Media Advocacy Workshop
January 31, 2019
Part 1: 9:00 am to 10:45 am
Part 2: 11:00 am to 12:15 pm
Part 3: 1:45 pm to 3:30 pm

Program Description:
Participants will break into small group sessions to focus on three different media law problems. One oral argument involves analysis of the Espionage Act and the First Amendment as it relates to the press. Another oral argument explores the intersection between copyright law and free speech in a digital media context. Finally, participants will engage in a pre-publication review exercise to develop their legal vetting skills.

Speakers

Stephanie Abrutyn, Senior Vice President & Chief Counsel, Litigation, HBO | New York, NY

Derek Bauer, Partner BakerHostetler | Atlanta, GA

Michael Berry, Partner Ballard Spahr | Philadelphia, PA

Edward Birk Marks Gray | Jacksonville, FL

Heather Dietrick, CEO Daily Beast | New York, NY

David Fink, Partner Kelley, Drye & Warren | Los Angeles, CA

Marc Fuller, Counsel Vinson & Elkins | Dallas, TX

Jack Greiner, Partner Graydon Head | Cincinnati, OH

Brendan Healey, Partner Mandell Menkes | Chicago, IL

James Lake, Partner Thomas & LoCicero | Tampa, FL

Amanda Leith, Senior Counsel NBCUniversal News Group | New York, NY

Craig Linder, Associate General Counsel, Dow Jones & Company | New York, NY

Frank LoMonte, Director Brechner Center for Freedom of Information, University of Florida | Gainesville, FL

Allison Lovelady, Partner Shullman Fugate | West Palm Beach, FL

Drew Shenkman, Senior Counsel Cable News Network | Atlanta, GA

Nathan Siegel, Partner Davis Wright Tremaine | Washington, D.C.

Nabiha Syed, Vice President and Associate General Counsel BuzzFeed, Inc. | New York, NY

Katie Townsend, Legal Director Reporters Committee for Freedom of the Press | Washington, D.C.

Kevin Vick, Partner Jassy Vick Carolan | Los Angeles, CA

Shaina Ward, Associate General Counsel, CARFAX | Centreville, VA

Corinna Zarek, Adjunct Faculty San Francisco State University | San Francisco, CA
Has the Sun Set on a Free and Independent Press?
January 31-February 2, 2019 | Eden Roc Hotel | Miami Beach, FL

Program Materials

1. Pre-Publication Review Exercise
2. Espionage Act and First Amendment Hypo *United States v. Benjamin Brandt*
Pre-Publication Review Exercise

Participant Instructions

This exercise is an opportunity to practice your pre-publication review skills and learn from experienced media lawyers in the process. You play the role of a lawyer for RNN, an online news publication. The Workshop Faculty play the roles of an RNN reporter, editor, and social media editor.

You have just been given the copy below and RNN wants to publish this on its website ASAP. You will be meeting the reporter and the editor to advise on potential legal issues with the article. The social media editor is also joining the meeting and wants to discuss some ideas for posts related to this story.

Please read this article and the related 911 transcript that will be posted with the article. Consider potential legal issues to discuss with the reporter and editor. Also, keep in mind how these issues may influence your analysis of whatever the social media editor wants to discuss.

Cast of Characters

RNN is a hypothetical online news company, including a website and social media outlets.

- Workshop participants – RNN lawyers
- Workshop Faculty 1 – RNN Reporter C. Chews
- Workshop Faculty 2 – RNN Editor J. Bean
- Workshop Faculty 3 – RNN Social Media Editor J. Rivers
Cami Bravado OD Stunner: Heroin-Addicted Singer Rushed to ER!

Friends Say Back-Up Dancer To Blame

PHOTO FROM PARTY SHOWS EVERYTHING

C. Chews, RNN

Los Angeles (RNN). Chart-topping singer Cami Bravado was transported to St. Francis Hospital on Saturday following an overdose of illegal drugs. She was at her home at the time, where a party was ongoing. Sources tell RNN that the singer, who had been partying for hours, had been consuming heroin, pills, and alcohol.

She collapsed on the floor in her home around 11 p.m. 911 was called to the scene.

According to a source, Bravado was not alone in her drug use during the party of approximately 50 people. “It was a wild one. Everyone was really partying hard.” But it was Bravado’s back-up dancer, Kevin Tenderline, who fueled the drug orgy when he brought in and pushed on Bravado the heroin and the pills.

“Not many people know this, but Cami has been battling drug demons for a while,” says a source. “She’s really been trying to stay clean. But Kevin just won’t let her be. He’s constantly pushing this shit on her. I guess she didn’t stay strong tonight.”

Tenderline, a Los Angeles native who dropped out of UCLA after one semester to tour with Dustin Thunderlak and has remained a sought-after back-up dancer ever since, has worked in professional dance for nearly 10 years. He joined Bravado’s show on her 2015 tour and the current tour, and appeared as a back-up dancer in the video for her Grammy-nominated hit single, Cold Out There. Some say Tenderline has become part of Bravado’s inner circle and has outsized influence over her.

In a 911 transcript obtained exclusively by RNN, it is revealed that it was a guest at the party, identifying herself as “Maddie,” who first called for help and disclosed that the beloved singer had overdosed. Sounding in distress, she described Bravado as “turning a weird color” and “maybe not even breathing.”

In a stunning turn, a photo from Bravado’s party appeared online. The photo shows the singer collapsed on the floor and seemingly unresponsive.

Bravado’s history of drug addiction was recently revealed by JNX, a celebrity news website. While Bravado herself has never commented publicly on the accusation and there is no record of her having received treatment, JNX sources insist she’s wrestled with demons for years and has been in a drug spiral over the last few months in particular since going back out on tour. But Bravado’s sister rejected JNX’s claims, insisting her sister had long managed diabetes, which can impact her health during periods of intense work.
Pre-Publication Review Exercise

Judges’ Notes

This exercise simulates an interaction between counsel and reporters/editors on a short deadline. You play the role of a reporter, editor, or social media editor. The workshop participants are the pre-publication lawyers.

These notes guide you through this exercise and identify potential pre-publication issues that have been incorporated into the materials. Also, you are welcome to ad lib facts for the purposes of eliciting pre-publication issues.

Workshop Committee members will be on hand to assist with timekeeping and any questions. Please note that most participants will have limited or no experience with pre-publication review and will likely need guidance throughout the exercise.

Workshop Design

Intro: Allow participants time to read the draft article. (~10 minutes)

Part I: Prepublication review of the draft article. (~15 minutes)

Part II: Prepublication review of potential social media post, including a photo of a celebrity in the hospital and a caption. Social Media Editor will also raise the possibility of obtaining a copy of the celebrity’s medical chart. (~15 minutes)

Part III: Debrief the exercise. Discuss vetting experiences and lessons from practice. (~20 minutes)

Materials

1. Draft article to be published ASAP. “Cami Bravado OD Stunner: ”
2. 911 Transcript – advance copy from the reporter’s police source
3. Photo of Bravado passed out on the floor – from public Facebook page
4. Photo of Bravado in hospital – from the Social Media Editor’s source

Cast of Characters

RNN is a hypothetical online news company, including a website and social media outlets.

- Workshop participants – RNN lawyers
- Workshop Faculty 1 – RNN Reporter C. Chews
- Workshop Faculty 2- RNN Editor J. Bean
- Workshop Faculty 3 – RNN Social Media Editor J. Rivers
Overview

**Reporter: C. Chews** wrote the copy and worked his/her sources at the police department to obtain an advance copy of the 911 tape.

**Editor: J. Bean** wants to get article published.

**Social Media Editor: J. Rivers.** During the exercise, Rivers tells the participants the following:

- Rivers has a source at the hospital, an administrative employee.
- This source provided a photograph of Bravado in her private hospital room.
- This source may be able to get a copy of a page of Bravado’s medical chart.
- Rivers did not pay the source for specific documents, photos or information, but s/he treats this source to an expensive dinner once a month.

**Part I – Draft Article (~ 15 minutes)**

**Material:**
- Draft article “*Cami Bravado OD Stunner: Heroin Addicted Singer Rushed to ER!*”
- 911 Transcript
- Photo of Bravado collapsed on the floor (taken from a public Facebook page)

**Faculty:** Reporter (C. Chews) and Editor (J. Bean)

RNN lawyers will review and advise Reporter Chews and Editor Bean on a story they want to publish immediately on RNN.com. The story reports about the overdose by a chart-topping singer. The reporting is based primarily on unnamed sources, and an “exclusive” 911 recording. You are welcome to ad lib facts about the sources, etc. to bring out potential pre-publication issues for the participants to identify and discuss.

**Part II – Social Media Post (~ 15 minutes)**

**Material:**
- Photo taken of Bravado in her private hospital room. Hospital source provided it to the Social Media Editor.

**Faculty:** Social Media Editor, J. Rivers

After the participants have had a to chance to vet the draft article, the Social Media Editor should indicate they want to post a photo of Bravado in the hospital with the *caption* “Bravado Hospitalized for Illegal Drug Overdose!”
Rivers tells the participants the following:

- Rivers has a source at the hospital, an administrative employee.
- This source provided a photograph of Bravado in her private hospital room.
- This source may also be able to get a copy of a page of Bravado’s medical chart.
- Rivers did not pay the source for specific documents or information, but s/he treats this source to an expensive dinner once a month.

Rivers asks:
1. Is the hospital room social media post legal?
2. If we get the medical chart, can we publish it? Can we use the information in it?

Participants should identify potential invasion of privacy issues. There is a potential newsgathering issue if RNN is participating in the hospital source’s obtainment of the photo and/or medical chart. The caption raises a defamation issue if its not certain she was taking illegal drugs.

Part III – Debrief (20 minutes)

This part is very helpful for the participants. Faculty can provide the participants with feedback on the hypo and more broadly share lessons from their experiences as a media lawyer, particularly regarding prepublication and related issues. Thank you for sharing your guidance with these new lawyers and law students!

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For your convenience, here are some potential issues to consider in the pre-pub exercise.

Part I – Draft article

Potential Claims:
- Copyright with Facebook photo? (Invasion of privacy?)
- What statements in this article are potentially defamatory? Sourcing? Fact-checking? Etc.
- What statements could give rise to an invasion of privacy claim?
- Who are the potential plaintiffs?
- Existence of drug “addiction” – Basis for claim of “addiction” is another publication. Anything else?
- Tenderline’s involvement – Is the article inaccurate regarding his role in providing Bravdo drugs? See 911 call.
- Drug orgy
- Group Libel – 50 people?
- Is Tenderline a public or private figure?
- Maddie? Ad lib facts to that suggest she is a private figure.
• 911 Transcript. We say it was exclusively released – any issues with privilege? Substantially fair and accurate prong of privilege?
• 911 Transcript says Lucy not Tenderline gave her pills. Could be issue with copy.
• Pills cause effect similar to heroin

Sourcing:
• What is the sourcing for placing the blame on Back-Up dancer? How many sources are there, it appears there are one or two from body of article?
• What is the sourcing for statement that Bravado had been partying for hours? If it’s the 911 transcript then need to attribute. If it’s source(s) then tease out knowledge, reliability, witnesses who may go on record if necessary.
• Need to attribute sources and assertions separately and find out support for Tenderline accusations as well as partying and drug consumption.
• Why did sources all ask to speak off the record? Would they agree to be named in the event of a lawsuit? Chews can say that s/he doesn’t want to spook the sources, who were also involved with drugs, by going back and asking them this question – so we should assume they will not be named even in the event of a lawsuit.

Investigation:
• What steps have you taken to confirm the accuracy and reliability of the sources’ allegations?
• Confirmed that basic background details check out?
• How do we know that Bravado has drug history? How many sources corroborated this? How do they know? Has Bravado ever spoken about this publicly?
• How do we know she overdosed and what specific drugs were used? Are there government records that do or could support this?

Comment Calls:
• When and how did you seek comment from Bravado?
• Did you seek comment from Tenderline?

Other possible claims:
• IIED
• State claims

Part II – Hospital Room Photo (and potentially copy of medical chart)
• Invasion of privacy (Intrusion upon seclusion; public disclosure of private fact; and potentially false light if cause of od was not illegal drugs)
• Potential newsgathering issues depending on arrangement with hospital source
• Potential defamation with caption
[Photo to include with article.]
Bravado Hospitalized for Illegal Drug Overdose!
Espionage Act and First Amendment Hypo

United States v. Benjamin Brandt

Benjamin Brandt is an investigative journalist who covers national security and international affairs for the New York Tribune, one of the most respected newspapers in the United States. Brandt is well-known and trusted on Capitol Hill and has confidential contacts throughout the previous and current administrations. During the past few years, Brandt used those contacts to break several stories relating to Russian meddling in the 2016 U.S. presidential election.

The Tribune’s website includes an article on the front page titled, Share Your Secrets With Us. Here’s How. It provides instructions on how to use SecureDrop and states that individuals can send “sensitive” information that is relevant to the public interest. An anonymous person provided stolen classified documents to the Tribune via SecureDrop. The person wrote: “I read your article, Share Your Secrets With Us. Here’s How. I wouldn’t have known how to provide this information without it. In any case, your readers might want to know about Russian election meddling and Syrian civilian deaths. These are stolen classified documents. Proceed with caution.” On July 28, 2018, Brandt published two articles for the Tribune based on this information.

First, Brandt published an article based on war logs provided by the anonymous sender (the “War Logs Article”). The War Logs Article described how, with the assistance of Russian intelligence, covert Syrian-led cyber operatives (who are affiliated with known terrorist organizations) were leading a social media disinformation campaign to sow discord in U.S. elections, and also developing ways to launch cyberattacks on U.S. infrastructure and election systems. The War Logs Article also discussed U.S. strategy to combat those actions, including CIA drone attacks, potential drone targets, and private-contractor “black-ops” missions.
Second, Brandt published an article based on diplomatic cables provided by the anonymous sender (the “Diplomatic Cables Article”). The Diplomatic Cables Article described an errant drone attack on a purported Syrian cyberwarfare target that turned out to be a civilian installation. While it resulted in the loss of significant civilian lives, the error was never acknowledged by U.S. government officials. In connection with these two articles, the *Tribune* published portions of the war logs and diplomatic cables, but redacted any information the paper believed would pose a risk to individuals or national security.

The next day, the U.S. government filed a two-count indictment against Benjamin Brandt under § 793(e) of the Espionage Act. 18 U.S.C. § 793(e) (2018). Count One was based on the War Logs Article. Count Two was based on the Diplomatic Cables Article. The indictment maintains that both the Diplomatic Cables Article and the War Logs Article illegally divulged U.S. military operations during an ongoing war against terrorism and have put U.S. lives in danger.

Brandt moved to dismiss the indictment, for two independent reasons. First, Brandt argued that § 793(e) does not apply because neither article contains information “relating to the national defense.” Second, Brandt argued that as-applied, § 793(e) violates the First Amendment of the U.S. Constitution because the information in both articles was lawfully obtained and relates to matters of public concern.

The district court granted in part, and denied in part, Brandt’s motion. Specifically, the court held that the information in the War Logs Article “relat[es] to the national defense” and as-applied § 793(e) does not violate Brandt’s First Amendment rights. The court further held that the information in the Diplomatic Cables Article does not “relat[e] to the national defense,” and therefore, did not reach the First Amendment issue as to the Diplomatic Cables article. The appeal (and cross-appeal) involves the following questions:
1. As a matter of statutory interpretation, does 18 U.S.C. § 793(e) apply to either or both of Brandt’s articles because they contain information “relating to national defense”?

2. As-applied, does § 793(e) violate Brandt’s First Amendment rights for publication of either or both articles under Bartnicki v. Vopper?

Please prepare an 8-10 minute oral argument regarding these issues, in support of the party for which you have been assigned to argue on behalf. Assume that the standard of review here is de novo. The Court (the fictional Twelfth Circuit Court of Appeals) expects counsel to be familiar with the following excerpted authorities at oral argument (copies of which are in your materials):

18 U.S.C. § 793(e)
N.Y. Times Co. v. United States, 403 U.S. 713 (1971)
United States v. Morison, 844 F.2d 1057 (4th Cir. 1988)
Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000)
Quigley v. Rosenthal, 327 F.3d 1044 (10th Cir. 2003)
United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OCEANIA

UNITED STATES OF AMERICA,

v. Case No.: 1:18-cr-00132-MJ-RES

BENJAMIN BRANDT,
Defendant.

ORDER ON MOTION TO DISMISS INDICTMENT FOR VIOLATIONS OF 18 U.S.C. § 793(e)

This Court has considered Defendant’s motion to dismiss the indictment, the Government’s opposition to the motion, and Defendant’s reply in support of the motion. For the following reasons, the motion is GRANTED IN PART AND DENIED IN PART.

BACKGROUND

This matter stems from the publication of two articles in the *New York Tribune* on July 28, 2018, both written by *Tribune* journalist, Benjamin Brandt. The next day, Brandt was indicted by a grand jury on two counts for violating the Espionage Act. Specifically, the Government contends that, in each article, Brandt communicated classified information to the public in violation of 18 U.S.C. § 793(e). Brandt has moved to dismiss both counts of the indictment arguing that: (1) the articles at issue did not publish information “relating to the national defense;” and (2) as-applied, 18 U.S.C. § 793(e) violates his First Amendment rights.

The two articles at issue were based on certain war logs and diplomatic cables provided to Brandt/the *Tribune* by an anonymous source, through an encrypted portal set up by the *Tribune* to encourage the public’s submission of “sensitive,” newsworthy information. The *Tribune* also published redacted portions of the war logs and the diplomatic cables.

First, the War Logs article described how, with the assistance of Russian intelligence, covert Syrian-led cyberoperatives (who are affiliated with known terrorist organizations) were
leading a social media disinformation campaign to sow discord in U.S. elections, and developing ways to launch cyberattacks on U.S. infrastructure and election systems. The War Logs also discussed U.S. strategy to combat those actions, including CIA drone attacks, potential drone targets, and private-contractor “black-ops” missions. Finally, the article described past actions and plans to interfere with U.S. elections. The Government charges that publication of this information from the war logs violates § 793(e).

Second, the Diplomatic Cables article described an errant drone attack on a purported Syrian cyberwarfare target that turned out to be a civilian installation. While it resulted in the loss of significant civilian lives, government officials never acknowledged the error. The Government charges that publication of this information from the diplomatic cables violates § 793(e).

**ANALYSIS**

A court’s review of the sufficiency of an indictment is deferential. An indictment need only: (1) contain the elements of the offense charged such that it fairly informs a defendant of the charge against him; and (2) allow him to plead acquittal or conviction against potential future prosecutions for the same offense. United States v. Rosen, 445 F. Supp. 2d 602, 644 (E.D. Va. 2006) (internal citations omitted). “[A]n indictment will survive a motion to dismiss if it tracks the statutory text at issue and also ‘contains a sufficient statement of the facts and circumstances to inform the accused of the specific offense with which he is charged.’” Id. at 644-645 (internal quotations omitted). The indictment satisfies these requirements.

The indictment tracks the statutory text of 18 U.S.C. § 793(e) and attaches the published news articles as the factual basis for the charged offenses. It charges Defendant with violating § 793(e) because he communicated information relating to the national defense that he was not authorized to receive through publishing the articles described above. Thus, the indictment
satisfies the basic requirements to survive a motion to dismiss.

Defendant contends, however, that the indictment should be dismissed because:

(1) as a matter of statutory interpretation, § 793(e) does not apply to publication of the specific information at issue here because it is "not relating to the national defense"; and

(2) regardless of the statutory interpretation issue, as-applied § 793(e) violates the First Amendment rights of freedom of speech and of the press for a variety of reasons.

The Court considers these arguments in turn.

A.

Defendant argues that even if § 793(e) applies to publication by the press, it does not apply to the specific information published because it is not “relating to the national defense.” In 1941, the U.S. Supreme Court affirmed convictions under another provision of the Espionage Act, holding that the phrase “national defense” is a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.” Gorin v. United States, 312 U.S. 19, 28 (1941). Because § 793(e) contains the same phrase, “relating to the national defense,” as the Espionage Act section at issue in Gorin, the Gorin Court’s definition of “relating to the national defense” applies here.

This Court holds that information in the War Logs Article is “relating to the national defense.” The war on terrorism is ongoing and its potential connection to Russian election meddling brings it within the ambit of the statute. Indeed, without deciding the issue, it would appear that even without this link to terrorist groups, potential Russian election meddling alone would relate to the “national defense.” Therefore, the information in the War Logs article is categorically the type of information that is “relating to the national defense.” The indictment shall not be dismissed as to the War Logs Article on these grounds.
Information in diplomatic cables, however, is different. By definition, diplomatic cables involve diplomacy, not national defense. Therefore, Defendant’s motion to dismiss as to the publication of the Diplomatic Cables article is granted.

B.

Defendant also argues that if the statute is construed to apply to information in the War Logs Article, it would violate his First Amendment rights as-applied. ¹ The First Amendment, however, is not absolute and the Court must temper its doctrinaire logic with practical wisdom; otherwise, it runs the risk of converting the constitutional Bill of Rights into a suicide pact.

Free speech rights must be balanced against competing government interests and it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation. Congress has given the executive branch the power to protect information vital to the national defense. This Court recognizes the public interest in such information, but cannot conclude that this interest trumps the countervailing interest in national security. ²

Therefore, Defendant’s motion is **GRANTED IN PART AND DENIED IN PART.**

**SO ORDERED** this 26th day of October, 2018.

/s/ Michelle Jenkins
United States District Judge

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¹ Because the count of the indictment related to the Diplomatic Cables Article has been dismissed on the grounds previously discussed, the Court does not address Defendant’s First Amendment-based arguments with respect that article.

² One of Defendant’s arguments is that established First Amendment law requires dismissal of the indictment because he lawfully obtained information of public concern, regardless of whether the documents were illegally obtained by a third-party. See Bartnicki v. Vopper, 532 U.S. 514 (2001). Bartnicki, however, does not control because Defendant could not lawfully obtain the information under 18 U.S.C. § 793(e). The Court questions whether Defendant indeed “lawfully” obtained the war logs under the facts of this case, where the newspaper’s website opening solicited the submission.
Espionage Act and First Amendment Hypo
Bench Memorandum

I. EXECUTIVE SUMMARY

This hypo involves a journalist being prosecuted under 18 U.S.C. § 793(e) of the Espionage Act. The issues presented include statutory interpretation and a First Amendment analysis. The statutory interpretation issue involves determining whether information published by the journalist is “relating to the national defense” under § 793(e). The First Amendment analysis asks whether the First Amendment precludes this prosecution under Bartnicki? The participants have been instructed to limit their arguments to these issues.

The facts include two news articles: (1) the War Logs Article about Russian election meddling; and (2) the Diplomatic Cables Article about civilian deaths. The Government filed a two-count indictment against the reporter, one count for each news article. The reporter filed a motion to dismiss based on the statutory interpretation issue and the First Amendment. The district court denied the motion to dismiss as to the War Logs Article, finding that it did contain information “relating to the national defense” and its publication was not protected by the First Amendment, but granted the motion to dismiss as to the Diplomatic Cables Article, finding that it did not contain information “relating to the national defense” and not reaching the First Amendment issue.

The Hypo and the District Court opinion provide further detail on the facts.

This bench memo provides some analysis of these issues. As always, your own thoughts and questions are more than welcome. Thank you for your helping making this Workshop a great experience for the participants!

II. ANALYSIS

Benjamin Brandt, a reporter for the New York Tribune, was indicted on two counts of violating the Espionage Act. His motion to dismiss raised issues of statutory construction and constitutional law regarding the application of § 793(e) to publication and newsgathering by the press.¹ The War Logs Article and Diplomatic Cables Article are designed to present a twist on questions the Supreme Court left unanswered in the Pentagon Papers case – namely, whether § 793(e) and the First Amendment permit the prosecution of the press for publishing truthful yet confidential records of a non-conventional war on election meddling, its connection to ongoing War on Terror initiatives, and an errant drone strike that killed civilians. Although the government

¹ In part, 18 U.S.C. 793(e) provides:

Whoever having unauthorized possession of, access to, or control over any document, . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . shall be fined under this title or imprisoned not more than ten years or both.
did not file criminal charges against the press in the *Pentagon Papers* case, the concurring/dissenting opinion(s) discussed § 793(e). In that case, the Supreme Court’s short *per curiam* opinion focused only on the government’s failure to satisfy the high burden for obtaining a prior restraint blocking the publication of the classified documents, not whether the papers could be prosecuted under § 793(e) for subsequent publication, *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). Unlike the *Pentagon Papers* case, this case involves more than mere historical information. It includes information in the *War Logs* Article about future election meddling plans.

