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**BEFORE THE  
SENATE JUDICIARY SUBCOMMITTEE ON  
INTELLECTUAL PROPERTY**

**WASHINGTON, D.C.**

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**DMCA HEARING:  
HOW DOES THE DMCA CONTEMPLATE  
LIMITATIONS AND EXCEPTIONS LIKE FAIR USE?**

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**COMMENTS OF THE  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)**

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**DMCA Hearing:  
How Does the DMCA Contemplate  
Limitations and Exceptions Like Fair Use?**

Testimony of Mickey H. Osterreicher  
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July 28, 2020

On behalf of the NPPA, I thank Chairman Tillis, Ranking Member Coons and the other members of this subcommittee for the opportunity to provide our testimony regarding how the Digital Millennium Copyright Act (DMCA) contemplates the limitations and exceptions in the Copyright Act, such as Fair Use. For visual journalists, being able to protect our intellectual property rights is of paramount importance if we are to maintain our livelihood and continue to play an invaluable role in our democracy.

**Introduction**

Founded in 1946, the National Press Photographers Association (NPPA) is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all media. As the “*Voice of Visual Journalists*,” NPPA encourages its members to reflect the highest standards of quality and ethics in their professional performance, in their business practices and in their comportment. Our members include still and television photographers, editors, students and representatives of businesses serving the visual journalism industry. The NPPA vigorously promotes the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. As staunch protectors of freedom of expression and of the press, it should come as

no surprise that we are also strong supporters of the exclusive rights guaranteed by copyright and an appropriately-balanced fair use defense, both of which are essential tools for visual journalists. As an organization, NPPA has worked closely with the U.S Copyright Office over the years and provided official comments on several issues including fair use, orphan works, the DMCA, registration fees and the CASE Act. We have also filed amicus briefs in copyright infringement cases involving fair use such as *Cariou v. Prince*<sup>1</sup> and *Brammer v. Violent Hues*.<sup>2</sup>

By way of background I am an award-winning visual journalist with over forty years' experience in print and broadcast. My work has appeared in such publications as the New York Times, Time, Newsweek and USA Today as well as on ABC World News Tonight, Nightline, Good Morning America, NBC Nightly News and ESPN. As a lawyer I am an official advisor to the American Law Institute (ALI) Restatement of Copyright Law and served as co-chair of the Fair Use Subcommittee of the American Bar Association (ABA) Copyright Committee.

During my career I have taken tens of thousands of still images and video recordings. Many of those were made while I was on staff at the Buffalo Courier-Express and then WKBW-TV. Many others were made as an independent contractor (freelancer) for other news organizations (in those cases, I licensed my work and retained my copyright). One example of my work was an aerial image made during the Blizzard of '77 for Time Magazine. That image has been licensed several times over the years, yet a reverse image search finds that image being used without permission on dozens of websites. Although the image has been registered with the U.S. Copyright Office, all too often my only recourse against this theft is to send a DMCA takedown notice in the hopes that the image will be promptly removed.

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<sup>1</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) *cert. denied* 134 S. Ct. 618 (2013).

<sup>2</sup> *Brammer v. Violent Hues*, 922 F.3d 255 (4th Cir. 2019).

Even as visual journalists, who cannot work from home, risk their health and safety covering the COVID-19 pandemic and protests over the death of George Floyd and in support of Black Lives Matter, the ongoing economic downturn and reduction in staff by many news organizations, means that more and more journalists are not employees but rather independent contractors. Given the unknown nature and timing of news it is extremely difficult to register works, enforce copyright and maintain and grow a small business, while also being available at a moment's notice to cover assignments. Visual journalists do this in the same business climate that has forced many of their employers to declare bankruptcy. With this economic backdrop, the importance of vigorous and effective remedies for copyright infringement has never been more important.

### **The Devaluation of Copyright in the Digital Age**

As both staff photographers and independent visual journalists, members of the NPPA create original intellectual property for publication and broadcast in all media. Our images and videos help Americans – and others – understand the important events taking place throughout the world. Over the years, due to a proliferation of new technologies that make copying and distributing images as simple as a mouse click and online service providers (OSPs) taking little to no responsibility for the activities occurring on their platforms, online infringement of our work has increased exponentially. These frequent and harmful acts of copyright infringement take a devastating economic toll on our members, who as small business owners, must shoulder the burden of policing infringements while at the same time seeking and fulfilling photographic assignments, working on self-initiated projects and maintaining all of the tasks of running a 24/7 business. Such losses may seem insignificant to big platforms and Internet companies worth billions of dollars, but to American journalists it can mean the difference between paying the rent, putting food on the table, paying for routine health care, or paying for a child's college education.

