

**United States Court of Appeals
for the Fourth Circuit**

RUSSELL BRAMMER,
Plaintiff-Appellant,

v.

VIOLENT HUES PRODUCTIONS, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
(1:17-cv-01009-CMH-IDD)

**BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, INC., NATIONAL PRESS PHOTOGRAPHERS
ASSOCIATION, AND TWO OTHER VISUAL ARTISTS GROUPS
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1, *amici* state as follows:

American Society of Media Photographers, Inc. (“ASMP”) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

National Press Photographers Association (“NPPA”) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

Graphic Artists Guild, Inc. (“GAG”) has no parent company nor issues stock. Accordingly, no publicly-held company owns 10% or more of its stock.

American Photographic Artists (“APA”) has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Dated: October 29, 2018

/s/ Thomas B. Maddrey
Counsel for Amici Curiae
American Society of Media Photographers, Inc.
and American Photographic Artists

/s/ Mickey H. Osterreicher
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STATEMENT OF INTEREST¹

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* the American Society of Media Photographers, Inc., National Press Photographers Association, Graphic Artists Guild, and American Photographic Artists respectfully submit this brief in support of plaintiff-appellant Russell Brammer. Pursuant to Federal Rule of Appellate Procedure 29(a)(3) a Motion for Leave to File is being submitted concurrently with this brief.

American Society of Media Photographers, Inc. (“ASMP”) is a 501(c)(6) non-profit trade association representing members who create and own substantial numbers of copyrighted photographs. These members all envision, design, produce, and sell their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-five-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.

National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation,

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4), no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae*, its members, or counsel, contributed money intended to fund preparation or submission of this brief.

editing, and distribution. NPPA's members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

Graphic Artists Guild, Inc. ("GAG") has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for fifty years. GAG educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

American Photographic Artists ("APA") is a not for profit trade association of professional photographers and copyright owners. APA members have a strong interest in the issues presented by this case because their businesses and livelihoods depend upon the broadly defined subject matter that is protected under the Copyright Act.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE “PURPOSE AND CHARACTER OF THE USE” FACTOR IN ITS FAIR USE ANALYSIS.

A. The district court incorrectly analyzed and misapplied the commercial aspect of the “purpose and character of the use” fair use factor.

An important consideration in a fair use analysis is the “purpose and character of the use” factor and whether it is commercial in purpose. 17 U.S.C. § 107 (1). “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 104 S. Ct. 774, 793, 78 L. Ed. 2d 574 (1984). But the court misunderstood commercial use when it analyzed this factor, assuming that because Violent Hues’ use was for informational purposes, it wasn’t commercial use. “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588 (1985). Even though the district court asserted that the image was “not used to advertise a product or generate revenue,” it was used to serve Violent Hues’ commercial interests. *Brammer v. Violent Hues*

Productions, LLC, 1-17-CV-01009, 2018 WL 2921089, at *2 (E.D.Va. June 11, 2018).

Newspapers, magazines, and other non-fiction works all serve to educate and inform. But they are certainly not excluded from copyright protection simply because they promote the spread of knowledge. Indeed, “all unpaid copying could be said to promote the spread of knowledge, so this principal is not particularly helpful in ‘separating the fair use sheep from the infringing goats.’” *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1282 (11th Cir. 2014) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586, 114 S.Ct. 1164, 1175 (1994)).

The fact that the photograph was informative by no means insulates the infringer from liability, and it does not weigh in favor of fair use. While facts themselves—such as what a place looks like—are not necessarily copyrightable, the expression of those facts, such as a photograph, *is* protected by copyright. As the Supreme Court recognized, “[t]o propose that fair use be imposed whenever the social value of dissemination ... outweighs any detriment to the artist, would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.” *Harper & Row*, 471 U.S. at 559. The Copyright Act does not prevent Violent Hues from taking their own photographs to accomplish the “informational” goal -- *Brammer*, 2018 WL 2921089 at *2 -- of depicting the neighborhood to market their event, it only prevents them

from misappropriating the photograph of another for their commercial, marketing purposes.

