

**Kennedy v. Gish, Sherwood & Friends, Inc.,  
No. 4:13-cv-02236-JAR (E.D. Mo. Nov. 5, 2015)**

Year	2015
Court	United States District Court for the Eastern District of Missouri
Key Facts	Kennedy, a professional photographer, displays his copyrighted photos on his websites. Defendant Gish, Sherwood & Friends, Inc. (Gish), an advertising agency, copied low-resolution versions of 169 photographs, through screenshots, from Kennedy’s websites and used 39 of these images in sample advertisements for internal evaluation by its client. Kennedy brought suit against Gish for its unauthorized copying and use of his photos. Gish argued its actions were protected under fair use because the copying and use of low-resolution images in advertising samples was a common industry practice known as “comp” use, and because such use transformed the photos by “re-siz[ing], cropp[ing], plac[ing] into graphic designs and supplement[ing]” them with text.
Issue	Whether defendant’s unauthorized use of low-resolution images of plaintiff’s photographs for internal evaluation of advertising samples qualifies as fair use.
Holding	The court determined on summary judgment that Gish’s unauthorized “copying of 169 of Kennedy’s low-resolution images through screenshots, and subsequent alteration of those images for use in a series of story boards . . . presentations, a . . . video, . . . posters, and a counter card design” as samples for internal evaluation by its client, was fair use. The court found that factors one, three and four of the statutory fair use analysis weighed in favor of fair use. With regard to the first factor, the purpose and character of the use, the court held that Gish’s alterations of the photos placed them “in a new context to serve a different purpose” than the originals and therefore constituted a transformative use that outweighed the commercial nature of the use. The parties did not dispute that Kennedy’s photos were creative, thus the court weighed the second statutory factor, the nature of the work, in favor of Kennedy. Next, despite the fact that Gish had copied the entirety of each photo, the court found that the third factor, the amount of the work used, weighed in favor of fair use because “even making an exact copy of the work is justifiable where the purpose of the work differs from the original.” Lastly, the court found that the fourth statutory factor, the effect of the use on the potential market for the work, weighed in favor of fair use because: (1) “market harm cannot be readily inferred” where the use is transformative; and (2) there was no evidence of lost revenues from Gish given evidence of Kennedy’s practice of offering free licenses for comp use to other advertising agencies. In its summary judgment opinion, the court declined to resolve infringement claims relating to Gish’s distribution of copies of the photos to its client, stating that factual matters remained for the jury.
Tags	Eighth Circuit; Photograph; Painting/Drawing/Graphic
Outcome	Fair Use Found; mixed result