

HOW ‘WORTHY’ IS NEWSWORTHY? RE-EVALUATING FAIR USE IN THE SOCIAL MEDIA AGE

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I. INTRODUCTION.....	287
II. BACKGROUND.....	289
<i>A. The Copyright Act and its Boundaries</i>	289
<i>B. Lucky Shots</i>	292
<i>C. Courts’ Treatment of Photojournalists</i>	294
<i>D. Copyright Versus the First Amendment</i>	297
III. ANALYSIS	300
<i>A. Two Sides of the Story: Individuals vs. News Outlets</i>	300
1. <i>Questioning the Harm to Non-Professional Plaintiffs</i>	301
2. <i>The Realities of Newsgathering in the Social Media Age</i>	303
<i>B. Proposal for a Judicial Focus on Public Interest in § 107 Cases</i>	305
<i>C. Best Practices for Newsrooms in the Meantime</i>	307
IV. CONCLUSION	308

I. INTRODUCTION

Nowadays, a social media user can share their words and images with an expansive network of people within seconds—all it takes is Internet access. Not only has the rise of social media platforms drastically changed the day-to-day lives of billions of users worldwide, but it has also transformed the way global audiences consume news.¹ For instance, rather than needing to wait until the next regularly scheduled television news broadcast or the next day’s newspaper, social media users can learn about the world’s most significant and most talked about events almost as soon as they happen.

Newsrooms around the world have been forced to adapt to the evolving landscape of social media and its accelerating effect on modern

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1. See generally H. Tankovska, *Number of Global Social Network Users 2017–2025*, STATISTA (Jan. 28, 2021), <https://www.statista.com/statistics/278414/number-of-world-wide-social-network-users/> [https://perma.cc/ZB73-9J9D].

news cycles.² For instance, newsrooms now rely on social media as an integral newsgathering tool and source-finding tool—especially when important news breaks and the first visuals are ones that have been shared onto social media by users at the scene.³ In the hyperconnected social media age, sharing thoughts and images online has become second nature to many.⁴ As a result, integrating social media into news coverage has become a modern newsroom necessity.⁵

While media outlets contend with the ways that social media has changed both how information is shared and consumed, they must also grapple with the litigious consequences of incorporating social media into news stories.⁶ Notably, when individuals take to social media with photos or videos of newsworthy encounters, they do so with the inherent awareness that their content will be available to potentially large swaths of worldwide users. Yet, as news outlets find themselves implicated in social media-related copyright infringement claims, courts have been asked to consider whether the advent of social media will also lead to changes in the interpretation of the longstanding copyright law concept of fair use.⁷

This Note argues recent court decisions ruling against news outlets that have reproduced social media images taken by non-professional photographers fail to consider the challenges newsrooms face in the digital age.⁸ Such decisions demonstrate a trend of courts' interpreting the

2. See Nicole Martin, *How Social Media Has Changed How We Consume News*, FORBES (Nov. 30, 2018), <https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/?sh=363251183c3c> [<https://perma.cc/4L2R-RWZ5>]; Steve Myers, *Social Media Has 'Central Role in Our Newsgathering,' Says AP's Lauren McCullough*, POYNTER (Jan. 7, 2010), <https://www.poynter.org/reporting-editing/2010/social-media-has-central-role-in-our-newsgathering-says-aps-lauren-mccullough/> [<https://perma.cc/5PSS-BDM5>].

3. Glenda Cooper, *Do Mainstream News Outlets Have a Moral Obligation to Citizen Journalists?*, NIEMANLAB (July 15, 2015), <https://www.niemanlab.org/2015/07/do-mainstream-news-outlets-have-a-moral-obligation-to-citizen-journalists/> [<https://perma.cc/UM2V-JBLP>].

4. See generally Jimit Bagadiya, *367 Social Media Statistics You Must Know in 2021*, SOCIAL PILOT <https://www.socialpilot.co/blog/social-media-statistics#fb-usage-stats> [<https://perma.cc/SNC5-6Y8D>] (last accessed Feb. 1, 2021).

5. See generally Myers, *supra* note 2; Cooper, *supra* note 3.

6. See *Otto v. Hearst Comm'ns, Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018); *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457 (E.D.N.Y. 2020); see also Alastair Reed, *A New Dawn in Social Newsgathering*, NIEMANLAB (last accessed Feb. 1, 2021), <https://www.niemanlab.org/2015/12/a-new-dawn-in-social-newsgathering/> [<https://perma.cc/L9FF-YHW8>].

7. Caroline E. Kim, *Insta-Fringement: What Is a Fair Use on Social Media?*, 18 J. MARSHALL REV. INTELL. PROP. L. 102, 113 (2018).

8. See *infra* Part III.A.2.

Copyright Act's ambiguous fair use factors in a manner that ultimately protects individual interests over the need to incorporate relevant visuals in news reporting.⁹ However, more liberally construing fair use in favor of news outlets' would acknowledge the impact of social media on news outlets, protect journalists who wish to use social media content to better inform the public, and introduce greater consistency in courts' approach to fair use.

Part II of this Note unpacks the tension that exists between journalism and copyright law, as well as the difficulty of interpreting fair use amid the evolution of content-sharing in the social media age.¹⁰ In particular, this Note will discuss the shortcomings of the Copyright Act's context-sensitive fair use factors as applied to social media-related lawsuits against news outlets.¹¹ Part III of this Note will address key differences in the practices of non-professionals who have taken lucky shots and professional photojournalists that warrant lesser copyright protections for non-professionals.¹² Additionally, Part III suggests that courts should give greater credence to the public interest purpose of news reporting in fair use determinations.¹³

Ultimately, this Note asserts that where an image posted onto a personal social media page can provide a helpful perspective into a breaking news event, use of that already widely shared image for the purposes of news reporting should easily pass into the threshold of fair use.

II. BACKGROUND

A. The Copyright Act and its Boundaries

Under § 107 of the Copyright Act, determining whether the use of a work is fair use requires consideration of four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit or 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

9. See generally *Otto*, 345 F. Supp. 3d at 437; *Cruz*, 444 F. Supp. 3d at 472.

10. See *infra* Part II.A.; see *infra* Part II.D.

11. See *infra* Part II.D.

12. See *infra* Part III.A.1.

13. See *infra* Part III.B.

whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴

The fair use factors expressed in § 107 are both open-ended and context-sensitive.¹⁵ Thus, copyright litigation arising out of social media content-sharing remains particularly difficult to adjudicate because § 107 is not explicit about what constitutes permissible sharing by third parties, like news outlets.¹⁶

The preamble to § 107 calls out particular circumstances when specifying that the ‘fair use’ of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research does not constitute copyright infringement.”¹⁷ However, all four stipulated ‘fair use’ factors must still be considered.¹⁸ Further, whether user-generated multimedia content is considered “shareable” on the mere basis that it is widely-accessible to all platform users remains ambiguous.¹⁹ This lack of clarity, coupled with the increasing ubiquity of social media, has resulted in legal disputes between news outlets and individuals over the extent to which ‘fair use’ protects media companies that publish or broadcast ‘newsworthy’ multimedia initially shared on personal social media accounts.²⁰

As social media use in modern society has expanded, the content published online has become increasingly commodified.²¹ Social media has evolved into a significant advertising space for businesses owners, and influencer marketing on social media platforms has become a veritable multi-billion-dollar industry.²² For some entrepreneurial individuals, posting videos and photos on platforms like Instagram, Twitter, Facebook, YouTube, or TikTok serves as a substantial source of revenue.²³ Thus, in a world where a social media post can go viral and reach global audiences

14. 17 U.S.C. § 107.