Within seconds of its creation an image may be copied and re-posted becoming “viral” in short order. It is absurdly easy for a digital image to be stripped of its metadata, preventing even a publisher with good intentions from identifying the rights holder and being able to legally license the work. Under increased competition, many use images without permission, credit, or compensation under the premise of “act first, apologize later” or the false notion that “free promotion”—promotion that was neither requested or desired—justifies infringement. As part of that cost/benefit analysis, these infringers weigh the probability of the infringement being discovered and the visual journalist suing against the time and cost involved in obtaining prior permission and licensing. And since these photos are often newsworthy, in the rare instance when these infringers are caught, they wrongfully rely on “fair use” as a defense against the infringement without any regard to the four-factor fair use analysis set forth in the statute.

The ever-increasing theft of our work does not just harm visual journalists, it also threatens the country’s public health and safety by undermining a profession America relies upon to provide the public with compelling images, stories and vital information. Most visual journalists view our profession as a calling. No one really expects to become wealthy in this line of work, but most do expect to earn a fair living, support themselves and their family, and contribute to society—as any American who makes an honest living should. Copyright infringement reduces that economic incentive dramatically. This in turn may abridge press freedoms by discouraging participation in this field at a time when it is vital to encourage involvement in journalism more broadly, particularly among underrepresented groups. It also devalues photography as both a news medium and art form, thereby eroding the quality of life and freedom of expression that are part of this great nation.

## **Fair Use and the DMCA**

For those with the time to search for infringements (which are widespread in news photography) – once found, most visual journalists are economically barred from bringing a claim due to the fact that they cannot afford to retain a copyright attorney or the high cost of bringing a claim in federal court. Often, their best and only alternative is to send a DMCA takedown notice which does not provide monetary compensation for the infringement of their work but at least is a tiny measure to stop rampant infringement . . . except for the “whack-a-mole” factor where an infringed image is taken down only to pop up again in another site or different URL shortly thereafter.

Misbehavior euphemistically called “right-click gone wild” and the general premise that appropriation of anything on the Internet falls under “fair use” regardless of whether it actually qualifies as fair use under the four-factor test also contributes to this pernicious problem for visual journalists. And while legitimate fair use is something that journalists support and sometimes rely on, a series of court decisions have distorted the boundaries of fair use in a way that has betrayed the long-established four-factor analysis and emboldened many infringers. Notions of transformative use, which—among the several factors taken into account—may lean toward a finding of fair use if work is used for a sufficiently distinct purpose, have been misapplied and allowed to dominate fair use determinations in a number of recent cases, some involving photographs. As we noted in our amicus brief in *Cariou*, “the core of this misguided position is that a reasonable person may perceive an unaltered visual work as transformed from the original, merely because it has been placed in a different context, such as a book versus a painting. This argument does not even need to be taken to its extreme to permit any form of ‘appropriation art’ — art that recontextualizes the works of others — without the permission of or

compensation to the original author.”<sup>3</sup> But a doctrine that so liberally permits appropriation “not only harms the market for original works, but also damages the artist’s market for sales of derivative works.”<sup>4</sup>

These broad and often inaccurate theories of what qualifies as fair use influence the behavior not only of individuals and organizations that misappropriate the works of others, but also the platforms and service providers who often dismiss or turn a blind eye to infringement. In the context of the DMCA, when a copyright owner identifies infringement and sends a takedown notice, users frequently assert broad fair use defenses that result in the content being put back online by the ISP. The copyright owner is then on the clock and has a short 10-to-14-day window to bring copyright infringement claims in federal court—a course of action that is simply not possible for countless individual creators who lack the time or resources to do so. The ability of accused infringers to have content put back up after questionable fair use claims, compounded with the aforementioned whack-a-mole problem that accompanies even clear non-fair uses, stacks the deck even further against copyright owners.

