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10 **UNITED STATES DISTRICT COURT**
 11 **DISTRICT OF NEVADA**

12 Teller, an individual,
 13 Plaintiff,
 14 v.
 15 Gerard Dogge (p/k/a Gerard Bakardy), an
 individual.
 16 Defendant.
 17
 18
 19

Case No. 2:12-cv-00591-JCM-GWF

**PLAINTIFF’S MOTION FOR
 SUMMARY JUDGMENT AS TO THE
 COPYRIGHT INFRINGEMENT
 CLAIM**

20 Plaintiff Teller (“Teller” or “plaintiff”) by and through undersigned counsel, hereby files this
 21 Motion for Summary Judgment as to the Copyright Infringement Claim (“motion”). Plaintiff Teller
 22 moves this court to enter summary judgment declaring that defendant Gerard Dogge (“defendant” or
 23 “Dogge”) is liable for copyright infringement as a matter of law. This motion is made pursuant to
 24 Rule 56 of the Federal Rules of Civil Procedure and is based upon the attached memorandum of
 25 points and authorities, the papers and pleadings on file in this action, the Declaration of Mark G.
 26 Tratos (“Tratos Dec.”) the exhibits attached hereto, and any oral argument permitted by this court at
 27 the time of hearing, all of which are incorporated herein by this reference.

28 ///

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1 DATED this 8th day of July, 2013.

2 GREENBERG TRAUERIG, LLP

3
4 /s/ Mark G. Tratos

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11 Counsel for Plaintiff

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 The copyright infringement claim in this suit is straightforward. Famous Las Vegas
15 magician Teller has been performing his signature illusion, “Shadows,” for almost forty years. In
16 1983, Teller obtained a U.S. Copyright Registration for “Shadows” as a work of the performing arts
17 in the nature of a “pantomime drama” (hereinafter the “Work”). The script on deposit with the U.S.
18 Copyright Office depicts the Work in dramatic detail, including how the main character of this
19 drama, “the Murderer,” dismembers a rose, piece by piece, by slicing into its shadow projected on a
20 screen some distance behind it. Teller’s live performances of the Work through time follow this
21 script exactly, including those captured on video and submitted with this motion, attached hereto as

22 **Exhibit 1.**

23 A few years ago, Belgian entertainer Gerard Dogge came across a video of Teller performing
24 the Work on YouTube. He downloaded the work and studied it. Hoping to make millions, Dogge
25 created his own rose prop and made plans to sell it and the illusion to the public. Dogge posted two
26 video advertisements on YouTube, showing Dogge performing “Shadows,” together with an offer to
27 sell the illusion for 2,249€, around \$3,000. There is no doubt that Dogge’s version is based on
28 Teller’s illusion, as Dogge states in the comments to the video that “I’ve seen the great Penn &
Teller performing a similar trick...” and Dogge “tagged” the videos with key word tags including

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1 “Penn” and “Teller.” The print advertisement Dogge created to advertise the illusion says “Better
2 Than in Las Vegas,” and when Dogge was asked to explain that in his deposition, he expressly
3 admitted that the reference to “Las Vegas” was a reference to Teller.

4 To prove copyright infringement, Teller must prove two elements: (1) “ownership” of a valid
5 copyright and (2) “copying” – that Dogge copied his copyrighted work. As a matter of law, Teller’s
6 copyright registration provides prima facie evidence of ownership. Copying is proven with two sub-
7 elements: Teller must show that Dogge had access to the copyrighted work and that the works are
8 substantially similar. Here, Dogge has admitted to having viewed Teller’s Shadows illusion on
9 YouTube; access is undisputed. As such, this motion focuses primarily on the issue of substantial
10 similarity.

11 Dogge admits to “cloning” Teller’s illusion – a man dressed in dark clothes dismembers a red
12 rose in a vase on a small table by cutting into its shadow, cast by a spotlight upon a white screen
13 several feet away, until nothing is left but the stem. Although there are small variations – a coke
14 bottle instead of the vase, the last few moments of the conclusion of the illusion¹ – there can be no
15 doubt that the two are substantially similar as a matter of law.²

16 As Dogge’s work is substantially similar to Teller’s copyrighted work, and because all other
17 elements of copyright infringement have been met, this court should grant summary judgment in
18 Teller’s favor. Because Dogge has infringed a prior registered work, this court should award
19
20

21 ¹ The last moment of Dogge’s presentation differs slightly; he removes the rose and empties the vase of water. But the
22 principal and distinctive dramatic action of the piece – pruning a rose by cutting its shadow – are recognizably
substantially the same.

23 ² However, as this court is aware through the filing of numerous discovery motions, defendant Dogge has refused to
24 produce his infringing video or the manual of his to perform the illusion or the instructional DVD which is at issue in
25 this litigation, and most recently claims that he deleted it from his computer hard drive and no longer has a copy of it.
Despite the court’s Order that Dogge produce the video, or in the alternative that he turn over his computer hard drive for
mirror-imaging and inspection to see if the video still exists, Dogge has not complied and has not produced the video.

