

════ *Núñez v. Caribbean International News Corp.*
 ════ *(El Vocero de Puerto Rico)*
 ════ 235 F.3d 18 (1st Cir. 2000)

TORRUELLA, C.J.: . . . Appellant Núñez, a professional photographer, took several photographs of Joyce Giraud (Miss Puerto Rico Universe 1997) for use in Giraud’s modeling portfolio. Núñez then distributed the photographs to various members of the Puerto Rico modeling

11. Just as secondary users may not exploit markets that original copyright owners would “in general develop or license others to develop” even if those owners had not actually done so, copyright owners may not preempt exploitation of transformative markets, which they would not “*in general* develop or license others to develop,” by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets. *See* 4 Nimmer §13.05[A][4], at 13-181-13-182 (recognizing “danger of circularity” where original copyright owner redefines “potential market” by developing or licensing others to develop that market). . . .

community in accordance with normal practice. After the photographs had been taken, some controversy arose over whether they were appropriate for a Miss Puerto Rico Universe, based on the fact that Giraud was naked or nearly naked in at least one of the photos. A local television program displayed the photographs on screen and asked random citizens whether they believed the photographs were “pornographic.” Giraud was interviewed by two local television stations as to her fitness to retain the Miss Universe Puerto Rico crown. El Vocero then obtained several of the photographs through various means. Over the next week, without Núñez’s permission, three of his photographs appeared in El Vocero, along with several articles about the controversy.

Núñez claimed that the reprint of his photographs in El Vocero without his permission violated the Copyright Act of 1976. The district court applied the fair use test of 17 U.S.C. §107. Focusing on the “newsworthy” nature of the photographs, the difficulty of presenting the story without the photographs, and the minimal effect on Núñez’s photography business, the court concluded that El Vocero had met the requirements of §107 and dismissed the complaint with prejudice. . . .

B. The Purpose and Character of the Use . . .

The district court found that appellee . . . both sought to “inform” and “gain commercially,” and that the two purposes offset each other in the fair use analysis. For a commercial use to weigh heavily against a finding of fair use, it must involve more than simply publication in a profit-making venture. . . . We agree with the district court that the commercial use here . . . constitutes more than mere reproduction for a profitable use. The photographs were used in part to create an enticing lead page that would prompt readers to purchase the newspaper. . . .

However, the district court also found that the pictures were shown not just to titillate, but also to inform. Puerto Ricans were generally concerned about the qualifications of Giraud for Miss Puerto Rico Universe, as is demonstrated by the several television shows discussing the photographs. This informative function is confirmed by the newspaper’s presentation of various news articles and interviews in conjunction with the reproduction. Appellee reprinted the pictures not just to entice the buying public, but to place its news articles in context; as the district court pointed out, “the pictures were the story.” . . .

. . . It suffices to say here that El Vocero did not manufacture newsworthiness, as it sought not to “scoop” appellant by publishing his photograph, but merely to provide news reporting to a hungry public. And the fact that the story is admittedly on the tawdry side of the news ledger does not make it any less of a fair use. . . .

Rather, what is important here is that plaintiffs’ photographs were originally intended to appear in modeling portfolios, not in the newspaper; the former use, not the latter, motivated the creation of the work. Thus, by using the photographs in conjunction with editorial commentary, El Vocero did not merely “supersede[] the objects of the original creation[s],” but instead used the works for “a further purpose,” giving them a new “meaning, or message.” *Campbell*, 510 U.S. at 579. It is this transformation of the works into news—and not the mere newsworthiness of the works themselves—that weighs in favor of fair use under the first factor of §107. . . .

Appellee’s good faith also weighs in its favor on this prong of the fair use test. . . . First, El Vocero attributed the photographs to Núñez. Although acknowledgment does not excuse infringement, the failure to acknowledge counts against the infringer. . . . Second, El Vocero obtained each of the photographs lawfully. An unlawful acquisition of the copyrighted work generally weighs against a finding of fair use; no such theft occurred here. . . .

In sum, the highlighting of the photograph on the front cover of *El Vocero* exposes the commercial aspect of the infringing use, and counts against the appellee. However, the informative nature of the use, appellee's good faith, and the fact that it would have been difficult to report the news without reprinting the photograph suggest that on the whole, this factor is either neutral or favors a finding of fair use.

C. Nature of the Copyrighted Work . . .

The district court suggested, and we agree, that Núñez's pictures could be categorized as either factual or creative: certainly, photography is an art form that requires a significant amount of skill; however, the photographs were not artistic representations designed primarily to express Núñez's ideas, emotions, or feelings, but instead a publicity attempt to highlight Giraud's abilities as a potential model. . . . Given the difficulty of characterizing the "nature" of the photographs, we find that the impact of their creativity on the fair use finding is neutral.

This reproduction, however, does not threaten Núñez's right of first publication. Although these photographs had not before been published in a book or public portfolio, they were hardly confidential or secret, as was the manuscript in *Harper & Row* prior to its serial publication. . . . Núñez had not sought to control further dissemination during his limited distribution: he had not registered the copyright prior to publication in *El Vocero*, required recipients to sign non-disclosure or no-resale agreements, or even sought oral promises from recipients not to re-distribute the photographs.

In sum, this factor favors appellee.

D. Amount and Substantiality of the Use . . .

. . . In this case, *El Vocero* admittedly copied the entire picture; however, to copy any less than that would have made the picture useless to the story. As a result, like the district court, we count this factor as of little consequence to our analysis. . . .

E. Effect on the Market . . .

. . . [W]e examine the effect of *this* publication on the market, and we also determine whether wide-scale reproduction of professional photographs in newspapers (for similar purposes) would in general affect the market for such photography. As to the first, we find little impact on the market for these specific pictures. The district court noted that the purpose of dissemination of the pictures in question is not to make money, but to publicize; they are distributed for free to the professional modeling community rather than sold for a profit. The fact that a relatively poor reproduction was displayed on the cover of a newspaper should not change the demand for the portfolio. If anything, it might increase it. . . .

However, the potential market for the photographs might also include the sale to newspapers for just this purpose: illustrating controversy. It is true that *El Vocero's* use of the photograph without permission essentially destroys this market. There is no evidence, however, that such a market ever existed in this case. Núñez does not suggest that he ever tried to sell portfolio photographs to newspapers, or even that he had the right to do so under the contract with Giraud. . . .

. . . Because the only discernible effect of the publication in *El Vocero* was to increase demand for the photograph, and because any potential market for resale directly to the newspaper was unlikely to be developed, this factor favors a finding of fair use. . . .