

APPENDIX

containing opinions below
& order denying rehearing

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RODNEY WOODLAND,	No. 23-55418
<i>Plaintiff-Appellant,</i>	D.C. No.
v.	2:22-cv-03930-
MONTERO LAMAR HILL, AKA Lil Nas X; DOES, 1-10, Inclusive,	AB-MRW
<i>Defendants-Appellees.</i>	OPINION

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Argued and Submitted January 13, 2025
Pasadena, California

Filed May 16, 2025

Before: Ronald M. Gould, Mark J. Bennett, and Kenneth
K. Lee, Circuit Judges.

Opinion by Judge Lee

SUMMARY*

Copyright

The panel affirmed the district court’s dismissal of an action for copyright infringement brought by Rodney Woodland against Montero Lamar Hill.

Woodland alleged that Hill, also known as Lil Nas X, posted photos of himself on his Instagram page that were too similar to photos on Woodland’s page.

The panel held that, in the online context, Woodland did not plausibly allege that Hill had “access” to Woodland’s photos and thus did not sufficiently allege the copying of copyrighted material.

Woodland also failed to plausibly allege that Hill unlawfully appropriated his photos. The panel held that the Copyright Act protects only the “selection” and “arrangement” of individual elements in a photo, and here, the “selection” and “arrangement” in the photos were not substantially similar.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Law Offices of Michael Shapiro, Los Angeles, California; for Plaintiff-Appellant.

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OPINION

LEE, Circuit Judge:

Rodney Woodland, a freelance artist and model, posts semi-naked photographs of himself in different poses on Instagram. Montero Lamar Hill, better known as the recording artist Lil Nas X, also has an Instagram account—and he, too, shares semi-naked photos of himself in varying poses (as one apparently does on Instagram these days). Woodland sued Hill for copyright infringement, alleging that several photos on Hill’s Instagram page are too similar to those from his own profile.

We affirm the district court’s order dismissing his copyright infringement claim. For a copyright claim, a plaintiff must show, among other things, (1) the copying of copyrighted material and (2) the unlawful appropriation of it. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018), *overruled in part on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1066–69 (9th Cir. 2020) (en banc). Woodland has not plausibly alleged either. First, Woodland has not plausibly pleaded that Hill had “access” to Woodland’s photos to allege copying. *See id.* The mere fact that Woodland posted his photos on his Instagram

page—without more—falls short of plausibly alleging that Hill had “access” to and saw Woodland’s photographs. Second, Woodland has not shown that Hill unlawfully appropriated his photos. While some elements from the photos appear superficially similar, the Copyright Act protects only the “selection” and “arrangement” of individual elements in a photo. *See id.* at 1119. And here, the “selection” and “arrangement” in the photos are not substantially similar.

BACKGROUND

Rodney Woodland describes himself as a visual artist, photographer, figure model, and online content creator. He posts many original photographs of himself semi-naked—or more precisely, naked with his groin area strategically covered or obscured—in various poses and backgrounds on Instagram. The photos at issue were posted on his Instagram account between August 2018 and July 2021. Each of Woodland’s twelve posts garnered between eight and seventy-five “likes.”

Montero Lamar Hill, otherwise known as Lil Nas X, is a well-known recording artist who actively uses Instagram to promote his music and tour dates. He, too, posts photographs of himself semi-naked in a wide array of poses and backgrounds. Between March and October 2021, Hill posted eight photographs on Instagram that Woodland claims infringed on twelve of his copyrighted photographs. Hill’s posts on Instagram receive hundreds of thousands, and sometimes millions, of “likes.”

In June 2022, Woodland sued Hill for copyright infringement, declaratory relief, accounting, and unjust enrichment. After Woodland filed his amended complaint,

the district court dismissed all of Woodland’s claims but granted him leave to amend.

After Woodland filed his second amended complaint, alleging only a copyright infringement claim, the district court dismissed the claim without leave to amend. The district court found that: (1) Woodland failed to allege any facts to show a reasonable possibility that Hill viewed Woodland’s photos on Instagram, and (2) Hill’s photos and Woodland’s photos were not substantially similar.

On appeal, Woodland argues that the district court erred on both grounds. We have jurisdiction under 28 U.S.C § 1291.

STANDARD OF REVIEW

We review the district court’s order granting a motion to dismiss for failure to state a claim de novo. *See McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1096 (9th Cir. 2023). We must “accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020) (quoting *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019)). From there, we “decide whether the complaint articulates ‘enough facts to state a claim to relief that is plausible on its face.’” *Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1239 (9th Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

DISCUSSION

To survive a motion to dismiss, Woodland must state a plausible claim for copyright infringement. To prove copyright infringement, a plaintiff must satisfy two prongs: “(1) ownership of a valid copyright, and (2) copying of

constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Because Hill does not dispute that Woodland’s photos are his original works, the question here is whether Woodland’s operative complaint plausibly alleges the second prong.

Our circuit bifurcates the second prong into “two distinct components: ‘copying’ and ‘unlawful appropriation.’” *Rentmeester*, 883 F.3d at 1117 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164–65 (9th Cir. 1977)). Plaintiffs must first show that the defendant copied the work at issue. *See Skidmore*, 952 F.3d at 1064. Without copying, there is no copyright violation because, unlike in the patent context, copyright law does not grant authors a monopoly on protected works. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01[A] (2024). So if a different author independently creates the same work without relying on the original work, that “is a complete defense to copyright infringement.” *Skidmore*, 952 F.3d at 1064.

