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### Fencing in Fair Use, the Tenth Circuit Partially Revives *Tiger King* Copyright Claims

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On March 27, 2024, in *Whyte Monkee Productions, LLC v. Netflix, Inc.*,<sup>1</sup> the United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part a summary judgment verdict for Netflix in a copyright infringement suit arising out of the unauthorized use of clips of eight videos in Netflix's hit seven-part documentary series, *Tiger King: Murder, Mayhem and Madness* ("*Tiger King*"). The videos in question were filmed by a former employee of the Gerald Wayne Interactive Zoological Park ("the Park"), a zoo founded by Mr. Joe Exotic, the subject of *Tiger King*. As to seven of the videos, the appellate court affirmed the district court's holding that they were works made for hire under Section 201 of the Copyright Act and, accordingly, the plaintiffs did not own the copyrights at issue and could not pursue infringement claims arising out of their use. As to the eighth video, the appellate court reversed the district court's finding of fair use. Guided by the United States Supreme Court's recent decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* ("*Warhol*"),<sup>2</sup> the circuit court found that the district court erred with respect to critical aspects of the fair use analysis and remanded the case for further review of the evidence and a rebalancing of the fair use factors. The decision provides important clarifications for the fair use analysis in the wake of *Warhol*—at least in the Tenth Circuit—and it reflects a less expansive view of fair use than many pre-*Warhol* decisions.

#### I. Factual Background

Netflix released *Tiger King* in March 2020. Among the footage included in the series were short clips from eight videos filmed by co-plaintiff Timothy Sepi. From March 2015 to August 2016, Mr. Sepi worked at the Park—a zoo that housed tigers, lions, and other exotic animals and was open to the public for tours—as a photographer, videographer, and film editor for a web series called *Joe Exotic TV*. Mr. Sepi filmed seven of the eight videos during his tenure at the Park, although the parties disputed whether those seven had been filmed as part of his job duties. Concurrent with Mr. Sepi's tenure at the Park, filmmakers associated with Royale Goode, Netflix's co-defendant, were filming and editing footage for *Tiger King*. In addition to filming its own content, Royale Goode licensed footage from Mr. Exotic and Jeffrey Lowe, who became the owner of the Park after Mr. Exotic. Royal Goode also reached out to Mr. Sepi for assistance in accessing other video footage filmed at the Park. Because Mr. Sepi no longer worked at the Park when contacted by Royal Goode, he redirected them to Mr. Exotic without asserting ownership in his footage at the time. Mr. Sepi filmed the eighth video after he terminated his employment with the Park. That video, which features the funeral of Mr. Exotic's husband, runs 23 minutes and 52 seconds long and was livestreamed on *Joe Exotic TV* (the

“Funeral Video”). Netflix used a 66-second clip of the Funeral Video in *Tiger King*. After Netflix released *Tiger King*, Mr. Sepi registered copyrights in all eight videos and sued Netflix and Royale Goode for copyright infringement for their use of the videos without Mr. Sepi’s permission.

## II. The District Court’s Grant of Summary Judgment

The U.S. District Court for the Western District of Oklahoma granted summary judgment for the defendants in April 2022. The district court first held that Mr. Sepi had failed to establish that he owned the seven videos he filmed while employed by the Park.<sup>3</sup> The district court pointedly criticized Mr. Sepi’s deposition testimony in the case on the issue of ownership, which sharply contradicted testimony he had given in an earlier, unrelated garnishment proceeding, as “a transparent attempt to create a sham issue of fact” and excluded it.<sup>4</sup> With respect to the eighth video, the district court concluded that there was “at least a factual dispute as to the originality of the video” but that the defendants’ inclusion of the clip in *Tiger King* was a fair use.<sup>5</sup>

Section 107 of the Copyright Act provides four non-exclusive factors that courts must consider when determining whether a defendant’s use of a protected work is fair:

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.<sup>6</sup>

Courts must consider and weigh all factors, but no one factor is dispositive, and the relative weight of each factor will differ from case to case.<sup>7</sup>

The district court found that all four factors weighed in favor of fair use. While the defendants’ use of the clip of the Funeral Video was commercial, the court found the use was transformative because the defendants had used the clip for a different purpose. Accordingly, the district court concluded that the first factor weighed in favor of fair use. Whereas Mr. Sepi had made the Funeral Video “for remembrance,” the defendants had “excised a relatively small portion of the video, interspersed it with comments from [Mr. Exotic’s husband’s] mother that are critical of Exotic, and woven it into the larger narrative of the series.”<sup>8</sup> The district court found that the defendants had “imbued the original video with a different character and altered its message” and “used it as raw material to create new information, new aesthetics, new insights and understandings.”<sup>9</sup> With respect to the nature of the copyrighted work, the district court found that the video had been previously published (as a result of livestreaming via YouTube) and was “more factual than creative,” both of which tipped the second factor in favor of fair use.<sup>10</sup> Because the defendants had used only a small portion of the Funeral Video in *Tiger King*, the third factor also favored fair use.<sup>11</sup> Finally, with respect to the fourth fair use factor, the district court found that *Tiger King* was “not a substitute” for the Funeral Video and that it was unlikely that “a person interested in viewing the funeral would consider viewing *Tiger King* as a replacement.”<sup>12</sup> Because Mr. Sepi had filmed the funeral “as a means of remembering his friend, and not as a creative or entertainment venture,” the defendants’ use of a clip from the video had “not usurped any primary market for the work.”<sup>13</sup>

Accordingly, the district court granted summary judgment to the defendants. The plaintiffs timely appealed.

### III. The Tenth Circuit's Affirmance of the District Court's Determination That the First Seven Videos Were Works Made for Hire

With respect to the district court's determination that the seven videos Mr. Sepi filmed while employed at the Park were works made for hire, the theory Mr. Sepi proffered on appeal was quite different from the one he asserted in the district court. In 2021, Mr. Sepi testified that he received a fee only for his photography work at the Park and that his job responsibilities did not include any videography. On appeal, Mr. Sepi and his co-plaintiff, Whyte Monkee Productions, conceded that his work at the Park involved both videography and photography, but they asserted, for the first time, that his employment as a videographer for tours at the Park did not extend to filming or editing conducted on his own time. Because the plaintiffs had failed to raise this "meaningfully different" argument before the district court, the appellate court held that they had forfeited the ability to offer their new explanation and lacked "entitlement to be heard on this line of argument for reversal."<sup>14</sup>

### IV. The Tenth Circuit's Reversal and Remand of the District Court's Determination on Fair Use

While the appellate court affirmed the district court's holding that the first seven videos were works made for hire under Section 201 of the Copyright Act, it disagreed with the lower court's assessment of fair use with respect to the eighth video. Although the appellate court agreed that the second and third factors (the nature of the copyrighted work and the amount and substantiality of the taking) favored the defendants, it found that the first factor (the purpose and character of the use) weighed against fair use and that the defendants had failed to carry their burden under the fourth factor to establish affirmatively an absence of market harm.

#### A. The Purpose and Character of the Use

As to the purpose and character of the defendants' use of the Funeral Video, the appellate court agreed with the plaintiffs that the defendants' streaming use of its funeral clip "is as commercial as it gets and is not transformative because the use makes no commentary upon the work itself."<sup>15</sup> Although the district court had correctly followed the mandate issued by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*,<sup>16</sup> to look for a "new expression, meaning, or message," the circuit court observed that, in *Warhol*, the Supreme Court clarified this mandate to require courts to look beyond just a "different genre of music and different lyrics" for a work "involving commentary on the original" that has some critical bearing on the substance and style of the plaintiff's work.<sup>17</sup> If a defendant's work does not provide commentary on the original work, the fairness in borrowing from that original work dwindles, and the commerciality of the use "loom[s] larger."<sup>18</sup>