15. *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 426 (S.D.N.Y. 2018).

16. Kim, *supra* note 7, at 113.

17. 17 U.S.C. § 107.

18. *Id.*

19. Kim, *supra* note 7, at 107–8.

20. *Id.* at 107; *see also Otto*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018); *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457, 462, 587 (E.D.N.Y. 2020); *Boesen v. United Sports Publ'ns, Ltd.*, No. 20–CV–1552(ARR)(SIL), 2020 WL 6393010 (E.D.N.Y. 2020).

21. *See generally* Kim, *supra* note 7, at 105.

22. *Id.* at 106; *see also* Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, BUS. INSIDER (Dec. 17, 2019), <https://www.businessinsider.com/influencer-marketing-report#:~:text=The%20influencer%20marketing%20industry%20is,gold%20standard%20for%20the%20group> [https://perma.cc/G7MG-A3MX].

23. Kim, *supra* note 7, at 106.

within minutes, the “notoriously vague” nature of copyright laws is an insufficient framework for navigating the fast-evolving world of social media and content-sharing.²⁴

Whether a particular use of a work is “transformative” is also an important factor in determining whether ‘fair use’ may apply.²⁵ The standard was first introduced by the Supreme Court in *Campbell v. Acuff-Rose Music*, where the Court decided that a work is ‘transformative’ when it adds something new with a further purpose or different character, or alters the original with new expression, meaning, or message.²⁶ Although noting that “transformative use is not absolutely necessary for a finding of fair use,” the Court explained that the goal of copyright—to promote science and the arts—is advanced by “transformative” works.²⁷ Thus, the “transformative” aspect lies at the core of the copyright “breathing space” guaranteed by the ‘fair use’ doctrine, and the more transformative a work, the less likely that the principal four factors will weigh against a ‘fair use’ determination.²⁸

However, legal scholars have argued that where an unauthorized use clearly fits within one of the “well-established fair use activities” delineated in the § 107 preamble, like news reporting, courts should not be compelled to analyze whether a use is “transformative.”²⁹ This suggested move away from the ‘transformative’ determination, in certain common fair use situations, is particularly relevant where courts have acknowledged that news organizations may more accurately convey information by faithfully reproducing an original.³⁰ Additionally, in cases involving news reporting, several courts have ruled that particular uses constitute fair use, even when they are not transformative.³¹ Thus, when it comes to assessing fair use by news organizations, scholars make a compelling argument that courts should focus more on whether a use

24. *Id.*

25. C.T. Drechsler, *Background and Meaning—Policy and Purpose of Copyright Cumulative Supplement in EXTENT OF DOCTRINE OF “FAIR USE” UNDER FEDERAL COPYRIGHT ACT*, 23 A.L.R.3d 139 (1969) (citing *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010)).

26. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

27. *Id.*

28. *Id.*

29. David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267, 277–78 (2018); see also C.T. Drechsler, *News Stories and Accounts of Current Events in EXTENT OF DOCTRINE OF “FAIR USE” UNDER FEDERAL COPYRIGHT ACT*, 23 A.L.R.3d 139 (1969) (citing 17 U.S.C. § 107; *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019)).

30. Shipley, *supra* note 29, at 329 (citing *L.A. News. Serv. v. CBS Broad., Inc.* 305 F.3d 924 (9th Cir. 2002)).

31. *Id.*

constitutes legitimate news reporting rather than applying the four traditional “fair use” factors and the transformative use standard.³²

B. Lucky Shots

At the crux of this review are cases stemming from news outlets’ use of an image or video posted on an individual’s personal social media account.³³ These particular suits are distinct from claims brought by professional or freelance photographers who have taken steps to protect their copyright.³⁴ Everyday social media users are likely to have a more limited understanding of copyright law or licensing agreements, and likely posted the image or video on their personal account with the intention of sharing it with a wide audience of people.³⁵ Profiting from the content may not have been something they even contemplated prior to posting.³⁶ Thus, it is important to understand how courts have unpacked both the rights of these everyday social media users and the traditional understanding of ‘fair use’ in news reporting.

For instance, in *Otto v. Hearst Communications*, the plaintiff wedding guest’s personal photo of President Donald Trump crashing a golf club ceremony was posted to Instagram by a relative of the bride without his permission.³⁷ Esquire magazine then used the social media photos without permission and credited the account as the source.³⁸ The publishing company, Hearst, was unaware of the true creator and copyright holder of the photo.³⁹ Although the photo was removed from the website, it was stored on Hearst servers, displayed on a web page, and used to earn ad revenue.⁴⁰

The U.S. District Court for the Southern District of New York held that although news-reporting is generally a widely-recognized ground for fair use, “the use of an image solely to illustrate the content of that image” is not fair use.⁴¹ Additionally, the court determined that the circumstances

32. Shipley, *supra* note 29, at 270.

33. See generally *Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018); *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

34. See *Boesen v. United Sports Publ’ns, Ltd.*, No. 20–CV–1552(ARR)(SIL), 2020 WL 6393010 (E.D.N.Y. 2020); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177 (D. Mass. 2007).

35. See Patricia Aufderheide, *Journalists, Social Media and Copyright: Demystifying Fair Use in the Emergent Digital Environment*, 9 J. BUS. & TECH. L. 59, 68 (2014).

36. *Id.*

37. *Otto*, 345 F. Supp. 3d at 420–21.

38. *Id.*

39. *Id.* at 422.

40. *Id.*

41. *Id.* at 428.

in *Otto* did not give rise to such an “extraordinary” situation that the need for news reporting was so compelling as to take precedence over copyright.⁴² Rather, the court noted that it would be “antithetical to the purposes of copyright protection,” to allow media companies to take personal images from social media pages to illustrate factual information and then benefit from the fair use defense.⁴³ The court ultimately reasoned that allowing media companies to assert fair use for all personal images posted on social media would discourage amateur photographers, disincentivize publishers from creating their own multimedia content for articles, and hinder both “the [p]rogress of [s]cience and useful [a]rts” and the creation of “informative, intellectually enriching” content.⁴⁴

A similar assessment was undertaken two years later by the U.S. District Court for the Eastern District of New York in *Cruz v. Cox Media Group*, where the plaintiff noticed a “commotion” on the streets of New York City.⁴⁵ He then took photos on his iPhone of New York City Police Department officers arresting a man suspected of committing a terrorist attack.⁴⁶ He shared the photo with a friend, who subsequently shared the photo on Instagram and took credit for the image.⁴⁷ His girlfriend also posted the image on Instagram, but she clarified that it was the plaintiff’s photo.⁴⁸ The plaintiff entered into licensing agreements with CNN and NBC, and granted both networks permission to publish the photo in exchange for licensing fees and credit.⁴⁹ However, Cox Media did not seek out a licensing agreement, and included the plaintiff’s photo in an article, a photo gallery, and on social media posts about the incident without crediting him.⁵⁰

The court held that the company infringed on the plaintiff’s copyright by actually copying the image, engaging in non-transformative use, and usurping Cruz’s potential market for the photograph.⁵¹ The *Cruz* court noted that the “display of a copyrighted image or video may be transformative where it serves to illustrate criticism, commentary, or a news story *about* that work.”⁵² However, the court determined that the use

42. *Id.* (citing *Twin Peaks Prod. Inc. v. Publ’ns Int’l., Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993)).

