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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION
10

11 TRACY CHAPMAN,
12 Plaintiff,
13 vs.
14 ONIKA TANYA MARAJ p/k/a NICKI
MINAJ and DOES 1-10,
15 Defendants.
16

Case No. 2:18-cv-9088-VAP-SS

**DEFENDANT ONIKA MARAJ'S
REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

Judge: Hon. Virginia A. Phillips
Date: September 14, 2020
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H.R.Rep. No. 94-1476, at 65 (1976), U.S. Code Cong. & Admin. News at
5659, 56798

1 **I. INTRODUCTION**

2 In her opposition to Maraj’s motion for summary judgment, Chapman levels
3 four general attacks on Maraj’s contention that her activities in the studio constituted
4 fair use:

- 5 • Maraj did not in fact have the benign intentions her motion
6 describes, when she went into the studio to record *Sorry*, so she
7 is not the “strawman” to whom her motion relates;
- 8 • The actual fair use factors set forth in 17 U.S.C. section 107
9 should not even be consulted, but if they are, they weigh in
10 Chapman’s favor and not Maraj’s;
- 11 • There is no reported decision supporting Maraj’s claim of “fair
12 use;” and
- 13 • Maraj’s position, if adopted, would “eviscerate” the derivative
14 work right under the Copyright Act.”

15 Chapman’s contentions are each addressed below. As shown, they are unsupported
16 by fact and law alike. They do not refute Maraj’s showing in her moving papers.
17 Maraj is entitled to the summary judgment she seeks.

18 **II. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT THAT**
19 **MARAJ RECORDED THE SONG WITH BENIGN INTENT**

20 As Maraj noted in her moving papers, Chapman has two prongs to her
21 copyright claim: She alleges that Minaj infringed Chapman’s copyright in *Baby*
22 *Can I Hold You*, both (i) by leaking the demo recording to the New York radio host
23 and (ii) by recording the demo in the first place. (Moving papers at 4:13-16.) As
24 also noted in the moving papers, “The instant motion challenges the legal viability
25 of the second claim only.” (*Id.*) The primary thrust of Chapman’s opposition is that
26 her claims cannot be parsed in this manner for analysis. In fact, according to
27 Chapman, Maraj’s motion is “deceptive” for even attempting to do so. (Dkt. 67 at
28 1, 3.) As Chapman explains, the facts are “uncontroverted” that Maraj herself
leaked the demo version to New York radio host “Flex”. Moreover, that leak shows
that Maraj did not record *Sorry* with benign intent. Factually and logically, these
arguments do not hold up.

1 They do hold up factually, because, as demonstrated in Maraj’s opposition to
2 Chapman’s cross-motion for summary judgment, the case against Maraj, on leaking
3 the demo version to Flex, is not “open and shut.” Disputed issues of material fact
4 exist, as to whether Maraj, or one of many other “suspects,” leaked the recording.
5 These disputes will require a jury to resolve. Therefore, to the extent that Chapman
6 is contending that “Maraj, *as a matter of law*, leaked the recording; therefore, she
7 must also be held liable, *as a matter of law*, for making the recording in the first
8 place, that argument is without merit.

9 Chapman’s arguments do not hold up logically either, because it is perfectly
10 plausible that, when recording *Sorry*, Maraj intended to release it publicly only after
11 receiving permission to do so – even if later on, she changed her mind and decided
12 to leak the recording. In fact, at this point, *the evidence is undisputed that, while in*
13 *the studio, Maraj intended to release the song only if a proper license were*
14 *obtained*. Maraj tells us so. (SUF 6 and 7.) And this testimony meshes with all the
15 undisputed, objective facts. Maraj’s team invested months of efforts to obtain
16 Chapman’s permission. Maraj got personally involved. Indeed, Maraj even
17 considered delaying the release of her album *Queen*, beyond August 10, simply to
18 have more time to negotiate with Chapman. (Dkt. 66-3 at ¶ 3.) Maraj publicly
19 tweeted about that potential delay. (Dkt. 54-2 at 82:16-25)

20 Chapman, on the other hand, has zero evidence that, while recording *Sorry*,
21 Maraj intended all along to leak the song to Flex. There is no triable issue of fact on
22 this point. While in the studio, while recording *Sorry*, Maraj was making a demo
23 version for the sole purposes of: (i) artistic experimentation and (ii) seeking
24 permission from Chapman to release the song.

