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Attorneys for Plaintiff
THE ASSOCIATED PRESS

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

THE ASSOCIATED PRESS,

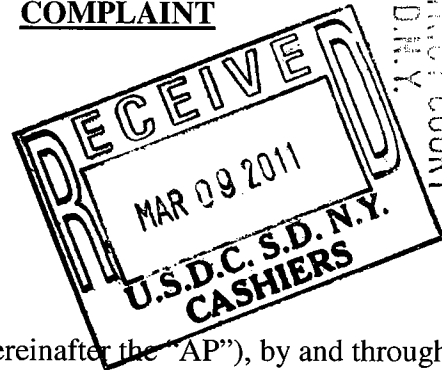
Plaintiff,

v.

ZUMIEZ, INC.,

Defendant.

COMPLAINT



U.S. DISTRICT COURT
S.D.N.Y.
11/03-9 PM 6:38
11/03/11

Plaintiff The Associated Press (hereinafter the "AP"), by and through its attorneys, Kirkland & Ellis LLP, for its Complaint against defendant Zumiez, Inc. ("Zumiez"), hereby states as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

1. The AP's claims arise out of Zumiez's willful and blatant violation of the AP's copyright in a photograph of President Obama, taken by the AP staff photographer Mannie Garcia in April 2006 (the "Obama Photo").

2. Zumiez has used the Obama Photo without The AP's consent in violation of the Copyright Act of 1976, as amended. Namely, Zumiez has violated the AP's exclusive rights in the Obama Photo by distributing and selling t-shirts bearing an infringing image of Barack Obama (the "Infringing Work") that was made by an artist named Shepard Fairey. Mr. Fairey used the Obama Photo without the AP's permission in making the Infringing Work.

3. The Infringing Work copies all the distinctive and unequivocally recognizable elements of the Obama Photo in their entire detail, retaining the heart and essence of The AP's photo, including but not limited to its patriotic theme. As the following side-by-side comparison illustrates, the striking similarity between The AP's copyrighted Obama Photo (displayed below on the left) and the Infringing Work that Zumiez used (displayed below on the right), is patently obvious:



The AP's Obama Photo

The Infringing Work

A true and correct copy of this side-by-side comparison is attached as **Exhibit A**.

4. Upon information and belief, Zumiez has distributed and sold infringing T-shirts using the Infringing Work (the “Obama Tees”). Upon information and belief, Zumiez purchased the Obama Tees from a California-based clothing company called One 3 Two, Inc., which does business under the name Obey Clothing (“Obey Clothing”).

5. Upon information and belief, Zumiez has earned substantial sums from the sale of the sale of the Obama Tees.

6. A consumer viewing the Obama Tees would readily recognize the Infringing Work depicted on the Obama tees as having been copied from the Obama Photo.

7. The Infringing Work does not alter any of the distinctive characteristics that make the Obama Photo so striking. All the recognizable elements remain completely and unmistakably intact in the Infringing Work, including the angle and slant of President Obama’s head and his gaze and expression; the contrast, focus, and depth of field of the photograph; as well as the shadow lines created by the lighting in the original photo. The Infringing Work even uses the red, white and blue flag imagery that is captured in the background of the AP’s photo. Nothing excuses Zumiez’ distribution and sale of derivative works based on the Obama Photo without first obtaining a license to use that photograph from the AP.

8. In light of Zumiez’s willful, unauthorized use of the AP’s Obama Photo, the AP asserts claims for damages based on copyright infringement under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq.

PARTIES

9. Plaintiff the AP is a New York not-for-profit corporation with its principal place of business at 450 West 33rd Street, New York, New York 10001. The AP is one of the largest and oldest news organizations in the world, serving as a source of news content in all formats — text, photos, graphics, audio, video and multimedia.

10. Upon information and belief, defendant Zumiez is a Washington State corporation with its headquarters in Everett, Washington. Also upon information and belief, in addition to its website located at <zumiez.com>, Zumiez operates more than 400 retail stores located throughout the United States, including in this District.