43. *Id.*

44. *Id.*

45. *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 462–63.

51. *Id.* at 466–71.

52. *Id.* at 468.

of the plaintiff's photo by Cox Media did not carry out the function of serving to illustrate criticism, commentary or a news story about the photo where it was instead used as an "illustrative aid" that depicted subjects mentioned in the Cox Media article.⁵³ The court asserted that nothing in the Cox Media article gave the plaintiff's photo further meaning or placed it in a new context, and to find fair use would be to "eliminate copyright protection anytime a copyrighted photograph was used in conjunction with a news story about the subject."⁵⁴

These rulings ultimately demonstrate courts' repeated emphasis that news reporting does not provide an automatic license to prevail on fair use.⁵⁵ Rather, recent decisions reveal a pattern of courts' interpreting the § 107 fair use factors in a manner that weighs the copyright interests of individuals over news outlets' desire to use social media posts to supplement stories.⁵⁶ These decisions also indicate the significance of the context under which news outlets choose to reproduce or share multimedia originally posted on social media.⁵⁷

C. Courts' Treatment of Photojournalists

While the courts in *Otto* and *Cruz* focused on the impact of copyright infringement on non-professional individuals, it is also important to consider the approaches that courts have taken in social media-related fair use lawsuits involving professional photojournalists. In cases involving professionals, courts have emphasized the importance of protecting photojournalists from market harm.⁵⁸ Such considerations by courts are reasonable due to the time, effort, and expertise that set the works of photojournalists apart from non-professional individuals.⁵⁹

53. *Id.*

54. *Id.* (quoting *Barcroft Media, Ltd. v. Coed Media Group, LLC*, 297 F. Supp. 3d 339, 352 (S.D.N.Y. 2017)).

55. *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 427 (S.D.N.Y. 2018); *Cruz*, 444 F. Supp. 3d at 467; see also Steve Zansberg, *Counseling Your Clients on Fair Use of Others' Works . . . While Standing on One Foot*, 34 COMM. L. 12, 15–16 (2019).

56. *Otto*, 345 F. Supp. 3d at 428; *Cruz*, 444 F. Supp. 3d at 467.

57. *Otto*, 345 F. Supp. 3d at 428; *Cruz*, 444 F. Supp. 3d at 468.

58. See *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007); *Boesen v. United Sports Publ'ns, Ltd.*, No. 20–CV–1552 (ARR)(SIL), 2020 WL 6393010, at *6 (E.D.N.Y. 2020).

59. See generally Ed Kashi, *The Unspoken Consequences of a Photojournalist's Life*, TIME (Apr. 28, 2016), <https://time.com/4311394/the-unspoken-consequences-of-a-photojournalists-life/> [<https://perma.cc/5FY3-TGNX>]; Ross Collins, *Ten Practical Principles for Photojournalists*, NORTH DAKOTA STATE UNIV. (2012), <https://www.ndsu.edu/pubweb/~rcollins/242photojournalism/Principles.html> [<https://perma.cc/3DDK-K2XB>].

For instance, *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177 (D. Mass. 2007), a freelance photographer brought a copyright infringement action against CBS and two of its affiliate stations for the unauthorized broadcast of his photographs of a known-gangster's arrest in a story about the arrest of another gangster.⁶⁰ The freelancer took the images while on assignment for *The Boston Globe* and registered the photographs with the Copyright Office.⁶¹ The defendant network claimed fair use incidental to news reporting.⁶² Nonetheless, the court ultimately determined that a fair use finding would destroy the photographer's expected market for the images and "fly in the face of the practical experience of the freelance photojournalism industry."⁶³

The decision turned on the court's consideration of CBS's use as "paradigmatic of the only market" the plaintiff's images could have.⁶⁴ However, the court noted that the loss of a licensing fee does not constitute "market harm" where the plaintiff-freelancer admitted that flashing of his image on television may "heat up" interest and increase demand for his photographs.⁶⁵ Additionally, the court acknowledged that it is unlikely that photojournalists would continue putting themselves in difficult or dangerous positions to capture newsworthy images if they could not collect licensing fees—and copyright is meant to prevent unrestricted use from likely drying up the source of content.⁶⁶

Further, at issue in *Boesen v. United Sports Publications, Ltd.*, was an image of a tennis player as a child that was taken by the plaintiff, a professional photographer.⁶⁷ The photographed tennis player announced her retirement from the sport on Instagram, and included a "cropped low-resolution version" of the plaintiff's image.⁶⁸ Thereafter, the defendant sports news publisher ran an article covering the tennis player's retirement announcement and "embedded" her Instagram post into the article.⁶⁹

The *Boesen* court ultimately held the fair use factors favored the defendant.⁷⁰ In its ruling, the court noted that the plaintiff's photograph did not incur the same protections as an unpublished work, because the

60. *Fitzgerald*, 491 F. Supp. 2d at 180–81.

61. *Id.* at 180.

62. *Id.* at 184.

63. *Id.* at 190.

64. *Id.* at 189.

65. *Id.*

66. *Id.*

67. *Boesen v. United Sports Publ'ns, Ltd.*, 20–CV–1552(ARR)(SIL), 2020 WL 6393010, at *1 (E.D.N.Y. Nov. 2, 2020).

68. *Id.*

69. *Id.* at *2.

70. *Id.* at *6.

plaintiff already published it on his own social media and website.⁷¹ Further, because the defendant embedded the post and it maintained all of the markings from Instagram—including the tennis player’s profile photo, username, and the accompanying text—it was transformative.⁷² The court considered this determination a balance between professional photographers’ interest in protecting their copyrights and their interest in covering events that will spark interest on social media, without giving publishers the unmitigated power to copy and paste copyrighted multimedia.⁷³

In the plaintiff’s motion to reconsider, he argued that the court overlooked the fact that a fair use finding would “erode” the market.⁷⁴ In response, the court determined there was “little market harm” because the cropped low-resolution version of the image in the embedded Instagram post was “a poor substitute for the original.”⁷⁵ The court added that its holding would not apply to news organizations manipulating images as “technical end-runs” to avoid copyright law by “shoplifting” multimedia via screenshots.⁷⁶

It is significant to consider the ways in which professional photojournalists differ from the non-professional plaintiffs in social media-related § 107 disputes with news outlets. Photojournalists exert substantial effort into capturing compelling images that are properly lit and strategically focused on newsworthy subjects.⁷⁷ As a result, it is common for these professionals to put themselves in difficult, uncomfortable, or even dangerous positions to do their work.⁷⁸ On the other hand, in the discussed cases involving non-professional plaintiffs, the newsworthy images at issue were taken quickly on smartphones during chance encounters.⁷⁹ These two types of image-takers differ substantially in circumstances, approaches, and knowledge about copyright.⁸⁰ Yet, courts in decisions like *Otto* and *Cruz* have expressed concern about the market

71. *Id.* at *5.