1 **III. THE “FAIR USE” FACTORS FAVOR MARAJ**

2 Chapman argues that the “fair use” factors should not even be considered.
3 Well, why not? This is a “fair use” issue. Further, given the undisputed evidence
4 that, while in the studio recording *Sorry*, Maraj’s intentions were benign, the “fair
5 use” factors weigh heavily in favor of Maraj.

6 **A. The Purpose and Character of the Use**

7 As noted in the moving papers, the first of the two important factors is the
8 “purpose and character of the use.” Here, the use is: putting together a demo
9 recording that both (i) experiments with the performer’s artistic vision and (ii) fixes
10 that vision in a concrete form that can be submitted to the rights holder for approval.

11 First, as also noted in the moving papers, the whole purpose of the Copyright
12 Act is to “promote the Progress of Science and useful Arts, by securing for limited
13 Times to Authors and Inventors the exclusive Right to their respective Writings and
14 Discoveries.” *United States Const., Art. I, Sec. 8, Clause 8*. By finding fair use
15 here, the Court would be “promoting” the “Arts”. The Court would be encouraging
16 creativity for the public good.

17 Moreover, as noted above, a second purpose of the demo recording was to
18 facilitate the approval process. Most rights holders request a demo. (SUF 8.) They
19 want to see or hear exactly how the work will be used. (*Id.*) Indeed, as testified by
20 Deborah Mannis Gardner, an experienced music industry executive, it is standard
21 practice to include a demo recording with a license request. (SUF 10.) According
22 to Mannis Gardner, the demo is included “99 percent of the time.” (*Id.*, emphasis
23 added). Even Chapman must recognize the utility of this practice. She herself has
24 requested to review a demo before giving approval. (SUF 9.)

25 Against these powerful arguments, Chapman makes three arguments. First,
26 she says that we must focus on the ultimate goal of the process – that the artist
27 would like to release the work for commercial purposes – and given this
28 circumstance, says Chapman, we must strictly ban unauthorized experimentation in

1 the studio. (Dkt. 67 at 12:24-13:5.) But isn't Chapman's position too blunt and
2 pointlessly limiting? Isn't there room for a more elegant solution, one that allows
3 for experimentation in the studio and the creation of demos for the purpose of
4 seeking a license, but which would bar the commercial release of *unauthorized*
5 derivative works?

6 Chapman's second argument is that artists, working in the studio, can simply
7 rely on the copyright holder to use discretion and not sue, even though mere
8 experimentation in the studio is a copyright violation. (Dkt. 67 at 8:9-16 ("The
9 practical effect . . . is that in instances where a defendant truly creates a work *solely*
10 for clearance purposes . . . , there is little risk of litigation because the incentives do
11 not exist").) Chapman clearly has overlooked the copyright lawsuits that abound
12 over the re-posting by celebrities of photographs of themselves that they find on the
13 internet. These lawsuits are suddenly quite "vogue" and filed on a daily basis.
14 Further, we have the LA Printex, fabric-pattern cases. In each instance, a whole
15 cottage industry has arisen, where the same lawyers pursue hundreds of cases over
16 "infringements" that produce no real damages but result in claims for \$150,000 in
17 statutory damages, plus attorneys' fees. Relying on the "discretion" of the
18 copyright holder, not to sue, is simply not an appealing alternative.

