

Case No. 14-14525

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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RAANAN KATZ,

*Plaintiff-Appellant,*

v.

IRINA CHEVALDINA,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Southern District of Florida  
The Honorable James Lawrence King  
Case No. 1:12-cv-22211-JLK

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**PROPOSED BRIEF OF *AMICUS CURIAE*  
ELECTRONIC FRONTIER FOUNDATION  
IN SUPPORT OF DEFENDANT-APPELLEE**

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**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to 11th Cir. R. 26.1-1, undersigned counsel for *amicus curiae* Electronic Frontier Foundation certifies that the following list includes all persons and entities having an interest in the outcome of this case, as well as all persons and entities listed on all certificates filed in the appeal prior to the filing date of this *amicus curiae* brief.

1. Borrello, Robert J., Trial Attorney for Defendant
2. Burton, Marc A., Trial Attorney for Defendant
3. Burton, Richard J., Trial Attorney for Defendant
4. Burton Firm (The), Trial Attorneys for Defendant
5. Center for Individual Rights, Attorneys for Appellee
6. Chesal, Michael B., Trial Attorney for Plaintiff
7. Chevaldina, Irina, Defendant/Appellee
8. Coffey Burlington, Trial Attorneys for Defendant
9. Davis, Michael T., Trial Attorney for Defendant
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13. Electronic Frontier Foundation, *Amicus Curiae*
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18. Katz, Raanan, Plaintiff/Appellant
19. King, James L., U.S. District Judge, S.D. Fla.
20. Kluger, Alan J., Attorney for Appellant
21. Kluger, Kaplan, Silverman, Katzen & Levine, PL, Attorneys for Appellant
22. Kuehne, Benedict P., Trial Attorney for Defendant
23. Law Office of Benedict P. Kuehne, P.A., Trial Attorneys for Defendant
24. Levine, Todd A., Attorney for Appellant
25. McAliley, Chris M., U.S. Magistrate Judge, S.D. Fla.
26. Nazer, Daniel, Attorney for *Amicus Curiae* Electronic Frontier Foundation
27. Peretz, Chesal & Herrmann, PL, Attorneys for Plaintiff
28. Randazza, Marc J., Trial Attorney for Defendant
29. Randazza Legal Group, Trial Attorneys for Defendant
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35. Solnick, Peter J., Trial Attorney for Defendant
36. Spielman, Darren J., Trial Attorney for Defendant
37. Stoltz, Mitchell, Attorney for *Amicus Curiae* Electronic  
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39. Torres, Edwin G., U.S. Magistrate Judge, S.D. Fla.
40. Villa, Vanessa, Trial Attorney for Defendant
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There is no interested party that is a publicly traded corporation.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Electronic Frontier Foundation states that it does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Dated: May 6, 2015

Respectfully submitted,

/s/ Mitchell Stoltz

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**STATEMENT OF INTEREST OF *AMICUS CURIAE***

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect innovation, free speech, and privacy in the digital world. With over 22,000 active donors and dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age, and it publishes a comprehensive archive of digital civil liberties information at [www.eff.org](http://www.eff.org). EFF is particularly interested in the First Amendment rights of Internet users and views the protections provided by both the First Amendment and the fair use doctrine as vital to the promotion of a robustly democratic society. As part of its mission, EFF has served as counsel or *amicus* in key cases involving the First Amendment and/or the fair use doctrine as applied to online speech, including *Golan v. Holder*, 132 S. Ct. 873, (2012) (*amicus*); *Dhillon v. Does 1-10*, No. C 13–01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014) (*amicus*); and *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281 (N.D. Cal. July 25, 2008) (*counsel*).

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party’s counsel authored this brief in whole or in part, and neither any party, nor any party’s counsel, contributed money towards the preparation of this brief. No person other

than *Amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Defendant-Appellee Irina Chevaldina (“Defendant”) consents to the filing of the brief, while counsel for Plaintiff-Appellant Raanan Katz (“Plaintiff”) has informed EFF that Plaintiff does not consent. Accordingly, EFF has concurrently filed a motion for leave to file this brief.

**STATEMENT OF THE ISSUES**

The *amicus* brief of EFF addresses the following issues:

1. Whether the Court should consider the First Amendment interests of both Defendant and the public when analyzing fair use in this case.
2. Whether the district court correctly determined that Defendant's use of the photograph in question was, as a matter of law, a protected fair use.

