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11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
14

15 **JOSEPH TIERNEY**, professionally
known as “Rime,” an individual;
16
Plaintiff,
17
v.
18
MOSCHINO S.P.A., an Italian
corporation; **JEREMY SCOTT**, an
19 individual; and **DOES 1-10** inclusive.
20
Defendants.
21

Case No. 2:15-cv-05900-SVW (PJWx)
Hon. Stephen V. Wilson

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

Date: May 23, 2016
Time: 1:30 pm
Courtroom: 6

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I. INTRODUCTION

1
2 To sustain their summary judgment, Defendants must establish that there are
3 no material factual issues as to Plaintiff’s claims of copyright infringement and
4 related wrongful conduct. Defendants fail to meet this burden. Rather than negate
5 essential elements of Plaintiff’s claims or provide undisputed evidence of their
6 affirmative defenses, Defendants’ motion for summary judgment merely rehashes
7 Defendants’ unsuccessful motions to strike (Anti-SLAPP) and motions to dismiss
8 and adds one new argument – that Plaintiff’s misappropriated artwork, as graffiti,
9 was “illegal” and therefore may be infringed without consequence. Defendants lack
10 authority for their position; the Copyright Act itself is neutral on whether copyrights
11 which derive extra-legally are protected.

12 Moreover, there was nothing criminal about Plaintiff’s work. To the contrary,
13 Plaintiff’s infringed artwork was created as part of the Detroit Beautification
14 Project, a publicly documented civic endeavor designed to combat illegal graffiti
15 and promote a better, more livable environment for the citizens of Detroit. There is
16 no bar to Plaintiff’s copyright in his design.

17 The Court has already ruled that Defendants’ previous pleading arguments,
18 raised anew here, are insufficient as a matter of law to overcome Plaintiff’s
19 complaint claims. Defendants’ resubmission of essentially the same declarations and
20 evidence supporting their prior failed pleading motions provides no basis for
21 summary judgment. At best, Defendants succeed only in highlighting that triable
22 factual issues remain.

23 Defendants admit the critical facts supporting Plaintiff’s claims. Defendants
24 used Plaintiff’s design and name in Defendants’ 2015 clothing collection without
25 Plaintiff’s authorization or knowledge. The infringing material included the
26 collection’s most-iconic piece - a show-stopping dress displaying Plaintiff’s Vandal
27 Eyes mural (the “Mural”) and worn by supermodel Gigi Hadid on the runway and
28

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1 by actress Katy Perry to the high-society Met Gala. Defendants distributed,
 2 displayed and otherwise publicized the infringing work on numerous occasions
 3 including at the May 2015 Metropolitan Museum of Art’s “Met Gala,” in
 4 connection with various advertisements, websites, and social media postings, and
 5 through runway shows and other public displays of the infringing designs.
 6 Defendant Jeremy Scott himself wore an infringing jacket to the Met Gala.
 7 Acknowledging these undisputed facts, Defendants claim they are nevertheless
 8 immune from liability for their infringement either because Plaintiff’s work was
 9 criminal and therefore should not be subject to copyright protection; or because
 10 Defendants’ infringing and wrongful conduct was unknowing, constituted fair use or
 11 was otherwise protected. Plaintiff fully refutes these contentions.

12 Defendants provide no explanation of how Plaintiff’s name and design came
 13 to be incorporated into Defendants’ 2015 Moschino clothing collection, offering
 14 only that Defendants are somehow not responsible because an unidentified “graphic
 15 artist at Moschino” purportedly selected the infringing material.¹ Defendants do not
 16 identify that Moschino employee (or even identify whether it is a single employee or
 17 a group of employees). Nor do Defendants reveal whether the employee, Defendant
 18 Scott, or someone else under Defendants’ charge was responsible for authorizing the
 19 infringing designs. Further, Defendants’ contentions are disproved by their own
 20 prior statements and admissions by which Defendant Scott has repeatedly claimed
 21 full responsibility and credit for the infringing designs.

22 In addition to the other defects in the summary judgment, Defendants also
 23 failed to properly meet and confer with Plaintiff’s counsel prior to filing the motion.
 24 Since the time of the Court’s order denying Defendants’ Anti-SLAPP motions and

25 ¹ Defendant Scott goes so far as to claim, despite wearing the products himself, and supervising
 26 and taking credit for the infringing collection, that until this action was filed, Scott was wholly
 27 unaware of Defendants’ decision to use Rime on Defendants’ goods and to prominently display
 Plaintiff’s work on Defendants’ clothing. (Declaration of Jeremy Scott (“Scott Decl.”), ¶¶ 6, 7, 9.)

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1 motions to dismiss, the parties engaged in significant and overarching settlement
2 discussions. Rather than expend already drained resources pursuing discovery and
3 otherwise litigating the case, the parties discussed and intentionally chose to forego
4 such expenses and instead direct all efforts toward settlement. The settlement labors
5 were fruitful and the parties ultimately agreed to all material terms of a settlement.
6 On April 19, Defendant Moschino filed a “notice of settlement-in-principle” seeking
7 a stay of all future deadlines to allow the parties to document their settlement. [Dkt.
8 57.]

