

No. 18-1763

---

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

RUSSELL BRAMMER,

*Plaintiff/Appellant,*

v.

VIOLENT HUES PRODUCTIONS, LLC,

*Defendant/Appellee.*

---

On Appeal from the United States District Court  
for the Eastern District of Virginia (Alexandria)  
Case No. 1-17-cv-01009, Judge Claude M. Hilton

---

**BRIEF OF *AMICUS CURIAE* ARTS & ENTERTAINMENT ADVOCACY  
CLINIC AT GEORGE MASON UNIVERSITY ANTONIN SCALIA LAW  
SCHOOL IN SUPPORT OF PLAINTIFF-APPELLANT**

---

ANTIGONE GABRIELLA PEYTON  
DAVID CHRISTOPHER JOHNSON  
**PROTORAE LAW PLLC**  
1921 Gallows Road, Suite 950  
Tysons, VA 22182  
(703) 749-8507

*Counsel for Arts & Entertainment  
Advocacy Clinic at George Mason  
University Antonin Scalia Law School*

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	v
INTEREST OF <i>AMICUS CURIAE</i> .....	1
I. THE PURPOSE AND CHARACTER OF THE USE .....	6
A. Transformative Use Requires a Contribution of New Value Beyond What is Conveyed by the Copyrighted Work .....	7
B. Violent Hues’ Use Was Not Transformative Because It Merely Superseded Brammer’s Work Without Contributing New Value .....	8
C. Upholding the District Court View of Transformative Use Would Seriously Erode the Exclusive Rights of Copyright Holders.....	10
II. THE GOOD FAITH SUB-FACTOR TO THE FIRST FAIR USE FACTOR IS NOT AN IGNORANCE OF THE LAW STANDARD .....	12
A. The Good Faith Sub-Factor Has Not Been Adequately Developed, Creating Uncertainty as to Its Application.....	14
B. Good Faith Should be Considered Neutral and Bad Faith Weigh Against a Finding of Fair Use .....	16
C. Violent Hues Neither Acted in Good or Bad Faith and This Sub- Factor Should Not Have Influenced the Fair Use Determination.....	18
III. THE NATURE OF THE COPYRIGHTED WORK.....	18
A. This Court Should Clarify the Analytical Framework for Evaluating the Second Factor .....	21
B. Under the Appropriate Analysis, the Brammer Photograph is Primarily Creative in Nature .....	23
C. Publication is Critical for Photographers to Realize the “Special Reward” of Copyright Protection and Should not be Used to Penalize Creators.....	25
CONCLUSION .....	27

## TABLE OF AUTHORITIES

	<b>PAGE(S)</b>
<b>CASES</b>	
<i>Atari Games Corp. v. Nintendo of Am., Inc.</i> , 975 F.2d 832 (Fed. Cir. 1992).....	17
<i>A.V. ex rel. Vanderhye v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009) .....	6, 7, 11, 19
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015) .....	7, 10, 22
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006) .....	26
<i>Bond v. Blum</i> , 317 F.3d 385 (4th Cir. 2003) .....	20
<i>Bouchat v. Balt. Ravens Ltd. P’ship</i> , 737 F.3d 932 (4th Cir. 2013) .....	6, 15, 16
<i>Brammer v. Violent Hues Prods., LLC</i> , 2018 WL 2921089 (E.D. Va. June 11, 2018).....	Passim
<i>BWP Media USA, Inc. v. Gossip Cop Media, LLC</i> , 87 F. Supp. 3d 499 (S.D.N.Y. 2015) .....	25
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	Passim
<i>Folsom v. Marsh</i> , 9 F. Cas. 342 (C.C.D. Mass. 1841).....	8
<i>Fox Film Corp. v. Doyal</i> , 286 U.S. 123 (1932).....	23
<i>Harper &amp; Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	Passim
<i>Oracle Am., Inc. v. Google LLC</i> , 886 F.3d 1179 (Fed. Cir. 2018) .....	3
<i>Pearson Educ., Inc. v. Kumar</i> , 721 F. Supp. 2d 166 (S.D.N.Y. 2010) .....	13

<i>Philpot v. Media Research Ctr. Inc.</i> , 279 F. Supp. 3d 708 (E.D. Va. 2018) .....	19
<i>Rogers v. Koons</i> , 960 F.2d 301 (2d Cir. 1992) .....	17
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	4, 20
<i>Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.</i> , 74 F.3d 488 (4th Cir. 1996) .....	20

## STATUTES

17 U.S.C. § 106 (2012) .....	4, 11
17 U.S.C. § 107 (2012) .....	Passim
H.R. Rep. No. 94-1476 .....	3
Pub. L. 100-568, 102 Stat. 2853 .....	13
S. Rep. No. 94-473, at 62.....	3
U.S. Const. art. I, § 8, cl. 8.....	10