With this clarification in mind, the circuit court found that the defendants' use was not transformative as they "did not comment on or 'target' Mr. Sepi's work at all," but rather used the video to comment on Joe Exotic and his "purported megalomania, even in the face of tragedy."<sup>19</sup> The circuit court found this use akin to the defendant's infringing use in *Warhol*, which the Supreme Court found had targeted musical artist Prince as a character instead of targeting the plaintiff's photograph of Prince. By taking plaintiff's video and employing it to comment on Mr. Exotic's "showmanship," rather than commenting on the video itself, defendants joined a "long list of would-be fair users" who have claimed to transform an original work without actually commenting on it in any meaningful way, such as "a musician who finds it helpful to sample another's song to make his own, a playwright who finds it helpful to adapt a novel, or a filmmaker who would prefer to create a sequel or spinoff, to name just a few."<sup>20</sup>

The commerciality of Netflix's use of the Funeral Video bolstered the appellate court's conclusion that the first factor favored the plaintiffs rather than the defendants. That the defendants profited from *Tiger King*, which had been streamed to millions of paying viewers on Netflix, was undisputed.

### ***B. The Nature of the Copyrighted Work***

In analyzing the second fair use factor, courts typically account for two separate considerations: whether the original work is creative or primarily factual and whether the original work has already been published.<sup>21</sup>

The appellate court was “unpersuaded” by the plaintiffs’ contention that a depiction of real events via camera is not enough to render a work factual.<sup>22</sup> Unlike a movie based on a fictional short story, secondary use of a “bare factual compilation” favors fair use under the second factor.<sup>23</sup> While a bare factual compilation may exhibit originality and creativity in its lighting, camera angle, and other manners of expressing facts and ideas, the court found that Mr. Sepi’s creative vision in the Funeral Video was “limited”—he placed the camera on a tripod and left it running, he did not edit the footage, and he exercised no creative decision-making when filming.<sup>24</sup>

The circuit court also found plaintiffs’ argument regarding publication—that livestreaming on YouTube and later posting it indefinitely constituted a “persistent public performance” but not a publication “in a copyright sense”—“unavailing.”<sup>25</sup> Not only did Mr. Sepi make the video publicly available, but he also was able to exercise his right of first publication by choosing to livestream and post the video for public consumption. Netflix, which published the series after Mr. Sepi disseminated his video, did not infringe on this right.

### ***C. The Amount and Substantiality of the Portion Used***

The circuit court was further “unconvinced” by plaintiffs’ arguments for the third fair use factor that the district court improperly prioritized the quantity of the copyrighted work used over the quality of the work taken, and that the qualitative value of the Funeral Video was high.<sup>26</sup> The court found defendants used a “quantitatively insubstantial amount” (66 seconds of a 24-minute video), which counseled in favor of a finding of fair use. Furthermore, even if defendants had used the most important scenes from the video, which the district court assessed defendants had not, the appellate court found defendants had used no more than was necessary to bring Mr. Exotic’s story to life.<sup>27</sup>

### ***D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work***

The appellate court disagreed with the district court’s assessment of potential market harm and found that plaintiffs had the better of the parties’ fourth factor arguments, notwithstanding a paucity of evidence of even potential market harm.<sup>28</sup> Although the plaintiffs did not themselves present compelling evidence of market harm, the appellate court observed that the defendants bore the burden of establishing the absence of market harm because fair use is an affirmative defense.<sup>29</sup> The defendants had failed to present affidavits or other affirmative evidence as to the absence of market harm and had instead relied on the limited nature of plaintiffs’ evidence on the issue, which consisted only of evidence that the defendants had paid other copyright holders to license videos used in *Tiger King*. In the appellate court’s view, this reliance was insufficient as a matter of law to establish that the fourth factor weighed in favor of fair use. While the defendants had highlighted that Mr. Sepi never licensed or otherwise commercially exploited any of his works, which “may indeed constitute evidence of market impact (or lack thereof) favorable to Defendants,” the district court did not take this evidence into account, and so its analysis of the record did not support its conclusion that the fourth factor favored defendants.<sup>30</sup> The appellate court reversed and remanded with instructions to the district court to afford the defendants an opportunity to “fill the evidentiary hole” and then to reweigh all four factors.<sup>31</sup>

