

13-1246
No.

Supreme Court, U.S.
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**In the
Supreme Court of the United States**

FREDERICK E. BOUCHAT,

Petitioner,

v.

**BALTIMORE RAVENS LIMITED
PARTNERSHIP; NFL ENTERPRISES LLC;
NFL NETWORK SERVICES, INC.;
NFL PRODUCTIONS LLC, d/b/a NFL Films,
a subsidiary of NFL Ventures L.P.,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THE PREAMBLE TO § 107 OF THE COPYRIGHT ACT PROVIDES THAT "[T]HE FAIR USE OF A COPYRIGHTED WORK. . .FOR PURPOSES SUCH AS CRITICISM, COMMENT, NEWS REPORTING, TEACHING. . .SCHOLARSHIP, OR RESEARCH, IS NOT AN INFRINGEMENT OF A 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"

THE QUESTIONS PRESENTED ARE:

- I. DOES AN UNAUTHORIZED DISPLAY OF AN ENTIRE PICTORIAL WORK IN FILMS, PHOTOGRAPHS AND OTHER DISPLAYS FOR A PURPOSE ILLUSTRATED BY THE PREAMBLE OF § 107 OF THE COPYRIGHT ACT GIVE RISE IN ITSELF TO A TRANSFORMATIVE USE?
- II. IS AN UNAUTHORIZED DISPLAY OF A PICTORIAL WORK IN ITS ENTIRETY EXCUSED BECAUSE IT IS AN INSUBSTANTIAL PORTION OF AN APPROPRIATING WORK?
- III. ARE RESPONDENTS, PREVIOUSLY ADJUDICATED INFRINGERS OF THE COPYRIGHTED WORK, ENTITLED TO THE BENEFIT OF A GOOD-FAITH FINDING AS A MATTER OF LAW?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover.

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Petitioner, Frederick E. Bouchat, petitions the Supreme Court of the United States to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on December 17, 2013. (Petitioner's Appendix ("Pet. App.") 4a, 39a).

REFERENCES TO OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Bouchat v. Baltimore Ravens Ltd. Partnership*, 737 F.3d 932 (4th Cir. 2013) (Pet. App. 4a); District Court Memorandum and Order, entered November 19, 2012, reported as *Bouchat v. Baltimore Ravens Ltd. Partnership*, 910 F. Supp. 2d 798 (D. Md. 2012) (Pet. App. 41a).

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit, for which Petitioner seeks review, was entered on December 17, 2013. (Pet. App. 39a). On December 31, 2013, Petitioner filed a Petition for Rehearing with Petition for Rehearing *En Banc*, which was denied by separate orders filed on January 14, 2014 (Pet. App. 72a, 74a), at which time the Court of Appeals also amended its opinion filed on December 17, 2013. (Pet. App. 1a).

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1338(a), in that Petitioner, Frederick E. Bouchat, filed two civil actions for copyright infringement under the copyright laws of the United States, i.e., 17 U.S.C. § 501 *et seq.*

Petitioner invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED IN THE CASE

17 U.S.C. § 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.

STATEMENT OF THE CASE

In 2002 and 2003, the Respondents were adjudicated infringers of Petitioner's pictorial work, the design of a football team logo that actively served as the Baltimore Ravens football team logo (known as the "Flying B Logo") (Pet. App. 43a) for the 1996-1998 seasons, during which time Respondents displayed it on helmets, tickets, game-day programs and in game films and photographs. *See Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 354-55 (4th Cir.) ("*Bouchat I*"), *cert. denied*, 532 U.S. 1038 (2001), *appeal after remand, Bouchat v. Baltimore Ravens Football Club, Inc. ("Bouchat II")*, 346 F.3d 514 (4th Cir. 2003), *cert. denied*, 541 U.S. 1042 (2004); *Bouchat v. Bon-Ton Dept. Stores, Inc. ("Bouchat III")*, 506 F.3d 315 (4th Cir. 2007), *cert. denied*, 553 U.S. 1014 (2008). The team stopped using the Flying B Logo on players' helmets, merchandise, game programs and the like shortly after the 1998 football season. (Pet. App. 7a-8a).

The Baltimore Ravens and the NFL nevertheless continued to make commercial use of the Flying B Logo after the 1998 season. During home games, the Ravens displayed the logo when it exhibited game footage from the 1996, 1997 and 1998 seasons on its large, outdoor, video screen for the crowd to watch during time-outs. NFL Films also displayed the logo in game footage, which it sold to the public in the form of half-hour-long Ravens yearly highlight films of the 1996, 1997 and 1998 seasons.

