

RECORD NO. 18-13233

In The
United States Court of Appeals
For The Eleventh Circuit

MITCHELL A. POHL, DDS,

Plaintiff – Appellant,

v.

MH SUB I LLC, d.b.a. OFFICITE,

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

BRIEF OF APPELLANT

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT (CIP)

Mitchell Pohl vs. MH Sub I LLC Appeal No. 18-13233-GG

11th Cir. R. 26.1-1(a) (enclosed) requires the appellant or petitioner to file a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) with this court within 14 days after the date the case or appeal is docketed in this court, and to include a CIP within every motion, petition, brief, answer, response, and reply filed. Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court. **You may use this form to fulfill these requirements.** In alphabetical order, with one name per line, please list all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

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REQUEST FOR ORAL ARGUMENT

Oral argument would be helpful for this court to understand the important issue of originality in photographic works presented on this appeal.

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I. JURISDICTIONAL STATEMENT

Mitchell A. Pohl, D.D.S. appeals the final judgment of the United States District Court for the Northern District of Florida, Tallahassee Division, District Judge Mark E. Walker, entered June 20, 2018. *Pohl v. MH Sub I, LLC*, 314 F. Supp. 3d 1225 (N.D. Fla. 2018). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court's determination on summary judgment that plaintiff's before and after photographs of his smiling dental patient Belinda are wholly utilitarian and not entitled to copyright protection should be vacated and remanded to permit a jury to determine whether plaintiff's photographs are sufficiently original and creative to be protectable by copyright.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Mitchell A. Pohl, D.D.S. ("Dr. Pohl") is a dentist whose practice is located in Boca Raton, Florida. (DE 40-1, ¶ 2). A career military veteran, Dr. Pohl served in the Air Force beginning in 1978, after graduating dental school, until 1992. (DE 49-1 at 7-8). Dr. Pohl retired from the Air Force and moved to Florida in 1992 and opened his private practice there. (DE 49-1 at 7-8)¹.

¹ Page references for transcripts of deposition cited herein refer to the CM/ECF page numbers in the header on the documents as filed with the district court.

Dr. Pohl's practice includes cosmetic dentistry, for example, the application of cosmetic veneers. (DE 40-1, ¶ 2). As part of his practice, Dr. Pohl photographs his patients to capture and display his dental work, and then posts these photographs on his website at www.bocaratoncosmeticdentist.com to showcase to the public his skills in the field of cosmetic dentistry. (DE 40-1, ¶¶ 6-8, 19). Dr. Pohl obtains written authorizations from patients to publish their images on his website. (DE 49-1 at 4).

The photographs at issue (also referred to herein as the "Works") are color digital photographs taken by Dr. Pohl in 2004 of a cosmetic veneer patient named Belinda. (DE 40-1, ¶ 4). Belinda was a nurse who worked in a hospital in Alaska. (DE 49-1 at 6). One day on the nursing floor a patient, having noticed Belinda's stained and misshapen teeth, referred to her as "E.M.U." (DE 49-1 at 6). Belinda asked another nurse what this meant; "extreme makeover ugly," a term coined by the reality television show "Extreme Makeover," she was told. (DE 49-1 at 6). Belinda was "crushed." (DE 49-1 at 6).

Several years later, while her insurance adjuster husband was working in Florida, and still suffering embarrassment from her misshapen teeth, Belinda sought out Dr. Pohl's services. (DE 49-1 at 6). On her first visit, Dr. Pohl followed his usual practice and took two pre-operative photographs of Belinda: a picture of her full face, and a separate close-up picture of her mouth. (DE 49-1 at 15-16).

The pre-op close-up is the "before" photograph at issue in this case. This photograph shows "before" Belinda's smile was corrected by Dr. Pohl, displaying yellowed, stained, and misshapen teeth. (DE 40-1 at 2).