19 The final argument that Chapman makes is that, even if a hypothetical
20 recording artist might be engaging in "fair use" by making a studio recording for
21 purposes of experimentation and licensing, Maraj was not such an artist. She,
22 according to Chapman, continued her efforts to perfect the recording, even after
23 Chapman denied Maraj's request to release the song. (Dkt. 67 at 13:6-15.) Yes, but
24 Maraj continued her efforts in the studio only so long as she also continued her
25 efforts to persuade Chapman to change her mind. According to Chapman herself,
26 the efforts to persuade her did not end until August 8, 2018. (Dkt. 1 at ¶ 32.)
27 Indeed, Maraj even considered delaying the release of her album *Queen*, beyond
28 August 10, simply to have more time to negotiate with Chapman. (Dkt. 66-3 at ¶ 3.)

1 And there is no evidence that Maraj continued to work on the recording past early
2 August. Therefore, based on the undisputed evidence, this first and most important
3 factor – the “purpose and character of the use” – strongly favors a finding of “fair
4 use” here.

5 **B. The Effect of the Use on the Potential Market for or Value of the**
6 **Copyrighted Work**

7 The other important factor in evaluating fair use under section 107, the fourth
8 factor, is “the effect of the use upon the potential market for or value of the
9 copyrighted work.” 17 U.S.C. § 107(4). And of course, as pointed out in the
10 moving papers, the creation of a derivative work for the limited, private purposes of
11 artistic experimentation and securing the copyright owner’s consent for broad
12 distribution has precisely zero impact on the commercial market for the original
13 work. Chapman’s only response is that Maraj supposedly leaked the recording to
14 Flex; therefore, commercial harm may be presumed. (Dkt. 67 at 14:17-16:2.) For
15 purposes of the present motion, however, that leak is irrelevant. Now, we are
16 strictly concerned with whether the creation of the studio recording, for the limited
17 purposes of experimentation and licensing, constituted “fair use.” A recording made
18 for those purposes could not have harmful effects on the commercial market for
19 Chapman’s song. Thus, this factor as well weighs heavily in favor of finding fair
20 use.

21 **C. The Second and Third “Fair Use” Factors**

22 The second and third factors are “the nature of the copyrighted work,” and
23 “the amount and substantiality of the portion used in relation to the copyrighted
24 work as a whole.” 17 U.S.C. §§ 107(2) and (3). As pointed out in the moving
25 papers, neither factor is of any real significance here. The work is a musical
26 composition, and much of it was used. These facts neither add to, nor detract from,
27 the real inquiry: do we want to encourage experimentation and musical expression,
28 and does a demo recording actually facilitate, not hinder, the licensing process?

1 In her opposition, Chapman argues that the second factor, the “nature of the
2 copyrighted work,” is important, because musical works are “precisely the sort of
3 expression that the copyright law aims to protect.” (Dkt. 67 at 17:23-25.) “Fair
4 use,” however, presupposes that the work is protectable; otherwise, we would not
5 have to consider “fair use.” A protectable work is the starting point for any
6 discussion of “fair use.” Therefore, this factor really adds nothing. See *Mattel v.*
7 *Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (The second factor
8 “typically has not been terribly significant in the overall fair use balancing”); and
9 *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012) (“The relative
10 importance of factor one . . . and factor four . . . has dominated the case law”).

11 With regard to the third factor, Chapman argues that a “substantial portion” of
12 the work was used. Chapman, however, misses the true meaning of the third factor.
13 We are not merely considering, in a vacuum, how much was used. On the contrary,
14 we are considering the amount used “in relation to the justification for that use.”
15 *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (“[T]his factor will
16 not weigh against an alleged infringer, even when he copies the whole work, if he
17 takes no more than is necessary for his intended use”). Here, the intended use was
18 to create a demo to submit to Chapman for approval. The portion of Chapman’s
19 *Baby Can I Hold You* that Maraj used was precisely that portion necessary to show
20 Chapman how Maraj intended to use the work in her song – no more and no less.
21 Therefore, if anything, factor three weighs in favor of finding fair use.

22 In sum, the important factors, one and four, both weigh heavily in favor of
23 finding fair use. Of the less important factors, factor three weighs in favor of
24 finding fair use, and factor two is essentially neutral. The Court should find fair use
25 here.