The Fourth Circuit, in an opinion by the late M. Blaine Michael with Judge Paul V. Niemeyer dissenting, held that the NFL's and the Ravens' commercial exploitation of their original

infringement of the copyrighted work in these game films was not fair use, even though the purpose of the highlight films was historical and the logo was incidental to that purpose. *Bouchat v. Baltimore Ravens Limited Partnership*, 619 F.3d 301, 308-13 (4th Cir. 2010) (“*Bouchat IV*”). Judge Niemeyer dissented on the ground that the purpose of the highlight films was historical and incidental to that purpose. On remand, the District Court entered judgment against the Ravens and NFL Films as infringers. *Bouchat v. Baltimore Ravens Ltd. Partnership*, 2012 WL 6738321 (D. Md. December 27, 2012) (issuing conditional injunction).

After remand, Petitioner discovered that the NFL and the Baltimore Ravens were still displaying the logo without his permission. In Court of Appeals case no. 12-2548, the first of the two District Court cases filed, Petitioner alleged that the Respondents were publicly displaying and infringing upon his copyright by the use of segments of game films repeatedly appearing on the NFL Network in three works in which the infringing logo is displayed. “Top Ten Draft Classes: 1996 Baltimore Ravens” includes a four-minute segment reflecting the Ravens’ inaugural 1996 draft class. “Top Ten Draft Busts” includes a four-minute segment about Lawrence Phillips, which segment concludes with a highlight clip in which the Ravens’ defense tackles Phillips. (Pet. App. 12a-13a, 60a). “Sound FX: Ray Lewis” contains sounds of linebacker Ray Lewis during games without outside commentary and with no voice-overs, and includes clips and highlights of Lewis in various Ravens football games during the 1996, 1997 and 1998 seasons. (Pet. App. 13a-14a, 61a). Respondents also displayed the appropriating

works many thousands of times on nfl.com and hulu.com (Pet. App. 12a) surrounded by advertisements of such marketers as McDonald's, Google Chrome, Van Heusen, GMC and Gatorade. In granting summary judgment on the ground of fair use, the District Court reasoned that the videos were documentaries, which were "substantially transformative" because the appropriating works added "something new by representing factual content, documenting and commenting on historical events, or functioning as a biography or career retrospective." (Pet. App. 62a). The District Court concluded that this transformative use outweighed all other factors under 17 U.S.C. § 107. (Pet. App. 62a-63a).

In the second case, Court of Appeals case no. 12-2543(L), Petitioner alleged that the Baltimore Ravens Limited Partnership displayed the logo in game and player-related photographs from the 1996-1998 seasons throughout its stadium's indoor Club Level Lounge, which is restricted to its high-paying, premier clientele, as décor for its bar and food-service stations. (Pet. App. 28a-30a, 53a, 55a). As wall covering for one section of the Club Level Lounge, the Ravens displayed the infringing logo as part of a collage of photos and other materials in a time line of Baltimore football. (Pet. App. 29a-30a, 52a). The District Court likewise granted summary judgment in favor of the Baltimore Ravens on the ground of fair use. Relying upon Part B of the Panel's opinion in *Bouchat IV*, 619 F.3d at 313-16,¹

¹ In *Bouchat IV*, the Court of Appeals also held that the display of the Flying B Logo on actual inaugural-season tickets and two photographs of the Ravens' first-draft picks in "[t]he (Footnote continued)

the District Court reasoned that the Ravens' display of the logo throughout the football stadium's indoor Club Level Lounge was consistent with a display in a museum and that there was no direct or immediate commercial advantage gained from the displays. (Pet. App. 56a-57a). In view of what it termed the "substantial transformative use," the District Court concluded that use in the Club Level Lounge was fair use under the other § 107 factors. (Pet. App. 57a-59a). In both cases, the District Court held that the Ravens, while the originator of the infringement, acted in good faith in believing that these uses were non-infringing. (Pet. App. 49a-50a, 57a, 62a).

