

## Stross v. Stone Textile

United States District Court for the Western District of Texas, Austin Division

June 27, 2019, Decided; June 27, 2019, Filed

1:18-CV-454-RP

### Reporter

2019 U.S. Dist. LEXIS 149424 \*

ALEXANDER STROSS, Plaintiff, v. STONE TEXTILE, LLC, and DOES 1-10, Defendants.

### Core Terms

Textile, photographs, blog, fair use, transformative, license, weigh, creative, summary judgment motion, copyrighted work, summary judgment, purposes, argues, nonmovant, website, courts, reasonable jury, copying, infringed, Notice, designs, factors, e-mail

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**Judges:** ROBERT PITMAN, UNITED STATES DISTRICT JUDGE.

**Opinion by:** ROBERT PITMAN

### Opinion

#### ORDER

Before the Court is Defendant Stone Textile, LLC's ("Stone Textile") Motion for Summary Judgment. (Dkt. 25). Having considered the motion and the responsive briefing, the record, and the relevant law, the Court finds that the motion should be denied.

#### **I. BACKGROUND**

Plaintiff Alexander Stross ("Stross") is a professional photographer whose business specializes in architecture, nature, and abstract photography. (Memo Mot. Summ. J., Dkt. 26-1, at 7-8; Stross Dep., Dkt. 26-8, at 1:8-11, 9:7-8). This case concerns four of his photographs (the "Photographs") taken of a house called City View designed by the architecture firm Dick Clark + Associates ("Dick Clark"). (Compl., [\*2] Dkt. 1, ¶¶ 8-11; Stross Dep., Dkt. 26-8, at 7:17-8:14). In 2013, Elizabeth Mollen ("Mollen"), Stone Textile's owner and designer, posted an article on Stone Textile's blog featuring the Photographs with her commentary on how Dick Clark incorporated environmentally friendly designs into the renovation of the City View home. (Memo Mot. Summ. J., Dkt. 26-1, at 11). Stross sued Stone Textile on May 29, 2018, alleging that Stone Textile infringed his copyrights when it displayed his photographs on the blog without license to do so. (Compl., Dkt. 1, ¶ 12). Stone Textile seeks summary judgment based on its fair use defense. (Mot. Summ. J., Dkt. 25).

#### **II. LEGAL STANDARD**

Summary judgment is appropriate when there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(a\)](#);

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). The Court must view the evidence in the light most favorable [\*3] to the nonmovant and draw all reasonable inferences in the nonmovant's favor, *Rosado v. Deters*, 5 F.3d 119, 122-23 (5th Cir. 1993), and cannot make credibility determinations or weigh the evidence, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). That said, when one party's version of the facts "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). *Rule 56* does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* After the nonmovant has been given [\*4] the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000).

### III. DISCUSSION

#### A. Summary Judgment Evidence

In 2010, Stross captured several photographs of the City View

house in Austin, Texas. (Stross Dep., Dkt. 26-8, at 6:12-22, 7:17-19). Stross subsequently registered the photographs with the U.S. Copyright Office that same year, and he currently owns the copyright to the images. (*Id.* at 9:3-8; Cert. of Registration, Dkt. 26-9).

Stone Textile is a product design company that specializes in textile design. (Mollen Dep., Dkt. 26-15, at 1:13-19). Stone Textile designs pillows, fabric, and wallpaper, but also does some interior design work. (*Id.*). Mollen sells Stone Textile's products on stonetextilestudio.com. (*Id.* at 5:8-23). In addition to Stone Textile's commercial activities, Mollen shares architecture and interior designs on Stone Textile's blog, stonetextileathome.com, as a creative outlet to inspire and educate design aficionados. (Memo Mot. Summ. J., Dkt. 26-1, at 8; Mollen Dep., Dkt. 26-15, at 5:11-23). Mollen wanted the blog to be a separate creative space from her e-commerce website. (Mollen Dep., Dkt. [\*5] 26-15, at 5:1-4). Stone Textile's blog posts feature information related to the company, including announcements, past events, home goods and other accessories, and completed projects. (Memo Mot. Summ. J., Dkt. 26-1, at 8; Mollen Dep., Dkt. 26-15, at 16:14-23).

