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# Fair Factors Four

Los Angeles lawyers Howard Leslie Hoffenberg and Dorisa Shahmirzai assess recent fair use case law page 16

*by* Howard Leslie Hoffenberg *and* Dorisa Shahmirzai

# *Four* Fair Factors

## Technology has made it easy to reproduce copyrighted work but not simplified the factual analysis that determines fair use

**CODIFIED IN THE 1976 COPYRIGHT ACT** the fair use exception to copyright infringement provides a list of the purposes for which the reproduction of portions—or even an entire—copyrighted work may be considered fair and not actionable.[1] These purposes are criticism, comment, news reporting, teaching, scholarship, and research. In addition, Section 107 of the act lists four factors to be considered in determining whether or not a particular use is fair.[2] The four factors are: 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.

In recent years, technology has made it simple to reproduce copyrighted work, and courts have struggled to provide guidance on how to stay within the boundaries of fair use. *North Jersey Media Group Inc. v. Pirro*[3] serves to introduce the risks of asserting a fair use defense for using a downloaded photograph. In *Pirro*, Fox News was sued for copyright infringement over its use of a photo by Thomas Franklin. The plaintiff, a publisher, alleged that a Fox News television program had posted on its Facebook page the iconic photograph by Franklin[4] depicting firefighters raising the American flag at the ruins of the World Trade Center site.[5] The photo was juxtaposed with the classic World War II photograph of Marines raising the American flag on Iwo Jima.[6]

Fox News raised the defense of fair use in a summary judgment motion. The court examined the four factors and denied summary judgment based on the last two factors.[7] As for the second factor, the court found it to favor a finding of fair use because the work "is factual and has been published."[8] As for factor three, the court was neutral because it was not clear that Fox's "use of any less of the Work would have ensured its audience's recognition of the iconic photograph."[9]

On the first factor, the judge found it not transformative.[10] The court reasoned that the news organization was hardly the first

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North Jersey Media Group Inc. v. Pirro
Monge v. Maya Magazi
Harper & Row v. Nation Enterprises
Kelly v. Arriba Soft Corporation
Kienitz v. Sconnie Nation LLC
Vanderhye v. adigms, LLC
Campbell v. Acuff-Ros Music, In
Blanch v. Koons
Gaylord v. United State

to have thought of combining two photographs. Furthermore, the court held that it was a question of fact whether Fox News used the photo for the commercial purpose of promoting Pirro's show as opposed to commemorating 9/11.[11] Regarding factor four, the judge observed that the plaintiff had raised more than $1 million in licensing revenue from the photo from existing licensing programs.[12] The court opined that what Fox News did created a risk that other media organizations would "forego paying licensing fees for the Work and instead opt to use the Combined Image at no cost."[13] The defendants failed to convince the court that reproducing the image juxtaposed to another and adding a social media hashtag was sufficiently transformative.

## News Reporting and Matters of Public Interest

The Ninth Circuit has followed the holding in *Pirro* that merely asserting that using content on a website that has news value or that concerns a matter of public interest does not automatically create a fair use defense. In *Monge v. Maya Magazines*,[14] Maya Magazines illicitly obtained and published six photographs from the secret wedding of pop singer Noelia Lorenzo Monge. In defense against a claim of copyright infringement, Maya Magazines asserted that it was reporting on a matter of public interest.

In rejecting this analysis, the Monge court observed that the preamble of Section 107 includes news reporting as illustrative of fair use. Nonetheless, relying on Supreme Court precedent from *Harper & Row, Publishers, Inc. v. Nation Enterprises,*[15] the Ninth Circuit stated that although news reporting is an example of fair use, it is not sufficient by itself.[16] The *Monge* court then went on to analyze under what circumstance would the utilization of a photograph in news reporting be transformative, a key term in the context of fair use.[17] Quoting from the U.S. Supreme court decision in *Campbell v. Acuff-Rose Music, Inc.*,[18] the Ninth Circuit observed: "The central purpose of this investigation is to see…whether the new work merely 'supersede[s] the objects' of the original creation… or instead adds something new…it asks, in other words, whether and to what extent the new work is 'transformative.'"[19]

