

H**Motions, Pleadings and Filings**

United States District Court,
S.D. New York.
Jorge Antonio SANDOVAL, Plaintiff,
v.
NEW LINE CINEMA CORP., New Line
Productions, Inc., and New Line Distribution,
Inc., Defendants.
No. 96 Civ. 3145(SHS).

Aug. 21, 1997.

Photographer brought copyright infringement action against producers and distributors of motion picture "Seven." Parties moved for summary judgment. The District Court, Stein, J., held that defendants' brief use of photographs in motion picture was fair use.

Defendants' motion for summary judgment granted; plaintiff's motion for summary judgment denied.

West Headnotes

[1] Copyrights and Intellectual Property ⚡
89(2)
99k89(2) Most Cited Cases
In copyright infringement cases, courts may resolve fair use determinations at summary judgment stage, where no material issues of fact remain to be tried. 17 U.S.C.A. § 107; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Copyrights and Intellectual Property ⚡
51
99k51 Most Cited Cases
To establish claim of copyright infringement, plaintiff must establish ownership of valid copyright and unauthorized copying or violation of one of the other exclusive rights afforded copyright owners

pursuant to Copyright Act. 17 U.S.C.A. § 101 et seq.

[3] Copyrights and Intellectual Property ⚡
53.2
99k53.2 Most Cited Cases

Producers and distributors of motion picture "Seven" made fair use of unpublished photographs by including them in motion picture for thirty seconds at most in a fleeting, obscured, and virtually undetectable manner; that use could not have adversely affected potential market for photographer's work. 17 U.S.C.A. § 107.

[4] Copyrights and Intellectual Property ⚡
53.2
99k53.2 Most Cited Cases

Fair use copyright inquiry requires case-by-case analysis, and the four factors are to be weighed together in light of purposes of copyright. 17 U.S.C.A. § 107.

[5] Copyrights and Intellectual Property ⚡
53.2
99k53.2 Most Cited Cases

Statutorily enumerated fair use factors in Copyright Act are nonexclusive, and unenumerated factors may have bearing on fair use determination. 17 U.S.C.A. § 107.

[6] Copyrights and Intellectual Property ⚡
83(1)
99k83(1) Most Cited Cases

Defendant bears burden of proof with respect to all issues in dispute concerning whether particular use of copyrighted work is a fair use for purposes of Copyright Act. 17 U.S.C.A. § 107.

[7] Copyrights and Intellectual Property ⚡
53.2
99k53.2 Most Cited Cases

Uses of copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research are more likely to be found to be fair uses than uses for commercial purposes. 17 U.S.C.A. § 107(1).

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FN2. Roger Ebert, "Two Against 'Seven': Pitt, Freeman Track Killer in Grisly, Intelligent Thriller," CHI. SUN-TIMES, Sept. 22, 1995, at 35, *available in* 1995 WL 6671917.

FN3. Kenneth Turan, "'Seven' Offers a Punishing Look at Some Deadly Sins," L.A. TIMES, Sept. 22, 1995, at F-1, *available in* 1995 WL 9829377.

The scene in which the Photographs appear is approximately 1 1/2 minutes in length. The light box which holds the Photographs is only visible in the background in approximately ten camera shots that range in duration from one to six seconds each, totaling at most thirty seconds. In the majority of those shots, the Photographs are obstructed by other objects in the scene--such as actors or furniture--and in no instance does the camera focus exclusively on the light box or the Photographs. Moreover, the light box images are out of focus for much of the time, since the camera is focused on the foreground. For these reasons, it is not surprising that plaintiff can state only that he and one or two unnamed acquaintances were able to identify the Photographs as his work, and only after careful scrutiny. Sandoval himself not only returned to the theater "at least twice," but also viewed enlarged still frames from the scene before he was able to conclude with certainty that ten of the images on the light box were the Photographs. Sandoval Aff. ¶¶ 7-13. The Court was only able to identify one of the Photographs as Sandoval's, and only after repeated viewings of the scene in connection with this motion for summary judgment.