JURISDICTION AND VENUE

11. This action asserts claims arising under the Copyright Act, 17 U.S.C. § 101 *et seq.* This Court has federal question jurisdiction over the AP's claims pursuant to 28 U.S.C. §§ 1331, 1338(a) and 1338(b).

12. Upon information and belief, this Court has personal jurisdiction over Zumiez because it transacts business in New York. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c).

FACTUAL BACKGROUND

The AP

13. The AP is one of the oldest, largest and most highly-regarded news organizations in the world. Founded in 1846, today it operates as a not-for-profit membership cooperative that gathers and distributes to news outlets worldwide news and information that is informative, educational or otherwise of public interest.

14. To support its worldwide news mission, the AP employs approximately 3,800 people in approximately 240 locations around the globe, providing thousands of newspapers, radio stations, television stations, news agencies, Web services, government and corporate clients with high-quality news around the clock in the form of text, photos, graphics, audio and video. On any given day, the AP's content can reach more than half the world's population through its members and clients.

The AP's Photography

15. News photography is an art form that requires skill, artistic judgment, dedication, countless hours of preparation and imagination. The AP's photographers document world events every day through a creative and painstaking journalistic process. Before the AP ever publishes a photograph, it first selects events for journalists to report on and capture, carefully chooses visual elements that will help create a compelling image, composes the relevant visual aspects of a story (based on experience, training and judgment), selects "the" image or images from multiple options and edits it to tell the full story.

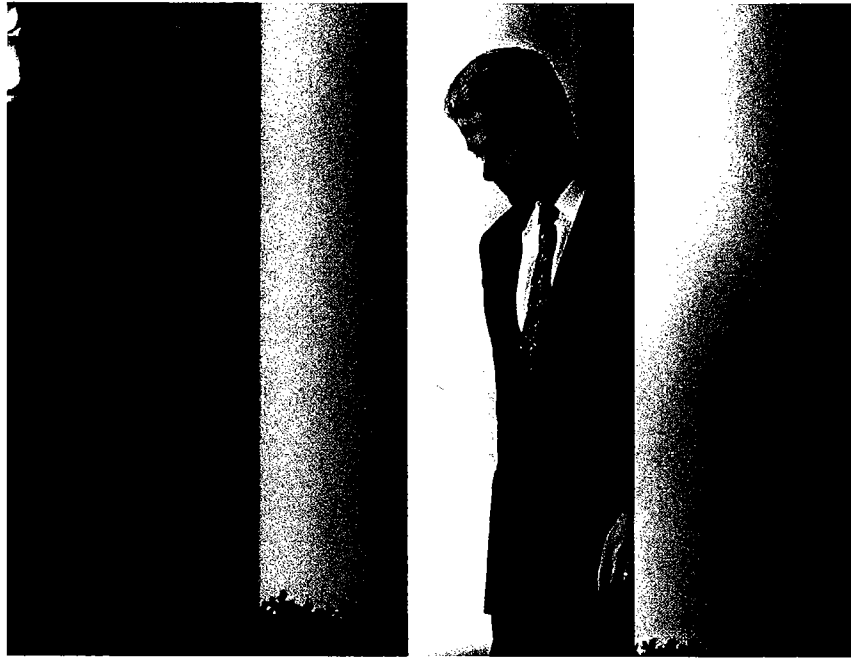
16. The AP's photographers capture iconic and newsworthy images through their thoughtful creative process, judgment and expertise. While photographing events, they carefully seek out those elements that might make a compelling photograph that also is relevant to the story at hand. Such elements include the choice of camera and lens, the timing and selection of subject matter, the angle, lighting and shadows, depth of field, color contrast, symmetry, scale and focus, as well as capturing peak action, emotion, or any number of other unique visual elements. It requires the creative talent and ability of the individual photographer to recognize these elements and find a way to create a compelling photograph.

17. The AP has a rich tradition of covering more than a century and a half of American politics. For example, the AP is one of the few contemporaneous sources of the text of Abraham Lincoln's Gettysburg Address. And the AP's photography is synonymous with some of America's most historic moments, often capturing highly original elements in otherwise familiar subjects. The AP Presidential Exhibit commemorates more than 80 iconic photographs of past U.S. Presidents and their families, including unforgettable photos of the Reagans, the Bushes (I and II), the Clintons, and the Obamas, among others. See <<http://www.ap.org/americanpresident/>>.

