

No. 18-877

In The
Supreme Court of the United States

—◆—
FREDERICK L. ALLEN, *et al.*,

Petitioners,

v.

ROY A. COOPER, III,
as Governor of North Carolina, *et al.*,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

—◆—
**BRIEF OF PROFESSOR SIMONE ROSE AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

—◆—
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INTEREST OF AMICUS CURIAE¹

Simone Rose is a Professor of Law and the Associate Dean for Intellectual Property Innovation at the Wake Forest University School of Law.²

Professor Rose teaches courses in copyright law and writes about legal issues affecting the scope of the Copyright Act. She has an interest in the sound development of this area of the law.

As a neutral scholar of copyright law, Professor Rose seeks to bring clarity and an unbiased perspective to this case—a perspective that asks the Court to reject the assumptions that Allen and his amici make about the State of North Carolina’s conduct here.

¹ In accordance with Supreme Court Rule 37.6, Professor Rose states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than she and her counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed letters granting blanket consent to the filing of amicus briefs.

² Professor Rose’s institutional affiliation is provided for identification purposes only.

INTRODUCTION

Petitioner Frederick Allen suggests that the Copyright Remedy Clarification Act was Congress's response to a "clearly widespread" and "clearly increasing" phenomenon of states infringing copyrights—a "menace," in Allen's words. Pet'r's Br. 19, 47. The "menace" that Allen portrays, however, is not one that copyright law acknowledges.

Allen and his amici assume that North Carolina's conduct here amounts to a copyright violation. But under two distinct copyright law doctrines—the *de minimis* use doctrine and the fair-use doctrine—Allen's claims do not amount to a copyright violation at all. Thus, North Carolina's conduct here is not indicative of a "clearly widespread" and "clearly increasing" phenomenon of states infringing copyrights, much less one that could justify abrogating the Eleventh Amendment.

For the reasons that follow, the Court should reject Allen and his amici's mistaken assumption that North Carolina violated copyright law.

SUMMARY OF ARGUMENT

Allen and his amici's assumption that North Carolina violated the Copyright Act is mistaken, because two doctrines of copyright law permitted North Carolina's actions here.

First, North Carolina's actions were permissible under copyright law's *de minimis* use doctrine. Under the *de minimis* use doctrine, certain technical violations of the Copyright Act are so trivial that the law will not impose legal consequences.

Here, North Carolina's conduct falls within the *de minimis* use doctrine. Allen's works consist of thousands of photographs and hundreds of hours of video footage from over thirteen years, but the State is alleged to have used only a thumbnail of a single photograph and a few seconds of video. Under the *de minimis* use doctrine, North Carolina's use of a mere fragment of Allen's work did not amount to a copyright violation.

Second, North Carolina's actions here were permissible under copyright law's fair-use doctrine. The fair-use doctrine strikes a balance between the need to protect copyrighted material while allowing others to build upon it. Certain uses that reflect that balance—so-called “fair” uses—do not amount to a copyright violation.

Of the factors that tend to establish fair use, the most important is whether the use reduces the market value of the original work. Courts also look to whether

the original work is used to catalog an important historical event, and whether the user relies in good faith on a contract with the copyright holder.

As described below, all three of those factors are present here. First, North Carolina did not reduce the market value of Allen's work; if anything, it may have increased the value. Second, the North Carolina Department of Natural and Cultural Resources, the agency charged with documenting and preserving the state's history, transformed Allen's work to educate the public about a historical event. Finally, North Carolina relied in good faith on a contract that it had with Allen—a contract that either authorized North Carolina's use (a complete defense under the Copyright Act) or, at a minimum, gave North Carolina a good-faith belief that its use was authorized. Thus, under the fair-use doctrine, North Carolina's actions here were permissible.

For these reasons, Allen and his amici's assumption that North Carolina violated the Copyright Act is mistaken. The Court should reject their invitation to shape constitutional law based on that mistaken assumption.

ARGUMENT**I. Under the *de minimis* use doctrine, North Carolina did not violate copyright law.****A. The *de minimis* use doctrine excuses trivial copying of copyrighted works.**

The *de minimis* use doctrine is premised on the concept that “the law will not impose legal consequences” for certain “insignificant violations” of the Copyright Act. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997); *see also Perris v. Hexamer*, 99 U.S. 674, 676 (1878) (noting that copying is only actionable when a “substantial” or “material part” of the original work is copied).

