

**CAN I USE THIS PHOTO I FOUND ON
FACEBOOK? APPLYING COPYRIGHT LAW
AND FAIR USE ANALYSIS TO PHOTOGRAPHS
ON SOCIAL NETWORKING SITES
REPUBLISHED FOR NEWS REPORTING
PURPOSES**

DAXTON R. “CHIP” STEWART, PH.D., LL.M.*

When news breaks about relatively unknown people, news media sometimes turn to social networking sites such as Facebook and MySpace to find photographs of the subject, as was the case with the woman connected to former New York Governor Eliot Spitzer when his name turned up in a prostitution probe. However, posting photos on social media does not make them public domain, and copyright holders may have a claim for infringement for unauthorized use of the photos. This article applies the four-part fair use analysis to such situations to evaluate the validity of that defense for photographs republished for news reporting purposes, and it concludes that fair use likely will not provide a shield in most situations. In situations where news publishers act in good faith and photographs are independently newsworthy, however, the fair use defense is more likely to succeed.

INTRODUCTION	94
I. COPYRIGHT, PHOTOGRAPHS AND NEWS REPORTING	97
II. APPLYING THE FAIR USE ANALYSIS	101
A. Purpose and Character of the Use.....	101
B. Nature of the Copyrighted Work	106
C. Amount and Substantiality of Use	108
D. Effect on Potential Market of the Copyrighted Work.....	110
III. CONCLUSION.....	115

* Daxton R. “Chip” Stewart, Ph.D., LL.M., is an assistant professor at the Schieffer School of Journalism, Texas Christian University. The author is grateful for the assistance of Nicole Cunningham, Ujal Ibrahim, Ashley Iszkun, Nicholas Olivier, Rachel O’Neal, Andrea Phillips, and Kirk Wise, graduate students at TCU. Their exploratory research and discussions of this topic made the article and its arguments as strong as they could be.

INTRODUCTION

When the news broke in March 2008 that New York Governor Eliot Spitzer was a client of a prostitution ring, leading to his resignation just days later, it was only a matter of time before the news media uncovered the subject of his extramarital dalliances.¹ Ashley Alexandra Dupré, a 22-year-old aspiring singer who worked for the Emperor's Club V.I.P., drew international attention, and no story was complete without photos of the woman.²

The Associated Press obtained and circulated photographs³ from Ms. Dupré's page on MySpace, a social networking site that allows users to share information and photos with others.⁴ The three photos, each featuring Ms. Dupré's face and one showing her in a bikini, appeared alongside news stories and were credited to MySpace.com.⁵ Other photos of Ms. Dupré appeared as well, including four in *The New York Post* that became "an Internet sensation" and were credited to a photographer at Contact Press Images.⁶ Ms. Dupré, through her lawyer, objected to the use of these photos, claiming that she did not consent to their publication and that their use violated copyright law.⁷

This issue is a vexing one for news media. When news breaks regarding relatively unknown people, the quickest and easiest route to photographs of them may be through social networking sites such as Facebook and MySpace and photo-sharing sites such as Flickr and Twitpic,

1. Michael Powell & Nicholas Confessore, *4 Arrests, Then 6 Days to the End of a Career*, N.Y. TIMES, Mar. 13, 2008, at B1.

2. Serge F. Kovaleski & Ian Urbina, *For an Aspiring Singer, a Harsher Spotlight*, N.Y. TIMES (Mar. 13, 2008), <http://www.nytimes.com/2008/03/13/nyregion/12cnd-kristen.html>.

3. Colleen Long, *Call Girl Laments Use of Exotic Photos*, USA TODAY (Mar. 15, 2008), http://www.usatoday.com/news/nation/2008-03-14-408953834_x.htm.

4. See *About Us*, MYSPACE, <http://www.myspace.com/Help/AboutUs> (last visited Nov. 23, 2011).

5. See, e.g., Kovaleski & Urbina, *supra* note 2.

6. Long, *supra* note 3.

7. Long, *supra* note 3. Ms. Dupré also claimed that publication of the photos invaded her privacy, which is unlikely in that she voluntarily shared the photos on a social networking site, thus removing any reasonable expectation of privacy she may have had in them. The law of privacy and its implications on sharing information on social networking sites has been well-covered elsewhere and will not be explored further in this paper. See, e.g., Brian Kane, *Balancing Anonymity, Popularity, & Micro-Celebrity: The Crossroads of Social Networking & Privacy*, 20 ALB. L.J. SCI. & TECH. 327 (2010) (examining the complications of using classic privacy torts when social networking sites are involved); Mary Graw Leary, *Reasonable Expectations of Privacy for Youth in a Digital Age*, 80 MISS. L.J. 1035 (2011) (arguing that rights to privacy of youth are not adequately protected by current applications of privacy law); Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313 (2009) (critiquing modern privacy law that does not adequately protect online sharing of information and proposing a new tort to protect against "omniveillance" in a future where everything is recorded and nothing is private).

which allow users to upload and share photographs.⁸ However, the First Amendment does not shield news media from the requirements of copyright law,⁹ and the photographs themselves do not become public domain through the terms of service of social networking sites. In fact, they make it clear that users retain their intellectual property rights in items they upload. For example, Twitpic, the photo-sharing utility of the microblog site Twitter, states the following: “All content uploaded is copyright [of] the respective owners. The owners retain full rights to distribute their own work without prior consent from Twitpic. It is not acceptable to copy or save another user’s content from Twitpic and upload to other sites for redistribution and dissemination.”¹⁰

A recent decision by the federal court for the Southern District of New York in *Agence France Presse v. Morel* applied these terms. That court allowed a copyright infringement case to proceed against news organizations that published photos taken by a freelance photojournalist and posted on Twitpic.¹¹

Facebook’s terms say that the site “respects the copyrights of others, and we prohibit users from uploading, posting or otherwise transmitting on the Facebook website any materials that violate another party’s copyrights.”¹² The terms also include procedures to follow for takedowns un-

8. The title of this article comes from a question the author of this article has heard numerous times while advising student media, including one on deadline as the student newspaper sought photographs of a student’s participation in a Miss America competition that occurred without a student photographer or available wire service photographer present.

9. In 1985, the Supreme Court declined to allow the First Amendment right to publish newsworthy information about public figures to trump the interests of copyright holders: “In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression . . . we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.” Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558-60 (1985). Several scholars have suggested that this decision and subsequent applications got the balance wrong and did not completely remove First Amendment protections for repeating copyrighted speech. See, e.g., Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL’Y 273, 286 (2009); Kathleen K. Olson, *First Amendment Values in Fair Use Analysis*, 5 JOURNALISM & COMM. MONOGRAPHS 159, 188 (2004). The First Amendment argument, however, bears little on the way courts currently apply fair use analysis to images used for news purposes and thus is not addressed further in this study.

10. *Terms of Service*, TWITPIC, <http://twitpic.com/terms.do> (last visited Nov. 23, 2011). The terms do allow users of Twitpic a non-exclusive license to use photos shared on the site with “permission from Twitpic in advance of said usage,” but secondary users must “attribute credit to Twitpic as the source where you have obtained the content.” *Id.*

11. See *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 298-99 (S.D.N.Y. 2011). Morel, a freelance photojournalist who took photographs of the earthquake in Haiti in January 2010 and posted them on Twitpic, sued after another man copied and sold rights to the photos to Agence France Press and Getty Images, a licensing company. *Id.* The court made no note of any assertion of fair use by the defendants, instead ruling on motions to dismiss Morel’s claims for vicarious and contributory infringement, among others. *Id.* at 308.

12. *How to Appeal Claims of Copyright Infringement*, FACEBOOK,

der the Digital Millennium Copyright Act.¹³

Because the copyright remains with the copyright holder, secondary users such as news media that plan to republish social networking photos either need permission or they must argue that their use qualifies as “fair use” under federal copyright law.¹⁴ With respect to the Dupré photos, the Associated Press asserted a fair use defense, and as a photo editor said, “[t]he Associated Press discussed the photos obtained from the MySpace page in great detail and found that they were newsworthy We distributed the photos that were relevant to the story. Those photos did not show nudity, nor were they explicit.”¹⁵ The Associated Press also issued a disclaimer as it circulated the photos saying they were only to be used “with reports or commentary on the Spitzer scandal,”¹⁶ perhaps in an attempt to ensure that the photos fell under the “news reporting” purpose protected as fair use.¹⁷

This argument—that newsworthy photographs shared on social networking sites are “fair use” under copyright law and thus can be republished without permission or penalties for infringement—has not been examined by the courts.¹⁸ In the aforementioned *Agence France Presse v. Morel* case, the court did not enter into the fair use analysis, instead ruling only on Morel’s arguments to proceed in his claims of vicarious and contributory infringement against the news organizations that printed

http://www.facebook.com/legal/copyright.php#!/legal/copyright.php?howto_appeal (last visited Nov. 23, 2011).

