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## Monge v. Maya Magazines, Inc.: The Demand for Celebrity Gossip and the Doctrine of Transformative Use in the Ninth Circuit

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## NOTE

# *MONGE V. MAYA MAGAZINES, INC.:* THE DEMAND FOR CELEBRITY GOSSIP AND THE DOCTRINE OF TRANSFORMATIVE USE IN THE NINTH CIRCUIT

ALYCE W. FOSHEE\*

## INTRODUCTION

Despite the decreased circulation of traditional newspapers, celebrity gossip magazines continue to flourish in the publishing world. In June 2012, *People Magazine* reached a paid circulation of over 3.5 million copies, putting the publication at number nine on the top U.S. consumer magazines list for the first half of the year.<sup>1</sup> Public demand for celebrity news and gossip is unwavering. With this popularity come problems—especially for those celebrities whose images end up supplying that high demand. In *Monge v. Maya Magazines, Inc.*, the Ninth Circuit presided over a copyright battle between celebrities and a gossip magazine regarding fair use in the unauthorized publication of photographs in connection with a news story in high public demand. The result was a majority opinion that mischaracterized current Ninth Circuit trends surrounding the application of the transformative-use doctrine, and created the risk of a “private use” exception for celebrities and their

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<sup>1</sup> *Top 25 U.S. Consumer Magazines for June 2012*, ALLIANCE FOR AUDITED MEDIA, <http://www.auditedmedia.com/news/research-and-data/top-25-us-consumer-magazines-for-june-2012.aspx> (last visited Oct. 10, 2013).

personal photos. Transformative use is an especially potent sub-issue in the concept of fair use; and “while a finding of transformativeness is not necessary to trigger an overall finding of fair use, it is sufficient to do so.”<sup>2</sup>

The facts of this case, in the words of Judge McKeown, author of the majority opinion, read like a “telenovela.”<sup>3</sup> The dramatic saga of *Monge v. Maya Magazines, Inc.* details a celebrity Las Vegas wedding kept secret for over two years and its ultimate exposure through a gossip magazine’s publication of allegedly stolen photographs. The plaintiffs, a Latin American singer and her manager, were secretly married in 2007.<sup>4</sup> Two years later, an employee of the couple sold an electronic memory card containing more than 400 photographs to the gossip magazine *TVNotas*, published by defendant Maya Magazines, Inc.<sup>5</sup> Maya published six of the photos taken from the stolen memory card relating to the 2007 wedding night.<sup>6</sup> The couple subsequently registered copyrights for five of the six published photos and brought an infringement suit against Maya.<sup>7</sup> Maya moved for summary judgment and asserted the affirmative defense of fair use under 17 U.S.C. § 107, the fair-use doctrine of the Copyright Act.<sup>8</sup> Maya claimed its unauthorized use of the photos amounted to fair use of a copyrighted work because the use was transformative, served as news reporting, and made use of only six out of 400 photos purchased.<sup>9</sup> This defense ultimately failed, as the Ninth Circuit ruled that the plaintiffs were entitled to summary judgment.<sup>10</sup>

Fair use has historically been known as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”<sup>11</sup> There are no bright-line rules for the application of this doctrine, which instead requires a case-by-case

<sup>2</sup> Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 605 (2008).

<sup>3</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1168 (9th Cir. 2012). A “telenovela” is a Spanish soap opera. *Id.*

<sup>4</sup> *Id.* at 1168-69.

<sup>5</sup> *Id.* at 1169-70.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1170. In addition to copyright infringement, the plaintiffs claimed statutory and common-law misappropriation of likeness. *Id.* The scope of this Note is limited to the copyright infringement claim.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1164.

<sup>10</sup> *Id.* at 1183-84.

<sup>11</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

analysis.<sup>12</sup> The four-factor test provided by 17 U.S.C. § 107 examines the nature of the copyrighted work, the purpose of the secondary use of the work, the quantity of the work used, and the effect of the use on the market for the original work.<sup>13</sup> In its analysis, the Ninth Circuit majority found the purpose and character of Maya's use to be non-transformative, and thus, unfair.<sup>14</sup> In contrast, the dissent argued Maya's purpose for publishing the photos was distinct and different from the plaintiffs' purpose in creating them, making the unauthorized secondary use of the photos transformative—and when a transformative use is found, it most often leads to an ultimate finding of fair use.<sup>15</sup> In light of Supreme Court jurisprudence and recent application of the fair-use doctrine, this Note argues that the dissenting opinion's analysis of the first fair-use factor is more aligned with recent caselaw than is the analysis of the majority. Further, when transformative use is present under the first factor, as the dissent would have found, it should be the determinative factor in the fair-use analysis.

Part I of this Note presents the factual and procedural history of *Monge v. Maya Magazines, Inc.*, followed by an overview of the fair-use doctrine. Additionally, Part I summarizes the application of the fair-use factors in the summary judgment ruling of the district court, and in the majority and dissenting opinions of the Ninth Circuit. Part II gives an in-depth analysis of the first factor, "purpose and character of the use," and the doctrine of transformative use as a sub-issue. This analysis illustrates how the doctrine of transformative use has been applied in recent caselaw and compares these decisions to the decision in *Monge*. Part III revisits *Monge* in light of the illustrative cases, concluding that the dissenting opinion is more persuasive than that of the Ninth Circuit majority. Also discussed are the possible impacts of the majority decision on future caselaw.

## I. BACKGROUND

The Ninth Circuit analyzed Maya's unapproved use of Monge's copyrighted photographs within the framework of the four factors of the fair-use doctrine codified in 17 U.S.C. § 107.<sup>16</sup> During this assessment, the court decided whether each factor weighed in favor of or against a

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<sup>12</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>13</sup> 17 U.S.C.A. § 107 (Westlaw 2014).

<sup>14</sup> *Monge*, 688 F.3d at 1174-76.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> *Monge*, 688 F.3d at 1172-83.

finding of fair use. The combination of these “mini analyses” was used to resolve the main question: was the unauthorized publication of the photographs a permissible “fair use” or copyright infringement?<sup>17</sup> Subpart A below examines the relevant law, the fair-use doctrine of the Copyright Act. Subpart B sets out a factual and procedural overview of *Monge v. Maya Magazines, Inc.* Subpart C takes a closer look at each of the fair-use factors and how the district court and the Ninth Circuit applied these factors to the facts of *Monge*.

#### A. RELEVANT LAW—THE FAIR-USE DOCTRINE

The fair-use doctrine has been labeled by courts as the “most troublesome” in all of copyright law.<sup>18</sup> This doctrine, which allows the non-permissive use of copyrighted works for certain purposes, was expressly recognized in the Copyright Act of 1976.<sup>19</sup> “The fair-use doctrine was designed to act as the counterbalance to copyright by permitting 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.”<sup>20</sup> To afford absolute control and ownership to the work’s creator would defeat the purpose of copyright protection, which is “[t]o promote the Progress of Science and useful Arts.”<sup>21</sup> Reproduction of a copyrighted work for the purpose of criticism, comment, news reporting, teaching, scholarship, or research commonly constitutes fair use rather than infringement.<sup>22</sup> However, federal copyright law does grant authors and creators certain “exclusive” rights to their original works fixed in a “tangible medium of expression.”<sup>23</sup> A violation of an author’s exclusive right to sell, reproduce, or create derivative works of their original creation amounts to copyright infringement.<sup>24</sup> For instance, verbatim copying of a literary work for profit without permission from the author

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<sup>17</sup> *Id.* at 1173-83.

<sup>18</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting).

<sup>19</sup> 18 AM. JUR. 2D *Copyright and Literary Property* § 78 (2013).

<sup>20</sup> *Monge*, 688 F.3d at 1184 (Smith, J., dissenting) (internal quotations marks and brackets omitted).

<sup>21</sup> *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>22</sup> 17 U.S.C.A. § 107 (Westlaw 2014). The examples listed in the preamble to the fair-use statute are “illustrative and not limitative” and are meant to provide only general guidance. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77 (1994).

<sup>23</sup> 17 U.S.C.A. §§ 102, 106 (Westlaw 2014).

<sup>24</sup> 13 WITKIN, SUMMARY OF CALIFORNIA LAW ch. XVIII, *Personal Property*, § 66 (10th ed. 2005).

or creator would constitute infringement unless excused as fair use.<sup>25</sup> In assessing whether a secondary use of a work is fair (and thus non-infringing), the Act provides four non-exclusive factors<sup>26</sup> to be considered,<sup>27</sup> including: (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>28</sup>

In addition, § 107 specifically notes that the unpublished nature of a work does not, in and of itself, bar a finding of fair use.<sup>29</sup> These factors are discussed in detail below as they were applied to the case at hand.

