
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
No. 1:17-cv-01009

BRIEF FOR APPELLEE

Judson D. Brown
Thomas P. Weir
Paul J. Weeks
KIRKLAND & ELLIS, LLP
655 15th Street, NW
Washington, DC 20005
202-879-5000
judson.brown@kirkland.com
tom.weir@kirkland.com
paul.weeks@kirkland.com

Counsel for Defendant-Appellee

November 19, 2018

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Violent Hues Productions, LLC is a limited liability company organized under the laws of Virginia. It is not a publicly held entity, it has no parent entity, no publicly held entity owns any portion of it, and no publicly held entity has a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE ISSUES.....	4
STATEMENT OF THE CASE	5
A. Factual Background.....	5
B. Procedural History	7
STANDARD OF REVIEW.....	9
SUMMARY OF ARGUMENT.....	9
ARGUMENT	11
I. Brammer’s Attempts to Alter the Record Below Are Improper and Should Be Rejected.....	11
II. The District Court Correctly Determined That VHP’s Use Was Fair.....	18
A. VHP’s Use Was Transformative, Noncommercial, and Done in Good Faith	21
1. VHP’s Use Was Transformative.....	22
2. VHP’s Use Was Noncommercial.....	33
3. Good Faith Is Relevant to the Fair Use Determination and Weighs in Favor of VHP	36
B. The Second Fair Use Factor Weighs in Favor of VHP	40
C. Under the Third Factor, the District Court Correctly Determined That VHP Used No More Than Was Necessary to Effectuate Its Purpose	45

D.	VHP’s Noncommercial Use Had No Effect on the Actual or Potential Market for the Photo	49
III.	Affirmance Will Not Significantly Undermine Non-Party Photographers’ Copyright Protections	56
	CONCLUSION	61

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A.V. ex rel. Vanderhye v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009).....	<i>passim</i>
<i>A.V. v. iParadigms LLC</i> , 544 F. Supp. 2d 473 (E.D. Va. 2008).....	29
<i>Am. Geophysical Union v. Texaco Inc.</i> , 60 F.3d 913 (2d Cir. 1994)	51
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	14
<i>Authors Guild, Inc. v. HathiTrust</i> , 755 F.3d 87 (2d Cir. 2014)	50
<i>Bill Graham Archives, LLC v. Dorling Kindersley Ltd.</i> , 386 F. Supp. 2d 324 (S.D.N.Y. 2005).....	39
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	29, 34
<i>Bond v. Blum</i> , 317 F.3d 385 (4th Cir. 2003).....	<i>passim</i>
<i>Bouchat v. Balt. Ravens Football Club, Inc.</i> , 346 F.3d 514 (4th Cir. 2003).....	14
<i>Bouchat v. Balt. Ravens Ltd. P’ship</i> , 619 F.3d 301 (4th Cir. 2010).....	<i>passim</i>
<i>Bouchat v. Balt. Ravens Ltd. P’ship</i> , 737 F.3d 932 (4th Cir. 2013).....	<i>passim</i>
<i>Brookshire v. C.F. Sauer Co.</i> , 63 F. App’x 736 (4th Cir. 2003)	17

Campbell v. Acuff-Rose Music, Inc.,
 510 U.S. 569 (1994) *passim*

Custer v. Pan Am. Life Ins. Co.,
 12 F.3d 410 (4th Cir. 1993)..... 13

Erwin v. United States,
 591 F.3d 313 (4th Cir. 2010)..... 14

Field v. Google Inc.,
 412 F. Supp. 2d 1106 (D. Nev. 2006)..... 39

Foster v. Univ. of Md.-E. Shore,
 787 F.3d 243 (4th Cir. 2015)..... 28

Fox News Network, LLC v. Tveyes, Inc.,
 883 F.3d 169 (2d Cir. 2018) 22

Harper & Row Publishers, Inc. v. Nation Enters.,
 471 U.S. 539 (1985) *passim*

Kelly Springfield Tire Co. v. Dowis,
 1994 WL 378093 (4th Cir. July 20, 1994) 13, 17

Kelly v. Arriba Soft Corp.,
 336 F.3d 811 (9th Cir. 2003)..... 27, 30, 43, 53

Liberles v. Cty. of Cook,
 709 F.2d 1122 (7th Cir. 1983)..... 17

New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.,
 904 F.2d 152 (2d Cir. 1990) 44

Nunes v. Mass. Dep’t of Corr.,
 766 F.3d 136 (1st Cir. 2014) 15

Nuñez v. Caribbean Int’l News Corp.,
 235 F.3d 18 (1st Cir. 2000) 29, 39, 41, 44

NXIVM Corp. v. Ross Inst.,
 364 F.3d 471 (2d Cir. 2004) 38, 49

Oracle Am., Inc. v. Google LLC,
886 F.3d 1179 (Fed. Cir. 2018) 38

Perfect 10, Inc. v. Amazon.com, Inc.,
508 F.3d 1146 (9th Cir. 2007) 22

Philpot v. Media Research Ctr. Inc.,
279 F. Supp. 3d 708 (E.D. Va. 2018) 54

*Roy Export Co. Establishment of Vaduz, Liechtenstein, Black
Inc., A. G. v. Columbia Broadcasting System, Inc.*,
503 F. Supp. 1137 (S.D.N.Y. 1980)..... 30, 31

Seltzer v. Green Day, Inc.,
725 F.3d 1170 (9th Cir. 2013) 44

Sony Corp. of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) *passim*

Springer v. Durflinger,
518 F.3d 479 (7th Cir. 2008) 15

Stewart v. Abend,
495 U.S. 207 (1990) 40

Sundeman v. Seajay Soc’y, Inc.,
142 F.3d 194 (4th Cir. 1998) *passim*

Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.,
756 F.3d 73 (2d Cir. 2014) 30, 33

Statutes

17 U.S.C. § 107..... 19, 20, 45, 49

Digital Millennium Copyright Act (DMCA), 17 U.S.C. §
1202(b) 7, 8, 9

Rules

E.D. Va. Local Civ. R. 56 13

Fed. R. Civ. P. 56 13

Other Authorities

H. Ball, *Law of Copyright & Literary Property* 260 (1944)..... 19

H.R. Rep. No. 94-1476 (1976)..... 38

Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L.
Rev. 1105, 1111 (March 1990) 23, 27

PRELIMINARY STATEMENT

This case involves a relatively minor dispute that Appellant has vehemently attempted to blow out of proportion on appeal. The facts are simple and undisputed: (i) Plaintiff-Appellant Russell Brammer took a photograph and posted it widely online in order to promote his photography skills; (ii) Defendant-Appellee Violent Hues Productions, LLC (“VHP”) saw the photograph online, believed it was in the public domain, and incorporated a portion of the photograph into an informational webpage; (iii) Brammer discovered this use, and threatened to sue unless VHP paid an exorbitant settlement fee; (iv) VHP immediately took the photograph down, and (v) after registering a copyright for the photo, Brammer sued VHP in federal court.

Despite bringing the suit, Brammer made little effort to participate in the litigation. He conducted almost no discovery, and even moved for a protective order to avoid giving a deposition—his sole rationale being that the case was so insignificant that sitting for a deposition was unduly burdensome. After discovery ended and VHP moved for summary judgment, Brammer failed to present a single factual dispute in response, barely responded to VHP’s fair use

arguments, and abandoned one of his claims. Presented with an undisputed record and clear binding precedent from this Court and the Supreme Court, the District Court granted summary judgment and held that VHP's use was "fair use" under the Copyright Act.

Now, after losing in litigation that he believed was too minor to require his participation, Brammer appeals to this Court to save him from his own failures below. There is no valid reason to do so.

Initially, much of what Brammer presents to this Court on appeal was never put before the District Court below. For instance, he argues that the lower court committed error by resolving certain factual issues at summary judgment, since a "reasonable jury" could have resolved those issues in Brammer's favor. Yet Brammer failed to raise a single factual dispute in his response to VHP's summary judgment motion below, thus conceding the facts as presented by VHP. As a result, the District Court did not resolve factual issues at all, but simply applied the facts that Brammer himself could not dispute. Indeed, even on appeal, Brammer cannot identify a single genuine issue of fact, as he fails to cite any record evidence for the factual disputes he now attempts to manufacture.

