonably relied upon and aspirational licensing practices, as opposed to actual historical licensing practices. Accordingly, neither opinion is reliable or relevant, and each opinion is inadmissible pursuant to Federal Rules of Evidence 702, 703 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

II. LEGAL STANDARD

Expert testimony is admissible only if it "both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *see also* Fed. R. Evid. 702. Pursuant to Rule 702, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue" and (1) must be "based upon sufficient facts or data," (2) must be "the product of reliable principles and methods," and (3) the expert must apply "the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the U.S. Supreme Court set forth the district court's "gatekeeping" obligation to ensure that "all forms of expert testimony, not just scientific testimony," survive scrutiny under Rule 702 before the testimony is presented to a fact-finder. If an expert relies on inadmissible evidence, it must be "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *See* Fed. R. Evid. 703.

This District has found that "[t]here must be 'a sufficiently rigorous analytical connection between [the expert's] methodology and the expert's conclusions ... and ... the scientific principles and methods [must] have been reliably applied by the expert to the facts of the case.'" *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 495 (S.D.N.Y. 2010) (citation omitted). Indeed, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Expert testimony should be excluded if it is "speculative" or "conjectural," or if it is based on assumptions "so unrealistic and contradictory as to suggest bad faith." *See Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (citation omitted). "The party seeking to rely on expert testimony bears the burden of establishing, by a preponderance of the evidence, that all requirements have been met." *Arista Records*, 715 F. Supp. 2d at 495.

III. KEDROWSKI'S OPINION REGARDING THE AP'S HYPOTHETICAL LOST LICENSING FEE SHOULD BE EXCLUDED

A. Kedrowski's Methodology for Calculating the AP's Licensing Fee Is Flawed Because It Is Not Based on the AP's Historical Licensing Practices

Actual damages based on a lost licensing fee are calculated based on the "fair market value of a license covering the defendant's infringing use." *Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001); *see also Semerdjian v. McDougal Littell*, 641 F. Supp. 2d 233, 239 (S.D.N.Y. 2009) (noting that "[t]he standard for determining the fair market value of the infringing use is an objective one—'the reasonable license fee on which a willing buyer and a willing seller would have agreed for the use taken by the infringer.'") (citation omitted). Instances of past licensing can serve as a benchmark for measuring the fair market value of a reasonable license fee. *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 359 (S.D.N.Y.

2003) (using the highest license fee that the plaintiff ever received for licensing a photograph in calculating actual damages).

Although examples of past licensing by the AP provide the most accurate basis for determining the actual licensing fee that the AP would have charged, Kedrowski does not base her opinion on past AP licenses. *See* Exhibit A to the Declaration of Robyn C. Crowther filed in support of Motion in Limine No. 1 (to Exclude Evidence re: Indirect Profits), Preliminary Expert Report of Kathleen M. Kedrowski ("Kedrowski Report"), ¶¶ 56-83; Exhibit A to Declaration of Robyn C. Crowther ("Crowther Decl."), Expert Report of Neil J. Zoltowski ("Zoltowski Report"), ¶¶ 23-40, 57. Instead, Kedrowski relies in part on royalties One 3 Two paid to other artists not involved in this litigation pursuant to One 3 Two's collaboration agreements with those third parties as well as industry licensing rates. Kedrowski Report, ¶¶ 56-83; Zoltowski Report, ¶ 59. However, the relevant foundation should be what ***the AP*** would have charged One 3 Two for a license. The result of Kedrowski's opinion highlights this methodological error: Kedrowski's hypothetical licensing fee in this case is $359,267, which bears no reasonable relationship to any license fee ever charged by the AP. For example, the ***highest licensing fee ever charged*** by the AP was $30,000, and this included "all industry, exclusive rights to Soup Kitchen International, Inc., its subsidiaries and affiliates for all advertising media rights, in perpetuity, predated to first date of appearance." Zoltowski Report, ¶ 40; Exhibit B to Crowther Decl., Deposition of Kathleen Kedrowski ("Kedrowski Depo."), Day 2, at 156:21-157:12. As the evidence produced in this case demonstrates, the license fees typically charged by the AP in the 2006-2009 time period were more frequently in the $35 to $3,300 range. Zoltowski Report, ¶¶ 23-39, 57.

