Dale M. Cendali
Claudia Ray
Brendan T. Kehoe
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: (212) 446-4800
Fax: (212) 446-4900

Michael F. Williams
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200

Attorneys for the Associated Press

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 OPPOSITION TO 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 LICENSING FEE

I. INTRODUCTION

Without offering any cases in support, Obey Clothing is asking for an order excluding probative and largely undisputed evidence of the parties' past licensing practices from the jury's consideration simply because Obey Clothing disagrees with the conclusions reached by two of the AP's experts, Kathleen Kedrowski and Blake Sell. Ms. Kedrowski and Mr. Sell will offer testimony about licensing agreements entered into by both the AP and Obey Clothing, as the parties' recent licensing practices are highly relevant for determining one element of the AP's damages: "the reasonable license fee on which a willing buyer and a willing seller would have agreed for the use taken by the infringer." Semerdjian v. McDougall Littell, 641 F. Supp. 2d 233, 239 (S.D.N.Y. 2009) (citing Davis v. Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001)).

To be sure, Obey Clothing cannot argue that the evidence at issue is irrelevant. Obey Clothing's own motion, (OC MIL No. 2 at 2), acknowledges that, in addition to disgorgement of an infringer's profits, an injured copyright owner is entitled to recover the "fair market value of a license covering the defendant's *infringing use*." Semerdjian, 641 F. Supp. 2d at 239 (citing Davis, 246 F.3d at 172). Furthermore, Obey Clothing recognizes, as it must, that "instances of past licensing can serve as a benchmark for measuring the fair market value of a reasonable license fee." (OC MIL No. 2 at 2 (citing Baker v. Urban Outfitters, Inc., 254 F. Supp. 2d 346, 359 (S.D.N.Y. 2003)). Rather, Obey Clothing merely takes issue with the weight that the AP's experts attributed to the parties' respective licensing practices, and it does so on the basis of mischaracterizations about the experts' proffered testimony and the evidence produced in discovery. At bottom, Obey Clothing's motion is flawed as a matter of law and predicated on assertions that are inaccurate as a matter of fact. As such, the AP respectfully asks the Court to deny Motion *in Limine* No. 2.

II. ARGUMENT

A. There Is No Valid Basis For Excluding The Testimony Of The AP's Experts.

The AP is offering the testimony of Kathleen Kedrowski and Blake Sell on the subject of the actual damages to which the AP is entitled as a result of Obey Clothing's infringement. As Obey Clothing acknowledges, in addition to disgorgement of an infringer's profits, an injured copyright owner is entitled to recover the "fair market value of a license covering the defendant's *infringing use*." Semerdjian, 641 F. Supp. 2d at 239 (citing Davis, 246 F.3d at 172) (emphasis in original). As detailed below, Ms. Kedrowski's and Mr. Sell's testimony will assist the jury in resolving the fair market value of a license covering Obey Clothing's infringing use of the Obama Photo.

Ms. Kedrowski determined that a hypothetical license for the use of Obama Photo would have involved an initial license fee of approximately $2,000, according to which Mr. Fairey and Obey Clothing would have obtained the right to use the Obama Photo in creating 5,000 t-shirts, 500 posters, stickers, and internet use. (OC MIL No. 1, Ex. A, Kedrowski Rpt. ¶ 79.) She concluded that Obey Clothing would have needed to approach the AP and negotiated an additional license for further merchandising, and that the additional license—due to the significant size and scope of the use—would have been in the form of a revenue-share in the amount of 17% of net revenues for artwork and 10% of net revenues for merchandise. (Id. ¶ 80.)

In reaching these conclusions, Ms. Kedrowski reviewed actual licenses that the AP had charged for the use of the Obama Photo and other Obama-related images in a variety of contexts. (Id. ¶ 66.) She also reviewed actual licenses that Mr. Fairey and Obey Clothing had charged for the use of photographs in the sale of their art and merchandising. (Id. ¶ 67.) In nearly every instance, Obey Clothing entered into royalty-based licenses for the use of photographs in its licensing. (See id. ¶ 67; Ex. F-1-2.) In addition, Ms. Kedrowski found that in circumstances like

those before the Court, "where Fairey and Obey Clothing have not sought permission for the right to use preexisting images owned by third parties, Fairey and Obey Clothing have paid royalties, or other lump-sum payments, to the owners of the rights to the images." (Id. ¶ 71.) Ms. Kedrowski checked the results of her work against information about industry licensing rates, which confirmed her analysis was correct. (Id. ¶ 76.)

