

RECORD NO. 18-1763

In The
United States Court Of Appeals
For The Fourth Circuit

RUSSELL BRAMMER,

Plaintiff – Appellant,

v.

VIOLENT HUES PRODUCTIONS, LLC,

Fernando Mico, Owner,

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA**

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

Appellant Russell Brammer (“Brammer”) appeals an Order of the U.S. District Court for the Eastern District of Virginia in favor of Appellee Violent Hues Productions, LLC (“VH”) on June 11, 2018. Joint Appendix (hereinafter “JA”) 227. In accordance with the accompanying Memorandum Opinion (JA 220-26), the June 11, 2018 Order granted VH’s Motion for Summary Judgment and dismissed the case. JA 227. On July 3, 2018, Brammer filed his timely Notice of Appeal. JA 228-29.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a), because the case arose under the U.S. Copyright Act, 17 U.S.C. § 101, *et seq.* This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the District Court erred by granting VH’s Motion for Summary Judgment finding fair use of Brammer’s copyrighted photograph.

STATEMENT OF THE CASE

On September 10, 2017, Brammer filed suit in the U.S. District Court for the Eastern District of Virginia against VH, alleging various violations of the U.S. Copyright Act, including direct copyright infringement. JA 10-19. On October 24, 2017, VH moved to dismiss Brammer’s Complaint. JA 2 (Dkt. 5). The motion was briefed and argued by the parties before the Honorable Claude M. Hilton, and that motion was denied. JA 2 (Dkts. 6; 7; 8; 13; 16); JA 20-32.

The parties engaged in discovery, after which VH filed its Motion for Summary Judgment, arguing the defense of fair use. JA 6 (Dkt. 53). The motion was briefed and argued by the parties before Judge Hilton, and that motion was granted, holding that VH's copying and posting of Brammer's copyrighted photograph, "Adams Morgan at Night," constituted fair use. JA 6-8 (Dkts. 53; 54; 55; 56; 57; 58; 62; 66; 69; 70; 76); JA 52-76; 77-177; 178-193; 194-204; 205-219; 227.

I. STATEMENT OF FACTS

Brammer is a professional photographer who relies on licensing revenue and print sales for his livelihood as a photographer. JA 39; 100-01; 110-11; 132-34; 169-70; 171-77. The photograph at issue in this case, "Adams Morgan at Night" (the "Photograph"), was taken by Brammer from a private rooftop using sophisticated "time release" techniques and equipment. JA 12; 16; 50; 121; 128; 132. It has won awards, and Brammer has earned monies from its distribution in both printed format and through licenses for uses on the Internet. JA 10; 102-03; 121; 128; 133-34; 170. Brammer registered the Photograph in the U.S. Copyright Office. JA 19; 51.

VH is a commercial entity in the business of organizing and hosting the Northern Virginia International Film Festival, an annual film festival designed to showcase films. JA 11; 139.

VH admitted to copying and posting Brammer's Photograph to its commercial website, without permission from, payment to, or attribution of, Brammer. JA 33-34 (Paras. 10-11); 139-40; 148-49. VH's website is clearly designed to promote and attract attendees to its film festival. JA 139-40; 148-49; 151; 159-62; 188-91. Although it claimed the purpose of the website was to advise filmmakers invited to attend the festival of activities in the local area (JA 140; 148-49; 151), that claim was not credible. Nevertheless, the District Court credited it as if it was a fact not subject to dispute. JA 223 (Opinion, at 4).

After VH's infringement began, Brammer did earn monies from exploitation of the Photograph twice, one of which was a print sale of the Photograph, and the other of which was a retroactive license for a past infringement that was granted by Brammer's licensing agent. JA 50 (JSUF 6); 116-128; 134.

SUMMARY OF THE ARGUMENT

The District Court committed numerous legal and factual errors in its fair use analysis, including the following:

1. It committed legal error by finding a "transformative use" where the infringing use neither commented on, nor criticized, nor made alterations to the original work.
2. It committed factual error by finding the infringing use was not a "commercial" use.
3. It committed both factual and legal errors by finding that the defendant used the Photograph on its website in "good faith" solely on the basis that some copies of the Photograph did not contain a

copyright notice and in determining that an infringer's "good faith" is a component to be weighed in a fair use analysis.

4. It committed legal error in weighing the defendant's use as part of the second fair use factor, which properly focuses on the nature of the copyright owner's work.
5. It committed legal error by finding that the plaintiff's publication of the work before the infringement weighed in favor of finding a fair use.
6. It committed legal and factual errors by failing to correctly analyze the amount and substantiality of the defendant's use.
7. It committed legal error by conflating two separate markets for the work: the printed copies market and the Internet licensing market.
8. It committed legal and factual error by finding that post-infringement print sales and Internet usage licenses weigh in favor of fair use.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for analyzing a district court's grant of summary judgment of fair use is *de novo*. See *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 937 (4th Cir. 2013) (hereinafter "*Bouchat V*") ("A fair use defense presents a mixed question of law and fact. Inasmuch as this appeal is from an order of summary judgment, our standard of review is one of *de novo*." (internal quotations and citations omitted)); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 201 (4th Cir. 1998) ("[W]e review the district court's legal conclusions *de novo*. The district court's subsidiary findings of fact are, of course, subject to a clearly erroneous standard of review." (citations omitted)).

The fair use doctrine “permits other people to use copyrighted material without the owner’s consent in a reasonable manner for certain purposes.” *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir.1992). Section 107 of the U.S. Copyright Act provides an illustrative list of the purposes for which the doctrine may be invoked, including “criticism, comment, news reporting, teaching, . . . scholarship, or research[.]” 17 U.S.C. § 107. The statute then lists four non-exclusive factors that courts must consider in determining whether a use is “fair.” These factors are:

- (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 original.

Id. The District Court erred in its analysis of each statutory fair use factor, and accordingly its decision should be overturned.

II. FACTOR ONE: THE PURPOSE AND CHARACTER OF VH’S USE IS NOT FAIR

Under Section 107(1) of the U.S. Copyright Act, whether or not VH’s use weighs in favor of fair use under the first fair use factor requires an inquiry as to “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes[.]” 17 U.S.C. § 107(1).

