

DOCKET NO. 18-1763

United States Court of Appeals
for the
Fourth Circuit

RUSSELL BRAMMER,

Plaintiff-Appellant,

– v. –

VIOLENT HUES PRODUCTIONS, LLC, FERNANDO MICO, Owner,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA IN NO. 1:17-CV-01009-CMH-IDD,
CLAUDE M. HILTON, SENIOR U.S. DISTRICT COURT JUDGE

**BRIEF FOR *AMICUS CURIAE* NEW YORK
INTELLECTUAL PROPERTY LAW ASSOCIATION
IN SUPPORT OF NEITHER PARTY**

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* New York Intellectual Property Law Association (NYIPLA) certifies that it is a New York not-for-profit corporation, has no parents and does not issue shares of stock. NYIPLA is a professional association, whose interests and practices lie in the areas of patent, trademark, copyright, trade secret, and other intellectual property law, and whose members include attorneys specializing in copyright law.

Dated: October 29, 2018

By: /s/ Martin B. Schwimmer
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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted on behalf of the New York Intellectual Property Law Association (“NYIPLA”).

The NYIPLA is a professional association of approximately 1,000 attorneys whose interests and practices lie in the areas of patent, trademark, copyright, trade secret, and other intellectual property law. The NYIPLA’s members include a diverse array of attorneys specializing in copyright law, including in-house counsel for businesses that own, enforce, and challenge copyrights, as well as attorneys in private practice who advise a wide array of clients on copyright matters and procure copyright registrations through the U.S. Copyright Office. Many of the NYIPLA’s member attorneys participate actively in copyright litigation, representing both owners and accused infringers. The NYIPLA, its members, and the clients of its members share an interest in having the standards governing the enforceability of copyrights be reasonably clear and predictable.

The arguments set forth in this brief were approved on October 28, 2018 by an absolute majority of the total number of officers and members of the Board of the NYIPLA (including such officers and Board members who did not vote for any reason including recusal), but do not necessarily reflect the views of a majority of the members of the Association or of the firms or other entities with which those members are associated.

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. No person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

After reasonable investigation, the NYIPLA believes that no member of the Board or Amicus Committee who voted to prepare this brief on its behalf, or any attorney in the law firm or corporation of such a Board or Committee member, or attorney who aided in preparing this brief, represents either party to this litigation. Some Committee or Board members or attorneys in their respective law firms or corporations may represent entities which have an interest in other matters which may be affected by the outcome of this litigation. A Board member who is counsel for Appellant on the appeal was recused from and did not participate in the voting relating to or any other preparation of this brief.

II. INTRODUCTION

NYIPLA respectfully submits this brief to address certain errors in the District Court's analysis of two of the four non-exhaustive factors set forth in 17 U.S.C. § 107 for the evaluation of fair use, which led to an erroneous conclusion below. The analysis in the District Court's decision runs contrary to settled law and, if the decision is affirmed and then relied upon by other courts, it could have devastating effects on the protection of many copyrighted works, particularly photographs. The

NYIPLA submits this brief to address these errors in the fair use analysis without taking a position on the underlying merits of the parties' dispute.

III. ARGUMENT

A. **The District Court's Analysis Erroneously Concluded that the First Factor of the Fair Use Analysis Favored Violent Hues.**

The first fair use factor articulated in the Copyright Act is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). This factor asks whether the new work merely “supersedes” or “supplants” the copyrighted work “or if it instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

Elements such as transformativeness and commerciality are not absolute; rather, each exists along a continuum and is properly assessed relative to the other. *See id.* at 579 (the first factor asks “whether and to what extent the new work is transformative.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, n.40 (1984) (cautioning that the question of commerciality is “not simply two-dimensional.”); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (citing *Campbell*, 510 U.S. at 579) (noting that the more transformative the use, the less weight that is afforded to other factors such as commercialism).