And for online service providers, the more amorphous the fair use interpretation the better, as it allows them to ignore potentially infringing content and continue to host material in a frictionless system that draws visitors—and advertisers—to their platforms. Many of the most powerful Internet platforms understand that it is in their interest to muddy the waters surrounding fair use, and they do not miss opportunities to influence cases that have the potential to further expand a court’s and the public’s understanding of what constitutes legitimate fair use. This results in the already unreasonable burdens imposed on copyright owners by outdated DMCA provisions being intensified to the point that they feel

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<sup>3</sup> *Cariou v. Prince*, Amicus Brief of NPPA, *et al* at 10. <https://blogs.nppa.org/advocacy/files/2013/12/Cariou-v-Prince-Dist-Ct-Amicus-Brief-12-16-13.pdf>.

<sup>4</sup> *Id.* at 9.

they have no effective means to fight infringement. The wealthy platforms continue their massive profits on the backs of creative professionals, whose income continues to decline.

Even on the rare occasion that infringement is proven, the financial loss is usually only a few hundred to a few thousand dollars. Such small dollar amounts make it impractical for most attorneys to justify appropriate retainers, since the amount of legal work may be the same as in cases worth significantly more. In when attorneys agree to handle such matters, visual journalists as plaintiffs must consider all the potential consequences and costs involved in discovery, as well as the risk they might lose their cases and be assessed the successful defendants' legal fees.

Other factors to be considered under current copyright jurisprudence are: whether statutory damages will apply or whether the award will more approximate actual damages (which, in cases of news photographs, are for the most part *de minimis* when compared to the cost of litigation and are sometimes difficult to calculate); the time spent by the photographer meeting with an attorney, going to court, attending depositions, etc. (this can quickly exact a toll on personal and business life); and finally, the emotional cost that a prolonged legal matter has on all participants. This is especially true for someone who believes something she created (perhaps risking her life at a news event) has been usurped by someone else, who is now intentionally using every legal roadblock to prolong the agony and to block a timely and fair settlement.



## Copyright and Fair Use

Copyright is, at its most basic, a property right, that must be assertively protected in order to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>5</sup>

There has always been tension between the exclusive rights granted by copyright law<sup>6</sup> to an author of a creative work and those who believe they have a concomitant right to use such work as “fair use.”<sup>7</sup> Compounding this historically vexing issue is a concern over the use of copyrighted works where the author cannot be determined or found, otherwise known as an “orphan work.” Nowhere are these conundrums more profound than in the use and misappropriation of photographs.

The exponential proliferation of visual images on the Internet has only exacerbated this confusing situation. According to reports, 20 million photographs are viewed on the Internet every minute.<sup>8</sup> Compounding that mind-boggling number is the very prevalent, though inaccurate, belief that if a photograph is posted on the Internet it is there for the taking and any such use is “fair” ” in the colloquial sense, and therefore must also qualify as “fair use” in the legal sense.

As stated by the U.S. Copyright Office (the Office), “the distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission.”<sup>9</sup> What makes photographs so unique is that rarely are they used except in their entirety.

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<sup>5</sup> United States Constitution, Article I, Section 8.

<sup>6</sup> 17 USC §106 <http://www.copyright.gov/title17/92chap1.html#106>.

<sup>7</sup> 17 USC §107 <http://www.copyright.gov/title17/92chap1.html#107>.

<sup>8</sup> See: <http://www.dailymail.co.uk/sciencetech/article-2295703/What-happens-Internet-minute-6m-Facebook-pages-viewed-1-3m-YouTube-clips-downloaded-.html>

<sup>9</sup> See: <http://www.copyright.gov/fls/fl102.html>.

For visual journalists and other creators, copyright is not just about receiving compensation for use but, in conjunction with the First Amendment, protects a creator from compelled speech and the right to *not* publish. Copyright also protects against work being used in unapproved or unintended ways. Subjects depicted in a photograph may have only consented to being photographed for certain purposes. The photographer may have moral objections to an image being used in a certain way or by certain groups.<sup>10</sup>

## **Fair Use**

One online publication asserted that “transformativeness”<sup>11</sup> alone should be used as a metric for determining fair use rather than the four factors articulated in the statute, despite the fact that transformativeness is only one piece of one of the four factors enumerated by Congress. (those factors being: the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for, or value of, the copyrighted work. But no single factor is determinative. “All are to be explored, and the results weighed together, in light of the purpose of copyright.”<sup>12</sup>)

Others assert that one way to bolster a fair use defense is by a good faith showing and providing “credit or attribution, where possible, to the owners of the material being used.”<sup>13</sup> Unfortunately such advice runs diametrically opposite of the law and the statement by the Copyright Office that

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<sup>10</sup> See: Alicia Calzada, *A strong example of why copyright matters*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, July 13, 2012, available at <http://blogs.nppa.org/advocacy/2012/07/13/a-strong-example-of-why-copyright-matters/> ; see also SILBEY, CONTROL OVER CONTEMPORARY PHOTOGRAPHY, 42 COLUM. J.L. & ARTS 351 (2019).