After performing dental work on Belinda, Dr. Pohl took two more photographs of Belinda: one of her full face and a separate close-up of her mouth. (DE 49-1 at 15-16). The post-op close-up is the "after" photograph at issue in this case. The post-op photo shows "after" Belinda's smile displaying bright white uniformly shaped teeth and a significantly more pronounced smile. (DE 40-1 at 2).

Dr. Pohl's photographic process involved selecting his camera, posing his subject, determining the lighting, determining the photo angle, and taking the picture. (DE 40-1, ¶ 5). Dr. Pohl takes all before and after photographs of patients himself and his office staff, dental assistants or hygienist are never allowed to take these photographs in cosmetic dentistry cases. (DE 49-1 at 17). Dr. Pohl takes photographs of patients sitting in the dental chair. (DE 49-1 at 17). He also has a photographic studio setup in his office that includes a stool for the patient and a

screen behind the patient which he uses when he needs more space to frame the photograph than taking it with the subject in the dental chair will permit. (DE 49-1 at 14). A dental assistant is always present when Dr. Pohl photographs his patients. (DE 49-1 at 23). The process for taking each photograph at issue took approximately five minutes. (DE 49-1 at 19).

The before photograph of Belinda was taken with her sitting in the dental chair. (DE 49-1 at 17). The after photograph of Belinda was taken with her standing in front of the screen. (DE 49-1 at 18). Before each photograph, Dr. Pohl prepared and posed Belinda by telling her to “smile” and “look at the camera.” (DE 49-1 at 18). Since the photographs at issue were close-ups, Dr. Pohl both moved the camera closer to Belinda and also zoomed in the image with the camera lens to enlarge it in the frame. (DE 49-1 at 19). Dr. Pohl’s camera had “preset lines on the lens that’s set for smile, full face mirror shot.” (DE 49-1 at 19). This allows Dr. Pohl to “set it to whatever shot I want, and then I can move the camera in and out until I get it in focus.” (DE 49-1 at 19).

Upon seeing the results of Dr. Pohl’s work, Belinda “couldn’t stop looking in the mirror.” (DE 49-1 at 6-7). Belinda subsequently wrote a letter of appreciation to Dr. Pohl in which she said that the two people “important in her life that changed her life” were her husband and Dr. Pohl. (DE 49-1 at 6-7).

After taking the photographs of Belinda, Dr. Pohl archived them on his computer, just as he did with all his photographs of all his patients. (DE 49-1 at 20). Dr. Pohl transferred the photographs to his computer by taking out the memory card in the camera and inserting it into his computer. (DE 49-1 at 20). In his computer, Dr. Pohl logged the photographs and categorized them by patient name. (DE 49-1 at 20).

Dr. Pohl registered his copyright in the Works himself by filing an application with the Copyright Office on November 28, 2005, paying the fee, and submitting the deposit material. (DE 40-1, ¶ 9-13; DE 40-2). The deposit material Dr. Pohl submitted included the entire “Boca Raton Cosmetic Dentist” website that was up on the internet in 2005 on CD or DVD-ROM. (DE 49-1 at 27). The application claimed copyright in his practice’s “Text and Photographs” and “website” therein. (DE 40-1, ¶ 9-13). The Register of Copyrights assigned Dr. Pohl’s registration number TX 5-210-837. (DE 40-2).

Thereafter, Dr. Pohl realized that his claim to “Text” in his website was incorrect, as he only intended to claim the before and after photographs contained therein. (DE 40-1, ¶ 14-15). So Dr. Pohl hired an attorney to submit a supplementary registration to correct this mistake and claim only “photographs.” (DE 49-1 at 29-30; DE 49-6). The supplementary registration issued by the

Copyright Office is dated February 3, 2013 and was assigned registration number TX 6-484-589. (DE 49-6).

After he filed the case below, Dr. Pohl realized he had made several other minor mistakes in his registration due to his unfamiliarity with the copyright registration process. (DE 40-1, ¶ 16-18). These mistakes consisted of incorrect dates of completion, first publication, and year of completion of the Works. (DE 40-1, ¶ 16-18). Dr. Pohl made these mistakes because he was confused and used dates referring to the completion and publication of his website, instead of dates referring to the completion and publication of the photographs claimed. (DE 40-1, ¶ 16-18).

