

COPYING PHOTOGRAPHS FOUND ONLINE AND THE FAIR USE DEFENSE

Two recent federal court decisions involving a company's unauthorized use of a photograph found online illustrate how courts evaluate the fair use defense to a claim that the company infringed the photographer's copyright.

This defense permits the use of a copyrighted work without authorization in certain situations, such as in connection with criticism, news reporting, or teaching concerning the work. In one decision, the court held that simply cropping a photograph before using it on another website is not fair use. In the other decision, the court found that using a photograph to criticize another party's use of that photograph in a news article is fair use.

THE FAIR USE DEFENSE

In determining whether using a copyrighted work constitutes fair use, and thus is not infringement, courts weigh four factors:

- 1) The use's purpose and character, including whether the use is transformative, meaning it communicates something different from the copyrighted work, and for nonprofit or educational versus commercial purposes.
- 2) The copyrighted work's nature, which involves analyzing the strength of the copyright rights and whether the work is factual or creative.

THE BOTTOM LINE

Companies that find photographs, images, or social media posts online and seek to use these works in advertising or another commercial context, without obtaining the copyright owner's permission, may subject themselves to copyright infringement claims, even if they crop the works before using them. The use of pre-existing works may constitute fair use when used in connection with commentary on or criticism of the works. When a company wants to use a pre-existing work without permission, it should consult with legal counsel to help evaluate whether its contemplated use can be considered fair use.

- 3) The amount and substantiality of the portion of the copyrighted work used in relation to the work as a whole.
- 4) The harm caused by the use to the potential market for the copyrighted work.

THE FOURTH CIRCUIT'S DECISION IN *BRAMMER V. VIOLENT HUES PRODUCTIONS, LLC*

Russell Brammer sued Violent Hues Productions, LLC (Violent Hues) for copyright infringement, alleging Violent Hues copied his photograph without authorization. Brammer's photograph, taken from a roof in

Washington, D.C., depicted a street in the Adams Morgan neighborhood in the evening, with traffic shown as light trails and surrounding buildings and streets in shadow. Brammer uploaded his photograph to an image hosting website with the phrase "© All rights reserved." Violent Hues then downloaded Brammer's photograph, cropped it to remove the shadowed portion, and posted the cropped version on a website it owned. This website — which promoted the Northern Virginia International Film and Music Festival, a revenue-generating event — had a page about tourist attractions in the Washington, D.C. area and included the cropped version

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of Brammer's photograph above the caption "Adams Morgan, DC."

The lower court held Violent Hues' copying of Brammer's photograph was fair use because the court found all four fair use factors weighed in Violent Hues' favor. For example, regarding the first factor — the use's purpose and character — the lower court explained that Violent Hues' use was transformative because its purpose was to provide information about the Adams Morgan neighborhood, while Brammer's purpose in taking the photograph was somehow promotional. Relatedly, the lower court found that Violent Hues' use was not commercial because it did not use Brammer's photograph to advertise a product or generate revenue.

The Fourth Circuit appeals court disagreed, holding the fair use factors weighed in Brammer's favor. Regarding the first factor, the Fourth Circuit determined that Violent Hues' copying of Brammer's photograph was not transformative. Violent Hues' cropping of Brammer's photograph did not imbue the photograph with new expression, meaning, or message but, instead, gave the photograph the same dimensions as other photographs on Violent Hues' website. The court also disagreed that Violent Hues transformed Brammer's photograph by using it to provide information about the Adams

Morgan neighborhood; Violent Hues simply used it for its original content. In addition, the court determined that Violent Hues' use of Brammer's photograph was commercial because:

- 1) Violent Hues was a limited liability company and used Brammer's photograph to promote a for-profit event; and
- 2) A commercial market exists for stock photographs like Brammer's photograph, since companies customarily purchase licenses to use such images in illustrating their websites.

The court then found the remaining fair use factors favored Brammer. The second factor — the work's nature — favored Brammer because his copyright rights were strong, since his photograph was a creative expression. As to the third factor — the amount of Brammer's work used by Violent Hues — while Violent Hues used half of Brammer's photograph, it kept the most expressive features that constituted the work's heart, *i.e.*, the featured street in the Adams Morgan neighborhood with the traffic in light trails. And, regarding the fourth factor — the use's effect on the value of the copyrighted work — there was a presumption of harm to the market for Brammer's photograph because Violent Hues engaged in a non-transformative, commercial use.

THE NEW YORK FEDERAL COURT'S DECISION IN *CLARK V. TRANSPORTATION ALTERNATIVES, INC.*

The Southern District of New York court recently addressed what appeared, at first, to be similar facts to *Brammer v. Violent Hues Productions, LLC*, but came to the opposite conclusion on fair use. The New York court dismissed a copyright infringement complaint by Dennis Clark against Transportation Alternatives, Inc. (TransAlt) concerning the use of a photograph Clark took showing a dockless bike parked neatly on the edge of the sidewalk, with room to walk by (dockless bikes are rental bikes that are parked in specific areas at bike racks or on sidewalks — not stored in docking stations — and accessed with smartphone applications). Clark's photograph appeared in a *New York Post* online article, headlined "Dockless bikes are already clogging NYC sidewalks." TransAlt's website then posted an article sarcastically headlined "August 7th 2018: There Aren't Enough Dockless Bikes and They're Cluttering the Sidewalks", which included a screenshot of the *Post* article that was cropped to show the headline, author's name, full photograph, and Clark's photographer credit. The TransAlt article explained that Clark's photograph did not support the *Post*

article's thesis that dockless bikes clogged New York City sidewalks.

The court held that TransAlt engaged in fair use of Clark's photograph. Regarding the first fair use factor, the court found that the TransAlt article was transformative because it used the screenshot to show that Clark's photograph refuted the Post article's argument, and the purpose of criticizing the *Post* article's journalism was different from the photograph's original purpose. The court also determined that TransAlt's use of Clark's photograph was not commercial because the TransAlt article was an opinion piece on a

nonprofit organization's website. The court did find that the second factor weighed in Clark's favor because his photograph was sufficiently creative. The court found that the third factor favored TransAlt because, although the TransAlt article copied the entirety of Clark's photograph, this use was reasonable for TransAlt to make its point. And, as to the final factor, the court determined that the TransAlt article's inclusion of the screenshot did not compete with Clark's photograph because it was unlikely someone who wanted an image of a dockless bike would pick the screenshot from the TransAlt article over Clark's photograph.

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