<sup>11</sup> See: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

<sup>12</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

<sup>13</sup> *Id.*

“acknowledging the source of the copyrighted material does not substitute for obtaining permission.”<sup>14</sup> This kind of inaccurate information has the double consequence of misinforming the public while attempting to shift the law by providing interpretations of the law that do not in any way reflect the intent of Congress (see Sen. Tillis letter to American Law Institute regarding Restatement of Copyright Law<sup>15</sup>).

### **Caselaw: It’s Complicated!**

Many believe it is very dangerous to advocate oversimplified answers to a *very complicated* body of law. Most believe that fair use is not a set of rights but rather a defense that must be affirmatively asserted to a copyright infringement claim once that case is commenced. It is then up to a court to decide using the four-factor test. Surprisingly, the infamous misappropriationist Richard Prince’s attorneys may have said it best in their Brief in Opposition to a grant of Certiorari regarding the Supreme Court’s “repeated and well-reasoned rule of law that *no bright-line rules exist* in the fair use analysis.”<sup>16</sup>

For example, in *Otto v. Hearst*, the defendant claimed that their unauthorized use of a work was protected by fair use because it involved reporting. The court appropriately and resoundingly rejected that notion, holding that “It would be antithetical to the purposes of copyright protection to allow media companies to steal personal images and benefit from the fair use defense by simply inserting the photo in an article which only recites factual information—much of which can be gleaned from the photograph itself. If so, amateur photographers would be discouraged from creating works and there would be no incentive for publishers to create their own content to illustrate articles: why pay to create or license photographs if all personal images posted on social media are free grist for use by media companies, as

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<sup>14</sup> See: <http://www.copyright.gov/fls/fl102.html>.

<sup>15</sup> See: <https://presspage-production-content.s3.amazonaws.com/uploads/1508/12.3ltrrestatementofcopyrights-804250.pdf?10000>.

<sup>16</sup> *Cariou v. Prince*, Brief in Opposition to Petition for a Writ of Certiorari, at 2 <https://www.ipintelligencereport.com/wp-content/uploads/sites/11/2013/11/Princes-opposition-to-petition-for-certiorari.pdf>.

Hearst argues here?”<sup>17</sup> The court continued, “Though news reporting is a widely-recognized ground for finding fair use under the Copyright Act, the use of an image solely to illustrate the content of that image, in a commercial capacity, has yet to be found as fair use in this District.”<sup>18</sup> As the nation’s largest organization of professional visual journalists, we couldn’t agree more about the importance of preserving copyright for news images. When a work like the image at issue in *Otto* is widely disseminated, that “indicates that there was indeed a market for it,” thus obliterating what is widely considered to be the most important of the four fair use factors. Yet a media company with a team of in-house attorneys, that is also an ISP in some circumstances, argued that the unauthorized use was not an infringing use. And although the court was right on fair use, after going to trial in federal court, the award to the photographer was a mere \$750.

In *Brammer v. Violent Hues*, the district court itself made an erroneous analysis of not one, but all four fair use factors and held that it was fair use when a music festival used a stock photo without permission, to illustrate the website promoting its event. On appeal, the Fourth Circuit overturned, holding that the defendant was “a commercial enterprise, and a commercial market exists for stock imagery, [and] its failure to pay the customary fee was exploitative and weighs against fair use.”<sup>19</sup> The Fourth Circuit also rejected as erroneous the lower court’s assessment that “good faith” was an element that could be weighed in favor of the infringer, when “all contemporary photographs are presumptively under copyright.”<sup>20</sup> The Fourth Circuit went on to overturn each of the erroneous holdings on the fair use factors, concluding, “[t]he fair use affirmative defense exists to advance copyright’s purpose of ‘promoting the Progress of Science and useful Arts.’ The defense does so by allowing ‘others to build

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<sup>17</sup> *Otto*, at 15.

