

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER BOFFOLI,  
Plaintiff,  
v.  
LAURIE MCCORMICK,  
Defendant.

Case No.: 25-CV-1528 JLS (VET)

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT’S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

(ECF No. 10)

Presently before the Court is Defendant Laurie McCormick’s Motion to Dismiss First Amended Complaint (“Mot.,” ECF No. 10). Also before the Court is Plaintiff Christopher Boffoli’s Opposition to Defendant’s Motion to Dismiss First Amended Complaint (“Opp’n,” ECF No. 12), and Defendant’s Reply in Support of Motion to Dismiss First Amended Complaint (“Reply,” ECF No. 13). After reviewing Plaintiff’s First Amended Complaint (“FAC,” ECF No. 8), the Parties’ arguments, and the relevant law, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant’s Motion (ECF No. 10).

**BACKGROUND**

Plaintiff is “a fine art, editorial, and commercial photographer who created ‘Big Appetites,’ a series of photographs featuring tiny figures photographed against real food backdrops.” FAC ¶ 7. Big Appetites has been published in more than 100 countries and

1 featured in major publications such as the New York Times, Washington Post, NPR, and  
2 CBS This Morning. *Id.* Plaintiff’s photographs from the Big Appetites collection are  
3 displayed and available for purchase in galleries across the world, often licensed for  
4 publication in media, and has led to Plaintiff’s frequent employment by “top advertising  
5 agencies and brands for commercial commissions based on his work.” *Id.* ¶¶ 8–9. Plaintiff  
6 registered each photograph in the Big Appetites collection with the U.S. Copyright Office.  
7 *Id.* ¶ 10. The photographs at issue here are “Papaya Golf” (Copyright Registration Number  
8 VAu 1-148-370 and included in the Big Appetites book registration Number  
9 VA0001948517) and “Banana Racers” (Copyright Registration Number VAu 1-198-948)  
10 (collectively, the “Copyrighted Photographs”). *Id.*

11 In January 2025, Plaintiff discovered that Defendant was displaying images with  
12 content that allegedly infringes on Plaintiff’s Copyrighted Photographs. *Id.* ¶ 11. Plaintiff  
13 alleges that Defendant’s photographs “Papaya Trap” and “The Big Banana” (collectively,  
14 the “Disputed Photographs”) copy “essential creative elements” of Plaintiff’s “Papaya  
15 Golf” and “Banana Racers.” *Id.* ¶ 12. Plaintiff alleges that the Disputed Photographs are  
16 “substantially similar” to the Copyrighted Photographs, and that the Copyrighted  
17 Photographs “have been widely published and publicly available since at least 2013  
18 through [Plaintiff’s] website, major publications, fine art galleries, and various licensed  
19 publications worldwide.” *Id.* ¶¶ 12–13.

20 Plaintiff further alleges that the Disputed Photographs were hosted on Amazon Web  
21 Services’ (“AWS”) servers. *Id.* ¶ 11. On or about January 16, 2025, Plaintiff submitted a  
22 takedown notice to AWS, informing AWS of the Disputed Photographs and requesting  
23 their removal from ASW’s servers. *Id.* ¶ 15. On March 12, 2025, AWS responded and  
24 took down the Disputed Photographs. *Id.* On April 17, 2025, Defendant filed a counter-  
25 notice—claiming that the Disputed Photographs were not infringing on Plaintiff’s  
26 copyright. *Id.* ¶ 16. AWS requested “notice that a United States district court lawsuit has  
27 been filed.” *Id.*

28 ///

1 On June 13, 2025, Plaintiff filed his complaint (ECF No. 1), which was amended on  
2 September 9, 2025 (ECF No. 8), bringing a claim for copyright infringement. On  
3 September 23, 2025, Defendant filed the present Motion arguing that Plaintiff has failed to  
4 state a claim for copyright infringement. *See generally* Mot.

