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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLA CALKINS, an individual  
  
Plaintiff,

No. 2:06-CV-2435 JAM DAD  
  
Order Granting Playboy  
Enterprises International  
Inc.'s Motion for Summary  
Judgment

v.

PLAYBOY ENTERPRISES  
INTERNATIONAL, INC., a  
corporation doing business as  
Playboy Magazine; and COLLEEN  
SHANNON, an individual,  
  
Defendants.

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Plaintiff Carla Calkins ("Calkins") brought this action for  
copyright infringement against defendant Playboy Enterprises  
International, Inc., a corporation dba Playboy Magazine ("PEI"),  
and Colleen Shannon ("Shannon") under the Copyright Act, 17  
U.S.C. § 106. PEI now moves for summary judgment. Calkins

1 opposes the motion. For the reasons stated below, the Court  
2 GRANTS the motion.<sup>1</sup>

### 3 I. UNDISPUTED FACTS

4 The Court finds the following facts to be undisputed.  
5 Calkins and her husband Robert Calkins ("Mr. Calkins") are the  
6 owners of a photography studio known as Mother Lode Photography  
7 ("Mother Lode"). Def.'s Undisputed Material Fact ("UMF") ¶ 1.  
8 Mother Lode specializes in individual portraits, family  
9 portraits, weddings and high school senior portraits. Id. ¶ 2.  
10 In 1996, Mr. Calkins, on behalf of Mother Lode, photographed  
11 Shannon while she was a high school senior. Id. ¶ 5. Following  
12 this photo session, Shannon ordered the "deluxe session" package  
13 from Mother Lode, which included indoor and outdoor portraits.  
14 Id. ¶ 5. Neither Shannon nor anyone else has ordered reprints  
15 of Shannon's senior portraits since they were created in 1996.  
16 Id. ¶¶ 10, 44.

17 In December 2003, a reproduction of one of Shannon's senior  
18 portraits ("Photograph") appeared in the January 2004 50th  
19 Anniversary edition of Playboy Magazine ("Playboy"), Def.'s UMF  
20 ¶¶ 11, 13, without Calkins' permission. Pl.'s UMF ¶ 1. The  
21 image, approximately 1¾ by 2¾ inches, is a reproduction of a  
22 waist-up shot of Shannon lying in a public field. Def.'s UMF ¶¶  
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28 <sup>1</sup> This motion was determined to be suitable for decision  
without oral argument. E.D. Cal. L.R. 78-230(h).

1 5, 8-9, 22-23, 29. The image appeared on the biography page  
2 (a.k.a. Playmate data sheet) of Playboy's centerfold feature,  
3 which also contained three other photographs of Shannon as well  
4 as a handwritten biography prepared by Shannon. Id. ¶¶ 15-16,  
5 20-21. The Photograph was not substantially altered before it  
6 was reproduced by PEI, except that it was reduced in size and  
7 "cropped" a little (i.e., the edges of the Photograph were  
8 eliminated or trimmed). Pl.'s UMF ¶¶ 6, 9, 23. According to  
9 Gary Cole ("Cole"), PEI's photography director, the purpose of  
10 the Playmate data sheet is to personalize each Playmate by  
11 providing insight into their life, including how they grew up  
12 and what their interests are. Def.'s UMF ¶¶ 17-19.<sup>2</sup> Mr. Cole  
13 testified that he believed the Photograph was a personal  
14 photograph belonging to Shannon because it did not appear to  
15 have been created by a professional photographer. Id. ¶¶ 28-31.  
16 Calkins testified that while it is Mother Lode's practice to  
17 affix a copyright sticker to each of its photographs, she  
18 acknowledges that this practice was not always followed. Id. ¶¶  
19 32-33. Calkins, for instance, does not allege that a copyright

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26 <sup>2</sup> To the extent that Calkins contends that Mr. Cole's  
27 deposition testimony is inadmissible hearsay, the court rejects  
28 this contention. While deposition testimony is ordinarily  
hearsay when submitted at trial, it is not hearsay in a summary  
judgment motion. See Surrell v. California Water Service Co.,  
518 F.3d 1097, 1107 (9th Cir. 2008); Orr v. Bank of America, NT  
& SA, 285 F.3d 764, 779 n. 27 (9th Cir. 2002).