## OTHER AUTHORITIES

1 <i>Patry on Copyright</i> § 1:1 (2018).....	21
1 <i>Patry on Copyright</i> § 1:89 (2018).....	13
4 <i>Patry on Copyright</i> § 10:21 (2018).....	7
4 <i>Patry on Copyright</i> § 10:156 (2018).....	4, 15
<i>Patry on Fair Use</i> § 4:3 (2018).....	25
Pierre N. Leval, <i>Toward a Fair Use Standard</i> , 103 HARV. L. REV. 1105, 1111 (1990) .....	6, 7

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, the undersigned states that the *amicus curiae* Arts & Entertainment Advocacy Clinic at George Mason University Antonin Scalia Law School is not a corporation that issues stock or has a parent corporation that issues stock.

## **INTEREST OF AMICUS CURIAE**

The *amicus curiae* Arts & Entertainment Advocacy Clinic at George Mason University Antonin Scalia Law School is an instructional clinic that represents individual artists and small businesses in the arts on a pro bono basis, employing student assistance. The clinic (“Clinic”) has observed the harm an inaccurate and over broad interpretation of the fair use defense can have on its clients and thus seeks to help the court in this case. The Clinic is run by Professor Sandra Aistars, who has over 20 years’ experience in advising clients both large and small on all aspects of copyright law. Neither she nor the Clinic have any vested interest in this case other than ensuring that copyright law develops in a manner that respects its Constitutional and statutory basis and ensures that creativity and innovation continue to flourish.<sup>1</sup>

---

<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local Rule 29, *amicus curiae* state that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation of submission of this brief; and no person other than the *amicus curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief. Neither Plaintiff-Appellant nor Defendant-Appellee has consented to the filing of this brief and, as such, it is filed under the attached Motion for Leave to File.

## INTRODUCTION

*Amicus* Clinic provides this historical view of the purpose of copyright law and the fair use defense, as well as this analysis of the practical problems with the law and its application to aid the Court’s evaluation of this case.<sup>2</sup> An overbroad application of the fair use defense threatens fundamental copyright protections and sanctions efficient infringement and long-standing prohibitions on unauthorized use of copyrighted works.

The fair use defense arose as judge-made doctrine and was later codified in Section 107 (“Section 107”) of the Copyright Act of 1976 (“the Copyright Act”). *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994). It operates today as a limited exception to the copyright owner’s exclusive rights. The fair use defense forgives an otherwise infringing use of copyrighted work if it is “for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research.” 17 U.S.C. § 107 (2012). This language confirms that the listing “was not intended to be exhaustive,” but nevertheless “give[s] some idea of the sort of activities the courts might regard as fair use under the circumstances.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (citation omitted).

---

<sup>2</sup> *Amicus* Clinic acknowledge and appreciate the contributions to the drafting of this brief of Rachelle H. Mortimer and Grant B. Ossler, students at George Mason University Antonin Scalia Law School, and Terrica V. Carrington, Copyright Counsel at The Copyright Alliance.

Additionally, legislative history reflects Congress’s intention that Section 107 “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication.” *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1191 (Fed. Cir. 2018) (quoting H.R. Rep. No. 94-1476, at 66 (1976), S. Rep. No. 94-473, at 62 (1975), U.S. Code Cong. & Admin. News 5659, at 5679 (1976)) (citing *Campbell*, 510 U.S. at 577).

The fair use defense performs the important function of balancing the rights of authors in their creative works with the First Amendment right to free speech. The Copyright Act provides four non-exclusive factors for courts to consider when addressing a fair use defense:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>3</sup>

17 U.S.C. § 107 (2012). None of these non-exclusive factors outweighs the others

---

<sup>3</sup> Additionally, the Supreme Court has explained that where the district court has found facts sufficient to evaluate each of the statutory fair use factors, an appellate court need not remand for further fact-finding and may make a legal determination that the use does not qualify as a fair use of the copyrighted work. *Harper & Row*, 471 U.S. at 560 (internal citations omitted).



and they must be balanced in light of the purpose and policies that underlie the Copyright Act as a whole. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455, 455 n.40 (1984) (“Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests.”). Courts have also considered additional factors not specifically listed in the statute, including transformative use and good faith.<sup>4</sup>

There will be significant negative ramifications for all authors from the interpretation of the fair use factors applied by the district court if the ruling is allowed to stand. The fair use exception to infringement, as applied, would swallow the rule that creators have certain exclusive rights in their work under Section 106 (“Section 106”)<sup>5</sup>, and undermine the statute’s goal of incentivizing the creation of new works. Fair use, when properly applied, shields infringers from liability in certain limited circumstances where doing so does not erode the exclusive rights and intended benefits of copyright protection. That did not occur in this case.