5 **The Photographs at Issue**

6 **Plaintiff Christopher Boffoli: “Banana Racers”**



16 **Defendant Laurie McCormick: “The Big Banana”**



26 ///

27 ///

28 ///

1 **Plaintiff Christopher Boffoli: “Papaya Golf”**



12 **Defendant Laurie McCormick: “Papaya Trap”**



21 **LEGAL STANDARD**

22 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the  
23 defense that the complaint “fail[s] to state a claim upon which relief can be granted.” To  
24 survive a 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as  
25 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,  
26 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is  
27 facially plausible when the facts pled “allow[] the court to draw the reasonable inference  
28 that the defendant is liable for the misconduct alleged.” *Id.* That is not to say that the claim

1 must be probable, but there must be “more than a sheer possibility that a defendant has  
2 acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall short of  
3 a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Though this  
4 plausibility standard “does not require ‘detailed factual allegations,’ . . . it [does] demand[]  
5 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (quoting  
6 *Twombly*, 550 U.S. at 555). In other words, a complaint will not suffice “if it tenders  
7 ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (alteration in original)  
8 (quoting *Twombly*, 550 U.S. at 557). Put differently, “a formulaic recitation of the  
9 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

10 Review under Rule 12(b)(6) requires a context-specific analysis involving the  
11 Court’s “judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. In performing  
12 that analysis, “a district court must accept as true all facts alleged in the complaint, and  
13 draw all reasonable inferences in favor of the plaintiff.” *Wi-LAN Inc. v. LG Elecs., Inc.*,  
14 382 F. Supp. 3d 1012, 1020 (S.D. Cal. 2019). “[W]here the well-pleaded facts do not  
15 permit the court to infer more than the mere possibility of misconduct, the complaint has  
16 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S.  
17 at 679 (second alternation in original). If a complaint does not survive Rule 12(b)(6), a  
18 court grants leave to amend unless it determines that no modified contention “consistent  
19 with the challenged pleading could . . . possibly cure the deficiency.” *Schreiber Distrib.*  
20 *Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

## 21 DISCUSSION

22 Defendant argues that Plaintiff fails to state a claim for copyright infringement  
23 because Plaintiff fails to adequately allege that Defendant copied the Copyrighted  
24 Photographs. Mot. at 10. First, Defendant argues that Plaintiff fails to allege that  
25 Defendant accessed the Copyrighted Photographs prior to the publication of the Disputed  
26 Photographs. *Id.* at 10–12. Second, Defendant argues that Plaintiff fails to allege  
27 substantial similarities between the photographs. *Id.* at 13–18. Defendant does not contest  
28 that Plaintiff owns valid copyrights for the Copyrighted Photographs. *See generally id.*

1 **I. Copyright Infringement**

2 “To state a claim for copyright infringement, the plaintiff must plausibly allege that  
3 she owns a valid copyright, and the defendant copied protected aspects of her work.” *Biani*  
4 *v. Showtime Networks, Inc.*, 153 F.4th 957, 962 (9th Cir. 2025) (citing *Skidmore v. Led*  
5 *Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc)). “The second prong contains two  
6 separate components: ‘copying’ (or ‘factual copying’) and illicit copying (or ‘unlawful  
7 appropriation’).” *Id.* (quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir.  
8 2018), *overruled on other grounds by, Skidmore*, 952 F.3d at 1066–69).

9 “Because independent creation of a work is a complete defense to copyright  
10 infringement, a plaintiff must first adequately plead that the defendant copied the work at  
11 issue.” *L ALD LLC v. Gray*, No. 24-CV-2195-GPC-MSB, 2025 WL 3228951, at \*5 (S.D.  
12 Cal. Nov. 18, 2025) (citing *Skidmore*, 952 F.3d at 1064). Direct evidence of copying is  
13 rare; therefore, “copying is often proven circumstantially.” *Id.* To allege copying by  
14 circumstantial evidence, the plaintiff must “plead facts plausibly showing either (1) ‘that  
15 the two works in question are strikingly similar,’ or (2) ‘that the works are substantially  
16 similar and that [the defendant] had access to the [Copyrighted Photographs].” *Malibu*  
17 *Textiles, Inc. v. Label Lane Int’l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019) (citations omitted)  
18 (cleaned up).

19 The Court agrees with Defendant that Plaintiff does not allege copyright  
20 infringement under a “strikingly similar” theory. *See* FAC ¶ 12; Mot. at 11; Opp’n at 13.  
21 Therefore, the Court only addresses whether Plaintiff has stated a claim under a  
22 “substantially similar” theory.