Mr. Sell also concluded that the AP and Obey Clothing would enter into an initial flat-rate license for use of the Obama Photo, followed by a royalty-based license for additional use. (OC Mot., Ex. D, Sell Rpt. ¶¶ 128-136.) Based on his extensive experience in the photo licensing industry, Mr. Sell noted in his report that "the common practice is to first license an image for a limited use and then negotiate new licenses for additional uses of the same image." (Id. ¶ 82.) Mr. Sell reviewed the AP's licensing practices and determined that they were consistent with prevailing industry practices in that regard. (Id. ¶ 101-06.) Mr. Sell's opinion is further buttressed by evidence of Obey Clothing's license and use of an image of a Palestinian woman from the AP for use on Obey Clothing's merchandise. The original license for that image was for a limited use on clothing and, now that Obey Clothing has exceeded that use, it must come back to the AP to negotiate a more extensive license. (See B. Sell Dep. (Dec. 2, 2010) 231:18-233:3.) Thus, there is ample support for Mr. Sell's opinion that is how the license deal for the Obama Photo would have been structured.

Ms. Kedrowski and Mr. Sell are more than qualified to present their conclusions to the jury. Ms. Kedrowski's credentials compare favorably in every respect with Neil Zoltowski, Obey Clothing's own witness who is offering opinions on the market value of a hypothetical license. Mr. Sell has worked in the photography industry since 1977 and is currently an industry management consultant. Before becoming a consultant, Mr. Sell was Director at Getty Images,

which Obey Clothing's own expert Neil Zoltowski notes is the industry leader in image licensing rights. At Getty, Mr. Sell was responsible for, among other things, the acquisition of photography-related companies, valuing Getty Images' photo archive and developing new markets for Getty Images to exploit its images. (Id. at ¶ 1.) The conclusions that Ms. Kedrowski and Mr. Sell offer are based upon reliable evidence of the sort that is routinely considered by courts in copyright cases. Their testimony will assist the jury in calculating the damages to which the AP is entitled under § 504(b). In sum, there is no justification for excluding Ms. Kedrowski and Mr. Sell from the jury.

B. Obey Clothing's Arguments Lack Support In The Record And The Law.

Although the legal basis for its motion is less than clear, Obey Clothing complains that Ms. Kedrowski's and Mr. Sell's opinions "are based on inadmissible evidence not reasonably relied upon and aspirational licensing practices, as opposed to actual historical licensing practices." (OC MIL No. 2 at 1.) These complaints are completely without merit.

First, the complaint that Ms. Kedrowski and Mr. Sell base their opinions on "aspirational licensing practices" is misplaced as a matter of law and mistaken as a matter of fact. With respect to the law, Obey Clothing's disagreement with how the AP's experts weighed the various factors that might affect the market value of a license for the Obama Photo provides no basis for excluding the experts under Daubert. Tellingly, while Obey Clothing asserts at various points in its motion that Ms. Kedrowski's analysis should have focused on "what the AP would have charged One 3 Two for a license," and that "examples of past licensing by the AP provide the most accurate basis for determining the actual licensing fee that the AP would have charged," (OC MIL No. 2 at 3), Obey Clothing offers no citations in support of its claims. That is because there are no cases holding that the proper standard for calculating damages under § 504(b) focuses on the injured party's historical licenses, much less that an expert should be excluded for

relying upon other evidence that is relevant to the market value of a hypothetical license. Indeed, the law is actually the opposite of what Obey Clothing suggests: cases within the Second Circuit (including cases relied upon by Obey Clothing) make clear that the "question is not what the owner would have charged, but rather what is the fair market value." Fournier v. Erickson, 242 F. Supp. 2d 318, 337 (S.D.N.Y. 2003) (citing Davis, 246 F.3d at 166) (emphasis added).

