

2013 WL 1415263 (C.A.4) (Appellate Brief)
United States Court of Appeals, Fourth Circuit.

Frederick E. BOUCHAT, Plaintiff-Appellant,

v.

BALTIMORE RAVENS LIMITED PARTNERSHIP, Defendant-Appellee,

Frederick E. Bouchat, Plaintiff-Appellant,

v.

NFL Enterprises LLC; NFL Network Services, Inc.; NFL Productions LLC, d/
b/a NFL Films, a subsidiary of NFL Ventures L.P., Defendants-Appellees.

Nos. 12-2543(L), 12-2548.

April 9, 2013.

On Appeal from the United States District Court for the District of Maryland at Baltimore

Brief of Amici Curiae International Documentary Association, Motion Picture Association of America, Inc., and Film Independent in Support of Defendants-Appellees and Urging Affirmance

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*1 I. STATEMENT OF INTEREST

This case concerns significant free speech interests and the right to use copyrighted material to document, depict, and discuss historical events. This right is critical to filmmakers (particularly of documentaries and docudramas), news organizations, public broadcasters, television networks, and anyone else who wants to present a truthful, realistic, accurate account of events in any audio or visual medium. *Amici curiae* in this case include the International Documentary Association, a nonprofit organization dedicated to promoting nonfiction filmmakers and increasing public awareness of the documentary film genre, the Motion Picture Association of America, Inc., a nonprofit trade association founded in 1922 to address issues of concern to the motion picture industry, and Film Independent, a nonprofit organization dedicated to helping independent filmmakers make their films; building the audience for independent film; and increasing diversity in the film industry. Each organization represents members who create or distribute films, including documentaries and other works of non-fiction, concerning a variety of historical and other subjects. Each has a keen interest in ensuring its members' fair use protections remain robust and intact.

Plaintiff-Appellant Bouchat asks this Court for an overbroad application of its ruling in *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010) *2 (“*Bouchat IV*”); effectively, he seeks the right to control any use of the Baltimore Ravens' “Flying B Logo” that is even remotely commercial, regardless of the context. Bouchat seeks the power to rewrite history. If accepted, the reach of Bouchat's position would not be limited to the Baltimore Ravens or the NFL. Filmmakers cannot accurately and effectively depict the real world or create historical narratives without relying on copyrighted material, which is why a long line of fair use decisions protects their right to do so without permission from copyright holders. These decisions protect this right to ensure creators freedom from the demands and conditions copyright holders would inevitably set on such a grant of permission (or the flat refusal of such permission). This case presents an important opportunity to reaffirm that copyright law does not permit copyright owners to hold historical facts hostage.¹

II. ARGUMENT

If this Court accepts Bouchat's expansion of *Bouchat IV* and adopts the rule he seeks, that decision would fly in the face of the controlling fair use standard *3 articulated by the United States Supreme Court, and conflict with an established and settled body of decisions holding that fair use protects historical and biographical uses like those at issue here, whether or not they are undertaken for profit. This conflict, in turn, would significantly--and negatively--influence *amici's* ability to engage in the precise type of cultural discourse copyright law intends to promote. *Bouchat IV's* holding must therefore be limited to the specific facts of that case.

A. Bouchat's Claims Affect Exceptionally Important Speech and Expression Rights

Bouchat asks this court to adopt a rule that would depart from well-established precedent and would have the potential to interfere with important speech and expression rights. Bouchat seeks nothing less than a *de facto* right to control the depiction of facts--in this case, events that actually happened on the football field--simply because those facts include the fact that the players wore uniforms that include Bouchat's copyrighted logo. It is antithetical to the purposes of copyright to use it to force an inaccurate depiction of actual events.