23 **II. Access**

24 First, Defendant argues that Plaintiff fails to adequately allege access because  
25 Plaintiff does not allege that Defendant had access to the Copyrighted Photographs, and  
26 Plaintiff’s allegations regarding widespread dissemination are insufficient. Mot. at 10–12.

27 “A showing of access requires ‘either evidence of a chain of events between the  
28 plaintiff’s work and defendants’ access to that work or evidence that the plaintiff’s work

1 has been widely disseminated.” *Biani*, 153 F.4th at 962 (quoting *Unicolors, Inc. v. Urb.*  
2 *Outfitters, Inc.*, 853 F.3d 980, 985 (9th Cir. 2017)). “To prove access, a plaintiff must  
3 show a reasonable possibility, not merely a bare possibility, that an alleged infringer had  
4 the chance to view the protected work.” *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d  
5 1138, 1143 (9th Cir. 2009).

6 The Court agrees with Defendant that Plaintiff does not appear to allege access based  
7 on a “chain of events” theory. See FAC ¶ 13; Mot. at 11; Opp’n at 8–10. Therefore, the  
8 Court only addresses whether Plaintiff sufficiently pled access under a “widespread  
9 dissemination” theory.

### 10 ***Widespread Dissemination***

11 “[U]nder a ‘widespread dissemination’ theory, a plaintiff may show access by  
12 demonstrating that the work has been broadly distributed; evidence of such widespread  
13 dissemination often ‘centers on the degree of a work’s commercial success and on its  
14 distribution through radio, television, and other relevant mediums.’” *Ambrosetti v. Oregon*  
15 *Cath. Press*, 151 F.4th 1211, 1221 (9th Cir. 2025) (quoting *Loomis v. Cornish*, 836 F.3d  
16 991, 997 (9th Cir. 2016)). “Where the ‘relevant market’ is smaller, the issue is whether the  
17 allegedly copied work ‘saturated’ that market.” *Id.* (cleaned up). There is no bright-line  
18 rule “where some number of units distributed always equals—or does not equal—access.”  
19 *Id.* at 1222 (citations omitted). “Rather, each case must be evaluated based on its ‘actual  
20 facts’ and whether those facts show a ‘reasonable opportunity’ for a defendant to access a  
21 plaintiff’s work.” *Id.* (citation omitted). “The allegations must, therefore, create more than  
22 a bare possibility of access and rise above mere speculation and conjecture.” *L ALD LLC*,  
23 2025 WL 3228951, at \*6 (citing *Woodland v. Hill*, 136 F.4th 1199, 1207 (9th Cir. 2025),  
24 *cert. denied*, 2026 WL 568311 (2026)).

25 Defendant argues that Plaintiff’s only allegation concerning access is that his  
26 photographs are “widely published and publicly available.” Mot. at 11 (quoting FAC ¶  
27 13). In her Reply, Defendant also argues that Plaintiff “generally references that his Big  
28 Appetites series was featured in media outlets in 2013, but he does not specifically allege

1 whether [the Copyrighted Photographs] were published sufficiently for there to have been  
2 a reasonable probability for Defendant to have accessed them.” Reply at 4. Further,  
3 Defendant argues that Plaintiff does not state where the Copyrighted Photographs were  
4 published or when they were available. *Id.* at 4–5. Defendant began her “Miniature  
5 Appetites” collection—which the Disputed Photographs are a part of—in 2013. *Id.* at 5.  
6 “Papaya Trap” was published on December 1, 2013, and “The Big Banana” was published  
7 on January 14, 2014. *Id.* Defendant argues that “[t]his fact is crucial, because other than  
8 a vague reference to 2013, the FAC is devoid of any detail regarding the timing of when  
9 [Plaintiff’s] works were available.” *Id.* (first citing FAC ¶ 13; and then citing *Klauber*  
10 *Bros., Inc. v. H&M Hennes & Mauritz LP*, No. CV 18-3507-MWF (SSX), 2019 WL  
11 4261878, at \*5 (C.D. Cal. June 18, 2019)).

