

Barcroft Media, Ltd. V. Coed Media Group, LLC
No. 16-CV-7634 (JMF) (S.D.N.Y. Nov. 2, 2017)

Year	2017
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiffs Barcroft Media, Ltd. (“Barcroft”) and FameFlynet, Inc. (“FameFlynet”) are purveyors of entertainment-related journalism and own copyrights in celebrity and human-interest photographs. Defendant Coed Media Group (“CMG”) runs celebrity gossip and entertainment websites, and displayed twelve of Plaintiffs’ images on its sites without taking any licenses. The images depict actresses like Salma Hayek and Amanda Bynes, and singers like Selena Gomez, as well as several non-celebrity subjects. Some of the images were cropped, or were thumbnails, or had text and/or CMG’s logo superimposed on them. Plaintiffs sent a cease-and-desist letter, and thereafter the parties attempted to negotiate a subscription fee whereby CMG could use Plaintiffs’ images. A year after those negotiations broke down, and after CMG deleted the images from its site, Plaintiffs filed suit for copyright infringement; CMG claimed that Plaintiffs waived most of their infringement claims, and that displaying the images was fair use. The court held a bench trial.
Issue	Whether CMG’s use of celebrity and human-interest photographs on its entertainment and celebrity websites constituted fair use.
Holding	The court determined that Plaintiffs did not waive their claims, and after conducting the four-step analysis, the court found that CMG’s use of the photographs was not fair. As to waiver, a statement by Plaintiffs’ representative “not to worry” about the images in the cease-and-desist letter could not constitute knowing waiver where license negotiations continued after the comments. As to fair use, the court concluded that the first factor, purpose and character of the infringing work, “cut[] strongly against CMG” because “it displayed the Images in the same manner and for the same purpose as they were originally intended to be used,” and thus were not transformative. The court held that the use was not transformative criticism or commentary because CMG’s articles “did not comment on, criticize, or report news <i>about the images themselves</i> ; instead, they used the Images as illustrative aids because they depicted the subjects described in its articles.” The court also noted “the commercial nature of CMG’s use.” The second factor, nature of the copyrighted work, “cut[] slightly in CMG’s favor” because the photographs “are essentially factual in nature.” The third factor, amount and substantiality of the portion used, weighed against fair use because CMG “used all or most of each original Image in its website displays.” The final factor, effect of the use upon the potential market, weighed against fair use because “CMG displayed the Images for the very purpose for which they were originally intended,” and thus the use “usurped the function of the original works in the market.” Further, “if CMG’s practice of using celebrity and human interest photographs without licensing were to become widespread, it is intuitive that the market for such images would diminish correspondingly.” Thus, the court concluded that CMG’s use of the photographs was not fair, and granted Plaintiffs a final injunction and damages.
Tags	Second Circuit, Internet/Digitization, Photograph, Review/Commentary
Outcome	Fair use not found

Source: U.S. Copyright Office Fair Use Index. For more information, see <http://copyright.gov/fairuse/index.html>.