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Bouchat v. Baltimore Ravens Ltd. Partnership

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Bouchat v. Baltimore Ravens Ltd.
Partnership

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The U.S. Constitution provides Congress the express authority to enact laws in order to encourage creative works for the public benefit.¹ Congress sought to achieve this goal with the Copyright Act of 1976 (the “Copyright Act”).² The Act provides copyright holders with certain exclusive rights over their works, preventing others from profiting off copyrighted works through reproduction, distribution, or display without permission.³ However, Congress included a number of exceptions in the Copyright Act that allow others to use copyrighted works without compensating the authors.⁴ One of these exceptions, known as the fair-use doctrine, is a four-factor test that courts must use to determine whether an alleged copyright infringer has a valid defense for using a copyrighted work without the author’s permission.⁵

This defense is intended to limit an author’s exclusive rights and to prevent copyright law from frustrating its original constitutional purpose.⁶ Specifically, fair use is critical for the creation of new works because new art builds upon what has come before it.⁷ The four factors in the fair-use analysis are: (1) the purpose and character of the new use, (2) the nature of the copyrighted work, (3) the amount and “substantiality” of the portion of the copyrighted work 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.⁸ The first factor is often considered the most important because it is “the soul of fair use.”⁹ When examining the purpose and character of a copyrighted work, courts analyze whether the new use is “productive and . . . employ[s] the [original work] in a different manner or for a different purpose from the original.”¹⁰ Although transformation is not a necessary element of fair use, “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”¹¹ Courts may consider a number of factors when determining whether a derivative work is sufficiently transformative, such as whether the new use is for comment, criticism, or news reporting, and whether the commercial

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1. U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
 2. See Copyright Act of 1976, 17 U.S.C. § 102 (2006).
 3. See *id.* § 106.
 4. *Id.* §§ 107–12.
 5. *Id.* § 107.
 6. See *id.*
 7. See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005), *aff’d*, 448 F.3d 605 (2d Cir. 2006) (“[T]he purposes of copyright are best served by permitting transformative uses that foster the creation of new works.”).
 8. 17 U.S.C. § 107.
 9. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).
 10. *Id.* at 1111.
 11. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

nature of the new use outweighs any transformative elements.¹² If courts do not carefully weigh the fair-use doctrine's factors, they risk constraining the copyright's "guarantee of breathing space" for new derivative works.¹³

In *Bouchat v. Baltimore Ravens Ltd. Partnership*, the U.S. Court of Appeals for the Fourth Circuit addressed the question of whether the sale of football highlight films containing a copyrighted logo qualified as fair use under section 107 of the Copyright Act.¹⁴ Frederick Bouchat created the original iconography upon which the Baltimore Ravens based their logo for the 1996, 1997, and 1998 football seasons.¹⁵ In 2008, Bouchat filed a request for an injunction in the federal district court of Maryland against the Ravens and NFL Films, Inc. to prevent them from distributing the highlight films and displaying the logo in their corporate offices.¹⁶ The district court held that the Ravens's use of the image constituted fair use because of "[t]he primarily historical and non-commercial nature of the uses and the relatively incidental use of the Flying B Logo."¹⁷ On appeal, the Fourth Circuit reversed the district court's decision, holding that the Ravens's use of the logo in their historical highlight films was not transformative and therefore not a fair use of Bouchat's original work.¹⁸

This case comment contends that the Fourth Circuit, in holding that the highlight films did not transform the nature of the logo, applied the U.S. Supreme Court's standard for the first factor of the fair-use analysis too narrowly. The Supreme Court has held that even new works that directly copy an original, copyrighted work may satisfy the first factor of the analysis and support a finding of fair use if that new use provides a new social benefit—because a new social benefit is an important factor courts should consider when determining whether the new work is transformative.¹⁹ In addition, other jurisdictions, relying on Supreme Court precedent, indicate that using copyrighted images can be transformative even where

12. 17 U.S.C. § 107; *Campbell*, 510 U.S. at 578 ("The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like."); *id.* at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

13. *Campbell*, 510 U.S. at 579.

14. (*Bouchat IV*) 619 F.3d 301 (4th Cir. 2010).