The Court of Appeals consolidated the appeals. It agreed that Respondents' uses were transformative because the purpose of Respondents' uses had changed. The Decision held that the Flying B Logo was no longer being used as a brand symbol or an on-field identifier, but was now used as part of historical displays and documentaries and thereby akin to those uses illustrated in the preamble to §

lobby of the Ravens headquarters [which] has an area that is dedicated to the history of the team" for which no fee was charged, transformed the purpose of the use because the display was a non-commercial use in a museum setting. *Id.*, at 313-14. "Most important, the use of the logo in a museum-like setting 'adds something new' to its original purpose as a symbol identifying the Ravens." *Id.*, at 314. "[U]nlike in the highlight films, there is no clear-cut commercial purpose behind the use of the logo in the Ravens lobby. The lobby is open to the public, free of charge." *Id.* Contrasting the display in the lobby to the highlight films, the Court emphasized that "the character of the use in the highlight films is particularly indefensible because the Ravens and the NFL are exploiting to their commercial advantage their original infringements." *Id.*

107. In considering the “purpose and character of the use” as required by § 107(1), the Decision gave presumptive weight to the historical purpose of the video displays. It equated the change in “purpose” to a transformative use. (Pet. App. 16a-17a, 20a, 32a). The Decision emphasized that “[t]his finding of transformative use is reinforced by the exceptionally insubstantial presence of the Flying B Logo in these videos” (Pet. App. 17a) and the lack of significance to the displays. (Pet. App. 33a). Respondents’ display of the appropriated logo had become an incidental and an insignificant portion of the overall appropriating historical works. (Pet. App. 17a-20a, 23a-24a, 33a-35a). The Court rejected Petitioner’s arguments that the logo was itself not the subject of historical discussion, criticism, commentary, news reporting or the like, and was displayed in its entirety without physical alteration, augmentation or manipulation. (Pet. App. 17a, 22a). “[I]t does not matter that the Flying B logo is unchanged in the videos, for ‘[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature.’” (Pet. App. 17a)(*quoting Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009)). It equated change in purpose with transformation. (Pet. App. 22a). Weighing the transformative uses heavily in favor of fair use, the Court of Appeals found fair use. (Pet. App. 23a-28a).

**REASONS FOR GRANTING THE WRIT
THE FOURTH CIRCUIT HAS DECIDED
AN IMPORTANT AND RECURRING
ISSUE OF COPYRIGHT LAW IN A
MANNER THAT CONFLICTS WITH THE
RULINGS OF THE FIRST, SECOND,
SIXTH AND NINTH CIRCUITS.**

Transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). “Most important to the court’s analysis of the first factor is the ‘transformative’ nature of the work.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006). Thus, the most important component of the inquiry into the “purpose and character of the use” is whether the use is transformative, i.e., whether the second use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 938 (quoting *Campbell*, 510 U.S. at 579), *amended on other grounds*, 313 F.3d 1093 (9th Cir. 2002).

The Fourth Circuit has jettisoned the transformative use analysis employed by other Circuits and has given presumptive weight to the “purpose” of the appropriating work that expands fair use to permit the wholesale appropriation of pictorial works where the appropriating works are labeled, as in this case, as “historical” or “documentaries.” The Fourth Circuit Decision itself points out that the implications of its Decision go well beyond the instant dispute, stating that “The

NFL may not arouse sympathies in the way that a revered artist does, but the consequences of this case reach far beyond its facts. Society's interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be." (Pet. App. 28a). It added: "If these uses failed to qualify as fair, a host of perfectly benign and valuable expressive works would be subject to lawsuits. That in turn would discourage the makers of all sorts of historical documentaries and displays, and would deplete society's fund of informative speech." (Pet. App. 37a). "Fair use . . . protects filmmakers and documentarians from the inevitable chilling effects of allowing an artist too much control over the dissemination of his or her work for historical purposes." (Pet. App. 26a).

The dissent in *Bouchat IV*, 619 F.3d at 320-21, stressed the importance of the same issues raised herein when it invited the NFL to file a petition for this Court's review: "It should not require the Supreme Court to instruct us that the Ravens' incidental and necessary use of the Flying B Logo in memorabilia and game highlights is transformative—the heart of the fair use doctrine—and therefore does not infringe Bouchat's copyright. See 17 U.S.C. § 107. Unfortunately, however, it does." *Id.*, at 322.