In addition, Brammer argues that the District Court committed error by failing to address or consider myriad fair use arguments that Brammer never presented below. This holds the District Court to an unfair and improper standard—if Brammer wanted the District Court to consider his arguments in opposition to summary judgment, it was incumbent upon him to actually put those those arguments before the court. He failed to do so, and those arguments are waived on appeal.

Even if they were not waived, however, Brammer's fair use arguments have little merit. For instance, several times he presses for bright-line rules where none exist; and the law is clear that such rules cannot exist under the flexible standards for fair use. Other times he urges the Court to adopt rules that have no basis in precedent, or goes so far as to suggest rules that directly contradict this Court's decisions. In all, Brammer makes little effort to show how the District Court's decision was not consistent with binding authority. That is because he cannot. The District Court applied the decisions of this Court and the Supreme Court to the undisputed facts before it, and correctly determined that VHP's use was fair.

Finally, both Brammer and amici argue that affirmance will result in widespread harm to photographers and other copyright holders. This is highly unlikely. The facts and circumstances of this case—most notably the fact that VHP’s use was noncommercial and had no effect on the actual or potential market for Brammer’s photograph—are such that this case should be easily distinguished from the vast majority of legitimate infringement suits. Moreover, the Supreme Court and this Court have made clear that noncommercial and innocuous uses—such as VHP’s use here—do not threaten the goals underlying the copyright laws and should be deemed fair. To hold otherwise would simply inhibit the flow of information without any countervailing benefit, and would unnecessarily subject benign uses of copyrighted works to onerous infringement suits.

The District Court’s decision should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined that VHP’s noncommercial and transformative use of Brammer’s photograph was fair use under the Copyright Act.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff-Appellant Russell Brammer is a freelance photographer. JA 39. On November 19, 2011, he took the photograph at issue in this case (the “Photo”), which depicts a portion of the Adams Morgan neighborhood in Washington, D.C. JA 50. In 2012, Brammer began posting the Photo to various websites online, including his personal website, his Facebook page, his personal “Flickr” webpage, and his personal “Smugmug” webpage. JA 50, 58. Brammer’s sole purpose in capturing the Photo and disseminating it freely online was to advertise his skills as a photographer. JA 58. Though Brammer has sold a handful of prints and licenses for the Photo, he has never made any affirmative efforts to market the Photo for print sales or licensing. JA 59. In September 2016—after the infringement alleged in this case began—Brammer filed for copyright registration of the Photo. JA 58-59. That application was granted in July 2017. JA 59.

Defendant-Appellee Violent Hues Productions, LLC (“VHP”) is a small business that organizes and runs an annual film festival called the “Northern Virginia Film Festival.” JA 59. In 2014, VHP created a “plan your visit” page on the festival’s website. *Id.* The page was not

intended to promote the festival, but rather to be a reference guide to the area for filmmakers whose work had been accepted to the festival. *Id.* To that end, the page provided information about hotels, restaurants, and stores near the festival, as well as various places that attendees might want to visit while in the Washington, D.C. area. JA 59-60. In 2016, VHP incorporated approximately half of the Photo into this reference webpage in order to inform attendees that Adams Morgan was one of a dozen places that they might want to visit. JA 159-62. When VHP's owner found the Photo online, he saw no indication that it was copyrighted and believed it was in the public domain. JA 60.

VHP first learned that the Photo might have been copyrighted when it received a demand letter from Brammer's counsel in February 2017. JA 60. The letter demanded that VHP immediately cease using the Photo, and pay \$4,500 to avoid litigation.¹ JA 60, 164-65. Brammer's counsel also attached Sections 504 and 505 of the Copyright Act, which provide the potential remedies for infringement—including

¹ Brammer later admitted that he valued actual damages in this case at only \$1,250. *See* JA 41. He has previously licensed the Photo for as little as \$75. JA 134.

actual damages, statutory damages of up to \$150,000, and attorney's fees. JA 168. The letter closed by threatening that "[t]he longer this matter continues, the more costly it will become to resolve without litigation. This is especially true if Violent Hues Productions attempts to avoid the responsibility of infringement or employ engages [sic] in delaying tactics." JA 165.

After receiving the letter, VHP immediately removed the Photo from its webpage. JA 60. Brammer's counsel then contacted VHP more than ten times over the ensuing six months trying to extract a settlement. JA 40. Those efforts were ultimately unsuccessful.

B. Procedural History

On September 10, 2017, Brammer filed suit against VHP in the United States District Court for the Eastern District of Virginia. JA 1. The Complaint asserted claims for copyright infringement and "removal and alteration of integrity of copyright management information" under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202(b). JA 13-14. Brammer sought actual damages, statutory damages, and attorney's fees. JA 15. VHP's owner initially attempted to represent

his company pro se, but the Court ordered him to obtain counsel, and VHP retained pro bono counsel soon after. JA 4.

The parties then proceeded with discovery. In an attempt to avoid sitting for a deposition in the very district where he brought suit, Brammer admitted that he had no valid claim for statutory damages or attorney's fees, conceding that the "case does not involve the possibility of statutory damages nor attorneys' fees pursuant to 17 U.S.C. § 504(c)," because Brammer did not register his copyright until after the alleged infringement began. JA 41.

Following discovery, VHP moved for summary judgment. VHP argued that it was entitled to summary judgment on Brammer's infringement claim because its use was "fair use" under the Copyright Act, and that Brammer had abandoned his DMCA claim by failing to develop any evidence to support that claim during discovery. JA 57-58. As required by the Local Rules, VHP's brief included a section that listed undisputed facts supporting its motion. JA 58-61. In response, Brammer did not dispute a single one of those facts or list any material fact that he contended was disputed. JA 178-85. Though he argued that VHP's use was not fair, Brammer's opposition brief failed entirely

to address his DMCA claim. *Id.* (Brammer's counsel officially abandoned the claim at the summary judgment hearing several weeks later, *see* JA 217, 221-22.)

After hearing argument on VHP's summary judgment motion, the District Court issued an opinion in which it found, based on the undisputed facts, that VHP's incorporation of the Photo into its reference webpage constituted fair use, and that Brammer had abandoned his DMCA claim. JA 220-27. On July 3, 2018, Brammer appealed the District Court's fair use determination. JA 228.

STANDARD OF REVIEW

"The fair use defense presents a mixed question of law and fact. In this arena we review the district court's legal conclusions *de novo* and its findings of fact for clear error." *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301, 307 (4th Cir. 2010) ("*Bouchat IV*") (citations omitted).

SUMMARY OF ARGUMENT

I. Brammer's attempts to alter the factual record below and present new legal arguments on appeal are impermissible. Though he failed to dispute a single fact on summary judgment below, Brammer now attempts to inject various factual disputes on appeal in order to

cast doubt upon the District Court's holding. Yet if Brammer had evidence to support these factual disputes, it was incumbent upon him to present it below. He did not. Indeed, even on appeal, he cannot actually cite to record evidence to support these supposed factual disputes. Instead, he relies solely on speculation and conjecture, neither of which are proper grounds for opposing summary judgment.

Similarly, Brammer presents a slew of legal arguments on appeal that were never presented below, and claims that the District Court committed error by failing to consider them. Yet, again, if Brammer believes those arguments were important to the lower court's consideration of VHP's summary judgment motion, he needed to raise them below. He did not. Those arguments have thus been waived, and the Court need not consider them on appeal.

II. The District Court correctly determined that VHP's use of the Photo was "fair use" under the Copyright Act, and Brammer's arguments to the contrary are meritless. In essence, Brammer asks this Court to either create factual disputes where none existed below; or establish new fair use rules that have no basis in binding authority, or are at odds with that authority. The District Court's decision resulted

from the application of binding precedent to the undisputed facts before it. That decision was entirely correct, and should be affirmed.

III. The harms predicted by Brammer and amici are unlikely to occur if the District Court's decision is affirmed. Initially, the facts of this case are sufficiently unique such that affirmance is highly unlikely to have any significant effect on photographers' copyright protections. More importantly, the Supreme Court has made clear that noncommercial uses which have no effect on the market for a copyrighted work—such as the use at issue here—need not be prohibited in order to preserve the incentive to create, and should be deemed fair. To hold otherwise would simply inhibit the flow of information or the creation of new works without any countervailing benefit, and would subject benign uses like the one here to onerous copyright infringement suits.