Further, and with respect to the facts, Obey Clothing is wrong about whether the AP has entered into royalty-based licenses for its images. As both Ms. Kedrowski and Mr. Sell noted in their expert reports, the AP has entered into royalty-based licenses, including licensing arrangements with the NCAA and the National Football League. (Kedrowski Rpt. ¶ 65; Sell Rpt. ¶¶ 105–06.) Ms. Kedrowski noted that the licensing agreement with the National Football League "may result in revenue shares of 17–40%." (Kedrowski Rpt. ¶ 65.) Obey Clothing had the opportunity to depose Ms. Kedrowski, Mr. Sell, and the AP's Rule 30(b)(6)-designated witness on licensing practices, Farah DeGrave, about these issues, and can thus challenge the AP's evidence of royalty-based licensing practices at trial through cross-examination. Thus, Obey Clothing has no legitimate ground for avoiding the evidence through a motion *in limine* directed at the AP's experts.

Second, Obey Clothing's contention that Ms. Kedrowski and Mr. Sell considered evidence "not reasonably relied upon" cannot be reconciled with applicable Second Circuit precedent. As detailed above, Ms. Kedrowski relied upon: "(i) The AP's licensing program; (ii) Fairey's and Obey Clothing's licensing practices; and, (iii) relevant industry licenses." (Kedrowski Rpt. ¶ 62.) Mr. Sell relied upon: the AP's licensing practices, (Sell Rpt. ¶ 101–08); and his own "experience in the photo archive industry, including at Getty Images and other archives," (id. ¶ 137). This is precisely the sort of evidence that courts within the Second Circuit

have upheld as reliable in the context of resolving the market value of a hypothetical license. See, e.g., Fournier, 242 F. Supp. 2d at 337 (citing Davis, 246 F.3d at 166). Indeed, the evidence of other licenses entered into by Obey Clothing and licensing industry practices are factors that Obey Clothing's own proffered expert should have considered in his analysis. He chose to ignore that evidence, however, because it did not fit with his conclusions about whether the AP would have sought a royalty-based license for the Obama Photo. (OC Mot., Ex. A, Zoltowski Rpt. ¶ 59.)

Third, the assertion that Ms. Kedrowski's and Mr. Sell's opinions are based on inadmissible evidence is simply false. The basis for this argument appears to be that, in developing her opinions, Ms. Kedrowski relied in part upon discussions with two employees of the AP who had knowledge of the AP's licensing practices, but who had not previously disclosed on the AP's Initial Disclosures. (OC MIL No. 2 at 4.) But all of the parties' experts in this case relied on conversations with the parties' business people. And Ms. Kedrowski timely disclosed her conversations in her opening expert report. Thus there was ample time in the expert discovery period to seek further discovery regarding these communications, but Obey Clothing chose not to do so. In particular, Obey Clothing had an entire day to depose Ms. Kedrowski (in addition to the entire day that counsel for Mr. Fairey deposed Ms. Kedrowski on largely the same aspects of her report), and chose not to ask her about these conversations. If Obey Clothing had asked, it would have discovered that Farah DeGrave, the AP's 30(b)(6) witness on licensing-related topics and sales manager in the AP's photo-licensing business, participated in each of Ms. Kedrowski's conversations. Notably, Obey Clothing and Mr. Fairey did depose Ms. DeGrave, who was timely disclosed on the AP's Initial Disclosures. Thus, because Obey Clothing could

have discovered this same evidence in both fact discovery and expert discovery, there is no prejudice to Obey Clothing for Ms. Kedrowski to have relied on these conversations.

III. CONCLUSION

For the reasons stated above, this Court should deny Obey Clothing's Motion *in Limine* No. 2 to exclude expert testimony concerning licenses entered into by the AP and Obey Clothing, and evidence of licensing industry practices.

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Respectfully submitted,

/s/ Dale M. Cendali

Dale M. Cendali
Claudia Ray
Brendan T. Kehoe
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Tel: 212-446-4800
Fax: 212-446-4900
dale.cendali@kirkland.com
claudia.ray@kirkland.com
brendan.kehoe@kirkland.com

Michael F. Williams
KIRKLAND & ELLIS LLP
655 15th Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200
michael.williams@kirkland.com

Attorneys for Counterclaim Defendant
THE ASSOCIATED PRESS