

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
EASTERN DISTRICT OF CALIFORNIA

PIETER AREND FOLKENS, dba A
HIGHER PORPOISE DESIGN GROUP,

Plaintiff,

v.

WYLAND (NFN), aka ROBERT
THOMAS WYLAND, an individual;
WYLAND WORLDWIDE, LLC, a
California Corporation;
WYLAND GALLERIES, INC., a
California Corporation;
SIGNATURE GALLERY GROUP,
INC., a Nevada Corporation
dba WYLAND GALLERIES; and
DOES 1 through 50, inclusive,

Defendants.

No. 2:14-cv-02197-JAM-CKD

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ON
COPYRIGHT INFRINGEMENT CLAIM**

This action arises from a copyright dispute between Plaintiff Folkens dba A Higher Porpoise Design Group ("Plaintiff") and Defendants Wyland (NFN), Wyland Worldwide, LLC, Wyland Galleries, Inc., and Signature Gallery Group, Inc. (collectively, "Defendants"). Defendants filed a motion for summary judgment (Doc. #33). This Order addresses the first claim for relief for copyright infringement as to the painting by Wyland entitled "Life in the Living Sea"; the Court took this

1 portion of Defendants' motion under submission at the hearing on
2 March 22, 2016. For the reasons stated below, the Court GRANTS
3 the motion.

4
5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 The following facts are undisputed. Plaintiff is a wildlife
7 artist, researcher, and author known for his work in the field of
8 marine mammals. First Am. Compl. (FAC) ¶ 5. Wyland is a "marine
9 wildlife artist whose giant 'whaling wall' murals grace 100
10 buildings worldwide." Notice of Mot. & Mot. of Defs. For Summ.
11 J.; Mem. of P. & A. ("Mot.") 2:5-6.

12 Plaintiff is the author and copyright owner of a pen and ink
13 illustration, published and registered in 1979, and entitled "Two
14 Tursiops Truncatus" a.k.a. "Two Dolphins." FAC ¶ 14.

15 In 2011, Wyland created a giclée on canvas (color photocopy
16 made on inkjet printers) entitled "Life in the Living Sea." FAC
17 ¶ 17; Wyland Decl. ¶ 18.

18 On September 22, 2014, Plaintiff filed this lawsuit,
19 claiming in part that Wyland's "Life in the Living Sea" infringes
20 Plaintiff's "Two Dolphins" (Doc. #1). Plaintiff then filed a
21 First Amended Complaint (Doc. #14). He asserts this copyright
22 infringement claim "against the artist Wyland and Wyland
23 Worldwide, LLC, the company that owns the copyright in 'Life in
24 the Living Sea.'" Mot. 6:12-14. "He also asserts [this]
25 infringement claim[] against Wyland Galleries, Inc. and Signature
26 Gallery Group, Inc. which he . . . asserts are art galleries that
27 sold th[e] work[]." Id. at 6:14-15. Plaintiff filed an
28 opposition on March 8, 2016 (Doc. #45). Thereafter, on March 15,

1 2016, Defendants filed a reply accompanied by evidentiary
2 objections (Doc. ##48, 50).

3
4 II. OPINION

5 A. Evidentiary Objections

6 Defendants raise numerous evidentiary objections to
7 Plaintiff's declaration and exhibits (Doc. #50). Specifically,
8 Defendants object to Plaintiff's declaration, paragraphs 16-20,
9 and the corresponding exhibits that compare "Two Dolphins" with
10 "Life in the Living Sea," under Daubert v. Merrell Dow
11 Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Federal Rules of
12 Evidence Rule 701 (opinion testimony by lay witness) and Rule 702
13 (no qualification of expert witness). Exs. 11b, 11d-g. The
14 Court need not address these objections, however, because even if
15 the Court assumes this evidence is admissible, it does not create
16 a genuine issue of material fact. Instead, the evidence purports
17 to show copying of the dolphins' general outlines, which under
18 Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003), is an
19 unprotectable element not entitled to copyright protection.

20 Defendants also object to exhibits that compare "Life in the
21 Living Sea" with "Love in the Sea." Exs. 19a-b; Folkens Decl.
22 ¶ 31. The Court need not address these objections, however,
23 because in ruling on this motion it compares "Life in the Living
24 Sea" with "Two Dolphins." See Norse v. City of Santa Cruz, 629
25 F.3d 966, 973-74 (9th Cir. 2010).

26 B. Copyright Infringement Claim

27 1. Copyright Infringement Standard

28 "To demonstrate copyright infringement, the plaintiff must

1 prove [two elements: (1)] ownership of a valid copyright and
2 [(2)] copying of constituent elements of the work that are
3 original." Twentieth Century Fox Film Corp. v. Entm't Distrib.,
4 429 F.3d 869, 876 (9th Cir. 2005). Defendants do not dispute the
5 first element—ownership of a valid copyright. See, e.g., Reply
6 2:23–24 (stating "*Two Dolphins* as a whole is a copyrightable
7 work"). "The instant motion addresses the second element—that
8 is, whether, in creating the accused work[], Wyland copied '*Two*
9 *Dolphins*.'" Mot. 8:26–28.