13. *Id.*

14. See 17 U.S.C. § 107 (2006).

15. Long, *supra* note 3.

16. Long, *supra* note 3.

17. 17 U.S.C. § 107 (2006).

18. The author searched LexisNexis Academic for all federal and state cases using the terms “fair use” and “photograph” in conjunction with the following social networking sites and terms, resulting in no cases relevant to this study: “myspace,” no cases found; “flickr,” no cases found; “social media,” no cases found; “social networking,” one case found, *Barclays Capital, Inc. v. TheFlyontheWall.com*, 700 F. Supp. 2d 310, 335 (S.D.N.Y. 2010), regarding the “hot news” doctrine, in which photographs were only mentioned in a footnote citing a case involving paparazzi; “facebook,” four cases found: *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010), primarily regarding the Digital Millennium Copyright Act and responsibilities of internet service providers to take down infringing videos, *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 U.S. Dist. LEXIS 46955, at *15 (W.D. Pa. Mar. 31 2010), involving the copyrightability of the “look and feel” of a website’s design and mentioning Facebook.com as an example, *Louis Vuitton Malletier SA v. Akanoc Solutions, Inc.*, 97 U.S.P.Q.2d 1178, 1185 n. 9 (N.D. Cal. 2010), in which the court dismissed in a footnote the defendant’s contention that storing the copyrighted works of another on a server was “fair use” by those who accessed the server, and *Summit Enter., LLC v. Beckett Media, LLC*, No. CV 09-8161, 2010 U.S. Dist. LEXIS 7833, at *14 (C.D. Cal. Jan. 12, 2010), regarding trademarks and copyrighted photographs from the *Twilight* series of books being posted on the Facebook page of a fan magazine, in which the only “fair use” mention was in the court’s alteration of an injunction against future use; and “twitter,” one case found, the aforementioned *Conference Archives*, which also listed twitter.com as an example of website design. *Conference Archives, Inc.*, 2010 U.S. Dist. LEXIS 46955, at *15.

his photographs without permission.¹⁹ Scholars and professionals have debated the issue in several forums online, generally advising that republishers seek permission because fair use might not apply²⁰ but failing to reach a consensus or to engage in a thorough legal analysis of the issue.²¹

The purpose of this article is to examine this in more depth, determining whether news media that republish photographs from social networking sites can successfully argue that these uses are protected as fair use for news reporting purposes. Section I of this paper discusses the underlying purposes of copyright regarding photographs and news reporting. Section II studies the four fair use factors as courts have applied them to situations involving photographs used for news reporting purposes and considers this in the context of situations involving photos shared on social network sites. Section III concludes with the implications of this analysis on other recent situations and advice to news media publishers regarding use of these kinds of images.

I. COPYRIGHT, PHOTOGRAPHS AND NEWS REPORTING

Creators of “original works of authorship fixed in any tangible medium of expression”²² are entitled to certain exclusive rights under the Copyright Act of 1976, including the right to make and distribute copies of the work,²³ the right to prepare derivative works,²⁴ and the right to

19. *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 308 (S.D.N.Y. 2011).

20. *See Ruling or No, Always Ask Permission Before Re-Using Images on the Social Web*, ZOMBIEJOURNALISM.COM (Jan. 7, 2011), <http://zombiejournalism.com/2011/01/ruling-or-no-always-ask-permission-before-re-using-images-on-the-social-web/#> (last visited Nov. 23, 2011) (noting that permission should be sought before using photos found on social networking sites); Clay Gaynor, *Student Editors Talk About Using Social Networking Sites as Sources; Experts Say Approach Sites With Caution*, 27 STUDENT PRESS LAW CENTER 18 (2005), available at http://backedwww.splc.org/news/report_detail.asp?id=1255&edition=38 (last visited Nov. 23, 2011) (noting that “user-provided images hosted on the social networking site may or may not be available under fair use” depending on “how the owner intends to use the photographs and on what use you have in mind”); Chip Stewart, *Can I use a Facebook photo in a news story without permission?* TEXAS CENTER FOR COMMUNITY JOURNALISM (2010), <http://digital.community-journalism.net/askanexpert/answers/can-i-use-facebook-photo-news-story-with> (last visited Nov. 23, 2011) (arguing that using photographs in this manner is not fair use).

21. One law professor suggests that in a situation involving Samantha Ronson, the former girlfriend of actress Lindsay Lohan, posting published paparazzi photos of herself on her MySpace page, “neither the fair use doctrine nor the First Amendment provides Ronson a dependable defense should the copyright holder choose to sue her.” Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 466 (2010). However, the article does not provide any more fair use analysis than this, focusing instead on substantive due process and liberty arguments to conclude that copyright law should not apply to private, not-for-profit uses.

22. 17 U.S.C. § 102(a) (2006).

23. *Id.* at §§ 106(1), (3).

24. *Id.* at § 106(2).

perform or display the work in public.²⁵ Importantly for this study, the protections extend to “pictorial” works,²⁶ which are specifically defined as including “photographs.”²⁷ Even before the modern version of the Copyright Act, the United States Supreme Court clarified in an 1884 case affirming a photographer’s copyright in a picture he arranged of Oscar Wilde that photographs, as “original intellectual conceptions of the author,” are subject to copyright protection.²⁸ The court noted that it was within the power of Congress to protect such works because of the creativity a photographer displays, noting that the photographer:

[E]ntirely from his own original mental conception . . . gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit.²⁹

Since then, courts have found that “[a]lmost any photograph ‘may claim the necessary originality to support a copyright.’”³⁰ Copyrights attach to photographs at the moment they are created,³¹ with the copyright belonging to the photographer as the author.³²

Asserting and protecting these rights, however, can be a challenge. If a work is used without permission, the author must register his or her copyright with the U.S. Copyright Office before being able to enforce the rights in court, as registration within five years of the creation of the work serves as prima facie evidence of the originality of the work with the author.³³ Amateur photographers, particularly those publishing pho-

25. *Id.* at §§ 106(4)-(5).

26. *Id.* at § 102(a)(5).

27. *Id.* at § 101; *see also* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884).

28. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

29. *Id.* at 54-55.

30. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08(e)(1) at 2-129 (Matthew Bender ed., 2011)).

31. *Id.*; 17 U.S.C. § 302(a) (2006). Copyrights for works created after January 1, 1978, extend from the moment of creation to 70 years after the death of the author.

32. However, not all photographs automatically receive copyright protection; the statute specifically exempts photographs taken of copyrighted works such as art or sculpture “offered for sale or other distribution to the public” in connection with advertisements or news reports regarding those items. 17 U.S.C. § 113(c) (2006).

33. *Id.* at § 411(a); *see also* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 347-48 (2010).

tos on the Web, often do not formally file for copyrights, making it more difficult—and costly—to defend their copyrights against a secondary user.³⁴

Photographers who do register to protect their copyrighted works also must still contend with fair use arguments, however. Under the Copyright Act of 1976, Congress recognized the fair use doctrine that had long been applied by courts as a common law doctrine,³⁵ in furtherance of the policy that copyright law should “promote the Progress of Science and useful Arts” as provided by the U.S. Constitution.³⁶ The Copyright Act attempted to accomplish that goal by allowing authors to build and improve upon prior works. As the U.S. Court of Appeals for the Second Circuit noted, fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”³⁷ It is in this balance, between encouraging creation of new works and allowing others to use the new works for valuable social purposes, that the tension exists.

The Copyright Act of 1976 provides that fair use of copyrighted works for “news reporting” purposes are not infringement.³⁸ The Supreme Court has only applied the fair use analysis to a situation involving news reporting purposes on one occasion: *Harper & Row v. Nation Enterprises*, in which the court decided in 1985 that *The Nation*’s republication of about 300 words from a leaked manuscript of former President Gerald Ford’s memoir, *A Time to Heal* was not a fair use.³⁹ While the essence of the court’s opinion was about the importance of first publication by the copyright holder in the fair use analysis,⁴⁰ both the six-justice majority and the dissenters noted the congressional intent behind including “news reporting” as a specific example of fair use. Justice O’Connor, writing for the majority, found that *The Nation*’s excerpt of Ford’s memoir was for “news reporting” purposes, which was listed by Congress as one of a “listing . . . not intended to be exhaustive” of potential fair uses. Thus, it was not “presumptively” a fair use, instead only qualifying the use for further fair use analysis.⁴¹ Justice Brennan disagreed, finding stronger import in Congress’ decision to list “news report-

34. See Shannon E. Trebbe, *Enhancing Copyright Protection for Amateur Photographers: A Proposed Business Model*, 52 ARIZ. L. REV. 97, 99-100 (2010).

