



# **FAIR USE JURISPRUDENCE 2019-2021: A COMPREHENSIVE REVIEW**

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**Prepared for Fair Use Week**



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<https://ipat.law.uci.edu/fairuse2021>



## Introduction

Copyright covers a huge range of expressive activity and is automatic. Just about anyone who wants to do more than read, watch, or use a work relies on the doctrine of fair use in order to avoid liability for copyright infringement. The Supreme Court has referred to fair use as a sort of safety valve that provides breathing space to allow copyright to coexist with freedom of expression. And it is an evolving doctrine; disputes concerning fair use are constantly working their way through the American legal system, but the vast majority of cases do not make the news despite their importance to creative expression and innovation.

At the UCI Intellectual Property, Arts, and Technology Clinic, we [work with independent filmmakers](#) to make sure that when they do need to make fair use, they can do so responsibly, appropriately—and safely. Over the past couple of years, our Filmmaker Counseling team began to hear of a rising number of fair use opinions coming out of the federal courts, and we decided to embark on an exhaustive study of recent fair use decisions in copyright infringement cases. In total, we identified and analyzed seventy-two opinions issued by federal courts and made available on Westlaw or Lexis between January 1, 2019, and February 25, 2021. Because so many of these cases have flown under the radar, we decided to make our research available to the public. In this document, we provide abstracts of 72 opinions along with some commentary on selected cases. We have also prepared an online table of these cases, which is available at <https://ipat.law.uci.edu/recent-fair-use-cases/>.

We were surprised by the sheer volume of fair use opinions, but our analysis yielded some interesting insights.

**There are a lot of fair use cases involving photographs.** Of the 72 opinions made available on Lexis or Westlaw, over half were about photographs—37 in total. Of these, 22 were from either repeat plaintiffs David Oppenheimer (2) and Larry Philpot (1) or from plaintiffs’ attorneys Richard Liebowitz (16) and Higbee and Associates (3) who file a high volume of cases. (The question of whether these repeat filers are a problem is for another report; we note, however, that three separate judges in this set of opinions made reference to misconduct by Mr. Liebowitz. In any event, it is quite clear that the cases in this report represent a tiny fraction of the photography cases being filed annually in recent years.)

What do these cases mean for the doctrine of fair use? The results are mixed. Some suits never should have been brought because the fair use was so clear—while in other cases, the defendant perhaps should have thought twice before asserting a fair use defense. Also, social media can complicate the analysis; the judges in the Southern District of New York are having an interesting conversation across cases about what it

means to embed an Instagram post (presumably licensed via Instagram’s API terms of use) versus just displaying the picture used in the post.

**There were very few cases dealing with technology.** Aside from a case involving a long-running dispute between Oracle and Rimini St., *Rimini St. v. Oracle Int'l Corp.*, 473 F. Supp. 3d 1158 (D. Nev. 2020), and another involving Zillow, there were almost no reported fair use cases dealing with technology issues—the last two years have not seen a *Sega v Genesis* or an *Author’s Guild v. Google*. Of course, we are awaiting the Supreme Court decision in *Google v. Oracle*, but the last twenty-six months have been surprisingly quiet.

We hope you find this review useful and interesting; it is freely available for you to use and share under a [Creative Commons Attribution-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-sa/4.0/).

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*Helmer v. Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.*,  
No. 1:20-CV-105, 2021 WL 428647, at \*1 (S.D. Ohio Feb. 8,  
2021)

RESOLUTION: **Motion to bifurcate denied. Fair use issue not decided**

Copyright infringement case over guides to whistleblower law published in 1994 and 2016. The district court denied defendants' motion to bifurcate trial between liability and damages phases. Defendants had stated that they planned to pursue a fair use defense, but the court noted that "this defense would also likely involve evidence applicable to both liability and damages. Under a fair use defense, Defendants would likely have to prove whether the Beasley Book's 'use is of a commercial nature or is for nonprofit educational purposes.' If this case were to be bifurcated, defense witnesses could be forced to testify twice: first about how the Beasley Book was written and for what purposes it was marketed, and then a second time about the profits Beasley Allen realized as a result.

Date Decided: February 8, 2021



*Larson v. Dorland Perry*, No. 19-CV-10203-IT, 2021 WL 352375  
(D. Mass. Feb. 2, 2021)

RESOLUTION: **Motion to dismiss denied. Declined to consider fair use**

Dorland wrote a letter regarding her decision to donate a kidney and claimed Larson committed copyright infringement of the letter in a short story. Larson claimed, inter alia, fair use. The court declined to consider fair use in a motion to dismiss, reasoning that to do so "would require a factual examination of the purpose of Larson's use, the nature of Larson's work, and the effect of Larson's use on the market or value of Dorland's work. None of these may be gleaned from the Cross-complaint or the works themselves. Accordingly, the court cannot conclude that Larson's use constituted fair use as a matter of law."

Date Decided: February 2, 2021

*DeLima v. Google, Inc.*, No. 1:19-CV-978-JL, 2021 WL 294560  
(D.N.H. Jan. 28, 2021)

RESOLUTION: **Motion to dismiss denied.**

Pro se plaintiff sued Google over alleged censorship of social media posts, including violation of fair use rights. Court held that violation of "fair use laws" is not a viable claim, "as 'fair use' is a defense to a copyright or trademark infringement claim and not a basis for an affirmative claim."

Date Decided: January 28, 2021

*Monsarrat v. Newman, No. CV 20-10810-RGS, 2021 WL 217362, at \*2 (D. Mass. Jan. 21, 2021)*

RESOLUTION: **Motion to dismiss granted on fair use grounds.**

Defendant was the admin for a LiveJournal community and moved the entire archive to a different service. Plaintiff claimed copyright infringement in one post that had been moved. The district court granted defendant's motion to dismiss on fair use grounds. The court held that defendant "did not publish the copyrighted post for the same purposes for which [plaintiff] initially created it; the plaintiff's use being "to highlight LiveJournal's harassment policy and demand deletion of other posts on the community website which he viewed as violative," and the defendant's "reproduction, on the other hand, was created solely for historical and preservationist purposes." The court also found that the second factor favored defendant given the mostly factual nature of the post, and concluded that there was no plausible market for the copyrighted post and thus no likelihood of market harm.

Date Decided: January 21, 2021

*Gayle v. Allee*, No. 18 CIV. 3774 (JPC), 2021 WL 120063  
(S.D.N.Y. Jan. 13, 2021)

RESOLUTION: Fair use. Plaintiff's motion for reconsideration denied.

Pro se plaintiff brought action for copyright infringement over graffiti plaintiff allegedly authored containing the words "ART WE ALL." Court declined to consider fair use claims given that it had dismissed on other grounds.

Date Decided: January 13, 2021

*Boesen v. United Sports Publ'ns, Ltd.*, No. 20-CV-1552 (ARR)  
(SIL), 2020 U.S. Dist. LEXIS 240935 (E.D.N.Y. Dec. 22, 2020)

RESOLUTION: Fair use. Plaintiff's motion for reconsideration denied.

Plaintiff moved to reconsider the district court's dismissal of his copyright infringement action against Defendant, which embedded an Instagram post containing Plaintiff's photo in its news article. The court found no issues with its previous analysis. The court once again distinguished situations where the defendant reproduces a photograph for the purpose of reporting on *the photo itself* (as in the instant case) from those in which the defendant reports on the *contents* of the photo. Additionally, the fact that Defendant ran advertisements alongside the article did not imply that Defendant used the photo for a commercial purpose. Finally, there was no likelihood of market harm because Defendant (a) reported on the Instagram post itself and (b) used a cropped, low-resolution version of Plaintiff's photo. Thus, the court denied Plaintiff's motion for reconsideration.

Date Decided: December 22, 2020

*Ed. note: a Richard Liebowitz case.*

*One of several recent cases that have addressed news articles that report on Instagram posts or where the post was "embedded" on the publication's website using the Instagram API. See also Walsh v. Townsquare Media and McGucken v. Newsweek.*

*Dr. Seuss Enters., Ltd. P'ship v. ComicMix Ltd. Liab. Co.*, 983  
F.3d 443 (9th Cir. 2020)

**RESOLUTION:** Fair use not determined. Reversed the lower court's grant of summary judgment to Defendant.

Defendant wrote a book that combined elements of Dr. Seuss's *Oh, the Places You'll Go!* and *Star Trek*; Plaintiff Seuss Enterprises sued for copyright violation. The district court granted Defendant's motion for summary judgment on fair use grounds, and Plaintiff appealed.

Like the district court, the Ninth Circuit found that Defendant's book was not a parody because it merely mimicked Seuss's style without subjecting Seuss's work to ridicule. Unlike the district court, though, the Ninth Circuit did not find Defendant's use transformative. Although Defendant "transformed" Seuss's illustrations in the literal sense, those transformations did not imbue Seuss's work with new expression, meaning, or message. Rather, Defendant reproduced Seuss's illustrations in meticulous detail while simply replacing Seuss's characters with *Star Trek* characters. As to the fourth factor, the court emphasized Defendant's failure to satisfy its burden of presenting evidence about the relevant markets. Furthermore, Defendant's book likely usurped the previously-exploited derivative work market for *Oh, the Places You'll Go!* and, like Seuss's book, targeted the market for gifts for graduating students. Thus, the Ninth Circuit reversed the district court's grant of summary judgment for Defendant.

