

Courts Limiting Use Of Copyrighted Photos For News Media

By **Tal Dickstein and Sarah Levitan** (January 28, 2019)

Charges of “fake news” are not the only thing buffeting the news business of late. As news outlets increasingly use images and videos in their reporting to engage subscribers, particularly on social media, they have become frequent targets of copyright infringement lawsuits. Armed with software that can automatically detect the use of their content on even the most obscure website, rights owners and licensing agents have brought an increasing number of copyright infringement claims challenging unlicensed uses of their works.



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News outlets have responded, with varying degrees of success, by invoking the doctrines of fair use, de minimis use and implied license. Recent court decisions have brought the contours and limits of those defenses into sharper focus. Media outlets should be aware of these case law developments, both to adjust their policies and practices in order to minimize their chances of becoming the target of an infringement claim, and to effectively defend themselves in the event they are forced into litigation.

Not All News Reporting Qualifies as Fair Use

The Copyright Act expressly identifies “news reporting” as a purpose for which use of a copyrighted work is not an infringement of copyright. It may therefore come as a surprise that including a photograph in a news report is not always protected as fair use. Whether such use is considered fair depends largely on whether it is “transformative,” in that it adds some new expression or meaning to the original photograph. Recent court rulings have emphasized that, in order to be considered transformative under the fair use doctrine, a news article that includes a photograph must contain either a significant amount of information about the subject of the photo that cannot be gleaned from the photo itself, or some commentary or criticism on the photo.



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Otto v. Hearst Communications Inc. involved a photograph of President Donald Trump making a surprise appearance at a wedding held at the Trump National Golf Club.[1] Esquire magazine posted an article on its website that reported on Trump’s appearance. The article included a photograph of the president and the bride that had been taken by one of the wedding guest (who dubbed himself “just a guy with an iPhone”) and uploaded to Instagram. The article noted that the golf club had previously marketed itself by boasting that Trump might appear at events held there.

The Southern District of New York granted summary judgment to the plaintiff on the defendant’s fair use defense, finding that, even though the article contained additional details about the golf club’s marketing tactics, it merely “recite[d] factual information — much of which can be gleaned from the photograph itself.”[2] In rejecting the fair use defense, the court also found that Esquire had published the photo for the same reason the plaintiff had originally taken it — namely, memorializing and reporting on Trump’s appearance at the wedding, and that Esquire’s use was therefore not sufficiently transformative.

On the other side of the fair use line is Philpot v. Media Research Center Inc., a case from the Eastern District of Virginia.[3] There, a conservative website published an article about celebrities’ political views that included an unlicensed photograph of country singer Kenny Chesney, and an article about Kid Rock’s planned campaign for the U.S. Senate that

included a photo of the famous rocker. Although the photographer had uploaded both photographs to Wikimedia with a creative commons license that permitted reuse as long as the photographer received attribution, the defendant used the photos in its articles without giving any attribution to the photographer.

The court found these uses to be sufficiently transformative, because the photographer's purpose in capturing the photos was different from the defendant's purpose in publishing the photos. While the photographer's goal was to depict the performing artists in concert, the defendant used the photos to report and comment on issues of public concern, rather than merely referencing the artists' identities as musicians. The court also rejected the plaintiff's argument that the defendants' use would undermine the licensing market for his photos, noting that the plaintiff had consented to third-party use of his photos in exchange for attribution credit but no royalty payment.

These cases indicate that, when it comes to fair use, the more commentary the better. Media outlets seeking to incorporate unlicensed photographs into their reporting should add commentary either about the subject of the photo but unrelated to the purpose for which the photo was originally taken, or about some matter of public interest involving the photograph itself. Merely describing or rehashing an event captured in a photo — even if the event is a matter of public interest — is unlikely to render the secondary use fair. In other words, although a photo is said to be worth a thousand words, even adding a thousand words to an unlicensed photograph won't qualify as fair use if those words merely describe or recount the events captured in the photo.

Even a Brief Use May Be Actionable

Even if an article's use of third-party content does not qualify as fair use, media outlets may argue that the amount of unlicensed material used is so small, and the duration so fleeting, that it constitutes nonactionable de minimis copying. While film and television producers have had some success invoking this argument when copyrighted material appears briefly in the obscured background of a scene, recent court decisions have limited the de minimis doctrine where a photograph or image is featured prominently in a news report.

In *Hirsch v. Complex Media Inc.*,^[4] the defendant published a news video about an associate of rap artist Bobby Shmurda being sentenced in a gang-related criminal proceeding. The video included a brief shot of a news article that had been published by the celebrity news and gossip website, *Page Six*, and featured plaintiff's copyrighted photograph of Shmurda's associate in the courtroom awaiting sentencing.

Even though the photograph was visible clearly for only two seconds (and blurred for another two seconds) out of a nearly two-minute-long video, the Southern District of New York allowed the plaintiff's copyright infringement claim to survive a motion to dismiss and proceed to the discovery phase. The court rejected the defendant's de minimis use argument, noting that the entire photograph was featured prominently in the center of the video, albeit for a brief time.^[5]

Thus, when the entirety of an image is clearly visible as part of a news video, even for a short period of time, the defendant may be unable to defeat a copyright infringement claim by arguing that its use was de minimis. To reduce the risk of a successful infringement claim, media and news organizations should consider cropping, obscuring or marginalizing any unlicensed third-party content that appears in their published videos, even if the content appears for only a few seconds.

Using Social Media Tools May Help Avoid Liability

As the cases discussed above illustrate, merely because a photograph has gone "viral" on

social media does not eliminate the risk of liability for media and news outlets that use the photo in their articles without a license. That is not to say, however, that content posted to social media can never be used without an express license.

In the *Hirsch v. Complex Media* case, the defendant argued that the plaintiff had granted the public at large an implied license to reproduce his photograph based on the fact that the online version of the Page Six article in which the photograph originally appeared included links that allowed users to “share” the article through email, weblinks or social media.

Although the court rejected that argument because those links allowed users to copy the Page Six article but not plaintiff’s photograph, it left open the argument that, in other circumstances, the use of sharing features on social media might give rise to an implied license that would defeat an infringement claim. Media outlets should therefore consider ways to incorporate existing social media sharing features into their news reporting, rather than copying unlicensed content directly into their articles and videos.

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[1] *Otto v. Hearst Communications, Inc.*, No. 17-cv-4712-GHW, 2018 U.S. Dist. LEXIS 208698 (S.D.N.Y. Dec. 10, 2018).

[2] *Id.* at *23.

[3] *Philpot v. Media Research Ctr. Inc.*, 279 F. Supp. 3d 708 (E.D. Va. 2018).

[4] *Hirsch v. Complex Media, Inc.*, No. 18 Civ. 5488 (CM), 2018 U.S. Dist. LEXIS 209701 (S.D.N.Y. Dec. 10, 2018).

[5] The court also rejected the defendant’s motion to dismiss based on fair use, explaining that the defendant’s video included the photograph for the same purpose as the Page Six article—to report on the criminal sentencing—and was therefore not sufficiently transformative.