Judge Leval has referred to this critical first factor as the “heart of the fair use inquiry.” *See On Davis v. The Gap, Inc.*, 246 F.3d 152, 171 (2d Cir. 2001), *as amended* (May 15, 2001). Yet, the District Court’s analysis of this factor is brief and misses the point. In a mere three sentences, it concludes that Violent Hues’ use is “transformative in function and purpose” because Violent Hues used the photo “to provide festival attendees with information regarding the local area,” and that the use is not commercial “because the photo was not used to advertise a product or generate revenue.” Joint Appendix (hereinafter “JA”) 223. After addressing transformativeness and commerciality as if they were wholly independent and binary considerations, the District Court then adds a conclusion that Violent Hues acted in good faith because its owner believed that the photograph was publicly available, suggesting that these alleged facts and this conclusion affects and affirms the finding that the first fair use factor weighs in favor of Violent Hues. *See id.*

This analysis contains multiple errors, many of which pertain to the transformativeness element. First, the analysis erroneously conflates the parties’ divergent motivations with a transformative function or purpose for Violent Hues’ use. Second, the analysis fails to fully consider the merits of Violent Hues’ purported “informational” purpose and whether that purported purpose, even if true, can actually justify the taking of Brammer’s expressive work.

These errors, compounded, yield a strikingly broad interpretation of what it means to be transformative. Conversely, the District Court's analysis also errs by reading commerciality too narrowly, and wholly failing to consider that Violent Hues profited by not compensating Brammer for its use of his photograph.

Finally, the District Court's analysis errs by appearing to accept and weigh Violent Hues' purported good faith as part of this analysis; the doctrine of fair use would entirely usurp copyright law if fair use could be established each time an alleged infringer stated that he found the work on the Internet and believed the photo was "publically [sic] available." JA 221.

1. The District Court's Analysis Erroneously Conflated Motivation with Purpose.

The District Court's misapplication of the fair use doctrine began when they adopted Violent Hues' contention that the type of change in purpose that Violent Hues claims to have made is properly considered transformative. Because its use does not alter or augment Brammer's photograph, Violent Hues argued that the use is transformative in "function" or "purpose." Specifically, Violent Hues argued that its purpose was to "provide[] festival attendees with information regarding the . . . neighborhood depicted in the Photo." JA 64. The District Court contrasts this alleged purpose with Brammer's motivation for creating and displaying his work, which Violent Hues characterizes as a "promotional or expressive use."

While a change in purpose or function can be transformative, the cases supporting this less traditional approach to transformativeness generally speak to situations other than the instant matter, where a defendant makes a wholly divergent, content-agnostic use of an expressive work. For example, in *iParadigms*, student essays were archived as “digital code” to create software capable of detecting plagiarism. *See iParadigms*, 562 F.3d at 634. This Court deemed the use of the essays transformative because it was intended for an entirely different purpose. *See id.* at 638–40. It was significant that the new function was wholly divorced from the expressive content of the individual essays. The essays as used in the software functioned not to convey their content to a reader, but simply as data points. *Cf. Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) (“Google’s claim of transformative purpose for copying from the works of others is to provide otherwise unavailable information about the originals.”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (“Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.”). These cases demonstrate that even a change in function or purpose must alter the appropriated work with new expression, meaning or message in order for the change in function or purpose to be transformative. *See also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006)

(finding a transformative use where decorative, promotional Grateful Dead posters were included as “historical artifacts” in a book about the band); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000) (finding a transformative use where photographs originally taken for a modeling portfolio were included in a news story to inform the public that the photos even existed). This is not the case here.

Motivation may be evidence of purpose, but it is not determinative of purpose. Violent Hues states simply that its purported motivation for appropriating the copyrighted work (to provide information) was different than Brammer’s motivation for creating and displaying it (to advertise his skills as a photographer). But neither of these alleged motivations speaks to the purpose or function of the work, which appears to be the same in the original and in the accused use: to visually convey a particular expressive image. *See, e.g., Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (holding that the use of a poster as decoration on a TV show was not transformative because it was used for “precisely a central purpose for which it was created” and defendants had done nothing with the poster to add anything new) (internal citation omitted).