As Judge Learned Hand observed, “[e]ven where there is some copying, that fact is not conclusive of infringement.” *West Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909). Instead, courts must ask whether copying reaches an “unfair extent.” *Ibid.*; *see also Warner Bros., Inc. v. American Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983) (citing *G.R. Leonard & Co. v. Stack*, 386 F.2d 38 (7th Cir. 1967)) (explaining that the doctrine allows for “the literal copying of a small and usually insignificant portion of [a] plaintiff’s work”); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. Rev. 1449, 1457–58 (1997) (noting that the doctrine is premised on the concept that “the law does not concern itself with trifles”).

A use can be *de minimis* under a quantitative analysis, a qualitative analysis, or both.³ See *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004); see also, e.g., *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998).

When courts apply a quantitative analysis, they look to the “amount of the copyrighted work . . . in the allegedly infringing work.” *Gordon v. Nextel Commc’ns*, 345 F.3d 922, 924 (6th Cir. 2003); *Sandoval*, 147 F.3d at 218 (using copyrighted photographs in background of movie scene held *de minimis*); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (copying of 30 characters out of 50 pages of source code held *de minimis*); *Toulmin v. Rike-Kumler Co.*, 316 F.2d 232, 232 (6th Cir. 1963) (copying of a sentence and a half from a book of 142 pages held *de minimis*); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03 (Matthew Bender rev. ed. 2019) [hereinafter Nimmer].

When courts apply a qualitative analysis, they look to whether a material aspect of a work has been appropriated—in essence, whether the “heart” of the work has been copied. *Elsmere Music, Inc. v. National Broad. Co.*, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff’d, sub nom. Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.2d 252 (2d Cir. 1980); see also *Newton*, 388 F.3d at 1196 (holding that sampling of a portion of a song that was

³ Some courts have held that both analyses are required. See, e.g., *Newton*, 388 F.3d at 1195. Other courts have relied exclusively on one analysis. See *Sandoval*, 147 F.3d at 217.

“no more significant than any other section” rendered the use *de minimis*); *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 89 F.3d 1548, 1560 (11th Cir. 1996) (holding that copying of elements of a computer program that were “not significant” in the context of the whole program were *de minimis*); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) (holding that use of “short and insignificant” excerpts from an unpublished journal were *de minimis*); *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1367 (E.D. Va. 1995) (holding that internet posting of copyrighted church documents that did not “capture the total essence” of the religion were *de minimis*); see generally 2 Nimmer, *supra*, § 8.01; 4 Nimmer, *supra*, § 13.03; 3 William F. Patry, *Patry on Copyright* § 9:60 (2007) [hereinafter Patry].

Here, as described below, an application of the *de minimis* use doctrine confirms that North Carolina’s use of a fragment of Allen’s works did not amount to a copyright violation.

B. North Carolina’s limited display of a fragment of Allen’s works was a *de minimis* use.

The relevant facts of this case are undisputed, and lend themselves to a straightforward application of the *de minimis* use doctrine.⁴

For over a decade, Allen observed as the State of North Carolina worked to recover artifacts from the Queen Anne’s Revenge. Pet. App. 9a. During this time, Allen took photographs and video of the sunken ship. Pet. App. 5a. Allen ultimately registered thirteen copyrights with the U.S. Copyright Office—one for each year of photographs and video. Pet. App. 9a. In total, Allen’s thirteen copyrights encompass thousands of photographs and hundreds of minutes of video. *See* Complaint at ¶ 43, *Allen v. Cooper*, 244 F. Supp. 3d 525 (E.D.N.C. 2017) (No. 5:15-CV-627-BO).

North Carolina displayed limited portions of Allen’s works in 2013. Pet. App. 12a. The Department included “a few seconds” of Allen’s works across five educational videos that the Department placed on YouTube. *See* Appellants’ Brief at 63, *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (Nos. 17-1522(L), 17-1602). The Department also circulated a newsletter about North Carolina’s maritime museums that contained a thumbnail of one of Allen’s photographs. *See supra* at

⁴ When the facts are undisputed, the issue of whether a use is *de minimis* is appropriate for determination on a Rule 12(b)(6) motion. *E.g.*, *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010).

