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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Robert J. Lang, Noboru Miyajima,
Manuel Sirgo, Nicola Bandoni,
Toshikazu Kawasaki, and Jason Ku,

Plaintiffs,

v.

Sarah Morris,

Defendant.

Case No.: 11 CV 8821
(BSJ) (AJP)

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Introduction

Plaintiffs submit this Reply Memorandum to address distortions and omissions in Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 67) ("Opposition").¹

A copyright infringement claim has two elements: (a) ownership of a valid copyright, and (b) copying of original elements of the copyrighted work. *See Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 361 (1991). Ms. Morris concedes copying the Infringed Works, and she has failed to overcome Plaintiffs' evidence of ownership of the Infringed Works—for reasons discussed at length in Plaintiffs' Opposition Memorandum to Defendant's Summary Judgment Motion (Dkt. 66) ("Plaintiffs' Opposition"); therefore, Plaintiffs have met their burden of establishing a *prima facie* case of infringement.

Ms. Morris asserts two defenses. First Ms. Morris argues that the claims are barred by the statute of limitations. Plaintiffs' Opposition lays out evidence and argument that compels the opposite conclusion, and in any event, this defense does not extend to all of the claims at issue. Second, Ms. Morris's fair use defense fails because the Infringing Works lack transformative value, rendering them unauthorized derivative works that infringe the rights of the respective copyright owners.

¹ The Opposition improperly addresses the claims in the proposed First Amended Complaint. The Opposition incorrectly states that Magistrate Judge Peck granted Plaintiffs' motion to amend the complaint. Actually, he granted Plaintiffs' request for permission to submit a motion to amend (Dkt. 26), on which this Court has not yet ruled. Defendant has ignored Magistrate Judge Peck's instructions that the original complaint's claims are at issue in the mutual summary judgment motions. Plaintiffs have not conducted discovery on the new claims of the First Amended Complaint.

I. The Undisputed Material Facts Show The Doctrine of Fair Use Does Not Apply

A fair use proponent carries the burden of proof. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (“*Campbell*”); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998). In balancing the four factors listed in Section 107 of the Copyright Act, courts must protect the rights of authors of original works from being ripped off by other artists who claim to put their work to a higher purpose. Morris’s evidence adds up to little more than self-serving statements about what interests her about origami and *post hoc* justifications of her use of Plaintiffs’ work. Her use was not transformative and it impaired the potential market for Plaintiffs’ derivative works by substituting for those works. Ms. Morris’s fair use defense therefore must fail.

As a distraction, Defendant’s Opposition points to nonexistent issues but wins no ground. The Court should see through this tactic of setting up paper tigers. For example, the Opposition implies Plaintiffs attempt to persuade the Court that prevailing on any one of the fair use factors is sufficient for a finding of fair use, while Plaintiffs have acknowledged the opposite. (*See* Dkt. 46, pg. 14.) Defendant also incorrectly accuses Plaintiffs of misapplying *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132 (2d Cir. 1998) (“*Castle Rock*”), while herself misstating that the defendant’s book was expressly promoted as a substitute for the original program. In fact the court held that “the SAT substitutes for a derivative market that a television program copyright owner such as Castle Rock ‘would in general develop or license others to develop’”—which is directly on point for the case at bar. *See id.* at 145 (quoting *Campbell*, 510 U.S. at 592).

As Plaintiffs show in their Opposition, Defendant repeatedly quotes them out of context, while ignoring and mischaracterizing Plaintiffs' relevant evidence. These tactics cannot substitute for what Defendant herself lacks—evidence sufficient to carry her burden on fair use.

Defendant's Opposition devotes significant space to evidence that Ms. Morris acknowledged using existing crease patterns in the Origami series and that she widely exhibited works in the series. These statements, corresponding to ¶ 26 and ¶ 20 of Plaintiff's Complaint, are not in dispute. Rather, the issue is what the Court should make of the following example: Mr. Miyajima created a graphic image of a crease pattern titled *Wolf*, which he posted on the internet; Ms. Morris downloaded the image and copied his design verbatim. She transferred the design to canvas, filling the interstices with paint, called her painting *Wolf*, and sold the work for \$108,000 (see Defendant's chart at Dkt. 53-1, Exh. T) as part of her Origami series—then repeatedly claimed that the works in the series were “found designs.” (See, e.g., Ahrens Dec., Exs. E & F.)

A. Morris's Works Are Not Transformative

A court may find a defendant's use was transformative even without a physical transformation; however, Ms. Morris makes assertions about her alterations to the original works that are contradicted by the evidence and common sense.

First, Defendant claims the evidence shows that she did not use any of Plaintiffs' works in their entirety. This is patently false, as is evident to even a casual observer (see Dkt. 1, Ex. A, comparing Morris's works to Plaintiffs') and acknowledged by Morris's assistant (see Jacobson Decl., Ex. N: Morris's copying of Miyajima's *Wolf* was “not changed at all from the original.”) While Ms. Morris claims to have used Plaintiffs'

crease patterns as “inspiration” and a “starting point” for her works, the final works are nearly line-for-line identical to the original graphic images. One need not be an art critic to recognize that the crease pattern designs are the core content, the heart of both the Infringed Works and the Infringing Works. Although she enlarged the scale of the designs for her paintings, the relative portion of the design made up of the crease pattern did not change. Each of the Infringing Works, like the works Ms. Morris copied from Plaintiffs, featured only a design of a crease pattern, no additional material.