ARGUMENT

I. Brammer's Attempts to Alter the Record Below Are Improper and Should Be Rejected

Significant aspects of Brammer's fair use arguments are fatally flawed because they rest on the presumption that the District Court

committed “clear error” when resolving certain factual issues that were undisputed below. By way of example, Brammer tells the Court that:

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. 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.

Br. (Doc. No. 19) 11 (footnote omitted). And similarly:

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.

Id. at 19. But what Brammer fails to tell the Court is that the District Court’s so-called “factual findings” were not findings at all. Instead, the facts underlying the opinion were based on those put forth in VHP’s summary judgment motion—facts that Brammer chose to concede by failing to respond to them. *See* JA 58-61, 178-85.

This Court has repeatedly cautioned—as have the Federal Rules of Civil Procedure and the Local Rules below—that a party’s failure to

properly “respond to a summary judgment motion may leave uncontroverted those facts established by the motion.” *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir. 1993); *see also, e.g., Kelly Springfield Tire Co. v. Dowis*, 1994 WL 378093, at *1 (4th Cir. July 20, 1994) (per curiam) (“The party opposing summary judgment must come forward with some minimal facts to show that summary judgment is not warranted.”); Fed. R. Civ. P. 56(e) (“If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may ... (2) consider the fact undisputed for purposes of the motion.”); E.D. Va. Local Civ. R. 56(B) (“In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.”). Despite these unambiguous warnings, Brammer did not contest a single fact included in VHP’s statement of undisputed facts supporting its motion. JA 58-61, 178-85; *see also* E.D. Va. Local Civ. R. 56(B) (opposition to summary judgment motion “shall include a specifically captioned section listing all material facts as to which it is contended that there

exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute”).

Instead, Brammer chose to proceed solely on the basis of unsupported speculation. Once again, this Court has warned parties repeatedly not to do so—“neither ‘[u]nsupported speculation,’ nor evidence that is ‘merely colorable’ or ‘not significantly probative,’ will suffice to defeat a motion for summary judgment.” *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (alteration in original; citations omitted); *see also Erwin v. United States*, 591 F.3d 313, 319 (4th Cir. 2010) (“[T]o defeat summary judgment” a party “cannot create a material fact by reliance on conclusory allegations or bare denials”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”).

Brammer therefore gets it all wrong when he argues, for example, that the District Court’s decision was “clearly erroneous” because “[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.” Br.11. No “reasonable jury” could make that finding because the *undisputed facts* below were that Brammer captured and posted the Photo for the purpose of advertising his photography skill, and that VHP’s purpose in using the Photo was to provide information as part of a reference guide. *See* JA 58-60. Contrary to Brammer’s argument, the District Court did exactly what it was supposed to do—take the undisputed facts presented in the motion for summary judgment and apply the law to them.

Brammer is similarly wrong when he argues that the District Court erred in making a determination regarding good faith because “good faith is obviously a factual determination for a jury after observing the demeanor of a witness.” Br.21. “Generally speaking, a party cannot raise a genuine dispute merely by relying on the hope that the jury will not trust the credibility of the witness, but must instead present some affirmative evidence on the point.” *Nunes v. Mass. Dep’t of Corr.*, 766 F.3d 136, 142 (1st Cir. 2014) (citation omitted); *see also Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (“The ... argument in opposition to summary judgment boils down to an allegation that defense witnesses are lying and the stated reasons for

the school's actions are phony.... However, when challenges to witness' credibility are *all* that a plaintiff relies on, and he has shown no independent facts—no proof—to support his claims, summary judgment in favor of the defendant is proper.” (emphasis in original)).

It was Brammer, not the District Court, who chose to rely on speculation and conjecture below instead of developing a factual record. Having done so, Brammer must live with that record. Instead, he casts blame on the District Court and doubles down on factual arguments grounded only in lawyer-hypothesis (such as when he argues that “it could not be clearer” that “defendant’s version of the photo can serve as a ‘market substitute,’” Br.37) and re-imagination of the record (such as when he incorrectly contends that “VH’s highly general purpose” in using the Photo was to “promot[e] the Washington, D.C. area,” Br.33). Tellingly, even now, Brammer fails to support these counterfactual contentions with any citation to the record. The Court should not entertain Brammer’s attempts to re-create the facts of this case on appeal.

Unsurprisingly, Brammer also puts blame on the District Court for supposed “legal errors” that are actually the necessary consequences

of Brammer's litigation choices. In numerous instances throughout his brief, Brammer makes arguments that he failed to make below, even though those arguments were clearly implicated by VHP's motion for summary judgment. "If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal." *Brookshire v. C.F. Sauer Co.*, 63 F. App'x 736 (4th Cir. 2003) (per curiam; citation omitted); *Kelly Springfield Tire*, 1994 WL 378093, at *1 ("Issues raised for the first time on appeal generally will not be considered."); *Liberles v. Cty. of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983) ("It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal.").

For example, while Brammer claims now that "the District Court's conflation of the print and licensing markets was legal error," Br.38-39, he made no argument regarding the need to assess these markets separately below, instead only asserting (without citation to evidence) that "Buchanan [sic] earns a significant portion of his income by

licensing his copyrighted work ... to clients as well as third parties that did not hire him to capture the original photographs,” JA 184. Similarly, while Brammer dedicates a significant portion of his brief to arguing that the “District Court erred by according any weight whatsoever to VH’s purported good faith in evaluating the first fair use factor,” Br.21-25, he made no mention of this argument below, and indeed conceded that good faith was relevant when he argued only that “Defendant did not use Copyrighted Photograph in good faith,” JA 181-82.

While Brammer’s newfound legal arguments are incorrect under binding precedent (as explained further below), the Court need not—and should not—entertain arguments that Brammer failed to raise below.

II. The District Court Correctly Determined That VHP’s Use Was Fair

The law of copyright “has never accorded the copyright owner complete control over all possible uses of his work. Rather, the Copyright Act grants the copyright holder ‘exclusive’ rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies.” *Sony Corp. of Am. v.*

Universal City Studios, Inc., 464 U.S. 417, 432-33 (1984). “All reproductions of the work, however, are not within the exclusive domain of the copyright owner;” for example, “[a]ny individual may reproduce a copyrighted work for a ‘fair use;’ the copyright owner does not possess the exclusive right to such a use.” *Id.* at 433.

“Fair use was traditionally defined as ‘a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.’” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting H. Ball, *Law of Copyright & Literary Property* 260 (1944)). “The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine.” *Id.* Since a “fair use” is a use outside of the owner’s exclusive rights, it “is not an infringement of copyright.” 17 U.S.C. § 107.

To guide courts in determining whether a use is “fair,” Section 107 provides four factors for consideration:

- (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.

Id. “These factors are ‘not meant to be exclusive,’ but rather ‘illustrative,’ representing ‘only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses.’” *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (quoting *Harper & Row*, 471 U.S. at 560 and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994)), *abrogated on other grounds by Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016); *see also Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 202 (4th Cir. 1998) (“These factors are not exclusive, but are particularly relevant to the fair use question.” (citation omitted)).

Since fair use is an equitable doctrine, a court’s assessment “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell*, 510 U.S. at 577; *see also Bond*, 317 F.3d at 394 (“Because a particular use must be examined for its reasonableness in determining whether it is a ‘fair use,’ any *per se* rule is inappropriate.”).

Though all four factors (and any other considerations a court deems relevant) are to be considered, this Court’s “precedents have placed primary focus on the first factor,” *Bouchat v. Baltimore Ravens Ltd. Partnership*, 737 F.3d 932, 937 (4th Cir. 2013) (“*Bouchat V*”), and the Supreme Court has stated that the fourth factor “is undoubtedly the single most important element of fair use,” *Harper & Row*, 471 U.S. at 566.

The District Court correctly determined that VHP’s use was fair, and that decision should be affirmed.