After plaintiff concluded that the Photographs used were his, he commenced this action. The complaint alleges copyright infringement, intentional infliction of emotional distress, and invasion of privacy pursuant to both New York's Civil Rights Law § 51 and California common law. [FN4] Plaintiff seeks *inter alia* to enjoin the further distribution and display of the film and to collect actual and statutory damages pursuant to 17 U.S.C. § 504(c). Defendants concede for purposes of this motion that plaintiff's Photographs are in the subject

scene, *see* Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J., dated November 18, 1996 ("Defs.' Mem.") at 9, but contend principally that the fleeting and insignificant use of the Photographs constitutes fair use of the copyrighted works pursuant to section 107 of the Copyright Act.

FN4. Sandoval subsequently withdrew his privacy and emotional distress claims. *See* Pl.'s Mem. Opp'n to Defs.' Mot. for Summ. J. and in Supp. of Pl.'s Cross-Mot. for Partial Summ. J., dated December 9, 1996 ("Pl.'s Mem.") at 2 n. 3; Pl.'s Reply Mem. in Supp. of Cross-Mot. for Partial Summ. J., dated January 3, 1997 at 1. Accordingly, only the copyright claim survives.

Discussion

I. The Standard for Summary Judgment

Summary judgment will be granted "only when the moving party demonstrates that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir.1995) (quoting Fed.R.Civ.P. 56(c)). In deciding whether a genuine dispute remains as to a material fact, the Court must resolve all ambiguities, and draw all reasonable inferences, against the moving party. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

[1] In cases involving the defense of fair use to an allegation of copyright infringement, "[b]ecause the fair use question is so highly dependent on the particular facts of each case, courts ... have usually found it appropriate to allow the issue to proceed to trial." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 (2d Cir.1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2201, 95 L.Ed.2d 856 (1987). However, several cases in this circuit have demonstrated that courts may resolve fair use determinations at the summary judgment stage, where no material issues of fact remain to be tried.

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See, e.g., *id.* at 1265; *Robinson v. Random House, Inc.*, 877 F.Supp. 830, 843 (S.D.N.Y.1995); *412 *Amsinck v. Columbia Pictures Industries, Inc.*, 862 F.Supp. 1044, 1050 (S.D.N.Y.1994).

II. Copyright Infringement

[2] To establish a claim of copyright infringement, the plaintiff must establish (1) ownership of a valid copyright and (2) unauthorized copying or a violation of one of the other exclusive rights afforded copyright owners pursuant to the Copyright Act. See *Twin Peaks Productions v. Publications Int'l. Ltd.*, 996 F.2d 1366, 1372 (2d Cir.1993). Among these rights are the rights to reproduce and display publicly the copyrighted work. See 29 U.S.C. §§ 106(1), (5) (1996).

In this case, defendants do not contest the validity of plaintiff's copyrights in the Photographs at issue. See Defs.' Mem. at 9. Moreover, defendants concede, for purposes of its summary judgment motion only, that plaintiff's copyrighted work is in the subject scene. See *id.* However, defendants argue that the light box images do not constitute "legally cognizable copies" because they are: (1) severely out of focus; (2) obscured by the scene's action and set dressing; and (3) substantially reduced in size. Similarly, defendants contend that their use of the Photographs cannot constitute a "public display" of plaintiff's Photographs because they are not recognizable to the public. Plaintiff counters that defendants did, in fact, make transparencies, or copies, of the Photographs, and that defendants also violated plaintiff's copyrights by "displaying" his copyrighted works by means of film.

For the reasons set forth below, plaintiff's copyrights have not been infringed because defendants' use of the Photographs was a fair use. Because this finding of fair use negates any liability stemming from defendants' use of the Photographs, this Court need not decide whether plaintiff has established the two elements of a copyright infringement claim.

III. Fair Use

[3][4] 17 U.S.C. § 107 provides that "the fair use of a copyrighted work ... is not an infringement of copyright." "This doctrine recognizes that there are circumstances in which the Copyright Act's goals of encouraging creative and original work is better served by allowing a use of a copyrighted work than prohibiting its use." *Robinson*, 877 F.Supp. at 839 (citing *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir.1992)). Section 107 goes on to provide that "[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include (1) the purpose and character of the use ... (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 on the potential market for or value of the copyrighted work." The inquiry requires a case-by-case analysis and the four factors are to be "weighed together in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 114 S.Ct. 1164, 1171, 127 L.Ed.2d 500 (1994) (citations omitted).