15. To view Bouchat's original drawing, see Brian Wm. Higgins, *Bouchat Sues Ravens, NFL Over "Flying B" Design*, MD. INTEL. PROP. L. BLOG (Feb. 8, 2008), <http://www.marylandiplaw.com/2008/02/articles/copyrights/bouchat-sues-ravens-nfl-over-flying-b-design/>.

16. *Bouchat v. Balt. Ravens Ltd. P'ship (Trial Decision)*, 587 F. Supp. 2d 686, 689 (D. Md. 2008).

17. *Id.* at 697.

18. *Bouchat IV*, 619 F.3d at 311, 313.

19. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that a parody of Roy Orbison's song *Pretty Woman* "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one").

the new use does not alter the original image.²⁰ However, the Fourth Circuit seems to have applied a standard that is much stricter than Supreme Court precedent requires. This comment argues that the approach taken by other circuits in their application of the Supreme Court's standard better effectuates the purpose of the Copyright Act. In order to determine the character and purpose of the derivative use, the Fourth Circuit should have construed the first factor of the test more liberally, giving greater weight to evidence that the highlight films did not exploit Bouchat's drawing and that the film's display of the logo transformed the original purpose of the copyrighted work.²¹ By doing so, the court would have advanced the purpose of the Copyright Act and, in turn, taken an approach that is consistent with Supreme Court precedent and jurisprudence in the Fourth Circuit's sister courts.

In 1984, Baltimore was left without a football team when its beloved Colts abandoned the city, literally overnight.²² Eleven years later, the Cleveland Browns moved to Baltimore and changed their name to the Ravens.²³ Frederick Bouchat, a security guard for a state office building in Baltimore, decided to try his hand at designing a logo for the new team.²⁴ In 1995, he created a number of potential logos, one of which would become known as the "Shield Drawing."²⁵ The drawing depicted a raven, its wings spread wide, holding in its beak both a shield bearing a "B" and a

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20. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (holding that images from Grateful Dead concerts were transformative); *Elvis Presley Enter. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (noting that television clips that play for only a few seconds and that are used for reference purposes are transformative because they provide context for a performer's career); *Warren Pub. Co. v. Spurlock*, 645 F. Supp. 2d 402, 419 (E.D. Pa. 2009) (relying on Second Circuit case law and Supreme Court precedent to note that biographies "in general . . . fit comfortably within" fair use); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 137 (S.D.N.Y. 2001) (holding that a documentary aimed at educating the public adds new value to the original).
21. Federal circuit courts seem particularly concerned with not just the commerciality of the new use, but whether the use in fact *exploits* the copyright to achieve its commercial value. See *Gaylord v. United States*, 595 F.3d 1364, 1376 (Fed. Cir. 2010) (holding that the United States's use of the copyrighted work was not fair use because it "allow[ed] the government to commercially exploit a creative and expressive work [that] will not advance the purposes of copyright"); *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.* 533 F.3d 1287, 1310 (11th Cir. 2008) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985))); *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 583 (6th Cir. 2007) (noting that the plaintiff's recording and distribution of copyrighted songs for its karaoke machines was not fair use because its transformative nature was minimal and it did so in order to avoid paying royalties); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) ("We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.").
22. Candus Thomson, *Ab, That Night, We Remember It Well*, BALT. SUN, Mar. 29, 2009, at 7D, available at <http://www.baltimoresun.com/sports/ravens/bal-sp.coltsmyths29mar29,0,3257615.story>.
23. Charles Babington & Ken Denlinger, *The Baltimore Browns Are Coming; Md. Offers NFL Team a Stadium, Lucrative Deal to Leave Cleveland*, WASH. POST, Nov. 7, 1995, at A1, available at <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/1995/95nfl4.htm>.
24. *Trial Decision*, 587 F. Supp. 2d 686, 692 (D. Md. 2008).
25. *Id.*

cross.²⁶ When the Ravens's mascot was chosen in 1996, Bouchat forwarded his Shield Drawing to the Maryland Stadium Authority,²⁷ requesting a signed letter of recognition and an autographed helmet as compensation.²⁸ A series of snafus and miscommunications put Bouchat's drawing into the hands of conceptual artists employed by the Ravens.²⁹ Those artists used the drawing to create the Flying B logo, which the Ravens used for their first three seasons in Baltimore—1996, 1997, and 1998.³⁰ In August of 1996, Bouchat received a registered copyright for his Shield Drawing, two months after the Ravens unveiled the Flying B logo, and more than a year after he had submitted the drawing to the Maryland Stadium Authority.³¹

In 1997, Bouchat filed his first copyright infringement suit against the Ravens in federal district court, where a jury found that the Ravens had infringed on Bouchat's copyright.³² In an interlocutory appeal, the Fourth Circuit affirmed the jury's findings.³³ Bouchat filed suit and appealed to the Fourth Circuit twice more, in 2003³⁴ and again in 2007,³⁵ both times addressing the issue of damages related to the Ravens's infringement. Both times, the courts rejected Bouchat's arguments.