Date Decided: December 18, 2020

*Sands v. What's Trending*, No. 20-CV-02735 (GBD) (KHP), 2020 U.S. Dist. LEXIS 236019 (S.D.N.Y. Dec. 14, 2020)

RESOLUTION: Fair use not determined. The magistrate judge recommended denying Defendant's motion to dismiss.

Plaintiff took a photo of actor Joaquin Phoenix on a movie set dressed as the Joker. Defendant published an online article entitled "First Pics of Joaquin Phoenix As The JOKER Released" that included Plaintiff's photo. Plaintiff sued for copyright infringement and Defendant moved to dismiss on fair use grounds. A Magistrate Judge found Defendant's use non-transformative because Defendant used Plaintiff's photograph for the same purpose for which it was taken, which the judge characterized as: "to document the comings and goings of celebrities, illustrate their fashion and lifestyle choices, and accompany gossip and news articles about their lives to show what Phoenix looked like on the movie set." Though the opinion also acknowledged that Defendant commented specifically on the photo and "sought to glean as much information as possible from the Photograph and to interpret the copyrighted work to keep its readers informed," the MJ recommended denying Defendant's motion to dismiss.

The district court adopted the MJ's recommendation in full on February 23, 2021. *Sands v. What's Trending, Inc.* No. 20CIV2735GBDKHP, 2021 WL 694382 (S.D.N.Y. Feb. 23, 2021).

Date Decided: December 14, 2020

*Ed. note: a Richard Liebowitz case.*

*The Magistrate Judge distinguished this case from Yang v. Mic Network and Walsh v. Townsquare Media on the grounds that those cases concerned stories about entire Instagram posts or news articles, while this case concerned a story about a photo. Given that the Magistrate Judge acknowledged that the accompanying story provided substantial commentary about and interpretation of the photo, it is puzzling why the judge held that it was used for the same purpose as the original. See also McGucken v. Newsweek and Boesen v. United Sports Publ'ns, Ltd.*



*Castle v. Kingsport Publ'g Corp.*, No. 2:19-CV-00092-DCLC,  
2020 U.S. Dist. LEXIS 233919 (E.D. Tenn. Dec. 14, 2020)

RESOLUTION: Fair use. Defendant's motion for summary judgment granted.

Plaintiff took a drone photograph of a controversial planned site for a public school in an attempt to prove that the school was being built on a sinkhole. After Plaintiff presented an enlarged version and distributed copies at a school board meeting, Defendant reproduced the photo in an article reporting on the school board engineer's position that the formations in question were not sinkholes but the result of blasting operations. Plaintiff sued for copyright infringement, and Defendant raised the fair use defense.

The district court held that Defendant used the photo for the transformative purpose of news reporting and to report on a controversy to which Plaintiff's photo was central. The court was also skeptical of the notion that there could be a market for a drone image of a high school construction site. Accordingly, the court granted Defendant's motion for summary judgment.

Date Decided: December 14, 2020

*Oppenheimer v. ACL LLC*, No. 3:19-CV-00024-GCM, 2020 U.S. Dist. LEXIS 226248 (W.D.N.C. Dec. 2, 2020)

**RESOLUTION:** Fair use not determined. Plaintiff’s motion for summary judgment denied as to fair use.

Defendant placed Plaintiff’s photograph of a Harrah’s lobby on its website to promote a cornhole event. Plaintiff sued for copyright infringement. As to fair use, the district court noted that Defendant used the entirety of the photo for what “appear[ed] to be a commercial purpose” (i.e., to promote the cornhole event) but declined to grant Plaintiff’s motion for summary judgment as to fair use because Plaintiff had not established facts sufficient to show that the secondary use usurped the market for the original work. The court noted that the record contained very little facts about the value of and expected profit from the photograph.

Date Decided: December 2, 2020

*Ed. note: This case was brought by frequent copyright plaintiff David Oppenheimer.*

*Nat'l Comm'n for the Certification of Crane Operators v. Nationwide Equip. Training*, No. 1:20-cv-483-TFM-M, 2020 U.S. Dist. LEXIS 239754 (S.D. Ala. Nov. 24, 2020)

RESOLUTION: **Not fair use. Plaintiff's motion for a preliminary injunction granted.**

Plaintiff writes and administers certification examinations for prospective crane operators. Defendant allegedly copied and sold Plaintiff's secret exam questions; Plaintiff sued for copyright infringement and requested a preliminary injunction. The district court did not buy Defendant's fair use defense; defendant used the questions in a non-transformative manner for a commercial purpose. Furthermore, the court determined that the fourth factor (market harm) weighed in Plaintiff's favor as well based inter alia on the conclusion that Plaintiff's accreditation was jeopardized by the infringement. The district court granted Plaintiff's motion for a preliminary injunction.

Date Decided: November 24, 2020

*Aoki v. Gilbert*, No. 2:11-cv-02797-TLN-CKD, 2020 U.S. Dist. LEXIS 215130 (E.D. Cal. Nov. 16, 2020)

**RESOLUTION: Not fair use. Defendant liable for copyright infringement following a bench trial.**

Defendant repeatedly used Plaintiff’s copyrighted slide deck (the subject of which was Plaintiff’s patented diabetes treatment method). Defendant’s use was unequivocally non-transformative and commercial because Defendant used copies of the slides for the purpose of attracting investors. The court also found that Defendant “caused confusion in the market” by representing that the results depicted in the slides resulted from Defendant’s treatment method (rather than Plaintiff’s). The court rejected Defendant’s fair use defense and found Defendant liable for copyright infringement.

Date Decided: November 16, 2020

*Lanard Toys v. Anker Play Prods.*, No. CV 19-4350-RSWL-  
AFMx, 2020 U.S. Dist. LEXIS 221783 (C.D. Cal. Nov. 12, 2020)

RESOLUTION: **Not fair use. Plaintiff's motion for summary judgment granted as to fair use.**

Plaintiff alleged that Defendants copied its toy packaging for a toy called “Chalk Bomb!” The district court found a triable issue of fact as to whether there was striking similarity between the parties’ packaging but rejected Defendants’ fair use defense because Defendants “used Plaintiff’s works commercially and derived a financial benefit from that use” under the first factor, and presumed a likelihood of market harm because “Defendants’ intended use was for commercial gain.” The court granted plaintiff’s motion for summary judgment as to fair use.

Date Decided: November 12, 2020

*Boesen v. United Sports Publ'ns, Ltd.*, No. 20-CV-1552 (ARR) (SIL), 2020 U.S. Dist. LEXIS 203682 (E.D.N.Y. Nov. 2, 2020)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Caroline Wozniacki, a former professional tennis player, announced her retirement in an Instagram post that featured Plaintiff's photograph. Defendant, a tennis news website, embedded the post, including the photograph, in an article about Wozniacki's retirement. Plaintiff sued Defendant for copyright infringement, and Defendant moved to dismiss on fair use grounds.

The district court's analysis followed that of *Walsh v. Townsquare Media, Inc.*, No. 19-CV-4958 (VSB), 2020 U.S. Dist. LEXIS 96090 (S.D.N.Y. June 1, 2020). In each case, the news article embedded the Instagram post in question because *the post itself* was the subject of the story. Here, Defendant's post served the transformative purpose of reporting on Wozniacki's Instagram post; it did not use Plaintiff's photograph as a generic image of Wozniacki. The court also found it implausible that Defendant's use could usurp the market for Plaintiff's photograph since Defendant only reproduced the photo as part of Wozniacki's post. Thus, the court granted Defendant's motion to dismiss.

Date Decided: November 2, 2020

*Ed. note: a Richard Liebowitz case.*

*See also* *Boesen v. United Sports Publ'ns, Ltd.*, No. 20-CV-1552 (ARR) (SIL), 2020 U.S. Dist. LEXIS 240935 (E.D.N.Y. Dec. 22, 2020) (*denying motion to reconsider this decision*).

*One of several recent cases that have addressed news articles that report on Instagram posts or where the post was "embedded" on the publication's website using the Instagram API. See also* *Walsh v. Townsquare Media and McGucken v. Newsweek.*

*Fellner v. Travel 4 All Seasons LLC*, No. CV-19-01719-PHX-DJH,  
2020 U.S. Dist. LEXIS 198638 (D. Ariz. Sep. 30, 2020)

RESOLUTION: Fair use. Defendant’s motion for summary judgment granted.

Defendant reproduced roughly half of Plaintiff’s news article on his travel website without permission. Plaintiff sued for copyright infringement, and Defendant moved for summary judgment on fair use grounds.

The court its first factor analysis exclusively on “whether the use was for commercial purposes,” ignoring the transformativeness analysis. It then determined that Defendant’s use was *not* for commercial purposes because Defendant operated a free blog and did not make a monetary profit. The court also “consider[ed] that Defendant identified Plaintiff as the author of the Article and provided a citation to the original work, in order that any visitor to the website could read the Article in full.” The court also found that the article was primarily factual, rejected Plaintiff’s contention that Defendant’s free blog was a “competing news organization” and Plaintiff introduced no evidence of reduced economic opportunities in the market. Thus, the court granted Defendant’s motion for summary judgment.