## **SUMMARY OF ARGUMENT**

This lawsuit is a blatant attempt by Plaintiff Raanan Katz to use copyright as a means to censor unwanted online criticism—*i.e.*, Defendant Irina Chevaldina’s blog posts criticizing Plaintiff’s business practices and featuring an “unflattering” photograph of Plaintiff. *See Katz v. Chevaldina*, No. 12-22211-CIV-KING, 2014 WL 2815496, \*1 (S.D. Fla. June 17, 2014) *report and recommendation adopted*, No. 12-22211-CV, 2014 WL 4385690 (S.D. Fla. Sept. 5, 2014). But Defendant’s speech is protected under the law. While the Copyright Act grants artists a limited monopoly over their creative works to “encourage the production of original literary, artistic, and musical expression for the good of the public,” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994), because the exercise of such rights inevitably impacts speech, the Act also contains necessary “built-in First Amendment accommodations”—such as the fair use doctrine. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). The fair use doctrine ensures that secondary authors can use copyrighted works for a variety of purposes, including precisely the kind of criticism and commentary at issue in this case. Plaintiff nevertheless filed this copyright infringement lawsuit, attempting to get an unflattering photograph of himself taken off the web.

This Court should not tolerate attempts to use copyright as a censorship tool. Such practices implicate not only the rights of individuals such as Defendant to

speak, but also the public’s right to receive information. Where litigants seek to use the judicial process as a means to stifle or discourage online discourse, the public has a distinct interest in ensuring that First Amendment protections—including fair use—are applied clearly and correctly so that the “marketplace of ideas” functions properly.

The district court correctly concluded that Defendant’s use of the photograph of Plaintiff in blog posts criticizing Plaintiff and his business practices was, as a matter of law, protected fair use. A contrary ruling would invite a wave of strategic copyright lawsuits designed to silence public criticism. *Amicus* urges this Court to affirm the decision below.

## ARGUMENT

### **I. COURTS SHOULD CONSIDER MISUSE OF COPYRIGHT FOR CENSORSHIP IN THE FAIR USE ANALYSIS.**

This lawsuit is a clear attempt by Plaintiff to silence Defendant, the author of two blogs highly critical of Defendant and his business practices. As outlined in the district court’s opinion, Plaintiff did not seek to obtain the rights to the photograph in question, or to register the photograph with the U.S. Copyright Office, until *after* Defendant first used the photo on her blog.<sup>1</sup> *See Katz*, 2014 WL

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<sup>1</sup> Plaintiff filed this lawsuit only nine days after entering into an Assignment of Copyright with the photographer, and before actually registering his copyright with the Copyright Office. *See Katz*, 2014 WL 2815496, at \*1–\*2.

2815496, \*1-\*2. The lower court acknowledged Plaintiff’s underlying censorship goal, noting that “Plaintiff testified that he obtained the Assignment of Copyright ‘[b]ecause [he] wanted to stop this atrocity’” and that Plaintiff “has not used the Photo other than in this litigation . . . , and has done so here to prevent its publication.” *Id.* at \*10.<sup>2</sup>

Plaintiff’s reliance on flimsy copyright infringement allegations in an attempt to silence uncomfortable public criticism is inappropriate and contrary to law. Unfortunately, it is hardly a new tactic. As outlined below, copyright infringement allegations have proven to be an attractive option for those seeking to chill criticism. It is precisely because of the attractiveness of copyright law for such misuse that this Court must diligently apply the protections afforded by the First Amendment and the fair use doctrine. Furthermore, given the broad First Amendment interests implicated by the use of copyright law to censor, the attempt at censorship should heavily inform the fair use analysis.

