

Appeal No. 18-1763

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United States Court of Appeals  
for the Fourth Circuit

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RUSSELL BRAMMER,  
*Plaintiff-Appellant,*

v.

VIOLENT HUES PRODUCTIONS, LLC,  
*Defendant-Appellee.*

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

Case No. 1:17-cv-01009-CMH-IDD  
The Honorable Claude M. Hilton, United States District Judge

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**BRIEF OF THE DIGITAL JUSTICE FOUNDATION AS AMICUS CURIAE  
IN SUPPORT OF RUSSELL BRAMMER AND REVERSAL**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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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: \_\_\_\_\_

Date: \_\_\_\_\_

Counsel for: \_\_\_\_\_

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## INTEREST OF AMICUS CURIAE

The Digital Justice Foundation (“DJF”)<sup>1</sup> is a 501(c)(3) nonprofit dedicated to protecting individual rights in digital spaces. As part of this mission, the DJF advocates for individual rights, including civil liberties, privacy rights, and intellectual-property rights, especially where such rights are implicated by the internet and other digital technologies.

The subject matter of this appeal implicates the DJF’s mission because this appeal has significant consequences for the ability of members of the public to protect their online photography from commercial exploitation. As an appeal about copyright infringement where the defendant made no attempt to license or clear the online photograph for lawful use, this appeal has significant implications for how private individuals can protect their online photos from commercial exploitation.

Here, the DJF is concerned about the district court’s contortions of fact and law to reach a finding of fair use below. Fair use is an incredibly important exception to copyright infringement. But, it is an exception. As the DJF’s brief demonstrates, the decision below is at odds with the broad corpus of fair-use

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the DJF certifies that (i) no party or party’s counsel authored this brief in whole or in part; (ii) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person other than the DJF and its counsel contributed money intended to fund the brief’s preparation or submission.

decisions and one that, if affirmed, would have serious negative repercussions for photographers, profession and amateur alike.

Thus, the DJF urges this Court to reverse the decision below.

## **REPRODUCTION OF THE RELEVANT STATUTORY SECTION**

- Section 107 of Title 17 of United States Code reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.



## **ISSUE PRESENTED**

1. Whether Defendant-Appellee Violent Hues Productions, LLC's infringing use of Plaintiff-Appellant Russell Brammer's photograph was a fair use.

## STATEMENT OF THE CASE

### **A. The Infringement**

This lawsuit is about garden-variety online infringement. Fernando Mico, the owner of Defendant-Appellee Violent Hues Productions, LLC (“VH”), went online, found a photograph he wanted to post on his business website, and posted it. Dist. Ct. Mem. Op. at 2, J.A. at 221. He made no inquiry to see if the photo was under copyright protection and made no attempt to lawfully license the photography for use in his business. Id. When Mr. Mico was caught in infringement, he removed the photograph from his website. Id.

### **B. The Decision Below**

Plaintiff-Appellant Russell Brammer sued for copyright infringement. The district court held that VH’s infringement was a fair use on summary judgment. Dist. Ct. Mem. Op. at 7, J.A. at 226.

On the first factor, the district court viewed the infringement as a transformative use because the purpose of VH’s use was “informational,” id. at 4, J.A. at 223, even though the specific webpage on VH’s website where Mr. Brammer’s photo appeared is almost entirely devoid of information, see Compl. Ex. 3, J.A. at 18. Then, the district court made the entirely irrelevant conclusion that the use was “in good faith.” Dist. Ct. Mem. Op. at 4, J.A. at 223.

On the second factor, the district court admitted that the photograph itself was expressive, but held that VH had “used the photo purely for its factual content” and noted that the work was published “without any indication that it was copyrighted.” Id. at 5, J.A. at 224.

On the third factor, the district court held that VH “used no more of the photo than necessary to convey the photo’s factual content[.]” Id. at 6, J.A. at 224.

On the fourth factor, the district court opined that the ongoing sale or licensing of Mr. Brammer’s photograph meant that VH’s infringement did not affect the market for the photograph. Id.

