

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

  
**NO JS-6**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GLEN E. FRIEDMAN,	)	Case No. CV 10-00014 DDP (JCx)
	)	
Plaintiff,	)	<b>ORDER GRANTING PLAINTIFF'S MOTION</b>
	)	<b>FOR SUMMARY JUDGMENT AND DENYING</b>
v.	)	<b>DEFENDANT'S MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT</b>
THIERRY GUETTA a/k/a MR.	)	
BRAINWASH,	)	[Motions filed on April 4, 2011]
	)	
Defendant.	)	
	)	
	)	
	)	

Plaintiff Glen E. Friedman ("Plaintiff") alleges that Defendant Thierry Guetta a.k.a Mr. Brainwash ("Defendant") infringed Plaintiff's copyright by creating, reproducing, displaying, and selling products incorporating Plaintiff's photograph of the hip hop music group Run-DMC (the "Photograph"). Plaintiff and Defendant filed cross motions for summary judgment. After reviewing the papers submitted by the parties, considering the arguments therein, and hearing oral arguments, the court GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant's Motion for Summary Judgment.

1 **I. Background**

2 In 1985 Plaintiff took a picture of the famous hip hop music  
3 group Run-DMC. (Compl. ¶ 12; Def.'s Statement of Uncontroverted  
4 Facts {"SUF"} ¶ 58.) The Photograph depicts the three artists  
5 standing shoulder-to-shoulder and wearing black stetson hats. (See  
6 Declaration of Guetta ("Guetta Dec."), Ex. B.) In 1994, Plaintiff  
7 published the Photograph in the book Fuck You Heroes. (Declaration  
8 of Friedman ("Friedman Dec.") ¶ 3.) In 2003, Plaintiff applied for  
9 and was issued Copyright Registration Certificate VA 1-221-001 for  
10 the Photograph. (Friedman Dec. ¶ 3.)

11 Defendant obtained the Photograph from the internet. (Guetta  
12 Dec. ¶ 7.) Defendant did not specifically seek out the Photograph  
13 or a portrait of Run-DMC, but rather, came across the Photograph by  
14 chance. (Id. ¶ 7.) No indication of a copyright existed on the  
15 Photograph, and Defendant was not aware that the Photograph was  
16 published in Plaintiff's book. (Id.) Defendant, an artist, often  
17 incorporates pre-existing images in the creation of his artwork.  
18 (Guetta De. ¶¶ 2-4.) For purposes of the present action, it is  
19 undisputed that Defendant created at least four categories of works  
20 that he admits "incorporat[ed] aspects" of the Photograph. (Guetta  
21 Dec. ¶¶ 6, 9, 12, 14.)

22 1. The "Old Photo" work was made by combining a scanned  
23 photograph of a 19th century couple with images of two of the  
24 members of Run-DMC. (Id. ¶ 9.) The Run-DMC portion of the photo  
25 came "from the digital image of the Photograph." (Id.) The Old  
26 Photo Work was printed as a 22" by 30" image, and Defendant sold  
27 multiple prints of this piece. (Id. ¶ 10.) Defendant also used  
28

1 reproductions of the Old Photo Work image on free postcards handed  
2 out to attendees of his 2008 Life is Beautiful show. (Id. ¶ 11.)

3 2. To create the "Broken Records" work, Defendant altered a  
4 digital image of the Photograph. The altered image eliminated the  
5 Photograph's background but left in place the outline of the Run-  
6 DMC trio. (Id. ¶ 12.) Defendant then projected this altered image  
7 onto a large piece of wood, painted on the wood, and glued 1,000  
8 pieces of phonograph records onto the wood. (Id.) Defendant only  
9 produced one copy of this piece. The Broken Records work was  
10 displaying at the Life is Beautiful installation in Los Angeles and  
11 was never offered for sale. (Id. ¶¶ 12-13.)