1 sticker was affixed to the photograph at issue in this case.

2 Id. ¶ 34.

3 In February 2004, the Photograph was registered with the  
4 Copyright Office under Mr. Calkins' name, and a Certificate of  
5 Registration was issued on February 5, 2004. Def.'s UMF ¶ 63.  
6 Calkins concedes that the copyright registration erroneously  
7 listed the date in which the Photograph was developed, May 15,  
8 1996, as the date of publication, and that she has made no  
9 effort to correct this error. Id. ¶¶ 65-66. On July 20, 2005,  
10 Mr. Calkins allegedly transferred the copyright to the  
11 Photograph and all the rights related to ownership of the  
12 copyright, past, present, and future, to Calkins. Id. ¶ 67. On  
13 November 2, 2006, Calkins filed an action for copyright  
14 infringement against PEI and Shannon. Docket at 1. On March 5,  
15 2008, PEI filed its motion for summary judgment. Docket at 23.

## 19 II. OPINION

### 20 A. Legal Standard

21 Rule 56(b) permits a party against whom a claim has been  
22 asserted to "move at any time, with or without supporting  
23 affidavits, for summary judgment on all or part of the claim."  
24 Fed.R.Civ.P. 56(b). Summary judgment is appropriate if "the  
25 pleadings, depositions, answers to interrogatories, and  
26 admissions on file, together with the affidavits, if any, show  
27 that there is no genuine issue as to any material fact and that  
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1 the moving party is entitled to a judgment as a matter of law."  
2 Fed.R.Civ.P. 56(c). The moving party bears the initial burden of  
3 demonstrating the absence of a genuine issue of material fact.  
4  
5 See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the  
6 moving party sustains its burden, the burden then shifts to the  
7 nonmoving party to go beyond the pleadings and by his or her own  
8 affidavits, or by the depositions, answers to interrogatories,  
9 and admissions on file, designate specific facts showing that  
10 there is a genuine issue for trial. See id. at 324 (citing  
11 Fed.R.Civ.P. 56(e)). "If the nonmoving party fails to produce  
12 enough evidence to create a genuine issue of material fact, the  
13 moving party wins the motion for summary judgment." Nissan Fire  
14 & Marine Ins. Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1103  
15 (9th Cir. 2000). "But if the nonmoving party produces enough  
16 evidence to create a genuine issue of material fact, the  
17 nonmoving party defeats the motion." Id. Summary judgment is  
18 appropriate if, viewing the evidence and the inferences  
19 therefrom in the light most favorable to the non-moving party,  
20 there are no genuine issues of material fact in dispute and the  
21 moving party is entitled to judgment as a matter of law.  
22  
23 Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989).  
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## 25 **B. Copyright Infringement**

26 PEI argues that summary judgment is appropriate with  
27 respect to Calkins' copyright infringement claim because PEI's  
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1 use of the Photograph is a "fair use" as set forth in 17 U.S.C.  
2 § 107.

3 "The Copyright Act, 17 U.S.C. § 106, protects the owner of  
4 a copyright by granting him or her exclusive rights to  
5 reproduce, distribute, and publicly display copies of the work."  
6 Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792, 799  
7 (9th Cir. 2003) (internal quotation marks omitted). "A prima  
8 facie case of copyright infringement by reproduction is  
9 established by showing ownership by the plaintiff and copying by  
10 the defendant." Id. A copyright owner's exclusive rights,  
11 however, are subject to statutory exceptions, including the  
12 exception for "fair use." Hustler Magazine Inc. v. Moral  
13 Majority Inc., 796 F.2d 1148, 1151 (9th Cir. 1986) (citing 17  
14 U.S.C. §§ 106, 107); see also Perfect 10, Inc. v. Amazon.com,  
15 Inc., 487 F.3d 701, 715 (9th Cir. 2007) (even if a plaintiff  
16 makes a prima facie case of direct infringement, the defendant  
17 may avoid liability if it can establish that its use is a "fair  
18 use" as set forth in § 107).<sup>3</sup> "The fair use doctrine confers a  
19 privilege on people other than the copyright owner 'to use the  
20 copyrighted material in a reasonable manner without his consent,  
21 notwithstanding the monopoly granted to the owner.'" Id. In  
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27 <sup>3</sup> Section 107 provides in pertinent part: "Notwithstanding  
28 the provisions of section 106, the fair use of a copyrighted  
work . . . is not an infringement of copyright." 17 U.S.C. §  
107.

