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)

COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S OPPOSITION TO THE ASSOCIATED PRESS'S MOTION IN LIMINE NO. 1 TO EXCLUDE EXPERT GABRIELLE GOLDAPER UNDER RULE 702

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I. INTRODUCTION

Through this lawsuit, the Associated Press (the "AP") seeks to obtain millions of dollars in profits earned from the sale of clothing by Defendant One 3 Two, Inc. d/b/a Obey Clothing ("One 3 Two"), based on the AP's claim that One 3 Two infringed its copyright in a certain stock photograph of then-Senator Barack Obama by placing an image created by Shepard Fairey (the "Hope Poster"), on apparel One 3 Two sold. One 3 Two is entitled to "apportion" any such damages by presenting evidence that consumers purchased its merchandise for reasons other than the purported infringement. In support of its apportionment argument, One 3 Two has designated an apparel expert, Gabrielle Goldaper, whose testimony the AP now seeks to exclude by way of its Motion *in Limine* No. 1. The AP's arguments are not well founded—not in small part because Goldaper is the *only* one of the 12 experts designated by the parties who has any real experience in the apparel industry. In contrast to the parties' other damages experts, who have accounting backgrounds, Goldaper provides a different perspective that will assist the jury in understanding why people may have purchased the Hope Poster merchandise.

Goldaper has more than 50 years of experience in the clothing business. She started in sales at Federated Department Stores in 1959, while going to school at Barnard College, and eventually became an owner and executive at several large national apparel companies. She now teaches classes, and consults, using this wealth of knowledge. Over the past half century, Goldaper has learned why retailers and consumers buy clothes, and she has used this experience in assisting clients, and the U.S. Agency for International Development, in starting and reviving apparel companies. Based upon this experience, Goldaper has opined in this case that 0 (zero) percent of the sales of One 3 Two's merchandise are attributable to the protectible elements of the AP's photograph that Fairey referenced in creating the Hope Poster. Instead, she attributes the sales to

the general fervor and support for Obama during the relevant period, and consumers' desires to be part of that zeitgeist.

The AP's concerns about Goldaper's opinion boil down to questions about the *soundness* of her opinion, such as her decision not to conduct any consumer survey. Goldaper has good reasons for not undertaking such procedures: the clothing industry is quite different from others, and it would not be informative to survey consumers almost two years after they bought shirts with the Hope Poster image on them. In any case, these questions go to the weight of Goldaper's testimony, and should be addressed on cross-examination and by narrower means than by excluding the one expert in this case who knows anything at all about the apparel business.

II. GOLDAPER WILL PROVIDE TESTIMONY THAT IS RELIABLE AND WILL ASSIST THE TRIER OF FACT

Expert testimony is admissible 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 Federal Rule of Evidence 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. Questions regarding the soundness of an opinion, or its methodological underpinnings, go only to the *weight* of the evidence—not its admissibility. *Microfinancial, Inc. v .Premier Holidays Int'l, Inc.*, 385 F.3d 72, 81 (1st Cir. 2004) (no plain error in overruling objection based on scope of factual investigation).

A. Goldaper Bases Her Opinions Upon 50 Years Experience In the Apparel Industry

Goldaper, who is currently an instructor at the Fashion Institute of Design and Merchandising in Los Angeles, began her career in the apparel industry in 1959, working for

Federated Department Stores[1] in New York while attending classes at Barnard College. (Deposition of Gabrielle Goldaper ("Dep."), at 68:12-69:21.) In the early 1970s, Goldaper became the co-owner of an apparel company that sold dresses and sportswear to the retail market, Prisma Corporation, which she turned around from a company that could barely make ends meet to a $20 million-a-year company. *See* Exhibit A to the AP's Motion *in Limine* No. 1 ("Ex. A"); *see also* Dep. at 93:4-22 (describing that Prisma Corporation was losing money until Goldaper became part-owner, after which she turned it around into a $20 million-a-year company). Since the mid-1980s, she has held executive positions at numerous public and private companies in the apparel industry, the most notable of which was Speedo. *See id.* She has also consulted for the U.S. Agency for International Development, traveling to developing countries and assisting in setting up clothing factories, businesses, and trade associations. (Dep. at 80:22-81:24.)