A. VHP’s Use Was Transformative, Noncommercial, and Done in Good Faith

In assessing the first fair use factor—“the purpose and character of the use”—this Court looks at both “whether the new work is transformative, and the extent to which the use serves a commercial purpose.” *Bouchat V*, 737 F.3d at 939 (citations omitted). In addition, “because the codified fair use doctrine remains an ‘equitable rule of reason,’” *Bouchat IV*, 619 F.3d at 311 (quoting *Sundeman*, 142 F.3d at 202), this Court has held that “‘the propriety of the defendant[s]’ conduct’ is ‘relevant to the ‘character’ of the use,” *id.* (alteration in original) (quoting *Harper & Row*, 471 U.S. at 562).

1. VHP's Use Was Transformative

As a general matter, “[i]n assessing the ‘character’ of the use,” courts “consider the specific examples set forth in section 107’s preamble ... with the goal of determining whether the use at issue ‘merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character.’” *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (quoting *Campbell*, 510 U.S. at 578-79). Answering this question requires an examination of “whether and to what extent the new work is transformative.” *Id.* (quoting *Campbell*, 510 U.S. at 579).² As defined by this Court, a “‘transformative’ use is one that ‘employ[s] the quoted matter in a different manner or for a different purpose from the original,’ thus transforming it.” *Vanderhye*, 562 F.3d at 638 (quoting

² Though courts do not often make the point explicitly, it is clear from *Campbell* that transformation is not simply a binary choice—i.e., the question is not solely whether a use is transformative or not. Instead, courts should consider the circumstances to determine *how transformative* the use actually is. See, e.g., *Bouchat V*, 737 F.3d at 941 (use was “substantially transformative”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (use was “highly transformative”); *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 178 (2d Cir. 2018) (use was “at least somewhat transformative”), *petition for cert docketed*, No. 18-321 (Sep 12, 2018).

Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (March 1990)).

A use can be deemed transformative without “alter[ing] or augment[ing]” the original work. *Id.* at 639. All that is required is a determination that the new work has a “different function and purpose than the original work[]; the fact that there [is] no substantive alteration to the work[] does not preclude the use from being transformative in nature.” *Id.*; see also, e.g., *Bouchat V*, 737 F.3d at 940 (“[C]ontrary to Bouchat’s claims, it does not matter that the Flying B logo is unchanged in the videos, for “[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature.” (quoting *Vanderhuy*, 562 F.3d at 639)). Brammer appears to concede this clear point of law, despite the fact that his lone argument on this sub-factor below was that VHP’s use could not be transformative because it did not significantly alter the Photo. *Compare* Br.8 with JA 180.³

³ Despite this concession, it is clear that Brammer disagrees as a policy matter with this so-called “expansion” of what can be deemed transformative. See, e.g., Br.8-10. Yet Brammer’s policy arguments do nothing to cast doubt upon the unequivocal decisions from this Court, and certainly cannot serve as a basis to criticize the District Court’s application of binding precedent to the facts before it.

The District Court below determined that VHP's use was "transformative in function and purpose." JA 223. The Judge based this determination on the undisputed facts in the record: "While Brammer's purpose in capturing and publishing the photograph was promotional and expressive, Violent Hues' purpose in using the photograph was informational: to provide festival attendees with information regarding the local area." *Id.* Contrary to Brammer's claim, this was not an "[a]ppli[cation] [of] the [i]ncorrect [l]egal [s]tandard for [t]ransformativeness," Br.7, but was a straightforward application of binding precedent to the undisputed facts.

Brammer's attacks on the District Court's determination are meritless. As an initial matter, Brammer's attempts to create factual disputes on appeal are plainly improper, as described above. *See supra* Section I. Specifically here, Brammer claims that "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." Br.11. But these so-called "factual findings" were no such thing—these facts were

undisputed below. In support of its Motion for Summary Judgment, VHP presented the following facts:

6. Plaintiff captured the Photo and posted it to his website to advertise his skills as a photographer.

...

16. Violent Hues intended the Website [where the photo at issue was posted] to be a reference guide for filmmakers or other artists whose work was accepted to the Northern Virginia Film Festival to use during their time in the Northern Virginia/Washington, D.C. region.

17. Though the Website has been changed at various times since it was originally posted in 2014, in 2016 it provided information to attendees regarding lodging and transportation options, as well as things to do in the Northern Virginia/Washington, D.C. region.

JA 58-60 (citations omitted). Each of these facts was supported by multiple citations to record evidence. In his opposition below, Brammer made no effort whatsoever to dispute these facts, and presented no evidence that could create genuine issues of material fact. *See* JA 178-85.

Yet now, on appeal, Brammer claims that “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 ... [or find] 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.” Br.11. But if Brammer had any evidence to support these potential jury findings, it was incumbent upon him to present that evidence to the District Court.⁴ Brammer cannot sit on his hands below and then attempt to manufacture a factual dispute on appeal where none previously existed. Notably, even now Brammer cannot cite to a single piece of record evidence to support these new fact arguments—further confirming that the only “support” he has is speculation.

Putting Brammer’s fake factual disputes aside, there is ample evidence to conclude that VHP’s use was transformative. It is undisputed that Brammer’s purpose in both capturing and publishing the Photo was to advertise his skills as a photographer. JA 58. It is likewise undisputed that VHP, on the other hand, used the Photo as part of a webpage designed to be utilized by festival attendees as a reference guide to the region during their visit. JA 59-60. To that end,

⁴ The same is true for Brammer’s claim that the alleged “purpose” of the Photo was to illustrate “the passage of time on a busy street.” Br.12. While undoubtedly the Photo does depict a street, the undisputed facts are that Brammer “captured the Photo and posted it to his website to advertise his skills as a photographer.” JA 58.

the webpage provided information for transportation, lodging, and things to do in the Northern Virginia/Washington, D.C. region. *Id.* VHP's use of the Photo was therefore solely informational—it provided festival attendees with information regarding the Washington, D.C. neighborhood depicted in the Photo.

Clearly then, VHP “employ[ed] the [Photo] in a different manner or for a different purpose from the original,’ thus transforming it.” *Vanderhye*, 562 F.3d at 638 (quoting *Leval*, 103 HARV. L. REV. at 1111); *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (“Arriba’s use of the images serves a different function than Kelly’s use—improving access to information on the internet versus artistic expression.... Because Arriba’s use is not superseding Kelly’s use but, rather, has created a different purpose for the images, Arriba’s use is transformative.”). This transformation weighs heavily in favor of fair use. *See Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

None of the various legal arguments offered by Brammer change this calculus. As an initial matter, not one of these arguments was put

before the District Court below—Brammer’s sole argument on transformative use below was that VHP’s use could not be transformative because it did not make substantial alterations to the Photo. JA 180-81. Any remaining arguments in his current briefing have therefore been waived. *See supra* pp. 16-18. Yet even if they were not waived, these arguments have no basis in this Court’s precedent.

First, Brammer (along with several amici) argues that the District Court improperly conflated the purposes of the parties—Brammer and VHP—with the purposes of the works themselves. *See* Br.11 n.1⁵; *see also* Brief of Volunteer Lawyers for the Arts, Inc. as Amicus Curae (Doc. No. 26-1) at 6-7. Yet Brammer presents no authority for the proposition that a court should—or even can—distinguish between the purpose of a work itself and the purpose of the individual who created that work. Indeed, it is difficult to imagine how a photograph could have a “purpose” in and of itself without reference to the purpose of the photographer who took it.

⁵ Not only did Brammer waive this argument by failing to raise it below, an argument raised only in a footnote of an opening brief is likewise considered waived. *See Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015).

Moreover, there is significant authority supporting precisely the type of analysis that the District Court undertook here. For example, in *Vanderhuy*, the district court’s fair use analysis—affirmed by this Court—compared the plaintiffs’ purposes in creating the works with the defendant’s purposes underlying its use of those works. *See A.V. v. iParadigms LLC*, 544 F. Supp. 2d 473, 482 (E.D. Va. 2008), *aff’d in relevant part*, 562 F.3d 630 (4th Cir. 2009). Other Circuits have likewise undertaken this analysis by comparing the respective purposes of the plaintiff and defendant, not the works themselves. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (“[Defendant]’s purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of [plaintiff]’s images fulfilled the dual purposes of artistic expression and promotion.”); *Nuñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (“[P]laintiffs’ photographs were originally intended to appear in modeling portfolios, not in the newspaper.... Thus, by using the photographs in conjunction with editorial commentary, [Defendant] used the works for ‘a further purpose,’ giving them a new ‘meaning, or

message.” (citation omitted)); *see also Kelly*, 336 F.3d at 819 (similar); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84-85 (2d Cir. 2014) (similar).