26 Further, the court ordered that Dogge consent to a stipulation that YouTube produce the video; and while Dogge
27 has provided plaintiff with a letter of consent that has been repeatedly submitted to YouTube (along with a copy of the
court’s Order), to date YouTube has not responded to the stipulated requests for production of Dogge’s video. As such,
28 plaintiff is proceeding with this motion with the best evidence available – the various documents and discovery
responses that are of record, as well Dogge’s own sworn deposition testimony.

1 statutory damages and attorneys' fees pursuant to the Copyright Act.³

2 **II. STATEMENT OF FACTS**

3 **A. FACTUAL BACKGROUND REGARDING PLAINTIFF**

4 **1.** Plaintiff is a professional entertainer and magician and part of the world-
5 famous magic and comedy duo Penn & Teller. Penn & Teller are famous in the magic community
6 for creating innovative magic tricks, and have become well-known in the United States and
7 throughout the world for their unique brand of entertainment, including both live theater and
8 televised shows that incorporate comedy along with unusual and cutting-edge magic routines
9 (hereinafter the "Show").

10 **2.** Penn & Teller have enjoyed major national and worldwide success, including
11 sold-out runs on Broadway, world tours, Emmy-winning TV specials and hundreds of guest
12 appearances on popular television shows such as "Late Show with David Letterman," "The Tonight
13 Show with Jay Leno," "Friends," "The Simpsons," "Chelsea Lately" and "Top Chef," to name a few.

14 **3.** Additionally, Penn & Teller had their own critically acclaimed television
15 series on the Showtime cable network called "Penn & Teller: BS!," which was nominated for
16 thirteen Emmys and was the longest running series in the history of the network. Penn & Teller also
17 had a British television series called "Fool Us" that recently ran, and have a show on the Discovery
18 Channel called "Penn & Teller Tell A Lie." Penn and Teller have had many appearances on
19 "Saturday Night Live" and a PBS special ("Penn & Teller Go Public"), and a public educational
20 series on PBS called "Behind the Scenes." They also appeared on two British television series.

21 **4.** Penn & Teller have written two national best-selling books, hosted their own
22 Emmy nominated variety show for the FX network, starred in their own specials for major networks
23 ABC, NBC and Comedy Central and produced the critically lauded feature film documentary "The

24 _____
25 ³ This motion relies upon excerpts from Dogge's deposition. At the time of filing, Dogge had not yet reviewed his
26 deposition transcript and made any changes. If Dogge does so, Teller will supplement or amend this motion as
27 appropriate. Further, there are several motions currently pending before the court that may affect this motion;
28 specifically, Teller's motion to enforce this court's orders and to compel, depending on the outcome, may affect the
evidence available. Teller also has a pending motion for clarification of the Minute Order dated July 5, 2013, which
set the hearing date for several pending motions for July 26. Teller requested that the court clarify whether or not this
was also intended to delay the dispositive motion deadline. Nevertheless, out of an abundance of caution, Teller files
his dispositive motions today so as to respect the deadline.

1 Aristocrats.”

2 5. Currently, Penn & Teller are performing their live Show regularly at The Rio
3 All-Suite Hotel & Casino in Las Vegas, Nevada (“The Rio”), where it has been running for over
4 eleven years, making it one of the longest running, successful and most-beloved shows in Las Vegas
5 history. Penn & Teller’s long run at The Rio has earned them the prestigious award of “Las Vegas
6 Magicians of the Year” six times, including in 2011.

7 6. Plaintiff Teller has been instrumental in the success of the Show, and has
8 created many of the original comedy bits and magic tricks that have been featured in the Show over
9 the years. One of Teller’s most successful and lasting original magic tricks is the dramatic work
10 “Shadows,” which is the subject of the instant litigation.

11 7. Teller created the highly innovative and unusual dramatic work “Shadows” in
12 1975, and obtained a U.S. Copyright Registration for it in 1983. True and accurate copies of U.S.
13 Copyright Office Certificate of Registration No. PA 469-609, and the deposit materials submitted in
14 support of the registration, are attached hereto as **Exhibit 2**.

15 8. “Shadows” essentially consists of a spotlight trained on a bud vase containing
16 a single flower or rose. The light falls in such a manner that the shadow of the real rose is projected
17 onto a white screen positioned some distance behind it. Teller then enters the otherwise still scene
18 takes a large knife, and proceeds to use the knife to dramatically sever the leaves and petals of the
19 rose’s shadow on the screen slowly, one-by-one, whereupon the corresponding leaves of the real
20 rose sitting in the vase fall to the ground, breaking from the stem at exactly the point where Teller
21 cut the shadow projected on the screen behind it. The magic trick “Shadows” was the first illusion
22 of its kind.

23 9. “Shadows” has been performed by Teller in Penn & Teller’s Show thousands
24 of times, including live and televised performances throughout the United States and the world. In
25 fact, “Shadows” has appeared in every Penn & Teller Show performed on and off Broadway and in
26 their national tours. It is the oldest, most venerated piece of material in continuous use in Penn &
27 Teller’s Show, and while other material has come and gone, it has remained as a universal favorite.