72. *Id.* at *6.

73. *Id.* at *5.

74. *Boesen v. United Sports Publ’ns, Ltd.*, 20–CV–1552(ARR)(SIL), 2020 WL762522, at *3 (E.D.N.Y. Dec. 22, 2020).

75. *Id.* (citing *Boesen*, 2020 WL 6393010, at *6).

76. *Boesen*, 2020 WL 762522, at *4.

77. *See generally* Kashi, *supra* note 59; Collins, *supra* note 59.

78. *Id.*

79. *See Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412, 419 (S.D.N.Y. 2018); *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

80. *See Otto*, 345 F. Supp. 3d at 422; *Cruz*, 444 F. Supp. 3d at 463; *see generally* Kashi, *supra* note 59; Collins, *supra* note 59; *see also* Andres Guadamuz, *What Do People Think About Copyright?*, TECH. L. JOTWELL (Feb. 24, 2014), <https://cyber.jotwell.com/what-do-people-think-about-copyright/> [<https://perma.cc/MF22-ZH4L>].

impact of fair use findings on non-professional individuals.⁸¹ Part III will delve further into why it is both reasonable and in the public's interest for courts to afford less copyright protections to non-professional photographers.⁸²

D. Copyright Versus the First Amendment

Fair use ultimately functions to protect the use of a copyrighted work in circumstances where the social benefit is greater than the individual owner's loss.⁸³ News reporting, specifically, is considered one of the well-established productive beneficiaries of fair use in the preamble to § 107.⁸⁴ Not only has the "newsworthy" defense been constitutionalized, but the Supreme Court has held the First Amendment's protections so expansive that false reports on matters of public interest are not actionable—unless those reports were made with actual malice.⁸⁵ Nonetheless, the claim that "the public is entitled to see" the content of a copyrighted work does not automatically mean that "fair use" applies on the basis of news reporting.⁸⁶ Rather, showing a small portion of the work is more likely to be deemed a fair use.⁸⁷ Additionally, the First Amendment does not categorically protect against claims of copyright infringement where news publications are not immune from liability under intellectual property laws.⁸⁸ Thus, an inherent tension exists between journalism and federal copyright law.⁸⁹

The paradoxical relationship between the First Amendment and copyright law was discussed by the United States Supreme Court in *Eldred v. Ashcroft*.⁹⁰ The *Eldred* Court noted that the First Amendment and the Copyright and Patent Clause in Article I of the United States Constitution were adopted close in time, which suggests that the Framers believed the "limited monopolies" arising out of copyright were compatible with the

81. See *Otto*, 345 F. Supp. 3d at 428; *Cruz*, 444 F. Supp. 3d at 470.

82. See *infra* Part III.A.

83. Aufderheide, *supra* note 35, at 61.

84. Shipley, *supra* note 29, at 296.

85. Patrick M. Garry, *The Erosion of Common Law Privacy and Defamation: Reconsidering the Law's Balancing of Speech, Privacy, and Reputation*, 65 WAYNE L. REV. 279, 294 (2020).

86. Zansberg, *supra* note 55, at 15.

87. *Id.*

88. *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 426–27 (S.D.N.Y. 2018) (citing *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 747, 480 (2d. Cir. 2007)).

89. Ryan McNamara, *Technically, It Wasn't Me: How a Questionable Finding of Copyright Infringement May Chill Journalism in the Social Media Age*, 93 TUL. L. REV. 1255, 1256 (May 2019).

90. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

freedom of speech.⁹¹ The Court considered that the Framers intention was for copyright to be the “engine of free expression,” because establishing a marketable right to use one’s expression via copyright creates an economic incentive to create and disseminate ideas.⁹² The Court also acknowledged that copyright law contains built-in First Amendment accommodations, like the “fair use” defense, which allows the public to use facts and ideas in a copyrighted work as well as an expression itself for limited purposes.⁹³ Fair use provides “considerable latitude” for uses like scholarship, comment, and even parody.⁹⁴ Ultimately, the Court in *Eldred* determined that a declaration that copyrights are “categorically immune” from First Amendment challenges is too broad. But when Congress has not altered the traditional copyright protection scheme, First Amendment scrutiny is unnecessary.⁹⁵

However, it is important to acknowledge the complexity of applying such ideas about the First Amendment and copyright paradox in the fast-paced social media age. News outlets, and local sources in particular, have struggled to maintain profitability since the advent of the Internet because relying on circulation and advertisers is no longer profitable.⁹⁶ Giants like Facebook and Google dominate online advertising revenue, news aggregators swipe content for free views, and individual attention spans have only gotten shorter.⁹⁷ As a result, newsrooms across the country are shrinking, and they often lack the resources to effectively chase important stories or keep up with the fast-paced social media-driven news cycle.⁹⁸

Thus, newsrooms have found themselves occasionally relying upon images of newsworthy happenings made widely accessible on social media to supplement reporting.⁹⁹ Eyewitness-taken images sometimes offer on-the-ground vantage points and first-hand accounts of important stories that mainstream news outlets cannot immediately access.¹⁰⁰ For

91. *Id.* at 219.

92. *Id.* at 219 (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985)).

93. *Id.* at 219-20.

94. *Id.* at 220.

95. *Id.* at 221.

96. Lindsay Marks, *Can Copyright Save the U.S. News Industry?: Applying the 2016 European Union Proposal to the United States*, 46 *AIPLA Q.J.* 61, 64–65 (Winter 2018).

97. *Id.* at 64–67.

98. See Elizabeth Grieco, *U.S. Newspapers Have Shed Half of Their Newsroom Employees Since 2008*, PEW RSCH. CTR. (Apr. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/04/20/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/> [<https://perma.cc/Y2C9-K98Z>].