1 determining whether a use is fair, courts engage in a case-by-  
2 case analysis and a flexible balancing of the following four  
3 non-exclusive factors: (1) the purpose and character of the use,  
4 including whether such use is of a commercial nature or is for  
5 nonprofit educational purposes; (2) the nature of the  
6 copyrighted work; (3) the amount and substantiality of the  
7 portion used in relation to the copyrighted work as a whole; and  
8 (4) the effect of the use upon the potential market for or value  
9 of the copyrighted work. Mattel, 353 F.3d at 800 (citing 17  
10 U.S.C. § 107); Hustler, 796 F.2d at 1151-52. Because fair use  
11 is an affirmative defense, PEI carries the burden of  
12 demonstrating it. Campbell v. Acuff-Rose Music, Inc., 510 U.S.  
13 569, 590 (1994). Where material facts are not in dispute, fair  
14 use is appropriately decided on summary judgment. Mattel, 353  
15 F.3d at 800.

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19 In the present case, PEI does not argue that Calkins cannot  
20 establish a prima facie case of copyright infringement; rather,  
21 PEI argues that its use of the Photograph is a "fair use" under  
22 the factors set forth in § 107. Thus, the question before the  
23 court is whether PEI's use of the Photograph is a "fair use."  
24

### 25 **1. Purpose and Character of the Use**

26 The first factor in a fair use inquiry requires the Court  
27 to consider "the purpose and character of the use, including  
28 whether such use is of a commercial nature or is for nonprofit

1 educational purposes." 17 U.S.C. § 107(1). The "purpose and  
2 character of use" factor in the fair use inquiry asks whether  
3 the work's purpose was for profit or not for profit and to what  
4 extent the new work is transformative and does not simply  
5 "supplant" the original work. Mattel, 353 F.3d at 800.  
6 Although not controlling, the fact that the work is used for a  
7 commercial or profit-making purpose as opposed to a non-profit  
8 purpose, weighs against a finding of fair use. Elvis Presley  
9 Enterprises, Inc. v. Passport Video, 349 F.3d 622, 627 (9th Cir.  
10 2003). And the degree to which the new user exploits the  
11 copyright for commercial gain-as opposed to incidental use as  
12 part of a commercial enterprise-affects the weight afforded to  
13 commercial nature as a factor. Id.; see also Hustler, 796 F.2d  
14 at 1152 (The critical issue is not whether the sole motive of  
15 the use is monetary gain but whether the user stands to profit  
16 from exploitation of the copyrighted material without paying the  
17 customary price.).  
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21 The second, and more important, inquiry under this first  
22 factor is to determine whether and to what extent the new work  
23 is "transformative." Perfect 10, 487 F.3d at 720 (citing  
24 Campbell, 510 U.S. at 579); see also Elvis Presley Enterprises,  
25 349 F.3d at 628 (the "transformative" nature of the new work is  
26 the most important inquiry under the first fair use factor). "A  
27 work is 'transformative' when the new work does not 'merely  
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1 supersede the objects of the original creation' but rather 'adds  
2 something new, with a further purpose or different character,  
3 altering the first with new expression, meaning, or message.' "  
4 Perfect 10, 487 F.3d at 720 (citing Campbell, 510 U.S. at 579);  
5 Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003).

7 The more "transformative" the new work, the less the  
8 significance of other factors that weigh against fair use, such  
9 as use of a commercial nature. Campbell, 510 U.S. at 579; Elvis  
10 Presley Enterprises, 349 F.3d at 628.

