



# Publications

## CASES OF INTEREST

LOEB & LOEB adds Depth.

### IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

June 29, 2011

#### Table of Contents

- [Cabell v. Sony Pictures Entertainment](#)
- [Glen E. Friedman v. Thierry Guetta](#)

#### **Cabell v. Sony Pictures Entertainment**, USCA Second Circuit, June 24, 2011

 [Click here for a copy of the full decision.](#)

- Circuit court affirms summary judgment in favor of defendants, motion picture producers, in copyright infringement case, finding that no plausible basis exists for a reasonable jury to find substantial similarity to plaintiff's works, and also affirming dismissal of state law unfair competition claim as preempted by the Copyright Act.

The Second Circuit affirmed the decision of the district court in *Cabell v. Sony Pictures Entertainment* granting summary judgment in favor of defendants, motion picture producers and others, on pro se plaintiff's copyright infringement and New York unfair competition claims.

Plaintiff alleged that the images and storyline of the film *You Don't Mess with the Zohan* were substantially similar to his works about a gay ex-Navy Seal who becomes a hairdresser. After de novo review of the relevant images in plaintiff's work, *Jayms Blonde*, and *Don't Mess with the Zohan*, the circuit court affirmed the judgment for "substantially the reasons stated by the district court in its thorough and well-reasoned opinion." Specifically, the court found that, aside from the unprotectable ideas of brandishing a blow dryer as a weapon and the fighting poses of the characters, no plausible basis existed for a reasonable jury to find that the parties' respective expressions of the concept of a crime-fighting hairdresser were substantially similar. In a footnote, the appellate court also noted that while plaintiff had originally claimed infringement based on the plotline of the film, which claim the district court also rejected, plaintiff had abandoned that claim on appeal by arguing that only that the alleged infringement was based solely on the visual images used to promote *Don't Mess with the Zohan*.

The circuit also affirmed as correct the district court's dismissal of the New York unfair competition claim as preempted by the Copyright Act and concluded by summarily rejecting as "without merit" plaintiff's arguments in support of his appeal.

#### **Glen E. Friedman v. Thierry Guetta**, USDC C.D. California, May 27, 2011

 [Click here for a copy of the full decision.](#)



# Publications

## CASES OF INTEREST

LOEB & LOEB adds Depth.

- District court grants summary judgment in favor of plaintiff copyright owner, finding that defendant's works, all of which contained altered reproductions of a photograph of the music group Run-DMC taken by plaintiff, were substantially similar plaintiff's work and were not entitled to fair use protection.

Plaintiff Glen E. Friedman took a photograph of the famous hip hop music group Run-DMC (the "Photograph"), depicting the three members standing shoulder to shoulder and wearing black Stetson hats. Plaintiff published the Photograph in a book and obtained a copyright registration certificate for the Photograph. Defendant Thierry Guetta, an artist who often incorporates pre-existing images into his artwork, found the Photograph on the internet and, without knowing that it had been published in plaintiff's book, created at least four types of works (the "Four Works") that incorporated aspects of the Photograph. Each of the Four Works incorporated the photograph in different ways. Some of the works were sold, some were put on public display, and others were incorporated into free postcards that were publicly distributed.

Plaintiff filed suit alleging that defendant infringed his copyright by creating, reproducing, displaying, and selling works incorporating the Photograph. On cross motions for summary judgment, the court granted plaintiff's motion and denied defendant's motion, finding that defendant's reproductions of the Photograph were substantially similar to plaintiff's copyrighted work and that defendant could not establish fair use.

While defendant did not dispute that plaintiff owned the copyright in the photograph, he argued that the elements he copied from the Photograph – the artists' pose, their clothes and demeanor, and the background of the picture – were not original and therefore not protectable. The court disagreed, noting that the protectable elements of a photograph generally include selection of subject, posture, background, lighting, and even perspective alone. The court concluded that plaintiff met the threshold for an original work by selecting the subject, arranging it, and making related decisions about "light and shadow, image clarity, depth of field, spatial relationships, and graininess." According to the court, "and that all of these "particular artistic decisions commutatively result in the Photograph."

The court then addressed the issue of substantial similarity: "Having considered the defendant's admission that he directly altered a digital copy of the Photograph and the striking similarity of the Four Works with the Photograph, the court concludes that no reasonable fact finder could find that the works are not substantially similar[.]"

Applying the "extrinsic" and "intrinsic" tests, the court observed that the Four Works plainly borrowed original elements of plaintiff's Photograph, including the selection of Run-DMC as the subject, the arrangement of the three artists, their poses, and their accessories and outfits, the lighting, and the perspective. Although the court acknowledged that defendant had altered the Photograph by removing the background and changing the color, it characterized these alterations as "minor changes" that did nothing to "alter the fact that the distinct figures in Plaintiff's Photograph remain clearly visible and identifiable." It held: "Here, Defendant admits that the Four Works were created by making small alterations to a digital



# Publications

## CASES OF INTEREST

LOEB & LOEB adds Depth.

copy of the Photograph, and the court concludes that the Four works are substantially similar to the Photograph. Because Defendant has copied Plaintiff's Photograph without authorization, Plaintiff is entitled to summary judgment in his favor."

Defendant also argued that his use of the photograph was protected by the fair use doctrine. The court disagreed.

The fair use doctrine confers a privilege on people other than the copyright owner to use the copyrighted material in a reasonable manner without the consent of the copyright owner. In determining whether a use is fair, courts consider: (1) the purpose and character of the use, including whether that 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.

Applying these factors, the court concluded that defendant could not establish fair use. In the court's view, defendant did not offer a "transformative alternative use" of the Photograph. The court also concluded that the other fair use factors also favored plaintiff, as the Photograph was taken for artistic purposes, was creative in nature, and fit squarely within the core of copyright protection. The court also found that the degree to which defendant borrowed elements from the Photograph was both quantitatively and qualitatively substantial. Finally, the court concluded that plaintiff's commercial and artistic use of the photograph competed directly with defendant's use.

---

For more information, please contact [Jonathan Zavin](mailto:jzavin@loeb.com) at [jzavin@loeb.com](mailto:jzavin@loeb.com) or at 212.407.4161.

Westlaw decisions are reprinted with permission of Thomson/West. If you wish to check the currency of these cases, you may do so using KeyCite on Westlaw by visiting <http://www.westlaw.com/>.

Circular 230 Disclosure: To assure compliance with Treasury Department rules governing tax practice, we inform you that any advice (including in any attachment) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer, and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.