By finding transformativeness in this situation, where the only change is an alleged different purported motivation driving the use, the District Court adopts a very broad reading of transformativeness that could seemingly apply in virtually any situation. For example, applying analogous logic in *On Davis v. The Gap*, in which

the plaintiff's glasses were used in The Gap's clothing advertisement, the Second Circuit might have found that The Gap's use was transformative in that its purpose was to show how an outfit might be styled, or to convey something about The Gap's edginess. Instead, the Second Circuit properly found no transformativeness because "[t]he ad shows Davis's Onoculii being worn as eye jewelry in the manner it was made to be worn—looking much like an ad Davis himself might have sponsored for his copyrighted design." *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001), *as amended* (May 15, 2001). Likewise, if this premise were applied in *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010) (hereinafter "*Bouchat IV*"), this Court might have found the Ravens' use of a copyrighted logo transformative merely because their purpose was to create a highlight reel, instead of to identify the Ravens using a recognizable team symbol. *See Bouchat IV* at 309 ("Simply filming football games that include the copyrighted logo does not transform the purpose behind the logo's use into a historical one.").

2. The Asserted Change in Purpose Does Not Justify the Extent of the Appropriation.

Even if this use for "informational" purposes could be considered to some extent transformative, however, that should not have ended the inquiry. The first factor asks not only what the purpose of the use is, but whether the appropriation at issue was necessary to accomplish that purpose. *See Storm Impact, Inc. v. Software of Month Club*, 13 F. Supp. 2d 782, 787 (N.D. Ill. 1998) ("This factor directs the

courts to examine whether the particular use made of copyrighted material was necessary to the asserted purpose, or whether the defendant's purpose could have been accomplished by taking nonprotectible [sic] material or less expression."); 2 WILLIAM F. PATRY, PATRY ON FAIR USE § 3.1 (May 2018 ed.) ("[W]hile the preamble directs the courts to determine whether the use is of a type potentially qualifying as a fair use, the first factor directs the courts to examine whether the particular use made of copyrighted material was necessary to the asserted purpose of criticism, comment, etc., or instead, whether defendant's purpose could have been accomplished by taking nonprotectable material such as facts, ideas, or less expression."); see also *Bouchat v. Baltimore Ravens Ltd. P'ship.*, 737 F.3d 932, 940 (4th Cir. 2013) (hereinafter, "*Bouchat V*") (finding of transformative purpose informed, in part, by the fact that the logo at issue appeared in defendant's videos for "fractions of a second" and was "all but imperceptible.").

Violent Hues did not need to portray the Adams Morgan neighborhood at all to achieve its purported purpose of providing information. The Adams Morgan neighborhood of Washington D.C. depicted in the image is one of 131 D.C. neighborhoods, and has no stated specific relationship to the film festival, which apparently took place in Virginia. Proximity to Virginia appears to be the only commonality between the neighborhood and Violent Hues' event. Further, Violent

Hues offers no explanation as to how its use of Brammer's image provides information, or even what information the Brammer image supposedly conveys.

Furthermore, Violent Hues did not need to portray this particular photograph. Violent Hues displayed the Brammer photograph of the Adams Morgan neighborhood between two other artistic images showing locations in what appear to be Virginia and Maryland, visually conveying expressive content, comprised of an attractive image of a street scene in Adams Morgan and other locations. Using Brammer's image was not essential to any function of Violent Hues' website. Violent Hues' use is thus very different from the numerous other cases where copying the specific works at issue was unavoidable and necessary. For example, in *iParadigms*, the copying of the students' essays was vital to the functionality of the plagiarism-detecting software. *See A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009). In *Authors Guild*, copying the books was necessary to facilitate searchable text. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015). In *Perfect 10*, the use of copyrighted images in a thumbnail search index served a different purpose than the images themselves. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007). In *TVEyes*, the indexing of video clips to allow users to parse through footage from more than 1,400 channels to view content of interest achieved a transformative efficiency. *See Fox News Network v. TVEyes, Inc.*, 883 F.3d 169, 177–78 (2d Cir. 2018).

