

---

No. 18-1763

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

---

RUSSELL BRAMMER,

*Plaintiff-Appellant,*

v.

VIOLENT HUES PRODUCTIONS, LLC,

*Defendant-Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

---

**BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE*  
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

---

Keith Kupferschmid  
Terry Hart  
COPYRIGHT ALLIANCE  
1331 H Street NW  
Suite 701  
Washington, DC 20005  
(202) 540-2243

Jacqueline C. Charlesworth  
Michelle Choe  
COVINGTON & BURLING LLP  
The New York Times Building  
620 Eighth Avenue  
New York, NY 10018-1405  
(212) 841-1000  
jcharlesworth@cov.com

Beth S. Brinkmann  
Michael J. Gaffney  
COVINGTON & BURLING LLP  
850 Tenth Street NW  
Washington, DC 20001

October 29, 2018

*Counsel for Amicus Curiae  
the Copyright Alliance*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1763          Caption: Russell Brammer v. Violent Hues Productions, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Copyright Alliance  
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jacqueline C. Charlesworth

Date: October 29, 2018

Counsel for: The Copyright Alliance

**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:

/s/ Jacqueline C. Charlesworth  
(signature)

October 29, 2018  
(date)

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	6
I.    As the Supreme Court Has Recognized, for a Use to Be a Fair Use It Must Be Justified Under the Law and Not Merely a Misappropriation of Another’s Creative Effort.....	6
II.   In Analyzing the First Fair Use Factor, the District Court Misinterpreted the Transformative Use Inquiry, Mischaracterized the Nature of the Use as Noncommercial, and Improperly Credited the Infringer’s Alleged “Good Faith” at the Liability Stage. ....	8
A.   Mere Copying of a Photograph—Without a Change in Purpose—Does Not Qualify as Transformative. ....	8
B. <i>De Minimis</i> Alterations to a Copyrighted Work Do Not Render a Use Transformative. ....	12
C.   An Informational Purpose Does Not Render a Use Transformative. ....	15
D.   The Defendant Plainly Used the Copyrighted Photograph in a Commercial Way.....	17
E.   The Supposed Good Faith of the Defendant Company Is Not Relevant to Liability.....	19
III.  The District Court Also Erred in Its Interpretation of the Second, Third, and Fourth Factors of the Fair Use Analysis. ....	20
A.   The Copyrighted, Time-Lapse Photograph Is Artistic and Expressive, Not Factual.....	20
B.   The Defendant Copied and Used the Central Image That Was the “Heart” of the Copyrighted Photograph.....	22

C.    Widespread Conduct Like the Defendant’s Conduct Sanctioned by the District Court Would Usurp the Market for Copyrighted Stock Photographs.....	24
CONCLUSION .....	27
CERTIFICATE OF COMPLIANCE.....	28
CERTIFICATE OF SERVICE .....	29

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>A.V. ex rel. Vanderhye v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009) .....	<i>passim</i>
<i>Am. Geophysical Union v. Texaco Inc.</i> , 60 F.3d 913 (2d Cir. 1994) .....	18
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015) .....	14
<i>Authors Guild, Inc. v. HathiTrust</i> , 755 F.3d 87 (2d Cir. 2014) .....	9
<i>Balsley v. LFP, Inc.</i> , 691 F.3d 747 (6th Cir. 2012) .....	13
<i>Barcroft Media, Ltd. v. Coed Media Group, LLC</i> , 297 F. Supp. 3d 339 (S.D.N.Y. 2017) .....	17
<i>Blanch v. Koons</i> , 467 F.3d 244 (2d Cir. 2006) .....	13
<i>Bond v. Blum</i> , 317 F.3d 385 (4th Cir. 2003) .....	21, 22
<i>Bouchat v. Baltimore Ravens Ltd. P’ship</i> , 619 F.3d 301 (4th Cir. 2010) .....	<i>passim</i>
<i>Bouchat v. Baltimore Ravens Ltd. P’ship</i> , 737 F.3d 932 (4th Cir. 2013) .....	8–10, 19
<i>Brewer v. Hustler Magazine, Inc.</i> , 749 F.2d 527 (9th Cir. 1984) .....	23
<i>Burrow-Giles Lithographic Co. v. Sarony</i> , 111 U.S. 53 (1884).....	21
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	<i>passim</i>