**A. Copyright Law Is Frequently Misused To Censor Unwanted Criticism.**

Recent years have seen an “increasing trend of plaintiffs discovering IP to achieve non-IP ends”—*i.e.*, abusing intellectual property law to do things it was

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<sup>2</sup> The district court declined to formally rule on whether Plaintiff misused his copyright by bringing a lawsuit for the improper purpose of silencing Defendant, finding that it was unnecessary to reach the issue because Defendant’s use of the photograph was plainly a fair use. *See Katz*, 2014 WL 2815496, at \*3 n.5.

never intended for, such as censoring criticism or suppressing information.<sup>3</sup> Indeed, threatening a copyright infringement lawsuit or sending a takedown notice pursuant to the process outlined in section 512 of the Digital Millennium Copyright Act (“DMCA”) are two of the quickest and easiest means to censor online criticism—despite the Supreme Court’s clear holding that copyright law does not protect against harm caused by criticism. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994) (holding that “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act”); *see also Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (“Copyright law is not designed to stifle critics.”).

Copyright infringement allegations offer several tactical advantages to litigants seeking to censor criticism. First, the potential availability of significant statutory damages for infringement—and the lack of statutory guidance as to how such damages should be calculated—increases both the uncertainty and risk of litigating fair use cases for even those with meritorious fair uses defenses (such as Defendant here), thereby encouraging rational actors to settle and discouraging future speakers from speaking. *See* 17 U.S.C. § 504(c) (providing for statutory damage awards between \$750 to \$30,000 for each work infringed—increasing up

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<sup>3</sup> *See* Matthew Schruers, *IP’s “Immigration” Policy*, The Disruptive Competition Project (Sept. 9, 2014), <http://www.project-disco.org/intellectual-property/090914-ips-immigration-policy/>.



to \$150,000 for “willful” infringement—and providing no guidance as to how a fact finder should set the amount); *see also* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1485 (2007) (noting that “fair use’s ability to shield unauthorized users is greatly undermined by the uncertainty that has become the hallmark of the doctrine”); Pamela Samuelson and Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480-91 (2009) (describing the unpredictability of statutory damages awards).<sup>4</sup>

Second, unlike the law governing defamation and other legal theories, copyright law explicitly grants courts discretion to award attorneys’ fees to the prevailing party. *See* 17 U.S.C. § 505. This further raises the risk involved in exerting one’s free speech rights in the face of an infringement accusation.

Third, extra-judicial processes—such as takedown requests sent pursuant to the DMCA—can be used to remove protected speech from online platforms, even where fair use is clear. *See* 17 U.S.C. § 512(c) (requiring service providers to remove copyrighted materials upon allegations of infringement under threat of losing safe harbor protections). Infringement allegations have been used to take down fair uses of copyrighted materials in the context of political campaigns—

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<sup>4</sup> A successful appeal here by Plaintiff, notwithstanding the fair use defense, would make the threat of exorbitant damages and expensive, protracted lawsuits all the more salient in future cases.

effectively removing highly-protected political speech from public discourse during critical periods, such as a McCain/Palin campaign advertisement that used excerpts from CBS News and an Obama/Biden campaign advertisement that used excerpts from NBC News—both just before the 2008 presidential election.<sup>5</sup>

There are numerous other examples of copyright being used as a tool for censorship—in the context of political speech and beyond. The case relied upon by the district court below, *Dhillon v. Does 1-10*, No. C 13–01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014), involved a lawsuit initiated by an active member of the California Republican Party after a political blogger used a headshot she had previously commissioned alongside comments critical of her candidacy for State Assembly. In 2014, well-known scientific commentator Myles Power was targeted by the producers of an AIDS denialist “documentary” he was debunking, *House of Numbers*; the producers sent YouTube various DMCA takedown requests in an attempt to get Power’s videos taken off the web.<sup>6</sup> In 2013, former Navy chaplain and Colorado Assembly candidate Gordon Klingenschmitt

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<sup>5</sup> Declan McCullagh, *McCain Campaign Protests YouTube’s DMCA Policy*, CNET (Oct. 14, 2008, 5:20 PM), [http://news.cnet.com/8301-13578\\_3-10066510-38.html](http://news.cnet.com/8301-13578_3-10066510-38.html); Steve McClellan, *YouTube Pulls Obama Spot*, ADWEEK (Oct. 1, 2008, 12:00 AM), <http://www.adweek.com/news/advertising-branding/youtube-pulls-obama-spot-97103>.