In April of 2016, Dr. Pohl performed a Google image search for his photographs of Belinda. (DE 40-1, ¶ 21). This search led to his discovery of at least seven websites for other dentists that displayed the Works without his permission. (DE 40-1, ¶ 22). Dr. Pohl took contemporaneous screenshots of these websites. (DE 40-1, ¶ 22; DE 40-3). The websites were all created by defendant doing business under the name “Officite.” (DE 40-1, ¶ 23).

After reporting the infringement to his attorney William Hollimon, Esq., on May 25, 2016, Mr. Hollimon also visited these same websites and took screenshots. (DE 40-5, ¶ 4; DE 40-6). That same day, Mr. Holliman sent the defendant a certified letter demanding it cease and desist and compensate Dr. Pohl

for infringement. (DE 40-5, ¶¶ 5-6; DE 40-7). On June 8, 2016, Mr. Holliman visited three of the seven websites and discovered the Belinda photographs had been removed. (DE 40-5, ¶¶ 7-8). Officite never responded to Mr. Holliman's letter. (DE 40-5, ¶ 9).

On April 18, 2017, Dr. Pohl filed suit against the defendant in the Northern District of Florida where the defendant did business and also created, maintained and hosted several websites for dentists who practiced in the Northern District. (DE 1, ¶¶ 3-4). The complaint asserted a single claim for infringement based upon defendant's copying, distribution and display of Dr. Pohl's before and after photographs of Belinda without his permission. (DE 1, ¶¶ 27-28). In response, defendant answered, asserted several affirmative defenses. (DE 6). The parties engaged in discovery; defendant took the depositions of Dr. Pohl and his attorney. On September 18, 2017, the district court set the case for pretrial conference on January 26, 2018. (DE 34).

On October 23, 2017, the parties filed cross-motions for summary judgment. Dr. Pohl filed a motion for partial summary judgment of liability for copyright infringement and exhibits in support. (DE 41; DE 40). Defendant filed its motion for summary judgment and exhibits in support. (DE 42). Dr. Pohl opposed defendant's motion. (DE 46). Defendant opposed Dr. Pohl's motion. (DE 47). Dr.

Pohl replied in further support of his motion. (DE 57). Defendant replied in further support of its motion and attached additional exhibits. (DE 52; DE 51).

Because defendant's motion for summary judgment failed to comply with the district court's summary judgment procedures involving page numbering of exhibits, defendant filed a corrected motion for summary judgment and exhibits. (DE 50; DE 53; DE 54; DE 56). While the district denied defendant's original motion as moot due to the filing of the corrected motion (DE 55), the subsequent filings were otherwise identical to the original ones.

On June 20, 2018, the district court entered its Order on Summary Judgment granting summary judgment to the defendant. (DE 61). The district court denied that portion of the motion by defendant that argued Dr. Pohl's copyright was invalid based upon mistakes in Dr. Pohl's registration certificate. (DE 61 at 5-7). The court determined that Dr. Pohl's copyright registration for the Belinda photographs was arguably valid despite his mistakes because the deposit materials included the photographs at issue. (DE 61 at 7). Since neither party had placed the deposit materials in the record, the court determined that material issues of fact regarding the validity of Dr. Pohl's copyright precluded summary judgment for the defendant on this issue. (DE 61 at 7).

However, the district court went on to determine that the before and after photographs of patient Belinda's upper and lower lips, teeth, and the skin

surrounding her mouth lacked sufficient originality and creativity and granted summary judgment on this ground to defendant. (DE 61 at 7-11). The district court determined that Dr. Pohl's Belinda photographs did not meet the Copyright Act's requirements for originality, and were insufficiently creative to warrant protecting. (DE 61 at 8-11). The district court found that "when viewing the before-and-after photos, no pairs of eyes on a reasonable jury can find any modicum of creativity or originality in these photographs." (DE 61 at 11).