The Ninth Circuit held that there was no transformative use of the wedding photos in the mere 1) choosing the most dramatic photographs or seconds of footage, 2) adding captions or headlines, 3) adding a voice-over, 4) performing minor cropping, and 4) making public what had been secret. There was a transformative use, however, in the arrangement of a photograph in a photo montage or its incorporation into other material aiming at making a comment on the photograph. The *Monge* court concluded that there was no transformative use in Maya's publishing of the six wedding photographs because, the pictures were "a 'clear, visual recording' of the couple's wedding."[20] The Ninth Circuit continued its analysis by taking into account the commercial nature of the use, finding precedent in the U.S. Supreme Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*,[21] that "every commercial use of copyrighted material is presumptively an unfair exploitation." The Ninth Circuit concluded: "On balance with transformativeness, the third factor is at best neutral, and does not support Maya's claim of fair use."[22]

Turning to the fourth factor, the Ninth Circuit observed that the effect of the use upon the potential market is the most important.[23] The *Monge* court noted that the photographs had been unpublished before the defendant used them, depriving the wedding photographer of an opportunity to be the first to market. The court opined that it would be "extraordinary" for the use of an unpublished work to be a fair use.[24] Hence, this factor weighed against fair use.[25]

The final step of fair use analysis is the denouement, in which the court undertakes a balancing. After making findings on the four factors (as well as any other relevant factor), the court balances those factors to reach a conclusion. The *Monge* court cited with approval an observation in *Nimmer on Copyright* that Section 107 "provides no guidance as to the relative weight to be ascribed to each of the listed factors."[26] In this case, however, the denouement was not difficult in that all of the factors ran against fair use.[27]

## Effect on the Market

In contrast to *Monge, Perfect 10 v. Amazon*[28] is a Ninth Circuit decision notable for its downplay of the fourth factor. *Perfect 10* involved a claim that Google infringed the plaintiff's copyrights by displaying on Google's image search thumbnail replicas of infringing third-party copies of images from the plaintiff's adult magazine and website. After it filed its lawsuit, Perfect 10 began marketing thumbnails of its images for download to cell phones. The trial court found this as sufficient to weigh the fourth factor against fair use. It found that users of Google's image search are able to capture the thumbnails that Google displays in response to an image search query and transfer them to cell phones.[29]

The Ninth Circuit rejected the trial court's analysis. It held that because the trial court did not make a finding that Google users had actually downloaded thumbnail images for cell phone use, the potential harm to Perfect 10's market remained hypothetical, and thus that the fourth factor favored neither party.[30]

The *Perfect 10* court held Google's display of thumbnail images to be fair use because of the use's highly transformative, socially beneficial character, despite possible harm to the plaintiff's potential market for licensing thumbnails.[31] The *Perfect 10* court was heavily influenced by Google's having created something new: search engine results. The Ninth Circuit did not go as far in exempting transformative uses from the analysis of market harm under the fourth factor. But, in refusing to consider Perfect 10's cell phone market as even a potential market that Perfect 10 would reasonably enter—when in fact it was a market that Perfect 10 had already entered—Perfect 10 sharply diminishes the scope and force of the fourth factor.

Four years before the *Perfect 10* decision, in the confines of a less controversial set of facts that did not involve undermining the market for cell phone pictures, the Ninth Circuit held that thumbnail reproductions by a search engine to be a fair use. In *Kelly v. Arriba Soft Corporation,* a commercial photographer sold pictures to various publications from his website. The defendant, Arriba Soft, ran a search engine that indexed images and returned thumbnails. Kelly's pictures appeared as thumbnails on the defendant's search engine, and he sued Arriba for copyright infringement.[32]

The court found that U.S. search engines may use thumbnails of images, although the issue of linking to full-size images instead of going to the original site was not resolved.[33] The Ninth Circuit analyzed the four fair use factors and concluded that Arriba's use of Kelly's images as thumbnails in its search engine was a fair use. As to the nature of the copyrighted work, the pictures were considered to be a published creative work available on the Internet. The court found creative work to favor a finding of infringement.[34] As a published work, the use was more likely to be fair use. As to purpose and character, the use was found to be commercial and transformative, because the images were not being sold as pictures but were to facilitate the identification of the images in the search engine.[35]

The court found the third factor to be neutral. "Copying an entire work militates against a finding of fair use.…If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.…This factor neither weighs for nor against either party.…It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information."[36]