12 In the present case, the Court finds that the Photograph  
13 was used for a commercial purpose inasmuch as PEI is a for-  
14 profit enterprise and the Photograph appeared in Playboy.  
15 However, the Court further finds that the use of the Photograph  
16 was incidental and less exploitative in nature than more  
17 traditional types of commercial use insofar as PEI was neither  
18 using the Photograph to directly promote sales of Playboy, nor  
19 trying to profit by selling the Photograph. See Kelly, 336 F.3d  
20 at 818. It is undisputed that the Photograph was reproduced as  
21 part of the centerfold feature of Playboy and was not advertised  
22 on the cover, nor made evident to prospective purchasers of  
23 Playboy. Thus, it does not appear that the Photograph was  
24 reproduced by PEI for the purpose of making a profit without  
25 paying the customary price. There is no evidence before the  
26 Court indicating that PEI profited from the use of the  
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1 Photograph. Indeed, the Photograph was merely one of hundreds  
2 of photos appearing in the January 2004 50th Anniversary edition  
3 of Playboy. Therefore, while Playboy is published for profit  
4 and the use of the Photograph contributed to its entertainment  
5 value, the manner of commercial use in this case does not weigh  
6 strongly against a fair use determination. See id.

8       Moreover, while the mere commercial use of copyrighted  
9 material generally weighs against a finding of fair use, it does  
10 not end the inquiry under this factor. Rather, the Court must  
11 consider whether and to what extent the new work is  
12 transformative. In this regard, the Court finds PEI's use of  
13 the Photograph to be transformative because although PEI made a  
14 replica of the Photograph, the reproduced image was much smaller  
15 and served an entirely different function than the original  
16 image. Mother Lode originally created the Photograph for the  
17 limited purpose of being used as a gift by Shannon's family and  
18 friends, Def.'s UMF ¶ 45, while PEI used the Photograph, in  
19 conjunction with other photographs of Shannon and a handwritten  
20 biography, for the purpose of personalizing Shannon by providing  
21 insight into her life, including how she grew up and what her  
22 interests are. Def.'s UMF ¶¶ 17-19. Thus, because PEI used the  
23 Photograph in a new context to serve a different function  
24 (inform and entertain Playboy readers) than the original  
25 function (gifts for family and friends), PEI's use did not  
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1 supersede the function of the original Photograph, and therefore  
2 PEI's use is transformative. See Kelly, 336 F.3d at 818-19; see  
3 also Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 22-23  
4 (1st Cir. 2000) (republication of photographs taken for a  
5 modeling portfolio in a newspaper was transformative because the  
6 photos served to inform, as well as entertain). Indeed, the  
7 reproduced image is not a suitable substitute for someone who  
8 wishes to use the Photograph as a gift because the image is  
9 significantly smaller and of lesser quality than the original  
10 Photograph. In other words, it is unlikely that Playboy readers  
11 would use the reproduced image for the original purpose for  
12 which it was created. Accordingly, because the transformative  
13 purpose of PEI's use of the Photograph is considerably more  
14 important than the fact that PEI used the Photograph as part of  
15 a for-profit enterprise, the first fair use factor weighs  
16 heavily in favor of a fair use determination.