In 2013, Mollen visited the City View home on an Austin modern-homes tour. (Memo Mot. Summ. J., Dkt. 26-1, at 10; Mollen Dep., Dkt. 26-15, at 4:2-11). After the tour, Mollen accessed Dick Clark's website and found Stross's Photographs depicting the City View home. (Mollen Dep., Dkt. 26-15, at 4:2-11). Several months after the tour, Mollen decided to share four of the images that she found on Dick Clark's website in an Earth Day article on Stone Textile's blog. (*Id.*). According to Mollen, she went to Dick Clark's website, copied the photos to her desktop, and put them onto her blog. (*Id.* at 4:12-18). Mollen was unaware that Stross owned the photos. (*Id.* at 4:19-23). Mollen authored an article on the blog describing the City View home under a blog section titled "Currently Loving" to show how a Dick Clark incorporated environmental protection into the home renovation. (Memo Mot. Summ. J., Dkt. 26-1, at 10; Mollen Dep., Dkt. 26-15, [\*6] at 4:2-23). Stone Textile neither referenced any of its products in the blog post nor generated any revenue as a result of the article. (Mollen Dep., Dkt. 26-15, at 9:23-10:11).

Three years later, on October 18, 2017, Stone Textile received a notice by e-mail from ImageRights International ("ImageRights") that the City View photographs displayed on its blog post violated Stross's copyright. (ImageRights E-mail, Dkt. 26-16). The notice demanded \$12,000 to resolve the dispute, and cautioned that ceasing to use the images would not release Stone Textile from liability. (*Id.* at 1). Mollen responded and removed the offending blog post including the

photographs. (*Id.* at 11; Mollen Dep., Dkt. 26-15, at 7:19-8:10). ImageRights continued to e-mail Mollen warning her that the photographs had not been removed and that Stone Textile still needed to purchase a license for violating Stross's copyright. (See ImageRights E-mails, Dkt. 26-16). Stone Textile did not respond to these e-mails, believing that they were sent in error. (Memo Mot. Summ. J., Dkt. 26-1, at 12).

### B. Stross's Objections to Summary Judgment Evidence

Stross objects to several pieces of evidence Stone Textile submitted with its Motion for Summary Judgment [\*7] describing how Stone Textile obtained Stross's photographs as inadmissible under the rules of evidence. (Notice, Dkt. 28, at 2-3). Specifically, Stross objects to Stone Textile's reliance on (1) a copy of the website realtor.com depicting the house at issue in this suit and a sample of photographs used in listings of the house, (*see* Pascucci Decl., Dkt. 26-3, ¶ 2; Copy of Realtor.com, Dkt. 26-4); (2) a copy of Dick Clark + Associates' website depicting the City View photographs, (*see* Pascucci Decl., Dkt. 26-3, ¶ 3; Copy of Dick Clark, Dkt. 26-5); and (3) a copy of the website of American Institute of Architects' 2013 Austin home tour describing the houses that would be visited, (*see* Pascucci Decl., Dkt. 26-3, ¶ 4; Copy of AIA, Dkt. 26-6).

Stross raised these objections in a notice to the Court, and—while unstated directly—Stross apparently asks that the Court disregard this evidence in considering Stone Textile's Motion for Summary Judgment. (*See* Notice, Dkt. 28, at 1-2). Stone Textile did not respond to Stross's objections either in its reply in support of its motion for summary judgment, (*see generally* Reply Mot. Summ. J., Dkt. 30), or in a separate filing. This Court's local rules [\*8] supply it with the authority to grant motions as unopposed when no response is timely filed. *See* W.D. Tex. Loc. R. CV-7(e)(2). Accordingly, the Court will sustain Stross's objections and will disregard the contested evidence for purposes of evaluating Stone Textile's Motion for Summary Judgment.

### C. Stone Textile's Motion for Summary Judgment

Stone Textile seeks summary judgment on Stross's copyright infringement claim. (Mot. Summ. J., Dkt. 25, at 1). Stone Textile does not dispute that its use of Stross's photos infringed his copyright. It argues only that its use of those photos constitutes "fair use" as protected "comment" and "news reporting" under [17 U.S.C. § 107](#). (Memo Mot. Summ. J., Dkt. 26-1, at 12).