As to the fourth factor, the court took

into account whether such actions were widespread, or solely based on the effect of the particular user. The court indicated that Arriba's use of Kelly's images in its thumbnails did not harm the market for Kelly's images or the value of his images.[37] The court indicated that the thumbnails would guide people to Kelly's work rather than away from it, and the size of the thumbnails makes using them instead of the originals unattractive.[38] The fourth factor also figures heavily in *Ringgold v. Black Entertainment Television*.[39] Faith Ringgold, a contemporary artist, owned the copyright to a work of art titled Church Picnic Story Quilt. HBO produced an episode of the television show *ROC* in which a poster of Ringgold's artwork was used as part of the set decoration. In 1995, Ringgold happened to watch the episode on BET. She sued the defendants, alleging infringement of her copyright.

The district court upheld the defendants' fair use defense after considering the four nonexclusive factors of Section 107.[40] However, the Second Circuit reversed, finding that HBO and BET's claim to fair use was invalid. As to purpose and character, the court found that HBO and BET's use of the copyrighted work was for decorative purposes, the same purpose for which Ringgold created the work.[41] Further, HBO and BET's use of the work was not transformative; they added nothing new to the original.[42] As to the amount and substantiality of the copyrighted work used, even though the poster was only visible briefly, the whole work could be seen.[43]

The fourth factor was most significant. The court indicated there is a market to license art for use on television sets. In the past, Ringgold had refused to license the poster for use on a television show because of price and accreditation disputes. Ringgold therefore did not have to demonstrate a negative effect on her ability to license the poster.[44] She only had to show that there is a market to license the poster for use as a set decoration. As such, the Second Circuit reversed the trial court's summary judgment in favor of HBO and BET.[45]

In *Kienitz v. Sconnie Nation LLC,*[46] the Seventh Circuit addressed a similar matter regarding the reproduction of a copyrighted image. In *Kienitz,* Sconnie Nation downloaded a picture of Paul Soglin from the website of Madison, Wisconsin, of which Soglin was the mayor. In addition to adding a political message, Sconnie Nation reworked the photograph, removing background and altering facial color, details, and expression before printing the image on T-shirts and tank tops.[47]

The Seventh Circuit analyzed the four fair use factors. On factor one, the political message outweighed any profit from sales. On factor two, the court determined that the use did not diminish the value of and any potential profit for licensing of the underlying copyrighted photograph. In essence, the court found exploitation to be noncommercial. On factor three, the court held even though the entire face was copied, this was considered fair use. The alleged infringer had removed color, facial expression, and detail. On factor four, the court found that T-shirts and tank tops were not a substitute for the original photograph, and the photographer had no for-profit licensing plans. The court affirmed summary judgment in favor of the defendants.[48]

In addition to a political message on a T-shirt, courts have viewed with favor a fair use defense to the taking of photographs for a biography. In *Warren Publishing Company et. al. v. Spurlock,* a district court granted summary judgment holding that defendant's reproduction of several graphic works, originally used as monster magazine covers by plaintiff, in a book retrospective of an artist's career was considered a fair use.[49] Regarding the first factor, the court held that the defendant's use of the copyrighted works was transformative.[50] This was because the defendant used the magazine covers to describe and illustrate the artist's body of work over his lifetime.[51] This was different from the plaintiff's use of the images on the magazine covers (namely, to sell magazines).

As to the second factor, the court held that this weighed slightly in favor of the plaintiff. However, the court considered this to be of limited relevance because the defendant's use was transformative and because the copyrighted works were out of print.[52] However, with respect to the third factor, the court agreed with the defendant's argument that the amount he used should be measured against the magazine as a whole.[53] The court rejected the plaintiff's argument that each magazine cover should be considered an individual work. Accordingly, the portion used by defendant was from 1 to 1.5 percent of each magazine as a whole. The court also rejected the plaintiff's argument that the magazine covers were the heart of each issue, noting that the magazine covers were used to entice readers and advertise the content of the magazines.