11. When Allen sent the Department a takedown letter, the State complied. Pet. App. 12a.

On these facts, North Carolina’s use was *de minimis*. Of the thousands of photographs amassed in Allen’s copyrights, the Department used a single image, and not even one that Allen claims was particularly special. That image was reduced down to a thumbnail. And that thumbnail appeared in a museum newsletter that has, at most, limited circulation.

Similarly, of the hundreds of hours of video, the Department only used “a few seconds” of it. Allen does not claim that these few seconds of video were particularly special, either. Moreover, the Department did not simply post Allen’s raw footage. Instead, the Department wove “a few seconds” of Allen’s footage into five educational videos.

Some visual examples of the alleged infringement that the complaint describes are available from the briefs and record below, and they further illustrate that any copying of Allen’s works was trivial. First, Allen’s Fourth Circuit brief provides a screen capture of footage⁵ that appeared in one of the Department’s YouTube videos:

⁵ Allen stated in his Fourth Circuit reply brief that this screen capture depicts a portion of the infringement “described in ¶¶ 44 and 46 of the Complaint.” Reply Brief for Appellees at 2 n.2, *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (No. 17-1522(L), No. 17-1602). It appears that this screen capture is what Allen contends appeared at the “3:05” timestamp of one of the

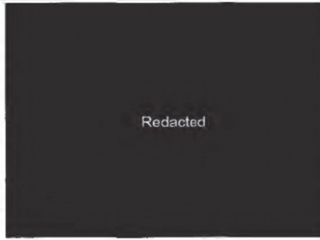


Department's five YouTube videos. It is unclear, however, whether the complaint alleges that the Department wove Allen's video footage into YouTube videos or, instead, displayed Allen's photographs in the background of the Department's own video. This ambiguity highlights other deficiencies with Allen's claims—namely, whether Allen's complaint provides sufficient notice of the alleged infringement to meet minimal pleading requirements. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also* Appellants' Reply Brief at 49, *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (No. 17-1522(L), No. 17-1602).

Second, the Fourth Circuit's electronic record⁶ contains a redacted version of the newsletter about North Carolina's maritime museums:

Another item expected in the planned excavation area was a large concretion encountered and mapped over a decade ago, but left on the bottom. When initially located, the approximate 2 foot x 3 foot x 2½ foot concretion mass of material included a post-wreck intrusive golf ball (one of five recovered from the site), numerous cannon shot, and at least two large sounding leads. When excavated a second time during this past autumn's field season, three additional sounding leads were found lying loose beneath the large concretion and recovered. Unfortunately, this promising concretion was relegated to the bottom once again.

Probably the most exciting items located during the 2012 field season were two new cannon in an area where none were expected. The guns are both about 4 feet, 4 inches long and found within four to five feet where two other similar-sized cannon were located several years ago. The previously recovered guns are both Swedish (one of which resides in the Blackbeard/Queen Anne's Revenge exhibit at the NCMM) and so it is suspected that the two new cannon may prove to be as well. Regrettably, the two newly-located cast iron weapons, numbers 26 and 27, were also left on the bottom. Unfortunately, the arrival of Hurricane Sandy cur-



tailed the last few days of the project, or even more work could have been accomplished. It is currently unknown what, if any, damage may have been done to the Queen Anne's Revenge site by storm-driven currents and swells. But this major storm, nicknamed "Frankenstorm" by some meteorologists, did manage to uncover a number of shipwrecks along the eastern seaboard from Georgia to New York. ■

Come Learn to Kayak!

By Ben Wunderly

If gas motors and propellers or halyards and booms sound like a bit too much, then maybe the peaceful simple paddling of a kayak is more your speed. Imagine having the stealth of a ninja, and acquiring the physique of an Olympic swimmer, all from spending some time on the water! Okay, maybe that is a bit of a stretch, but sneaking up on wildlife and staying in shape can definitely be achieved from learning to kayak.

Kayaking is a relatively inexpensive and easy way to explore the coastal waters of North Carolina. It can get you up close to shorebirds, dolphins and red drum without scaring them away. Amy Lamphier and her family came to Beaufort on vacation from Cary, North Carolina and remarked, "We enjoyed learning about the ecology of the local waterways as well as watching the tide change during our kayak excursion." You can also access shallow water, opening up many more places to explore. An added bonus is the sheer physical aspect of the activity that can shape your upper body and core muscle groups as you paddle along. If you are thinking about getting into this sport and want to give it a test run, sign up for a Learn to Kayak course. These classes will teach you everything you need to know about kayaking on the coast, including safety measures and places to go.