28 10. “Shadows,” among all of Penn & Teller’s repertoire, has attained an

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1 iconic quality as the piece with the longest association to Penn & Teller’s Show, and to Teller
 2 himself. It is considered one of the rare new plots in the canon of 20th Century magic and is Teller’s
 3 principal claim to fame in magic history. In fact, “Shadows” is to this day a major part of the Show
 4 currently running at The Rio, and it has been used so extensively and exclusively by Teller that it has
 5 become his signature piece - millions of people in the United States and around the world have seen
 6 Teller perform “Shadows,” and have come to identify this signature piece with its creator and
 7 source: Teller.

8 **B. UNDISPUTED FACTS RELATING TO COPYRIGHT INFRINGEMENT CLAIM**

9 **1.** Teller owns a valid copyright registration for the Work, as evidenced by U.S.
 10 Copyright Office Certificate of Registration No. PA 469-609 and the deposit materials consisting of
 11 the script of the Work submitted in support of the registration, (*See Exhibit 2*).

12 **2.** Teller has been performing the Work in accordance with the script on deposit
 13 with the U.S. Copyright Office, as indicated in videos capturing Teller’s live performances of the
 14 Work through time. (*See Exhibit 1*).

15 **3.** Dogge has seen a video of Teller’s live performance of the Work, and
 16 downloaded a copy of Teller’s video to his computer. *See* excerpts from deposition of Gerard
 17 Dogge, taken June 11, 2013 (“Dogge Depo”), attached hereto as **Exhibit 3**, pp. 37:10-11, 50:6-8;
 18 and Dogge’s answer to plaintiff’s first set of requests for admissions, dated February 8, 2013,
 19 response to request no. 3, p. 2:14-16, attached hereto as **Exhibit 4**). Dogge created a video of
 20 himself performing the Work called “The Rose and Her Shadow,” in an attempt to copy or “clone”
 21 Teller’s Work. (*See Exhibit 3*, Dogge Depo, pp. 179:4-180:4). He decided to profit from Teller’s
 22 work by selling instruction on how to perform the illusion and his prop.

23 **4.** Dogge posted this video advertisement on YouTube, showing Dogge
 24 performing “Shadows,” together with an offer to sell the illusion for 2,249€, around \$3,000. (*See*
 25 **Exhibit 4**, response to request no. 16; **Exhibit 3**, Dogge Depo, p. 66:9-15).

26 **5.** Dogge states in the comments to the video that “I’ve seen the great Penn &
 27 Teller performing a similar trick...” (*See* Screenshot of Dogge’s Video (TELLER000071), attached
 28 hereto as **Exhibit 5**; **Exhibit 3**, Dogge Depo, pp. 83:12-17)

1 6. Dogge also states in the comments to the video that “This is the most magical,
2 romantic, and beautiful illusion I know.” (See **Exhibit 3**, Dogge Depo, pp. 83:7-11; see also
3 **Exhibit 5**).

4 7. Dogge “tagged” the videos with key word tags including “Penn” and “Teller.”
5 (See Dogge’s answer to plaintiff’s second set of requests for admissions, dated March 28, 2013,
6 attached hereto as **Exhibit 6**, responses to requests to RFA 30-31).

7 8. The print advertisement Dogge created to advertise the illusion says “Better
8 Than in Las Vegas.” (See Dogge’s Dutch Advertisement and English translation of same, attached
9 hereto as **Exhibit 7**).

10 9. Dogge testified that the videos ended with a few words on the screen that also
11 said “the better than in Las Vegas trick.” When Dogge was asked to explain what he was referring
12 to, he expressly admitted that the reference to “Las Vegas” was a reference to Teller. (See **Exhibit**
13 **3**, Dogge Depo, pp. 67:12-17).

14 10. Defendant intended his video “The Rose and Her Shadow” reach a worldwide
15 audience, and intended to sell the illusion to anybody who would buy it. (See **Exhibit 4**, response to
16 request no. 25-26; **Exhibit 3**, Dogge Depo, p. 136:4-7. (Q. “Was there any restriction as to the type
17 of person that was going to buy this illusion?” A: “That he would pay for it, Mr. Tratos. That was
18 the only restriction.”)).

19 11. Dogge testified that his illusion was not a “kidnapping” of Mr. Teller’s
20 illusion, as Teller had contended at an earlier point in the litigation, but a “cloning.” (See **Exhibit 3**,
21 Dogge Depo, pp. 179:4-180:4.)

- 22 12. Dogge’s video advertisement follows Teller’s script/performance closely:
- 23 a. Dogge’s video advertisement of The Rose and Her Shadow begins without
24 Dogge in view of the camera, and simply shows a rose in a vase sitting on
25 a table with its shadow clearly projected on a screen behind it. (See
26 **Exhibit 3**, Dogge Depo, pp. 67:24-68:7; see also **Exhibit 7**).
 - 27 b. Dogge enters the frame and begins dismantling the Rose by cutting its
28 shadow. (See **Exhibit 3**, Dogge Deposition 68:10-11, 68:19-21; see also

1 Screenshot of Dogge’s Video (TELLER000070), attached hereto as
2 **Exhibit 8).**

3 c. Dogge places the knife on the shadow of the rose where the leaves connect
4 to the stem, appearing to cause the actual leaves to fall. (See **Exhibit 3,**
5 Dogge Deposition 69:1-9; *see also* Screenshot of Dogge’s Video
6 (TELLER000069), attached hereto as **Exhibit 9**; *see also* Dogge’s answer
7 to plaintiff’s third set of requests for admissions, response to request no. 9,
8 p. 4:10-13, attached hereto as **Exhibit 10).**

9 d. Dogge then goes to the other set of leaves on the other side of the stem and
10 performs the same act, appearing to cause the corresponding leaves to fall.
11 (See **Exhibit 3,** Dogge Depo, p. 69:13-23).

