

MEMORANDUM

To: Supervisor
From: Elizabeth Gray
Date: ____, 2024
Re: Sisters for a Safe Center City; Fair Use Defense

QUESTION PRESENTED

Greta Games, Executive Director of the Philadelphia nonprofit organization, Sisters for a Safe Center City (“Sisters”), created a GIF to inform the city’s residents about the nonprofit’s self-defense resources. The GIF used a copyrighted image taken from Dena Dee’s “Maskless” exhibit, a collection of canvases she recently showed at Philadelphia’s New Age Gallery (“Gallery”). Under Third Circuit law in the Eastern District of Pennsylvania, should Games’s GIF constitute a fair use of Dee’s original work?

BRIEF ANSWER

Probably, yes. In deciding whether use of a copyrighted work is permissible under the fair use exception to the Copyright Act, 17 U.S.C. § 107, courts assess the totality of four non-exclusive factors: (1) the purpose and character of the use, including whether it is of a commercial nature or for non-profit educational purposes; (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 or value of the copyrighted work. 17 U.S.C. § 107. Under these factors, Games’s GIF should qualify as a fair use because it transforms Dee’s original work to convey a different message and serve a different purpose, and

because the GIF does no damage to the original market. To start, the two works express different meanings. Whereas Dee's canvas celebrates how unmasked first responders expressed themselves during the pandemic, Gomez's GIF seeks to provide information on available self-defense resources to those who feel unsafe in Center City today. Second, although Games's GIF takes Dee's entire canvas, Games transforms the original so extensively for a new, noncommercial purpose that differs from the original work's commercial purpose that a court should consider Games's use a fair one. Finally, the GIF is unlikely to replace the original or diminish its market demand because the GIF does not promote any product or service associated with the original canvas. With these factors considered together, the GIF should be considered a fair use of the original.

FACTS

In 2022, Sisters started to raise awareness about services that enable Philadelphia residents to feel safer on the city's streets. To this end, Sisters' leader, Greta Games, created a promotional GIF to educate residents about a new series of self-defense classes at Sisters' main facility. Sisters intends to use the GIF in its campaign to promote its self-defense classes to those who feel unsafe, especially if feeling that way while waiting for public transit or navigating city streets affected by the pandemic's economic effects. Sisters sought to expand the access to its classes to people who had moved into the city during or after 2022, as they had not been exposed to the organization's pre-pandemic, monthly street fairs (which had not resumed since 2020).

The GIF that Games created uses an image from a flyer that publicized the museum's public display of a collection of works by Deena Dee, a Philadelphia-based modern artist whose work has been shown in prominent art institutions nationwide. The image on the flyer about the

collection, “Maskless,” depicts a faceless version of Raina Reed, a well-known Center City community organizer and one of Games’s close friends. Inspired by the style, attitude, and resiliency of Center City’s unmasked front-line workers during the pandemic, Dee sought to capture the “core elements of modern Philadelphia style.” Dee’s original canvases depicted faceless people, intended to downplay facial features and highlight “overall style and essence.” (Local Artists to Watch, Philly Magazine, Oct. 2021, at 2). Dee has spoken enthusiastically about three potential buyers for her canvas collection, and she also plans to publish a coffee-table book featuring her canvases. (Local Artists to Watch, Philly Magazine, Oct. 2021, at 2).

To create the GIF, Games scanned the faceless image of Reed from the museum exhibit’s flyer, merged the image into a photo of Reed that Games took, and enhanced and brightened the color. Games also superimposed the message, “You are not maskless,” in bold text. (Proposed Sisters’ Promotional GIF (on file with author). Games believes the message will resonate with those whose physical or economic limitations “may make them feel unprotected” and “faceless” in the city. (Email from Robert Astrid, Senior Partner, to author (Oct. 4, 2021)).

Games decided to incorporate Reed’s image from the original flyer, rather than create one from scratch, partly due to Sisters’ “limited financial resources and manpower.” (Email from Robert Astrid, Senior Partner, to author (Oct. 4, 2021)). Moreover, Reed is “a prominent, empowering figure with whom Center City residents were likely already familiar,” and Games thought using her depiction served the organization’s informational, campaign goals more effectively than using another model. (Email from Robert Astrid, Senior Partner, to author (Oct. 4, 2021)). Sisters plans to feature the GIF in Sisters’ social-media profiles, which together have more than 100,000 followers.