After a plaintiff shows that the defendant copied the work, the plaintiff must then prove “unlawful appropriation.” *Hanagami v. Epic Games, Inc.*, 85 F.4th 931, 941 (9th Cir. 2023). Copyright law “does not forbid *all* copying” because Congress did not want to stifle creativity and creation by categorically cordoning off large swaths of areas as off-limits. *Rentmeester*, 883 F.3d at 1117 (emphasis added). A copyright thus does not protect the “ideas” in a plaintiff’s work. Instead, protection extends only to the plaintiff’s “particular *expression*” of those ideas. *Krofft*, 562 F.2d at 1163 (emphasis added); *see also* 17 U.S.C. § 102(b) (stating that copyright protection does not “extend to any idea, procedure, process, system, method of operation,

concept, principle, or discovery”). A defendant may copy the unprotected “‘ideas’ or ‘concepts’ used in the plaintiff’s work,” but may not copy the protected expression of those ideas and concepts. *Rentmeester*, 883 F.3d at 1117. To show unlawful appropriation, the plaintiff must prove that the defendant copied enough of the protected expression in the work “to render the two works ‘substantially similar.’” *Id.* (quoting *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 914 (9th Cir. 2010)).

As explained below, Woodland fails to establish either copying or unlawful appropriation, and we affirm the district court on both grounds.

I. Woodland fails to plausibly allege copying because he cannot show Hill had “access” to his photographs.

Because direct evidence that a defendant copied a plaintiff’s work “is rarely available” (as in our case), *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987), a plaintiff often proves copying circumstantially by showing: (1) “that the defendant had access to the plaintiff’s work and” (2) “that the two works share similarities probative of copying,” *Rentmeester*, 883 F.3d at 1117.¹

¹ The “similarities probative of copying” element is different from “substantially similar” under the unlawful appropriation analysis, despite their similarity in wording. The former imposes a much more forgiving standard, as the probative “similarities between the two works need not be extensive.” *Rentmeester*, 883 F.3d 1117. Because Woodland’s failure to plausibly plead “access” dooms his claim of copying and we later analyze whether the photos are “substantially similar” in addressing unlawful appropriation, we do not discuss the “similarities probative of copying” element.

To show circumstantial evidence of “access,” the plaintiff may generally either provide (a) “evidence of a ‘chain of events . . . between the plaintiff’s work and defendants’ access to that work’ or” (b) “evidence that ‘the plaintiff’s work has been widely disseminated.’” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 985 (9th Cir. 2017) (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000), *overruled in part on other grounds by Skidmore*, 952 F.3d at 1066–69)).

Woodland concedes that his works are not widely disseminated, given that his Instagram photos received between eight and seventy-five “likes” only. So he must plead “evidence of a ‘chain of events’” linking Hill’s access to his works. *Unicolors*, 853 F.3d at 985 (quoting *Three Boys Music*, 212 F.3d at 482). The chain of events must raise “a reasonable possibility” for Hill to have viewed his work—“not merely a bare possibility.” *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009); *see also Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016). A theory of access cannot be “mere speculation or conjecture.”² *Three Boys Music*, 212 F.3d at 482.

² Woodland argues that his burden of proof to show access is lower because, in his view, Hill’s photos are very similar to Woodland’s. This is the reverse application of the now-abrogated “inverse ratio rule.” The inverse ratio rule permitted a lower showing of similarity when the plaintiff had strong proof of access. *See, e.g., Three Boys Music*, 212 F.3d at 485. Our en banc court rejected the inverse ratio rule in *Skidmore*, 952 F.3d at 1069, but Woodland claims that the reverse application of that rule survived our decision in *Skidmore*. While at least some of our reasons in *Skidmore* for abrogating the inverse ratio rule extend equally to its reverse application, we need not decide whether *Skidmore* also abolished the reverse of the inverse ratio rule. Even if the reverse application of the rule remains intact, it does not help Woodland because the similarities between his and Hill’s works are limited.

A. Today’s social media and digital platforms like Instagram could make it easier to show “access” to copyrighted materials.

Woodland tries to plead “access” by alleging that Hill, as an Instagram user, had a reasonable possibility of viewing Woodland’s photos on that social media platform.³ As explained later, Woodland ultimately fails to raise a reasonable possibility that Hill viewed his works and thus had “access” to the copyrighted photos. But Woodland’s theory highlights how today’s online platforms like Instagram can theoretically make it easier to show “access” in a copyright claim.

Our access doctrine developed “offline” as we addressed copyright claims involving videotapes, books, and other physical items. *See, e.g., Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (finding no access where home video sold only 17,000 copies); *Three Boys Music*, 212 F.3d at 482 (explaining that plaintiffs could successfully prove access by showing their music “was widely disseminated through sales of sheet music, records, and radio performances” (quoting PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 8.3.1.1, at 91 (1989))). In the offline world, it can be difficult to show access if the copyrighted material did not sell well. For example, we affirmed that a plaintiff who sued Jane Fonda for allegedly lifting copyrighted material from her novel did not show access because the plaintiff’s book had sold fewer than 1,000 copies. *Jason v.*

³ Based on the facts that Hill uses Instagram and Woodland posts photos on it, Woodland says he pleaded “direct access.” But neither of those alleged facts amounts to direct evidence that Hill saw Woodland’s work. At best, they can only be circumstantial evidence that Hill may have stumbled upon Woodland’s work.

Fonda, 526 F. Supp. 774, 776 (C.D. Cal. 1981), *adopted and aff'd by Jason v. Fonda*, 698 F.2d 966, 967 (9th Cir. 1982).

We start by stating the obvious: the Internet makes it easier than ever to reach an artist's copyrightable works. With a couple of clicks of the mouse or a few taps to the screen, artists can upload their works to a website or a platform like Spotify, YouTube, or Instagram, making them available to millions or billions of individuals around the world—including copycats.