12 3. To create the "Stencil" works, Defendant states that he  
13 "altered" "a digital image of the Photograph . . . so that it could  
14 be made into a one piece stencil . . . ." (Id. ¶ 14.) Defendant  
15 then "placed the stencil on top of [] three canvases with different  
16 backgrounds and used black spray paint to superimpose the image of  
17 Run-DMC." (Id.) One of the Stencil Works was put on public  
18 display and none of them were offered for sale. (Id. ¶¶ 14-15.)

19 4. The "Banner Work" was made by hand-painting a projected  
20 altered reproduction the Photograph onto a canvas. (Id. ¶ 16, Ex.  
21 J.) The Banner Work was sold prior to the Life is Beautiful show,  
22 but it was displayed at the show and during a three-day music  
23 festival in 2008 in New York. (Id. ¶ 16.) The Banner Work was also  
24 reproduced on postcards handed to attendees upon leaving the Life  
25 is Beautiful show. (Id.)

26 On January 4, 2010, Plaintiff filed suit in federal court  
27 alleging infringement by the Old Photo, Broken Records, Stencil,  
28 and Banner works (collectively the "Four works") of Plaintiff's

1 copyright of the Photograph. On April 4, 2011, Plaintiff and  
2 Defendant filed cross motions for summary judgment.

3 **II. Legal Standard**

4 Summary judgment is appropriate where "the pleadings, the  
5 discovery and disclosure materials on file, and any affidavits show  
6 that there is no genuine issue as to any material fact and that the  
7 movant is entitled to a judgment as a matter of law." Fed. R. Civ.  
8 P. 56(c); see also Celotex Corp. v. Catrett , 477 U.S. 317, 324  
9 (1986). The evidence is viewed in the light most favorable to the  
10 non-moving party, and all justifiable inferences are to be drawn in  
11 its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255  
12 (1986).

13 A genuine issue exists if "the evidence is such that a  
14 reasonable jury could return a verdict for the nonmoving party,"  
15 and material facts are those "that might affect the outcome of the  
16 suit under the governing law." Anderson, 477 U.S. at 248. No  
17 genuine issue of fact exists "[w]here the record taken as a whole  
18 could not lead a rational trier of fact to find for the non-moving  
19 party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
20 U.S. 574, 587 (1986).

21 It is not enough for a party opposing summary judgment to  
22 "rest on mere allegations or denials of his pleadings." Anderson,  
23 477 U.S. at 259. Instead, the non-moving party must go beyond the  
24 pleadings to designate specific facts showing that there is a  
25 genuine issue for trial. Celotex, 477 U.S. at 325. The "mere  
26 existence of a scintilla of evidence" in support of the non-moving  
27 party's claim is insufficient to defeat summary judgment.  
28 Anderson, 477 U.S. at 252.

1 **III. Discussion**

2 Plaintiff alleges that Defendant infringed his copyright for  
3 the Photograph in violation of 17 U.S.C. § 101 et seq. Defendant  
4 argues that Plaintiff cannot establish copyright infringement of  
5 the Photograph because there is no substantial similarity between  
6 the Photograph and the allegedly infringing uses. Alternatively,  
7 Defendant argues that his use of the Photograph was fair use  
8 pursuant to 17 U.S.C. § 107.

9 **A. Originality and Substantial Similarity**

10 It is undisputed that Plaintiff holds the copyright for the  
11 Photograph, and it well established that photographs are entitled  
12 to copyright protection. See Burrow-Giles Lithographing Co., 111  
13 U.S. 53 (1884) (upholding the copyright of a photograph of Oscar  
14 Wilde). As a general rule, the copyright owner of a photograph  
15 holds the exclusive rights to reproduce, adapt (i.e. create  
16 derivative works), publicly distribute, and publicly display the  
17 work. See 17 U.S.C. § 106.