The importance of fair use is reflected in the Court's review of fair use in three copyright actions: *Campbell* (discussing the importance of transformative use and holding that the commercial character of a rap music parody did not create a presumption against fair use as a presumption of market harm was limited to non-transformative

uses); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (holding in part that unauthorized, non-commercial home video recording for later viewing of material broadcast over the public airwaves was a fair use); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (holding that a magazine's unauthorized publication of verbatim quotes from the "heart" of unpublished presidential memoirs was not fair use). The Court, however, has not issued an opinion in a copyright action concerning the fair use of a "pictorial, graphic or sculptured work[]" or visual art as defined and categorized by 17 U.S.C. § 101 (Definitions); § 102(5) (Subject matter of copyright). (Pet. App. 77a, 79a).

THE FOURTH CIRCUIT DECISION IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, SECOND, SIXTH AND NINTH CIRCUITS, WHICH HOLD THAT A CHANGE IN PURPOSE TO ONE OF THE PURPOSES ILLUSTRATED BY THE PREAMBLE OF § 107 DOES NOT ESTABLISH A TRANSFORMATIVE USE *PER SE* AND REQUIRE A SEPARATE ANALYSIS OF WHETHER AND TO WHAT EXTENT THE NEW USE OF THE COPYRIGHTED WORK IS TRANSFORMATIVE.

The Decision is in conflict with those of the First, Second, Sixth and Ninth Circuits, which hold a finding that an appropriating use that has as its purpose one of the enumerated purposes in the preamble to § 107, i.e., criticism, comment, news reporting, teaching, scholarship, or research or the like, is not sufficient in itself to turn the first factor

in favor of fair use and does not end the inquiry; the first-factor analysis requires a separate assessment of whether the use of the copyrighted work is transformative. *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (holding that contemporaneous re-transmission of radio broadcasts over the telephone was not fair use, and stating “We agree that the difference in purposes tends to support Kirkwood’s fair use claim. However, difference in purpose is not quite the same thing as transformation, and *Campbell* instructs that transformativeness is the critical inquiry under this factor.”); *Los Angeles News Service v. Reuters Television Intern., Ltd.*, 149 F.3d 987, 993 (9th Cir.) (holding that a re-telecast of only a small portion of copyrighted news footage was not fair use and stating that “Although defendants’ service does have a news reporting purpose, its use of the works was not very transformative. Reuters copies footage and transmits it to news reporting organizations; Reuters does not explain the footage, edit the content of the footage, or include editorial comment.”), *cert. denied*, 525 U.S. 1141 (1998); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (“Comline’s abstracts were for the purpose of news reporting. But the fair use factor of purpose and character of use....requires a more nuanced analysis: it asks whether and to what extent the new work ‘adds something new, with a further purpose or different character, altering the first.....’”) (*quoting Campbell*, 510 U.S. at 579); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22-23 (1st Cir. 2000) (publication of photographs appearing in a newspaper article did not establish transformative use or even the

“newsworthiness’ exception”); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1385-86 (6th Cir. 1996) (alleged use with educational purpose was not transformative), *cert. denied*, 520 U.S. 1156 (1997); *see also American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 13-15 (S.D.N.Y. 1992) (Leval, J.) (finding that Texaco’s duplication of photocopies of entire articles published in scientific and technical journals, and distributing the duplicated copies to hundreds of Texaco scientists for purposes of research, was not transformative, and rejecting that a purpose enumerated in the preamble to § 107 is presumptively determinative of the first factor), *aff’d*, 60 F.3d 913 (2d Cir. 1994). Otherwise, copyright protection would be eviscerated by non-transformative copying of protected works, so long as the appropriating purpose was illustrated by the preamble. *American Geophysical Union*, 802 F. Supp. at 13-14.

By contrast to the Decision, in every Circuit in which use of the copyrighted work has been found to be transformative involving a change in purpose or function, the appropriated work itself was physically altered or augmented so that its original expressive content was eclipsed. *See, e.g., Bill Graham Archives*, 448 F.3d at 608-12 & n.3&4; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164-65 (9th Cir. 2007) (holding that Internet search engine’s use of reduced, lower-resolution versions of full-sized images stored on third-party computers, i.e., “thumbnail images,” of copyrighted photographs was fair use); *see also Vanderhye*, 562 F.3d at 639 (use was transformative where school converted student papers to digital code and archived them in that

format, for purpose of evaluating originality of school papers to prevent plagiarism).