In 2008, Bouchat filed suit for the fourth time, seeking to enjoin the Ravens, the National Football League, NFL Films, Inc., and the Baltimore Sun from displaying

26. *Id.* at 693.

27. Originally tasked with securing financing and condemnation authority for Baltimore's Oriole Park at Camden Yards, the Maryland Stadium Authority (MSA) later oversaw the construction and administrative management of the Ravens's M&T Bank Stadium. *See Who We Are, MARYLAND STADIUM AUTHORITY*, <http://www.mdstad.com/content/view/12/79/> (last visited Jan. 20, 2012). The MSA now manages several other stadiums within the state. *Id.*

28. *Trial Decision*, 587 F. Supp. 2d at 693.

29. *Id.*

30. *Id.* at 693–94.

31. *Id.* at 693.

32. *See Bouchat v. Balt. Ravens, Inc. (Bouchat I)*, 241 F.3d 350 (4th Cir. 2001).

33. *Id.* at 352. On interlocutory appeal, the Fourth Circuit addressed (1) whether the proof of "reasonable possibility" of access to the copyrighted work was legally sufficient, (2) whether the court would adopt a "striking similarity" theory of access, (3) whether the infringement claim should have been dismissed because the plaintiff failed to note the derivative nature of the drawing on his application, and (4) whether the court improperly coerced the jury with its jury instruction. *Id.* at 353. The Fourth Circuit affirmed the district court on all of these questions, ultimately holding that the Ravens had infringed on Bouchat's copyright. *Id.* at 354–57.

34. *See Bouchat v. Balt. Ravens Football Club, Inc. (Bouchat II)*, 346 F.3d 514 (4th Cir. 2003). Bouchat sought damages in the form of revenue gained from merchandise such as video games, trading cards, and sales of programs. *Id.* at 518. The district court granted partial summary judgment to the defendants and excluded this evidence of third-party revenues from being presented to the jury. *Id.* The jury then ruled in favor of the Ravens, having found "that the Non-Excluded Merchandise Revenues were attributable entirely to factors other than the Defendants' infringement of Bouchat's copyright." *Id.* at 519; *see also* 17 U.S.C. § 504(b) (2006).

35. *Bouchat v. Bon-Ton Dep't Stores, Inc. (Bouchat III)*, 506 F.3d 315, 328–29 (4th Cir. 2007) (holding that Bouchat was precluded from pursuing statutory damages from licensees of the Flying B logo incurred before the registration of the copyright).

the logo in two types of Ravens memorabilia.³⁶ The district court ruled in favor of the defendants, finding that these uses of the Flying B logo constituted fair use and therefore did not violate the Copyright Act.³⁷ The district court also found that “[t]he display of pictures or artifacts from the 1996–1998 season in the context of a presentation of a team’s history is analogous to the inclusion of pictures of copyrighted posters in a book presenting a biography of a rock band.”³⁸ Regarding the highlight reels, the district court concluded “the nature and purpose of [the highlight reels] are primarily historical with only an incidental, in context, insignificant, commercial purpose.”³⁹ The district court explained that

the purpose [of the highlight reels] is to make available a depiction of past events as they occurred. Except for a few seconds of an approximately half hour film in which the Flying B Logo appears alone, the visibility of the logo on players’ uniforms is incidental to the purpose of showing films of the 1996–98 team in action.⁴⁰

