

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD HARBUS,

Plaintiff,

v.

MANHATTAN INSTITUTE FOR POLICY
RESEARCH, INC.,

Defendant.

1:19-CV-06124

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

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Defendant the Manhattan Institute for Policy Research, Inc. (“Manhattan Institute” or the “Institute”) respectfully submits the following Memorandum of Law in support of its Motion to Dismiss Plaintiff’s First Amended Complaint (“FAC”).

PRELIMINARY STATEMENT

The Manhattan Institute is a non-profit institution dedicated to developing and disseminating new ideas that foster greater economic choice and individual responsibility. This case is about the Institute’s right under copyright law to educate the public about its scholarship and research work. In September 2018, the New York Post published an op-ed piece written by one of the Institute’s research Fellows. The New York Post published a photograph with the op-ed which the media outlet had licensed from Plaintiff for a fee. After the New York Post published the op-ed, the Institute displayed the piece in a library-like section of its website which houses the Institute’s work. Neither Plaintiff nor the New York Post disputes the Institute’s right to display on its website the text of the op-ed piece. Plaintiff nevertheless contends that the Institute’s display of an obscured image of the photograph above the text of the op-ed infringes Plaintiff’s copyright in the photograph.

Plaintiff’s copyright claim is precluded by the fair use doctrine, which provides that reasonable uses of copyrighted works without a copyright owner’s consent are non-infringing. Here, each of the well-known fair use factors weighs in favor of fair use.

Purpose and Character of the Use. The Institute’s purpose in using the photograph was sharply different from Plaintiff’s purpose in creating the work. Plaintiff took the photograph to document a government official (Governor Andrew Cuomo) speaking at a newsworthy event. The Institute used the photograph to educate the public about the publication of one of the Institute’s own scholarly articles that advanced the Institute’s non-profit mission.

Nature of the Copyrighted Work. Plaintiff’s photograph is a previously published, factual image depicting a public figure speaking at a public event. It does not lie at the core of creative copyrightable works.

Reasonableness of the Use. The Institute’s use of the photograph was reasonable given its purpose to educate the public about the op-ed’s publication and the Institute’s work. This is especially so, given that the FAC demonstrates that the Institute displayed a cropped and obscured version of the work.

Lack of Market Harm. The Institute’s display of the photograph to educate the public about its own op-ed piece will have no impact on the market value of Plaintiff’s work. According to Plaintiff’s own allegations, Plaintiff licenses his works to online and print media—not to think tanks seeking to educate the public about their own published works.

For each of these reasons, this Court should conclude that the Institute’s use of Plaintiff’s photograph was a fair, and thus non-infringing, use.

ALLEGATIONS OF THE COMPLAINT

I. THE PARTIES

Plaintiff Richard Harbus is a professional photographer who licenses his photographs “to online and print media for a fee.” FAC ¶ 5.

Defendant Manhattan Institute is a New York based think tank. FAC ¶ 6. As evidenced by the Institute’s publicly available federal tax return, the Institute is a non-profit organization, subject to Section 501(c)(3) of the United States’ Internal Revenue tax code. *See* Manhattan Institute IRS Form 990 for 2017-2018, https://apps.irs.gov/pub/epostcard/cor/132912529_201809_990_2019082316592256.pdf (last visited November 15, 2019); *see also* Exhibit A to the Declaration of Cynthia S. Arato, dated November 15, 2019 (“Arato Decl.”) (same). As further

documented in the Institute’s publicly available tax return, the Institute’s mission is “to develop and disseminate new ideas that foster greater economic choice and individual responsibility.”

Arato Decl., Ex. A.¹

II. THE PHOTOGRAPH AND THE CHALLENGED USE

Plaintiff owns the copyright in a photograph (the “Photograph”) of Governor Andrew Cuomo holding a microphone and speaking in front of the old and new Tappan Zee bridges:



FAC ¶¶ 7–8 and Ex. A.