The 1994 landmark U.S. Supreme Court decision of *Campbell v. Acuff-Rose Music, Inc.* is largely responsible for the consideration of “transformative” use by the courts under the first fair use factor. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). In *Campbell*, the Court held that, because parody is a form of criticism, and thus can provide a “social benefit, by shedding light on an earlier work, and, in the process, creating a new one[.]” and thus “has an obvious claim to transformative value,” a parodic work properly falls within the enumerated fair uses within the preamble of Section 107. *Id.*

Since *Campbell*, many courts, including this one, have widely recognized two sub-factors as being particularly relevant to the first factor analysis: (1) “whether the new work is transformative”; and (2) “the extent to which the use serves a commercial purpose.” *Bouchat V*, 737 F.3d at 939 (citations omitted). Importantly, not every use that is merely different in purpose from the original qualifies as a transformative use; rather, there has developed a number of criteria that courts look to in the analysis, all of which require a significant justification for the secondary use. *See Campbell*, 510 U.S. at 580 (“If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or *to avoid the drudgery in working up something fresh*, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other

factors, like the extent of its commerciality, loom larger.” (emphasis added)).

Here, the District Court decided incorrectly that VH’s use was “transformative” because it served an “informational” purpose—but an “informational” purpose in this context does not meet the test to excuse infringement.

A. The District Court Applied the Incorrect Legal Standard for Transformiveness

The District Court erred by misapplying the legal standard of what qualifies as a transformative use. Citing *A.V. ex. rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009), the Court stated that a secondary use “can be transformative in function or purpose without altering or actually adding to the original work.” JA 223 (Opinion, at 4).

This is incorrect as applied in this case. To begin with, it is useful to review what the Supreme Court actually stated in *Campbell*, where the Court explained that if the secondary work “has no critical bearing on the substance or style of the original . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish)[.]” *Campbell*, 510 U.S. at 580. Accordingly, “[t]he central purpose of this investigation is to see . . . whether the new work merely supersedes the objects of the original creation, or instead *adds something new*, with a further purpose or different character, *altering the first with new expression*, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Id.* at 579 (emphasis added) (citations omitted).

Accordingly, under the language of *Campbell* itself, the second work must actually either make some critical use of, or change to, the original work to qualify as transformative. VH's use of Brammer's Photograph here does nothing of the sort.

However, after *Campbell*, some appeals courts expanded the doctrine of transformativeness in unique circumstances where the second work did not alter the original itself, but made use of it in what the courts felt were justifiable circumstances, such as Internet search functionality and indexing (and excerpts in aid thereof), appropriation art, or detection of plagiarism. *See, e.g., Author's Guild v. Google, Inc.*, 804 F.3d 202, 216-18 (2d Cir. 2015) (hereinafter, "*Google Books*") (search and snippets); *Cariou v. Prince*, 714 F.3d 694, 705-09 (2d Cir. 2013) (appropriation art); *A.V. ex. rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638-40 (4th Cir. 2009) (detection of plagiarism). In such cases, the original work was either barely recognizable within the second work, or the secondary use served a completely and radically different purpose than the original—the works were taken not for their creative nature or for what they expressed, but rather to serve a justifiable secondary purpose.

Other circuits then criticized those cases because an undue emphasis on a different purpose would threaten to override the exclusive right a copyright owner has in making derivative works. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758-59 (7th Cir. 2014) ("We're skeptical of *Cariou's* approach, because asking

exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights under § 106(2).”); *see also Cambridge University Press et al. v. Patton et al.*, 769 F.3d 1232, 1262-63 (11th Cir. 2014) (finding defendants’ use of excerpts of plaintiffs’ works was not transformative, and criticizing the Second Circuit’s expansive reading of what is transformative).

The Second Circuit heard the criticism and received the message that its post-*Campbell* holdings went too far. In subsequent decisions, it dialed back what can qualify as transformative, holding that the *Google Books* and *Cariou* cases presented unique factual circumstances, and limited what can be viewed properly as a transformative justification. *See TCA TV Corp. v. McCollum*, 839 F.3d 168, 180-81 (2d Cir. 2016) (acknowledging criticism of *Cariou* and declining to defend it, stating, “[T]he focus of inquiry is not simply on the new work, *i.e.*, on whether that work serves a purpose or conveys an overall expression, meaning, or message different from the copyrighted material it appropriates. Rather, the critical inquiry is whether the new work uses the copyrighted material *itself* for a purpose, or

imbues it with a character, different from that for which it was created. Otherwise, any play that needed a character to sing a song, tell a joke, or recite a poem could use unaltered copyrighted material with impunity, so long as the purpose or message of the play was different from that of the appropriated material.”

(emphasis added) (citations omitted)); *see also Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 188 (2d Cir. 2018) (limiting the *Google Books* decision to situations where using unaltered excerpts of a work adds important value to search functionality).

The purported purpose of VH in using Brammer’s Photograph here is not even close to being transformative. The District Court’s reliance on a distinction between Brammer’s promotional and expressive purpose and VH’s unrelated informational purpose is simply wrong. JA 223 (Opinion, at 4). First, it defines both parties’ intentions far too narrowly, and second, it does not analyze properly whether VH had any justification, let alone a sufficiently transformative one, for taking Brammer’s work. Even the *Google Books* decision, which is at the extreme end of the fair use spectrum, did not go so far. *See Google Books*, 804 F.3d at 215 (“A taking from another author’s work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification.”).

As a threshold matter, the District Court's decision is clearly erroneous in finding as a factual matter that Brammer's purpose was limited to promotion and expression while VH's purpose was limited to conveying information.¹ A reasonable jury could easily find that VH used Brammer's Photograph to depict the Adams Morgan neighborhood, and that Brammer had the identical purpose. A jury also could find reasonably that VH's purpose was commercial in nature to promote its film festival, just as Brammer's purpose was commercial in nature to sell his photographs.

The fact that Brammer's Photograph is an excellent depiction of the Adams Morgan neighborhood does not justify the taking. *See Google Books*, 804 F.3d at 215 (“[T]he would-be fair user of another's work must have justification for the taking. A secondary author is not necessarily at liberty to make wholesale takings

¹ Moreover, the District Court committed legal error by comparing *Brammer's* purpose in using the Photograph with *VH's* purpose in using the Photograph. The inquiry on transformative purpose properly compares the character and purpose of *Brammer's work*, the Photograph, and the character and purpose of the *second work* published by VH, but not the purposes of the parties themselves. *See Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301, 308-09 (4th Cir. 2010) (“A ‘transformative’ use is one that employs the copyrighted work in a different manner or for a different purpose from the original, thus transforming it.”). Thus, the focus is on the extent to which the original work's purpose is transformed, irrespective of the author's purpose in using the original work. If the District Court's comparison were indeed proper to determine transformative purpose, then *every* use by a person or entity not Brammer would be for a transformative purpose, because only Brammer, as the Photograph's author, could properly use the Photograph for the purpose of advertising his skills as a photographer, *i.e.*, the “promotional” purpose. JA 223 (Opinion, at 4).

of the original author's expression merely because of how well the original author's expression would convey the secondary author's different message.”).