[5][6] Importantly, the factors enumerated in Section 107 are nonexclusive, and unenumerated factors may have bearing on the fair use determination. See *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 931 (2d Cir.1994); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-155 to 156 (1997). The defendant bears the burden of proof with respect to all issues in dispute concerning whether a particular use of a copyrighted work is a "fair use" for purposes of 17 U.S.C. § 107. See *American Geophysical Union*, 60 F.3d at 918.

A. The Purpose and Character of the Use

[7][8] The first factor listed in section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." Uses of a copyrighted work for purposes such as "criticism, comment, news reporting, teaching ..., scholarship, or research," are more likely to be found to be fair uses than uses for commercial purposes. See *id.*;

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Twin Peaks Productions v. Publications Int'l. Ltd., 996 F.2d 1366, 1374-75 (2d Cir.1993). However, the Second Circuit has recently explained that courts should be wary of placing too much emphasis on whether *413 or not a given use is commercial in nature, "[s]ince many, if not most, secondary users seek at least some measure of commercial gain from their use." *American Geophysical Union*, 60 F.3d at 921. A second consideration under this factor is whether the secondary use might be said to be a "transformative use" in the sense that it "adds something new, with a further purpose or different character" than the copyrighted work. *Id.* at 922- 23 (citing *Campbell*, 510 U.S. at 579, 114 S.Ct. at 1171).

In this case, defendants surely produced and distributed the film *Seven* with a commercial purpose. However, it is also true that defendants do much more than "merely supersede the [copyrighted work]" by exhibiting them, however obscurely, for the first time in the film. *See Campbell*, 510 U.S. at 579, 114 S.Ct. at 1171. The use of plaintiff's Photographs was transformative, in the sense that defendants used the visual images created in plaintiff's work in furtherance of the creation of a distinct visual aesthetic and overall mood for the moviegoer watching the scene in the killer's apartment. Defendants did not use the Photographs to promote *Seven*, nor is there any indication that defendants were trying to exploit directly the theoretical market for Sandoval's previously unexhibited photography. *See Ringgold v. Black Entertainment Television, Inc.*, 1996 WL 535547, at 3. This case is thus unlike *Woods v. Universal City Studios, Inc.*, 920 F.Supp. 62 (S.D.N.Y.1996), which is unavailingly relied upon by plaintiff. In that case, the court found that the movie set created by the defendant film studio was essentially a recreation of plaintiff's copyrighted drawing. *Id.* at 64-65.

While the commercial purpose of *Seven* weighs in favor of plaintiff on this first factor, the transformative nature of the use of the Photographs means that factor one will not weigh heavily in the overall fair use analysis. *See Campbell*, 510 U.S. at 579, 114 S.Ct. at 1171 ("the more transformative

the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use").

B. Nature of the Copyrighted Work

[9] There is no dispute that Sandoval's Photographs are creative and original works of art. Thus, this factor favors plaintiff. This finding is buttressed by the fact that Sandoval has yet to exhibit publicly his Photographs, since the unpublished nature of a copyrighted work weighs against a finding of fair use under this factor. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563, 105 S.Ct. 2218, 2232, 85 L.Ed.2d 588 (1985).

C. Amount and Substantiality of the Portion Used

[10] The third factor listed in section 107 is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." The Court must take into account the quantity and value of the material used in relation to the work as a whole. *See Campbell*, 510 U.S. at 586-87, 114 S.Ct. at 1175.

Though defendant included in the scene's background plaintiff's ten copyrighted works in their entirety, at most a single one of the Photographs is recognizable as Sandoval's work, and that only after careful scrutiny and repeated viewings. For the vast majority of the thirty seconds in which the light box appears, the Photographs are not discernible to even an individual viewing the scene with an eye toward identifying the copyrighted works; they are even less identifiable to the average viewer concentrating on the foreground action. This fleeting and obscured use of plaintiff's work did not and cannot capture the essence or value of the plaintiff's work. *See Ringgold, supra*, 1996 WL 535547 at 4 (holding that obstructed, unfocused view of copyrighted poster in television episode for a total of less than twenty-seven seconds was insubstantial, and that factor favored finding of fair use); *Amsinck*, 862 F.Supp. at 1050 (finding that

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defendant's display of copyrighted mobile in its entirety in defendant's film for periods of a few seconds and over a total of ninety-six seconds--at some points in close-ups-- did not preclude a finding of fair use); *Mura v. Columbia Broadcasting System, Inc.*, 245 F.Supp. 587, 590 (S.D.N.Y.1965) (use of copyrighted puppets *414 for approximately thirty-five seconds in children's television program was fair use, in part, because the puppets were not a principal attraction but were used in an "incidental" manner).