Moreover, in this case, the Court has the opportunity to provide greater clarity regarding what constitutes a transformative use under the first statutory

---

<sup>4</sup> See, e.g., § 10:156. *Additional factors, including good faith*, 4 *Patry on Copyright* § 10:156 (2018).

<sup>5</sup> 17 U.S.C. § 106 (2012).

factor analysis, how the good faith sub-factor relates to the fair use analysis, and how the second statutory factor analysis should address the predominant nature and publication status of the copyrighted work. In contrast with the first and fourth factors, the good faith sub-factor and the second factor have not been fully developed in case law and, as demonstrated in this case, regularly present comprehension challenges for parties and the district courts. The proper evaluation of all factors<sup>6</sup> is essential to the correct application of the fair use defense and balancing of First Amendment free speech rights with the rights granted under the Copyright Act.

*Amicus* urges the Court to clarify the analysis of the good faith sub-factor and second factor in order to guide parties and district courts toward analyses of fair use in individual cases that are consistent with the purpose and text of the Copyright Act. The bundle of rights granted to authors under the Copyright Act and the incentive to create under the Copyright Clause of the Constitution are in danger of being seriously weakened should the fair use factors continue to be evaluated and reflected in the body of law incorrectly.

## **ARGUMENT**

---

<sup>6</sup> This brief does not address the third or fourth factor, leaving that to Brammer and other *amici*.

## **I. The Purpose and Character of the Use**

Proper examination of the first fair use factor involves consideration of the “purpose and character” of the use. 17 U.S.C. § 107(1) (2012). The purpose and character of an alleged infringer’s use analyzes (1) “whether the new work is transformative” and (2) “the extent to which the use serves a commercial purpose.” *Bouchat v. Balt. Ravens Ltd. P’ship (Bouchat II)*, 737 F.3d 932, 939 (4th Cir. 2013) (internal citations omitted). Appropriate examination of this first factor is a vital element in a court’s determination of whether a use qualifies as a fair use under Section 107.

The Supreme Court and the Fourth Circuit have explicitly determined that to be transformative in “purpose and character,” the new use must add something “with a further purpose or different character.” *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (quoting *Campbell*, 510 U.S. at 578–79). A different purpose or character, constituting a transformative use, is one that “alter[s] the first with new expression, meaning, or message,” and “employs the quoted matter in a different manner or for a different purpose from the original, thus transforming it.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

A transformative use must not merely supersede the original creation. *Campbell*, 510 U.S. at 583. As the preamble to Section 107 suggests, for a proper

analysis of the first factor to fall in favor of the defendant’s use, it must contribute something new to the use made by the creator of the work by “changing the content of the original, by providing insights into it, or by serving a different purpose that serves the goals of copyright.” § 10:21. *Transformative or productive uses*, 4 *Patry on Copyright* § 10:21 (2018).

**A. Transformative Use Requires a Contribution of New Value Beyond What is Conveyed by the Copyrighted Work**

This Court has previously held that a transformative use can be in function and purpose without altering the original work. *Vanderhye*, 562 F.3d at 639. However, such a use cannot make “wholesale takings of the original author’s expression merely because of how well the original author’s expression would convey the secondary author’s different message.” *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 213 (2d Cir. 2015). A transformative work is one that employs the copied material in an entirely different manner or for a different purpose than the original. *Vanderhye*, 562 F.3d at 639; *see also* *Leval, supra*, at 1111–12. “If...the secondary use adds value to the original—if the [copyrighted work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Leval, supra*, at 1111. Absent such addition of value to the public lexicon, a secondary use is not a

fair use but one that merely “supersedes” the original work. The fair use defense *does not* excuse use of a protected work that supersedes it.

[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

*Harper & Row*, 471 U.S. at 550 (citing *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)).

**B. Violent Hues’ Use Was Not Transformative Because It Merely Superseded Brammer’s Work Without Contributing New Value**

*Amicus* suggests that the district court erred in analyzing Appellee’s use of Appellant’s copyrighted work to determine whether it was “transformative in function and purpose” under the first factor. When conducting an analysis of the first factor, the district court determined that Appellant’s use was “transformative in function and purpose” because it conveyed information, and was not promotional or expressive. *Brammer v. Violent Hues Prods., LLC*, No. 1-17-CV-01009, 2018 WL 2921089, at \*4 (E.D. Va. June 11, 2018).

Violent Hues’ stated purpose for its use of the photograph was “to provide festival attendees with information regarding the local area” and argued this was a non-commercial use because it was “not used to advertise a product or generate

revenue.” *Brammer*, 2018 WL 2921089, at \*4. To accomplish this informational purpose, Violent Hues’ took the entirety of the Brammer photograph and cropped it to focus on the central features, the heart, of the work.