We briefly addressed access in this online context in *Art Attacks*. See 581 F.3d at 1145. In that case, the plaintiffs alleged that because they posted their artistic designs to their standalone website, the designs were sufficiently widely disseminated. *Id.* We acknowledged that the Internet provides an opportunity “to reach a wide and diverse audience” but held that the plaintiffs failed to show wide dissemination. *Id.* Our decision in *Art Attacks* highlights that *availability* should not be confused with *access*. It is not easy to stumble upon a single webpage amid the “vast quantity of material on the Internet.” *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 208 (2003). Although the designs in *Art Attacks* were publicly available to anyone on the Internet, the mere publication to a standalone webpage did not amount to wide dissemination that would have made it easy for the defendants to encounter the designs. 581 F.3d at 1145.

Online platforms like Instagram, Spotify, and YouTube, however, are different from the plaintiffs' webpage in *Art Attacks*. While standalone websites make content available to anyone in the world, digital platforms do that and more. Digital platforms create online communities and actively connect content creators with content consumers. Platforms

like Instagram are designed to facilitate the discovery and sharing of available content by using algorithms to recommend tailored content to consumers. No longer do people have to search for specific content in the vast expanse of the Internet; in today's digital landscape, social media networks and other platforms continually push individualized content to consumers based on each individual's preferences, usage, and habits. And by expanding a content creator's reach, these digital platforms can increase the chances that other people will see—*i.e.*, have access to—the creator's copyrighted content.

Consider the proverbial pajama-clad blogger from the early 2000s who would share his musings on his personal Internet blog while sitting in his mother's basement. Unless someone intentionally searched for that blog website, almost no one (except perhaps his hapless mother who encouraged him to go outside and find gainful employment) would have likely viewed his blog posts, even though theoretically they were available to everyone. But in the age of Twitter/X and other content-sharing platforms, that erstwhile blogger's reach could multiply dramatically as others' "views" and "likes" on Twitter/X may push his posts to a larger audience under that platform's algorithm. Indeed, content from an ordinary person with a few followers can now go "viral" and reach millions of people.

It is no wonder why, then, in the "digitally interconnected world" of online platforms "the concept of 'access' is increasingly diluted." *Skidmore*, 952 F.3d at 1068. To sum up, social media and other digital-sharing platforms could make it easier for plaintiffs to show that defendants had access to their materials—but only *if* they can show that the defendants had a reasonable chance of seeing their work under that platform's algorithm or content-

sharing policy. That is a big “if”—and, as explained below, Woodland has fallen short here.

B. Woodland fails to plausibly plead that Hill had “access” to his Instagram photos.

While Instagram may make a user’s content more widely accessible, it is not enough to simply allege that Hill is an active user of Instagram and thus had a reasonable possibility of viewing Woodland’s photos. As the district court explained, there are over a billion users and many more posts on Instagram. The mere fact that Hill uses Instagram and that Woodland’s photos are on Instagram raises no more than a “bare possibility” that Hill viewed Woodland’s photos. *Art Attacks*, 581 F.3d at 1143.

Perhaps recognizing this reality, Woodland offers a chain of events to bolster his claim that Hill had a reasonable possibility of viewing Woodland’s photos on Instagram. Woodland contends that Instagram’s recommendation algorithm increased the chances that Hill viewed Woodland’s works. According to Woodland, because the content that Hill and Woodland post to their respective Instagram profiles “shares in sub-genres of similar content, involving artistic nude Black male modeling,” Instagram’s algorithm would likely have recommended Woodland’s posts to Hill. Woodland asks us to take judicial notice of various informational pages published by Instagram to support this theory.

But Woodland’s theory is rooted in speculation. Even if we took judicial notice and accepted the information as true, Instagram’s purported policy does not support Woodland’s theory. None of the documents support the contention that similar profile content alone would cause Instagram to promote a profile’s posts to users. *See, e.g., How Instagram*

Feed *Works*, INSTAGRAM, <https://help.instagram.com/1986234648360433/> (last visited May 8, 2025). Rather, Woodland’s sources explain that Instagram suggests posts based on the accounts that users follow; the posts users like, share, and comment on; users’ history of connecting with accounts; and how popular a particular post is and how others have interacted with that post. *See id.* We need not decide today what precise facts a plaintiff must allege about a digital platform’s algorithm or content-sharing policy to show “access.” But we can say that Woodland has not sufficiently pleaded that Hill had access to his Instagram photos, given that he does not plausibly allege that Hill followed, liked, or otherwise interacted with posts or accounts connected to or similar to Woodland. And because Woodland has failed to show access, he has not adequately alleged copying.

C. Woodland cannot shore up his copying claim by alleging “serial infringement.”

Undeterred by his failure to show access (and thus copying), Woodland says that we must not miss the forest for the trees and contends that this is a case of “serial infringement.” Hill allegedly copied not one or two of Woodland’s photos, but twelve. The sheer number of allegedly similar photos, Woodland says, raises an inference of copying that helps his claim survive the motion to dismiss.

Woodland does not cite the Copyright Act or any of this court’s precedent to support the idea that alleging multiple copied works helps plaintiffs state a copyright infringement claim. Nor can we find any. His argument also fails as a logical matter. Even assuming Hill’s works share similarities with Woodland’s, that does not necessarily show access. The mere existence of multiple works does not prove

access. When there is no direct evidence of copying, a plaintiff must meet his burden by either pleading wide dissemination or a chain of events that raises a reasonable possibility that the defendant viewed the work. Woodland has done neither.