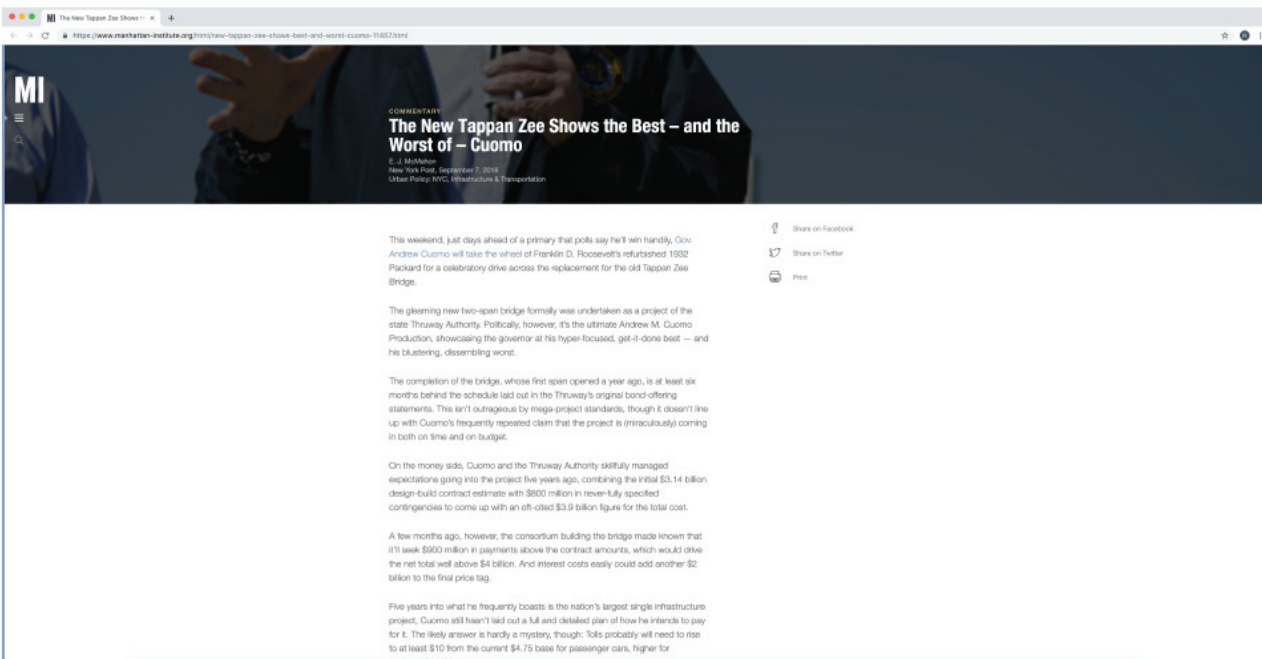
On September 5, 2018, the New York Post published an op-ed titled “The new Tappan Zee shows the best—and the worst—of Cuomo” (the “Op-Ed”). FAC, Ex. B. The New York Post illustrated the Op-Ed with the Photograph, which it licensed from Plaintiff for a fee. FAC ¶ 8.

¹ This Court may take judicial notice of the Institute’s non-profit status and mission, as set forth in the Institute’s publicly available tax filings. *See Byrd v. City of New York*, No. 04-1396-CV, 2005 WL 1349876, at *1 (2d Cir. June 8, 2005) (“[W]e have often held that material that is a matter of public record may be considered in a motion to dismiss.”); *Porrazzo v. Bumble Bee Foods, LLC*, 822 F. Supp. 2d 406, 411 (S.D.N.Y. 2011) (“[I]t is well-established that courts may take judicial notice of publicly available documents on a motion to dismiss.”).

As the New York Post noted when publishing the Op-Ed, an Adjunct Fellow of the Institute, E.J. McMahon, authored the Op-Ed. FAC, Ex. B at 2.

On September 7, 2018, the Institute posted the Op-Ed on its website (the “Website”). FAC ¶¶ 6, 11 and Ex C. The Institute posted the Op-Ed in the “Publications: Commentary” section of the Website, which serves as the Institute’s publicly available scholarship library, housing for public consumption the thousands of articles written under its auspices that have been published by the Wall Street Journal, the New York Daily News, USA Today, the New York Post, and other prominent news media. *See* Publications: Commentary, Manhattan Institute, <https://www.manhattan-institute.org/publications?pubtype=commentary> (last visited Nov. 15, 2019).

