

# **EXHIBIT B**

## **TO THE AP'S MOTION IN LIMINE NO. 4 TO LIMIT THE OPINION TESTIMONY OF NEIL ZOLTOWSKI**

<p>1</p> <p>UNITED STATES DISTRICT COURT</p> <p>SOUTHERN DISTRICT OF NEW YORK</p> <p>-----</p> <p>SHEPARD FAIREY and OBEY GIANT</p> <p>ART, INC.,</p> <p>Plaintiffs,</p> <p>vs. 1:09-CV-1123 (AKH)</p> <p>THE ASSOCIATED PRESS,</p> <p>Defendant/Counterclaim Plaintiff,</p> <p>vs.</p> <p>SHEPARD FAIREY, OBEY GIANT</p> <p>ART, INC., OBEY GIANT LLC and</p> <p>STUDIO NUMBER ONE, INC.,</p> <p>Counterclaim Defendants.</p> <p>-----</p> <p>VIDEOTAPED DEPOSITION OF BLAKE SELL</p> <p>Thursday, December 2, 2010</p> <p>9:27 a.m.</p> <p>Reported by:</p> <p>Joan Urzia</p>	<p>3</p> <p>1</p> <p>2 A P P E A R A N C E S:</p> <p>3</p> <p>4</p> <p>5 JONES DAY</p> <p>6 Attorneys for Plaintiff</p> <p>7 222 East 41st Street</p> <p>8 New York, New York 10017</p> <p>9 BY: EDWIN FOUNTAIN, ESQ.</p> <p>10 ALAN RABINOWITZ, ESQ.</p> <p>11</p> <p>12</p> <p>13 KIRKLAND &amp; ELLIS LLP</p> <p>14 Attorneys for Defendant</p> <p>15 601 Lexington Avenue</p> <p>16 New York, New York 10022</p> <p>17 BY: CLAUDIA RAY, ESQ.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24 (Continued)</p> <p>25</p>
<p>2</p> <p>1</p> <p>2 December 2, 2010</p> <p>3 9:27 a.m.</p> <p>4 New York, New York</p> <p>5</p> <p>6 VIDEOTAPED DEPOSITION of BLAKE</p> <p>7 SELL, held at the offices of Jones Day, 222</p> <p>8 East 41st Street, New York, New York,</p> <p>9 pursuant to Notice, before Joan Urzia, a</p> <p>10 Notary Public of the State of New York.</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>4</p> <p>1</p> <p>2 A P P E A R A N C E S: (Continued)</p> <p>3</p> <p>4 CALDWELL LESLIE &amp; PROCTOR, ESQS.</p> <p>5 Attorneys for Counterclaim</p> <p>6 Defendant - 132 Inc.</p> <p>7 1000 Wilshire Boulevard</p> <p>8 Suite 600</p> <p>9 Los Angeles, California 90017</p> <p>10 BY: KELLY PERIGOE, ESQ.</p> <p>11</p> <p>12</p> <p>13 ALSO PRESENT:</p> <p>14 Ed Sattler, Videographer</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>



<p style="text-align: right;">161</p> <p>1 B. Sell</p> <p>2 that George Clooney, who we all are</p> <p>3 familiar with, but he had just won the</p> <p>4 Academy Award a month earlier, and in fact</p> <p>5 that year 2006 was People Magazine's</p> <p>6 Sexiest Man Alive, so he carried a lot of</p> <p>7 weight in the entertainment circle as well</p> <p>8 as the news cycle.</p> <p>9 So what I'm saying here is that</p> <p>10 based on my understanding of the way AP</p> <p>11 works, Manny Garcia was sent there, not</p> <p>12 just to cover Obama -- I'm sorry, not just</p> <p>13 to cover Clooney on the Darfur, but he was</p> <p>14 sent there to try to see what else he could</p> <p>15 shoot for the purposes of the archive and</p> <p>16 any other purposes the AP could come up</p> <p>17 with for pictures that could be derived</p> <p>18 from that event.</p> <p>19 Q. So are you saying that the Obama</p> <p>20 photo is not related to the news worthiness</p> <p>21 of the Clooney press conference itself?</p> <p>22 MS. RAY: Objection. Misstates</p> <p>23 his testimony.</p> <p>24 A. I'm sorry, one more time?</p> <p>25 Q. Sure.</p>	<p style="text-align: right;">163</p> <p>1 B. Sell</p> <p>2 pictures transmitted, he was in a number of</p> <p>3 them, but the only picture that he was by</p> <p>4 himself was clearly not connected to the</p> <p>5 story because it didn't relate to Darfur,</p> <p>6 but it was part of the overall event.</p> <p>7 That's a long answer and I</p> <p>8 apologize for that, but it's best</p> <p>9 explanation I can give you.