Finally, as to the fourth factor, it favored the plaintiff because the plaintiff provided evidence that he had been interested in publishing a book of magazine covers and that the publication of the defendant's work would harm the market for the plaintiff's book.[54] However, the court noted that the plaintiff had not pursued this interest until the defendant had published his book. The court indicated the plaintiff's "failure to exploit his copyrights in the magazine covers for approximately 22 years substantially detracts from his argument on the fourth factor."[55]

## The Federal Circuit

An insight as to how the Federal Circuit handles fair use is gained from *Gaylord v. United States*.[56] Frank Gaylord appealed the decision of the U.S. Court of Claims that a stamp issued by the U.S. Postal Service made fair use of a copyrighted work, specifically, sculptures of soldiers that constituted part of the Korean War Veterans Memorial. The court determined that Gaylord was the sole author of the sculptures and that they were not exempt from copyright protection under the Architectural Works Copyright Protection Act.[57] The appellate court further indicated that the court of federal claims erred when it determined that the stamp made fair use of Gaylord's work.

As to the first factor, the Federal Circuit disagreed with the Court of Claims, reasoning that the inquiry must focus on the purpose and character of the stamp rather than that of the photograph taken by amateur pho-

tographer John Alli.[58] The stamp, the court held, did not reflect any "further purpose" than the artwork.[59] As the Court of Claims found, the stamp and artwork share a common purpose: to honor veterans of the Korean War.[60] The court went on to observe that works that make fair use of copyrighted material often transform the purpose or character of the work by incorporating it into a larger commentary or criticism. For example, in *Blanch v. Koons,* an artist incorporated a copyrighted photograph of a woman's feet adorned with glittery Gucci sandals into a collage that could be interpreted as a comment on consumerist culture.[61] The court determined that this was fair use in part because the collage was transformative.[62] It reasoned that the collage and the photo had "sharply different" purposes and that the collage was intended to be a "commentary on the social and aesthetic consequences of mass media."[63] This type of transformation of a copyrighted work into a larger commentary or criticism falls squarely within the definition of fair use.

The *Gaylord* court concluded that the stamp did not transform the character of the artwork. Although the stamp altered the appearance of the work by adding snow and muting the color, these alterations do not impart a different character to the work. To the extent that the stamp had a surreal character, the original work contributed to that character. A photograph capturing the sculptures on a cold morning after a snowstorm does not transform the artwork's character, meaning, or message. As the court held, "Nature's decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude."[64]

Analysis of the purpose and character of the use also included whether the "use is of a commercial nature or is for nonprofit educational purposes."[65] The Postal Service acknowledged receiving $17 million from the sale of the stamps, including to collectors.[66] The court determined that the stamp clearly had a commercial purpose. As to the second factor, the underlying work, the court indicated that although the work is part of a national monument—perhaps the epitome of a published work—given the overall creative and expressive nature of the work, this factor weighed against fair use.[67]

The court considered the third factor to weigh against fair use. The court indicated that although the government's use of the statues in the stamp weighed against fair use, the court disagreed that the weight was mitigated by the quality of the artwork.[68] The original work constituted the focus—essentially the entire subject matter—of the stamp. Although the snow and muted coloring lessened the features of the soldiers, the stamp clearly depicted an image of the artwork. Thus, the court concluded that this factor weighed against fair use.

Finally, as to the fourth factor, the court indicated that there was no clear error in the lower court's determination that the stamp has not and will not adversely impact Gaylord's efforts to market derivative works. Someone seeking to take a photograph of the artwork or otherwise create a derivative work would not find the stamp to be a suitable substitute. The court agreed that this factor favored fair use. However, on balance, weighing all factors, the court determined that the use by the Postal Service was not a fair use.[69]

## Verbatim Taking in Whole

Although many fair use cases involve images and artwork, text is not forgotten. *A.V. ex rel. Vanderhye v. iParadigms, LLC*[70] is a noteworthy example. The Fourth Circuit held that a defendant's verbatim copying without alteration of a plaintiff's copyrighted work, but for a different expressive purpose or function, constitutes a transformative fair use and ultimately enough to tip the balance in favor of fair use. In that case, iParadigms ran the Turnitin plagiarism detection service. Schools that subscribe to the service require their students to upload term papers onto the Turnitin website. Turnitin then electronically compares each student paper against its electronic database of published articles and previously uploaded student papers. Further, if the school has given permission, Turnitin stores each new student paper in its database for use in evaluating the originality of other students' papers in the future.[71]

Some high school students whose papers had been archived in Turnitin's database sued iParadigms for copyright infringement. The Fourth Circuit held that iParadigms had engaged in fair use.[72] The court found that the use was transformative because it was undertaken to prevent plagiarism, which is an entirely different purpose than that for which student authors created their papers.[73] The Fourth Circuit cited the Ninth Circuit's ruling in Perfect 10 in support of the proposition that a use can be transformative in function or purpose without altering or actually adding to the original work.[74] Moving to the third factor, the court held that the amount of the copyrighted work used must be evaluated in light of the nature of the use.[75] Since it was reasonably necessary for the transformative use to copy the entire work, the third factor was not considered to count against fair use.