In her 50-year career, Goldaper has gained specialized knowledge as to the buying habits of both the retail buyer and the end consumer. (Dep. at 202:10-21.) As Goldaper explained, the clothing industry is very different from other industries. Often a clothing company will decide to put a new item into its clothing line, without much time to test or probe its potential profitability, in order to take advantage of some fad or passing interest of consumers. (*See* Dep. at 241:1-244:12.) People who are successful in the industry have therefore learned to make decisions more "by the gut," than in other industries. *See id.*[2]

[1] Federated Department Stores is now known as Macy's Inc. and owns Macy's, Bloomingdales, and other large department stores.

[2] The AP makes much of Goldaper's acknowledgement that many decisions in the apparel industry are made "by the gut" as opposed to any scientific method. Rule 702 requires only that an expert have "specialized" knowledge, and 50 years of successfully creating and advising companies as to the buying habits of retailers and end consumers certainly counts as such, even if that advice is from the gut. The AP's derogatory description of Goldaper's testimony is particularly confounding as the AP's *accounting* expert, Kathleen Kedrowski, also seeks to rely on her "gut," even though (footnote continued)

Goldaper's experience in and knowledge of the apparel industry, and more specifically the buying habits of retailers and consumers, is precisely the sort of specialized knowledge that may be helpful for a trier of fact in a case where damages revolve around the profits earned on apparel. *See, e.g., Trouble v. The Wet Seal, Inc.*, 179 F. Supp. 2d 291 (S.D.N.Y. 2001) (finding expert testimony based on former experience as executive of a major chain of retail clothing stores to be sufficiently reliable to be admissible); *Hagale Indus., Inc. v. Lands' End, Inc.*, No. 00-3474-CV-S-4, 2002 WL 34365830 (W.D. Mo. Dec. 2, 2002) (qualifying opinion of expert based upon knowledge of the apparel industry and also permitting plaintiff to provide expert opinions based upon his own knowledge and experience in the apparel industry). Remarkably, Goldaper is the only designated expert in this case with any significant experience in the apparel industry. For that reason alone, she will be able to provide helpful information for jurors.

B. The Second Circuit Has Relied on Similar Expert Opinions in Apportioning Damages in Copyright Cases

As the Second Circuit first acknowledged more than 70 years ago, even where defendants are found liable for copyright infringement, they may seek to demonstrate that consumers purchased infringing goods for reasons that are not attributable to the infringement and thus limit the amount of profits to which plaintiffs are entitled. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939). This is particularly the case where, as here, the allegedly infringing work is derivative and highly original. 6 Patry on Copyright, § 22:147 (discussing *Sheldon*).

Sheldon involved a movie, *Letty Lynton*, that was based on a copyrighted play. Defendants sought to limit their damages by presenting the opinions of industry experts (movie producers and movie distributers), who testified that the infringement of the copyrighted play contributed a small

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the accounting profession is hardly one in which professionals can rely only on their personal feelings. This issue is discussed in greater detail in One 3 Two's Motion *in Limine* No. 1.

fraction of the sales of the movie; they opined that the sales were mostly based on the popularity of the actors (Joan Crawford and Robert Montgomery), the skill of the producers and directors, and the scenery and costumes, among other factors. *Id.* at 50. These opinions do not appear to have been based on any surveys or empirical studies, but rather on the experts' industry experiences. *See id.* After noting that plaintiffs had failed to present any industry experts of their own, the Second Circuit awarded just one-fifth of the net profits, which was slightly more than the experts had opined, to be sure that the award was not "too small." *Id.* at 51.