The Fourth Circuit reversed the district court’s ruling that the use of the Flying B logo in the Ravens’s historical highlight films was fair use, but agreed with the lower court’s finding of fair use as to the Ravens’s use of the logo in the display of photos and game tickets.⁴¹ First, a majority of the court held that the district court erred in holding that the films constituted fair use based on their historical context and their “incidental” use of the logo.⁴² It reasoned that “[s]imply filming football games that include the copyrighted logo does not transform the purpose behind the logo’s use into a historical one.”⁴³ The crux of the court’s reasoning focused on the principle that if “the logo is still being used as a logo, that is, as an identifying symbol of the Ravens, the purpose behind the use is not transformative.”⁴⁴

The Fourth Circuit reached a different conclusion when it held that the Flying B logo in the framed photographs and game tickets hanging in the lobby of the Ravens’s headquarters constituted fair use.⁴⁵ The court found that these uses were more consistent with “teaching . . . , scholarship, or research,” which are examples of fair use identified in section 107 of the Copyright Act.⁴⁶ The court pointed to the fact

36. *Trial Decision*, 587 F. Supp. 2d 686, 694 (D. Md. 2008). The claims against the *Baltimore Sun* were dismissed with prejudice at Bouchat’s request. *Bouchat IV*, 619 F.3d 301, 306 (4th Cir. 2010).

37. *Trial Decision*, 587 F. Supp. 2d at 697.

38. *Id.* at 695 (citing *Bill Graham Archives v. Dorling-Kindersley, Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006)).

39. *Id.* at 696.

40. *Id.*

41. *Bouchat IV*, 619 F.3d at 309.

42. *Id.*

43. *Id.*

44. *Id.* at 310.

45. *Id.* at 314.

46. *Id.* (alteration in original) (quoting 17 U.S.C. § 107 (2006)).

that the display containing the logo was cordoned off in a museum-like section of the lobby,⁴⁷ and therefore the display added something new to the original purpose of the logo: namely, the documentation of facts in an education-like context.⁴⁸ The court affirmed the district court's analysis that these uses of the logo in displays in the corporate offices constituted fair use.⁴⁹ The Fourth Circuit then remanded the case to the district court for a determination of whether the Ravens, the NFL, and NFL Films should be enjoined from distributing the reels.⁵⁰

The dissenting judge agreed with the district court's finding of fair use.⁵¹ In his opinion, Judge Niemeyer stated:

The Ravens' use of the Flying B Logo is . . . necessary for its *new purpose* of recounting and recalling franchise history, and *that use has no value for—indeed it is irrelevant to—the original purpose of identifying the franchise, as the franchise is now identified by the Raven Profile Logo*. And it follows that any monetary motive in recounting and recalling history through memorabilia and highlights is based on the value of the *history*, not the value of the Flying B Logo.⁵²

Invoking the fair-use doctrine's purpose as an "equitable rule of reason," the dissent noted that Ravens's football history—a history that the team itself created yard by yard and game by game—should not be excluded from the fair-use exception because of the "incidental" appearance of the Flying B logo, which appears only as a necessary part of that history.⁵³

This case comment contends that the Fourth Circuit applied the first factor of section 107 of the Copyright Act too narrowly.⁵⁴ The Flying B logo, used in the context of a historical highlight film, is transformative when considered under a broader understanding of the first factor of the fair-use analysis.⁵⁵ The Fourth

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 317. On remand, the district court denied Bouchat's request for a permanent injunction against future use of the Flying B logo, so long as the defendants distributed reasonable compensation to Bouchat for such use. *See Bouchat v. Balt. Ravens Ltd. P'ship*, No. MJG-08-397, 2011 U.S. Dist. WL 5445947 (D. Md. Nov. 9, 2011).

51. *Bouchat IV*, 619 F.3d at 318 (Niemeyer, J., dissenting) (agreeing with the district court's analysis that the use of the Flying B Logo was primarily historical, and the use of the logo was incidental to the historical purpose of the highlight films).

52. *Id.* at 321.

53. *Id.* at 323 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) ("[S]ection [107] identifies various factors that enable a court to apply an equitable rule of reason analysis to particular claims of infringement." (footnotes omitted) (internal quotation marks omitted))).

54. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (discussing the broader investigation into the "purpose and character" as part of the first factor, nothing that "Congress resisted attempts to narrow the ambit of this traditional [factor one] enquiry by adopting categories of presumptively fair use").

55. *See id.* at 578–79.

Circuit's rigid approach threatens creators of legitimate works who may otherwise be eligible for protection under the fair-use doctrine.