12 e. Dogge then places his knife on the shadow of the rose where the petals
13 join the stem and begins to cut the petals from the rose. (See **Exhibit 3,**
14 Dogge Depo, pp. 69:24-70:3-5).

15 f. Dogge then repeats that action and causes more petals to fall. (See
16 **Exhibit 3,** Dogge Depo, p. 70:6-8).

17 g. Left with only one petal, Dogge cuts its shadow and it falls. (See **Exhibit**
18 **3,** Dogge Depo, p. 70:12-16).

19 **III. LEGAL ARGUMENT**

20 **A. LEGAL STANDARD**

21 FED. R. CIV. P. 56 requires entry of summary judgment when “the pleadings, depositions,
22 answers to interrogatories and admissions on file, together with the affidavits, if any, show that there
23 is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
24 matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 205 (1986); *Newton*
25 *v. Uniwest Financial Corp.*, 802 F. Supp. 346, 352 (D. Nev. 1990). “Judgment as a matter of law is
26 appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the
27 nonmoving party.” *Johnson v. Wells Fargo Home Mortg., Inc.*, 558 F. Supp. 2d 1114, 1118 (D.
28 Nev. 2008) (citing FED. R. CIV. P. 50(a)).

1 Substantive law determines which facts are material. To prevent entry of summary
2 judgment, there must be a dispute over the facts that will affect the outcome of the lawsuit under
3 governing law. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. An issue is not genuine if the
4 evidence presented is self-serving and uncorroborated. “When opposing parties tell two different
5 stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe
6 it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary
7 judgment.” *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007).

8 For summary judgment, the moving party bears the initial burden of demonstrating the
9 absence of a genuine issue of material fact and thereby, is entitled to judgment as a matter of law.
10 FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265
11 (1986). If that burden has been met, the non-moving party must then come forward and establish the
12 specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v.*
13 *Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348 (1986). To withstand a properly supported
14 motion, the nonmoving party who bears the burden of proof at trial must come forward with
15 evidence to support the essential elements of its claim. *National Assn. of Gov’t Employees v. City*
16 *Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 321-23).

17 The non-moving party’s burden is such that it must do more than simply show there is some
18 metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 586. The non-moving party
19 must produce enough evidence so that a reasonable trier of fact could return a verdict or judgment
20 for the non-moving party. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. Accordingly, mere
21 disagreement or bald assertions that a genuine issue of material fact exists does not preclude the use
22 of summary judgment. *Harper v. Wallingford*, 877 F. 2d 728, 731 (9th Cir. 1989).

23 **B. PLAINTIFF’S PARTIAL MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED**
24 **BECAUSE THE UNDISPUTED FACTS SHOW THAT DEFENDANT HAS INFRINGED**
PLAINTIFF’S REGISTERED COPYRIGHT.

25 In order to prevail on a claim for direct copyright infringement, a plaintiff must establish two
26 elements by a preponderance of the evidence: (1) plaintiff’s ownership of a valid copyright; and (2)
27 defendant’s copying of constituent elements of a work that are original. *Feist Publications, Inc. v.*
28 *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

1 **1. Plaintiff Owns a Valid Copyright.**

2 With regard to the first element, ownership of a valid copyright, a copyright registration
3 certificate constitutes *prima facie* evidence of plaintiff’s ownership of a valid copyright. 17 U.S.C.
4 §410(c); *see Southern Bell Tel. & Tel. v. Associated Tel. Directory Publishers*, 756 F.2d 801(11th
5 Cir. 1985); *Microsoft Corp. v. PC Exp.*, 183 F. Supp. 2d 448, 453 (D.P.R. 2001); *Arthur Rutenberg*
6 *Corp. v. Dawney*, 647 F. Supp. 1214, 1216 (M.D. Fla. 1986).

7 Here, plaintiff owns a valid copyright in the Work at issue as evidenced by U.S. Copyright
8 Office Certificate of Registration No. PA 469-609. (*See Exhibit 2*). This copyright registration
9 provides *prima facie* evidence of plaintiff’s ownership of a valid copyright; as such, the first element
10 of establishing a claim for direct copyright infringement is satisfied.

11 **2. Defendant Copied Constituent Elements of Plaintiff’s Original Work.**

12 The second prong, copying, requires a plaintiff to demonstrate that the defendant used
13 constituent elements of plaintiff’s material that are original, and thus, subject to copyright protection.
14 *See Feist Publications, Inc.*, 499 U.S. at 361. Copying can generally be shown when “the infringer
15 had access to plaintiff’s copyrighted work and that the works at issue are substantially similar in
16 their protected elements.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). In
17 other words, “copying is demonstrated by showing (1) circumstantial (or other) evidence of
18 defendants’ access to the protected works, and (2) substantial similarity between the copyrighted and
19 accused works.” *Lanard Toys Ltd. v. Novelty Inc.*, 511 F. Supp. 2d 1020, 1031 (C. D. California,
20 Western Division 2007) (citing *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1043 n. 2
21 (9th Cir. 1994)).