## 20 **2. Nature of the Copyrighted Work**

21 The second factor in a fair use inquiry requires the Court  
22 to consider the "nature of the copyrighted work." 17 U.S.C. §  
23 107(2). Works that are creative in nature, such as photographs  
24 that are meant to be viewed by the public for informative and  
25 aesthetic purposes, are closer to the core of intended copyright  
26 protection than are more fact-based works. Kelly, 336 F.3d at  
27 820. The fact that a work is published or unpublished is also a  
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1 critical element of its nature insofar as unpublished works are  
2 less likely to qualify as fair use because the author's right to  
3 control the first public appearance of his work weighs against  
4 the use of his work before its release. Id. "The right of  
5 first publication encompasses not only the choice whether to  
6 publish at all, but also the choices when, where, and in what  
7 form first to publish a work." Harper & Row, 471 U.S. at 564.  
8 When dealing with transformative uses, this factor is not  
9 terribly significant in the overall fair use balancing. See  
10 Mattel, 353 F.3d at 803. In this case, it is undisputed that  
11 the Photograph was professionally created and that Calkins'  
12 neither intended nor intends to publish the Photograph. It is  
13 further undisputed that the Photograph was not publicly released  
14 prior to its appearance in Playboy and that Calkins did not  
15 register the Photograph with the Copyright office until after it  
16 was published by PEI. Thus, because Calkins' copyrighted  
17 Photograph can fairly be said to be a creative work, see Kelly,  
18 336 F.3d at 820 (finding photographs created by professional  
19 photographer to be creative in nature); see also Nunez, 235 F.3d  
20 at 23 (finding that modeling photographs could be categorized as  
21 either factual or creative even though the photographer posed a  
22 model, chose her clothing, makeup and hairstyle, arranged  
23 lighting and backdrop, and gave her instructions on facial  
24 expression, because the photographs were not artistic  
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1 representations designed primarily to express the photographer's  
2 ideas, emotions, or feelings, but instead a publicity attempt to  
3 highlight the model's abilities as a potential model), and  
4 because PEI's publication of the Photograph supplanted Calkins'  
5 right to control the first public appearance of the work, this  
6 factor weighs against a fair use determination, but only  
7 slightly.  
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### 9 **3. Amount and Substantiality of the Portion Used**

10 The third factor in a fair use inquiry requires the Court  
11 to examine the "amount and substantiality of the portion used in  
12 relation to the copyrighted work as a whole." 17 U.S.C. §  
13 107(3). While wholesale copying militates against a finding of  
14 fair use, the extent of permissible copying varies with the  
15 purpose and character of the use. Kelly, 336 F.3d at 820. For  
16 instance, if the secondary user only copies as much as is  
17 necessary for his or her intended use, such as replicating an  
18 entire photograph, then this factor will not weigh against him  
19 or her. See id. at 820-21 (finding that this factor did not  
20 weigh either for or against either party where the defendant  
21 (operator of visual search engine) copied each of plaintiff's  
22 images as a whole because it was necessary to do so in order to  
23 maintain the usefulness of the visual search engine by allowing  
24 users to recognize the image and decide whether to pursue more  
25 information about the image and decide whether to pursue more  
26 information about the image and decide whether to pursue more  
27 information about the image and decide whether to pursue more  
28 information about the image or the originating web site). In

1 this case, the Court finds that this factor does not weigh  
2 either for or against a finding of fair use because although PEI  
3 copied the entire Photograph, it was reasonable to do so in  
4 light of PEI's purpose for using the Photograph. The extent of  
5 the copying was consistent with and to further the "purpose and  
6 character of the use," that is, it was necessary for PEI to copy  
7 the entire Photograph in order to personalize Shannon by showing  
8 Playboy readers how Shannon looked as a high school senior. To  
9 use a lesser portion of the Photograph would have defeated PEI's  
10 purpose for using it.

13 **4. Effect of the Use Upon the Potential Market for or Value**  
14 **of the Copyrighted Work**

15 The fourth factor in a fair use inquiry focuses on "the  
16 effect of the use upon the potential market for or value of the  
17 copyrighted work." 17 U.S.C. § 107(4). This factor is  
18 undoubtedly the single most important element of fair use.  
19 Harper & Row, 471 U.S. at 566; Elvis Presley Enterprises, 349  
20 F.3d at 630. This factor requires courts to consider not only  
21 the extent of market harm caused by the particular actions of  
22 the alleged infringer, but also whether unrestricted and  
23 widespread conduct of the sort engaged in by the defendant would  
24 result in a substantially adverse impact on the potential market  
25 for the original. Kelly, 336 F.3d at 821 (citing Campbell, 510  
26 U.S. at 590); Elvis Presley Enterprises, 349 F.3d at 631. The

1 more transformative the new work, the less likely the new work's  
2 use of copyrighted materials will affect the market for the  
3 materials. Elvis Presley Enterprises, 349 F.3d at 631. In  
4 determining whether the use has harmed the work's value or  
5 market, courts have focused on whether the infringing use: (1)  
6 tends to diminish or prejudice the potential sale of the work,  
7 or (2) tends to interfere with the marketability of the work, or  
8 (3) fulfills the demand for the original work. Hustler, 796  
9 F.2d at 1155-56. If a use has no demonstrable effect upon the  
10 potential market for, or the value of, the copyrighted work,  
11 then such use need not be prohibited in order to protect the  
12 author's incentive to create. Sony Corp. v. Universal City  
13 Studios, Inc., 464 U.S. 417, 450 (1984).