The Copyright Act sets forth four factors to be applied in determining whether the use of a copyrighted work constitutes fair use and therefore "is not an infringement."⁵⁶ These factors are:

- (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.⁵⁷

Congress did not intend for the list to be exhaustive because the factors are guidelines for the courts rather than hard-and-fast rules; "[t]he task [of finding fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."⁵⁸ However, in general, the outcome of the first factor will significantly influence a court's determination of whether a finding of fair use is appropriate.⁵⁹

The Supreme Court clarified the standard for fair use in *Campbell v. Acuff-Rose Music, Inc.* There, the Court held that "[t]he central purpose of this investigation is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new . . . altering the first with new expression, meaning, or message."⁶⁰ The Court noted that while transformation was not necessary to an ultimate finding of fair use, transformative use of the original would tend to weigh against the other fair use factors.⁶¹

The Court also acknowledged that examining whether a work is for a commercial or nonprofit purpose is only one element of the first factor of the analysis.⁶² It noted

56. 17 U.S.C. § 107. The first sentence of the statute states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id.

57. *Id.*

58. *Campbell*, 510 U.S. at 578; *see also* H.R. Rep. No. 94-1476, at 66 (1976) ("[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.").

59. *See* Leval, *supra* note 9. In addition, many courts spend a substantial portion of their analysis on the first factor of the defense. *See Bouchat IV*, 619 F.3d 301, 308–11 (4th Cir. 2010); *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608–12 (2d Cir. 2006); *Sundeman v. The Sejay Society, Inc.*, 142 F.3d 194, 202–04 (4th Cir. 1998).

60. *Campbell*, 510 U.S. at 578 (citations omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342 (1841) (No. 4901)).

61. *Id.*

62. *Id.* at 584.

that Congress “urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence” in order to examine the overall character and purpose of the work.⁶³ Commerciality cannot automatically prohibit fair use anymore than nonprofit use can automatically permit it.⁶⁴

While mechanical copying may survive a fair-use analysis, it often does not.⁶⁵ There are many cases in which courts have found copyright infringement for the mere copying of other works.⁶⁶ Indeed, “the extent to which the use is transformative is the more critical inquiry.”⁶⁷ Courts are much more likely to find derivative works to be fair use when they are transformative.

The Fourth Circuit addressed this issue in *A.V. ex rel. Vanderbye v. iParadigms, L.L.C.* when it considered whether a database program that archived student-written papers was fair use.⁶⁸ The Turnitin Plagiarism Detection Service program compared the student works to content available on the Internet.⁶⁹ The program then created an “originality report” for each paper, showing what percentage of the student’s work might not be original.⁷⁰ Four students sued iParadigms on the theory that the company had violated the copyrights they had in their papers by archiving their works in Turnitin without their permission.⁷¹ The district court granted summary judgment to the defendants, in part, because it found iParadigms’s use of the student works constituted fair use.⁷² In particular, the district court found that the new use by

63. *Id.*

64. *See id.*

65. *Id.*

66. *See* Am. Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000) (finding that unauthorized copying of religious texts did not constitute fair use); Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (holding that copying articles did not constitute fair use because “[r]ather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original”); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that space-shifting music to digital form, while innovative, was not transformative).

67. Stephanie Greene, *Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law*, 39 AM. BUS. L.J. 57, 73–74 (2001).

68. 562 F.3d 630 (4th Cir. 2009).

69. *Id.* at 634–35. The court described the functionality and terms of service of Turnitin:

To submit a paper to Turnitin, a student must create a user profile on the web site, a process that requires the student to click on “I Agree” under the “terms of agreement” or “Clickwrap Agreement.” The Clickwrap Agreement provided, among other things, that the services offered by Turnitin are “conditioned on [the user’s] acceptance without modification of the terms, conditions, and notices contained herein,” and that “[i]n no event shall iParadigms . . . be liable for any . . . damages arising out of or in any way connected with the use of this web site.”

Id. (alterations in original).

70. *Id.* at 634.

71. *Id.* at 635.

72. *Id.* at 636.