B. Kedrowski Improperly Bases Her Opinion on Aspirational Licensing Practices and Inadmissible Evidence

Instead of basing her opinion on the AP's historical licensing practices, Kedrowski relies instead on the AP's aspirational licensing practices and inadmissible evidence. Kedrowski's reliance on aspirational (if not speculative) licensing practices of the AP (charging a lump sum followed by a "running royalty" constituting a percent of net revenues) is a deeply flawed methodology and is based on evidence not reasonably relied upon. *See* Kedrowski Report, ¶¶ 56-83. The evidence shows that the AP's typical practice in January 2008 (when Shepard Fairey accessed the photograph of President Obama) was to license photographs for a fixed flat fee or lump sum alone. Zoltowski Report, ¶¶ 20-22; Kedrowski Report, ¶¶ 56-83. Indeed, the AP's 30(b)(6) witness designated as most knowledgeable on the topic of licensing, Farah DeGrave, confirmed that the AP charged fixed fees based on the AP's pricing guidelines and indicated that the AP was in the process of trying to change its practices to push a royalty-based license. *See* Exhibit C to Crowther Decl., Deposition of Farah DeGrave at 64-72, 83-86, 113-121, 131.

In an apparent attempt to avoid calculating the hypothetical license based on a fixed fee, in her report Kedrowski relies on inadmissible discussions with Dawn Cohen and Lloyd Pawlak—two AP employees who were not designated as 30(b)(6) witnesses or identified in the AP's Rule 26 Initial Disclosures—in concluding that a royalty-based fee would have been appropriate. Kedrowski Report, ¶ 65. Relying on her discussion with Pawlak, Kedrowski lists a sole example of a royalty-based license and opines that "licensing The AP images for the National Football League posters and related commercial projects may result in revenue shares of 17-40%." *Id.* (at 38). The AP never produced any documents relating to this alleged licensing agreement with the National Football League, however, and thus any evidence in this regard is

inadmissible. Kedrowski's heavy reliance on her discussions with these two individuals and supposed licensing agreements that were never produced—as opposed to DeGrave's sworn testimony and the historical licenses entered into by the AP which were produced in this litigation—merely highlights the unreasonable bases of her opinion, the unreasonableness of her methodology, and the unreliability of her opinion. *See* Fed. R. Evid. 703.

C. Kedrowski's Hypothetical Lost License Fee Improperly Includes the Fee the AP Would Allegedly Have Charged Fairey

Kedrowski's conclusion that the hypothetical lost license fee is $359,267 is also flawed to the extent that it includes the initial flat fee of $2,000 that the AP would have charged, and ***both*** the royalty-based fee that the AP would have charged Fairey ($113,850) and the royalty-based fee it would have charged One 3 Two ($243,417). Exhibit D-1 to Kedrowski Report. Any evidence relating to what ***Fairey's*** licensing fee would have been is irrelevant and should be excluded. Accordingly, Kedrowski's unreliable and unreasonable opinion relating to the hypothetical licensing fee that the AP would have charged One 3 Two should be excluded in its entirety. If this Court is inclined to permit Kedrowski to express an opinion in this regard, however, any evidence of the fee that the AP would have charged Fairey should be excluded as irrelevant.

IV. SELL'S OPINION REGARDING THE AP'S HYPOTHETICAL LOST LICENSING FEE SHOULD BE EXCLUDED

In his report, Sell does not attempt to quantify the hypothetical license fee that the AP would have charged One 3 Two. Instead, Sell generally opines that any hypothetical license would have been royalty-based. *See* Exhibit D to Crowther Decl., Expert Report of Blake Pembroke Sell, ¶¶ 101-145. Like Kedrowski, Sell fails to rely on the historical licensing practices and licensing agreements entered into by the AP during the relevant time period.

Indeed, Sell acknowledges in his report that the AP's business model is to "move toward" revenue-sharing arrangements. Sell Report, ¶ 102. Also like Kedrowski, Sell references alleged AP license agreements which were not produced in this case and are thus inadmissible. Specifically, Sell references a February 2009 exclusive license with the NCAA and an April 2009 exclusive licensing deal with the National Football League, but fails to provide any details regarding the terms of these licensing agreements. *Id.*, ¶¶ 105-106. In any event, that the AP may have recently negotiated one or two royalty-based licensing agreements in 2009 and that it aspires to enter into royalty-based licenses in the future is of no relevance in determining what the AP would have charged One 3 Two for a license in early 2008. There are numerous examples of AP licensing agreements (all of which were based on a flat fee) that were produced in this case that can and should serve as the basis for calculating any hypothetical lost license fee. In contrast, there is no admissible evidence in this case showing a single example of an AP license which is royalty-based. Consequently Sell's opinion that the parties would have negotiated a royalty-based license is unreliable and should be excluded. Fed. R. Evid. 702.

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V. CONCLUSION

Based on the foregoing, One 3 Two respectfully requests that the Court grant this Motion and preclude the AP from offering the testimony and reports of its experts, Kathleen M. Kedrowski and Blake Pembroke Sell, at trial relating to the AP's hypothetical lost licensing fee.

Dated: February 25, 2011
Los Angeles, California

Respectfully submitted,

By: /s/ Robyn C. Crowther

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