

KIRKLAND ALERT

June 2011

Federal Judge Rejects Fair Use Argument in *Friedman v. Guetta*

Three federal courts in New York and Los Angeles have recently held that the use of pre-existing photographs by “appropriation” artists did not fall within the “fair use” exception to copyright protection under Section 107 of the federal Copyright Act.

The most recent of the three decisions, which has not been widely reported, was issued on May 27, 2011, in a case brought by photographer Glen E. Friedman against Thierry Guetta (a/k/a Mr. Brainwash) for copyright infringement. Judge Dean D. Pregerson of the Central District of California granted summary judgment for Friedman, finding that Guetta’s works were substantially similar to Friedman’s famous photograph of the rap group Run D.M.C., and that Guetta’s use of the photograph was not a fair use. No notice of appeal has yet been filed. Friedman’s original photograph and Guetta’s work, using a traced stencil of the photograph on canvas (the “Stencil Work”), are pictured below.



In *Friedman v. Guetta*, Friedman’s photograph was originally published in a 1994 book of Friedman’s photographs. Guetta claimed that he obtained a copy of the photograph without a copyright notice from the Internet after he came across it by “chance,” and that he did not know it had been published in Friedman’s book. Guetta made several different works using Friedman’s photograph, including: (i) the Stencil Work pictured above; (ii) a work depicting two of the rappers from the photograph combined with an old photo of a couple (the “Old Photo Work”); (iii) a work that was made by “hand-painting a projected altered reproduction of the photograph” on a canvas banner (the “Banner Work”); and (iv) a work that was made by tracing the photograph on wood and gluing 1000 pieces of broken phonographic records onto the wood (the “Broken Records Work”). Guetta sold the original Banner Work and prints of the Old Photo Work and used the images to promote his 2008 exhibition titled *Life is Beautiful*.¹ The Stencil Work and the Broken Records Work were displayed at the exhibition, but were not sold or otherwise used to promote the show.

In his May 27th decision, Judge Pregerson rejected Guetta’s argument that he did not copy the protectable, or original, elements of the photograph. Guetta had argued that Friedman’s depiction of the rap group was common, or *scenes à faire*, and was therefore only entitled to thin copyright protection against near-verbatim copy-

ing. In rejecting this argument and holding that the works were substantially similar, the court held that the similarities between Friedman’s photograph and Guetta’s works, such as in the lighting and perspective, the selection and arrangement of the subject matter, and the rappers’ pose, clothing, and accessories, outweighed Guetta’s changes to the background and coloring of the works: “this court is of the mind that as long as the essence of the expressions of the subject or subjects is copied, there will almost always be substantial similarity.”

The court also found against Guetta as to all four fair use factors. Regarding the first fair use factor, the purpose and character of the use, which considers whether a work is “transformative,” as well as whether the use is of a commercial purpose and whether the defendant acted in good faith, the court held that Guetta’s works were not a “transformative alternative” to the original photograph because both Friedman and Guetta are “artists” and because at least some of Guetta’s works were sold and were therefore commercial. With regard to the second fair use factor, the nature of the copyrighted work, the court held the photograph of Run D.M.C. fell within “the core of copyright protection” and was thus creative, weighing the second factor in favor of Friedman. The court also found that the third fair use factor, the amount and substantiality of the original work that was used, favored Friedman, concluding that Guetta’s use was “quantitatively and qualitatively” substantial as he did little more than “eliminate the background” and had

taken the “heart of the photograph.” Lastly, the fourth fair use factor, the effect of the use on the potential market for the original, also weighed against fair use as Guetta’s display and sale of his works to collectors competed directly with Friedman’s own use of the photograph for the same purposes.

Friedman v. Guetta marks the third time this year that courts have held that an appropriation artist’s use of a pre-existing photograph was not a fair use. In *Fairey v. The Associated Press*, a highly publicized case in which Kirkland & Ellis LLP partner Dale Cendali and her team represented the AP, Judge Alvin K. Hellerstein in the Southern District of New York granted the AP’s motion for summary judgment striking defendant Obey Clothing’s fair use defense. Obey Clothing is the exclusive licensee of the artist Shepard Fairey and had sold t-shirts and other merchandise bearing Fairey’s *Obama Hope* graphic, which was copied from an AP copyrighted photograph. Similarly, in *Cariou v. Prince*, Judge Deborah A. Batts in the Southern District of New York granted photographer Patrick Cariou’s motion for summary judgment, concluding that the artist Richard Prince’s works incorporating several of Cariou’s photographs of Jamaican Rastafarians were substantially similar to the original photos and not fair use.

¹ Thierry Guetta, and his 2008 *Life is Beautiful* exhibition, were the subject of street artist Banksy’s critically acclaimed 2010 documentary, *Exit Through the Gift Shop*.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Claudia Ray
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/cray
+1 (212) 448-4948

Johanna Schmitt
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/jschmitt
+1 (212) 448-4841

Brendan T. Kehoe
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/bkehoe
+1 (212) 448-4824

This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising. Prior results do not guarantee a similar outcome.