35. See *Harper & Row*, 471 U.S. at 549.

36. U.S. CONST. art. I, § 8, cl. 8.

37. *Iowa State Univ. Research Found. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

38. 17 U.S.C. § 107 (2006). The statute also lists “criticism, comment . . . teaching (including multiple copies for classroom use), scholarship, or research” as qualifying purposes for fair use. *Id.*

39. *Harper & Row*, 471 U.S. at 542.

40. *Id.* at 569.

41. *Id.* at 561.

ing” specifically, arguing that it is a “prime example” of intended fair uses that benefit the public by allowing dissemination of information to the public.⁴²

The justices agreed that the analysis does not turn on the quality of the news report, but on the purpose in creating it, regardless of whether the information was actually “new” to the public. Justice O’Connor expressed that the Court should be wary of determining what is news and what is not, and instead should focus on whether the use was fair,⁴³ while Brennan said this was proper, noting that “[c]ourts have no business making such evaluations of journalistic quality.”⁴⁴

Regardless, the Court found that a qualifying purpose of the use such as “[n]ews reporting” is just one factor for courts to consider when considering whether a use is fair.⁴⁵ The four factors for courts to consider in fair use cases 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.⁴⁶

The Supreme Court has noted that because fair use is rooted in an “equitable rule of reason,” these four factors are not exclusive, though they are “especially relevant” as courts consider and apply the fair use analysis.⁴⁷ The Supreme Court has noted that this “task is not to be simplified with bright-line rules” as courts apply the factors on a case-by-case basis.⁴⁸ The factors are not to be “treated in isolation,” but rather, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.”⁴⁹

The courts have not considered a situation in which copyrighted images shared on social networking sites were copied and republished for news reporting purposes—such as the one involving Ms. Dupré. In Section II, each of the four factors are considered as they apply to such a situation by drawing parallels to past court decisions regarding news reporting uses of photographs and other information voluntarily shared rather than commercially sold.

42. *Id.* at 591 (Brennan, J., dissenting).

43. *Id.* at 561 (majority opinion).

44. *Id.* at 591 n.15 (Brennan, J., dissenting).

45. *Id.* at 560-61 (majority opinion).

46. 17 U.S.C. § 107 (2006).

47. *Harper & Row*, 471 U.S. at 560.

48. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

49. *Id.* at 578.

II. APPLYING THE FAIR USE ANALYSIS

A. Purpose and Character of the Use

In the first factor of the fair use analysis, courts consider the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁵⁰ A finding that the secondary use is for commercial purposes favors the original copyright holder; the Supreme Court has found that such commercial uses are “presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”⁵¹ Conversely, noncommercial uses are more likely to be fair use and favor the secondary user.⁵²

In the situation at hand—publishers using copyrighted photographs shared on social networking sites, as was the case with the Associated Press circulating photos of Ms. Dupré—the secondary use would unquestionably be for commercial news reporting purposes. The Supreme Court has long recognized the benefits of news reporting uses to informing the public. People cannot own the “history of the day” or the facts underlying their news reports. As the Court noted in 1918, “[i]t is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.”⁵³

However, the Court has also recognized that such uses can be commercial in nature and do not automatically shield secondary uses for news purposes. In *Harper & Row*, the Court found that *The Nation* was unquestionably informing the public on important matters arising during Ford’s presidency, particularly regarding his decision to pardon disgraced ex-President Richard Nixon, but that this was done for commercial purposes—“scooping the forthcoming hardcover and *Time* abstracts.”⁵⁴ While *The Nation*’s sole purpose was not commercial, this was not dispositive; rather, the question to ask was “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁵⁵ For example, *The Nation* could have bid for an exclusive abstract before publication of the book, which *Time* magazine did at a cost of \$25,000.⁵⁶ This commercial function outweighed the public

50. 17 U.S.C. § 107(1) (2006).

51. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

52. *See, e.g., Shell v. City of Radford, Va. Dep’t of Police*, 351 F. Supp. 2d 510, 511-12 (W.D.Va. 2005), in which the district court found that the police department’s use of an unpublished photograph of a crime scene for investigatory functions was not commercial, leading in part to a finding of fair use.

53. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

54. *Harper & Row*, 471 U.S. at 562 (emphasis added).

55. *Id.*

56. *Id.* at 542-43.

benefit of the use to the point that the Supreme Court weighed the first factor in favor of Harper & Row.⁵⁷

Other courts have followed this reasoning. In *Los Angeles News Service v. KCAL-TV Channel 9*, the Ninth Circuit found no fair use in television station KCAL airing video footage of Reginald Denny being beaten, footage that was originally shot by Los Angeles News Service (LANS).⁵⁸ Because KCAL “is a for-profit company that is engaged in a commercial enterprise that . . . gathers, and then (indirectly) ‘sells’ news,” the station stood to profit from the news service’s original work without paying for it.⁵⁹ Instead of paying for its own staff to cover the news, KCAL “depriv[ed] LANS of its . . . valuable right of licensing its original videotape which creatively captured the Denny beating in a way that no one else did.”⁶⁰ Similarly, citing both the *Los Angeles News Service* and *Harper & Row* decisions, the District of Massachusetts court found that CBS and its affiliates are “undisputedly commercial entities” and that they “stood to profit” from use in a newscast of a freelance photographer’s images of mobster Stephen Flemmi, thus weighing against a finding of fair use.⁶¹

Following this line of cases, the commercial nature of news reporting uses would favor an original copyright holder who does not grant permission for news media to publish photos found on social networking sites. However, a finding that the secondary use is for a commercial purpose does not preclude a court from finding that the use is fair. The Supreme Court, in its 1993 decision in *Campbell v. Acuff-Rose Music, Inc.*, found that the central purpose of the first factor was to protect “transformative use[s]” that go beyond merely superseding the original work by adding “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁶² In *Campbell*, the Supreme Court found that rap group 2 Live Crew’s parody of the song “Oh, Pretty Woman” was transformative enough to qualify as fair use and thus did not infringe Acuff-Rose Music’s copyright.⁶³

The “transformative” aspect of the first factor of the fair use analysis is extraordinarily important for secondary users. One researcher found that in the six years after *Campbell*, in all but one of 38 lower court opinions, “the courts’ determinations regarding transformative use . . . corre-

57. *Id.* at 561-62.

58. *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120 (9th Cir. 1997), *cert. denied*, 522 U.S. 823 (1997).

59. *Id.* at 1121.

60. *Id.*

61. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 186-87 (D. Mass. 2007).

62. *Campbell*, 510 U.S. at 579.

63. *Id.* at 594.

lated to their overall decisions regarding fair use.”⁶⁴ The cases in which the court found transformative use were typically those in which the secondary uses “add original expression that clearly constitute criticism, commentary or scholarship.”⁶⁵ Courts are also more likely to find transformative value in uses that benefit the public.⁶⁶

Several courts have found that secondary uses of photographs may be “transformative” depending on how they are used. In *Blanch v. Koons*, the Second Circuit found that a painting by the artist Jeff Koons entitled “Niagara,” which included a photograph of women’s feet in Gucci sandals and with bronze nail polish taken by fashion photographer Andrea Blanch, was transformative because the painting had a different purpose than the photo (serving as “commentary on the social and aesthetic consequences of mass media”).⁶⁷ In *Kelly v. Arriba Soft Corp.*⁶⁸ and *Perfect 10, Inc. v. Amazon.com, Inc.*,⁶⁹ the Ninth Circuit found transformative fair use in thumbnails of digital images displayed and stored on servers by Internet search engines. The court noted that even exact copies of photos could be “highly transformative”⁷⁰ if they are being used for different purposes, in these cases allowing users to “improv[e] access to information on the [I]nternet”⁷¹ rather than any artistic or entertainment purposes of the original photographs.⁷² While the copies may have been exact, the secondary use by search engines had productive benefits for society, which the court deemed “transformative” uses.⁷³ The Southern District of New York found fair use in photographs used as part of a *National Geographic Magazine* cover montage used in a poster celebrating the National Geographic Society’s centennial.⁷⁴

The aforementioned uses were not for news reporting purposes, but other courts have found that copyrighted photographs used for news pur-

64. Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 583 (2000).