Brammer's Photograph depicts the passage of time of a busy street in the Adams Morgan neighborhood at night. In its simplest form, the purpose and function of the Photograph is to illustrate this scene. Thus, VH used the Photograph for precisely the purpose it was intended to be used, and as such, its purpose is non-transformative. *See TCA TV Corp. v. McCollum*, 839 F.3d 168, 182-83 (2d Cir. 2016) (“As this court has recognized, there is nothing transformative about using an original work in the manner it was made to be used.” (internal quotations and citations omitted)); *Bigelow v. Garrett*, No. 6:18-cv-00039, 2018 U.S. Dist. LEXIS 146435, at *5-6 (W.D. Va. Aug. 28, 2018) (“Defendants rely on *their* gloss of the photo depicted in the complaint, stating that they transformed it from a mere historical depiction of a border crossing into a political stance on illegal immigration. . . . Defendants' use of the photo still conveys, and is meant to convey, what it always conveyed: A crossing at the U.S./Mexico border.” (emphasis in original)).²

² Although the District Court did not expressly rely on VH's cropping of the Photograph as a basis for its finding of transformativeness, VH's cropped version does not qualify as transformative. The Fourth Circuit and other circuit courts agree that the extent to which a reasonable observer can perceive aesthetic elements of the original work within the secondary use is relevant to the transformativeness analysis. *See Bouchat V*, 737 F.3d at 940 (4th Cir. 2013) (“The

In failing to search for a real justification for VH's taking, the District Court thus allowed itself to fall into a trap of finding the facts could only be determined in such a manner that supported its erroneous legal conclusion, discussed next. To do so was clear error.

With respect to its legal distinction between an expressive and promotional purpose and the purpose of conveying information, the District Court committed legal error. The District Court apparently relied on two of this Court's decisions, *Bouchat V* and *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009). But in each of those cases, this Court made a distinction between a secondary use that was related to the original work's expressive qualities, as opposed to those that related to the communication of *historical facts*. This case presents no similar issue.

extent to which unlicensed material is used in the challenged work can be a factor in determining whether a . . . use of original materials has been sufficiently transformative to constitute fair use.” (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (alterations in original)). In particular, the Fourth Circuit in *Bouchat V* repeatedly emphasized the significance of the fact that plaintiff's work was barely recognizable or perceivable in the defendant's secondary use, in determining that the use was transformative. See *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 940-41 (4th Cir. 2013). The same is not true here. Where “[t]he primary image in both works is the photograph itself[,]” for the secondary use to be considered transformative, a reasonable observer must conclude that the defendant “materially altered the composition, presentation, scale, color palette, and media originally used by” the plaintiff. *Graham v. Prince*, 265 F. Supp. 3d 366, 381 (S.D.N.Y. 2017) (citations omitted). Here, all of the salient aesthetic elements of the original Photograph were reproduced by VH. Compare JA 16, with JA 17.

In *iParadigms*, defendant used plaintiffs' essays and other written materials for an online database that served as a plagiarism-detection service. *iParadigms, LLC*, 562 F.3d at 634. Through the service, teachers and professors could compare their students' submissions to those in iParadigms' database in order to detect whether the new submissions plagiarized the works of other authors. *Id.* This Court held that because the purpose of the copying was to determine whether or not the new student submissions were original, the original works were being used for the purpose of establishing a historical fact, rather than being used for the expressive qualities of the original works. *Id.* at 638-40. Accordingly, the use was justifiable and qualified as transformative. *Id.*

In *Bouchat V*, the plaintiff was the designer and copyright owner of the "Flying B" logo, used historically by the Baltimore Ravens. *Bouchat V*, 737 F.3d at 935. Defendants, through archival footage of the Ravens, used the logo in connection with two documentary films which the Fourth Circuit stated "share[d] the qualities of other historical documentaries." *Id.* at 944. The Court held that, although defendants did not acquire a license to reproduce the Flying B logo, their use was transformative and justified because "archival footage, commentary, and interviews" are "crucial to the creation of any historically accurate film," which "also align the videos with the examples in § 107's preamble: 'criticism, comment, news reporting, teaching . . . scholarship, or research.'" *Id.* (citing 17 U.S.C. § 107).

The *Bouchat V* court explained that the fair use doctrine prevents copyright owners from gaining “substantial leverage over select historical facts,” in the depiction of certain matters, because otherwise “[i]t would force those wishing to create videos and documentaries to receive approval and endorsement from their subjects, who could simply choose to prohibit unflattering or disfavored depictions.” *Id.* (internal quotations and citations omitted).

That is not what happened here. Rather, VH’s use of the Photograph was not for the purpose of telling a historical fact—VH could have used a written description of the Adams Morgan neighborhood, it could have taken its own photograph, or it could have licensed one from many of the available stock photography services. *See, e.g., Roy Exp. Co. Establishment of Vaduz v. CBS*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980) (holding that defendant’s use of plaintiff’s copyrighted work in a documentary about Charlie Chaplin was unfair, because, *inter alia*, there existed sufficient materials available in the public domain to effectuate the same purpose), *aff’d*, 672 F.2d 1095 (2d Cir. 1982). Simply put, VH did not need to use this particular copyrighted Photograph to convey a historical fact in the same way as using the “Flying B” logo was justified in *Bouchat V*. Instead, VH simply used the Photograph to “to avoid the drudgery in working up something fresh,” and thus its “the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish).” *Campbell*, 510 U.S. at 580.

It is readily apparent that in both *iParadigms* and *Bouchat V*, as in decisions from the other circuits applying the “transformative use” test to find fair use, the defendants’ works or systems could not have been created *but for* the use of the respective plaintiffs’ works. None of the concerns or justifications present in those cases exist here. The outcomes in *Bouchat V* and *iParadigms* were highly specific to the facts of those cases, and should not be broadly applied outside of their contexts.

