

TYPES NOT MAPPED YET July 07, 2016 | TTR not mapped yet | Michael L. Nepple

Fox News fair use claim for Facebook post of 9-11 image remains unresolved

Earlier this year, just hours before beginning jury selection, Fox News settled a copyright dispute regarding its use of Thomas Franklin's iconic photograph, "Raising the Flag at Ground Zero," thus leaving its fair use argument unresolved.

Franklin's photograph depicts three firefighters preparing to raise the American flag at the site of the fallen twin towers. North Jersey Media Group (NJMG) reportedly generated more than \$1 million in licensing fees for the photograph over the years.

Fox's use found the Franklin photograph on the Internet juxtaposed with an equally iconic photograph, of Marines raising the flag over Iwo Jima during World War II. On the 12th anniversary of the 9/11 attacks, a production assistant for a Fox program found the two photos through a Google search, added the social media hashtag, #neverforget, and posted the combined work on the program's Facebook page, as seen in the image below from court filings.



NJMG sued for copyright infringement. Fox responded with a motion for summary judgment based on fair use. Fox concentrated heavily on its claim that the composition was both transformative and protected commentary.

Fox asserted that photographs and other source material don't necessarily need to be changed in order to be transformative. "A party does not need to create an independently copyrightable work for its use of an original work to be fair. What matters is the transformative purpose of the defendant's use of the copyrightable elements of the original work." Fox cited to several recent cases which it claimed found a transformation, even when the original was unchanged.

Fox further argued that the juxtaposition between Franklin's 9/11 photograph and the Iwo Jima photograph, along with the social media hashtag, #neverforget, was protected commentary about American resilience in the face of terrorism. Fox also argued that its actions did not usurp the market for the Franklin photograph – in part because it used a cropped, low-resolution version – and it didn't directly profit from the use of the photo.

NJMG countered that the only "comment" made by Fox, other than the addition of the non-protected hashtag, #neverforget, was to draw "the obvious connection to the Iwo Jima photograph" which NJMG deemed "insubstantial." NJMG also denied that Fox's use was transformative, because it "failed to create any new content, failed to use existing content for a materially different purpose, and failed to disseminate existing content to a new audience that might not have seen it otherwise." NJMG also claimed that especially if subsequent copying by others became widespread, Fox News' actions will damage its licensing efforts.

The district court denied Fox's fair use argument at the summary judgment stage, finding, among other things, that the key "purpose and character of the use" factor needed factual development as to whether the use was primarily commentary or commercial. The court also found Fox's physical transformations of the photo (cropping, use of low resolution, and presentation together with the Iwo Jima photo and hashtag) insufficient because "the Work is barely altered and is immediately recognizable as the iconic 9/11 photograph." The Court also disfavored Fox's commentary argument, believing that "no part of the Combined Images constitutes an original idea on the part of the Defendants." The Court also found that "Fox News's interest in the Combined Images ... poses a very real danger that other such media organization will forego paying licensing fees for the Work and instead opt to use the Combined Image at no cost."



Fox subsequently sought an immediate appeal from the denial of its summary judgment motion. In its request, Fox substantially expounded on its social-media-is-necessarily-protected-commentary argument. Fox argued that social media is “inherently transformative” and, thus, anything posted on social media is protected as fair use. According to Fox, “[e]xpression on social media, and on Facebook in particular, is thus inherently intertwined with ‘comment’ and ‘criticism,’ purposes that the Copyright Act sets forth as presumptively fair ... Every post is an invitation for others to comment and criticize; every message and images invites reciprocal expression.”

The immediate appeal was denied, and the case set for trial. Fox News and NJMG [announced in February](#) that they had settled the claim. Hence, Fox’s fair use theory has not yet been fully tested.

[Mike Nepple](#) is an partner in Thompson Coburn’s intellectual property group. He can be reached at (314) 552-6149 or mnepple@thompsoncoburn.com.

authorsTest

michael

Michael L. Nepple