Brammer’s argument that VHP’s use cannot be transformative because VHP did not have a “significant justification” fares no better. Though his brief is not entirely clear, Brammer’s point seems to be that since VHP could have achieved the same (or a similar) purpose through other means—such as by using a written description of Adams Morgan or a public-domain photograph—its use cannot be transformative. *See Br.15-16*. Not only is this argument once again belied by the record—for instance, it was undisputed below that when VHP copied the Photo, it believed the Photo was in the public domain, *see JA 60*—but it has no legal basis.

The only authority that Brammer can cite for this proposition is an out-of-circuit district court opinion, *Roy Export Co. Establishment of Vaduz, Liechtenstein, Black Inc., A. G. v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), and he clearly misrepresents the holding of that case. *Roy* arose in an entirely different posture than this case—there, the court was addressing CBS’s

motion for judgment notwithstanding the verdict, following a trial in which a jury determined that CBS was not entitled to the fair use defense. *Id.* at 1141. On the page Brammer cites, the court *does not hold*—as Brammer claims—“that defendant’s use ... was unfair, because, *inter alia*, there existed sufficient materials available in the public domain to effectuate the same purpose.” Br.15. Rather, the Court merely held that given the evidence adduced at trial, “[t]he jury *could reasonably have concluded* that ... 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.” *Roy*, 503 F. Supp. at 1144 (emphasis added). No fair-minded reader could conclude that the opinion creates the rule that Brammer cites it for.

More importantly, Brammer’s argument cannot be squared with Fourth Circuit precedent. For example, in *Bouchat IV*, one of the uses at issue was the Baltimore Ravens’ use of a copyrighted logo in a museum-like display in the team’s headquarters. *See Bouchat IV*, 619 F.3d at 313-16. The logo was “displayed in the Ravens lobby on actual game tickets from the inaugural season and in two large photos of the

team's first ever first-round draft picks." *Id.* at 314. This Court determined the uses were fair, in large part because the "use of the logo in a museum-like setting 'adds something new' to its original purpose...." *Id.* However, if Brammer's argument was correct, that case was wrongly decided. After all, the Ravens surely could have achieved the same or similar ends by not using the copyrighted logo at all—they could have, as Brammer suggests, provided a written description of the Ravens' inaugural season and draft picks, or perhaps commissioned an artist to create new works depicting the same subjects. Yet this Court still found the Ravens' uses to be transformative, and ultimately fair.

Bouchat V is similar. One of the uses at issue in that case was the Ravens' use of the copyrighted logo in historical displays in the team's stadium. Again, this Court found those displays to be transformative because in this new context, the logo "no longer serve[d] the[] original purpose[]," and was instead "intended to chronicle a significant aspect of Ravens' history." *Bouchat V*, 737 F.3d at 947. Once again, the Ravens could have used non-copyrighted means to chronicle or celebrate those specific aspects of the team's history. The fact that the team did

not use those other means was no bar to this Court's determination that those uses were transformative and fair.

In sum, the District Court correctly determined based on undisputed facts and binding precedent that VHP's use was transformative; that holding should be affirmed.

2. VHP's Use Was Noncommercial

While important, the question of whether a use is transformative is not dispositive of the first factor, or of the fair use analysis. *See Swatch*, 756 F.3d at 84 (“While a transformative use generally is more likely to qualify as fair use, ‘transformative use is not absolutely necessary for a finding of fair use.’” (quoting *Campbell*, 510 U.S. at 579)). If a use is not transformative, “other factors, like the extent of its commerciality, loom larger.” *Campbell*, 510 U.S. at 580. Here, the undisputed facts show that VHP's use was noncommercial, as the District Court correctly held.

In assessing this sub-factor, the question is not whether the defendant's overall enterprise seeks to earn profits, but instead whether the specific use at issue was for commercial purposes. In other words,

“[i]t is appropriate to evaluate the use’s commercial status on its own terms.” *Bouchat IV*, 619 F.3d at 314 (citation omitted).

Bouchat IV is once again instructive. In that case, this Court focused not on whether the Ravens were a for-profit enterprise, but rather whether the team gained a “direct or immediate commercial advantage” from the use at issue. *Id.* (citation omitted). And since “the team’s profits, revenues, and overall commercial performance were not tied to” the use, the Court determined that the use was noncommercial. *Id.* (citation omitted). *Bouchat V* repeated this analysis, determining again that the uses at issue were noncommercial because they did not contribute in any meaningful way to the Ravens’ profits. *See Bouchat V*, 737 F.3d at 942 (“Although the logo was part of a product created for commercial gain, its role in facilitating that gain was unquestionably minimal.”); *id.* at 948 (“The Ravens are not gaining direct or immediate commercial advantage from any logo display at issue here.” (citation omitted)). Other Circuits are in accord. *See, e.g., Bill Graham*, 448 F.3d at 611-12 (finding use to be noncommercial where it was “incidental to the commercial biographical value of the book” and was not used to advertise or promote the book in any way).

Though he cites once to *Bouchat IV* in this section of his brief, Brammer makes no attempt to actually address this binding precedent. Instead, he cobbles together out-of-circuit and unpublished decisions to argue that since VHP could have conceivably received an indirect commercial benefit from its use of the Photo, its use must be deemed commercial. *See* Br.17-21. That is not the law.

In addition, Brammer's argument is based on factual speculation that is contradicted by the undisputed record. In the District Court below, the facts bearing on this sub-factor were undisputed: VHP never sold any copies of the Photo, VHP intended the webpage to be used for informational purposes by attendees to its festival, VHP never charged for access to the webpage, VHP never had any paid advertisements on the webpage, and VHP never made any revenue from the webpage. *See* JA 59-61. Despite his improper attempts to again create fact issues on appeal—*see, e.g.*, Br.19 (“VH runs a film festival and a reasonable jury could find that VH used Brammer's Photograph to promote the festival.”)—Brammer conceded these facts below. It was therefore entirely proper for the District Court to determine, based on this Court's precedent and the undisputed facts, that VHP's “use was

noncommercial, because the photo was not used to advertise a product or generate revenue.” JA 223.

*3. Good Faith Is Relevant to the Fair Use Determination
and Weighs in Favor of VHP*

In weighing the first factor, the District Court also considered the propriety of VHP’s conduct and held that its use was “in good faith.”

JA 223. The Court explained:

The record indicates that Mr. Mico, Violent Hues’ owner, found the photo online and saw no indication that it was copyrighted. Mr. Mico attests that he thus believed the photo was publically available. This good faith is further confirmed by the fact that as soon as Violent Hues learned that the photo may potentially be copyrighted, it removed the photo from its website.

*Id.*⁶ Because Brammer is unable to contest the factual basis for the District Court’s holding—he conceded all of these facts below, *see* JA 60-61—he argues instead that VHP’s good faith should be irrelevant to the

⁶ As this quote makes clear, Brammer is incorrect when he claims that the District Court’s holding was “solely based on its determination that in some (but not all) instances, Brammer published copies of the Photograph without a copyright notice.” Br.21. The fact that Brammer posted the Photo in certain places online without any copyright notice—while true—was not central to the Court’s discussion of VHP’s good faith. Thus Brammer’s two-page detour through the law of copyright notice is misplaced. *See* Br.22-23.

fair use analysis here. Once again, Brammer not only failed to raise this argument below, but his current position has little merit.