B. The district court’s application of “good faith” is not consistent with copyright law.

The district court’s holding, that the infringer’s reckless and willful blindness to copyright favors the infringer in a fair-use defense, turns the Copyright Act on its head and encourages future infringers to remain ignorant of their responsibility to obtain a proper license before using an image. The district court incorrectly called this recklessness the “good faith” of the defendant. Because copyright infringement is a strict liability tort, a party’s “good faith” is not a part of the fair use analysis or a part of any analysis of whether a work is infringing. The Copyright Act “does not require that the infringer know that he is infringing or that his conduct amount[s] to a willful violation of the copyright owner’s rights.” *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004). “The fact that infringement is ‘subconscious’ or ‘innocent’ does not affect liability,” and any consideration of mental state is reserved for the damages portion of the case. *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997).

Apart from works in the public domain, any photo that has been taken in recent decades is a copyrighted work. 17 U.S.C. § 102(a)(5) (vesting copyright in pictorial works); 17 U.S.C. § 302 (copyright endures until 70 years after the death of the author); *Golan v. Holder*, 565 U.S. 302, 309, 132 S. Ct. 873, 879, 181 L. Ed.

2d 835 (2012) (explaining while copyright protection at one time hinged on compliance with notice, registration, and renewal requirements, the U.S. removed those formalities to join the Berne Convention in 1989). To put it another way, contrary to the assertion that Mr. Mico “saw no indication that it was copyrighted,” ALL works of visual art are likely copyrighted. *Brammer*, 2018 WL 2921089 at *2. Certainly, a professional-quality photograph like the one at issue here should be presumed copyrighted, absent evidence to the contrary.

Those who choose to publish or display photographs in a manner reserved for the author by copyright law have a responsibility to ensure that such use is permissible. Indeed, a party “act[s] recklessly by refusing, as a matter of policy, to even investigate or attempt to determine whether particular [works] are subject to copyright protections.” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 992 (9th Cir. 2017). *See also*, *BMG Rights Mgmt. (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293, 312 (4th Cir. 2018) (“copyright infringement is willful if the defendant ‘recklessly disregards a copyright holder's rights’”); *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir. 2016) (failing to explicitly ask about copyrights amounts to “recklessness or willful disregard, and thus willfulness”). Rather than providing a shield from responsibility under copyright law, failure to exercise due diligence or investigate the copyright status of a work

supports a finding of both recklessness and willful blindness which results in enhanced statutory penalties. *Id.*

Upholding the district court’s analysis of supposed “good faith”—when determining whether a use is infringing—would turn copyright law on its head, would return the U.S. to pre-1989 era copyright law, and would contravene congressional intent in revising the Copyright Act to comply with the Berne Convention, which requires works to be protected regardless of notice. The mental state of the infringer has never been, and should not now be, a factor considered in the fair use analysis. Caselaw is clear that willfully ignoring the copyright status of a work should not be something that provides a shield to infringers.

II. THE DISTRICT COURT IMPROPERLY ANALYZED THE “NATURE OF THE COPYRIGHTED WORK” FAIR USE FACTOR.

A. Both creative works and factual works are entitled to protection, and the continuum on which the two rest is nuanced.

The second factor for the court to evaluate in a fair use defense is “the nature of the copyrighted work.” 17 U.S.C. § 107(2). As the lower court correctly notes, the more creative a work, the more protection it is accorded in a fair use analysis. *Brammer*, 2018 WL 2921089 at *2. This sliding-scale, however, is far more nuanced than the court acknowledges. By noting, then discarding, the creative elements of this photograph, this court eviscerates the ability of *any* photograph to

be entitled to copyright protection. Those elements, and the creative intent behind them, lie at the heart of photography as an expressive form of art that reflects the world as seen in the photograph. Even though *Amici*'s members document the world in a factual manner, the process and the results involve a high degree of creativity. The factual nature and the creative nature are not mutually exclusive.

Burrow-Giles Lithographic Co. v. Sarony recognizes photographs as copyrightable from earliest times. 111 U.S. 53, 55 (1884). In a more recent case, a Colorado District Court denied a defendant's motion to dismiss a copyright infringement claim, and based on the fair use doctrine's analysis of the "minimal-creativity requirement" found that

the Plaintiffs allege numerous facts regarding Hill's creative touch on the photo *e.g.*, choosing the exact pose, camera angle, focal length of lens, aperture, shutter speed, lighting, and the photo's color. Inspection of the photo reveals that it is more creative than informational or functional and that Hill, as a professional wedding photographer, took special care in taking the photo and making sure it depicted the appropriate tone for the occasion. *Hill v. Public Advocate of the U.S.*, 35 F.Supp.3d 1347, 1359 (D.Colo. 2014).