22 **a. The Undisputed Facts Show that Defendant Had Access to**
23 **Plaintiff’s Work.**

24 The term “access” is defined as “an opportunity to view or copy plaintiff’s work.” *Three*
25 *Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir.2000) (quoting *Sid & Marty Krofft Tele.*
26 *Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir.1977)). Access is proven where “(1)
27 a particular chain of events is established between the plaintiff’s work and the defendant’s access to
28 that work (such as through dealings with a publisher or record company), or (2) the plaintiff’s work

1 has been widely disseminated.” *Id.*

2 Here, the undisputed facts show that Dogge had access to plaintiff’s copyrighted work. In
 3 Dogge’s sworn deposition testimony, he not only admitted to having seen a video of Teller
 4 performing the Work, but he also admitted to keeping a copy of Teller’s video on his computer.
 5 Specifically, when asked if he had ever seen Teller perform the Work, Dogge answered “I saw
 6 Shadows from Mr. Teller, the illusion, magic trick, on the Internet on YouTube.” See **Exhibit 3**,
 7 Dogge Depo, p. 37:10-11. Later in Dogge’s deposition testimony he admits that he downloaded and
 8 stored a video copy from YouTube of Teller’s performance of “Shadows.” See **Exhibit 3**, Dogge
 9 Depo, p. 50:6-8 (“Q. Did you keep a copy of that video on your computer? A. Yes, I did.”)⁴

10 As further evidence of Dogge’s access to Teller’s Work, in an answer to one of Plaintiff’s
 11 Requests for Admission, defendant admitted to having seen a video on the internet of Teller
 12 performing the Work. See **Exhibit 4**, response to request no. 3, p. 2:14-16 (“Yes, I Admit that I’ve
 13 seen Teller perform Shadows, on the internet (YouTube) prior to creating The Rose and Her
 14 Shadow.”) As such, the undisputed facts show that defendant had access to plaintiff’s Work.

15 **b. The Undisputed Facts Show that Defendant’s Video is**
 16 **Substantially Similar to Plaintiff’s Work.**

17 “A grant of summary judgment for plaintiff is proper where works are so overwhelmingly
 18 identical that the possibility of independent creation is precluded.” *Twentieth Century-Fox Film*
 19 *Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329-30 (9th Cir. 1983) (citing *Peter Pan Fabrics, Inc. v. Dan*
 20 *River Mills, Inc.*, 295 F.Supp 1366, 1369 (S.D.N.Y.), *aff’d*, 415 F.2d 1007 (2d Cir. 1969). The Ninth
 21 Circuit has reasonably understood that summary judgment is necessarily available for copyright
 22 infringement cases based on the facts of each case. *MCA*, 715 F.2d 1327 at 1330, n. 6 (“If Rule 56 is
 23 to be of any effect, summary judgment must be granted in certain situations. See 6 J. Moore & J.
 24 Wicker, Moore’s Federal Practice § 56.17[14] at 56-800 to 802 (3d ed. 1982)”).

25
 26
 27 ⁴ Interestingly, when Dogge and Teller first communicated in an effort to settle the case, Dogge claimed he saw Teller
 28 perform the illusion while on a trip to Las Vegas and that he had posed for a picture with Teller, he then later changed
 his testimony on this point when the litigation began but nevertheless admits to downloading and watching the Teller
 performance.

1 To determine whether two works are substantially similar, the Ninth Circuit employs a two-
2 part analysis: an ‘extrinsic’ test and a subjective ‘intrinsic’ test. *Lanard Toys Ltd.*, 511 F. Supp. 2d
3 at 1037 (citing *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir.1996)); *Cavalier v. Random House,*
4 *Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). “Under the extrinsic test, the court considers whether two
5 works share a similarity of ideas and expression as measured by external, objective criteria.” *Id.*
6 (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir.1994)). “In
7 applying the extrinsic test, the court carries out an ‘analytic dissection’ of the isolated elements of
8 each work, excluding the other elements and the combination of elements.” *Id.* (citing *Dr. Seuss*
9 *Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir.1997)). In applying the
10 “intrinsic” test, the court determines whether a reasonable person would perceive a substantial
11 similarity in the “total concept and feel” of each work. *Lanard Toys Ltd.*, 511 F. Supp. 2d at 1038
12 (citing *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir.1984)). When applying these two
13 analyses, Ninth Circuit courts have found that when an allegedly infringing work is so closely hewn
14 to the copyrighted work in its observable elements, both of the tests are fulfilled. *E.g. Star Fabrics,*
15 *Inc. v. Target Corp.*, No. CV 10-07987 DDP AGRX, 2011 WL 4434221 (C.D.Cal. Sept. 22, 2011)
16 (finding substantial similarity and granting summary judgment for plaintiff when infringing dress
17 manufacturer used observably the same design as a copyrighted dress); *Sanrio, Inc. v. Jay Yoon*, No.
18 5:10-CV-05930 EJD, 2012 WL 610451, at *3 (N.D. Cal. Feb. 24, 2012) (finding substantial
19 similarity and granting plaintiff’s motion when infringing user sold costume jewelry featuring
20 distinctive characteristics of copyrighted “Hello Kitty” characters); *L.A. Printex Industries, Inc. v.*
21 *Lia Lee, Inc.*, No. CV-08-1836 ODW PJWX, 2009 WL 789877, at *5 (C.D. Cal. Mar. 23, 2009)
22 (finding substantial similarity and granting plaintiff’s copyright infringement summary judgment
23 motion when infringing user sold shirts with “virtually identical” designs compared to copyrighted
24 design); *Livingston v. Morgan*, No. C-06-2389 MMC, 2007 WL 2140900, at *7-8 (N.D. Cal. July
25 25, 2007) (finding substantial similarity and granting plaintiff’s motion for summary judgment for
26 copyright infringement for infringer’s use of photo which was identical in “concept and feel” to
27 copyrighted photo); *Asia Entertainment, Inc. v. Nguyen*, (C.D. Cal. 1996) (finding substantial
28 similarity and granting summary judgment for plaintiff when infringing song had approximately the