18. With respect to politicians, in particular, because they are photographed almost every day, it takes skill and imagination to photograph them in a way that captures and conveys a compelling story.

19. Among the AP's many distinctive photographs are those covering political events and campaigns. One such example is Scott Applewhite's photograph (depicted below) of President Clinton, taken as he walked to a podium in the Rose Garden of the White House in 1998 to deliver a short statement about the then-impending impeachment inquiry. Although the photograph depicted a public figure in a public and familiar setting, and was covered by the White House Press Corps, Applewhite was able to capture in a single image the enormous impact of the Monica Lewinsky affair on President Clinton as a person as well as a politician. The President had just emerged into view from behind the pillars of the White House, his somber expression punctuated by the long shadows and his just-visible wedding band. It is a foreboding image of a Presidency nearly ended by the shadow of an extra-marital affair. Mr. Applewhite "spotted this angle as photographers were moved to a camera platform and then hung

back from the pack waiting for the right moment as President Clinton moved towards [the] podium.” See Brian Horton, Guide to Photojournalism 33 (2d ed. 2001).



20. Another example of the AP’s rich history of photographing presidents is shown in the photograph depicted below of former Presidents John Kennedy and Dwight Eisenhower in Camp David as they walked away from a posed photo op to discuss problems created by the Bay of Pigs invasion. The AP’s Paul Vathis took this photograph, a photograph that transcends time, through the use of extraordinary skill, observation, planning and persistence. After the Press Secretary had declared no more pictures, and other photographers started packing their gear, Mr. Vathis observed the two presidents walking away. He quickly conceived the image in his mind and skillfully managed to take the shot through the legs of a Secret Service Agent.



21. As these examples demonstrate, the AP's photographs speak to their audiences in a way that words simply cannot — by conveying visually a unique narrative captured at a specific moment in time.

22. The outstanding quality and significance of the AP's efforts has been recognized over the years with numerous awards, including 49 Pulitzer Prizes to date. Of these, 30 have been awarded to the AP for its photographic work. The AP has also earned myriad other awards for its photography.

23. Because the AP's content is of such high quality and significance and its reports provide such essential information to the public at large, potential users of its content are prepared to pay, and do pay, fair consideration for the right to use the AP's works. A vast array of customers under a variety of commercial arrangements directly or

indirectly license from the AP the right to access and use its content across a variety of media, genres, geographies and languages. Some of these customers have licensed rights in and to the AP's content for over a century.

24. The talent, skill and effort required to create compelling still images has fostered a vibrant market for professional photography, one on which many photographers have come to rely for their livelihoods. In addition, many content providers, whether news or entertainment in nature, rely on this revenue to support their activities. The AP's licensing program not only allows it to continue operating its full scale, robust and dependable newsgathering services worldwide, but it enables the AP to pursue efforts protecting the First Amendment and guaranteeing public access to open government on the local, state and federal levels.

The Obama Photo

25. On March 29, 2006, the AP hired Mannie Garcia as a full-time, salaried staff photographer. While working as a staff photographer in April 2006, Mr. Garcia covered an event at the National Press Club headlined by actor George Clooney, who spoke about his then-recent visit to war-torn Darfur and released video footage from his trip. The event was also attended by, among others, then-Senator Sam Brownback and then-Senator Barack Obama, long before he announced his candidacy for the Presidency. Senators Brownback and Obama had co-sponsored a bill, titled The Darfur Peace and Accountability Act, which sought to increase funding for peacekeeping operations in Sudan.

26. The focus of the contemporaneous coverage of the event — and indeed the headline and text of the AP's story that day — was Mr. Clooney's

involvement with, and recent trip to, Darfur. Mr. Garcia, however, also focused on then-Senator Obama for several of his photographs, positioning himself in such a way that he was able to illustrate the charismatic junior Senator at a unique and expressive angle against the patriotic backdrop of the American flag.