The Second Circuit again relied on the testimony of industry experts to apportion damages in *Sygma Photo News, Inc. v. High Society Magazine, Inc.*, 778 F.2d 89 (2d Cir. 1985). *Sygma* involved a claim of copyright infringement due to the use of a photo of the actress, Raquel Welch, on the cover of a men's magazine. Defendants argued that the cover photo of Ms. Welch (in the buff) only partially contributed to the sales of the magazine, and put forward expert testimony regarding the importance of cover photos to a purchasing consumer. *See id.* at 94. The testimony, which had been adduced in a previous case involving the same magazine, included opinions from the president of a national distributor of magazine as to what makes the "typical man looking to buy a men's magazine" decide to purchase a particular issue. *Id.* (opining that "it would not make much difference" whether there was a female celebrity on the cover as opposed to an unknown woman); *see also id.* at 95 (discussing plaintiff's expert's testimony that the "decision to buy or not is . . . made as an emotional response, usually in a matter of seconds"). In *Sygma*, the district court had concluded that the holder of the copyright in Raquel Welch's photograph was entitled to 75 percent of the profits from the sale of that particular issue of the magazine; the Second Circuit found that analysis to be "radically inconsistent with the expert testimony," and so reversed. *Id.* at 96.

Goldaper offers precisely the same type of industry savvy and experience as the experts in *Sheldon* and *Sygma*. Her opinion is that the elements of the Garcia Photograph that are protected by copyright did not contribute or add any quantifiable value to the design of the merchandise sold by One 3 Two, and thus the AP should be entitled to 0 percent of the profits from the sale of such merchandise. Ex. A, ¶ 1. Instead, she opines that the reason the Obama Merchandise was so successful was primarily because it featured a likeness of then-Senator Barack Obama, and consumers were motivated to purchase the clothing with his likeness on it because it filled an emotional need for consumers and allowed them to feel fashionable.[3] Ex. A, ¶ 25. This opinion would be helpful for the trier of fact to consider.

The AP objects to Goldaper's opinion in part based upon its disagreement with the statement of law that was provided to Goldaper with regard to what constitutes a protectible element. As One 3 Two has argued in other motions, it believes that the AP is incorrect in *its* statement of the law. *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001) ("Copyright protection extends only to those components of a work that are original to the author . . . ."); *Psihoyos v. The National Geographic Society*, 409 F. Supp. 2d 268, 275 (S.D.N.Y. 2005) (protectible elements of a photograph may include posing the subjects, lighting, angle, selection of the film and camera, evoking the desired expression, background, perspective, shading, and color).

Even if there were some additional protectible element or portion of the photograph that Goldaper did not consider, however, that does not make her opinion unhelpful. Indeed, the *Sygma* Court expressly concluded that "want of precision is not a reason for denying apportionment altogether." 778 F.2d at 95. Rather than exclude Goldaper's testimony altogether—which would

[3] The basis of Goldaper's opinions—focusing on her understanding of the reasons why consumers buy clothing—is remarkably similar to the plaintiff's expert's opinion that was admitted in *Sygma*.

mean that no experts in the case would have any specialized knowledge about the clothing industry—the proper result would be to allow the AP to cross-examine Goldaper as to what weight she gives any other elements that are deemed protectible.[4]

C. Goldaper's Analysis Is Reliable and Based Upon Her Knowledge and Experience

An expert's opinion is deemed to be sufficiently reliable if the expert's conclusions are based upon the knowledge and experience of her discipline rather than "subjective belief and unsupported speculation." *Daubert v. Merrell Dow Pharmceuticals, Inc.*, 509 U.S. 579, 590 (1993). Because "[t]oo much depends upon the particular circumstances of the particular case at issue," the district court has broad discretion in determining the relevant factors to be employed in assessing reliability and in determining whether the analysis is in fact reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150-51 (1999).