A. Does § 793(e) Apply to Brandt’s Publication of This Information?

The statutory-construction argument is whether the information in either of the articles is “relating to the national defense” within the meaning of § 793(e).

- The term “relating to the national defense” also appears elsewhere in the statute, including the section now codified as § 794(a). In interpreting that section, the Supreme Court has held that “national defense” is a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.” *Gorin v. United States*, 312 U.S. 19, 28 (1941). The *Gorin* case has not been included in the materials, but this language is cited in a number of the cases that are in the materials, including *N.Y. Times Co.*, 403 U.S. at 738.

- In *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), which involved a prosecution under § 793(e), the district court surveyed the case law and concluded that “[c]ourts ... have chosen to limit the phrase by requiring the government to prove (i) that the information is closely held by the government and (ii) that the information is the type of information that, if disclosed, could harm the United States.” *Id.* at 618. Here, disclosure may arguably have a net positive effect in that citizens will be more attuned to potential manipulation.

Diplomatic Cables Article:

- With regard to the diplomatic cables, the Fourth Circuit has held that § 793(e) applies to diplomatic cables. *United States v. Truong Dinh Hung*, 629 F. 2d 908, 918 (4th Cir. 1980). Accordingly, the government should cite *Truong Dinh Hung* as strong support for the argument that information in diplomatic cables are “relating to the national defense.” In other words, the hypothetical district court opinion’s conclusory analysis that diplomatic cables, “by definition,” cannot relate to the national defense is unfounded and the workshop participants defending the reporter should be weary of adopting that argument. Of course, that does not mean the information in these diplomatic cables is necessarily “relating to the national defense.”
The diplomatic cables at issue in *Truong Dinh Hung* related to peace negotiations in the Vietnam War and the court held that they were “relating to the national defense.” The diplomatic cables at issue here relate to an errant drone attack on a purported Syrian cyberwarfare target that turned out to be a civilian installation. While it resulted in the loss of significant civilian lives, government officials never acknowledged the error. Is this information “relating to the national defense”?

**War Logs Article:**

- As to the War Logs article, that information seems closer to information “relating to the national defense.” The government will argue that, although perhaps less conventional than prior military engagements, the defense of the integrity of our elections is still a war, and the information disclosed in the War Logs Article relating to Russian election meddling is no less “related to the national defense.” The government might note that, over the past several years, the CIA has been given increased authority to conduct military-style operations, as have private defense contractors. Moreover, unlike the *Pentagon Papers* case, the war logs contain information about future plans of election meddling and cyberwarfare against the United States.

- Brandt will contend that these arguments go too far. By the same logic, are actions taken by the government in prosecution of the “war” on drugs “relating to the national defense”? For example, would information about CIA assistance to the Colombian military in attacks against FARC rebels be “relating to the national defense”? What about measures taken by domestic law enforcement to seize accounts and economic assets of reputed drug lords? And given that the United States has military interests around the globe, most issues of diplomacy relate in some way to the “national defense.” Interpreting § 793(e) so broadly that it covers information that is arguably only tangentially related to the “national defense” magnifies the constitutional concerns discussed below, and it is well established that courts should attempt to construe laws so as to avoid such constitutional problems.

**B. Does Application of § 793(e) to Brandt Violate the First Amendment?**

The press has never been the target of a criminal prosecution under § 793(e), so no court has directly considered the extent to which the First Amendment protects a journalist like Brandt.² The two closest lower-court precedents are *United States v. Morison* and *United States v. Rosen*.

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² In the *Pentagon Papers* case, Justice White (joined by Justice Stewart), signaled that he saw no First Amendment barrier to prosecution of the press under the Espionage Act. See *N.Y. Times Co.*, 403 U.S. at 736-37 (White, J., concurring) (“[T]he newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.”); see also *Rosen*, 445 F. Supp. 2d at 638 (“[A] close reading of [the New York Times] opinions indicates that the result may have been different had
United States v. Morison

The defendant in Morison was an employee at the Naval Intelligence Support Center, who did off-duty work for Jane’s Defence Weekly. United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988). The Navy had approved of his arrangement with Jane’s, subject to the condition that Morison not provide any classified information to Jane’s. Id. When Morison became dissatisfied with the Navy, he sought permanent employment with Jane’s, and in connection with his discussions with Jane’s passed on classified photographs of a Soviet aircraft carrier. Id. at 1061. Morison’s defense argued that he was essentially a journalistic “source,” not a classic spy. The Fourth Circuit affirmed his conviction, but two of the three panel judges distinguished Morison from a member of the press or a source for it.

For example, Judge Wilkinson wrote in a concurring opinion that “Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute” and that “it is important to recognize that ... his prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication on classified materials.” Id at 1081, 1085 (Wilkinson, J., concurring).

As Judge Wilkinson observed in his concurring opinion in Morison, “[t]he First Amendment interest in informed popular debate does not simply vanish at the invocation of the words ‘national security.’” Morison, 844 F.2d at 1081.

As a result, both Brandt and the government will have to grapple with the “inherent tension between government transparency so essential to a democratic society and the government’s equally compelling need to protect from disclosure information that could be used by those who wish this nation harm.” Id. at 629. In determining how to resolve this tension, the Court should consider the applicability of Bartnicki v. Vopper, 532 U.S. 514 (2001).

United States v. Rosen

In Rosen, the defendants were not government employees, but officials of the pro-Israel lobbying group American Israel Public Affairs Committee (“AIPAC”). United States v. Rosen, 445 F. Supp. 2d 602, 638 (E.D. Va. 2006). They received sensitive information through a leak from a Defense Department employee, which they then transmitted to others, including journalists and foreign officials. Id. at 609-10. The defendants moved to dismiss the indictment against them on several grounds, including the First Amendment. Id. The district court held, however, that a narrowly construed § 793(e) would pass First Amendment muster. Id. at 640-43.

The Rosen court rejected “the government’s proposed categorical rule that espionage statutes cannot implicate the First Amendment.” Rosen, 445 F. Supp. 2d at 629-30; see also id. at

the government sought to prosecute the newspapers under Section 793(e) subsequent to the publication of the Pentagon Papers.”).
630 (“So, too, the mere invocation of ‘national security’ or ‘government secrecy’ does not foreclose a First Amendment inquiry.”). At the same time, “it is equally well established that the invocation of the First Amendment does not ‘provide immunity for every possible use of language[.]’” *Id.* at 632 (quoting *Dennis v. United States*, 341 U.S. 494, 503 (1951)).

Thus, it is possible to argue that § 793(e) cannot or should not apply to the press. But, the First Amendment issues are not limited to the press alone.

*Bartnicki v. Vopper*

In *Bartnicki*, the defendants, who included two radio stations and a radio talk-show host, were sued under federal and state wiretapping acts for broadcasting the contents of illegally recorded cell phone conversations. *Bartnicki v. Vopper*, 532 U.S. 514, 518-20 (2001). The media defendants had received the tape from a source who had found it in his mailbox. *Id.* at 519. The Supreme Court held that “[a] stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.” *Id.* The press loses this shield only when it participates in the illegal conduct. *Id.* at 517-18. The question of what “participation” in the illegal conduct means is open to interpretation. In *Quigley v. Rosenthal*, 327 F. 3d 1044, 1067 (10th Cir. 2003), the Tenth Circuit found, among other things, that knowing who illegally recorded conversations weighed in favor of participating in the conduct. In *Peavy v. WFAA-TV*, 221 F.3d 158, 170 (5th Cir. 2000), the Fifth Circuit held that a question of fact existed as to whether knowing participation in a scheme rises to the level of active participation.

Here, Brandt will argue that the *Bartnicki* principle applies because, like the defendants in that case, he received the war logs and diplomatic cables through an intermediary and had no role in illegally obtaining them. The government will argue, however, that *Bartnicki* is distinguishable because the wiretap statutes at issue in that case did not forbid the media defendants’ receipt of the illegally recorded tapes. See *Bartnicki*, 532 U.S. at 525 (“[The defendants’] access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else.”); *id.* at 538 (Breyer, J., concurring) (“And, as the Court points out, the statutes do not forbid the receipt of the tape itself”). By contrast, § 793(e) does prohibit Brandt from receiving and retaining the material at issue here. Accordingly, the government will argue that Brandt did not lawfully obtain the war logs and diplomatic cables within the meaning of *Bartnicki*.

In response, Brandt will argue that the government construes the *Bartnicki/Daily Mail* principle too narrowly. In determining whether the media defendants in these cases obtained information “lawfully,” the Supreme Court’s focus has always been on the original disclosure by the government source and whether the media defendants participated in, conspired in, or aided and abetted that disclosure. The Court’s reasoning has been consistent: Even where the government has legitimate interests in preventing the dissemination of information, the First Amendment requires it to serve those interests by targeting the leaker, not the recipient of the leak. See, e.g., *Bartnicki*, 532 U.S. at 529 (“The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”). This principle would offer little protection if a legislature could simply prohibit the “receipt” of information, and thereby
remove the First Amendment obstacle to imposing liability on the publication of otherwise lawfully obtained information on a matter of public concern.

But, there is another Bartnicki issue here. Does the Tribune’s solicitation of “sensitive” information and instructions on how to use SecureDrop cross the line into inducement and thus make Bartnicki inapplicable? In part, Justice Breyer’s concurrence states:

For one thing, the broadcasters here engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained. They “neither encouraged nor participated directly or indirectly in the interception.” App. to Pet. for Cert. in No. 99–1687, p. 33a. See also ante, at 1760. No one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape’s still later delivery by the intermediary to the media.

See Bartnicki, 532 U.S. at 538 (Breyer, J., concurring).

In sum, there are several avenues for discussion during the oral argument as to both the “relating to the national defense” issue and the First Amendment issue.

III. SAMPLE QUESTIONS

Here are some sample questions for your consideration.

A. Questions for Brandt

- Are the government’s efforts to protect the U.S. election system from foreign interference “relating to the national defense”?

- What would you consider to be the limits of the term “relating to the national defense”?

- Section 793(e) may not criminalize receipt of protected information, but it clearly criminalizes retention and distribution of protected information. Does this provision violate the First Amendment right of free speech. If not, does the First Amendment provide an exception to this rule for reporters and, if so, what are the limits to such an exception?

- If we were to accept that a First Amendment exception to § 793(e) existed for reporters, would that create a possibility that someone could become a reporter simply for the purpose of disseminating stolen information?

- Mr. Brandt obviously knew that the articles were stolen from the government. How can this Court consider him to have “lawfully” obtained stolen documents? Where is the legal transfer of information?
• Did the *New York Tribune* lose the protection of *Bartnicki* by inducing the disclosure of stolen information via its article, *Share Your Secrets With Us. Here’s How*?

B. Questions for Appellee (United States)

• Whereas the diplomatic cables at issue in *Truong Dinh Hung* case related to peace negotiations in the Vietnam War, the Diplomatic Cables Article here relates to an errant drone attack on a purported Syrian cyberwarfare target that turned out to be a civilian installation. It resulted in the loss of significant civilian lives and government officials never acknowledged the error. What war makes the information disclosed in the Diplomatic Cables Article “relating to the national defense?”

• As to the War Logs Article, is it problematic that the attacks were conducted by CIA drones and private defense contractors instead of the U.S. military?

• How much ground does “relating to the national defense” cover? Does § 793(e) apply to every action taken to protect U.S. citizens? The war on drugs? The battle against cancer? Protecting U.S. children from sexual predators? Where does the government want the Court to draw the proverbial line?

• Does “national security” automatically foreclose a First Amendment inquiry? In other words, do First Amendment protections decrease when the security of the nation is potentially at risk? Does the First Amendment protect “national security?”

• Does the *Bartnicki* decision protect the *New York Tribune* because the anonymous source’s message intimates that he both obtained the confidential information and sought to distribute it prior to seeing the article?

• Would the First Amendment be better served by targeting the leaker, not the recipient of the leak?

• Does the redaction of certain information protect Mr. Brandt from prosecution under Section 793(e) because he did not actually distribute confidential information?
§ 793. Gathering, transmitting or losing defense information, 18 USCA § 793

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or
The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful. Accordingly, these cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. The Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception, or the conflict that gave rise to this action. It is therefore not surprising that Circuit judges, as well as the Members of this Court, have come to differing conclusions about the First Amendment’s application to this issue. Nevertheless, having considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.

I

During 1992 and most of 1993, the Pennsylvania State Education Association, a union representing the teachers at the Wyoming Valley West High School, engaged in collective-bargaining negotiations with the school board. Petitioner Kane, then the president of the local union, testified that the negotiations were “‘contentious’” and received “‘a lot of media attention.’” App. 79, 92. In May 1993, petitioner Bartnicki, who was acting as the union’s “chief negotiator,” used the cellular phone in her car to call Kane and engage in a lengthy conversation about the status of the negotiations. An unidentified person intercepted and recorded that call.

In their conversation, Kane and Bartnicki discussed the timing of a proposed strike, id., at 41–45, difficulties created by public comment on the negotiations, id., at 46, and the need for a dramatic response to the board’s intransigence. At one point, Kane said: “‘If they’re not gonna move for three percent, we’re gonna have to go to their, their homes .... To blow off their front porches, we’ll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news. (UNDECIPHERABLE).’” Ibid.

In the early fall of 1993, the parties accepted a nonbinding arbitration proposal that was generally favorable to the teachers. In connection with news reports about the settlement, respondent Vopper, a radio commentator who had been critical of the union in the past, played a tape of the intercepted conversation on his public affairs talk show. Another station also broadcast the tape, and local newspapers published its contents. After filing suit against Vopper and other representatives of the media, Bartnicki and Kane (hereinafter petitioners) learned through discovery that Vopper had obtained the tape from respondent Jack Yocum, the head of a local taxpayers’ organization that had opposed the union’s demands throughout the negotiations. Yocum, who was added as a defendant, testified that he had found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and Kane. Yocum played the tape for some members of the school board, and later delivered the tape itself to Vopper.

II

In their amended complaint, petitioners alleged that their telephone conversation had been surreptitiously intercepted by an unknown person using an electronic device, that Yocum had obtained a tape of that conversation, and that he intentionally disclosed it to Vopper, as well as other individuals and media representatives. Thereafter, Vopper and other members of the media repeatedly published the contents of that conversation. The amended complaint alleged that each of
the defendants “knew or had reason to know” that the recording of the private telephone conversation had been obtained by means of an illegal interception. *520 Id., at 27. Relying on both federal and Pennsylvania statutory provisions, petitioners sought actual damages, statutory damages, punitive damages, and attorney’s fees and costs.2

After the parties completed their discovery, they filed cross-motions for summary judgment. Respondents contended that they had not violated the statute because (a) they had nothing to do with the interception, and (b) in any event, their actions were not unlawful since the conversation might have been intercepted inadvertently. Moreover, even if they had violated the statute by disclosing the intercepted conversation, respondents argued, those disclosures were protected by the First Amendment. The District Court rejected the first statutory argument because, under the plain statutory language, an individual violates the federal Act by intentionally disclosing the contents of an electronic communication when he or she “know[s] or ha[s] reason to know that the information was obtained” through an illegal interception.3 App. to Pet. for Cert. in No. 99–1687, pp. 53a–54a (emphasis deleted). Accordingly, actual involvement in the illegal *521 interception is not necessary in order to establish a violation of that statute. With respect to the second statutory argument, the District Court agreed that petitioners had to prove that the interception in question *522 was intentional,4 but concluded that the text of the interception raised a genuine issue of material fact with respect to intent. That issue of fact was also the basis for the District Court’s denial of petitioners’ motion. Finally, the District Court rejected respondents’ First Amendment defense because the statutes were content-neutral laws of general applicability that contained “no indicia of prior restraint or the chilling of free speech.” Id., at 55a–56a.

Thereafter, the District Court granted a motion for an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). It certified as controlling questions of law: “(1) whether the imposition of liability under the [wiretapping statutes] solely for broadcasting the newsworthly tape on the Defendant [Vopper’s] radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of [the] Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping] statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment.” App. to Pet. for Cert. in No. 99–1728, p. 76a. The Court of Appeals accepted the appeal, and the United States, also a petitioner, intervened pursuant to 28 U.S.C. § 2403 in order to defend the constitutionality of the federal statute.

All three members of the panel agreed with petitioners and the Government that the federal and Pennsylvania wiretapping statutes are “content-neutral” and therefore subject to “intermediate scrutiny.” 200 F.3d 109, 121 (C.A.3 1999). Applying that standard, the majority concluded that the *522 statutes were invalid because they deterred significantly more speech than necessary to protect the privacy interests at stake. The court remanded the case with instructions to enter summary judgment for respondents. In dissent, Senior Judge Pollak expressed the view that the prohibition against disclosures was necessary in order to remove the incentive for illegal interceptions and to preclude compounding the harm caused by such interceptions through wider dissemination. In so doing, he agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, Boehner v. McDermott, 191 F.3d 463 (C.A.D.C.1999). See also Peavy v. WFAA–TV, Inc., 221 F.3d 158 (C.A.5 2000).5 We granted certiorari to resolve the conflict. 530 U.S. 1260, 120 S.Ct. 2716, 147 L.Ed.2d 981 (2000).

IV

The constitutional question before us concerns the validity of the statutes as applied to the specific facts of these cases. Because of the procedural posture of these cases, it is appropriate to make certain important assumptions about those *525 facts. We accept petitioners’ submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents “had reason to know” that it was unlawful. Accordingly, the disclosure of the contents of the intercepted conversation by Yocum to school board members and to representatives of the media, as well as the subsequent disclosures by the media defendants to the public, violated the federal and state statutes. Under the provisions of the federal statute, as well as its Pennsylvania analogue, petitioners are thus entitled to recover damages from each of the respondents. The only question is whether the application of these statutes in such circumstances violates the First Amendment.8

In answering that question, we accept respondents’ submission on three factual matters that serve to distinguish most of the cases that have arisen under § 2511. First, respondents played no part in the illegal interception. Rather, they found out about the interception
only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Cf. *Florida Star v. B.J.F.*, 491 U.S. 524, 536, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (“Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step”). Third, the subject matter of the conversation was a matter of public concern. If the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.

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VI

As a general matter, “state action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). More specifically, this Court has repeatedly held that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need ... of the highest order.” *Id.*, at 103, 99 S.Ct. 2667; see also *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978).

Accordingly, in *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (per curiam), the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party. In so doing, that decision resolved a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information that, if disclosed, might seriously impair the security of the Nation. In resolving **1762** that conflict, the attention of every Member of this Court was focused on the character of the stolen documents’ contents and the consequences of public disclosure. Although the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted in Justice Harlan’s dissent, *id.*, at 754, 91 S.Ct. 2140, neither the majority nor the dissenters placed any weight on that fact.

However, *New York Times v. United States* raised, but did not resolve, the question “whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” *Florida Star*, 491 U.S., at 535, n. 8, 109 S.Ct. 2603. The question here, however, is a narrower version of that still-open question. Simply put, the issue here is this: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?” *Boehner*, 191 F.3d, at 484–485 (Sentelle, J., dissenting).

*529* Our refusal to construe the issue presented more broadly is consistent with this Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment. Rather,

“[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels not resolving anticipatorily.... We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.” *Florida Star*, 491 U.S., at 532–533, 109 S.Ct. 2603.

See also *Landmark Communications*, 435 U.S., at 838, 98 S.Ct. 1535. Accordingly, we consider whether, given the facts of these cases, the interests served by § 2511(1)(c) can justify its restrictions on speech.

The Government identifies two interests served by the statute—first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted. We assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor’s own use of information that he or she acquired by violating § 2511(1)(a), but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.
The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party. Although there are some rare occasions in which a law suppressing one party’s speech may be justified by an interest in deterring criminal conduct by another, see, e.g., New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), this is not such a case.

**1763 With only a handful of exceptions, the violations of § 2511(1)(a) that have been described in litigated cases have been motivated by either financial gain or domestic disputes. In virtually all of those cases, the identity of the person or persons intercepting the communication has been known. Moreover, petitioners cite no evidence that Congress viewed the prohibition against disclosures as a response to the difficulty of identifying persons making improper use of scanners and other surveillance devices and accordingly of deterring such conduct, and there is no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions.

Although this suit demonstrates that there may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, surely this is the exceptional case. Moreover, there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing to engage in surreptitious interceptions. Unusual cases fall far short of a §532 showing that there is a “need ... of the highest order” for a rule supplementing the traditional means of deterring antisocial conduct. The justification for any such novel burden on expression must be “far stronger than mere speculation about serious harms.” United States v. Treasury Employees, 513 U.S. 454, 475, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Accordingly, the Government’s first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient.

The Government’s second argument, however, is considerably stronger. Privacy of communication is an important interest, Harper & Row, Publishers, Inc. v. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), reviewed many of the decisions that settled the “general proposition that freedom of expression upon public questions is

“In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one’s speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.” President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

Accordingly, it seems to us that there are important interests to be considered on both sides of the constitutional calculus. In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place. We need not decide whether that interest is strong enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern. Cf. Time, Inc. v. Hill, 385 U.S. 374, 387–388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (reserving the question whether truthful publication of private matters unrelated to public affairs can be constitutionally proscribed). In other words, the outcome of these cases does not turn on whether § 2511(1)(c) may be enforced with respect to most violations of the statute without offending the First Amendment. The enforcement of that provision in these cases, however, implicates the core purposes §533 the fear of public disclosure of private conversations might well have a chilling effect on private speech.


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Our opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), reviewed many of the decisions that settled the “general proposition that freedom of expression upon public questions is
secured by the First Amendment.”


We think it clear that parallel reasoning requires the conclusion that a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern. That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis’ classic opinion in Whitney v. California, 274 U.S., at 372, 47 S.Ct. 641, but it is no less worthy of constitutional protection.

**1766 The judgment is affirmed.

It is so ordered.

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We granted certiorari, 403 U.S. 942, 943, 91 S.Ct. 2270, 2271, 29 L.Ed.2d 853 (1971) in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled ‘History of U.S. Decision-Making Process on Viet Nam Policy.’

‘Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.’ The District Court for the Southern District of New York in the New York Times case, 328 F.Supp. 324, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, 446 F.2d 1327, in the Washington Post case held that the Government had not met that burden. We agree.

So ordered.

Judgment of the Court of Appeals for the District of Columbia Circuit affirmed; order of the Court of Appeals **2142 for the Second Circuit reversed and case remanded with directions.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring. DP I adhere to the view that the Government’s case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe *715 that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the
purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government’s case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

‘Now, Mr. Justice (BLACK), your construction of * * * (the First Amendment) is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only *718 say, Mr. Justice, that to me it is equally obvious that ‘no law’ does not mean ‘no law’, and I would seek to persuade the Court that that is true. * * * (T)here are other parts of the Constitution that grant powers and responsibilities to the Executive, and * * * the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.’

And the Government argues in its brief that in spite of the First Amendment, ‘(t)he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.’

In other words, we are asked to hold that despite the First Amendment’s emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of ‘national security.’ The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously farreaching contention that the courts should take it upon themselves to ‘make’ a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make *2144 such a law. See concurring opinion of Mr. Justice DOUGLAS, *719 post, at 2145. To find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’ No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press and free *720 assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.’

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully. It should be noted at the outset that the First Amendment provides that ‘Congress shall make no law * * * abridging the freedom of speech, or of the press.’ That leaves, in my view, no room for governmental restraint on the press.

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek *2145 to use. Title 18 U.S.C. s 793(e) provides that ‘(w)hoever having unauthorized possession of, access to, or control over any document, writing * * * or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign
nation, willfully communicates * * * the same to any person not entitled to receive it * * * (s)hall be fined *721 not more than $10,000 or imprisoned not more than ten years, or both.”