II. Woodland also fails to show unlawful appropriation.

Woodland's copyright claim falters for another reason: he has failed to show unlawful appropriation because none of Hill's photographs are substantially similar to Woodland's.

A. Woodland must show that the selection and arrangement of the objective elements of his photographs—not the individual elements in isolation—are substantially similar to Hill's.

To show unlawful appropriation, a plaintiff “must demonstrate that the works share *substantial* similarities.” *Hanagami*, 85 F.4th at 941 (emphasis in original). “Our circuit uses a two-part test to assess substantial similarity:” (1) the extrinsic test, which compares objective similarities in protectable expression, and (2) the intrinsic test, which evaluates similarity from the point of view of a reasonable observer. *Id.* While “the intrinsic test is reserved exclusively for the trier of fact,” *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018), the extrinsic test “may be decided by the court as a matter of law,” *Rentmeester*, 883 F.3d at 1118 (citing *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 319 (9th Cir. 1987)). And because a plaintiff must satisfy both the extrinsic and intrinsic tests, failure to meet the extrinsic test is fatal. *See id.*

Only copying of protectable expression leads to unlawful appropriation, so the first step in the extrinsic test is to “distinguish between the protected and unprotected material in a plaintiff’s work.” *Gray v. Hudson*, 28 F.4th 87, 96 (9th Cir. 2022) (quoting *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)). Photographs are not easily “dissected into protected and unprotected elements.” *Rentmeester*, 883 F.3d at 1119. To start, we look to the “objective elements that reflect the various creative choices the photographer made in composing the image—choices related to subject matter, pose, lighting, camera angle, depth of field, and the like.” *Id.*; see also *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1077 (9th Cir. 2000) (discussing objective elements of a photograph).

Contrary to Woodland’s assertions, the individual elements in photographs—the poses, lighting, costumes, and makeup—are not themselves protected from infringement. Rather, we held in *Rentmeester* that when viewed in isolation, these objective elements—even “highly original elements”—are unprotected. 883 F.3d at 1119. Rather, “[w]hat *is* protected by copyright is the photographer’s selection and arrangement of the photo’s otherwise unprotected elements. If sufficiently original, the combination of subject matter, pose, camera angle, etc., receives protection, not any of the individual elements standing alone.” *Id.* (emphasis in original). Thus, “[a] second photographer is free to borrow any of the individual elements featured in a copyrighted photograph, ‘so long as the competing work does not feature the same selection and arrangement’ of those elements.” *Id.* at 1120 (quoting *Feist*, 499 U.S. at 349).

We do not have a “well-defined standard for assessing when similarity in selection and arrangement becomes

‘substantial,’” *Rentmeester*, 883 F.3d at 1121, but the result in *Rentmeester* is instructive. In *Rentmeester*, which was also decided on a motion to dismiss, the plaintiff sued Nike for infringing his photo of “Michael Jordan in a leaping pose inspired by ballet’s *grand jeté*.” *Id.* The court determined that while Nike had borrowed the “general idea or concept embodied in the [plaintiff’s] photo”—Michael Jordan in a leaping, *grand jeté*-inspired pose—Nike “produced an image that differs from *Rentmeester*’s photo in more than just minor details.”⁴ *Id.* at 1121. We noted differences in the positions of Jordan’s limbs, the backgrounds and foregrounds, the presence or lack of sun, and the position of the basketball hoop and Jordan’s body in the frame. *Id.* at 1121–22. The photos were “as a matter of law not substantially similar.” *Id.* at 1125.

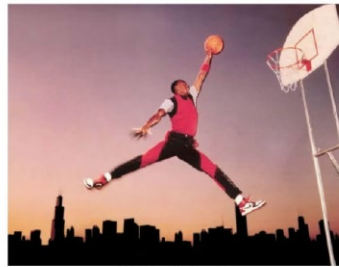
Woodland tries to distinguish *Rentmeester* from this case. He says that unlike here, once Michael Jordan’s image was filtered out of the photos in *Rentmeester*, no similarities remained. But that is true here, where any likeness in Woodland’s and Hill’s works is found largely in the subjects’ poses. He also points out that *Rentmeester* limited its holding to photographs of “recognizable subject matter.” 883 F.3d at 1120 n.2. We used “recognizable” to distinguish

⁴ Woodland unsuccessfully argues that the district court erroneously focused on the differences between Hill’s and Woodland’s photographs rather than their similarities. True, courts may not excuse substantial similarity by later pointing out differences between the works. *See L.A. Printex Inds., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 852 (9th Cir. 2012) (“[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate.” (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936))). But as we did in *Rentmeester*, courts may identify differences in the works to explain why there is no substantial similarity.

subject matter found in reality from “abstract photographic works” that cannot be readily recognized as “facts.” *See id.* at 1120, 1120 n.2. We did not use recognizable as a synonym for a public figure as Woodland suggests.



Rentmeester's photograph



Nike's photograph

Ultimately, the “photos’ selection and arrangement of elements must be similar enough that ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them.’” *Rentmeester*, 883 F.3d at 1121 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.)).