No prior experience is required but it is recommended that you know how to swim and are comfortable being on the water. "There are so many variables that can affect a kayaking trip in this area you really

have to put forth an effort to plan an excursion" says North Carolina Maritime Museum kayak instructor and guide Ben Wunderly. Appropriate clothing would be something you don't mind getting wet if it is warm out, or if it is cold out, something that will keep you dry, and of course sun protection is a must. You will want to wear sturdy shoes that can get wet just in case you have to get out of the boat. The types of kayaks we use are equipped with storage hatches for stowing away some snacks and water, but not completely water tight if you plan on bringing a cell phone or other electronics. Although a little tricky to master, foot-controlled rudders on our boats will help you steer. Within no time you will be able to explore the never ending marshes and estuaries of eastern North Carolina.

Learn to Kayak classes will be offered in the late spring and early summer. Be on the lookout for our program calendars or check the website at www.ncmaritimemuseums.com for exact dates, times and registration information. ■



Beaufort

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⁶ See Electronic Record at 166, *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (No. 17-1522(L), No. 17-1602) [hereinafter Electronic Record].

As these visual examples show, North Carolina's use of Allen's work was trivial.

The Second Circuit's decision in *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998), further illustrates this point. There, the plaintiff brought an infringement claim against a movie producer who included copyrighted photographs in certain scenes. *Id.* at 216. After reviewing the scenes at issue, the court held that the alleged copying fell below "the quantitative threshold" for actionable copying. *Id.* at 218.

In support of this holding, the court noted that the photographs only appeared in the background. *Ibid.* This, in turn, reduced their size and rendered them "barely discernable." *Id.* at 216. Likewise, the Second Circuit referenced the short "length of time the copyrighted work appear[ed] in the allegedly infringing work." *Id.* at 217. The movie at issue was over two hours long, yet the copyrighted pictures only appeared in scenes that spanned a collective minute and a half. *Id.* at 216.

For these reasons, the court held that the alleged infringement was "*de minimis* as a matter of law." *Id.* at 217.

Here, like the multiple images in *Sandoval*, the single newsletter image was displayed in a medium that reduced its size and made it hard to view. Indeed, a thumbnail of one of Allen's pictures in a newsletter is no different than a background image in the scene of a movie. In both instances, the resolution of the

originals are reduced to the point that they “fall[] below the quantitative threshold” for actionable copying. *Sandoval*, 147 F.3d at 218.

The reasoning in *Sandoval* also supports treating the brief use of Allen’s video on YouTube as *de minimis*. The Second Circuit appropriately noted the “length of time the copyrighted work appear[ed] in the allegedly infringing work.” *Id.* at 217. That time totaled a minute and a half of a two hour and seventeen-minute movie—roughly one percent.⁷

Here, the State displayed “a few seconds” of Allen’s works in videos that spanned a total of approximately 25 minutes—also less than one percent. *See* Complaint at ¶ 44, *Allen v. Cooper*, 244 F. Supp. 3d 525 (E.D.N.C. 2017) (No. 5:15-CV-627-BO). Furthermore, in at least one of the YouTube videos, none of Allen’s footage is used. Instead, Allen’s work merely appears in the background in a scene with a young child observing a museum exhibit. *See supra* at 10. Like the quantitatively insignificant background images in *Sandoval*, the single image that appears in this YouTube video is “barely discernable.” *Sandoval*, 147 F.3d at 216.

A qualitative analysis also confirms that North Carolina’s use was *de minimis*. As noted above, a qualitative analysis asks whether the putative infringer has used a material aspect of the copyrighted work—in essence, whether the putative infringer has

⁷ *See* Internet Movie Database, *Seven (Se7en)*, <https://www.imdb.com/title/tt0114369/> (last visited Sept. 19, 2019).

used the “heart” of the work. *Elsmere Music*, 482 F. Supp. at 744; *see also supra* at 6–7.

Here, Allen’s works comprise thousands of varied images and hundreds of hours of video footage taken over thirteen years—an undifferentiated mass that does not have a single “heart,” the way a song’s key riff does, for example. *Cf. Elsmere Music*, 482 F. Supp. at 744. Again, Allen does not contend that the images or footage at issue was particularly special, compared to the unused images and footage. Whatever the “heart” of Allen’s work may be, North Carolina could not have exceeded any qualitative threshold by using an exceptionally small portion of this undifferentiated mass of work.