26 **IV. MARAJ HAS A PUBLISHED LEGAL CASE THAT SUPPORTS HER**
27 **POSITION**

28 In her opposition, Chapman proclaims with conviction: “Ms. Maraj does not

1 cite a single case supporting [her claim of “fair use”]. In fact, none exist.” Actually,
2 a case does exist, *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998).
3 *Sundeman* has some striking similarities to the present case. In both cases, a copy
4 was made of a copyrighted work for the purpose of seeking permission from the
5 rights holder to publish the work. In both cases, permission was denied, and the
6 work never was published. In *Sundeman*, the production of a copy, for the purpose
7 of seeking permission, was deemed “fair use.” That result was upheld by the Fourth
8 Circuit.

9 The facts of *Sundeman* are as follows. Marjorie Kinnan Rawlings Baskin
10 (“Rawlings”) was a well-known author. Her most famous book, *The Yearling*, won
11 a Pulitzer Prize in 1939 (and was a childhood favorite.) After Rawlings’ death, her
12 husband (“Baskin”) became the personal representative of her estate. The defendant
13 (“Seajay”) came into possession of a manuscript of Rawlings’ first, and
14 unpublished, novel, *Blood of My Blood*. Seajay made two copies. Seajay sent the
15 first to a literary critic (“Blythe”) to prepare a critical analysis of the work. She did
16 so and presented her analysis at a symposium held by the Marjorie Kinnan Rawlings
17 Society. Blythe hoped to publish her critical analysis but knew she would need
18 permission to do so. Seajay sent the second copy of *Blood of My Blood* to the
19 University of Florida library for the following purposes: (i) authentication by
20 Baskin (the personal representative of Rawlings’ estate), (ii) to gauge the University
21 of Florida’s interest in publishing the work, and (iii) to seek permission from Baskin
22 to publish the work. Baskin denied permission to publish either Blythe’s literary
23 criticism or the work itself. Neither was published. Nevertheless, Baskin sued
24 Seajay for copyright infringement. His suit was based principally on Seajay’s
25 creation of the two copies.

26 Following trial, the district court held that the creation of the copies was “fair
27 use”:

28 The lower court found that the complete copy of *Blood of*

1 *My Blood* given to Blythe was permissible since it was
 2 provided to prevent damage to the original manuscript
 3 during the course of her scholarly work. Regarding the
 4 partial copy sent to the University of Florida Library, the
 5 district court found that it was made for the dual purposes
 6 of allowing Baskin, or his designee, to authenticate it and
 7 to allow the University of Florida Press to determine
 8 whether it was worthy of publication. The court also
 9 decided that Seajay knew that no publication of the novel
 10 would take place without first obtaining the permission
 11 of the copyright holder. (Id. at 201.)

12 This result was upheld on appeal, where the Court noted:

13 Fair use is an “equitable rule of reason,” for which “no
 14 generally applicable definition is possible.” H.R.Rep. No.
 15 94–1476, at 65 (1976), U.S. Code Cong. & Admin. News
 16 at 5659, 5679. The statute requires a “case-by-case
 17 analysis” to determine whether a particular use is fair.
 18 *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 577,
 19 114 S.Ct. 1164, 1170, 127 L.Ed.2d 500 (1994). (Id. at
 20 202.)

21 * * *

22 Obviously, the copies of *Blood of My Blood* provided to
 23 Blythe and the University of Florida Library were
 24 qualitatively and quantitatively substantial. Nonetheless,
 25 when the extent of the copying is considered with the
 26 purpose and character of the uses, the amount and
 27 substance of the copies are justified. *See Campbell*, 510
 28 U.S. at 586–87, 114 S.Ct. at 1175–76. In order for Blythe
 to perform her scholarly criticism of the novel, she
 obviously needed access to either the original or an entire
 copy. Similarly, in order for the Library to authenticate
Blood of My Blood as being Rawlings' work, to
 determine whether the work was worthy for publication,
 and to obtain the necessary permission from the
 copyright holder, it too needed either the original or a
 nearly complete copy. * * * Thus, we find that the
 amount and substantiality of the portion of *Blood of My*
Blood copied for Blythe and the Library did not exceed
 the amount necessary to accomplish these legitimate
 purposes. *See Supermarket of Homes, Inc. v. San*
Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1409
 (9th Cir.1986). (Id. at 206.)

