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## What's wrong with this picture?

By Andrew J. Thomas

Unauthorized use of copyrighted photographs presents recurring problems for copyright law, especially when it comes to the fair use defense. Consider how three federal appellate courts have approached the issue in the past year.

On April 25, in *Cariou v. Prince*, the 2nd U.S. Circuit Court of Appeals issued a decision that broadly protected the works of “appropriation artist” Richard Prince, who created pricey works of art by reproducing the “serene and deliberately composed” images of professional photographer Patrick Cariou and then painting on them. A divided panel found the works to be “transformative” and protected by the fair use doctrine based on an ad-hoc analysis of Prince’s “different aesthetic,” including how extensively he had altered the images. Notwithstanding the artist’s testimony that his paintings “don’t really have a message,” the majority supplied its own art criticism, grounding its findings in a side-by-side examination of how the respective works “may reasonably be perceived.” The court opined that Prince’s “composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs.”

Last August, by contrast, the 9th and 6th U.S. Circuit Courts of Appeals held that fair use did not protect magazines that used personal, point-and-shoot snapshots as part of their editorial content, because the courts deemed the magazines’ uses of the photographs to be not particularly newsworthy or necessary. *Monge v. Maya Magazines*, 688 F.3d 1164 (9th Cir. 2012); *Balsley v. LFP*, 691 F.3d 747 (6th Cir. 2012).

In all three cases, the courts focused extensively on how much (or little) the photos themselves were physically altered and how much of each picture was copied — aspects of the fair use analysis that make the least sense in the context of photographs. In so doing, the courts misapprehended an essential question in fair use analysis — whether the defendant has reproduced the copyrighted work for the same basic purpose as the original, or whether the defendant has “transformed” the original work by using it for a different purpose, in a manner that adds new meaning or conveys a new message.

Photographs present a difficult case for fair use, because often the defendant must reproduce all or almost all of the work to make any meaningful use of it. The U.S. 1st Circuit Court of Appeals addressed these issues in 2000 in *Nunez v. Caribe-*

*an International News Corp.*, 235 F.3d 18. There, a professional photographer had taken pictures of a young woman in Puerto Rico for use in her modeling portfolio. After he distributed the photos within the local modeling community, a controversy erupted because the young woman was “Miss Puerto Rico Universe,” and in at least some of the photos she was nude. A local newspaper published three of the photos along with several articles about the controversy.

Affirming the district court’s fair use finding, the Court of Appeals held that the newspaper’s use of the photographs, while commercially motivated, also was transformative in that the photos were used to “inform” the public and to “place its news articles in context” — a purpose quite removed from the reasons the photos originally were created. The court concluded that “the pictures were the story” and that it “would have been much more difficult to explain the controversy without reproducing the photographs.” The newspaper’s different purpose in using the photos also led the court to find there was no likelihood of market harm because the newspaper reproductions did not “usurp” the market for the modeling portfolio.

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The last point is critical. Where the defendant has used the copyrighted work for the same intrinsic purpose as the copyright owner, courts generally hold the use is not fair — even where the photograph or footage is highly newsworthy. For example, where one news organization republishes another news organization’s photos or footage to capitalize on their news value and enhance its own coverage, fair use does not apply because the defendant has simply used the copyrighted work for the same purpose it originally was created. The 9th Circuit issued several decisions in the 1990s on this point, all involving footage of the 1992 Los Angeles riots. E.g., *L.A. News Service v. Reuters Television*, 149 F.3d 987 (9th Cir. 1998).

Over the past year, however, the 6th and 9th Circuits have rejected fair use arguments by publications that used personal, nonprofessional photographs as part of their editorial content, and for purposes quite divergent from the copyright owners’ motives.

In *Balsley*, a TV news reporter in Ohio known professionally as Catherine Bosley

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sued *Hustler* magazine over the publication of embarrassing photos. While on vacation in Florida, she had entered a “wet t-shirt” contest and ultimately danced nude on a bar. Someone took pictures and posted the photos online, and the reporter lost her job a few months later. She then purchased all rights in the photographs and registered them for copyright protection in an effort to stop their further dissemination.

Two years later, *Hustler* published one of the photos as part of its “Hot News Babes” monthly feature, after a reader “nominated” Bosley for the contest and told *Hustler* about the online photos. Next to the picture, *Hustler* published three sentences describing Bosley and a paragraph promoting its contest. On appeal from a jury verdict for Bosley, the 6th Circuit rejected *Hustler*’s fair use argument, finding that the photo was years old and not newsworthy and that the “contest” aspect of the feature — which was added to the magazine to “encourage reader participation” — showed that *Hustler*’s purpose was more commercial than informative. While focusing on *Hustler*’s purpose in publishing the photo, however, the court ignored the fact that the plaintiff’s purpose in suing had nothing to do with copyright law’s policy of incentivizing creators of expressive works — her motive was simply to prevent any further publication of an embarrassing photo.

*Monge* likewise involved the use of infringement litigation to serve the cause of privacy and secrecy, but the 9th Circuit’s decision is more troubling for news organizations because the photographs at issue clearly were newsworthy and because the court aggressively second-guessed the editorial judgments of the defendant.

In a split decision, the panel reversed a summary judgment on fair use in favor of a Spanish language gossip magazine, *TV Notas*, which had published an exposé including six previously unpublished photos showing the secret wedding in a Las Vegas chapel of a Latin pop star and her manager. After two years of keeping the covert nuptials a secret, the couple’s driver sold

the wedding night photos to the magazine, after finding them on a memory chip in the manager’s car. Maya published the photos on the cover and inside the magazine, exposing the clandestine marriage — which the manager testified had been kept secret for “marketing reasons” — and spoiling the star’s image as an “unwed sex symbol.”

The *Monge* majority largely ignored the couple’s stated purpose of keeping the photos private, and instead proclaimed broadly that “waving the news reporting flag is not a get out of jail free card in the copyright area.” The court put great weight on the unpublished nature of the photographs and stressed that Maya had not altered the photos in any significant way. In finding the photos were not sufficiently newsworthy, the majority purported to distinguish between cases where the existence of the photos are the story (as in *Nunez*) and cases where the photos related to a larger issue (the secret wedding) that could have been documented some other way — by substituting a marriage certificate for the photographs, for example.

How can these upside-down results be reconciled? In *Cariou*, the court found it was a fair use to appropriate photographs for the same broadly artistic purpose as the originals, so long as the images themselves were altered or manipulated. But *Monge* and *Balsley* vindicated infringement claims by plaintiffs who plainly were motivated not by the creative incentives embodied in copyright law but instead by a desire to control how they were portrayed in the media.

Perhaps the different results can be explained by sympathy for the *Monge* and *Balsley* plaintiffs, whose privacy to some extent had been invaded. The results also seem to reflect more than a little cultural elitism — where the fair use arguments of a soap opera tabloid and a sex magazine just aren’t taken as seriously as those of a celebrity artist with a chorus of museums and art critics lined up as *amici* at his side. All three cases suggest the transformative use analysis is becoming untethered from the basic purposes of copyright law.

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