<sup>6</sup> Timothy Geigner, *AIDS Denial Crazyies Go All DMCA on Videos Educating People of Their Crazyiness*, techdirt.com (Feb. 14, 2014, 1:44 PM), <https://www.techdirt.com/articles/20140210/05172926163/aids-denial-crazyies-go-all-dmca-videos-educating-people-their-crazyiness.shtml>.

launched a campaign to use the DMCA to shut down the YouTube account of Right Wing Watch (“RWW”), a project of People for the American Way that reports on the political views of right-wing politicians.<sup>7</sup> And back in 2007, talk show host Michael Savage sued the Council on American-Islamic Relations (“CAIR”) for copyright infringement after CAIR used excerpts of Savage’s show to rebut his anti-CAIR comments. *See Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, \*1 (N.D. Cal. July 25, 2008). The district court found CAIR’s use of the clips to be such a clear example of fair use that it granted CAIR’s motion to dismiss on the pleadings. *Id.* at \*9. These are but a few examples of copyright law being misused as a tool to censor unwanted criticism and commentary.

**B. The Court’s Fair Use Analysis Should Be Informed By the Broad First Amendment Interests At Play When Copyright Is Used as a Tool for Censorship.**

Because of the demonstrated potential for misuse of copyright law, the landscape for speakers who wish to use copyrighted material for purposes of commentary and criticism can, as a practical matter, be difficult to navigate—even when the use in question is plainly fair. It is therefore especially important in cases

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<sup>7</sup> Corynne McSherry, *No More Downtime for Free Speech: EFF Helps People for the American Way Challenge DMCA Abuser*, Electronic Frontier Foundation (Dec. 8, 2013), <https://www.eff.org/deeplinks/2013/12/no-more-downtime-free-speech-eff-helps-people-american-way-challenge-dmca-abuser>.

such as the one at hand—where the use of copyrighted material is protected by the First Amendment and where copyright law is clearly being used to censor unwanted criticism—that courts not only diligently apply the four fair use factors, but also consider in their fair use analysis the broad First Amendment interests implicated by such censorship attempts.

A balanced copyright system recognizes the need to provide economic incentives for artists while also providing plenty of breathing room for commentary and criticism. Section 107 of the Copyright Act provides this breathing room. *See* 17 U.S.C. § 107. The built-in First Amendment protections that fair use is intended to embody are therefore clearly and directly implicated in this case. *See, e.g., Eldred*, 537 U.S. at 219–20 (“copyright law contains built-in First Amendment accommodations,” including the fair use defense); *Golan v. Holder*, 132 S. Ct. 873, 890 (2011) (same); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (First Amendment protections are “embodied in the Copyright Act’s . . . latitude for scholarship and comment traditionally afforded by fair use”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–65 (11th Cir. 2001) (noting “the First Amendment principles built into copyright law through . . . the doctrine of fair use”).

The First Amendment interests implicated in this case are not limited to those of Defendant, but also include the public’s right to receive and engage with

speech of the type at issue here—public criticism of a local business owner.<sup>8</sup> The First Amendment not only “embraces the right to distribute literature,” but it also “necessarily protects the right to receive it.” *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); accord *Board of Education v. Pico*, 457 U.S. 853, 867 (1982) (“the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”).

The Court should consider the broad First Amendment interests implicated by the use of copyright for censorship when weighing the four statutory factors. In this case, given Plaintiff’s motive to censor, such an analysis strongly supports affirmance.

## **II. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANT’S USE OF PLAINTIFF’S PHOTOGRAPH WAS A PROTECTED FAIR USE.**

The district court correctly concluded that Defendant’s use of the photograph in question—in all of the roughly two-dozen alleged instances of infringement—was, as a matter of law, a fair use sheltered by Section 107 of the

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<sup>8</sup> Plaintiff is an owner of a number of shopping centers throughout Florida and holds a minority stake in the Miami Heat professional basketball team. *Katz*, 2014 WL 2815496, at \*1.

Copyright Act.<sup>9</sup> Section 107 lays out four factors that must inform the fair use analysis: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the work used; and (4) the effect of the use on the market of the primary work. *Harper & Row*, 471 U.S. at 560–61. As the district court correctly noted, these factors are to be explored and weighed together “in light of the purposes of copyright.” *Campbell*, 510 U.S. at 578–79. Here, each factor either favors fair use, or is neutral at best, and Defendant’s blog posts furthered, rather than thwarted, the purposes of copyright.