The Government suggests that the word ‘communicates’ is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, ss 792—799. In three of those eight ‘publish’ is specifically mentioned: s 794(b) applies to ‘Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates * * * (the disposition of armed forces).’

Section 797 applies to whoever ‘reproduces, publishes, sells, or gives away’ photographs of defense installations.

Section 798 relating to cryptography applies to whoever: ‘communicates, furnishes, transmits, or otherwise makes available * * * or publishes’ the described materials. (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that s 793 does not apply to the press is a rejected version of s 793. That version read: ‘During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the *722 enemy.’ 55 Cong.Rec. 1763. During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong.Rec. 2167.

Judge Gurfein’s holding in the Times case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C. s 793 states in s 1(b) that: ‘Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.’ 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

These disclosures may have a serious impact. But that is no basis for sanctioning **2146 a previous restraint on *723 the press. As stated by Chief Justice Hughes in Near v. Minnesota ex rel. Olson, 283 U.S. 697, 719—720, 51 S.Ct. 625, 632, 75 L.Ed. 1357:

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The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression *724 of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.


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Mr. Justice STEWART, with whom Mr. Justice WHITE joins, concurring.
In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident. I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

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The defendant is appealing his conviction under four counts of an indictment for violation of 18 U.S.C. § 641, and of two provisions of the Espionage Act, 18 U.S.C. § 793(d) and (e). The violations of the Espionage Act involved the unauthorized transmittal of certain satellite secured photographs of Soviet naval preparations to “one not entitled to receive them” (count 1) and the obtaining of unauthorized possession of secret intelligence reports and the retaining of them without delivering them to “one entitled to receive” them (count 3). Counts 2 and 4 of the indictment charged violation of the theft provisions of 18 U.S.C. § 641. His defense was essentially that the statutes did not encompass the conduct charged against him and, if they did, the statutes were unconstitutional. At trial, he also found error in certain evidentiary rulings by the district judge. We find the claims of error unfounded and affirm the conviction.

Summary of the Facts

The defendant was employed at the Naval Intelligence Support Center (NISC) at Suitland, Maryland from 1974 until October, 1984. At the time of the incidents involved in this prosecution, he was assigned as an amphibious and hospital ship and mine warfare analyst in the NISC and as such had been given a security clearance of “Top Secret – Sensitive Compartmented Information.” His work place was in what was described as a “vaulted area,” closed to all persons without a Top Secret Clearance.

For some time prior to the incidents with which this prosecution is concerned, the defendant had been doing certain off-duty work for Jane’s Fighting Ships, an annual English publication which provided current information on naval operations internationally. Sometime before July, 1984, Jane’s, which for many years had been publishing Jane’s, had begun the publication of another periodical on a weekly basis. This new publication was called Jane’s Defence Weekly and its editor-in-chief was Derek Wood, with an office in London. The defendant had been paid varying amounts for such services as rendered Jane’s dependent on the value of the information he furnished. This arrangement with Jane’s had been submitted to and approved by the Navy but subject to the defendant’s agreement that he would not obtain and supply any classified information on the U.S. Navy or extract unclassified data on any subject and forward it to Jane’s. The defendant’s off-duty services with Jane’s had become a subject of some controversy between him and the Navy. As a result, the defendant had become dissatisfied with his employment by the Navy and wished to secure full-time employment with Jane’s. The defendant began a correspondence with Wood on the prospects for full-time employment with the periodical. He requested an opportunity to interview Wood when the latter was in Washington next.

Wood visited Washington in June, 1984, and, by arrangement, saw the defendant in connection with the latter’s request for employment. At that time, Wood discussed with the defendant a report which had appeared in the American press with regard to an explosion that had recently occurred at the Severomorsk Soviet Naval base. Wood expressed the interest of his publication in securing additional details since such an explosion was “a very serious matter.” The defendant told Wood that the explosion “was a much larger subject than even they had thought and there was a lot more behind it.” The defendant also said he could “provide more material on it” if Jane’s were interested. Wood responded that he was interested in receiving
additional material on the explosion and, if the defendant were able to provide such, he could use for transmission of such material to *Jane’s* “the facsimile machine for direct transmission in our [Jane’s] Washington editorial office.” The defendant told Wood also that he could provide Wood with other material. While there was no direct statement about what compensation the defendant would receive if he sent material to Wood that was used the practice had been that when the defendant had in the past furnished material of interest *Jane’s* had paid the defendant. When Wood returned to London a few days later, he received from the defendant “about three typed pages of material background on Severomorsk.” A few days later, the defendant transmitted to Wood “two other items on further explosions that had occurred at the site on different dates and also a mention of one particular explosion in East Germany.”

The activity of the defendant which led to this prosecution began on July 24, 1984, a few days after the interview of the defendant by Wood and after the defendant had sent Wood the material described in the preceding paragraph. At that time the defendant saw, on the desk of another employee in the vaulted area where he worked, certain glossy photographs depicting a Soviet aircraft carrier under construction in a Black Sea naval shipyard. The photographs, produced by a KH–11 reconnaissance satellite photographing machine, had been given this analyst so that he could analyze and determine the capabilities and capacities of the carrier under construction. The photographs were stamped “Secret” and also had a “Warning Notice: Intelligence Sources or Methods Involved” imprinted on the borders of the photographs. The defendant later in his confession said he had earlier sent an artist’s sketch of a Soviet carrier under construction to *Jane’s* and had been paid $200 for his services. When he saw the photographs, the defendant recognized them as satellite photographs of the Soviet ship, taken by a secret method utilized by the Navy in its intelligence operations. Unobserved, he picked the photographs up, secreted them, and, after cutting off the borders of the photographs which recorded the words “Top Secret” and the Warning Notice as well as any indication of their source, mailed them to Derek Wood personally. *Jane’s Defence Weekly* published the photographs in its weekly edition a few days later and made the pictures available to other news agencies.\(^1\) One of these photographs was published on August 8, 1984 in the *Washington Post*. When the Navy officers saw the photographs, they began a search and discovered that the photographs had been stolen. An investigation was immediately begun to ascertain the identity of the thief.

**II.**

*The Convictions under Sections 793(d) and (e)*

The initial defense of the defendant to his prosecution as stated in Counts 1 and 3 of the indictment (sections 793(d) and (e)), rests on what he conceives to be the meaning and scope of the two espionage statutes he is charged with violating. It is his position that, properly construed and applied, these two subsections of 793 do not prohibit the conduct of which he is charged in those counts. Stated more specifically, it is his view that the prohibitions of these two subsections are to be narrowly and strictly confined to conduct represented “in classic spying and espionage activity”2 by persons who, in the course of that activity had transmitted “national security secrets to agents of foreign governments with intent to injure the United States.” He argued that the conduct of which he is charged simply does not fit within the mold of “classical spying” as that term was defined, since he transmitted the national security secret materials involved in the indictment to a recognized international naval news organization located in London, England, and not to an agent of a foreign power. In short, he leaked to the press; he did not transmit to a foreign government. It therefore follows, under his construction of the statutes, that he was not guilty of their violation by his transmittal of this national security material, even though, under the government’s proof, he had without authorization and clandestinely abstracted that material from the highly secret national intelligence office in which he worked and had, with reason to know that the publication of such materials reasonably would imperil the secrecy and confidentiality of the nation’s intelligence-gathering capabilities, communicated such materials to one “not entitled to receive” them, reasonably knowing that the receiver of the material would publish it to all the world. Such is the initial ground on which the defendant declares that his motion for acquittal on the charges in counts one and three of the indictment (section 793(d) and (e)) was erroneously overruled.

The defendant does not predicate his argument relating to the scope of the statutory meaning on the actual facial language of the statutes themselves. It is fair to say he concedes that the statutes themselves, in their literal phrasing, are not ambiguous on their face and provide no warrant for his contention. Both statutes plainly apply to “whoever” having access to national defense information has under section 793(d) “wilfully communicate [d], deliver[ed] or transmit[ted] ... to a person not entitled to receive it,” or has retained it in violation of section 793(e). The language of the two statutes includes no limitation to spies or to “an agent of a foreign government,” either as to the transmitter or the transmitee of the information, and they declare no exemption in favor of one who leaks to the press. It covers “anyone.” It is difficult to conceive of any language more definite and clear.
Admitting, however, that the statutes construed literally as they are facially stated did apply to his conduct, the defendant posits that the legislative history demonstrates conclusively that these statutes, whatever their facial language, were to be applied only to “classic spying” and that they should be limited in their application to this clear legislative intent.

We are convinced, though, that the legislative history will not support the defendant’s construction of sections 793(d) and (e).

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It seems abundantly clear from this legislative history that sections 793(d) and (e) were not intended to be restricted in application to “classic spying” but were intended to criminalize the disclosure to anyone “not entitled to receive it.” Accordingly, whether we look to the literal language of the statutes themselves, to the structure of the Act of which the sections were a part, or to the legislative history, sections 793(d) and (e) may not be limited in their scope to “classic spying,” as the defendant argues.

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It is unquestionably true that the prosecutions generally under the Espionage Act, and not just those under section 793(d), have not been great. This is understandable. Violations under the Act are not easily established. The violators act with the intention of concealing their conduct. They try, as the defendant did in this case, to leave few trails. Moreover, any prosecution under the Act will in every case pose difficult problems of balancing the need for prosecution and the possible damage that a public trial will require by way of the disclosure of vital national interest secrets in a public trial. 

Haig v. Agee, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). All these circumstances suggest that the rarity of prosecution under the statutes does not indicate that the statutes were not to be enforced as written. We think in any event that the rarity of the use of the statute as a basis for prosecution is at best a questionable basis for nullifying the clear language of the statute, and we think the revision of 1950 and its reenactment of section 793(d) demonstrate that Congress did not consider such statute meaningless or intend that the statute and its prohibitions were to be abandoned.

We therefore conclude that the legislative history does not justify the rewriting of this statute so as to nullify its plain language by limiting the statutes’ application to the “classic” spy, even if we should assume—in our opinion, improperly—that it was appropriate to look to legislative history in order to ascertain the application of the plain literal language of sections 793(d) and (e). Nor do we find of any relevance whether there have been few prosecutions under these sections.

The legislative record is similarly silent on any Congressional intent in enacting sections 793(d) and (e) to exempt from its application the transmittal of secret military information by a defendant to the press or a representative of the press. Actually, there was little or no discussion of the First Amendment in the legislative record directly relating to sections 793(d) and (e) in this connection. There was, it is true, discussion of the First Amendment during the enactment of the Espionage Act of 1917 as a whole, but Professor Rabban, who reviewed carefully the legislative record, concluded that the focus of such discussion was on “[a] provision of the bill that would have allowed the President to censor the press dominated congressional discussion and was eventually eliminated by the conference committee” but “[i]ronically, the section of the bill that ultimately provided the basis for most of the prosecutions *1068 [which included section 793(d), subsection (e) not being added until the 1950 revision] hardly received any attention” in that discussion. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U.Chi.L.Rev. 1205, 1218 (1983). What legislative discussion of section 793(d) as there was related to the meaning of the phrase “one not entitled to receive it” and the term “information respecting the national defense.” We deal with these discussions later in our disposition of consideration of the defendant’s vagueness and overbreadth claims. There is, however, no evidence whatsoever in the legislative record that the Congress intended to exempt from the coverage of section 793(d) national defense information by a governmental employee, particularly by one who had purloined from the files of the Department such information, simply because he transmitted it to a representative of the press.

But, though he cannot point to anything in the legislative record which intimates that Congress intended to exempt “leaks to the press,” as the defendant describes it, he argues that, unless such an exemption is read into these sections they will run afoul of the First Amendment. Actually we do not perceive any First Amendment rights to be implicated here. This certainly is no prior restraint case such as New York Times v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), and United States v. Progressive, Inc., 467 F.Supp. 990, and 486 F.Supp. 5 (W.D.Wis.1979). It is a prosecution under a statute, of which the defendant, who, as an employee in the intelligence service of the military establishment, had been expressly noticed of his obligations by the terms of his letter of agreement with the Navy, is being prosecuted for purloining from the intelligence files of the Navy national defense materials clearly marked as “Intelligence Information” and “Secret” and for transmitting that material to “one not entitled to receive it.” And the prosecution premises its prosecution on establishing that he did this knowingly and “wilfully” as evidenced by the manner in which he sought to conceal the “Secret” character of the
information and the efforts he had taken to thwart any tracing of the theft to him. We do not think that the First Amendment offers asylum under those circumstances, if proven, merely because the transmittal was to a representative of the press.

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Moreover, the defendant in this case knew that he was dealing with national defense material which a “foreign government in possession of ... would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country’s efficiency in ferreting out foreign espionage.” Gorin v. United States, 312 U.S. 19, 29, 61 S.Ct. 429, 434, 85 L.Ed.2d 488 (1941). He was an experienced intelligence officer. He had been instructed on all the regulations concerning the security of secret national defense materials. See United States v. Jolliff, 548 F.Supp. 229, 230 (D.Md.1981); United States v. Wilson, 571 F.Supp. 1422, 1426–27 (S.D.N.Y.1983). With the scienter requirement sections 793(d) and (e), bulwarked with the defendant’s own expertise in the field of governmental secrecy and intelligence operations, the language of the statutes, “relating to the national security” was not unconstitutionally vague as applied to this defendant and this is especially true, since the trial judge, under proper instructions, left for the jury, as he should have, the determination whether the materials involved met the test for defense material or information and the jury found they did. Gorin v. United States, supra, 312 U.S. at 32, 61 S.Ct. 429, 436, 85 L.Ed. 488 ("The question of the connection of the information with national defense is a question of fact to be *1074 determined by the jury as negligence upon undisputed facts is determined"); United States v. Boyce, 594 F.2d 1246, 1251 (9th Cir.1979); Note, The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks, 33 Wayne L.Rev. 205, 214–17 (1986). Further, the materials involved here are alleged in the indictment and were proved at trial to be marked plainly “Secret” and that classification is said in the Classification Order to be properly “applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security.” That definition of the material may be considered in reviewing for constitutionality the statute under which a defendant with the knowledge of security classification that the defendant had is charged. United States v. Walker, 796 F.2d 43, 47 (4th Cir.1986). We are thus convinced that the statutory language “relating to the national defense,” as applied to the defendant, is not constitutionally vague under our prior decisions reviewing section 793.

Conclusion

Having reviewed all of the defendant’s claims of error herein and found them without merit, we affirm the judgment of conviction of the defendant herein.

AFFIRMED.

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Primarily at issue is whether the First Amendment shields WFAA-TV, Inc., and its reporter, Robert Riggs, from liability for their “use” and “disclosure”, in violation of the Federal and Texas Wiretap Acts, of the contents of the Peavys’ cordless telephone conversations, illegally intercepted and recorded by the Harmans, with them providing the recordings to Riggs and with Riggs and WFAA having some participation concerning the interceptions, at least as to their extent. *** The district court granted summary judgment for WFAA and Riggs, holding, inter alia: the Harmans were neither so “procured” nor “obtained”; and even though defendants engaged in proscribed “use” and “disclosure”, the First Amendment trumps the two Acts. We AFFIRM in part; REVERSE in part; VACATE in part; and REMAND.

[12] The Texas Act does not define “obtains”; similarly, the parties did not cite, nor did we find, any Texas cases interpreting that term for purposes of the Act. The parties’ briefs focus primarily on federal “procurement”. According to the Peavys, “obtain” has essentially the same meaning as “procure”. Defendants apparently agree: they maintain the evidence and authorities cited in their discussion of the federal procurement claim also demonstrate they did not “obtain” the Harmans’ interceptions in violation of the Texas Act.

The Peavys cite the BLACK’S LAW DICTIONARY definition of “obtain”: “to get hold of by effort; to get possession of; to procure: to acquire, in any way”. BLACK’S LAW DICTIONARY 1228 (rev. 4th ed., West 1968) (emphasis added). The Seventh Edition of BLACK’S contains no definition of the term. Webster defines it as “to gain or attain possession or disposal of usu[ally] by some planned action or method” or “to bring about or call into being”. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 1559 (1986). See also THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1970 (1993) (“Come into the possession or enjoyment of; secure or gain as the result of request or effort; acquire, get.”).

The Texas Court of Appeals has stated: “In the absence of a statutory definition, statutory language is measured by common understanding and practices”. Reeves v. State, 969 S.W.2d 471, 487 (Tex.App.—Waco 1998), cert. denied, 526 U.S. 1068, 119 S.Ct. 1462, 143 L.Ed.2d 547 (1999); see also Carroll v. State, 911 S.W.2d 210, 220 (Tex.App.—Austin 1995) (“[i]n the absence of special definitions, statutory language can be measured by common understanding and practices or construed in the sense generally understood”).

Carroll, 911 S.W.2d at 220, relied on dictionary
definitions of “obtain” when construing the Texas statutory exclusionary rule, TEX.CODE CRIM. P. ANN. art. 38.23(a) (prohibiting admission at trial against accused in criminal case of evidence “obtained ” in violation of federal or Texas law (emphasis added)). See Reeves, 969 S.W.2d at 487 (construing art. 38.23 and stating that “ ‘obtain’ means to gain or attain by planned action or effort” (citing State v. Daugherty, 931 S.W.2d 268, 270–71 (Tex.Crim.App.1996)); Ferguson v. State, 699 S.W.2d 381, 386 (Tex.App.—Fort Worth 1985) (citing dictionary definitions in concluding that, although robbery statute uses term “obtain”, trial court’s use of terms “appropriate” and “acquire”, rather than “obtain”, in jury charge was not error).

The Peavys contend “obtain” does not require any “active participation” in the interception, but only knowing participation in the overall scheme by which the communications were intercepted. They maintain it is enough to knowingly condone another’s interceptions and advise him concerning them; or to implicitly encourage the interception by using the information for the interceptor’s benefit.

In this regard, they urge applying the definition of aiding and abetting applied by the Supreme Court in Nye & Nissen v. United States, 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919 (1949), cited in the legislative history of the Federal Wiretap Act. See S.Rep. No. 90–1097, 90th Cong., 2d Sess., *171 reprinted in 1968 U.S.C.C.A.N. 2112, 2181. In Nye, “aid and abet” was defined to mean “that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed”. Id. at 619, 69 S.Ct. 766 (internal quotation marks and citation omitted).

 Defendants respond that the Federal Act’s legislative history does not discuss or cite any particular language in Nye with approval, and does not equate “procure” with “aid and abet”. They urge that “procure” (and, presumably, “obtain” for Texas Act purposes) means “actively bringing about, causing or instigating something to be done”. Alternatively, they claim that, under the definition relied on by the Peavys, their conduct does not constitute “aiding and abetting” the interceptions.

Defendants assert there is no evidence they caused, instigated, or enlisted Harman to make the interceptions, or participated in, or encouraged, them. They note his interceptions started before Riggs contacted them, and continued after they stopped accepting tapes from him.

The summary judgment record contains the following evidence pertinent to this “obtains”, as well as the “procures”, claim. The Harmans acquired the scanner and, prior to contacting WFAA or meeting with Riggs, began intercepting and recording the Peavys’ telephone conversations. Defendants never provided Harman with equipment to assist in that.

The Harmans called WFAA and met with Riggs, because they were frustrated with the lack of action by law enforcement authorities to whom they had reported Peavy’s conduct, and wanted it investigated and exposed.

When the Harmans asked Riggs whether he wanted a copy of the tape listened to at their initial meeting, and any future tapes they might make, he replied that he did. Riggs instructed Harman not to turn the recorder on and off while listening to the intercepted conversations, and not to edit the tapes, to prevent authenticity challenges.

As the Harmans made additional tapes, they called Riggs and told him. Occasionally, he telephoned the Harmans to ask if additional tapes were available. Riggs testified in his deposition: he was very interested in obtaining any additional information to further his investigation of Peavy; and he asked Harman to keep him aware of whatever else he was hearing.

Either Riggs or Ward picked up the tapes from the Harmans. Harman testified in his deposition: when Riggs came to pick up tapes, he would listen to them at the Harmans’ home; he told Harman he would “look into” the contents of the tapes; and later told Harman he was “finding more stuff” based on such contents.

According to Mrs. Harman, Riggs and Harman, after their initial meeting, had “a lot” of telephone conversations. After the Harmans learned recording the conversations was illegal and WFAA informed them it would not accept additional tapes, they continued intercepting the Peavys’ conversations, and continued telephone contact with Riggs. Riggs also met with the Harmans in their home after they learned of the illegality.

On 1 March 1995, after Watler told Riggs, Miller, and Ward they could not accept additional tapes, Riggs called Harman and recorded their conversation, without Harman’s knowledge. In that conversation, Riggs discussed the progress defendants had made on the story and assured Harman repeatedly that he and WFAA were going to continue working on the story.

Viewing this evidence in the light most favorable to the Peavys, we conclude that, although they are not entitled to summary judgment on this point, neither are defendants.
Construing “obtains” in the sense generally understood (gain or attain by planned action or effort), a reasonable jury could find that, with the exception of the *172 interceptions made by the Harmans prior to their contacting WFAA and Riggs, and possibly the interceptions made after Riggs informed Harman that WFAA would not accept additional tapes, defendants’ interim conduct constituted “obtaining” the Harmans to intercept the Peavys’ conversations, in violation of the Texas Act (as well as “procuring” them in violation of the Federal Act).

At the very least, to the extent Riggs’ instructions regarding recording entire conversations caused the Harmans to intercept and record portions of conversations they otherwise would not have intercepted and recorded, a reasonable jury could conclude Riggs “obtained” (or “procured”) the Harmans’ interception of those discrete portions.

A reasonable jury also could conclude that defendants’ willingness to pursue the investigation and exposure of Peavy’s alleged wrongdoing—the purpose for which the Harmans contacted WFAA—encouraged the Harmans to continue intercepting, and recording, the Peavys’ conversations, even if it was not the sole motivation for their doing so.

III.

For the foregoing reasons, we AFFIRM the summary judgment insofar as it (1) dismissed the Peavys’ claim for damages, under the Federal Act, for defendants’ “procuring” the Harmans to make the interceptions, and (2) held, for contexts other than for their television broadcasts, that, in violation of the Federal and Texas Acts, defendants “used” and “disclosed” the contents of the intercepted communications; REVERSE the summary judgment insofar as it (1) applied strict scrutiny and (2) held that the First Amendment precludes, under the Federal and Texas Acts, holding defendants civilly liable for “use” and “disclosure”; VACATE the summary judgment insofar as it (1) held that, under the Federal Act, defendants had not “procured” the Harmans to make the interceptions (this being a separate issue from the correct dismissal of the procurement action for damages), (2) dismissed the Peavys’ claim, under the Texas Act, for so “obtaining” the Harmans, (3) dismissed the Peavys’ claim, under Texas law, for civil conspiracy, and (4) held that, in violation of the Federal and Texas Acts, defendants, in their television broadcasts, “disclosed” the contents of the interceptions; and REMAND for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; VACATED in part; and REMANDED.

All Citations

221 F.3d 158, 28 Media L. Rep. 2601
Plaintiffs William and Dorothy “Dee” Quigley are residents of Evergreen, Colorado, an upscale suburb in the foothills west of Denver. In August 1994, Mitchell and Candice Aronson moved into a house near the Quigleys. The initial interactions between the Quigleys and the Aronsons were positive. For example, the Quigleys hosted a “welcome party” so the Aronsons could become acquainted with the residents of the neighborhood. Within a month, however, the relationship between the Quigleys and the Aronsons in general, and the relationship between Mrs. Quigley and Mrs. Aronson in particular, soured.

In mid-August 1994, Mrs. Aronson, unbeknownst to Mr. and Mrs. Quigley, took two of the Quigleys’ children (ages 14 and 9 at the time) to an R-rated movie. Mrs. Quigley expressed her concern about the incident to Mrs. Aronson. In late September 1994, two of the Quigleys’ children were standing outside their home when one of the Aronsons’ vehicles, driven by a teenage neighbor and occupied by two of the Aronsons’ children, swerved at the Quigley children. Mrs. Quigley again contacted Mrs. Aronson to express her concern. According to Mrs. Quigley, Mrs. Aronson confirmed that the sixteen-year-old neighbor had driven her children to school, but told Mrs. Quigley it was “none of [her] goddamn business.” App. at 2117.