Although the use of the Photographs in their entirety leads the Court to find that this fair use factor favors plaintiff, the Court declines to hold that the obscured and fleeting nature of the use precludes a finding of fair use. See *Amsinck*, 862 F.Supp. at 1050.

D. The Effect upon the Potential Market for the Copyrighted Work

[11] The fourth factor listed in section 107 instructs the court to examine the effect that the infringing work will have on the market for the original work. 17 U.S.C. § 107(4). This factor is arguably the most important of the four enumerated factors of the fair use analysis. See *Harper & Row*, 471 U.S. at 566, 105 S.Ct. at 2233 (this factor is "undoubtedly the single most important element of fair use"); accord 4 NIMMER ON COPYRIGHT § 13.05[A][4], 13-186 to 187 ("this [factor] emerges as the most important, and indeed, central fair use factor"); but see *American Geophysical Union*, 37 F.3d at 889 (noting that the Supreme Court's discussion of the fourth factor in its most recent fair use decision, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994), omits that this factor is the most important element). This factor requires courts to consider not only the extent of market harm caused by the specific use in question, but the effect that would occur if that type of use became widespread. See *Harper & Row*, 471 U.S. at 568, 105 S.Ct. at 2234.

Here, the defendant's fleeting and obscured use of the Photographs as part of the background to a movie scene cannot be considered a substitute for

the Photographs by any stretch of the imagination. Sandoval's work is virtually undetectable in the scene at issue. Thus, the value of and market potential for his work is in no way usurped, since the public is not even aware after viewing *Seven* that they have had a glimpse of Sandoval's work. Even widespread uses of Sandoval's Photographs in such a fleeting, obscured, and out-of-focus manner could not begin to encroach on the potential market for his work. In short, this important factor weighs decidedly in defendants' favor.

Conclusion

After weighing the above factors, the Court concludes that the use defendants have made of the Photographs is a "fair use" of them pursuant to 17 U.S.C. § 107. The fleeting, obscured, and virtually undetectable use of Sandoval's Photographs in *Seven* for at most thirty seconds could not have adversely effected the potential market for Sandoval's work. As a matter of law, this finding is not outweighed by those fair use factors which favor plaintiff. See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir.1991).

For the reasons set forth above, defendants' motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

SO ORDERED:

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• 1:96cv03145 (Docket) (Apr. 30, 1996)

END OF DOCUMENT

**Briefs and Other Related Documents**

United States Court of Appeals,
Second Circuit.
Jorge Antonio SANDOVAL, Plaintiff-Appellant,
v.
NEW LINE CINEMA CORP., New Line
Productions, Inc. and New Line Distribution,
Inc., Defendants-Appellees.
Docket 97-9175.

Argued May 20, 1998.
Decided June 24, 1998.

Photographer brought copyright infringement action against producers and distributors of motion picture "Seven," alleging that defendants used ten copyrighted photographs in motion picture without permission. The United States District for the Southern District of New York, Sidney H. Stein, J., 973 F.Supp. 409, granted summary judgment for defendants and dismissed complaint. Photographer appealed. The Court of Appeals, Telesca, District Judge, sitting by designation, held that defendants' use of photographs was de minimis.

Affirmed.

West Headnotes

[1] Copyrights and Intellectual Property ⚡72.1
99k72.1 Most Cited Cases

District court should not resolve claim of fair use, in copyright infringement action, without first determining whether alleged infringement was de minimis.

[2] Copyrights and Intellectual Property ⚡51
99k51 Most Cited Cases

To establish that the infringement of a copyright is de minimis, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.

[3] Copyrights and Intellectual Property ⚡51
99k51 Most Cited Cases

For purpose of determining whether use of copyrighted work is de minimis, observability of work is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work.

