

Romanova v. Amilus Inc.
138 F.4th 104 (2d Cir. 2025)

Year	2025
Court	United States Court of Appeals for the Second Circuit
Key Facts	Plaintiff Jana Romanova (“Romanova”), a professional photographer, took a picture of a woman with two snakes in a domestic environment. Romanova licensed the photograph to National Geographic Magazine, which published it in an article titled “Intimate Photos of People and Their Beloved Pet Snakes.” Defendant Amilus Inc. (“Amilus”) subsequently copied the photograph and incorporated it into an article titled “Trending: Dogs, Cats . . . and Other Pets, to Start Off 2018” on Amilus’s website, which required a paid subscription to access. After receiving no response to cease-and-desist demands sent to Amilus, Romanova sued for copyright infringement. In the district court, Amilus did not answer the complaint or appear; Romanova moved to enter default judgment. While that motion was pending, the court on its own ordered Romanova to demonstrate why Amilus’s use was not fair. Without Amilus’s participation, the court determined that its publication of the photograph was fair use, finding that it communicated a message that was different than Romanova’s original intent and dismissed Romanova’s complaint with prejudice. Romanova appealed; Amilus did not participate.
Issue	Whether using a photograph that was licensed and published in an article to illustrate another article on a different website that charges a subscription fee constitutes fair use.
Holding	Considering the first factor, the purpose and character of the use, the appellate panel concluded that Amilus’s use was not transformative or justified. In a lengthy evaluation of the caselaw on this factor, the court outlined a few categories of justifications that—in addition to parody, criticism, and commentary—favor a finding of fair use: (1) providing information to the public about the copied work or its author; (2) contributing valuable information on any subject of public interest; and (3) providing a valuable service to the public. The court further noted that because such uses typically do not enable public access to the copy, they are unlikely to “serve as a substitute for the original in the marketplace” or “substitute for the protected expression of the original.” Turning to the ruling below, the panel found “two significant errors” in the district court’s transformativeness analysis. First, the district court improperly focused on whether the user “asserted a fact about the original” when it should have instead considered “whether <i>the copying of the original</i> communicates a message that differs from the message of the original.” Second, the district court did not identify a valid justification for the copying. Performing its own analysis, the appellate panel concluded that Amilus’s copying did not show a growing trend to publish photos of people with pets online, and even if it did, that rationale did not justify unauthorized copying and distribution of Romanova’s photograph because “[l]ittle would remain of an author’s copyright protection if others could secure the right to copy and distribute a work simply by asserting some fact about the copied work” that was not commentary or criticism. The court further concluded that Amilus commercially exploited Romanova’s work because it stood to profit from its monthly subscription fee while “competing in a market that copyright law reserves exclusively to [Romanova].” In short, the court found the first factor “decidedly favors [Romanova].” The second factor, the nature of the copyrighted work, weighed against fair use because the photograph was an artistic work and the message that it conveyed was “identically replicated” by Amilus’s copy. On the third factor, the amount and substantiality of the portion used

	in relation to the copyrighted work as a whole, the court found that while Amilus’s copying of the entirety of the work was “not fatal to a claim of fair use,” it also precluded Amilus from asserting that only a small portion was taken to “escape liability.” Finally, the court concluded that the fourth factor, the effect upon the potential market for or value of the original work, did not favor fair use because Amilus’s “unauthorized distribution . . . diminished the value of [Romanova’s] copyright by diminishing the likelihood that others would seek and pay for a license to publish the Photograph.” In conclusion, the appellate panel held that none of the four factors favored fair use, nor did they collectively support fair use. The appellate court reversed and remanded the case, ordering the district court to enter default judgment for Romanova.
Tags	Internet/Digitization; Photograph
Outcome	Fair use not found

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