A “wholesale taking” of the heart of the work, without an addition of value, is not transformative. The district court erroneously accepted the justification for using the work as presented by Violent Hues and, without further investigation into the use on a macro level, concluded that such use constituted fair use. If the photograph was used on the website of a photography critic discussing the use of the time lapse element in the photograph, the district court may have been correct; here, the use was on Violent Hues’ website soliciting submissions its sponsored film festival and advertising the event to attendees, both clearly commercial and promotional purposes. Although what was being promoted changed, this use by Violent Hues merely superseded Brammer’s and failed to transform the copyrighted photograph. Using a photograph merely to depict the object of the photograph – in this case, the Adams Morgan neighborhood of northwest Washington, D.C – without adding to it through commentary, criticism, or otherwise is a superseding use that is not transformative; reproducing that photograph on another website, or on a sweatshirt, or as wallpaper may change the media and context of delivering the content, but the purpose – depicting the object of the photograph – remains the same.

The district court eviscerated the meaning of transformative use when it sanctioned Violent Hues' appropriation of the photograph on its website promoting a film festival from which the organization profits. In looking specifically to the function and purpose of a use, transformation occurs when "something new and different is communicated from the original or *expands its utility*." *See Authors Guild*, 804 F.3d at 214 (*emphasis added*). Violent Hues copied Brammer's photograph, cropped it to the heart of the work, and displayed it on its website to convey "information regarding the local area" without adding value or expanding the photograph's utility.

Violent Hues has clearly superseded the original Brammer photograph, adding nothing in the form of new meaning, creation, idea, expression, or function and purpose.

**C. Upholding the District Court View of Transformative Use Would Seriously Erode the Exclusive Rights of Copyright Holders**

Accepting the district court's finding of transformative use, without need for addition of new value, obliterates the incentive to create and reflects the harm for which copyright protection was enshrined in the Constitution: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their" creations. U.S. Const. art. I, § 8, cl. 8. Congress further saw fit to protect a bundle of rights for the creator of the

copyrighted works through Section 106, including the right to control the use, display, and creation of derivative works. 17 U.S.C. § 106 (2012).

Holding in favor of Violent Hues would inappropriately expand on this Court's prior analysis of the fair use factors in *Vanderhye*. In that case, iParadigms aggregated students' papers to analyze and compare them against future papers to detect plagiarism. The Court found that use of the papers in this manner provided new value in identifying plagiarized works, constituting fair use because the dissemination that was occurring by iParadigms incidentally to and in furtherance of this purpose sufficiently transformed the students' papers and was "completely unrelated to the expressive content" within each. *Vanderhye*, 562 F.3d at 640. Under the district court's analysis of transformation in the case at bar, iParadigms would have been permitted to use students' papers to convey the information in the papers alongside the expressive content without a requirement for a license because such use would be informative.

In another common context, under the district court's holding and analysis of fair use, an author may write a book regarding his life as president and his controversial pardon of a former political figure, then have that content taken verbatim for the same purpose and made into a screenplay for a movie without a license from him. That hypothetical book has expression and contains information regarding the author as president, which the author took great time and effort to



create. The use of the same copyright-protected content in an unsanctioned screenplay and movie is an infringing derivative work and not a fair use because it would not add something new to or expand the book's utility. The author of the original book would, under the district court's analysis, have no right to any proceeds should the movie become successful, which would harm and possibly destroy the market for his book.

Through these examples, it should be clear that upholding the district court's summary judgment order and rationale would erode the exclusive bundle of rights reserved for creators under Section 106, including rights over the control of subsequent uses of the works and over the creation of derivative works.

## **II. The Good Faith Sub-Factor to the First Fair Use Factor Is Not an Ignorance of the Law Standard**

The district court erred in considering Violent Hues' ignorance of the law as evidence of good faith and set dangerous precedent regarding behaviors that can excuse infringing activities. In finding Violent Hues' use was in good faith, the district court improperly cited the fact that "[Violent Hues' owner] found the photo online and saw no indication that it was copyrighted." *Brammer*, 2018 WL 2921089, at \*4. This is not the law. Copyright protection under U.S. law is automatic from the moment of creation and a copyright notice need not be affixed

to the published work for that protection to adhere.<sup>7</sup> This Court should clarify the scenarios in which the good faith sub-factor should be considered in cases where the fair use defense is asserted. The good faith sub-factor is not often considered by courts when evaluating fair use; when it has been, the opinions have not made clear how and when this analysis should be applied. This uncertainty as to the role of good faith in the four-factor statutory test leads some courts, like the district court in this case, to sanction an ignorance of copyright law as a defense to copyright infringement.