<b>Cases</b>	<b>Page(s)</b>
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.</i> , 499 U.S. 340 (1991).....	15
<i>Fitzgerald v. CBS Broad., Inc.</i> , 491 F. Supp. 2d 177 (D. Mass. 2007).....	13, 23
<i>Folsom v. Marsh</i> , 9 F. Cas. 342 (C.C.D. Mass. 1841).....	20
<i>Fox News Network, LLC v. TVEyes, Inc.</i> , 883 F.3d 169 (2d Cir. 2018) .....	8, 24
<i>Harper &amp; Row, Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	6, 18, 22
<i>Infinity Broad. Corp. v. Kirkwood</i> , 150 F.3d 104 (2d Cir. 1998) .....	9
<i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2003) .....	14
<i>Monge v. Maya Magazines, Inc.</i> , 688 F.3d 1164 (9th Cir. 2012) .....	12, 17, 21, 23
<i>Murphy v. Millennium Radio Grp. LLC</i> , 650 F.3d 295 (3d Cir. 2011) .....	11, 14, 26
<i>Oracle Am., Inc. v. Google LLC</i> , 886 F.3d 1179 (Fed. Cir. 2018) .....	11, 12, 20
<i>Ringgold v. Black Entm't Television, Inc.</i> , 126 F.3d 70 (2d Cir. 1997) .....	12
<i>Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory</i> , 689 F.3d 29 (1st Cir. 2012).....	18
<i>Stewart v. Abend</i> , 495 U.S. 207 (1990).....	21
<i>TCA Television Corp. v. McCollum</i> , 839 F.3d 168 (2d Cir. 2016) .....	12

<b>Cases</b>	<b>Page(s)</b>
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975).....	6
 <b>Statutes</b>	
17 U.S.C. § 106.....	6
17 U.S.C. § 107.....	4, 6
 <b>Other Authorities</b>	
Fed. R. App. P. 29.....	1
H.R. REP NO. 94-1476 (1976).....	6
Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> .....	20
Pierre N. Leval, <i>Toward a Fair Use Standard</i> , 103 Harv. L. Rev. 1105 (1990).....	9
U.S. Const. art. I, § 8, cl. 8.....	6



## STATEMENT OF INTEREST<sup>1</sup>

*Amicus* the Copyright Alliance is a non-profit organization representing artists and innovators who depend upon copyright law to protect their creative works and livelihoods. Its members include thousands of individual creators, as well as trade groups and companies, representing a broad spectrum of creative output—from movies, to music, to photographs, to literature. The Copyright Alliance seeks to encourage the production of creative works for the benefit of the public by ensuring that those who make and invest in the development of such works are fairly compensated for their efforts.

The Copyright Alliance has a significant interest in the outcome of this case. The ability of Copyright Alliance members—and U.S. creators in general—to make a living from their craft depends upon courts’ properly interpreting the nature and scope of the exclusive rights provided under the Copyright Act. This includes articulating and applying the fair use doctrine—a doctrine on which Copyright Alliance members themselves frequently rely—in a way that furthers, not undermines, the purposes of copyright law.

---

<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), the Copyright Alliance states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a)(3), the Copyright Alliance has filed a motion for leave to file this brief.

The court below did not properly observe the boundaries of fair use. Instead, it ignored well-established principles when it condoned unauthorized, uncompensated reproduction and use of a copyrighted work in a manner that effectively destroys a critical licensing market for that work. The court's decision has potentially ruinous consequences for the many Copyright Alliance members who depend upon compensation generated by licensed uses of their creative works. The flawed fair use assessment of the court below negates a core market for professional photographers, and also provides inaccurate guidance on the doctrine that threatens the rights of other creator members of the Copyright Alliance.

### **SUMMARY OF ARGUMENT**

Ignoring fundamental tenets of the fair use doctrine, the court below held that the defendant's appropriation of Brammer's copyright-protected photograph from an online source and reproduction of the photograph to promote its own enterprise was permissible under the law, leaving the artist who took the photograph without any compensation for this exploitation of his creative work and ignoring its value to the defendant. Important rights of creators under the Copyright Act would be at risk if the district court's decision were upheld. The Act provides authors with exclusive rights in their creative works, including the right to reproduce and distribute them, to prepare derivative works from them, to perform and display them publicly, and to authorize others to engage in these activities. Without the ability to exercise and

enforce these rights, professional photographers, visual artists, and other authors, including Copyright Alliance members, would be unable to make a living from their creative endeavors.

The defendant, Violent Hues Productions, operates an annual film festival in the Washington, D.C. area, as well as a related website promoting the festival. On that website, the defendant sought to highlight additional Washington attractions, including the Adams Morgan neighborhood. Instead of taking its own photograph of Adams Morgan, the defendant found an appealing photograph of the neighborhood created by the plaintiff, photographer Russell Brammer, at another online location. The defendant did not seek permission or a license to use Brammer's photograph on its website or to promote its festival. Instead, the defendant simply copied it from the other site and posted it to the defendant's own site, cropping off a portion at the top and bottom to suit the defendant's layout needs.