## SUMMARY OF THE ARGUMENT

1. The decision below is far out of the mainstream for fair use decisions. The infringement at issue advances none of the salutary public policy goals ordinarily associated with a fair use. Instead, this infringement interferes with a core licensing market.
2. This was not “good faith” infringement. Instead, it was negligent infringement by an infringer whose line of business—film festivals—would reasonably lead the infringer to have some familiarity with to copyright. Taking a minute of time to conduct a simple reverse image search on Google would have revealed that this work was subject to copyright protection and needed a license.
3. The fair use decision below is hard to square with the plethora of freely available, high-quality photography that depicts the Adams Morgan neighborhood. Numerous such photographs can be found on Flickr under a Creative Commons license in what is likely the same amount of time it took Mr. Mico and Violent Hues Productions, LLC, to find and infringe Mr. Brammer’s copyright. The difference is that Creative Commons licenses are free and lawful to use.
4. Affirming would harm the public interest. In the era of social media, everyday persons, not just professional photographers, have an important

interest in control over the use of their photographs. Affirming would undermine that control without any important advantage for the public, i.e., without advancing innovation, competition, education, scholarship, or free expression. This Court should reverse.

## ARGUMENT

### **I. The district court’s fair use decision is far outside the mainstream.**

Courts have often described fair use as a “case-by-case” analysis. See, e.g., Bouchat v. Baltimore Ravens Ltd. P’ship, 737 F.3d 932, 938 (4th Cir. 2013) (“‘case-by-case’ basis”), Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 21 (1st Cir. 2000) (“case-by-case analysis”).

Despite this description, extensive scholarly work has identified key trends that emerge from the corpus of fair use decisions. See e.g., Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. Pa. L. Rev. 549, 554 (2008) (seeking “systematically to induce from the population of section 107 opinions what our fair use doctrine actually is in practice”).

Pertinent here, Professor Pamela Samuelson has conducted a near-exhaustive analysis of the “common patterns” that underlie fair use holdings. Pamela Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. 2537, 2541 (2009). Professor Samuelson concludes that there are five types of uses, or “policy-relevant clusters,” where courts have traditionally found fair use, id. at 2543:

1. Free Speech and Expression Fair Uses: Works that “criticize, comment upon, or offer new insights about those works and the social significance of others’ expressions” are often deemed fair uses. Id. at 2549. Examples include parodies, critiques, critical

commentaries, news reporting, and certain appropriation art. Id. at 2549-66.

2. Authorship-Promoting Fair Uses: The constitutional purpose to further the development of creative expression leads courts to sometimes allow “second authors to make productive use of earlier works.” Id. at 2569. Examples include scholarship, social and cultural commentary, and incidental uses. Id. at 2570-76.
3. Uses That Promote Learning: “Teaching, scholarship, and research” are uses specifically enumerated in the preamble of Section 107 and are seen as uses that promote “public access to knowledge.” Id. at 2581.
4. Foreseeable Personal or Noncommercial Uses: Fair use decisions have also authorized uses “for private, noncommercial purposes, for litigation and other legitimate government purposes, and for some commercial advertisements.” Id. at 2588. Notably, the fair uses in advertising were to permit *comparative* advertising between competing products or to permit a company to advertise a positive review it had received in Consumer Reports. Id. at 2598-99.
5. Unforeseen Uses: The last category of fair uses include innovative technologies that facilitate personal uses of copyrighted works and

uses of copyrighted works that improve competition or innovation.

Id. at 2603-06.

Notably, Violent Hues (“VH”) did not use Mr. Brammer’s photo in any of these salutary ways. First, VH makes no critical commentary or analysis of Mr. Brammer’s photograph. Instead, Mr. Mico just posted the photograph on VH’s website. Second, VH does not infringe in a manner that furthers the purposes of the Copyright Act, i.e., by creating original expressions that could not otherwise be created but for the infringement.