#### B. FACTUAL AND PROCEDURAL HISTORY OF *MONGE V. MAYA MAGAZINES, INC.*

Latin American pop star and model Noelia Lorenzo Monge secretly wed manager and producer, Jorge Reynoso, in a Las Vegas ceremony in early 2007.<sup>30</sup> In an effort to preserve Monge's image as a young sex symbol and protect their privacy, the couple went to great lengths to keep their marriage confidential.<sup>31</sup> Only six photographs were taken that night, all with Monge's personal camera.<sup>32</sup> Monge and Reynoso successfully concealed their clandestine wedding for two years, even from their own families.<sup>33</sup>

During the summer of 2008, Reynoso allegedly left a memory card containing the wedding photographs in a vehicle owned by Oscar Viqueira, a paparazzo who was occasionally employed by the couple as a body guard and driver.<sup>34</sup> Viqueira sold the entire card containing 400 photographs to Maya Magazines, Inc. in February 2009 for \$1,500.<sup>35</sup> Maya produces multiple publications and had previously featured

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<sup>25</sup> See e.g. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

<sup>26</sup> See *infra* Part I.C.

<sup>27</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012).

<sup>28</sup> 17 U.S.C.A. § 107 (Westlaw 2014).

<sup>29</sup> *Id.*

<sup>30</sup> *Monge*, 688 F.3d at 1168-69.

<sup>31</sup> *Id.* at 1168-69; see *id.* at 1192 (Smith, J., dissenting) (noting that the only witnesses to the wedding ceremony itself were the minister and two chapel employees).

<sup>32</sup> *Id.* at 1169 (majority opinion).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1168-69.

<sup>35</sup> *Id.* at 1169.

photographs of both Monge and Reynoso in its gossip magazines.<sup>36</sup> After reviewing the contents of the card, Maya published six photographs of the couple's wedding night in *TVNotas*, its Spanish-language celebrity gossip magazine.<sup>37</sup> Three of the photographs appeared on the cover, and all six were displayed in a two-page spread that incorporated titles and captions commenting on the couple's then-confirmed, secret marriage.<sup>38</sup> After publication and sales of Issue 633 of *TVNotas*, which contained the wedding pictures, Monge and Reynoso registered copyrights for five of the six photos.<sup>39</sup> The couple subsequently filed their complaint against Maya alleging copyright infringement in the U.S. District Court for the Central District of California; the parties filed cross motions for summary judgment.<sup>40</sup> The district court, finding no genuine issue as to any material fact, granted summary judgment in favor of defendant Maya, based on a finding of fair use under § 107.<sup>41</sup> The plaintiffs appealed.

### C. APPLICATION OF THE FAIR-USE DOCTRINE

Both the district court and the Ninth Circuit panel applied the fair-use doctrine in *Monge v. Maya Magazines, Inc.* The district court found no copyright infringement, after determining that two factors were neutral and two weighed in favor of a finding of fair use.<sup>42</sup> In contrast, the Ninth Circuit found that all four factors weighed *against* the fair-use defense; the court of appeals therefore reversed the district court's judgment and remanded with instructions to enter summary judgment for the plaintiffs.<sup>43</sup> In a dissenting opinion, Circuit Judge Smith identified the majority decision as inconsistent with Supreme Court precedent and offered a separate analysis.<sup>44</sup> The majority and dissenting opinions conflicted, at least in part, on the application and outcome of each factor;

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<sup>36</sup> *Id.* at 1168 (explaining that Maya previously paid Monge to pose for their magazine *H is for Hombres* and Reynoso sold photos of him and his former wife to Maya on multiple occasions).

<sup>37</sup> *Id.* at 1169.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1170 (noting that Monge and Reynoso registered copyrights for all of the photos depicting their wedding night except for one post-ceremony photo of the couple posing in front of a Playboy logo).

<sup>40</sup> *Id.* The complaint also asserted claims for statutory misappropriation of likeness and common-law misappropriation of likeness, which were dismissed by the district court. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Monge v. Maya Magazines, Inc.*, No. CV 09-5077-R, 2010 WL 3835053, at \*2-3 (C.D. Cal. Sept. 30, 2010), *rev'd*, 688 F.3d 1164 (9th Cir. 2012).

<sup>43</sup> *Monge*, 688 F.3d at 1184.

<sup>44</sup> *Id.*

the largest disparity was in the analysis of factor one, the purpose and character of the defendant's use of the photos.

### 1. *Factor One: Purpose and Character of the Use*

An inquiry into the purpose and character of the use focuses on whether the secondary use of a copyrighted work furthers a different purpose, adds something new, or *transforms* the original, giving it a new meaning or expression.<sup>45</sup> The doctrine of transformative use is "considered within the framework" of the analysis of this first factor.<sup>46</sup> In order to be transformative, "the use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."<sup>47</sup> The Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* held that although not essential for fair use, a finding of transformativeness largely promotes the sciences and arts, one of the main goals of copyright protection.<sup>48</sup> Additionally, courts consider the element of commerciality versus the educational character of the use under the first factor.<sup>49</sup> Although commerciality tends to weigh against fair use, this is not conclusive.<sup>50</sup>

Parody, which encompasses a transformative element, generally signifies fair use under the first factor.<sup>51</sup> In many cases, parody creates a new work in the process of commenting on or criticizing the original.<sup>52</sup> In *Campbell v. Acuff-Rose Music, Inc.*, rap group 2 Live Crew's parody of the song *Oh, Pretty Woman* was deemed transformative by the Supreme Court because the play on words could reasonably be perceived as comment or criticism of the original song.<sup>53</sup>

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<sup>45</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841), which discussed the common-law application of the fair-use principle).

<sup>46</sup> Jason M. Nolan, *The Role of Transformative Use: Revisiting the Fourth Circuit's Fair Use Opinions in Bouchat v. Baltimore Ravens*, 16 VA. J.L. & TECH. 538, 547 (2011). The doctrine of transformative use is discussed in depth in Part II.B of this Note.

<sup>47</sup> *Id.* (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990), which coined the term "transformative use").

<sup>48</sup> *Campbell*, 510 U.S. at 579.

<sup>49</sup> 17 U.S.C.A. § 107 (Westlaw 2014).

<sup>50</sup> *Campbell*, 510 U.S. at 585.

<sup>51</sup> *Id.* at 579.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 583.



The district court found Maya's use to be transformative, so that the first factor weighed in favor of fair use.<sup>54</sup> The court opined that, for the plaintiffs, the photos served as documentation of their wedding.<sup>55</sup> In contrast, Maya used the photos for the distinct purpose of confirming a marriage that the plaintiffs had publicly denied.<sup>56</sup> In corroborating the story of the secret marriage, the "newsworthiness" of the photos played a role in the analysis and also favored fair use.<sup>57</sup>

The Ninth Circuit took a more detailed approach. In assessing the first factor, the court considered three sub-issues: 1) the news reporting aspect of the publication, 2) any transformation that occurred, and 3) the commercial nature of the use.<sup>58</sup> Following these considerations, Judge McKeown, writing for the Ninth Circuit majority, found the first factor to be "at best neutral."<sup>59</sup> The court acknowledged that Maya's publication of the clandestine wedding photos was undoubtedly news reporting, an illustrative usage listed in the statute's preamble.<sup>60</sup> However, news reporting does not support a "per se finding of fair use" and is only intended as an example of what *may* amount to fair use.<sup>61</sup> According to the majority, Maya's only "transformation" of the photos was minor cropping and the addition of headlines and captions. Further, Maya's use, although for a distinct purpose, was nothing more than "wholesale copying sprinkled with written commentary," and "was at best minimally transformative."<sup>62</sup> Additionally, Maya undisputedly profited from the clearly commercial use of the plaintiffs' photos.<sup>63</sup> Any transformation Maya engaged in was outweighed by the commercial nature of the publication, according to the majority.<sup>64</sup>

<sup>54</sup> *Monge v. Maya Magazines, Inc.*, No. CV 09-5077-R, 2010 WL 3835053, at \*2 (C.D. Cal. Sept. 30, 2010), *rev'd*, 688 F.3d 1164 (9th Cir. 2012).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012).

<sup>59</sup> Because the first factor was neutral—weighing neither for nor against a finding of fair use—the court concluded that it did not support the affirmative defense of fair use, a matter on which Maya bore the burden of proof. *Id.*

<sup>60</sup> *Id.* at 1173; *see also* 17 U.S.C.A. § 107 (Westlaw 2014).

