

# SDNY: Use of Photojournalists' 9/11 Footage May Be Fair Use

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A firefighter digging through rubble. An ambulance being lifted out of the wreckage. Photographs of these and other somber scenes from downtown Manhattan on September 11, 2001 formed the basis of photojournalist Anthony Fioranelli's copyright infringement case against several media organizations that allegedly used these photos without permission. Recently, the S.D.N.Y. issued a mixed ruling on whether use of these harrowing-yet-iconic photos was fair.

## Background

Plaintiff Fioranelli was one of four reporters allowed access to Ground Zero immediately after the September 11, 2001 terrorist attack on the World Trade Center ("9/11"). Fioranelli compiled his raw footage of Ground Zero and registered it with the Copyright Office (the "Content"). CBS licensed Fioranelli's Content and agreed to pay Fioranelli for each use of any portion of the Content, but later created multiple newsreels and licensed them to other media organizations without Fioranelli's permission and without compensating Fioranelli for those further uses. Fioranelli sued CBS and its purported sublicensees, including BBC, A&E Television Networks, and Paramount Pictures (among others), alleging that sixteen works—including the CBS newsreels, ten documentaries/docuseries, a docudrama, a "making of" featurette, a religious TV program, and two programs exploring/debunking conspiracy theories—infringed his copyright in the Content. The parties moved for summary judgment, with the defendants seeking a judgment from the court that their use was *de minimis* and fair.

## *De Minimis* Use

While there was no dispute that the defendants actually copied Fioranelli's Content, the parties disputed whether the amount copied was legally actionable. The defendants relied on a quantitative analysis, arguing that because they used only a small portion of Fioranelli's total footage, their use was *de minimis*.

The court disagreed, holding that a defendant's quantitatively brief display of a copyrighted work, "when conspicuously displayed, can be actionable." Applying this standard, the court found that defendants prominently displayed the Content in fourteen of the sixteen challenged works, which contained a full-screen depiction of Fioranelli's Content. The court noted that the Content was "not mere background footage" but was "clearly observable" and "the focus of the film when shown."

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The court further found that the remaining two works—a docudrama and its “making of” featurette—used the Content as the focal point of an entire scene and were also not *de minimis*. Accordingly, the court denied defendants’ motion for summary judgment on *de minimis* use, finding that the qualitative prominence of defendants’ uses (*i.e.*, to occupy an entire screen or as the focal point for the viewer) outweighed the quantitative brevity of such uses.

## Fair Use

Regarding defendants’ motion for summary judgment on fair use, the court analyzed the four familiar fair-use factors.

Regarding the second factor (the nature of the copyrighted work), the court found that photojournalism (like Fioranelli’s Content) consists primarily of non-fictional renderings of historical events, and often precludes substantial demonstrations of creativity. As such, the nature of the Content—which was non-fictional and historical—weighed in favor of the defendants.

As for the fourth factor (the effect on the potential market for the copyrighted work), the court found that defendants’ uses were paradigmatic of the market for the Content, *i.e.*, licensing to media organizations and “a clear substitute” for Fioranelli’s Content. The court also found that allowing CBS to sublicense the Content to other media organizations without compensating Fioranelli for those sublicensed uses would gravely impact freelance photojournalists, who seek out footage expecting to collect licensing fees for their work. Accordingly, the court found that the fourth factor weighed against the defendants.

As for the first and third factors, the court separately analyzed the alleged infringements. Regarding the first factor (the purpose and character of the use), the court found that some alleged infringements were transformative, whereas others were not, and further found that, for some alleged infringements, fair use issue could not be decided at summary judgment. While the court agreed with Fioranelli that each of the defendants’ uses were commercial in nature, which tends to weigh against fair use, it found that this was not dispositive of the various fair use determinations.

The court found that seven of the challenged works were not transformative because none incorporated Fioranelli’s Content to comment on or critique it, and because those works shared the original purpose of Fioranelli’s Content—to inform the viewer of what happened on 9/11 and its aftermath. In particular, the court held that “[t]he expressive purpose of the original use and the secondary use are the same,” and that defendants’ use of unaltered copies of Fioranelli’s Content to achieve the same purpose that Fioranelli sought to achieve, led the court to conclude that such uses were not transformative.

As for another seven of the challenged works (which included the religious TV program and programs exploring/debunking conspiracy theories), the court declined to make a fair use determination on summary judgment, based in part on defendants’ arguments that their use was transformative because it served a different purpose than Fioranelli’s purpose in creating the Content. For example, the court noted that the programs exploring/debunking conspiracy theories were intended “to educate viewers about conspiracy theories surrounding 9/11” which was not Fioranelli’s original purpose. Similarly, the court held that a reasonable juror could find that use of Fioranelli’s Content to build a political argument was a sufficiently different purpose so as to potentially render the use transformative. Accordingly, the court held that this was an issue to be determined at trial.

The court also found that a docudrama and its “making of” featurette were transformative. The

docudrama was a fictionalized retelling of a story of two police officers trapped in the rubble at Ground Zero, wherein Fioranelli's Content is superimposed on the television that a fictionalized police officer's family is watching. The court found that the docudrama used Fioranelli's Content creatively to construct a unique fictionalized setting, not to record or share history. As such, the docudrama's use of Fioranelli's Content was found transformative. As for the "making of" featurette, the court found that its purpose was to provide insight into the rationale behind the cinematic choices made in the film, rendering that transformative as well.

As for CBS' alleged unauthorized use of the Content, the court held the first fair use factor favored Fioranelli for the additional reason that the infringement was in bad faith because CBS removed a watermark reading "NOT FOR BROADCAST" from Fioranelli's footage before CBS used the footage in its newsreels. The court found that this decision, together with the fact that CBS' use duplicated Fioranelli's original purpose and was commercial in nature, led the first factor to weigh slightly in Fioranelli's favor.

In analyzing the third factor (the amount and substantiality of use), the court referred back to its *de minimis* use analysis and declined to adopt the defendants' mathematical, quantitative approach, instead considering whether "the extent of Defendants' copying is consistent with or more than necessary to further the purpose and character of the use." For seven works found not transformative, the court found this factor neutral, and for seven additional works the court left this determination for trial, as reasonable jurors could disagree regarding whether the defendants used more of the copyrighted material than necessary for each work's purpose. For the two uses that the court found transformative (the docudrama film and featurette), the court found that the few seconds of copyrighted material shown on the in-scene television were "no more than necessary to ensure the viewer understood that the family was watching the events of 9/11 unfold on television."

In sum, the court found that the seven non-transformative uses (the two newsreels and six historical, non-political documentaries) were not fair use; that the two uses that were transformative (the docudrama film and featurette) were fair use; and that for the seven remaining works, fair use could not be decided on summary judgment.

The case is *Fioranelli v. CBS Broad. Inc.*, No. 15-CV-0952 (VSB), 2021 WL 3372695 (S.D.N.Y. July 28, 2021).

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