</p> <p>10 Q. Mr. Sell, moving ahead to the</p> <p>11 next section, which I believe is 3B, and</p> <p>12 specifically paragraph 127, and in</p> <p>13 paragraph 127, you're referring to</p> <p>14 Mr. Jarosz's opinion as recited in</p> <p>15 paragraph 125 that The Associated Press</p> <p>16 would have agreed to a flat-rate fee of</p> <p>17 \$3,000 for all uses of the Obama photo by</p> <p>18 Mr. Fairey.</p> <p>19 And you say in paragraph 127 that</p> <p>20 such a license would have been inconsistent</p> <p>21 with industry practice.</p> <p>22 Do you see that, sir?</p> <p>23 A. Yes, I do.</p> <p>24 Q. What is the industry practice</p> <p>25 you're referring to in paragraph 127?</p>
<p style="text-align: right;">162</p> <p>1 B. Sell</p> <p>2 Is your point that the Obama</p> <p>3 photo, although taken by Mr. Garcia at the</p> <p>4 Clooney press conference, does not itself</p> <p>5 relate to the news worthiness of the press</p> <p>6 conference?</p> <p>7 MS. RAY: Objection. Form.</p> <p>8 A. I mean, I think I can answer that</p> <p>9 that when you go out to photograph a news</p> <p>10 event, there is typically a tag or a hook</p> <p>11 on that event. This particular tag was</p> <p>12 Darfur and George Clooney.</p> <p>13 So if a photographer had gone out</p> <p>14 and returned from only one picture of that</p> <p>15 event and it happened to be Senator Obama</p> <p>16 by himself, he would not have done a good</p> <p>17 job of covering the news of the day, which</p> <p>18 was George Clooney speaking at an event</p> <p>19 about Darfur.</p> <p>20 So that in the context of the</p> <p>21 hook, which was Darfur, George Clooney,</p> <p>22 Obama was an extra character, one aspect of</p> <p>23 the story but not the key aspect of the</p> <p>24 story. So the fact that he was there was</p> <p>25 part of the story, which is why of the 16</p>	<p style="text-align: right;">164</p> <p>1 B. Sell</p> <p>2 MS. RAY: Objection to form.</p> <p>3 Objection, misstates his report. It</p> <p>4 speaks for itself.</p> <p>5 A. If, in 125, if the picture had</p> <p>6 been a royalty-free picture offered by a</p> <p>7 library other than The Associated Press, so</p> <p>8 it doesn't license its pictures that way --</p> <p>9 for example, iStockPhoto, which is a</p> <p>10 company owned by Getty Images which</p> <p>11 licenses nothing but royalty-free</p> <p>12 pictures -- if that picture had been</p> <p>13 available through iStockPhoto, they would</p> <p>14 have licensed it as a royalty-free image</p> <p>15 for whatever amount they licensed it for,</p> <p>16 which could have been 30, or \$3,000 or</p> <p>17 whatever the amount was.</p> <p>18 But The Associated Press doesn't</p> <p>19 license images that way for rights-managed</p> <p>20 image, which is what this is.</p> <p>21 So he's basically saying that the</p> <p>22 AP would have licensed the picture as a</p> <p>23 royalty-free picture, and they don't</p> <p>24 license pictures that way.</p> <p>25 Q. Well --</p>



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<p style="text-align: right;">165</p> <p>1 B. Sell</p> <p>2 A. And the key words there -- I'm</p> <p>3 sorry, I don't mean to interrupt.</p> <p>4 Q. Go ahead.</p> <p>5 A. The key words there is for all</p> <p>6 uses for all time, which is a definition of</p> <p>7 royalty-free image -- or royalty-free</p> <p>8 license.</p> <p>9 Q. So it's not the -- setting aside</p> <p>10 the dollar amount for a moment -- it's not</p> <p>11 the fact that -- it's not Mr. Jarosz's</p> <p>12 opinion that the AP would have licensed it</p> <p>13 for a fixed fee you're objecting to, is</p> <p>14 that that fixed fee would have been for all</p> <p>15 uses at all times; is that correct?