1 same lyrics translated from copyrighted song).

2 Here, the undisputed facts show that Dogge’s video “The Rose and Her Shadow” is
 3 substantially similar to Teller’s Work. Because defendant Dogge has not complied with the court’s
 4 order and refuses to produce his infringing video, there is no copy of Dogge’s infringing video to
 5 show the court at this time.⁵ However, plaintiff feels that the undisputed facts contained in the
 6 record amply show that the Dogge’s video is substantially similar to plaintiff’s Work as a matter of
 7 law. As such, plaintiff supports his argument for substantial similarity with the best evidence
 8 available – the various documents and discovery responses that are of record, as well Dogge’s own
 9 sworn deposition testimony.

10 For the convenience of the court, and for ease of comparison, plaintiff presents the
 11 undisputed facts proving substantial similarity in a chart form, as follows:

<u>Plaintiff Teller’s Copyright of “Shadows”</u>	<u>Defendant Dogge’s Video Performance of “The Rose and Her Shadow”</u>
<p>14 “The stage is dark. The spotlight is slowly 15 illuminated, revealing the rose and the vase, and 16 casting their shadows on the screen.” (See Exhibit 2, p. TELLER000004).</p>	<p>14 “Q. ... When you posted the video, did you first have the image of the rose and its shadow appearing first by itself before you enter the filled version on the screen? 17 A. I don’t understand your question, Mr. Tratos. Do you mean that the video start with a – a picture without me in the scene? Is this your question? 18 Q. That’s correct. 19 A. Yes, I think so, sir. As I remember, I was not in the picture.” 20 (See Exhibit 3, Dogge Depo, p. 67:24-68:7; see also Dogge’s Dutch Advertisement and English 21 translation of same, attached hereto as Exhibit 22 7).</p>
<p>24 “The Murderer becomes visible, lurking stage right, turning his dagger thoughtfully in his 25 fingers.” (See Exhibit 2, p. TELLER000004).</p>	<p>24 “Q. Okay. Did you enter the picture from the left-hand side of the screen? 25 A. I entered the picture, as I remember, from the right-hand side of the screen.” (See Exhibit</p>

26 ⁵ As the court is fully aware, Dogge continues to claim that he deleted the video from his computer hard drive, well after
 27 the start of the litigation, and no longer has a copy of it. As the court is also aware, to this point YouTube has not
 28 responded to requests for the video. If Teller obtains the video while this motion is still pending, Teller will file it with
 the court.

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1		3, Dogge Depo, 68:8-11).
2		
3	“He raises the dagger. He places the tip of the	“Q. Okay. Did you take the knife and place
4	dagger on the paper screen, just at the point	the knife on the shadow of the rose where the
5	where the shadow of the branch joins the	leaves were connected to the stem first?
6	shadow of the leaves.” (See Exhibit 2 ,	A. Yes, I think so Mr. Tratos. Yes.”
	p.TELLER000004).	(See Exhibit 3 , Dogge Depo, p. 69:1-4; see also
		Exhibit 9).
7	“He stabs gently through the paper. The (stage	“Q. And when you did that, did you cut
8	right) leaves of the real rose fall, breaking from	apparently – did – did the video make it appear
9	the stem at exactly the point where the shadow	as if you cut the leaves from the stem, causing
10	was cut.” (See Exhibit 2 , p. TELLER000004).	them to fall?
11		A. Yes, I did, Mr. Tratos.” (See Exhibit 3 ,
12		Dogge Depo, p. 69:5-9).
13		“ Request No. 9: Admit that in the YouTube
14		videos of the Rose and Her Shadow, as you
15		“cut” the shadow of the Rose Apparatus, the
16		corresponding leaf falls off of the Rose
		Apparatus.
		Response: Defendant admits this request.”
		(See Exhibit 10 Dogge’s answer to plaintiff’s
		third Set of requests for admissions, response to
		request no. 9, p. 4:10-13).
17	“The Murderer pauses, then glides to the far	“Q. ... Did you then go to the other set of
18	(left) edge of the screen. He looks at the	leaves on the other side of the stem and perform
19	remaining (stage right) leaf—branch. Again he	the same act of putting the knife on the shadow
20	cuts through the shadow, and again the	at the connecting point and apparently cut those
21	corresponding real rose leaves fall.”	leaves off by – by putting the knife on the
22	(See Exhibit 2 , p. TELLER000005).	shadow?
23		A. I remember I did, Mr. Tratos. Yes.
24		Q. And did that cause the appearance of those
25	“He looks at the blossom. He raises the dagger,	leaves to fall?
26	placing its tip on the shadow of the stem just	A. On the real rose, of course, the – the – the
27	where it joins the blossom.”	leaves were falling on the real rose. And that’s
28	(See Exhibit 2 , p.TELLER000005).	what you could see in the shadow as well. Yes.”
		(See Exhibit 3 , Dogge Depo, p. 69:13-23).
	“He pierces the paper. One by one petals start	“Q. Okay. And did you, in fact, then put your
	to fall.”	knife on the shadow of the rose where the petals
		occurred attached to the stem?
		A. Yes, Mr. Tratos.”
		(See Exhibit 3 , Dogge Depo, pp. 69:24-70:2).