[4] Copyrights and Intellectual Property ⚡51
99k51 Most Cited Cases

Like the analysis of a fair use claim, an inquiry into the substantial similarity between a copyrighted work and the allegedly infringing work must be made on a case-by-case basis, in determining whether use of work was de minimis, as there are no bright-line rules for what constitutes substantial similarity.

[5] Copyrights and Intellectual Property ⚡64
99k64 Most Cited Cases

Use of copyrighted photographs in motion picture was de minimis, and thus did not amount to copyright infringement, as photographs were not displayed with sufficient detail for average lay observer to identify even subject matter of photographs, much less the style used in creating them.

*215 L.Donald Prutzman, Stecher, Jaglom & Prutzman, New York City, for Plaintiff-Appellant.

Stephen F. Huff, Pryor, Cashman, Sherman & Flynn, New York City (Tom J. Ferber, Jeff Sanders, of counsel), for Defendants-Appellees.

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(Cite as: 147 F.3d 215)

Before: MESKILL, KEARSE, Circuit Judges, and TELESKA, District Judge. [FN*]

FN* The Honorable Michael A. Telesca, United States District Court for the Western District of New York, sitting by designation.

TELESKA, District Judge.

INTRODUCTION

Jorge Antonio Sandoval appeals from the judgment of the United States District Court for the Southern District of New York (Sidney H. Stein, Judge) granting defendants' *216 motion for summary judgment and dismissing Sandoval's copyright infringement action. Sandoval brought suit claiming that the defendants, producers and distributors of the motion picture "Seven," used ten of his copyrighted photographs in that movie without his permission. Because we hold that defendant's use of Sandoval's pictures was *de minimis*, we affirm the judgment of the District Court.

BACKGROUND

Jorge Antonio Sandoval is an artist and photographer who lives and works in Southern California. Between 1991 and 1994, he created a series of 52 untitled, and highly unusual black and white self-portrait studies. The series contains, *inter alia*, photographs of Sandoval with his face tightly wrapped with wire; with his face covered by soap bubbles; and lying on what appears to be a bed of thorns. It is undisputed that Sandoval owns the copyrights to these photographs, which were never published nor publicly shown.

In 1995, New Line Cinema Corp. produced and commenced distribution of the motion picture "Seven". The movie is based upon a fictitious story of a depraved photographer who commits seven torturous murders, each of which is designed to evoke or represent one of the traditional seven deadly sins recognized in the doctrines of the Roman Catholic Church.

In one scene, approximately one hour and sixteen

minutes into the movie, two investigators search the photographer's apartment for evidence linking him to the murders. On the back wall of the apartment is a large light-box with a number of photographic transparencies attached to it. The parties agree, for purposes of summary judgment, that ten of the transparencies affixed to the light box are reproductions of Sandoval's self-portraits.

At approximately one hour and seventeen minutes into the movie, the light box is turned on, allowing light to pass through the non-opaque portions of the transparencies posted on the box. During the next minute and a half, the light box and Sandoval's pictures, or portions of each, are briefly visible in eleven different camera shots. The longest uninterrupted view of the light box lasts six seconds, but the box is otherwise visible, in whole or in part, for a total of approximately 35.6 seconds. The photographs never appear in focus, and except for two of the shots, are seen in the distant background, often obstructed from view by one of the actors. In these two shots, figures in the photographs are barely discernable, with one shot lasting for four seconds and the other for two seconds. Moreover, in one of the shots, after one and a half seconds, the photograph is completely obstructed by a prop in the scene.

DISCUSSION

I. *The Proceedings Below.*

The District Court held that New Line Cinema's use of Sandoval's copyrighted photographs constituted a fair use of that material under § 107 of the Copyright Act (codified at 17 U.S.C. § 107), and therefore granted defendants' motion for summary judgment and dismissed the complaint. In making that determination, the District Court considered four factors which are set forth in § 107 of the Copyright Act as relevant, non-exclusive considerations in determining whether or not the use of copyrighted material is a fair use. [FN1] Specifically, the *217 Court examined: (1) the purpose and character of the use of the photographs; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect upon the potential market for the

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copyrighted photographs. *Sandoval v. New Line Cinema Corp.*, 973 F.Supp. 409, 412-414 (S.D.N.Y.1997).

FN1. Section 107 of the Copyright Act provides in relevant part that:

the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1994).