</p> <p>16 MS. RAY: Objection. Misstates</p> <p>17 his testimony.</p> <p>18 A. I'm sorry, I want to make sure I</p> <p>19 catch what you're saying.</p> <p>20 Q. Sure. I'll try again.</p> <p>21 In paragraph 125, you</p> <p>22 characterize Mr. Jarosz's opinion that The</p> <p>23 Associated Press would have agreed to a</p> <p>24 flat-rate fee topping out at \$3,000 for all</p> <p>25 uses of the Obama for all time.</p>	<p style="text-align: right;">167</p> <p>1 B. Sell</p> <p>2 You know, sometimes in my</p> <p>3 experience at Getty Images a customer,</p> <p>4 particularly a commercial customer like</p> <p>5 Nike or somebody will want to buy a picture</p> <p>6 out of our archive and say we want this</p> <p>7 picture forever, we don't want anybody else</p> <p>8 to see it, we'll buy, we'll buy it out --</p> <p>9 we call it a buyout -- and they would pay a</p> <p>10 flat-rate, in which case they would get it</p> <p>11 for all uses for all time, and that would</p> <p>12 be written into the contract.</p> <p>13 But The Associated Press</p> <p>14 contracts -- Associated Press doesn't</p> <p>15 license its images that way typically.</p> <p>16 Q. In footnote 75, Mr. Sell, at the</p> <p>17 bottom of page 34, and again, feel free to</p> <p>18 read the entire footnote, but about</p> <p>19 two-thirds of the way down you write that,</p> <p>20 "I believe that the AP has a standard</p> <p>21 framework for licensing its images that</p> <p>22 still allows its sales representatives the</p> <p>23 necessary freedom to craft each individual</p> <p>24 license to meet the particular needs of the</p> <p>25 customer and the nature of the particular</p>
<p style="text-align: right;">166</p> <p>1 B. Sell</p> <p>2 A. Right.</p> <p>3 Q. Let's set the dollar amount aside</p> <p>4 for the minute.</p> <p>5 If I understood you correctly,</p> <p>6 you haven't objected that Mr. Jarosz opined</p> <p>7 that the AP would have agreed to a</p> <p>8 flat-rate fee. You're objecting that it</p> <p>9 would have agreed to such a fee for all use</p> <p>10 was the Obama photo for all time; is that</p> <p>11 correct?</p> <p>12 MS. RAY: Objection. Form.</p> <p>13 Misstates the testimony.</p> <p>14 A. What I'm saying is that The</p> <p>15 Associated Press would not have agreed to a</p> <p>16 license that precluded an evaluation of all</p> <p>17 potential uses of that picture, but what</p> <p>18 this says is for all uses for all time.</p> <p>19 The Associated Press would not</p> <p>20 have licensed one of its pictures, it would</p> <p>21 not have come up with a number regardless</p> <p>22 of a number, and said you can use this</p> <p>23 forever, anywhere you want, unless that was</p> <p>24 a specific deal for probably a much higher</p> <p>25 amount than this.</p>	<p style="text-align: right;">168</p> <p>1 B. Sell</p> <p>2 use."</p> <p>3 Does that relate to what you were</p> <p>4 just talking about -- essentially, is this</p> <p>5 talking about rights management?</p> <p>6 MS. RAY: Objection. Form.</p> <p>7 A. Let me read this.</p> <p>8 Q. Please do.</p> <p>9 A. I'm sorry. So what this refers</p> <p>10 to is the fact that The Associated Press</p> <p>11 would have assigned a sales rep and that's</p> <p>12 required because he would have been a</p> <p>13 commercial customer and they don't license</p> <p>14 things automatically through the website.</p> <p>15 So they would have assigned the</p> <p>16 sales rep to talk to him, and then that</p> <p>17 sales rep would have tried to figure out</p> <p>18 what his initial purposes might have been</p> <p>19 and what subsequent purposes might be</p> <p>20 derived from the initial license, and in</p> <p>21 the case of this use of a picture,</p> <p>22 obviously it evolved into a few different</p> <p>23 uses.</p> <p>24 So the initial licenses that they</p> <p>25 might have come up with would be based on a</p>