* * *

A use that does not materially impair the marketability of
 the copyrighted work generally will be deemed fair.
Advanced Computer Services, 845 F.Supp. at 366 (citing
Sony, 464 U.S. at 450–51, 104 S.Ct. at 792–93; *Harper*
 & *Row*, 471 U.S. at 566–67, 105 S.Ct. at 2233–34;
N.A.D.A. Servs. Corp. v. Business Data of Virginia, Inc.,

1 651 F.Supp. 44, 48 (E.D.Va.1986)). The only evidence
 2 presented at trial as to the market effect of the allegedly
 3 infringing uses was that, despite the Blythe presentation
 4 and the copies to Blythe and the Library, the University
 5 of Florida Press still wanted to publish *Blood of My
 Blood*. Based on this evidence, the district court held that
 the uses made by Seajay did not diminish the potential
 market for, or value of, *Blood of My Blood*. [9] This
 finding of fact was not clearly erroneous. (Id. at 206-07.)

6 In short, in *Sundeman*, by making a copy of a literary work, for the purposes
 7 of gauging interest in its publication *and seeking permission to publish*, the
 8 defendant Seajay made “fair use” of that work. Similarly here, Maraj made use of
 9 the work in issue for artistic experimentation (to try to come up with something
 10 worthy of artistic release) and to seek permission from the rights holder. In the
 11 present case, as in *Sundeman*, Maraj’s use of the work in issue should be found to be
 12 “fair use”.

13 **V. MARAJ DOES NOT ASK THE COURT TO ELIMINATE AN**
 14 **AUTHOR’S RIGHT TO PREPARE DERIVATIVE WORKS**

15 According to Chapman, “Ms. Maraj asks this Court to virtually extinguish
 16 [the derivative work] right.” (Dkt. 67 at 2:1-2.) Because the Copyright Act gives
 17 owners the exclusive right to “prepare” a derivative work, Chapman argues, Maraj
 18 should be held liable for infringing that right, even if she had nothing to do with the
 19 broadcast of *Sorry* on the radio. (Id. at 6-8.)

20 In making this argument, Chapman forgets that “fair use” is a recognized
 21 defense to alleged infringement by preparing a derivative work. 17 U.S.C. section
 22 106 is the code section that grants an author the exclusive right to prepare derivative
 23 works. The introduction to that section states that it is “subject to sections 107
 24 through 122.” Section 107 is the fair use provision on which Maraj’s motion is
 25 based. Dkt. 57 at 5-8. Further, many cases apply the fair use defense in the context
 26 of derivative works. For example, in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.
 27 569 (1994), the Supreme Court signaled it was most likely a fair use for the rap
 28 group “2 Live Crew” to have created (and commercially released) a recording of a

1 derivative version of Roy Orbison’s *Oh, Pretty Woman*.

2 Second, as a practical matter, Chapman’s fear that the “sky is falling” is
3 simply unfounded. Right now, no one seeks a license to experiment in the studio to
4 create derivative works. If the Court were to side with Maraj in this dispute, the
5 Court would merely be preserving the status quo. Nothing would change. No rights
6 would be “eviscerated.” Chapman would still have the right to prevent others from
7 distributing derivative works to the public. On the other hand, were this Court to
8 decide against Maraj, the recording industry would enter into a strange new era,
9 where merely holding a studio session, with the tape rolling, would put an artist in
10 peril.

11 **VI. CONCLUSION**

12 In light of the above, and for the reasons further set forth in Maraj’s initial
13 moving papers, summary judgment is warranted as to Chapman’s draconian theory.
14 Copyright law should incentivize creativity, not stifle it in the way Chapman’s
15 opposition seeks. Maraj’s use of Chapman’s work as part of creative
16 experimentation and to facilitate the clearance process was a fair use.

17
18 DATED: August 31, 2020

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