9 Explicitly relying on the fact that settlement was a “done deal,” and with the
10 concurrence of all parties, Plaintiff refrained from pursuing discovery he had
11 previously requested, including Defendants’ depositions. Plaintiff mistakenly trusted
12 Defendants’ word and expressed intentions. Defendant Scott ultimately torpedoed
13 the settlement, making new demands after the material terms had been agreed upon
14 and on the eve of the court’s early deadline to file summary judgment. The
15 Defendants did not conduct a Rule 7-3 conference with Plaintiff’s counsel prior to
16 filing the summary judgment. Until reading the Defendants’ papers, Plaintiff had no
17 notice of the grounds upon which Defendants would rely to argue the absence of
18 triable issues. As set out in these opposition papers, Plaintiff contends he has
19 established multiple material issues precluding summary judgment. If the court is
20 nevertheless inclined to consider the summary judgment, for the reasons and on the
21 grounds discussed in the concurrently filed Request For Discovery, Plaintiff
22 requests the summary judgment be deferred in accord with Federal Rule of Civil
23 Procedure 56(d) and that Plaintiff be provided the opportunity to take the
24 depositions of Defendants Moschino and Jeremy Scott, as well as Defendants’ non-
25 party declarant Elizabeth Mattie, and submit further briefing on the identified factual
26 issues following those depositions.

1 **II. RELEVANT FACTUAL BACKGROUND**

2 **A. Plaintiff's mural was created as part of program to combat illegal graffiti.²**

3 Contrary to Defendants' new and unsubstantiated assertions of illegal
 4 conduct, Plaintiff's Vandal Eyes Mural was created as part of a Detroit civic effort
 5 (the Detroit Beautification Project) to improve the city. (See, Tierney, Cory,
 6 Armand Decls.). Along with several other prominent artists, Plaintiff was invited to
 7 participate in the Beautification Project in 2011, visiting Detroit to create legal
 8 murals around the city. (Tierney Decl., ¶4.) Plaintiff was told by the Project
 9 coordinators and organizers that they had been given permission to create murals
 10 from all of the property owners at all of the locations visited. (*Id.*, ¶5; see also
 11 Armand and Cory Decls., ¶¶2-10.) The Beautification Project received widespread
 12 and favorable press. (Decls. of Tierney (¶11), Armand (¶14) and Cory (¶15).) See,
 13 also, e.g., July 31, 2012 article, *The Best of the Detroit Beautification Project* at link
 14 <http://ilovedetroitmichigan.com/detroit-graffiti-street-art/the-best-of-the-detroit-beautification-project/>.

15
 16 **B. Defendant Scott has taken credit for the designs in question.**

17 Despite Defendant Scott's declaration submitted in support of the summary
 18 judgment that he had no involvement in, knowledge of, or responsibility for
 19 selecting, incorporating, using or otherwise appropriating Plaintiff's name and work
 20 in Scott's 2015 Moschino collection, Scott has, on multiple occasions, publicly
 21 taken credit for these designs, including giving interviews stating his total

22
 23 ² In accord with Federal Rules of Evidence Rule 201, Plaintiff requests that the Court take judicial
 24 notice of the news articles and media accounts identified in Plaintiff's opposing papers, including
 25 this Memorandum and in ¶11 (p.3) of the supporting Declaration of Plaintiff Joseph Tierney
 26 ("Tierney Decl."); ¶¶2, 3 of the supporting Declaration of Jeff Gluck ("Gluck Decl."), and ¶¶14,
 27 15 of the supporting Declarations of Jesse Cory ("Cory Decl.") and Daniel Armand ("Armand
 28 Decl. The cited publications may be used to indicate, not the truth of their contents, but "what was
 in the public realm at the time." *In re Wells Fargo Mortg. Backed Certificates Litig.*, 712
 F.Supp.2d 958, 966 n. 2 (N.D.Cal.2010), citing *Von Saher v. Norton Simon Museum of Art at
 Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

1 responsibility for all aspects of the collection. See, e.g., April 2, 2015, video
 2 interview of Mr. Scott located at link
 3 [http://www.marieclaire.co.uk/news/548994/video-interview-with-moschino-](http://www.marieclaire.co.uk/news/548994/video-interview-with-moschino-creative-director-jeremy-scott-about-the-aw15-moschino-collection.html)
 4 [creative-director-jeremy-scott-about-the-aw15-moschino-collection.html](http://www.marieclaire.co.uk/news/548994/video-interview-with-moschino-creative-director-jeremy-scott-about-the-aw15-moschino-collection.html). And see,
 5 July 7, 2015 article at link: [http://www.bustle.com/articles/97992-jeremy-scott-](http://www.bustle.com/articles/97992-jeremy-scott-releases-street-moschino-collection-mood-board-thats-a-wonderful-blast-of-90s-style-icons)
 6 [releases-street-moschino-collection-mood-board-thats-a-wonderful-blast-of-90s-](http://www.bustle.com/articles/97992-jeremy-scott-releases-street-moschino-collection-mood-board-thats-a-wonderful-blast-of-90s-style-icons)
 7 [style-icons](http://www.bustle.com/articles/97992-jeremy-scott-releases-street-moschino-collection-mood-board-thats-a-wonderful-blast-of-90s-style-icons).

8 **C. Defendant Scott’s previous involvement in infringement claims belies his**
 9 **claims of ignorance as to the infringing conduct here.**

10 Defendant Scott has been accused of infringement on multiple occasions and
 11 has previously faced legal action for his infringing conduct. See e.g., September 6,
 12 2013, *The Fashion Law* article at link:

13 [http://www.thefashionlaw.com/archive/jimbo-phillips-sued-jeremy-scott-they-just-](http://www.thefashionlaw.com/archive/jimbo-phillips-sued-jeremy-scott-they-just-settled)
 14 [settled](http://www.thefashionlaw.com/archive/jimbo-phillips-sued-jeremy-scott-they-just-settled).