Date Decided: September 30, 2020

*Ed. note: a Richard Liebowitz case.*



*Alexander v. Take-Two Interactive Software, Inc.*, No. 18-cv-966-SMY, 2020 U.S. Dist. LEXIS 177130 (S.D. Ill. Sep. 26, 2020)

RESOLUTION: Fair use not determined. Defendant's motion for summary judgment denied.

Plaintiff designed several tattoos that appeared on a wrestler depicted in Defendant's "WWE 2K" series of video games. Plaintiff sued defendant for copyright infringement, and Defendant moved for summary judgment on fair use grounds. The district court declined to rule on fair use at the summary judgment stage because of several material factual disputes, such as Plaintiff's purpose in creating the tattoos, the tattoos' size and prominence in the video games, and the degree of market harm, if any.

Date Decided: September 26, 2020

*Iantosca v. Elie Tahari, Ltd.*, No. 19-cv-04527 (MKV), 2020 U.S. Dist. LEXIS 171512 (S.D.N.Y. Sep. 18, 2020)

RESOLUTION: **Not fair use. Plaintiff's motion for summary judgment granted.**

Plaintiff photographed a model wearing Defendant fashion label's clothing. Defendant posted the photograph on its Facebook and Twitter accounts without Plaintiff's permission, and Plaintiff sued for copyright infringement. The court rejected Defendant's fair use defense because Defendant used the entirety of Plaintiff's photograph for a commercial purpose and in a manner that precluded Plaintiff from obtaining a licensing fee. Thus, the district court granted Plaintiff's motion for summary judgment.

Date Decided: September 18, 2020

*Ed. note: a Richard Liebowitz case.*

*The defendant questioned whether the registration number Plaintiff provided was for the actual photograph at issue, and the court noted that it "is aware that, in at least one prior case, Plaintiff's counsel did exactly what Defendant alleges—file a complaint citing the registration number from a different photograph, where the photograph at issue was not registered until after the suit was filed." So the court sua sponte ordered its own certified deposit copies of the works on file under the applicable Copyright Registration Number. Several cases we reviewed made reference to misconduct by this attorney.*

*Chapman v. Maraj*, No. 2:18-cv-09088-VAP-SSx, 2020 U.S. Dist. LEXIS 198684 (C.D. Cal. Sep. 16, 2020)

RESOLUTION: Fair use. Defendant's motion for partial summary judgment granted.

Nicki Minaj (defendant) created a cover of a song based on a song by Tracy Chapman (plaintiff). Minaj refrained from including her song on her album since her attempts to obtain a license from Chapman were unsuccessful, but someone leaked Minaj's song to a radio DJ. Chapman sued Minaj for infringement of her distribution right and right to create derivative works.

The court denied Chapman's motion for summary judgment as to the distribution issue because there was a material dispute regarding who leaked the song. However, it granted Minaj's motion for partial summary judgment as to the derivative work right because Minaj's creation of the song constituted fair use. The court was unwilling to uproot the common practice within the music industry of experimenting with a song before seeking a license in light of copyright's constitutional purpose of promoting the progress of science and the useful arts. Furthermore, Minaj made no attempt to commercially exploit her song; rather, she chose to withhold it from her album. Finally, there was no evidence that Minaj's private experimentation with Chapman's work could have harmed the market for Chapman's work, so the court granted Minaj's motion for partial summary judgment.

Date Decided: September 16, 2020

*Ed. note: The practice of pre-license experimentation is also standard in other creative industries including the film business.*

*Rimini St. v. Oracle Int'l Corp.*, 473 F. Supp. 3d 1158 (D. Nev. 2020)

RESOLUTION: **Not fair use. Counterclaimant's motion for summary judgment granted.**

Rimini Street allegedly infringed Oracle's copyrights to its enterprise software by providing third-party updates to and support for the software. A jury found in Oracle's favor on the copyright infringement question, and the Ninth Circuit upheld the verdict in 2018. In an attempt to avoid further copyright infringement, Rimini Street began servicing clients' instances of Oracle's software either on clients' own computer systems or on a third-party server (not on Rimini's own servers). Rimini sued Oracle for declaratory judgment that its new business model did not violate Oracle's copyrights, and Oracle filed a counterclaim in which it alleged copyright infringement, *inter alia*.

The Nevada District Court rejected Rimini's fair use defense. Rimini's use of Oracle's software was clearly commercial in nature, and Rimini's updates to the software were non-transformative because they "were ultimately implemented in the same PeopleSoft software as the original" which "works just as the original copyrighted software does." The second and third factors weighed in Oracle's favor because software products are at least somewhat creative and Rimini created exact RAM copies of Oracle's software, which were essential to the creation and functionality of the updates. The "effect on the market" factor also weighed in Oracle's favor because Rimini and Oracle are direct competitors in the aftermarket for software support. The court therefore granted Oracle's motion for partial summary judgment as to Rimini's defense of fair use.

Date Decided: September 14, 2020

*Ed. note: The court in this case relied in significant part on the Federal Circuit's reasoning in Oracle America, Inc. v. Google, Inc.*, 886 F.3d 1179, 1197 (Fed. Cir. 2018), which is currently under consideration at the United States Supreme Court (oral argument was on October 20, 2020). The outcome of *Google v. Oracle* at the Supreme Court may abrogate some of the court's reasoning as to fair use, but is not likely to change the outcome of the court's determination here.

*Schwartzwald v. Oath Inc.*, No. 19-CV-9938 (RA), 2020 U.S. Dist. LEXIS 165641 (S.D.N.Y. Sep. 10, 2020)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Plaintiff took a photograph of an actor walking down the street. Defendant cropped the photo, placed a text box over the actor's groin, and included the picture in an online article entitled *25 Things You Wish You Hadn't Learned in 2013 and Must Forget in 2014*. The photo's caption discusses rumors about the actor's body in the context of a discussion of various news and entertainment stories from 2013.

The district court found Defendant's use transformative because it "served the dual purpose of mocking both [the actor] and those who found the Photograph newsworthy in the first instance." The fact that Defendant superimposed a text box over the most relevant part of the photo, in the court's view, (a) made market harm unlikely and (b) added to the transformativeness of Defendant's use. The court also determined that paparazzi photos of this sort are more factual than creative in nature, and found it "unlikely that any potential purchasers of the Photograph would opt for Oath's version instead of the original." The court granted Defendant's motion to dismiss.

Date Decided: September 10, 2020

*Ed. note: a Richard Liebowitz case*

*Stross v. Hearst Communs., Inc.*, No. SA-18-CV-01039-JKP, 2020  
U.S. Dist. LEXIS 161293 (W.D. Tex. Sep. 3, 2020)

RESOLUTION: Fair use not determined. Defendant's motion for summary judgment denied.

Plaintiff sued Defendants for exceeding the scope of their license for Plaintiff's photographs of "tiny houses" on the Llano River in Texas. On Plaintiff's motion for summary judgment, the district court declined to evaluate fair use because there was a genuine dispute of material fact as to whether Defendants infringed Plaintiff's copyright in the first instance.

Date Decided: September 3, 2020

*Beom Su Lee v. Karaoke City*, 2020 U.S. Dist. LEXIS 157834  
(S.D.N.Y. Aug. 31, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Plaintiff sued Defendants for unauthorized use of Plaintiff's father's music at Defendants' karaoke bars. The district court denied Defendants' motion to dismiss on their fair use defense because Defendants merely argued that karaoke renditions of songs *can* constitute parody, and the pleadings do not establish whether the performances at issue were parodic in nature.

Date Decided: August 31, 2020



*Backgrid USA, Inc. v. Euphoric Supply Inc.*, No. 3:20-cv-00914-BEN-BLM, 2020 U.S. Dist. LEXIS 154225 (S.D. Cal. Aug. 24, 2020)

RESOLUTION: Fair use not determined. Defendants' motion to dismiss denied.

Plaintiff alleged that Defendant used its photograph of Kanye West on packaging for its Kanye West action figure. Defendant moved to dismiss on fair use grounds, but the court denied the motion because Defendant's fair use argument depended on information not present in the complaint, such as the levels of creativity and transformativeness in Defendant's use and whether there was a market for Plaintiff's work.

Date Decided: August 24, 2020

*Bain v. Film Indep., Inc.*, No. CV 18-4126 PA (JEMx), 2020 U.S. Dist. LEXIS 141859 (C.D. Cal. Aug. 6, 2020)

RESOLUTION: Fair use. Defendant's motion for summary judgment granted.

An "acting reel" is fair use. Defendant, an actress, made a reel of clips from Plaintiff's film in which Defendant appeared and sent the reel to casting directors in search of further employment. Plaintiff sued Defendant for infringing her copyright in the film, and Defendant moved for summary judgment. The district court ruled that Defendant's reel served the transformative purpose of showcasing Defendant's acting abilities, utilized only the portions of the film necessary to achieve that purpose, and could not possibly have usurped the market for the film. Thus, the court granted Defendant's motion for summary judgment.