Third, although the district court described the use as “informational,” Dist. Ct. Mem. Op. at 4, J.A. at 223, it is hard to see how the infringement provides any information in context. VH’s infringement is certainly not educational in the sense that it provides scholarship or teaching materials—or anything close. Fourth, VH’s infringement is not a personal use, but a commercial use. It is neither comparative advertising nor a reference to a positive review of VH’s film festival. Fifth and finally, VH’s use is not innovative. It does nothing to further competition or promote innovation.

Instead, the infringement here is garden-variety infringement. It advances none of the salutary public policy goals ordinarily associated with fair use. In fact, VH’s infringement is best characterized as something that Professor Samuelson notes is almost most often held to not to be fair use: interference with a “core



licensing market.” Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. 2537, 2560. Mr. Brammer’s primary livelihood as a photographer is to license his photographic works or sell copies of them. And the Copyright Act’s *raison d’être* is to provide Mr. Brammer and photographers like him with compensation.

Thus, the district court’s analysis is a highly anomalous application of fair use. Rather than implicating the traditional categories of fair use that importantly prevent copyright from being overextended in a manner detrimental to the public interest, the district court’s decision is a massive extension of fair use to a traditional market for photographers: online licenses.

The district court’s decision is far outside of the mainstream for fair use decisions.

**II. Violent Hues did not act in good faith and it could have easily confirmed that this work was subject to copyright,**

Likely, the district court rendered its anomalous decision because it believed VH’s infringement was “in good faith.” Dist. Ct. Mem. Op. at 4, J.A. at 223. The district court emphasized Mr. Mico’s subjective state of mind in posting the photograph and that he took Mr. Brammer’s photo down when he received a demand letter. Id. at 2, J.A. at 221.<sup>2</sup>

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<sup>2</sup> It is also empirically supported that, all else equal, district courts are significantly more likely to find fair use when an individual, rather than a corporation, brings a

However, there is a strong reason to doubt a characterization that this infringement was in good faith. As the district court itself notes, Violent Hues “organizes an annual film festival, the ‘Northern Virginia Film Festival.’” Id. It is hard to imagine that this entire film festival operates without any organizational knowledge of copyright law, the licensing of works, or other aspects of copyright law. After all, a film festival is by definition a series of public performances of audiovisual works, i.e., films.

Although this fact does not support a finding of willful infringement by VH, it undermines an argument that VH had truly no idea that it might be infringing copyright by publicly displaying Mr. Brammer’s unlicensed photo on its website. Moreover, that Mr. Mico “saw no indication that the photo was copyrighted,” id., is a poor defense of his conduct. Again, it is improbable that the films shown in the festival indicate their copyright protection throughout, but Mr. Mico presumably has some idea that the films he shows are copyrighted.

“Good faith entails not only honesty in fact, but reasonableness as well.” Peer Int’l Corp. v. Latin Am. Music Corp., 161 F. Supp. 2d 38, 48 (D.P.R. 2001). Here, VH did not act reasonably because it made no effort to ascertain whether the photograph was in fact copyrighted. A couple seconds of effort would have

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copyright claim. See Matthew Sag, Predicting Fair Use, 73 Ohio State L.J. 47, 66-67, 78 (2012).

enlightened VH: a reverse image search of the photograph at issue on Google brings up Mr. Brammer's website.<sup>3</sup> Or, Mr. Mico could have found that Mr. Brammer retained all the rights to the instant photograph on his Flickr account. Either way, a few keystrokes would have supplied Mr. Mico the information he needed: that this work needed a license, just like many of the films VH publicly performs at VH's film festival.

In this sense, VH's infringement was not in good faith, but was, at best, well-meaning negligence. Indeed, VH itself was the least cost avoider of its infringement. It should not be rewarded for this infringement by a public-policy exception through a finding of fair use.