15 Defendant Scott also has personal experience working with, and even
 16 licensing artwork from graffiti artists. In 2013, Scott himself chose to seek
 17 permission and properly license artwork from notorious street graffiti artist Kenny
 18 Scharf for Scott’s eponymous Jeremy Scott Collection. See,
 19 <http://www.complex.com/style/2013/09/jeremy-scott-kenny-scharf-collaboration>, a
 20 September 11, 2013, article on the collaboration. Mr. Scharf had been arrested for
 21 illegal graffiti just months before the Scott/Scharf collaboration. See, April 22, 2013
 22 article at link: [http://hyperallergic.com/69465/kenny-scharf-opens-up-about-his-](http://hyperallergic.com/69465/kenny-scharf-opens-up-about-his-recent-graffiti-arrest/)
 23 [recent-graffiti-arrest/](http://hyperallergic.com/69465/kenny-scharf-opens-up-about-his-recent-graffiti-arrest/).³

24 _____
 25 ³ Defendant Scott’s past licensed collaboration with street graffiti artist Scharf, who admits illegal
 26 activity and was arrested for tagging mere months before contracting with Defendant Scott,
 27 highlights the absurdity of Defendants’ overheated rhetoric comparing Plaintiff to notorious
 28 murderer, the Black Dahlia. First, there is no evidence whatever that Plaintiff has any criminal
 background or has even been accused of illegal conduct. To the contrary, Plaintiff has never been
 convicted of any crime and has no criminal record. (Tierney Decl., ¶12.). Defendants’ comparison
 (footnote continued)

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1 In his Answer to Plaintiff’s Complaint in this action, Defendant Scott also
2 admits that Scott attended the high-profile 2011 MOCA exhibition, “Art in the
3 Streets” featuring Plaintiff’s work. (Dkt 50, ¶10.) Scott’s denials that he was aware
4 of Plaintiff or Plaintiff’s work are illogical and not believable.

5 **D. Plaintiff’s dealings with the property owner suggest no trespass, and**
6 **Defendants’ declarant as to the property in question lacks foundation for**
7 **her assertions.**

8 As noted, Plaintiff participated in the Detroit Beautification Project at the
9 specific invitation of the Project’s founders and with explicit assurances that the
10 artwork was being undertaken legally and with the permission of the affected
11 property owners. (Tierney, Armand, Cory Decls.). There was no indication either at
12 the time Plaintiff created his Mural or following the Mural’s creation on a standing
13 wall in an abandoned field that there was any objection to, let alone a claim of
14 illegality associated with the Mural’s creation. (*Id.*).

15 Defendant’s declarant as to the abandoned property, Elizabeth Mattie, does
16 not claim to have worked at the property management company at the time the
17 Mural was created – she attests that she has been working there only since 2014,
18 three years *after* the Mural’s creation. (See, Dkt. 56-4, Mattie Decl., ¶2.) Ms. Mattie
19 lacks foundation for her claims that she is unaware of any permission request or
20 authorization for the Detroit Beautification Project work completed at the property.
21 Plaintiff objects to and moves to strike Ms. Mattie’s unsupported Declaration.

22
23 _____
24 is wholly inapt and unwarranted. More, by Defendants’ asserted logic that all street art is, by
25 definition, illegal and should not be subject to copyright as a matter of public policy, Scott could
26 have just cherry picked any of Scharf’s “illegally” placed street art without needing any license at
27 all. And yet Defendant Scott openly collaborated with Scharf and publicly announced that
28 collaboration. Such collaborations by Scott give further credence to Plaintiff’s claims that Scott’s
misuse of Plaintiff’s name and artwork would be presumed to be licensed and authorized as
opposed to blatantly misappropriated and unauthorized.

III. LEGAL STANDARD

1
2 Defendants, as the parties moving for summary judgment, have both an initial
3 burden of production and the ultimate burden of persuading the court that there is
4 “no genuine dispute as to any material fact and the movant is entitled to judgment as
5 a matter of law.” Fed.R.Civ.P. 56(a). A court weighing a summary judgment motion
6 must view the evidence and draw all reasonable inferences in the light most
7 favorable to the nonmoving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
8 (1986). A fact is “material” if it “might affect the outcome of the suit under the
9 governing law,” and a dispute as to a material fact is “genuine” if there is sufficient
10 evidence for a reasonable trier of fact to decide in favor of the nonmoving party.
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary
12 judgment stage, the court “does not assess credibility or weigh the evidence, but
13 simply determines whether there is a genuine factual issue for trial.” *House v. Bell*,
14 547 U.S. 518, 559-60 (2006).

15 Because summary judgment is a “drastic device,” cutting off a party’s right to
16 present its case to a jury, the moving party bears a “heavy burden” of demonstrating
17 the absence of any triable issue of material fact. *Ambat v. City & County of San*
18 *Francisco*, 757 F3d 1017, 1031 (9th Cir. 2014). The moving parties must establish
19 beyond controversy every essential element of their claim or defense: “If the movant
20 bears the burden of proof on an issue, either because he is the plaintiff or as a
21 defendant he is asserting an affirmative defense, he must establish beyond
22 peradventure all of the essential elements of the claim or defense to warrant
23 judgment in his favor.” *Fontenot v. Upjohn Co.* 780 F2d 1190, 1194 (5th Cir. 1986).
24 Declarations and other evidence of the moving party that would not be admissible at
25 trial are subject to a timely objection and may be stricken. Fed.R.Civ.P. 56(c)(2); see
26 *FDIC v. New Hampshire Ins. Co.* (9th Cir. 1992) 953 F2d 478, 484.