[Section 106](#) of the Copyright Act confers a bundle of

exclusive rights to the owner of a copyright, including the right "to publish, copy, and distribute the author's work." [Harper & Row Publishers, Inc. v. Nation Enters.](#), [471 U.S. 539, 547, 105 S. Ct. 2218, 85 L. Ed. 2d 588 \(1985\)](#). But these rights are subject to "certain statutory exceptions," including the "privilege of other authors to make 'fair use' of an earlier author's work." *Id.* (citing [17 U.S.C. § 107](#)). [Section 107](#) was intended to codify the pre-existing judicial doctrine of fair use, which was "traditionally defined as 'a privilege in others than the owner of the copyright to use [\*9] the copyrighted material in a reasonable manner without his consent.'" *Id.* at [549](#) (citing H. Ball, *Law of Copyright and Literary Property* 260 (1944)). Fair use is an affirmative defense for which WOS has the burden to establish that its otherwise infringing use of Philpot's photos is excused. [Campbell v. Acuff-Rose Music, Inc.](#), [510 U.S. 569, 590, 114 S. Ct. 1164, 127 L. Ed. 2d 500 \(1994\)](#).

[Section 107](#) of the Copyright Act permits the unauthorized use or reproduction of copyrighted work if it is "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research." [17 U.S.C. § 107](#). Fair use is a mixed question of law and fact and requires a case-by-case determination on whether a particular use of a copyrighted work is fair. [Campbell](#), [510 U.S. at 577](#); [Harper & Row](#), [471 U.S. at 560](#). Making that determination requires consideration of four factors: (1) the purpose and character of the use; (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 on the potential market for or value of the copyrighted work. [17 U.S.C. § 107](#). These factors are non-exclusive, [Harper & Row](#), [471 U.S. at 560](#), and are to be "weighed together, in light of the purposes of copyright," [Campbell](#), [510 U.S. at 578](#). Accordingly, some courts have described "the ultimate test of fair use" as "whether the copyright law's goal of promoting the [\*10] Progress of Science and useful Arts would be better served by allowing the use than by preventing it." [Bill Graham Archives v. Dorling Kindersley Ltd.](#), [448 F.3d 605, 608 \(2d Cir. 2006\)](#) (citation and internal quotation marks omitted).

#### 1. Factor One: The Purpose and Character of Use

Under the first factor, courts consider the extent to which using a work is transformative, and whether such use is for commercial or noncommercial purposes. *See* [Harper & Row](#), [471 U.S. at 562](#) ("Also relevant to the 'character' of the use is 'the propriety of the defendant's conduct.'") (quoting 3 [Nimmer, Copyright § 13.05\[A\]](#), at 13-72 (1984)); *id.* ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."); [Campbell](#), [510 U.S. at 578-79](#) ("[T]he 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." Stone Textile argues that its use of Stross's photographs was non-commercial and transformative.<sup>1</sup> (Mot. Summ. J., Dkt. 26-1, at 16). Stross, however, argues that there is a question of material fact as to whether Stone Textile's use was commercial. (Resp. Mot. Summ. J., Dkt. 27, at 3-4). Stross also disputes Stone Textile's claim that its use was transformative. (*Id.* at 5).

The Court finds that there is [\*11] a dispute of fact regarding whether Stone Textile's use of Stross's photos is commercial. Stone Textile included Stross's photos in a blog post commenting on the home's features, an example of the novel approaches that were being incorporated into the home to benefit the environment. (Memo. Mot. Summ. J., Dkt. 26-1, at 16; Mollen Dep., Dkt. 26-15, at 5:14-23). Although Stone Textile is a for-profit interior design business, Stone Textile says it operates its blog for a separate, non-commercial purpose: to share newsworthy information. (Mollen Dep., Dkt. 26-15, at 5:13-23). Stone Textile argues that the blog is a "stand-alone feature," and it did not stand to profit in any way from the blog post because (a) the article's intent was to comment on the home's features, (b) none of Stone Textile's products are included in the photographs, and (c) the blog post did not promote Stone Textile's business or products. (Memo. Mot. Summ. J., Dkt. 26-1, at 16-17; Mollen Dep., Dkt. 26-15, at 9:23-10:11). Finally, Stone Textile represents that it did not in fact capture any revenue as a direct consequence of using Stross's photographs. (Reply Mot. Summ. J., Dkt. 30, at 5 (citing Mollen Dep., Dkt. [\*12] 26-15, at 9:23-10:11)).