Ms. Morris hides behind sweeping generalizations about origami, crease patterns, and her general process in creating the paintings in the Origami Series—which consists of about 80 works. However, at issue here are works infringing 17 of Plaintiffs’ copyrighted designs from the original complaint, not the entire Origami Series. Ms. Morris does not address what alterations she made to the individual Infringed Works she copied. She stays at the level of generalizations to avoid acknowledging that the specific works at issue here were copied verbatim and used essentially in their entirety. There were no sepia tones or curved lines in the works belonging to Mr. Miyajima or Mr. Ku, and there were very few, if any, changes to the designs at issue here before their transfer to canvas and the addition of color. (See Dkt. 1, Ex. A.)

Even where there were some alterations to Plaintiffs’ designs, the resulting works are readily recognizable as a recasting of the image at issue. Unlike in *Blanch v. Koons*, the second work has the same relative role within the square frame as the original—that is, the crease pattern design is the only thing featured. (See Dkt. 1, Ex. A.) Repackaging a work, even when transferring it to a different medium or a different scale, is not enough to take it out of the realm of a derivative work. See *Castle Rock*, 150 F.3d at 143. Because

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Ms. Morris's works merely recast the originals, they are derivative works.

Size is Immaterial. Morris makes much of the size of her paintings relative to the original works; however, the infringing designs were reproduced in the form of drawings, large paintings, silkscreen prints, postcards, and appeared in a variety of sizes in various publications. Ms. Morris created digital copies of the paintings, which were published at a scale similar to the works they infringed. For example, the April 2009 issue of *Wallpaper** Magazine featured Angel on the cover, and also included a thumbnail-size version measuring about 2 cm x 2 cm, the size shown at right. (Supplemental Declaration of Caroline Valentino (“Valentino Decl.”), Exh. A, D001289.)



Images of Morris's Cat, Rabbit, and Swan measuring only a few inches across were published with an interview of Morris in *Res Magazine*. (Morris Decl., Dkt. 53-3, at pg. 2.)² Ms. Morris's work Wolf was also printed as a postcard (see Supp. Decl. of Andrew Jacobson, Exh. Y, showing the publication contract). All of these examples show the irrelevance of the size of the paintings Ms. Morris created relative to the original crease patterns. The public can experience the Infringing Works in many formats—and in each case, what is plainly evident is the crease pattern on which it is based.

Observations Are Not Commentary. The issue here is not the “heft” of Ms. Morris's works, but the weight of what she said about her work in the context of the fair use defense. What the Court should find lacking is Defendant's assertion that her verbal

² Ms. Morris's Rabbit, the issue's cover, appears at www.resartworld.com/old_issues.htm to be smaller than Miyajima's crease pattern at URL www.h5.dion.ne.jp/~origami/e/cat.html.

commentary about her work justifies copying Plaintiffs' images for her own use. The difficulty of origami, the flatness of paper, origami's roots in China, and its use in popular culture as a symbol of impending change (see press releases for Morris's exhibitions, attached to the Decl. of Julie Ahrens as Exs. E & F; Morris Tr. 136:3-137:16) are observations that are neither creatively based, novel, nor related to the original works. This does not constitute transformative commentary, and therefore it is not a defense to copyright infringement.

Notably, Morris's gallery press releases (see Decl. of Julie Ahrens, Exs. E & F) do not support her claims about the purpose of her work related to China, political commentary, etc. The final statement indicates that Morris's "primary interest in origami is its use in popular culture to signify an impending event." This sort of lightweight observation and background material does not pass for "commentary" on culture or society of the type contemplated by the fair use inquiry. Finding Ms. Morris's use to be transformative risks allowing the fair use defense to swallow the protections under § 106.

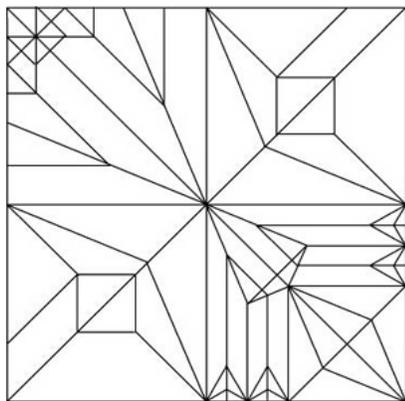
B. Morris Took the Heart of Plaintiffs' Works

Under the second fair use factor, "[o]riginal works that are creative in nature will generally receive greater copyright protection." *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997). Plaintiffs have thoroughly addressed the inaccuracies of Ms. Morris's portrayal of the purpose of their works (see Plaintiffs' Opposition). They have testified as to the decorative or artistic purpose of their crease patterns (see, e.g., Lang Decl., ¶ 31) and to the types of creative and artistic choices they

make in creating their works (see, e.g., Miyajima Decl., ¶ 8; Ku Decl. ¶¶ 8-9) Defendant Morris took the heart of Plaintiffs' works.

