

EXHIBIT B

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT
ART, INC.,
Plaintiffs,
vs. 1:09-CV-1123 (AKH)
THE ASSOCIATED PRESS,
Defendant/Counterclaim Plaintiff,
vs.
SHEPARD FAIREY, OBEY GIANT
ART, INC., OBEY GIANT LLC and
STUDIO NUMBER ONE, INC.,
Counterclaim Defendants.

VIDEOTAPED DEPOSITION OF BLAKE SELL
Thursday, December 2, 2010
9:27 a.m.

Reported by:
Joan Urzia

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23
24 (Continued)
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1
2 December 2, 2010
3 9:27 a.m.
4 New York, New York
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6 VIDEOTAPED DEPOSITION of BLAKE
7 SELL, held at the offices of Jones Day, 222
8 East 41st Street, New York, New York,
9 pursuant to Notice, before Joan Urzia, a
10 Notary Public of the State of New York.
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<p>161</p> <p>1 B. Sell 2 that George Clooney, who we all are 3 familiar with, but he had just won the 4 Academy Award a month earlier, and in fact 5 that year 2006 was People Magazine's 6 Sexiest Man Alive, so he carried a lot of 7 weight in the entertainment circle as well 8 as the news cycle. 9 So what I'm saying here is that 10 based on my understanding of the way AP 11 works, Manny Garcia was sent there, not 12 just to cover Obama -- I'm sorry, not just 13 to cover Clooney on the Darfur, but he was 14 sent there to try to see what else he could 15 shoot for the purposes of the archive and 16 any other purposes the AP could come up 17 with for pictures that could be derived 18 from that event. 19 Q. So are you saying that the Obama 20 photo is not related to the news worthiness 21 of the Clooney press conference itself? 22 MS. RAY: Objection. Misstates 23 his testimony. 24 A. I'm sorry, one more time? 25 Q. Sure.</p>	<p>163</p> <p>1 B. Sell 2 pictures transmitted, he was in a number of 3 them, but the only picture that he was by 4 himself was clearly not connected to the 5 story because it didn't relate to Darfur, 6 but it was part of the overall event. 7 That's a long answer and I 8 apologize for that, but it's best 9 explanation I can give you. 10 Q. Mr. Sell, moving ahead to the 11 next section, which I believe is 3B, and 12 specifically paragraph 127, and in 13 paragraph 127, you're referring to 14 Mr. Jarosz's opinion as recited in 15 paragraph 125 that The Associated Press 16 would have agreed to a flat-rate fee of 17 \$3,000 for all uses of the Obama photo by 18 Mr. Fairey. 19 And you say in paragraph 127 that 20 such a license would have been inconsistent 21 with industry practice. 22 Do you see that, sir? 23 A. Yes, I do. 24 Q. What is the industry practice 25 you're referring to in paragraph 127?</p>
<p>162</p> <p>1 B. Sell 2 Is your point that the Obama 3 photo, although taken by Mr. Garcia at the 4 Clooney press conference, does not itself 5 relate to the news worthiness of the press 6 conference? 7 MS. RAY: Objection. Form. 8 A. I mean, I think I can answer that 9 that when you go out to photograph a news 10 event, there is typically a tag or a hook 11 on that event. This particular tag was 12 Darfur and George Clooney. 13 So if a photographer had gone out 14 and returned from only one picture of that 15 event and it happened to be Senator Obama 16 by himself, he would not have done a good 17 job of covering the news of the day, which 18 was George Clooney speaking at an event 19 about Darfur. 20 So that in the context of the 21 hook, which was Darfur, George Clooney, 22 Obama was an extra character, one aspect of 23 the story but not the key aspect of the 24 story. So the fact that he was there was 25 part of the story, which is why of the 16</p>	<p>164</p> <p>1 B. Sell 2 MS. RAY: Objection to form. 3 Objection, misstates his report. It 4 speaks for itself. 5 A. If, in 125, if the picture had 6 been a royalty-free picture offered by a 7 library other than The Associated Press, so 8 it doesn't license its pictures that way -- 9 for example, iStockPhoto, which is a 10 company owned by Getty Images which 11 licenses nothing but royalty-free 12 pictures -- if that picture had been 13 available through iStockPhoto, they would 14 have licensed it as a royalty-free image 15 for whatever amount they licensed it for, 16 which could have been 30, or \$3,000 or 17 whatever the amount was. 18 But The Associated Press doesn't 19 license images that way for rights-managed 20 image, which is what this is. 21 So he's basically saying that the 22 AP would have licensed the picture as a 23 royalty-free picture, and they don't 24 license pictures that way. 25 Q. Well --</p>

<p>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>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>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>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>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>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>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>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>



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



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



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