10 Since direct evidence of copying is not available in most
11 cases, the second element—copying—"may be established by showing
12 that the works in question 'are substantially similar in their
13 protected elements' and that the infringing party 'had access' to
14 the copyrighted work." Rice v. Fox Broad. Co., 330 F.3d 1170,
15 1174 (9th Cir. 2003) (quoting Metcalf v. Bochco, 294 F.3d 1069,
16 1072 (9th Cir. 2002)). Defendants do not contest access and
17 instead argue that "as a matter of law, there is no substantial
18 similarity." Mot. 9:3.

19 In considering substantial similarities between two works,
20 the Ninth Circuit employs both an extrinsic test and intrinsic
21 test. "[T]he extrinsic test . . . objectively considers whether
22 there are substantial similarities in **both** ideas and expression,
23 whereas the intrinsic test continues to measure expression
24 subjectively." Apple Comput., Inc. v. Microsoft Corp., 35 F.3d
25 1435, 1442 (9th Cir. 1994). "The standard for infringement—
26 substantially similar or virtually identical—determined at the
27 'extrinsic' stage is applied at the 'intrinsic' stage." Mattel,
28 Inc. v. MGA Entm't, Inc., 616 F.3d 904, 914 (9th Cir. 2010), as

1 amended on denial of reh'g (Oct. 21, 2010). "The 'intrinsic
2 test' is a subjective comparison that focuses on whether the
3 ordinary, reasonable audience would find the works substantially
4 similar in the total concept and feel of the works." Cavalier v.
5 Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (internal
6 quotation marks omitted).

7 On a motion for summary judgement, "only the extrinsic test
8 is important." Kouf v. Walt Disney Pictures & Television, 16 F.3d
9 1042, 1045 (9th Cir. 1994); see also Shaw v. Lindheim, 919 F.2d
10 1353, 1359 (9th Cir. 1990) (holding that in a copyright case
11 involving literary works, plaintiff's satisfaction of the
12 extrinsic test is sufficient to survive summary judgment on
13 substantial similarity issue); L.A. Printex Indus., Inc. v.
14 Aeropostale, Inc., 676 F.3d 841, 852 n.5 (9th Cir. 2012), as
15 amended on denial of reh'g and reh'g en banc (June 13, 2012)
16 (indicating "the 'Shaw rule' applies to art work").

17 When applying the extrinsic test, the court examines whether
18 the two works share a similarity of ideas and expression, as
19 measured by external, objective criteria. This examination
20 "often requires analytical dissection of a work." Three Boys
21 Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000). To
22 accomplish analytical dissection, the court divides a work into
23 its constituent parts to determine whether similarities between
24 the works are attributable to protectable or unprotectable
25 elements. In other words, the court "distinguish[es] protectible
26 from unprotectible elements and ask[s] only whether the
27 protectible elements in two works are substantially similar."
28 L.A. Printex Indus., Inc., 676 F.3d at 849-50 (holding that

1 "original selection, coordination, and arrangement of" flowers,
2 buds, stems, and leaves is protectable expression). As relevant
3 here, in comparing art works the court examines "the similarities
4 in their 'objective details in appearance,' including, but not
5 limited to, 'the subject matter, shapes, colors, materials, and
6 arrangement of the representations.'" Id. (quoting Cavalier, 297
7 F.3d at 826 (comparing art works)).

8 Summary judgment under the extrinsic test "is not highly
9 favored" in copyright cases. L.A. Printex Indus., Inc., 676 F.3d
10 at 848 (internal quotation marks omitted). However, "[s]ummary
11 judgement is appropriate if the court can conclude, after viewing
12 the evidence and drawing inferences in a manner most favorable to
13 the non-moving party, that no reasonable juror could find
14 substantial similarity of ideas and expression," i.e., no
15 reasonable juror could find the extrinsic test met. Id.
16 (internal quotation marks omitted).

17 2. Analysis

18 The parties dispute whether two dolphins crossing underwater
19 is a protectable element. Defendants argue that Plaintiff "may
20 not prevent others from depicting dolphins that simply bear
21 realistic features of dolphins, crossing underwater." Mot. 12:4-
22 5.

23 Plaintiff recognizes that his "Two Dolphins" "may only
24 receive 'thin protection,'" Opp'n 9:14-15, but counters that the
25 pose, attitude, perspectives, and arrangement of the two dolphins
26 are protectable elements. See id. at 10:4-6. As for the two
27 dolphins' arrangement, Plaintiff contended at the hearing that
28 there is no evidence of dolphins in nature crossing in the

1 specific pose featured in both parties' works.