Here, had Violent Hues simply wanted to offer information about the Adams Morgan neighborhood, it could have done so in any number of ways other than taking and using Brammer's image without compensating Brammer. It could have described the area, provided a map, or commissioned or licensed a photograph. It was not necessary for Violent Hues to use Brammer's work to accomplish this aim, nor was it reasonable to do so. *See, e.g., Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003), *overruled on other grounds by Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir. 2011) (finding certain uses of television clips as "historical reference points" fair, while others uses lacked transformative purpose as they employed the clips "in excess of this benign purpose.").

3. The District Court's Analysis Erroneously Construed Commerciality Narrowly, and Not in Light of the Low Degree of Any Transformativeness.

This Court has held that "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." *iParadigms*, 562 F.3d at 638 (4th Cir. 2009) (quoting *Harper & Row Publ'rs v. Nation Enters.*, 471 U.S. 539, 562 (1985)); *see also Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 50–60 (1st Cir. 2012) ("[T]he commercial-noncommercial distinction the law draws centers not on whether a user intends to

line his own pockets, but rather on ‘whether the user stands to profit from the exploitation of the copyright material without paying the customary price.’”). Here, rather than following this accepted analysis, the District Court summarily concluded that Violent Hues’ use was non-commercial “because the photo was not used to advertise a product or generate revenue.” JA 223. This conclusion wholly disregards that Violent Hues in fact “profited” by using Brammer’s expressive work by virtue of not compensating him. Given the limited degree of transformativeness in Violent Hues’ use, if any, the fact that Violent Hues did not reap a direct profit from its use of Brammer’s photo should not conclusively categorize the use as non-commercial.

4. Violent Hues’ Alleged Good Faith Is Irrelevant.

In connection with its evaluation of the first fair use factor, the purpose and character of Violent Hues’ use, the District Court’s analysis inappropriately gave credence to Violent Hues’ alleged good faith. Specifically, the District Court cited evidence of Violent Hues’ subjective belief that the photo was available for copying because it was on the Internet, and Violent Hues’ removal of the photograph from its website after notification from Brammer. JA 223. Setting aside the separate issue of whether Violent Hues’ actions actually evince good faith, such alleged good faith should be irrelevant to finding fair use.¹ *See, e.g., Oracle Am., Inc. v. Google LLC,*

¹ Fair use has its roots in equity. *See Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 202 (4th Cir. 1998). A defendant asserting fair use is generally expected to have acted “in a manner generally compatible with principles of good faith and fair

886 F.3d 1179, 1203 (Fed. Cir. 2018) (“[W]hile bad faith may weigh against fair use, a copyist’s good faith cannot weigh in favor of fair use.”); *Bouchat V*, 737 F.3d 932, 942 (4th Cir. 2013) (noting that, “as an initial matter, ‘good faith’ is not listed as a fair use factor in § 107 of the Copyright Act”); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1192, n.6 (9th Cir. 2012) (applying the “general rule that a party claiming fair use must act in a manner generally compatible with principles of good faith and fair dealing”) (citing *Perfect 10, Inc.*, 508 F.3d at 1164, n.4); *North Jersey Media Group v. Pirro*, 74 F. Supp. 3d 605, n.13 (S.D.N.Y. 2015) (noting that defendant’s subjective belief that she did not need permission to post a copyrighted image located using a Google search on a television program’s social media page was “entitled to little weight” and pointing out that “whether Defendants appropriate the Work in good faith is irrelevant to the [fair use] analysis”); *see also* 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.08(B)(1) (“the innocent

