

Davidson v. United States
No. 13-942C (Fed. Cl. June 29, 2018)

Year	2018
Court	United States Court of Federal Claims
Key Facts	Plaintiff Robert Davidson is the sculptor of a Statue of Liberty replica (the “Work”), located at the New York–New York Hotel & Casino in Las Vegas, Nevada. Davidson’s replica was not exact; in particular, he described the face of his Lady Liberty as “softer” and “more contemporary.” The United States Postal Service (“USPS”) used a photograph of Davidson’s statue on a stamp without having received permission to do so or giving attribution to Davidson. Indeed, the USPS at that time did not know the photograph was of a replica. The photograph was from Getty Images, to which the USPS paid a license fee to use the photograph. Getty Images, however, did not own the rights to the underlying subject depicted in the photograph. Davidson brought a copyright infringement claim against the United States, acting through USPS, to recover damages under 28 U.S.C. § 1498(b).
Issue	Whether the government’s use of a photograph of a copyrighted work on a stamp is fair.
Holding	The court determined that the government’s use of a photograph of the Work was not fair. The court concluded that the first factor, purpose and character of the infringing work, weighed in favor of Davidson. The court found that the use was commercial: the particular photograph was chosen in large part based on “the attractiveness of the image” in hopes of achieving “higher sales.” The second factor, nature of the copyrighted work, was neutral. While “the original elements of plaintiff’s statue were creative and expressive, its intended use as a replica mitigates in favor of defendant.” Moreover, the Work had been on public display, which indicates that a use is more likely to be fair. The third factor, amount and substantiality of the portion used, weighed against a finding of fair use. The photograph used on the stamp, in focusing on the face of the statue, highlighted “[t]he original and expressive portion of plaintiff’s statue.” The final factor, effect of the use upon the potential market, weighed in favor of fair use. Davidson conceded that this factor favored the government, since he “could cite no harm to [his] business from the Postal Service’s use, and he has shown no other interest in exploiting the work.” Weighing the factors together, the court concluded that the fact the USPS “print[ed] billions of copies and s[old] them to the public as part of a business enterprise...overwhelmingly favor[ed] a finding of infringement.” Even after the USPS realized its error, it “offered neither public attribution nor apology.” The court, therefore, found that the government’s use of the photograph featuring Davidson’s statue was not fair.
Tags	Federal Circuit, Sculpture, Photograph
Outcome	Fair use not found