

**Philpot v. WOS, Inc.**  
**No. 1:18-CV-339-RP (W.D. Tex. Apr. 22, 2019)**

Year	2019
Court	United States District Court for the Western District of Texas
Key Facts	Plaintiff Larry Philpot is a freelance photographer who attends concerts where he takes photographs—sometimes in exchange for tickets, food, and drinks, but never for monetary compensation. Philpot uploads his photographs to Wikimedia Commons, where they are available for free, subject to a Creative Commons attribution license that requires users to credit him and/or his personal website. Defendant WOS, Inc., a small media company, operates a website focused on country music. WOS published two articles on its website using two of Philpot’s concert photographs featuring musicians discussed in the articles. Both photographs were attributed to “Wikimedia Commons,” and one credited Philpot by his Wikimedia username. Philpot sent WOS a cease-and-desist letter concerning the photograph that did not credit him at all. In response, WOS added Philpot’s username. Philpot brought a copyright infringement action against WOS for its use of both photographs. WOS filed a motion for summary judgment on the issue of fair use.
Issue	Whether use of concert photographs available for free under a Creative Commons attribution license in connection with articles about musicians constitutes fair use.
Holding	Concerning the first factor, the purpose and character of the use, the court found the use to be commercial because, despite the limited profitability of WOS’s articles, the photographs were used to generate advertising revenue based on page views. Considering whether the uses were transformative, although a jury could find the uses constitute commentary, the court concluded that a reasonable jury could also find that the works were used for the same purpose. At the summary judgment stage, the court concluded the commerciality and transformativeness analysis favored Philpot. The second factor, the nature of the copyrighted work, also favored Philpot because even though his photographs convey factual information, they also reflect “creative judgments about things like angle, framing, and timing.” On the third factor, the amount and substantiality of the work used, the court distinguished WOS’s use from cases where use of the entire image was necessary because those cases involved commentary on the image or the works were reduced to thumbnails for search. Lastly, the court commented that the fourth factor, the effect of the use on the potential market for or value of the work, presumptively weighed in favor of Philpot because the use was commercial and not transformative. This presumption was rebutted, however, by evidence there is no actual or potential market for Philpot’s photographs because the two works at issue are available for free and Philpot “makes little to no money licensing or selling prints of any of his photos.” While the fourth factor tilted in favor of fair use, the court determined that its weight was not “so great” or fair use “so obvious” that no reasonable jury could find otherwise. As such, WOS’s motion for summary judgment on its fair use defense was denied.
Tags	Photograph; Internet/Digitization
Outcome	Preliminary ruling; Fair use not found

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