dealing.” *See Perfect 10, Inc.*, 508 F.3d at 1164, n.8 (9th Cir. 2007) (citing *Harper & Row*, 471 U.S. at 562–63). For that reason, bad faith is considered relevant, if not dispositive. *Cf. Fisher v. Dees*, 794 F.2d 432, 436–37 (9th Cir. 1986) (“One theme running through the composers’ briefs is that Dees’ alleged bad conduct should bar his use of the equitable defense of fair use. The principle invoked is sound.”) *with NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 (2d Cir. 2004) (“it is clear that a finding of bad faith, or a finding on any one of the four factors, cannot be considered dispositive,” citing *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 923 F. Supp. 1231, 1244, n.14 (N.D. Cal. 1995)). That the presence of bad faith may cut against a finding of fair use does not suggest that the inverse is true, namely, that good faith in and of itself (particularly where the alleged good faith consists essentially of a claim of ignorance of the law) should weigh in favor of fair use.

intent of the defendant constitutes no defense to liability”); Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1126–28 (1990) (“The inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits.”); *but see Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1122 (D. Nev. 2006) (“the fact that Google has acted in good faith in providing ‘cached’ links to web pages lends additional support for the Court’s fair use finding”).

Copyright infringement is a strict liability offense. *See* 17 U.S.C. § 501(a); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004) (strict liability applies to direct infringers). As courts in this circuit have recognized, good faith is not relevant to the fundamental question of liability, though it may be relevant to the assessment of damages. *See, e.g., Silver Ring Splint Co. v. Digisplint, Inc.*, 543 F. Supp. 2d 509, 519 (W.D. Va. 2008) (innocent infringement not relevant as plaintiff sought summary judgment on liability only); *Phoenix Renovation Corp. v. Rodriguez*, 439 F. Supp. 2d 510, 517 (E.D. Va. 2006) (“While the defense of innocent infringement can impact the remedies available against a defendant for copyright infringement, it ‘will not constitute a defense to a finding of liability.’”).

In accepting Violent Hues’ allegations regarding its purported good faith, the District Court decision cites no case law. Further, the lone case upon which Violent Hues relies for its argument that its purported good faith counts in its favor does not

actually support that proposition. Violent Hues relies upon a sentence in *Bouchat IV*, stating that because fair use has its roots in equity, “the propriety of the defendant’s conduct is relevant to the ‘character’ of the use.” *Bouchat IV*, 619 F.3d 301, 311 (4th Cir. 2010). In *Bouchat IV*, however, this Court addressed the relevance of a defendant’s bad faith conduct, and found that, particularly given the non-transformative nature of defendant’s use, defendant’s misdeeds barred it from relying on fair use. *See id.* *Bouchat IV* therefore stands for the different and non-equivalent proposition that bad faith can work against a defendant, not for the proposition that good faith evinces fair use.

B. The District Court’s Analysis Erroneously Concluded that the Second Factor of the Fair Use Analysis Favored Violent Hues.

1. The District Court’s Analysis Erroneously Characterized Expressive Images as Facts.

The second fair use factor articulated in the Copyright Act is “the nature of the copyrighted work.” 17 U.S.C. § 107(2). This factor generally looks at the extent to which the work is of a kind that is “closer to the core of intended copyright protection than others.” *See Campbell*, 510 U.S. at 586 (listing dichotomies of works as being along a spectrum of creativity). The Supreme Court has held that bare facts do not possess requisite originality. *See Feist Publ’ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 347–48 (1991). As copyright protection does not extend to the use of facts, protection extends only to the manner of expression. *See Bond v. Blum*, 317

F.3d 385, 394 (4th Cir. 2003). Consequently, fair use is less likely to be found in creative works than “factual” ones. *iParadigms*, 562 F.3d at 640 (quoting *Stewart v. Abend*, 495 U.S. 207 (1990)). The District Court’s analysis correctly quotes the *Bond* analysis, further acknowledging that uses “not related to [a work’s] mode of expression but rather to its historical facts” are more permissible fair uses. *Id.* at 396.

