

Golden v. Michael Grecco Prods.

No. 19-CV-3156 (NGG) (RER), 2021 U.S. Dist. LEXIS 43701 (E.D.N.Y. Mar. 9, 2021)

Year	2021
Court	United States District Court for the Eastern District of New York
Key Facts	Plaintiff, Lee Golden III, owns and operates a pop culture blog. In 2015, Golden published a blogpost about rumors of a possible reboot of the television show <i>Xena: Warrior Princess</i> (the “Post”). Golden’s post included a photograph of Lucy Lawless as Xena (the “Photograph”), which was taken by professional photographer Michael Grecco in 1997 for a photoshoot for the original television show. Grecco was paid for the images he took and he retained all copyrights to the photographs. Since 2009, Grecco had licensed Photograph through Getty Images. Although disputed by Grecco, Golden points to evidence showing the Photograph was licensed eleven times between 2010 and 2013, generating \$3.94 in revenue. Golden’s blog earns money from displaying banner ads, but Golden asserts he earned no money from the Post. In 2018, Grecco discovered the Post and informed Golden of the alleged infringement of the Photograph. Golden responded by apologizing and removing the photograph, but after Grecco threatened legal action, Golden brought an action seeking a declaratory judgment that he did not violate Grecco’s copyright or, in the alternative, that he was an innocent infringer. Grecco asserted a counterclaim for copyright infringement to which Golden asserted fair use and other defenses.
Issue	Whether the use of a promotional photograph from a commercial photoshoot in a blog post reporting on the television show is fair use.
Holding	Considering the first factor, the purpose and character of the use, the court found that Golden’s use of the Photograph was not transformative, which weighed against fair use. Although the Post could be considered “news reporting” about the potential reboot, Golden used the Photograph as an “illustrative aid,” not to provide criticism or commentary on the Photograph itself. The court also found that the Post did not transform the purpose of the Photograph from “promotion to historical artifact.” The second factor, the nature of the copyrighted work, disfavored fair use because the Photograph is “[a] portrait photograph that is the clear product of the photographer’s artistic choices.” The third factor, the amount and substantiality of the portion used, disfavored fair use as well because Golden used the entire image, unaltered. The court found the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, also disfavored fair use. Although there was limited demand for licensing the Photograph, the court reasoned that the “secondary market would be meaningless if entertainment websites could use the image without paying the licensing fee, even if few or no customers showed interest in [the Photograph].” The court weighed these factors together and concluded that Golden’s use of the Photograph was not fair use.
Tags	Internet/Digitization; News reporting; Photograph
Outcome	Fair use not found

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