Goldaper testified that the apparel industry remains fairly unscientific and run by the "gut"; companies must make decisions on the fly, and successful clothing professionals can identify what will make one item of clothing successful, and what will result in clothes left hanging on clearance racks. In addition to an experienced "gut," however, Goldaper also relied on recognized principles as to consumers' motives for purchasing apparel, as set forth in the textbook, *Fashion from Concept*

[4] Goldaper offers a second opinion that clothing companies generally incur greater overhead costs when they produce merchandise that is intended to be given away for charitable purposes. One 3 Two only intends to seek to introduce this opinion for a limited, narrow purpose. Should the AP introduce evidence regarding One 3 Two's internal, projected calculation of overhead when determining how much money to put toward projects—called the Obama Special Projects—intended to help the Obama campaign, Goldaper's second opinion will explain why One 3 Two's internal projections were higher than what the actual overhead turned out to be. One 3 Two will object to the AP's introduction of any such evidence, which is irrelevant, and confusing to boot. Accordingly, this Court need not make any determination about this second opinion unless and until the other evidence is admitted.

to Consumer, in arriving at her opinion. Ex. A, ¶ 18. That there are published guidelines supports the reliability of Goldaper's analysis. *Daubert*, 509 U.S. at 591.

Moreover, Goldaper's opinion is based on the very same personal experiences that underlie the admitted opinions in *Sheldon* and *Sygma*. Similarly, in *Semerdjian v. McDougal Littell*, 641 F. Supp. 2d 233 (S.D.N.Y. 2009), this District allowed the testimony of a school administrator, who opined in a copyright case that the infringed work (an illustration) contributed 0 (zero) percent to the sales of the infringing merchandise (a textbook). *Id.* at 245. The administrator, who had two decades' experience in selecting textbooks for several school districts, testified that schools do not purchase the textbooks in question based upon the illustrations they contain. *Id.* Goldaper similarly explained that consumers would not buy T-shirts because of the background, angle, or lighting in the Garcia Photo (even assuming that they were copied in the Hope Poster image).

The AP makes a number of complaints about Goldaper's opinions that, at base, question only the *soundness* of her opinions and the nature of her methodologies. For instance, the AP points out that Goldaper did not perform any empirical studies or surveys. As Goldaper explained, she probably would have performed some of the analyses suggested by the AP had the Obama Merchandise still been on sale (or about to be marketed) at the time of this lawsuit: she would have visited stores and spoken to salespersons and customers. (Dep. at 238:1-240:11.) Based upon her 50 years in the industry, however, she was aware that it would not be helpful to try to interview salespersons or customers given the passage of time, since the last sale of Obama Merchandise was more than a year before she was even retained. *See id.*

The clothing industry moves too quickly for stale surveys to be reliable. Goldaper understood that, whereas an expert who is simply conducting surveys or interviewing salespersons might not. *Cf. Loussier v. Universal Music Group, Inc.*, No. 02 Civ. 2447, 2005 WL 5644422 (June

28, 2005) (excluding Kathleen Kedrowski—who happens to be the AP's damages expert in this case—as apportionment expert in case involving copyrighted music because she had no experience in the music industry but instead sought to rely on empirical analyses).

At best, the AP's attacks only go to the weight of Goldaper's opinions, not their admissibility. *Semerdjian* 641 F. Supp. 2d at 245 (stating that any weaknesses in expert's experience or process could be covered by cross-examination). Accordingly, to the extent the Court has any question about Goldaper's methodologies, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of attacking her opinions. *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (quoting *Daubert*); *see also Primrose Operating Co. v. National Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) ("It is the role of the adversarial system, not the court, to highlight weak evidence.").

III. CONCLUSION

For the reasons stated herein, the Court should deny the AP's motion to exclude One 3 Two's expert Gabrielle Goldaper. Were the Court to consider excluding Goldaper, One 3 Two requests that the Court hold a hearing pursuant to Federal Rule of Evidence 104 in which Goldaper may testify and make clear that she will be helpful for the trier of fact.

Dated March 4, 2011
Los Angeles, California

Respectfully Submitted,

By: /s/ Robyn C. Crowther

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