As an initial matter, there can be no doubt that “because the codified fair use doctrine remains an ‘equitable rule of reason,’ ‘the propriety of the defendants’ conduct’ is ‘relevant to the ‘character’ of the use.” *Bouchat IV*, 619 F.3d at 311 (quoting *Sundeman*, 142 F.3d at 202, and *Harper & Row*, 471 U.S. at 562). Brammer’s claim to the contrary—that “both the U.S. Supreme Court and the Fourth Circuit have rejected [good faith] as relevant to the fair use analysis,” Br.23—is belied by the cases he cites. In *Campbell*, the Supreme Court held simply that if a “use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use.” *Campbell*, 510 U.S. at 585 n.18. And in *Bouchat V*, this Court merely noted that it was “questionable whether allegations of subjective ‘bad faith’ could undercut a use that objectively was fair.” *Bouchat V*, 737 F.3d at 942. Neither opinion “reject[s]” the relevance of good faith, as Brammer wrongly claims. Indeed, other courts have determined that it is error for a district court *not* to consider the propriety of a defendant’s conduct in the fair use

analysis. *See, e.g., NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 (2d Cir. 2004).

Likewise, Brammer is wrong he when tries to reject the relevance good faith because it “is not listed as a fair use factor.” Br.23. Of course, it is well-settled that the four fair use factors are non-exclusive, as courts must be accorded flexibility in assessing whether a given use is fair. *See Harper & Row*, 471 U.S. at 560 (“The factors enumerated in the section are not meant to be exclusive: ‘[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.’” (quoting H.R. Rep. No. 94-1476, at 65 (1976))); *Sundeman*, 142 F.3d at 202 (similar).

Since he is unable to show that the propriety of a defendant’s conduct is irrelevant, Brammer falls back on an argument that “bad faith may [only] weigh against a finding of fair use.” Br.23. This argument is also dubious. Initially, the Federal Circuit decision that Brammer relies on is an outlier (see below), and even it found that the jury’s consideration of evidence showing the defendant’s good faith was proper under certain circumstances. *See Oracle Am., Inc. v. Google*

LLC, 886 F.3d 1179, 1203 (Fed. Cir. 2018). More importantly, the District Court’s analysis is consistent with decisions from several other courts. The First Circuit, for instance, has held that a defendant’s “good faith [] weighs in its favor on [the first factor] of the fair use test.” *Nuñez*, 235 F.3d at 23. The facts underpinning the good faith determination in *Nuñez* are almost identical to those here: the defendant asserted “that it believed in good faith that the photographs were available for general, unrestricted circulation and redistribution,” and the plaintiff offered “little evidence to rebut this assertion.” *Id.*; see also *Bill Graham Archives, LLC. v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005) (“The court [] weighs favorably defendants’ [good faith] conduct in the equitable balance of fair use.”), *aff’d*, 448 F.3d 605 (2d Cir. 2006); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006) (“The fact that Google has acted in good faith in providing ‘Cached’ links to Web pages lends additional support for the Court’s fair use finding.”).⁷

⁷ The *Field* case also presents similar facts to those discussed by the District Court here—the defendant did not learn about any potential infringement until litigation, and removed the allegedly infringing use immediately upon learning of a potential dispute. *Id.* at 1122-23.

Finally, Brammer’s argument that the propriety of a defendant’s conduct can only cut one way is at odds with basic principles of fair use law. The Supreme Court has held that fair use “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Campbell*, 510 U.S. at 577; *see also Sony*, 464 U.S. at 448 n.31 (stating that Congress “eschewed a rigid, bright line approach to fair use” in codifying the fair use doctrine). This Court has repeated this admonition, holding that “[b]ecause a particular use must be examined for its reasonableness in determining whether it is a ‘fair use,’ any *per se* rule is inappropriate.” *Bond*, 317 F.3d at 385. Brammer asks this Court to set aside these first principles and create a bright-line rule here. The Court should reject this offer.

B. The Second Fair Use Factor Weighs in Favor of VHP

The second fair use factor, “the nature of the copyrighted work,” requires an assessment of both the creative and factual nature of the original work. *See Vanderhye*, 562 F.3d at 640. As this Court has explained, “‘fair use is more likely to be found in factual works than in fictional works,’ whereas ‘a use is less likely to be deemed fair when the copyrighted work is a creative product.’” *Id.* (quoting *Stewart v. Abend*,

495 U.S. 207, 237 (1990)). In assessing this factor, courts also look to whether the original work has been previously published. *See id.* at 640-41. Below, the District Court correctly determined that Brammer’s “prior publication and Violent Hues’ use of the photo for its factual content favors a finding of fair use.” JA 224.

Brammer’s argument that the District Court erred by analyzing the Photo “based solely on the identity of its subject” rather than “the various creative and original elements comprising the work” is simply wrong. Br.27. The District Court specifically stated that “[t]he photograph in question contained creative elements (such as lighting and shutter speed choices),” but also correctly observed that the Photo was “a factual depiction of a real-world location: the Adams Morgan neighborhood in Washington, D.C.” JA 224. This assessment of both the factual and creative aspects of the Photo is precisely the type of analysis called for under this factor, and is similar to the analysis that other courts have undertaken when addressing the fair use of copyrighted photographs. *See, e.g., Nuñez*, 235 F.3d at 23 (analyzing both the creative and factual nature of the photographs in question, and finding that they “could be categorized as either factual or creative”).

Equally wrong is Brammer's claim that 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." Br.26. This argument is laughably at odds with binding precedent. In reality, both the Supreme Court and this Court have repeatedly said that "*we do not consider the § 107 factors 'in isolation, one from another,'* but we weigh them together 'in light of the purposes of copyright.'" *Bond*, 317 F.3d at 395 (emphasis added) (quoting *Campbell*, 510 U.S. at 578); see *Bouchat IV*, 619 F.3d at 308 (similar).

Indeed, with regard to the second fair use factor, this Court has held that the nature of the work *should be* assessed in relation to the first factor, and "if the disputed use of the copyrighted work 'is not related to its mode of expression but rather to its historical facts,' then the creative nature of the work is mitigated." *Vanderhye*, 562 F.3d at 640 (quoting *Bond*, 317 F.3d at 396). Additionally, this Court has made clear that "the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose." *Bouchat IV*, 619 F.3d at 315 (citation omitted). Thus it was entirely

correct for the District Court to assess the second factor in relation to the first; and its determination that VHP's use of "the photo purely for its factual content" mitigated the creative nature of the Photo is consistent with binding authority. JA 224.

The District Court was also correct to determine that Brammer's publication of the "photograph on several websites as early as 2012" weighed in favor of fair use. This Court has held that "the fair use of an unpublished work is narrower in scope" than the fair use of a previously published work, in light of the goal of copyright to allow an author to control the first publication of his or her work. *See Vanderhye*, 562 F.3d at 640. Although publication is not dispositive as to whether the second factor supports fair use, "[p]ublished works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." *Kelly*, 336 F.3d at 820.

Though he never raised the argument below, Brammer claims on appeal that while lack of publication can weigh against fair use, the fact that a copyrighted work was previously published can *never* weigh in favor of fair use. *See* Br.28-30 & n.4. Yet this argument suffers from the same basic flaw as his good faith argument above—binding

authority makes clear that fair use requires a fact-intensive, holistic analysis, and does not lend itself to the application of per se rules. *See supra* p. 40.

Moreover, contrary to Brammer’s proposed rule (and contrary to his claimed inability to find any decisions similar to the District Court’s, *see* Br.29 n.4), courts regularly weigh prior publication in favor of fair use. For example, in *Nuñez*, the First Circuit considered the circumstances surrounding the various prior publications of the photographs at issue—including, as here, the fact that (i) the photos were intended for public dissemination, (ii) the photographer made no effort to limit further dissemination, and (iii) the photographer failed to register the work until after the alleged infringement began—and determined that these prior publications tipped the second factor in favor of fair use. *See Nuñez*, 235 F.3d at 24. Other circuits have conducted similar analyses. *See, e.g., New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 157-58 (2d Cir. 1990) (weighing prior publication in favor of fair use under the second factor); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (weighing plaintiff’s “wide[] disseminat[ion]” in favor of fair use, but ultimately finding that

the creative nature of the work tipped the second factor slightly in plaintiff's favor). In fact, this Court has determined that even an *unpublished* work does not necessarily weigh against a finding of fair use. *See, e.g., Vanderhuy*, 562 F.3d at 640 (finding the second factor neutral even where the works at issue were unpublished). There is thus no bright line rule with respect to prior publication. Instead, as with all of the fair use factors, courts assess publication as one circumstance among several that define whether the nature of the copyrighted work supports a finding of fair use.