65. *Id.*

66. See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994), in which the court explained, “courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest.”

67. *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

68. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003).

69. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164-65 (9th Cir. 2007).

70. *Id.* at 1165.

71. *Kelly*, 336 F.3d at 819.

72. *Id.* at 815. In *Kelly*, the photographs in dispute were of the American West professional photographer Leslie Kelly. In *Perfect 10*, the photographs were images of nude models. *Perfect 10, Inc.*, 508 F.3d at 1154.

73. See Kathleen K. Olson, *Transforming Fair Use Online: The Ninth Circuit’s Productive-Use Analysis of Visual Search Engines*, 14 COMM. L. & POL’Y 153, 174 (2009), in which the author argues that to conclude that merely productive use is transformational, the court had to torture the “transformative use” doctrine established in *Campbell v. Acuff-Rose Music*.

74. *Faulkner v. Nat’l Geographic Soc’y*, 294 F. Supp. 2d 523, 547 (S.D.N.Y. 2003).

poses can have transformative value as well. In *Nunez v. Caribbean International News Corp.*, the First Circuit Court of Appeals held that newspaper *El Vocero*'s republication of nude photographs of the reigning Miss Puerto Rico Universe qualified as "fair use" and thus was not infringing.⁷⁵ In *Nunez*, photographer Sixto Nunez had intended for the photographs to be used as part of a modeling portfolio, a far different purpose than the news reporting purpose that *El Vocero* claimed.⁷⁶ Further, the existence of the photographs had actually become the news, and reporting on the controversy would have been difficult without including the photos because "the pictures were the story."⁷⁷ Distinguishing this case from *The Nation*'s unauthorized publication of the Ford memoirs in *Harper & Row*, the court pointed out:

It suffices to say here that *El Vocero* did not manufacture newsworthiness, as it sought not to "scoop" appellant [Nunez] by publishing his photograph, but merely to provide news reporting to a hungry public. And the fact that the story is admittedly on the tawdry side of the news ledger does not make it any less of a fair use.⁷⁸

This, however, is a very limited exception. The court itself noted that "[u]nauthorized reproduction of professional photographs by newspapers will generally violate the Copyright Act . . .,"⁷⁹ making the exception chiefly because of the independent newsworthiness of the photographs. Under this reasoning, photographs must "be the story" in order to be transformative when used for news reporting purposes. Similar logic could be found in a Southern District of New York decision in 1992, the year before the Supreme Court announced the "transformative" analysis in *Campbell*. In *Mathieson v. Associated Press*, the court found a strong news reporting interest in the Associated Press' publication of photographs of Col. Oliver North wearing body armor that ran with the news-wire's story about North's new business venture.⁸⁰ The photographer had taken the photos for brochures produced by North's company but kept his copyright and did not consent to the secondary use. In this case, the brochure photos were deemed to be an important part of the story, and the fact that the Associated Press had "some commercial motivation is of little if any import in this instance where the clear purpose of the use—news reporting—dispels the notion of theft or piracy which has charac-

75. *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

76. *Id.* at 23.

77. *Id.* at 22.

78. *Id.* at 22-23.

79. *Id.* at 25.

80. *Mathieson v. Associated Press*, 23 U.S.P.Q. 2d (BNA) 1685, 1689 (S.D.N.Y. 1992).

terized other actions.”⁸¹

The intention and actions behind publication by the secondary users—*El Vocero* and the Associated Press—were given credit by both courts. In *Nunez*, the First Circuit found that *El Vocero* had attributed the photographs to Nunez, had not acquired the photos unlawfully, and had “believed in good faith that the photographs were available for general, unrestricted circulation and redistribution.”⁸² And while not finding good faith, the court in *Mathieson* held that the claim that the Associated Press acted in “bad faith” in not seeking permission before publication was “without merit” and should not alter the fair use analysis.⁸³

These holdings clearly are the exception rather than the rule, and courts in several aforementioned cases have not found transformation in the secondary uses of photographs for news purposes. In *Fitzgerald v. CBS*, the Massachusetts District Court was not persuaded by arguments that Fitzgerald’s photos of the mobster Steven Flemmi were “transformed” because CBS cropped state troopers out of the photo and that the arrest of the mobster was “downgraded from breaking news to a supplementary part of a larger story.”⁸⁴ The court noted that this use was slightly less transformative than *El Vocero*’s use of the Miss Puerto Rico Universe modeling photos in *Nunez* but still more transformative than the use by KCAL of Los Angeles News Service’s footage of the Reginald Denny beating.⁸⁵ In that case, the Ninth Circuit found that KCAL would have made a better argument if it had claimed that the Los Angeles News Service’s recording “of the Denny beating *itself* became a news item shortly after it was published because its view was so extraordinary.”⁸⁶ But the court did not find any transformation, and thus no fair use, while noting the lack of good faith action by KCAL because it asked for a license, was denied it, and did not credit LANS when it aired the video.⁸⁷ In a separate case, the Ninth Circuit distinguished a more transformative use of the video in question: Court TV’s inclusion of a few seconds of the video in a montage for the opening of the program “Prime Time Justice.”⁸⁸

An example from the Southern District of New York simply summarizes this point. The court, in finding no transformative value in an auto magazine’s use of a photograph of a man standing by a decorative Cadillac, said that the magazine “uses the photo to show what it depicts,”

81. *Id.* at 1688.

82. *Nunez*, 235 F.3d at 23.

83. *Mathieson*, 23 U.S.P.Q. 2d at 1688.

84. *Fitzgerald*, 491 F. Supp. 2d at 185-86.

85. *Id.* at 185.

86. *KCAL-TV Channel 9*, 108 F.3d at 1121.

87. *Id.* at 1121-1122.

88. *Los Angeles News Serv. v. CBS Broad, Inc.*, 305 F.3d 924, 940-941 (9th Cir. 2002).

which was, in this case, “how an art car looks.”⁸⁹ This kind of use adds nothing to the original use, is not commentary, is not criticism, is not newsworthy on its own, and thus is not transformative.

Applying this analysis of the first factor – the “purpose and character of the use”—makes clear that news publishers face an uphill battle to claim fair use when publishing photographs shared on social networking sites. The commercial nature of publishing news for profit weighs against news media. And while the purposes of the original and secondary uses are vastly different—the original use is for sharing information with friends, while the secondary use is for informing the public—this is unlikely to be deemed a “transformative” use unless the underlying photos are newsworthy in themselves, as was the case in *Nunez*. In the situation involving the photos of Ms. Dupré, while there may have been great public interest about *her* and what she looked like, that would not necessarily mean there was independent news interest in the photographs she chose to share with friends on MySpace. Further, news organizations would need to show that they acted in good faith, believing that the photos were available for public consumption, properly crediting the photos to the copyright holder, and accessing them without violating terms of service or resorting to illegal means such as hacking. This last point presents a difficult situation for news publishers. Accessing photos shared on social networking sites such as Facebook and MySpace and redistributing them in violation of the Terms of Service of those sites, which require users to abide by other users’ intellectual property rights, would likely make it hard to claim good faith use.

B. *Nature of the Copyrighted Work*

The second factor of the fair use analysis considers the “nature of the copyrighted work.”⁹⁰ Because copyright law “generally recognizes a greater need to disseminate factual works than works of fiction or fantasy,”⁹¹ courts are more likely to find fair use in works of fact, news and history than in more creative works. Courts also consider whether the copyright holder has circulated the work for publication; a finding that a work was unpublished and still under the “creative control” of the author weighs against a finding of fair use.⁹²

The Supreme Court has not expounded at length on this factor. In *Harper & Row*, the Court spent four paragraphs briefly summarizing the intent behind the factor. The court found that while *The Nation* should be afforded some protection to copy brief quotes that may be “arguably

89. *Psihoyos v. Nat’l Exam’r*, 49 U.S.P.Q. 2d (BNA) 1766, 1768 (S.D.N.Y. 1998).

90. 17 U.S.C. § 107(2) (1996).

91. *Harper & Row*, 471 U.S. at 563.

