

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. 4 TO EXCLUDE CERTAIN
TESTIMONY OF NEIL ZOLTOWSKI**

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I. INTRODUCTION

There is no dispute that actual damages in this case are properly measured by considering the fair market value of the Associated Press's (the "AP") hypothetical lost license fee, and both parties have designated experts for the purpose of assessing these damages. Although the AP purports to rely on Getty Images' licensing practices as a guide for its own licensing practices, the AP seeks to preclude One 3 Two, Inc. d/b/a Obey Clothing's ("One 3 Two) expert, Neil Zoltowski, from considering Getty Images' online licensing system as part of his actual damages assessment. In the Expert Report of Neil Zoltowski ("Zoltowski Report"), Zoltowski carefully considers a number of license agreements and the AP's pricing guidelines which were produced in this litigation, as well as information derived from Getty Images' website. Based on his thorough analysis, Zoltowski concludes that any hypothetical license fee would have been based on a fixed flat fee and would not be royalty-based. Tellingly, *the AP's own expert also relies on Getty Images' practices* and reaches the opposition conclusion, finding that the hypothetical lost license in this case would have included a royalty-based component. Thus, the AP seeks to rely on certain of Getty Images' supposed practices to support its computation of actual damages but seeks to preclude One 3 Two from doing the same. The AP cannot have it both ways. If the AP intends to rely on Getty Images to support its conclusion that any hypothetical lost license fee would have been royalty-based, One 3 Two is entitled to offer evidence that rebuts this conclusion. Moreover, the AP's assertion that Zoltowski's reliance on Getty Images was improper goes to the weight, and not the admissibility, of his purported testimony, and it should not be precluded.

II. ZOLTOWSKI'S CONSIDERATION OF GETTY IMAGES' ONLINE LICENSING SYSTEM IS REASONABLE AND PROPER

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. While an expert’s opinion must be reliable to be admissible, “[a] minor flaw in an expert’s reasoning or a slight modification of an otherwise reliable method will not render an expert’s opinion *per se* inadmissible.” *Barrera v. Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400, 409 (S.D.N.Y. 2004). “Although expert testimony should be excluded if it is ‘speculative or conjectural,’ if it is ‘based on assumptions so unrealistic and contradictory as to suggest bad faith,’ or if it is ‘in essence an apples and oranges comparison,’ ‘other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.’” *Id.*

Pursuant to Rule 703, the facts that form the basis for an expert’s opinions or inferences need not be admissible in evidence “[i]f of a type reasonably relied upon by experts in the particular field.” *See* Fed. R. Evid. 703. In calculating the hypothetical lost license fee for the use a photograph, it is reasonable for an expert to rely on factors such as the type of use, size of use, and circulation and the type of media in which the photograph is reproduced, and to consider “the documents, photographs, and websites” that are relevant to the case. *See, e.g., Barrera*, 346 F. Supp. 2d at 409-410 (expert considered type of use, size of use, circulation and the type of media in which the photograph was reproduced in addition to documents, photographs and websites relevant to the action in calculating the reasonable license fee for the use of a photograph); *see also Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 359 (S.D.N.Y. 2003) (noting that instances of past licensing can serve as a benchmark for measuring the fair market value of a reasonable license fee and rejecting expert’s attempt to value the plaintiff’s lost license fee at an amount far greater than

past fees charged); *On Davis v. The Gap, Inc.*, 246 F.2d 152, 161 (2d Cir. 2001) (finding that actual damages could be based on a royalty fee actually paid to the plaintiff in the past).