12 Plaintiff alleges that the Copyrighted Photographs are part of the “Big Appetites”  
13 collection, which “has been published in more than 100 countries around the world and has  
14 been featured in major publications such as the New York Times, Washington Post, NPR,  
15 and CBS This Morning, among many others.” FAC ¶ 7. Plaintiff further alleges that the  
16 Big Appetites collection “can be found in galleries and private collections in the US,  
17 Canada, Europe, and Asia,” and that his “images” are frequently “licensed for publication  
18 in books, magazines, calendars, online publications, commercial websites, and greeting  
19 cards.” *Id.* ¶ 8.

20 Specifically, Plaintiff relies on the Ninth Circuit decision in *Ambrosetti* for the  
21 proposition that in niche creative communities—such as miniature food photography—  
22 plaintiffs “do[] not need to show widespread dissemination among [artists] generally, but  
23 only among members of this small scene.” Opp’n at 9 (quoting *Ambrosetti*, 151 F.4th at  
24 1222). Plaintiff argues that the relevant market for widespread dissemination is  
25 “photographers who create miniature scenes using food as landscapes,” and within this  
26 “tiny professional niche, Big Appetites has achieved dominant presence through every  
27 meaningful channel, including major media coverage, international gallery representation,  
28 commercial licensing, and industry recognition.” *Id.* at 10 (citing FAC ¶¶ 7–9). Plaintiff

1 states that Defendant is a member of this narrow field, as she confirms that “she has created  
2 miniature photography since 2011, maintains a website dedicated to this work, and has  
3 received media coverage for her miniature art.” *Id.* Thus, Plaintiff concludes that the  
4 prominence of his work “in this microscopically small field” while Defendant “actively  
5 works in the identical niche” demonstrates a reasonable opportunity of access. *Id.*

6 At the motion to dismiss phase, the Court concludes that Plaintiff has plausibly  
7 alleged a “reasonable opportunity” for Defendant to access the Copyrighted Photographs.  
8 *See Ambrosetti*, 151 F.4th at 1221. Plaintiff has alleged that his photographs have reached  
9 worldwide recognition within the narrow field of miniature food photography—a group  
10 which Defendant has been a member of since 2011. *See Mot.* at 8; FAC ¶¶ 7–9. Plaintiff  
11 alleges that the Copyrighted Photographs are a member of the Big Appetites collection,  
12 which have been published in “major publications such as the New York Times,  
13 Washington Post, NPR, and CBS This Morning.” FAC ¶ 7. The Court finds that this  
14 plausibly establishes evidence of widespread dissemination as this “often ‘centers on the  
15 degree of a work’s commercial success and on its distribution through radio, television,  
16 and other relevant mediums.’” *Ambrosetti*, 151 F.4th at 1221 (quoting *Loomis*, 836 F.3d  
17 at 997). Here, where the relevant market is smaller, the Court finds that Plaintiff has  
18 plausibly alleged “saturation” of the miniature food photography market. *See* FAC ¶¶ 7–  
19 9.

20 Regarding Defendant’s arguments, drawing all reasonable inferences in favor of  
21 Plaintiff, the Copyrighted Photographs are part of the Big Appetites collection, and thus,  
22 when Plaintiff alleges the success of Big Appetites globally, the Court infers that the  
23 Copyrighted Photographs are included in those allegations. *See id.* Plaintiff also alleges  
24 that these have been available publicly since 2013—making the Copyrighted Photographs  
25 plausibly available prior to the creation of the Disputed Photographs, created in late 2013  
26 and early 2014. *See* FAC ¶ 13; Reply at 4–5.

27 Further, the Court agrees with Plaintiff that Defendant’s membership in the niche  
28 field of miniature food photography, paired with the success of Plaintiff’s Big Appetites