B. None of Hill’s works are substantially similar to Woodland’s.

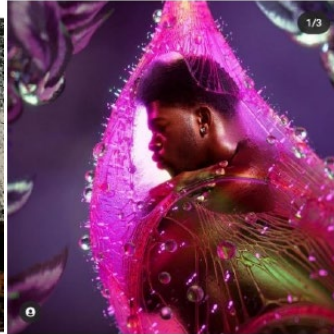
Because Hill’s photos share few similarities with Woodland’s—and certainly no more similarities than shared by Nike’s and Rentmeester’s photos—none are substantially similar.

lifemodlrw



Woodland's photograph

lilnaxx



Hill's photograph

To start with Woodland's work titled "Lit by Larimer," Hill's photograph shares almost nothing in common with Woodland's. The photos both depict a Black man folded in on himself, but the similarities stop there. The objective elements in the photos—the men's poses, colors, lighting, backgrounds, etc.—are different, and so the selection and arrangement of these elements also widely differ.

lifemodlrw



Woodland's photograph

lilnaxx



Hill's photograph

Hill's allegedly infringing photo here does not share substantial similarity with the selection and arrangement of features in Woodland's work "Horizon." The

commonalities go no further than the depiction of a man reclining on his side with certain body parts strategically covered—a common pose in photos of male models and actors. In any event, the models’ specific poses differ, particularly in the placement of arms and hands. Additionally, the backgrounds, colors, lighting, perspectives, and accessories on the main subject vary widely.

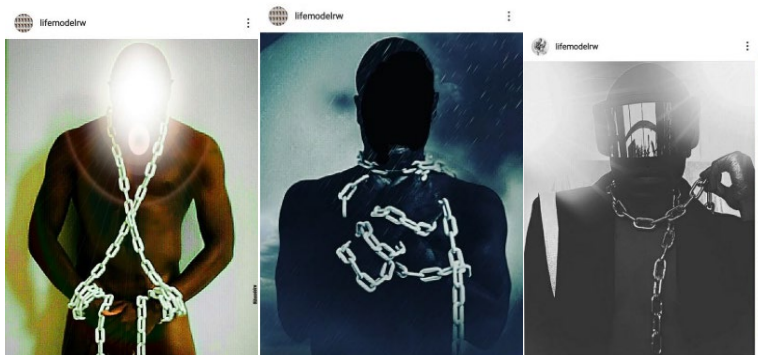


Woodland’s photograph



Hill’s photograph

Woodland’s work “Morning Fog” and Hill’s photo do not share substantial similarities, either. Granted, the photos both portray a naked Black man with a bright light obscuring his groin in front of a blue sky-like background, but the way that idea is expressed in the selection and arrangement of elements is not similar. There are other differences: (1) the positioning of arms, (2) Hill’s face is visible, while Woodland’s is obscured, and (3) Hill’s skin glistens, while Woodland is surrounded by blue shadow.



Woodland's photographs



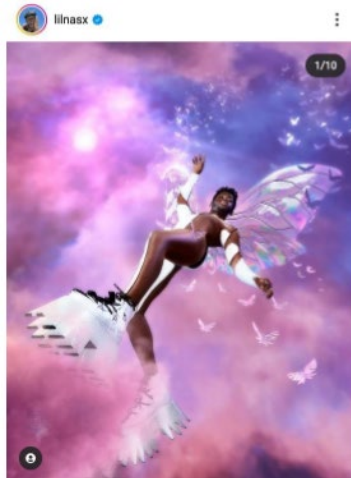
Hill's photograph

None of Woodland's photos depicting a subject draped in chains—"Unknown Soulja," "Bound Not Broken," and "Juneteenth" (top row)—share substantial similarities with Hill's photo of himself wrapped in chains. The idea in each of the photos is the same—the provocative image of a Black man in chains. But that idea is not protected—indeed, it is a common motif in many pieces of art. Only the expression through the selection and arrangement of objective elements

receives copyright protection. And in looking at the selection and arrangement, we conclude there is little in common. The physical features of the subjects, arrangements of the chains, backgrounds, lighting, angles, colors, and positions of the subjects in the frames all differ.



Woodland's photograph

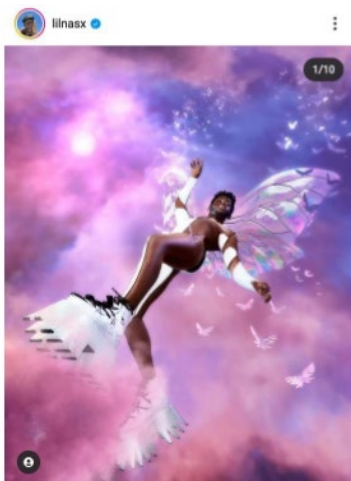


Hill's photograph

The only similarity between Woodland's work titled "To the Moon" and Hill's photo is the depiction of a man in an atmospheric setting with his head angled away from the camera and feet nearer to the viewer. In all other respects, the photos differ in color, subject, pose, lighting, spacing, and background.



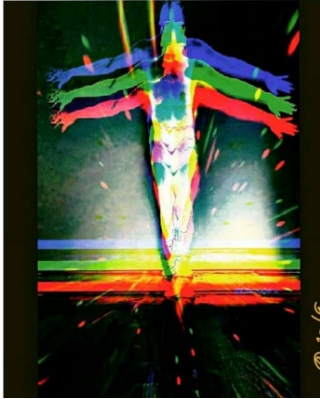
Woodland's photograph



Hill's photograph

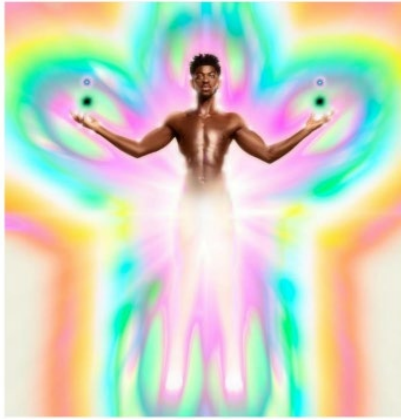
These two photos do not share substantial similarity. Woodland's subject seems to be lying back or falling onto a cloth-covered surface. Sure, Hill positioned his arms similarly to those of Woodland's subject, who is also a Black man with feet near the viewer, but the left arm of Woodland's subject cuts out of frame at the elbow. Hill's facial expression and the position of his lower body differ from that of Woodland's subject, and none of the other elements in the photo—background, lighting, angle, and color—are similar.

lifemodelrw



Woodland's photograph

lilnasx



Hill's photograph

Woodland's work "Tiedye" and Hill's photo share nothing in common beyond depicting a man standing with arms outstretched—an unprotectable idea. When the expression of that idea varies so widely in nearly all respects (as here), there is no substantial similarity.