Many of the other precipitating events concerned the couples’ dogs.

First Amendment protection
The ADL contends that even if it violated the federal wiretap act by “using” the intercepted telephone conversations in preparing and filing the civil complaint against the Quigleys, that “use” was protected by the First Amendment. In other words, the ADL contends that the First Amendment would apply to protect it from liability in this case under the federal wiretap act. The district court’s entry of judgment, following a jury trial, on plaintiffs’ claims against them under the federal wiretap act for using intercepted cordless telephone conversations, and under Colorado state law for defamation, invasion of privacy by intrusion, and false light invasion of privacy. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, reverse the judgment on plaintiffs’ invasion of privacy by intrusion and false light invasion of privacy claims, and affirm the remainder of the judgment. Our partial reversal has no effect upon the damage awards.
court rejected the ADL’s argument during trial. Because the issue raised by the ADL is one of law, our scope of review is de novo. See generally Salve Regina College, 499 U.S. at 231, 111 S.Ct. 1217.

In support of its argument, the ADL relies heavily on Bartnicki v. Vopper, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001), which was decided after the trial in this case. In Bartnicki, an unidentified person intercepted and recorded a cellular telephone conversation between the president of a local teachers’ union and the union’s chief negotiator. The conversation concerned the status of negotiations between the union and the local school board, and included references to a potential strike by the union, a discussion of a potential response to the “board’s intransigence,” and references to “go[ing] to the[ ] ... homes” of the board members, “blow[ing] off their front porches,” and “do[ing] some work” on the board members. Id. at 518–19, 121 S.Ct. 1753. The recording of the conversation subsequently wound up in the hands of a radio commentator, who played the tape “on his public affairs talk show.” Id. at 519, 121 S.Ct. 1753. “Another station also broadcast the tape, and local newspapers published its contents.” Id. The two people whose conversation was recorded filed suit against various media representatives asserting, in part, that the broadcast of the tape violated the federal wiretap act. The media defendants moved for summary judgment arguing, in part, that their disclosures of the tape were protected by the First Amendment. The district court rejected the defendants’ argument, but the Third Circuit reversed, concluding that the federal wiretap act was “invalid because [it] deterred significantly more speech than necessary to protect the privacy interests at stake.” Id. at 522, 121 S.Ct. 1753. The Supreme Court subsequently granted certiorari to review the matter.

At the beginning of its opinion, the Supreme Court emphasized that the case “present[ed] a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech.” Id. at 518, 121 S.Ct. 1753. Continuing, the Court noted that “the disclosure of the contents” of the intercepted telephone conversation “violated the federal” wiretap act, and that “[t]he only question [wa]s whether the application of the [ ] statute[ ] in such circumstances violate[d] the First Amendment.” Id. at 525, 121 S.Ct. 1753. Although the Court acknowledged the wiretap act served an important purpose by protecting the privacy of communications, id. at 532–33, 121 S.Ct. 1753, it emphasized that, under the facts before it, the application of *1067 the act

“implicate[d] the core purposes of the First Amendment” by “impos[ing] sanctions on the publication of truthful information of public concern.” Id. at 533–34, 121 S.Ct. 1753. Ultimately, the Court concluded that the privacy concerns at issue had to “give way when balanced against the interest in publishing matters of public importance.” Id. at 534, 121 S.Ct. 1753. Thus, the Court agreed that the defendants were immune from liability under the federal wiretap act.

Contrary to the ADL’s assertions, we conclude the instant case is distinguishable from Bartnicki in a number of respects. First, and most importantly, the contents of the Quigleys’ intercepted telephone conversations were not matters of public concern. Although the ADL asserts otherwise, it is apparent after listening to those recorded conversations that the Quigleys were engaging in what they thought was private discussion with each other or with friends and family regarding their ongoing dispute with the Aronsons. Although the Quigleys (primarily Mrs. Quigley) sometimes engaged in derogatory banter about the Aronsons, it is apparent that those comments represented nothing more than private thoughts about an inherently private matter. Further, as previously discussed, there is no credible basis for concluding, as suggested by the defendants, that the Quigleys were engaged in an anti-Semitic campaign to harass the Aronsons and force them out of the neighborhood (indeed, the jury’s findings clearly refute the defendants’ arguments on this point). Thus, any First Amendment interest in publishing those private remarks was considerably less significant than the First Amendment interest at issue in Bartnicki. Second, unlike the defendants in Bartnicki, the defendants in this case did not accurately portray the contents of the Quigleys’ recorded telephone conversations. In Bartnicki, the defendants broadcast the recorded conversation and printed a transcript of the conversation. Here, in contrast, the defendants merely used snippets of the Quigleys’ conversations in preparing the Aronsons’ civil complaint, and inaccurately portrayed those comments as demonstrating the existence of an anti-Semitic campaign on the part of the Quigleys against the Aronsons. Third, although the jury in this case found that the ADL did nothing to “procure” the recorded conversations, it was uncontroversial that the ADL, from the time of its first contacts with the Aronsons in late October 1994, knew that the Aronsons were the persons responsible for recording the Quigleys’ telephone conversations. Further, it was uncontroversial that the ADL knew, during November and early December 1994, that the Aronsons were continuing to record the Aronsons’ telephone conversations. This is in contrast to the media defendants in Bartnicki, who “found out about the interception [at
issue] only after it occurred, and in fact never learned the identity of the person or persons who made the interception.” 532 U.S. at 525, 121 S.Ct. 1753.

12 The ADL concedes that “[t]he right to petition the government and to engage in public speech through the filing of lawsuits may not enjoy the protection afforded by Bartnicki’s holding in a civil case of purely private significance.” Defs.’ Op. Br. at 49.

It is true that the Court in Bartnicki left open the question of whether the interest in protecting the privacy of communications “is strong enough to justify the application of” the federal wiretap act “to disclosures ... of purely private concern.” Id. at 533, 121 S.Ct. 1753. Nonetheless, we are persuaded that, if faced with the issue, the Court would conclude that the interest in privacy is sufficient to allow the federal wiretap act to be applied to situations, such as the case here, involving the “use” of intercepted telephone conversations concerning purely private matters. Thus, we hold that application of the federal wiretap act to the ADL’s actions in this case does not violate the First Amendment.

CONCLUSION

We REVERSE the judgment of the district court with regard to plaintiffs’ invasion of privacy by intrusion and false light invasion of privacy claims. Our reversal of these judgments does not have any effect upon the damage awards. We AFFIRM the judgment of the district court in all other respects.

All Citations

327 F.3d 1044
445 F.Supp.2d 602
United States District Court,
E.D. Virginia.

UNITED STATES OF AMERICA,
v.
Steven J. ROSEN, Keith Weissman.

No. 1:05CR225.
Aug. 9, 2006.

ELLIS, District Judge.

In this Espionage Act prosecution, defendants Steven Rosen and Keith Weissman have been charged in Count I of a superseding indictment with conspiring to transmit information relating to the national defense to those not entitled to receive it, in violation of 18 U.S.C. § 793(g).

Defendants, by pretrial motion, attack the constitutionality of § 793 in three ways. First, they argue that the statute, as applied to them, is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Second, they argue that the statute, as applied to them, abridges their First Amendment right to free speech and their First Amendment right to petition the government. Third, defendants assert the First Amendment rights of others by attacking the statute as facially overbroad. In the alternative, defendants urge the Court to avoid these constitutional issues by interpreting the statute as applying only to the transmission of tangible items, i.e., documents, tapes, discs, maps and the like.

In addition, defendant Rosen has been charged in Count III of the superseding indictment with aiding and abetting the transmission of information relating to the national defense to one not entitled to receive it, in violation of 18 U.S.C. § 793(d) and 2. He seeks dismissal of this count on the ground that the facts alleged in the superseding indictment in support of this count are legally insufficient.

and was primarily engaged in lobbying officials of the executive branch with policy-making authority over issues of interest to AIPAC. Rosen did not have a security clearance during the period of the alleged conspiracy, and had not held a security clearance since his employment with the RAND Corporation in the late 1970s and early 1980s. Indeed, Rosen’s security clearance had been terminated on or about July 6, 1982. Defendant Weissman was AIPAC’s Senior Middle East Analyst and worked closely with Rosen in lobbying the executive branch of the U.S. government. Weissman has never held a security clearance. Alleged co-conspirator Lawrence Franklin worked on the Iran desk in the Office of the Secretary of the Department of Defense (DOD) and held a top secret security clearance during the alleged conspiracy.

In general, the superseding indictment alleges that in furtherance of their lobbying activities, defendants (i) cultivated relationships with government officials with access to sensitive U.S. government information, including NDI, (ii) obtained the information from these officials, and (iii) transmitted the information to persons not otherwise entitled to receive it, including members of the media, foreign policy analysts, and officials of a foreign government.

Rosen and Weissman have challenged the constitutionality of Count I of the superseding indictment based on the guarantees of the First Amendment. First, they argue that their conduct, as alleged in the superseding indictment, may not be proscribed without transgressing the First Amendment’s guarantees of free speech and the right to petition the government.

The operative statute at issue in defendant’s constitutional challenge is codified at 18 U.S.C. § 793 and provides, in pertinent part, as follows:

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully
communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it....

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of the conspiracy.

18 U.S.C. § 793. A brief history of this statute provides necessary context and helps illuminate the analysis of the questions presented.

For much of this nation’s history, those who violated the nation’s trust by engaging in unauthorized disclosures of government secrets were prosecuted under generally applicable statutes punishing treason, unlawful entry into military bases, and theft of government property. See Harold Edgar and Benno C. Schmidt, Jr., The Espionage Statutes and Publication of Defense Information, 73 Colum. L.Rev. 929, 940 (1973) [hereinafter Espionage Statutes]. The first statute specifically intended to protect government secrets, and § 793’s progenitor, was the Defense Secrets Act of 1911. In terms that have survived largely unaltered for nearly a century, it prohibited the willful communication of knowledge concerning “anything connected with the national defense” to one “not entitled to receive it.” The statute did not define what was “connected to the national defense,” nor did it provide a clear basis for determining who was “entitled to receive” that knowledge. Notwithstanding these deficiencies, the drafters of the next legislative attempt to protect government secrets, which became known as the Espionage Act of 1917, were generally content to adopt the basic language of the 1911 statute. Thus, title I, section 1, subsection (d) of the Espionage Act provided that—

whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, wilfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it ... shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both.

See 40 Stat. 217 (June 15, 1917). This provision, which is the precursor to both §§ 793(e) and (d), was altered in three material respects when Congress last amended the statute as part of the Internal Security Act of 1950. See 64 Stat. 987 (Sept. 23, 1950). First, Congress removed those with unlawful possession of NDI from the ambit of subsection (d), and created subsection (e) which focuses on this subset of persons. See id. Second, Congress expanded the category of what could not be communicated pursuant to §§ 793(d) and (e) to include “information relating to the national defense,” but modified this additional item by adding a scienter requirement to the effect that “the possessor has reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation.” See id. Finally, in contrast to subsection (d), Congress drafted subsection (e) to require one with unlawful possession of national defense information to return it to the government even in the absence of a demand for that information. See id.; see also New York Times Co. v. United States, 403 U.S. 713, 738 n. 9, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (White, J., concurring) (citing S.Rep. No. 81–2369, at 8–9 (1950) S.Rep. No. 81–2369, at 8–9 (1950)).

Over the years, numerous commentators have criticized these provisions as excessively complex, confusing, indeed impenetrable. Yet, despite repeated calls for reform of these provisions in the more than half century since their last amendment in 1950, the statute has
remained unchanged.

Section 793’s litigation history is sparse, but nonetheless both pertinent and instructive. The modest number of reported decisions reflect that § 793 prosecutions are relatively rare and that over the years, the statute has successfully weathered several constitutional challenges on both vagueness and First Amendment grounds. While the Supreme Court has never considered a § 793(d) or (e) case, it has considered and rejected a vagueness challenge to the phrase “information relating to the national defense” as used in a related espionage statute. See Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941). At the circuit level, authority is less sparse, but still relatively scarce. Particularly pertinent here is United States v. Morison, 844 F.2d 1057 (4th Cir.1988), in which the Fourth Circuit denied vagueness and First Amendment challenges to § 793 by a naval intelligence officer who transmitted classified satellite photographs of Soviet naval preparations to a British periodical. The Fourth Circuit has also considered and rejected vagueness challenges to § 793 and related espionage statutes in other cases. See United States v. Truong, 629 F.2d 908, 918–19 (4th Cir.1980) (rejecting vagueness challenge based on lack of evil intent in term willfulness); United States v. Dedeyan, 584 F.2d 36, 40 (4th Cir.1978) (rejecting vagueness and overbreadth challenges to the term “relating to the national defense” as used in § 793(f)); see also United States v. McGuinness, 35 M.J. 149, (C.M.A.1992) (rejecting a vagueness challenge to the term “unauthorized” as used in § 793(e)).

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A.

 Defendants first argue that the content of the information described by the phrase “information relating to the national defense” is insufficiently clear when such information is transmitted orally. In this respect, it has long been recognized that the phrase “information relating to the national defense” is quite broad and potentially too broad since, especially in time of war, any information could conceivably relate to the national defense. See United States v. Heine, 151 F.2d 813, 815 (2d Cir.1945) (“It seems plain that the section cannot cover information about all those activities which become tributary to ‘the national defense’ in time of war; for in modern war there are none which do not.”). Courts, facing the obvious need to find some limiting construction, have not limited the phrase by specific subject matter, but instead have chosen to limit the phrase by requiring the government to prove (i) that the information is closely held by the government and (ii) that the information is the type of information that, if disclosed, could harm the United States. A review of the most pertinent case law interpreting and cabining the phrase is instructive.

In Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941), the Supreme Court rejected a similar vagueness challenge to identical language used in section 2(a) of the Espionage Act, currently codified at 18 U.S.C. § 794(a). In that case, defendant Gorin, a citizen of the U.S.S.R., had obtained from defendant Salich, a naval intelligence officer, the substance of over fifty reports relating to Japanese activities in the United States, which the two had conspired to transmit to the Soviet Union. Id. at 22, 61 S.Ct. 429. The Supreme Court rejected an attempt by defendants to tie the term “information relating to the national defense” to information relating to those places listed in section 1(a) of the statute, currently codified at § 793(a). Stating instead that the term “national defense” had acquired a well-known meaning “as a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.” Gorin, 312 U.S. at 28, 61 S.Ct. 429. Significantly, as the trial court in Gorin instructed the jury, the term encompasses the United States’ own intelligence reports about another nation’s military activities, “[f]or from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.” Id. at 31, 61 S.Ct. 429.

The considerable breadth of the subject matter falling within the phrase “related to the national defense” has been confirmed in more recent cases. Thus, in United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir.1980), the Fourth Circuit rejected the defendants’ argument that “information relating to the national defense” was restricted to military matters, holding instead that the U.S. diplomatic cables relating to the 1977 Paris peace negotiations with the North Vietnamese were “related to the national defense” within the meaning of §§ 793 and 794. Truong, 629 F.2d at 918. In response to Truong’s argument that the material he transmitted was not covered by the phrase, the Fourth Circuit explained that “Congress intended ‘national defense’ to encompass a broad range of information and rejected attempts to narrow the reach of the statutory language.” Id. (citing Edgar and Schmidt, Espionage Statutes, 73 Colum. L.Rev. at 972–74). Similarly, in Morison, the Fourth
Circuit approved the district court’s instruction to *620 the jury describing “information relating to the national defense” as including “all matters that directly or may reasonably be connected with the national defense of the United States against any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness.” Morison, 844 F.2d at 1071. In sum, the phrase “information relating to the national defense” has consistently been construed broadly to include information dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities.

Rather than limiting the subject matter scope of the phrase “information relating to the national defense,” or restricting it to tangible material, courts have carefully cabined the phrase’s scope in two ways. First, courts have limited the term by requiring that the information be closely held by the government. This requirement was recognized by the Supreme Court in Gorin, and served as the basis for Judge Hand’s decision in United States v. Heine, 151 F.2d 813 (2d Cir.1945), in which he reversed Heine’s conviction under the predecessor to § 794 because the information about airplane production Heine delivered to the Germans was publicly available. See id. at 817. As Judge Hand put it,

As declared in Gorin ... it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all. Id. at 816. Similarly, the Fourth Circuit’s rejection of a vagueness challenge to the term “information relating to the national defense” in Morison, was based, in part, on the district judge’s instruction to the jury that “the government must prove that the documents or the photographs are closely held in that they have not been made public and are not available to the general public.” Morison, 844 F.2d at 1071–72.20

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The second judicially imposed limitation on the phrase “information relating to the national defense” is the requirement that its “disclosure would be potentially damaging to the United States or useful to an enemy of the United States.” Morison, 844 F.2d at 1071–72. This important requirement is implicit in the purpose of the statute and assures that the government cannot abuse the statute by penalizing citizens for discussing information the government has no compelling reason to keep confidential. As the Supreme Court has instructed, the statute only applies to information for which there is an “occasion for secrecy,” and there is no “occasion for secrecy” unless disclosure of the information the government seeks to protect implicates an important government interest such as the national security. See Gorin, 312 U.S. at 28, 61 S.Ct. 429. This second NDI judicial gloss was explicitly relied upon in the concurring opinions of Judges Wilkinson and Phillips in Morison as necessary to save the statute from Morison’s First Amendment challenge. As Judge Wilkinson explained:

The district court’s limiting instructions properly confine prosecution under the statute to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the vagueness and overbreadth doctrines restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government.

As declared in Gorin ... it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all.

Id. at 816. Similarly, the Fourth Circuit’s rejection of a vagueness challenge to the term “information relating to the national defense” in Morison, was based, in part, on the district judge’s instruction to the jury that “the government must prove that the documents or the photographs are closely held in that they have not been made public and are not available to the general public.” Morison, 844 F.2d at 1071–72.20

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§§ 793(d) and (e) is cured through the judicial glosses that have been added to these phrases. To the extent that oral transmission of information relating to the national defense makes it more difficult for defendants to know whether they are violating the statute, the statute is not thereby rendered unconstitutionally vague because the statute permits conviction only of those who “willfully” commit the prohibited acts and do so with bad faith. So construed, both phrases pass Fifth Amendment muster; they are not unconstitutionally vague as applied to these defendants.

VII.

In the end, it must be said that this is a hard case, and not solely because the parties’ positions and arguments are both substantial and complex. It is also a hard case because it requires an evaluation of whether Congress has violated our Constitution’s most sacred values, enshrined in the First and the Fifth Amendment, when it passed legislation in furtherance of our nation’s security. The conclusion here is that the balance struck by § 793 between these competing interests is constitutionally permissible because (1) it limits the breadth of the term “related to the national defense” to matters closely held by the government for the legitimate reason that their disclosure could threaten our collective security; and (2) it imposes rigorous scienter requirements as a condition for finding criminal liability. 58

*646 The conclusion that the statute is constitutionally permissible does not reflect a judgment about whether Congress could strike a more appropriate balance between these competing interests, or whether a more carefully drawn statute could better serve both the national security and the value of public debate. Indeed, the basic terms and structure of this statute have remained largely unchanged since the administration of William Howard Taft. The intervening years have witnessed dramatic changes in the position of the United States in world affairs and the nature of threats to our national security. The increasing importance of the United States in world affairs has caused a significant increase in the size and complexity of the United States’ military and foreign policy establishments, and in the importance of our nation’s foreign policy decision making. Finally, in the nearly one hundred years since the passage of the Defense Secrets Act mankind has made great technological advances affecting not only the nature and potential devastation of modern warfare, but also the very nature of information and communication. These changes should suggest to even the most casual observer that the time is ripe for Congress to engage in a thorough review and revision of these provisions to ensure that they reflect both these changes, and contemporary views about the appropriate balance between our nation’s security and our citizens’ ability to engage in public debate about the United States’ conduct in the society of nations.

An appropriate Order will issue.

All Citations
445 F.Supp.2d 602
I.

David Truong, a Vietnamese citizen and son of a prominent Vietnamese political figure, came to the United States in 1965. At least since his arrival in the United States, Truong has pursued an active scholarly and political interest in Vietnam and the relationship between Vietnam and the United States. In 1976, Truong met Dung Krall, a Vietnamese-American, the wife of the American Naval Officer, who had extensive contacts among the Vietnamese community in Paris. Truong persuaded Krall to carry packages for him to Vietnamese in Paris. The recipients were representatives of the Socialist Republic of Vietnam at the time of the 1977 Paris negotiations between that country and the United States. Truong's phone was tapped and his apartment was bugged from May, 1977 to January, 1978. The telephone interception continued for 268 days and every conversation, with possibly one exception, was monitored and virtually all were taped. The eavesdropping device was operative for approximately 255 days and it ran continuously. No court authorization was ever sought or obtained for the installation and maintenance of the telephone tap or the bug. The government thus ascertained that Humphrey was providing Truong with the copies of secret documents. This leak of sensitive information of course ceased when Truong and Humphrey were arrested on January 31, 1978.

After a protracted trial, Truong and Humphrey were both convicted of espionage and conspiracy to commit espionage in violation of 18 U.S.C. §§ 371 and 794(a) and (c). They were also convicted of delivery of material related to the national defense to unauthorized persons in violation of 18 U.S.C. §§ 793(e).

III.

The defendants were convicted of several violations of the espionage statutes and related provisions. Truong and Humphrey raise a number of challenges to these convictions.

A. Espionage Statutes

The jury found that the defendants had violated three espionage provisions, 18 U.S.C. s 794(a), s 794(c), and s 793(e). Two principal objections are made by the defendants to their convictions under these statutes, and we will consider them in order:

(1) National Defense

A common prerequisite for a conviction under each of the statutes is that the defendant transmit information “relating to the national defense.” The defendants argue that this phrase limits the reach of the statutes to military matters and assert that none of the materials transmitted by Truong and Humphrey related to the “national
defense" thus defined.

Contrary to the defendants’ argument, the legislative history of the espionage statutes demonstrates that Congress intended “national defense” to encompass a broad range of information and rejected attempts to narrow the reach of the statutory language. See Edgar and Schmidt, The Espionage Statutes and Publication of Defense Information, 73 Colum.L.Rev. 929, 972-74 (1973). Resting on a similar reading of the intent of Congress, the Supreme Court in Gorin v. United States, 312 U.S. 19, 28, 61 S.Ct. 429, 434, 85 L.Ed. 488 (1941), underscored the breadth of “national defense” as used in the espionage statutes: “National Defense, the Government maintains, ‘is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.’ We agree that the words ‘national defense’ in the Espionage Act carry that meaning.” Thus, the defendants’ attempt to constrict the ambit of “national defense” to strictly military matters cannot succeed. See United States v. Boyce, 594 F.2d 1246 (9 Cir.1979), cert. denied, 444 U.S. 855, 100 S.Ct. 112, 62 L.Ed.2d 73 (1980).

Under either the strict definition urged by the defendants or the broad definition endorsed by the Supreme Court in Gorin, the defendants transmitted information which related to the national defense. The materials sent to Paris included information which related directly to the United States military, including information about Vietnamese designs on Thailand, American POW’s in Indochina, and American military materiel which had fallen into the hands of the Vietnamese government. In addition, under the broader definition of national defense, the packages contained a great deal of national defense information, in the form of names of United States sources for intelligence about the Vietnamese government. On the facts of this case, there can be no doubt that the information transmitted was information “relating to the national defense.”

We affirm the defendants’ convictions, subject to further proceedings on remand. Upon remand, the district court will examine the final group of documents produced by the prosecution for Jencks Act material and take such steps as are consistent with this opinion.

AFFIRMED.
DMCA Safe Harbor and Fair Use Hypo


Plaintiff Ida Barnett is a local librarian in Yorkville. In her spare time, she maintains a website, YorkvilleSkinny.com, where she publishes articles and photos focusing on “all the latest gossip” about prominent people in town. Her website has a small following of largely local visitors, and it generates just enough revenue from ad sales to local businesses to pay for Barnett’s out-of-pocket expenses, such as web hosting. Barnett has also sold freelance photos to media companies on two occasions.

