



Publication of Noelia's Secret Wedding Photos Not Fair Use, Ninth Circuit Finds

September 27, 2012

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The Ninth Circuit Court of Appeals held that a gossip magazine's publication of photographs of a secret celebrity wedding did not constitute fair use under the Copyright Act. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. Aug. 14, 2012).

Noelia Lorenzo Monge, the Puerto Rican pop singer and model known to the world as Noelia, married her manager, Jorge Reynoso, in January 2007. The couple attempted to keep their marriage a secret to maintain Noelia's image as a single sex symbol. Only the minister and two chapel employees witnessed the wedding ceremony. For two years Noelia and Reynoso succeeded in keeping their marriage a secret, even from their families.

In the summer of 2008, Oscar Viqueira, a paparazzo who worked as a driver and bodyguard for Noelia and Reynoso, discovered a memory chip containing photographs of the wedding night. Viqueira sold the photos to Maya Magazines for \$1,500, without Noelia's or Reynoso's permission.

Maya published three photos of the wedding ceremony, and three additional photos from the wedding night, in Issue 633 of TVNotas Magazine. Until then, the photos had been unpublished. The TVNotas cover headline stated: "The Secret Marriage of Noelia and Jorge Reynoso in Las Vegas." The photo spread inside referred to the "first and exclusive photos of the secret wedding." Issue 633 was the first time the public learned of the wedding – including Reynoso's mother, who berated her son for getting married without telling her.

Noelia and Reynoso promptly registered the copyrights in five of the photos and then brought suit against Maya for copyright infringement. The Central District of California granted summary judgment in favor of Maya based on fair use. 2010 WL 3835053 (Sept. 30, 2010). The Ninth Circuit reversed.

Fair use is an affirmative defense to copyright infringement. The fair use doctrine, the Ninth Circuit explained, presumes that unauthorized copying has occurred but protects such copying under



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certain circumstances. Section 107 of the Copyright Act enumerates four factors for courts to consider in evaluating a fair use defense:

- (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.

With regard to the important first factor, the Ninth Circuit recognized that Maya's sensational coverage of the wedding qualified as news reporting, but this was not sufficient to establish fair use. Maya's use was purely commercial. Moreover, it was minimally transformative: "Maya left the inherent character of the images unchanged." The court rejected Maya's claim that publication of the photos as an exposé amounted to a meaningful transformation. It emphasized that the photos were not necessary for Maya to inform the public of the wedding. Maya could just as easily have published the marriage certificate, a matter of public record.

Although Maya's reporting on the clandestine wedding was newsworthy, newsworthiness, by itself, is insufficient to demonstrate fair use. Similarly, exposing truths in the public interest is not a bell weather of fair use.

Turning to the second fair use factor, the court noted that photographs are "generally viewed as creative, aesthetic expressions ... and have long been the subject of copyright." This is the case even where a photo documents an event. The court pointed to "iconic" photos such as the sailor's kiss in Times Square on V-J Day, the first landing on the moon, and the falling of the Berlin Wall.

Moreover, the unpublished nature of the photos was "key." The court relied on *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 555 (1985): "Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."

Harper & Row involved the unpublished memoirs of President Ford. Just before Time Magazine was scheduled to publish an excerpt, the Nation Magazine ran an article that included verbatim quotations from the book, which it had obtained from an unauthorized source. The Supreme Court found that this conduct was not fair use and could constitute copyright infringement. *Harper & Row* makes clear, the Ninth Circuit explained, there is no "fair use free pass to news reporting on public figures."

The Ninth Circuit also found that the third fair use factor – "amount and substantiality" – weighed against fair use, both quantitatively and qualitatively. Maya published the six photographs largely in their entireties, with only minimal cropping. While Maya served a "legitimate role as a news gatherer," the court explained, "one clear portrait depicting the newly married couple in wedding garb with the priest would certainly have sufficed to verify the clandestine wedding."

Finally, the court considered the fourth fair use factor, "the effect of the use upon the potential market." It found that this factor, "the single most important element of fair use," also did not help Maya. Clearly there was a market for the photos; indeed, Noelia and Reynoso were in the business of selling images of themselves. Moreover, Maya regularly paid for celebrity wedding photos – including those at issue as well as others in the same publication. The court was unmoved by the fact that Noelia and Reynoso had not shown any interest in publishing their photos, because the relevant consideration is the *potential* market. In any event, a copyright owner is free to change her mind. Maya's publication of the photos acted as a "market replacement," depriving Noelia and Reynoso of the ability to sell them should they so choose. "[A]fter the publication of Issue 633, the bottom literally dropped out of the market – neither Maya nor anybody else is likely to purchase these pictures from the couple."

In summary, the Ninth Circuit found that none of the Section 107 factors favored fair use. Thus, the district court's ruling was in error. "Waving the news reporting flag is not a get out of jail free card in the copyright arena," the court explained.

Judge Smith disagreed with the majority's reasoning in an impassioned dissent. In his view, the decision was inconsistent with Supreme Court precedent and "thwarts the public interests of copyright by allowing newsworthy public figures to control their images in the press."

Under the majority's analysis, public figures could invoke copyright protection to prevent the media's disclosure of any embarrassing or incriminating works by claiming that such images were intended only for private use.

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[P]ublic figures should not be able to hide behind the cloak of copyright to prevent news media from exposing their fallacies.

Monge, like *Harper & Row* before it, forced the court to address the conflict between copyright protection, on the one hand, and unbridled access to matters of public interest, on the other. The difficulty in squaring these competing interests helps make the fair use doctrine, as the court remarked, one of "the most troublesome in the whole law of copyright."

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