The district court then briefly addressed Dr. Pohl's motion for summary judgment. (DE 61 12-13). The district court recognized that Dr. Pohl had come forward with a registration for his copyright in the Belinda photographs, and had also shown websites demonstrating copying. (DE 61 at 12). However, the district court ultimately refused to rule further in view of its earlier finding that the Works lacked creativity and originality. (DE 61 at 13).

The district court concluded by observing

There is nothing remotely creative about taking close-up photographs of teeth. The before-and-after shots served the purely utilitarian purpose of displaying examples of Pohl's dental services to potential customers. They do not merit copyright protection.

(DE 61 at 13).

IV. STANDARD OF REVIEW

Review of the district court's grant of summary judgment *de novo*, considering all the evidence and factual inferences in the light most favorable to the non-moving party. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1232 (11th Cir. 2010) (citing *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 956 (11th Cir. 2009)).

V. SUMMARY OF THE ARGUMENT

The district court's summary judgment ruling is contrary to over 100 years of copyright law to the effect that photography is inherently original authorship. The law is settled that the degree of creativity required to satisfy the originality requirement for a copyright is "minimal." The record in this case clearly establishes (at the very least a question of fact) that this standard was met. Indeed, the record establishes that Dr. Pohl determined the lighting and photo angle, told the subject to "smile" and "look at the camera," zoomed in on her smile, and made a series of other creative choices. The district court improperly relied on Dr. Pohl's ostensibly utilitarian motive for taking the photographs (promoting his dental practice), which is legally irrelevant to the issue of eligibility for copyright.

The district court erred when it determined that Dr. Pohl's before and after photographs of Belinda were not original works entitled to copyright protection. Dr. Pohl's Works met the extremely low bar of originality for photographs.

Creativity, which the district court looked for separately, is not an additional requirement, but is part and parcel of originality. The district court's "utilitarian purpose" analysis was flawed. When correctly viewed through the lens of copyright law, Dr. Pohl's photographs are entitled to protection and summary judgment for Officite should have been denied.

VI. ARGUMENT

Courts have historically viewed summary judgment as inappropriate in the copyright infringement context because of the inherently subjective nature of the inquiry. See *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1223 (11th Cir. 2008). The district court should have left the subjective determination whether Dr. Pohl's photographs are protectible by copyright to the jury. The district court's determination that "no pairs of eyes on a reasonable jury can find any modicum of creativity or originality in these photographs" improperly subsumed the role of the jury. This court should reverse and remand to permit the jury to determine whether Dr. Pohl's before and after photographs of Belinda are sufficiently original to warrant protection by copyright.

A. Standard on Summary Judgment

Cross motions for summary judgment were made below. The standard for cross motions for summary judgment is the same as for motions for summary judgment. See *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984).

Although cross-motions were made, Officite was still required to establish the absence of genuine issues of material fact regarding whether Dr. Pohl's photographs were entitled to copyright protection, and that it was entitled to judgment as a matter of law on that issue. See *Chambers & Co. v. Equitable Life Assur. Soc. of the U.S.*, 224 F.2d 338, 345 (5th Cir. 1955) ("Both parties filed and argued motions for summary judgment, but this does not warrant the granting of either motion if the record reflects a genuine issue of fact.").² See also *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538-39 (5th Cir. 2004) (holding that cross-motions for summary judgment "must be considered separately," and "each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law").

Officite failed to meet its burden on summary judgment. Dr. Pohl's evidence showed his photographs were original authorship that displayed creativity, entitling them to copyright protection. The district court's contrary determination ignored, diminished, and demeaned Dr. Pohl's evidence. Viewing this evidence objectively and drawing all factual inferences in a light most favorable to Dr. Pohl dictates that summary judgment should have been denied.