<sup>61</sup> *Monge*, 688 F.3d at 1173; *see also* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

<sup>62</sup> *Monge*, 688 F.3d at 1176. The Ninth Circuit majority focused primarily on *material* or *physical* transformation and dismissed Maya's contention that difference in purpose is sufficient to show transformation. *See id.* at 1175-76. As discussed in Part II of this Note, a difference in purposes behind the original work and a secondary use can make the secondary use highly transformative, an important part of the first factor analysis. *See* discussion *infra* Part II.B-C.

<sup>63</sup> *Monge*, 688 F.3d at 1176.

<sup>64</sup> *Id.* at 1177.

In contrast, the Ninth Circuit dissent found the purpose and character of Maya's use weighed *in favor* of fair use.<sup>65</sup> In his analysis, Judge Smith relied on the Supreme Court's opinion in *Campbell* finding that the more transformative a subsequent use of copyrighted material, the less commerciality and other factors come into play under the first factor.<sup>66</sup> Physical transformation occurred when Maya cropped, edited, and added commentary to the photographs in a stylized two-page spread, an act that was downplayed by the majority.<sup>67</sup> Further, the dissent opined that the plaintiffs' use of the photos as personal images, which they concealed to maintain Monge's public image, was fundamentally different from Maya's use of the photos for direct documentary evidence and proof of a secret marriage.<sup>68</sup> A distinction in purpose tends to lead to a finding of transformativeness, which is significant under the first factor.<sup>69</sup> Moreover, the dissent would have found Maya's use of the photographs was not only a factual display of the couple's marriage but an integral part in exposing the depth of their relationship and the extent to which their representations to the public were false.<sup>70</sup> This element of newsworthiness, coupled with physical transformation and fundamentally different purposes, led Judge Smith to conclude that the first factor weighed in favor of fair use, despite the commercial nature of the publication.<sup>71</sup>

## 2. *Factor Two: Nature of the Copyrighted Work*

A key question for courts in analyzing the second factor is whether the work has been published.<sup>72</sup> Although not necessarily determinative, the unpublished "nature"<sup>73</sup> of a copyrighted work tends to weigh against

<sup>65</sup> *Id.* at 1188 (Smith, J., dissenting).

<sup>66</sup> *Id.* at 1185 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>67</sup> *See id.* ("The majority attempts to diminish the significance of Maya's commentary, cropping, re-sizing, and arrangement of the photos by presenting the publication as little more than a photo album.").

<sup>68</sup> *See id.* at 1186-87 ("As Reynoso testified, the images were withheld from the public solely for marketing purposes, in order to maintain Noelia's image of being a single singer [to] appeal to young people. ('Q: Why did you decide to have a secret wedding? A: I just mentioned to you that we're trying to protect her image of being a single singer to appeal to young people . . . Q: Were there any other reasons? A: No, just marketing reasons.')) (some internal quotation marks omitted).

<sup>69</sup> *Id.* at 1187.

<sup>70</sup> *Id.* at 1187-88.

<sup>71</sup> *Id.* at 1188.

<sup>72</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (1985).

<sup>73</sup> The term "nature" comes from the statutory language of the fair-use doctrine. *See* 17 U.S.C.A. § 107 (Westlaw 2014). In this context it is used to describe various characteristics of a work and different classifications a work can be given, such as published versus unpublished. *See*

fair use.<sup>74</sup> Copyright law seeks to protect the author's right of first publication, including when, where, in what form, and ultimately whether to publish at all.<sup>75</sup> Consideration is also given to the work's creative as opposed to informational nature, with creative works receiving greater protection.<sup>76</sup> When there is an unauthorized publication of a manuscript that has been kept confidential in preparation for publication elsewhere, the unpublished nature of the work weighs heavily against fair use.<sup>77</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, a landmark decision by the Supreme Court in the fair-use arena, illustrates this point.<sup>78</sup> Harper & Row, the copyright owner of President Ford's autobiography *A Time to Heal*, gave *Time* magazine the exclusive right to feature a portion of the unpublished memoir in an upcoming issue.<sup>79</sup> An undisclosed source came into possession of the manuscript and sold it to Nation Enterprises, which published an article designed to "scoop" the piece that was to appear shortly thereafter in *Time*.<sup>80</sup> *Time* subsequently canceled its article and refused to pay Harper & Row, which then sued Nation Enterprises for copyright infringement.<sup>81</sup> The Supreme Court held that Nation's use of the unpublished work clearly infringed upon the author's right to control the manner and quality of the first publication.<sup>82</sup>

The district court in *Monge* did not consider whether the work had been published. That the photos were taken by unskilled chapel employees as opposed to highly skilled professional photographers led the court to conclude that Monge's photos were essentially factual in

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*also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) ("This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.").

<sup>74</sup> See *Harper & Row*, 471 U.S. at 564 ("[T]he author's right to control the first public appearance of his expression weighs against such use of the work before its release.").

<sup>75</sup> *Id.*

<sup>76</sup> *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1154 (9th Cir. 1986); see *also Harper & Row*, 471 U.S. at 563 (1985) (finding that fair use more often exists when works are of a factual nature, because "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy").

<sup>77</sup> See *Harper & Row*, 471 U.S. at 564 (1985) ("[T]he author's right to control the first public appearance of his expression weighs against such use of the work before its release.").

<sup>78</sup> Since the famous case of *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court has only heard three other cases addressing fair use: *Harper & Row*, 471 U.S. 539; *Stewart v. Abend*, 495 U.S. 207 (1990); and *Campbell*, 510 U.S. 569. Nolan, *supra* note 46, at 549.

<sup>79</sup> *Harper & Row*, 471 U.S. at 542.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 564.

nature, rather than artistic or creative.<sup>83</sup> Due to the factual nature of the photos, the court concluded the second factor was neutral and weighed neither in favor of nor against fair use.<sup>84</sup>

Like the district court, the Ninth Circuit considered creativity under the second factor and conceded that the wedding photos were not highly artistic in nature.<sup>85</sup> It chose to focus instead on the unpublished status of the photos, which the Supreme Court has deemed a critical element of a work's nature.<sup>86</sup> Because Maya's use precluded the plaintiffs' right to control the first publication of the photos, the court found the second factor weighed against a finding of fair use, despite the lack of creativity.<sup>87</sup>

As to the nature of the copyrighted work, the dissent would have found the second factor to be either neutral or slightly in favor of fair use.<sup>88</sup> Judge Smith argued that these "point and shoot" photos were not highly creative, but factual and documentary in nature.<sup>89</sup> The dissent acknowledged the unpublished nature of the couple's photographs prior to Maya's use, but considered this to be less significant under the second factor, due to the factual and documentary nature of the photos.<sup>90</sup>

### 3. *Factor Three: Amount and Substantiality of the Portion Used*

Courts review both qualitative and quantitative aspects of the use in assessing the amount and substantiality of the use in comparison to the original work.<sup>91</sup> Under the third factor, a secondary use that copies the "heart" of the original, without a change or addition of new material, merely supersedes or replaces the original, and weighs against fair use.<sup>92</sup> In *Harper & Row*, defendant Nation Enterprises copied approximately 300-400 words verbatim from President Ford's memoir in its infringing article.<sup>93</sup> Although these quotes were an insubstantial quantity of the manuscript as a whole, they were "essentially the heart of the book."<sup>94</sup>

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<sup>83</sup> *Monge v. Maya Magazines, Inc.*, No. CV 09-5077-R, 2010 WL 3835053, at \*2 (C.D. Cal. Sept. 30, 2010), *rev'd*, 688 F.3d 1164 (9th Cir. 2012).

<sup>84</sup> *Id.*

<sup>85</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012).

<sup>86</sup> *Id.* at 1177-78; *Harper & Row*, 471 U.S. at 564.

<sup>87</sup> *Monge*, 688 F.3d at 1178.

<sup>88</sup> *Id.* at 1189 (Smith, J., dissenting).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

<sup>92</sup> *Id.* at 587-88.

<sup>93</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

<sup>94</sup> *Id.* at 564.

The passages selected were among the most interesting and powerful of the whole memoir and served as a dramatic focal point for the infringing article.<sup>95</sup>

The district court concluded the third factor was neutral. While the photos were minimally cropped, Maya published only five of the 400 photos contained on the purchased memory card.<sup>96</sup> The court reasoned that Maya published only the photos absolutely necessary to corroborate its story that Monge and Reynoso were in fact married.<sup>97</sup> This neutral finding weighed neither for nor against fair use.