1 collection within that field, plausibly alleges that Defendant had a reasonable opportunity  
2 to access Plaintiff’s Copyrighted Photographs. *See Ambrosetti*, 151 F.4th at 1222 (finding  
3 where both plaintiff and defendant were members of the same niche community that  
4 plaintiff need not “show widespread dissemination among [photographers] generally, but  
5 only among members of this small scene”); *Peterson v. Berggren*, No. 25-CV-1268-AB,  
6 2026 WL 310025, at \*7 (D. Or. Feb. 5, 2026) (finding allegations of widespread  
7 dissemination sufficient where defendants participated “in the same consumer market” as  
8 plaintiff and frequently sold products on the same websites and major retailers); *Browne v.*  
9 *Donalds*, No. 21-CV-2840-AB-AJR, 2024 WL 3468898, at \*16 (C.D. Cal. May 28, 2024)  
10 (“Drawing all reasonable inferences in Plaintiffs’ favor, the success and popularity of [the  
11 copyrighted work] in the reggae dancehall scene supports a ‘reasonable possibility’ that  
12 Defendants had the opportunity to hear [the copyrighted work.]”); *Gregorini v. Apple Inc.*,  
13 No. 20-CV-406-SSS-JC, 2024 WL 5264949, at \*5 (C.D. Cal. Nov. 25, 2024) (finding at  
14 summary judgment that a reasonable possibility that defendants had the chance to view the  
15 copyrighted work due to the copyrighted work’s “notoriety in the independent film scene  
16 during the same time [d]efendants consumed independent films, and when [the disputed  
17 work] itself was in development”).

18 Therefore, Plaintiff has plausibly alleged access under a widespread dissemination  
19 theory, and Defendant’s Motion is **DENIED** on this ground.

### 20 **III. Substantial Similarity**

21 Defendant next argues that Plaintiff fails to sufficiently allege substantial similarities  
22 between the Copyrighted Photographs and the Disputed Photographs to allege unlawful  
23 appropriation. Mot. at 13.

24 “[C]opyright law does not forbid all copying.” *Biani*, 153 F.4th at 963 (quoting  
25 *Rentmeester*, 883 F.3d at 1117). Therefore, in addition to copying, a plaintiff must also  
26 show “unlawful appropriation.” *Id.* “This component requires proof that the defendant  
27 copied enough of the plaintiff’s protected expression of . . . ideas or concepts to render the  
28 two works ‘substantially similar.’” *Id.* (quoting *Rentmeester*, 883 F.3d at 1117) (cleaned

1 up). The Ninth Circuit applies a two-part test for substantial similarity—the “extrinsic”  
2 and “intrinsic” tests. *Id.* (citing *Rentmeester*, 883 F.3d at 1118). “And because a plaintiff  
3 must satisfy both the extrinsic and intrinsic tests, failure to meet the extrinsic test is fatal.”  
4 *Woodland*, 136 F.4th at 1210 (citing *Rentmeester*, 883 F.3d at 1118).

5 “The extrinsic test assesses the objective similarities of the two works, focusing only  
6 on the protectable elements of the plaintiff’s expression.” *L ALD LLC*, 2025 WL 3228951,  
7 at \*8 (citing *Rentmeester*, 883 F.3d at 1118). The court “first filters out ‘the unprotectable  
8 elements of the plaintiff’s work—primarily ideas and concepts, material in the public  
9 domain, and *scènes à faire* (stock or standard features that are commonly associated with  
10 the treatment of a given subject).” *Id.* (quoting *Rentmeester*, 883 F.3d at 1118). “The  
11 remaining protectable elements are then compared ‘to corresponding elements of the  
12 defendant’s work to assess similarities in the objective details of the works.” *Id.* (quoting  
13 *Rentmeester*, 883 F.3d at 1118).

14 Regarding photographs, “photos can be broken down into objective elements that  
15 reflect the various creative choices the photographer made in composing the image—  
16 choices related to subject matter, pose, lighting, camera angle, depth of field, and the like.”  
17 *Rentmeester*, 883 F.3d at 1119 (citing *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074–  
18 75 (9th Cir. 2000)). Copyright protection does not extend to these individual elements in  
19 isolation, nor can a photographer “claim a monopoly on the right to photograph a particular  
20 subject just because he was the first to capture it on film.” *Id.* “[T]hese objective  
21 elements—even ‘highly original elements’—are unprotected.” *Woodland*, 136 F.4th at  
22 1210 (citing *Rentmeester*, 883 F.3d at 1119). However, “[i]f sufficiently original, the  
23 combination of subject matter, pose, camera angle, etc., receives protection, not any of the  
24 individual elements standing alone.” *Rentmeester*, 883 F.3d at 1119. Therefore, “a  
25 photographer’s copyright is limited to ‘the particular selection and arrangement’ of the  
26 elements as expressed in the copyrighted image.” *Id.* at 1120 (citation omitted). Thus, “[a]  
27 second photographer is free to borrow any of the individual elements featured in a  
28 copyrighted photograph, ‘so long as the competing work does not feature the same