It is hardly surprising that Violent Hues Productions would be drawn to Brammer's photograph, an eye-catching, time-lapse depiction of Adams Morgan that would be appealing to prospective festival attendees. The defendant's incorporation of Brammer's photograph into its film festival website was an archetypal use of a stock image—indeed, exactly the type of use on which photographers depend for their livelihoods. Although the photograph was removed after Brammer complained, Brammer received no licensing fee for the unauthorized

use. Brammer thus brought an infringement claim seeking compensation in the form of damages, as he was entitled to do. Rather than awarding Brammer the damages he was due, however, the district court improperly ruled that defendant's misappropriation of the copyrighted photograph was "fair use."

Contrary to the district court's decision, the fair use doctrine is not a broad prerogative to make unauthorized uses of creative works one finds online (or elsewhere) simply because it is easy to do. Nor is it a basis to deny plaintiffs such as Brammer damages for the unlicensed use of their works. It is, rather, an important—but limited—exception to infringement liability that affords "breathing space" in copyright law for criticism, commentary, and other justifiable uses of a copyrighted work that do not interfere with the original market for that work.

Section 107 of the Copyright Act, which codifies the fair use doctrine, enumerates four factors to be carefully considered and weighed together in evaluating a defense of fair use: (1) the purpose and character of the use, including whether it is of a commercial nature or for a nonprofit educational purpose; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work used in relation to the work as a whole; and (4) the effect of the use upon the potential market for or value of the work. 17 U.S.C. § 107; *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 637–38 (4th Cir. 2009). The district court erred in its application of each of these four factors.

Under the first factor, the court misinterpreted the nature of the use by Violent Hues Productions on its film festival website, incorrectly characterizing the use as transformative and noncommercial and improperly crediting that enterprise's supposed "good faith" in dismissing Brammer's claims. On the second factor, the court wrongly concluded that Brammer's highly expressive, time-lapse photograph was "factual" and "informational" and thus less deserving of protection. Third, the court ignored that the defendant copied the central image and essence of Brammer's photograph, homing in on and reproducing the "heart" of the work. Fourth, the court failed to consider the market harm to Brammer, and creators in general, that would result if widespread unauthorized copying of the type at issue is considered permissible.

If the district court's decision is upheld, these harmful misunderstandings will be further propagated in the law. The Copyright Alliance is particularly concerned about the district court's transformative use analysis. That analysis found, contrary to controlling precedent, that merely copying an image from one website to another can qualify as "transformative" and thus constitute a fair use. Such an approach not only ignores well-established law but has the potential to destroy the market for stock photographs and other artistic works, as well as the livelihoods of those who create them.

## ARGUMENT

### I. **As the Supreme Court Has Recognized, for a Use to Be a Fair Use It Must Be Justified Under the Law and Not Merely a Misappropriation of Another’s Creative Effort.**

Copyright law exists to allow authors to “secure a fair return for [their] creative labor” so that the public may benefit. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); *see also* U.S. Const. art. I, § 8, cl. 8 (Congress is empowered to “promote the Progress of Science and useful Arts” by enacting systems of copyright and patent protection). As the Supreme Court has explained, “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row*, 471 U.S. at 558. Section 106 of the Copyright Act enumerates the exclusive rights granted to authors under the Act. These include the right to reproduce, distribute, publicly perform, publicly display, and create derivative works based upon a copyrighted work, and to authorize others to do these things. 17 U.S.C. § 106.

In enacting the 1976 Copyright Act, Congress recognized the importance of allowing “breathing space” for certain limited uses of copyrighted works by codifying the judicially created doctrine of fair use as an exception to infringement liability. 17 U.S.C. § 107; H.R. REP NO. 94-1476, at 65 (1976); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (explaining that “transformative

works . . . . lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . .”). As is evident from section 107 itself, however, Congress did not allow for the presumptive rights of authors to be cast aside as a matter of convenience. There must be a legally recognized and specific justification for the unauthorized use of a copyrighted work; examples of such justifications appear in the preamble of section 107, which refers to uses for purposes of criticism, comment, news reporting, teaching, and the like as the types of uses that may qualify as fair uses. With these examples in mind, a court is required to conduct a fact-specific inquiry into a defense of fair use, analyzing that use under each of the four factors of section 107. In particular, in assessing whether a use is “transformative” under the first factor, the Supreme Court has instructed that the challenged use must not merely “supersede[] the objects of the original,” but instead should “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579 (citations and internal quotation marks omitted).

Unauthorized copying of a copyrighted work in a manner that is not justifiable under the principles set forth in section 107 is infringement. That is precisely what occurred in this case. The defendant copied Brammer’s copyrighted photograph without permission and used it for the very basic purpose of illustrating and enhancing the Violent Hues Productions website. Such a use is not “transformative,”

as the district court found, but is, in fact, exactly the type of use for which Brammer’s copyrighted photograph was created—and that photographers like Brammer license and rely upon for income. Unless reversed, the district court decision will embolden website operators and others to misappropriate copyrighted photographs and other visual works in the online environment, undermining copyright law and devaluing the creative efforts of Copyright Alliance members.