<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Brammer* at 12.

<sup>20</sup> *Id.* at 14.

freely upon the ideas and information conveyed by a work.’ **But fair use is not designed to protect lazy appropriators.**”<sup>21</sup>

In *Associated Press v Meltwater*,<sup>22</sup> the defendant asserted the affirmative defense of transformative fair use in their appropriation of copyright-protected material from the plaintiff for a “new purpose.” Despite the court’s assumption for purposes of its opinion that Internet search engines are a transformative use of copyrighted work, it still held that Meltwater engaged in copyright infringement and that its copying was “not protected by the fair use doctrine.”<sup>23</sup> In rendering its opinion the court found that the purpose and character of the use was not transformative (because there was no commentary or transformation of work in any meaningful way) and distinguished Meltwater News service from Google News as not so much a search engine, but an expensive subscription service marketed as a news clipping service. The court also found that Meltwater copied too much of the AP articles both quantitatively and qualitatively. Finally, the court found that Meltwater’s use of the works detrimentally affected the potential market and value of AP’s articles. We believe this was the correct result, but an ISP that does not know any better might side with Meltwater.

The U.S. Circuit Court of Appeals for the Second Circuit reversed and vacated a lower court decision<sup>24</sup> in part finding that Richard Prince infringed on the copyright of Patrick Cariou’s photographs when they were used in Prince’s work. Once again, the question of the “transformative nature” of the new work came into play in deciding the fair use question. The lower court had initially granted Cariou’s motion for summary judgment, finding that the artwork had infringed upon his copyrighted photographs. But the circuit court disagreed with the lower court analysis of the fair use factors. To illustrate how

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<sup>21</sup> *Id.* at 5 (internal quotes omitted; emphasis added).

<sup>22</sup> *Associated Press v Meltwater*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013).

<sup>23</sup> *Id.* at 541.

<sup>24</sup> *Cariou*.

difficult these types of decisions are, *Cariou* involved thirty pieces of artwork, but the appeals court was only able to make a determination on twenty-five of them, remanding the remaining five pieces back to the lower court for application of the appeals court’s newly minted “proper standard”<sup>25</sup> for a determination on fair use.<sup>26</sup>

In dissent Judge John Clifford Wallace agreed that the lower court’s finding was flawed, but believed that all of the works in question should be remanded for further reconsideration and factual determination under the legal standard just articulated by majority.<sup>27</sup> He also opined that “perhaps new evidence or expert opinions will be deemed necessary by the fact finder—after which a new decision can be made under the corrected legal analysis.”<sup>28</sup> Judge Wallace also took the majority to task for employing its own “artistic judgment” when comparing the transformative nature between the two works.<sup>29</sup> He cautioned against departing from aesthetic neutrality and that he would feel “extremely uncomfortable” doing so in his “appellate capacity,” let alone his “limited art experience.”<sup>30</sup> Noting the court had appeared to move away from that foundational imperative in determining fair use he cited the admonition by Justice Oliver Wendell Holmes that “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”<sup>31</sup> And yet, every second of everyday, online service providers, creators, and users—many with no legal training or firm grasp of the fair use doctrine—are asked to do just that.

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<sup>25</sup> *Id.* at 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 25.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 27 quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)

A different court also held that at universities, the use of copies from unlicensed electronic course reserves in place of traditional printed course packs was permissible under fair use.<sup>32</sup> That decision was 350 pages. It weighed the four fair use factors, with the court finding that the unpaid use of small excerpts of the works in question was acceptable given it would not discourage academic creativity in new works.<sup>33</sup>

In another fair use case the court found that the scanning of books for the purposes of indexing meets the transformative requirement even when copying entire written works because, according to the Second Circuit, it adds value and transforms the work from its original intent by providing full-text searching and access for print disabled individuals.<sup>34</sup> Decisions like these overlook clear instances of copyright infringement while focusing on what the copying *may* eventually be used for in the future.<sup>35</sup> It's a dangerous theory that excuses misappropriation for the sake of the claimed greater good of public access, and similar cases must be closely monitored to ensure that courts do not further erode the protections guaranteed to copyright owners.