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<p style="text-align: right;">169</p> <p>1 B. Sell</p> <p>2 limited set of what he actually did with it</p> <p>3 and then some renegotiation with it, and</p> <p>4 that would be because he had an assigned</p> <p>5 sales rep who would manage that -- it's</p> <p>6 called rights-managed because it's a</p> <p>7 managed relationship.</p> <p>8 Q. All right.</p> <p>9 You refer in paragraph 75 to my</p> <p>10 review of The Associated Press' price</p> <p>11 guide, and you don't cite a particular</p> <p>12 document there, and I'm wondering if you</p> <p>13 can describe the price guide that you're</p> <p>14 referring to.</p> <p>15 MS. RAY: Objection to form.</p> <p>16 A. I'm sorry, I'm trying to find the</p> <p>17 word price --</p> <p>18 Q. I'm sorry, it's the sixth line</p> <p>19 down in footnote 75, the line starting,</p> <p>20 "Based on Ms. DeGrave's testimony as well</p> <p>21 as my review of The Associated Press' price</p> <p>22 guide."</p> <p>23 A. Uh-huh.</p> <p>24 Q. I'm trying to figure out what</p> <p>25 document you're referring to there.</p>	<p style="text-align: right;">171</p> <p>1 B. Sell</p> <p>2 A. Take advantage of the</p> <p>3 popularity -- some -- all pictures aren't</p> <p>4 created equal. During the course of a day,</p> <p>5 3 to 5,000 pictures come in to The</p> <p>6 Associated Press through its photographers</p> <p>7 and freelancers. Although they may start</p> <p>8 out equal, at one point sometimes one</p> <p>9 picture gets, people will start licensing</p> <p>10 that picture more than another.</p> <p>11 So you will identify that need,</p> <p>12 it's a supply and demand business, so</p> <p>13 you'll identify that need and price the</p> <p>14 picture accordingly. So some pictures</p> <p>15 taken from one event may not necessarily</p> <p>16 license for this picture, other pictures</p> <p>17 taken at that same event, depending on how</p> <p>18 the salesperson is able to calculate the</p> <p>19 value of the picture.</p> <p>20 Q. Does The Associated Press</p> <p>21 increase the price of photographs based on</p> <p>22 their popularity?</p> <p>23 MS. RAY: Objection to form.</p> <p>24 A. Well, the reason why they require</p> <p>25 commercial customers to talk to a sales rep</p>
<p style="text-align: right;">170</p> <p>1 B. Sell</p> <p>2 A. Well, it's either one or both of</p> <p>3 these documents which I cited earlier,</p> <p>4 which were your exhibits.</p> <p>5 Q. Exhibits 5 and 6?</p> <p>6 A. I believe so.</p> <p>7 Q. Okay.</p> <p>8 A. I didn't see a lot of price</p> <p>9 guides. I believe this was the limit of</p> <p>10 what I saw.</p> <p>11 Q. I thought that might be the case.</p> <p>12 I just wanted to confirm that.</p> <p>13 Moving to paragraph 135, on page</p> <p>14 35, Mr. Sell, and again feel free to read</p> <p>15 the paragraph.</p> <p>16 A. Okay.</p> <p>17 Q. In the second sentence continuing</p> <p>18 to the third sentence of paragraph 135, you</p> <p>19 state that, "Sometimes a photograph can</p> <p>20 become particularly popular. When that</p> <p>21 happens, it is possible for a photo archive</p> <p>22 to negotiate favorable terms that allow it</p> <p>23 to take advantage of that popularity."</p> <p>24 What do you mean by that, sir?