DISCUSSION

A court should deem Games's GIF a fair use because the GIF substantially transforms the original canvas's message, serves a new purpose, and shows no indication it would impair the canvas's market value. Such a result is consistent with both the immediate aim of copyright law, to protect the copyright holder's creative labor, and the law's ultimate purpose, to "stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). In other words, copyright law protects creative labor from egregious infringement while still allowing others to build upon prior works. See *id.* Congress actualized the latter goal in Section 107 ("Section 107") of the Copyright Act of 1976 ("Act"), establishing the affirmative defense of "fair use" to copyright infringement. 17 U.S.C.A. § 107 (2006).

Section 107 lays out four factors courts should consider when deciding whether a particular use of a copyrighted work constitutes a fair use: (1) the purpose and character of the use, including whether it is of a commercial nature as opposed to a nonprofit or educational one; (2) the nature of the original copyrighted work; (3) the amount and substantiality of the portion of that original work used compared to that work as a whole; and (4) the effect of the use upon the potential market for or value of that original copyrighted work. *Id.* The four factors are not individually dispositive and should be "weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994).

Here, the totality of factors weighs in favor of fair use. As to factor one, Games substantially transformed the original image's message and purpose. Because the parties have stipulated that the canvas is a creative work, however, and because copies of creative works are less likely to satisfy the fair-use analysis than copies of factual works would be, a court will likely conclude that factor two weighs against fair use. Factor three may also weigh against fair

use, because the GIF took the entire image of the original canvas, but given how substantially Games altered that original, a court should still judge the fair use defense satisfied as a whole. Finally, factor four weighs strongly in favor of fair use because the GIF's promotional, educational character shows it is unlikely to act as a replacement for the original or infringe on its market share. With all four factors taken together, the GIF should qualify as a fair use.

A. Factor one favors fair use because the GIF and canvas convey substantially different messages and serve distinct purposes.

When assessing fair use, courts consider whether a new work sufficiently transforms the meaning, character, and purpose of the original, copyrighted work. *Campbell*, 510 U.S. at 569. A work that, as a mere copy, could substitute for the original is unlikely to qualify as a fair use. *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002). When comparing the character of an original and new use, courts weigh the works' respective goals, asking whether the new work advances a commercial interest or instead serves an educational, noncommercial objective. *Bell v. Powell*, 350 F. Supp. 3d 723 (S.D. Ind. 2018).

The more significantly a new work alters the message of an original, copyrighted work, the more likely the new work is to satisfy the fair use defense. *Campbell*, 510 U.S. at 579. The *Campbell* Court held in favor of fair use where a music group had parodied a well-known pop song for commercial use. *Id.* at 570. The Court explained that the original song and the new parody expressed opposing messages, with the former being a man's idealized "romantic musings" and the latter being "degrading taunts [and] a bawdy demand for sex." *Id.* at 583. The Court concluded that the parody sufficiently transformed the original work to satisfy the first fair-use factor, reasoning that the parody qualified as "something new, with a further purpose or different character, [a transformation] with new expression, meaning, or message." *Id.* at 580.

At the other end of the spectrum is *Ty*, where the court rejected a fair use defense because both new and original works expressed the same message. *Ty, Inc.*, 292 F.3d at 518. The defendant there had published picture books and collectors' guides containing photos of the plaintiff's product, Beanie Babies. *Ty, Inc.*, 292 F.3d at 518. The court held that the picture books were not sufficient transformations but were "essentially just a collection of photographs of Beanie Babies" with little added or altered. *Id.* at 519. The court deemed the photos "derivatives," which, it explained, are less likely to satisfy the fair use analysis because they are not sufficient transformations but rather retain the original work's message. *Id.* at 520.