On September 23, 2017, Barnett was jogging past Club Erotica – a strip club that was recently raided by police as a front for prostitution – when she recognized a car in the parking lot. It belonged to Rev. Jerry Fitzpatrick, a fundamentalist pastor who was running a long-shot campaign for the local school board. Fitzpatrick was notorious for his fiery sermons with titles like “Pray the Porn Away.” As she saw a man leave the club and head for the car, Barnett turned on her cellphone video camera and began recording. The resulting video lasts 20 seconds. In it, Barnett can be heard calling out “Reverend Fitzpatrick,” causing the man to turn around. His face is visible for only a moment as he notices the camera; then he covers his head, jumps into the vehicle and speeds away.

When she arrived home, Barnett uploaded the video to her personal “channel” on the video hosting website YourVideo.com. She also posted a brief gossip item about the encounter to YorkvilleSkinny and embedded a YourVideo player, which allowed readers of her blog post to play the video in its entirety, download a copy, or share it on their own YourVideo pages. Barnett’s post became the talk of the town and was shared by numerous local residents on social media. A few days later, Fitzpatrick withdrew from the race.

Later that week, the story was picked up by JoltFix, a popular online news site that aims to provide sensational news to a national audience. The website boasts 12 million unique visits per month, making it one of the most visited U.S. news and entertainment sites. Its content largely consists of short, gossipy blog posts about celebrities and other public figures. The site operates under a “soft paywall” and subscription fees make up about 25 percent of JoltFix’s monthly revenue while ad sales constitute the remaining 75 percent. JoltFix has a significant following on all the major social media platforms. The JoltFix website includes a “share this story” feature that lets visitors easily share JoltFix content on social media.

In addition to its paid staff of eight writers, JoltFix maintains a roster of approximately 120 volunteer Citizen Correspondents (“Correspondents”) who provide content for JoltFix.com. Correspondents are required to complete a day-long training session at JoltFix’s headquarters, which includes instruction on style and content standards. According to the 2017 training manual, would-be Correspondents were encouraged to emphasize visual content—specifically, photos and videos—to drive traffic to JoltFix posts and optimize their performance on social media. At the

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1 JoltFix allows access to five free posts per month. Access to subsequent posts that month require a subscription fee.
end of the training, Correspondents receive two JoltFix T-shirts and a small “swag bag” of branded merchandise from JoltFix and its sponsors. They are otherwise uncompensated.

Each Correspondent receives a username and password to log in to JoltFix.com and upload content to the website. A Correspondent post does not become visible to the public until a JoltFix editor approves it. JoltFix editors are extremely busy and spend limited time reviewing each potential Correspondent post. Aside from removing potentially unlawful content and correcting obvious typos, editors do not alter Correspondents’ contributions. While Correspondents are given access to an online “Idea Board” where they can sign up to cover specific stories that JoltFix editors believe to be of interest, Correspondents largely produce content of their own initiation and do not receive assistance from JoltFix employees in preparing their posts.

JoltFix reserves the right to terminate the posting privileges of any Correspondent at any time for any reason, and it has revoked the login credentials of Correspondents whose submissions contained material that infringed copyright or was deemed libelous, obscene, or of “poor quality” inconsistent with the site’s editorial standards and tastes. Correspondents also sign an “Independent Contractor Agreement” that states in part:

No employer/employee relationship is contemplated or created by this Agreement. Correspondent is not an agent or authorized representative of JoltFix Publishing Corp. Correspondent accepts sole and exclusive responsibility for all of his/her acts or omissions in the course of the Independent Contractor relationship. By assent to this Agreement and continued use of the platform, Correspondent warrants that he/she holds the rights to all works posted through the Citizen Correspondent portal.

Despite this language, the website receives five to ten DMCA takedown notices per month attributable to content posted by Correspondents. JoltFix posts approximately 300 videos or images per month submitted by Correspondents.

Hilda Johnson became a Correspondent after attending a “recruitment open house” at JoltFix headquarters in July 2017. The day after Fitzpatrick ended his campaign, Johnson learned through a friend about Barnett’s post on YorkvilleSkinny.com and decided to turn it into a JoltFix post. Johnson wrote a short item about Fitzpatrick’s candidacy and withdrawal and added a still image from Barnett’s video showing the moment that Fitzpatrick turns toward the camera with a startled look. Using a free online “meme generator” that she learned about during her JoltFix Correspondent training, Johnson altered the image by superimposing a caption across the width of the screen: “TFW THEY FIND OUT YOU’RE A PORN-AGAIN CHRISTIAN.”2 Johnson’s altered image (“the Meme”) makes no direct mention of Barnett’s article or YorkvilleSkinny.com, and does not credit Barnett as the originator. A JoltFix editor reviewed the Meme in the Correspondent section’s moderation queue, made no changes, and published it the following morning.

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Barnett became aware of the JoltFix post because it was widely shared on social media with more than 6,000 “retweets” on Twitter and 1,750 “shares” on Facebook. In fact, Google searches display Johnson’s blog post and the accompanying Meme on JoltFix as the first result, while the YorkvilleSkinny original post shows up much further down in the search results. Still, Barnett’s post about Fitzpatrick is by far the most viewed item on YorkvilleSkinny.com, and Barnett has submitted no evidence showing her website suffered any diminution in advertising sales or any other tangible loss.

Upset about the use of her content, Barnett submitted a “takedown notice” on JoltFix.com and demanded that JoltFix remove Johnson’s post and pay a $500 freelancer fee for the use of the image from her video. Approximately 36 hours later, JoltFix removed the post from its website but did not otherwise respond to her demand. Barnett then registered the video with the U.S. Copyright Office and sued JoltFix for direct copyright infringement.

JoltFix has moved for summary judgment on the grounds that it is protected by the safe harbor provision of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, because it complied with applicable notice-and-takedown procedures. In response, Barnett argues that JoltFix cannot rely on the DMCA safe harbor because the “storage” of the Meme was essentially “directed” by JoltFix and not by a third-party “user,” and because JoltFix received a financial benefit directly attributable to infringing activity that the website’s operators had the right and ability to control. Barnett claims that 35% of the images and videos on JoltFix are copyright infringing. JoltFix denies this claim, asserts the percentage is much lower, and that it immediately takes action when notified of copyright infringement. As an additional defense, JoltFix also argues that its use of a still image to create a meme for news reporting purposes is transformative and qualifies as a permissible “fair use”—a conclusion that Barnett disputes.

For purposes of JoltFix’s summary judgment motion, the federal district court³ has requested oral argument on the following issues:

1. Does the DMCA safe harbor apply to JoltFix’s use of a still image from Barnett’s video posted by one of its Correspondents?

2. Does JoltFix’s use of a still image from Barnett’s video qualify as a “fair use”?

Please prepare an 8-10 minute oral argument regarding these issues. The Court expects counsel to be familiar with the following excerpted authorities:

- Digital Millennium Copyright Act, 17 U.S.C. § 512(c);
- Copyright Act, 17 U.S.C. § 107;
- BWP Media USA Inc. v. Clarity Digital Group, LLC, 820 F.3d 1175 (10th Cir. 2016);
- Mavrix Photographs LLC v. LiveJournal, Inc., 873 F.3d 1045 (9th Cir. 2017);
- North Jersey Media Group, Inc. v. Pirro, 74 F. Supp. 3d 605 (S.D.N.Y. 2015); and

³ This case takes place in the hypothetical state of Verona, in a federal district court in the 12th Federal Circuit. Cases from other circuits are not binding precedent.
Bench Memo
DMCA Safe Harbor and Fair Use Hypo


Introduction

The Digital Millennium Copyright Act contains a safe harbor that protects internet service providers from monetary liability for claims of copyright infringement based on content stored “at the direction of a user.” 17 U.S.C. § 512(c). Recent cases have addressed whether a service provider is protected from liability under the § 512(c) safe harbor when its content is provided by independent contractors or reviewed and approved by a website’s volunteer moderators.

Fair use provides another affirmative defense to copyright infringement. Although courts have yet to address whether the use of a photo in a meme is sufficiently transformative to constitute a fair use, recent cases have analyzed the fair use defense when photos have been repurposed online or shared on social media.

This hypothetical involves a copyright infringement claim against a news organization that uses content provided by volunteer contributors. The claim is based on the unauthorized use of a photo in a meme. The defendant has moved for summary judgment on the grounds that it is protected from liability by the DMCA safe harbor and/or the fair use defense.

Participants have been asked to address the following questions at oral argument on defendant’s motion for summary judgment:

(1) Does the DMCA safe harbor apply to JoltFix’s use of a still image from Barnett’s video posted by one of its Correspondents?

(2) Does JoltFix’s use of a still image from Barnett’s video qualify as a “fair use”?

This bench memo provides guidance on these issues and sample questions that you can pose to the participants, but it is by no means exhaustive. As always, we welcome your independent questions and thoughts.

Materials

Workshop participants and judges have been provided excerpts of the following materials:

- Digital Millennium Copyright Act, 17 U.S.C. § 512(c);
- Copyright Act, 17 U.S.C. § 107;
- BWP Media USA Inc. v. Clarity Digital Grp., LLC, 820 F.3d 1175 (10th Cir. 2016);
- Mavrix Photographs LLC v. LiveJournal, Inc., 873 F.3d 1045 (9th Cir. 2017);
- North Jersey Media Group, Inc. v. Pirro, 74 F. Supp. 3d 605 (S.D.N.Y. 2015); and
Summary for Judges

Plaintiff Ida Barnett, is a small town blogger suing a national media organization, JoltFix, for direct copyright infringement. Barnett’s claim is based on JoltFix’s use of a still image taken from a newsworthy video that Barnett posted on her blog. Barnett’s video shows local political candidate, pastor, and anti-porn advocate Rev. Jerry Fitzpatrick exiting an adult establishment. The image was submitted to JoltFix by one of its volunteer contributors (known as “Correspondents”), Hilda Johnson, who used a still image from Barnett’s video to create a meme.

JoltFix has moved for summary judgment on the grounds that it is shielded by the DMCA safe harbor under § 512(c) and that its use of the image as a meme qualifies as a permissible “fair use.” In response, Barnett argues that JoltFix cannot rely on the DMCA safe harbor because the “storage” of the meme was essentially “directed” by JoltFix and not by a third-party “user,” and because JoltFix received a financial benefit directly attributable to infringing activity that the website’s operators had the right and ability to control. Barnett further disputes that JoltFix’s use of the image qualifies as a fair use.

Issue 1: Applicability of the DMCA Safe Harbor

a. Stored “at the direction of a user”

To be eligible at the threshold for the § 512(c) safe harbor, a service provider must show that the infringing material was stored “at the direction of a user.” § 512(c)(1). The question presented by this hypo is whether JoltFix’s involvement in its Correspondents’ submission process precludes it from claiming that the Meme was stored “at the direction of” a third party. In recent years, two appellate courts have considered this issue.

In BWP Media USA Inc. v. Clarity Digital Group, LLC, 820 F.3d 1175 (10th Cir. 2016), the Tenth Circuit affirmed summary judgment in favor of the defendant, Clarity Digital. The BWP Media court held that that a self-described “citizen journalism” website, Examiner.com, was protected by the DMCA safe harbor against liability for infringing material posted by its network of volunteer “Examiners.” Although Examiner.com was heavily involved in recruiting and overseeing its contributors, the court placed decisive weight on the “independent contractor agreement” signed by each user, under which each contributor warranted that no infringing material would be posted to Examiner.com. See id. at 1180. The court held that Examiner.com did not direct its Examiners to post infringing content simply by suggesting topics and soliciting articles and pictures because the website had made clear that copyright infringement was prohibited and provided Examiners with a legal means to include licensed photos in their articles.

In contrast, the Ninth Circuit denied summary judgment to the defendants in Mavrix Photographs LLC v. LiveJournal, Inc., 873 F.3d 1045, 1048 (9th Cir. 2017). In Mavrix, a celebrity photo agency sued the blogging platform LiveJournal over the unauthorized posting of 20 photographs uploaded to a popular LiveJournal discussion group by unpaid users of the site. Crucially, every post was reviewed before it became publicly visible by a team of volunteer moderators led by a LiveJournal employee. The Ninth Circuit held that whether the infringing images were posted “at the direction of a user” was to be determined by common-law agency principles and there was at least a question...
of fact as to whether the moderators were LiveJournal’s agents. The court rejected BWP Media to the extent that it failed to analyze the role of the website’s contributors under the law of agency. See id. at 1053, n. 8.

This hypothetical contains facts that are similar to and different from both cases. For instance, like the defendant in BWP Media, JoltFix uses volunteer citizen journalists that it recruits and oversees, and it requires these Correspondents to sign an independent contractor agreement. Unlike the defendant in BWP Media, however, JoltFix does not provide access to a photo license database and its instructions to its Correspondents on the prohibition of copyright infringement are less clear. Additionally, in contrast to the moderators in Mavrix, the JoltFix editors approve nearly every submission and their role is arguably more akin to permissible “accessibility-enhancing” activities (discussed in Mavrix) that would not disqualify a website from claiming DMCA safe harbor protection. Do these differences mean JoltFix may still claim protection under the DMCA safe harbor or are there material questions of fact as to whether JoltFix directed the storage of the infringing content? There are numerous other factual distinctions to explore.

Participants can also address whether the independent contractor agreement is conclusive as to the lack of an agency relationship or whether the facts suggest that the Correspondents were agents of JoltFix. On the one hand, Correspondents resemble independent contractors since they apparently work off premises, use their own equipment and supplies, set their own hours, and receive no compensation or benefits. On the other hand, Correspondents are recruited and trained by JoltFix employees and they provide a service essential to JoltFix’s business model and interchangeable with that of its salaried employees.

b. Financial benefit from infringing content it has the right and ability to control

If JoltFix can meet the threshold requirement of showing that its content is stored at the direction of a user, it must also show that it did not “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” § 512(c)(1)(B).

As explained in Mavrix, in assessing a service provider’s right and ability to control infringing content, the fact finder should consider the service provider’s procedures and general practices, not specific posts. The “right and ability to control” involves “something more than the ability to remove or block access to materials posted on a service provider’s website.” Mavrix, 873 F.3d at 1058. To that end, participants must grapple with whether JoltFix functions like a traditional publishing platform because JoltFix suggests substantive content through its “Idea Board” and its editors manually screen each post, or whether the editors’ review process is like the automated screening activities that do not disqualify a service provider from claiming protection under the DMCA safe harbor.

As to the question of “financial benefit” from infringing content, Mavrix states that the “financial benefit need not be substantial or a large portion of the provider’s revenue.” Id. at 1059. According to case law cited in Mavrix, a financial benefit has been shown where the vast majority of a website’s content is infringing, the service operators actively encouraged infringement, and the website primarily attracted visitors seeking to engage in infringing activity. There was also some
In two recent cases, courts considered whether the repurposing of material on the internet constituted a fair use and arrived at different outcomes. In North Jersey Media Group, Inc. v. Pirro, 74 F. Supp. 3d 605 (S.D.N.Y. 2015), the court denied the defendant’s motion for summary judgment and found that a news organization’s reuse of a 9/11 photo was not “transformative” where it was published on social media unaltered except for the addition of a hashtag. In contrast, in Philpot v. Media Research Center, Inc., 279 F. Supp. 3d 708 (E.D. Va. 2018), the court granted the defendant’s motion for summary judgment and found that an online publisher’s republication of concert photos was “transformative” where the publisher repurposed the photos for commentary on the political leanings and ambitions of the musicians, thus diverging from the creator’s original purpose of depicting how the musicians perform. Here, the main issue is whether JoltFix’s use of Barnett’s content as the basis for her Meme constituted a transformative fair use.

To be transformative, a use must do something more than repackage or republish the original copyrighted work. The question is whether the republication alters the first with new expression, meaning, or message. Here, as in North Jersey Media Group, Johnson’s creation of the Meme did not significantly alter the original work since she merely took a still-frame from Barnett’s video and added a caption to it. Also, unlike the situation in Philpot, Johnson’s purpose of using the photos for news reporting and commentary is no different from Barnett’s original purpose. On the other hand, by creating a Meme, Johnson has arguably transformed the video into something new. It can now be easily shared (and indeed, has been widely shared on social media) and repurposed in entirely different contexts if others continue to add new captions. Further, what is the relevance, if any, that the JoltFix post is a still image taken from video, as opposed to a photo?

In arguing the fair use factors, participants should also analyze the journalistic or commercial purpose of JoltFix’s post since JoltFix focuses on sensationalistic content and relies heavily on advertising revenue. Participants should also consider and the effect on the potential market for Barnett’s work. The popularity of the photo indicates that it has some licensing value and Barnett has sold freelance photos on two occasions. On the other hand, Barnett has not shown that she suffered any diminution in advertising sales and it may be arguable that the JoltFix post increased traffic to her website because it is the most viewed item on her website.
Potential Questions to Ask Participants

Issue 1: Applicability of the DMCA Safe Harbor

1. Is this case distinguishable from BWP Media? What about Mavrix? Should this Court adopt the Tenth Circuit’s approach in BWP Media? Should this Court adopt the Ninth Circuit’s approach in Mavrix?


3. In analyzing whether the material was stored at the direction of a user, should the court focus on the Correspondents’ submission of content or on the JoltFix editors’ role in making the content publicly accessible? Why?

4. If the Court finds that JoltFix cannot rely on the DMCA safe harbor because of its level of control, would that essentially penalize JoltFix for policing its content? Is this a desirable policy outcome? Does § 512 require a particular result or is it ambiguous as applied to these facts?

5. Does this Court have sufficient facts to grant/deny summary judgment? If not, what facts are necessary?

6. What effect does your approach have on the free flow of information on the internet? What should a website like JoltFix do if it cannot possibly review all of the content on its site for potential infringement?

7. If we allow JoltFix to escape liability here, does that mean all service providers would be able to avoid liability under the DMCA safe harbor?

8. Does JoltFix have the right and ability to control infringing activity? Does JoltFix’s level of control disqualify it from claiming protection under the DMCA safe harbor?

9. Does JoltFix receive a financial benefit directly attributable to infringing activity? Does this disqualify JoltFix from claiming protection under the DMCA safe harbor?
Issue 2: Applicability of the fair use defense

1. Is this case distinguishable from *North Jersey Media Group*? What about *Philpot*? Should this Court adopt either approach?

2. What are the most important fair use factors to consider in this case?

3. Is a meme always fair use? Why/why not?

4. Would it make a difference to your argument if Johnson had used a still photograph that Barnett took, as opposed to a frame from a video? Why/why not?

5. What new message does the Meme convey, and how is that different from Barnett’s video? Is adding a caption enough to constitute fair use here? Is adding a caption ever enough to constitute fair use?

6. How much consideration should be given to JoltFix’s commercial interests here?

7. How should the largely factual nature of Barnett’s work—a candid, spur-of-the-moment news video—affect our analysis?

8. How should we weigh the amount and substantiality of the portion used—should we look at the whole image or the fact that it was only a tiny portion of Barnett’s video?

9. If JoltFix’s use of the photo actually increased traffic to Barnett’s website does that mean she cannot establish market harm?
17 U.S.C.A. § 512

§ 512. Limitations on liability relating to material online

Effective: December 9, 2010

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(c) Information residing on systems or networks at direction of users.--

(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

***

17 U.S.C.A. § 107

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

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

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
820 F.3d 1175  
United States Court of Appeals, Tenth Circuit.

BWP MEDIA USA, INC., d/b/a Pacific Coast News; National Photo Group, LLC, Plaintiffs–Appellants, v. CLARITY DIGITAL GROUP, LLC, n/k/a AXS Digital Medial Group, LLC, Defendant–Appellee.

No. 15–1154.  
April 25, 2016.

Before KELLY, MATHESON, and MORITZ, Circuit Judges.

Opinion

KELLY, Circuit Judge.

Plaintiff–Appellant BWP Media USA, Inc. d/b/a Pacific Coast News and National Photo Group, LLC (“BWP”) appeals from the district court’s summary judgment in favor of Defendant–Appellee Clarity Digital Group, LLC n/k/a AXS Digital Media Group, LLC (“AXS”). *** BWP owns the rights to photographs of various celebrities. In February 2014, BWP filed a complaint alleging that AXS infringed its copyrights by posting 75 of its photographs without permission on AXS’s website, Examiner.com. *** AXS asserted it was protected under the DMCA’s safe harbor provision of the Digital Millennium Copyright Act (“DMCA”) and moved for summary judgment. The district court agreed. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Background

A. The DMCA

Recognizing the need “to update domestic copyright law for the digital age,” Congress enacted the DMCA. Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 26 (2d Cir.2012). Section 512 of the DMCA contains a safe harbor provision protecting online and internet service providers (“ISPs”) from monetary liability, only allowing *1178 for limited injunctive relief, when copyright infringement occurs through use of the service. 17 U.S.C. § 512(c). The safe harbor provision is designed to “preserve[ ] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements,” while simultaneously providing “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” H.R. Rep. No. 105–551, pt. 2, at 49–50 (1998). To benefit from safe harbor protection, the ISP must first show that the infringing content was stored “at the direction of a user.” 17 U.S.C. § 512(c)(1). Once this is established, there are numerous factors which must be satisfied to come within the protection of the safe harbor.*** Specific to this case, an ISP will not qualify for safe harbor protection if it had either actual knowledge of the infringement or knowledge of facts or circumstances from which infringing activity is apparent. Id. § 512(c)(1)(A)(i)–(ii). Additionally, if the ISP became aware of the infringement and did not act expeditiously to remove or disable access to the content, it cannot qualify for safe harbor protection. Id. § 512(c)(1)(A)(iii).

B. Infringing Activity on Examiner.com

Examiner.com characterizes itself as a “dynamic entertainment, news and lifestyle network that serves more than 20 million monthly readers across the U.S. and around the world.” *** Rather than hiring a centralized writing staff, the content generated on Examiner.com is created by independent contractors, called “Examiners,” all over the world. To become an Examiner, the writer must fill out an application including a proposed topic and a short writing sample. Examiner.com evaluates the writing sample, conducts a background check, and, assuming the application is approved, the Examiner enters into a contract entitled the Independent Contractor and Agreement License with Examiner.com. The contract expressly provides that: (1) Examiners are independent contractors, not employees and (2) copyright infringement *1179 is prohibited.4 Because it was a group of Examiners that posted the infringing content on Examiner.com, AXS asserted it was protected under the DMCA’s safe harbor provision.

3 The contract states, “You will provide the Services hereunder as an independent contractor and not as the agent, employee, legal representative, partner, or joint venturer of Examiner.com.” J.A. 138.

4 The contract provides: (1) “You must have permission from the owner/copyright holder of any content before including it on your Web Page, unless it was provided by Examiner.com;” (2) “Do not include any copyrighted material on our site (including text, photos, video, audio, or anything else) without the permission of the owner;” and (3) “You also may not post any content that infringes any ... copyright.” J.A. 133–141.

On appeal, BWP argues that AXS should not be protected by § 512’s safe harbor for two reasons. First, BWP argues AXS cannot get past the threshold requirement that the

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infringing content be stored “at the direction of a user.” 17 U.S.C. § 512(c)(1). Specifically, BWP argues that: (1) Examiners are not “users,” but (2) even if Examiners are “users,” AXS directed the Examiners to post the infringing content. Second, BWP claims that even if AXS satisfies this threshold, safe harbor protection does not apply because AXS had actual or circumstantial knowledge of the infringement. Id. § 512(c)(1)(A)(i)–(ii). We review the district court’s grant of summary judgment de novo. *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir.2003). We reject each argument raised by BWP.

Discussion

A. Section 512’s threshold requirement, that the infringing content be stored at the direction of a “user,” is satisfied.

The DMCA’s safe harbor requires that the infringing content be stored at the direction of a “user.” BWP attempts to divide this requirement into two distinct inquiries, asking who is a “user” and who directed the infringing content to be stored. As explained below, the key to interpreting this requirement is not to isolate certain words but rather, to take the provision as a whole, giving meaning to each word in context.