2 Defendants' reply that "the only original element
3 [Plaintiff] can claim that also appears in Wyland's work is that
4 the two bottlenose dolphins cross. This generic addition to the
5 depiction of actual dolphins does not amount to the 'quantum of
6 originality' required to protect this element of Plaintiff's
7 work." (Reply 8:3-6.)

8 The main similarity between Wyland's "Life in the Living
9 Sea" and Plaintiff's "Two Dolphins" is two dolphins swimming
10 underwater, with one swimming upright and the other crossing
11 horizontally. See Mot. 9:16-10:5 (discussing the main
12 similarities and differences between the parties' works).

13 But this idea of a dolphin swimming underwater is not a
14 protectable element. Much like a narwhal's tusk, Plaintiff's
15 arguments do not help it survive in the sea of Ninth Circuit
16 precedent. In the Ninth Circuit, natural positioning and
17 physiology are not protectable. For instance, in Satava v.
18 Lowry, 323 F.3d 805 (9th Cir. 2003), the plaintiff asserted
19 copyright protection in a glass-in-glass jellyfish sculpture.
20 The Ninth Circuit held that the plaintiff "may not prevent others
21 from copying aspects of his sculptures resulting from either
22 jellyfish physiology or from their depiction in the glass-in-
23 glass medium," since the sculptures combined several
24 unprotectable elements, including jellyfish with tentacles or
25 bells, jellyfish in bright colors, and jellyfish swimming
26 vertically. Id. at 810-11. Similarly, in Aliotti v. R. Dakin &
27 Co., the Ninth Circuit held: "No copyright protection may be
28 afforded to the idea of producing stuffed dinosaur toys or to

1 elements of expression that necessarily follow from the idea of
2 such dolls." 831 F.2d 898, 901 (9th Cir. 1987); see also George
3 S. Chen Corp. v. Cadona Int'l, Inc., 266 F. App'x 523, 524 (9th
4 Cir. 2008) (finding the concept of "a 'cute' dolphin—with an open
5 mouth and an uplifted, twisted tail which made it appear to be
6 swimming—" is an unprotectable element); Florentine Art Studio,
7 Inc. v. Vedet K. Corp., 891 F. Supp. 532, 537 (C.D. Cal. 1995)
8 (finding in part that the idea of three dolphins jumping or
9 leaping is unprotectable).

10 Moreover, Plaintiff has "failed to identify any elements" of
11 his work "that are not commonplace or dictated by the idea of
12 [two] swimming dolphin[s]." George S. Chen Corp., 266 F. App'x
13 at 524. The concept of two dolphins crossing underwater
14 "necessarily follow[s] from the idea of" two dolphins swimming
15 together. Id. Specifically, the cross-dolphin pose featured in
16 both works results from dolphin physiology and behavior since
17 dolphins are social animals, they live and travel in groups, and
18 for these reasons, they are commonly depicted swimming close
19 together. See Aliotti, 831 F.2d at 901 n.1 (explaining that a
20 Tyrannosaurus stuffed toy's open mouth was an unprotectable
21 element, since Tyrannosaurus "was a carnivore and is commonly
22 pictured with its mouth open"). Therefore, no reasonable juror
23 could find substantial similarity of ideas and expression, since
24 the similarities between Plaintiff's "Two Dolphins" and Wyland's
25 "Life in the Living Sea" are unprotectable elements.

26 Plaintiff also argues there is evidence of direct copying.
27 Opp'n 12:21-14:1. At the hearing, he contended that this is a
28 case of tracing. However, Plaintiff's Exhibit 12 shows a 300%

1 enlargement of "Two Dolphins" over a different painting, and
2 Frank McGrath's Expert Report, Exhibit 5, compares "Two Dolphins"
3 and a different painting that is not at issue in this portion of
4 Defendants' motion. While Plaintiff's Exhibit 13 compares the
5 parties' works, it focuses on the dolphins' general outlines,
6 which is an unprotectable element, and "a [single] point of
7 intersection of the two dolphins" in Plaintiff's work, which
8 Plaintiff focused on at the hearing. Overall, this purported
9 evidence of direct copying is insufficient to establish the
10 presence of a genuine dispute of material fact on the copying
11 issue. Therefore, summary judgment for Defendants is proper on
12 this portion of their motion.

13
14 III. ORDER

15 For the reasons set forth above, the Court GRANTS
16 Defendants' Motion for Summary Judgment on Plaintiff's first
17 claim for relief for copyright infringement as to the painting by
18 Wyland entitled "Life in the Living Sea" of Plaintiff's First
19 Amended Complaint.

20 IT IS SO ORDERED.

21 Dated: April 6, 2016

22
23 
24 JOHN A. MENDEZ,
25 UNITED STATES DISTRICT JUDGE
26
27
28