Applying these lessons here, a court should conclude that Games's GIF was a fair use because it conveyed a new and distinct message that represented a sufficient transformation of the original. Games altered the original by brightening its colors and adding bold text, and a side-by-side comparison shows that the GIF becomes something new as it morphs from a faceless figure into the photo of Reed. Unlike in *Ty, Inc.*, Games integrated Dee's image into the GIF, altering and expanding upon it to communicate a new message. *Ty, Inc.*, 292 F.3d at 518. Dee's original image thus served as a mere jumping-off point from which Games produced a new work that reflected creative efforts and talent in a way that the Beanie Baby photos did not. A court should thus distinguish *Ty* and conclude that the fair use defense applies here for the same reasons it applied in *Campbell*: the two works expressed different ideas with different purposes.

That the two works arguably convey not only different, but contradictory, messages, further supports fair use. Dee's canvases depicted faceless people, downplaying the role of facial features to capture the models' overall style and essence. (Local Artists to Watch, *Philly Magazine*, Oct. 2021, at 2). Games, on the other hand, took Dee's faceless depiction of Reed and gave it a face overlaid by the statement, "You are not FACELESS." (Proposed Sisters'

Promotional GIF (on file with author)). In this way, Games equated being “faceless” with being “alone,” whereas Dee celebrated the resilient and “faceless” frontline workers. (Local Artists to Watch, Philly Magazine, Oct. 2021, at 2; Email from Roberts Astrid, Senior Partner, to author (Oct. 4, 2021)). Thus, although the GIF and the original canvas both explore the same theme (facelessness), they convey that theme in opposing lights. Just as the original song and the new, parody song in Campbell expressed conflicting messages about romantic songs, the GIF and canvas expressed conflicting messages about facelessness. Campbell, 510 U.S. at 583. By inverting the original’s message into a new, unique statement, Games’s GIF reinterpreted and recontextualized the original image, amounting to a transformation that supports fair use.

Also supporting fair use is that courts have held when a new work draws on a commercial, original work and does so for a non-commercial purpose, that gives the new use a non-commercial character that indicates a transformation of the original’s purpose. *Bell v. Powell*, 350 F. Supp. 3d 730. In *Bell v. Powell*, a defendant nonprofit printed the plaintiff’s cityscape photograph on a brochure promoting a conference. *Id.* at 724. Because the plaintiff sold digital copies of the photo for \$200 online, the court acknowledged that the original photo’s “nature” was “to sell copies.” *Id.* at 724. Nevertheless, the court held that the new brochure did not intend to “feature [or profit from] the photograph,” but had educational goals, which demonstrated that the photo’s “purpose and character were changed.” *Id.* at 730. The court also explained that even though participants paid to attend the conference that the brochure promoted, that did not undermine the conference’s (and therefore the brochure’s) noncommercial objective. *Id.* at 729. The court concluded that by promoting and informing attendees about the conference, the brochure gave the original photo a new, non-commercial purpose that supported the court’s overall fair-use finding. *Id.* at 730.

Just like in *Bell*, the noncommercial nature of Games's GIF shows that Games substantially and comprehensively transformed Dee's original canvas. The GIF, which promotes a nonprofit's community outreach efforts and does not generate profit, is a straightforward example of a noncommercial product; this in and of itself points toward fair use. The GIF's noncommercial character also shows that it substantially transformed the purpose of Dee's original, commercial image. Dee sought commercial gain from her canvas, whereas Games did not. Although profit may not have been Dee's sole motive, Dee modified the canvas's aesthetic value and social commentary, as evidenced by her speaking enthusiastically about potential buyers and her publishing the coffee table books. (*Local Artists to Watch*, *Philly Magazine*, Oct. 2021, at 2). Considering Dee's commercial aspirations for the original, the GIF's non-commercial character shows that Games sufficiently reinterpreted and transformed the original to educate and inform.

Even if Sisters charges fees for its services, moreover, its doing so does not compromise the nonprofit's noncommercial nature. *Bell*, 350 F. Supp. 3d at 729. Just as the nonprofit in *Bell* charged a conference fee, Sisters may raise money to further its goals without jeopardizing its overall, non-commercial nature. *Id.* That an organization raises money to sustain itself and uphold its mission does not make the organization a commercial enterprise. See *id.* Unlike the Campbell plaintiff, moreover, who profited off each copy of the parody song it sold, any money the GIF generates is only ancillary to its noncommercial goals. See *Campbell*, 510 U.S. at 570. Ultimately, therefore, the GIF not only transformed the original canvas's message but also gave it a "further purpose" (educational outreach) and a "new character" (noncommercial as opposed to commercial). *Id.* at 579. Using Dee's original work to support Sister's outreach campaign, Games through the GIF seeks to raise awareness rather than to benefit financially, which is a

noncommercial goal. (Email from Robert Astrid, Senior Partner, to author (Oct. 4, 2021)). Accordingly, the first factor favors a fair use outcome.