## Other Defenses

Although *Vanderhye* and the recent, much-discussed decision in *Lenz v. Universal Music Corporation*[76] (holding that fair use is to be considered on Digital Millennium Copyright Act takedown demand) may be praised for strengthening the shield of fair use, it should be noted that fair use is not the only defense available to an artist who uses a preexisting photograph. In *Fairey et al. v. The Associated Press,*[77] for example, Obey Clothing acquired illustrations of President Barack Obama from artist Shephard Fairey and generated millions of dollars in revenue by selling T-shirts and hoodies with the illustrations. In creating them, Fairey used a copyrighted photograph that was owned by the Associated Press. In the two most well-known examples, Fairey stylized the photographs by removing detail and adding coloring.

Surprisingly, Obey Clothing did not raise fair use as a defense. Rather, Obey Clothing defended on the grounds that the only elements that the Associated Press photograph shared with Fairey's illustrations were those that are not protected by copyright law because: 1) they are ideas, not expression, 2) they naturally flow from the unprotected idea and therefore are not protected under the scenes a faire doctrine, or 3) they were not chosen, created, or otherwise the original work of the Associated Press's photographer. In the Fairey case, there is no court ruling on the success of this defense strategy because the dispute settled. In other copyright cases, however, this ideas-not-expression defense strategy has had success.

In *Harney v. Sony Pictures Television, Inc.*,[78] freelance photographer Donald Harney took a picture of a young girl on her father's shoulders holding a palm frond, with a church in the fabled Beacon Hill section of Boston in the background. As fate would have it, the father abducted his daughter. The FBI used Harney's photograph in a wanted poster, and Sony Pictures Television produced a docudrama on the story. Sony used a simulation of the photograph, using a male adult model holding a young girl model on his shoulder. Harney sued for copyright infringement.

The First Circuit reasoned that copyright protection "extends only to those components of a work that are original to the author," and that "a work that is sufficiently 'original' to be copyrighted may nonetheless contain unoriginal elements."[79] The court's analysis initially "dissect[s]' the earlier work to 'separat[e] its original expressive elements from its unprotected content.'"[80] The First Circuit held: "[S]ubject matter that the photographer did not create could be viewed as 'facts' that, like ideas, are not entitled to copyright protection."[81] Quoting from prior decisions, the *Harney* court held: "The Supreme Court has observed that '[t]he most fundamental axiom of copyright law is that "[n]o author may

copyright his ideas or the facts he narrates.'"[82]

Applying this holding, the *Harney* court found that Sony had only taken factual elements form Harney's photograph (a daughter on father's shoulders) and no expressive original content (such as the palm in her hand or the church in the background). In particular, the court held: "Inescapably, however, Harney's creation consists primarily of subject matter—'facts'—that he had no role in creating, including the central element of the Photo: the daughter riding piggyback on her father's shoulders."[83] Sony was judged nonliable for copyright infringement.

As these cases indicate, transformative purpose is not limited to physically transforming the work. Transformation may include the reason for using the work and is central to fair use. Perfunctory manipulation is likely to be perceived as such and not be weighty enough to establish a transformative use for purposes of asserting a fair use. A new message or utility will likely be very influential in tipping the balance in favor of finding a transformative use. Courts have nevertheless stated that transformative use is not a necessary or sufficient requirement for a finding of fair use. Effect on the market for the original work is a heavily weighed factor. Those who reuse content are advised to avoid perfunctory fair use analysis. ■