Turnitin was transformative because it “prevent[ed] plagiarism by comparative use” of the original works to its database and online sources.⁷³

The Fourth Circuit agreed with the district court’s analysis of the transformative quality of the Turnitin program.⁷⁴ Specifically, the court found that a derivative work “can be transformative *in function or purpose without altering or actually adding to the original work.*”⁷⁵ The court noted that iParadigms’s use had an entirely different function compared to the original works, and the lack of “substantive alteration to the works does not preclude the use from being transformative in nature.”⁷⁶ The Fourth Circuit affirmed the district court’s granting of summary judgment to the defendants on the copyright infringement claim.⁷⁷

In *Bouchat*, the Fourth Circuit cited *iParadigms* as precedent for its discussion of the first factor of the fair-use test; however, it did not rely on that case in its analysis.⁷⁸ Instead, the court relied on three cases from the Second Circuit: *Ringgold v. Black Entertainment Television, Inc.*; *Davis v. The Gap, Inc.*; and *Bill Graham Archives v. Dorling Kindersley Ltd.*⁷⁹ The court found that the Ravens’s use of the logo was more analogous to the uses in *Ringgold* and *Davis*.⁸⁰ By contrast, the court distinguished the highlight films from the reprinted images in *Bill Graham Archives*, which the Second Circuit held to be transformative.⁸¹ In doing so, it minimized the transformative nature of the highlight films, giving too much weight to the commercial nature of the films.⁸²

The *Ringgold* court found that the display of a copyrighted “story quilt” in the HBO Independent Productions series *Roc* did not constitute fair use because the artist’s work was used “for precisely a central purpose for which it was created—to be decorative.”⁸³ The *Ringgold* court speculated that a television program might be able to employ the quilt under the fair-use exception, such as in a television news program featuring the plaintiff’s work.⁸⁴ However, in this case, the court found that “just as members of the public expect to pay to obtain a painting or a poster to decorate their

73. *Id.*

74. *Id.* at 640.

75. *Id.* at 639 (emphasis added) (citing *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1165 (9th Cir. 2007)).

76. *Id.*

77. *Id.* at 647.

78. *Bouchat IV*, 619 F.3d 301, 320 (4th Cir. 2010).

79. *Id.* at 310.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Ringgold v. Black Entm’t Television*, 126 F.3d 70, 79 (2d Cir. 1997).

84. *Id.* at 79.

homes,” television producers should also expect to pay for the privilege of using the work in the decoration of a set.⁸⁵

The *Davis* court held that Gap, Inc.’s use of decorative jewelry and glasses did not constitute fair use of copyrighted decorative eyewear because there was “nothing transformative about the Gap’s presentation of [the] copyrighted work” and that the “ad shows [jewelry] being worn . . . in the manner it was made to be worn.”⁸⁶ The court found that the advertisement used the jewelry for its intended purpose—as decorative eyewear—and nothing more.⁸⁷ The *Davis* court stated that whether the new use is commercial “acquires an importance it does not have when the new work is transformative.”⁸⁸

The Fourth Circuit analogized the Ravens’s logo to the quilt in *Ringgold* and the jewelry in *Davis* by presenting two hypothetical persons: one watching a Ravens football game in 1996 and another watching the Ravens’s 1996 highlight reel in 2010.⁸⁹ The court reasoned that in either case, the logo served the same purpose—to identify the Ravens.⁹⁰ It considered *Ringgold* and *Davis* most analogous because the “[l]ogo remains a logo used to identify the Ravens, just like [a] decorative poster . . . remained a decorative poster, and . . . decorative eyewear . . . remained decorative eyewear.”⁹¹

The Fourth Circuit oversimplified the relationship between the original work and the *purpose and character* of the new use of the original work. This relationship should include whether the derivative work might provide a new social benefit that the original does not.⁹² That someone might still use the original copyrighted work to identify the Ravens bears little relevance on the analysis; rather, the real question is whether the character and purpose of the new work “adds value to the original.”⁹³

The facts of *Ringgold* and *Davis* are inapposite to the highlight reels. The courts in those cases held as they did because there was no new “expression, meaning, or message” in the television program and advertisement when they included the original works.⁹⁴ But by comparing the Ravens’s football highlight films to the advertisement in *Davis*, the Fourth Circuit disregarded critical facts about the highlight reels themselves.⁹⁵ The reels were not mere displays of past football events.

85. *Id.* at 80.

86. *Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

87. *Id.*

88. *Id.* at 175.