**II. In Analyzing the First Fair Use Factor, the District Court Misinterpreted the Transformative Use Inquiry, Mischaracterized the Nature of the Use as Noncommercial, and Improperly Credited the Infringer’s Alleged “Good Faith” at the Liability Stage.**

The court below erred when it found that the first factor of section 107’s fair use analysis favored the defendant. As articulated by this Court, “[t]he essential inquiry under the first factor can be separated into two parts: whether the new work is transformative, and the extent to which the use serves a commercial purpose.” *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 939 (4th Cir. 2013) (“*Bouchat V*”) (citations omitted). The district court misapplied both prongs, and erroneously considered an irrelevant factor of “good faith.”

**A. Mere Copying of a Photograph—Without a Change in Purpose—Does Not Qualify as Transformative.**

For a secondary use of a copyrighted work to be transformative, that use must do “something more than repackage or republish the original copyrighted work.” *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 176–77 (2d Cir. 2018)



(quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014)); *see also* *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (“[A] use of copyrighted material that ‘merely repackages or republishes the original’ is unlikely to be deemed a fair use.”) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)). Here it is readily apparent that Violent Hues Productions’ copying and pasting of Brammer’s photograph did not “add[] something new” or alter it with “new expression, meaning, or message.” *See Campbell*, 510 U.S. at 579; Leval at 1111.

This Court’s decisions in *Bouchat IV* and *Bouchat V* illustrate why the defendant’s use was not transformative. The Court explained in those cases that “[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.” *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 308–09 (4th Cir. 2010) (“*Bouchat IV*”) (alterations, quotation marks, and citation omitted). The *Bouchat* cases involved alleged infringement of a copyright-protected logo for the Baltimore Ravens’ football team called the “Flying B.” The original purpose of the logo was to serve as “an identifying symbol” of the Ravens, and, as such, “it represented the Ravens brand, differentiated Ravens players from members of opposing teams, and generally served as the focal point of promotional efforts.” *Bouchat IV*, 619 F.3d at 309; *Bouchat V*, 737 F.3d at 947. In *Bouchat IV*, the Court held that the team’s

reproduction of the Flying B logo in commercially distributed season highlight films was not transformative, explaining that the “use of the logo in the films serve[d] the same purpose that it did when defendants first infringed . . . [T]he Flying B logo identifies the football player wearing it with the Baltimore Ravens.” 619 F.3d at 309. Moreover, “[t]he simple act of filming the game in which the copyrighted work was displayed did not ‘add[] something new’ to the logo.” *Id.* (quoting *Campbell*, 510 U.S. at 579).

By contrast, certain incidental and historical representations of the Flying B logo—including in a display housed in the Ravens’ corporate lobby dedicated to “the history of the team”—were found by the Court to qualify as transformative fair uses.<sup>2</sup> *See id.* at 313–14. But the Court reached that conclusion only after finding that these additional uses did not serve the same purpose as the original work. Instead of serving as an identifying symbol as originally intended, the logo was used in the team’s corporate lobby as part of artifacts of the team’s history in a “museum-like setting.” *Bouchat IV*, 619 F.3d at 314; *see also Bouchat V*, 737 F.3d at 940 (fleeting appearance of logo in documentary films served historical, not original, purpose);

---

<sup>2</sup> The fair use analysis requires a case-by-case, fact-specific assessment. The Copyright Alliance is not suggesting that any incidental use of a work or use in a historical context would necessarily qualify as a fair use. *See Bouchat IV*, 619 F.3d at 309 (“Merely labeling a use as historical does not create a presumption of fair use.”).

*iParadigms*, 562 F.3d at 639 (reproduction of student papers for anti-plagiarism database transformative because it “had an entirely different function and purpose than the original works”).

No such change in purpose is present here. Unlike the transformation of the Ravens logo—from a team identifier to a relic of history—the use of Brammer’s photograph on Violent Hues Productions’ film festival website was exactly the same as the original purpose of the photograph: to offer the viewer a creative and inviting depiction of a Washington streetscape. Here, as in the *Bouchat* season highlight films, the use at issue was not transformative. The defendant merely lifted an artistic image and used it, without authorization or payment, for the very same purpose for which it was created.

Many other courts have similarly held that there is nothing transformative about copying an image or other work from one context to another. Indeed, “[t]o some extent, any use of copyrighted work takes place in a slightly different context than the original.” *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1202 (Fed. Cir. 2018). In *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011), for example, the court held that a radio show’s use of a copyrighted photograph of two “shock jocks” without the photographer’s authorization was not a fair use because the radio show “simply posted [the] photograph on their website.” *Id.* at 307. In the court’s words, defendants “did not want to go to the trouble of creating their own

eye-catching photo” but “simply appropriated” the image “for the same purpose” for which it was created. *Id.*; *see also Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (displaying a poster of Ringgold’s painting in the background of an episode of defendants’ television show was not transformative because the “defendants have used Ringgold’s work for precisely a central purpose for which it was created—to be decorative”); *TCA Television Corp. v. McCollum*, 839 F.3d 168, 182 (2d Cir. 2016) (rejecting claim that “Who’s on First?” routine was transformed even though performed in a “sharply different context”); *Oracle*, 886 F.3d at 1201 (“In any event, moving material to a new context is not transformative in and of itself . . .”).

