



Copying a Photograph Openly Available Over the Internet Constitutes Copyright Infringement, Despite Attempted Fair Use Defense by Appropriation Artist

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In 1985, Glen E. Friedman took a photograph of Run DMC, a then famous and now iconic rap group, standing shoulder-to-shoulder and wearing black Stetson hats (the “Friedman Photograph”). The photograph itself became relatively famous. Friedman published the photograph in a not-so-family-friendly titled book F**k You Heroes, and in 2003 obtained a copyright registration for the photograph. Thierry Guetta, an appropriation artist¹ known as Mr. Brainwash,² found the Photograph on the Internet and, by his own admission, used a digital image of the Friedman Photograph in the creation of his own works. Friedman sued Guetta.³

On cross-motions for summary judgment, the Court for the Central District of California found that Guetta’s works infringed the Friedman Photograph. *Friedman v. Guetta*, 2:10-cv-00014 (C.D. Cal. May 27, 2011).⁴ The Court denied Guetta’s motion, which was based upon an argument that the works were not substantially similar in their original aspects and the fair use defense.

Guetta did not dispute that Friedman owned the copyright in the Friedman Photograph. His argument that the works were not substantially similar relied upon two main points: 1) the Friedman photograph depicted Run DMC in an unoriginal manner, and 2) third parties had created

¹ The Tate has a concise history and definition of appropriation art here: <http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=23>.

² See <http://www.mrbrainwash.com>.

³ Background on the lawsuit, Mr. Guetta’s association with Banksy, the Friedman Photograph and the allegedly infringing works can be found here: <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.

⁴ Available at: http://www.pattishall.com/pdf/Friedman_v_Guetta.pdf



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similar photographs. That is, Guetta claimed that the Friedman Photograph was not original with respect to the portions copied by Guetta.

The Court found these arguments unpersuasive, stating that Friedman had “selected and arranged the subject... made related decisions about light and shadow, image clarity, depth of field, spatial relationships, and graininess...[, and] also selected the background and perspective of the Photograph.” *Id.* at p. 6. As the Court stated,

A photograph of a person captures a person's expression in a particular instant of time, and will almost always possess the requisite level of creativity to warrant protection.

It was irrelevant that other photographs of Run DMC were similar. The Friedman Photograph was original and Guetta’s works were strikingly similar.

Guetta also moved for summary judgment based upon fair use. Most of us are familiar with the fair use doctrine, but its application by courts is fluid and must be analyzed on a case-by-case basis. Appropriation art tests the limit of fair use and Guetta forced the court to squarely address it.⁵ The Court ruled against Guetta.

In the Ninth Circuit, fair use analysis follows the following non-exclusive factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Id. at 11.

The first factor asks “to what extent the new work is ‘transformative’ and does not simply ‘supplant’ the original work...” *Id.* (citation omitted). For a work to be transformative, there must be a “real, substantial condensation of materials and intellectual labor and judgment bestowed thereon...merely facile use of scissors...or extracts of the essential parts constituting the chief value of the original work do not constitute fair use.” *Id.* at 11-12 quoting *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000).

The Court found that Guetta did not offer a transformative alternative use of the Friedman Photograph, both parties were artists, and the images used by both artists were works of visual art for public display. Importantly for budding appropriation artists, the Court noted that “although the statements made by [the] respective artworks and the mediums by which those respective

⁵ See, e.g., *Cariou v. Prince*, 1:08-cv- 11327 (S.D.N.Y. March 18, 2011). Here, another appropriation artist, Richard Prince, was found to have infringed photograph Patrick Cariou’s copyrights in certain photographs of Rastafarians in Jamaica that were published in a book by Cariou. Prince has appealed the ruling. A discussion of this case with useful links can be found here: <http://jolt.law.harvard.edu/digest/copyright/cariou-v-prince>.

statements were made differ, the use itself is not so distinct as to render Defendant's use a transformation of Plaintiff's copyright." The Court also found telling that Guetta had displayed his for works in shows where his works were offered for sale (and two of the allegedly infringing works were, in fact, sold). The Court also stated that Guetta's works competed directly in the market for the Friedman Photograph.

In conclusion, the Court stated that:

To permit one artist the right to use without consequence the original creative and copyrighted work of another artist simply because that artist wished to create an alternate work would eviscerate any protection by the Copyright Act. Without such protection, artists would lack the ability to control the reproduction and public display of their work and, by extension, to justly benefit from their original creative work.

This author does not wish to engage in the debate over what may or may not constitute a fair transformative work of appropriation art or an infringement. Perhaps the appropriation artist has to accept the risk that they lose a copyright suit, but many artists have accepted far greater risks for their art. However, this case illustrates one very simple point that all Internet users should understand: just because an image is freely available over the Internet does not mean that it lacks copyright protection. Use of an image obtained from the Internet in a marketing presentation, on your own website or in another work, is subject to the same copyright laws as images obtained from a book or other traditional work. Organizations and individuals must be diligent in confirming that a particular image obtained from the Internet is subject to an appropriate license, is in the public domain or is being used in a manner that falls squarely within the fair use defense.

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