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

B. The Originality Requirement.

Originality is in the statute. 17 U.S.C. § 102(a) (“copyright protection subsists ... in *original* works of authorship...”). Photographs are one of the works of authorship that the copyright statute explicitly defines as proper subject matter. 17 U.S.C. § 101 (“photographs” are a type of copyrightable “pictorial, graphic, and sculptural works”); 17 U.S.C. § 102(a)(5) (“copyright protection subsists ... in ... Pictorial, graphic, and sculptural works”).

“Originality is a constitutional requirement.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). To qualify for copyright protection, a work must be original to the author. *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 547 (1985). “The *sine qua non* of copyright is originality.” *Feist*, 499 U.S. at 345. Original, as the term is used in copyright, means only that the work was independently created by the author, as opposed to copied from other works. 1 Nimmer on Copyright § 2.01 (2018). “Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” *Feist*, 499 U.S. at 345-46.

Almost one hundred years ago, Judge Learned Hand observed that “because no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike,” photography is inherently original authorship deserving of copyright protection. *Jewelers’ Circular Publishing Co. v.*

Keystone Publishing Co., 274 F. 932, 934 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922). Judge Hand’s view has since become the prevailing view. 1 Nimmer on Copyright, § 2.08 (2018) (citing *Jewelers’ Circular* for the proposition that “[almost] any . . . photograph may claim the necessary originality to support a copyright merely by virtue of the photographers’ personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.”).

1. Creativity is not a Separate Requirement; it is Part and Parcel of Originality.

Copyrightable originality requires “independent creation” by the author “plus a modicum of creativity.” *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1409 (11th Cir. 2015) citing *Feist*, 499 U.S. at 346; see also, *Feist*, 499 U.S. at 358 (describing the degree of creativity required as “minimal”). The requirement is that the work possess “some creative spark, no matter how crude, humble or obvious.” *Feist*, 499 U.S. at 345 (quotation marks omitted). “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.” *Feist*, 499 U.S. at 345, 111 S. Ct. at 1287; see also *Montgomery v. Noga*, 168 F.3d 1282, 1290 (11th Cir. 1999) (same).

Creativity is not a separate requirement; it is part and parcel of what makes a work original. See *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 142-43 (S.D.N.Y. 1968) (amateur photographer’s raw footage of the assassination of

President John Kennedy was sufficiently original because of the creative effort involved in selecting type of camera, film, lens, area in which to shoot, time to film, and position of camera). This court has determined a photograph of a sculptural artwork to be sufficiently original for copyright protection where it involved minimal creativity in the “selection of lighting, shading, timing, angle, and film.” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1215 (11th Cir. 2000). This court has similarly determined a rendering of a design for distressed wood flooring created by adding marks to scans of wood planks to be sufficiently creative to “hurdle the low bar of copyrightable originality.” *Home Legend*, 784 F.3d at 1410.

“Originality merely requires independent creation by the author and just a scintilla of creativity.” *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004). Since “the originality requirement is a low bar,” *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 824 (11th Cir. 1982), so too must be the amount of creativity required to hurdle that low bar.

C. Dr. Pohl’s Works Display Originality.

In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Supreme Court held that photographers are authors whose intellectual production, thought, and conception entitle them to copyright protection in their photographs. *Burrow-Giles* concerned protection of a photograph of playwright Oscar Wilde.

The decision described the photographic process of Sarony, the photographer of Oscar Wilde, as follows:

That the plaintiff about the month of January, 1882, under an agreement with Oscar Wilde, became and was the author, inventor, designer, and proprietor of the photograph in suit, the title of which is 'Oscar Wilde No. 18,' being the number used to designate this particular photograph and of the negative thereof; that the same is a useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same at his place of business in said city of New York, and within the United States, entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit, Exhibit A, April 14th, 1882, and that the terms 'author,' 'inventor,' and 'designer,' as used in the art of photography and in the complaint, mean the person who so produced the photograph.

