

Can We Publish This Photo?

Analyzing Fair Use When the Well-Known Subject of an Image Owns the Copyright

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Content providers wrestle with the vagaries of the fair use doctrine when they decide whether to run photographs or video clips without authorization (or when they decide – after publication – how to respond to copyright claims). A new wrinkle to this analysis has arisen more and more frequently with the rise of on-line photo-sharing services and social networks: public figures often own the copyright to internet images of *themselves*. For example, celebrities like Miley Cyrus, Rihanna, and Kim Kardashian often tweet their own photos, taken in a mirror or by a friend or family member, and celebrity sex tapes and politicians' revealing self-portraits leak to the masses and “go viral.” The famous subjects of these images, who have taken the photos themselves or acquired the rights, can then threaten or assert copyright claims against the media in order to prevent publication of unflattering or embarrassing photographs. The media, as always, can argue “fair use.” Two August 2012 decisions, in the Sixth and Ninth Circuits, have rejected the argument, ruling in favor of public-figure plaintiffs seeking to prevent publication of images of themselves.

A pair of late 1990's cases involving a sex tape of Poison front man Bret Michaels and “Baywatch” star Pamela Anderson Lee (ah, the 90's...) provide a helpful backdrop. An internet-based adult entertainment company acquired the tape and announced its intention to distribute it online, and the program “Hard Copy” featured short clips of the video in its report of the impending release. Michaels promptly registered a copyright in the video, sued Paramount (the broadcaster of Hard Copy) for copyright infringement, and filed for a preliminary injunction against the website to prevent it from publishing the video. The Court granted the injunction against the adult website, rejecting the site's fair use defense because, *inter alia*, the use was inherently commercial and would destroy the value of Michaels' and Lee's exclusive rights in the video, even though the website only intended to post short clips. *Michaels v. Internet Enter. Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998). In contrast, the Court entered summary judgment against Lee and Michaels on their copyright claims against Paramount, finding that Hard Copy made fair use of the sex-tape because the clips were newsworthy, the program transformed the clips by interspersing them with newsworthy information, and Hard Copy's use was not in competition with Michaels and Lee's potential commercial exploitation of the film. *Michaels v. Internet Enter. Grp., Inc.*, No. CV 98-0583, 1998 U.S. Dist. LEXIS 20786 (C.D. Cal. Sept. 14, 1998).

The differing rulings in the Michaels-Lee sex-tape cases reflected a distinction between what types of uses do and don't constitute fair use of copyrighted material – distinguishing between purely commercial and non-transformative use on the one hand, and newsworthy, transformative use on the other. Unfortunately for the media, the recent Sixth and Ninth Circuit decisions draw the doctrinal lines differently. Following is a summary of the two cases and a brief discussion of take-away points that on-line publishers should keep in mind.

The Ninth Circuit – Clandestine Nuptials

The Ninth Circuit's opinion in the case of [*Monge v. Maya Magazines*](#), 688 F.3d 1164 (9th Cir. 2012), addressed whether Maya's publication of an exposé featuring previously unpublished photos of the secret wedding of Latin pop star Noelia Lorenzo Monge to her manager, Jorge Reynoso, in its Spanish language gossip magazine, "TVNotas," constituted fair use. After two years of keeping their Las Vegas wedding a secret, the couple's driver sold six photos from the night of the wedding to Maya for \$1500 after finding them on a memory chip left in Reynoso's car. The magazine published the photos in a multi-page spread exposing the couple's marriage and sullyng Monge's image as a "young, single, pop-singer."

Following publication, the couple registered the copyrights for five of the six photos and sued the magazine for copyright infringement, among other claims. After the district court disposed of the couple's other claims, it granted Maya's motion for summary judgment on the couple's copyright claims based on the fair use doctrine. On appeal, addressing only the fair use issues, a divided panel disagreed that the publication constituted fair use, reversed the lower court, and directed summary judgment in favor of the couple.

In balancing the four fair use factors set forth in the Copyright Act, – (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the work used, and (4) the effect of the use upon the potential market for the work – the Court of Appeals held that all four factors weighed against a finding of fair use. The Court emphasized that "[w]aving the news reporting flag is not a get out of jail free card in the copyright arena," especially where Maya did not transform the photos in any significant way and used the photos for exclusively commercial purposes. To demonstrate that the photos were not sufficiently newsworthy, the Court attempted to draw a distinction between cases where the existence of the photos *are* the story, versus cases like this, where the photos related to a larger issue of the couple's clandestine wedding. As such, the Court asserted that the story could have been told through other means such as by substituting the couple's marriage certificate for the photographs. Next, the Court largely ignored the couple's stated intention of keeping the photos private, and instead, took great stock in the unpublished nature of the photos. The Court further reasoned that Maya's use "negatively affected both the potential and actual markets for the couple's photos."