The Institute posted the Op-Ed as it was published by the New York Post, with the Photograph atop the piece. FAC, Ex. C. The Institute identified on the Website both that the New York Post had published the Op-Ed and the date of the publication. *Id.*; FAC ¶ 11. As Plaintiff alleges in his FAC, the Institute’s post did not include the entirety of the Photograph. Instead, the Institute displayed a darkened, cropped image of the Photograph, partially obscured by text and the Website’s menu buttons, as follows:



FAC, Ex. C. To the right of the text, the Institute included links allowing viewers to print the Op-Ed or to share it with others on Facebook or Twitter. *See id.* (displaying example of Plaintiff's counsel attempting to share the Op-Ed through his Facebook account).

Plaintiff does not allege that he or the New York Post owns the copyright to the text of the Op-Ed or that the Institute needed the consent of either Plaintiff or the New York Post to display the text of its own Fellow's Op-Ed.

ARGUMENT

I. THE INSTITUTE'S DISPLAY OF THE PHOTOGRAPH TO HIGHLIGHT ITS NON-PROFIT WORK WAS A FAIR USE

The Institute displayed the Photograph, solely as part of the Op-Ed, to illustrate, and inform the public about, the non-profit organization's research work, as part of its library of Institute publications. That is fair under 17 U.S.C. § 107, which provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching

(including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107.

To determine that the Institute’s use was fair, this Court is to analyze the following non-exhaustive factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education 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.

Id.

This Court is not to treat the statutory fair-use factors “in isolation, one from another,” and no single factor is determinative. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994). Rather, this Court must explore all factors and weigh the results together “in light of the purposes of copyright” (*id.*), “[t]o promote the Progress of Science and useful Arts.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015) (quoting U.S. Const., Art. I, § 8, cl. 8)). The fair use determination is “an open-ended and context-sensitive inquiry.” *Blanch v Koons*, 467 F.3d 244, 251 (2d Cir. 2006). The analysis “calls for case-by-case analysis” and is not susceptible to “bright-line rules.” *Campbell*, 510 U.S. at 577.

Here, while no single factor is determinative, all four factors weigh in favor of fair use.²

² This Court may dismiss the FAC on fair use grounds because the facts supporting fair use are clear from the FAC and judicially noticeable facts. *See, e.g., Yang v. Mic Network, Inc.*, No. 18-cv-7628 (AJN), 2019 WL 4640263 (S.D.N.Y. Sept. 24, 2019) (Rule 12(b)(6) dismissal); *Clark v. Transp. Alts., Inc.*, No. 18-cv-9985 (VM), 2019 WL 1448448 (S.D.N.Y. Mar. 1 8, 2019) (Rule 12(b)(6) dismissal); *Oyewole v. Ora*, 291 F. Supp. 3d 422 (S.D.N.Y. 2018) (Rule 12(b)(6) dismissal), *aff’d* 776 F. App’x 42 (2d Cir. 2019); *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F.

A. The Purpose and Character of the Institute’s Use Favors Fair Use

The first fair use factor—the purpose and character of the Institute’s use—favors a finding of fair use because the Institute used the Photograph for non-profit research, scholarship, and educational purposes sharply different than the purpose for which Plaintiff created the work.

1. The Institute’s Use Furthers Research, Teaching, And Scholarship

The first statutory factor favors a finding of fair use because the Institute’s use is rooted within the categories identified by Congress as especially important to copyright’s ends, including teaching, scholarship, and research. 17 U.S.C. § 107 (highlighting scholarship, research, and teaching as especially deserving of fair use protection).