Plaintiff-Appellant Brammer has already extensively discussed why this "good faith" is not legally relevant to a determination of fair use. See Pl.-Appellant's Br. at 21-25, see also Bouchat v. Baltimore Ravens Ltd. P'ship, 737 F.3d 932, 942 (noting that "'good faith' is not listed as a fair use factor in § 107"). But, the DJF adds to this discussion that yet another aspect of Mr. Mico's purported good faith is legally irrelevant.

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<sup>3</sup> In fact, Mr. Brammer's website is the first result once the extensive blogosphere criticism of the district court's opinion is excluded from the search results. Obviously, Mr. Mico would not have seen that criticism had he search prior to this lawsuit.

The district court credited Mr. Mico’s decision to remove the photo from his website upon receiving the demand letter. Dist. Ct. Mem. Op. at 2, J.A. at 221. This expedient removal is irrelevant to a finding of fair use and liability because Mr. Mico, the owner of VH himself, posted the photograph. If a third-party unrelated to VH had posted it, there would be no liability for VH because the Digital Millennium Copyright Act’s safe harbor provisions would apply. See 17 U.S.C. § 512(c)(1). But those are not the facts of this case. VH itself, not a third party, infringed.

**III. Violent Hues could have easily found and freely used similar high-quality photographs through a Creative Commons license.**

Moreover, VH’s infringement is especially unacceptable considering the various available alternatives available to infringement.

Mr. Brammer’s brief effectively addresses how the availability of public domain works or stock photography licenses undermines VH’s reliance on a fair use defense to copyright infringement. See Pl.-Appellant’s Br. at 32-33 (“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.”).

This Court, however, should also consider how the ample availability of works subject to a Creative Commons license presents another important dimension to the fair use analysis here.

Creative Commons is a nonprofit corporation that has developed and popularized certain standardized licenses that allow copyright holders to distribute and license works, often for free. See “Creative Commons: Share Your Work,” accessed Oct. 29, 2018, <https://creativecommons.org/share-your-work/>. Through partnerships with major online media platforms, including Flickr, YouTube, and Vimeo, Creative Commons has helped to establish an online ecosystem where over 1.4 billion creative works are subject to Creative Commons licenses. Id. Many are subject to licensing for free. Other are may be licensed for free if the licensee attributes the copyrighted work to the creator.

Here, Plaintiff-Appellant Russell Brammer published his photograph on Flickr, an online photography site, where he clearly indicated that his photograph was subject to copyright and that all rights were reserved. See Compl. Ex. 2, J.A. at 17. By contrast, other photographers had published their works on Flickr and volunteered those works to the Creative Commons via Creative Commons licenses. Indeed, a number of these works are also high-quality photography of the very Adams Morgan neighborhood that Mr. Brammer depicted in his infringed work. A few examples include:

- A daytime photograph of the Adams Morgan neighborhood, available for free with author attribution. See <https://www.flickr.com/photos/taedc/15054540987/> (photo taken Sept. 14, 2014).
- A daytime festival at an Adams Morgan intersection, available for free with author attribution. <https://www.flickr.com/photos/taedc/15054527037/> (photo taken Sept. 14, 2014).
- A darker daytime showing of still other building constituting the Adams Morgan neighborhood, available for free with author attribution. <https://www.flickr.com/photos/taedc/7144560613/> (photo taken May 4, 2012).

These are not the only examples. The DJF easily located four additional photos that were available for free, with photographer attribution, on Flickr.<sup>4</sup> Notably, these images were not hard to find. Flickr permits easy filtering by Creative Commons license, so that licenses available for free and for commercial use can be located with ease.

The doctrinal uptake of these available alternative photos of Adams Morgan is simple. Not only would the smallest of efforts have permitted Mr. Mico and VH

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<sup>4</sup> See (1) <https://www.flickr.com/photos/taedc/15054548087/>, (2) <https://www.flickr.com/photos/taedc/15240710012/>, (3) <https://www.flickr.com/photos/taedc/15054338459/>, and (4) <https://www.flickr.com/photos/taedc/15054338459/>.

to realize that Mr. Brammer’s photograph was subject to copyright protection, efforts just as minimal would have led Mr. Mico to comparable works highlighting the Adams Morgan neighborhood. To boot, these works were available *for free* under a Creative Commons license. These high quality, freely available works place a greater burden on VH to justify its infringement of Mr. Brammer’s specific work.