B. The original’s creative nature cuts against fair use but not decisively.

The second fair use factor is the nature of the copyrighted work, with courts affording greater protection to highly creative works than to factual or informational content. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“[The] use of a creative work is less likely to be fair than use of a factual work.”). Here, Dee’s original “Maskless” canvas is a paradigmatic creative work, reflecting artistic expression and original vision rather than factual reporting. This creative nature of the original canvas weighs against fair use. See *Campbell*, 510 U.S. at 586. This factor is not determinative, however, and it must be weighed with the other factors. See *id.* at 578 (“All factors are to be weighed together, in light of the purposes of copyright.”).

C. That the GIF uses the entirety of the original work weighs against a fair-use finding but is not dispositive.

Because Games incorporated the entire original image into the GIF when she could have conveyed the same message without doing so, a court’s evaluation of factor two should weigh against a finding of fair use, but that should not doom the fair use defense overall. When assessing whether a new use is fair, courts consider two factors: (1) the reasonableness of the amount and substantiality of the original portion taken relative to the whole; and (2) the extent to which the new user altered the portion taken. *Galvin v. Illinois Republican Party*, 130 F. Supp. 3d 1187, 1192 (N.D. Ill. 2015).

New works that use the entirety of an original work are less likely to satisfy the fair use analysis if the infringing party could have conveyed the same message through other means. *Galvin*, 130 F. Supp. 3d. In *Galvin v. Illinois Republican Party*, for instance, the defendants

created political campaign flyers with a photo of a politician that the plaintiff had taken. *Id.* at 1194. The court held there was sufficient proof of fair use, reasoning that the defendants could have “effectuate[d] their criticism” of the photo without using the whole of it. *Id.* By contrast, in *Bell*, even though a nonprofit organization incorporated an entire copyrighted image into its new work (a brochure for an upcoming conference), the court held that the fair use defense applied because the nonprofit used only a small portion of the brochure and the copied image was only one of the many images the nonprofit used. *Bell*, 350 F. Supp. 3d at 729. The *Bell* court also emphasized that the brochure’s purpose was only to educate and inform. *Id.* at 730. On these grounds, the *Bell* court held that although the new brochure used the entire original photo, the brochure was still a fair use because it gave the original a new character. *Id.* at 729.

Here, even though Games incorporated Dee’s entire original image into the GIF, that should not resolve the fair use analysis against her; rather, the amount Games used should be viewed in relation to how substantially she changed it. *Id.* Taking into account both factors, the GIF should still qualify as a fair use. That is so because like the defendants in *Galvin* and *Bell*, Games integrated the original image alongside other images and text. Although Games was not required to use Dee’s image to convey her message, that does not mean it was necessarily unreasonable that she did, because the actual GIF was arguably more effective than the original because the GIF featured Reed, a prominent, empowering figure with whom Center City residents were likely already familiar. (Email from Robert Astrid, Senior Partner, to author (Oct. 4, 2021)). Had Games used another model, the message she sought to convey through the GIF might not have resonated as much, especially given Reed’s role as an activist for whom residents felt trust and respect. *Id.*

Finally, although Games could have featured Reed without using the original, it is

reasonable that she would avoid starting from scratch given Sisters' limited resources. As in *Bell*, where the court deemed the alleged infringement reasonable under the circumstances, there's a good argument that the nonprofit's limited resources and Reed's prominence made Games's decision to use the entire image "reasonable in relation to the [GIF's] purpose." *Campbell*, 510 U.S. at 587. Therefore, even though Games's use of the entire, original image weighs against fair use, when viewed with the other fair use factors, it should not defeat the defense's applicability.

D. That the GIF is unlikely to replace the original in its commercial market or reduce the original's market value points toward a finding of fair use.