99. Cooper, *supra* note 3.

100. Brian Montopoli, *The Rise of Citizen Journalism*, CBS NEWS (Sept. 21, 2005, 9:42 AM), <https://www.cbsnews.com/news/the-rise-of-citizen-journalism/>

instance, to provide compelling perspectives of the 2020 Beirut Explosion, major news outlets relied on videos that individuals on the ground in Lebanon recorded and shared to their personal social media pages.¹⁰¹ Further, following the storming of the U.S. Capitol by insurrectionists on Jan. 6, 2021, USA TODAY published an article calling on its audience to either identify people in publicly available photos or to submit their own images or videos of the event.¹⁰² Additionally, social media posts that quickly generate substantial nationwide or global engagement can be newsworthy in and of themselves.¹⁰³ This is particularly true when a post involves a breaking news event or a notable public figure.¹⁰⁴

Nonetheless, the ambiguity of the “fair use” factors set out in § 107 has left both courts and litigants with more questions than definitive answers.¹⁰⁵ Thus, it has become increasingly important to determine an updated assessment of fair use that considers the challenges that social media poses for modern day news outlets, the significance of the press’s contributions to the public, and the interests of individual social media users.¹⁰⁶

[<https://perma.cc/5YFY-KJDR>]; Rachael Kennedy, *Consider the Source: The Importance of the Eyewitness in Real-Time News Coverage*, MEDIUM (July 27, 2015), <https://medium.com/1st-draft/consider-the-source-106253680a59> [<https://perma.cc/S4GV-7DCN>].

101. E.g., Evan Hill, et al., “*What Footage of the Beirut Explosion Tells Us About the Blast*,” N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/world/middle-east/beirut-explosion-footage.html> [<https://perma.cc/93HA-7NVK>].

102. *Help USA TODAY Tell the Story of Those Who Stormed the US Capitol*, USA TODAY (Jan. 8, 2021, 3:07 PM), <https://www.usatoday.com/story/news/2021/01/07/dc-protests-help-us-identify-rioters-who-stormed-capitol/6583447002/> [<https://perma.cc/4D33-A85D>].

103. See generally Monica Anderson & Andrea Caumont, *How Social Media is Reshaping News*, PEW RSCH. CTR. (Sept. 24, 2014), <https://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/> [<https://perma.cc/XB9L-LRLT>]; Ann Friedman, *Going Viral: How to Make Content Sharable*, COLUM. JOURNALISM REV. (Mar./Apr. 2014), https://archives.cjr.org/feature/going_viral.php [<https://perma.cc/98JL-3KNK>].

104. See generally Elizabeth Dwozkin & Craig Timberg, *The Unseen Machine Pushing Trump’s Social Media Megaphone into Overdrive*, THE WASHINGTON POST (Oct. 30, 2020), <https://www.washingtonpost.com/technology/2020/10/30/trump-twitter-domestic-disinformation/> [<https://perma.cc/Z9EB-U2F6>]; Marie-Helene DiBenedetto, *Posts That Went Viral in 2019*, MOONDUST (Dec. 2, 2019), <https://www.moondustagency.com/knowledge-center/posts-viral-2019> (webpage no longer available).

105. Kim, *supra* note 7, at 106.

106. See generally Zansberg, *supra* note 55, at 16; Nic Newman, *Journalism, Media and Technology Trends and Predictions 2019*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2019), <https://www.digitalnewsreport.org/publications/2019/journalism-media-technology-trends-predictions-2019/> [<https://perma.cc/2YXT-9TCQ>].

III. ANALYSIS

A. Two Sides of the Story: Individuals vs. News Outlets

At issue are copyright disputes involving individuals who encountered newsworthy events or people and have taken to social media to share their photos or videos.¹⁰⁷ As illustrated in *Otto* and *Cruz*, such individuals are often in the right place at the right time.¹⁰⁸ Additionally, in these scenarios, the images at issue were shared onto social media platforms populated by large swaths of users from around the globe.¹⁰⁹ According to the most recent metrics at the time of this writing, Facebook has 2.7 billion users, Instagram has 1 billion users, Twitter has 330 million users, and Snapchat has 249 million users.¹¹⁰ Nonetheless, the prospect of news outlets subsequently sharing individuals' personal—albeit newsworthy—social media content gives rise to a complicated copyright analysis in light of the muddiness of § 107.¹¹¹

As illustrated in *Otto*, when newsworthy encounters happen unexpectedly, any unsuspecting smartphone user may manage to get a lucky shot.¹¹² However, the true copyright ownership of such photos can become unclear when images are so easily shared from friend to friend or acquaintance to acquaintance before winding up on social media.¹¹³ Taking into account the precarious nature of social media content ownership, the *Otto* court determined that it was not sufficient for media

107. See generally *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018); *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457 (E.D.N.Y. 2020).

108. E.g., *Otto*, 345 F. Supp. 3d at 419; *Cruz*, 444 F. Supp. 3d at 462.

109. See *Otto*, 345 F. Supp. 3d at 421; *Cruz*, 444 F. Supp. 3d at 462.

110. H. Tankovska, *Facebook: Number of Monthly Active Users Worldwide 2008-2020*, STATISTA (Feb. 2, 2021), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/#:~:text=How%20many%20users%20does%20Facebook,the%20biggest%20social%20network%20worldwide> [https://perma.cc/9SXJ-4EEM]; H. Tankovska, *Instagram: Distribution of Global Audiences 2021, by Age Group*, STATISTA (Feb. 10, 2021), <https://www.statista.com/statistics/325587/instagram-global-age-group/#:~:text=With%20over%201%20billion%20monthly,95%20million%20Instagram%20users%20each> [https://web.archive.org/web/20210321192922/https://www.statista.com/statistics/325587/instagram-global-age-group/#:~:text=With%20over%201%20billion%20monthly,95%20million%20Instagram%20users%20each]; H. Tankovska, *Twitter: Number of Monthly Active Users 2010-2019*, STATISTA (Jan. 27, 2021), <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> [https://perma.cc/2AVW-ZFJM]; H. Tankovska, *Daily Active Users of Snapchat 2014-2020*, STATISTA (Mar. 5, 2021), <https://www.statista.com/statistics/545967/snapchat-app-dau/> [https://perma.cc/A87F-ARZH].

111. Kim, *supra* note 7, at 113.

112. *Otto*, 345 F. Supp. 3d at 420.

113. E.g., *id.* at 420–21.

outlets to merely credit the social media accounts posting the images as the content's source.¹¹⁴ Similarly, in *Cruz*, the plaintiff shared his photo with his friend and his girlfriend, who both shared it on Instagram—subsequently, the plaintiff's friend falsely claimed credit for the image on social media.¹¹⁵

1. Questioning the Harm to Non-Professional Plaintiffs

Notably, courts assessing copyright disputes between individuals and news outlets have considered the impact on the potential market for the plaintiffs' work.¹¹⁶ For example, the *Otto* court asserted that allowing media companies to claim fair use in these circumstances would discourage amateur photographers while giving news publishers license to avoid taking their own photos and videos.¹¹⁷ Whereas in *Cruz*, the court determined the defendant media company usurped the plaintiff's potential market for the photograph.¹¹⁸ However, both the *Otto* and *Cruz* plaintiffs took steps to share their multimedia to others for free and did not attempt to protect their copyright until they saw the opportunity to assert a claim for monetary damages.¹¹⁹

A fair use determination would hardly discourage amateur photographers where billions of individuals take to social media to share notable or interesting images with the world every second.¹²⁰ As the *Fitzgerald* court noted, the loss of a licensing fee is hardly a market harm where the use of an image by a news outlet can increase interest in a non-professional photographer.¹²¹ When the plaintiffs in *Cruz* and *Otto* took the smartphone images at issue, both merely sought to document an attention-grabbing event.¹²² Also, neither were professional photojournalists with an established interest in the continued sale of multimedia that they dedicated expertise and time to produce.¹²³ Thus, it is unlikely that a fair use ruling would have resulted in substantial market harm where both merely sought to capitalize upon a chance encounter.¹²⁴ Further, in light of a fast-paced 24/7 news cycle, the value of eyewitness

114. *Id.* at 422, 437.