92. *Id.*

necessary adequately to convey the facts,” the excerpts in question went beyond fair use because they included too much of President Ford’s expressive writing.⁹³ Secondary use of such “subjective descriptions and portraits of public figures whose power lies in the author’s individualized expression” were enough to tilt this factor in favor of the copyright holder, as did the fact that the manuscript was unpublished and confidential.⁹⁴

Regarding photographs, courts focus on the level of expressive conduct shown by the photographer in determining whether works are factual or creative and whether they have been circulated publicly. In *Nunez*, the First Circuit noted, “certainly, photography is an art form that requires a significant amount of skill,” but found that the modeling photos were less “artistic representations designed primarily to express Nunez’s ideas, emotions, or feelings” than they were displaying the subject’s potential as a model.⁹⁵ While the court was neutral about the creative aspect of the photo, it ultimately favored *El Vocero* in the second factor because the modeling photos were “hardly confidential or secret” and did not threaten Nunez’s right of first publication.⁹⁶

Other courts follow this logic and generally favor the secondary user when photographs are used for news reporting purposes. The Ninth Circuit found that this factor “strongly favors” KCAL in its unlicensed broadcast of Los Angeles News Service’s tape of the Reginald Denny beating, which was “informational and factual and news” and had been previously circulated.⁹⁷ The Massachusetts district court reached a similar conclusion in *Fitzgerald*, holding that this factor favored fair use in republication of the mobster photos because the photographer’s works had been previously published and that the photographs showed “no more than the minimum authorial decision-making necessary to make a work copyrightable.”⁹⁸ In *Mathieson*, the Southern District of New York court found that a photo of Oliver North wearing a bulletproof vest was more creative and thus more likely to receive protection from secondary uses, but a small headshot of North was less imaginative or creative and thus was more likely to be fairly used.⁹⁹

However, this factor does not seem to receive much weight from courts when considering the four factors together. While the courts in

93. *Id.*

94. *Id.* The Supreme Court provided even less analysis in *Campbell*, finding that the songwriter’s creative expression “falls within the core of copyright’s protective purposes,” but that nevertheless, this factor was “not much help in this case” because parody, by necessity, will include copying of other creative works. *Campbell*, 510 U.S. at 586.

95. *Nunez*, 235 F.3d at 23.

96. *Id.* at 24.

97. *KCAL-TV Channel 9*, 108 F.3d at 1122.

98. *Fitzgerald*, 491 F. Supp. 2d at 188.

99. *Mathieson*, 23 U.S.P.Q. 2d (BNA) at 1689.

each of the aforementioned district and court of appeals cases found that the “nature of the copyrighted work” factor favored the secondary user at least in part, the *Nunez* court was the only one to find that the use was fair. That case seemed to turn more on the transformative value of the work and the good faith republication than on any other factor. Based on that showing, the second factor likely favors a finding of fair use when news media republish social media photographs. That is helpful to republishers but is by no means dispositive.

C. Amount and Substantiality of Use

The third factor courts examine in a fair use inquiry is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁰⁰ This factor includes both calculations and context. Courts look at how much of the original work is used, how much of the secondary work constitutes the original work, and the relative importance of the portion taken from the original work. For example, in *Harper & Row*, the Supreme Court counted the number of words in the copyrighted Ford memoir (more than 200,000), the number of words that were used by *The Nation* in its article featuring unauthorized excerpts (about 300), and the number of words in the article published by *The Nation* itself (2,250 words).¹⁰¹ The low percentage of the original work taken (less than 1 percent of Ford’s manuscript) and how much of the secondary work it constituted (about 13 percent of *The Nation*’s article) seemed to favor a finding of fair use. However, the court found that even this “insubstantial” amount in terms of mathematics was not conclusive.¹⁰² The court found that the portion taken was “essentially the heart of the book,” specifically regarding Ford’s decision to pardon Nixon, and that these excerpts “serve as (the) dramatic focal points” of the article in *The Nation*.¹⁰³ With this context in mind, the court found that this factor favored the original copyright holder.

Still photography presents a challenge to this analysis. Rather than counting words or seconds of video footage, as was the case in *Los Angeles News Service v. KCAL-TV Channel 9*,¹⁰⁴ courts must examine photographs that have generally been republished in full. For this reason, the District Court of Massachusetts noted in *Fitzgerald* that the amount-and-

100. 17 U.S.C. § 107(3) (1996).

101. *Harper & Row*, 471 U.S. at 598.

102. *Id.* at 565.

103. *Id.* at 565-66.

104. In this case, KCAL used 30 seconds of LANS’ 4-minute, 40-second original videotape, but the Ninth Circuit found that although “a small amount of the entire Videotape was used, it was all that mattered” because the part KCAL showed was the heart of the work. *KCAL-TV Channel 9*, 108 F.3d at 1120-22.

substantiality factor “weighs less when considering a photograph—where all or most of the work often must be used in order to preserve any meaning at all.”¹⁰⁵ Even in this case, where the court found that CBS edited the photograph “in a way that was arguably more than superficial” by cropping out the portion of the photo with a state trooper, this was not enough to sway the court. Instead, the court found that the factor was split and, regardless, “the overall significance of this factor to the fair use determination is minor.”¹⁰⁶ The First Circuit in *Nunez* reached a similar conclusion, finding that if *El Vocero* had copied any less than the photo in its entirety it “would have made the picture useless to the story.”¹⁰⁷ While this finding of an entire taking certainly favored the copyright holder, the court minimized its import, saying it “count[ed] this factor as of little consequence to our analysis.”¹⁰⁸

New York district courts have recognized one wrinkle to this analysis that may benefit news publishers of photographs shared on social networking sites. In *Mathieson*, the photos of Oliver North in body armor republished by the Associated Press were just two of 20 photographs taken by the photographer that appeared in the promotional brochure. The Southern District of New York court found that even though those photos were taken in their entirety, they were part of a larger body of work, and that work—the brochure—is what constitutes a single “work.”¹⁰⁹ Thus, the court concluded, “[t]he fact that eighteen other photos from the brochure were not depicted lessens the amount of defendant’s copying” of that single work.¹¹⁰ By this reasoning, a news publisher could claim that photo galleries uploaded by a user to Flickr or MySpace or Facebook were a “collective work” for copyright purposes, comparable to an anthology,¹¹¹ and that republishing only one or two photos from the gallery would tilt the amount-and-substantiality factor in favor of a finding of fair use. Still, the weight of winning this part of the argument is questionable. Courts seem to minimize the importance of the third factor in the fair use analysis, even noting in the *Mathieson* case that this

105. *Fitzgerald*, 491 F. Supp. 2d at 188.

106. *Id.* at 188-89.

107. *Nunez*, 235 F.3d at 24.

108. *Id.*

109. *Mathieson*, 23 U.S.P.Q. 2d (BNA) at 1690. The court based this analysis in part on a Western District of New York case in which more than 100 photos is a seed catalog were deemed to be a “compilation” and thus a single work, though that was in the context of determining damages for infringement rather than fair use. *Stokes Seeds Ltd. v. Geo. W. Park Seed Co.*, 783 F. Supp. 104, 106-07 (W.D.N.Y. 1991).

110. *Mathieson*, 23 U.S.P.Q. 2d at 1690.

111. *See* 17 U.S.C. § 101 (2006), which defines a “compilation” as including “collective works” that “constitutes an original work of authorship” and “collective work” as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”

factor was “proportionally less significant” because of the relative weight of other fair use factors.¹¹²

D. *Effect on Potential Market of the Copyrighted Work*

In the final factor of the fair use inquiry, courts consider “the effect of the use upon the potential market for or value of the copyrighted work.”¹¹³ Courts have consistently announced this as an extraordinarily significant part of the analysis. In *Harper & Row*, the Supreme Court noted that “[t]his last factor is undoubtedly the single most important element of fair use,”¹¹⁴ and in *Stewart v. Abend*, the court similarly found that this factor is “the ‘most important, and indeed, central fair use factor.’”¹¹⁵ A finding that the unauthorized secondary use harms the market of the original work strongly favors the copyright holder, while a neutral effect—such as a finding that the works were in different markets or that the secondary use may actually enhance the market of the original—favor a finding that the use was fair. In *Campbell*, for example, the court found no effect on the marketplace of the original work because there was “no evidence that a potential rap market was harmed in any way by 2 Live Crew’s parody, rap version [of ‘Oh, Pretty Woman’]” even though copyright holders could possibly have issued licenses for derivative works in that market.¹¹⁶

The focus of courts is not just on actually causing commercial losses to the copyrighted work. This was the case in *Harper & Row*, when *The Nation*’s infringement forced *Time* magazine to cancel its exclusive deal to publish an excerpt of the book, costing the copyright holders at least \$12,500.¹¹⁷ But courts also examine the loss in the “potential market” for the copyrighted work. In *Sony Corp. of America v. Universal City Studios*, the Supreme Court found that video recording of copyrighted television programs did not result in a “great deal of harm” to the potential market for the original broadcasts of the programs.¹¹⁸ It created

112. *Mathieson*, 23 U.S.P.Q.2d at 1690.