18 Here, Defendant admits that he obtained the Photograph on the  
19 internet and used a digital copy of that image in the creation of  
20 the Old Photo, Broken Records, Stencil, and Banner works. However,  
21 Defendant argues that the elements of the Photograph that he copied  
22 were not original. For example, Defendant argues that the Run-  
23 DMC's pose, depicted in the Photograph, such as the "B-Boy Stance"  
24 and the subjects' "stern countenances" were already in the public  
25 domain and unoriginal. Defendant further argues that "[t]here are  
26 many photographs of Run-DMC from the 1980's that are similar to  
27 [Plaintiff's] Photograph, including the style of clothing, pose,  
28 demeanor and background [exhibited in the Photograph]," thereby

1 making those elements of the Photograph unoriginal or, to use  
2 Defendant's term, "unprotectable." (Def.'s Motion 7:17-20; 9:13.)  
3 The court disagrees.

4 The protectable elements of a photograph generally include  
5 "selection of subject, posture, background, lighting, and perhaps  
6 even perspective alone." Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d  
7 1068, 1076-77 (9th Cir. 2000). In Burrow-Giles, the Supreme Court  
8 considered whether the defendant had infringed plaintiff's  
9 copyright of a photograph he took of Oscar Wilde. 111 U.S. at 54.  
10 In that case, the defendant argued that the photograph "involve[d]  
11 no originality of thought or any novelty," because it was it was  
12 the "mere mechanical reproduction of the physical features or  
13 outlines of some object." Id. at 59. The Court disagreed,  
14 explaining that where a photographer so contrives a photograph by  
15 "posing [the subject] in front of the camera, selecting and  
16 arranging the costume, . . . arranging the subject so as to present  
17 graceful outlines, arranging and disposing the light and shade,  
18 suggesting and evoking the desired expression," the work is a  
19 "original mental conception" and entitled to the benefit of  
20 copyright protection. Id. at 55.

21 Here, it is undisputed that Plaintiff selected and arranged  
22 the subjects. Although the court believes that no more is  
23 required, the court also notes that Plaintiff made related  
24 decisions about light and shadow, image clarity, depth of field,  
25 spatial relationships, and graininess that were all represented in  
26 the copyrighted Photograph. Plaintiff also selected the background  
27 and perspective of the Photograph, and all of these particular  
28 artistic decisions commutatively result in the Photograph. With

1 respect to Defendant's argument that Plaintiff's selected pose and  
2 arrangement of Run-DMC was common, the court is not persuaded. To  
3 qualify for copyright protection, a work must be "original" to the  
4 author, which means only that the work was independently created by  
5 the author and that it possesses at least some minimal degree of  
6 creativity. Feist Publications Inc. v. Rural Telephone Service  
7 Co., Inc., 499 U.S. 340, 345 (1991). "[T]he requisite level of  
8 creativity [required to constitute an original work] is extremely  
9 low; even a slight amount will suffice." Id. "Originality does  
10 not signify novelty; a work may be original even though it closely  
11 resembles other works so long as the similarity is fortuitous, not  
12 the result of copying." Id. Plaintiff's work is original.

13       Having concluded that Plaintiff's work is original and,  
14 therefore, entitled to the benefit of copyright protection, the  
15 court next considers Plaintiff's claim that Defendant has infringed  
16 Plaintiff's related copyrights. To prove copyright infringement, a  
17 plaintiff must demonstrate (1) ownership of the allegedly infringed  
18 work and (2) copying of the protected elements of the work by the  
19 defendant. Narell, 872 F.2d at 910. Because direct copying is  
20 difficult to prove, a plaintiff can satisfy the second element by  
21 demonstrating that (a) the defendant had access to the allegedly  
22 infringed work and (b) the two works are substantially similar in  
23 both idea and expression of that idea. Pasillas v. McDonald's  
24 Corp., 927 F.2d 440, 442 (9th Cir. 1991).

