

Photographs

Copying Photo for Local Film Fest Site Didn't Infringe Copyright (1)

A film festival organizer didn't infringe a photographer's copyright by posting an edited image of a trendy Washington, D.C., neighborhood, a federal court ruled.

Posting photos online without permission is widely considered to be copyright infringement, and most defendants settle without much of a fight. The court's reasoning, if adopted by other federal courts, could offer relief to website operators who have been bombarded by infringement cases over photographs.

"Such an application is troubling insofar as it potentially runs afoul of the copyright owner's exclusive right to create derivative works," David S. Gold, an arts and entertainment lawyer with Cole Schotz PC, Hackensack, N.J., told Bloomberg Law.

The Northern Virginia International Film & Music Festival cropped and displayed Russell Brammer's time-lapse photo of the Adams Morgan neighborhood on its website in 2016 with other images of the Washington area. Brammer sued the festival's producers, Violent Hues Productions LLC, alleging infringement.

The U.S. District Court for the Eastern District of Virginia ruled June 11 that the website posting was protected as fair use. The court said the use was transformative because Brammer's image was used for informational purposes only.

"While Brammer's purpose in capturing and publishing the photograph was promotional and expressive, Violent Hues' purpose in using the photograph was information: to provide festival attendees with information regarding the local area," the court said.

Brammer's lawyer, David C. Deal told Bloomberg Law he is considering his client's options.

"I think there's probably a good chance we'll appeal," Deal said.

Fair Use Rulings Inconsistent The copying of creative works for certain purposes, such as criticism, commentary, and educational purposes, is allowed under the fair use doctrine. Fair-use determinations are made on a case-by-case basis and are difficult to generalize.

Federal trial and appeal courts have applied the relevant factors inconsistently, Gold said, resulting in "a frustrating lack of predictability as to how the courts will rule in these cases."

A federal appeals court found in 2013 that Google LLC's decision to make the content of several institutional libraries digital to allow for full-text searching was a fair use. But earlier this year another appeals

court said Google's copying of certain parts of Java programming language to create an Android mobile operating system was not a fair use.

Courts consider four factors under the Copyright Act when deciding whether a particular use is fair. The first and fourth factors—focusing on the nature of the defendant's use and the economic hardship to the plaintiff—have emerged as critical in many fair-use cases.

The first fair-use factor asks a court to consider the purpose and character of the defendant's use, such as whether the use is commercial. Recent cases have applied the factor by asking whether the defendant use was transformative, such as Google Book Search's full-text searching.

Tom J. Ferber, an intellectual property and media and entertainment litigator with Pryor Cashman LLP, New York, criticized the Eastern District of Virginia for reaching its conclusion without adequate explanation.

"This is an eye-catcher," Ferber said, referring to the image. "I believe it was used because it's an eye-catcher, and it's an eye-catcher because of the artistry of the photo. It's much more than informational."

"If all you wanted was an informational photo to show what the neighborhood looks like, then you would take a normal, unartistic photo that was simply an unartistic rendering," he added.

Copyright litigator J. Michael Keyes of Dorsey & Whitney LLP, Seattle, agreed.

"As far as I can tell, they just copied the photograph," he said. "I'm not sure that injects new meaning into the photograph itself."

Commercial Value Is Key The fourth fair-use factor focuses on whether the defendant's use negatively affects the market for or value of the original work. It is often the determining factor in fair-use rulings, Keyes said.

The court concluded that the festival's use didn't affect Brammer's ability to license or sell copies of the image, noting that Brammer had sold only three prints and three licenses.

"At least two of these sales occurred after Violent Hues' alleged infringement began, demonstrating that Violent Hues' use did not affect the market for the photo," the court said.

Keyes said this was not the right question to address.

"That's clearly not the test," Keyes said. He said the court should have asked whether there was a market for Brammer to license the image for the kind of use that Violent Hues made.

Another intellectual property trial lawyer said he could understand the court's reasoning.

"There seemed to be no evidence introduced to show that there was economic damage to the plaintiff," Fabio

E. Marino, an intellectual property trial lawyer with Pol-sinelli PC, San Francisco, told Bloomberg Law.

Judge Claude M. Hilton issued the court's ruling.

The Law Office of David C. Deal represented Bram-mer. Kirkland & Ellis LLP represented Violent Hues.

Violent Hues' lawyer didn't immediately respond to a Bloomberg Law request for comment.

The case is *Brammer v. Violent Hues Prods., LLC*, E.D. Va., No. 17-1009, 6/11/18.

BY ANANDASHANKAR MAZUMDAR

To contact the reporter on this story: Anandashankar Mazumdar in Washington at amazumdar@bloomberglaw.com

To contact the editor responsible for this story: Re-becca Baker at rbaker@bloomberglaw.com

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