## V. Key Takeaways

- The Tenth Circuit's decision calls into question whether, in the wake of *Warhol*, an alleged infringer's transformative *purpose* that alters the original work with a new expression, meaning, or message is sufficient to satisfy the first fair use factor under the statute. While numerous courts pre-*Warhol* found use of an original work for a different purpose to be sufficiently transformative under the first fair use factor,<sup>32</sup> the Tenth Circuit held here that using a work for a different purpose, even a completely different one, is not enough by itself to tip the first factor in the defendant's favor.
- Post-*Warhol*, it is proving challenging for defendants to establish transformative use without commenting on or criticizing the original work. According to the Tenth Circuit, it is not enough to imbue the original work with a new meaning or message; the secondary use must target the original work, not merely a character depicted in the original work.
- Because fair use is an affirmative defense, defendants carry the burden of proving with concrete evidence that a statutory factor weighs in its favor, even if the plaintiff has no evidence to show it does not. Defendants cannot rely on a plaintiff's failure to introduce evidence of harm to the market for the original work but rather must come forward with affirmative evidence of their own as to the absence of any such harm.
- Because a court must consider each of the four statutory factors and weigh the results together, securing the reversal of a district court's judgment as to even one factor may require remand so the district court can perform a rebalancing in light of the appellate court's guidance.

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<sup>1</sup> \_ F.4th \_, 2024 WL 1291909 (10th Cir. Mar. 27, 2024).

<sup>2</sup> 598 U.S. 508 (2023).

<sup>3</sup> See *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 601 F. Supp. 3d 1117, 1128-34 (W.D. Okla. 2022).

<sup>4</sup> *Id.* at 1132; see also *id.* at 1126-31.

<sup>5</sup> *Id.* at 1135-39.

<sup>6</sup> 17 U.S.C. § 107.

<sup>7</sup> See, e.g., *Warhol*, 598 U.S. at 550–51 (“The Court has cautioned that the four statutory fair use factors may not ‘be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.’”); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994); see generally 4 NIMMER ON COPYRIGHT, § 13F.09 (2023).

<sup>8</sup> *Whyte Monkee Prods.*, 601 F. Supp. at 1136.

<sup>9</sup> *Id.* at 1136-37 (quotation omitted).

<sup>10</sup> *Id.* at 1137.

<sup>11</sup> *Id.* at 1138.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Whyte Monkee Prods.*, 2024 WL 1291909, at \*6.

<sup>15</sup> *Id.* at \*8.

<sup>16</sup> 510 U.S. at 579.

<sup>17</sup> *Whyte Monkee Prods.*, 2024 WL 1291909, at \*9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*10 (quoting *Warhol*, 598 U.S. at 547-48).

<sup>21</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003).

<sup>22</sup> *Whyte Monkee Prods., LLC*, 2024 WL 1291909, at \*10.

<sup>23</sup> *Id.* at \*11.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at \*13.

<sup>27</sup> *Id.* at \*14.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*15 (citing *Campbell*, 510 U.S. at 593-94).

<sup>30</sup> *Id.* at \*16.

<sup>31</sup> *Id.*

<sup>32</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (finding Google's use of thumbnail images "highly transformative"; "[a]lthough an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. . . [and] provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool"); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (finding iParadigms' archiving students' works as digital code to prevent plagiarism "had an entirely different function and purpose than the original works; the fact that there was no substantive alteration to the works does not preclude the use from being transformative in nature"); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216 (2d Cir. 2015) ("We have no difficulty concluding that Google's making of a digital copy of Plaintiffs' books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose.").

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