

**Shirman v. WHEC-TV, LLC**  
**18-CV-6508-FPG, 2019 U.S. Dist. LEXIS 83767 (W.D.N.Y. May 17, 2019)**

Year	2019
Court	United States District Court for the Western District of New York
Key Facts	Plaintiff Boris Shirman is a photographer who recorded interviews with and took photographs of young voters as they prepared to vote in the 2016 presidential election. Shirman compiled the audio recordings of the interviews and corresponding photographs into a video montage organized thematically concerning topics related to the voters' political involvement. On the eve of the election, Defendant WHEC-TV, LLC ("WHEC"), a TV news broadcaster, aired a story about first-time voters in the upcoming election, which incorporated portions of both the audio and video of Shirman's video, to which it added voice-over and graphics. Shirman sued for copyright infringement. WHEC filed a motion to dismiss.
Issue	Whether a news broadcaster's repackaging portions of a video montage into a news segment about the same topic is a fair use.
Holding	The court denied WHEC's motion to dismiss based on its fair use defense. The first fair use factor, the purpose and character of the use, did not favor WHEC. Initially, the court noted that even though the statute's preamble mentions "news reporting" as a favored category, a news report that "merely repackages or republishes the original" is unlikely to be fair. The court could not conclude that the use was "transformative" as a matter of law. WHEC's claim that it aired Shirman's montage to report on "the creation of the video itself" was unpersuasive. In addition, although it did not reject WHEC's argument that the original work concerned voters' feelings whereas its reporting concerned issues that were important to new voters, it found that it also found it plausible that the broadcast used Shirman's video for the same purpose as the original. Also, WHEC's use was commercial and it "profited" by forgoing licensing fees. On the second factor, the nature of the copyrighted work, the fact that Shirman's work was factual and had been previously published weighed in WHEC's favor, but the court declined to determine this factor conclusively. Considering the third factor, the amount and substantiality of the work used, the court contrasted WHEC's "strong" argument that it only used a small portion of Shirman's video in its broadcast with the countervailing fact that a "substantial portion" of WHEC's broadcast was composed of "repackaged material" from Shirman's video. The court concluded that this factor was "difficult to fully assess" until the question of whether the use was transformative was answered. The fourth factor, the effect of the use on the potential market for or value of the work, weighed against a finding of fair use. Shirman licenses his work, so by using it in an "arguably non-transformative manner," WHEC adversely impacted Shirman's market. And if this conduct became widespread, "it would 'destroy' the market for Shirman's work." Weighing the factors together and finding that factual issues remain, at this stage, the court could not conclude that WHEC established its fair use defense, and thus denied the motion to dismiss.
Tags	Second Circuit; Film/Audiovisual; News reporting; Photograph; Review/Commentary
Outcome	Preliminary finding; fair use not found

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