27 A party opposing a motion for summary judgment must set forth specific
28

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1 material facts showing a “genuine dispute” as to a “material fact. “(T)he non-
 2 movant need not match the movant witness for witness, nor persuade the court that
 3 her case is convincing, she need only come forward with appropriate evidence
 4 demonstrating that there is a pending dispute of material fact.” *Waldridge v.*
 5 *American Hoechst Corp.*, 24 F3d 918, 921 (7th Cir. 1994). The opposing party’s
 6 evidence, whether or not it has the burden of proof at trial, must be sufficient to
 7 create a genuine dispute as to a fact that is material to the outcome of the suit. *Rojas*
 8 *v. Roman Catholic Diocese of Rochester*, 660 F3d 98, 105-106 (2nd Cir. 2011).
 9 “[I]n ruling on a motion for summary judgment, the nonmoving party's evidence `is
 10 to be believed, and all justifiable inferences are to be drawn in [that party's] favor.”
 11 *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1551-52, 143 L.Ed.2d 731 (1999)
 12 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255.

13 IV. ARGUMENT

14 A. Defendant Scott cannot escape liability on summary judgment based on 15 his unsupported assertions of non-responsibility for his own collection.

16 Plaintiff has explained that Scott is the Creative Director of Moschino, and
 17 that the dress in question was so important to the season’s collection that Scott (and
 18 Katy Perry) wore it to the Met Gala to make a splash. [Complaint ¶¶ 12, 20.] The
 19 inference relied upon is obvious: It stands to reason that the high-profile head
 20 designer and creative visionary of the Moschino brand would participate in the
 21 design of its most high-profile garment of the season. The sole support for
 22 Defendants’ assertions of Scott’s non-responsibility for the infringing conduct at
 23 issue is Scott’s own implausible and self-serving declaration disclaiming knowledge
 24 of Plaintiff or Plaintiff’s artwork and asserting that Defendant Scott passed off
 25 responsibility for the selection, use and incorporation of Plaintiff’s name and work
 26 on Defendant’s goods to one or more unidentified “graphic artists at Moschino.”
 27 (Scott Decl., ¶¶4, 5.). The Court has already adjudicated that such substantively
 28

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1 devoid assertions are insufficient to establish undisputed facts. (Dkt 49, Order
2 denying Defendants’ motions to strike/dismiss Plaintiff’s Complaint, p.4 (“The
3 Court finds that Scott’s position as Moschino’s creative director is sufficient to
4 create a reasonable inference that he was involved in Moschino’s collection. As
5 Tierney argues, it is a reasonable inference that ‘the high-profile head-designer and
6 creative visionary of the Moschino brand would participate in the design of its most
7 high-profile garment of the season.’”) (Citation omitted).)

8 Scott has also not demonstrated that he could not be a contributory infringer.
9 Contributory infringement is a judicially created doctrine that derives from the
10 common law of torts. *Tiffany Inc. v. eBay, Inc.*, 600 F.3d 93, 103 (2d Cir. 2010)
11 (citations omitted). In *Inwood Laboratories Inc. v. Ives Laboratories, Inc.*, the
12 Supreme Court explained contributory infringement claims as follows: Liability for
13 trademark infringement can extend beyond those who actually mislabel goods with
14 the mark of another. Even if a manufacturer does not directly control others in the
15 chain of distribution, it can be held responsible for their infringing activities under
16 certain circumstances. Thus, [1] if a manufacturer or distributor intentionally
17 induces another to infringe a trademark, or [2] if it continues to supply its product to
18 one whom it knows or has reason to know is engaging in trademark infringement,
19 the manufacturer or distributor is contributorily responsible for any harm done as a
20 result of the deceit. *Proctor & Gamble Co. v. Haugen*, 317 F.3d 1121, 1128 (10th
21 Cir. 2003) (quoting *Inwood Labs Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 853–54
22 (1982)). Although “the *Inwood* case involved a manufacturer-distributor,” the Court
23 did not limit its decision only to those situations. *Fonovisa, Inc. v. Cherry Auction,*
24 *Inc.*, 76 F.3d 259, 264–65 (9th Cir. 1996) (finding liability for swap meet organizer
25 who had right and ability to control vendor sales, received attendance fees, and had
26 increased attendance due to presence of infringing vendors.)

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1 **B. Plaintiff’s copyright infringement claim survives.**

2 **1. “Vandalism” is not a defense to copyright infringement.**

3 Defendants argue that Plaintiff lacks standing to assert a copyright claim
4 because Plaintiff’s Vandal Eyes Mural was an act of illegal vandalism and trespass.
5 (Docket 56-1, pp.4-8.) Because these arguments were raised for the first time in the
6 brief filed on April 18, if the Court is inclined to consider Defendants’ claim,
7 Plaintiff seeks a Rule 56(d) request for a short continuance to permit necessary
8 discovery. But, respectfully, the developed facts establish at minimum a genuine
9 factual dispute. Defendants are also simply wrong on the copyright argument.

10 **2. Plaintiff was not guilty of trespass or vandalism.**

11 Plaintiff explains the circumstances of the creation of the Vandal Eyes Mural
12 in his declaration submitted herewith and in Section II (A) and (D) above. In short,
13 in 2011, Plaintiff was asked to participate in an invitation-only artists’ project called
14 the Detroit Beautification Project intended to alleviate blight in that economically
15 devastated city. (Tierney Decl., ¶4.) Plaintiff created the Mural with the specific
16 understanding and instruction that the Mural was authorized by the property owner.
17 (*Id.*, ¶5.) Plaintiff has never been told or had any reason to believe that the work was
18 unauthorized, unwanted or improper. (*Id.*, ¶¶ 6-11.) To the contrary, Plaintiff’s
19 Mural has received wide acclaim.

