

Brammer v. Violent Hues Productions, LLC
No. 18-1763 (4th Cir. Apr. 26, 2019)

Year	2019
Court	United States Court of Appeals for the Fourth Circuit
Key Facts	Plaintiff Russell Brammer is a photographer who shot a time-lapse photograph of the Adams Morgan neighborhood in Washington, D.C. Brammer posted the image on several image-sharing websites and his personal website with the phrase “© All rights reserved” beneath it. Defendant Violent Hues Productions, a film festival organizer, used a cropped version of Brammer’s photograph on its website alongside information about things to do in the D.C. area. After Brammer contacted Violent Hues to request compensation for the unauthorized use, defendant removed the photograph from its website but refused to compensate Brammer. Brammer initiated a copyright infringement action. The district court granted summary judgment to Violent Hues, holding that its use was a fair use. Brammer appealed.
Issue	Whether the use of a cropped stock photograph on a film festival website to illustrate a list of nearby tourist attractions is a fair use.
Holding	The court found the first factor, the purpose and character of the use, weighed against fair use because the use was not transformative. Unlike technological or documentary uses that involve contextual change, Violent Hues used the photograph precisely for its content, that is, to depict Adams Morgan. Although Violent Hues claimed that its use provided film festival attendees with “information” regarding Adams Morgan, this use “would not be hindered if it had to comply with Brammer’s copyright.” Further, using the photograph to illustrate a website promoting a for-profit festival without paying for a license was commercial use. In addition, because the defendant, at best, acted negligently, the panel rejected the district court’s finding that Violent Hues’ use was in “good faith.” The second factor, the nature of the copyrighted work, also weighed against fair use because Brammer’s photograph is a “stylized image, with vivid colors and a bird’s-eye view” infused with “creative choices” that entitle it to “thick” copyright protection. In the court’s view, the fact that the image had previously been published was of “no effect” in the context of photography. The third factor, the amount and substantiality of the work used, weighed against fair use because Violent Hues used roughly half the photograph, removing only the negative space and keeping the most expressive features. The fourth factor, the effect of the use on the potential market for or value of the work, weighed against fair use as well. The court applied a presumption of market harm because Violent Hues’ use was commercial and not transformative. Brammer also introduced evidence showing that he twice licensed the photograph—a licensing market which would be “dampened” if Violent Hues’ conduct were widespread. Considering the four factors together, the court concluded that “the copying here fails the ‘ultimate test’ of fair use: Violent Hues’ online display of Brammer’s photo does not serve the interest of copyright law.” Indeed, while some content “sharing” online may be fair, “[i]f the ordinary commercial use of stock photography constituted fair use, professional photographers would have little financial incentive to produce their work.” Accordingly, the panel reversed and remanded the case.
Tags	Fourth Circuit; Photograph; Internet/Digitization
Outcome	Fair use not found

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