**A. The Purpose and Character of the Use Is Noncommercial, Transformative, and in the Public Interest.**

The district court correctly concluded that Defendant’s use of the photograph was both noncommercial and transformative. As the court noted, “the record is clear that Defendant used [the photograph] as a means of satirizing and criticizing Plaintiff”—not merely to identify him. *Katz*, 2014 WL 2815496, at \*6. Furthermore, there is no indication that the use of the photograph had any commercial component. *See id.*

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<sup>9</sup> Plaintiff argues that the district court analyzed only blog posts containing altered versions of the photograph. *See*, Initial Brief of Appellant (“IBA”) (filed Feb. 17, 2015), pp. 18, 21–26. That is simply not the case. The district court’s analysis applied to each of the alleged instances of infringement—whether or not the photo had been altered. *See, e.g., Katz, e.g.*, 2014 WL 2815496, at \*5–\*6 & n.8 (outlining each of the allegedly infringing posts and stating “[t]hese blog posts all present unabashed criticism of, and commentary on, Plaintiff’s business and litigation practices”). In any event, for the purposes of the fair use analysis in this case, given the critical nature of the blog posts at issue, the question of whether or not the photograph was altered is minimally relevant.

Plaintiff's sole basis for arguing that Defendant's use of the photograph was commercial is the fact that, in a single blog post, Defendant noted her interest in writing a book about her experience with Plaintiff's company, RK Centers. *See* IBA, pp. 28–29. As the court held in *Dhillon*, such conclusory and speculative assertions regarding the possibility of financial gain “are insufficient to raise a genuine issue of material fact to defeat summary judgment.”<sup>10</sup> 2014 WL 722592, at \*4; *see also Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979) (conclusory and speculative testimony in affidavits and moving papers insufficient to raise genuine issues of fact). The district court thus correctly concluded that Defendant's use was noncommercial.

Defendant's use was also transformative. A use is transformative where it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579; *see also A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (transformative works are those which do not “merely replace[]” the original work but rather add “a further purpose or different character”). Defendant used the photograph as part of her criticism of Plaintiff and his business practices. In each of the blog posts at issue, the photograph is included alongside commentary on

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<sup>10</sup> Even if the Court gave credence to Plaintiff's speculation about the possibility that Defendant may someday profit off her use of the photograph, it makes little if any difference to the ultimate fair use determination in this case. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“[T]he commercial or nonprofit educational character is not conclusive, but rather a fact to be weighed along with others in fair use decisions.”) (internal citations and quotations omitted).

Plaintiff. Such a use is distinct from the original purpose of the photograph—to identify Plaintiff in a factual news article—and appropriate given Defendant’s purpose of criticizing Plaintiff.

The district court correctly analogized this case to the facts of *Dhillon*, where a politician sued a political blogger for copyright infringement based on the blogger’s use of her headshot in a blog post critical of her candidacy for State Assembly. In *Dhillon*, the court held that “the defendant’s use of the headshot photo was transformative because it served the purpose of criticism, rather than identification.” 2014 WL 722592, at \*5. The court noted that use for purposes of criticism and commentary “is precisely what the Copyright Act envisions as a paradigmatic fair use.” *Id.* (citing *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1152–53 (9th Cir. 1986)).

In an attempt to distinguish *Dhillon*, Plaintiff takes the novel position that in order for a secondary use of a photograph to be transformative, an inherently positive photograph must be used for negative commentary (or, presumably, vice versa). *See* IBA, pp. 40–41. According to Plaintiff, because the photograph at issue was unflattering, and thus negative, Defendant’s use of the photograph in negative blog posts was not transformative. *See id.*

Plaintiff’s position dramatically oversimplifies both the facts of *Dhillon* and the cited text of *Campbell*—that the central purpose of the first fair use factor is to assess “whether the new work merely supersedes the objects of the original creation (supplanting the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or



message[.]” *Campbell*, 510 U.S. at 579 (internal citations and quotation marks omitted). Indeed, pursuant to Plaintiff’s interpretation of the law, only flattering or otherwise “inherently positive” photographs could be used for purposes of criticism or negative commentary. But neither *Dhillon* nor *Campbell* mandate such a positive-negative dichotomy. The key to the court’s finding in *Dhillon* that the defendant’s use of the headshot was transformative was not that the defendant used a positive photograph for negative criticism, but simply that the defendant used a photograph initially intended for identification for purposes of criticism. *Dhillon*, 2014 WL 722592, at \*5.