1 selection and arrangement’ of those elements.” *Id.* (citation omitted). “The two photos’  
2 selection and arrangement of elements must be similar enough that ‘the ordinary observer,  
3 unless he set out to detect the disparities, would be disposed to overlook them.” *Id.*  
4 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.  
5 1960)).

6 “Only the extrinsic test’s application may be decided by the court as a matter of law  
7 . . . .” *L ALD LLC*, 2025 WL 3228951, at \*8 (citing *Rentmeester*, 883 F.3d at 1118).  
8 “Although ruling as a matter of law at the pleading stage can sometimes be appropriate,  
9 the Ninth Circuit has ‘long held that summary judgment is not highly favored on questions  
10 of substantial similarity.’” *Id.* (quoting *Zindel v. Fox Searchlight Pictures, Inc.*, 815 F.  
11 App’x 158, 159 (9th Cir. 2020)) (cleaned up). “Courts must be just as cautious before  
12 dismissing a case for lack of substantial similarity on a motion to dismiss.” *Zindel*, 815 F.  
13 App’x at 159. “Dismissal is only warranted if, as a matter of law, the similarities between  
14 the two works are only unprotectable material or are de minimis, such that reasonable  
15 minds could not differ on the issue of substantial similarity.” *L ALD LLC*, 2025 WL  
16 3228951, at \*8 (collecting cases). “If additional evidence uncovered in discovery ‘could  
17 shed light on any issues that actually matter to the outcome,’ then dismissal at the pleading  
18 stage is inappropriate.” *Id.* (quoting *Rentmeester*, 883 F.3d at 1123). Further, the  
19 “copyrighted and allegedly infringing works must be presented to the court, such that the  
20 works are ‘capable of examination and comparison.’” *Zindel*, 815 F. App’x at 159–60  
21 (quoting *Rentmeester*, 883 F.3d at 1123).

22 ///  
23 ///  
24 ///  
25 ///  
26 ///  
27 ///  
28 ///

1           **A. “Banana Racers” vs. “The Big Banana”**

2           The Court first considers whether Defendant’s “The Big Banana” is substantially  
3 similar to Plaintiff’s “Banana Racers.” The Court concludes it is not.

4           Plaintiff Christopher Boffoli: “Banana Racers”



11           Defendant Laurie McCormick: “The Big Banana”



18           Defendant argues that, like the photographs at issue in *Rentmeester*, “the allegedly  
19 infringed and infringing photographs are before the Court[,] and they at most share  
20 unprotected elements selected and arranged differently.” Mot. at 15 (citing *Rentmeester*,  
21 883 F.3d at 1121). Plaintiff argues that Defendant incorrectly focuses on superficial  
22 differences omitting “the crucial similarity that both photographers selected the exact same  
23 fruit-sport pairing and used the banana’s natural curves as a racetrack.” Opp’n at 19. Both  
24 Parties rely on *Rentmeester* and *Woodland* for their respective arguments; thus, the Court  
25 considers each in turn.

26 ///

27 ///

28 ///

1 In *Rentmeester*, which was decided on a motion to dismiss, the plaintiff sued Nike  
2 for alleged infringement of a photo of Michael Jordan leaping with a basketball.  
3 *Rentmeester*, 883 F.3d at 1121. The Ninth Circuit “determined that while Nike had  
4 borrowed the ‘general idea or concept embodied in the [plaintiff’s] photo’—Michael  
5 Jordan in a leaping, *grand jeté*-inspired pose—Nike ‘produced an image that differ[ed]  
6 from [the plaintiff’s] photo in more than just minor details.’” *Woodland*, 136 F.4th at 1211  
7 (quoting *Rentmeester*, 883 F.3d at 1121) (summarizing the *Rentmeester* decision). The  
8 court noted “differences in the positions of Jordan’s limbs, the backgrounds and  
9 foregrounds, the presence or lack of sun, and the position of the basketball hoop and  
10 Jordan’s body in the frame.” *Id.* (citing *Rentmeester*, 883 F.3d at 1121–22). The Ninth  
11 Circuit thus affirmed the district court’s dismissal of plaintiff’s complaint with prejudice.  
12 *Rentmeester*, 883 F.3d at 1125.