Ignorance of the law is generally not an excuse.<sup>8</sup> This precedent, if left unchecked, creates an incentive for Internet users to remain ignorant of copyright law and notices as they continue to take and use online copyright-protected content without authorization. Good faith is inherent in fair use, and should not be weighed

---

<sup>7</sup> The mandatory notice requirement for published works was abolished following the amendment to the Copyright Act of 1976 by the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, effective March 1, 1989. § 1:89. *Amendments to 1976 Act—100th Congress: 1987–1988—Berne Implementation Act of 1988*, 1 *Patry on Copyright* § 1:89 (2018).

<sup>8</sup> The time honored maxim of *ignorantia juris non excusat* (“ignorance of the law excuses not”) is deep in our judicial history, reflected in a litany of cases and in the knowledge of most first year law students. In the copyright context, this has recently been reflected in *Pearson Educ., Inc. v. Kumar*, 721 F. Supp. 2d 166, 179 n.20 (S.D.N.Y. 2010) (“In the words of philosopher and jurist John Selden, ‘Ignorance of the law excuses no man; not that all men know the law, but because ‘tis an excuse every man will plead, no man can tell how to refute him.’”) (internal citations omitted).

one way or the other in the analysis. Rather, *amicus* suggest that only a finding of *bad faith* should be considered in the overall fair use analysis and should weigh against a finding of fair use.

**A. The Good Faith Sub-Factor Has Not Been Adequately Developed, Creating Uncertainty as to Its Application**

The Supreme Court first articulated the good faith sub-factor in *Harper & Row*, 471 U.S. 539, a case involving the publication of excerpts from an unpublished work without permission from the author. When the Supreme Court considered the first factor, it looked at the fact that Nation had used a “purloined manuscript” to publish these excerpts. *Id.* at 563. This use of a stolen manuscript, taken with “the *intended purpose* of supplanting the copyright holder’s commercially valuable right of first publication” weighed against a finding of fair use and demonstrated an intent to supplant the author’s right of first publication. *Id.* at 562–63. The Court also stated that “[f]air use presupposes good faith.” *Id.* at 562. While the decision in *Harper & Row* opened the good faith sub-factor to be considered when determining whether a use is fair, it did not develop the sub-factor enough to show courts specifically how or when it should be weighed in a particular fair use analysis.

In *Campbell*, 510 U.S. 569, the Supreme Court did not find the good faith analysis applicable. In that case, the hip-hop group 2 Live Crew wrote a song titled

“Pretty Woman” intended to satirize Roy Orbison’s song “Oh, Pretty Woman.” *Id.* at 572. Before publishing the song, the group requested permission from Acuff-Rose, who held the copyright to Orbison’s song, and offered to pay a fee to and credit Orbison and Acuff-Rose for use of the song. *Id.* In a footnote, the Court rejected Acuff-Rose’s argument that this request for permission showed that 2 Live Crew did not believe their use was fair. *Id.* at 585 n.18. The Court said that “even if good faith were central to fair use” the request for permission could show a good faith effort on the part of 2 Live Crew to avoid litigation. *Id.*<sup>9</sup> This decision created further confusion as to the importance of good faith and whether courts are permitted to evaluate the intent of parties in their assessment of whether their actions are in good *or* bad faith.

This Court considered the good faith sub-factor when evaluating a claim of fair use in *Bouchat II*, 737 F.3d 932 (4th Cir. 2013), but also questioned its importance. In that case, Bouchat had created a “B” logo for the Baltimore Ravens National Football League franchise. He was never compensated, and the Ravens began using a “Flying B” logo that Bouchat thought was very similar to his own logo. *Id.* at 935. Bouchat argued that the Court should find bad faith on the part of the Ravens because they had been found to infringe copyrights in the past. *Id.* at

---

<sup>9</sup> “[I]f a use is otherwise fair, no permission is necessary.” § 10:156. *Additional factors, including good faith*, 4 *Patry on Copyright* § 10:156 (2018).

942. The Court refused to find that the Ravens had acted in bad faith because there was no evidence that they had done so. It also stated that good faith was not listed as a factor in Section 107 and that “it is questionable whether allegations of subjective ‘bad faith’ could undercut a use that objectively was fair.” *Id.* Like the decision in *Campbell*, this decision did not lessen confusion among the lower courts as to how this sub-factor should be weighed or what actions would constitute bad faith.