Date Decided: August 6, 2020

*Kobi Karp Architecture & Interior Design, Inc. v. O'Donnell  
Dannwolf & Partners Architects, Inc.*, Civil Action No. 19-24588-  
Civ-Scola, 2020 U.S. Dist. LEXIS 131909 (S.D. Fla. July 27,  
2020)

RESOLUTION: Fair use not determined. Defendants' motion to dismiss denied.

The Surf Club hired Plaintiff to design a residential development. Plaintiff prepared the architectural drawings. After replacing Plaintiff with another architect, The Surf Club submitted altered versions of Plaintiff's drawings to the local government in order to obtain permission to begin construction. Plaintiff sued The Surf Club (and others) for copyright infringement and other causes of action.

On Defendants' motion to dismiss, the district court declined to evaluate fair use. The court could not determine from the face of the complaint, for example, whether the drawings were creative or how Defendants altered the drawings. Thus, the court declined to dismiss the case on fair use grounds.

Date Decided: July 27, 2020

*Miller v. Suriel Grp., Inc.*, No. 19-24936-CIV, 2020 U.S. Dist.  
LEXIS 197832 (S.D. Fla. July 21, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Plaintiff alleged that Defendant infringed his copyrights to two photographs by posting the photos to their website. Defendant moved to dismiss on fair use grounds. The district court ruled that disposition of Defendant's fair use claims was inappropriate at the motion to dismiss stage given the court's limited access to facts and the court's "narrow inquiry" at that stage.

Date Decided: July 21, 2020

*Ed. note: The plaintiff was represented by Higbee and Associates. The firm has brought dozens of lawsuits in the last several years, frequently on behalf of photographers; [Public Citizen has accused](#) the firm of predatory tactics.*

*Reilly v. Louder With Crowder, LLC*, No. 3:20-CV-0395-S, 2020  
U.S. Dist. LEXIS 125725 (N.D. Tex. July 16, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Defendant allegedly used Plaintiff's photo of a PETA protestor in an online article. Defendant moved to dismiss on fair use grounds, but the court denied the motion because the "potential market for or value of the Photograph cannot be evaluated from the face of Plaintiff's Complaint."

Date Decided: July 16, 2020

*Ed. note: a Richard Liebowitz case.*

*Marano v. Metro. Museum of Art*, No. 19-CV-8606 (VEC), 2020  
U.S. Dist. LEXIS 122515 (S.D.N.Y. July 13, 2020)

RESOLUTION: Fair use. Complaint dismissed.

The Met (Defendant) published Plaintiff’s photograph of Eddie Van Halen on its website as part of an online catalog for an exhibition that examine instruments used in rock ‘n’ roll. The photo in question showed Mr. Van Halen performing, presumably using his “Frankenstein” guitar which was the subject of that portion of the exhibition. Plaintiff sued for copyright infringement. The district court ordered Plaintiff to show cause why the case should not be dismissed under the fair use doctrine.

The district court relied heavily on *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), in dismissing Plaintiff’s complaint. Plaintiff claimed that the purpose of the photograph was to “what Van Halen looks like in Performance” and that “the original meaning” behind the Photo was to “convey the message that Van Halen is a groundbreaking and unorthodox musician.” The court distinguished this use from the Met’s purpose which was “to spotlight[] the ‘Frankenstein’ guitar—using the Photo to reference and contextualize the exhibition object, which Van Halen pieced together himself ‘to achieve the ultimate guitar for tone, playability, dependability, and functionality.’” The court also reasoned that the exhibition catalog is a scholarly use. Following the Second Circuit in *Bill Graham*, the court held that the fourth factor tipped in Defendant’s favor since Defendant’s use fell within a “transformative market”—i.e., a market consisting of those seeking to examine the “Frankenstein” guitar.

Date Decided: July 13, 2020

*Ed. note: a Richard Liebowitz case.*

*It is difficult to think of a more quintessential fair use than to show in an exhibition catalog how an object was used in situ. Exhibition catalogs, particularly from large museums like the Met, are scholarly works (frequently book-length), and very often contain substantial scholarly analysis, criticism, and commentary. In addition, given that exhibitions and their catalogs customarily seek to provide comprehensive coverage of a movement that can span decades, fair use is particularly important; without it, any artist or rightsholder who would withhold permission could undermine the entire exhibition and turn copyright into a form of private censorship.*

*Bell v. Worthington City Sch. Dist.*, No. 2:18-cv-961, 2020 U.S. Dist. LEXIS 96424 (S.D. Ohio June 2, 2020)

RESOLUTION: Fair use. Defendant’s motion for summary judgment granted.

A football coach shared a passage from Plaintiff’s book on his team’s website; another member of the same coaching staff retweeted the passage. Plaintiff sued the coaches’ employer, a school district, for copyright infringement. The district court found that the “purpose and character” factor favored Defendant because the coaches’ only purpose in using the passage—which discusses the effort it takes to be a winner—was to educate their players; thus, though the passage was not transformative use, it was an educational use. Furthermore, Plaintiff could point to no evidence of market harm for the book from which the passage was taken, so the court granted Defendant’s motion for summary judgment.

Date Decided: June 2, 2020

*McGucken v. Newsweek LLC*, 2020 U.S. Dist. LEXIS 96126  
(S.D.N.Y. June 1, 2020).

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Defendant Newsweek embedded Plaintiff's Instagram photo in an article using Instagram's API, and Plaintiff sued for copyright infringement. The court rejected Defendant's fair use argument since Defendant's use was plainly non-transformative and could serve as a market substitute for Plaintiff's photo; citing *Barcroft Media, Ltd. v. Coed Media Group*, the court distinguished between this case and those in which "the photograph itself is the subject of the story."

Date Decided: June 1, 2020

*Ed. note: Judge Wood examined very similar facts in Sinclair v. Ziff Davis. In that case, Judge Wood determined that "pursuant to Instagram's various terms and policies, [plaintiff] had granted Instagram the right to sublicense the photograph at issue, and that because Plaintiff uploaded the Photograph to Instagram and designated it as 'public,' she agreed to allow Mashable, as Instagram's sublicensee, to embed the Photograph in its website." Like Judge Wood, Judge Failla in this case ruled that Instagram possessed the right to sublicense Plaintiff's photo to Newsweek—but unlike Judge Wood, Judge Failla declined to hold at the motion to dismiss stage that Instagram had done so. The decision presumably paves the way for summary judgment in Defendant's favor upon evidence of such a sublicense (whether express or implied).*

*One of several recent cases that have addressed news articles that report on Instagram posts or where the post was "embedded" on the publication's website using the Instagram API. See also Boesen v. United Sports Publ'ns, Ltd and Walsh v. Townsquare Media.*



*Noland v. Janssen*, No. 17-CV-5452 (JPO), 2020 U.S. Dist. LEXIS 95454 (S.D.N.Y. June 1, 2020)

RESOLUTION: Fair use. Defendant’s motion to dismiss granted.

Plaintiff, an American sculptor, sued Defendant, a German art collector, under VARA and the Copyright Act after Defendant restored a sculpture he purchased from Plaintiff in 1990. Defendant’s restoration efforts took place in Germany and the Copyright Act does not apply extraterritorially absent a domestic “predicate act,” so Plaintiff argued that Defendant violated the Copyright Act by distributing photos and plans of the sculpture in the U.S. in connection with an attempted sale.

The court rejected Plaintiff’s argument on fair use grounds. The court found the use transformative because Defendant’s photos and plans were not offered for their artistic value, but in furtherance of a sale. Likewise, the photos and plans in no way usurped the market for the sculpture. Thus, the court granted Defendant’s motion to dismiss.

Date Decided: June 1, 2020

*Walsh v. Townsquare Media, Inc.*, No. 19-CV-4958 (VSB), 2020  
U.S. Dist. LEXIS 96090 (S.D.N.Y. June 1, 2020)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Defendant, an online magazine, embedded Plaintiff's Instagram post in an article. The post included a picture of Cardi B taken by Plaintiff, and Plaintiff sued for copyright infringement.

The district court found Defendant's use transformative because the subject of the article was the Instagram post itself—not the photo featured in the post—and the post was included in the article for news reporting purposes. Similarly, the court found it implausible that Defendant's use of the photo could serve as a market substitute since the photo only appeared in the article as part of Plaintiff's post. Thus, the court granted Defendant's motion to dismiss.

Date Decided: June 1, 2020

*Ed. note: a Richard Liebowitz case.*

*One of several recent cases that have addressed news articles that report on Instagram posts or where the post was "embedded" on the publication's website using the Instagram API. See also Boesen v. United Sports Publ'ns, Ltd, and McGucken v. Newsweek.*

*Johnson v. Fla. State Golf Ass'n*, No. 8:19-cv-3202-T-60AEP,  
2020 U.S. Dist. LEXIS 93163 (M.D. Fla. May 28, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Defendant posted Plaintiff's golf photo on its website without authorization. Defendant moved to dismiss the complaint on fair use grounds, but the district court denied the motion because the "facts necessary to make the [fair use] determination [we]re [not] evident on the face of the complaint."