But, VH’s use of the work on its website as an aesthetically pleasing depiction of a neighborhood where the film festival would take place could have been met by any of these other photographs. Because VH could have easily used freely available works from the Creative Commons to achieve its purpose, the infringement of Mr. Brammer’s photograph was particularly unreasonable here and should weigh strongly against a finding of fair use.

Instead of performing a search that would have taken VH mere minutes—probably no longer than it took Mr. Mico to find Mr. Brammer’s photo in the first place—VH made unauthorized use of Mr. Brammer’s copyrighted photograph. By analogy, VH’s actions are akin to going to the mall to shoplift a candy bar when free samples are being handed out next door.

The availability of other, freely available works depicting Adams Morgan undermines the rationale of using Mr. Brammer’s photograph for its informational

purposes rather than for the aesthetic qualities and artistic choices possessed in the infringed photograph.

**IV. Affirming would harm the public interest, not just professional photographers.**

There are important reasons for this Court to be especially solicitous of photographic copyrights. As the Supreme Court has acknowledged, “photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law.” Cnty. for Creative Non-Violence v. Reid, 490 U.S. 730, 747 n.13 (1989) (quoting with approval a Copyright Office memorandum).

But, this case does not only implicate the rights of professional photographers. The ubiquity of the internet has revolutionized nearly every corner of 21st Century American life, and copyright law is no exception.

An often-overlooked impact of the internet, and especially social media, is that for the first time in history most citizens have become both creators and publishers of “fixed expressions,” i.e., the subject matter of copyright. Therefore, this Court should make its decision in light of the fact that most citizens in 21st Century America are copyright content creators, not merely copyright users.

Copyright has been particularly impacted by the internet’s current web 2.0 architecture in which user-generated content makes up a substantial



portion of the web’s content. Simply put, in 2018 most citizens are copyright creators. And, in 2018 most citizens are creating and distributing their works to the public for consumption through social media, but like Mr. Brammer are not surrendering their copyrights in their family photos, vacation albums, or, more seriously, nude self-photographs, to just any passerby. User-created expressions are ubiquitous online including: photographs, videos, social media posts, blogs, online reviews, emails—but they are also protected by copyright.

The emergence of most Americans as copyright creators puts an increased importance on the individual copyright creator, who is often less legally sophisticated and often has diminished access to legal representation than copyright owners of the pre-internet age. And, it makes the rights of the individual copyright holder on the internet more important because those rights are an important backstop for privacy in an era where online platforms are constantly changing their privacy policies and how much they expose works. The harmful misappropriations of copyrighted works online are legion and copyright law plays an important role in limiting what other online actors can do with private photographs shared online.

Often, fair use decisions implicate a public-interest in favor of fair use. This case is different. A finding of fair use in no way advance public interests in innovation, competition, scholarship, education, or expression. To the contrary, a

finding of fair use puts everyday persons photography at risk of commercial exploitation by those with whom they have no relationship whatsoever. The public interest scales here weigh in favor of reversal and against fair use.

## **CONCLUSION**

This Court should reverse.

October 30, 2018

Respectfully submitted  
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATIONS**

Excluding the parts of the document exempted by Rule 32(f) and local rule,  
this motion contains 3529 words.

This brief has been prepared in Microsoft word using Times New Roman,  
size 14-point font.

/s/ Andrew Grimm  
Andrew Grimm

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 30, 2018, I electronically filed the foregoing with the Clerk of this Court using this Court's CM/ECF system. Participants in this case who are CM/ECF users, or represented by CM/ECF users, are hereby served by CM/ECF.

/s/ Andrew Grimm  
Andrew Grimm