But the question is whether Stone Textile "st[ood] to profit from exploitation of the copyrighted material without paying the customary price"—here, obtaining a license and attribution—not whether Stone Textile actually generated any revenue from its exploitation.<sup>2</sup> [Campbell, 510 U.S. at 584-85.](#)

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<sup>1</sup> Stone Textile also argues that its use was in good faith because it cited the source where it found the Photographs. (Mot. Summ. J., Dkt. 26-1, at 17-18 (citing [Nunez, 235 F.3d at 23](#) (finding that good faith weighed in favor of fair use); [Harper & Row, 471 U.S. at 562-63](#) (noting that the propriety of a defendant's conduct is also relevant to the character of the use, and that fair use presupposes good faith))). But "while bad faith may weigh against fair use, a copyist's good faith cannot weigh in favor of fair use." [Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1203 \(Fed. Cir. 2018\)](#). Stross does not argue that Stone Textile's use was in bad faith. (See Resp. Mot. Summ. J., Dkt. 27, at 5). Accordingly, the Court declines to address Stone Textile's argument that it used the photos in good faith to support its fair use defense.

<sup>2</sup> Stone Textile points to no authority for the proposition that

Stone Textile is a private, commercial interior decorating company. In the modern age, blogs and articles are often used by for-profit enterprises to build brand awareness and credibility among prospective consumers. Here, the blog is conducted under the auspices of Stone Textile's business, promoting Stone Textile's brand, rather than under a separate non-profit entity with purely journalistic or educational purposes. Indeed, the blog itself links to Stone Textile's commercial website. (Memo Mot. Summ. J., Dkt. 26-1, at 16; Mollen Dep., Dkt. 26-15, at 5:13-23). From this perspective, and viewed in a light most favorable to Stross, a reasonable jury could find that Stone Textile stood to profit from its use of Stross's photographs by including them on its blog. This subfactor tends to weigh against a finding of fair use but is far from dispositive. *See, e.g., Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013)* (citing [Campbell, 510 U.S. at 584](#)) (cautioning that the illustrative [\*13] uses under [17 U.S.C. § 107](#)—reporting, comment, criticism, teaching, scholarship, and research—are generally conducted for profit and noting that the concern is the unfairness associated with unauthorized use to capture significant revenues).

As for whether Stone Textile's use is transformative, the question is "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." [Campbell, 510 U.S. at 579](#) (cleaned up) (citation omitted). The importance of this subfactor is determined on a sliding scale: "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." *Id.*

Stone Textile argues that its use is transformative because it used the photographs for a different purpose than Stross. It says that Stross's purpose was for Dick Clark to have samples of a completed project to promote additional architecture projects, while Stone Textile's use is to report on environmentally friendly housing designs in honor of Earth Day. (Memo Mot. Summ. J., Dkt. 26-1, at 17 (citing Stross [\*14] Dep., Dkt. 26-8, at 8:3-14; Mollen Dep., Dkt. 26-15, at 4:3-11)). According to Stone Textile, the commentary on the materials and techniques used in construction of the home pictured in the photographs makes its use transformative. (*Id.*). Stross responds that the infringing use has no transformative element because Stone Textile merely does what Stross intended: display the property that is the subject of the photos. (Resp. Mot. Summ. J., Dkt. 27, at 5). Stone Textile reproduced the photographs in

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generating no revenue weighs in favor of fair use. (See Reply Mot. Summ. J., Dkt. 30, at 4-5 (citing Mollen Dep., Dkt. 26-15, at 9:23-10:11)).



their entirety. (*Id.*). This disagreement about how to characterize Stross's purpose and Stone Textile's use is a fact issue for a jury. For purposes of deciding Stone Textile's motion, the Court finds that a reasonable jury could conclude that both parties used the photos for the same purpose. And when a work is reproduced exactly for the same purpose, the use is not transformative. See [Balsley v. LFP, Inc.](#), 691 F.3d 747, 759 (6th Cir. 2012) (quoting *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003)) ("Where 'an original work is merely retransmitted in a different medium' or where the 'resulting use of the copyrighted work . . . [is] the same as the original use,' the new work is not 'transformative.'"); [Monge v. Maya Magazines, Inc.](#), 688 F.3d 1164, 1177 (9th Cir. 2012) (finding that newsworthy commentary on a photograph amounted to "minimal transformation"). [\*15] Viewing the facts in the light most favorable to Stross, this factor weighs in his favor.