115. *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

116. *See, e.g., Otto*, 345 F. Supp. 3d at 426; *Cruz*, 444 F. Supp. 3d at 470.

117. *Otto*, 345 F. Supp. 3d at 428.

118. *Cruz*, 444 F. Supp. 3d at 470.

119. *See id.; Otto*, 345 F. Supp. 3d at 428.

120. Tankovska, *supra* note 1.

121. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007).

122. *See Otto*, 345 F. Supp. 3d at 419; *Cruz*, 444 F. Supp. 3d at 462.

123. *See generally Otto*, 345 F. Supp. 3d at 420; *Cruz*, 444 F. Supp. 3d at 462.

124. *See Otto*, 345 F. Supp. 3d at 428; *Cruz*, 444 F. Supp. 3d at 470.

visuals is limited by the passing of time.¹²⁵ The window for non-professional image takers to profit from newsworthy images is a relatively short one, because as time goes on and public interest in a newsworthy occurrence wanes, interest in capturing the event decreases.¹²⁶ Additionally, for individuals with a limited connection to the media industry, newsworthy encounters are more likely to stem from surprising or unusual occurrences.¹²⁷

Discouraging news outlets from incorporating the photos and videos of non-professional eyewitnesses into news reporting with adverse fair use rulings does not benefit the public at large. Any multimedia content that is shared on social media has already been made available to global audiences at no cost.¹²⁸ Thus, it is questionable to impose monetary damages on news outlets for the use of widely available visuals that supplement news stories for the benefit of the public. Additionally, courts have acknowledged that copyright serves to protect the works of creators such that they are incentivized to continue making content.¹²⁹ This reasoning appropriately serves photojournalists, who put themselves in difficult or dangerous positions to take newsworthy images and thereafter seek to protect the copyright of their images.¹³⁰ On the other hand, lay individuals who record and share chance newsworthy encounters are typically not initially concerned with their rights under copyright law or the potential for pecuniary gain, as demonstrated by their willingness to share their content with others for free.¹³¹

A determination acknowledging the limited market harm to non-professional photographers in social media-related cases against news outlets would add much needed clarity and consistency to courts' fair use determinations. Further, such a determination is necessary as it has become more common for social media users to inadvertently take on the role of "citizen journalists" during newsworthy events.¹³²

125. See generally Martin, *supra* note 2.

126. See generally Martin, *supra* note 2; Laura Hazard Owen, *A Typical Big News Story in 2018 Lasted About 7 Days (Until We Moved on to the Next Crisis)*, NIEMANLAB (Jan. 25, 2019), <https://www.niemanlab.org/2019/01/a-typical-big-news-story-in-2018-lived-about-7-days-until-we-moved-on-to-the-next-crisis/> [<https://perma.cc/UUX5-RMNU>].

127. See, e.g., *Otto*, 345 F. Supp. 3d at 420; *Cruz*, 444 F. Supp. 3d at 462.

128. Tankovska, *supra* note 1.

129. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007).

130. See generally Collins, *supra* note 59; Dawn Gilfillan, *How to Become a Photojournalist*, ENVIRA GALLERY (Dec. 21, 2019), <https://enviragallery.com/how-to-become-a-photojournalist/> [<https://perma.cc/XGV9-S2SP>].

131. See, e.g., *Otto*, 345 F. Supp. 3d at 419; *Cruz*, 444 F. Supp. 3d at 462.

132. See generally Myers, *supra* note 2; Reed, *supra* note 6.

2. The Realities of Newsgathering in the Social Media Age

The aims and actions of news outlets are fundamentally driven by several “news values.”¹³³ While scholars have raised arguments about the need for news values to continue evolving as outlets seek to connect with more diverse communities and contend with new technologies, several basic news values endure.¹³⁴ These core news values include the following: impact, timeliness, prominence, proximity, bizarreness, conflict, and currency (the value given to stories about topics that are currently in the public’s spotlight).¹³⁵ However, the advent of social media has pushed news outlets to adapt quickly to a more demanding, fast-paced, increasingly interconnected, and information-hungry world.¹³⁶

Social media become a significant tool for news outlets to share their articles or broadcasts, but it has also become a powerful tool for newsgathering.¹³⁷ By staying active on social media, reporters can find out about breaking news events within seconds of their occurrence.¹³⁸ Further, by monitoring the posts of users interacting with certain hashtags, using particular key words, or sharing multimedia, newsroom staff can glean information about the scale, scope, and key players involved in a newsworthy event before a reporter even reaches the scene.¹³⁹ There are also instances where social media posts themselves have become newsworthy.¹⁴⁰ These can be posts by high profile figures or merely content that has triggered such high user engagement that it has effectively

133. Meredith D. Clark, *It’s Time for a New Set of News Values. Here’s Where We Should Start*, POYNTER (June 27, 2016), <https://www.poynter.org/newsletters/2016/its-time-for-a-new-set-of-news-values-heres-where-we-should-start/> [<https://perma.cc/7E3U-P6RC>].

134. *Id.*

135. University of North Carolina at Pembroke Journalism, *What Are the Seven News Values?*, UNCP, <http://wp.lps.org/akabour/files/2013/12/The-Seven-News-Values.pdf> [<https://perma.cc/6NY4-EB4S>] (last accessed Feb. 1, 2021).

136. Martin, *supra* note 2.

137. *See* Myers, *supra* note 2; Reed, *supra* note 6.

138. *See id.*

139. *See id.*

140. *See, e.g.*, Katie Van Syckle, *Five Years, Thousands of Insults: Tracking Trump’s Invective*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/insider/trump-twitter-insults-list.html> [<https://perma.cc/JV4A-8APB>]; Christopher Rosa, *Cher’s Twitter Is Still the Best Thing on the Internet, in Case You’re Wondering*, GLAMOUR (July 20, 2018), <https://www.glamour.com/story/cher-best-tweets> [<https://perma.cc/78AT-KH87>]; Catriona Harvey-Jenner, *The Most Liked and Retweeted Tweets of 2020*, COSMOPOLITAN (Dec. 8, 2020), <https://www.cosmopolitan.com/uk/reports/a34902054/most-popular-tweets/> [<https://perma.cc/NEN4-RDMH>].