Here, the District Court weighed the undisputed facts and determined that both the prior publication of the Photo *and* VHP's "use of the photo for its factual content" rather than its creative elements tipped the second factor in favor of fair use. JA 224. This holistic assessment was entirely proper, and should be affirmed.

C. Under the Third Factor, the District Court Correctly Determined That VHP Used No More Than Was Necessary to Effectuate Its Purpose

The third fair use factor assesses "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). Much like the second factor, this factor is not to be

assessed in isolation. Rather, the transformative nature of the use must be taken into account because “[t]he extent of permissible copying varies with the purpose and character of the use.” *Sundeman*, 142 F.3d at 205-206 (citation omitted). A transformative use may require certain portions of the copyrighted work, and such use is considered fair when the infringer uses no more of the original work than necessary to facilitate that transformative purpose. *See id.* In light of VHP’s transformative use of the Photo for an informational purpose, the District Court correctly determined that the third factor weighed in favor of VHP because VHP “used no more of the photo than was necessary to convey the photo’s factual content” to effectuate its purpose. JA 225.

Again, the facts bearing on this factor are undisputed—Brammer admitted in his deposition and conceded below that VHP cropped and used approximately half of the Photo on its webpage. JA 60. And although Brammer never argued below that Violent Hues copied the “heart” of the Photo (waiving the argument on appeal), VHP does not dispute that the section of the Photo it used contains a relatively significant portion of the copyrighted work.

Given this, Brammer's sole remaining argument centers on his claim that "*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" scene. Br.32 (emphasis in original). This argument misses the point. The analysis under the third factor is not whether the defendant's *overall* purpose could have been achieved using other means, but instead focuses solely on the *specific* use at issue, and whether the amount used was reasonable in light of the purpose of the use.

Bouchat IV is again instructive. After finding that the lobby uses in that case were transformative (*see supra* pp. 31-32), this Court held that the third factor was neutral because the Ravens' use of the entire "Flying B" logo was necessary "in order to fulfill the legitimate transformative purpose of exhibiting the Ravens inaugural season tickets and the photos of the team's first ever draft picks." *Bouchat IV*, 619 F.3d at 315. Again, surely the Ravens could have had a historical display without discussing the inaugural season's draft picks and tickets, or could have displayed a text description of the Ravens' inaugural season and draft picks without including images of the

tickets or the players' uniforms. If Brammer's logic were to hold, the fact that the Ravens could have achieved the same or similar *overall purpose* without using the Flying B logo would make *any* use of that logo unreasonable, and thus tip the third factor against fair use.

However, the Court did not address the Ravens' overarching purpose in assessing the third factor. Rather, the Court noted that if the Ravens "wish[ed] to display" *those items* in an informational (and therefore transformative) manner, the team needed to show the entire copyrighted work to fulfill this purpose. *Id.* The Court thus determined that "[t]he third factor ... does not weigh against a finding of fair use because the amount copied is justified in relation to the transformative purpose behind the use." *Id.* However, "because the entire work [was] displayed," the Court did not "weigh the third factor in favor of fair use," but held that it was neutral between the parties. *Id.*

Similarly here, the proper frame for analysis is whether, upon selecting the Photo for its informational purpose, VHP used no more of the Photo than was necessary to effectuate that purpose. The District Court properly analyzed VHP's use through this lens, and determined that the portion of the Photo used was reasonable in light of its

transformative purpose of informing festival attendees about attractions in Washington, D.C. And unlike *Bouchat IV*, since VHP only used half of the photo, the District Court correctly determined that the third factor weighed in favor of fair use.

D. VHP's Noncommercial Use Had No Effect on the Actual or Potential Market for the Photo

The fourth fair use factor looks at “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). The Supreme Court has held that “[t]his last factor is undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566.

In assessing this factor, the Court’s “task is to determine whether the defendants’ use of plaintiffs’ works ‘would materially impair the marketability of the work[s] and whether it would act as a market substitute’ for them.” *Vanderhye*, 562 F.3d at 643 (alteration in original) (quoting *Bond*, 317 F.3d at 396). The focus of the analysis is “not upon ‘whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but [upon] whether the secondary use *usurps the market of the original work.*” *Id.* (emphasis & alteration in original) (quoting *NXIVM*, 364 F.3d at 482). In other

words, “[t]he fair use doctrine protects against a republication which offers the copyrighted work in a secondary packaging, where potential customers, having read the secondary work, will no longer be inclined to purchase again something they have already read.” *Id.* (citation omitted); *see also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) (“[T]he Factor Four analysis is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work.”).

Where a use is noncommercial—as is the case here, *see supra* Section II(A)(2)—the burden of proof on this factor shifts to the plaintiff. While the plaintiff need not show “actual present harm,” he or she must show “by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.” *Sony*, 464 U.S. at 451 (emphasis in original); *see also Bond*, 317 F.3d at 395 (“Because the challenged use is noncommercial, [plaintiff] must demonstrate that the use ... would harm the potential market for his manuscript.”); *Bouchat IV*, 619 F.3d at 315 (“[W]hen the use ‘is for a noncommercial purpose, the likelihood [of future market harm] must be demonstrated’ by the copyright holder.” (second alteration in original) (quoting *Sony*, 464 U.S. at 451)).

Brammer has utterly failed to carry his burden here. Initially, he appears to concede that he cannot show any *actual* harm to the market for the Photo, as he does not even address the District Court’s holding that “[t]here is no evidence that Violent Hues’ use has had an adverse effect on the market for the photograph”. *See* JA 225.⁸ With respect to potential harm, Brammer can point to no “**evidence** that *some* meaningful likelihood of future harm exists” *Sony*, 464 U.S. at 451 (second emphasis in original). Instead, he relies only on speculation that such harm **could** occur. *See, e.g.*, Br.37 (theorizing that another user “could simply copy the version published by VH for free”). Courts consistently reject speculation like this, holding that where there is no evidence of potential harm, the fourth factor weighs in favor of fair use. *See, e.g., Sony*, 464 U.S. at 454 (weighing fourth factor in favor of fair

⁸ Contrary to amicus VLA’s argument, the fact that VHP did not pay a licensing fee to Brammer for this specific use is irrelevant under this factor. *See* Doc. No. 26-1 at 17. To hold otherwise would effectively read the fourth factor out of the fair use analysis. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 n.17 (2d Cir. 1994) (“[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.” (emphasis in original)).

use where “[n]o likelihood of harm was shown at trial” and the harm claimed by plaintiffs was “speculative and, at best, minimal” (citation omitted)); *Bouchat IV*, 619 F.3d at 315 (“Bouchat offered no evidence of market harm as a result of the lobby displays. The transformative and noncommercial use in the lobby and the lack of evidence about market harm leads us to weigh the market effect factor in favor of a finding of fair use.”); *Vanderhuy*, 562 F.3d at 645 (weighing fourth factor in favor of fair use where there was “nothing in the record to suggest that any of these [future harm] scenarios envisioned by plaintiffs are anything more than unfounded speculation”); *Bond*, 317 F.3d at 395 (fourth factor favors fair use where plaintiff was unable “to identify any harm or potential harm”).

Not only does Brammer make no showing of a meaningful likelihood of future harm, the undisputed evidence shows that any such harm is unlikely. Notably here, Brammer conceded that he ***makes no effort to market the Photo***, whether for licensing or print sales. See JA 59, 114-15. Thus there is little evidence of any market at all (as discussed more fully below), let alone one that could be harmed by VHP’s use. Moreover, the fact that VHP used approximately half of the

Photo makes any speculative harm even less likely—to the extent another individual wanted to use the Photo, VHP’s smaller cropped version would be a poor substitute. *See Campbell*, 510 U.S. at 587 (“The facts bearing on [the third fair use] factor will also tend to address the fourth, by revealing the degree to which the [allegedly infringing use] may serve as a market substitute for the original”); *see also Kelly*, 336 F.3d at 821 (fourth factor favored fair use where the allegedly infringing “thumbnail” pictures “would not be a substitute for the full-sized images because the thumbnails lose their clarity when enlarged”).

