

## Copyright Counsel Eager for Clarity on Fair Use for Viral Videos



On July 7, Michael Bautista captured a video on his cellphone from the scene of the shooting in Dallas, Texas, that left five police officers dead. Within 24 hours, the three-minute video was purchased by ViralHog LLC, a Montana-based startup, and anyone, including the media, would need to pay a licensing fee to use it or be subject to a copyright infringement claim.

The monetization of viral videos has been gaining traction as startup companies, such as ViralHog or Jukin Media Inc., acquire video and capitalize on its popularity. While initially those videos featured cute animals and unfortunate flops, there has been a slight shift in direction at the companies as police and civilian violence has been increasingly caught on film.

For Laurence Pulgram, co-chairman of the copyright litigation group with Fenwick & West in San Francisco, there's a difference between an entertaining cat video and a history-changing tragedy in terms of monetization and whether the fair use defense should apply.

"Fair use is certainly a topic that attorneys are always scratching their heads over," Pulgram said about the notoriously fact-intensive doctrine. "When a client comes to you and asks 'Is this OK?' the challenge is to run through cases that are most similar to your client's in order to make a gut check on whether or not something qualifies as fair use," said Pulgram.

The problem, though, is that there are no cases dealing with the monetization of viral videos that depict serious news.

“Will someone challenge them? That’s to be seen,” said Emily Campbell, who leads the trademark and copyright group at Dunlap Codding in Oklahoma. “Will someone challenge these groups who are monetizing viral videos?”

What’s happening, Campbell said, is that companies such as ViralHog are taking advantage of the uncertainty.

ViralHog founder Ryan Bartholomew, on the other hand, says the law is clear. “Whether a video is of a funny cat or a tragic event, the videographer owns their work and is entitled to control it,” he told Fortune in July. “A viral video will always be monetized by someone, and representation can ensure a video’s owner reaps the benefits rather than those who steal it.”

The idea behind obtaining copyrights for videos of major news events is not new. The Zapruder film from President John F. Kennedy’s assassination generated litigation 50 years ago. The 26.6-second video provides the most detail as to what happened on Nov. 22, 1963.

Abraham Zapruder sold the footage to Life magazine but three years later, a former Life employee wanted to use images from the film in his own book about the assassination. He had an artist recreate the images but was sued by Life for copyright infringement, a lawsuit which brought fair use into play. The court ruled in the employee’s favor, arguing that the public should have all possible information surrounding Kennedy’s assassination.

In terms of the commercial factor of selling a book for profit containing sketches of the film, the court found that “the book is not bought because it contained the Zapruder pictures; the book is bought because of the theory of [the author] and its explanation, supported by Zapruder pictures.”

Meanwhile, the text of Martin Luther King, Jr.’s “I have a dream” speech is considered private property despite the mass media coverage. His estate was able to enforce the copyright, which he obtained in the days after his speech, in a court case against CBS News in 1999, when the network refused to pay the estate royalties for using the text. The court ruled that even though he gave the speech in public and distributed the speech to news outlets, those actions did not constitute public distribution because of the copyright he’d obtained.

So while copyrights and historic events have intersected before, the “new factor,” Pulgram said, “is the intermediary who stepped in and built a business around it.”

“Copyright law is supposed to incentivize the creation of useful arts and sciences,” Pulgram said. “And here we’ve got a situation where the purchaser of the work did not need to be incentivized to create it. It was created because someone was at the tragic place at the tragic time.”

That makes strong copyright protection less important from a policy perspective, Pulgram says. Then, “a commercial intermediary steps in to invest in and make money by the distribution of the work. Now we have a commercial factor.”

Pulgram, who represents broadcast media outlets, said organizations have a choice when it comes to licensed viral videos: Pay the licensing fee or don’t use the video.