The instant case presents a particularly stark example of mere copying from one context to another. Allowing such copying to be deemed fair use and precluded from liability would destroy the market for stock photography. Photographers license their photographs for use in various contexts, including on others’ websites. *See* Br. for the Digital Media Licensing Association as *Amicus Curiae* in Supp. of Appellant (“DMLA Br.”), at Part I.A.

**B. *De Minimis* Alterations to a Copyrighted Work Do Not Render a Use Transformative.**

Courts have routinely held that mere cropping of a copyrighted photograph, as occurred here, does not render a use transformative. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012) (finding that “neither minor

cropping nor the inclusion of headlines or captions transformed” the photographs such that publication in a magazine constituted a fair use); *Balsley v. LFP, Inc.*, 691 F.3d 747, 759 (6th Cir. 2012) (picture that was “unaltered other than for minor cropping . . . . did not add any creative message or meaning to the photograph”); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 188 (D. Mass. 2007) (“What 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.”) (citations and internal quotation marks omitted). Rather, in the cases where use of a photograph has been deemed transformative, the changes were more than trivial. For example, in *Cariou v. Prince*—which notably has been called the “high-water mark” of the Second Circuit’s recognition of transformative use by the Second Circuit itself—the court found certain collages using copyrighted photographs to be transformative because the “composition, presentation, scale, color palette, and media [were] fundamentally different and new compared to the photographs.” 714 F.3d 694, 706 (2d Cir. 2013); *see also Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (finding use of a fashion photograph with “changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects’ details and, crucially, their entirely different purpose and meaning” as “part of a massive painting” to be a transformative fair use).

The defendant’s modifications here—which were *de minimis* and did not effectuate any change in purpose or meaning—fall far short of the type of alterations that could conceivably support a claim of transformative use, even if one looks to the permissive interpretations of transformative use espoused by the Second Circuit in *Cariou* and *Koons*. Violent Hues Productions simply took Brammer’s copyrighted photograph from one website and posted it to its own, cropping the top and bottom edges and leaving the central time-lapse street scene—that is, the “heart” of the work—intact.

Indeed, defendant’s cropping here appears to have been entirely functional, rather than creative, in nature; it evidently sought to conform the photograph to the size and shape of the other photographs on the same webpage. *See* JA139, 159–61. Such an unremarkable change, which did not add new purpose or meaning, does not qualify as transformative.<sup>3</sup> Instead it seems that Violent Hues Productions simply “did not want to go to the trouble of creating [its] own eye-catching photo.” *Murphy*, 650 F.3d at 307.

---

<sup>3</sup> Nor was the use equivalent to a database of books, thumbnail images, or term papers, where the content is being used for search purposes, rather than for consumption. *See Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *iParadigms*, 562 F.3d at 630. In any event, the Copyright Alliance questions the fair use analysis in such “functional” use cases, and believes that the transformative use doctrine has moved too far in favor of finding fair use in those contexts. There is no need further to address these cases in the instant discussion, however, because the infringement at issue clearly does not fall into the “functional” use category.

**C. An Informational Purpose Does Not Render a Use Transformative.**

The district court concluded that the use here was “transformative in function and purpose” because Brammer’s original purpose in creating the photograph was “promotional and expressive” whereas, in the court’s view, Violent Hues Productions’ purpose in using the photograph was “informational.” JA223. Such flawed logic, if upheld, would set a dangerous precedent that could essentially eliminate protection for copyrighted photographs and other works in myriad contexts.

All types of copyrighted works convey some type of information. Photographs, movies, books, and other creative works often describe or depict people, places, and things. Although copyright law does not protect ideas, such as the concept of a city neighborhood at night, it does protect an artist’s chosen expression of an idea—in this case, the particular way the artist has chosen to depict the Adams Morgan neighborhood in a time-lapse photograph. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349–50 (1991) (noting that “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work”). While Brammer certainly cannot prevent other photographers from taking their own original photographs of the Adams Morgan neighborhood, he owns and is entitled

to protect the creative expression that is embodied in *his* photograph of Adams Morgan.

The fact that the use of a copyrighted photograph or other work conveys some sort of information does not entitle a company like Violent Hues Productions to copy the work without permission for use on its website. If the unauthorized use of a copyrighted work could be justified simply by asserting that the work “convey[s] information,” copyright protection could disappear altogether. Almost any use of a copyrighted work would satisfy that test, whether the work was a photograph, book, movie, or song. A website owner could without authorization copy and post the *Star Wars* trilogy to inform visitors of the true identity of Luke Skywalker’s father, or stream the *Hamilton* soundtrack to provide insight into the lives of the Founding Fathers—but those uses would certainly not be considered fair uses.