</p> <p>25 MS. RAY: Objection. Form.</p>	<p style="text-align: right;">172</p> <p>1 B. Sell</p> <p>2 is so they can individually craft a license</p> <p>3 for those pictures.</p> <p>4 Q. But do you know whether The</p> <p>5 Associated Press takes into account a</p> <p>6 photograph's popularity in negotiating a</p> <p>7 license with a particular customer?</p> <p>8 MS. RAY: Objection. Form.</p> <p>9 Asked and answered.</p> <p>10 A. I believe that the answer is yes</p> <p>11 because, as I said, every picture is not</p> <p>12 equal to every other picture. So when they</p> <p>13 have a picture -- for example, I'll use an</p> <p>14 example of earlier, you cite my experience</p> <p>15 with the shoe bomber -- granted it's a</p> <p>16 different kind of situation than the</p> <p>17 picture we're talking about.</p> <p>18 However, if there is a demand for</p> <p>19 that picture, that picture of a shoe bomber</p> <p>20 is not equal to another picture shot by</p> <p>21 that same passenger of his wife sitting</p> <p>22 next to him -- I'm being obviously absurd.</p> <p>23 So when you look at a picture</p> <p>24 taken from the same event, and one picture</p> <p>25 has high value and another picture has low</p>



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<p style="text-align: right;">173</p> <p>1 B. Sell</p> <p>2 value.</p> <p>3 Now, the reason why they don't</p> <p>4 license pictures automated through the AP</p> <p>5 system is so they can take advantage of</p> <p>6 that difference and require you to talk to</p> <p>7 a salesperson.</p> <p>8 Q. Right.</p> <p>9 But do you know whether The</p> <p>10 Associated Press -- strike that.</p> <p>11 Do you know whether The</p> <p>12 Associated Press charges higher prices</p> <p>13 based on a photograph's popularity holding</p> <p>14 the end uses of the photograph by a</p> <p>15 particular customer constant?</p> <p>16 MS. RAY: Objection to form.</p> <p>17 A. I'm not sure I understand.</p> <p>18 Q. Sure.</p> <p>19 Two customers come into the AP,</p> <p>20 each wanting to license a different</p> <p>21 photograph.</p> <p>22 A. Uh-huh.</p> <p>23 Q. Their use and the value of that</p> <p>24 photograph to that customer is the same in</p> <p>25 both respects. The only difference is the</p>	<p style="text-align: right;">175</p> <p>1 B. Sell</p> <p>2 A. Uh-huh.</p> <p>3 Q. And so what do you mean by</p> <p>4 popularity there?</p> <p>5 A. By popularity, I refer to</p> <p>6 basically the demand for that picture.</p> <p>7 Q. As measured by the number of</p> <p>8 customers licensing that particular</p> <p>9 photograph?</p> <p>10 A. Not necessarily -- and again, I'm</p> <p>11 not trying to be difficult -- but sometimes</p> <p>12 you can have a picture of a shoe bomber and</p> <p>13 nobody has yet licensed that picture, but</p> <p>14 you know that that picture is going to be</p> <p>15 in high demand before you even attempt to</p> <p>16 go out and license it.</p> <p>17 So therefore, the starting point</p> <p>18 for negotiation is very, very high. So</p> <p>19 from that sense a picture is popular before</p> <p>20 it's ever been seen by anybody.</p> <p>21 Q. And are you aware of any instance</p> <p>22 where The Associated Press has increased</p> <p>23 the price of a photograph because of its</p> <p>24 popularity?</p> <p>25 MS. RAY: Objection. Form.</p>