**THE DECISION IS IN CONFLICT WITH
DECISIONS OF THE SECOND CIRCUIT
FINDING A LACK OF
TRANSFORMATIVE USE OF PICTORIAL
AND SCULPTURAL WORKS.**

In *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d at 78-80, a case relied on by the Court in *Bouchat IV*, 619 F.3d at 310, the Court held that the use of a poster of an artistic work, in less than perfect focus, in a set for a television program in one, four-to-five-second segment and several smaller segments, for a total of 26-27 seconds, was not transformative because the program used the poster “for precisely a central purpose for which it was created--to be decorative.” *Id.*, at 79. By contrast, the Court noted that if a TV news program produced a feature about the work’s artist and included camera shots of her work, the case for a fair use defense would be extremely strong. The Court found the District Court’s analysis legally flawed because it failed to assess the decorative purpose for which the defendants used the copyrighted work and instead tipped the first factor against the plaintiff because the poster was incidental to the television program, or did not cause one to view the program. *Id.*, at 80. It rejected the “incidental-use” argument on the ground that the same could be said of virtually all set decorations and would expand “fair use to permit wholesale appropriations of copyrighted art for movies and television.” Incidental use as a test “makes it far too easy for a defendant to invoke the fair use defense.” *Id.*

Similarly, in another case relied on by the Court in *Bouchat IV*, 619 F.3d at 310, the Court, in *On Davis v. The Gap, Inc.*, 246 F.3d 152, 173-76 (2d Cir. 2001) (Leval, J.),² held that one piece of non-functional jewelry worn over the eyes in the manner of eyeglasses by one of seven individuals depicted in a photograph utilized in an advertisement for Gap clothing was not a transformative use of the jewelry, pointing out that the advertisement featured the eyeglasses in the manner in which they were made to be worn. The Court in *Bouchat IV* followed *On Davis* and *Ringgold*:

[J]ust as in *Ringgold* and *On Davis*, there is nothing transformative in the use of the Flying B Logo in the season highlight films. The Flying B Logo remains a logo used to identify the Ravens, just like the decorative poster in *Ringgold* remained a decorative poster, and just like the decorative eyewear in *Davis* remained decorative eyewear worn as nonfunctional jewelry.

Bouchat IV, 619 F.3d at 310.

THE DECISION IS IN CONFLICT IN PRINCIPLE WITH THE DECISIONS OF THE FIRST AND SECOND CIRCUITS FINDING TRANSFORMATIVE USE OF PICTORIAL WORKS.

In *Nunez*, 235 F.3d at 22-23, the newspaper's alleged-infringing publication of a professional

²Pierre N. Leval, Toward a Fair Use Standard, 103 *Harv. L. Rev.* 1105, 1111 (1990), is cited throughout the *Campbell* opinion. See *Campbell*, 510 U.S. at 576 & n.8, 578 & n.10, 579, 585 n.18, 586, 587, 591 & n.21, 592 & 593 n.23.

photographer's photographs of Miss Puerto Rico Universe posing naked, which were originally intended to appear in modeling portfolios, had become the subject of a public controversy. In assessing the first statutory factor, the First Circuit expressly rejected the premise that the photographs were necessarily fair use merely because the photographs were used for news purposes or that newsworthiness was *per se* fair. *Nunez*, 235 F.3d at 22-23 (citing *Harper & Row*, 471 U.S. at 561). "[B]y 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.'" *Nunez*, 235 F.3d at 23 (quoting *Campbell*, 510 U.S. at 579).

In *Bill Graham Archives*, 448 F.3d 605, a case relied upon by the courts below (Pet. App. 16a-18a, 23a, 33a, 35a, 57a-58a, 61a) and the Court in *Bouchat IV*, 619 F.3d at 310, the Second Circuit held the use of a copyrighted concert ticket and concert posters to be transformative when used in a lengthy, creative, biographical work that traced the history of a rock band, the Grateful Dead. The appropriating work displayed the copyrighted works in significantly reduced size and format so that the details of the images were barely visible and arranged them in a creative fashion to illustrate and explain historic events in combination with a prominent time line, textual material and original graphical artwork presented in a collage of text and images on each page of the book. The copyrighted concert ticket and concert posters were, in part, the subject of textual commentary. *Bill Graham Archives*, 448 F.3d at 608-12 & n.3&4.

Similarly, in *Blanch v. Koons*, 467 F.3d 244, 251-54 (2d Cir. 2006), the Court found transformative use where the accused artist excised from a copyrighted photograph in a fashion magazine a pair of lower legs, which the artist manipulated and blended into an artistic collage commenting on popular culture. See also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114-15 (2d Cir. 1998) (photograph showing body of pregnant woman and face of male actor, which advertised forthcoming movie, was transformative); *Cariou v. Prince*, 714 F.3d 694, 698 (2d Cir.) (alteration and incorporation of photographs from a published book into a series of paintings and collages was fair use in 20 of 25 instances), *cert. denied*, ___U.S. ___, 134 S. Ct. 618 (2013).