In this case, Violent Hues Productions used Brammer’s photograph on its film festival website because the photograph depicted an area near the festival, which simply underscores the fact that the company’s use was a typical one for a photograph—namely, to accompany and enhance the written content of its site. Significantly, there were a number of ways defendant could have achieved its purpose without violating the Copyright Act. It could have sought and obtained permission to use Brammer’s photograph, or taken and used its own photograph of the Adams Morgan neighborhood. Or, it could have licensed an alternative



photograph from a stock photography website. If the goal were to disseminate information about a neighborhood, any of these options would have sufficed. There was no particular need to use Brammer’s photograph here. *See* Appellant’s Br. at Part I.B; DMLA Br. at Part I.

Courts have been clear in rejecting fair use claims based upon uses such as the defendant’s here. In *Barcroft Media, Ltd. v. Coed Media Group, LLC*, 297 F. Supp. 3d 339 (S.D.N.Y. 2017), for example, the court disallowed an asserted fair use defense by a website that posted celebrity photographs to accompany its gossip articles. The court recognized that affording fair use protection merely because the photographs were “used in conjunction with a news story about the subject of that photograph” would eviscerate copyright protection for many photographs. *Id.* at 352; *see also Monge*, 688 F.3d at 1175 (while under copyright law a user “possesses an unfettered right to use any factual information revealed through the photos for the purpose of enlightening its audience,” the user “can claim no need to bodily appropriate” the expression of that information “by utilizing portions of the actual photos”) (citation, internal quotation marks, and alterations omitted). This Court should likewise reject the fair use claim here.

**D. The Defendant Plainly Used the Copyrighted Photograph in a Commercial Way.**

The district court erroneously determined that the defendant’s use of Brammer’s photograph was “non-commercial” because, according to the court, it

was “not used to advertise a product or generate revenue.” JA223. This characterization was plainly inaccurate. The photograph was used in connection with commercial activity: a website promoting defendant company’s film festival, an event generating paid ticket sales. *See* JA139–40, 216. That the defendant, a limited liability corporation, is not organized as a nonprofit only underscores the commercial nature of the use.

As this Court has explained, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use [of the copyrighted work] is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Bouchat IV*, 619 F.3d at 311 (quoting *Harper & Row*, 471 U.S. at 562). The “commercial-noncommercial distinction” thus looks beyond “whether a user intends to line his own pockets” and “encompasses other non-monetary calculable benefits or advantages.” *Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012).

Even if the defendant had been a nonprofit, in evaluating the “commercial use” factor under section 107, courts look beyond the status of the user and focus on the nature of the use. *See id.* (finding that a nonprofit entity can “profit” from the use of another’s copyrighted work “[r]egardless of whether [the infringing use] generated actual financial income” for the nonprofit); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921–22 (2d Cir. 1994) (“[A] court’s focus should be on

the *use* of the copyrighted material and not simply on the *user . . .*”). Here, the defendant’s use was a standard illustrative use of a copyrighted photograph for which a well-established market exists and users are expected to pay.

The district court’s cursory analysis to the contrary appears to be based on the mistaken premise that, unless a user markets or sells the photograph itself, use of the photograph cannot be commercial, regardless of the context in which it is used. That is not the law; nor should it be. An entity, whether nonprofit or for-profit, cannot avoid paying for its copying of a valuable creative work simply because the copy is not being sold. In this case, while the defendant did not sell the copy it made of Brammer’s photograph, the defendant exploited the copy without paying the “customary price”—that is, the licensing fee. That makes it a commercial use for purposes of the fair use analysis. *See Bouchat IV*, 619 F.3d at 311 (explaining that it is “customary for NFL teams to license their copyrighted logos for use in any number of commercial products” and that the plaintiff “did not receive the customary price for the use of his copyrighted logo”).

**E. The Supposed Good Faith of the Defendant Company Is Not Relevant to Liability.**

In dismissing Brammer’s infringement claim based upon Violent Hues Productions’ assertion of fair use, the district court improperly credited the defendant’s supposed “good faith” as part of the fair use analysis. But “‘good faith’ is not listed as a fair use factor in § 107,” as this Court has recognized. *Bouchat V*,

737 F.3d at 942. “[W]hile bad faith may weigh against fair use, a copyist’s good faith cannot weigh in favor of fair use.” *Oracle*, 886 F.3d at 1203. Cf. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.08[B][1] (Matthew Bender ed. 2018) (“In actions for statutory copyright infringement, the innocent intent of the defendant constitutes no defense to liability. . . . [T]he injury is worthy of redress, regardless of defendant’s innocence.”).