On review, the Ninth Circuit used both a qualitative and quantitative approach in analyzing the third factor.<sup>98</sup> The court noted that the minimal cropping done by Maya led to a conclusion that Maya published the “heart” of each photo.<sup>99</sup> In terms of quantity, the district court had analyzed this factor under the assumption that the 400 electronic files on the memory card constituted the “entire work.”<sup>100</sup> In contrast, the Ninth Circuit interpreted the “entire work” to be the five copyrighted photos the couple had registered subsequent to their publication; in this context, Maya copied 100% of the “work” at issue.<sup>101</sup> The Ninth Circuit majority consequently found that the third factor did not support a finding of fair use.<sup>102</sup>

In his dissenting analysis, Judge Smith took note that the majority opinion cited no binding legal authority for its finding that the photos must be addressed individually because five separate copyrights were registered.<sup>103</sup> Conversely, the dissent argued that Maya carefully chose which photos out of the original 400 they would use to corroborate their story.<sup>104</sup> Because of this extreme selectivity, the dissent reasoned that, with respect to the three wedding photographs, the third factor weighed either neutrally or slightly in favor of fair use.<sup>105</sup>

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<sup>95</sup> *Id.* at 565-66.

<sup>96</sup> *Monge v. Maya Magazines, Inc.*, No. CV 09-5077-R, 2010 WL 3835053, at \*3 (C.D. Cal. Sept. 30, 2010), *rev'd*, 688 F.3d 1164 (9th Cir. 2012).

<sup>97</sup> *Id.*

<sup>98</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1178 (9th Cir. 2012).

<sup>99</sup> In this part of the analysis, the court looked at each of the five photos as a separate work in and of itself, to determine if the “heart” of each was copied. *Id.*

<sup>100</sup> *See Monge*, 2010 WL 3835053, at \*3.

<sup>101</sup> *See Monge*, 688 F.3d at 1179 (explaining that if the copyrighted work was considered to be the five photos out of the six published that the Plaintiffs registered copyrights for, then it followed that the work was copied in its entirety).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1190 (Smith, J., dissenting).

<sup>104</sup> *Id.* at 1191.

<sup>105</sup> *Id.*

#### 4. *Factor Four: Effect on the Potential Market for, or Value of, the Copyrighted Work*

The fourth factor considers whether the market for the original has been “materially impaired” by the secondary use.<sup>106</sup> Market harm or impairment is shown through diminished sales and demand for the original copyrighted work.<sup>107</sup> In *Campbell*, the Supreme Court examined the fourth factor in conjunction with the first, purpose and character of the use. Market harm is greater when a commercial use of a copyrighted work merely supersedes the original and acts as a market replacement.<sup>108</sup> Conversely, when a secondary use transforms the purpose and character of the original, market harm may not be readily inferred, and market substitution becomes less likely.<sup>109</sup> The *Campbell* court noted that a parody will not likely affect the market for the original because different market functions are served by the parody as opposed to the original.<sup>110</sup> In contrast, a verbatim copying of portions of an unpublished manuscript may have a hugely negative impact on the market for and value of the original.<sup>111</sup>

An analysis of the fourth factor should account for the “market failure” theory.<sup>112</sup> In an infringement suit, market failure is found if the defendant can prove that the copyright owner would refrain from licensing the work in an effort to keep certain information private, essentially eliminating any potential market for that work.<sup>113</sup> Under this theory, an owner’s reason for *not* licensing the work must be the

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<sup>106</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–67 (1985) (“Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.”).

<sup>107</sup> *Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155-56 (9th Cir. 1986).

<sup>108</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See *Harper & Row*, 471 U.S. at 567 (discussing how Nation Enterprises’ “scoop” of the *Time* magazine article directly caused *Time* to rescind its contract with Harper & Row, cancel the publication of the article, and refuse to pay the \$12,500 fee that had been agreed upon).

<sup>112</sup> See *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1191 (9th Cir. 2012) (Smith, J., dissenting) (“[T]he Couple’s intention never to publish photos *must* frame our market harm analysis because their intention was based upon their desire to conceal their secret Las Vegas wedding from the public.”).

<sup>113</sup> *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 n.2 (9th Cir. 2000) (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1634 (1982)).

focus.<sup>114</sup> The decision to keep it out of the public arena must be unrelated to the goals of copyright.<sup>115</sup>

The district court found that no market for the plaintiffs' photos existed, and therefore no market harm could ensue from Maya's publication. Essentially, because Monge and Reynoso vigorously fought to keep their marriage concealed from society, and even from their own families, it followed that they never intended to publish the photos *at all*.<sup>116</sup> The court therefore concluded that the fourth factor weighed in favor of fair use.<sup>117</sup>

However, the Ninth Circuit found the fourth and final factor to weigh against a finding of fair use.<sup>118</sup> Judge McKeown reasoned that both Maya and the plaintiffs participated in the market for celebrity photos: Maya through publication of and profit from such photos, and the plaintiffs through their past sales of personal photos to the media.<sup>119</sup> Maya's purchase of the wedding photos for \$1,500 undoubtedly showed that a market demand existed for such photos.<sup>120</sup> Not only did Maya's use destroy the plaintiff's right of first publication, but the market value of the photos was significantly decreased once the news of their clandestine wedding was out.<sup>121</sup>

In his dissent, Judge Smith championed the "market failure" theory in defense of Maya. This theory, he argued, under which an author "specifically keeps a work from being published for the purposes of concealing information," should have been applied to the use in this case.<sup>122</sup> The intent of Monge and Reynoso never to publish these photos should therefore have favored a finding of fair use, because the potential market subject to harm did not exist.<sup>123</sup> Proof of this intention lay in the plaintiffs' refusal to confide even in their families, and their desire to preserve Monge's image as a sex symbol for business and marketing purposes.<sup>124</sup>

<sup>114</sup> Gordon, *supra* note 113, at 1634.

<sup>115</sup> *Id.*

<sup>116</sup> See *Monge v. Maya Magazines, Inc.*, No. CV 09-5077-R, 2010 WL 3835053, at \*3 (C.D. Cal. Sept. 30, 2010) ("Plaintiffs went to great lengths to conceal their marriage. . . . Thus, there is no indication that they ever intended to market the photos themselves."), *rev'd*, 688 F.3d 1164 (9th Cir. 2012).

<sup>117</sup> *Id.*

<sup>118</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012).

<sup>119</sup> *Id.* at 1181.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1182.

<sup>122</sup> *Id.* at 1191 (Smith, J., dissenting).

<sup>123</sup> *Id.* at 1192.

<sup>124</sup> *Id.* at 1186-87, 1192.

## II. ANALYSIS

This Note focuses on the application of the first fair-use factor, purpose and character of the use, in the *Monge* case. Specifically addressed in Part II is the sub-issue of transformativeness. A survey of recent fair-use caselaw provides examples of transformative use from the Ninth Circuit and outside circuits.

### A. TAKING A CLOSER LOOK AT THE FIRST FAIR-USE FACTOR: PURPOSE AND CHARACTER OF THE USE

Judge Pierre Leval, then of the United States Court of Appeals for the Second Circuit, addressed the ambiguity of the fair-use statute in his *Melville B. Nimmer Memorial Lecture* delivered at UCLA in 1997.<sup>125</sup> According to Judge Leval, the “chaotic confusion” caused by statutory recognition of the fair-use doctrine is largely due to the uninformative nature of the statute.<sup>126</sup> The statute fails to dictate what constitutes a “fair use”; Congress’s use of the words “purpose and character of the use” provide no guidelines as to what “purpose and character” of a secondary work will favor or disfavor a finding of fair use.<sup>127</sup> Because fair use is given a variety of interpretations among judges, “decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.”<sup>128</sup> Much difficulty arises in defining the purpose behind the use of a copyrighted work. Multiple purposes may be present simultaneously, and explicit guidance as to what purposes are deemed transformative has not been provided by higher courts.<sup>129</sup>

The four factors are non-exclusive, and all must be considered in a legal analysis that balances the interests of the copyright owner against those of the secondary user.<sup>130</sup> Justice O’Connor, writing for the majority in *Harper & Row*, called the fourth factor, the effect on the market, “the single most important element of fair use.”<sup>131</sup> In his lecture, Judge Leval characterized this assertion as dictum that played no role in

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<sup>125</sup> See Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449 (1997) (adapted from Melville B. Nimmer Memorial Lecture, delivered at UCLA on Feb. 24, 1997).

<sup>126</sup> *Id.* at 1450-54.

<sup>127</sup> *Id.* at 1454.

<sup>128</sup> Leval, *supra* note 47, at 1107.