By contrast, other courts have determined that merely having the conveyance of information as a purpose is not a cognizable “transformative use” that justifies a taking. It is well established that “difference in purpose is not quite the same thing as transformation, and *Campbell* instructs that transformativeness is the critical inquiry under this factor. . . . [A] use of copyrighted material that merely repackages or republishes the original is unlikely to be deemed a fair use.” *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (internal quotations and citations omitted); *see also United States v. ASCAP*, 599 F. Supp. 2d 415, 427 (S.D.N.Y. 2009) (“[A]ny difference in applicant’s informational purpose in streaming previews of ASCAP music from the original entertainment purpose of the music is insufficient, by itself, to render applicant’s use transformative.”); *House of Bryant Publs, LLC v. A&E TV Networks*, No. 3:09-0502, 2009 U.S. Dist. LEXIS 101878, at *18 (M.D. Tenn. Oct. 30, 2009) (use of

song titled “Rocky Top” was not transformative as “there is no perceptible attempt to actually place ‘Rocky Top’ in any sort of larger context,” with “no commentary, criticism or even discussion of ‘Rocky Top.’ Rather, basically, the excerpt from ‘Rocky Top’ simply plays, fades, and then stops, and the Episode moves on to the next topic.”); *see also Bigelow*, 2018 U.S. Dist. LEXIS 146435, at *5-6 (“Presumably, that is precisely why Defendants selected the photo—a picture of say, a mountaintop, would be meaningless as part of an anti-immigration stance.”).

The District Court’s finding as to transformativeness under the first factor relied solely on VH’s purported difference in purpose. JA 223 (Opinion, at 4). This was clear error. VH otherwise did not add to or alter the original author’s expression. In other words, it provided no justification for its unauthorized use. As such, this factor should weigh against a finding of fair use.

B. The District Court Also Erred by Applying an Incorrect Legal Standard for Commerciality

In holding that VH’s use of Brammer’s Photograph was for non-commercial purposes on the sole basis that it was “not used to advertise a product or generate revenue[,]” the District Court improperly narrowed the legal standard for commercial use. JA 223 (Opinion, at 4). Generally, “[c]onsideration of the purpose and character of the use includes an examination of ‘whether [the] use is of a commercial nature or is for nonprofit educational purpose.’” *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 310 (4th Cir. 2010) (hereinafter “*Bouchat IV*”)

(quoting 17 U.S.C. § 107(1)). However, in the Fourth Circuit, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but *whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.*” *Id.* at 311 (quoting *Harper & Row v. Nation Enters.*, 471 U.S. 539, 562 (1985)) (emphasis added).

Therefore, the broad legal standard for commerciality recognizes two types of for-profit endeavors, each of which may be considered a commercial purpose: “direct profits (generated by selling an infringing product) and indirect profits (revenue earned from operations enhanced by the infringement).” *TD Bank, N.A. v. Hill*, No. 12-7188 (RBK/JS), 2015 U.S. Dist. LEXIS 97409, at *63 (D.N.J. July 27, 2015); *see also Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1994) (recognizing this distinction); *L.A. Times v. Free Republic*, No. CV 98-7840 MMM (AJWx), 2000 U.S. Dist. LEXIS 5669, at *48-49 (C.D. Cal. Mar. 31, 2000).

Therefore, the question of commerciality is not a question of whether VH used the Photograph to advertise a specific product or generate revenue from fees earned from selling unauthorized copies of the Photograph. Rather, the question is whether VH gained a commercial advantage, either directly or indirectly, as a consequence of using Brammer’s Photograph without paying the customary licensing fee. *See Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 409 (5th Cir. 2004) (“While Compaq did not produce the SCG for individual sale or profit,

the Supreme Court has noted that ‘the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.’ Thus, the inclusion of the *SCG* with each Compaq computer constitutes a commercial use of the copied material.”) (quoting *Harper & Row*, 471 U.S. at 562).

VH runs a film festival and a reasonable jury could find that VH used Brammer’s Photograph to promote the festival. Characterizing the website as “informational” does not justify the non-payment of a licensing fee for VH’s use of the Photograph, and a jury could reject that argument. In circumstances such as this, a finding that a defendant’s use of a photograph was non-commercial on summary judgment is clearly erroneous. See *Marobie-Fl., Inc. v. Nat’l Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1175 (N.D. Ill. 1997) (“It is undisputed that NAFED obtained copies of plaintiff’s clip art files for free although they ordinarily cost money. It is undisputed that NAFED placed these files on its Web Page and made them available free of cost to its members and other Internet users. It is also undisputed that NAFED uses its Web Page for the commercial purposes of promoting the association (whose members pay dues) and generating advertising revenue. The clip art files enhanced the Web Page and furthered these commercial purposes; they were clearly not placed on the Web Page for the purposes of criticism, comment, news reporting, teaching, scholarship, or

research.”); *Television Digest, Inc. v. United States Tel. Ass’n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (“USTA may not have directly profited in the sense of a monetary gain; however there is no dispute that USTA saved money by photocopying one subscription issue instead of ordering the amount of subscriptions it required per reader. USTA places great reliance on the fact that it is a non-profit organization. However this does not compel a finding of fair use.”). If the District Court’s application of the fair use doctrine is upheld, it would have the disastrous effect of all but eliminating an author’s ability to maintain control of her copyrighted work, and just as important, generate income from it.

Moreover, where a defendant has a choice between using a copyrighted work versus a work in the public domain, the circumstances weigh in favor of a finding of commercial use under the first fair use factor. *See Roy Exp. Co. Establishment of Vaduz*, 503 F. Supp. at 1144 (“Here the evidence established that CBS had prepared an alternative version of its special which largely used films in the public domain rather than plaintiffs’ copyrighted films. The jury could reasonably have concluded that if, as CBS strenuously argued, it was essential to proper coverage of Chaplin’s death that some film clips be shown, the showing of excerpts from films in the public domain would have been sufficient, and that CBS’ decision to broadcast the offending version was motivated by commercial rather than educational considerations. Nor does CBS’ emphasis on the

unsponsored nature of the show establish that CBS did not use the films for commercial exploitation, since common experience suggests that CBS stood to gain at least indirect commercial benefit from the ratings boost which it had reason to hope would (and in fact did) result from the special.”).

As noted above, even VH’s asserted purpose in using the Photograph had nothing to do with commentary, criticism, or information about the work *itself*. Rather, it was merely intended to depict the Adams Morgan neighborhood. It was therefore free to use any public domain photograph of the same intersection, or use its own photograph of the same, or otherwise convey the virtues of the local area. That VH instead used Brammer’s copyrighted work only supports a finding of commerciality (and that it merely sought to “to avoid the drudgery in working up something fresh”); this factor thus should weigh in Brammer’s favor and the District Court’s decision should be overturned. *Campbell*, 510 U.S. at 580.

