

**Philpot v. Indep. J. Review**  
**92 F.4th 252 (4th Cir. 2024)**

Year	2024
Court	United States Court of Appeals for the Fourth Circuit
Key Facts	Plaintiff Larry Philpot, a concert photographer, took a photograph of musician Ted Nugent in July 2013. Philpot published the photograph on Wikimedia Commons where it is available for free but subject to a Creative Commons attribution license that requires users to credit Philpot and his personal website. Philpot also licensed the photograph. Defendant Independent Journal Review (“IJR”), a news and opinion website, published an article in 2016 titled “15 Signs Your Daddy Was a Conservative,” which featured Philpot’s photo without attribution. The article contained a hyperlink to Nugent’s Wikipedia page, from which users could then access the Wiki Commons site that hosted the photograph and contained the attribution information. The article generated approximately \$2 to \$3 in advertising revenue based on the number of page views. In 2020, Philpot sued IJR for copyright infringement. IJR moved for summary judgment, raising the affirmative defense of fair use. Philpot also moved for partial summary judgment that the use was not fair. The district court granted IJR’s motion despite finding there was a genuine dispute of material fact as the validity of Philpot’s copyright registration. Philpot appealed.
Issue	Whether use of a photograph available under a Creative Commons attribution license in an article on a website that generates ad revenue constitutes fair use.
Holding	The court concluded that IJR’s use of the photograph did not constitute fair use as all four factors weighed against such a finding. Concerning the first factor, the purpose and character of the use, the court found the use to be non-transformative and commercial. The court determined that the use was not transformative because IJR used the photograph for “precisely the same reason” that Philpot took it: to depict Nugent. Further, the court concluded that IJR “did not alter or add new expression . . . beyond cropping the negative space” and, rejecting the district court’s finding, held that merely placing the photograph in a new context without adding “new function or meaning” was not transformative. The court found IJR’s use was commercial because IJR “stood to profit” from advertising revenue earned through article views. The court also considered the use “exploitative” as Philpot licensed the photograph and “IJR did not pay the customary price of direct attribution.” The second factor, the nature of the copyrighted work, also weighed against a finding of fair use because Philpot made “several creative choices in capturing the [photograph],” which “merits ‘thick copyright protection’.” On the third factor, the amount and substantiality of the portion of the work used, the court held that although IJR cropped some of the negative space, it copied a “significant percentage” of the photograph and kept the expressive features that constitute the “heart” of the work. Lastly, the court held that the fourth factor, the effect of the use on the potential market for or value of the work, weighed against fair use. The court concluded that IJR failed to rebut the presumption of market harm for a commercial, non-transformative use involving duplication of an entire work. In addition, the court observed that although Philpot permits use of the photograph for “nothing more than proper attribution,” his potential market for licensing the photograph to media outlets would decrease if IJR’s behavior—copying for commercial purposes without payment or attribution—became widespread.
Tags	Internet/Digitization; Photograph
Outcome	Fair use not found

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