

Schwartzwald v. Oath Inc.
No. 19-CV-9938 (RA), 2020 U.S. Dist. LEXIS 165641 (S.D.N.Y. Sept. 10, 2020)

Year	2020
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff Lawrence Schwartzwald took a photograph of actor Jon Hamm walking down the street in which Hamm appears not to be wearing any underwear under his pants (the “Photograph”). Schwartzwald licensed the Photograph to media outlets through his agency. HuffPost.com, a media website owned and operated by Defendant Oath Inc. (“Oath”), published an article titled “25 Things You Wish You Hadn’t Learned in 2013 and Must Forget in 2014,” that listed various events and trends, including notable events involving celebrities. One item in the list entitled “Some ad men don’t do underwear” discussed the media coverage that “Jon Hamm’s privates” received that year, and was accompanied by a cropped version of the Photograph, with a black box containing the words “Image Loading” over Hamm’s groin. Schwartzwald registered the Photograph in 2017 and brought suit for copyright infringement in 2018. Oath moved to dismiss the complaint, asserting fair use.
Issue	Whether using a cropped version of an unlicensed photograph in an online article discussing the attention the photograph had received when it was first published constitutes a fair use.
Holding	The court found that the first factor, the purpose and character of the use, favored a finding of fair use. Oath’s use was transformative because unlike the original photograph that illustrated what Jon Hamm looks like walking down the street, Oath’s use “served the dual purpose of mocking both Hamm and those who found the Photograph newsworthy in the first instance.” The court found that the article’s headline “makes clear that the broader purpose of the article is to poke fun at events, trends, or topics that went ‘viral’.” In addition, the play on words in the text box “alludes to both the nature of digital technology and the body part at issue,” further indicating Oath’s intention of mocking the Photograph and larger situation. The court noted that Oath’s use was also transformative because, by superimposing a text box over Hamm’s groin, “Oath modified the very portion of the Photograph that made it most valuable or unique in the first instance.” The commercial nature of the use weighed against fair use, but the court gave this limited weight because the use was transformative. The second factor, the nature of the copyrighted work, favored fair use because the court found that the “Photograph is more factual in nature than creative” and it was previously published. The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, weighed in favor of fair use because, by extensively cropping the photo and adding a text box, Oath limited its use to an amount reasonable to serve its purpose of identifying and mocking the viral topic. The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, similarly weighed in favor of fair use because it was unlikely that the secondary use would function as a substitute for the original given that “Oath’s use of the Photograph obscures its central feature.” Taking the factors together, the court found fair use as a matter of law.
Tags	News Reporting; Photograph; Review/Commentary
Outcome	Fair use found

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