<p style="text-align: right;">174</p> <p>1 B. Sell</p> <p>2 photograph.</p> <p>3 Does The Associated Press take</p> <p>4 into account the popularity of one</p> <p>5 photograph versus the other and charge a</p> <p>6 higher price because a photograph is more</p> <p>7 popular?</p> <p>8 MS. RAY: Objection. Form.</p> <p>9 A. It can.</p> <p>10 Q. Does it?</p> <p>11 A. And that's why the system is</p> <p>12 designed that way, to take advantage of</p> <p>13 that difference, because every picture is</p> <p>14 not the same as every other picture.</p> <p>15 Now, I think, maybe we need a</p> <p>16 definition of what popularity means.</p> <p>17 Q. Sure.</p> <p>18 A. I mean, as I said, it's a supply</p> <p>19 and demand business. So popularity doesn't</p> <p>20 mean there's a vote on it taken by the</p> <p>21 public. It could be popularity just based</p> <p>22 on other circumstances.</p> <p>23 Q. Well, you refer in paragraph 135</p> <p>24 to taking advantage of a photograph's</p> <p>25 popularity.</p>	<p style="text-align: right;">176</p> <p>1 B. Sell</p> <p>2 A. I would say that every license,</p> <p>3 because it has to go through a salesperson,</p> <p>4 that that is one of the factors a</p> <p>5 salesperson would calculate, is the value</p> <p>6 of that image to that customer.</p> <p>7 Again, I have to make a</p> <p>8 distinction between an editorial customer</p> <p>9 and a commercial customer. An editorial</p> <p>10 customer can come to the AP Images' website</p> <p>11 and simply plug in some criteria which</p> <p>12 calculates the geographic region, the size,</p> <p>13 placement, all those other factors,</p> <p>14 including duration, which is in effect a</p> <p>15 calculation of the value of that picture,</p> <p>16 so it is a revenue share that's</p> <p>17 non-expressly stated that way.</p> <p>18 But when a commercial customer</p> <p>19 comes to The Associated Press to license a</p> <p>20 picture, they must talk to a sales rep and</p> <p>21 that sales rep doesn't simply referring to</p> <p>22 the sales guide, they look at the picture,</p> <p>23 they try to evaluate what the picture is,</p> <p>24 whether or not it's a picture of Kennedy</p> <p>25 and the Chairman of the Soviet Union, of</p>



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<p>177</p> <p>1 B. Sell</p> <p>2 which there is very, very few pictures in</p> <p>3 existence, so that picture would become</p> <p>4 more popular or more high in demand. So</p> <p>5 I'm using the word popular in that context.</p> <p>6 Q. Mr. Sell, let's go to Section</p> <p>7 3b2, which begins at the top of page 36 of</p> <p>8 your report. And the heading of this</p> <p>9 section is, "The new license would have</p> <p>10 incorporated a revenue-sharing based</p> <p>11 royalty."</p> <p>12 And so in this context -- well,</p> <p>13 let's go back. The new license you're</p> <p>14 referring to here is what?</p> <p>15 A. I'd have to go back and look in</p> <p>16 context, I'm sorry.</p> <p>17 Q. Sure. That's all right.</p> <p>18 A. There is two aspects to this</p> <p>19 deal. One would have been the initial</p> <p>20 license, which we were discussing</p> <p>21 everything prior to that, and the initial</p> <p>22 license would have been Shepard Fairey, one</p> <p>23 of the associates contacting The Associated</p> <p>24 Press salesperson and saying I want to use</p> <p>25 this for X number of things for X amount of</p>	<p>179</p> <p>1 B. Sell</p> <p>2 subsequent contingencies, which would be</p> <p>3 basically a second license for the picture</p> <p>4 based on those contingencies.</p> <p>5 In this case, since no initial</p> <p>6 license was ever negotiated, since Shepard</p> <p>7 Fairey didn't go through the trouble to do</p> <p>8 that, you know, at this point we're talking</p> <p>9 about a first and second license which are</p> <p>10 done post facto, which are an entirely</p> <p>11 different problem.