<sup>129</sup> Nolan, *supra* note 46, at 544.

<sup>130</sup> 17 U.S.C.A. § 107 (Westlaw 2014); Nolan, *supra* note 46, at 546.

<sup>131</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).



the holding of the case and was unsupported by case authority.<sup>132</sup> Since the decision in *Harper & Row*, scholars have found that the first factor, the purpose and character of the use, is likely more dispositive of fair use than the fourth factor, the effect on the market.<sup>133</sup>

The 1994 Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.* provided guidance in the application of the first factor. The Court initially analyzed the purpose and character of a secondary use through the examples given in the preamble to the statute.<sup>134</sup> Although this list is not exhaustive, nor are such uses automatically presumed to be fair, the statute asserts that copying for the purpose of “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” may all be deemed fair use.<sup>135</sup>

The two main sub-issues to be considered under a “purpose and character of the use” analysis are transformativeness and commerciality.<sup>136</sup> Justice Souter, writing for the unanimous Court in *Campbell*, labeled commerciality as “only one element to be weighed in a fair use enquiry.”<sup>137</sup> Justice Souter criticized the appellate decision in that case for placing excess weight on the opinion in *Sony Corp. of America v. Universal City Studios, Inc.*, which found commercial use of a copyrighted work to be dispositive against a finding of fair use.<sup>138</sup> The use of the word “including” in the statute itself is proof that commerciality is but one element to be considered under the first factor, according to Justice Souter.<sup>139</sup> The heart of the first-factor analysis is whether and to what extent the secondary use is *transformative*, that is, whether it adds something new or changes the purpose, meaning, or

<sup>132</sup> Leval, *supra* note 125, at 1459.

<sup>133</sup> Nolan, *supra* note 46, at 546-47.

<sup>134</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

<sup>135</sup> 17 U.S.C.A. § 107 (Westlaw 2014).

<sup>136</sup> See discussion *supra* Part I.C.1.

<sup>137</sup> *Campbell*, 510 U.S. at 572.

<sup>138</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . .”). In *Campbell*, Justice Souter said the appellate court had erred in placing such significance on this quote as to find that the commercial nature of the parody made the use presumptively unfair. *Campbell*, 510 U.S. at 583-84.

<sup>139</sup> *Campbell*, 510 U.S. at 584 (“The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term ‘including’ to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into ‘purpose and character.’”). Given this reasoning, this Note focuses solely on the transformative element of the first factor and not commerciality.

message of the original copyrighted work.<sup>140</sup> The significance of the transformative element is discussed in depth below.

## B. THE DOCTRINE OF TRANSFORMATIVE USE

The doctrine of transformative use is a “judicially created consideration” that has become an important sub-issue under the first factor.<sup>141</sup> Examples of transformative use may include quoting an original work for the purpose of criticism, proving a fact, exposing the character of the original author,<sup>142</sup> or showing parody or symbolism.<sup>143</sup> When describing transformative use in *Campbell*, Justice Souter quoted an 1841 opinion by Justice Story:

The 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, with a further purpose or different character, altering the first with new expression, meaning, or message . . . .<sup>144</sup>

If the secondary use of a copyrighted work is transformative, other factors that may weigh against fair use, such as commerciality, become less significant in the analysis.<sup>145</sup> Transformativeness focuses on the *purpose* behind the use; even if the original work is not physically altered, a secondary use may be transformative if the work is employed for a different purpose or in a different context.<sup>146</sup> In fair-use litigation, the court must determine the purpose behind the original work, the purpose of the secondary use, and any distinction between the two.<sup>147</sup> According to Judge Leval, it is the court’s duty to interpret the doctrine so that it protects secondary uses that enrich society by creating new information, new insights, new aesthetics, and new understandings through the transformation of copyrighted works.<sup>148</sup>

<sup>140</sup> See *id.* at 579.

<sup>141</sup> See *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173 (9th Cir. 2012). (“The term ‘transformative’ or ‘transformation’ appears nowhere in the statute.”).

<sup>142</sup> See *infra* Part III.A.

<sup>143</sup> Leval, *supra* note 47, at 1111.

<sup>144</sup> *Campbell*, 510 U.S. at 579 (internal citations omitted).

<sup>145</sup> See *id.*

<sup>146</sup> See *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006); see also Leval, *supra* note 47, at 1111.

<sup>147</sup> Nolan, *supra* note 46, at 541.

<sup>148</sup> Leval, *supra* note 47, at 1111.

Professor Barton Beebe, intellectual-property expert, also observed how transformativeness plays a significant role in fair-use analysis.<sup>149</sup> In conducting an empirical study of fair-use cases decided between 1978 (when the Copyright Act went into effect)<sup>150</sup> and 2005,<sup>151</sup> Beebe concluded:

In those opinions in which transformativeness did play a role, it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test. More specifically, the data suggest that *while a finding of transformativeness is not necessary to trigger an overall finding of fair use, it is sufficient to do so.*<sup>152</sup>

As a “vital indicator” of fair use,<sup>153</sup> where a transformative purpose is present, a decision will likely find fair use.<sup>154</sup> It follows that a defendant’s success regarding a fair-use claim largely depends on whether the court interprets the secondary use to be transformative. The dissent in *Monge* argued that Maya’s purpose in publishing the photos was distinct and different from the plaintiffs’ purpose in creating them, and was therefore transformative.<sup>155</sup> Under this rationale, Maya’s transformative purpose would have weighed in favor of fair use. The following illustrative cases exemplify transformative uses from recent decisions of the Ninth Circuit and other circuits. These decisions embody sufficiently transformative secondary purposes that ultimately led to findings of fair use.

### C. ILLUSTRATIONS OF TRANSFORMATIVE USE IN RECENT FEDERAL COURT DECISIONS

According to Professor Beebe, modern fair-use caselaw is concentrated around four courts whose opinions have been most

<sup>149</sup> Barton Beebe, B.A., University of Chicago; Ph.D., Princeton University; J.D., Yale University. Beebe, *supra* note 2, at 624.

<sup>150</sup> Nolan, *supra* note 46, at 555.

<sup>151</sup> During this period 306 opinions were reported from the federal courts that cited the fair-use statute, 17 U.S.C. § 107, and referred to least two of the fair-use factors. These cases made “substantial use” of § 107 and the four-factor test. Beebe, *supra* note 2, at 564–65 n.63.

<sup>152</sup> *Id.* at 605 (emphasis added).

<sup>153</sup> Nolan, *supra* note 46, at 554.

<sup>154</sup> *See id.* (“[W]hen a secondary user successfully argues that his or her use of the copyrighted work was for a different purpose, then the use will be, or is likely to be, fair.”).

<sup>155</sup> *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1186–87 (9th Cir. 2012) (Smith, J., dissenting).

influential: the Supreme Court, the Second and Ninth Circuits, and the District Court for the Southern District of New York.<sup>156</sup> Between 1978 and 2005, the largest percentage of appellate opinions on fair use came from the Second and Ninth Circuits, with 38.6% and 28.4% of the total cases, respectively.<sup>157</sup> In addition to boasting the greatest volume of cases, the Second and Ninth Circuits were also the most frequently cited by outside courts.<sup>158</sup> Among the illustrative cases outlined in this section, five of seven stem from the Second or Ninth Circuit. In light of the influence these circuits have had in modern fair-use caselaw, their opinions on transformative purpose should have had a greater impact on the holding in *Monge*, and should have directed the majority to find transformative, and thus fair, use. In all of the following cases, one trend is consistent: a secondary use of a photograph or other aesthetic work amounted to fair use based on a finding of transformative purpose.

### 1. *Mattel, Inc. v. Walking Mountain Productions*

In *Mattel, Inc. v. Walking Mountain Productions*, the Court of Appeals for the Ninth Circuit ruled that an artist's parody-laden photographs depicting Mattel's "Barbie" constituted fair use.<sup>159</sup> Mattel Corporation, copyright owner and creator of the famous "Barbie" doll, filed an infringement suit against photographer Thomas Forsythe, doing business as "Walking Mountain Productions," for his photograph series titled "Food Chain Barbie."<sup>160</sup> Forsythe's series of seventy-eight photographs depicted nude Barbie dolls posed in absurd or sexualized positions amongst kitchen appliances, for the purpose of critiquing "the objectification of women" and "the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies."<sup>161</sup> The court found that Forsythe's photographs transformed Barbie's meaning from "the ideal American woman" and a "symbol of American girlhood" into commentary that was intended to critique the influence Barbie has had on gender roles and the position of women in

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<sup>156</sup> Beebe, *supra* note 2, at 568.