C. The District Court Also Erred by Crediting VH’s Supposed “Good Faith” Intent

The District Court erred by according any weight whatsoever to VH’s purported good faith in evaluating the first fair use factor. While good faith is obviously a factual determination for a jury after observing the demeanor of a witness, it appears that the District Court made this finding solely based on its determination that in some (but not all) instances, Brammer published copies of the Photograph without a copyright notice. JA 223 (Opinion, at 4). This factual

finding on summary judgment was clear error, and it also led to an impermissible legal conclusion.

As an initial matter, the publication of copyright-protected works with a copyright notice is not required under the U.S. Copyright Act, and is irrelevant to the merits of a fair use determination. The use of a copyright notice is permissive, and can provide evidence of evidence of willfulness for purposes of damages. *See* 17 U.S.C. § 401(a) (“Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section *may* be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.” (emphasis added)).

The relevance of a copyright notice, if applied to a work, is only as to actual or statutory damages, and is irrelevant to the liability aspects of the case. *See* 17 U.S.C. § 401(d) (“Evidentiary weight of notice. If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of § 504(c)(2) [concerning increased statutory damages cap for willful copyright infringement].)”).

It is undisputed that some of Brammer's publications of the Photograph on the internet *did* contain a copyright notice, and thus the question for the damages portion of this case will be whether the jury believes VH that its representative did not have access to those notices. But from the standpoint of liability and fair use, the absence of a notice has no bearing whatsoever. Neither the District Court, nor VH, cited any authority for such a proposition, and Brammer has been unable to locate any support for using the lack of notice in a fair use determination.

In fact, only the opposite is true. It is well established in the case law that while bad faith may weigh against a finding of fair use, the inverse is not true. *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1203 (Fed. Cir. 2018) (“[W]hile bad faith may weigh against fair use, a copyist’s good faith cannot weigh in favor of fair use. . . . [T]he innocent intent of the defendant constitutes no defense to liability.” (internal quotations and citations omitted)). The element of “good faith” is not listed as a fair use factor, and thus both the U.S. Supreme Court and the Fourth Circuit have rejected it as relevant to the fair use analysis. *Campbell*, 510 U.S. at 585 n.18 (intent not central to fair use); *Bouchat V*, 737 F.3d at 942 (4th Cir. 2013) (“As an initial matter, ‘good faith’ is not listed as a fair use factor in § 107 of the Copyright Act and it is questionable

whether allegations of subjective ‘bad faith’ could undercut a use that objectively was fair.” (citing *Campbell*, 510 U.S. at 585 n.18)).³

Indeed, a defendant’s “good faith” intent cannot be relevant to the liability phase of a copyright infringement case, because direct infringement (as contrasted with inducement or contributory infringement) is a strict liability offense. *See CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (“[T]he Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner’s rights.”); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016) (“Copyright infringement is a strict liability offense in the sense that a plaintiff is not required to prove unlawful intent or culpability[.]”). Instead, the culpability of the infringer in direct infringement cases is a damages issue; not a consideration as part of the fair use analysis. *See, e.g., Philpot v. LM Communs. II of S.C., Inc.*, Civil Action No. 5:17-CV-173-CHB, 2018 U.S. Dist. LEXIS 113927, at *20 (E.D. Ky. July 10, 2018) (“Nor can Defendant rely upon any assertion of innocence to defend against the claim of infringement, as the Court cannot excuse liability for

³ By contrast, in *Bouchat IV*, this Court did weigh the Baltimore Ravens’ conduct against it in finding its use in that situation was not fair: “The Ravens and the NFL are not innocent third parties documenting the history of the Ravens or the Ravens logo. Instead, defendants were responsible for the original copyright infringement, the use of the Flying B as the Ravens logo. Defendants cannot assert that it is a fair use to profit from that very same copyright infringement when the purpose of the use is not transformed.” *Bouchat IV*, 619 F.3d at 311.

infringement on this ground. . . . Rather, the Court may consider the relative culpability of the infringer, including willfulness, *in determining damages*, which is a question for another day.” (granting summary judgment in favor of plaintiff on claim for copyright infringement; rejecting fair use argument) (citations omitted)).

In other contexts involving strict liability offenses where the defendant’s intent is not an element of the tort, this Court has held that the defendant’s good faith is not a defense. *See Hobbs v. United States*, No. 90-1861, 1991 U.S. App. LEXIS 27696, at *9, *20 (4th Cir. Nov. 8, 1991) (affirming district court holding that good faith was not a defense to the strict liability violation alleged); *Telecomm. Sys. v. Mobile 365, Inc.*, No. 3:06CV485, 2009 U.S. Dist. LEXIS 126761, at *11 (E.D. Va. Mar. 31, 2009) (“The party’s intent is not material; as such, good faith is not a defense to civil contempt.”). Accordingly, the District Court’s reliance on VH’s purported good faith in analyzing the first fair use factor was in clear derogation of established case law.

In summary, the District Court’s analysis under the first fair use factor was based on legal error and clearly erroneous factual findings. A reasonable jury could find that VH’s use of the Photograph was non-transformative and was made for a commercial purpose. As such, this factor weighs in favor of Brammer, and the District Court’s opinion should be reversed.

III. FACTOR TWO: THE NATURE OF BRAMMER'S PHOTOGRAPH WEIGHS AGAINST FAIR USE

A. The District Court Erred by Considering the First Factor in its Second Factor Analysis; Standing Alone, the Photograph is a Highly Expressive Work

With respect to the second statutory fair use factor, the District Court committed legal error by importing its consideration of the nature of VH's purported transformative use, instead of evaluating the second factor in isolation. Nowhere in the language of 17 U.S.C. § 107(2) is there discussion of the nature of the *defendant's use* of a work. To be clear, "the second statutory factor, 'the nature of the copyrighted work,' draws on Justice Story's expression, the 'value of the materials used.'" *Campbell*, 510 U.S. at 586 (quoting 17 U.S.C. § 107(2)); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841) (emphasis added).

Thus, the second statutory fair use factor is focused on the nature of the original work, not on the nature of the defendant's use (which is the focus of the first fair use factor). Thus, putting aside the District Court's incorrect conclusion that VH's use was transformative and non-commercial (*see supra*), the consideration of any such transformative purpose in weighing the second factor was itself clear error.