Given the very nature of photography, the use of a mechanical or digital device such as a camera should not mitigate against creativity when viewed in the context of originality. Even in 1884 the Court took notice of what Lord Justice Bowen said: "that photography is to be treated for the purposes of the [copyright] act as an art, and the author is the man who really represents, creates, or gives effect

to the idea, fancy, or imagination.” *Burrow-Giles* 111 U.S. at 61 (citing *Nottage v. Jackson*, 11 Q.B.D. 627 (1883)).

There is a distinction to be made between the nature of a true “fair use” of a factual work (i.e. as the basis for an analysis or some further creation) and the wholesale taking of a work, or the heart of the work, as in this case. Courts have held that even if a work is factual in nature, it cannot be simply stolen under the fair use doctrine. Rather, factual works are entitled to protection from use in a factual manner due to the “equitable nature of the fair use analysis.” *Financial Information Inc., v. Moody’s Investor Services, Inc.*, 751 F.2d 501, 509 (2d Cir. 1984). Here, the court found that because the copyrighted work was, in its view, factual it was less entitled to copyright protection; and although it found the infringing use to be factual as well, it still favored fair use under the second “nature of the copyrighted work” factor. This was error.

B. Photography is a creative art comprising myriad elements of choices and determinations and should be afforded the same amount of protection as other art forms.

A photograph is a 2-D visual representation of a 3-D world, and as such, a viewer must rely on their eyes in the evaluation of a photograph. But just as a manuscript evokes in the reader both depth and sense of the subject being written about, a photograph often delivers a more visceral impact upon the mind as it removes one additional layer between the message and reality. Copyright law

protects the “expression of ideas,” and there may be no truer expression of an idea than a photograph. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822-23 (9th Cir. 2002).

Photographers the world over would be distressed to hear that their creations were being discarded as simply “factual.” This framework presumes that the photograph is divorced from the creativity of the photographer. Beyond being simply factual, photographs are works of art in which the artist has carefully created or considered each individual element. These creative elements expressed in a tangible work of art are precisely what the copyright laws protect. *Burrow-Giles*, 111 U.S. 53.

Why didn't Violent Hues simply take their own photo of the neighborhood, which still exists and is available to be photographed by anyone with a smartphone? The answer may lie in the extensive creative effort that went into Brammer's photograph. Those same qualities also entitle it to copyright protection. At each step in creating a photograph, the photographer injects his skill and talent as revealed through his creative choices. The opinion recounts just a few of the creative choices this photographer needed to make to arrive at his final images, including “lighting and shutter speed choices.” *Brammer*, 2018 WL 2921089, at *2. This list of elements is quite incomplete. Creative decisions such as camera angle, aperture, ISO, time of day, lens choice, composition, season, addition or subtraction of light, and so many

more elements are the fundamental building blocks of this image. It is precisely because of these choices that Violent Hues chose *this* image to usurp.

Due to these elements, “factual” as applied to photographs is not an appropriate measure of protectability. *Amicus* NPPA, whose members are visual journalists that communicate facts to society daily, requires its members to agree to a “Code of Ethics” that is the industry standard for visual journalists.² As part of this Code, photojournalists are mandated to “[b]e accurate” and “maintain the integrity of the photographic images’ content and context.”³ In other words, it is their *duty and responsibility* to remain factual. Despite this, few would argue that the work of these visual journalists is not creative or worthy of the highest levels of protection.

A photograph is an expression of a moment in time, a moment that must be carefully planned so that many creative elements come together at the “decisive moment”⁴ when the photographer presses the shutter. In sum and substance,

² See *Code of Ethics*, NPPA, (last visited Oct. 26, 2018), <https://nppa.org/nppa-code-ethics>.