25       Because it is undisputed that Plaintiff owns the rights to the  
26 Photograph, the court proceeds to address the second prong of  
27 copyright infringement test, i.e. access and substantial  
28 similarity. The Ninth Circuit has expressed disfavor for summary

1 judgment on questions of substantial similarity, but explained that  
2 "it is nevertheless appropriate to grant summary judgment if,  
3 considering the evidence and drawing all inferences from it in the  
4 light most favorable to the nonmoving party, no reasonable jury  
5 could find that the works are substantially similar in idea and  
6 expression." Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th  
7 Cir. 1991). Having considered the Defendant's admission that he  
8 directly altered a digital copy of the Photograph and the striking  
9 similarity of the four works with the Photograph, the court  
10 concludes that no reasonable fact finder could find that the works  
11 are not substantially similar, and therefore Plaintiff is entitled  
12 to summary judgment.

13 "Proof of access requires an opportunity to view or to copy  
14 plaintiff's work." Three Boys Music Corp. v. Bolton, 212 F.3d 477,  
15 482 (9th Cir. 2000) (internal quotation omitted). "Opportunity"  
16 has been defined as a "reasonable" possibility that Defendants  
17 viewed Plaintiff's Design. Jason v. Fonda, 526 F. Supp. 774,  
18 776-77 (C.D. Cal. 1981). Because Defendant has admitted access to  
19 the Photograph, (Guetta Dec. ¶ 7.), the court proceeds to consider  
20 whether the Photograph and the Four works are substantially similar  
21 in both idea and expression of that idea.

22 To determine whether two works are substantially similar, the  
23 Ninth Circuit employs a two-part analysis – an extrinsic and an  
24 intrinsic test. The "extrinsic test" is an objective comparison of  
25 specific expressive elements. Cavalier v. Random House, Inc., 297  
26 F.3d 815, 822 (9th Cir. 2002). The "intrinsic test" is a  
27 subjective comparison that focuses on "whether the ordinary,  
28 reasonable audience" would find the works substantially similar in

1 the "total concept and feel of the works." Kouf v. Walt Disney  
2 Pictures & Televison, 16 F.3d 1042, 1045 (9th Cir. 1994). In  
3 applying the two-part test, the court "inquire[s] only whether 'the  
4 protectable elements, standing alone, are substantially similar'  
5 and "filter[s] out and disregard[s] the non-protectable elements."  
6 Cavalier, 297 F.3d at 822.

7 Here, the Four works plainly borrow original elements of  
8 Plaintiff's Photograph, including, for example, the following: the  
9 selection of the Run-DMC subjects, the arrangement of the three  
10 subjects, the poses of the individual subjects, the subjects'  
11 accessories and outfits, the lighting, and the perspective. See,  
12 e.g., Los Angeles News Service v. Tullo, 973 F.2d 791, 794 (9th  
13 Cir. 1992) (considering selection of subject, posture, background,  
14 lighting, and perspective to be creative decisions that are  
15 protectible elements of a photographer's work). In the present  
16 action, Defendant removed the background and change the coloring in  
17 the Four works. These minor changes, however, do not alter the  
18 fact that the distinct figures in Plaintiff's Photograph remain  
19 clearly visible and readily identifiable. In fact, the outline of  
20 each figure is almost exactly replicated in the Broken Records,  
21 Stencil, and Banner works. Even in the Old Photo Work, in which  
22 two of the figures from the Photograph appear alongside two  
23 characters from a different photograph, the two members of Run-DMC  
24 depicted are exact replications of the Photograph.

25 Our language is rich with words that attempt to communicate  
26 the many feelings and thoughts that make us human. We also use  
27 facial expressions, actions, and body language to convey meaning.  
28 A particular countenance might express happiness, interest,

1 boredom, fear, or some combination of the almost limitless  
2 expressions that make up our unspoken language. Copyright law  
3 recognizes that any spark of originality of expression is  
4 protected. The extrinsic test lends itself well to the objective  
5 comparison, *inter alia*, of designs or patterns. However, when the  
6 issue is whether the acknowledged appropriation of a photograph of  
7 a person or persons coupled with modifications by a defendant  
8 constitutes substantial similarity, this court is of the mind that  
9 as long as the essence of the expressions of the subject or  
10 subjects is copied, there will almost always be substantial  
11 similarity. A photograph of a person captures a person's  
12 expression in a particular instant of time, and will almost always  
13 possess the requisite level of creativity to warrant protection.