1	(See Exhibit 2 , p. TELLER000005).	A. I think so. Yes, Mr. Tratos.” (See Exhibit 3 , Dogge Depo, p. 70:3-5).
2		
3	“He twists the knife. More petals fall.” (See Exhibit 2 , p. TELLER000005).	“Q. And did you – did you repeat that action again to cause more petals to fall? A. Yes, Mr. Tratos.” (See Exhibit 3 , Dogge Depo, p. 70:6-8).
4		
5		
6	“Only one remains. He gives a final jab. The last petal drops off.” (See Exhibit 2 , p. TELLER000005).	“Q. Sure. When you finally were left with the – A. The last part? Q. – the rose stem and just one petal, did you then cut the petal off by cutting its shadow?” A. Yes, Mr. Tratos.” (See Exhibit 3 , Dogge Depo, p. 70:12-16).
7		
8		
9		
10	“He lowers the dagger. He contemplates the stem of the rose, now pruned of its leaves and its flower.” (See Exhibit 2 , p. TELLER000005).	“Q. ...So then, when you completed those particular steps, can you tell me if you then had a stem that was naked, had nothing, either leaves or petals, did you set your knife down? A. Yes.” (See Exhibit 3 , Dogge Depo, pp. 71:25-72:4).
11		
12		
13		

The undisputed facts demonstrate the striking similarities between Teller’s Work and Dogge’s infringing video performance; therefore, both the “extrinsic” and “intrinsic” tests are fulfilled here. Under the “extrinsic” test, a comparison of the similarity of ideas and expression as measured by external, objective criteria shows that Dogge’s video performance is virtually identical to Teller’s Work. Both share the central theme of the main (and only) actor in the drama cutting the projected shadow of a rose in a vase to manipulate the actual rose. The actor in both Teller’s Work and Dogge’s video moves deliberately and methodically to dismember the rose, petal by petal, by cutting into only the rose’s shadow with a large knife. Each cut of the shadow is rewarded with another falling petal until the entire rose has been completely pruned, leaving only the naked stem. The above chart of undisputed facts exemplifies an analytic dissection of the isolated elements of both the Work and the video, and shows that Dogge’s video performance is nearly identical to Teller’s copyrighted Work each and every step of the way.

With regard to the “intrinsic” test, a reasonable person would undoubtedly perceive a substantial similarity in the total concept and feel of both works. Again, the central theme of cutting

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1 a rose's shadow to affect the rose itself is the main concept of both Teller's Work and Dogge's video
 2 performance.⁶ The action is performed in a virtually identical manner by a sole actor in each drama,
 3 demonstrating a strikingly similar look and feel for both works.

4 Finally, Dogge himself admitted that his illusion was not a "kidnapping" of Mr. Teller's
 5 Work, as Teller had contended at an earlier point in the litigation, but rather was a "cloning" of it.
 6 (See **Exhibit 3**, Dogge Depo, pp. 179:4-180:4). Dogge's admission shows that he intended to copy
 7 Teller's Work when he made his video of the illusion and offered to sell it to the world. As such, a
 8 grant of summary judgment for plaintiff is proper because Teller's copyrighted Work and Dogge's
 9 video are so overwhelmingly identical, and Dogge's intent to copy Teller's Work is so blatantly
 10 evident, that the possibility of independent creation is precluded.

11 **C. PLAINTIFF IS ENTITLED TO STATUTORY DAMAGES FOR DEFENDANT'S WILLFUL**
 12 **COPYRIGHT INFRINGEMENT.**

13 Having satisfied the elements of his claim for direct copyright infringement, plaintiff is
 14 entitled to an award of the maximum Statutory Damages for defendant's willful infringement of the
 15 plaintiff's registered copyright. Under the Copyright Act, statutory damages are available to a
 16 copyright owner whose effective date of registration is prior to the time the infringement begins. See
 17 17 U.S.C. § 412. A copyright owner "may elect, at any time before final judgment is rendered, to
 18 recover, instead of actual damages and profits, an award of statutory damages for all infringements
 19 involved in the action." 17 U.S.C. § 504(c)(1).