113. 17 U.S.C. § 107(4) (2006).

114. *Harper & Row*, 471 U.S. at 566.

115. *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(A)(4) at 13-198.2 (Release No. 85, 2011)). In *Stewart v. Abend*, the Supreme Court found no fair use in re-releasing and redistributing a motion picture based on a short story, when the author had authorized use of the short story but died during the renewal term of the copyright because the consent to make derivative works was deemed to have lapsed. The court found substantial impact on the potential market value for new movies based on the short story.

116. *Campbell*, 510 U.S. at 593. Also at issue was whether parodies should be seen as derivative works because they are critical rather than derivative in nature. *Id.* at 592.

117. *Harper & Row*, 471 U.S. at 567. The court noted, “Rarely will a case of copyright infringement present such clear-cut evidence of actual damage.”

118. *Sony*, 464 U.S. at 451 (quoting *Universal City Studios v. Sony Corp. of Am.*, 480 F.

two tracks for other courts to apply this factor, depending on the outcome of the first factor regarding purpose and character of the secondary use.¹¹⁹ If the unauthorized use of copyrighted works is for commercial gain, then courts may presume a harm to the potential market of the copyrighted work.¹²⁰ For noncommercial secondary uses, the copyright holder must prove “by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.”¹²¹

As discussed above, news reporting purposes are unquestionably “commercial” under the first factor, meaning in the fourth factor copyright holders are entitled to a presumption that the potential market for the work has been harmed. As the Supreme Court noted in *Campbell*, the presumption of harm is even greater when the secondary use is “mere duplication” of the original because it may serve as a “market replacement for it, making it likely that cognizable market harm to the original will occur.”¹²² Thus, duplication of photographs for news purposes are likely to be presumptively harmful to the market of the copyrighted work, tilting this factor in favor of a finding that the use was not fair.

To overcome this presumption, news media publishers would need to establish that there is no actual harm to the market for the copyrighted photographs. When the original market for the photographs is the same as the market for the secondary use—in this case, for commercial news publications—the use is unlikely to be fair. For example, the Massachusetts District Court in *Fitzgerald* found that the unauthorized inclusion of the plaintiff’s photographs in a CBS broadcast harmed the actual and potential market for the photos because “CBS’s use of the photographs is paradigmatic of the only market the photographs could reasonably have: licensing to media outfits.”¹²³ When “unrestricted use would likely dry up the source” for the market, the court should find that the use was not fair.¹²⁴ Even when the markets are similar but not identical—such as full-page news photographs¹²⁵ or magazine centerfolds¹²⁶ that could compete with the photographer’s ability to license the copyrighted work for publication as a poster—courts have weighed this factor against a finding of fair use.

Supp. 429, 467 (C.D. Cal. 1979)).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Campbell*, 510 U.S. at 591.

123. *Fitzgerald*, 491 F. Supp. 2d at 189.

124. *Id.*; see also *KCAL-TV Channel 9*, 108 F.3d at 1123, in which the Ninth Circuit noted that the fourth factor did not favor a finding of fair use because “KCAL’s use of LANS’s works for free, without a license, would destroy LANS’s original, and primary market.”

125. See Update Art, Inc. v. Maariv Isr. Newspaper, Inc., 635 F. Supp. 228, 232 (S.D.N.Y. 1986).

126. See *Psihoyos*, 49 U.S.P.Q. 2d (BNA) at 1769-70.

However, news publishers have had some success in establishing fair use under the fourth factor when the original market for the photographs is different than the market for the secondary use—and when evidence is lacking that there is a market for the photographs at all. In *Mathieson*, the Southern District of New York found no evidence supporting a finding that a market existed for the photographer's images of Oliver North, noting that Mathieson "could not specifically identify a single situation in which he lost a pending sale or license agreement" as a result of the unauthorized republication by the Associated Press.¹²⁷

Nunez is perhaps the most compelling case for those claiming fair use. In *Nunez*, the First Circuit found that despite an unauthorized commercial use of the photographer's modeling photos of Miss Puerto Rico Universe, which may have had commercial value by being sold to newspapers exclusively so they could "illustrat[e] controversy," there was no evidence in this case that "such a market ever existed."¹²⁸ The fact that Nunez had distributed the photographs in the modeling community for free and did not intend to sell them weighed against the photographer's claim that the potential market was harmed by *El Vocero's* use.¹²⁹ The court also noted the possibility that *El Vocero's* low-quality republication may have actually enhanced the market potential of the modeling photos because buyers may become interested in the original, reasoning that "a newspaper front page is simply an inadequate substitute for an 8" x 10" glossy."¹³⁰

This reasoning, however, strains logic. In the space of one paragraph, the First Circuit found both that (a) there was *no* potential market and (b) that there *was* a potential market that may have been enhanced by the secondary use, and in the following paragraph, the court found that (c) in this context, "[s]urely the market . . . is small or nonexistent."¹³¹ The court seems to distinguish between multiple potential markets: (1) sale to newspapers that was clearly preempted by *El Vocero's* publication, "essentially destroy[ing] this market,"¹³² (2) sale of the glossy original photographs that was not harmed by the newspaper's republication, and (3) distribution of the photographs in the professional modeling community, which was done freely by Nunez and thus caused the photographer no harm. Though Nunez had not sought to sell the controversial photographs to newspapers, this failure to act did not preclude the photographer from doing so, a fact the court recognized. However, in

127. *Mathieson*, 23 U.S.P.Q. 2d (BNA) at 1690.

128. *Nunez*, 235 F.3d at 25.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

spite of the existence of this actual market—the controversial photos were published on the front page of a newspaper for commercial purposes, after all—the court found that *El Vocero* had met its burden to overcome the presumption of harm to the market and establish fair use. The most likely explanation for this is the context of the case and the other factors, including *El Vocero*'s good faith attribution to Nunez, and the previous free distribution of the photos in the modeling community.

The First Circuit's reasoning in *Nunez* may favor a finding of fair use where news media publish social networking photos. Like *Nunez*, Ms. Dupré voluntarily distributed her photos, which had no apparent actual or potential market at the time they were taken. But for Ms. Dupré and others like her, the secondary use in the news publishing market would destroy any ability they might have as copyright holders to profit by licensing their photographs, which would be some evidence of harm. It might even be enough to make it difficult for defendants to overcome their burden of proving a lack of potential harm to the market. As the Supreme Court mentioned in *Harper & Row*, "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"¹³³ In a situation such as Ms. Dupré's, widespread distribution of her copyrighted photos would adversely harm her ability to license them to news publishers, meaning that potential harm is evident, thus making it harder for the republishers to claim fair use.

Overall, considering all four factors in the fair use analysis, there is some support for claims of fair use and some support for no finding of fair use in a situation where news media republish social networking photographs. The first factor, purpose and character of the use, likely favors the copyright holder because the news reporting use is commercial, unless the secondary user can establish that the news use is "transformative" by showing, for example, that the photographs had "become the story" and were newsworthy in their own right. The second factor, the nature of the copyrighted work, likely favors fair use by the news publisher because the underlying news photographs are closer to fact than fiction, despite the level of creativity and originality displayed by the photographer in shooting the image. The third factor, amount and substantiality, likely favors the copyright holder because all or most of the photograph in question must be used for the news reporting use to have any relevance, though this factor may be split if the secondary user has engaged in substantial cropping of the photo or has chosen one photo that was part of a larger collective work. The fourth factor, effect on the potential market, also likely favors the copyright holder because the news

133. *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

reporting use would impact the ability of the photographer to license newsworthy photos to other publishers.

As mentioned above, the four factors are not to be weighed equally, but rather to be considered as a whole on a case-by-case basis to determine whether a secondary use is fair. In cases involving photographs used for news purposes, the second and third factors—nature of the copyrighted work, likely favoring secondary news publishers, and the amount and substantiality of the use, likely favoring copyright holders—have been given very little consideration by courts. Instead, the fair use analysis in such situations appears to turn on three questions arising in the first and fourth factors:

(1) Is the news reporting use of the photograph transformative by providing criticism, commentary or productive uses above and beyond the purpose of the original photo?