Zoltowski is a financial and economic consultant retained by One 3 Two to offer an opinion regarding actual damages (*i.e.* the AP's hypothetical lost licensing fee). *See* Exhibit A to the AP's Motion, Zoltowski Report. He meets the criteria for an expert under Rule 702, as he has extensive experience providing economic valuation of intellectual property and has earned the Accredited Valuation Analyst ("AVA") and Certified Forensic Financial Analyst ("CFFA") designations granted by the National Association of Certified Valuation Analysts ("NACVA"). *Id.* at ¶ 1. He has also earned the Certified Licensing Professional ("CLP") designation from the Licensing Executives Society USA and Canada, Inc. ("LES"). *Id.*

The opinions expressed in Zoltowski's report are admissible under Rules 702 and 703. Consistent with the typical method for calculating damages based on a lost license fee, Zoltowski considered "the documents, photographs, and websites" in this case in formulating his opinion. *See, e.g., Barrera*, 346 F. Supp. 2d at 409-10. In particular, he relied on the historical licensing practices of the AP as reflected in the licensing agreements and the AP's pricing guide produced in this litigation and additionally considered information publicly available on the internet relating to Getty Images' online licensing system. *See* Exhibit A to the AP's Motion, Zoltowski Report at ¶¶ 17-48. As explained below, Zoltowski's consideration of Getty Images' practices was in response to the AP's representations that it considers Getty Images' practices in pricing its own licenses. Thus, Zoltowski's method was reliable and properly applied to the facts of this case. Accordingly, to the extent that the information Zoltowski located on the Getty Images website is hearsay, his reliance on that information was nevertheless proper pursuant to Rule 703.

A. *The AP Has Represented That It Considers Getty Images' Licensing Practices*

The AP has repeatedly represented that it considers Getty Images' licensing practices as a guide for its own licensing practices. For example, Farah DeGrave, the AP witness designated as most knowledgeable on the topic of licensing, testified at her deposition that AP sales representatives at times relied on Getty Images' website. *See, e.g.*, Exhibit A, Deposition of Farah DeGrave at 133:18-22 (“If I was at a client’s location, I would say why don’t we jump on the Getty site and see what they are charging. And we would come up with a price, you know, that was similar to that.”) and 138:19-22 (“And we would definitely use the Getty site as a reference to say, well, what is the industry charging for this right now”). In addition, the AP’s expert, Blake Pembroke Sell, purports to rely on Getty Images’ practices to support his opinion that the AP would have entered into a royalty-based license in this case. *See* Exhibit B, Expert Report of Pembroke Blake Sell at ¶ 101 (“It is my understanding that The Associated Press’ strategic business model is premised on emulating the business models of its key competitors such as Getty Images”) and ¶ 90 (“Deals that I designed or managed while director in Business Development at Getty Images were commonly structured around revenue share deals with resellers, content partners, content publishers and content creators.”). Thus, the AP itself attempts to rely on Getty Images’ practices in support of its actual damages calculation.¹ Significantly, however, the AP’s reliance on Getty Images to support its argument that a royalty-based license would have been appropriate is not supported by the admissible evidence in this case, which demonstrates that a flat rate fee license would have instead been appropriate.

¹ In its Motion, the AP claims that “Getty Images’ online licensing system is wholly at odds with the AP’s own licensing practices...” Motion at 5. Aside from the fact that this statement is contradicted by DeGrave’s testimony and the evidence produced in this case, it is also inconsistent with the AP’s attempt to rely on Getty Images’ supposed practices to the extent they support the AP’s claim that a royalty-based fee would have been appropriate here.

B. There is No Admissible Evidence to Support the AP's Argument That the Hypothetical License Fee the AP Would Have Charged Would Have Been Royalty-Based

There is no admissible evidence to support the AP's argument that the hypothetical license fee that the AP would have charged One 3 Two would have had a royalty-based, revenue-sharing component. *See* Exhibit A to AP's Motion, Zoltowski Report at ¶ 54. Nor does Getty Images' online licensing system support the AP's argument in this regard. As explained in the Zoltowski Report, the license prices generated by Getty Images' online system are comparable to the applicable AP license agreements which are based on flat rate fees and which have been produced in this case. *See id.* In contrast, Getty Images' supposed royalty-based approach, which the AP argues serves as a basis for comparison, is not consistent with any of the AP's historical license agreements produced in this case.