While the District Court’s analysis briefly acknowledges that there are “creative elements” of Brammer’s photo, it inexplicably divorces these elements from the photo as copied, to conclude that Violent Hues used the photo “purely for its factual content.” *See Bond*, 317 F.3d at 395. While the subject of a photograph may be “factual” insofar that it reproduces what exists in the world, it is long recognized that the original aspects of a photograph—“lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved”—are the result of artistic creation. *See Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)). These elements are the creative decisions that push photography away from merely capturing the world as it is, into a manifestation of expression protectible by copyright law. *See id.* Thus, photographs are simultaneously factual and creative. *See Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000); *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2002) (“Photographs

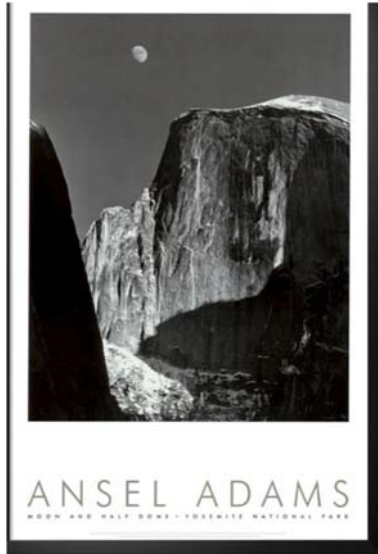
that are meant to be viewed by the public for informative and aesthetic purposes, such as Kelly's, are generally creative in nature.”).

Accordingly, *Violent Hues*, by precisely reproducing the Brammer photograph, did not copy facts, but rather, copied an altered image of the Adams Morgan neighborhood as creatively expressed by Brammer. It is simply incorrect to say that Brammer's photo is merely a “factual depiction of a real-world location,” because the houses in Adams Morgan are not blue and pink in reality, and the cars' headlights do not leave a trail of light in real life.

2. The District Court's Analysis Arbitrarily Broadened the Scope of Fair Use Protection for Published Works.

Furthermore, the District Court cites absolutely no law in finding that “the scope of fair use is broadened when a copyrighted work has been previously published.” JA 224. We agree that unpublished works are entitled to a greater scope of protection than published works, particularly where the work's commercial success depends on the artist preserving their right to first publication. *See Harper & Row* at 555. There is no reason, however, to conclude that the “published” nature of Brammer's photo warrants a broadened scope of fair use. Taken to its logical conclusion, the District Court's analysis would seemingly permit rampant, uncompensated copying of the vast multitudes of creative works that are published on the Internet.

3. The District Court’s Analysis Erroneously Mischaracterized the Relationship of Violent Hues’ Reproduction of Copyrightable Elements as Factual and Not Expressive.



As the *Bond* court notes, the inquiry considering the first and second factor is in determining whether the relationship is with the “expressive mode,” or with the “historical facts.” *See Bond* at 395–96. Contextually, the photo appears alongside two other “nice” photos of local Washington D.C. area attractions. Violent Hues’ asserted use of Brammer’s photo is analogous to using

this photo (left) to inform visitors to Yosemite that Half Dome is a nearby attraction, or this photo (below) to inform New York City tourists that Times Square is a fun place to visit.

As stated in Section I, Violent Hues reproduced the expressive elements of Brammer’s work, namely the resulting visual effects of Brammer’s artistic choices as to lighting and shutter speed. Violent Hues did not add contextual information targeted at the content of the work (i.e., criticism) or the work itself



(i.e., background information about the work). Because the parties’ purposes were identical—conveying a visual image—and the nature of the portion of the work

copied was the expressive depiction of the Adams Morgan neighborhood, it is clear that a creative work has been copied for a decorative purpose. Such mechanical copying of creative elements is clearly not fair use.

IV. CONCLUSION

In part for the reasons discussed herein, the District Court's decision should be overturned.

Respectfully submitted this 29th day of October, 2018.

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

Dated: October 29, 2018

By: /s/ Martin B. Schwimmer
Martin B. Schwimmer

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I HEREBY CERTIFY that on this 29th day of October, 2018, the foregoing Amicus Curiae Brief for the New York Intellectual Property Law Association was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent through e-mail to all parties by operation of the Court's CM/ECF system.

Dated: October 29, 2018

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