As detailed on the Website, the Institute engages in significant policy research and educational efforts. Among other things, the Institute works with experts in a range of domestic policy areas and through Fellows who engage “in public discourse through authoring reports, essays, and books; testifying at government hearings; and reaching citizens directly through various media.” See About Our Think Tank, Manhattan Institute, <https://www.manhattan-institute.org/about> (last visited Nov. 15, 2019). To further its mission of disseminating new ideas, the Institute makes its works freely available to viewers in a library on its Website. The Institute’s display of the Op-Ed, as published by the New York Post, in the library section of the Website, along with numerous other articles published under the Institute’s auspices, furthered

Supp. 3d 497 (S.D.N.Y. 2017) (Rule 12(c) dismissal), *aff’d*, 729 F. App’x 131 (2d Cir. 2018); *Adjmi v. DLT Entm’t Ltd.*, 97 F. Supp. 3d 512 (S.D.N.Y. 2015) (Rule 12(c) dismissal); *Arrow Prods., LTD. v. Weinstein Co. LLC*, 44 F. Supp. 3d 359 (S.D.N.Y. 2014) (Rule 12(c) dismissal); see also *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016) (acknowledging that fair use can be “so clearly established by a complaint as to support dismissal of a copyright infringement claim”); *Axiom Inv. Advisors, LLC by & through Gildor Mgmt., LLC v. Deutsche Bank AG*, 234 F. Supp. 3d 526, 538 (S.D.N.Y. 2017) (dismissal is warranted if “it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff’s claims are barred as a matter of law”).

the Institute’s research, scholarship, and educational efforts by disseminating information about the Institute’s work to the public.³ For this reason, the first factor favors a finding of fair use.

2. The Institute Used the Photograph For A Different Purpose

The first statutory factor also favors a finding of fair use because the Institute’s use of the Photograph was transformative; it furthered a different purpose or character from, and did not merely “supersede[,] the objects of the original creation.” *Campbell*, 510 U.S. at 579 (internal quotation omitted).

Here, Plaintiff and the Institute used the Photograph for different purposes. Plaintiff created the Photograph to capture Governor Cuomo speaking before a crowd in front of the Tappan Zee Bridge and to license that work to news outlets for a fee. FAC ¶¶ 5, 7–8. In contrast, the Institute displayed the Op-Ed, along with the Photograph, in the “Publications: Commentary” section of the Institute’s Website to educate the public about the Institute’s not-for-profit work and to show the public how the Institute’s work was published in the New York Post. Unlike Plaintiff or even the New York Post, the Institute did not use the Photograph to depict Governor Cuomo as the subject of the Op-Ed. Instead, the Institute displayed the Photograph as part of the original Op-Ed, within its larger scholarship library, to document the publication of the Op-Ed itself and to educate the public about the Institute’s work.

³ Plaintiff refers to the Website in his Complaint, and the Website is integral to his allegations, given that the Website is where the Institute committed its alleged act of infringement. (FAC ¶¶ 6, 11 and Ex C). For this reason, this Court may consider the contents of the Website, including the Institute’s mission driven work, as set forth on the Website. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (“[d]ocuments that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered” on motion to dismiss, as can any document “upon which the complaint solely relies and which is integral to the complaint” (emphasis and internal quotation omitted)); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 694 n.3 (S.D.N.Y. 2009) (Chin. J.) (drawing facts from “Court’s own review of the Website” on motion to dismiss because website was “incorporated by reference into the Complaint”); *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 319 n.1 (S.D.N.Y. 2006) (same).

Because the Institute displayed the work in this new context and to serve a different purpose than Plaintiff's original purpose, the first factor favors a finding of fair use. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (finding fair use where defendant used images "in a new context to serve a different purpose"); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (first factor favored fair use where defendant's "purpose in using the copyright images at issue . . . [wa]s plainly different from the original purpose for which they were created"); *Yang v. Mic Network, Inc.*, No. 18-CV-7628 (AJN), 2019 WL 4640263, at *3–*5 (S.D.N.Y. Sept. 24, 2019) (first factor favored fair use where defendant displayed portions of New York Post article, along with photograph published with article, for media criticism purpose that was not the same purpose for which photograph was originally intended to be used); *Clark v. Transp. Alts., Inc.*, No. 18-CV-9985 (VM), 2019 WL 1448448, at *1 and *3 (S.D.N.Y. Mar. 18, 2019) (same; defendant's goal was to depict "the manner in which the *Post* article's headline, author byline, and the Photograph were arranged on the *Post*'s website" and to identify and inform viewers about the *Post* article).⁴

Because the Institute did not use the Photograph for the same purpose as Plaintiff (or the New York Post, for that matter), the first fair use factor supports a finding of fair use.