Burrow-Giles, 111 U.S. at 54.

While Sarony's image of Wilde may have been artistic, a work need not be artistic to receive protection. *Mazer v. Stein*, 347 U.S. 201 (1954). Originality denotes only enough definite expression so that one may distinguish authorship. *Id.* at 214 ("they must be original, that is, the author's tangible expression of his ideas."); *Burrow-Giles*, 111 U.S. at 60 (a photograph is copyrightable because of the author's efforts in composing subject shows the photograph was "an original work, the product of plaintiff's intellectual invention").

Dr. Pohl's photographs of Belinda were the product of intellectual invention and original works of authorship. Dr. Pohl's process was not unlike that of Sarony. Dr. Pohl selected his camera, posed his subject, determined the lighting, determined the photo angle, and took the picture. (DE 40-1, ¶ 5). The process for taking each photograph took about five minutes. (DE 49-1 at 19). Dr. Pohl chose to take the before photograph of Belinda with her sitting in the dental chair. (DE 49-1 at 17). He chose to take the after photograph with her standing in front of a screen he uses when he needs more space to frame the photograph than the dental chair will permit. (DE 49-1 at 14, 18).

Before each photograph, Dr. Pohl posed Belinda, told her to "smile" and to "look at the camera." (DE 49-1 at 18). Since the photographs at issue were close-ups, Dr. Pohl both moved the camera closer to Belinda and also zoomed in the image with the camera lens to enlarge it in the frame. (DE 49-1 at 19). Dr. Pohl's camera had "preset lines on the lens that's set for smile, full face mirror shot." (DE 49-1 at 19). This allows Dr. Pohl to "set it to whatever shot I want, and then I can move the camera in and out until I get it in focus." (DE 49-1 at 19).

The district court's insistence on a "creative spark" for copyright protection (DE 61 at 10) confused creativity— a term that appears nowhere in the text of the Copyright Act of 1976 – with originality. This was a mistake, and one that is commonly made. See 1 *Nimmer on Copyright* § 2.01 ("Still, it must be recognized

that the case law has muddled the distinction; many courts combine creativity and originality under the portmanteau term of ‘originality.’”).

“Federal courts have historically applied a generous standard of originality in evaluating photographic works for copyright protection.” *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 519 (7th Cir.2009). Except for a limited class of photographs that can be characterized as “slavish copies,” courts have recognized that most photographs contain at least some originality in their rendition of the subject-matter. *Id.*; see also *Rogers v. Koons*, 960 F.2d 301, 307 (2nd Cir.1992) (“Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”).

Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1234 (11th Cir. 2010). The Copyright Office agrees. See, U.S. Copyright Office, Circular 42, Copyright Registration of Photographs (“The copyright in a photograph protects the photographer’s artistic choices, such as the selection of the subject matter, any positioning of subject(s), the selection of camera lens, the placement of the camera, the angle of the image, the lighting, and the timing of the picture.”)

The unrebutted record evidence demonstrates that Dr. Pohl’s photographs of Belinda satisfied this Circuit’s originality requirement. The Belinda photos are original to Dr. Pohl and no one else. Belinda’s after photo especially reflects the original conception of Dr. Pohl the dentist photographer. Dr. Pohl staged the photos, composed the photos, took the photos, and produced the photos. Other than

Belinda herself, each and every component of Dr. Pohl's photographs of Belinda are original to him.

Nimmer teaches that

the following three propositions govern the sources and nature of originality in photographs: (i) the originality in a photograph is to be gleaned from its author's choices in the rendition, timing, or creation of the subject matter involved in the photograph; (ii) that originality makes the work eligible for protection and simultaneously fixes the scope and coverage of protection that the photograph may obtain (e.g., thin); and (iii) the author's choices—constitutive of originality—must manifest themselves in the expressive content of the photograph seeking protection.