(2) Is the potential market for the copyrighted photograph harmed by unauthorized republication? and

(3) Did the news publisher act in good faith when using the copyrighted work without permission? Applying these factors to the situation involving the republication of photos that Ms. Dupré took of herself and uploaded to her MySpace account to be shared with her approved friends, it is unlikely that courts would find fair use. First, the photographs were not newsworthy on their own, and thus they are unlikely to be “transformative” as the First Circuit provided in *Nunez*. Rather, the purpose of publishing them would be to show the world what Ms. Dupré looks like, and duplicating images for their original purposes in a way that supplants the need for the original does not favor a finding of fair use. Second, the market for such photographs is evident in the rush to acquire and publish them by the Associated Press, and republishing the photos without permission destroys Ms. Dupré’s ability to profit by licensing the photos to news publishers. While she did not anticipate a market when she took the photographs, this does not mean that she cannot profit from them once a market emerges. The Supreme Court’s creation of a presumption of harm to the market when the secondary use is commercial will likely be difficult to overcome unless the news publishers can establish that no market for the photos actually exists, a difficult argument to make when a news organization is willing to pay a newswire for access to such photos in the first place. Finally, establishing good faith by news publishers may be a challenge in circumstances different than the unique ones present in the *Nunez* case. Ms. Dupré uploaded and shared the photographs to MySpace consistent with its terms of service, which note that users “continue to retain any such rights that you may have in your Content,” subject to a limited non-exclusive license for MySpace to use content on its site. The terms of service also state that users “may not copy, modify, translate, publish, broadcast, transmit, dis-

tribute, perform, display, sell or otherwise use any Content appearing on or through the MySpace Services.”¹³⁴ It would not be hard for a court to find that Ms. Dupré had a reasonable expectation that her uploaded content could not be used by third parties without permission, and that accessing MySpace and using the photos in express disregard to the site’s terms of service would not constitute an act of “good faith” by news publishers.

In light of the preceding fair use analysis, the concluding section of this paper discusses the implications of this analysis, suggests what it might mean for other recent controversies involving news publication of photographs found on social networking sites, and offers guidance to publishers who are considering such uses.

III. CONCLUSION

While the fair use analysis conducted in the above section may make it unlikely that news publishers would, as a matter of course, be able to successfully claim fair use when republishing photographs found on social networking sites, it is not impossible to envision a court drawing parallels to the First Circuit’s *Nunez* holding and finding fair use.

The fair use analysis heavily relies on circumstances and context, and individual outcomes can be hard to predict. This has led to understandable confusion among secondary copyright users and legal scholars who have struggled to find consistency in the courts’ application of the four factors. This is largely because of, as Professor Kathleen K. Olson has noted, “the *ad hoc* nature of most courts’ fair use decision-making.”¹³⁵ Professor Matthew D. Bunker has called the application of the fair use analysis “arbitrary and unreliable” after the Supreme Court’s decision in *Campbell* that altered the transformative use doctrine.¹³⁶

However, the above cases do provide some guidance for news publishers. Acting in good faith should not be underestimated. Courts have recognized that a good-faith belief by a defendant that it was engaging in fair use is evidence that infringement is not willful for damages purposes.¹³⁷ While this does not necessarily affect the fair use analysis, it is recognized by courts, which show some sympathy for good faith actions. One commentator has said the unstated “fifth factor” of fair use is “Does the judge like you?” and is based on one’s intentions and behavior exhibited in connection with the use.¹³⁸

134. *Terms & Conditions*, MYSPACE.COM, <http://www.myspace.com/Help/Terms> (last visited Nov. 23, 2011).

135. Olson, *supra* note 9, at 168.

136. Bunker, *supra* note 9, at 291.

137. *Fitzgerald*, 491 F. Supp. 2d at 190.

138. Jonathan Bailey, *The Problem with the Fifth Fair Use Factor*, PLAGIARISM TODAY

The recent litigation involving Righthaven LLC might present such an example. Righthaven LLC is a company that has purchased copyrights from publishers such as the *Las Vegas Review-Journal* and *The Denver Post* with the intent of bringing infringement suits against people who copy news articles on the Web.¹³⁹ The plaintiffs seek maximum statutory damages of \$150,000 plus seizure of the domain name in these cases,¹⁴⁰ and courts have been finding fair use in unusual circumstances. The District Court of Nevada found fair use despite the commercial nature of a news article copied in part on a Realtor's Web page.¹⁴¹ Two other district courts have found fair use despite the reposting of full articles on non-commercial Web sites.¹⁴² While the litigation initiated by Righthaven, often referred to as "copyright trolls" for their copyright enforcement efforts, is not in bad faith, it clearly has not been favored by the district courts. A recent example involving copyrighted photographs would seem to compound this perception problem for Righthaven. The company brought an infringement suit against the Internet publisher Ars Technica for republishing a photograph from *The Denver Post* as part of its coverage of Righthaven litigation against the news aggregation Web site Drudge Report.¹⁴³ The photograph was not only used for news purposes and newsworthy in its own right—it was the subject of the litigation—but it also turned out that Ars Technica did not use the original copyrighted work. Rather, it used a lower quality black-and-white copy made from public court filings as an exhibit in the case, for which Ars Technica could make an even stronger case for fair use. Righthaven,

(Mar. 24, 2011), <http://www.plagiarismtoday.com/2011/03/24/the-problem-with-the-fifth-fair-use-factor>.

139. John Patrick Pullen, *Las Vegas's Copyright Crapshoot Could Maim Social Media*, FORTUNE (Jan. 6, 2011), <http://tech.fortune.cnn.com/2011/01/06/las-vegass-copyright-crapshoot-could-maim-social-media>.

140. *Id.*

141. *See* Righthaven LLC v. Realty One Group Inc., 96 U.S.P.Q.2d 1516, 1517 (D. Nev. 2010), in which the court found fair use in part because the secondary user only reposted the first eight sentences of a 30-sentence news article.

142. *See* Righthaven LLC v. Klerks, 2010 U.S. Dist. LEXIS 105307, at *10 (D. Nev. Sept. 17, 2010), in which the court found "a sufficiently meritorious defense of fair use" by Klerks after a third party posted an article about skyscrapers and urban development in its entirety on a non-commercial Web site he maintained; *see also* Righthaven LLC v. Jama, No. 2:10-CV-01322-JCM-LRL, at 2 (D. Nev. filed Mar. 25, 2011), in which the court found fair use despite the fact that the nonprofit center in question posted a 33-paragraph article from the *Las Vegas Journal-Review* in its entirety, available at <http://docs.justia.com/cases/federal/district-courts/nevada/nvdce/2:2010cv01322/75299/34/>.

143. *See* Nate Anderson, *Copyright Troll Righthaven's Epic Blunder: A Lawsuit Targeting Ars*, ARS TECHNICA (Mar. 2011), <http://arstechnica.com/tech-policy/news/2011/03/copyright-troll-righthavens-epic-blunder-a-lawsuit-targeting-ars.ars>; *see also* Steve Green, *Righthaven Drops Infringement Lawsuit Against Journalist*, LAS VEGAS SUN (March 29, 2011), <http://www.lasvegassun.com/news/2011/mar/29/righthaven-drops-infringement-lawsuit-against-jour/>.

claiming it made a mistake, requested dismissal of the lawsuit shortly after it was filed.¹⁴⁴

The presence of good faith (or the lack of bad faith) republication helped *El Vocero* and the Associated Press prevail in their fair use arguments in the *Nunez* and *Mathieson* cases, respectively, and while it has not been specifically mentioned in the *Righthaven* cases, the apparent good faith by defendants in those cases—for example, the Realtor “directed readers of his blog to the full text of the Work”¹⁴⁵—may be persuasive to courts considering fair use. Certainly the presence of bad faith actions, such as being denied a license and using the copyrighted work anyway¹⁴⁶ or removing copyright management information and other markers of the original copyright holder,¹⁴⁷ make the case far more difficult for a secondary user.

Another argument put forth by a *Righthaven* defendant—implied license—also has potential if a fair use argument fails. While exclusive transfers of licenses must be done in writing, non-exclusive transfers, such as permitting multiple other users to republish, may be done orally or implicitly.¹⁴⁸ In *Field v. Google Inc.*, the District of Nevada court extended this reasoning to Google’s assertion that a Web publisher, by failing to use an industry-standard “no-archive meta-tag” to prevent search engines from using cached links, must have known Google would use those links to access the copyrighted works on his pages. Therefore, Google argued, the publisher granted an implied license to Google to use the works.¹⁴⁹ In *Righthaven LLC v. Klerks*, the District Court of Nevada applied this reasoning again, finding that implied license was the “most meritorious defense” for Klerks in republishing an article in full.¹⁵⁰ Klerks argued that the *Las Vegas Journal-Review* “offered the article to the world for free, encouraged people to save and share the article with others without restrictions, and permitted users to ‘right-click’ and copy the article from its website.”¹⁵¹

While it might be an intriguing argument for news publishers, implied license has yet to be tested in federal appellate courts in Internet copyright cases, and it presents some logical flaws. Lack of express non-

144. *Id.*

145. *Righthaven LLC*, 96 U.S.P.Q.2d at 1517.