13 Similarly, in *Woodland*, the Ninth Circuit also affirmed the district court’s dismissal  
14 of plaintiff’s second amended complaint without leave to amend. *Woodland*, 136 F.4th at  
15 1217. There, the court noted that while the photographs at issue shared a few similarities,  
16 none were substantially similar. *Id.* at 1212. The court analyzed each photo at issue—  
17 noting that “objective elements in the photos—the men’s poses, colors, lighting,  
18 backgrounds, etc.—[were] different, and so the selection and arrangement” of those  
19 elements also widely differed. *Id.* While the models in the photographs shared some  
20 common poses, these poses are common “in photos of male models and actors” and many  
21 of the motifs in the images were common, unprotected ideas in “many pieces of art.” *Id.*  
22 at 1213–14.

23 Here, the Court finds that while “The Big Banana” and “Banana Racers” share a  
24 common subject—bananas and bicycle riders—almost all the other aspects of the image  
25 differ. For example, in Plaintiff’s “Banana Racers,” the bananas are turned down toward  
26 the table with the bikers riding over the top, the background is a light purple, there are  
27 strawberries in the foreground, the framing is zoomed out and not focused on any single  
28 rider, and the angle is of the bananas to the side. In Defendant’s “The Big Banana,” the

1 bananas are turned toward the ceiling with the bikers ascending the bananas, the  
2 background is dark, and the angle is zoomed in close, focused on one rider who appears to  
3 be winning the race.

4 While these images share some objective similarities, e.g., bike riders and bananas,  
5 their selection and arrangement substantially differ. While Defendant may have “borrowed  
6 the ‘general idea or concept embodied in [Plaintiff’s] photo,’” *Woodland*, 136 F.4th at 1211  
7 (quoting *Rentmeester*, 883 F.3d at 1121), “[a] second photographer is free to borrow any  
8 of the individual elements featured in a copyrighted photograph, ‘so long as the competing  
9 work does not feature the same selection and arrangement’ of those elements,”  
10 *Rentmeester*, 883 F.3d at 1120 (citation omitted). Therefore, “The Big Banana” and  
11 “Banana Racers” are “as a matter of law not substantially similar.” *Woodland*, 136 F.4th  
12 at 1211 (citing *Rentmeester*, 883 F.3d at 1125). Defendant’s Motion is **GRANTED** as to  
13 “The Big Banana” and “Banana Racers.”

14 ***Leave to Amend***

15 Leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P.  
16 15(a)(2). But while the rule should be interpreted liberally, leave should not be granted  
17 automatically. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). In  
18 determining whether to grant leave to amend, trial courts should consider various factors,  
19 including bad faith, undue delay, prejudice to the opposing party, futility of amendment,  
20 and whether the party has previously amended. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

21 Applying the *Foman* factors, the Court declines to grant Plaintiff leave to amend.  
22 Here, the copyrighted and allegedly infringing works were presented to the court, such that  
23 the works were “capable of examination and comparison.” *Zindel*, 815 F. App’x at 159–  
24 60 (quoting *Rentmeester*, 883 F.3d at 1123). Further, “The Big Banana” and “Banana  
25 Racers” are as a matter of law not substantially similar, and no new allegations would  
26 change this dispositive fact. *See Rentmeester*, 883 F.3d at 1125; *Anton Int’l v. Gaojing*  
27 *Wei*, No. 21-CV-121-JWH-KKx, 2021 WL 3017996, at \*5 (C.D. Cal. Apr. 28, 2021) (“No  
28 additional facts could cure this defect, because [the plaintiff] has already submitted

1 photographs that permit the Court to compare [the plaintiff’s] works to [the defendant’s]  
2 products.”). Therefore, Court finds that “it is clear that granting leave to amend would [be]  
3 futile.” *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061  
4 (9th Cir. 2004).