27. In one of the photographs he took that day, Mr. Garcia consciously and deliberately captured now-President Obama at a specific moment in time, one for which he had patiently waited. The unique composition, angle, center of focus, framing, and depth of field, along with the particular reflection of light, shadow lines and contrast, combined with the particular type of lens that Mr. Garcia chose, created a unique image of President Obama, his head slanted slightly to the left, his chin lifted and his eyes fixed off into the distance. In short, it was a flattering, compelling portrait of then-Senator Obama that made him look presidential. A true and correct copy of this photo (the “Obama Photo”) is shown below and attached hereto as **Exhibit B**:



The AP holds a copyright registration, Registration No. VA 1-356-885, in the Obama Photo.

28. Mr. Garcia has described some of the elements that went into capturing the Obama Photo at the National Press Club that day, demonstrating the thought, craft, patience and judgment that he brought to bear on its creation: “I’m on my knees, I’m down low, and I’m just trying to make a nice, clean head shot. And I’m waiting. I’m looking at the eyes. I mean, sure, there’s focus, and I want the background to be a little bit soft. I wanted a shallow depth of field. I’m looking and waiting. I’m waiting for him to turn his head a little bit. I’m just patiently making a few pictures here and there, and I’m just looking for a moment when I think is right, and I’m taking some images as I’m going along, and then it happened. Boom, I was there. I was ready.” See Interview of Mannie Garcia on National Public Radio, February 26, 2009, available at <<http://www.npr.org/templates/story/story.php?storyId=101184444>>.

The Creation of The Infringing Works

29. Artist and business owner Shepard Fairey (“Fairey”) created the Infringing Work in or about January 2008.

30. During the course of his career, Fairey has developed a reputation for copying the works of other artists and photographers in making his graphic works.

31. For instance, upon information and belief, Fairey used the work of Cuban poster artist Rene Mederos, taking a poster that Mr. Mederos created in 1972 and printing it on T-shirts, as shown in the two images below:



Mederos Poster



Fairey T-shirt Image

32. Fairey has admitted that he “came across” the AP’s Obama Photo in January 2008 after doing searches on Google Images for images of then-Senator Obama. Fairey has said that he was looking for an image of Obama that was “Presidential,” and in which Obama was “gazing off into the future, saying, ‘I can guide you.’” That was exactly what Mr. Garcia had captured in the Obama Photo and exactly what Fairey took when he copied it.

33. Upon information and belief, Fairey deliberately chose to use the AP’s Obama Photo, from among approximately 200 other images, because it captured the essence of what Fairey was looking for due to the unique qualities imparted to it by the photographer’s own creative input.

34. Despite Google’s clear policy explicitly requiring users to obtain permission from copyright owners prior to use, Fairey admittedly downloaded the Obama Photo without ever bothering to obtain the AP’s permission or offering it any compensation.

Zumiez’s Use Of The Infringing Work

35. Fairey began selling posters and prints using the Infringing Work in or about January 2008.

36. Upon information and belief, Obey Clothing began making and selling t-shirts bearing the Infringing Work (the “Obama Tees”) in or about April 2008.

37. Upon information and belief, Zumiez was familiar with Fairey’s work because it had previously purchased t-shirts bearing Fairey’s images from Fairey’s clothing licensee, Obey Clothing.

38. Upon information and belief, Zumiez purchased the Obama Tees from Obey Clothing and sold them to consumers, including on its website, <zumiez.com>, and/or in various of its retail store locations.

39. Upon information and belief, Zumiez sold the Obama Tees in 2008 and 2009. Also upon information and belief, the Obama Tees were a very successful item for Zumiez.

COUNT ONE — COPYRIGHT INFRINGEMENT

(17 U.S.C. § 101 et seq.)

40. The AP incorporates by reference ¶¶ 1-39 above as if fully set forth herein.

41. By the actions alleged above, Zumiez has infringed and will continue to infringe the AP’s copyright in the Obama Photo by distributing and selling the Obama Tees using the Infringing Work.