⁴ Plaintiff previously contended that the first factor cannot favor the Institute because the Institute did not comment on the Photograph or the Op-Ed. Pl.'s Resp. to Def.'s Pre-Motion Letter, Dkt. No. 16 at 2. That is wrong. There is "no requirement that a work comment on the original or its author" for the first factor to favor a finding of fair use. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). Nor would commentary have made sense, given that the Institute's purpose was to accurately convey how the Op-Ed appeared in the original publication. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) ("In the context of news reporting and analogous activities . . . , the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration.").

3. The Institute's Display Was Not Commercial

The first factor also favors fair use because the Institute used the Photograph for a non-profit purpose. *See* 17 U.S.C. § 107(1); *Blanch*, 467 F.3d at 251 (commercial versus non-profit use is “an explicit part of the first fair-use factor”); *cf. Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”).

The Institute did not display the Photograph or even the underlying Op-Ed on its Website to capture revenues, profits, or financial rewards. *See Harper*, 471 U.S. at 462 (“The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”); *Blanch*, 467 F.3d at 253 (acknowledging that “courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest,” as opposed to “private economic rewards” (internal quotation omitted)). Instead, as a qualified 501(c)(3) organization, the Institute displayed the work to mark the publication of the Op-Ed and to educate the public in furtherance of its non-profit mission to “develop and disseminate new ideas that foster greater economic choice and individual responsibility.” Arato Decl., Ex. A. The Institute’s use was decidedly non-commercial. For this reason too, the first fair use factor supports a finding of fair use.

* * *

Each of the above considerations supports a finding of fair use under the first fair use factor. The Institute displayed the Photograph to further its scholarship, research, and education driven mission; the Plaintiff created the Photograph for an entirely different purpose; and the Institute displayed the Photograph to further its non-profit work.

B. The Nature of the Photograph Favors Fair Use

The second fair use factor—the nature of the Photograph itself—supports a finding of fair use because the Photograph is a published, primarily factual work that depicts a newsworthy event. *See* 17 U.S.C. § 107(2); *Blanch*, 467 F.3d at 256 (second factor favors fair use where the copied work is “factual or informational,” rather than creative, or has previously been published (internal quotation omitted)); *Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 940 (9th Cir. 2002) (second factor “clearly point[ed] towards fair use” where copyrighted work was “informational and factual and news” and “published before its use by the alleged infringer” (alterations omitted)).

Plaintiff concedes that the New York Post published the Photograph as part of the Op-Ed before the Institute displayed the Op-Ed on the Website. *See* FAC ¶¶ 8, 11. Accordingly, the Photograph is plainly a published work, which favors a finding of fair use. *Harper*, 471 U.S. at 564 (“[T]he scope of fair use is narrower with respect to unpublished works.”); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991) (“The ‘scope of fair use is narrower with respect to unpublished works’ because ‘the author’s right to control the first public appearance of his expression weighs against such use of the work before its release.’”).

The Photograph is also a factual, as opposed to a creative, work since Plaintiff took the Photograph to document Governor Cuomo at a newsworthy event. *See, e.g., Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23–24 (1st Cir. 2000) (photographs that are “not artistic representations designed primarily to express [the photographer’s] ideas, emotions, or feelings” can be categorized as factual); *Galvin v. Illinois Republican Party*, 130 F. Supp.3d 1187, 1194–95 (N.D. Ill. 2015) (photograph of local politician at a political event was “primarily factual in

nature”); *North Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 620 (S.D.N.Y. 2015) (photograph of historic event was “quintessential” photojournalism and thus factual).

Because the Photograph was a published, factual work, the second fair use factor also supports a finding of fair use.

C. The Amount and Substantiality of the Use Favors Fair Use

The Institute’s use was fair under the third factor as well because it was “reasonable in relation to the purpose of the copying,” *Campbell*, 510 U.S. at 586, which was to educate the public about the Institute’s work and to maintain a publicly available archive of the Institute’s works to further the Institute’s education and scholarship mission. *See also Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (the third factor examines whether “the copying used more of the copyrighted work than necessary and whether the copying was excessive”).