146. *KCAL-TV Channel 9*, 108 F.3d at 1122.

147. *See* *Wilen v. Alt. Media Net, Inc.*, 74 U.S.P.Q.2d 1053, 1056 (S.D.N.Y. 2005), in which the court did not find a valid fair use defense on grounds of parody or “transformation” in defendants’ “willful concealment of the copyright notices” on seven photographs.

148. *See* John S. Sieman, Comment, *Using the Implied License to Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 898 (2007) (citing 17 U.S.C. § 204(a) (2006)).

149. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

150. *Klerks*, 2010 U.S. Dist. LEXIS 105307, at *10.

151. *Id.* While the court did not hold that this was a valid defense, it found that it was “sufficiently plausible” that the case could proceed to further hearings on the matter. *Id.* at 11.

consent to republish does not necessarily mean that consent can be implied, and the *Field v. Google* case may be limited to its facts regarding industry standards on caching. Further, evidence that the copyright holders do not intend to grant consent by allowing sharing presents a challenge for the implied consent defense in the future. Regardless, this is an area that is ripe for future study.

Considering the fair use analysis conducted in this study, the following guidance is offered to news publishers considering the use of photographs found on social networking sites:

1. Use your original work or seek publicly-available works

The safest path for a media outlet is always, of course, to publish photographs the media outlet owns the rights to. When such photographs are not readily available, news publishers should consider using publicly available works such as those licensed through Creative Commons. The photo-sharing site Flickr, for example, has a Creative Commons section with more than 25 million photos available on an “attribution” license. An “attribution” license means publishers only must give credit to the photographer to have authorization.¹⁵² While not all Creative Commons photographs are safe for secondary use by news publishers—more than 52 million photos, for example, are designated “attribution-non commercial-no derivatives,” meaning commercial and derivative uses are not authorized¹⁵³—this is still an area safer than grabbing photographs from other areas of Flickr or from individuals’ pages on Facebook or MySpace.

2. Seek permission from the copyright holder

When original or publicly available work is not readily present to publishers as they seek to inform the public about breaking news on deadline, publishers should seek express permission from the copyright holder. In the case involving Ms. Dupré, a phone call to her or her lawyer may have been enough to establish whether permission would be granted. It is evident from the circumstances that Ms. Dupré was not pleased by the use of her photographs and would not have granted permission; this fact, if known in advance, would have been enough to let publishers know they were entering dangerous territory by using her photos. If the copyright holder does not permit the secondary use, this does not necessarily mean that a fair use argument will fail. In *Campbell*, the 2 Live

152. Explore/Creative Commons, FLICKR, <http://www.flickr.com/creativecommons/> (last visited Nov. 23, 2011).

153. *Id.*; see also Ginsburg, *supra* note 33, at 314 n.7.

Crew was denied permission for its parody of “Oh, Pretty Woman,” which Justice Souter wrote should not be “weighed against a finding of fair use” because “(i)f the use is otherwise fair, then no permission need be sought or granted.”¹⁵⁴ Nevertheless, the Ninth Circuit in the *Los Angeles News Service v. KCAL* case noted that a good faith defense becomes more difficult when a news organization is denied a license and uses material anyway.¹⁵⁵ For news publishers, it would not be much better to willingly refuse to seek a license, knowing that it will likely be denied, and then rest hopes on the slim chance that a court will find fair use.

In such situations, it is quite possible that news publishers will be able to identify or contact the copyright holder on deadline. Social networking sites make contacting people much easier, often allowing direct messaging to users and sometimes providing phone numbers, email addresses, or other contact information to friends or the general public. Publishers should use these tools to make efforts to contact copyright holders in advance of publication.

Contact becomes more difficult when a copyright holder cannot be identified—for example, when photographs are posted on the user’s Facebook or MySpace page by a third party. Further, publishers have no real protection beyond claims of fair use for republishing “orphan works.”¹⁵⁶ Courts have not recognized an orphan works defense for publishers who cannot locate copyright holders to seek authorization to republish,¹⁵⁷ and Congress failed to pass the “Shawn Bentley Orphan Works Act of 2008,” which would have allowed an affirmative defense for publishers who engaged in “diligent” searches for copyright holders.¹⁵⁸

Additionally, those seeking to republish photographs could seek permission from the social networking or photo sharing site hosting the photographs if this is allowed under the Terms of Service. In May 2011, Twitpic altered its Terms of Service to allow users of the site a “non-exclusive . . . license to use, reproduce . . . display and perform the Content” as long as the users received permission from Twitpic in advance and attributed credit to Twitpic.¹⁵⁹ Though Twitpic said it altered the Terms of Service to “protect users’ photos from abuse by the media,” the move angered users who saw it as a naked grab of their copyrights for

154. *Campbell*, 510 U.S. at 585 n. 18.

155. *KCAL-TV Channel 9*, 108 F.3d at 1122.

156. See Benjamin T. Hickman, Note, *Can You Find a Home for this “Orphan” Copyright Work? A Statutory Solution for Copyright-Protected Works Whose Owners Cannot be Located*, 57 SYRACUSE L. REV. 123, 128 (2006).

157. See *Kahle v. Gonzales*, 487 F.3d 697, 698-99 (9th Cir. 2007).

158. S. 2913, 110th Cong. § 514(b)(2)(A)(i) (2008).

159. *Supra* note 10.

commercial purposes.¹⁶⁰ Secondary users should examine the Terms of Service of websites to see if permission may be granted from the site itself.

3. Consider whether the photograph is independently newsworthy

Is the photograph the news publisher is planning to use newsworthy of its own accord? If so, this may provide the “transformative” value that photographs need to be fairly used. Consider whether the existence of the photograph could be the subject of a news story. In *Nunez*, it was the existence of nude modeling photographs of Miss Puerto Rico Universe that was the news; the photographs themselves were necessary illustrations of their existence. One recent example involves former U.S. Representative Chris Lee, a Republican from New York who resigned after his extramarital dalliances became public upon the publication of email discussions with a woman on Craigslist and a photograph he sent to her.¹⁶¹ The existence of the photograph in question, which Rep. Lee took of himself in a mirror, was unquestionably an important part of this story. Secondary use for news purposes is more likely to qualify as fair use in this situation.

4. Act in good faith

There are a number of ways publishers can show that they are acting in good faith. Essentially, publishers should act as if they are trying to fulfill their constitutionally-implied duties to inform the public about important matters while not taking advantage of people who may have a valid market for their copyrightable creations. In the *Nunez* case, the First Circuit noted the importance of attribution. Because *El Vocero* gave credit to *Nunez*, this was evidence that the newspaper was acting in a transparent manner and not trying to hide the source of the works.¹⁶² Further, a news publisher should provide links to the original works when possible, as the Realtor did in *Righthaven LLC v. Realty One Group, Inc.*¹⁶³ to let the audience know the source of the material and have a way to access the full content in its original format.

In this article, the author set out to provide a thorough analysis of the fair use defense as it applies to news organizations that publish pho-

160. *Twitpic Angers Users Over Copyright Grab*, BBC NEWS (May 12, 2011), <http://www.bbc.co.uk/news/technology-13372982>.

161. See Raymond Hernandez, *New York Congressman Resigns Over E-Mails*, N.Y. TIMES (Feb. 9, 2011), <http://www.nytimes.com/2011/02/10/us/politics/10lee.html>.

162. *Nunez*, 235 F.3d at 23.

163. *Righthaven LLC*, 96 U.S.P.Q.2d at 1518.

tographs shared by users on social networking Web sites such as Facebook and MySpace or other sites that allow photo sharing such as Twitpic and Flickr. By examining several federal court opinions, the author suggests that fair use is unlikely to protect news publishers except in circumstances when photographs are a news story in themselves and publishers act in good faith in republishing them. While news publishers would obviously prefer stronger protection, either under the First Amendment or through application of the “implied license” doctrine, Congress and the courts have yet to provide for this. News organizations should continue to push for such protection, but they should be cautious about relying on these grounds when publishing copyrighted photographs of others without authorization.