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[1] *See generally* 17 U.S.C. §107.
[2] *Id.*
[3] North Jersey Media Group Inc. v. Pirro, No. 13 Civ. 7153 (S.D. N.Y. Feb 10, 2015).
[4] *Id.*
[5] *Id.* at 2.
[6] *Id.* at 4.
[7] *Id.* at 8.
[8] *Id.* at 10-17.
[9] *Id.* at 18-20.
[10] *Id.* at 11-13.
[11] *Id.*
[12] *Id.* at 6, 22-25.
[13] *Id.* at 24.
[14] Monge v. Maya Magazines, 688 F. 3d 1164 (2012).
[15] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557 (1985).
[16] Monge, 688 F. 3d at 1173.
[17] *See generally* Pierre N. Leval, *Toward a Fair Use Standard,* 103 HARV. L. REV. 1105 (1990) (transformative use) [hereinafter Leval].
[18] Monge, 688 F. 3d at 1173-74.
[19] *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); *see also* Folsom v. Marsh, 9 F. Cas., 342, 348 (No. 4,901) (C.C.D. Mass. 1841); Harper & Row, 471 U.S. at 562; Leval, *supra* note 17, at 1111.
[20] Monge, 688 F. 3d at 1173-74 (quoting L.A. News Serv. v. KCAL-TV Channel 9, 108 F. 3d 1119, 1122 (1997)).
[21] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).
[22] Monge, 688 F. 3d at 1176-77.
[23] Harper & Row, 471 U.S. at 566.
[24] Monge, 688 F. 3d at 1177-80.
[25] *Id.* at 1180-2.
[26] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER

ON COPYRIGHT §13.05[A] (2011).

[27] Monge, 688 F. 3d at 1183-84.

[28] Perfect 10 v. Amazon, 508 F. 3d 1146 (9th Cir. 2007).

[29] *Id.* at 1165.

[30] *Id.* at 1168.

[31] *Id.* at 1166.

[32] Kelly v. Arriba Soft Corp., 336 F. 3d 811 (2003).

[33] *Id.*

[34] *Id.* at 942.

[35] *Id.* at 941.

[36] *Id.* at 943.

[37] *Id.* at 944.

[38] *Id.*

[39] Ringgold v. Black Entm't Television, 126 F. 3d 70 (2d Cir. 1997).

[40] *Id.*

[41] *Id.* at 79-80.

[42] *Id.*

[43] *Id.* at 81.

[44] *Id.*

[45] *Id.*

[46] Kienitz v. Sconnie Nation LLC, 766 F. 3d 75 (7th Cir. 2014).

[47] *Id.*

[48] *Id.* at 76.

[49] Warren Publishing Co., et. al. v. Spurlock, 645 F. Supp. 2d 402 (E.D. PA. 2009).

[50] *Id.* at 418.

[51] *Id.* at 419.

[52] *Id.* at 423. (citing Peter Letterese & Assocs., Inc. v. World Inst. of Scientology, 533 F. 3d 1287 (11th Cir. 2008) (out-of-print works are generally accorded less copyright protection)).

[53] *Id.* at 424.

[54] *Id.* at 426.

[55] *Id.* at 427.

[56] Gaylord v. United States, 595 F. 3d 1364 (2010).

[57] *Id.* at 1374.

[58] *Id.*

[59] *Id.* at 1375. *See also* Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

[60] Gaylord, 595 F. 3d at 1375.

[61] Blanch v. Koons, 467 F. 3d 244, 248 (2d Cir. 2006).

[62] *Id.* at 252-53.

[63] *Id.*

[64] *Id.*

[65] 17 U.S.C. §107.

[66] Gaylord, 595 F. 3d at 1374.

[67] *Id.*

[68] *Id.* at 1375.

[69] *Id.*

[70] A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F. 3d 630 (4th Cir. 2009).

[71] *Id.* at 634.

[72] *Id.* at 645.

[73] *Id.* at 640.

[74] *Id.* at 639.

[75] *Id.* at 642.

[76] Lenz v. Universal Music Corp., 801 F. 3d 1126 (2015).

[77] Fairey et al. v. The Associated Press, No. 1:09-cv-01123-AKH (S.D. N.Y. 2011).

[78] Harney v. Sony Pictures Television, Inc., 704 F. 3d 173 (1st Cir. 2013).

[79] *Id.* at 178 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991)).

[80] Harney, 704 F. 3d at 179 (quoting Coquico, Inc. v. Rodríguez-Miranda, 562 F. 3d 62, 66 (1st Cir. 2009)).

[81] Harney, 704 F. 3d at 179.

[82] *Id.* at 181 (quoting Feist, 499 U.S. at 344-45 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985))).

[83] Harney, 704 F. 3d at 184.