THE DECISION CONFLICTS WITH THE FOURTH CIRCUIT'S PRIOR DECISION IN *BOUCHAT V. BALTIMORE RAVENS LTD. P'SHIP*, 619 F.3d 301, AND FOLLOWS THE DISSENT IN THAT CASE THAT URGED SUPREME COURT REVIEW ON THE SAME ISSUES PRESENTED IN THIS CASE.

In *Bouchat IV*, relying on the Second Circuit decisions in *Ringgold*, *On Davis* and *Bill Graham*, the Fourth Circuit rejected the District Court's conclusion that the use of the logo was transformative because the highlight films were "primarily historic:" "Merely labeling a use as historical does not create a presumption of fair use. Even the six uses specifically listed in the preamble to § 107 do not create presumptive categories of fair use protection. A transformative purpose is also required." *Bouchat IV*, 619 F.3d at 309-10; *accord*

Ringgold, 126 F.3d, at 78-80; *On Davis*, 246 F.3d at 173-76; compare with *Bill Graham Archives*, 448 F.3d at 608. The Court specifically rejected the premise that the dramatic editing, music, narration and historical purpose of the appropriating works transformed the use of the infringing logo. *Id.*, at 309. “[T]he character of the use in the highlight films is particularly indefensible because the Ravens and the NFL are exploiting to their commercial advantage the original infringements.” *Id.*, at 313-14.

The Fourth Circuit also held in *Bouchat IV* that “[t]he district court erred in minimizing the display of the Flying B logo as ‘incidental to the primary [historical] purpose [of the films]’ as ‘a taking may not be excused merely because it is insubstantial with respect to the *infringing* work,’ for ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’” *Id.*, at 312 (quoting *Harper & Row*, 471 U.S. at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.) (Hand, J.), *cert. denied*, 298 U.S. 669 (1936))); see also *Harper & Row*, 471 U.S. at 565 (“Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”).

By contrast, Judge Niemeyer, in his dissent in *Bouchat IV*, took the position that the use was transformative because the logo was an incidental and necessary part of the Ravens’ recounting of their history: “The incidental and necessary display of the Flying B Logo in connection with these items is totally transformative of the use of the Flying B

Logo--changing from its use as the symbol identifying the Ravens franchise to its use as an incidental and necessary part of history.” *Bouchat IV*, 619 F.3d at 320-21 (Niemeyer, dissenting). Thus, Judge Niemeyer invited the NFL to file a petition for this Court’s review to instruct the Court of Appeals “that the Ravens’ incidental and necessary use of the Flying B Logo in memorabilia and game highlights is transformative--the heart of the fair use doctrine...” *Id.*, at 322. The NFL elected to not file a petition for writ of certiorari with the Court.

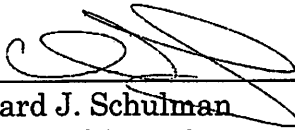
Here, as in *Bouchat IV*, Respondents displayed the infringing logo in its entirety, without any change from the manner in which it was displayed in those years in which the videos were infringing uses. The District Court employed virtually the same rationale in the instant cases as was previously rejected and reversed in *Bouchat IV*. Making no reference to Judge Niemeyer’s dissent in *Bouchat IV*, the Decision in this case effectively followed Judge Niemeyer’s dissent and thesis that the NFL’s display of the Flying B Logo in film segments was a transformative use because the display of the logo was incidental and necessary to the historical purposes of the videos. Without saying as much, the Decision adopted Judge Niemeyer’s dissent that the logo on the helmets was no longer used to identify players on the field but was an incidental historical use of a discontinued, corporate-brand identifier. (Pet. App. 15a-20a). Similarly, the Court of Appeals also held in this case that the Ravens’ display of the logo in the Club Level Lounge of the stadium was incidental to a broader, historical display and purpose. (Pet. App. 28a-35a). The logo was no

longer a logo, but a historical artifact. (Pet. App. 32a).

CONCLUSION

Petitioner, Frederick E. Bouchat, respectfully requests that the Supreme Court of the United States grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'H. Schulman', is written over a horizontal line.

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