20 Under Michigan law, criminal trespass requires that the person had been
21 forbidden to enter or directed to leave. Mich. Comp. Laws § 750.552. Plaintiff was
22 neither forbidden to enter nor directed to leave. As he understood matters, he had
23 been invited to the location as part of the Detroit Beautification Project. For
24 vandalism, the destruction of property act must have been willful and malicious.
25 Mich. Comp. Laws § 750.377a. Again, there is no evidence presented that Plaintiff
26 was intentionally or maliciously engaged in the destruction of property.⁴ There is no

27 ⁴ There wasn’t even “property” to vandalize or trespass on; the Mural was created on a standing
28 (footnote continued)

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1 evidence presented of any wrongdoing by Plaintiff.

2 **3. Defendant’s declarant as to the purported lack of permission to**
3 **create the Mural lacks foundation for her claims.**

4 Defendants’ illegality argument is founded entirely on the declaration of
5 Elizabeth Mattie [Docket 56-4] who claims to be a representative of the property
6 where the work had been painted. According to Ms. Mattie, no permission had been
7 sought and, absent permission, she concludes the act would have been unlawful.
8 Mattie Decl. [Docket 56-4], ¶¶13-17. As addressed, Ms. Mattie’s declaration is
9 fatally flawed and insufficient to establish any material issue. Specifically, and
10 remarkably, Ms. Mattie does not state that she was actually working for the
11 purported property management company (Angel Group LLC) when the Vandal
12 Eyes Mural was created, or during the time that the company supposedly owned the
13 abandoned property. According to her declaration, she began as a Collections
14 Manager *three years after* the Mural was created and *one year after* the property
15 was sold. Ms. Mattie, the only declarant on this point, is also obviously not
16 qualified to opine on the criminal law of Michigan generally, and plainly has no idea
17 as to the circumstances of creating Plaintiff’s Mural. Defendants fail to set out any
18 material fact, let alone any undisputed material fact, tending to establish that the
19 Mural was illegal.

20 **4. Copyright law does not exclude protection for street art.**

21 Defendants open their brief by recalling the gruesome unsolved Black Dahlia
22 murder. (Dkt 56-1, pp. 1-2). According to Defendants, an image of the murderer’s
23 distinctive mutilation would of course not be protected by copyright law had it been
24 distributed by police and media. Defendants then reason that if images of corpse
25 mutilation are not protected from distribution, then it stands to reason that Plaintiff’s

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27 _____
28 wall of an uninhabitable structure, in an abandoned field. (Tierney Decl., ¶¶ 6, 8, 9, 11.)

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1 creating a socially-inspired work of art on an abandoned building would likewise
2 not be protected by copyright against a fashion designer who copies the work on a
3 dress as part of a line of clothing. There is no rational for this claim. By defendants'
4 logic, that there would have been no copyright protection for *This Land is Made for*
5 *You and Me* if it were written by Woody Guthrie while "trespassing" on somebody's
6 meadow. Or for Jack Kerouac if he wrote *On the Road* using a pilfered typewriter. Or
7 for William Burroughs if he wrote *Naked Lunch* while under the influence of an
8 illegal substance. But that is not the case; as shown, copyright law is intent on
9 fostering creative output, not vetting the creators or clearing the work.

10 Defendants cite no opinion where a court has overridden the plain terms of
11 the Copyright Act -- copyright is afforded to original works of creation affixed to a
12 tangible medium -- and denied a claim for copyright for reasons advanced here by
13 Defendants. The plain terms of the Copyright Act should apply.

14 Defendants argue that the laws of copyright afford only a "privilege" and not
15 a right, citing *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984). While
16 copyright may be a "privilege," i.e., a time-limited monopoly conferred by law, it
17 creates rights for the copyright holder. As *Sony Corp.* instructed, copyright laws are
18 "intended to motivate the creative activity of authors and inventors by the provision
19 of a special reward, and to allow the public access to the products of their genius
20 after the limited period of exclusive control has expired." *Id.* at 429. But that said,
21 the "special reward" is secondary to the public interest in receiving the benefit of
22 creative output. *Id.* "The sole interest of the United States and the primary object in
23 conferring the monopoly lie in the general benefits derived by the public from the
24 labors of authors." *Id.* To maximize output, copyright law is neutral as to the
25 content:

26 There is nothing in the Copyright Act to suggest that the courts are to
27 pass upon the truth or falsity, the soundness or unsoundness, of the
28

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1 views embodied in a copyrighted work. The gravity and immensity
2 of the problems, theological, philosophical, economic and scientific,
3 that would confront a court if this view were adopted are staggering
4 to contemplate. It is surely not a task lightly to be assumed, and we
5 decline the invitation to assume it.

6 *Belcher v. Tarbox*, 486 F.2d 1087, 1088 (9th Cir. 1973). The Copyright Act is
7 similarly indifferent to the identity of the creator: “Because the private suit of the
8 plaintiff in a copyright infringement action furthers the congressional goal of
9 promoting creativity, the courts should not concern themselves with the moral worth
10 of the plaintiff.” *Mitchell Bros. Film Group v. Cinema Adult Theatre*, 604 F.2d 852,
11 869 (5th Cir. 1979). Moreover, because the right of reproduction is essential to
12 copyright, the right is essentially in the intangible work, which is protected
13 independently from its physical embodiment. In short, the goal of fostering output
14 would be undercut by the approach proffered by Defendants that certain creators
15 essentially forfeit copyright protection. If there were a violation of law, there are
16 ample other means in our legal system to address it directly, and not compromise the
17 workings of the copyright laws.