Date Decided: May 28, 2020

*Ed. note: a Higbee and Associates case.*

*Brown v. Netflix, Inc.*, 2020 U.S. Dist. LEXIS 92739 (S.D.N.Y.  
May 27, 2020)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Plaintiffs sued Defendants for streaming a documentary that included eight seconds of Plaintiffs' song, "Fish Sticks 'n' Tater Tots," about "a student's journey from her classroom to her school cafeteria to eat fish sticks and tater tots for lunch." The documentary centered on a group of burlesque dancers, one of whom used the song in a fish-themed performance. The district court granted Defendants' motion to dismiss on fair use grounds because Defendants' use transformed the work's comedic purpose and was of very limited duration. Regarding the market factor, the court noted that the film targeted a very different audience, and in any event, "not every effect on potential licensing revenues enters the analysis under the fourth factor, and a copyright holder has no right to demand that users take a license unless the use that would be made is one that would otherwise infringe an exclusive right."

Date Decided: May 27, 2020

*Ed. note: For a discussion of this case, see Jack Lerner, "Fair Use for Documentary: A Never-Ending Fight," Documentary (July 8, 2020), <https://www.documentary.org/online-feature/fair-use-documentary-never-ending-fight>.*

*Int'l Code Council, Inc. v. UpCodes, Inc.*, 2020 U.S. Dist. LEXIS 92324 (S.D.N.Y. May 26, 2020)

RESOLUTION: **Mixed result. Defendant's motion for summary judgment granted as to one category of materials but not the other.**

Defendant posted Plaintiff's model building codes on its website in two formats: (1) as adopted by various state and local governments, and (2) "redlined" to the adopted regulations. Plaintiff sued for copyright infringement.

The district court ruled that Defendant's use of the as-adopted codes constituted fair use. Even though Defendant did not transform the codes themselves, its purpose—to educate the public—was transformative, and the information communicated was factual. As to the redlined codes, however, the court declined to find fair use as a matter of law since there was a factual dispute regarding whether they served as market substitutes for Plaintiff's model codes.

Date Decided: May 26, 2020

*CDK Glob. LLC v. Brnovich*, No. CV-19-04849-PHX-GMS, 2020  
U.S. Dist. LEXIS 88632 (D. Ariz. May 20, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Plaintiffs operate dealer management systems (DMSs), which store and process data for car dealers. The Arizona legislature enacted a “Dealer Law” requiring DMS providers to allow unlicensed third parties access to providers’ respective DMSs. Plaintiffs challenged this law, arguing that this requirement violated their software copyrights since “each time a user runs the DMS software, that process creates a new fixed copy of the original computer program code in the computer's random access memory,” and Defendant claimed such scenarios constitute fair uses.

The district court found Defendants’ fair use argument insufficient at the motion to dismiss stage. Plaintiffs alleged that third parties could extract the relevant data without copying Plaintiffs’ software, and the court distinguished this fact from previous Ninth and Seventh Circuit cases such as *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000), where the defendants’ fair use arguments were successful because such copying was the only way to achieve the desired result.

Date Decided: May 20, 2020

*Bassett v. Jensen*, Civil Action No. 18-10576-PBS, 2020 U.S. Dist. LEXIS 82431 (D. Mass. May 11, 2020)

RESOLUTION: Fair use not determined. Defendant's motion for summary judgment denied.

Plaintiff rented her home to Defendant, who produced pornographic films in the home without Plaintiff's knowledge or consent. Plaintiff's artwork, which decorated the house, appeared in Defendant's films, so Plaintiff sued for copyright infringement. The court denied Defendant's motion for summary judgement on fair use—even though Plaintiff admitted there was no market for her artwork—holding that Defendant's use was non-transformative, Plaintiff's works were creative, and Defendant used some of the works in their entirety.

Date Decided: May 11, 2020

*Delano v. Rowland Network Communs. LLC*, No. CV-19-02811-  
PHX-MTL, 2020 U.S. Dist. LEXIS 81374 (D. Ariz. May 8, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Plaintiff sued Defendant for copyright infringement, alleging that Defendant used Plaintiff's photo of the U.S.-Mexico border without permission. The district court declined to analyze fair use at the motion to dismiss stage since basic issues of fact were in dispute, such as whether Defendant posted a "very small cropped amount" of the photo or a "full color and full-scale" version of the photo.

Date Decided: May 8, 2020

*Ed. note: a Richard Liebowitz case.*



*Werner v. Evolve Media, LLC*, No. 2:18-cv-7188-VAP-SKx, 2020  
U.S. Dist. LEXIS 106477 (C.D. Cal. Apr. 28, 2020)

RESOLUTION: **Not fair use. Plaintiff's motion for summary judgment granted.**

Defendant used Plaintiff's animal photos in an online article without permission. The district court granted Plaintiff's motion for summary judgment, finding that it was "undisputed that Defendants exploited the works commercially, derived financial benefit from displaying them on their websites, and did not 'transform' the works in any way."

Date Decided: April 28, 2020

*Ed. note: a Higbee & Associates case.*

*Harbus v. Manhattan Inst. for Policy Research, Inc.*, 2020 U.S. Dist. LEXIS 74568 (S.D.N.Y. Apr. 27, 2020)

RESOLUTION: Fair use. Defendant’s motion to dismiss granted.

The New York Post licensed Plaintiff’s photograph of Andrew Cuomo for use in conjunction with an article. Defendant, a think tank, noted the article’s publication in a post on its website, which featured a darkened and heavily cropped version of Plaintiff’s photo overlaid with text. The district court granted Defendant’s motion to dismiss because Defendant substantially transformed the photo, Defendant used the photo in conjunction with research and educational efforts and is a non-profit organization, and Defendant’s cropped version of the photo could not have harmed the market for Plaintiff’s photo.

Date Decided: April 27, 2020

*Ed. note: a Richard Liebowitz case.*

*In this case the court considered whether defendant acted in bad faith, declaring that “it is the defendant’s burden to show that it did not act in bad faith” when asserting a fair use defense. In the same paragraph, however, the court noted that “the Second Circuit has instructed that the bad faith of a defendant generally contributes little to fair use analysis, and is not dispositive of a fair use defense, or even the first factor.” In any event, the court determined that there were no allegations of bad faith conduct given that “a defendant’s alleged failure to consult counsel alone is not indicative of bad faith.”*

*Wild v. Rockwell Labs*, No. 4:19-CV-00919-W-RK, 2020 U.S. Dist. LEXIS 68761 (W.D. Mo. Apr. 20, 2020)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied.

Defendant pest control company used Plaintiff entomologist's wildlife photos on its website without permission. The district court denied Defendant's motion to dismiss because Defendant's fair use arguments relied on factual "matters . . . not within the four corners of the Complaint," such as Defendant's online sales revenue.

Date Decided: April 20, 2020

*Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS-SDA, 2020 U.S. Dist. LEXIS 53287 (S.D.N.Y. Mar. 26, 2020)

RESOLUTION: Fair use. Defendant’s motion for summary judgment granted.

Defendant 2K Games publishes video games that feature realistic depictions of NBA players, including their tattoos. Plaintiff owned the exclusive right to license several tattoos that appeared in the games and sued for copyright infringement.

In granting Defendant’s motion for summary judgment, the court emphasized the transformative nature of Defendant’s use: Defendant only included the tattoos in the games to accurately portray the players (“general recognizability” and not for “the [p]layers to express themselves through body art”), the tattoos make up a tiny fraction of the games, and the tattoos were not included in the games for commercial reasons. The court also noted that the tattoos’ appearances in video games cannot serve as substitutes for their use in any other media.

Date Decided: March 26, 2020

*Tresóna Multimedia, Ltd. Liab. Co. v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638 (9th Cir. 2020)

RESOLUTION: Fair use. Affirming district court's grant of summary judgment for defendant on fair use.

A high school show choir sang twenty seconds of a song to which Plaintiff owned a copyright interest as part of an eighteen-minute show piece that reworks pieces from multiple songs to tell a story of a local Dust Bowl-era community ravaged by drought

In granting Defendants' motion for summary judgment, the Ninth Circuit found that defendants' use was both highly transformative and rooted in an educational purpose. The court also found that the transformative nature of defendants' arrangement dampened its ability to serve as a market substitute, especially considering the fact that defendants only used the song's chorus.

Date Decided: March 24, 2020

*Cruz v. Cox Media Grp., LLC*, No. 18-CV-1041 (NGG) (AKT),  
2020 U.S. Dist. LEXIS 44474 (E.D.N.Y. Mar. 13, 2020)

RESOLUTION: **Not fair use. Plaintiff's motion for summary judgment granted.**

Defendant included Plaintiff's photograph of an arrest in an online news article without permission. The district court granted Plaintiff's motion for summary judgment because Defendant used the entire photo in a non-transformative manner and usurped the market for the photo. The court distinguished situations in which a work is included in a news report about the work (which supports a finding of fair use) from those in which a work is used merely to further inform a news report (as was the case here).