In sum, North Carolina’s limited display of a fragment of Allen’s works was “*de minimis* as a matter of law.” *Sandoval*, 147 F.3d at 217. This *de minimis* use of Allen’s work did not amount to a copyright violation.

II. Under the fair-use doctrine, North Carolina did not violate copyright law.

A. Certain fair uses of copyrighted works are permissible under copyright law.

The fair-use doctrine is as old as the first copyright and predates Blackbeard's acquisition of the Queen Anne's Revenge. Pet. App. 6a. Soon after the creation of the first statutory copyright protection in 1709, English courts recognized that certain "fair abridgements" did not infringe on an author's rights. Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1112 (1990). The doctrine is now a staple of American copyright law, borne out of "the need simultaneously to protect copyrighted material and to allow others to build upon it." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

Under the fair-use doctrine, certain limited uses of copyrighted material are permissible if they "promote the Progress of Science and useful Arts." *Campbell*, 510 U.S. at 575 (quoting U.S. Const. art. I, § 8, cl. 8). The doctrine calls for a weighing of multiple factors. See 4 Nimmer, *supra*, § 13.05 (discussing section 107 of the Copyright Act). If an analysis of those factors establishes that the use is fair, then permission from the copyright holder is not required. *Ibid.*

Several fair-use factors are codified in section 107 of the Copyright Act. *See* 17 U.S.C. § 107.⁸ Codifying these factors was Congress’s attempt to help copyright “users in determining when the principles of the doctrine apply.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

The Copyright Act lists six classic examples of fair use: criticism, comment, news reporting, teaching, scholarship, and research. *See* 17 U.S.C. § 107. The Act also lists four non-exclusive factors that courts should consider—along with traditional principles—when making a fair use determination. Those four factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;⁹ (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. *See ibid.*

⁸ This brief does not belabor a factor-by-factor analysis of fair use, because the trial court has not yet conducted its own fair-use analysis. *See* Pet. App. 75a–76a. Rather, to illustrate the relative weakness of Allen’s claims, this brief highlights for the Court those aspects of the fair-use doctrine that counsel most heavily in favor of fair use.

⁹ Courts applying the “character” portion of the first factor often consider whether a use is transformative. *See, e.g., Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001); *cf. infra* at 20–22 (discussing the transformative nature of historical works).

In addition to these statutory factors, there are a number of non-statutory factors that courts use to analyze whether a use is a fair use. *See* 4 Patry, *supra*, § 10:156 (noting that courts “routinely consider other factors” beyond section 107); *see also* 4 Nimmer, *supra*, § 13.05 (discussing “alternatives to the four factors” in section 107).

These common-law factors continue to exist—and continue to evolve—alongside the statutory factors in section 107. *See* H.R. Rep. No. 94-1476, at 66 (1976). This is because Congress expressly disavowed any attempt “to freeze the doctrine in the statute.” *Ibid.* Instead, Congress noted that “the doctrine is an equitable rule of reason,” so “no generally applicable definition is possible, and each case raising the question [of fair use] must be decided on its own facts.” *Id.* at 65; *see also* 4 Patry, *supra*, § 10:156.

Of the statutory and non-statutory factors that courts use to analyze fair use, the most relevant here are:

- the “[e]ffect of the use upon the potential market for or value of the copyrighted work,” a statutory factor under section 107, *see infra* at 18–19
- whether the use is a historical account, a non-statutory factor, *see infra* at 20–22
- whether the use relied in good faith on a contract with the copyright holder, another non-statutory factor, *see infra* at 23–24

Here, as described below, an assessment of these three factors confirms that North Carolina’s use of Allen’s works was a fair use.

B. North Carolina’s use of Allen’s works falls within the fair-use doctrine.

1. North Carolina’s use did not reduce the market value of Allen’s works.

The Court has observed that a use’s effect on market value is “undoubtedly the single most important element of fair use.” *Harper*, 471 U.S. at 566. The Court has also noted that “[a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

The rationale for this rule is that, when a use has “no demonstrable effect upon the potential market,” copyright protections are unnecessary to preserve the original author’s “incentive to create.”¹⁰ *Id.* at 450.