14 In sum, because the composition of the Run-DMC figures in the  
15 Photograph is a result of Plaintiff's originality, the Photograph  
16 and its related elements are each protected. Here, Defendant  
17 admits that the Four works were created by making small alterations  
18 to a digital copy of the Photograph, and the court concludes that  
19 the Four works are substantially similar to the Photograph.  
20 Because Defendant has copied Plaintiff's Photograph without  
21 authorization, Plaintiff is entitled to summary judgment in his  
22 favor.

23 **B. Fair Access**

24 Defendant argues that even if the Four works are substantially  
25 similar to the Photograph, Defendant's use of the Photograph was  
26 fair under the fair use doctrine and therefore protected.

27 The fair use doctrine confers a privilege on people other than  
28 the copyright owner "to use the copyrighted material in a

1 reasonable manner without the consent of the copyright owner." Los  
2 Angeles News Service v. Tullo, 973 F.2d 791, 796 (9th Cir. 1992)  
3 (internal quotation marks and citation omitted). The Copyright Act  
4 explains that the "fair use" of a copyrighted work is intended "for  
5 purposes such as criticism, comment, news, reporting, teaching . .  
6 ., scholarship, or research . . . ." 17 U.S.C. § 107.

7 In determining whether a use is fair, courts engage in a  
8 case-by-case analysis and a flexible balancing of the following  
9 four non-exclusive factors: (1) the purpose and character of the  
10 use, including whether such use is of a commercial nature or is for  
11 nonprofit educational purposes; (2) the nature of the copyrighted  
12 work; (3) the amount and substantiality of the portion used in  
13 relation to the copyrighted work as a whole; and (4) the effect of  
14 the use upon the potential market for or value of the copyrighted  
15 work. Mattel, 353 F.3d at 800 (citing 17 U.S.C. § 107). Because  
16 fair use is an affirmative defense, Defendant carries the burden of  
17 demonstrating it. Campell v. Acuff-Rose Music, Inc., 510 U.S. 569,  
18 590 (1994). The court considers each factor in turn and then  
19 together and concludes that Defendant cannot satisfy its burden  
20 here.

21 1. Purpose and character of use

22 The "purpose and character of use" factor in the fair use  
23 inquiry asks "to what extent the new work is 'transformative'" and  
24 does not simply "supplant[]" the original work and whether the  
25 work's purpose was for- or not-for-profit. Campbell v. Acuff-Rose  
26 Music, Inc., 510 U.S. 569, 579 (1994). In considering whether a  
27 work is transformative, the court asks whether there was "real,  
28 substantial condensation of materials and intellectual labor and

1 judgment bestowed thereon," "merely facile use of the scissors []  
2 or extracts of the essential parts constituting the chief value of  
3 the original work," do not constitute a fair use. Worldwide Church  
4 of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1117  
5 (9th Cir. 2000). "[U]se for the same intrinsic purpose as the  
6 copyright holder's . . . seriously weakens a claimed fair use."  
7 Id. at 1117.

8 Here, Defendant has not offered a transformative alternative  
9 use of the Photograph image. Both Plaintiff and Defendant are  
10 artists, and the image was used by both in works of visual art for  
11 public display. Although the statements made by those respective  
12 artworks and the mediums by which those respective statements were  
13 made differ, the use itself is not so distinct as to render  
14 Defendant's use a transformation of Plaintiff's copyright.  
15 Furthermore, Defendant admits that the Old Photo work was offered  
16 for sale and sold. Similarly, the Banner work was sold and  
17 publicly displayed at the Life is Beautiful show. The other two  
18 works were also on display at the Life is Beautiful show, which  
19 Defendant does not dispute was a venue where Defendant had his  
20 artwork for sale. The court is not persuaded that Defendant's use  
21 of the Four works was of a distinct character and the court finds  
22 it significant that all of the works were on display at a show  
23 where Defendant exhibited and sold his artwork and where Defendant  
24 sold two of the works.