Date Decided: March 13, 2020

*Ed. note: a Richard Liebowitz case.*

*Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2020  
U.S. Dist. LEXIS 35134 (N.D. Ga. Mar. 2, 2020)

RESOLUTION: **Mixed result. Fair use found as to thirty-seven of the forty-eight materials in question.**

On remand from the Eleventh Circuit, the district court once again reformulated its approach to evaluating fair use with respect to a university's unauthorized use of portions of published works for educational purposes. As instructed by the Eleventh Circuit, the district court eschewed its previously-employed quantitative approach to fair use in favor of a more holistic analysis and afforded the fourth factor—the effect on the potential market for the copyrighted work—more weight. The court ultimately found that the university made fair use of all but eleven of the forty-eight materials in question.

Date Decided: March 2, 2020

*In re DMCA Subpoena to Reddit, Inc.*, No. 19-mc-80005-SK (JD),  
2020 U.S. Dist. LEXIS 37033 (N.D. Cal. Mar. 2, 2020)

RESOLUTION: Fair use. Motion to quash granted.

An anonymous Reddit user, a lifelong Jehovah’s Witness, posted two images critical of Watchtower, a publishing organization for Jehovah’s Witnesses, on Reddit. Watchtower subpoenaed Reddit under § 512(h) of the DMCA in order to obtain the user’s identity, and the Electronic Frontier Foundation moved to quash the subpoena on the user’s behalf, as the user may have been ostracized from his religious community had his identity been revealed.

After a magistrate judge denied the motion to quash, the Northern District of California, reviewing *de novo*, granted the motion because the Reddit user’s use of the two images in question—an advertisement and a chart, each created by Watchtower—was protected by the fair use doctrine. Most importantly, the court found that (1) the use was transformative since the images were used to criticize Watchtower, and (2) there was no evidence of a market for either the ad or the chart, and both were distributed for free. Thus, the use was protected by fair use and the district court granted the motion to quash.

The court declined to undertake a sustained First Amendment analysis, reasoning that “to tackle broad online speech issues” is unnecessary “when an analysis under copyright law and fair use will do.” The court also ruled that its fair use determination was sufficient to quash the subpoena, because “fair use is not a mere defense to copyright infringement, but rather is a use that is not infringing at all”; therefore, the original justification for the subpoena—to discover the target’s identity as an alleged copyright infringer—did not exist.

Date Decided: March 2, 2020



*Morris v. Wise*, No. 1:19 CV 2467, 2020 U.S. Dist. LEXIS 35744  
(N.D. Ohio Mar. 2, 2020)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Defendant published a video on YouTube criticizing Plaintiff's business practices. Plaintiff sued Defendant for copyright infringement (among other things) since Defendant used a picture of Plaintiff in his video's thumbnail without permission.

The district court granted Defendant's motion to dismiss since all four factors weighed in Defendant's favor: Defendant transformed the picture by adding text, the picture was of a public figure and was used to criticize that figure, and there was no market for the picture.

Date Decided: March 2, 2020

*Estate of Smith v. Graham*, No. 19-28, 2020 U.S. App. LEXIS  
3484 (2d Cir. Feb. 3, 2020)

RESOLUTION: Fair use. Affirmed the district court’s grant of summary judgment in favor of Defendants.

Drake sampled a song from Jimmy Smith in his song “Pound Cake.” Jimmy Smith’s estate sued, and Drake claimed that his sampling constituted fair use, as he was criticizing the message of Jimmy Smith’s song.

The court found the use transformative since Drake used the copyrighted work for a purpose, or imbued it with a character, different from that for which it was created. The “nature of the copyrighted work” factor was of limited usefulness since the song was used for a transformative purpose. The amount used was reasonable in relation to the purpose of the copying, the two songs appealed to very different audiences, and there was no evidence of the existence of an active market for the Jimmy Smith song, “which is vital for defeating Defendants’ fair use defense.” The Second Circuit affirmed the district court’s grant of summary judgment to Defendants.

Date Decided: February 3, 2020

*Ed. note: In 2019, the IPAT Clinic co-authored an amicus brief in this case on behalf of a group of intellectual property law professors. See Brief for Intellectual Property Professors as Amici Curiae Supporting Appellees, Estate of James Oscar Smith v. Aubrey Drake Graham, 799 Fed. Appx. 36 (2020) (No. 19-0028). The brief is available [here](#).*

*Hughes v. Benjamin*, No. 17-cv-6493 (RJS), 2020 U.S. Dist.  
LEXIS 18994 (S.D.N.Y. Feb. 3, 2020)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Plaintiff posted a video on YouTube of her reaction to Hillary Clinton losing the 2016 Presidential Election. Soon thereafter, Defendant posted a YouTube video that incorporated approximately one minute and thirty seconds of Plaintiff's video and criticized it, calling her a "social justice warrior" with a "lack of awareness." The court determined that Benjamin's use constituted fair use.

The court determined that Defendant's use was transformative since he criticized the video Plaintiff posted. As for the second factor, the court found Plaintiff's video "factual and informational" but also "expressive and creative" as it provides a first-hand account of a newsworthy event as well as commentary. Next, the court noted that while Benjamin copied a large percentage of the video, the clips copied were "critical" to his video's purpose and that he copied as much of Plaintiff's video "as was deemed reasonably necessary for him to convey his critical message." Lastly, the court determined that the markets for the videos were not the same. The court granted Defendant's motion to dismiss.

Date Decided: February 3, 2020

*Comerica Bank & Tr., N.A. v. Habib*, No. 17-12418-LTS, 2020  
U.S. Dist. LEXIS 1343 (D. Mass. Jan. 6, 2020)

RESOLUTION: **Not fair use. Plaintiff's motion for summary judgment granted.**

Habib went to multiple Prince concerts and recorded parts of the performances. Habib uploaded his recorded videos to YouTube, and Comerica alerted YouTube of the copyright infringement. Habib claimed fair use, and Comerica sued.

The court found that Habib's videos did not fall under the fair use doctrine. The videos were not transformative, as he did not "add any new meaning or expression to the underlying works." Habib stood to gain traffic to his YouTube channel, and although his videos were not monetized, that is not a requirement under the fair use doctrine. Prince's songs and performances are highly creative works that fall within the heart of the Copyright Act. The court also determined that the videos showed the heart of Prince's works—i.e., the best parts of the performances. Lastly, Comerica and the Prince Estate lose revenue when unauthorized Prince videos are posted online.

Date Decided: January 6, 2020

*Pierson v. DoStuff Media, LLC*, No. A-19-CV-00435-LY, 2019  
U.S. Dist. LEXIS 188020 (W.D. Tex. Oct. 29, 2019)

RESOLUTION: **Not fair use. Defendant's motion to dismiss denied.**

Defendant allegedly posted Plaintiff's photographs of the band Lotus Land on their website. The court denied Defendant's motion to dismiss because Defendant simply reposted the photos in their entirety without any transformation. The court declined to find a difference between Plaintiff's stated purpose, "showing musicians in performance," and Defendant's declared purpose to "inform the public about an upcoming music event." Instead, the court held that the purposes for the Defendant's use and the Plaintiff's were the same, which was "to show the Lotus Land band members performing their music."

Date Decided: October 29, 2019

*Ed. note: a Richard Liebowitz case.*

*Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019)

RESOLUTION: Fair use. Defendant's motion to dismiss granted.

Defendant posted an article about the social media reaction to a *New York Post* article. Defendant's article included a screenshot of the Post article that contained roughly half of Plaintiff's photo, which he had licensed to the Post for the article. The court granted Defendant's 12(b)(6) motion because Defendant's use of the photo was heavily transformative (Defendant analyzed and criticized the article), Defendant used only part of the photo, and Defendant's use had no effect on the market for the photo.

Date Decided: September 23, 2019

*De Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019)

RESOLUTION: Fair use. Defendant’s motion for summary judgment granted.

Plaintiff first sued Defendants in France in the late 1990s for publishing volumes of a book, *The Picasso Project*, that reproduced photographs of Picasso’s works. The court determined that the use of the photographs fell within the fair use exception because the first, third, and fourth factors favored fair use.

The court determined that the book, while commercial in nature, is meant for “libraries, academic institutions, art collectors and auction houses.” The court said that “the mere commercial nature of a work does not create a presumption against fair use; such a presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country” (internal quotation marks omitted). Further, Defendants copied less than ten percent of the photos, and no evidence showed that the photos were the “heart” of the project. Lastly, there was no market harm as *The Picasso Project* and the photos have distinctly separate markets.

Date decided: September 12, 2019

*Viper Nürburgring Record LLC v. Robbins Motor Co. LLC*, No. 5:18-cv-04025-HLT, 2019 U.S. Dist. LEXIS 152931 (D. Kan. Sep. 9, 2019)

RESOLUTION: **Not fair use. Defendant's motion for summary judgment denied.**

Defendants entered into a contract with Plaintiff which licensed a license to use one photograph from a world-record attempt on a race track; Plaintiff asserted that Defendants' use exceeded the scope of the license. The court found that Defendants used Plaintiff's photos for commercial purposes (e.g., by posting them on a website and Facebook page), and granted summary judgment as to fair use. The court did not undertake a transformative use analysis.