¹⁰ This “incentive to create” that the Court recognized in *Sony* accurately states the purpose of the copyright law. 464 U.S. at 450. It also stands in contrast to the notion that Allen and his amici advance: that copyright law is about protecting a “property right.” Pet’r’s Br. 18. Allen and his amici’s “property right” concept misapprehends the fundamental nature of American copyright law. “Copyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science.” 1 Patry, *supra*, § 1:1.

Were it otherwise, copyright law “would merely inhibit access to ideas without any countervailing benefit.” *Id.* at 450–51.

For the same reasons, a use that actually *increases* the market value of the original work “strongly favors a finding of fair use.” 4 Patry, *supra*, § 10:155 (quoting *Corbello v. Vito*, 2017 WL 2587924, at *8 (D. Nev. June 14, 2017)). This is especially true when a use causes a plaintiff’s work to “suddenly become successful.” *Ibid.*

Here, North Carolina’s *de minimis* use of Allen’s work could not possibly have reduced its market value. *See supra* at 8–14. In reality, North Carolina’s use likely had the opposite effect: If anything, it gave Allen’s works the imprimatur of “official” government approval—instant credibility for a private filmmaker.

Indeed, North Carolina’s use (and the lawsuit that followed) has afforded Allen nationwide publicity—a result that may help a future documentary film “become successful.” 4 Patry, *supra*, § 10:155.¹¹ In fact, it appears that Allen has always had this benefit in mind. The parties’ agreement provides North Carolina with rights to “[a]ll non-commercial digital media,” so long as a link to Allen’s website is “clearly and visibly displayed.” Pet. App. 10a.

In sum, North Carolina’s use of Allen’s works did not reduce their market value. If anything, the

¹¹ *See, e.g.*, Adam Liptak, *Blackbeard’s Ship Heads to Supreme Court in a Battle Over Another Sort of Piracy*, N.Y. Times (Sept. 4, 2019), <https://www.nytimes.com/2019/09/02/us/politics/supreme-court-blackbeard-piracy.html>.

opposite may be true. As the most important factor in a fair-use analysis, this factor counsels strongly in favor of a conclusion that the use of Allen's works was fair.

2. North Carolina's use educated the public about the state's history.

The leading copyright treatises acknowledge that "virtually every case" involving historical use leads to a finding of fair use. 4 Patry, *supra*, § 10:69.50. Such historical uses include "historical accounts, whether in print or in video." *Ibid.* (describing these historical accounts as "a traditional fair use").

Historical accounts constitute fair use because "the goal of copyright . . . is generally furthered by the creation of *transformative* works." 4 Nimmer, *supra*, § 13.05 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). A "transformative" use is one that "alter[s] the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579.

Historical accounts, by definition, are "transformative," because they use the works for a different purpose than the one for which they were created. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (holding that use of Grateful Dead posters in biographical account was transformative because the use of the posters was "different from the original purpose for which they were created"); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th

Cir. 2003) (holding that use of television clips in a film about the life of Elvis Presley was transformative because they were “cited as historical reference points in the life of a remarkable entertainer”).

Here, like “virtually every case” involving historical accounts, 4 Patry, *supra*, § 10:69.50, North Carolina’s use of Allen’s work constitutes fair use. The Department of Natural and Cultural Resources is the agency charged with documenting and preserving North Carolina’s history. In furtherance of that mission, the Department used Allen’s works to educate the public about an important event in North Carolina’s history. *See* Resp’t’s Br. 6.¹²

Although it is true that Allen seeks to create and market a documentary that will likely have some historical aspects, *see* Electronic Record at 86–87, the State’s educational, “museum-like” use of Allen’s works “adds something new.” *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 314 (4th Cir. 2010) (quoting *Campbell*, 510 U.S. at 579). This educational, “museum-like” use is transformative, because North Carolina’s use is “different from the original purpose

¹² The educational character of North Carolina’s use also weighs in favor of fair use under section 107’s first factor. The “central purpose” of that factor is to determine “whether and to what extent the new work is transformative.” *Campbell*, 510 U.S. at 579. North Carolina had a duty “to convey information to the public accurately.” *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014). And fulfilling that educational duty altered the “meaning” and “message” of North Carolina’s use, making it transformative. *Campbell*, 510 U.S. at 579.

for which [the works] were created”—a profit-generating movie. *Bill Graham Archives*, 448 F.3d at 607.