The Sixth Circuit – The "Hot News Babe"

Only two days later, in [*Balsley v. LFP, Inc.*](#), 691 F.3d 747 (6th Cir. 2012), the Sixth Circuit affirmed a jury verdict against Hustler Magazine for copyright infringement after it published photos of local Ohio news anchor Catherine Bosley dancing nude in a "wet t-shirt" contest while on vacation in Florida. During the contest, an amateur photographer took pictures of Bosley as she undressed on top of a bar, and later published the images on his website. After the photos gained publicity, Bosley lost her position as anchor. In an effort to restore her reputation and stop the photos' dissemination, Bosley bought all copyright interests in the photos and registered them with the U.S. Copyright Office. Two years after the incident, at the urging of one of its readers, Hustler located the photographs on the internet and included one of the photographs in the "Hot News Babes" section of its magazine. Prior to publication, Hustler allegedly tried and

failed to locate the copyright owner of the photos, and instead, opted to ask its lawyer whether it could publish the photos without permission. The attorney advised the magazine that publication of one photo would constitute fair use, and Hustler went ahead with publication.

Bosley filed suit against the magazine asserting various claims, including copyright infringement, to which the magazine responded with a fair use defense. Following trial on the copyright infringement claim, a jury found for Bosley, but concluded that the magazine's infringement was not willful, and awarded her \$135,000 in damages. After Hustler's motion to set aside the verdict was denied, it appealed the fair use decision.

The Court of Appeals upheld the jury verdict. First, with regard to the purpose and character of the use, the Court concluded that the use was indisputably for commercial purposes and that a jury could reasonably have concluded that Hustler was selling the picture rather than the underlying story, especially considering that the "Hot News Babes" section was a reader contest that offered a reward for successful nominations of "Hot News Babes," and the photo was old, previously published, no longer newsworthy, and not transformed in any meaningful way. Second, with respect to the nature of the work, the Court concluded that photographs have varying degrees of creative elements and that the jury could have found that the factor was at least neutral or "in slight favor" of Bosley. Third, the Court found that the amount and substantiality of use element favored Bosley because Hustler published the entire photograph with only minor cropping. Fourth, regarding the effect of use on the market, the Court concluded that Bosley's current intention to remove the photographs from the market was irrelevant to its inquiry into whether the use of the photograph has potential for an adverse effect on the market for the photographs.

Take-Aways

Both *Monge* and *Balsley* bear close reads. There are a number of "red flags" of which publishers should be aware as they make their own fair use analyses – but also at least some ways in which particularly "bad facts" make these cases inapposite to many unauthorized uses of photos. Some take-away points:

- These cases – *Monge* in particular – reflect a narrow view of "transformativeness," a concept at the center of fair use. While merely republishing or rebroadcasting visual works, or adding minor changes like a caption or voice-over to a complete work will generally not, alone, be transformative, a publisher's substantial explanation, combination or editing of works may be transformative. The *Monge* majority saw Maya's use as "wholesale copying sprinkled with written commentary" while the dissent found that "Maya's commentary, editing, and arrangement of the photos added to, and ultimately changed, the original character of the images by advancing them as the basis of an exposé." Transformative is in the eye of the beholder.
- These cases also underscore that newsworthiness *alone* does not support a fair use defense. As the Ninth Circuit put it: "The tantalizing and even newsworthy interest in the photos does not trump a balancing of the fair use factors." On the other hand, newsworthiness is a significant consideration, and it should be kept in mind that both of

these cases involve pictures of events which happened two to three years prior to publication and therefore could be seen as especially stale.

- *Monge* repeatedly emphasizes that the photos of the plaintiffs' wedding were not themselves the story, or even necessary to covering the story; a marriage certificate would have sufficed to illustrate that the couple had married two years earlier. The dissent sees this approach as a "dangerous intrusion" upon the editorial function which "would effectively vest in the courts the power to circumscribe news stories and the sources upon which the media may rely." But dissents do not make law; publishers will need to take the majority's more intrusive approach into account.
- *Monge* also made quick work of determining that the magazine's use was commercial because it was motivated by profits and in fact profited from this publication – qualities of many works of scholarship, research or education at the core of the fair use doctrine. In *Balsley*, that call may have been easier – but that case is readily distinguishable from most uses because the photos were entered as part of a contest which *Hustler's* editors admitted was meant to increase sales by encouraging reader involvement.
- The third fair use factor – "amount and substantiality" – can be sliced in different ways too. In each case, the plaintiff defined the work very narrowly and the defendant defined it broadly, arguing that what was in fact used was only a portion of the larger work. Both courts easily found that the "works" in question were the individual photos, which were used in full (less minor cropping), and *not* the larger collections from which they came.
- Finally, with respect to the fourth fair use factor of market effect, both courts made short shrift of the argument that the subjects of the photos intended to keep them private, so therefore there was no market for them. The issue is the impact on the *potential* market. There is ample authority for the point, although it should be noted that *Monge* had particularly unhelpful facts for defendant – namely, that the couple had, in the past, sold photos of themselves at private events (indeed, even of Reynoso's prior wedding) – some of them to Maya Magazine itself. It was undoubtedly difficult to argue, on these facts, that no market for the photos existed.

Other courts may disagree with the Sixth and Ninth Circuit's narrow application of the fair use doctrine, but publishers should take them into consideration in evaluating fair use of photos and footage owned by the public-figure subjects themselves.