“gone viral.”¹⁴¹ Thus, news outlets have come to both rely on and be burdened by social media platforms.¹⁴²

As information has become increasingly more accessible to the public via the Internet, both print and television news outlets have experienced volatile shifts in advertising revenue due to waning viewership and subscribership.¹⁴³ As a result, newspapers across the country have folded, television audience numbers have nose-dived, news radio shows have gone off the air, foreign news bureaus have been abandoned, and overall newsroom staff numbers have shrunk.¹⁴⁴ Local news sources have been the hardest hit.¹⁴⁵

With reduced staff and fewer resources, newsrooms across the country now depend upon social media for assistance when big news stories break—particularly for visuals.¹⁴⁶ As the United States District Court for the District of Massachusetts noted in *Fitzgerald*, “[n]ewscasts without imagery draw fewer viewers, ratings fall, and revenue falls in turn.”¹⁴⁷ These are realities that recent judicial decisions ruling in favor of individual plaintiffs have failed to consider. If newsrooms are discouraged from incorporating photos and videos shared on social media in instances where such visuals can provide an immediate look into a developing news story, the public may be deprived of helpful information or perspectives.

141. See generally *id.*

142. See Myers, *supra* note 2.

143. See Marks, *supra* note 96, at 64–65; Michael Barthel et al., *Coronavirus-Driven Downturn Hits Newspapers Hard as TV News Thrives*, PEW RESEARCH CENTER (Oct. 29, 2020), <https://www.journalism.org/2020/10/29/coronavirus-driven-downturn-hits-newspapers-hard-as-tv-news-thrives/> [<https://perma.cc/K7KK-MZK2>]; Adam Levy, *TV Networks Are About to Lose a Lot of Ad Revenue*, NASDAQ (Oct. 8, 2020, 9:45 AM), <https://www.nasdaq.com/articles/tv-networks-are-about-to-lose-a-lot-of-ad-revenue-2020-10-08> [<https://perma.cc/58KP-HKER>].

144. See David Bauder & David A. Lieb, *Decline in Readers, Ads Leads Hundreds of Newspapers to Fold*, ASSOCIATED PRESS (Mar. 11, 2019), <https://apnews.com/article/0c59cf4a09114238af55fe18e32bc454> [<https://perma.cc/23V6-3HJ7>]; Rick Porter, *TV Long View: Five Years of Network Ratings Declines in Context*, THE HOLLYWOOD REPORTER (Sept. 21, 2019, 5:00 AM), <https://www.hollywoodreporter.com/live-feed/five-years-network-ratings-declines-explained-1241524> [<https://perma.cc/49NG-E8RZ>]; Samantha Hissong, *In a Crisis, Radio Should Be Bigger Than Ever – So Why Isn't It?*, ROLLING STONE (Apr. 21, 2020, 12:00 PM), <https://www.rollingstone.com/pro/features/radio-coronavirus-crisis-985533/> [<https://perma.cc/E9Q8-WTEM>]; Grieco, *supra* note 98.

145. See Lauren Harris, *Now We Need to Rebuild Local Newsrooms*, COLUM. JOURN. REV. (Nov. 11, 2020), https://www.cjr.org/business_of_news/now-we-need-to-rebuild-local-newsrooms.php [<https://perma.cc/W37X-E88G>]; Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive its Local Newsrooms*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/> [<https://perma.cc/WFJ9-5WP5>].

146. See Myers, *supra* note 2; Reed, *supra* note 6.

147. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 187 (D. Mass. 2007).

B. Proposal for a Judicial Focus on Public Interest in § 107 Cases

The debatable nature of the fair use factors under § 107 has given rise to complex legal analyses. For instance, in fair use cases involving news outlets and non-professional photographers, courts assess the following: the portion of the work used, whether the work is “creative” or “factual” in nature, the intentions of the news outlet, any changes to the work, and any market harm to the originator of the work.¹⁴⁸ However, in light of the current prevalence of quickly sharing attention-grabbing photos and videos to social media, it is not likely that social media-related fair use litigation will disappear anytime soon. Yet, in such cases, recent court decisions have trended in favor of the plaintiffs.¹⁴⁹

To this point, it is important to consider the public interest that drives news reporting, which is expressly distinguished as one of the “well-established fair use activities” in the § 107 preamble.¹⁵⁰ A free press is regarded as a keystone in maintaining democracy.¹⁵¹ It is protected by the First Amendment and has also been referred to as the “Fourth Estate” that accompanies the three other branches of government.¹⁵² As the American Press Institute has noted, “the foremost value of news is as a utility to empower the informed[,]” and “[t]he purpose of journalism is thus to provide citizens with the information they need to make the best possible decisions about their lives, their communities, their societies, and their governments.”¹⁵³ Regardless of social media’s impact on the industry, news outlets still play a significant role as society’s “watchdogs,” asking important questions and undertaking investigations about institutions, political leaders, businesses, and more.¹⁵⁴

Without traditional news outlets, it would be far more difficult to filter out accurate and critical information from the noisiness of the world’s opinions, and it would be similarly difficult to combat conspiracy theories

148. See *Otto*, 345 F. Supp. 3d at 426–33; *Cruz*, 444 F. Supp. 3d at 466–71.

149. See *Otto*, 345 F. Supp. 3d at 437; *Cruz*, 444 F. Supp. 3d at 472.

150. 17 U.S.C. § 107.

151. See Delbert Tran, *The Fourth Estate as the Final Check*, YALE LAW SCHOOL MFIA (Nov. 22, 2016), <https://law.yale.edu/mfia/case-disclosed/fourth-estate-final-check> [<https://perma.cc/ZJ9Z-YF4W>].

152. See *id.*; U.S. CONST. amend. I.

153. Walter Dean, *What is the Purpose of Journalism?*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/purpose-journalism/#:~:text=News%20is%20that%20part%20of,utility%20to%20empower%20the%20informed> [<https://perma.cc/R5SC-33JV>] (last visited Mar. 16, 2022).

154. See generally *id.*; Butch Ward, *Watchdog Culture: Why You Need it, How You Can Build it*, POYNTER (May 26, 2005), <https://www.poynter.org/reporting-editing/2005/watchdog-culture-why-you-need-it-how-you-can-build-it/> [<https://perma.cc/B57R-EUVD>].

and misinformation.¹⁵⁵ Thus, courts assessing § 107 disputes involving citizens and news outlets should weigh the substantial role that the news industry plays in the public's interest over the limited and incidental commercial interests of non-professional image-takers whose works have been shared on social media. Courts should also consider the unique challenges that newsrooms are facing in the evolving digital age as well as the increased propensity of individuals to share high volumes of multimedia online for free.¹⁵⁶

During breaking news events where multimedia shared on social media are the first available visuals or present particularly compelling vantage points, it is reasonable for news outlets to have a strong interest in using such content to supplement their developing coverage.¹⁵⁷ Further, the distinction between professional photographers and individuals who have chance encounters with newsworthy occurrences is significant to acknowledge where their commercial interests and motivations are different.¹⁵⁸ In 2020, 1.82 billion people logged into Facebook daily, the average Instagram user posted at least one image a day, and approximately 9,281 tweets were sent every single second.¹⁵⁹ Such platforms are built on the premise of sharing content, and individuals take photos and videos of the entirety of their daily lives with the intention of sharing that content with a vast community of people on the Internet.¹⁶⁰ Courts have implied that news reporting does not give media companies free reign to scour social media pages for multimedia and avoid paying creators licensing fees.¹⁶¹ However, there must be an emphasis on public interest in fair use matters where strengthening the position of news outlets protects the Fourth Estate's ability to keep the collective informed.