Because noncommercial, new uses may still diminish an original's market value, courts assess whether a new work's purpose, character, and audience demonstrate that it exists in a separate market. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014). New uses that could substitute for and replace the original in its established market are more likely to impair the original's market value and weigh against fair use. *Kienitz*, 766 F.3d at 759; *Galvin*, 130 F. Supp. 3d at 1196.

In *Kienitz*, for example, the defendant used the plaintiff's copyrighted photograph of a mayor on t-shirts that it sold as a form of political commentary. *Kienitz*, 766 F.3d at 757. Even though the defendants intended to make a small profit from the shirts, the court deemed the new use fair, concluding that a "tank top is no substitute for the original photograph." *Id.* at 759. The court also noted that the plaintiff himself did not allege that the shirt reduced the demand for his original work or any use of it that he was considering. *Id.* at 759. The court concluded that a fair-use finding was warranted because the new use did not reduce the value the plaintiff could derive from the original. *Id.* at 759.

So too here, Games's GIF is not likely to supersede Dee's original work commercially or

to reduce its market demand. Games created the GIF for social media, and her alterations to the canvas demonstrate she did not intend it to be a piece of visual art. (Email from Nick Aster, Senior Partner, to author (Oct. 4, 2021)). The alterations—brightened colors, bold text, and merging images—also better suit social media than a museum, private collection, or book, so a buyer seeking a museum-quality painting or fine art book is unlikely to consider the GIF a replacement for the original canvas. Therefore, the GIF is unlikely to exist within the original’s market, let alone reduce its demand. One potential concern is that Dee could sell copies of the image online as a digital download, but simply because two works reach an online audience does not establish they are market competitors. The GIF should still constitute fair use because it dramatically changed the original image’s message and purpose and is thus unlikely to substitute for the original even if it became available for purchase as a digital download.

A new use that mocks or diminishes an original may qualify as a fair use as long as does not undercut the original’s market value. *Galvin*, 130 F. Supp. 3d at 1196. In *Galvin v. Illinois Republican Party*, the court ruled that the defendant’s political flyers, which used a copyrighted photo of the plaintiff politician, constituted a fair use of the original photo because the flyers were unlikely to serve as a replacement or substitute for the original. 130 F. Supp. 3d at 1196. The court emphasized that the flyers, which extensively altered the original photo, were intended to criticize and mock the political figure’s fiscal policies. *Id.* On that basis, the court reasoned that anyone seeking an accurate photo of the politician would not “plausibly” choose the flyer instead. *Id.* Although the court acknowledged that the flyers may threaten the reputation of the politician and thus the value of the photo itself, the court emphasized that a copyright does not protect the holder from that type of harm. *Id.* The court concluded that unfavorable, unflattering uses such as parody or critical commentary can still be fair if they do not “result in a

substantially adverse impact on the potential market for the original.” Id. at 1195.

Similarly, here, even if the GIF challenges or devalues the original by criticizing it, that does not prevent the GIF from qualifying as a fair use. See Galvin, 130 F. Supp. 3d at 1196. The fair use analysis does not protect against “commercial depreciations” due to “critical commentary of the underlying work,” but against the harm of market substitution. Galvin, 130 F. Supp. 3d at 1196. Thus while Dee could assert both that (a) the GIF dissociates her work from its proper platform or identifies her original canvas with lowbrow mass media, thereby undermining its status as fine art, and that (b) the GIF’s social media presence could taint her reputation such that museums would be less inclined to exhibit her future work, neither of those issues are relevant. Even if Dee’s fears materialize, her “blemished reputation” is not protected by copyright law. Id. at 1197. Because the material issue is whether the GIF could feasibly replace the original, where, as here, the GIF is an unlikely market substitute, that supports a finding of fair use regardless of any collateral, reputational harm the GIF may cause to Dee. See id.

CONCLUSION

Games’s GIF should constitute a fair use of Dee’s canvas because the two works express distinct messages, serve different purposes, and exist in separate markets. Games thoroughly transformed the original canvas’s character, producing a new work that is unlikely to encroach on the canvas’s market or reduce its demand. Games also created the GIF not to generate profit but to advance Sisters’ salutary goals of reminding people who feel “faceless” that they are not alone. Given copyright law’s fundamental purpose to “stimulate artistic creativity for the general public good,” in the end, the proposed GIF should satisfy the test for fair use.