## 2. Factor Two: The Nature of the Copyrighted Works

In considering nature of the copyrighted work, courts look at "the extent to which [the work] is a creative work enjoying broader copyright protection as opposed to a factual work requiring broader dissemination." [Nunez v. Caribbean Int'l News Corp.](#), 235 F.3d 18, 23 (1st Cir. 2000) (citing *Harper & Row*, 471 U.S. at 563-64).<sup>3</sup> 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); see also *Harper & Row*, 471 U.S. at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."). Stone Textile argues that the primary purpose of Stross's photographs was to factually depict a house, not the expression of his ideas, emotions, or feelings. (Mot. Summ. J., Dkt. 26-1, at 21). Stross, however, contends that his photographs reflect numerous creative choices, and thus contain significant expressive content that is not merely factual. (Resp. Mot. Summ. J., Dkt. 27, at 6). Although photographs have "varying degrees of creativity," [Balsley](#), 691 F.3d at 760, a reasonable jury could agree with Stross that the photos reflect his creative judgments about things like angle, framing, timing, and post-production choices. (*Id.* at 6-7). When creative [\*16] judgments are apparent in a photograph—even if the purpose of the image is to document or convey factual information—

<sup>3</sup> Courts also consider whether a work was unpublished at the time of use, "in which case the right of first publication is implicated." [Nunez](#), 235 F.3d at 23 (citing *Harper & Row*, 471 U.S. at 564). In such a case, "[t]he author's right to control the first public appearance of his expression weighs against such use of the work before its release." *Harper & Row*, 471 U.S. at 564. Because there is no dispute that Stross's photos were published before Stone Textile's use, the right of first publication is not implicated here.

courts tend to hold that the work is creative in nature. See, e.g., [Rentmeester v. Nike, Inc.](#), 883 F.3d 1111, 1120-21 (9th Cir. 2018) (concluding that creative choices, including lighting, camera angle, depth of field, and foreground and background elements, entitled a photograph of Michael Jordan dunking a basketball broad protection); [Monge](#), 688 F.3d at 1177 (noting that photographs, even if primarily factual in nature, involve various creative elements). Viewing the facts in the light most favorable to Stross, this factor weighs in his favor.

## 3. Factor Three: The Amount and Substantiality of the Portions Used

In considering the amount and substantiality of the portions used, courts "examine both the quantitative and qualitative aspects of the portion of the copyrighted material taken." [Monge](#), 688 F.3d at 1178 (citing *Campbell*, 510 U.S. at 586). "While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use." *Kelly*, 336 F.3d at 820. That said, "the extent of permissible copying varies with the purpose and character of the use." [Bill Graham Archives](#), 448 F.3d at 613 (citing *Campbell*, 510 U.S. at 586-87). "Unless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair [\*17] use." *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 311 (4th Cir. 2010). So, for example, courts have concluded that wholesale copying does not weigh against finding fair use when doing so is necessary to make a fair use of the image. See *Kelly*, 336 F.3d at 821 (finding the wholesale replication of images used for a search engine database necessary for the purpose of recognition); [Nunez](#), 235 F.3d at 24 (finding that copying less than the entire photo would have made the photo useless to a story about the photo itself).

Stone Textile concedes that it used Stross's photographs in their entirety. (Memo Mot. Summ. J., Dkt. 26-1, at 21). But it argues that doing so was necessary in order for its blog viewers to have access to the full information about the house. (*Id.* at 21-22 (citing *Kelly*, 336 F.3d at 821)). Stross counters that Stone Textile's use was not necessary because it could have taken the photographs itself or paid a professional photographer to do so.<sup>4</sup> (Resp. Mot. Summ. J., Dkt. 27, at 7-8). But Stross's argument misunderstands the "necessity" justification for using an entire image. "The 'inquiry must focus upon whether the extent of copying is consistent with or more than necessary to further the purpose and character of the use.'" [Nunez](#), 235 F.3d at 24 (quoting *Castle Rock Entm't*,

<sup>4</sup> Stross offers no authority to support his argument that the availability of alternative means to capture similar images militates against finding fair use. (See Resp. Mot. Summ. J., Dkt. 27, at 7-8).

*Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998)) (cleaned up); see also *Campbell*, 510 U.S. at 586-87 (noting that the inquiry "varies with the purpose [\*18] and character of the use"). Here, Stone Textile used the photos to provide commentary on the house, so the entire image is necessary to provide relevant context. See *Nunez*, 235 F.3d at 24. But, as already stated, a reasonable jury could find that Stone Textile's work was for commercial purposes and not transformative. Accordingly, this factor weighs neither in favor nor against a finding of fair use.

#### 4. Factor Four: The Effect on the Works' Potential Market or Value

Finally, courts consider "the effect of the use upon the potential market for or value of the copyrighted work." *Campbell*, 510 U.S. at 590 (quoting 17 U.S.C. § 107(4)). "This last factor is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. Analysis of 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 (cleaned up). Put differently, the inquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 567.

This factor presumptively weighs in the plaintiff's favor [\*19] if the use is commercial, because "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Balsley*, 691 F.3d at 760 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)). However, when the "second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred." *Campbell*, 510 U.S. at 591. Courts have described this factor as "concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright holder." *Nunez*, 235 F.3d at 24 (quoting *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998)).

Because a reasonable jury could find that Stone Textile's use of Stross's photos is commercial, this factor presumptively weighs in Stross's favor. *Balsley*, 691 F.3d at 760. And because, viewing the evidence in Stross's favor, Stone Textile's use is not transformative, the Court need be skeptical of market substitution for the reasons described in *Campbell*, 510 U.S. at 591. This factor weighs in Stross's favor.

Stone Textile argues that Stross has not provided any actual

evidence that there has been a negative effect on the potential market for or the value of his photographs. (Memo Mot. Summ. J., Dkt. 26-1, at 22-23). Stone Textile notes that another user purchased a license from Stross to use the photographs [\*20] four months after Stone Textile's blog post. (See Builder License, Dkt. 26-16). This argument, however, misses the mark. The fair use inquiry is concerned with the potential market effects should the challenged use become widespread. See *Harper & Row*, 471 U.S. at 568. It is not disputed that Stross offers a license to use his photographs for purchase. (See Memo Mot. Summ. J., Dkt. 26-1, at 23; Resp. Mot. Summ. J., Dkt. 27, at 9). But the widespread use of Stross's photographs without a license would eliminate the need to purchase a license. Stone Textile also argues that because Stross has previously granted no-fee licenses for news or commentary purposes, widespread use of his photographs in non-commercial articles would not impact the market. (Reply Mot. Summ. J., Dkt. 30, at 9-10). Although Stross has apparently granted a no-fee license before, he still maintained control over when to grant such licenses, and thus Stross could consider the consequences of granting a no-fee license. Stone Textile's use, however, deprived Stross of that opportunity, and widespread use of Stross's photos without a license or Stross's prior approval, would eliminate the need to purchase a license. Accordingly, this factor—the most [\*21] important of the four—weighs in Stross's favor.

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When the evidence is viewed in Stross's favor, three of the four factors tilt his direction, including the most important factor. Stone Textile is thus not entitled to summary judgment based on its fair use defense.

#### IV. CONCLUSION

For the reasons given in this order, **IT IS ORDERED** that Stone Textile's Motion for Summary Judgment, (Dkt. 25), is **DENIED**.

The Court directs the parties, or counsel acting on their behalf, to appear for a final pretrial conference on **Wednesday, August 7, 2019, at 9:00 AM** in the United States Courthouse, Courtroom #4, Fifth Floor, 501 West 5th Street, Austin, Texas.

The parties should consult Local Rules CV-16(e)—(f) regarding matters to be filed in advance of the final pretrial conference. Each party is expected to file the materials required by Local Rule CV-16(e) as one electronic document, styled as a "Notice to the Court," with each of the 10 submissions identified in the Local Rules (as applicable) attached as an exhibit to that electronic document. If a party

deems it necessary to file any of those submissions under seal, it may file one separate electronic document, styled as a "Motion for Leave to File [\*22] Under Seal," and attach those submissions as exhibits. Any such motion should explain in detail why sealing the attached exhibits is necessary. Similar expectations govern the submissions required by Local Rule CV-16(f).

**SIGNED** on June 27, 2019.

/s/ Robert Pitman

ROBERT PITMAN

UNITED STATES DISTRICT JUDGE

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