18 Defendants identify *Villa v. Pearson Education, Inc.*, No. 03-C3717, 2003
19 WL 2292178 (N.D. Ill, Dec. 9, 2003) as the only court to be posed the question of
20 copyright protection for illegal graffiti, and note that it “strongly implied that it
21 would not be entitled to copyright protection.” (Dkt 56-1, p.6.) *Villa* is a
22 memorandum order on a motion to dismiss. The motion was *denied*. Contrary to
23 Defendants’ contention, the *Villa* Court ruling strongly suggests that, at least absent
24 a separate conviction from a criminal court, an allegation of illegality as to the
25 underlying work is insufficient for a defendant to prevail on summary judgment as
26 the analysis necessarily involves disputed factual issues. See, *You Look Complicated*
27 *Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case*
28

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1 *Against a Major International Retailer* (John Eric Seay, Journal of Intellectual
 2 Property Law, Vol. 20, Issue 1 (2012) at 80-81) (arguing that even illegal graffiti
 3 should be subject to copyright protection.)⁵

4 In any event, there is no competent evidence that Plaintiff's Mural was
 5 created while trespassing or in any other improper manner. Defendants' argument of
 6 illegality is unavailing. Defendants' final argument is unclean hands. Defendants
 7 have not established any unclean hands defense and none is present. The cases
 8 Defendants cite reveal that the defense does not apply where a plaintiff's purported
 9 misconduct is not directly related to the merits of the controversy between the
 10 parties. See, *Saxon v. Blann*, 968 F.2d 676, 680 (8th Cir. 1992); see also *Mitchell*
 11 *Bros, supra*, 604 F.2d at 852 ("The maxim of unclean hands is not applied where
 12 plaintiff's misconduct is not directly related to the merits of the controversy between
 13 the parties, but only where the wrongful acts in some measure affect the equitable
 14 relations between the parties in respect of something brought before the court for
 15 adjudication." (internal quotations omitted).) The doctrine has no application in this
 16 case.

17 **C. Plaintiff's §1202 Claim is based on sufficient evidence.**

18 While Plaintiff typically signs his work with the name Rime, he chose to affix
 19 the symbol for the Seventh Letter to his Vandal Eyes Mural. Tierney Decl, ¶3.
 20 Plaintiff is part of The Seventh Letter, a collective of artists. In a prior declaration,
 21 Plaintiff stated that "The public, and in particular my target audience, understands
 22 the symbol to indicate that the Seventh Letter is the source of the artwork." Decl. of
 23 Tierney [Docket 32-2], ¶5. Defendants seize on the word "source" to argue that
 24 Plaintiff is not the owner of the copyright and therefore lacks standing to assert a
 25 copyright violation. [Docket 56-1, p.8.]

26 _____
 27 ⁵ See, also, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, (Celia Lerman, NYU,
 28 JIPEL, Vol. 2.)

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1 There is no dispute that Plaintiff created the mural. Work for hire aside, the
2 author of a work owns the copyright. “To Promote the Progress of Science . . . by
3 securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”
4 U.S. CONST. art. I, § 8, cl. 8. The chosen symbol does not change history. Plaintiff
5 created the work. That he chose to make essentially a political statement by affixing
6 the designation from a collective of artists – of which he is a part – does not alter
7 this reality or deprive Plaintiff of the ability to enforce his copyright claims.

8 **D. Plaintiff’s Lanham Act and Unfair Competition claims are not subject**
9 **Defendants’ asserted affirmative defenses**

10 Defendants reiterate their “*Rogers*” and “nominative fair use” defenses
11 advanced earlier in Defendants’ Anti-SLAPP motions to strike and motions to
12 dismiss. (Dkt Nos. 13, 14, 18, 19.) The Court previously ruled that Defendants had
13 not established these defenses:

14 “Although Defendants raise affirmative defenses under *Rogers v.*
15 *Grimaldi*, 875 F.2d 994 (2d Cir. 1989), and nominal fair use, the
16 Court finds that a determination of these fact-intensive inquiries
17 would be better suited in a motion for summary judgment. At this
18 stage, the Court cannot determine whether Defendants’ use of
19 “RIME” was explicitly misleading as to the source or content of the
20 work given the context in which “RIME” appeared – namely,
21 alongside the highlight piece of the collection, which heavily
22 featured “Vandal Eyes” – or whether Defendants’ use was simply
23 nominative. [Citations omitted.]” [Dkt. 49, Court’s Order Denying
24 Motions to Dismiss [14][18]; Denying Motions to Strike [13][19],
25 pp. 7-8.]

26 Defendants offer no further support for these arguments in their summary
27 judgment motion than they did at the pleading stage. Indeed, the sole evidence
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1 supporting these defenses is the declaration of Defendant Scott – a declaration that
 2 is largely identical to the declaration Scott provided at the pleading stage. For the
 3 same reasons these defenses failed at the pleading stage, they also fail here.