Courts have long recognized that photographs may be used in their entirety and still be deemed a fair use. *See e.g., Bill Graham Archives*, 448 F.3d at 613 (explaining that “copying the entirety of a work is sometimes necessary to make a fair use of the image,” and that “such copying does not necessarily weigh against fair use”); *Nunez*, 235 F.3d at 24 (defendant’s use of the entire photograph “of little consequence to our analysis”). Given the purpose of the Institute’s use, it would have been reasonable for the Institute to display the entirety of the Photograph in order to share the full Op-Ed with the public. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (reasonable even for profit-seeking publication to display entirety of work to “allow users to recognize” it); *Bill Graham*, 448 F.3d at 613 (reasonable even for profit seeking defendant to display reduced versions of entire original images); *Clark*, 2019 WL 1448448, at *4 (use of entire photograph by profit seeking defendant was reasonable and necessary because purpose of defendant’s use was to show “the Photograph *as used in the*

context of the Post Article to highlight the Post's decision to place this particular photograph directly alongside the Post Article's headline" (emphases original)).

Here, Plaintiff challenges the Institute's use on the Website of a darkened and cropped portion of the bottom of the Photograph, partially obscured by overlaid text—including the Op-Ed's title and author byline, the date of the Post's original publication, and subject tags associated with the Op-Ed. FAC, Ex. C. As a result of the Institute's substantial cropping and overlaid text, neither Governor Cuomo's face nor the Tappan Zee bridge is visible in the portion of the Photograph reproduced on the Website. *Id.* Instead, the only things arguably visible from the Photograph are two hands holding a microphone and the outline of a men's chest—and even those are obscured by the text and appear in a darkened tone. *Id.*; *see also Yang*, 2019 WL 4640263, at *6 (third factor favored defendant because it used "a significantly cropped version of the Photograph").

The third factor, like the first two factors, thus favors a find of fair use.

D. The Effect of the Use on the Potential Market Favors Fair Use

The Institute's use was also fair under the fourth factor because the use had no effect "upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). To evaluate this factor, a court is to consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impacts on the potential market for the original," *Campbell*, 510 U.S. at 590 (internal quotation and alteration omitted), including the "use's impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets," *Swatch Grp.*, 756 F.3d at 91 (internal quotation omitted). This factor favors a finding of infringement only where the secondary use "usurps the market of the original work" by serving as a substitute. *HathiTrust*, 755 F.3d at 99 (internal quotation omitted).

Nothing about the Institute's unique and limited use of the Photograph will impair the general licensing market for the Plaintiff's works. Plaintiff concedes that he licenses his photojournalism works for a fee to "online and print media" (FAC ¶ 5), and that is exactly what Plaintiff already did here. He licensed the Photograph to the New York Post for a fee so the Post could illustrate the subject matter of the Op-Ed. FAC ¶ 8.

The Institute, however, is not a media company, and it did not use the Photograph, or any portion of the Photograph, to independently illustrate any media publication. Instead, the Institute displayed an already completed piece of journalism, written by one of its own Fellows, on its non-profit Website to further its non-profit mission and to educate the public about the article's successful publication in the New York Post.⁵

A determination of fair use in this case would, accordingly, not impair Plaintiff's ability to license his works for a fee to online and print media. Instead, at most, a finding of fair use would recognize only a non-profit organization's narrow right to share with the public the work done under its auspices and to illustrate the depth, breadth, and prestige of that organization's work. Indeed, since there is no dispute that the Institute was within its rights to display the text of the Op-Ed on the Website, this case concerns the even narrower right of a non-profit to use portions of previously licensed photograph to illustrate exactly how a prominent media publication chose to publish the non-profit's scholarly work. Thus, a fair use ruling will have no impact on Plaintiff's media licensing market.

⁵ The Institute paid no fee to Plaintiff. This Court, however, should reject any argument that a supposed "lost" licensing fee from the Institute supports a finding of market harm. Indeed, "were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder." *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 929 n.17 (2d Cir. 1994) (emphasis original).

The fourth factor, accordingly, also favors a finding of fair use.

CONCLUSION

Because all four statutory factors governing the fair use inquiry support fair use, Defendant respectfully requests that the Court dismiss Plaintiff's FAC with prejudice.

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New York, New York

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