**B. Good Faith Should be Considered Neutral and Bad Faith Weigh Against a Finding of Fair Use**

The fair use doctrine is a defense built into copyright law meant to balance First Amendment rights and the exclusive rights of copyright holders. When the intent of a use is to supplant the exclusive rights of copyright holders for gain, this is not considered a “fair” use. Rather, fair uses are permitted to further the progress of science and benefit society by encouraging public discourse or creating a transformative new work. As previously noted, in *Harper & Row*, the Supreme Court concluded that good faith was inherent in fair use. 471 U.S. at 541. This is because of the fair use exception’s purpose of benefitting the public and promoting progress.

Evidence of bad faith, however, should weigh against a finding of fair use. The Supreme Court considered bad faith relating to the purloined manuscript in

*Harper & Row*, and other courts have also considered evidence of bad faith, when available. 471 U.S. 539. The Second Circuit considered bad faith to weigh against a finding of fair use in *Rogers v. Koons* when the Defendant tore the copyright notice off of the plaintiff's work before having it reproduced. 960 F.2d 301, 309 (2d Cir. 1992). The Federal Circuit also considered bad faith's relationship to fair use in *Atari Games Corp. v. Nintendo of Am., Inc.* when the defendant took a copy of the original source code of the Nintendo cartridge-locking program from the Copyright Office under color of using it in on-going litigation, and, combined with manual transcription of the Nintendo object code, then used this to reverse engineer its own program allowing Atari cartridges to interface with the Nintendo gaming system. 975 F.2d 832, 836–837, 843 (Fed. Cir. 1992). That court said that “[t]o invoke the fair use exception, an individual must possess an authorized copy of a literary work.” *Id.* at 843. These examples show an intent not to use the copyright protected work in a fair way to promote progress, but rather to take—without authorization—rights such as reproduction or use that are reserved for the copyright holder.

A fair use analysis should only weigh bad faith against a finding of fair use, and should consider good faith to be neutral. Good faith is inherent to fair use while bad faith may show that the intent and purpose of fair use are not being met in the particular circumstances where a court is analyzing factual evidence of bad

faith.

**C. Violent Hues Neither Acted in Good or Bad Faith and This Sub-Factor Should Not Have Influenced the Fair Use Determination**

Violent Hues provided evidence that it was ignorant of the law and did not know that a photograph does not require a copyright notice to be protected. It also alleged that it used the photograph without attempting to understand the law or investigate who owned the rights to Brammer's photograph. While this evidence does not show that Violent Hues had a specific intent to appropriate any of the rights of the copyright holder, neither does it show that the company made efforts to comply with the Copyright Act. If the Court allows Violent Hues' ignorance of the law to be considered good faith and weighed in favor of fair use, this could drastically weaken the rights of copyright holders. This same "head in the sand" argument could be applied to other media of expression, such as movies, as well as blog posts, white papers, and other Internet-based content, as but a few examples.

**III. The Nature of the Copyrighted Work**

The district court erred in analyzing the copyrighted work as being predominantly factual and when determining that its publication broadened the scope of fair use. *Amicus* suggests the Court should take this opportunity to clarify the second factor analysis to aid in determining when the factual elements of a copyrighted work are outweighed by the creative elements and the effect of

publication on the fair use analysis.

Although the first and fourth factors are generally viewed as the most important factors in the fair use analysis, the precedent of the Supreme Court and the Fourth Circuit make clear that “whether a given use of copyrighted material is ‘fair’ requires a case-by-case analysis in which the statutory factors are not ‘treated in isolation’ but are ‘weighed together, in light of the purposes of copyright.’” *Vanderhye*, 562 F.3d at 638 (quoting *Campbell*, 510 U.S. at 578); *see also Philpot v. Media Research Ctr. Inc.*, 279 F. Supp. 3d 708, 714 (E.D. Va. 2018). The second factor often receives less analysis than the first and fourth factors, resulting in the copyrighted work being categorized as either factual or creative, published or unpublished. But such questions rarely lead to unambiguous answers. When copyrightable works contain both factual and creative elements, as in this case, the courts often find that the second factor is neutral, seemingly as a matter of convenience and without real analysis.

A more careful analysis of the second factor is critical to the overall fair use evaluation. Both the Supreme Court and Fourth Circuit have recognized the “gradations” between primarily factual or primarily creative works. It is in these gradations that the purpose of copyright law and the rights of copyright holders must be preserved; a more thorough analysis of what elements predominate a creative but factual work better serve this goal. The Copyright Act “is intended to



motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony*, 464 U.S. at 429. This “bundle of exclusive rights” approach—the “special reward”—may be properly limited by a true fair use on the basis that “the public has an interest in retaining in the public domain ‘the right to discover facts and exchange ideas freely.’” *Harper & Row*, 471 U.S. at 546–47; *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (quoting *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 492 (4th Cir. 1996)). The mere inclusion of facts within a work does not negate the creative expression reflected in the copyrighted work. The difficulty, as the Court knows, lies in determining what elements of the copyrighted work are predominant, and, on balance, more important to the public interest.