</p> <p>12 But if he had negotiated --</p> <p>13 again, I'm using Jarosz's example of what</p> <p>14 he thought the initial license would be and</p> <p>15 if there had been an initial license, which</p> <p>16 we know there wasn't, there would have had</p> <p>17 to have been a subsequent license.</p> <p>18 Q. All right.</p> <p>19 And when you say the new license</p> <p>20 would have incorporated a</p> <p>21 revenue-sharing-based royalty, what do you</p> <p>22 mean by revenue-sharing-based royalty?</p> <p>23 MS. RAY: Objection. Form.</p> <p>24 A. The same things we've been</p> <p>25 discussing all morning here, that every</p>
<p>178</p> <p>1 B. Sell</p> <p>2 time, and some sort of deal would have been</p> <p>3 structured based on that, the value again</p> <p>4 to Shepard Fairey of that project at that</p> <p>5 time.</p> <p>6 But since the project evolved to</p> <p>7 include many, many more things, a new</p> <p>8 license would have had to have been</p> <p>9 negotiated. So when I say a new license,</p> <p>10 I'm referring to a subsequent license.</p> <p>11 Now, in some cases, and I've done</p> <p>12 this in a fair amount, in some cases that</p> <p>13 second license might be built into the</p> <p>14 first license as a set of contingencies.</p> <p>15 So if a book publisher comes to</p> <p>16 license a picture, in the example we used</p> <p>17 before, a book publisher may not really</p> <p>18 know how popular a textbook is going to be,</p> <p>19 for example, yet they're publishing it on</p> <p>20 spec, you don't necessarily have a customer</p> <p>21 for it yet. They don't know how many</p> <p>22 universities or high schools it's going to</p> <p>23 be in.</p> <p>24 So you come up with a price and</p> <p>25 you bake into the initial contract</p>	<p>180</p> <p>1 B. Sell</p> <p>2 license is based on some understanding that</p> <p>3 the salesperson has of a value of their</p> <p>4 project to, in this case Shepard Fairey,</p> <p>5 since we're being specific here about</p> <p>6 Shepard Fairey.</p> <p>7 So Shepard Fairey would have come</p> <p>8 to the, on the phone, discussed with the</p> <p>9 sales rep that he was going to do X amount</p> <p>10 of things with this picture over X amount</p> <p>11 of time, and the salesperson would have</p> <p>12 said this is the amount that we think is --</p> <p>13 well, they would have discussed it</p> <p>14 internally, decided what the value of it</p> <p>15 was to Shepard Fairey and try to come up</p> <p>16 with a system based on that, or again using</p> <p>17 your example, they could have also</p> <p>18 negotiated with him an explicit or</p> <p>19 implicit -- explicit -- --</p> <p>20 Q. Expressed?</p> <p>21 A. Expressed revenue share. I</p> <p>22 forget the terminology we used.</p> <p>23 Q. So you're saying it could have</p> <p>24 been a baked-in revenue share, to use your</p> <p>25 phrase, or an express percentage revenue</p>



<p style="text-align: right;">181</p> <p>1 B. Sell</p> <p>2 share?</p> <p>3 A. But since it never took place --</p> <p>4 Q. Right.</p> <p>5 A. -- it could have been either-or.</p> <p>6 Q. So the word royalty doesn't have</p> <p>7 a particular meaning in this case?</p> <p>8 A. I mean every --</p> <p>9 Q. Is it --</p> <p>10 A. Royalty is a license. So I mean</p> <p>11 it could, I could have used a different</p> <p>12 word there, but it means the same thing.</p> <p>13 Q. Royalty here doesn't mean</p> <p>14 something different than licensing fee,</p> <p>15 it's not a term of art having a particular</p> <p>16 meaning in this context.</p> <p>17 MS. RAY: Objection. Form.