89. *Bouchat IV*, 619 F.3d 301, 309 (4th Cir. 2010).

90. *Id.*

91. *Id.* at 310–11.

92. See Leval, *supra* note 9, at 1111.

93. *Id.*

94. See *Ringgold v. Black Entm’t Television*, 126 F.3d 70, 79 (2d Cir. 1997); *Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

95. See Brief for Defendants-Appellees at 7, *Bouchat IV*, 619 F.3d 301 (2010) (No. 08-2381).

The reels employed dramatic editing, musical additions, flourishes, and even voice-over narration.⁹⁶

Nor did the highlight reels simply display a copyrighted work, as was the case with the poster in *Ringgold*. The reels employed the Flying B logo in a far different context than its original use as an identifier. The reels possessed narrative and storytelling characteristics, retelling Ravens's football history in a dramatic and stylized fashion.⁹⁷ These facts suggest that the reels' use of the logo is much more akin to the museum display in the Ravens's corporate office. Both involve the factual display of the logo, with the logo placed in a special location and context that are part of the chronicling of the Ravens's football history.

In addition, although the cases are quite different, the Fourth Circuit also glossed over some of its own precedent when reviewing the highlight reels. In *iParadigms*, the court held that the derivative work "can be transformative in function or purpose without altering or actually adding to the original work."⁹⁸ Yet in *Bouchat*, the court suggested that the highlight reels' use of the logo would have been more transformative had they altered or added to the logo's original use as an identifying symbol of the team by discussing the copyright controversy over the Flying B logo or the history of the logo itself.⁹⁹ Although true, the court's analysis ignored the scope of the films, which told the story of only the football games played in a particular season, and not the general business or historical aspects of the franchise. In light of *iParadigms*, the court erred in finding that "[t]here is no transformative purpose behind the depiction of the Flying B logo in the highlight films."¹⁰⁰ The highlight reels transformed the original logo by including it in historical, stylized documentaries. In so doing, the reels provided a new storytelling context and presented the logo as part of a narrative of the Ravens's early seasons.

Ultimately, *Bouchat* is more analogous to *Bill Graham Archives v. Dorling Kindersley Ltd.* than *Davis* or *Ringgold*.¹⁰¹ In that case, the Second Circuit faced the question of whether images of Grateful Dead concert posters constituted fair use when reprinted in a coffee table book about the history of the band.¹⁰² The Court noted:

In some instances, it is readily apparent that [defendant's] image display enhances the reader's understanding of the biographical text. In other instances, the link between image and text is less obvious; nevertheless, the images still serve as historical artifacts graphically representing the fact of significant Grateful Dead concert events selected by the *Illustrated Trip's* author for inclusion in the book's timeline. We conclude that both types of

96. *Id.*

97. *See id.*

98. *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630, 639 (4th Cir. 2009).

99. *Bouchat IV*, 619 F.3d at 309.

100. *Id.*

101. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

102. *Id.* at 607.

uses fulfill [defendant's] transformative purpose of enhancing the biographical information in *Illustrated Trip*, a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.¹⁰³

The Second Circuit identified a number of factors that minimized the original commercial and expressive value of the posters.¹⁰⁴ These included (1) the size of the reprinted posters, (2) the de-emphasis of their expressive value, (3) their minimal use in relation to the rest of the new work, and (4) the degree to which the posters were exploited for the commercial gain of the new work.¹⁰⁵ In analyzing the first factor of the fair-use test, the Second Circuit found the works were transformative because the posters were not used for their original, advertising purpose, but rather as historical documentation that the Grateful Dead concerts had taken place.¹⁰⁶ As a result, in conjunction with the other factors, the court found the defendant's use of the copyrighted posters to be fair use.¹⁰⁷

A similar analysis should have been applied to the Ravens's highlight films. In the reels, the Flying B logo was de-emphasized as an identifying symbol.¹⁰⁸ As the Ravens's appellate brief noted, and the Fourth Circuit acknowledged, the highlight reels were dramatically edited game footage.¹⁰⁹ Such editing had the effect of minimizing the value of the Flying B logo as an identifying symbol for the Ravens. An announcer describing previous and upcoming plays, slow motion effects focusing on specific players, musical flourishes at key moments of video—all of these elements changed the character and purpose of the logo and lessened its impact as an identifying marker.¹¹⁰ This is because the editing and narration provided cues that made it possible to identify the teams independent of the logo.¹¹¹ Moreover, the editing and dramatic elements combined to inform the casual observer that the films were recounting specific events from the Ravens's history.