1 Nimmer on Copyright § 2A.08 (2018).

Dr. Pohl's photos of Belinda meet these requirements. Dr. Pohl took the photos. Of that there is no question or dispute. Dr. Pohl's photos are without question images that Dr. Pohl created for rendition of Belinda's mouth and teeth a) before cosmetic dental treatment, and b) after cosmetic dental treatment. Dr. Pohl chose the specific timing when the images were created to reflect their contents, namely Belinda before and Belinda after, and this is also unchallenged. Dr. Pohl chose the other photographic elements including what "pose" Belinda's mouth should strike. i.e. a smile. Those were Dr. Pohl's original decisions. He made these decisions himself in creating the Belinda photographs.

All of Dr. Pohl's choices and decisions were original to him. On Belinda's first visit he observed the available lighting, trained his human eye through his

camera, instructed Belinda where to look and what expression to adopt, i.e. “he posed her for the camera,” which involved telling her “to tilt her head, lift her chin up or down, instruct her to smile, or to tell her to look at the camera.” (DE 61 at 10). Dr. Pohl also determined when to press the shutter. Thereafter, once Dr. Pohl had performed his cosmetic dental procedures on Belinda, he repeated the process over by observing the available light, looking through the viewfinder, instructing Belinda to smile in a particular way, and then chose when to press the shutter.

Since *Burrow-Giles* until now, no case has refused copyright protection for a photograph taken by a human being³ of another human being on originality grounds. The court below is the first to so hold. The argument that a photograph of a human being is uncopyrightable has been made and rejected before. See, e.g., *Playboy Enters. v. Starware Publ’g Corp.*, 900 F. Supp. 433, 437 n.4 (S.D. Fla. 1995) (rejecting the “unprecedented argument that photographs of humans are not deserving of copyright protection.”); *Denenberg v. LED Techs., LLC*, Civil Action No. 11-cv-03155-RBJ, 2012 U.S. Dist. LEXIS 140513, 2012 WL 4478970 (D. Colo. Sept. 28, 2012) (determining that before and after photographs of patients taken by a facial surgeon and posted on his practice’s website were sufficiently original and protected by copyright). This court should reject it again.

³ To be sure, a photograph taken by a non-human may be unprotectable. See *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (the “money selfie” case).

D. The District Court’s Flawed “Utilitarian Purpose” Justification Should be Rejected.

The district court’s conclusion that Dr. Pohl’s photographs of Belinda “serve the purely utilitarian purpose of advertising Pohl’s services,” and its reliance on “Dr. Pohl’s admission that ‘I use the before and after pictures of my dental work to promote my skills in the field of cosmetic dentistry.’ ECF No. 40-1, at ¶ 19,” is fundamentally flawed. What Dr. Pohl used the photographs of Belinda for is irrelevant for purposes of determining originality. “Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use – if use means to increase trade and to help make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.” *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.). Under the district court’s reasoning, advertising photographs generally cannot qualify as original works for copyright protection because they are used for a utilitarian purpose. That rule finds no precedent. See *Id.* (“[T]he special adaptation of these pictures to the advertisement ... does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of [plaintiff’s] rights, but it is not a bar.”); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000) (advertising photos of a vodka bottle were entitled to copyright protection because they met the low threshold for originality).

Even if Dr. Pohl used the photographs of Belinda for advertising, the Works served more than a utilitarian purpose. Everyone's mouth and teeth are different. And unless Belinda has an identical twin sister, no potential patient can legitimately believe that their mouth is identical to Belinda's before photo, or that Dr. Pohl's cosmetic dental services will result in a smile with teeth identical to Belinda's after photo. Rather, the real purpose of Dr. Pohl's photographs are threefold: a) to show the contrast between before and after, b) to show the happiness apparent on Belinda's partial face as a result of her satisfaction with Dr. Pohl's work; and c) to demonstrate Dr. Pohl's skill as a cosmetic dentist. Obtaining photographs that accomplish those three goals may not be rocket science, but it is certainly not uncreative or unoriginal.