25 2. Nature of the copyrighted work

26 The second factor in the fair use analysis "recognizes that  
27 creative works are closer to the core of intended copyright  
28 protection than informational and functional works." Dr. Seuss

1 Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1402  
2 (internal quotation omitted). “[P]hotographs taken for aesthetic  
3 purposes, are creative in nature and thus fit squarely within the  
4 core of copyright protection.” Elvis Presly Enterprises, Inc. v.  
5 Passport Video, 349 F.3d 622, 629 (9th Cir. 2003). Although this  
6 factor “typically has not been terribly significant in the overall  
7 fair use balancing,” here it weights against a defense of  
8 Defendant’s use. Dr. Seuss, 109 F.3d at 1402.

9 3. Amount and substantiality of the portion used

10 The third factor asks whether “the amount and substantiality  
11 of the portion used in relation to the copyrighted work as a whole  
12 . . . are reasonable in relation to the purpose of the copying.”  
13 Campbell, 510 U.S. at 586. In this case, the degree to which  
14 Defendant borrowed elements from Plaintiff’s Photograph was both  
15 quantitatively and qualitatively substantial. Defendant downloaded  
16 an exact digital copy of the Photograph and used substantial  
17 portions of that photograph, including the three individuals’  
18 faces. In the Banner work, for example, Defendant did little more  
19 than eliminate the background. The Run-DMC individuals are readily  
20 identifiable in each of the Four works, and in each of the Four  
21 works the figures are making precisely the same pose and wearing  
22 the same exact stetson hats and large jackets that they are in the  
23 Photograph. Furthermore, in all of the works except the Old Photo,  
24 the three figures are making the same facial expressions as they  
25 are in the Photograph. Defendant took a substantial portion of the  
26 Photograph in order to create each of the Four works, and the  
27 portion Defendant took was at the heart of the Photograph.

28 4. Effect of the use upon potential market

1           The fourth fair use factor is "the effect of the use upon the  
2 potential market for or value of the copyrighted work." 17 U.S.C.  
3 § 107(4). In considering this factor, the court looks to both the  
4 extent of the market harm caused by showing and selling the  
5 Defendant's artwork and whether widespread use would hurt the  
6 potential market for the Photograph. Here, Plaintiff has  
7 previously used the Photograph for commercial use, namely by  
8 publishing it in the book Fuck You Heroes and by selling it to  
9 collectors. (See Friedman Dep., Dkt. No. 53, Ex. 3 120:19-121:23.)  
10 Accordingly, Plaintiff's commercial and artistic use of the  
11 Photograph competes directly with Defendant's use. Defendant  
12 cannot appropriate this market by making works that infringe  
13 Plaintiff's copyright.

14           In sum, the court concludes that Defendant cannot meet his  
15 burden of establishing a fair use of Plaintiff's Photograph. To  
16 permit one artist the right to use without consequence the original  
17 creative and copyrighted work of another artist simply because that  
18 artist wished to create an alternate work would eviscerate any  
19 protection by the Copyright Act. Without such protection, artists  
20 would lack the ability to control the reproduction and public  
21 display of their work and, by extension, to justly benefit from  
22 their original creative work.

23

24

25

26 ///

27 ///

28 ///

1 **V. Conclusion**

2 For the reasons stated above, the court DENIES Defendant's  
3 Motion for Summary Judgment and GRANTS Plaintiff's Motion for  
4 Summary Judgment.

5

6

IT IS SO ORDERED.

7

8

9

Dated: May 27, 2011

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

  
DEAN D. PREGERSON  
United States District Judge