Another case from the Ninth Circuit demonstrates that a derivative work can be transformative even if the derivative work uses the original in a substantially similar manner. In *Perfect 10 v. Amazon.com, Inc.*, the plaintiff, the copyright holder of photographs of nude models, sought a preliminary injunction against Amazon.com,

103. *Id.* at 609–10.

104. *Id.* at 611.

105. *Id.* at 611–13.

106. *Id.* at 612.

107. *Id.* at 615.

108. See *Trial Decision*, 587 F. Supp. 2d 686, 596 (D. Md. 2008).

109. See *Bouchat IV*, 619 F.3d 301, 309 (4th Cir. 2010); Brief for Defendant-Appellee, *supra* note 95, at 7, 20.

110. Compare *Bill Graham Archives* 448 F.3d at 611–12 (discussing a reduced size of the poster images, the movement away from expressive value, the minimal use in relation to the rest of the work, and the lack of commercial exploitation of the original copyrighted work) with *Trial Decision*, 587 F. Supp. 2d at 695–96 (discussing the minimalist use and size of the logo and movement away from simple identifying marker).

111. See Brief for Defendants-Appellees, *supra* note 95, at 7.

Inc. and Google for displaying its copyrighted images in Internet search engines.¹¹² The Ninth Circuit considered whether this constituted fair use.¹¹³ In examining the purpose and character of the images within the search engines, the Ninth Circuit found the use could be highly transformative because “a search engine provides an entirely new use for the original work . . . [by] put[ting] images ‘in a different context’ so that they are ‘transformed into a new creation.’”¹¹⁴ The fact that an entire image appeared in the search results did not by itself diminish the transformative nature of the search engines.¹¹⁵

In addition, the court determined “that even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.”¹¹⁶ The Ninth Circuit concluded that the transformative nature of the search engines, as well as the widespread public benefit it provided, were enough to outweigh the commercial value the defendants derived from the derivative work.¹¹⁷ As a result, the court weighed the first factor in favor of the defendants and ultimately vacated the preliminary injunction based on its finding of fair use—that the transformative nature of the search engines outweighed the direct copying of the thumbnail images.¹¹⁸ The *Bouchat* court should have held as the Ninth Circuit did in *Perfect 10*—that the highlight films, even though they employed an exact copy of the infringing Flying B logo, put that logo into a context altogether different from its purpose as an identifier; rather it became a part of the Ravens’s football narrative.

The court’s conclusion that the Ravens’s highlight films were not transformative is inconsistent with *iParadigms*, *Bill Graham*, and *Perfect 10*.¹¹⁹ The Fourth Circuit should have looked beyond the purpose of the logo, as an identifying symbol of the team, and instead focus on the character and purpose of the logo presented in the films.¹²⁰ “The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”¹²¹ The Fourth Circuit should have lent less weight to the films’ commercial nature and given more weight to the fact that the films, in conjunction with their editing and storytelling nature, put the Flying B logo in a light distinctive from that of a simple identifier.

112. 487 F.3d 701 (9th Cir. 2007).

113. *Id.* at 719.

114. *Id.* at 721.

115. *Id.*

116. *Id.* at 721–22.

117. *Id.* at 723.

118. *Id.* at 723, 725.

119. *See Bouchat IV*, 619 F.3d 301, 309 (4th Cir. 2010).

120. *See Perfect 10*, 487 F.3d at 721.

121. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

Thus, the Fourth Circuit incorrectly held that the use of the Flying B logo in the Ravens' highlight reels did not constitute fair use. In doing so, the court misconstrued the standard articulated by the Supreme Court in *Campbell v. Acuff-Rose*, strayed from more flexible interpretations in other jurisdictions, and, as a result, applied the fair-use factors too rigidly. The court also failed to consider the transformative nature of the films, the social value that the films provided, and the fact that the commercial nature of the films did not exploit the original work. As a result, the Fourth Circuit has allowed a copyright holder to "stifle the very creativity [the Copyright Act] was designed to foster."¹²²

122. *Id.* (quoting *Stewart*, 495 U.S. at 236).