The second factor, when properly analyzed and applied, buttresses the analysis of the first and fourth factors. To better understand “the purpose and character of the use” of the copyrighted work in the first factor and whether such use is transformative, the nature of the copyrighted work in question must be fully analyzed.<sup>10</sup> Further, to assess the “effect of the use upon the potential market for or

---

<sup>10</sup> *Amicus* suggests that the parties and district courts may benefit from approaching the fair use analysis by resequencing the statutory fair use factors of 17 U.S.C. § 107 so a more logical progression applies. This revised sequence would begin with the nature of the copyrighted work (factor 2) and the amount and substantiality of

value of the copyrighted work” in the fourth factor, understanding how the effect of publication relates to the medium of the work and the creator’s ability to generate value from it is essential.

**A. This Court Should Clarify the Analytical Framework for Evaluating the Second Factor**

Clarifying the analysis undertaken with respect to the second factor will help parties and district courts determine when the factual elements of a copyrighted work are outweighed by the creative elements, disfavoring a finding of fair use. The case at bar is an appropriate vehicle for providing this greater clarity because it deals with a familiar concept of photographs published online, combines elements of creativity and fact in the work at issue, and demonstrates that a threshold can be established based on whether copyrightable subject matter removes access to or at least constrains the public’s ability to make use of factual content. Moreover, the Court can borrow from other familiar concepts, including the trademark concept of nominative fair use and the defense of necessity to the tort of trespass on real property.<sup>11</sup> Under the former doctrine, third parties may use a trademark of another

---

the portion used in relation to the copyrighted work as a whole (factor 3), then return to analyze the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes (factor 1), and, finally, look to the effect of the use upon the potential market for or value of the copyrighted work (factor 4).

<sup>11</sup> The prevailing theory of copyright is as a property right. *See § 1:1. Generally, 1*

only as necessary to describe another product or compare it to their own. Under the latter doctrine, third parties are excused from the tort of trespass where such trespass was necessary to protect himself or the public in an emergency situation. The operative concept, in both cases, reframed for copyright law, is an excused infringement on the basis of “necessity.”

The concern of the courts with protecting access to items in the factual lexicon strongly suggests that the second factor should weigh in favor of the alleged infringer where use of the factual content is both necessary for and, accordingly, the least trespassory means of, conveying the factual content. Where use of the copyrighted work is not necessary to convey the same factual content, the motivation behind the creation of copyright law should be preserved and creativity rewarded. “At least unless a persuasive fair use justification is involved, authors of factual works, like authors of fiction, should be entitled to copyright protection of their protected expression. The mere fact that the original is a factual work therefore should not imply that others may freely copy it.” *Authors Guild*, 804 F.3d at 220.

---

*Patry on Copyright* § 1:1 (2018). Although not real property, and not necessarily personal property, the analogy between trespass to real or personal property and infringement, which is essentially a trespass, of copyright is apt.

The bundle of rights granted by copyright law, and not just the access to facts, is and has always been in the public interest. “The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Thus, public benefit is served both from the protection of the copyright holder’s bundle of rights and access to facts. By providing greater clarity regarding the proper analysis of the nature of the copyrighted work in this manner, emphasizing predominance of creative elements versus fact and necessity for access to the facts, the goal of providing the “special reward” of copyright protection and preserving the public interest in the creation of creative works can be maintained while providing a justifiable basis for a finding of fair use.

**B. Under the Appropriate Analysis, the Brammer Photograph is Primarily Creative in Nature**

The district court considered that “[t]he photograph in question contained creative elements (such as lighting and shutter speed choices)” but gave greater weight in its determination to the fact that it depicted a real world location. *Brammer*, 2018 WL 2921089, at \*2. The district court then improperly analyzed this factor in light of *Violent Hues*’ unauthorized use of the photograph, and not the intended use of the content creator, intermingling factor one with the factor two

analysis. The district court's premise that a third party can select elements out of a whole during the consideration of the second factor, without respecting the copyrighted content creator's purpose for the whole, sanctions abuse of the fair use defense to appropriate any copyrighted material so long as the user can claim that a factual element within the whole was the reason for their unauthorized appropriation.

Instead, an appropriate analysis of factual versus creative centers on the concept of not constraining the public from using the underlying facts by protecting the creative elements. The Copyright Act first codified the fair use doctrine in naming a non-exhaustive list of fair use purposes including "criticism, comment, news reporting, teaching ..., scholarship, [and] research." 17 U.S.C. § 107 (2012). These carve-outs are all uses meant to protect dialogue, fact, and learning; none of the examples are primarily for commercial gain. By more clearly applying the second factor to determine whether fact or creative elements predominate the copyrighted work, the Court has the opportunity to more closely adhere to the original purposes and language of the statute.