C. Morris's Works Are Plaintiffs' Works Repackaged

Defendant's Opposition falsely claims that Morris did not use any of the works in their entirety. In fact, in most cases, she added so little content to the designs at issue that the appropriated content is "front and center" in relation to the new works. For example, Morris incorporated the entire Penguin design created by Miyajima into her work Rockhopper. She appears to have added two lines to his design, changes that are not readily apparent.



Miyajima's Penguin



Morris's Rockhopper

As with the other Infringing Works, the overall impression is that Rockhopper is simply a painted version of Penguin.

Campbell instructs that the question under the third fair use factor is "whether the extent of copying is reasonable in light of its purpose." *Campbell*, 510 U.S. at 586. When discussing her work and its purpose, Ms. Morris made observations about origami, rather than referencing the original works to add meaning and a different perspective.

In *Blanch v. Koons*, the court noted:

It seems to us that Koons's copying of "Silk Sandals" was indeed reasonable when measured in light of his purpose, to convey the "fact" of the photograph to viewers of the painting, . . . in light of the quantity, quality, and importance of the material used. . . . He did not copy those aspects of "Silk Sandals" "whose power lies in [Blanch's] individualized expression.' As Blanch testified in her deposition, her key creative decisions in the shoot were the choice of an airplane cabin as a setting and her placement of the female model's legs on the male model's lap. But neither the airplane background nor the man's lap appear in "Niagara."

Blanch v. Koons, 467 F. 3d 244, 257-58 (2d Circ. 2006) (brackets original) (internal citations omitted).

Here, Plaintiffs' key creative choices related to the presentation of their works, including which lines to portray or omit (*see, e.g.*, Lang Decl., ¶ 31; Miyajima Decl., ¶ 8; Ku Decl. ¶¶ 8-9), and the directional orientation (meaning which side would be the top edge). In most cases, Morris did copy these key elements of Plaintiffs' creative decisions nearly line-for-line. She did not take a portion of the images, nor did she place the crease patterns in the context of larger works—she copied them all and used them all, making minor changes if any. In *Campbell*, the Court held it to be relevant

whether 'a substantial portion of the infringing work was copied verbatim' for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Morris's work, while it does not fulfill demand for the original crease patterns, does supersede the derivative market for these works. thus weighs heavily in Plaintiffs' favor.

D. Market

Defendant's Opposition skirts past the fact that, under the fourth fair use factor, the Court here is to consider the harm Ms. Morris caused to Plaintiffs' *potential* market, along with the impact of unrestricted and widespread conduct of the same sort.

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Campbell, 510 U.S. at 590 (1994). Harm to the market for derivative works is essential to the analysis. *Id.* And Plaintiffs have documented not only the existence of a derivative market for crease pattern art, but the fact that Dr. Lang is one of the major artists to develop this market. (See Declaration of Robert J Lang, ¶ 9.)

It is remarkable that Defendant would first argue that a quote from Dr. Lang's book had granted her permission to steal his crease patterns (see Opposition at pg. 10), and then claim that Plaintiffs believe their right to control all uses of their crease patterns "trumps all" (Opposition at pg. 21). Plaintiffs did not invite Morris to steal their work and enter the market for derivative works based on their crease patterns. On the other hand, they have also not ignored the balance of benefits to the public versus their personal gain. Dr. Lang's initial reaction to learning of the plagiarism of his work demonstrates that he did give consideration to whether Morris was creating something that could stand on its own as an independent work of art, and came to the conclusion that it cannot. (See Declaration of Robert Clarida, 6/29/12, Ex. M.)

Allowing artists to make verbatim or close copies of origami artists' crease patterns and colorize them for the commercial gain of the secondary user deprives the author of the right to enter the derivative market. Furthermore, the public does not benefit from the confusion created about who authored the crease pattern at issue. Some works in the Origami series depict designs that are not crease patterns, even if they were originally "inspired" by crease patterns. (See Morris Depo., pgs. 290-296, Jacobson Decl., Ex. V.)

Nor does the case law support Defendant's argument. In *Castle Rock*, the court considered this balance between public and private interests, and noted:

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Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on *Seinfeld*, such as by creating and publishing *Seinfeld* trivia books (or at least trivia books that endeavor to "satisfy" the "between-episode cravings" of *Seinfeld* lovers), the copyright law must respect that creative and economic choice. "It would . . . not serve the ends of the Copyright Act — *i.e.*, to advance the arts — if artists were denied their monopoly over derivative versions of their creative works merely because they made the artistic decision not to saturate those markets with variations of their original."

In summary, this is a case of one artist making verbatim copies of entire works authored by others and using them in their entirety for her own commercial gain, harming the potential market for their derivative works. Plaintiffs do not ask the Court to step into the role of art critic, but to find that based on the undisputed material facts, Ms. Morris's wrongdoing is not immunized by the fair use doctrine.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that summary judgment be entered finding Morris liable for copyright infringement on the First through Sixteenth, and Twentieth Claims for Relief of the Original Complaint.

Respectfully submitted,

Dated: September 24, 2012.

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