

Fair Use Update: Just Because It's Newsworthy Doesn't Mean You Can Put It on the Air

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A recent decision by the United States Court of Appeals for the Ninth Circuit strengthens the copyright protection available for previously unpublished materials at the potential expense of the media industry. In *Monge v. Maya Magazines, Inc.*, celebrity gossip magazine *TVNotas* published two-year-old photographs of the wedding between Latin pop singer Noelia Lorenzo Monge and her manager, music producer Jorge Reynoso, under the headline, "The Secret Wedding of Noelia and Jorge Reynoso in Las Vegas." Monge and Reynoso had concealed the fact of their marriage from even Reynoso's own mother to protect Monge's image as a young, single pop singer.

The six images published by *TVNotas* came from a collection of approximately four hundred images and three videos that the magazine purchased from Oscar Viquiera, a paparazzo who occasionally worked as a driver and bodyguard for Monge and Reynoso. Viquiera claimed that he found the memory chip containing the pictures in his SUV after he had lent it to Reynoso. Monge and Reynoso sued the parent company of *TVNotas*, Maya Publishing, for copyright infringement.

The federal Copyright Act provides an exception for "fair use of a copyrighted work . . . for purposes such as . . . news reporting." To determine whether a use is "fair," the statute provides four non-exclusive factors for courts to consider: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for

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or value of the copyrighted work. Moreover, a 1992 amendment to the Copyright Act specifies that fair use may apply even to an unpublished work.

Based on these principles, the district court dismissed the case on summary judgment, finding that because Monge and Reynoso's marriage previously was undisclosed, Maya's publication of the photographs was newsworthy and constituted fair use. Monge and Reynoso appealed.

In evaluating the first statutory fair use factor—the purpose and nature of the use—the Ninth Circuit identified three relevant considerations: news reporting, transformation, and commercial use. The court held that “[a]lthough news reporting is an example of fair use, it is not sufficient itself to sustain a *per se* finding of fair use.” On the second consideration—transformation—the court found that although Maya published the images for a different purpose than that for which they were taken, this did not constitute transforming the photos. While agreeing that the magazine possessed “an unfettered right to use any factual information revealed through the photos,” the court found that this did not extend to the “publication of a noted figure's copyrighted expression.” Moreover, on the third consideration, the court held that the publication of a gossip magazine is “undisputably commercial in nature.”

Consistent with this finding, the Ninth Circuit also held that the nature of the works was not a fair use. Although the photographs were “point-and-shoot images” that lacked creativity, the court held that Maya's subsequent publication “supplanted Plaintiff's right to control the first public appearance of the photographs,” and thus counseled against the publisher's claim of fair use.

As to the amount and substantiality of the use, the court found that both quantitatively and qualitatively, the magazine published a substantial portion of the photos. Although the magazine only published six photographs out of the hundreds that it obtained, the Ninth Circuit emphasized that these were the only six photos from Monge and Reynoso's wedding night. Further, in the most important section of this opinion for the media industry, the Ninth Circuit appeared to second guess the magazine's editorial judgment, opining that the magazine's “reporting purpose could have been served through publication of the couple's marriage certificate or other sources other than copyrighted photos.”

Finally, as to the effect on the potential market, the court found that even though the photographs were not published, the copyright holder “has the right to change his mind.” Considering all of the factors together, the Ninth Circuit reversed the lower court, holding that the publication of the previously unpublished photos, while possibly newsworthy, did not constitute fair use.

The *Monge* case could hinder the ability of news organizations to broadcast copyrighted materials under the fair use exemption. While future opinions will determine the contour of the Ninth Circuit's ruling—especially as it applies to the use of sound bites and video clips—for now, news organizations should exert caution when determining whether to broadcast previously unpublished materials, asking not only whether the information itself is “newsworthy,” but also whether there is another way to present the information without the use of copyrighted material.