The defendant used Brammer’s copyrighted photograph without permission in order to enhance its company’s website for its own gain. This does not constitute “good faith.” Even if it did, it certainly cannot overcome a finding of infringement. *See Campbell*, 510 U.S. at 585 n.18 (“[G]ood faith does not bar a finding of infringement.”) (citing *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841)). While the defendant company removed the photograph after receiving notice of the infringement, this fact may be relevant at most to the proper amount of damages owed—not to whether the defendant’s copying and exploitation of the photograph without permission qualifies as a fair use.

### **III. The District Court Also Erred in Its Interpretation of the Second, Third, and Fourth Factors of the Fair Use Analysis.**

#### **A. The Copyrighted, Time-Lapse Photograph Is Artistic and Expressive, Not Factual.**

The second factor in the fair use analysis turns on the nature of the copyrighted work. It “focuses attention on the extent to which a work falls at the core of creative

expression” in that “a fictional work might be closer to the core of copyright than a factual work.” *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003), *abrogated on other grounds by Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1984 n.1 (2016) (citation omitted); *see also iParadigms*, 562 F.3d at 640 (“[A] use is less likely to be deemed fair when the copyrighted work is a creative product.”) (quoting *Stewart v. Abend*, 495 U.S. 207, 237 (1990)).

The district court erred in holding that this second factor weighed in favor of Violent Hues Productions’ fair use defense on the ground that Brammer’s copyrighted photograph was “a factual depiction of a real-world location.” JA224. Depicting an actual location does not render a photograph “factual” or unprotectable. It is well established that photographs of real-world subjects qualify for copyright protection. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (holding that a photograph of Oscar Wilde was original and entitled to copyright protection based upon posing of Wilde, and selection and arrangement of props and lighting); *see also Monge*, 688 F.3d at 1177 (“Photos are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright.”).

The photograph in this case is imbued with the photographer’s artistic choices, including an unusual perspective and time-lapse elements. Far from being “factual,” it is highly creative and at the “core” of what copyright is intended to protect. *See*

*Bouchat IV*, 619 F.3d at 311 (holding that “creative works” are near “the core of works protected by the Copyright Act”) (citation, internal quotation marks, and alteration omitted).

The district court further erred in concluding that the second factor favored fair use because the copyrighted photograph had been published by Brammer. While an infringer’s fair use defense may be less likely to prevail in the context of the copying of an *unpublished* work, *see iParadigms*, 562 F.3d at 640; *Bond*, 317 F.3d at 395–96, the fact that a work is published does not weigh in favor of fair use.

**B. The Defendant Copied and Used the Central Image That Was the “Heart” of the Copyrighted Photograph.**

The third factor of the fair use analysis calls for consideration of the amount and substantiality of the portion of the original copyrighted work that is used in the allegedly infringing copy. “Generally speaking, ‘as the amount of the copyrighted material that is used increases, the likelihood that the use will constitute a ‘fair use’ decreases.’” *iParadigms*, 562 F.3d at 642 (quoting *Bond*, 317 F.3d at 396). But “in addition to quantity, the quality and importance of the copyrighted materials used” must be considered—“that is, whether the portion of the copyrighted material [used] was the heart of the copyrighted work.” *Id.* (citations and internal quotation marks omitted); *see also Harper & Row*, 471 U.S. at 564–65 (concluding that short excerpts of President Ford’s unpublished memoirs were not a fair use given that they

constituted “the heart” and “the most interesting and moving parts” of the manuscript).

The district court here wrongly determined that the third factor favored Violent Hues Productions based on the basic cropping it performed to fit Brammer’s photograph onto the company’s website. In so doing, the court ignored the fact that the defendant took the central image, and heart, of the photograph. Indeed, by cropping the top and bottom edges, the infringing use homed in on the most creative aspects of the work, *e.g.*, the street scene and time-lapse features. Even if the cropped portions were as much as half (as suggested by the district court), the unauthorized copying was quantitatively and qualitatively substantial, contrary to the district court’s conclusion.

As noted above, cropping a photograph in the manner done here is not considered transformative. Nor does it tip the third factor in favor of fair use. That is especially true where, as here, the most creative and significant aspects of the photograph remain intact. *See, e.g., Monge*, 688 F.3d at 1178 (finding that, despite cropping, “‘heart’ of each individual copyrighted picture was published” by the infringer and weighed against fair use); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) (third factor weighed against fair use because “only a small portion of the photograph was cropped off”); *Fitzgerald*, 491 F. Supp. 2d at 188

(noting that while defendant edited the copyrighted photograph by cropping it, defendant “use[d] most of the ‘heart’ of the photo” and did not change its meaning).

