

EXHIBIT B
TO ONE 3 TWO, INC.'S
OPPOSITION TO THE AP'S
MOTION IN LIMINE NO. 4

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Civil Action No. 09-01123(AKH)

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

**Expert Witness Report of
Blake Pembroke Sell**

CONFIDENTIAL: SUBJECT TO PROTECTIVE ORDER

EXHIBIT B TO ONE 3 TWO'S

CONFIDENTIAL | Page 1

**OPPOSITION TO AP'S
MOTION IN LIMINE NO. 4**

Marines in a licensing deal that reached \$150,000 after evolving to include Web rights, video distribution and a one month embargo from licensing the image to other customers.

88. In December 2001 while managing Sipa Press, I licensed a picture of the “shoe bomber” Richard Reid that was taken by a passenger on American Airlines Flight 63, to a number of organizations, including the *New York Times* and several television networks. That deal involved a complex renegotiation of rights including multiple extensions of 24-hour usage periods, web rights, and agreements of use by the networks and their affiliates. The total revenue from these deals was more than \$100,000; the deal with the *New York Times* alone resulted in a payment of \$10,000.

89. During my time at Sipa Press and World Picture News, many of the images that we licensed to the major news magazines involved the magazines returning to license the image for additional uses, including use in their foreign publications, for their websites, or for use in year-end editions or other supplemental publications.

90. Deals that I designed or managed while director in Business Development at Getty Images were commonly structured around revenue sharing deals with resellers, content partners, content publishers and content creators. The typical arrangement called for Getty Images to receive a pro-rated portion of the partner’s revenue, based on the amount of Getty Images content included in their products.

91. Another common scenario involving multiple licenses or a multi-scenario license for the same image to the same customer involves book publishers. Many book publishers, especially text book publishers, do not initially know how many copies of a book will be published, how many editions of the book will be made, if the book will be in hardback and paperback, if the book will be translated and published in multiple languages or if the book will be distributed in multiple world regions. As and when each of these questions is answered, the license is modified or additional licenses are granted, each charging an additional fee.

92. In my experience, the fees for such additional licenses are calculated based on the sales representative’s estimation of what the particular use is worth – *i.e.*, how much revenue it likely will generate for the customer.

copies each. We ultimately negotiated a royalty due to Getty Images of 17% of gross sales.

99. In the opposite situation, where the image is to be used on a large number of units that will be sold at a low price per unit, the royalty rate per unit tends to be lower with the idea that the photo archive would be compensated based on higher volume.

100. I structured or managed a number of commercial partnership deals at Getty Images that involved delivery of Getty Images content for use in partner products. Among the deals that I handled was a 2006 deal with a startup Los Angeles-based company. Under the terms of that deal, Getty Images captured 30% of the company's profit from their sales, which resulted in a royalty of roughly 10% of the company's total sales based on an average profit margin of 20-30%.

I. The Associated Press' License Pricing Structure

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, my former employer, as evidenced by, among other things, hiring away key personnel with experience working for competitors and greatly expanding its sales team.⁶²

102. A key component of the AP Images business model is to move toward pricing that is both (i) more in line with the generally higher prices charged by competitors such as Getty Images and Corbis and (ii) based directly or indirectly on a revenue-sharing arrangement.⁶³

103. As discussed above, prospective commercial customers are required to contact an Associated Press sales representative and discuss the nature and scope of the project at hand.

104. Once this relationship is established, the customer's project is managed based on how the project evolves. It is common for a customer to obtain multiple licenses for

⁶²In order to obtain high-level expertise, The Associated Press hired key personnel with experience at Getty Images, the industry leader, including Ian Cameron as VP of AP Images, Laura Malone as Intellectual Property legal counsel, Farah DeGrave as manager of sales operations, in addition to 18 additional sales persons for AP Images. Interview with F. DeGrave, Oct. 1, 2010.

⁶³F. DeGrave (Mar. 23, 2010) Tr. at 120:6-14 and Ex. 12 (AP 0005572-5602).