</p> <p>18 A. No. I believe what I'm trying to</p> <p>19 say here is that either -- if there had</p> <p>20 been a second license, it would have been</p> <p>21 based on a revenue-sharing arrangement of</p> <p>22 some sort, whether it was expressed or not</p> <p>23 expressed, and there would have been</p> <p>24 revenue-based royalty paid for that I am</p> <p>25 imagine, or revenue-based license or</p>	<p style="text-align: right;">183</p> <p>1 B. Sell</p> <p>2 opposed to a lump sum base license.</p> <p>3 A. Uh-huh.</p> <p>4 Q. Do you see that, sir?</p> <p>5 A. Yes, I do.</p> <p>6 Q. So when you refer to a lump</p> <p>7 sum-based license, are you referring to a</p> <p>8 royalty-free license?</p> <p>9 A. No, I'm not.</p> <p>10 Q. What are you referring to?</p> <p>11 A. The Associated Press doesn't</p> <p>12 license its pictures as royalty-free.</p> <p>13 Q. Okay.</p> <p>14 A. So I'm using a lump sum as, in</p> <p>15 the same context we use it in the earlier</p> <p>16 footnote, when we first sat down, which was</p> <p>17 revenue is based on a baked-in</p> <p>18 understanding of the value to the customer</p> <p>19 and it would have been a fixed amount.</p> <p>20 If I could also add?</p> <p>21 Q. Please.</p> <p>22 A. Revenue sharing was something</p> <p>23 that Shepard Fairey had done with other</p> <p>24 photographers, based on the documents that</p> <p>25 I had seen, which I state in, I believe</p>
<p style="text-align: right;">182</p> <p>1 B. Sell</p> <p>2 whatever, however you want to express it.</p> <p>3 Q. In paragraph 138, you indicate</p> <p>4 that Shepard Fairey said he intended to</p> <p>5 sell commissioned artworks for as much as</p> <p>6 \$100,000 each.</p> <p>7 Do you see that, sir?</p> <p>8 A. Yes, I do.</p> <p>9 Q. And what statements by Mr. Fairey</p> <p>10 are you referring to there?</p> <p>11 MS. RAY: Objection. Form.</p> <p>12 A. This had to come out of</p> <p>13 depositions that I read. I assume -- I</p> <p>14 mean, I would assume it has to be somewhere</p> <p>15 in either his testimony or in Danziger or</p> <p>16 some of the other sources I found.</p> <p>17 Q. You don't have a specific</p> <p>18 recollection sitting here now?</p> <p>19 A. I didn't cite it, but I'm sure I</p> <p>20 didn't pull a number out of the area.</p> <p>21 Q. In paragraph 142, Mr. Sell, you</p> <p>22 refer to Ms. DeGrave's testimony that if a</p> <p>23 potential licensee planned to use an AP</p> <p>24 Images' photo to create merchandise, the AP</p> <p>25 may entertain a revenue share license as</p>	<p style="text-align: right;">184</p> <p>1 B. Sell</p> <p>2 it's 140 -- no, no, sorry, is that</p> <p>3 correct -- but I saw documents saying that</p> <p>4 Shepard Fairey had entered into</p> <p>5 revenue-sharing arrangements. So it didn't</p> <p>6 strike me as particularly peculiar that he</p> <p>7 would entertain that when Farah DeGrave</p> <p>8 mentioned that to me.</p> <p>9 Q. What do you know about the</p> <p>10 circumstances of those instances where</p> <p>11 Mr. Fairey agreed to a revenue share with a</p> <p>12 photographer?</p> <p>13 A. What I've read in reports by</p> <p>14 Jarosz and -- I'm sorry, what I've read in</p> <p>15 the reports --</p> <p>16 Q. Kudrowski?</p> <p>17 A. No, Zoltowski. Sorry. I got</p> <p>18 them mixed up.</p> <p>19 Q. Mr. Sell, do you have an expert</p> <p>20 opinion on whether Shepard Fairey's</p> <p>21 creation of the Obama HOPE image affected</p> <p>22 the value of the Obama photo?</p> <p>23 MS. RAY: Objection. Form.</p> <p>24 A. I mean, it's one of the things I</p> <p>25 was --</p>



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