The decisions relied by the district court below in support of its "utilitarian purpose" determination do not compel a different outcome. Several were decided at the early stages on motions for preliminary injunction and did not definitively determine originality was lacking for the photographs at issue. See *Inspired By Design, LLC v. Sammy's Sew Shop, LLC*, 2016 WL 6093778, 2016 U.S. Dist. LEXIS 144988 (D. Kan. Oct. 19, 2016) (denial of a preliminary injunction in case involving photographs of pet beds); *Custom Dynamics, LLC v. Radiantz LED Lighting, Inc.*, 535 F. Supp. 2d 542, 549 (E.D.N.C. 2008) (denial of a preliminary injunction in case involving photographs of aftermarket motorcycle lighting

accessories); and *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542 (S.D.N.Y. 2001) (denial of preliminary injunction in case involving generic photographs of Chinese food). In addition, the decisions relied upon by the district court involved photographs that, like the photographs in *Latimer*, were merely derivative of the objects displayed in the photos and nothing more. See, e.g., *Custom Dynamics*, 535 F. Supp. 2d at 549 (photographs merely “served the purely utilitarian purpose of displaying examples of its products to potential customers.”).

Dr. Pohl’s photographs of Belinda are not analogous to photographs of Chinese food or aftermarket motorcycle parts. The Chinese food photographs in *Oriental Art* were found to “lack any artistic quality” and suffered from a failure by the plaintiff to “describe how the photographs were taken, or how they were incorporated into the copyrighted design as a whole.” *Oriental Art*, 175 F. Supp. 2d at 547. No evidence to determine originality was offered for the unregistered photographs of “aftermarket motorcycle taillights with a neutral surface in the background” in *Custom Dynamics* either. See *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 679 F. Supp. 2d 312, 321–22 (E.D.N.Y. 2010) (denying motion to dismiss claims for photographs of perfume bottles based on originality and criticizing reliance on *Oriental Art* and *Custom Dynamics*).

Dr. Pohl's Belinda before and after photographs are different. Belinda is not an inanimate object. She is a woman, a female human being. A person.

Embarrassed and "crushed" by her stained and crooked teeth and seeking both the tangible and intangible benefits that a beautiful smile can provide, she sought help from Dr. Pohl, cosmetic dentist and amateur photographer. And when she went to see Dr. Pohl, Dr. Pohl had a myriad of original choices and decisions to make about the photographs he wished to take of Belinda.

Belinda is not a plate of Chinese food, a type of aftermarket motorcycle part, or a pet bed. Belinda is a human being. And, as a human being, Belinda is arguably a member of the only species that shows pleasure, happiness, contentment, and other similar emotions that beautiful teeth might trigger, by smiling.⁴ Belinda's before teeth show her teeth and hers alone. Belinda's after teeth show her after teeth and hers alone. And Belinda's smile, especially her smile in the after photo, shows Belinda's pleasure, happiness and contentment with her after teeth, with the effect her after teeth have on her as a person, and with Dr. Pohl's abilities as a cosmetic dentist.

⁴ See Marley, "Do Only Humans Smile?", <https://theamazingworldofpsychiatry.wordpress.com/2011/03/20/do-only-humans-smile/> (accessed July 12, 2018).

VII. CONCLUSION

The district court determined that there were genuine issues of fact for a jury whether Dr. Pohl's copyright registration was valid. (DE 61 at 7)). The district court erred by concluding that no reasonable jury could find that Dr. Pohl's photographs are not sufficiently original to warrant copyright protection. If a jury were to determine that Dr. Pohl validly registered his copyright, he would be entitled to a rebuttable presumption of originality. 17 U.S.C. § 410(c). For the reasons set forth herein, the judgment should be vacated, and the case remanded for trial.

DATED: October 26, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,827 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this Brief of Appellant complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14 point font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of October, 2018, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 26th day of October, 2018, I caused the required number of bound copies of the foregoing Brief of Appellant to be filed via UPS Next Day Air with the Clerk of this Court.

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