<sup>157</sup> *Id.* at 567.

<sup>158</sup> *See id.* at 568 ("[C]ircuit and district court opinions from outside the Second Circuit cited to an average of 1.55 circuit court cases from the Second Circuit per fair use analysis, and those from outside the Ninth Circuit cited to an average of 0.68 circuit court cases from the Ninth Circuit per fair use analysis.").

<sup>159</sup> *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

<sup>160</sup> *Id.* at 796.

<sup>161</sup> *Id.*

society.<sup>162</sup> The transformation in the meaning behind Barbie along with the use of Barbie as parody weighed in favor of fair use.<sup>163</sup>

## 2. *Kelly v. Arriba Soft Corp.*

In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit found that a search engine operator's use of copyrighted photographs in search results qualified as fair use.<sup>164</sup> Leslie Kelly, a professional photographer, sued Arriba Soft Corporation for copyright infringement after it used thumbnails of her photographs of the American Midwest in search displays (as opposed to the traditional text) in its visual search engine.<sup>165</sup> Although Arriba's thumbnails were exact replications of Kelly's photographs, the use was transformative because the purpose behind the use was completely different from Kelly's intended purpose.<sup>166</sup> Kelly's purpose in creating the photographs was artistic and entirely aesthetic.<sup>167</sup> In transforming Kelly's images into smaller, reduced-resolution thumbnails, Arriba utilized the images as tools for the purpose of enhancing search results.<sup>168</sup> The purpose of indexing and improving access to various websites was deemed to be highly transformative and to have no relation to aesthetic expression, the purpose for which the photos were originally created.<sup>169</sup> Additionally, the reduced size and lower resolution of the photos used by Arriba made them inappropriate for aesthetic display, because enlarging the photos resulted in a significant loss of quality.<sup>170</sup> The court found a transformative purpose under the first factor and ultimately found fair use.<sup>171</sup>

## 3. *Perfect 10, Inc. v. Amazon.com, Inc.*

In a consolidated action, the Ninth Circuit heard a copyright infringement suit filed by Perfect 10, Inc., against both Amazon and Google for the defendants' display of its images in thumbnail form.<sup>172</sup>

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<sup>162</sup> *Id.* at 802.

<sup>163</sup> *Id.*

<sup>164</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>165</sup> *Id.* at 815.

<sup>166</sup> *Id.* at 818.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 820.

<sup>172</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

Perfect 10 published and sold photographs of nude models on a subscription website, some of which were illegally republished elsewhere on the web.<sup>173</sup> Subsequently, Google’s search engine software automatically included these photos in its index and displayed thumbnail versions of the copyrighted photos in search results.<sup>174</sup> Under the first-factor analysis, the court cited *Kelly v. Arriba* in finding Google’s use of the photos transformative.<sup>175</sup> Similar to what the defendant did in *Kelly*, Google took photos originally created for an aesthetic or entertaining purpose, and transformed them into “pointer[s]” directing internet users to a source of information, a use that added social value to the original photos.<sup>176</sup> The court explained that this significantly transformative use served a public benefit and weighed heavily in favor of fair use.<sup>177</sup>

#### 4. *Bouchat v. Baltimore Ravens Ltd. Partnership*

In *Bouchat v. Baltimore Ravens* the Court of Appeals for the Fourth Circuit found fair use regarding a display of the “Flying B Logo” in the lobby of the Baltimore Ravens’ team headquarters.<sup>178</sup> Artist Frederick Bouchat created and owned the copyright to the drawing used by the Ravens as their official team logo from 1996 through 1998.<sup>179</sup> The “Flying B Logo” appeared in photographs on the helmets of players from the team’s first-ever draft picks and on tickets from the Ravens’ first season, both of which were on display in the lobby.<sup>180</sup> In its first-factor analysis, the court examined the use of the logo in a “museum-like setting” (the team headquarters lobby was dedicated to displaying team history), which it determined to be fair use of a work for the purpose of teaching, scholarship, or research, as listed in the preamble to § 107.<sup>181</sup> The original purpose of the logo was a symbol of identification for the Ravens.<sup>182</sup> In contrast, the logo’s use in a museum-like setting, as a historical display of the Ravens’ inaugural season and first draft picks, was a transformative purpose adding new value to the logo.<sup>183</sup> By

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<sup>173</sup> *Id.* at 1157.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1165.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1166, 1169-70.

<sup>178</sup> *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301 (4th Cir. 2010).

<sup>179</sup> *Id.* at 306.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 314.

<sup>182</sup> *Id.* at 309.

<sup>183</sup> *Id.* at 314.

displaying the “Flying B Logo” in a historical context, the Baltimore Ravens used the logo for its factual rather than expressive content; the court found this favored fair use.<sup>184</sup>

### 5. *Blanch v. Koons*

In *Blanch v. Koons*, the Court of Appeals for the Second Circuit affirmed a summary judgment for the defendant artist, finding that the artist’s use of a fashion photographer’s copyrighted photo in a collage painting was fair.<sup>185</sup> Defendant Koons, a visual artist known for incorporating popular media and consumer advertising images into his artwork, used a photograph of a woman’s legs, taken by Blanch, in his “Easyfun-Ethereal” series painting titled “Niagara.”<sup>186</sup> Koons, whose work is widely displayed in museums and commercial galleries, became the target of a copyright infringement suit after Blanch discovered “Niagara” on display in the Guggenheim Museum in New York City.<sup>187</sup> Koons successfully proved his secondary use of Blanch’s photograph was transformative, because his purpose in using the photo was drastically different from Blanch’s purpose in creating it.<sup>188</sup> Koons used the image as raw material for the purpose of commenting on the “social and aesthetic consequences of mass media.”<sup>189</sup> In contrast, Blanch originally created the photograph, titled “Silk Sandals by Gucci,” as a fashion advertisement for publication in *Allure* magazine.<sup>190</sup>

### 6. *Reyes v. Wyeth Pharmaceuticals, Inc.*

Although the district court in *Reyes v. Wyeth Pharmaceuticals, Inc.* ultimately did not find fair use, the court’s analysis under the first factor is a helpful illustration of transformative use based on a difference in purpose. The work involved was a glass sculpture created by Reyes, titled “The Watcher,” which was subsequently photographed without her

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<sup>184</sup> *Id.*

<sup>185</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

<sup>186</sup> *Id.* at 246-248.

<sup>187</sup> *Id.* at 246-249.

<sup>188</sup> *Id.* at 252.

<sup>189</sup> *Id.* at 253. Although this Note focuses on transformative purpose, this case also exemplifies physical transformation of a work in a secondary use. Koons “included in the painting only the legs and feet from the photograph, discarding the background. . . . Koons inverted the orientation of the legs so that they dangle vertically downward above the other elements of ‘Niagara’ rather than slant upward at a 45-degree angle as they appear in the photograph. He added a heel to one of the feet and modified the photograph’s coloring.” *Id.* at 248.

<sup>190</sup> *Id.* at 247-48.

permission and used by Wyeth Pharmaceuticals in an advertisement that was part of a campaign to raise awareness about rheumatoid arthritis.<sup>191</sup> The court inferred that Reyes, in creating “The Watcher,” intended it to be sold and or displayed as a visual work of art and to appear next to the other sculptures in her “Guardians of the Four Elements” series.<sup>192</sup> While the depiction of “The Watcher” in the campaign ad was not materially altered in any way, nor was it the subject of criticism or commentary, the *purpose* behind the use of the sculpture was transformative, and the court accorded a great deal of weight to this finding.<sup>193</sup> The ad pictured a woman holding “The Watcher” with the overlaid text, “I was born to create . . . but I was diagnosed with rheumatoid arthritis.”<sup>194</sup> The ad’s purpose was to show it is possible, due to available treatments, for individuals suffering from the disease to enjoy creative activities such as sculpting that involve dexterity and joint function.<sup>195</sup> The broader purpose behind the ad campaign was to raise awareness of rheumatoid arthritis and available treatments.<sup>196</sup> This was distinct from the purpose behind the original creation of “The Watcher,” which had nothing to do with the disease, even though the sculpture was still depicted as a creative work of art in the secondary use.<sup>197</sup> Although the court ultimately found the defendant’s use of Reyes’s glass sculpture in a public-service ad campaign was *not* fair use, the court *did* find the use to be somewhat transformative.<sup>198</sup>

### 7. *Bill Graham Archives v. Dorling Kindersley Ltd.*

In *Bill Graham Archives v. Dorling Kindersley Ltd.*, the Court of Appeals for the Second Circuit found that fair use was made of seven Grateful Dead images reproduced in a biographical book of the music group published by Dorling Kindersley.<sup>199</sup> Bill Graham Archives owned copyrights to the images in question, which were originally used on

<sup>191</sup> Reyes v. Wyeth Pharm., Inc., 603 F. Supp. 2d 289, 293 (D.P.R. 2009).