Brammer's Photograph in this case is undoubtedly a highly creative and expressive, not factual, work. It is not just a mere snapshot of a street corner taken on a cellphone; the Photograph in this case is a highly creative work, involving a

number of creative choices including timing, lighting, angle, composition, time-lapse effect, and others. JA 16; 121; 128; 132. Taken to its logical conclusion, the District Court's opinion would deem any photograph of a real-world location to be a factual, thinly-protected work.

The Photograph therefore should not be analyzed based solely on the identity of its subject, as the District Court did here; rather, the focus should be on the various creative and original elements comprising the work itself. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). In short, this was not a conventional shot of the Adams Morgan neighborhood, and in fact, Brammer had to obtain special permission to photograph the street from his particular shooting location. JA 121; 128; 132; *see Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1120 (9th Cir. 2018) ("Rentmeester's photo is undoubtedly entitled to broad rather than thin protection. The range of creative choices open to Rentmeester in producing his photo was exceptionally broad; very few of those choices were dictated by convention or subject matter."). As such, this factor should weigh in favor of Brammer.

B. The District Court Erred by Weighing Pre-Publication in Favor of Fair Use

Without citation, the District Court held that the fact that Brammer had previously published the Photograph prior to VH's infringing use weighed in favor of fair use. JA 224 (Opinion, at 5). This proposition is entirely incorrect and constituted legal error.

Although the District Court provides no citation to any case law supporting this proposition, Brammer assumes, based on VH's summary judgment papers, that the District Court may have had in mind the Supreme Court's decision in *Harper & Row*, which held that "the scope of fair use is narrower with respect to unpublished works." *Harper & Row*, 471 U.S. 539, 564 (1985). However, it is a gross misinterpretation of copyright law to take that holding and declare the opposite is true by weighing the second factor in favor of the infringer. As the Supreme Court explained, there is a special right of first publication recognized in unpublished expressive works:

The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.

Harper & Row, 471 U.S. at 553; *see also iParadigms, LLC*, 562 F.3d at 641.

Below, VH argued, and the District Court held, that the *inverse* must then also be true. Not only does such a proposition defy logic, it has been expressly rebuked by other circuits. *See, e.g., Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 62 (1st Cir. 2012) ("However, the Monastery's remaining Works were published, reducing—to some extent—

concerns as to the Archbishop's unilateral publication of versions of them. But *that does not tip the fair use balance in favor of the Archbishop, even with respect to the previously published Works.*" (emphasis added) (citations omitted)); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 187 (D. Mass. 2007) (fact that photographs had been published before CBS's use of them "does not mean that this inquiry weighs in favor of fair use, only that [the] photographs do not fall into the category of private works to which the doctrine of fair use is especially unsuited.").⁴

⁴ Instead of weighing the second factor in favor of a defendant in circumstances where the work has been published, some courts simply decide to give the second factor less weight in the balancing test, but still weigh it in favor of the copyright holder. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612-13 (2d Cir. 2006) (describing district court's limitation on weight given to the second factor and finding fair use for a different reason). Brammer has located one recent federal magistrate's decision finding that this sub-factor can be neutral as to the parties in certain circumstances not present here. *Sinclair v. Am. Media, Inc.*, No. 18-CV-0823 (LAK)(SN), 2018 U.S. Dist. LEXIS 154116, at *18 (S.D.N.Y. Sep. 7, 2018) (recommending that because the work was previously published and contained both informational and creative elements, this factor, at best, should be neutral as to the parties). Below, VH cited to the Eastern District of Virginia's decision in *Philpot v. Media Research Ctr., Inc.*, 279 F. Supp. 3d 708 (E.D. Va. 2018) for the proposition that where a work is published "fair use is broader in scope" but in *Philpot*, the district court ruled the factor was neutral and in any event it wrongly misquoted and inverted this Court's decision in *iParadigms* 562 F.3d at 640, where this Court said that "fair use of an unpublished work is narrower in scope." *Philpot v. Media Research Ctr., Inc.*, 279 F. Supp. 3d 708, 718 (E.D. Va. 2018). Simply put, Brammer has located *no decisions* where the second factor was weighed *in favor of the defendant* simply because a work was previously published before the infringement, as the District Court did here, making its decision a unique outlier and further demonstrating it is wrong.

When weighed with the highly creative nature of Brammer's Photograph here, the second factor should be weighed in his favor on summary judgment, and the District Court's decision should be overturned.

IV. FACTOR THREE: THE AMOUNT AND SUBSTANTIALITY OF THE PHOTOGRAPH TAKEN WAS UNREASONABLE IN RELATION TO THE PURPOSE OF THE COPYING

The third fair use factor requires consideration of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). Regarding the “amount” taken, “as the amount of the copyrighted material that is used increases, the likelihood that the use will constitute a ‘fair use’ decreases.” *iParadigms, LLC*, 562 F.3d at 642 (internal citations and quotations omitted).

As to substantiality, “this statutory factor also requires courts to consider, in addition to quantity, the ‘quality and importance’ of the copyrighted materials used, that is, whether the portion of the copyrighted material was ‘the heart of the copyrighted work.’” *Id.* (internal citations and quotations omitted); *see Campbell*, 510 U.S. at 587.

Further, “the extent of permissible copying varies with the purpose and character of the use.” *Campbell*, 510 U.S. at 586-87 (1994). In other words, whether or not the use is commercial and transformative bears on how much of the first work can be taken in order to be considered a fair use.

A. VH's Minimal Alterations to the Photograph Weigh Against Fair Use

As argued more fully above, with respect to aesthetic alterations of the Photograph, VH's unauthorized copy involved minimal cropping of Brammer's Photograph. Two cases involving the alleged infringement of photographic works by appropriation artist Richard Prince are particularly instructive on how such alterations should be viewed under the third fair use factor.

In *Cariou v. Prince*, the Second Circuit determined that all but five works created by Prince were fair uses as a matter of law, because extensive physical alterations served to render the originally works barely recognizable and thus they were visually transformed. *Cariou v. Prince*, 714 F.3d 694, 710-11 (2d Cir. 2013). The Court declined to make a fair use determination on the five other works, remanding them to the district court, as they did "not sufficiently differ from the photographs of Cariou's that they incorporate for [the court] confidently to make a determination about their transformative nature as a matter of law." *Id.*

For the five remanded works, the Court noted that they began as "classical portraiture and landscape photos," but contained key differences when viewed in the context of defendant's work, including: lozenges painted over the subject's eyes and mouth, the addition of "cartoonish appendages" and enlarged hands, an electric guitar pasted onto the canvas, and cutting the subject out and taping it onto a blank canvas. *Id.* Nevertheless, despite the number of alterations which the

Court admitted “unarguably change the tenor of the piece,” the Court stated that “it is unclear whether these alterations amount to a sufficient transformation of the original work of art such that the new work is transformative.” *Id.* Thus, it could not determine whether there was fair use as a matter of law.