I raise these cases for the simple purpose of showing just how complicated the concept of fair use can be. Courts are struggling mightily to draw the line between what does and does not qualify as a fair use. And as evidenced above, these courts often get it wrong. When a federal judge with a team of law clerks was so dramatically off the mark on the fair use analysis in *Brammer*, it is clear that the untrained gatekeepers of millions of DMCA takedown requests cannot reasonably be expected to make the right call. And the result is devastating to creators. Any implication that fair use analysis must be a part of the DMCA process puts everyone in the impossible position of acting as judge and jury when it

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<sup>32</sup> *Cambridge University Press et. al. v. Mark Becker et al*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

<sup>33</sup> *Id.* at 1240.

<sup>34</sup> *See: Authors Guild, Inc. v Hathitrust, et al*, 755 F.3d 87 (2d Cir. 2014).

<sup>35</sup> *Id.* At 92.

comes to making these determinations of facts and law. The DMCA process expects non-experts to be able to determine whether a use is or is not a legally permissible “fair use” under the four-factor analysis when the average person simply thinks a fair use is a use that is morally “fair” in their own subjective opinion and the vast majority have never even heard of the four-factor test. That is a recipe for disaster and is a big reason visual journalists are plagued by online piracy masquerading as fair use.

## **Conclusion**

As the legal system tries vainly to keep-up with technology and social policy as it relates to copyright protections for photographs and other visual images, a few things are hopefully apparent. Those who assert “fair use” as a condition precedent to the theft of photographs and visual images, do so at their peril. As the U.S. Supreme Court noted, fair use is an “affirmative defense”<sup>36</sup> that must be successfully proven by the named defendants once a copyright infringement lawsuit has been commenced. “Defendants bear the burden of proving that each use was a fair use under the statute. The analysis of the fair use defense must be done on a case-by-case basis, and ‘all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.’”<sup>37</sup>

There is a strong argument that an examination of the four fair use factors mitigates in favor of the photographer when the use is commercial or even for many educational purposes. Given that almost all copyright infringements of photographs involve their entire use rather than just a small portion of the picture, the third factor in considering fair use should favor the photographer in cases where the photographs are used without any transformative changes being made to them. Finally, the effect of the use upon the potential market for, or value of, the photograph may also be summed by Justice Holmes, when he wrote, “that these pictures had their worth and their success is sufficiently shown by the desire

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<sup>36</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994).

<sup>37</sup> *Cambridge* at 48.



to reproduce them without regard to the plaintiffs' rights."<sup>38</sup> A picture that someone wants to use has value, and photographers deserve to recoup their creative, financial and substantive investment in the marketplace.

To paraphrase U.S. District Judge Denise L. Cote's ruling in *Meltwater* – A defendant misappropriates a photograph in its entirety in order to make money directly from the undiluted use of the copyrighted material; where this use is a central feature of its business model and not an incidental consequence of the use to which it puts the copyrighted material. Photographing newsworthy events occurring around the globe is an expensive and dangerous undertaking and enforcement of copyright laws permits the photographer to earn the revenue that underwrites that work. Permitting a defendant to take the fruit of the photographer's labor for its own profit, without compensating the photographer, injures the photographer's ability to perform this essential function of democracy.

Rather than advising users about a potential fair use safe harbor, many suggest following the golden rule of "do unto others" by first seeking permission, offering to provide credit and expecting to pay when using photographs on the web. It will make a rather complicated legal issue much simpler and less costly in the long run.

Fair use is meant to protect those who stand on the shoulders of others when creating new works. It is not meant to allow massive industries to build their wealth on the uncompensated backs of small businesses and creative professionals, such as photographers, whose works are infringed with impunity hundreds, if not thousands of, times a day both intentionally and inadvertently. To say "it's complicated" is an understatement but for creators of visual works this issue must be properly addressed. Anything less turns copyright law on its head and makes it a right without a remedy.

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<sup>38</sup> *Bleistein* at 252.

In a digital age of ever-expanding creativity and consumption, updated legal principles and new legislative mechanisms are needed to ensure that the DMCA remains viable. The rights of photographers and the needs of users must be integrated into a functioning system that incentivizes and rewards creativity and innovation on both sides of the issue while simultaneously recognizing an inherent right of creators to exercise at least some control over the use of their works.

Such an updated and “fair” DMCA is imperative if the exclusive protections imbued in copyright law and the threat to photographers’ ability to be compensated for their work are to be “fairly” reconciled with freedom of expression.

Respectfully submitted,

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July 27, 2020