Woodland's photograph



Hill's photograph

Woodland's photo titled "Polkadot Pose" has little in common with Hill's photo other than that each photo shows a naked Black man whose front body is hidden from view. The poses, backgrounds, colors, lighting, angles, and accessories on the main subject are different.



Woodland's photographs



Hill's photograph

While Hill's work shares some elements in common with Woodland's photos "SEE SAW" and "At Rest," these similarities do not rise to the level of substantial similarity. Unlike Hill, Woodland's subject in SEE SAW has folded his arms across his chest, and his right knee is folded at a sharp angle. The subject is in front of a yellow wall and a white door, resting on a stool, and the bottom of the subject's body is in shadow. Hill's body, by contrast, is glistening and none of him is in shadow.

Woodland's subject in At Rest has bent his left knee instead of his right. In further contrast to Hill's photo, the subject is lying on a stool covered with a sheet. The light in Woodland's photo is above the subject and creates shadows, while Hill's photo does not feature a source of light. Both of Woodland's photos are realistic, while the setting of Hill's photo features fantastical elements. In sum, as in *Rentmeester*, these differences—despite some similarities in the photos—are dispositive, and Woodland has failed to show that Hill unlawfully appropriated his photos. See 883 F.3d at 1121.

CONCLUSION

We **AFFIRM** the district court's order granting the motion to dismiss Woodland's second amended complaint without leave to amend.

JS-6

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 RODNEY WOODLAND,

11 Plaintiff,

12 v.
13

14 MONTERO LAMAR HILL, aka LIL
15 NAS X, and DOES 1-10, inclusive.

16 Defendants.
17

Case No. 2:22-cv-03930-AB-MRWx

**ORDER GRANTING DEFENDANT'S
SECOND MOTION TO DISMISS**

I. INTRODUCTION

Before the Court is Defendant Hill’s (“Defendant”) Motion to Dismiss Plaintiff’s Second Amended Complaint (“SAC,” Dkt. No. 39). Plaintiff filed an opposition (Dkt. No. 40.) Defendant filed a Reply (Dkt. No. 41.) The Court heard oral argument on February 10, 2023 and took the matter under submission. For the foregoing reasons, Defendant’s Motion is **GRANTED**.

II. BACKGROUND

Plaintiff's alleges as follows. Plaintiff is an adult freelance visual artist, photographer, figure model, and creator of online content that is available on his Instagram page and website. SAC ¶¶ 5, 9. Defendant is a well-known recording artist and Instagram content poster who garners millions of views for his posts. *Id.* ¶¶ 6, 10. Without Plaintiff's consent, Defendant published a series of Instagram posts, advertisements, album covers, and merchandise that copied, appropriated, and mimicked twelve of Plaintiff's copyrighted photographs. *Id.* ¶ 11-12.

As a result, Plaintiff in his First Amended Complaint (“FAC”) brought claims for (1) copyright infringement, (2) declaratory relief, (3) accounting, and (4) unjust enrichment. *Id.* ¶¶ 17-30. Defendant moved to dismiss the FAC for failure to state a claim, which the Court granted on December 8, 2022, granting Plaintiff leave to amend.

On December 28, 2022, Plaintiff filed his SAC, alleging only copyright infringement. Defendant now moves to dismiss the SAC in its entirety.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8 requires a plaintiff to present a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a pleading for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6).

To defeat a Rule 12(b)(6) motion to dismiss, the complaint must provide

2.

1 enough factual detail to “give the defendant fair notice of what the . . . claim is and the
2 grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
3 The complaint must also be “plausible on its face,” that is, it “must contain sufficient
4 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
5 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A
6 plaintiff’s “factual allegations must be enough to raise a right to relief above the
7 speculative level.” *Twombly*, 550 U.S. at 555. “The plausibility standard is not akin
8 to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
9 defendant has acted unlawfully.” *Id.* Labels, conclusions, and “a formulaic recitation
10 of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

11 A complaint may be dismissed under Rule 12(b)(6) for the lack of a
12 cognizable legal theory or the absence of sufficient facts alleged under a cognizable
13 legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).
14 When ruling on a Rule 12(b)(6) motion, “a judge must accept as true all of the
15 factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94
16 (2007). But a court is “not bound to accept as true a legal conclusion couched as a
17 factual allegation.” *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

18 The court generally may not consider materials other than facts alleged in the
19 complaint and documents that are made a part of the complaint. *Anderson v.*
20 *Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). However, a court may consider materials
21 if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged
22 the existence of the materials in the complaint or the complaint “necessarily relies” on
23 the materials. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation
24 omitted). The court may also take judicial notice of matters of public record outside
25 the pleadings and consider them for purposes of the motion to dismiss. *Mir v. Little*
26 *Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Lee*, 250 F.3d at 689-90.