In another case involving Richard Prince, the district court more recently held again that a complete reproduction of a plaintiff’s photograph where the only changes made to the original were comments added by the defendant below the photograph, did not render the second work transformative as a matter of law, and therefore could not weigh the third factor in favor of the defendant. *Graham v. Prince*, 265 F. Supp. 3d 366, 382 (S.D.N.Y. 2017).

In each case, defendant’s use of plaintiff’s work involved more than “cropping,” yet even still the courts declined to hold that the third factor weighed in favor of the defendant. In light of these cases, it cannot seriously be doubted that the minimal cropping employed by VH here was insufficient to render its use fair under the third factor.

Moreover, *any* taking of Brammer’s Photograph was unreasonable in relation to the purpose of the copying, because VH could have used any number of public domain photos depicting the same street corner in Washington, D.C. or otherwise depicting the Adams Morgan neighborhood. As set forth by the U.S. Supreme Court, the third factor asks whether the “quantity and value of the

materials used are *reasonable in relation to the purpose of the copying.*”

Campbell, 510 U.S. at 586 (emphasis added). Here, even taking its disputed claim at face value, VH used Brammer’s Photograph for the purpose of providing information about Washington, D.C. for attendees of its film festival. The purpose of the copying and use had nothing to do with the Photograph itself. Therefore, there was no justification whatsoever for the use of Brammer’s work, since the purpose could have been effectuated by using any number of public domain photos depicting the same information.

Thus, any amount of taking was unreasonable when viewed in light of VH’s highly general purpose of promoting the Washington, D.C. area. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1179 (9th Cir. 2012) (“While we do not discredit Maya’s legitimate role as a news gatherer, its reporting purpose could have been served through publication of the couple’s marriage certificate or other sources rather than copyrighted photos. Even absent official documentation, one clear portrait depicting the newly married couple in wedding garb with the priest would certainly have sufficed to verify the clandestine wedding. Maya used far more than was necessary to corroborate its story—all three wedding images and three post-wedding photos. Thus, analyzing both the quantitative and qualitative aspects of the published material, this factor weighs against fair use.”).

B. VH Copied the “Heart” of the Photograph

Under the third factor, regardless of the quantity of the copyrighted work taken by the VH, “[w]hat matters is whether the alleged infringer used the ‘heart’ of the material; in other words, superficial editing or cropping does not impact the Court’s consideration.” *Fitzgerald*, 491 F. Supp. 2d at 188 (citing *Harper & Row*, 471 U.S. at 565; *Campbell*, 510 U.S. at 587).

Here, VH’s slight cropping of the Photograph does not assist its fair use argument.⁵ The heart of Brammer’s work remains intact in VH’s unauthorized use. The Photograph still clearly displays the focus of the original work—a time-lapse image of the Adams Morgan neighborhood. *Compare* JA 16, *with* JA 17. *See Fitzgerald*, 491 F. Supp. 2d at 188 (“Given the slight cropping of the photo but the preservation of most of the photo’s meaning, this factor is balanced between fair use and infringement. In any event, the overall significance of this factor to the fair use determination is minor.”).

⁵ Moreover, despite arguments concerning cropping, VH does not dispute that it copied the Photograph *in toto* before it cropped the version it published, a use that was not authorized by Brammer. *See Silicon Knights, Inc. v. Epic Games, Inc.*, 551 F. App’x 646, 648-49 (4th Cir. 2014) (“Silicon Knights also argues that its copying was *de minimis* as a matter of law. Yet Silicon Knights admits in its briefing that over 20% of the code in its game engine was copied from Unreal Engine 3, and Silicon Knights does not dispute that it copied Unreal Engine 3 *in toto* when it began development on *The Box*, a use that was not authorized under the parties’ written license agreement. Thus, it is clear that the jury had a legally sufficient evidentiary basis to find for Epic.” (citations omitted)).

For the foregoing reasons, the third fair use factor should weigh against a finding of fair use, and the District Court's decision should be overturned.

V. FACTOR FOUR: VH'S USE USURPS BRAMMER'S LICENSING MARKET FOR THE PHOTOGRAPH

The fourth fair use factor asks whether the infringing use impacts the "potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). The District Court here committed legal error by considering a post-infringement sale of a print version of the Photograph when evaluating the impact on the Photograph's market for Internet licenses (JA 134; 225 (Opinion, at 6)); and further made a clearly erroneous factual finding that a post-infringement license, granted retroactively by Brammer's licensing agent to resolve an infringement claim (JA 134; 116-28; 225 (Opinion, at 6)), demonstrates that the potential market for the future licensing of the Photograph was not impacted by VH's infringement.

A. The Market for Sales of the Photograph and the Licensing Market for the Photograph are Separate and Distinct Markets

The District Court committed a legal error by conflating the market for the sale of printed copies of the Photograph with the market for the licensing of the Photograph for Internet uses. The District Court weighed the fourth fair use factor in favor of VH based partly on the fact that Brammer sold a physical print of the Photograph after the infringement began. JA 225 (Opinion, at 6). This was legally erroneous.

Brammer testified that he exploits his Photograph in at least two distinct ways. First, he offers for sale physical prints of his Photograph that, for example, can be framed and hung up on an office wall or inside a home. JA 106; 114-15; 134. Second, he offers licenses for the use of copies of his Photograph to individuals and entities seeking to use the Photograph in connection with its publication on publicly viewable Internet websites. JA 101; 103; 115; 134. These are distinct markets. As such, evidence of success in one market post-infringement has no bearing whatsoever on the usurpation of the author's opportunities in another market post-infringement. *Advanced Comput. Servs. of Mich. v. MAI Sys. Corp.*, 845 F. Supp. 356, 366 (E.D. Va. 1994) (the infringer's "argument reflects a confusion as to the appropriate relevant market, which is the *market for licensing MAI's copyrighted software, not the market for selling MAI computers*. Plaintiffs' unauthorized use of MAI's copyrighted software clearly deprives MAI of license fees associated with the use of their software." (emphasis added)); *see also American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, at 930 (2d Cir. 1994) (court must consider the "impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets[.]"). Here, the market for Internet licenses of Brammer's Photograph is not just a potential market, it is a market he has already developed.