1. The word “user” in the DMCA should be interpreted according to its plain meaning.

We are often tasked with interpreting complex statutory language but, when “the statutory language is clear, our analysis ends and we must apply its plain meaning.” *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir.2011). We need not torture “the language of the statute when a simple, straightforward reading obviates the necessity of making such semantic contortions.” *Equal Emp’t Opportunity Comm’n v. Louisville N. R.R. Co.*, 505 F.2d 610, 619–20 (5th Cir.1974); see also *Resolution Tr. Corp. v. Fed. Sav. and Loan Ins. Corp.*, 25 F.3d 1493, 1500 (10th Cir.1994). The word “user” in the DMCA is straightforward and unambiguous. Simply put, a “user” is “one that uses.” *Merriam–Webster’s Collegiate Dictionary* 1297 (10th ed. 2001). In the DMCA context, we agree with the district court that the term “‘user’ describes a person or entity who avails itself of the service provider’s system or network to store material.” *BWP Media USA Inc.*, 2015 WL 1538366 at *6. We note that opinions interpreting the DMCA’s safe harbor provisions have not exhaustively defined the term, suggesting apparent clarity. See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1015–20 (9th Cir.2013); *Viacom Int’l, Inc.*, 676 F.3d at 38–40; *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117–18 (9th Cir.2007).

*1180* In an effort to narrow the word “user,” BWP suggests the ordinary meaning of the term would protect every ISP from liability for copyright infringement. See Aplt. Br. at 17. BWP has offered several alternative definitions of “user”—at one point suggesting “user” should exclude an ISP’s owners, employees, and agents, at another point suggesting “user” should exclude anyone who entered into a contract and received compensation from an ISP.

Putting aside, for a moment, that BWP offers no legal authority to support either definition, we need not look far to reject the argument that a plain language definition of “user” will protect every ISP from liability for copyright infringement.*** The term “user” cannot be read in isolation, it must be read in conjunction with the remainder of the safe harbor provision. See *King v. Burwell*, —— U.S. ———, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015). Safe harbor protection is conditioned on various factors: An ISP will only qualify for safe harbor protection when it can show, inter alia, that the content was stored at the direction of a “user,” that the ISP had no actual knowledge of the infringement, that there were no surrounding facts or circumstances making the infringement apparent, or that upon learning of the infringement, the ISP acted expeditiously to remove or disable access to the infringing material. See 17 U.S.C. § 512(c)(1)(A).

BWP also argues that Examiners are agents of AXS and therefore not “users.” No evidence supports the notion that the Examiners are agents. Thus, the argument is contrary to the language of the contract, our interpretation of the term “user,” and agency principles generally. As previously stated, a “user” is anyone who uses a website—no class of individuals is inherently excluded. Moreover, the Examiners are not agents—the contract language explicitly designates Examiners as independent contractors: “You will provide the Services hereunder as an independent contractor and not as the agent, employee, legal representative, partner, or joint venturer of Examiner.com.” J.A. 138. We may rightfully consider that language. *United States v. New Mexico*, 581 F.2d 803, 808 (10th Cir.1978).

Finally, BWP argues that even if there is no actual agency relationship, the Examiners had apparent authority and therefore should be considered employees of AXS under *Community for Creative Non–Violence v. Reid*, 490 U.S. 730, 741, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). There are numerous reasons to reject this argument. First, evidentiary insufficiency. As the district court noted, we lack evidence of an agency relationship or any apparent authority. See *Restatement (Third) of Agency* § 3.03 cmt. b (Am. Law. Inst. (2015)) (“[A]n agent’s apparent authority originates with expressive conduct by the principal toward a third party ... [t]he fact that one party performs a service that *1181* facilitates the other’s business does not constitute such a manifestation.”).

Second, even if the Examiners have apparent authority, and they do not, this does not equate to an employee-employer relationship under *Reid*, 490 U.S. at 741, 109 S.Ct. 2166. In *Reid*, the Supreme Court analyzed an oral agreement
between two parties and at one point in its analysis recognized that because “Congress intended terms such as ‘employee,’ ‘employer,’ and ‘scope of employment’ to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” Id. at 740, 109 S.Ct. 2166. While BWP correctly identifies that Reid involves an analysis of copyright law generally and that Reid dealt minimally with agency law issues, nowhere in Reid is there anything to support the assertion that apparent authority would automatically transform an agent into an employee. Aplt. Br. at 42.

Third, as previously discussed, simply because someone is an employee does not automatically disqualify him as a “user” under § 512. Therefore, even if we were to ignore the contract language and accept both of BWP’s flawed legal assertions—AXS would still not be automatically disqualified from the safe harbor.

2. The infringing material was not stored at the direction of AXS.

The key to limiting the safe harbor provision and preventing the creation of the “lawless no-man’s-land,” Aplt. Br. at 17, is to look to the language constraining the word “user.” The relevant question isn’t who is the “user,” but rather, who directed the storage of the infringing content? See 17 U.S.C. § 512(c)(1). Key to this provision is control. There is no protection under § 512 when the infringing material is on the system or network as a result of the ISP’s “own acts or decisions.” H.R.Rep. No. 105-512, pt.2, at 53 (1998). When an ISP “actively encourag[es] infringement, by urging [its] users to both upload and download particular copyrighted works,” it will not reap the benefits of § 512’s safe harbor. Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020, 1043 (9th Cir.2013). However, if the infringing content has merely gone through a screening or automated process, the ISP will generally benefit from the safe harbor’s protection. See, e.g., Shelter Capital Partners LLC, 718 F.3d at 1020; Io Grp., Inc. v. Veoh Networks, Inc., 586 F.Supp.2d 1132, 1146–48 (N.D.Cal.2008); CoStar Grp., Inc. v. LoopNet, Inc., 164 F.Supp.2d 688, 701–02 (D.Md.2001), aff’d, 373 F.3d 544 (4th Cir.2004).

BWP argues that even if Examiners are “users,” AXS cannot rely upon the safe harbor because it directed the Examiners to post the infringing content. According to BWP, AXS created this control by issuing instructions on the general topics Examiners were to write about, actively soliciting new articles, and suggesting that Examiners include slide shows or pictures to accompany articles. BWP, however, fails to explain how this evidence crosses the chasm between encouraging the Examiners to post pictures with articles and encouraging Examiners to post infringing content. Not only did AXS make clear copyright infringement was prohibited, it also provided Examiners with licensed photographs to accompany their articles. No reasonable trier of fact could find that the infringement was at the direction of AXS.

3. AXS did not have actual or circumstantial knowledge of the copyright infringement and therefore, is not disqualified from safe harbor protection.

Because AXS cleared the initial hurdle requiring the content be stored at *1182 the direction of a “user,” the next step is to determine whether AXS has been disqualified from the safe harbor by any of the subsequent provisions. Relevant to this case, if the ISP has actual or circumstantial knowledge of the infringing activity, it does not qualify for safe harbor protection. See 17 U.S.C. § 512(c)(1)(A)(i)-(ii).

   a. AXS was not willfully blind to the infringement and therefore cannot be said to have actual or circumstantial knowledge of the infringement.

Because photographs of celebrities are typically protected by copyright and AXS knew celebrity images were being posted on Examiner.com, BWP asserts that AXS was willfully blind to the copyright infringement. BWP argues that “by requiring Examiners to post (specific) content to the Website (periodically under threat of termination), Defendant engages in precisely the kind of purposeful conduct that brought about the infringement.” Aplt. Br. at 36. This statement is contrary to both the evidence in the record and cases interpreting the DMCA. As previously stated, there is nothing in the record showing that AXS encouraged the Examiners to post infringing material. There is also nothing in the record showing that AXS ignored signs or circumstances suggesting copyright infringement was occurring on Examiner.com. Although BWP is correct in stating AXS encouraged Examiners to incorporate photographs into articles, AXS provided Examiners a legal means by which to accomplish this. Examiners have access to a photo bank full of images for which AXS owns the licenses. Prior cases also clearly establish that “merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the actual knowledge requirement under §512(c)(1)(A)(i).” Shelter Capital Partners LLC, 718 F.3d at 1022–23 (“For the same reasons, we hold that [an ISP’s] general knowledge that it hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag.”).***

AFFIRMED.
873 F.3d 1045  
United States Court of Appeals,  
Ninth Circuit.

MAVRIX PHOTOGRAPHS, LLC, a California  
limited liability company, Plaintiff–Appellant,  
v.  
LIVEJOURNAL, INC., Defendant–Appellee.

No. 14-56596  
Argued Submitted October 7, 2016—Pasadena,  
California  
Filed April 7, 2017  
Amended August 30, 2017

Before: Harry Pregerson, Richard A. Paez, and Morgan  
Christen, Circuit Judges.

OPINION

Paez, Circuit Judge:

Plaintiff Mavrix; Photographs (“Mavrix”) appeals the  
district court’s summary judgment in favor of Defendant  
LiveJournal. Mavrix sued LiveJournal for posting twenty  
of its copyrighted photographs online. The district court  
held that the Digital Millennium Copyright Act’s  
(“DMCA”) § 512(c) safe harbor protected LiveJournal  
from liability because Mavrix’s photographs were stored at  
the direction of the user. 17 U.S.C. § 512(c).

To be eligible at the threshold for the § 512(c) safe harbor,  
LiveJournal must show that the photographs were stored at  
the direction of the user. Although users submitted  
Mavrix’s photographs to LiveJournal, LiveJournal posted  
the photographs after a team of volunteer moderators led by a  
LiveJournal employee reviewed and approved them. Whether these photographs were truly  
stored at the direction of the user, or instead whether  
LiveJournal is responsible for the photographs, depends on  
whether the acts of the moderators can be attributed to  
LiveJournal. The issue we must decide is whether the  
common law of agency applies to LiveJournal’s safe  
harbor defense. The district court ruled that the common  
law of agency does not apply to this analysis. We disagree  
and conclude that it does. As there are genuine factual  
disputes regarding whether the moderators are  
LiveJournal’s agents, we reverse the district court’s  
summary judgment and remand for trial.

I.

LiveJournal

LiveJournal is a social media platform. Among other  
services, it allows users to create and run thematic  
“communities” in which they post and comment on content related to the theme. LiveJournal communities can create  
their own rules for submitting and commenting on posts.

LiveJournal set up three types of unpaid administrator roles to run its communities. “Moderators” review posts submitted by users to ensure compliance with the rules. “Maintainers” review and delete posts and have the authority to remove moderators and users from the community. Each community also has one “owner” who has the authority of a maintainer, but can also remove maintainers.

LiveJournal protects against copyright infringement in its communities through various mechanisms. LiveJournal follows the formal notice and takedown procedures outlined in the DMCA by designating an agent and form to report infringement, and by promptly removing infringing posts and prohibiting repeat abusers from the community. 17 U.S.C. § 512(c)(1)(C). LiveJournal’s Terms of Service instructs users not to “[u]pload, post or otherwise transmit any Content that infringes any patent, trademark, trade secret, copyright or other proprietary rights.”

Oh No They Didn’t! (“ONTD”)

ONTD is a popular LiveJournal community which features up-to-date celebrity news. Users submit posts containing photographs, videos, links, and gossip about celebrities’ lives. ONTD moderators review and publicly post some of the submissions. Other users engage in conversations about the celebrity news in the comments section of each post. For example, one of the ONTD posts at issue contained photographs that Mavrix had taken which appeared to show that super-celebrity Beyoncé was pregnant. Users speculated in the comments section of that post that Beyoncé was indeed pregnant.

*1050 Like other LiveJournal communities, ONTD created rules for submitting and commenting on posts. ONTD’s rules pertain to both potential copyright infringement and substantive guidance for users. For example, one rule instructs users to “[i]nclude the article and picture(s) in your post, do not simply refer us off to another site for the goods.” Another rule provides “Keep it recent. We don’t need a post in 2010 about Britney Spears shaving her head.” ONTD’s rules also include a list of sources from which users should not copy material. The sources on the list have informally requested that ONTD stop posting infringing material. ONTD has also automatically blocked all material from one source that sent ONTD a cease and desist letter.

ONTD has nine moderators, six maintainers, and one owner. ONTD users submit proposed posts containing celebrity news to an internal queue. Moderators review the submissions and publicly post approximately one-third of them. Moderators review for substance, approving only
those submissions relevant to new and exciting celebrity news. Moderators also review for copyright infringement, pornography, and harassment.

When ONTD was created, like other LiveJournal communities, it was operated exclusively by volunteer moderators. LiveJournal was not involved in the day-to-day operation of the site. ONTD, however, grew in popularity to 52 million page views per month in 2010 and attracted LiveJournal’s attention. By a significant margin, ONTD is LiveJournal’s most popular community and is the only community with a “household name.” In 2010, LiveJournal sought to exercise more control over ONTD so that it could generate advertising revenue from the popular community. LiveJournal hired a then active moderator, Brendan Delzer, to serve as the community’s full time “primary leader.” By hiring Delzer, LiveJournal intended to “take over” ONTD, grow the site, and run ads on it.***

As the “primary leader,” Delzer instructs ONTD moderators on the content they should approve and selects and removes moderators on the basis of their performance. Delzer also continues to perform moderator work, reviewing and approving posts alongside the other moderators whom he oversees. While Delzer is paid and expected to work full time, the other moderators are “free to leave and go and volunteer their time in any way they see fit.” In his deposition, Mark Ferrell, the General Manager of LiveJournal’s U.S. office, explained that Delzer “acts in some capacities as a sort of head maintainer” and serves in an “elevated status” to the other moderators. Delzer, on the other hand, testified at his deposition that he does not serve as head moderator and that ONTD has no “primary leader.”

Mavrix

Mavrix is a celebrity photography company specializing in candid photographs of celebrities in tropical locations. The company sells its photographs to celebrity magazines. According to Mavrix, infringement of its photographs is particularly devastating to its business model. Since Mavrix’s photographs break celebrity news, such as the pregnancy of Beyoncé, infringing posts on sites like ONTD prevent #1051 Mavrix from profiting from the sale of the photographs to celebrity magazines.

Procedural History

Mavrix filed an action for damages and injunctive relief against LiveJournal alleging infringement on the basis of twenty Mavrix photographs posted on ONTD. ONTD posted the photographs in seven separate posts between 2010 and 2014. Some of these photographs contained either a generic watermark or a specific watermark featuring Mavrix’s website “Mavrixonline.com.” *** When Mavrix filed this lawsuit, LiveJournal removed the posts.***

LiveJournal moved for summary judgment on the basis of the § 512(c) safe harbor. The district court granted LiveJournal’s motion and denied Mavrix’s cross-motion for partial summary judgment, concluding that the § 512(c) safe harbor shielded LiveJournal from liability for copyright infringement. Mavrix timely appealed.***

III. A.

The DMCA strikes a balance between the interests of “copyright holders in benefitting from their labor; ... entrepreneurs in having the latitude to invent new technologies without fear of being held liable if their innovations are used by others in unintended infringing ways; and those of the public in having access to both ...” Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020, 1037 (9th Cir. 2013). The DMCA balances these interests by requiring service providers to take down infringing materials when copyright #1052 holders notify them of the infringement and by limiting service providers’ liability for unintentional infringement through several safe harbors. Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004).

*** LiveJournal claimed protection from damages under the § 512(c) safe harbor for “infringement of copyright by reason of the storage [of material] at the direction of a user.” 17 U.S.C. § 512(c)(1). To be eligible at the threshold for the § 512(c) safe harbor, a service provider must show that the infringing material was stored “at the direction of the user.” 17 U.S.C. § 512(c)(1).*** If it meets that threshold requirement, the service provider must then show that (1) it lacked actual or red flag knowledge of the infringing material; and (2) it did not receive a “financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” Id. Because the § 512(c) safe harbor is an affirmative defense, LiveJournal must establish “beyond controversy every essential element,” and failure to do so will render LiveJournal ineligible for the § 512(c) safe harbor’s protection. See S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003); see also UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1013 (9th Cir. 2013).

B.***

1.

LiveJournal must make a threshold showing that Mavrix’s photographs were stored at the direction of the user. *** The district court held that although moderators screened and publicly posted all of the ONTD posts, the posts were at the direction of the user. The district court focused on the users’ submission of infringing photographs to LiveJournal rather than LiveJournal’s screening and public posting of the photographs. *** The § 512(c) safe harbor focuses on the service provider’s role in making material stored by a user publicly accessible on its site. See Shelter Capital, 718 F.3d at 1018; S. Rep. No. 105-190, at 43-44
(1998). Contrary to the district court’s view, public accessibility is the critical inquiry. In the context of this case, that inquiry turns on the role of the moderators in screening and posting users’ submissions and whether their acts may be attributed to LiveJournal.

2.

Mavrix, relying on the common law of agency, argues that the moderators are LiveJournal’s agents, making LiveJournal liable for the moderators’ acts. The district court erred in rejecting this argument.

*** Along with other courts, we have applied agency law to questions much like the question of LiveJournal’s liability for the moderators’ acts. We applied agency law to determine whether a service provider was responsible under the DMCA for copyright infringement by its employees. Fung, 710 F.3d at 1038. The Tenth Circuit applied agency law to determine whether a service provider was responsible under the DMCA for copyright infringement by its contractors. See BWP Media USA, Inc. v. Clarity Dig. Grp., LLC, 820 F.3d 1175, 1180 (10th Cir. 2016). Finally, a district *1054 court applied agency law to determine whether a service provider was responsible under the DMCA for the acts of moderators. Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578 SVW( ), 2009 WL 6355911, at *13 n.21 (C.D. Cal. Dec. 21, 2009), aff’d in part, 710 F.3d 1020 (9th Cir. 2011).*** We therefore have little difficulty holding that common law agency principles apply to the analysis of whether a service provider like LiveJournal is liable for the acts of the ONTD moderators.

The Tenth Circuit held that the service provider’s contractors were “users” rather than agents under the DMCA. BWP, 820 F.3d at 1180. The court also held that even if the contractors were agents, they were not employees. Id. at 1181. Finally, the court held that even if the contractors were employees, they could still be users. Id. To the extent that BWP’s holding contradicts our case law that common law principles of agency apply to the DMCA such that a service provider is liable for the acts of its agents, including its employees, we reject it. See, e.g., Fung, 710 F.3d at 1038 (“When dealing with corporate or entity defendants, ... the relevant intent must be that of the entity itself, as defined by traditional agency law principles ....”).

3.

In light of the summary judgment record, we conclude that there are genuine issues of material fact as to whether the moderators are LiveJournal’s agents. The factual dispute is evident when we apply common law agency principles to the evidentiary record.

“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) Of Agency § 1.01 (Am. Law Inst. 2006). For an agency relationship to exist, an agent must have authority to act on behalf of the principal and “[t]he person represented [must have] a right to control the actions of the agent.” Restatement (Third) Of Agency § 1.01, cmt. c (Am. Law Inst. 2006).

An agency relationship may be created through actual or apparent authority. Gomez v. Campbell–Ewald Co., 768 F.3d 871, 878 (9th Cir. 2014) (citing Restatement (Third) of Agency §§ 2.01, 2.03, 4.01 (Am. Law Inst. 2006)), cert. granted, — U.S. ——, 135 S.Ct. 2311, (191 L.Ed.2d 977, 2015), and aff’d, — U.S. ——, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016). Actual authority arises through “the principal’s assent that the agent take action on the principal’s behalf.” Restatement (Third) of Agency § 3.01 (Am. Law Inst. 2006). LiveJournal argues that it did not assent to the moderators acting on its behalf. Mavrix, however, presented evidence that LiveJournal gave its moderators explicit and varying levels of authority to screen posts. Although LiveJournal calls the moderators “volunteers,” the moderators performed a vital function in LiveJournal’s business model.*** There is evidence in the record that LiveJournal gave moderators express directions about their screening functions, including criteria for accepting or rejecting posts. Unlike other sites where users may independently post content, LiveJournal relies on moderators as an integral part of its screening and posting business model. LiveJournal also provides three different levels of authority: moderators review posts to ensure they contain celebrity gossip and not pornography or harassment, maintainers delete posts and can remove moderators, and owners can remove maintainers. Genuine *1055 issues of material fact therefore exist regarding whether the moderators had actual authority.

Apparent authority arises by “a person’s manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.” Restatement (Third) of Agency § 3.03 (Am. Law Inst. 2006); see also Hawaiian Paradise Park Corp. v. Friendly Broad. Co., 414 F.2d 750, 756 (9th Cir. 1969). “The principal’s manifestations giving rise to apparent authority may consist of direct statements to the third person, directions to the agent to tell something to the third person, or the granting of permission to the agent to perform acts ... under circumstances which create in him a reputation of authority. ...” Hawaiian Paradise Park, 414 F.2d at 756.

LiveJournal selected moderators and provided them with specific directions. Mavrix presented evidence that LiveJournal users may have reasonably believed that the moderators had authority to act for LiveJournal. One user whose post was removed pursuant to a DMCA notice
complained to LiveJournal “I’m sure my entry does not violate any sort of copyright law. ... I followed [ONTD’s] formatting standards and the moderators checked and approved my post.” The user relied on the moderators’ approval as a manifestation that the post complied with copyright law, and the user appeared to believe the moderators acted on behalf of LiveJournal. Such reliance is likely traceable to LiveJournal’s policy of providing explicit roles and authority to the moderators. Accordingly, genuine issues of material fact exist regarding whether there was an apparent authority relationship.

Whether an agency relationship exists also depends on the level of control a principal exerts over the agent. See *Hollingsworth v. Perry*, ——U.S. ———, 133 S.Ct. 2652, 2657–58, 186 L.Ed.2d 768 (2013) (referring to control as one of “the basic features of an agency relationship”); *United States v. Bonds*, 608 F.3d 495, 505 (9th Cir. 2010) (explaining that the “extent of control exercised by the employer” is the “essential ingredient” in determining an agency relationship) (quoting *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096 (9th Cir. 2008)). Evidence presented by Mavrix shows that LiveJournal maintains significant control over ONTD and its moderators. Delzer gives the moderators substantive supervision and selects and removes moderators on the basis of their performance, thus demonstrating control. Delzer also exercises control over the moderators’ work schedule. For example, he added a moderator from Europe so that there would be a moderator who could work while other moderators slept. Further demonstrating LiveJournal’s control over the moderators, the moderators’ screening criteria derive from rules ratified by LiveJournal.***

On the other hand, ONTD moderators “are free to leave and go and volunteer their time in any way they see fit.” In addition, the moderators can reject submissions for reasons other than those provided by the rules, which calls into question the level of control that LiveJournal exerts over their conduct. This evidence raises genuine issues of material fact regarding *1056* the level of control LiveJournal exercised over the moderators. From the evidence currently in the record, reasonable jurors could conclude that an agency relationship existed.

4.

We turn briefly to a related issue that the fact finder must resolve in the event there is a finding that the moderators are agents of LiveJournal. In that event, the fact finder must assess whether Mavrix’s photographs were indeed stored at the direction of the users in light of the moderators’ role in screening and posting the photographs. Infringing material is stored at the direction of the user if the service provider played no role in making that infringing material accessible on its site or if the service provider carried out activities that were “narrowly directed” towards enhancing the accessibility of the posts. See *UMG Recordings, Inc. v. Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F.Supp.2d 110, 123 (S.D.N.Y. 2013). The Fourth Circuit extended accessibility-enhancing activities to include a real estate website’s “cursory” manual screening to determine whether photographs indeed depicted real estate. *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 556 (4th Cir. 2004). The fact finder should determine whether LiveJournal’s manual substantive review process went beyond the automatic processes we have approved as accessibility-enhancing activities such that any infringements were still by reason of storage at the direction of the user.

The ONTD moderators manually review submissions and publicly post only about one-third of submissions. The moderators review the substance of posts; only those posts relevant to new and exciting celebrity gossip are approved. The question for the fact finder is whether the moderators’ acts were merely accessibility-enhancing activities or whether instead their extensive, manual, and substantive activities went beyond the automatic and limited manual activities we have approved as accessibility-enhancing.***

Because the district court focused on the users’ submission of Mavrix’s photographs rather than on ONTD’s role in making those photographs publicly accessible and rejected Mavrix’s argument that unpaid moderators could be agents of LiveJournal, *1057* the district court erred in granting summary judgment to LiveJournal. Genuine issues of
material fact exist as to whether the moderators were LiveJournal’s agents. Accordingly, remand is warranted. In assessing LiveJournal’s threshold eligibility for the § 512(c) safe harbor, the fact finder must resolve the factual dispute regarding the moderators’ status as LiveJournal’s agents and in light of that determination, whether LiveJournal showed that Mavrix’s photographs were stored at the direction of the users.