27 IV. DISCUSSION

28 Defendant seeks to dismiss Plaintiff’s SAC in its entirety because (1) Plaintiff

1 fails to plausibly allege that copying occurred, and (2) Plaintiff fails to plausibly allege
2 copying of protected expression under the Ninth Circuit’s extrinsic test. Specifically,
3 Defendant argues Plaintiff has not shown Defendant had access to Plaintiff’s Photos
4 under a chain of events or widespread dissemination theory. Defendant further argues
5 Plaintiff has failed to show there were any substantial similarities between the
6 protected elements of Plaintiff’s and Defendant’s Photos. The Court finds Plaintiff
7 has failed to plausibly plead access and substantial similarity, and therefore has failed
8 to state a claim for copyright infringement.

9 **A. Copyright Infringement**

10 To state a claim for copyright infringement, Plaintiff must allege that (1) he
11 owns a valid copyright in the Photos, and (2) Defendant copied protected aspects of
12 Plaintiff’s Photos. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952
13 F.3d 1051, 1064 (9th Cir. 2020). “The second prong of the infringement analysis
14 contains two separate components: copying and unlawful appropriation.” *Id.*
15 “Unfortunately, [courts] have used the same term—‘substantial similarity’—to
16 describe both the degree of similarity relevant to proof of copying and the degree of
17 similarity necessary to establish unlawful appropriation. The term means different
18 things in those two contexts.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th
19 Cir. 2018), *overruled on other grounds by Skidmore*, 952 F.3d 1051.

20 To allege actionable copying, Plaintiff must plead facts plausibly showing that
21 the works in questions are either (1) “strikingly similar” or (2) “substantially similar
22 and that [Defendant] had access to [Plaintiff’s Photos].” *Malibu Textiles, Inc. v.*
23 *Label Lane Int’l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019). “On the other hand, the
24 hallmark of unlawful appropriation is that the works share *substantial* similarities.”
25 *Skidmore*, 952 F.3d at 1064. “In our circuit, we use a two-part test to determine
26 whether the defendant’s work is substantially similar to the plaintiff’s copyrighted
27 work.” *Id.* “The first part, the extrinsic test, compares the objective similarities of
28 specific expressive elements in the two works. Crucially, because only substantial

1 similarity in protectable expression may constitute actionable copying that results in
2 infringement liability, it is essential to distinguish between the protected and
3 unprotected material in a plaintiff's work." *Id.* (citations omitted.) "The second
4 part, the intrinsic test, test[s] for similarity of expression from the standpoint of the
5 ordinary reasonable observer, with no expert assistance." *Id.*

6 Defendant argues that Plaintiff failed to plausibly allege access and unlawful
7 appropriation. Accordingly, the Court focuses its discussion on these elements.

8 **1. Access¹**

9 To allege access, "a plaintiff must show a reasonable possibility, not merely a
10 bare possibility, that an alleged infringer had the chance to view the protected work."
11 *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). As
12 explained in the prior dismissal Order, Plaintiff may demonstrate access either by "(1)
13 establishing a chain of events linking the plaintiff's work and the defendant's access,
14 or (2) showing that the plaintiff's work has been widely disseminated." *Id.* Because
15 Plaintiff concedes he is not attempting to show widespread dissemination, he must
16 prove access under the chain of events theory.

17 Plaintiff argues the time frame of the Photos' publications established a chain of
18 events because all of Defendant's Photos were published after Plaintiff's Photos.
19 However, there is no pattern between the dates of publication, as the time gaps range
20 between months and years following the publication of Plaintiff's Photos. The mere
21 passage of time between the two sets of Photos does not create an inference that
22 Defendant (or even someone who knew Defendant) would have seen Plaintiff's
23 content. This fact suggests only that Plaintiff's Photos were published at some point
24 in time prior to Defendant's Photos, a fact necessary for any copyright infringement
25

26 ¹ Plaintiff requested this Court allow limited discovery to prove his claim of access.
27 However, *Iqbal*, 556 U.S. at 678, requires a showing of plausibility before a plaintiff
28 can reach discovery, and as Plaintiff has failed to plausibly plead Defendant had
access to Plaintiff's Photos, he is not entitled to even a limited discovery.

1 claim, as Defendant aptly points out in its Motion to Dismiss. Mot. at 9.

2 Furthermore, the fact that Defendant “actively uses the social media site” where
3 the Photos were published is not sufficient to plausibly show he accessed the images.
4 There are over a billion users on Instagram, with the most popular accounts garnering
5 millions of “likes” on a single post. 75 is the maximum number of likes Plaintiff
6 received on the Photos which Defendant allegedly copied. Without more, there is no
7 way to infer that Defendant was any more likely to have accessed Plaintiff’s Photos
8 than any of the other millions of Instagram users. *Design Basics, LLC v. Lexington*
9 *Homes, Inc.*, 858 F.3d 1093, 1108 (7th Cir. 2017) (“We decide only that the existence
10 of the plaintiff’s copyrighted materials on the Internet, even on a public and ‘user-
11 friendly’ site, cannot by itself justify an inference that the defendant accessed those
12 materials.”) While of course it is possible that Defendant could have potentially
13 viewed Plaintiff’s Instagram content, Plaintiff has not put forth any evidence or
14 alleged any facts showing Defendant was plausibly among the accounts which the
15 Photos actually reached.

16 2. Substantial Similarity

17 Defendant next alleges Plaintiff failed to allege substantial similarity under this
18 Circuit’s extrinsic test.

19 The Court employs a two-part test to determine whether there is a substantial
20 similarity between Plaintiff’s and Defendant’s works: (1) the extrinsic test, which
21 “assesses the objective similarities of the two works, focusing only on the protectable
22 elements of the plaintiff’s expression,” and (2) the intrinsic test, which “test[s] for
23 similarity of expression from the standpoint of the ordinary reasonable observer, with
24 no expert assistance.” *Skidmore as Tr. For Randy Craig Wolfe Tr. v. Led Zeppelin*,
25 952 F.3d 1051 (9th Cir. 2020). “Only the extrinsic test’s application may be decided
26 by the court as a matter of law.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th
27 Cir. 2018), *overruled on other grounds by Skidmore as Tr. For Randy Craig Wolfe Tr.*
28 *v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020). Accordingly, the Court focuses on

1 this first part of the test only.