B. VH's Unauthorized Use of the Photograph Usurps the Licensing Market for the Photograph

VH's use of the Photograph serves as a market substitute for Brammer's copyright-protected Photograph, and that alone tips the balance of this factor in favor of Brammer. As the District Court acknowledged, Brammer has issued at least three usage licenses for the Photograph, and thus Brammer already has shown that the Photograph is capable of, and is, being exploited by him in the licensing market. *See* JA 225 (Opinion, at 6). As set forth in *Campbell*, the key inquiry under the fourth factor is whether the defendant's version of the photo can serve as a "market substitute" for the original. *See Campbell*, 510 U.S. at 587.

Here, it could not be clearer that that is the case. In its relatively unaltered form, the cropping employed by VH still displays what is the heart of the original work. Compare JA 16, *with* JA 17. Taken to its logical conclusion, an affirmance of the District Court's holding on this issue would mean that potential licensees of the Photograph will no longer be incentivized to pay a licensing fee to use the Photograph. Instead, they could simply copy the version published by VH for free. Therefore, VH's use presents the possibility of entirely usurping Brammer's licensing market. *See TCA Television*, 839 F.3d 168, 186 (2d Cir. 2016) ("[T]he district court disregarded the possibility of defendants' use adversely affecting the licensing market for the Routine." (citations omitted)); *House of Bryant Pubs, LLC*, No. 3:09-0502, 2009 U.S. Dist. LEXIS 101878, at *25-27 ("[T]he court must

accept as true the plaintiff's allegations that it regularly licenses 'Rocky Top' and that allowing this type of infringement to go unpunished would harm the plaintiff's licensing market. Moreover, the plaintiff responds that the defendant was not attempting to enter new, fair use markets through this clip; rather the defendant used the clip of 'Rocky Top' in precisely the same manner HOB would seek to license it. . . . The plaintiff contends that 'if every potential licensee could use 'Rocky Top' any time the state of Tennessee, Knoxville or UT were mentioned,' on a theory that the potential licensee was somehow exploiting a new 'fair use' market, 'HOB's licensing ability would be completely eroded.'"); *see also Richard Anderson Photography v. Brown*, Civil Action No. 85-0373-R, 1990 U.S. Dist. LEXIS 19846, at *5 (W.D. Va. Apr. 16, 1990) ("Assuming that the plaintiff is the owner of the copyright, I find that the defendant's use of photographic images used without license was not fair because such use denied the plaintiff licensing fees which clearly affects the value of the copyrighted work.").

C. The District Court Erred by Finding that a Post-Infringement Sale and License Weigh in Favor Of Fair Use

The District Court's basis for its finding in favor of VH under the fourth fair use factor was the fact that Brammer sold a physical print of the Photograph and issued a retroactive license, via his licensing agency for the purpose of settling an infringement claim, after the infringement in this case began. For the reasons stated above, the District Court's conflation of the print and licensing

markets was legal error, but even if the markets for physical prints and Internet licenses could be conflated, the District Court's decision also is clearly erroneous in finding that post-infringement sales or licenses by the copyright owner weigh in favor of fair use.

That is because the District Court misapplied the heart of the fourth fair use factor's inquiry. "In weighing this factor, a court properly looks to not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the *potential* market for the original." *TCA TV Corp.*, 839 F.3d at 186 (citing *Campbell*, 510 U.S. at 590) (emphasis added); *see* 17 U.S.C. § 107(4) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . (4) the effect of the use upon the *potential market for or value of the copyrighted work.*" (emphasis added)).

Here, especially because Brammer has demonstrated that there is an actual licensing market for his Photograph, the potential harm to the licensing market if the District Court's decision is upheld is readily apparent. It is simply not correct to infer that somehow this market is not affected negatively by VH's use because there was one single license issued for a third party's past infringement after VH's infringement occurred. The District Court cited no case law to support its

conclusion that a few post-infringement sales or licenses can demonstrate that the market would not be usurped, and no case law exists to support such a proposition.

Further, the law is clear that a copyright plaintiff is not required to show a decline in licensing requests for the Photograph in order for the fourth factor to weigh in its favor. *See Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (“The District Court’s assessment of the fourth factor in favor of the defendants was legally flawed. The Court relied primarily on the fact that the ROC episode had little likelihood of adversely affecting poster *sales* and that Ringgold had not claimed that her ability to license the poster had been negatively impacted. The first consideration deserves little weight against a plaintiff alleging appropriation without payment of a customary *licensing* fee. The second consideration confuses lack of one item of specific damages with lack of adverse impact on a potential market. *Ringgold is not required to show a decline in the number of licensing requests* for the ‘Church Picnic’ poster since the ROC episode was aired. The fourth factor will favor her if she can show a traditional, reasonable, or likely to be developed market for licensing her work as set decoration. Certainly unrestricted and widespread conduct of the sort engaged in by the defendants . . . would result in substantially adverse impact on the potential market for licensing of the original.” (emphasis added)); *see also House of Bryant*

Publs, LLC, No. 3:09-0502, 2009 U.S. Dist. LEXIS 101878, at *24 (“In similar cases to this one, the evidence presented as to this factor will often focus on the effect on the potential market for *licensing* of the relevant musical compositions. That is, where the copyright holder clearly does have an interest in exploiting a licensing market and *especially where the copyright holder has actually succeeded in doing so*, the fact that the defendant’s use deprived the plaintiff of licensing revenues it would have otherwise received is relevant to the fair use analysis.” (emphasis in original) (internal citations and quotations omitted)).

Here, the potential for an adverse impact on Brammer’s licensing market is clear. Therefore, this factor should weigh against a finding of fair use, and the District Court’s decision should be overturned.

CONCLUSION

In summary, the District Court committed both legal errors that this Court should reverse *de novo* and factual errors that this Court should reverse under its clearly erroneous standard of review. The District Court incorrectly analyzed each of the four fair use factors, by imposing improper standards on existing doctrines, using improper inverse reasoning, or conflating the prior holdings of this Court and the Supreme Court. For the reasons stated above, the District Court’s decision should be reversed.

REQUEST FOR ORAL ARGUMENT

Brammer respectfully requests that this Court hear oral arguments in this case.

Respectfully submitted,

/s/ David C. Deal

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I hereby certify that on October 22, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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/s/ Priscilla C. Winkler

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