5 **B. “Papaya Golf” vs. “Papaya Trap”**

6 The Court next considers whether Defendant’s “Papaya Trap” is substantially  
7 similar to Plaintiff’s “Papaya Golf.” The Court concludes that it is.

8 Plaintiff Christopher Boffoli: “Papaya Golf”



14 Defendant Laurie McCormick: “Papaya Trap”



20 Defendant argues that the only similarity between the photographs is that they both  
21 depict a golfer on a papaya, but otherwise the images differ in camera angle, color palette,  
22 style of miniatures, and artistic tone. Mot. at 17–18. Plaintiff argues that Defendant  
23 catalogs “irrelevant differences while minimizing or omitting the core similarities in  
24 protected expression.” Opp’n at 22. Plaintiff asserts that the creative combination of the  
25 papaya, golfers, and papaya seeds as a golf obstacle are a protected selection and  
26 arrangement of elements. *Id.* at 22–23.

27 ///

28 ///

1 Here, the Court finds that, at the pleading stage, Defendant’s “Papaya Trap” is  
2 substantially similar to Plaintiff’s “Papaya Golf.” Both images depict a golfer on a papaya  
3 with the papaya seeds depicting a golf obstacle. Both images are centered on one golfer  
4 located near the papaya seed obstacle and are surrounded by a dark background. The only  
5 significant difference between the images is the number of golfers and the papaya’s slight  
6 change in position within the frame. The Court finds that “the differences in details  
7 between [the photographs] are easily overlooked” and the difference in the minor details  
8 “are more indicative of deliberate copying rather than producing an image unmistakably  
9 different in material details.” *Peterson*, 2026 WL 310025, at \*10; *Moebius v. HB USA*  
10 *Holdings, Inc.*, CV 21-2109-CJC(PVCx), 2021 WL 9747624, at \*3 (C.D. Cal. July 16,  
11 2021) (finding substantial similarity in photographs of a woman peering through blue  
12 blinds when the arrangement of “elements suggest[ed] an intentionality and expression  
13 which the Court [found] to be substantially similar between the two works”).

14 Further, “not only does the complaint plead the similarities between the works, but  
15 it ‘provides side-by-side pictures that make the similarities apparent.’” *Kevin Barry Fine*  
16 *Art Assocs. v. Ken Gangbar Studio, Inc.*, 391 F. Supp. 3d 959, 968 (N.D. Cal. 2019)  
17 (denying motion to dismiss and finding substantial similarities where the two sculptures  
18 had “similar general arrangements, with similar cluster patterns, presented in nearly the  
19 same way”) (quoting *Malibu Textiles*, 922 F.3d at 953); *Malibu Textiles*, 922 F.3d at 953  
20 (finding substantial similarity where the works contained “nearly identical floral, leaf,  
21 botch, and dot elements, and those elements are arranged in virtually the same way”). The  
22 selection and arrangement of elements between “Papaya Trap” and “Papaya Golf” are  
23 similar enough that “the ordinary observer, unless he set out to detect the disparities, would  
24 be disposed to overlook them.” *Peter Pan Fabrics*, 274 F.2d at 489.

25 Therefore, Plaintiff has sufficiently alleged that “Papaya Trap” is substantially  
26 similar to “Papaya Golf.” Defendant’s Motion is **DENIED** as to these photographs.

27 ///

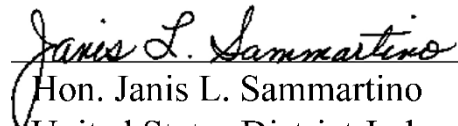
28 ///

**CONCLUSION**

For the reasons stated above, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant’s Motion to Dismiss First Amended Complaint (“Mot.,” ECF No. 10). Plaintiff’s claim for copyright infringement as applied to “Banana Racers” is **DISMISSED WITHOUT LEAVE TO AMEND**. Defendants **SHALL** file an answer within thirty (30) days of the electronic docketing of this Order regarding Plaintiff’s claim for copyright infringement as applied to “Papaya Golf.”

**IT IS SO ORDERED.**

Dated: April 7, 2026

  
Hon. Janis L. Sammartino  
United States District Judge

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28