20 Furthermore, where the infringing conduct of the defendant is willful, the maximum award of
 21 statutory damages is \$150,000.00 for each work infringed. 17 U.S.C. § 504(c)(2). Generally,
 22 defendants are found to have acted willfully when they have knowledge their conduct constitutes
 23 copyright infringement. See *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th
 24 Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019 (1991); See also, *Fitzgerald Publ'g Co. v.*
 25 *Baylor Publ'g Co.*, 807 F.2d 1110, 1115 (2d Cir. 1986); *Zomba Enters., Inc. v. Panorama Records,*
 26 *Inc.*, 491 F.3d 574, 584 (6th Cir. 2007); *Cable/Home Communication Corp. v. Network Prods., Inc.*,

27
 28 ⁶ In fact, Teller was first informed of the infringing video by a fellow magician who recognized the trick as Teller's.

1 902 F.2d 829, 851 (11th Cir. 1990). Courts have also found the defendant acted willfully where the
 2 plaintiff sent a letter informing the defendant of the infringing activity, and the defendant chose to
 3 simply ignore the letter. *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1227-9 (7th Cir.
 4 1991).

5 Here, plaintiff is electing to pursue statutory damages rather than actual damages and profits
 6 for Defendant's willful infringement of plaintiff's copyrighted work. Plaintiff's effective date of
 7 registration is prior to the commencement of Defendant's infringing activities. Further, plaintiff has
 8 shown defendant willfully infringed plaintiff's copyright. Therefore, plaintiff timely obtained a
 9 copyright registration in the Work and is entitled to the maximum statutory damages of \$150,000.
 10 Specifically, the evidence of record shows that plaintiff's effective date of copyright registration is
 11 January 6, 1983. (See **Exhibit 2**). Defendant's subsequent infringement began many years later
 12 when he created and posted his "The Rose and Her Shadow" video to YouTube on or about March
 13 of 2012.

14 Furthermore, defendant's infringement was willful because defendant was made aware of
 15 plaintiff's valid ownership of a copyright registration in the Work when Teller and Dogge started to
 16 discuss the issue on or about March 15, 2012. Despite Dogge becoming aware that one of his
 17 infringing videos had been taken down from YouTube as the result of plaintiff's copyright
 18 complaint, he left a second, nearly identical, video up on YouTube with full knowledge that it was
 19 infringing.⁷ Due to defendant's willful infringement of plaintiff's registered copyright, and
 20 defendant's knowing and blatant disregard for plaintiff's rights and livelihood, this court should
 21 award plaintiff the maximum statutory damages.

22 **D. PLAINTIFF IS ENTITLED TO HIS ATTORNEYS' FEES AND COSTS.**

23 The Copyright Act provides:

24 **§ 505. Remedies for infringement: Costs and attorney's fees**

25 In any civil action under this title, the court in its discretion may
 26 allow the recovery of full costs by or against any party other than the
 United States or an officer thereof. Except as otherwise provided by

27 _____
 28 ⁷ Which second video was also subsequently removed from YouTube though another formal copyright complaint by plaintiff.

1 this title, the court may also award a reasonable attorney's fee to the
2 prevailing party as part of the costs.

3 17 U.S.C. § 505.

4 Further, 17 U.S.C. § 412 provides that attorneys' fees and costs are available only to
5 copyright owners who registered their unpublished works prior to the commencement of the
6 infringement. Additionally, in a case where the infringement began after publication but prior to
7 registration, a copyright owner who obtains a registration within three months of after first
8 publication of the work is also entitled to recover attorneys' fees and costs. 17 U.S.C. § 412(2).

9 Here, as set forth above in the discussion of statutory damages, plaintiff is entitled to
10 attorneys' fees and costs because the copyright registration in the Work was obtained timely.
11 Plaintiff has been forced to expend legal costs during the prosecution of this matter, and based on the
12 defendant's knowing and willful conduct, plaintiff should be awarded its attorneys' fees and costs in
13 this matter. Upon request of the court, plaintiff shall produce detailed billing statements for this
14 matter for in-camera inspection, in order to protect the attorney-client privilege associated with such
15 a detailed billing statement and shall supplement any further documentation that this court deems
16 necessary.

17 **IV. CONCLUSION**

18 In light of the foregoing, plaintiff respectfully requests that this court GRANT Teller's
19 Motion for Summary Judgment as to the Copyright Infringement Claim.

20 Dated this 8th day of July, 2013.

21 GREENBERG TRAUIG, LLP

22 /s/ Mark G. Tratos

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CERTIFICATE OF SERVICE

Pursuant to FED. R. CIV. P. 5(b), I hereby certify that on July 8, 2013, service of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO THE COPYRIGHT INFRINGEMENT CLAIM** was made this date through the Court's CM/ECF electronic filing system, via electronic mail and United States mail, postage prepaid to:

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/s/ Cynthia Nev
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