Moreover, the fact that much of the Queen Anne’s Revenge still rests at the bottom of the Atlantic Ocean demands this outcome. If Allen is granted a monopoly on otherwise inaccessible history, it would be “injurious to the public interest.” See 3 Patry, *supra*, § 9:60.¹³ Conversely, North Carolina’s use here—educating the public about an important historical event—would “advance [the] public welfare,” one of copyright law’s central objectives. *Mazur v. Stein*, 347 U.S. 201, 219 (1954); see also *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability.”).

In short, North Carolina’s use of Allen’s works to educate the public about the state’s history is an important fair-use factor. That factor, in combination

¹³ Allen comes close to suggesting that if copyright law prevents him from enjoying this monopoly, it might violate the Constitution. Pet’r’s Br. 23 (“[B]y referring to the property rights that exist in creative works as ‘exclusive Right[s],’ the Intellectual Property Clause denotes that those rights are to belong solely to the copyright holder.”); *id.* at 29 (Congress has the affirmative “responsibility to protect . . . exclusive intellectual property rights”).

This Court has never held that the Intellectual Property Clause requires Congress to make copyrights exclusive. In fact, the Court has held the opposite. See *Goldstein v. California*, 412 U.S. 546, 559 (1973) (holding that the Intellectual Property Clause “allow[s] Congress to eschew all protection” for writings when “the national interest” requires their “free and unrestricted distribution”).

with the others below, shows why North Carolina's use falls within the fair-use doctrine.

3. North Carolina relied in good faith on its contract with Allen.

If a contract grants a license to use a particular work, then “the existence of actual consent negates the necessity of conducting a fair use analysis in the first place.” *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1308 (11th Cir. 2008). Such a license, of course, is an “independent affirmative defense to a claim of copyright infringement.” *Ibid.*

Contracts can be ambiguous, however, and disputes often arise as to whether a use falls within a contract. In those instances, the fair-use doctrine provides an important backstop: When a user of a copyrighted work relies in good faith on a contract with the copyright holder, courts have “routinely considered” that factor as evidence of fair use. Patry, *supra*, § 10:156 (collecting cases).

The rationale for considering that factor is that “[f]air use presupposes ‘good faith’ and ‘fair dealing[,]’” *Harper*, 471 U.S. at 562, which are features inherent in a contractual relationship, *see Campbell*, 510 U.S. at 585 n.18; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 n.8 (9th Cir. 2007) (“[A] party claiming fair use must act in a manner generally compatible with principles of good faith and fair dealing.”); *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.

1992) (same); *see generally* Patry, *supra*, § 10:156 n.5 (collecting authority).

Here, it is undisputed that there was a contract between the parties: an October 2013 settlement agreement. Pet'r's Br. 12. In that agreement, Allen expressly allowed the State to retain "still photographs[] and other media." Pet. App. 10a. That agreement allowed the Department to display "[a]ll non-commercial digital media." *Ibid.* And, critically, that agreement provided that the State could "mak[e] records available to the public." Pet. App. 11a.

North Carolina was entitled to rely on these contractual provisions. Notably, when the Fourth Circuit rejected Allen's attempt to pierce qualified immunity (a holding that Allen does not challenge here), it concluded that "reasonable officials in the position of the North Carolina officials would not have understood *beyond debate* that their publication of the material violated Allen's rights under the Copyright Act." Pet. App. 39a. For the same reason, North Carolina's reliance on the contract was, at a minimum, in good faith.

In sum, North Carolina's good-faith reliance on a contract, in combination with the two factors described above, shows why North Carolina's use falls within the fair-use doctrine. Thus, North Carolina's use of Allen's works did not amount to a copyright violation.

* * *

Copyright law's *de minimis* use and fair-use doctrines are important safeguards against infringement claims that undermine, rather than promote, copyright law's objectives. These doctrines enable courts to take a holistic view about whether a use is so trivial that copyright law ought not recognize it, and whether a use is fair. Through their common-sense approach, these doctrines help filter out non-meritorious claims, like the ones Allen brought here.

In deciding this case, the Court should consider these copyright law doctrines against Allen's suggestion of a "clearly widespread" and "clearly increasing" phenomenon of states infringing copyrights—the "menace" that Allen seeks to portray. Pet'r's Br. 19, 47. After all, if copyright law *permits* the very conduct that Allen complains of here, it shows that Allen's theory of a "menace" does not hold water.



CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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