Plaintiff’s interpretation of the law is not only absurd, but it is also unworkable. It would force courts to engage in an analysis of whether any given photograph was inherently flattering or unflattering—innately subjective terms that are incapable of unambiguous definition or consistent application. Indeed, such an analysis would involve the precise sort of value determinations the Supreme Court counseled against in *Campbell*. See 510 U.S. at 582 (holding that whether a parody is in good or bad taste “should not matter to fair use”: “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits”) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).<sup>11</sup>

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<sup>11</sup> Plaintiff also argues that the district court should have considered Defendant’s alleged “bad faith” in drafting the blog posts. See IBA, p. 51. The district court correctly rejected this argument. *Katz*, 2014 WL 2815496, at \*10 n. 12. The allegations of bad faith have nothing to do with the alleged copyright

**B. The Nature of the Copyrighted Work Weighs in Defendant’s Favor.**

The district court also correctly concluded that the second fair use factor—the nature of the copyrighted work—weighs in Defendant’s favor. In evaluating this factor, courts consider whether the work itself is primarily creative or factual, and whether or not the work has already been published. *Harper & Row*, 471 U.S. at 563–564. As the district court noted, there is no dispute that the photograph was published prior to Defendant’s use—a status that weighs in favor of fair use. *See Katz*, 2014 WL 2815496, at \*7; *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003).

The remaining question is whether the photograph is primarily creative or factual, and the district court correctly held that it is primarily factual—further weighing in favor of fair use. Other courts have similarly held that videotapes or photographs of current events are by nature primarily informational and entitled to a lower level of copyright protection. *See Los Angeles News Serv. v. Tullo*, 973

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infringement. As the district court noted, “[w]hen courts have considered the issue of bad faith, they have looked at whether the alleged infringer used copyrighted material to usurp a commercial advantage that belonged to the copyright holder, or obtained the material in an underhanded manner.” *See id.* As such, even if Plaintiff did have some legitimate complaint about the alleged “bad faith” underlying either Defendant’s blog posts or her behavior in the related state court defamation lawsuit, that was an issue for the state court to consider; it is not relevant to the Court’s analysis of fair use here. *See Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 942 (4th Cir. 2014) (“[I]t is questionable whether allegations of subjective ‘bad faith’ could undercut a use that objectively was fair.”).

F.2d 791, 798 (9th Cir. 1992); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 188 (D. Mass. 2007) (rejecting argument that candid photograph of mobster snapped as he left police station was a creative work). In addition, where the use is transformative, as here, the nature of the work is “not . . . terribly significant in the overall fair use balancing.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003). This is especially true where the copyright owner is trying to censor speech, rather than promote its own creative work.

**C. Defendant Used as Much of the Photograph as Was Necessary for the Criticism.**

The district court also correctly concluded that the third fair use factor—whether the proportion of the original work used in the secondary work is reasonable in relation to its purpose—is neutral in this case. *See Campbell*, 510 U.S. at 587. As the Ninth Circuit has explained, where “the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.” *Kelly*, 336 F.3d at 820–21. As such, as the district court noted, “[t]his factor weighs less when considering a photograph—where all or most of the work often must be used in order to preserve any meaning at all—than a work such as a text or musical composition, where bits and pieces can be excerpted without losing all value.” *See Fitzgerald*, 491 F. Supp. 2d at 188; *see also Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (to copy any less than the entire image “would have made the picture useless to the story”; third fair use factor thus “of little consequence to our analysis”); *Bill Graham*

*Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006); *Dhillon*, 2014 WL 722592, \*5.

