
Good Faith Still Isn't Fair: Fourth Circuit Holds No Fair Use for Violent Hues

Brammer v. Violent Hues Productions, LLC

By: Francyn Brown and Manon Burns | May 9, 2019

In a recent cautionary tale, the Fourth Circuit in *Brammer v. Violent Hues Productions, LLC*¹ held that a showing of good faith by an accused copyright infringer does not weigh in favor of finding fair use. In doing so, the Fourth Circuit reversed the district court's decision, which held that the Defendant's unauthorized display of a copyrighted photograph constituted "fair use" under the Copyright Act.

Though the internet has made copying as easy as a few clicks of a button, users can nonetheless be held liable for copyright infringement even when they hold good faith beliefs that works available on the internet are free to use. The Fourth Circuit's decision demonstrates a willingness of the court to bring consumer behaviors of the technological age in line with the Copyright Act's goals of furthering intellectual objectives, rather than *vice versa*.

Brammer concerns the unauthorized use of one photograph (owned by Plaintiff Russell Brammer, hereinafter called the "Photo"), one time by one party, the Defendant Violent Hues Production, LLC ("Violent Hues"). Violent Hues is a production company that also owns a website which promotes the Northern Virginia International Film and Music Festival. Fernando Mico, the owner of Violent Hues, posted a cropped version of Brammer's Photo without any attribution or commentary. Mico maintained that he did not see any indication on the photo itself, which was posted on Flickr, that the Photo was copyrighted, so he believed it to be publicly available. However, Mico was mistaken. Brammer posted the Photo on Flickr above the caption "© All rights reserved."

Violent Hues ultimately removed the Photo from its website but did not compensate Brammer.

The sole issue for the Fourth Circuit to resolve was whether Violent Hues made fair use of Brammer's photo and thus would not be liable to Brammer for copyright infringement, noting that "fair use is not designed to protect lazy appropriators."² The Court applied the statutory test of fair use, considering four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³

¹ *Brammer v. Violent Hues Productions, LLC*, Case No. 18-1763, 2019 WL 1867833 (4th Cir. April 26, 2019).

² *Id.* at *2.

³ *Id.* (citing 17 U.S.C. § 107).

In the Court’s assessment of the first factor, it noted that Violent Hues’ use of the Photo was not transformative, since the only obvious change made to the Photo’s content was to crop it so as to remove negative space. Further, the Court found that Violent Hues’ use of the Photo was commercial in nature, since it promoted a for-profit film festival. Even though the non-transformative and commercial nature of Violent Hues’ use weighed against a finding of fair use, Violent Hues nonetheless argued that the first factor weighed in Violent Hues’ favor because it acted in good faith. Violent Hues’ argument relied on the Supreme Court-approved principle that bad faith weighs against the accused infringer in a fair use analysis. However, as the Court concluded, this approach to *bad faith* does not necessarily lead to the conclusion that a showing of *good faith* weighs *in favor* of finding fair use. Therefore, any supposed good faith on part of the accused infringer does not tip the scales in favor of the infringer. Further, the Court noted that even if good faith was relevant to the fair use inquiry, Violent Hues did not offer any evidence that it acted in good faith. Therefore, the Court concluded that the first factor weighed against a finding of fair use.

The Court proceeded to weigh each of the next three factors—finding that none of the factors weighed in favor of finding fair use and ultimately concluding that Violent Hues was liable for copyright infringement. The Court noted the practical implications if it were to reach a different conclusion, stating that the “allowance of Violent Hues’ defense would frustrate copyright’s central goal. If the ordinary commercial use of stock photography constituted fair use, professional photographers would have little financial incentive to produce their work.”⁴

Considering the far-reaching implications for creators of what seems to be the ever-broadening scope of fair use, this case provides a much-needed win for artists and for keeping copyright jurisprudence aligned with the purposes of the Copyright Act. No matter the intention of the infringer, creators can at least be assured that the copy-and-paste infringer cannot wield its ignorance like a weapon against the rightful copyright owner.

⁴ *Id.* at *8.