42. The AP is entitled to recover from Zumiez any actual damages it has sustained, and any gains, profits and advantages obtained by Zumiez, as a result of its acts of infringement alleged above. At present, the amount of such damages, gains, profits and advantages cannot be fully ascertained by the AP, but will be established according to proof at trial.

43. The AP is also entitled to recover statutory damages for Zumiez's willful infringement of its copyright in the Obama Photo.

PRAYER FOR RELIEF

44. The AP incorporates by reference ¶¶ 1-43 as if set forth herein.

WHEREFORE, the AP requests:

- (a) That the Court find that Zumiez has infringed the AP's copyright in the Obama Photo;
- (b) That the Court enter judgment for the AP against Zumiez for the AP's actual damages according to proof, and for any profits attributable to infringement of its intellectual property in accordance with proof;
- (c) That the Court enter judgment for the AP and against Zumiez for statutory damages based upon its acts of infringement pursuant to the Copyright Act of 1976, 17 U.S.C. § 101, et seq.;
- (d) An award of Counterclaim Defendants' costs and disbursements of this action, including reasonable attorneys' fees, pursuant to 17 U.S.C. § 505;
- (e) That the Court grants such other, further, and different relief as the Court deems just and proper.

Dated: March 9, 2011

KIRKLAND & ELLIS LLP

A handwritten signature in cursive script, appearing to read "Dale Cendali", written over a horizontal line.

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EXHIBIT A

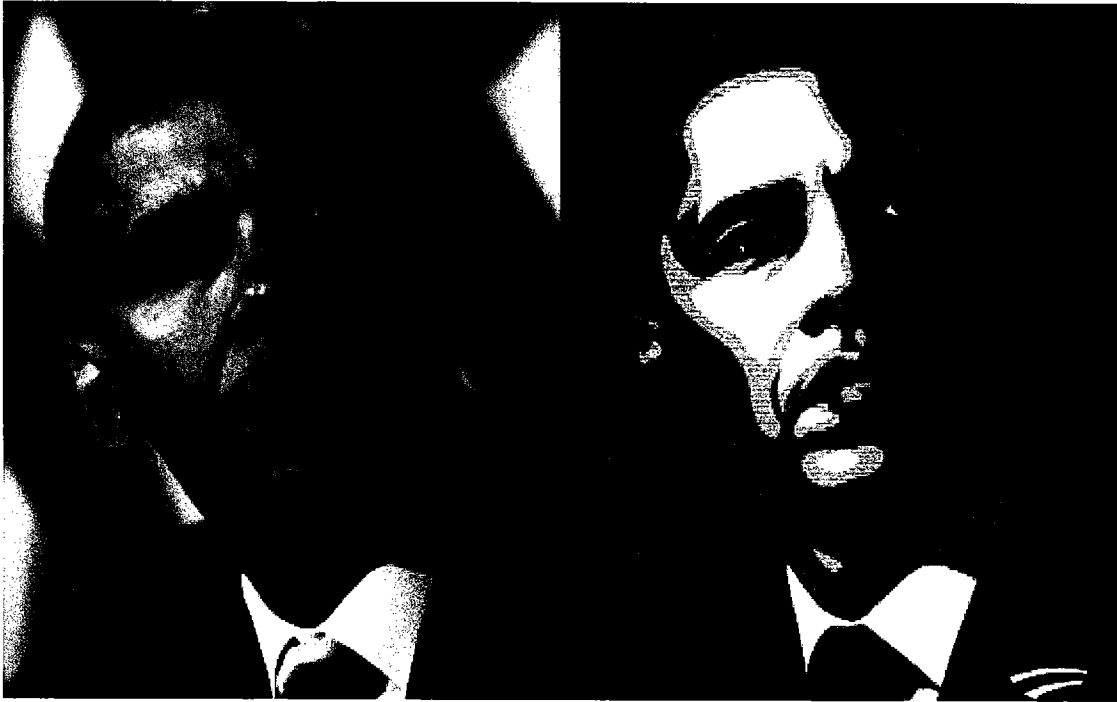


EXHIBIT B