4 **1. Defendants have not demonstrated that their *Rogers* Defense**
 5 **absolves them on First Amendment Grounds.**

6 The “*Rogers*” affirmative defense permits use of a trademark where the public
 7 interest in avoiding consumer confusion is outweighed by the public interest in free
 8 expression. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (“*Rogers*”). In
 9 *Rogers*, actress Ginger Rogers brought suit against the producer of Fellini’s film
 10 entitled “Ginger and Fred,” about two fictional dancers who had imitated Ginger
 11 Rogers and Fred Astaire and became known as “Ginger and Fred.” In response to
 12 the defendant’s First Amendment defense, the Second Circuit held that the
 13 likelihood of confusion standard governing trademark infringement claims must be
 14 adjusted to accommodate the First Amendment’s protection of free speech. *Id.*

15 Defendants’ attempt to employ this defense fails, among other reasons,
 16 because Defendants fail to demonstrate that the mark (Plaintiff’s name “Rime”) has
 17 “entered the public discourse or become an integral part of our vocabulary,” as had
 18 arguably occurred in Ms. Rogers’ case. *Rebellion, LLC v. Perez*, 732 F. Supp. 2d
 19 883, 887–888 (N.D. Cal. 2010). In the Ninth Circuit, the *Rogers* defense applies
 20 only where the mark at issue has widespread cultural and linguistic prominence. *Id.*
 21 (denying dismissal on summary judgment because plaintiff’s mark “must be of such
 22 cultural significance that it has become an integral part of the public’s vocabulary”);
 23 *see Warner Bros. Entertainment v. Global Asylum, Inc.*, 2012 WL 6951315 (C.D.
 24 Cal. 2012), *aff’d*, 544 Fed. Appx. 683, 41 Media L. Rep. (BNA) 2681 (9th Cir.
 25 2013). Plaintiff does not allege that he is the kind of household name that could give
 26 rise to a *Rogers* defense. Nor do Defendants suggest he is. Indeed, in its motion to
 27 dismiss, Moschino went so far as to belittle Tierney for his purported obscurity: “It
 28

1 defies logic that a ‘high-end apparel brand based in Italy,’ would have knowledge of
 2 a graffiti artist living in Brooklyn.” [Dkt. 18, 18:25-26.]

3 Even absent the requirement that a plaintiff’s mark be an “an integral part of
 4 our vocabulary,” and even if discovery had been fully developed, which has not
 5 occurred, Defendants’ *Rogers* defense would be a stretch. In no way did Defendants
 6 *need to* use Plaintiff’s name and false signature on their clothing in order to say
 7 something of importance. The problem with Defendants’ latest motion is that they
 8 still offer no evidence on whether use of the mark has artistic relevance (or for that
 9 matter, whether it misleads). If Defendants wanted to make use of this defense, at
 10 very least they should have included a declaration stating the reason for using the
 11 “Rime” mark, showing its artistic relevance. But on the contrary, Defendants’ only
 12 relevant declarant (Mr. Scott) goes out of his way to assert that he played no role in
 13 the infringing graphic design. [Dkt 56-3, Scott Decl., ¶ 3-4.] What Mr. Scott has to
 14 say about the use of graffiti elements in general has no bearing on why Rime’s name
 15 was used or its artistic relevance, or why any name or trademark was used or has
 16 artistic relevance.

17 **2. Defendants have not demonstrated that their “Nominative Fair**
 18 **Use” Defense absolves them on First Amendment Grounds.**

19 Under the “nominative fair use” defense, a defendant is allowed to use a
 20 plaintiff’s mark when necessary to refer to the plaintiff’s goods or services. Such a
 21 use is permitted when there is no likelihood of confusion. 4 McCarthy on
 22 Trademarks and Unfair Competition § 23:11 (4th ed.). This type of use has been
 23 labeled a non-confusing “nominative use” because it “names” the real owner of the
 24 mark. *Id.* The Ninth Circuit did not originally conceive “nominative fair use” to be
 25 an affirmative “defense,” like “classic fair use.” *Id.* Rather, “nominative fair use”
 26 was created to be an alternative method for analyzing if there is the kind of
 27 likelihood of confusion that constitutes trademark infringement. *Id.* The “nominative
 28

1 fair use” analysis is a “defense” only in the sense that an accused infringer in certain
 2 cases can use the analysis to argue that there will be no infringement because there
 3 will be no likelihood of confusion. *Id.* The analysis is fact-intensive and requires
 4 knowledge of how, when, why, and in what manner the use occurred. *See, e.g.,*
 5 *Autodesk, Inc. v. Dassault Sys. SolidWorks Corp.*, 2008 WL 674224 (N.D. Cal. Dec.
 6 18, 2008); *KP Permanent Make-Up, Inc. v. Lasting Impression I., Inc.*, 408 F.3d
 7 596, 609 (9th Cir. 2005) (both cases cited by the Court in denying Defendants’ prior
 8 motions to strike/motions to dismiss).

9 As with their *Rogers* defense, Defendants have not come close to establishing
 10 that their use of “RIME” was not explicitly misleading as to the source or content of
 11 the work given the context of Defendants’ use. To the contrary, Defendants offer
 12 only Mr. Scott’s declaration as supporting evidence for this defense – and Mr. Scott
 13 denies any knowledge of the questioned use, claiming unnamed Moschino personnel
 14 found, selected, and incorporated RIME into Defendants’ goods “completely
 15 independently” of Scott and without “any knowledge” by Scott. (Dkt 56-3, Scott
 16 Decl., ¶¶4-7.)