An information-hungry society does not benefit when media companies are tied up in § 107 disputes, especially amid the shrinking of

155. Paul Cheung & John Sands, *More Research and Resilient Journalists are Needed to Combat the Misinformation Disorder*, KNIGHT FOUND. (Oct. 29, 2020), <https://knightfoundation.org/articles/more-research-and-resilient-journalists-are-needed-to-combat-the-misinformation-disorder/> [<https://perma.cc/YNA6-PZVM>].

156. *See generally* Myers, *supra* note 2; Reed, *supra* note 6; *see also* Bagadiya, *supra* note 4.

157. *See* Hill, et al., *supra* note 101; USA TODAY, *supra* note 102.

158. *See infra* Section III.A.1.

159. Bagadiya, *supra* note 4.

160. *See* Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 420, 440 (2019).

161. *See* *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007) (opining that finding fair use in favor of CBS would destroy "the only potential market that exists for the photographs" and dissuade freelance photojournalists from seeking out and capturing difficult to achieve images).

newsrooms across the country.¹⁶² Such cases may be particularly burdensome for local outlets like the Atlanta Cox Media station WSB-TV in *Cruz*.¹⁶³ Further, in cases where plaintiffs' newsworthy images have been shared with others and posted on social media at no cost, rulings that reject a finding of fair use are questionable.¹⁶⁴ It would benefit public interest, the First Amendment's aims of maintaining the freedom of the press, and judicial economy if the public interest purpose of news reporting was the factor weighed most heavily by courts. A judicial pattern of broad protections for news outlets in social media-connected § 107 cases would protect and reassure journalists who wish to provide comprehensive news reporting by incorporating social media content into their stories. However, such a stance would still leave room for courts to deny news outlets' fair use in cases where the use of a photo or video is frivolous and not ultimately necessary to inform the public of the story at hand.

In *Fitzgerald*, the court noted that copyright is intended to prevent the unfettered use of works from drying up the sources of content.¹⁶⁵ However, sharing images and videos on social media has become such an ingrained part of present social norms that it is unlikely users will cease sharing multimedia online solely due to fears about fair use.¹⁶⁶ Everyday users typically take to social media intending to connect with and share information to a wide audience.¹⁶⁷ Focusing on public interest in fair use cases would take into account the ways that social norms have been fundamentally changed by social media and the need for news outlets to effectively use these online services as storytelling tools. To this point, news outlets' use of multimedia found on social media for the purpose of keeping the public informed about important news events should easily warrant a fair use ruling.

C. Best Practices for Newsrooms in the Meantime

Nonetheless, there has not been much discussion within the courts about how the "fair use" factors may be clarified so as to better guide news

162. See Grieco, *supra* note 98.

163. See generally *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 463 (E.D.N.Y. 2020).

164. See generally *id.* at 462; *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 419 (S.D.N.Y. 2018).

165. See *Fitzgerald*, 491 F. Supp. 2d at 189.

166. See Patricia Reaney, *Most of World Interconnected Through Email, Social Media*, REUTERS (Mar. 27, 2012, 6:25 AM), <https://www.reuters.com/article/net-us-socialmedia-online-poll/most-of-world-interconnected-through-email-social-media-idUSBRE82Q0C420120327> [<https://perma.cc/NV5V-55W6>]; Bagadiya, *supra* note 4.

167. See *id.*; Ginsburg & Budiardjo, *supra* note 160, at 440.

outlets that must contend with legal complexities arising from their utilization of the social media landscape.¹⁶⁸ Given the complexities and inconsistencies that accompany fair use cases, both courts and scholars have advised newsrooms to proceed with extreme caution when handling multimedia originating from social media platforms.¹⁶⁹ Courts have also emphasized that while news reporting is an expressly mentioned fair use category, that fact alone does not create an automatic presumption of fair use.¹⁷⁰ Rather, a news reporting nexus is merely treated as a consideration when making a fair use determination.¹⁷¹ Yet, the fair use disputes that have arisen between individuals and news outlets would not exist but for the hyperconnectivity that exists on social media. Further, as social media continues to remain a ubiquitous presence, news outlets must contend with the volatility that new technology has brought to industry.

Steve Zansberg, a longtime attorney for media entities and former chair of the American Bar Association's Forum on Communications Law, noted that he often advises clients to "use only what you need and no more."¹⁷² To this point, Zansberg has argued that prior to using, embedding, or hyperlinking a third-party image found on social media, journalists should ask whether the use is necessary to illustrate criticism, commentary, or a news story.¹⁷³ Such uses are more likely to be considered fair use and transformative, while courts are unlikely to deem the impermissible use of a copyrighted image for the mere sake of illustrating the content of a story to be fair use.¹⁷⁴

Consequently, in the event that a newsroom staffer is unable to obtain consent for the use of multimedia found on a social media platform, the news outlet must proceed at its own risk where it is difficult to be certain that it will prevail on the fair use defense.¹⁷⁵ Ultimately, the best way to avoid liability is to get permission from the originator of the content before using it in an article or news broadcast.¹⁷⁶

IV. CONCLUSION

In light of the context-specific and open-ended questions posed by the traditional fair use factors under § 107, decisions regarding social media-

168. See Zansberg, *supra* note 55, at 13; Kim, *supra* note 7, at 106.

169. See Ginsburg & Budiardjo, *supra* note 160, at 439.

170. See Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 184 (D. Mass. 2007).

171. See *id.*

172. Zansberg, *supra* note 55, at 15.

173. *Id.* at 14.

174. *Id.* at 12, 15.

175. Ginsburg & Budiardjo, *supra* note 160, at 439.

176. *Id.*

related fair use disputes between individuals and news outlets are prone to complexity and inconsistency. Additionally, thus far, courts and scholars alike have failed to posit tangible § 107 reform accounting for the unique challenges facing media companies in the social media-powered information age. Newsrooms around the world are tasked with keeping up with a rapidly paced 24-hour online news cycle while also contending with staffing shortages, revenue losses, and limited resources.

Social media platforms have empowered individuals to share content instantaneously and assert greater control over the information that exists on the Internet. Meanwhile, journalists have found themselves on precarious legal footing when it comes to incorporating social media into their news reporting. It is evident that through their ubiquity, social media platforms have become a veritable staple in societies around the world. Everyday users, newsrooms, legislators, judges, and attorneys alike must all contend with the changes that social media has brought.

Nonetheless, to impose copyright liability for the use of globally available social media posts for journalistic purposes unnecessarily handicaps media outlets' ability to provide accurate and up-to-date information to their audiences. If courts were to weigh public interest more heavily in fair use cases involving news outlets, this would protect the value of journalistic endeavors and the ability of social media content to enhance news reporting for the benefit of the collective. Yet, until either the courts or the legislature provide greater clarity on § 107, newsrooms are forced to tread lightly when it comes to newsworthy images and videos initially shared on social media pages.