**C. Widespread Conduct Like the Defendant’s Conduct Sanctioned by the District Court Would Usurp the Market for Copyrighted Stock Photographs.**

Under the fourth fair use factor, courts must consider not only whether the defendant’s individual use of the copyrighted work would harm the market, but also whether widespread unauthorized copying of the type at issue would, in the aggregate, cause market harm. The Supreme Court has explained that the fourth factor thus requires courts to ask “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.” *Campbell*, 510 U.S. at 590 (citation and internal quotation marks omitted). Accordingly, courts must look beyond the “market harm caused by the particular actions of the alleged infringer.” *TVEyes*, 883 F.3d at 179 (quoting *Campbell*, 510 U.S. at 590).

The district court here built its market harm analysis on a flawed foundation because it erroneously concluded that the defendant’s use of the copyrighted photograph was transformative. When a court makes such a mistake and finds a use to be transformative under the first factor, the court may be less likely to conclude that the infringing copy serves as a market substitute for the original. *Campbell*, 510 U.S. at 591 (finding market harm under the fourth factor is more likely when a use



“amounts to mere duplication” of the original, whereas when a court finds under the first factor that “the second use is transformative,” “market substitution” is “less certain”); *iParadigms*, 562 F.3d at 643 (“The analysis of whether the disputed use offers a market substitute for the original work overlaps to some extent with the question of whether the use was transformative.”); *see also Bouchat IV*, 619 F.3d at 313 (“We have already found that defendants’ use of the Flying B logo in the highlight films is not transformative and that the logo is used for a commercial purpose. These findings, and defendants’ failure to show the lack of a market, require us to weigh the fourth factor against a finding of fair use.”); *id.* (“When a use is not transformative, market substitution is more likely.”).

The market harm analysis in this case should have proceeded from the understanding that the use in question was not transformative, and thus might well usurp licensing opportunities for Brammer’s copyrighted work. The court acknowledged that Brammer had licensed and been paid by others for uses of the photograph in question, so a market for the work was clearly established. JA225; *see also* JA133–34. More generally, the existence of a market for stock photography, including for licensed online uses, is a matter of common knowledge. As the Third Circuit explained in *Murphy*, “if it were possible to reproduce [a professional photographer’s] unaltered work, as a whole, without compensation under the guise of news reportage—a traditional, reasonable, or likely to be

developed market for professional photographers—it would surely have a substantially adverse impact on his ability to license his photographs.” 650 F.3d at 308 (internal quotation marks and alterations omitted).

As this Court has elaborated, a market for the use of copyrighted visual art exists even absent any proof that the infringer’s revenue flows from the misappropriated work:

If a football team decides that it needs a logo, it can either design one itself or hire a graphic artist to design one. A market does not fail to exist for the product of the designer’s services (here, the logo) simply because the football team’s profits do not ultimately derive from the use of that logo.

*Bouchat IV*, 619 F.3d at 312. The court below was thus misguided in its judgment that there was no adverse impact on the market for the licensing of Brammer’s copyrighted photograph because the defendant “did not sell copies of the photo or generate any revenue from it.” JA226.

Copyright Alliance members fear the harm that would follow if this Court were to embrace the deeply flawed approach of the district court. *See* DMLA Br. at Part I.B. The market for stock photographs—especially the licensing of photographs for website use—would be gravely impaired if copying of the type at issue here were widely condoned as “fair use.” Moreover, declaring such unauthorized reproduction and use of another’s copyrighted work to be legitimate, and not deserving of

compensation, destroys the licensing market not only for photographers, but other creators as well.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

/s/ Jacqueline C. Charlesworth  
Jacqueline C. Charlesworth

Keith Kupferschmid  
Terry Hart  
COPYRIGHT ALLIANCE  
1331 H Street NW  
Suite 701  
Washington, DC 20005  
(202) 540-2243

Jacqueline C. Charlesworth  
Michelle Choe  
COVINGTON & BURLING LLP  
The New York Times Building  
620 Eighth Avenue  
New York, NY 10018-1405  
(212) 841-1000  
jcharlesworth@cov.com

Beth S. Brinkmann  
Michael J. Gaffney  
COVINGTON & BURLING LLP  
850 Tenth Street NW  
Washington, DC 20001

October 29, 2018

*Counsel for Amicus Curiae  
the Copyright Alliance*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Jacqueline C. Charlesworth  
Jacqueline C. Charlesworth  
COVINGTON & BURLING LLP  
The New York Times Building  
620 Eighth Avenue  
New York, NY 10018-1405  
(212) 841-1000  
jcharlesworth@cov.com

October 29, 2018

*Counsel for Amicus Curiae  
the Copyright Alliance*

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of October, 2018, a true and correct copy of the foregoing Brief was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Jacqueline C. Charlesworth  
Jacqueline C. Charlesworth  
COVINGTON & BURLING LLP  
The New York Times Building  
620 Eighth Avenue  
New York, NY 10018-1405  
(212) 841-1000  
jcharlesworth@cov.com

October 29, 2018

*Counsel for Amicus Curiae  
the Copyright Alliance*