C.

Once the district court concluded that the moderators were not LiveJournal’s agents (except for its employee Delzer), it proceeded to address the two remaining disputed requirements for establishing the § 512(c) safe harbor defense—lack of knowledge of infringements and lack of any financial benefit from infringement that it had the right and ability to control. Because these issues may be contested on remand, we proceed to address them to provide guidance to the district court.***

2.

Finally, if the fact finder determines that LiveJournal met the § 512(c) safe harbor threshold requirement (i.e., that the photographs were stored at the direction of the user, see 17 U.S.C. § 512(c)(1)), and that LiveJournal lacked knowledge of the infringements (see 17 U.S.C. § 512(c)(1)(A)), then the fact finder should determine whether LiveJournal showed that it did not financially benefit from infringements that it had the right and ability to control. See 17 U.S.C. § 512(c)(1)(B).

We agree with the district court in Io Group, Inc. v. Veoh Networks, Inc. that the fact finder should consider the service provider’s procedures that existed at the time of the infringements when assessing the service provider’s right and ability to control the infringements. 586 F.Supp.2d 1132, 1153 (N.D. Cal. 2008). The fact finder should consider the service provider’s general practices, not its conduct with respect to the specific infringements.15 See Shelter Capital, 718 F.3d at 1023, 1030.

15 This inquiry is different from both the threshold determination (i.e., whether the infringing material was stored at the direction of the user, see 17 U.S.C. § 512(c)(1)), and the knowledge showing (i.e., whether the service provider had knowledge of the infringing material, see 17 U.S.C. § 512(c)(1)(A)), where the fact finder should focus on the specific infringements, rather than on the service provider’s general practices and procedures.

“Right and ability to control” involves “something more than the ability to remove or block access to materials posted on a service provider’s website.” Id. (quoting YouTube, Inc., 676 F.3d at 38). The service provider does “something more” when it exerts “high levels of control over activities of users.” Id. The service provider exerts “high levels of control,” for example, when it, “prescreens sites, gives them extensive advice, prohibits the proliferation of identical sites,” provides “detailed instructions regard[ing] issues of layout, appearance, and content,” and ensures “that celebrity images do not oversaturate the content.” Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146, 1173, 1182 (C.D. Cal. 2002).***

The district court concluded that LiveJournal did not have high levels of control such that it had “something more” than the right and ability to remove or block access to material posted on ONTD. LiveJournal’s rules instruct users on the substance and infringement of their posts. The moderators screen for content and other guidelines such as infringement. Nearly two-thirds of submitted posts are rejected, including on substantive grounds. In determining whether LiveJournal had the right and ability to control infringements, the fact finder must assess whether LiveJournal’s extensive review process constituted high levels of control to show “something more.”

LiveJournal must also show that it did not derive a financial benefit from infringement that it had the right and ability to control. See 17 U.S.C. § 512(c)(1)(B). “In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one.” S. Rep. No. 105-190, at 44 (1998). The financial benefit need not be substantial or a large proportion of the service provider’s revenue. Ellison, 357 F.3d at 1079. In Fung, we held that a financial benefit was shown when “there was a vast amount of infringing material on [the service provider’s] websites ... supporting an inference that [the service provider’s] revenue stream is predicated on the broad availability of infringing materials for [its] users, thereby attracting advertisers.” 710 F.3d at 1045. On the other hand, the service provider in that case “promoted advertising by pointing to infringing activity” and “attracted primarily visitors who were seeking to engage in infringing activity, as that is mostly what occurred on [the service provider’s] sites.” Id.

LiveJournal derives revenue from advertising based on the number of views ONTD receives. Mavrix presented evidence showing that approximately 84% of posts on ONTD contain infringing material, although LiveJournal contested the validity of this evidence. The fact finder should determine whether LiveJournal financially benefitted from infringement that it had the right and ability to control.***

IV.

For the foregoing reasons, we reverse the district court’s grant of summary judgment to LiveJournal, vacate its order denying discovery, and remand for further proceedings consistent with this opinion.

REVERSED, VACATED and REMANDED.
AMENDED OPINION AND ORDER

RAMOS, District Judge.

Plaintiff North Jersey Media Group Inc. ("Plaintiff" or "NJMG") brings this action against Jeanine Pirro and Fox News Network, LLC ("Fox News") (collectively, "Defendants") under the Copyright Act, 17 U.S.C. § 101, alleging that Defendants infringed on Plaintiff's copyright in its now iconic photograph of three firefighters raising the American flag at the ruins of the World Trade Center site on September 11, 2001 (the "Work"). Fox News posted a photograph that juxtaposed the Work with the classic World War II photograph of four U.S. Marines raising the American flag on Iwo Jima*** (the "Combined Image") on a Facebook page associated with Fox News' television program Justice with Judge Jeanine. Defendants contend that posting the Combined Image was protected "fair use" under the Copyright Act. See 17 U.S.C. § 107. Pending before the Court is Defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56. (Doc. 31) For the reasons set forth below, Defendants’ motion for summary judgment is DENIED.

I. Factual Background***

b. Fox News’ Use of the Combined Image

Defendant Pirro hosts Justice with Judge Jeanine (the "Program"), a news and commentary program that airs on the Fox News Channel. Pl.’s 56.1 Counter–Stmt. ¶ 12. Fox News also manages a Facebook page that is associated with the Program (the "Pirro Facebook Page"). Id. ¶ 13. Fox News created the Pirro Facebook Page at least in part to promote the Program. SeeDefs.’ 56.1 Counter–Stmt. ¶ 2.

According to Defendants, Georeen Tanner, a Fox News production assistant assigned to the Program, is also principally responsible for managing and posting content to the Pirro Facebook Page.Defs.’ 56.1 Stmt. ¶ 13. ***.

Tanner found the Combined Image on September 11, 2013, when she Googled "9/11" in order to find an image to post on the Pirro Facebook Page to commemorate the events of September 11, 2001.Defs.’ 56.1 Stmt. ¶¶ 19, 20; see Tanner Decl. ¶ 10. Defendants claim that Tanner had not previously seen the Combined Image, but that she immediately recognized the juxtaposition of the Work and Raising the *611 Flag on Iwo Jima. Defs.’ 56.1 Stmt. ¶ 23. According to Defendants, Tanner chose to use the Combined Image precisely because of the parallel drawn between the first responders and the Marines. Id. ¶ 24. Tanner posted the Combined Image to the Pirro Facebook Page that day. Pl.’s 56.1 Counter–Stmt. ¶ 28. The decision to post the Combined Image was hers, and she did not seek the advice of the legal department or anyone else associated with the Program before doing so. Id. ¶ 29.

Plaintiff disputes Tanner’s purported intentions based on Tanner’s deposition testimony that (i) she is paid by Fox News to update the Pirro Facebook Page in order to engage the page’s followers, and (ii) one of the purposes of the Pirro Facebook Page is to promote the Program. Pl.’s 56.1 Counter–Stmt. ¶¶ 19–20; see Tanner Tr. 54:8–10, 55:1521.

Tanner did not alter the Combined Image other than to add the phrase “# neverforget.” Defs.’ 56.1 Stmt. ¶ 33. Tanner stated in her declaration that she posted the Combined Image to convey Fox News’ participation in the global conversation taking place on social media that day. Id. ¶ 37. According to Defendants, hundreds of people commented on Fox News’ posting of the Combined Image on Facebook. Id. ¶ 36.

On September 11, 2013, “# neverforget” was a popular hashtag that Tanner saw many times on social media. Pl.’s 56.1 Counter–Stmt. ¶ 34.

The Combined Image does not include the entirety of the Work. Pl.’s 56.1 Counter–Stmt. ¶ 31. Portions of the top and the right-hand side of the Work do not appear in the Combined Image. Id. As a result, the firefighters occupy a larger portion of the Combined Image than they do in the Work. Id. The Combined Image also differs from the Work in that the resolution is lower and the scale is smaller. Defs.’ 56.1 Stmt. ¶ 29; Pl.’s 56.1 Counter–Stmt. ¶ 29.

According to Defendants, the Combined Image found on Google did not contain any restrictions on copying. Defs.’ 56.1 Stmt. ¶ 25. *** Defendants contend that Tanner did not seek permission from anyone to use the Combined Image because she did not believe—and still does not believe—that she needed permission to use the image for the purpose of making a commentary in remembrance of the events of September 11, 2001. Id. ¶ 35.

The events of September 11, 2001 were not discussed on the editions of the Program that aired on the Saturdays immediately preceding and following the posting *** nor did the posting contain any information about the contents of the upcoming edition of the Program. Pl.’s 56.1 Counter–Stmt. ¶ 38.***
On September 13, 2013, after learning that an attorney had contacted Defendant Pirro to request that Fox News remove the Combined Image from the Pirro Facebook Page, Defendants deleted the posting. Defs.’ 56.1 Stmt. ¶ 39.

c. Licensing and Other Uses of the Work

Almost immediately after publication of the Work, Plaintiff was “inundated” with requests to license the photograph. Pl.’s 56.1 Stmt. ¶ 17. To date, NJMG has raised more than $1 million in licensing revenue from the Work. Id. ¶ 20. This licensing reached its peak in the period 2002 to 2004, but has continued over time. Id. NJMG has licensed the Work for a fee to several media outlets, including television and print media. See Declaration of Dori Ann Hanswirth (“Hanswirth Decl.”), Ex. O. Plaintiff’s gross revenue for editorial licensing from January 1, 2013 through June 3, 2014 was $10,221.71, whereas its gross revenue for commercial licensing during the same period was $4,698.91. Defs.’ 56.1 Counter–Stmt. ¶ 19; see Hanswirth Decl., Ex. S.

Plaintiff has also licensed the Work for use to a number of entities at no cost. Pl.’s 56.1 Counter–Stmt. ¶ 47. Since Fox News’ posting of the Combined Image on September 11, 2013, Plaintiff has licensed the Work through Getty and the Associated Press at least 14 times. Id. ¶ 41. While Plaintiff occasionally sent cease and desist letters in connection with infringing uses of the Work,*** see id. ¶ 43; Declaration of Jennifer A. Borg In Opposition to Defendants’ Motion for Summary Judgment ¶¶ 11–12, NJMG did not file any lawsuits concerning the alleged infringement of its copyright in the Work until December 6, 2012. Pl.’s 56.1 Counter–Stmt. ¶ 45.***

There is no dispute that Plaintiff may have granted a license to Fox News for the use of the Combined Image if Fox News had made such a request before Tanner posted the image to the Pirro Facebook Page. Pl.’s 56.1 Stmt. ¶ 23.***

IV. Discussion

Plaintiff has brought this action under the Copyright Act of 1976, 17 U.S.C. § 101 et seq. The purpose of the copyright law is “[t]o promote the Progress of Science and useful Arts....” U.S. Const. Art. I, § 8, cl. 8. “[T]he copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.” Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L.Rev. 1105, 1107 (1990) (“Leval”); see Cariou v. Prince, 714 F.3d 694, 705 (2d Cir.2013), cert. denied, — U.S. ——, 134 S.Ct. 618, 187 L.Ed.2d 411 (2013). The Copyright Act furthers this purpose by granting authors a limited monopoly over the dissemination of their original works of authorship. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 95 (2d Cir.2014). In particular, the Copyright Act confers upon authors certain enumerated exclusive rights over their works during the term of the copyright, including the rights to reproduce the copyrighted work and to distribute those copies to the public. Id. (citing 17 U.S.C. § 106(1), (3)).

At the same time, there are important limits to an author’s rights to control original and derivative works. Id. at 95. “One such limit is the doctrine of ‘fair use,’ which allows the public to draw upon copyrighted materials without the permission of the copyright holder in certain circumstances.” Id. The fair use doctrine mediates between the “property rights [copyright law] establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest *614 of us to express them—or ourselves by reference to the works of others, which must be protected up to a point.” Blanch v. Koons, 467 F.3d 244, 250 (2d Cir.2006).

The fair use doctrine was codified in the Copyright Act of 1976, which lists four nonexclusive factors that must be considered in determining fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. Although Defendants bear the burden of proving that their use was fair, they need not establish that each of the factors set forth in Section 107 weighs in their favor. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 81 (2d Cir.2014) (quoting NXIVM Corp. v. Ross Inst., 364 F.3d 471, 476–77 (2d Cir.2004), cert. denied, 543 U.S. 1000, 125 S.Ct. 607, 160 L.Ed.2d 458 (2004)). Instead, the factors “are to be explored, and the inquiry may be guided by the examples set forth in the fair use statute.” Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 578, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). Moreover, as will be seen below, certain considerations will be relevant with respect to more than one factor.

As the Supreme Court stated in Campbell, the fair use inquiry may be guided by the examples set forth in the preamble to Section 107, such as whether the purpose of the use was for “criticism, comment, news reporting, teaching ...., scholarship, or research.” 510 U.S. at 578–79, 114 S.Ct. 1164; see 17 U.S.C. § 107.

Although fair use is a mixed question of law and fact, courts in the Second Circuit have “on a number of occasions” resolved fair use determinations at the summary judgment stage where there are no genuine issues of
material fact. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., 150 F.3d 132, 137 (2d Cir.1998).

a. Factor One: The Purpose and Character of the Use

The first factor, which addresses the manner in which the copied work is used, is the “heart of the fair use inquiry.” Blanch, 467 F.3d at 251. As the Supreme Court instructed in Campbell, the central purpose of the inquiry is to see whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. 510 U.S. at 579, 114 S.Ct. 1164 (quoting Folsom v. Marsh, 9 F.Cas. 342, 348 (no. 4,901) (C.C.D.Mass.1841)). In other words, the investigation “asks ... whether and to what extent the new work is ‘transformative.’ ” Id. (quoting Leval at 1111). “A use is transformative if it does something more than repackag[e] or republish the original copyrighted work.” HathiTrust, 755 F.3d at 96.

“Although transformative use is not ‘absolutely necessary’ to a finding of fair use, ‘the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.’ ” Authors Guild, Inc. v. Google Inc., 954 F.Supp.2d 282, 290–91 (S.D.N.Y.2013) (quoting Campbell, 510 U.S. at 579, 114 S.Ct. 1164). Indeed, if “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.’ ” Castle Rock, 150 F.3d at 142 (quoting Leval at 1111). “Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.” HathiTrust, 755 F.3d at 96. And as the Court stated in Campbell, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” 510 U.S. at 579, 114 S.Ct. 1164.

1) Transformative Use

Defendants argue that the first factor favors a finding of fair use because the connection drawn between the events of September 11, 2001 and Iwo Jima can be “comfortably categorized as ‘comment.’ ” Defs. Mem. L. 14. According to Defendants, Tanner’s use of the phrase “# neverforget” connoted remembrance of, and signaled Fox News’ participation in an ongoing, global discussion concerning, the events of September 11, 2001. Id. Defendants further claim that they used a derivative of the Work for a distinct purpose: whereas Franklin’s purpose in creating the Work was to report the news of the day, Fox News’ use was designed to express solemn remembrance for September 11, 2001 and link the heroic acts of that day and World War II. Id. at 17. Plaintiff, on the other hand, claims that Fox News did not create any new content, use existing content for a materially different purpose, or disseminate existing content to a new audience that might not have seen it otherwise. Pl. Opp. Mem. L. 13. NJMG further contends that Fox News used the Combined Image not for commentary, but rather for a commercial purpose: to advertise and promote the Program. Pl.’s 56.1 Counter-Stmt. ¶ 24.

To be sure, Defendants did not simply copy the Work wholesale. The image used by Defendants was different from the Work in five distinct ways. Fox News used a(1) cropped, (2) lower-resolution version of the Work, (3) which was juxtaposed with Raising the Flag on Iwo Jima and (4) in a smaller scale than the Work, and (5) added the phrase “# neverforget.”

Despite Defendants’ claims regarding their use of the Work, however, the Court cannot conclude as a matter of law that the Combined Image transformed the Work sufficiently to merit protection as fair use. As Plaintiff asserts—accurately in the Court’s view—the alterations to the Work are “barely discernable” unless the viewer is specifically prompted to look for them. Pl. Opp. Mem. L. 13–14. The Work is the clearly predominant feature of the Combined Image. Thus, a casual observer may believe that he is simply viewing the Work with only the hashtag added. Second Circuit authority suggests that more is required to “transform” an image.***

The Combined Image used by Fox News surely altered the content and message of the Work, but only minimally. *** It therefore cannot be said that Fox News presented an “entirely different aesthetic” from the Franklin photograph. Cf. Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1173, 1176 (9th Cir.2012) (concluding that gossip magazine’s publication of copyrighted photographs of celebrity plaintiffs’ wedding as an exposé “sprinkled with written commentary” was “at best minimally transformative”; the court noted that the gossip magazine could not “simply take fair use refuge under the umbrella of news reporting”).

Wholly apart from the image itself, there is also an issue as to whether the commentary Fox News wished to convey created anything new at all, much less anything transformative. On the particular facts of this case—as it involves the secondary use of a secondary use****—it can be argued that no part of the Combined Image constitutes an original idea on the part of Defendants; some other person first thought to combine the two photographs, and the phrase “# neverforget” was a ubiquitous presence on social media that day. Thus Fox News’ commentary, if such it was, merely amounted to exclaiming “Me too.” Analyzed from that perspective, the posting does not begin to constitute the creation of “new information, new aesthetics, new insights and understandings” required for finding a transformative purpose. Castle Rock, 150 F.3d at
2) Commercial Use

As part of the first factor, the Court must also consider whether, and to what extent, Defendants’ use was for a commercial purpose. This consideration arises when a secondary user makes unauthorized use of copyrighted material to gain a profit through copying the original work. Arrow Prods., LTD. v. Weinstein Co., 44 F.Supp.3d 359, 369–70, 2014 WL 4211350, at *8 (S.D.N.Y.2014). However, the mere fact that Fox News operates a for-profit news service, and that the Pirro Facebook Page is intended to capture revenues for the network, is insufficient for a finding in Plaintiff’s favor. The Second Circuit has consistently recognized that “[a]lmost all newspapers, books and magazines are published by commercial enterprises that seek a profit,” Consumers Union of U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1049 (2d Cir.1983), and has “discounted this consideration where ‘the link between [the defendant’s commercial gain and its copying is ... attenuated’ such that it would be misleading to characterize the use as ‘commercial exploitation.’ ” Swatch, 756 F.3d at 83. ***

Rather, the relative importance of this factor is determined on a sliding scale: the more transformative the work, the less important the commercial purpose. Because, as discussed in the previous section, neither the image nor the message conveyed by the Combined Image was substantially transformative, “the question whether the new use is commercial thus acquires an importance it [would] not [otherwise] have...” Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir.2001); cf. United States v. Am. Soc’y of Composers, Authors & Publishers, 599 F.Supp.2d 415, 429 (S.D.N.Y.2009) (“[A]pplicant’s use of previews is not transformative, and, thus, the significance of its commercial use is not reduced, but instead takes on greater importance.”).

Defendants contend that their use of the Work was not “commercial,” in particular because there is no evidence that Fox News captured any revenues as a direct consequence of its use. Defs. Mem. L. 19.*** Plaintiff argues that Fox News’ use of the Work constituted advertising and was therefore commercial. Pl. Opp. Mem. L. 8. In support of this contention, NJMG references the banner posted across the top of the Pirro Facebook Page, as well as the fact that the page invited users to respond to the Program’s in-show polls, alerted them about upcoming guests, and attached videos from episodes of the Program. While Tanner asserts that she posted the Combined Image to convey Fox News’ participation in a global conversation about 9/11, she plainly stated in her deposition that the purpose of her role with respect to the Pirro Facebook Page is to engage the page’s followers, and that Fox News operates the page, inter alia, to promote the Program. There exists, then, at least a question of material fact as to whether Fox News posted the Combined Image for the purely expressive purpose of commenting on the events of September 11, 2001, or whether it did so for the commercial purpose of promoting the Program. See *619 Pl. Opp. Mem. L. 11.*** Given the relative importance of this factor on the facts of this case, the Court is unable to conclude that it weighs in favor of either party as a matter of law.***

b. Factor Two: The Nature of the Work

***Courts have generally adopted two types of distinctions in their analysis of the second factor: (1) whether the work is expressive or creative, such as a work of fiction, or more factual with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower. Blanch, 467 F.3d at 257 (quoting 2 Howard B. Abrams, The Law of Copyright, § 15:52 (2006)); see also Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 540, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (“The unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use.”). In the end, however, this factor is rarely found to be determinative, Arrow Prods., 44 F.Supp.3d at 370–71, 2014 WL 4211350, at *9 (citing Davis, 246 F.3d at 175).

Defendants argue that both prongs favor a determination of fair use. First they argue that the Work is factual in nature and not the product of a wholly creative process. Defs. Mem. L. 21. Instead, Defendants claim that Plaintiff’s copyright interest in the Work is limited to Franklin’s creative decisions in taking the photograph: “Plaintiff cannot claim ownership in the firefighters’ actions, the expressions on their faces, their ash uniforms, or the American flag.” Id. Defendants further contend that the previous publication of the Work favors a finding of fair use. Id. at 21–22.

According to Plaintiff, the nature of the Work weighs against fair use because it is a “stunning [example] of photojournalism, taken under life threatening conditions, during one of the most significant events in recent American history.” Pl. Opp. Mem. L. 19. Plaintiff claims the Work involved many creative decisions, including the orientation of the photograph and the selection of a specific lens to best capture *620 the steel wreckage at the World Trade Center site. Id. In Plaintiff’s view, the Work is “not merely the depiction of an unforgettable historical event, but also the product of considerable creativity.” Id.
The Court finds that the second factor favors a finding of fair use. There can be no dispute that the Work is a non-fictional rendering of an event of utmost historical importance, which Franklin created during the course of his duties as a news photographer. Franklin did not create the scene or stage his subjects—to the contrary, he plainly acknowledged that the photograph “just happened.” *** Also weighing in Defendants’ favor is the fact that the Work has been published since September 12, 2001.

Courts analyzing similar photographic works created for news gathering or other non-artistical purposes have found this factor to weigh in favor of fair use. In Katz v. Chevaldina, No. 12 Civ. 22211, 2014 WL 2815496, at *1 (S.D.Fla. June 17, 2014), adopted by, 2014 WL 4385690 (S.D.Fla. Sept. 5, 2014), the court considered the defendant’s publication of a critical blog post which incorporated a copyrighted photograph of the plaintiff. The court concluded that the second factor weighed in the defendant’s favor because the photograph captured the plaintiff in a public setting and was simply used to identify him, and there was “no evidence that the photographer influenced, at all, the Plaintiff’s activity, pose, expression or clothing.” Id. at *8 (emphasis added). *** Accordingly, because the Work is factual and has been published, this factor favors a finding of fair use. As mentioned above, however, this factor is rarely determinative.

c. Factor Three: The Amount and Substantiality of the Portion Used

The third factor bearing on fair use is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). *** “In general, ‘the more of a copyrighted work that is taken, the less likely the use is to be fair.’ ” Swatch, 756 F.3d at 89 (quoting Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir.1998)). As the Second Circuit has noted, however, there are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use. HathiTrust, 755 F.3d at 98 (quoting Maxtone–Graham v. Burtchaell, 803 F.2d 1253, 1263 (2d Cir.1986)). *** “The crux *621 of the inquiry is whether ‘no more was taken than necessary.’ ” HathiTrust, 755 F.3d at 98 (quoting Campbell, 510 U.S. at 589, 114 S.Ct. 1164). Moreover, this 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.” Fitzgerald, 491 F.Supp.2d at 188; see also Katz, 2014 WL 2815496, at *8.