Having reviewed DeGrave's representations at her deposition regarding the AP's reliance on Getty Images, Zoltowski examined Getty Images' website in conducting his analysis of the AP's hypothetical lost license fee. In doing so, Zoltowski compared the actual, historical fees the AP charged for comparable licenses to the license fee generated by Getty Images' online pricing system, and determined that Getty Images' online pricing was in line with the AP's practices as reflected by the admissible documents and testimony. *See* Exhibit A to AP's Motion, Zoltowski Report at ¶¶ 23-48. For example, in December 2008, Obey Giant Art and the AP entered into a license agreement for use of a photograph of a Palestinian Woman peering from a balcony ("Palestinian Woman Photo"). *Id.* at ¶ 34. That license agreement consisted of two components:

- i Payment of \$590 for "one time non-editorial usage, up to 5000 t-shirts, 1 year distribution only, no additional rights granted; and

- i Payment of \$387 for “one time non-editorial usage, up to 500 pieces for use on limited edition illustrated prints, up to 5 years distribution, no additional rights granted.

Id. Using Getty Images’ website, Zoltowski assessed the price of a license under considerations and criteria similar to the Palestinian Woman license (*i.e.* one year, non-exclusive U.S. rights to make up to 5,000 t-shirts for retail use to promote political views) and the price generated by Getty Images was \$590—the same price actually charged by the AP for the Palestinian Woman license in December 2008. *Id.* at ¶ 47, n. 74. Accordingly, as explained in his report, Zoltowski reasonably concluded that the Getty Images pricing had not changed materially since the time period when the parties would have entered into the hypothetical license and that it was similar to the prices charged by the AP at that time:

I have utilized the current pricing from the Getty Images website for purposes of this analysis under the assumption that Getty Images’ pricing has not changed materially since the time period when the parties would have entered into these license agreements. The Getty Images agreements discussed above (*i.e.* Johnny Cash, John Lennon) provide support for this assumption. Additionally, a search of the Getty Images website under the considerations and criteria similar to the Palestinian Woman license results in the exact same price of \$590 (see footnote 74).

Id. at ¶ 46, n. 72. Accordingly, Zoltowski’s methodology and reliance on Getty Images’ online pricing system was reasonable and sound, and it supports One 3 Two’s position that a flat rate fee for a license would have been appropriate.

C. Zoltowski’s Consideration of Getty Images’ Practices Goes to the Weight, Not the Admissibility, of His Testimony

In any event, Zoltowski’s consideration of Getty Images’ website goes to the weight, rather than the admissibility, of his testimony in this regard. Whether Getty Images’ online pricing system may or may not have changed slightly between 2008 and 2010 is irrelevant and beside the point.

Barrera, 346 F. Supp. 2d at 409 (noting that a minor flaw in an expert’s reasoning will not render the opinion inadmissible). What is relevant is that the AP seeks to rely on Getty Images’ practices

to support its computation of actual damages but seeks to preclude One 3 Two from doing the same. The AP cannot have it both ways. If the AP intends to rely on Getty Images to support its conclusion that any hypothetical lost license fee would have been royalty-based, One 3 Two is entitled to offer evidence that rebuts this conclusion. Zoltowski's reliance on Getty Images' online pricing system— which generates fixed, flat fee licenses similar to the license agreements historically entered into by the AP— demonstrates the weakness of the AP's argument. Thus, the AP's assertion that Zoltowski's reliance on Getty Images was improper goes to the weight, and not the admissibility, of his purported testimony, and it should not be precluded. *Barrera*, 346 F. Supp. 2d at 409.

III. CONCLUSION

For the reasons stated herein, the Court should deny the AP's motion to exclude certain testimony of Neil Zoltowski.

Dated March 4, 2011
Los Angeles, California

Respectfully Submitted,

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