In determining how the four factors should be evaluated, the District Court relied heavily on the analysis employed in *Ringgold v. Black Entertainment Television, Inc.*, 1996 WL 535547 (S.D.N.Y. Sept. 19, 1996), a similar case involving an infringement claim against the producers of a television program in which an artist's copyrighted artwork was used as set dressing without her permission. *Ringgold*, however, was subsequently reversed by this court on grounds that the District Court had improperly analyzed two of the four factors set forth in § 107. *Ringgold v. Black Entertainment Television*, 126 F.3d 70 (2nd Cir.1997). *Sandoval* contends on appeal that since the District Court below utilized the same flawed

analysis as the District Court in *Ringgold*, this Court should reverse the judgment below and direct the District Court to grant summary judgment to the plaintiff on the issue of liability.

In *Ringgold*, this Court held that a District Court's failure to properly weigh two of the four factors set forth in § 107 warranted remand for proper examination of those factors under the correct legal standards. *Ringgold*, 126 F.3d at 78-81. We also stated, however, that where the unauthorized use of a copyrighted work is *de minimis*, no cause of action will lie for copyright infringement, and determination of a fair use claim is unnecessary. *Ringgold*, 126 F.3d at 76 (where "the allegedly infringing work makes such a quantitatively insubstantial use of the copyrighted work as to fall below the threshold required for actionable copying, it makes more sense to reject the claim on that basis and find no infringement, rather than undertake an elaborate fair use analysis....").

[1] In the instant case, the District Court decided the fair use issue without first ascertaining whether or not the use of the copyrighted material was *de minimis*. We believe it was error to resolve the fair use claim without first determining whether the alleged infringement was *de minimis*. However, because the claimed copying is *de minimis* as a matter of law, we affirm the judgment of the District Court.

II. The Infringement of Plaintiff's Copyrighted Photographs is *De Minimis*.

[2][3][4] To establish that the infringement of a copyright is *de minimis*, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial "as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." *Ringgold*, 126 F.3d at 74 (citing 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A] at 13-27). In determining whether or not the allegedly infringing work falls below the quantitative threshold of substantial similarity to the copyrighted work, courts often look to the amount

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of the copyrighted work that was copied, as well as, (in cases involving visual works), the observability of the copyrighted work in the allegedly infringing work. *Ringgold*, 126 F.3d at 75. Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work. *Ringgold*, 126 F.3d at 75. Like the analysis of a fair use claim, an inquiry into the substantial similarity between a copyrighted work and the allegedly infringing work must be made on a case-by-case basis, as there are no bright-line rules for what constitutes substantial similarity. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (analysis of fair use claim must be made on case-by-case basis); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.1960)(test for infringement of a copyright is necessarily "vague" and determinations must be made "ad hoc").

*218 [5] We have reviewed a video copy of the relevant portions of the alleged infringing work, and find that the defendants' copying of Sandoval's photographs falls below the quantitative threshold of substantial similarity. Unlike the artwork at issue in *Ringgold*, where the artwork was "clearly visible" and "recognizable as a painting ... with sufficient observable detail for the 'average lay observer' ... to discern African-Americans in Ringgold's colorful, virtually two-dimensional style," *Ringgold*, 126 F.3d at 77, Sandoval's photographs as used in the movie are not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them.

The photographs are displayed in poor lighting and at great distance. Moreover, they are out of focus and displayed only briefly in eleven different shots. Unlike *Ringgold*, in which the court found that brief but repeated shots of the poster at issue reinforced its prominence, the eleven shots here have no cumulative effect because the images contained in the photographs are not distinguishable. In short, this is the type of case the

Ringgold court anticipated when it observed that "[i]n some circumstances, a visual work, though selected by production staff for thematic relevance, or at least for its decorative value, might ultimately be filmed at such distance and so out of focus that a typical program viewer would not discern any decorative effect that the work of art contributes to the set." *Ringgold*, 126 F.3d at 77. Because Sandoval's photographs appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable, we find the use of those photographs to be *de minimis*.

CONCLUSION

For the aforementioned reasons, we find that defendants' use of Sandoval's copyrighted material was *de minimis* and affirm the judgment of the District Court.

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- 97-9175 (Docket) (Sep. 23, 1997)

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