<sup>192</sup> *Id.* at 296.

<sup>193</sup> *Id.* (explaining that the sculpture was created for the purpose of artistic display, but it was used by *Wyeth* as a tool to convey a message and promote awareness of rheumatoid arthritis, a use the court deemed transformative).

<sup>194</sup> *Id.* at 293. The ad further advised individuals suffering from rheumatoid arthritis to consult their physicians about treatment options that could allow them to slow joint damage and reduce pain, in order to continue doing certain hobbies and activities. *Id.*

<sup>195</sup> *Id.* at 296.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 296-97.

<sup>198</sup> *Id.* at 292.

<sup>199</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).



Grateful Dead event posters and concert tickets.<sup>200</sup> In 2003, Dorling Kindersley published a coffee table book depicting the cultural history of the Grateful Dead, which incorporated the seven images in reduced form for the purpose of describing the concerts they represented.<sup>201</sup> The court held the publisher's use of the creative images in a biographical work was transformative.<sup>202</sup> The expressive and promotional purposes for which the images were originally used were distinct from the purpose behind their reproduction in Dorling Kindersley's book.<sup>203</sup> The publisher used the images to memorialize historic events in the Grateful Dead's thirty-year career in a chronological fashion.<sup>204</sup> The images served as graphic factual representations of specific concerts and events as well as enhancement for the biographical information that was communicated throughout the book.<sup>205</sup> The transformative purpose behind the publication, coupled with the size and layout changes of the images, led the court to find the purpose and character of Dorling Kindersley's use weighed heavily in favor of fair use, which was the ultimate holding of the case.<sup>206</sup>

#### D. SUMMARY

These cases illustrate common themes among secondary uses of copyrighted works. In each instance, a visual artistic work underwent a transformation in purpose, as opposed to physical alteration. *Mattel, Kelly, Perfect 10, Blanch*, and *Bill Graham Archives* each involved one or more photographs used for a different purpose by a secondary user with little or no physical modifications.<sup>207</sup> *Bouchat* and *Reyes* involved similar situations, in which works of art ("Flying B Logo" in *Bouchat*, a glass sculpture in *Reyes*) was created for one purpose and then subsequently photographed and employed for another purpose. Not only were these distinctions in purpose deemed transformative under the first factor analysis, but every decision except *Reyes* ultimately found the defendant's secondary use to be fair.

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<sup>200</sup> *Id.* at 607.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 615.

<sup>203</sup> *Id.* at 608-09.

<sup>204</sup> *Id.* at 609.

<sup>205</sup> *Id.* at 610.

<sup>206</sup> *Id.* at 615.

<sup>207</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), was the only case involving significant physical changes to the original copyrighted photograph. See *supra* Part II.C.5 and note 189.

The original works in these cases were created for a variety of purposes, including symbolism and identification,<sup>208</sup> fashion advertising,<sup>209</sup> concert promotion,<sup>210</sup> and general artistic, aesthetic, and expressive purposes.<sup>211</sup> In contrast, secondary users employed these works for commentary and criticism,<sup>212</sup> as search engine tools,<sup>213</sup> to promote awareness of rheumatoid arthritis,<sup>214</sup> and to memorialize historical events.<sup>215</sup> Likewise, the photographs in *Monge* were created by the plaintiffs for private use,<sup>216</sup> to memorialize their wedding night and hold sentimental, visual, and aesthetic value. Conversely, Maya utilized the photos as documentary evidence to prove the existence of a marriage and to comment on or criticize the couple's representation of their relationship thus far.<sup>217</sup>

The majority opinion in *Monge* cited *Perfect 10*, noting the distinction in purpose between Maya's use and that of the plaintiffs.<sup>218</sup> In an attempt to distinguish the use in *Perfect 10* from that in *Monge*, the majority asserted Maya's use of the wedding photos left their inherent character unchanged, implying that the secondary use in *Perfect 10* did in fact change the character of the original images.<sup>219</sup> The majority went on to state that a separate purpose by itself does not necessarily transform the work into something new.<sup>220</sup> This statement is at odds with the Ninth Circuit's opinion in *Perfect 10*, which noted that "[t]he fact that Google incorporates the entire *Perfect 10* image into the search engine results does not diminish the transformative nature of Google's use."<sup>221</sup> This analysis, coupled with the minimal physical transformation of the images by Google,<sup>222</sup> indicates that a distinction in purpose is enough to show transformation. This example shows how the majority analysis in *Monge*

<sup>208</sup> See *supra* Part II.C.1, 4.

<sup>209</sup> See *supra* Part II.C.5.

<sup>210</sup> See *supra* Part II.C.7.

<sup>211</sup> See *supra* Part II.C.2, 3, 6, 7.

<sup>212</sup> See *supra* Part II.C.1, 5.

<sup>213</sup> See *supra* Part II.C.2, 3.

<sup>214</sup> See *supra* Part II.C.6.

<sup>215</sup> See *supra* Part II.C.4, 7.

<sup>216</sup> See *infra* Part III.B.

<sup>217</sup> See *supra* Part I.C.1, summarizing the dissent's analysis of the first fair-use factor in *Monge*.

<sup>218</sup> *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012).

<sup>219</sup> See *id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

<sup>222</sup> See *id.* at 1155 ("The thumbnail images are reduced, lower-resolution versions of full-sized images stored on third-party computers.").

strayed from the path of previous Ninth Circuit rulings regarding transformative purpose.

The dissenting opinion in *Monge* correctly interpreted Ninth Circuit precedent from *Mattel* in analyzing Maya's use under the second factor. The dissent relied on *Mattel* for its conclusion that Maya's transformative use of the photos held a greater significance in the overall analysis than the unpublished or commercial nature of the photos.<sup>223</sup> Supreme Court precedent laid the foundation for the *Mattel* court's opinion that the nature of the copyrighted work is typically not a "terribly significant" element in the overall analysis, and "the more transformative the new work, the less will be the significance of the other factors."<sup>224</sup> Following this reasoning, the dissent argued Maya's transformative use should have been paramount in the analysis and should have mitigated the negative impact of other characteristics of the use, such as the previously unpublished nature of the plaintiffs' photos.<sup>225</sup>

Had the majority aligned its analysis of the first factor with these previous decisions from the Ninth Circuit and other circuits, its findings would have been similar to those of the dissent and would have favored a finding of fair use.

## CONCLUSION

The illustrative cases in Part II, read together with the facts of *Monge*, make the dissenting opinion more persuasive than the majority opinion of the Ninth Circuit. If a photo is created for one purpose and subsequently published for another purpose, that publication should be deemed a transformative use, and that finding should be given the most weight under the fair-use doctrine. Subpart A below revisits the decision in *Monge* in light of the analysis above. Subpart B contemplates the possible impacts of the majority decision in *Monge v. Maya Magazines, Inc.*, including the "private use exception" examined by Judge Smith in his dissent.

### I. REVISITING THE DECISION IN *MONGE V. MAYA MAGAZINES, INC.*

The *Monge* majority found Maya's use of the wedding photos in its magazine spread to be non-transformative because (1) minimal material

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<sup>223</sup> *Monge*, 688 F.3d at 1189 (Smith, J., dissenting).

<sup>224</sup> *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>225</sup> *Monge*, 688 F.3d at 1189 (Smith, J., dissenting).

changes were made, (2) the photos were used for the same purpose of documenting the wedding, and (3) the photos were insufficiently newsworthy.<sup>226</sup> Dissenting, Judge Smith disagreed on all points.<sup>227</sup> Although the dissent addressed the significance of Maya's physical editing of the photos and their newsworthy value, its discussion regarding purpose is especially persuasive because the analysis of transformative purpose is more closely aligned with fair-use precedent.<sup>228</sup>

Plaintiffs Monge and Reynoso created the collection of photos in question as a keepsake to memorialize their wedding night.<sup>229</sup> The couple intended the photos for personal use only and intentionally kept these photos and their marriage status confidential as part of a marketing ploy.<sup>230</sup> In *Toward a Fair Use Standard*, Judge Leval noted that transformative uses may include "exposing the character of the original author [or] proving a fact,"<sup>231</sup> words that Judge Smith used to support his contention that transformative use was present.<sup>232</sup> Judge Smith argued that Maya used the couple's wedding photos as an exposé, revealing the true nature of Monge and Reynoso's relationship as being contrary to their previous representations.<sup>233</sup> Maya's use of the photos in such a way exposed the character of the original "authors" (Monge and Reynoso as creators) and went to prove the fact of their marriage—the kinds of circumstances recognized by Judge Leval as examples of fair use. Conversely, the majority found that both Monge and Maya used the photos for the identical purpose of documenting the wedding.<sup>234</sup> This interpretation simply skimmed the surface of Maya's purpose in publishing the photos. As Judge Smith contended in his dissent, while "documentation of the wedding" was the original *subject matter* of the photos, the majority opinion "repeatedly confuse[d]" this with the *intended purpose* of the photos.<sup>235</sup> In fact, the two purposes were fundamentally different; Maya utilized the photos as an exposé, of a

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<sup>226</sup> *Id.* at 1173-76 (majority opinion).