As a result, the District Court was entirely correct to conclude that this factor weighs in favor of VHP. Brammer’s additional challenges to the holding—both of which he failed to raise below, *see* JA 184—cast no doubt upon the validity of this holding.

First, Brammer’s argument that the District Court “conflat[ed] the market for the sale of printed copies of the Photograph with the market for the licensing of the Photograph for Internet uses,” Br.35, does him no good. In essence, his argument appears to be that the market for prints of the Photo is irrelevant here, and the District Court should have focused solely on the “market for Internet licenses”; a market

which Brammer claims to have developed. *See* Br.35-36. Yet the claim that Brammer has developed *any* market for internet licenses of the Photo is specious.

The only two “internet licenses” Brammer has previously provided were the result of facts similar to those here—a party used the Photo online, Brammer discovered the use, and Brammer reached out to secure a settlement payment in lieu of litigation. *See* JA 172-77; Br.38 (stating that Brammer “issued a retroactive license ... for the purpose of settling an infringement claim.”); *see generally* DE 60 (VHP motion in limine below regarding settlement evidence). Given that Brammer makes no attempt to market the photo for licensing, *see* JA 59, the facts are clear that the only internet “market” he has developed is one where he waits for individuals to use the Photo online, and then threatens to sue unless they pay him a fee. That is no market at all, or at the very least is not the type of market that a court should be concerned with under the fourth factor. *See Philpot v. Media Research Ctr. Inc.*, 279 F. Supp. 3d 708, 719 n.13 (E.D. Va. 2018) (“Congress plainly did not intend to preserve a market for copyright litigation when it enacted the

Copyright Act so any impairment of the litigation market for plaintiff's ... [p]hotographs has no bearing on this analysis.”).⁹

Brammer's final argument—that the District Court was wrong to weigh “post-infringement sales or licenses by the copyright owner” in favor of fair use, *see* Br.38-41—is similarly devoid of merit. As described above, the only alleged harm that Brammer can claim here is entirely speculative. His argument then is that the District Court should have discounted the actual evidence—i.e., that post-infringement payments indicate that there was no actual effect on the market for his Photo—in favor of rank speculation that potential harm was theoretically possible. Not only is this contrary to common sense, it is clearly not the law—both on fair use specifically, *see supra* pp. 51-52, and more generally on summary judgment, *see supra* p. 14.

⁹ Even if the Court were to consider this a legitimate market for consideration here, VHP's use could have the perverse effect of *increasing* the market for the Photo, as more uses like VHP's could lead to more settlement payments. *Cf. Bond*, 317 F.3d at 396-97 (“Ironically, if anything, the defendants' use increases the value of the work in a perverse way, but it certainly doesn't decrease it.” (internal quotation marks omitted)).

III. Affirmance Will Not Significantly Undermine Non-Party Photographers' Copyright Protections

In addition to their arguments regarding fair use, various amici argue that affirmance will cause significant harm to the interests of non-party professional photographers. In essence, they all argue that if the District Court's opinion stands, "all photographs could be used on websites without permission, credit or compensation under the banner of fair use," and "[t]he market for stock photographs ... would be gravely impaired" See, e.g., Brief of American Society of Media Photographers, Inc., et al., as Amicus Curae (Doc. No. 31-2) at 13; Brief of The Copyright Alliance as Amicus Curae (Doc. No. 30-1) at 26. While amici's concerns may be sincere, affirmance is unlikely to bring about the grave harms they predict.

Initially, any argument that affirmance here would somehow create a rule that "all photographs could be used on websites without permission," is simply wrong. Doc. No. 31-2 at 13. Not only did the District Court's decision create no such rule, but fair use "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Campbell*, 510 U.S. at 577. Of course, that does not mean that this Court should be blind to the

potential consequences of its holdings on future cases. But the facts and circumstances of this case are such that affirmance is unlikely to affect most (if not all) of the amici.

For example, Brammer's motivations in taking and disseminating the Photo are notably different than those of the amici. As described above, Brammer conceded that he took and posted the Photo in order to promote his skills as a photographer, *not* in order to sell licenses for third-party uses of the Photo. This is confirmed by the fact that Brammer published the Photo on multiple websites (sometimes without providing copyright notice) in order to advertise his skills, and that he makes no effort whatsoever to market the photo for licensing. This is in stark contrast to amici, who aver that they take and publish photos *in order to* sell licenses. *See, e.g.*, Brief for PACA, et al., as Amicus Curae (Doc. 24-1) at 1-2. This difference would presumably play a significant role in assessing whether a user of amici's photographs would be merely "supersede[ing] the objects of the original creation" under the first fair use factor. *Vanderhuy*, 562 F.3d at 638. Likewise, photographers who publish their copyrighted works online in order to license them would presumably be able to provide *some* evidence of actual or potential

harm, unlike the rank speculation that Brammer presents here. Given that the fourth factor's assessment of market harm is "undoubtedly the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, it would be easy to draw a clear distinction between the District Court's fair use decision below and a future case that involved some actual evidence of harm or potential future harm.

In addition, putting aside the potential distinguishing factors between this case and any that may come after, amici's concern that affirmance would chill the creation of new copyrighted material is simply overblown. *See, e.g.* Doc. No. 24-1 at 18 ("[B]ecause unauthorized users like VHP do not pay for the content they take, copy, and publicly display or distribute, authors may be disincentivized from creating new content or making the content available if the desire or willingness to pay for such content no longer exists."). The Supreme Court's decision in *Sony* is instructive here. In *Sony*, the Court addressed claims by owners of copyrighted television content that Sony's sale of VCR equipment facilitated copyright infringement. 464 U.S. at 419. As part of that analysis, the Court assessed whether consumers' unauthorized taping of television programs was

infringement or fair use. *Id.* at 447. The Court determined that these uses were fair because the taping was noncommercial, and because the copyright holders had failed to show any potential harm to the market for their works. *Id.* at 451-56.

In so holding, the Court stated that—contrary to amici’s arguments—“a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.” *Id.* at 450.¹⁰ In addition, the Court noted that “[t]he prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.” *Id.* at 450-51; *see also id.* at 451 n.34 (“In certain situations, the copyright owner suffers no substantial harm from the use of the work.... Here again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimis non curat lex.*” (citation omitted)).

¹⁰ In fact, the Court rejected an argument from the dissent that is almost identical to that raised by amici: “It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.” *Id.* at 480-81 (Blackmun, J., dissenting).

The Court in *Sony* also warned against turning such innocuous uses into per se violations of federal copyright law without *some* showing of harm. *See id.* at 454 (“[T]he public interest in making television broadcasting more available ... supports an interpretation of the concept of ‘fair use’ that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act ... as a violation of federal law.”). This Court’s decision in *Bouchat V* was animated in part by similar concerns: “The uses here were not only transformative, but also—take your pick—fleeting, incidental, de minimis, innocuous. If these uses failed to qualify as fair, a host of perfectly benign and valuable expressive works would be subject to lawsuits.” 737 F.3d at 949.

VHP’s use here was nothing if not benign. Again, the facts were undisputed: VHP believed the Photo was in the public domain, used the Photo for the noncommercial purpose of providing free information to festival attendees, and immediately removed the Photo from the webpage after finding out that it might be copyrighted. Most importantly, there is zero evidence that VHP’s use caused any harm to the actual or potential market for the Photo. This is precisely the type

of use that should be deemed “fair,” as the District Court correctly determined.

CONCLUSION

The judgment should be affirmed.

November 19, 2018

Respectfully submitted,

/s/ Thomas P. Weir

Judson D. Brown

Thomas P. Weir

Paul J. Weeks

KIRKLAND & ELLIS, LLP

655 15th Street, NW

Washington, DC 20005

202-879-5000

judson.brown@kirkland.com

tom.weir@kirkland.com

paul.weeks@kirkland.com

*Counsel for Defendant-Appellee
Violent Hues Productions, LLC*

STATEMENT REGARDING ORAL ARGUMENT

Because the facts and legal arguments are adequately presented in the briefs and amply support affirmance of the decision below, VHP believes that the decisional process would not be significantly aided by oral argument.

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

November 19, 2018

/s/ Thomas P. Weir
Thomas P. Weir

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Thomas P. Weir

Thomas P. Weir