Applied to the case at bar, if Violent Hues wished to use a representation of Adams Morgan purely for its "factual content," other options, including a map of the area, taking the short drive from Alexandria to take their own snapshot of the area without the artistry of Brammer's photograph, or finding a photograph

committed to the public domain were options available to the Appellant. The burden would properly lie with Violent Hues to show that its use of Brammer's copyrighted photograph was the least trespassory means of conveying the factual content. Brammer's photograph conveyed more than the factual elements of its setting, demonstrated by the ability to convey fewer artistic elements, and permitting the artistic content to be protected would not constrain the public from representing the factual elements in another manner. Accordingly, the district court should have determined that the creative nature of Brammer's photograph and alternate avenues to convey the same facts regarding the neighborhood weighed against a finding of fair use.

**C. Publication is Critical for Photographers to Realize the “Special Reward” of Copyright Protection and Should not be Used to Penalize Creators**

The district court erroneously stated that “the scope of fair use is broadened when a copyrighted work has been previously published.” *Brammer*, 2018 WL 2921089, at \*2. This is not the law. “The fact that a work is published does not mean that the scope of fair use is broader.” § 4:3. *Published works, Patry on Fair Use* § 4:3 (2018). “[O]veremphasis of publication status in the fair use analysis would be ‘in tension with the Copyright Act's express grant to copyright holders of rights over derivative works.’” *BWP Media USA, Inc. v. Gossip Cop Media, LLC*,

87 F. Supp. 3d 499, 508–09 (S.D.N.Y. 2015) (citing *Blanch v. Koons*, 467 F.3d 244, 252 n.4 (2d Cir. 2006)). Rather, there are few modern copyrightable works that do not need to be published in written or electronic form in order to develop a market and to realize their potential economic value to their creator. Those requiring publication include photographs, audio recordings, audiovisual works, and literary works, among myriad others. To merely state that making a copyrightable work available to the public broadens the scope of fair use eviscerates the exclusive bundle of rights granted under Section 106. By incorrectly concluding that publication broadens the scope of fair use, the district court both misstated the law and ignored the realities required for bringing copyrightable works to market, undermining the “special reward” of copyright protection and undercutting the purpose of encouraging creation and display fostered by the Constitution.

Rather, to maintain these goals, a finding that a work has been published should be viewed as neutral until it is considered until the fourth factor analysis for impact on the market of the copyrighted work. This approach serves the purpose of protecting the exclusive rights under Section 106 for unpublished works, without putting an unnecessary thumb on the scale for published works and allowing the remainder of the fair use factors to determine whether a secondary use balances in favor of fair use, or not. Further, this analysis does not specifically prejudice the

types of works that require publication to connect to their market. The simplistic approach of the district court in this case goes directly against the purpose of copyright protection: encouraging the creation and dissemination of creative works. Allowing this holding and analysis to stand would entirely undermine the purpose of copyright protection and the proper evaluation of the fair use factors.

### **CONCLUSION**

For the reasons provided above, this Court should clarify the proper fair use analysis to be applied in this and future copyright cases.

Dated: October 29, 2018

Respectfully submitted,

*/s/ Antigone Gabriella Peyton*

ANTIGONE GABRIELLA PEYTON

DAVID CHRISTOPHER JOHNSON

**PROTORAE LAW PLLC**

1921 Gallows Road, Suite 950

Tysons, VA 22182

Phone: (703) 749-8507

Fax: (703) 942-6758



## CERTIFICATE OF SERVICE

I certify that on October 29, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

### *Counsel for Appellant*

David C. Deal  
LAW OFFICE OF DAVID C. DEAL PLC  
P.O. Box 1042  
Crozet, VA 22932

David Leichtman  
Tatsuya Adachi  
LEICHTMAN LAW PLLC  
3 Park Avenue  
15<sup>th</sup> Floor  
New York, NY 10016

Dated: October 29, 2018

### *Counsel for Appellee*

Judson D. Brown  
Thomas P. Weir  
Paul J. Weeks  
KIRKLAND & ELLIS, LLP  
655 15<sup>th</sup> Street, NW  
Washington, DC 20005

/s/ Antigone Gabriella Peyton  
ANTIGONE GABRIELLA PEYTON  
PROTORAE LAW PLLC

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). As counted by the word processing program used to prepare it (Microsoft Word), the brief contains 6,489 words, excluding the parts of the brief exempted by the Fed. R. App. P. 32(f).

2. This brief 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). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 29, 2018

*/s/ Antigone Gabriella Peyton*  
ANTIGONE GABRIELLA PEYTON  
**PROTORAE LAW PLLC**