<sup>227</sup> *Id.* at 1185 (Smith, J., dissenting).

<sup>228</sup> See *supra* Part II.D.

<sup>229</sup> *Monge*, 688 F.3d at 1174-76.

<sup>230</sup> The reasoning behind the secrecy of their marriage was to preserve Monge's image as a young, single singer to make her more appealing to young people. *Id.* at 1186-87 (Smith, J., dissenting); see also *supra* Part I.A.

<sup>231</sup> Leval, *supra* note 47, at 1111.

<sup>232</sup> *Monge*, 688 F.3d at 1186 (Smith, J., dissenting).

<sup>233</sup> *Id.* at 1187.

<sup>234</sup> *Id.* at 1186.

<sup>235</sup> *Id.*

secret marriage and the character of the authors, while the plaintiffs created the photos as a personal and private keepsake. As illustrated in Part IIC and D above, a distinct and different purpose is a crucial element of transformativeness, and a transformative use most often weighs in favor of fair use.

The use in *Monge* was most similar to the uses in *Perfect 10* and *Kelly*, in which exact replications of images were used in thumbnail versions as search engine tools. In both of those cases, minimal physical alteration took place.<sup>236</sup> Instead, the relevant transformation was in the distinct purpose for which the images were employed. Likewise, Maya engaged in minimal physical transformation but used the photos for an entirely different purpose. Transformation in purpose should be enough. Judge Smith's opinion also drew attention to the significance of Maya's commentary in the stylized two-page spread.<sup>237</sup> Commentary, as exemplified in *Mattel* and *Blanch*, is recognized by 17 U.S.C. § 107 as a type of use that may be deemed fair.<sup>238</sup> In both those cases, the secondary use of the works was for the purpose of comment and critique.<sup>239</sup> In publishing its exposé of the plaintiffs' wedding night, Maya was essentially commenting on the lifestyles of Monge and Reynoso, along with proving the fact of their marriage and exposing the character of the plaintiffs, the original authors.<sup>240</sup> It was the dissenting opinion rather than the majority that recognized the similarities between *Monge* and recent federal opinions and applied an analysis more comparable to those illustrative opinions.<sup>241</sup> Under Judge Smith's dissent, which diligently followed Ninth Circuit precedent, Maya's use would have been deemed transformative, an element with significant influence over the final fair-use determination.

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<sup>236</sup> See *supra* Part II.C.2, 3 (explaining how in each case, the only physical transformation that took place was a reduction of full-sized images into thumbnail versions).

<sup>237</sup> *Monge*, 688 F.3d at 1185 (Smith, J., dissenting).

<sup>238</sup> 17 U.S.C.A. § 107 (Westlaw 2014) (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [17 U.S.C. §§ 106 and 106A], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

<sup>239</sup> See *supra* Part II.C.1, D.2.

<sup>240</sup> See *Monge*, 688 F.3d at 1185-86 (Smith, J., dissenting) (discussing the stylized spread and colorful behavior of the singer).

<sup>241</sup> See *supra* Part II.C.

## II. POSSIBLE IMPACT OF THE MAJORITY OPINION: THE PRIVATE-USE EXCEPTION

The *Monge* decision may have a dramatic impact on future fair-use cases in the Ninth Circuit and beyond. As noted above, the Ninth Circuit is among the most influential circuits in recent fair-use caselaw, with outside courts citing an average of 0.68 Ninth Circuit opinions per fair-use analysis.<sup>242</sup> In his dissent, Judge Smith expressed concern over a possible “private use exception” that could flow from the majority’s ruling. Judge Smith read the majority opinion to essentially mean that if a work is created for private use, subsequent publication for its newsworthy element will not amount to fair use.<sup>243</sup> This would be true especially in a situation in which other means of exposing a newsworthy story may exist.<sup>244</sup> The ability to corroborate a news story in some way through a non-copyrighted source does not automatically remove the element of newsworthiness.<sup>245</sup> In the words of Judge Smith, “News stories have multiple purposes, layers, and facets and, by their nature, evolve over time.”<sup>246</sup>

Creating a private-use exception could potentially result in a plethora of frivolous lawsuits. Imagine “private use” as a means of retaliation against media publications by those in the public eye. Any celebrity or public figure, after being subjected to unfavorable press that includes a photograph or other work, could subsequently register the published work and sue for copyright infringement.<sup>247</sup> Sex tapes, cell phone and Instagram photos, texts, tweets, and Facebook posts are all “works” that could presumably fall under the umbrella of private-use immunity.<sup>248</sup> “[Celebrities’] influential role in society sets them apart

<sup>242</sup> Beebe, *supra* note 2, at 568. From 1978 through 2005, fair-use opinions from the Second and Ninth Circuits were cited by outside courts an average of 1.55 and 0.68 times per fair-use analysis, respectively. *Id.* The Fifth Circuit is next, having had its opinions cited 0.14 times per fair-use analysis by outside courts. *Id.* These numbers show that the Ninth Circuit not only is the second most influential circuit in recent fair-use law, but is over four times *more* influential than the next-most-cited circuit. *Id.*

<sup>243</sup> *Monge*, 688 F.3d at 1187 (Smith, J., dissenting).

<sup>244</sup> *See id.* at 1188.

<sup>245</sup> *See id.* (describing how the dissent disagreed with the majority’s contention that publishing the couple’s marriage certificate, a public record, would have been sufficient to corroborate Maya’s story).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1187-88.

<sup>248</sup> In his opinion, Judge Smith specifically discussed the text messages used in implicating Tiger Woods’s multiple infidelities and Congressman Weiner’s seminude photos displayed across Facebook and Twitter as examples of newsworthy stories that could have been destroyed had these public figures been allowed to copyright these “works” based on their private-use purpose. *Id.*

from the private individual, and thus, they invite attention and comment.”<sup>249</sup> Those who choose lifestyles or careers in the public eye should be aware of and prepared for their images to surface in the media from time to time in ways that may be unfavorable. This is the cost of living a “public” lifestyle. Media companies simply supply the public with an item, namely celebrity gossip, that is in high demand. Celebrities and public figures profit from the public dissemination of their images just as much as, if not more than, they are harmed. Because the former cannot come without the latter, the publication of any image for its newsworthy element—even if the image was originally created for private use—should constitute fair use..

Continuing advances in technology create additional opportunities for abuse of copyright law under a private-use exception. Every owner of a digital camera or smart phone is essentially a “photographer,” and with exponential growth in the popularity of social media, it becomes increasingly easier to view, share, and appropriate the photographs of others. A private-use exception could in theory, protect every photo taken by an individual and posted on social media, or sent via email or text message. Such photos could easily be downloaded or saved and subsequently supplied to a media outlet for publication. Under the private-use exception, such photos would potentially be protected if registered by the owner. Such protection does not further the essence of copyright, which is to promote science and the arts, not the casual cell phone or Facebook photo.<sup>250</sup> In a litigation-hungry society, such an exception could serve as a vehicle for owners of such photos to pursue financial gain.

This theoretical exception overrides the newsworthiness concept under fair use and invokes the courts, rather than society, to decide what is sufficiently newsworthy.<sup>251</sup> There should be no private-use exception. The obsession with celebrity gossip in today’s society fuels the demand for stories such as the one told in *Monge*, thereby making them newsworthy. In light of recent fair-use caselaw, courts should place greater, if not dispositive weight, on the first factor, “the purpose and character of the use,” and the transformative-use doctrine in order to avoid the creation of a private-use exception in the context of newsworthy celebrity gossip.

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<sup>249</sup> Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 471 (2013) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)) (internal quotation marks omitted).

<sup>250</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>251</sup> *Monge*, 688 F.3d at 1188 (Smith, J., dissenting).