The Court concludes that this factor is neutral. Given the express purpose of commemorating the events of 9/11, it is not clear that Fox News’ use of any less of the Work would have ensured its audience’s recognition of the iconic photograph. *** Therefore, the Court cannot conclude that the third factor favors either party.***

d. Factor Four: The Effect of the Use Upon the Market for or Value of the Original

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). In Harper & Row, the Supreme Court described this factor as “undoubtedly the single most important element of fair use.” 471 U.S. at 566, 105 S.Ct. 2218. This factor “requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market’ for the original.” Campbell, 510 U.S. at 590, 114 S.Ct. 1164 (quoting 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.05[A][4] (1993)). The Second Circuit has “made clear that ‘[the court’s] concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use suppresses or even destroys the market for the original work.’ ” Cariou, 714 F.3d at 708 (quoting Blanch, 467 F.3d at 258). ***The Second Circuit has concluded that an alleged infringer has usurped the market for copyrighted works, including the derivative market, where the infringer’s target audience and the nature of the infringing content is the same as the *622 original. Cariou, 714 F.3d at 709; see, e.g., Castle Rock, 150 F.3d at 145 (finding that a Seinfeld trivia book usurped the show’s market because it substituted for a derivative market that a television program copyright owner would in general develop or license others to develop). In conducting this analysis, courts are “mindful that ‘[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original,’ even though ‘the fair use, being transformative, might well harm, or even destroy, the market for the original.’ ” Cariou, 714 F.3d at 709 (quoting id. at 145).

Furthermore, “[i]t is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.” Am. Geophysical Union, 60 F.3d at 929 (internal citations omitted). As the Second Circuit has noted, however, “were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would always favor the copyright holder.” Id. at 930 n. 17; see also Bill Graham Archives, 448 F.3d at 614.

Defendants contend that the fourth factor favors a finding of fair use because Plaintiff has not produced evidence that it lost any licensing revenue as a result of the use, or that
Fox News ever attempted to oust Plaintiff from its licensing market, let alone that it has usurped such a market. Defs. Mem. L. 23–24.*** NJMG counters that the unauthorized use here damaged the licensing market for the Work, and that widespread copying of the same sort would greatly diminish Plaintiff’s copyright. Pl. Opp. Mem. L. 23.

The Court finds that this factor weighs against fair use. As discussed above, the Combined Image is not substantially transformative. It does not present an “entirely different aesthetic” but instead relies upon the Work’s original subjects and setting to retain the Work’s historical meaning. And it is this historical meaning that has allowed the Work to remain popular to this day, as evidenced by the fact that NJMG has raised more than $1 million in licensing revenue from the Work to date. Indeed, there is no dispute that NJMG, which was “inundated” with licensing requests at the time of the Work’s original publication, still maintains an active licensing program for the photograph, including by licensing the Work to media entities for editorial use, precisely the type of use Defendants urge they intended here. Fox News’ interest in the Combined Image therefore poses a very real danger that other such media organizations will forego paying licensing fees for the Work and instead opt to use the Combined Image at no cost. Accordingly, given the predominance of the Work in the Combined Image, the posting on the Pirro Facebook Page poses a much greater danger to NJMG than simply the loss of licensing revenues from this one-time use.***20

Finally, Defendants’ argument that the fourth factor favors fair use because Plaintiff has not presented evidence that it lost even a single dollar of licensing revenue is unavailing. As the Second Circuit stated in Bill Graham Archives, the court’s role with respect to the fourth factor is to “look at the impact on potential licensing revenues for ‘traditional, reasonable, or likely to be developed markets.’ ” 448 F.3d at 614 (emphasis added) (quoting Am. Geophysical Union, 60 F.3d at 930).***

The fourth factor therefore weighs against a finding of fair use.

e. Overall Assessment
Weighing the results together, in light of the purposes of copyright, the Court cannot conclude as a matter of law that Defendants’ use of the Work was fair. Material questions of fact exist concerning the purpose of the Combined Image’s use, precluding a determination of the first statutory factor. The second factor weighs in favor of fair use, but that factor is only rarely determinative and is not so in this case. The third factor is neutral. The fourth and most important factor weighs against fair use. Accordingly, Defendants’ motion for summary judgment must be denied.

V. Conclusion
For the reasons set forth above, Defendants’ motion for summary judgment is DENIED. The Clerk of the Court is respectfully directed to terminate the motion. Doc. 31.

It is SO ORDERED.
MEMORANDUM OPINION

T.S. Ellis, III, United States District Judge

The central dispute in this copyright infringement action is whether defendant’s use of two of plaintiff’s photographs of famous musicians to accompany online articles about those musicians’ political views constitutes fair use of the photographs, not impermissible infringement.

The Parties

• Plaintiff, Larry Philpot, has worked as a professional photographer since 2007 and 2008.

• Plaintiff posts his photographs on websites like Wikimedia, in part, to achieve greater fame, making his photographs more valuable in the long-term.

• Defendant, Media Research Center Inc., is an IRS approved 501(c)(3) non-profit organization with its principal place of business in Reston, Virginia.

• Defendant publishes news and commentary regarding issues of public debate in order to expose and critique media bias against American Judeo-Christian religious beliefs.

• Defendant operates a website, www.mrctv.org (“MRCTV”), to broadcast conservative values, culture, politics, and liberal media bias and to entertain the public. Plaintiff adds that defendant also owns MRCTV to generate revenue for MRC via donations and advertising revenue.

Chesney Photograph and Pro–Life Article

• The Chesney Photograph depicts Kenny Chesney performing in concert.

• Plaintiff uploaded the Chesney Photograph to the Wikimedia website, where the photograph was available for use, subject to a Creative Commons attribution license, version 3.0 (“CCL”).

• The CCL does not require users to provide monetary compensation for use of the Chesney Photograph, but it does require licensees to identify plaintiff as the author of the Chesney Photograph.

• On or about January 22, 2015, defendant posted an article on MRCTV, entitled “8 A–List Celebrities That Are Pro–Life” (“Pro–Life Article”), which included pictures of, and stories about, celebrities who are supportive of the pro-life movement.

• The Pro–Life Article contained plaintiff’s Chesney Photograph alongside a discussion of a pro-life song written by Chesney.

• The Pro–Life Article did not attribute the Chesney Photograph to plaintiff.

Kid Rock Photograph and Senate Article

• The Kid Rock Photograph depicts Kid Rock performing in concert.

• Plaintiff uploaded the Kid Rock Photograph to the Wikimedia website on or about September 2013, where the photograph was available for use, subject to a CCL.

• On or about July 13, 2017, defendant posted an article on MRCTV, entitled “Kid Rock Announces 2018 U.S. Senate Bid” (“Senate Article”), which discussed Kid Rock’s announced campaign for election to the United States Senate.

• The Senate Article contained a cropped version of plaintiff’s Kid Rock Photograph with a headline banner across the bottom of the photograph.

• The Senate Article did not attribute the Kid Rock Photograph to plaintiff.

On July 20, 2017, plaintiff initiated this copyright infringement action against defendant, seeking damages for defendant’s allegedly unauthorized copying and public display of plaintiff’s photographs of Kenny Chesney and Kid Rock. Following completion of discovery, defendant, on November 1, 2017, filed the motion for summary judgment at issue here, arguing: (ii) that defendant’s use of the photographs falls under the “fair use” exception to copyright protections; (ii) that defendant’s use of the photographs falls under the “fair use” exception to copyright protections; (ii) that defendant’s use of the photographs falls under the “fair use” exception to copyright protections; (ii) that defendant’s use of the photographs falls under the “fair use” exception to copyright protections; (ii) that defendant’s use of the photographs falls under the “fair use” exception to copyright protections.

Plaintiff opposes the motion, contending: (ii) that defendant’s use of the Chesney and Kid Rock Photographs does not fall within the “fair use” exception.

II.

*** Under Rule 56, Fed. R. Civ. P., summary judgment is appropriate only where there is “no genuine dispute as to any material fact” such that the moving party “is entitled to

IV.

Section 106 of the Copyright Act grants “a bundle of exclusive rights to the owner of the copyright,” including the rights “to publish, copy, and distribute the author’s work.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546–47, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (citing 17 U.S.C. § 106). These rights, however, are “subject to a list of statutory exceptions, including the exception for fair use provided in 17 U.S.C. § 107.” *** If fair use, or another statutory exception, is established, then the use of the copyrighted work does not infringe on the copyright owner’s exclusive rights. See 17 U.S.C. § 107.

The dispute here focuses on fair use and § 107 of the Copyright Act provides that the following factors must be examined to determine whether a copyrighted work’s use in a particular case constitutes “fair use”, including:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.


Supreme Court and Fourth Circuit precedent make clear that in weighing these factors, courts should not treat the factors in isolation, “but rather the results are to be weighed together, in light of the purposes of copyright.” *Bouchat v. Balt. Ravens Ltd. P’ship. (Bouchat I)*, 619 F.3d 301, 307–08 (4th Cir. 2010) (quoting *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 578, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (internal quotation marks omitted)). At the same time, Fourth Circuit precedent has “placed primary focus on the first factor.” *Bouchat v. Balt. Ravens Ltd. P’ship. (Bouchat II)*, 737 F.3d 932, 937 (4th Cir. 2013). And the Supreme Court has noted the paramount importance of the fourth factor. *Harper & Row Publishers, Inc.*, 471 U.S. at 566, 105 S.Ct. 2218 (“This last factor is undoubtedly the single most important element of fair use.”). As such, the crux of the parties’ fair use dispute focuses chiefly on the first and fourth factors. As described below, the undisputed factual record points persuasively to the conclusion that defendant’s use of the Chesney and Kid Rock Photographs constituted fair use. Thus, defendant’s motion for summary judgment must be granted.

A.

The first fair use factor—“the purpose and character of the use”—weighs in favor of defendant because the undisputed factual record reveals that defendant’s use of the Chesney and Kid Rock Photographs is transformative and essentially noncommercial. In this respect, the Fourth Circuit has adopted a two-part inquiry under this first factor, considering: (i) “whether the new work is transformative;” and (ii) “the extent to which the use serves a commercial purpose.” *Bouchat II*, 737 F.3d at 939. A work is transformative if, instead of “merely supersed[ing] the objects of the original creation,” the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” *Campbell*, 510 U.S. at 578–79, 114 S.Ct. 1164 (internal quotation marks omitted). Moreover, the Fourth Circuit has made clear that “[the use of copyrighted work] can be transformative in function or purpose without altering or actually adding to the original work.” *A.V. ex rel. Vanderhye*, 562 F.3d at 639.

2 See also *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (“A ‘transformative’ use is one that ‘employ[s] the quoted matter in a different manner or for a different purpose from the original,’ thus transforming it.”).

**715** These principles, applied here, compel the conclusion that defendant’s use of the Chesney and Kid Rock Photographs was transformative. The undisputed factual record discloses that the “expression,” “meaning,” and “message” of defendant’s use of the Photographs here is plainly different from plaintiff’s intended use of the Photographs. Plaintiff testified that he was a professional photographer of musicians and that he took the Chesney and Kid Rock Photographs to depict the objects of the original creation, informing citizens about pro-life or candidates for U.S. Senate elections. See Pl. Dep. 44:21, 45:2, 74:21–75:3. *** In sum, the defendant’s use of the Chesney and Kid Rock Photographs to depict the objects of the original creation, informing citizens about pro-life advocacy or candidates for U.S. Senate elections

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candidates—was different from plaintiff’s purpose in taking the Photographs.

This conclusion is consistent with precedent from this circuit and elsewhere. In a series of cases in which a copyright owner sued the Baltimore Ravens for using his copyrighted logo, the Fourth Circuit considered the transformative nature of various videos depicting the copyright owner’s Ravens logo. In Bouchat I, the Fourth Circuit found the use of the copyrighted *716 logo in highlight reels from past seasons was not transformative because “[t]he use of the logo in the films serve[d] the same purpose that it did when defendants first infringed...”, namely the logo “identifies the football player wearing it with the Baltimore Ravens,” Bouchat I, 619 F.3d at 309. By contrast, in Bouchat II, the Fourth Circuit found that the use of the logo in videos summarizing the performance of players and highlighting the history of the team was transformative. Bouchat II, 737 F.3d at 940. The Bouchat II court noted that the season highlight films at issue in Bouchat I “did not change the way in which viewers experienced the logo, making the use non-transformative.” Id. at 941. The performance summaries and historical videos in Bouchat II, by contrast, used the footage “to tell stories and not simply rehash the season,” and as such, those videos were transformative. Id.

Defendant’s use of the Photographs much more closely resembles the use of the Baltimore Ravens logos in Bouchat II than the use of the logos in Bouchat I. Unlike Bouchat I, defendant’s use of the Chesney and Kid Rock Photographs changes the way in which viewers experience the Photographs. Specifically, although in Bouchat I, the films “capture[d] the logo as it originally appeared, and the logo remain[ed] a symbol identifying the Ravens,”*** in this case, defendant captures the Chesney and Kid Rock Photographs as they originally appear but the Photographs do not solely remain Photographs identifying those celebrities as musicians. Rather, defendant’s placing the Photographs alongside articles about the concerts depicted, the Photographs were created, namely to identify certain celebrities instead of simply rehashing their identities as musicians. Bouchat II, 737 F.3d at 941.

Notably, other circuits have determined that the use of photographs is transformative where, as here, the use serves purposes beyond mere artistic expression, by informing the public about a newsworthy event, providing commentary, or adding other social benefit. See, e.g., Perfect 10, Inc. v. Amazon.com Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (finding that the use of thumbnail images in search engines was transformative because the use “improv[ed] access to information on the [I]nternet” and provided a “social benefit by incorporating an original work into a new work”); Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 22–23 (1st Cir. 2000) (holding that the republication of photographs taken from a modeling portfolio in a newspaper was transformative because the photographs informed while also serving an entertainment function). Similarly, here, the use of the Chesney and Kid Rock Photographs in association with the Pro-Life and Senate Articles improves access to information and provides social benefit by allowing readers to identify the celebrities depicted as individuals who share their political views.

The cases plaintiff cites do not compel a contrary result. Thus, in Balsley v. LFP Inc., 691 F.3d 747 (6th Cir. 2012), the Sixth Circuit determined that a defendant had not demonstrated that his use of a photograph was transformative as a matter of law. The Balsley case involved a photograph of a news reporter participating in a wet t-shirt concert that was subsequently published in a magazine as a part of a “Hot News Babe” contest. Id. at 747–49. The Sixth Circuit rejected the defendant’s argument that the picture was published *717 to “illustrate its entertainment news story” and considered it more likely that the photo, and the article in which it appeared, were simply used “to enhance readership, rather than as a social commentary.” Id. at 759. By contrast here, there is no dispute here that defendant used the Chesney and Kid Rock Photographs as part of articles providing social commentary and reporting on news. To be sure, the Chesney and Kid Rock Photographs may have enhanced defendant’s articles visually, but the articles, together with the Photographs, were plainly used for the socially beneficial purposes of conveying a political message beyond merely enhancing readership. Accordingly, this case stands in stark contrast to Balsley.

Plaintiff also cites Psihoyos v. Nat’l Exam’r, 1998 WL 336655, at *3 (S.D.N.Y. June 22, 1998), which is also unpersuasive. The defendant there used a photograph of a car for precisely the same reason for which the photograph was created, namely to show the appearance of an art car, a car covered in artwork. Id. Here, by contrast, defendant is using the Chesney and Kid Rock Photographs for a purpose completely different from the purpose for which the Photographs were created, namely to identify certain celebrities as pro-life advocates or potential conservative Senate candidates. Thus, Psihoyos, like Balsley, is also unpersuasive here.

*** Had defendant used the Chesney and Kid Rock Photographs alongside articles about the concerts depicted, then that use might not have been transformative. But importantly, defendant here used the Photographs in a completely different context, namely to identify these celebrities as pro-life advocates or conservative candidates for office.

In sum, because defendant used the Chesney and Kid Rock
Photographs in a new context, to tell new stories about the musicians as pro-life advocates or candidates for office, defendant’s use of the Photographs was transformative.

The second part of the inquiry under the first fair use factor is whether the use of copyrighted work is commercial in nature. The undisputed factual record discloses that defendant’s use of the Chesney and Kid Rock Photographs was not essentially commercial. At most, defendant’s use of the Photographs might be considered commercial only insofar as defendant received very small amounts of revenue ($26.57) through advertisements on the webpages associated with the articles and may have received minor donations ($50) through links on the webpages associated with the articles.

At the same time, the undisputed factual record reveals that defendant does not charge readers for access to its articles, nor did it sell the Chesney and Kid Rock photographs to other parties. See Martin Decl. ¶¶ 20, 31. Instead, defendant’s articles were available for free to anyone accessing the Internet. Compare Nunez, 235 F.3d at 22 (finding use was commercial where “[t]he photographs were used in part to create an enticing lead page that would prompt readers to purchase the newspaper”). Moreover, defendant is a nonprofit organization and its mission is to expose and critique media bias against what it views as traditional American Judeo–Christian religious beliefs, not to increase its own profits. See Martin Decl. ¶¶ 3–4. Accordingly, defendant’s use of the Chesney and Kid Rock photographs is “more incidental and less exploitative” than the commercial use typically seen in copyright infringement cases. Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) (finding “use of [copyrighted work] was more incidental and less exploitative in nature than more traditional types of commercial use” where defendant did not use images directly to promote the website nor did defendant try to profit by selling the images directly).

In sum, the record discloses that even assuming defendant’s use of the Chesney and Kid Rock Photographs produced a very small amount of revenue, it was far from essentially commercial. Given this and given that the Supreme Court has recognized that any commercial use is not determinative in and of itself, *** this factor does not outweigh the transformative nature of defendant’s use of the Photographs.

The second factor—“the nature of the copyrighted work”***—is neutral. To begin with, where, as here, the copyrighted work is published, *** the fair use is broader in scope. See A.V. ex rel. Vanderhye, 562 F.3d at 640 (citing Harper & Row Publishers, Inc., 471 U.S. at 555, 105 S.Ct. 2218). But the Supreme Court has also instructed that “fair use is more likely to be found in factual works than in fictional works,” and “a use is less likely to be deemed fair when the copyrighted work is a creative product.” Stewart v. Abend, 495 U.S. 207, 237, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990) (internal quotation marks and alteration omitted). The Chesney and Kid Rock Photographs are likely both factual and creative—the Photographs are factual insofar as they depict the celebrities in concert, and the Photographs are creative insofar as the photographer made judgments about lighting, lens speed, and angle in capturing the Photographs.” Accordingly, this factor is neutral.

Circuits have decided whether photographs are creative or factual in different ways. The Ninth Circuit has held that “[p]hotographs that are meant to be viewed by the public for informative and aesthetic purposes...are generally creative in nature.” Kelly, 336 F.3d at 820. At the same time, the First Circuit has held that photographs are both factual and creative, Nunez, 235 F.3d at 23, and the Sixth Circuit has noted that “photographs have varying degrees of creativity.” Balsley, 691 F.3d at 760.

The third fair use factor considers the “amount and substantive of the portion” *** used in relation to the copyrighted work as a whole.”*** Generally, as the amount of copyrighted material that is used increases, the likelihood of fair use decreases. Here, defendant used all of the Chesney Photograph and only slightly cropped plaintiff’s photograph of Kid Rock. Accordingly, this factor weighs against a fair use finding. See Reiner v. Nishimori, 2017 WL 1545589 (M.D. Tenn. Apr. 28, 2017) (quoting Balsley, 691 F.3d at 760) (“[C]opying an entire work militates against a finding of fair use.”).

The final factor involves consideration of “the effect of the use upon the potential market for or value of the copyrighted work”;*** that is, whether “the defendants’ [use of the work] would materially impair the marketability of the work and whether it would act as a market substitute for it.” Bouchat II, 737 F.3d at 943. In this regard, courts have considered “(i) “the extent of market harm caused by the particular actions of the alleged infringer”; and (ii) “whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market.” Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 24 (1st Cir. 2000) (quoting Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 110 (2d Cir. 1998)).

see also A.V. ex rel Vanderhye, 562 F.3d at 643 (“The fair use doctrine protects against a republication which offers the copyrighted work in a secondary packaging, where potential customers, having read the secondary work, will no longer be inclined to purchase again
something they have already read.

This factor, applied here, weighs in favor of a fair use finding because there is no showing on this record of any impact on any economic market for the Chesney or Kid Rock Photographs. To begin with, it is undisputed that, to date, there has been no economic impact on any market for the Chesney and Kid Rock Photographs as a result of defendant’s use of the photographs. Indeed, on this record, there is no economic market for the Photographs. Plaintiff admits that he posted his photographs on Wikimedia for use by others for free, rather than selling them for a profit, because his purpose in taking the Chesney and Kid Rock Photographs was to gain greater fame, not to make money. Indeed, plaintiff admits that he has received no remuneration for use of the Chesney and Kid Rock Photographs outside of the litigation context. See Pl. Dep. at 48:10–50:9, 77:15–18. Defendant’s use of the Chesney and Kid Rock Photographs cannot impair the marketability of plaintiff’s works where, as here, plaintiff has not actually contemplated marketing those works. See Am. Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1994) (noting that the assertion that plaintiff has suffered some “adverse effect on its potential licensing revenues as a consequence of [the defendant’s use]” does not carry weight if the defendant “filled a market niche that the [copyright owner] simply had no interest in occupying”). Similarly, were defendant’s use of the Photographs to become widespread, plaintiff would not lose out on any revenue because plaintiff contemplated allowing parties to use the Photographs for free. In sum, because plaintiff offers his Chesney and Kid Rock Photographs for free, plaintiff has not demonstrated that any market harm has resulted from defendant’s use of the Photographs or that any market harm would result were defendant’s use of the Photographs to become widespread.

***The Fourth Circuit has made clear that “‘[w]hen the use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.’” Bouchat I, 619 F.3d at 315 (quoting Campbell, 510 U.S. at 591, 114 S.Ct. 1164). And “when the use ‘is for a noncommercial purpose, the likelihood of future market harm must be demonstrated’ by the copyright holder.” Id. (quoting Sony, 464 U.S. at 451, 104 S.Ct. 774) (internal quotation marks omitted). Here, as defendant’s use of the Chesney and Kid Rock Photographs was both transformative and essentially noncommercial. Accordingly, market harm may not be readily inferred and must be demonstrated by the copyright holder. Plaintiff, however, has failed to point to any record evidence of concrete market harm, referring only to speculative future harm from a lack of attribution. Plaintiff has not suggested that he plans to remove his Chesney and Kid Rock photographs from Wikimedia or that he has plans to sell the Photographs. Nor is there any evidence in the record to support plaintiff’s contention that attribution will meaningfully impact the value of his photographs. Such unfounded speculation cannot support a finding of a likelihood of market harm.

In sum, there is nothing in this record to suggest there is currently any market for the Chesney or Kid Rock Photographs or that any preparations have been made to establish or create a market. Any speculative economic effects on the future market for plaintiff’s Chesney and Kid Rock Photographs owing to a lack of attribution do not outweigh the lack of direct economic effects and defendant’s generally noncommercial use of the Photographs. Accordingly, this factor weighs in favor of finding a fair use.

V.

***These principles, applied here, point persuasively to the conclusion that defendant’s use of the Chesney and Kid Rock Photographs constituted fair use. As discussed above, the undisputed factual record reveals that the first and fourth fair use factors militate in favor of a fair use finding, the second factor is neutral at best, and the third factor weighs slightly against a fair use finding. Given the paramount importance of the first and fourth factors, the limited weight of the second and third factors when the work is transformative, and copyright’s purpose to “[t]o promote the Progress of Science and useful Arts,”*** the facts alleged in this case make out a fair use defense as a matter of law. Accordingly, defendant’s motion for summary judgment must be granted.

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17 Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) (“The burden of proof as to market effect rests with the copyright holder if the challenged use is of a ‘noncommercial’ nature.”); Nat’l Rifle Ass’n of Am. v. Handgun Control Fed’n, 15 F.3d 559, 561 (6th Cir. 1994) (finding the final factor weighs in plaintiff’s favor if she can “show[ ] that the purpose or character of the use was commercial”); ***.

18 Indeed, defendant made only approximately $27 in advertising revenue from the webpages displaying the Chesney and Kid Rock Photographs and at most $50 in donations via the links contained alongside the Pro–Life and Senate Articles. Defendant did not directly sell the Photographs or even sell the articles in which the Photographs appeared.