Date Decided: September 9, 2019



*Oyewole v. Ora*, 776 F. App'x 42 (2d Cir. 2019)

RESOLUTION: Fair use. Affirmed the district court's grant of summary judgment in favor of Defendant.

The Second Circuit affirmed—without further analysis—the lower court's determination that The Notorious B.I.G.'s use of the phrase "party and bullshit" (originally used by a spoken word poetry group) in a song constituted fair use. See *Oyewole v. Ora*, 291 F. Supp. 3d 422, 2018 U.S. Dist. LEXIS 39139 (S.D.N.Y., Mar. 7, 2018).

Date Decided: September 4, 2019

*Dlugolecki v. Poppel*, No. CV 18-3905-GW(GJSx), 2019 U.S. Dist. LEXIS 149404 (C.D. Cal. Aug. 22, 2019)

RESOLUTION: **Not fair use. Defendant's motion for summary judgment denied.**

Dlugolecki took Meghan Markle's middle and high school photographs, which ABC obtained from yearbooks and broadcasted. During the six broadcasts, which included a total eight hours of broadcast time, ABC displayed the photos for a total of 49 seconds.

The court was unable to conclude that any of the four factors clearly favored fair use. The use was transformative, though not significantly in its estimation. The photos were not critical to the underlying story, and ABC had a commercial purpose in using the photos given that it used them in promotions of its coverage. Further, the amount of creativity present in yearbook photos is limited, but nonzero. Lastly, the court found that ABC usurped the market for Dlugolecki's photos by publishing them without a license.

Date Decided: August 22, 2019

*Ed. note: It is regrettable that the court did not give more weight to the historical and biographical nature of the photos in question. Yearbook photos constitute an important documentary and historical record and courts should give news reporters, scholars, and others wide latitude to use them for such purposes. This case seems more analogous to SOFA Entertainment, Inc. v. Dodger Prods., Inc., 709 F.3d 1273, 1276, 1278 (9th Cir. 2013), which concluded that the defendant had used video clip "for its biographical significance" and "as a biographical anchor," and had thereby "imbued it with new meaning" and "put the clip to its own transformative ends" than the earlier Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1170 (9th Cir. 2012) case that involved pilfered photos of a celebrity wedding that were used to show the wedding.*

*Cancian v. Hannabass & Rowe, Ltd.*, Civil Action No. 7:18-cv-00283, 2019 U.S. Dist. LEXIS 121112 (W.D. Va. July 19, 2019)

RESOLUTION: **Not fair use. Defendant's motion for summary judgment denied.**

Cancian took a photo of a summer road with trees on either side, which he edited and posted on his website. Hannabass is a body repair corporation, and contracted with Stinson Communications to build their website. Stinson owns a variety of stock images and they put the photo on Hannabass's website.

The court found that fair use did not apply in this situation. The court found little, if any, transformative value in the use of the photo on Hannabass' website because the photo was not necessary to provide historical accuracy to the article. The court found that the second factor weighed in favor of fair use, as Defendants were using the photo to depict a road in fall; the third factor weighed against fair use since the photo was reproduced in its entirety. The final factor weighed against a finding of fair use, as "Cancian is a commercial photographer who engages in the licensing of photographs for profit."

Date Decided: July 19, 2019

*Oppenheimer v. Kenney*, No. 1:18-cv-00252-MR, 2019 U.S. Dist. LEXIS 115066 (W.D.N.C. July 10, 2019)

RESOLUTION: Fair use not determined. Defendant's motion to dismiss denied to allow for further factual development.

Defendant allegedly took Plaintiff's photographs and posted them on his non-commercial, informational blog. The court denied Defendant's 12(b)(6) motion because fair use is a fact-intensive question.

Date Decided: July 10, 2019

*Ed. note: a David Oppenheimer case.*

*Tylor v. Hawaiian Springs, LLC*, No. 17-00290 HG-KJM, 2019  
U.S. Dist. LEXIS 111726 (D. Haw. July 3, 2019)

RESOLUTION: **Not fair use. Plaintiff's motion for partial summary judgment granted.**

Plaintiff, a professional photographer, sued Defendant, a bottled water company, for re-pinning his picture on Defendant's Pinterest page. The picture was of a mock advertisement for Defendant made by a non-party for a college course and pinned to the non-party's website. The court granted Plaintiff's motion for partial summary judgment as to Defendant's fair use defense, holding that none of the four factors supported Defendant's fair use argument.

Date Decided: July 3, 2019

*Stross v. Stone Textile*, No. 1:18-CV-454-RP, 2019 U.S. Dist. LEXIS 149424 (W.D. Tex. June 27, 2019)

RESOLUTION: Fair use not determined. Defendant's motion for summary judgment denied.

Defendant, a textile company, posted Plaintiff's photo of a house on its blog with analysis on how environmental protection was incorporated into the house's renovation. The court denied Defendant's motion for summary judgment because issues of material fact existed, including whether the use was transformative and whether it was a commercial use.

Date Decided: June 27, 2019

*Beom Su Lee v. Roku Karaoke*, No. 18-cv-8633-KM-SCM, 2019  
U.S. Dist. LEXIS 102988 (D.N.J. June 19, 2019)

RESOLUTION: **Not fair use. Defendant's motion to dismiss denied.**

Defendants allegedly used Plaintiff's copyrighted material in their karaoke bars. The court denied Defendants' motion to dismiss on fair use grounds because where "[a] performance for public entertainment has been plausibly alleged; the court cannot simply assume an educational or satirical use of the material." The court noted that defendants merely suggested that customers participate in karaoke "to improve their voice" and to engage in parodies. A performance for public entertainment has been plausibly alleged; the court cannot simply assume an educational or satirical use of the material." The court denied the motion to dismiss on the basis that "the pertinent facts and considerations that might support a claim of fair use are not apparent from the face of the complaint."

Date Decided: June 19, 2019

*Red Label Music Publ'g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975  
(N.D. Ill. 2019)

RESOLUTION: Fair use. Defendant's motion for summary judgment granted.

Defendant made a documentary about the 1985 Chicago Bears and included clips of the team's "Super Bowl Shuffle" music video (sixteen video clips totaling fifty-nine seconds; eight seconds of audio). Plaintiff owns the rights to the video and sued for copyright infringement.

As to the first factor, the court recognized that the documentary's purpose (to tell the story of the '85 Bears) differed from the music video's purposes (to entertain and raise money for charity). The video was reasonable to include in the documentary because it was one of the "guidepost[s]" of the Bears' season. "The purpose and character of the documentary is to comment on the sport-social phenomenon that was the 1985 Chicago Bears. This kind of historical commentary that documentary filmmakers often produce adds something new to a music video that was originally intended to entertain and raise money." The court found the second factor "largely neutral" because the filmmakers used the clips for historical, rather than creative, reasons. Next, the court held that the third factor favored fair use because the filmmakers used just eight seconds of the song's audio and 59 seconds of the video: two percent and seventeen percent, respectively; plus, the video made up only one percent of the documentary. As to the fourth factor, the court noted that no one would decline to purchase or license the music video because a fraction of it appeared in a documentary. Thus, the court granted Defendant's motion for summary judgment.

Date Decided: May 30, 2019



*Shirman v. WHEC-TV, LLC*, No. 18-CV-6508-FPG, 2019 U.S. Dist. LEXIS 83767 (W.D.N.Y. May 17, 2019)

RESOLUTION: Fair use not determined. Defendant’s motion to dismiss denied to allow for further factual development.

Plaintiff made a video about secondary students “voting” for the first time in a mock election. Defendant news station used a clip from the video in a news story; Defendant moved to dismiss on fair use grounds.

The court analyzed the transformativeness factor with reference to two Ninth Circuit cases: *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997), and *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002). The court could not find as a matter of law that Defendant’s use of the clip was transformative. Although Defendant argued it used the clip to communicate a message distinct from Plaintiff’s original message, that was not the only possible inference. The second factor weighed in Defendant’s favor since Plaintiff’s video primarily communicated factual information. The “amount/substantiality used” factor was difficult to evaluate due to disagreements over the message of Defendant’s video but weighed against Defendant because most of the news segment used video and/or audio from Plaintiff’s video. The “effect upon the potential market” factor was also unclear because widespread use of Plaintiff’s video could destroy the market for the video. Thus, the court denied Defendant’s motion to dismiss.

Date Decided: May 17, 2019

*Ed. note: a Richard Liebowitz case.*

*Furie v. Infowars, LLC*, 401 F. Supp. 3d 952 (C.D. Cal. 2019)

**RESOLUTION:** Fair use not determined. Defendant’s motion for summary judgment denied due to the existence of material issues of fact.

Furie created a comic book character named Pepe the Frog that became a popular internet meme. Defendant created a “Make America Great Again” poster, which was a collage of politically relevant figures and included Pepe’s head. InfoWars listed the poster for sale on its website.

The court denied Defendant’s motion for summary judgment because there were many factual disputes. The court noted that for the use to be transformative it customarily needed to comment on the author’s work. As for the nature of the copyrighted work, the court disagreed that Pepe the Frog’s “meme-ification” weighed in favor of fair use, as Furie’s original creation and depiction of Pepe, and his subsequent creation of “Pepe in Blue Shirt,” fall within the core of copyright protection. Next, the court evaluated the amount of work used and found that there were too many disputed issues of fact for this factor to weigh in either direction. Lastly, the court looked at the effect of use on the market and determined that the factor did not weigh against or for fair use since there was conflicting evidence.