17 **E. Plaintiff’s right of publicity claim rests on sufficient evidence.**

18 Cal. Civ. Code Section 3344 prohibits (in part) the knowing “use” of
 19 another’s “name, voice, signature, photograph, or likeness, in any manner, on or in
 20 products, merchandise, or goods....” Plaintiff alleges that Defendants knowingly
 21 *used* his name by placing his false signature on clothing, and advertisements for
 22 clothing, without authorization. In spite of the fact that such allegation seems to add
 23 up to a paradigmatic example of a proper Section 3344 claim, Defendants allege
 24 they may not be liable under this statute because Defendants’ Creative Director,
 25 Defendant Scott, claims he was ignorant of Plaintiff’s identity. Such unsubstantiated
 26 allegations are insufficient to defeat Plaintiff’s claim.

27 **1. Defendants showcase the existence of material factual issues by**
 28

1 **arguing that their unapproved use of Plaintiff’s tag was**
2 **simultaneously knowing and necessary but also unintentional and**
3 **ignorant.**

4 Defendants renew the argument made previously that Plaintiff’s right of
5 publicity claim is “dead on arrival” because there was no “knowing” use of
6 Plaintiff’s name or persona. More specifically, Defendants argue that an unnamed
7 graphic designer or designers at Moschino were responsible for the improper use.
8 Such allegations do not absolve Defendants from liability.

9 Plaintiff has alleged facts that virtually compel the inference that Defendants
10 knew they were referring to Plaintiff. It seems more than likely that in writing the
11 word “Rime” on their clothing, Defendants were referring to the Rime who happens
12 to be the Plaintiff in this action. For one thing, they also used Plaintiff’s graphic
13 artwork in the very same collection, which would count as a miraculous coincidence
14 if Defendants were unaware of Plaintiff. Further, Defendants admit that they
15 directed or allowed Moschino personnel to select, gather, and use Plaintiff’s name in
16 Defendants’ collection. Whether Defendant Scott himself actually designed the
17 fashions for which he claimed credit, or whether Scott relegated the collection to be
18 designed by other Moschino personnel, someone affiliated with Defendants
19 knowingly selected and used Plaintiff’s name. Defendants are responsible for such
20 use.

21 **2. Defendants have not established their use was “transformative.”**

22 Even as they claim they did not know who Plaintiff was, Defendants also
23 claim they purposefully transformed Plaintiff’s name into a new and different
24 derivative work that could have stand-alone copyright protection. Such bare
25 allegations are insufficient to establish Defendants’ infringement as transformative
26 use—which requires a highly fact-specific inquiry.

27 The very case Defendants rely on shows this. The *Comedy III* case
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1 enumerates at least five factors to consider in determining whether a work is
2 sufficiently transformative to obtain First Amendment protection. *See also* J.
3 Thomas McCarthy, *The Rights of Publicity and Privacy* § 8:72 (2d ed. 2012). First,
4 if “the celebrity likeness is one of the ‘raw materials’ from which an original work is
5 synthesized,” it is more likely to be transformative than if “the depiction or imitation
6 of the celebrity is the very sum and substance of the work in question.” *Comedy III*
7 *Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 405 (2001). Second, the
8 work is protected if it is “primarily the defendant’s own expression”—as long as that
9 expression is “something other than the likeness of the celebrity.” *Id.*, at 406. This
10 factor requires an examination of whether a likely purchaser’s primary motivation is
11 to buy a reproduction of the celebrity, or to buy the expressive work of that artist.
12 McCarthy, *supra*, § 8:72. Third, to avoid making judgments concerning “the quality
13 of the artistic contribution,” a court should conduct an inquiry “more quantitative
14 than qualitative” and ask “whether the literal and imitative or the creative elements
15 predominate in the work.” *Comedy III*, 25 Cal.4th at 407. Fourth, the California
16 Supreme Court indicated that “a subsidiary inquiry” would be useful in close cases:
17 whether “the marketability and economic value of the challenged work derive
18 primarily from the fame of the celebrity depicted.” *Id.* Lastly, the court indicated
19 that “when an artist’s skill and talent is manifestly subordinated to the overall goal of
20 creating a conventional portrait of a celebrity so as to commercially exploit his or
21 her fame,” the work is not transformative. *Id.*, at 408. Triable issues preclude
22 summary judgment based on this analysis.

23 V. CONCLUSION.

24 Plaintiff has shown that substantial factual issues surround each of his
25 complaint claims. Defendants deliberately copied Plaintiff’s design and used
26 Plaintiff’s name in Defendants’ 2015 clothing collection, without Plaintiff’s
27 knowledge or approval. Defendants have yet to reveal who, among Defendants, was
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1 particularly responsible for choosing Plaintiff’s design and name. Regardless of that
2 person’s identity however, Jeremy Scott took credit for the collection and promoted
3 the infringing goods, including by himself wearing an infringing product at a high
4 profile event. Ample evidence establishes that Defendants knew or were responsible
5 for knowing that the infringement was improper. For all these reasons and because
6 Defendants have failed to prove the absence of triable issues, Defendants’ summary
7 judgment cannot stand. Plaintiff respectfully requests that the Court deny
8 Defendants’ motion.

9 In the alternative, if the Court questions whether disputed factual issues exist,
10 Plaintiff requests that the Court defer ruling on the motion until such time as
11 Plaintiff has had the opportunity to take the depositions of Defendants Moschino
12 and Scott and present the Court with further evidence from those depositions
13 establishing material issues of fact.

14 ///

15 ///

16 Respectfully submitted,
17 ERIKSON LAW GROUP

17 DATED: May 2, 2016

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By: _____/s/
David Alden Erikson
Attorneys for Plaintiff JOSEPH TIERNEY
p/k/a RIME

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