Plaintiff argues that Defendant did not need to use any part of the photograph to further her criticism—*i.e.*, that any use of the photograph in the blog posts “was entirely unnecessary to, and [did] not further, any alleged criticism.” *See* IBA, pp. 36, 45. Plaintiff misconstrues the law. The third factor does not ask courts to analyze the editorial or artistic decisions made by a defendant, nor does it ask courts to determine whether a defendant’s use of any given image was crucial to the underlying criticism—two inherently subjective determinations. Rather, it asks courts to assess whether a defendant, who has chosen to use a given image as part of new speech, has used an amount of the original work that is proportional to the purpose of the use. *See Campbell*, 510 U.S. at 587. Plaintiff’s reading of the law would in fact be unworkable, as it would result in the third fair use factor almost always weighing against a finding of fair use—at least in cases involving photographs. Indeed, it would almost always be possible to engage in criticism without reliance on any given photograph. Furthermore, such a reading again runs counter to *Campbell*, which as explained above counsels against courts engaging in such inherently subjective value judgments. *See* 510 U.S. at 582.

**D. Defendant Did Not—and Will Not—Cause Cognizable Market Harm.**

Finally, the district court correctly concluded that the fourth fair use factor—whether a defendant’s use of a copyrighted work is likely to cause harm to the market for the original—weighs strongly in favor of fair use. The fourth factor is

especially important in this case because Katz complains of *reputational* harm—*i.e.*, harm caused by the expressive content of Plaintiff’s speech—rather than *market* harm. Indeed, Plaintiff’s brief makes it abundantly clear that he is not complaining about a cognizable copyright harm—*i.e.*, usurped demand for the original photograph—but of suppressed demand as a result of Defendant’s criticism. He notes, “I may never learn of the people and business who didn’t do business with me, or changed the way they conduct business with me[.]” IBA, p. 46. Such reputational harm has nothing to do with the alleged infringement and has no bearing on the fair use analysis. *See Consumers Union of the United States v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983) (rejecting a reputational harm theory under the fourth fair use factor because “[t]he Copyright Act was not designed to prevent such indirect negative effects of copying.”).

As a doctrine designed to provide breathing room for free speech, fair use protects criticism. As explained above, the Supreme Court has held that it is legitimate for a parody or criticism “to suppress demand for the original by its critical effect.” *Campbell*, 510 U.S. at 598. As such, “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.” *Id.* 591–92; *see also Fisher*, 794 F.2d at 438 (“[T]he economic effect . . . with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can have that

effect—but rather whether it fulfills the demand for the original.”).<sup>12</sup> If Katz believes he has been criticized unfairly, he should, and indeed did, pursue a state law claim for defamation. Copyright simply does not provide a remedy for the harm he alleges.

Because Defendant’s use of the photograph was both noncommercial and transformative in nature, it is Plaintiff’s burden to demonstrate that there is a likelihood of market harm. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). Plaintiff has not carried that burden. Indeed, not only has he failed to allege a cognizable copyright harm, but he has failed to even allege that a market for the photograph exists. Plaintiff maintains that there is a potential market for the photograph even though he has no present intent to sell or otherwise profit from it. *See IBA*, pp. 46–47. While it is true that the relevant consideration is a “potential market” and not whether a plaintiff has a present intent to profit off the original work, Plaintiff still must demonstrate that such a potential market exists. *See Peter Letterese and Associates, Inc. v. World Inst. of Scientology Enterprises*, 533 F.3d 1287, 1317 (11th Cir. 2008) (citing *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000)); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014) (“The goal of copyright is to stimulate the creation of new works, not to furnish copyright holders with control over all markets.”). But Plaintiff has failed to demonstrate the

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<sup>12</sup> What a secondary use may not do “is usurp demand [for the original] by its substitutive effect.” *Campbell*, 510 U.S. at 598; *see also Fisher*, 794 F.2d at 438 (“Biting criticism suppresses demand; copyright infringement usurps it.”).

existence of any potential or existing market for the photograph. Plaintiff again points only to Defendant's blog post about her interest in writing a book about her experience with Plaintiff, arguing that the use of the photograph in the post evinces the photograph's intrinsic value. *See* IBA, p. 49. This argument is both circular and entirely speculative, and it should thus carry little weight. *See Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991) (fourth factor supports fair use where potential market is "highly improbable"). The district court thus correctly concluded that the fourth fair use factor weighs in favor of Defendant.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm both the district court's finding that Defendant's use of the photograph in question was protected fair use and its corresponding order granting Defendant's Motion for Summary Judgment.

Dated: May 6, 2015

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH TYPE-VOLUME LIMITATION,  
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PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,236 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point, Times New Roman font.

Dated: May 6, 2015

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### CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 6, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 6, 2015

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