Date Decided: May 16, 2019

*Bell v. Magna Times, LLC*, No. 2:18CV497DAK, 2019 U.S. Dist. LEXIS 72750 (D. Utah Apr. 29, 2019)

RESOLUTION: Fair use. Defendants' motion to dismiss granted.

Dr. Keith Bell is a poet and author of a book. The Magna Times published a part of Dr. Bell's book known as the "WIN passage" after a local football coach used it in a speech. Bell argued that Defendants could not move to dismiss on fair use grounds because they had not raised the fair use doctrine in their Answer. The Court allowed the Defendants to continue with their motion to dismiss. The court then moved to the question of whether publishing the "WIN passage" in their newspaper violated Dr. Bell's copyright. The court concluded that such use was fair use, as "there is no allegation that the football coach's use of the quote was anything but fair use in the education of his student athletes. The news reporting of that fair use was similarly not attempting to capitalize on the quote." The court determined that the other factors also favored fair use, and granted Defendants' motion to dismiss.

Date Decided: April 29, 2019

*Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255 (4th Cir. 2019)

RESOLUTION: **Not fair use. Reversed and remanded.**

Violent Hues Productions, which holds a for-profit film festival in Washington, D.C., used a cropped version of Brammer’s photograph of the Adams Morgan neighborhood on its website without permission or paying for a license. The district court granted summary judgment to Violent Hues on fair use grounds. The Fourth Circuit reversed.

The court determined that it was not transformative to crop a photo by what it characterized as simply removing negative space. The court highlighted possible “documentary” uses, which it noted “may be important to the accurate representations of historical events. These representations often have scholarly, biographical, or journalistic value., and are frequently accompanied by commentary on the copyrighted work itself,” and as “raw material for new technological functions.” It found that Defendant did neither here. The court also found that Defendant is a commercial enterprise and a commercial market exists for stock imagery. Finally, the court held that Defendant’s claim of good faith did not help its fair use defense, and the district court clearly erred by finding otherwise.

Date Decided: April 26, 2019

*Ed. note: The professional photography industry was very concerned about the district court’s fair use holding and several amicus briefs were filed in support of the Plaintiff-Appellant.*

*Philpot v. WOS, Inc.*, No. 1:18-CV-339-RP, 2019 U.S. Dist.  
LEXIS 67978 (W.D. Tex. Apr. 22, 2019)

RESOLUTION: **Not fair use. Defendant's motion for summary judgment denied.**

Defendant allegedly used Plaintiff's photos in their news articles without attribution and in violation of a Creative Commons license after Plaintiff had uploaded the documents to Wikimedia Commons. The court declined to grant Defendant's motion for summary judgment on fair use grounds holding that disagreement as to how to characterize each party's use of the photos is a fact issue for a jury. The court also found that because Philpot only seeks attribution for his work and doesn't generally expect or receive payment, there was no evidence that Defendant's use would have any effect on the market for Plaintiff's photos, and thus the market factor weighed decisively in Defendant's favor. Nevertheless, the court held that there existed genuine issues of material fact that would preclude a jury trial.

Date Decided: April 22, 2019

*Clark v. Transp. Alts., Inc.*, No. 18 Civ. 9985 (VM), 2019 U.S.  
Dist. LEXIS 46274 (S.D.N.Y. Mar. 18, 2019)

RESOLUTION: Fair use. Plaintiff's motion to dismiss is denied.

Clark owns a photo of a dockless bike parked at the edge of a sidewalk. TransAlt provided a photo of a *New York Post* article that was "cropped such that it shows only the Post Article's headline, author byline, the Photograph, and Clark's photographer credit."

The court determined that TransAlt's use of the photo fell within the fair use doctrine. In applying the four factors, the court determined that the first and fourth factors weighed in favor of fair use; importantly, TransAlt used the image of the Post article to critique and comment on the Post's use of Plaintiff's photo, as it contradicted the point the Post attempted to convey in its article. The court found that the second and third factors cut against fair use since the photo was creative and TransAlt replicated the entire photo but concluded "that the use of the entire Photograph was 'reasonable in relation to the purpose of the copying.'"

Date Decided: March 18, 2019

*Ed. note: a Richard Liebowitz case.*

*VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019)

**RESOLUTION: Not fair use. Affirmed the district court's grant of summary judgment in favor of Plaintiff as to fair use.**

Zillow is an online real estate marketplace and has thousands of photographs of the properties listed on its website. Thousands of these copyrighted photos come from VHT, the largest professional real estate photography studio in the country. Zillow uses VHT's photos on two parts of their websites: the "Listing Platform" and "Digs." The fair use component of the case focused solely on the Digs photos; Digs is a search engine that allows users to search the Zillow database by various criteria such as room type, style, cost, and color.

The court held that the label "search engine" is not a talismanic term that serves as an on-off switch as to fair use, and focused on the importance of considering the details and function of a website's operation in making a fair use determination. The issue with Zillow's Digs was that the search results did not direct users to the original sources of the photos (VHT's website). Rather, they linked to other pages within Zillow's website and, in some cases, to third-party merchants that sold items similar to those featured in the photo. Further, Digs displayed VHT images in their entirety, not merely thumbnails, and the photos as displayed on Zillow served the same functions as the originals. Thus, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of VHT as to fair use.

Date Decided: March 15, 2019

*Sands v. CBS Interactive Inc.*, No. 18-cv-7345 (JSR), 2019 U.S. Dist. LEXIS 46260 (S.D.N.Y. Mar. 13, 2019)

RESOLUTION: **Not fair use. Defendant's motion for summary judgment denied.**

Defendant CBSi used Plaintiff's photos of the set of a television show (which was being filmed in a public location) in an online article without permission. The court quickly dismissed Defendant's motion for summary judgment on fair use since all four factors patently weighed in Plaintiff's favor.

Date Decided: March 13, 2019

*Ed. note: a Richard Liebowitz case.*

*This is one of three fair use opinions since the beginning of 2019 we have found that referred to improper conduct by the Liebowitz Law Firm. In this case, in denying Plaintiff's motion for attorney's fees the court cited McDermott v. Monday, LLC, No. 17-cv-9230 (DLC), 2018 U.S. Dist. LEXIS 184049, 2018 WL 5312903, at \*2-3 (S.D.N.Y. Oct. 26, 2018) and described that case in a parenthetical as "detailing the Liebowitz Law Firm's history of questionable litigation practices and holding that 'it is undisputable that Mr. Liebowitz is a copyright troll.'"*



*Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053 (D. Mont. 2019)

RESOLUTION: Fair use. Defendant's motion for summary judgment granted.

Defendant (the Republican National Committee) used Plaintiff's photos of a Democratic politician in various mailers without permission. First, the court found Defendant's use transformative because "the placement of the image in the mailer" along with graphical elements "changed the function and meaning of the Work by connoting a critical message not inherent to the Work itself." The court also held that political purposes are distinct from commercial purposes. Next, the court ruled that the second factor did not weigh in favor of either party: on one hand, Plaintiff's photo was published, but on the other hand, the photo featured creative elements. The third factor weighed against fair use because Defendant used virtually the entire photo. Finally, the court determined that Defendant did not interfere with Plaintiff's ability to profit from her photo. Plaintiff was paid \$500 for photographing the event in question, and the court could not conceive of a future commercial use for the photo. Thus, the fourth and most important factor weighed in favor of fair use, and the court granted Defendant's motion for summary judgment.

Date Decided: February 22, 2019

*May v. Sony Music Entm't*, 399 F. Supp. 3d 169 (S.D.N.Y. Feb. 13, 2019)

**RESOLUTION:** Fair use not determined. The magistrate recommended denying Defendant's motion for summary judgment as there were material facts at issue.

Plaintiff alleged that Defendant Miley Cyrus infringed his copyright by including the phrase "We run things / Things don't run we" in her 2013 hit "We Can't Stop." Plaintiff had published a song in 1988 (entitled "We Run Things") that featured the same lyric several times throughout the song.

The magistrate judge first found Defendant's work transformative. Although Defendant used the lyric in the same expressive medium (i.e., music) as Plaintiff, the lyrics were "strikingly different in tone and message": Cyrus's song was a message of female empowerment, while Plaintiff's song subjugated women. Furthermore, the lyric was featured much less prominently in Cyrus's song. Thus, the first factor favored fair use. The second factor, on the other hand, did not favor fair use since Plaintiff's song was unequivocally creative. Next, the court held that, in order to be accurately assessed, the third factor required additional factual development regarding "what Defendants sought to accomplish and how they did so." The court also thought the fourth factor required more facts since it was unclear whether there could have been a "market" for Plaintiff's work. Due to the various aforementioned factual deficiencies, the magistrate recommended denying Defendant's motion for summary judgment despite holding that "analysis of the relevant factors strongly indicates that Defendants' use of the Phrase is a fair use."

Date Decided: February 13, 2019



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