2 Plaintiff alleges Defendant unlawfully appropriated Plaintiff's works by
3 creating substantially similar content that "copied at least the original elements" of
4 Plaintiff's Photos, such as the "rendition, timing, and creation of the subject." SAC ¶¶
5 7, 9. In its prior Order, this Court ruled Plaintiff did not plausibly allege unlawful
6 appropriation because he failed to "identify concrete elements based on objective
7 criteria" required by the extrinsic test. *Three Boys Music Corp. v. Bolton*, 212 F.3d
8 477, 485 (9th Cir. 2000), overruled on other grounds by *Skidmore*, 952 F.3d 1051.
9 Here, Plaintiff attempts to cure this deficiency by providing a detailed account of his
10 creative inspirations for each photograph, such as "slavery in the United States" and a
11 "summer sunset." SAC ¶¶ 7-8. However, "[c]opyright law only protects expression
12 of ideas, not the ideas themselves." *Cavalier v. Random House, Inc.*, 297 F.3d 815,
13 823 (9th Cir. 2002). Plaintiff does not point to any protectable expression in his
14 photographs, such as the camera angles, timing, or shutter speed. Instead, he alleges
15 similarities in such elements as "subject pose," "facial expressions," and "nudity."
16 (SAC ¶ 13.) However, as the Court explained in its prior Order, Plaintiff does not
17 have a protectable interest in the use of nude bodies, specific poses, or any other
18 natural features of the human body. *See Folkens v. Wyland Worldwide, LLC*, 882
19 F.3d 768, 775 (9th Cir. 2018) ("But when, as here, the only areas of commonality are
20 elements first found in nature, expressing ideas that nature has already expressed for
21 all, a court need not permit the case to go to a trier of fact."). Furthermore, the
22 expression of these elements is not substantially similar, as the photographs depict
23 different people, against different backgrounds, with different lighting techniques.
24 Plaintiff has done nothing more than provide the same "formulaic recitation of the
25 protectable elements of a photograph," Dkt. No. 37, that this Court has already
26 deemed insufficient to support a claim for copyright infringement.

27 Plaintiff's reliance on *Columbia Pictures Indus., Inc. v. Miramax Corp.*, 11 F.
28 Supp. 2d 1179 (C.D. Cal. 1998) does not change the Court's analysis. In that case, the

1 court considered two movie posters and determined “Plaintiffs have a protectable
2 interest in idea and expression based on the total ‘look and feel’” of the posters.
3 *Columbia Pictures*, 11 F. Supp. 2d at 1185. The court ultimately found the
4 defendant’s poster was “substantially similar to the expressive ideas contained” in the
5 plaintiff’s poster based on similarities in factors such as “color,” “manner of
6 expression,” the poster background, and the subject matters’ “size” and “stances.” *Id.*
7 at 1186. However, none of the similarities in that case are present in the case at bar,
8 as the two different subjects are generally depicted in different sizes, poses,
9 background colors, and with different facial expressions. Additionally, as previously
10 noted, Plaintiff does not have a protectable interest in factors such as subject pose and
11 facial expression, and Plaintiff has failed to show that *Columbia Pictures* controls
12 over more recent Ninth Circuit decisions, such as *Rentmeester* or *Skidmore*.

13 Plaintiff further recites a list of creative choices which courts have found to be
14 “potentially protectable” and which Plaintiff used in creating his Photos, relying on
15 *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076–1077 (9th Cir. 2000) to support
16 his assertion that his creative choices were original. Opp’n at 9. However, simply
17 noting that he used creative choices which are “potentially protectable” does not
18 bolster his argument regarding the similarities between his choices and Defendant’s.
19 *Id.* The cases Plaintiff relies on to show he made certain creative choices only support
20 the assertion that Plaintiff’s Photos are “sufficiently original to be copyrightable,”
21 Opp’n at 8, an assertion which Defendant does not dispute. As this showing of
22 originality is not sufficient to overcome his burden of proving substantial similarity,
23 his claim for copyright infringement must fail.

24 V. CONCLUSION

25 Accordingly, Defendant’s motion to dismiss Plaintiffs’ complaint for failure to
26 state a claim is **GRANTED**.

27 Courts may deny leave to amend at their discretion due to “undue delay, bad
28 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies

1 by amendments previously allowed, undue prejudice to the opposing party by virtue
2 of allowance of the amendment, futility of amendment, etc.” *Foman v. Davis*, 371
3 U.S. 178, 182 (1962). This is Plaintiff’s third attempt to plead a viable complaint, and
4 nothing about the SAC and Plaintiff’s briefing suggests that the Plaintiff can plead the
5 facts to state any plausible claim. In light of these circumstances, the Court will
6 dismiss the action without leave to amend.

7
8 Dated: April 3, 2023



HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 24 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RODNEY WOODLAND,

Plaintiff-Appellant,

v.

MONTERO LAMAR HILL, AKA Lil Nas
X; DOES, 1-10, Inclusive,

Defendants-Appellees.

No. 23-55418

D.C. No.

2:22-cv-03930-AB-MRW

Central District of California,
Los Angeles

ORDER

Before: GOULD, BENNETT, and LEE, Circuit Judges.

The petition for panel rehearing, **Dkt. No. 67**, is **DENIED**.