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17 In the present case, Calkins contends that PEI's  
18 reproduction of the Photograph caused Mother Lode to lose  
19 revenue in the form of lost sales of the Photograph. However,  
20 it is undisputed that Mother Lode is not in the business of  
21 reselling its clients' photographs to third parties.  
22 Furthermore, Calkins concedes that she neither intended nor  
23 intends to publish the Photograph or otherwise exploit it in any  
24 way (e.g., sell or license the Photograph to a third party).  
25 Def.'s UMF ¶¶ 55-56, 59-62. Thus, the question of market harm  
26 turns on whether PEI's use of the Photograph had a demonstrable  
27 effect on Calkins' ability to sell reprints of the Photograph to  
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1 Shannon. In this regard, there is no evidence before the Court  
2 indicating that PEI's use of the Photograph had any discernable  
3 impact on Shannon's decision not to order reprints of the  
4 Photograph. In fact, it is undisputed that neither Shannon nor  
5 anyone else has ordered a reprint of the Photograph since it was  
6 created in 1996. Moreover, because PEI's reproduction of the  
7 Photograph is not an adequate substitute for the original (i.e.,  
8 PEI's reproduced image does not fulfill the demand for the  
9 original Photograph), PEI's use of the Photograph does not usurp  
10 a market that properly belongs to Calkins. In short, there is  
11 no evidence before the Court demonstrating that PEI's use of the  
12 Photograph interfered in any way with the marketability of the  
13 work. Accordingly, because Calkins failed to demonstrate a  
14 connection between PEI's use of the Photograph and lost sales,  
15 the Court finds that PEI's use did not cause actual market harm.  
16 A lack of actual market harm, however, does not end the inquiry  
17 under this factor. The Court must also consider whether  
18 unrestricted and widespread conduct of the sort engaged in by  
19 PEI would result in a substantially adverse impact on the  
20 potential market for the original or its derivatives. In this  
21 regard, the Court finds that Calkins failed to demonstrate how  
22 PEI's use of the Photograph would adversely impact the potential  
23 market for the original Photograph if PEI's conduct should  
24 become widespread. There is no evidence before the Court  
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1 demonstrating how comparable use of the Photograph would harm  
2 Calkins' ability to sell reprints to Shannon. Indeed, if  
3 anything, widespread publication of the Photograph would have a  
4 positive effect on the potential market for the original  
5 Photograph by increasing demand for reprints. Accordingly,  
6 because PEI's use of the Photograph had no demonstrable effect  
7 upon the potential market for, or the value of, the Photograph,  
8 this factor weighs strongly in favor of a fair use  
9 determination.  
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12 In sum, after considering the four fair use factors, the  
13 Court concludes, on balance, that PEI's use of the Photograph is  
14 a fair use.<sup>4</sup>  
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### 16 III. CONCLUSION

17 For the reasons stated above, the Court GRANTS PEI's  
18 motion.

19 **IT IS SO ORDERED.**

20 Dated: May 14, 2008

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23 JOHN A. MENDEZ,  
24 UNITED STATES DISTRICT JUDGE

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25 <sup>4</sup> Because the Court finds that PEI's use of the Photograph  
26 is a fair use under § 107, the Court need not consider whether  
27 Calkins is entitled to statutory damages and attorney's fees  
28 under 17 U.S.C. § 412. The Court also finds it unnecessary to  
decide PEI's motion to strike Calkins' untimely opposition to  
PEI's motion for summary judgment. The Court would note,  
however, that Calkins filed her opposition two days late and  
provided no explanation to this Court for the late filing.

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