³ *Id.*

⁴ “Henri Cartier-Bresson, a founder of modern photojournalism, proposed one of the most fascinating and highly debated concepts in the history of photography: ‘the decisive moment.’ This moment occurs when the visual and psychological elements of people in a real-life scene spontaneously and briefly come together in perfect resonance to express the essence of that situation. Some people believe that the unique purpose of photography, as compared to other visual arts, is to capture this fleeting, quintessential, and holistic instant in the flow of life. For this reason, many photographers often mention the decisive moment, or similar ideas about capturing the essence of a transitory moment, when they describe their work.” John Suler, *Photographic Psychology: Image and Psyche, Part 3: Creative Captures & Post-Processing, The Decisive Moment*, (last visited Oct. 26, 2018), http://truecenterpublishing.com/photopsy/decisive_moment.htm.

photographs exist with no less depth and meaning than any other art, and as such should be entitled to the full protection of copyright law. To hold otherwise strikes a blow at the heart of the photographer's craft and livelihood.

III. THE DISTRICT COURT IGNORED THE REAL-WORLD IMPLICATIONS OF ITS HOLDING ON THE PROFESSIONAL PHOTOGRAPHIC COMMUNITY WHEN EVALUATING THE "EFFECT ON THE MARKET" FACTOR.

In its opinion, the court held that "there is no evidence that Violent Hues' use has had an adverse effect on the market for the photograph," because the photograph was sold or licensed after the infringement. *Brammer*, 2018 WL 2921089, at *3. This interpretation evinces a lack of understanding of how the community of commercial photographers and visual journalists actually earn a living. While other *amici* have detailed the effect with respect to licensing across the board, a short explanation specific to photographers may be illustrative.

First, a photographer like Mr. Brammer derives his income precisely from licensing his imagery for a wide range of uses. A photographer never knows what the use will be until the client seeks to license the work. It can be anything from a small thumbnail on a website to a billboard. That is the heart of a professional photographer's business model – licensing images. Mr. Brammer was denied this

opportunity to be paid for his work because Violent Hues stole it rather than properly licensing it for use on their website.

In this way, a photography license is no different than a car tire. The tire is created to be sold to a car owner. It would stretch reason and logic to say that if a thief stole the tire and put it on their car, that there was no effect on the market for the tire maker. Specifically, the property owner was deprived of the instant sale.

But the loss of the individual sale is not the serious market harm that is most important here. *See Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007). Rather, market harm exists because the “use of the photograph[] is paradigmatic of the only market the photograph[] could reasonably have.” *Id.* At a macro level, the holding of the district court chills the ability of all photographers to have a market for their work – in that Violent Hues did not take advantage of any of the options in the marketplace to pay for the professional image they used – thus helping to lead to the destruction of the market. Following the reasoning of the district court, all photographs could be used on websites without permission, credit or compensation under the banner of fair use. If Violent Hues—a business that desires to use professional photography for its marketing effort—can simply steal this work instead of license it, all other businesses can and will follow suit, and, consequently, an entire industry will be negatively impacted, if not demolished.

Other courts have recognized this and expressly held that when a copyright holder “maintains an active licensing program for [a] photograph, including by licensing [it for] precisely the type of use” that the infringer engages in, the infringement “poses a very real danger that other[s] will forego paying licensing fees for the Work and instead opt to use [it] at no cost.” *N. Jersey Media Group Inc. v. Pirro*, 74 F. Supp. 3d 605, 622 (S.D.N.Y. 2015) (effect on the market factor weighed against media company which stole classic 9/11 photo that had earned over \$1 million in licensing fees). As a different court explained:

It is hard to imagine that freelance photojournalists would continue to seek out and capture difficult to achieve pictures if they could not expect to collect any licensing fees. This is exactly the kind of situation that copyright is meant to impact—where unrestricted use would likely dry up the source.” *Fitzgerald*, 491 F. Supp. 2d at 189 (fourth factor weighed against infringer when infringer’s use of a factual photograph that photographer had taken for the purpose of licensing to clients like the infringer).

If the factual works of *amici’s* members are up for grabs, the market for these “useful Arts” will disappear.

CONCLUSION

For the reasons set forth above, *amici curiae*, respectfully request that this Court should grant the relief requested by Plaintiff-Appellant by reversing the erroneous district court's decision.

Dated: October 29, 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,432 words.

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

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CERTIFICATE OF SERVICE

I certify that on October 29, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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