The potential impact of Bouchat's claims is not limited to the Baltimore Ravens or the NFL. Many historical subjects cannot be discussed effectively without the use of copyrighted material. It would be difficult, for example, to make an effective biography of an actor without including audiovisual clips depicting his *4 work, in order, for example, to illustrate a point about his career and impact, *Hofheinz v. A & E Television Networks*, 146 F.Supp.2d 442, 446-47 (S.D.N.Y. 2001) (finding transformative

film footage used for the purpose of enabling the viewer to understand the actor Peter Graves' modest beginnings in the film business), or to create a comprehensive study of surrealist art without including works by Salvador Dali, to accompany the author's commentary, see *Warren Publ'g Co. v. Spurlock*, 645 F.Supp.2d 402, 419 (E.D. Pa. 2009). It would be nearly impossible to document any sliver of life in a major American city without capturing vast numbers of logos, signs, billboards, and other copyrighted works along the way. Cf. *ESS Entm't 2000 v. Rock Star Videos*, 547 F.3d 1095, 1100 (9th Cir. 2008) (“Possibly the only way, and certainly a reasonable way, to” recreate “look and feel” of city was “to recreate a critical mass of the businesses and buildings that constitute it,” even if protected by trademark). It would be similarly impossible to make a documentary about the healthfulness of McDonald's food (*Super Size Me*) or Wal-Mart's business practices (*Wal-Mart: The High Cost of Low Price*) without depicting each company's logo.²

*5 Bouchat asks this Court to set forth a rule that would require permission for uses like these. That rule would have a profoundly negative impact on free speech and expression because rights-holders would demand some control over the way individuals or organizations are portrayed, or simply choose to prohibit unflattering or disfavored depictions. In fact, such demands already often occur in the biographical publishing field. See, e.g., Gordon Bowker, *An End to Bad Heir Days: The Posthumous Power of the Literary Estate*, THE INDEPENDENT (Jan. 6, 2012) (discussing Stephen James Joyce's “truculence” regarding providing permission to scholars interested in studying James Joyce to quote the author's works and letters).

But even if rights-holders could be expected not to demand formal control, the cost of requesting, negotiating, and obtaining permission for every copyrighted logo or other artwork captured as an incidental and necessary part of any real-life scene would often be prohibitive or simply unimaginable. A basic shot of an urban commercial center like Times Square could require hundreds of negotiations. *6 These obstacles would create a profound chilling effect on the speech of anybody who wants to create documentaries or any other work of non-fiction. Even the idea that these uses *might* require a license will chill a great deal of speech and tend to circumscribe the public's legal rights to freely use copyrighted works. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L.J. 882, 884 (2007).

The concerns about chilling effects are no less salient because Bouchat recognizes certain uses he would consider to be “fair”—namely, “the use of the video clips in a sports museum from which the original infringers obtain no commercial benefit[]” and “when a local Baltimore television station, in a pre-Super Bowl show, shows a short clip of Ray Lewis tackling San Francisco 49ers' head coach, Jim Harbaugh, while he quarterbacked for the Indianapolis Colts in 1996.” Petr. Br. at 39-40. As the Supreme Court recently wrote in a major copyright case regarding the first sale doctrine:

[T]he fact that harm has proved limited so far may simply reflect the reluctance of copyright holders so far to assert [their] rights. They may decide differently if the law is clarified in their favor. Regardless, a copyright law that can work in practice only if unenforced is not a sound copyright law. It is a law that would create uncertainty, would bring about selective enforcement, and, if widely unenforced, would breed disrespect for copyright law itself.

Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. _____, slip op. at *24 (2013). In order to avoid such uncertainty, this Court should clarify that fair use does not *7 shield only those uses the rights-holder considers “fair.” Rather, a use can and should be found fair regardless of the rights-holder's feelings towards the work; any other rule would create uncertainty, selective enforcement, and disrespect for the law.

B. Bouchat Misstates Well-Established Fair Use Principles, and Overstates The Holding in *Bouchat IV*

Bouchat has mischaracterized multiple key aspects of the fair use inquiry in his brief in this case, including the scope of the transformativeness requirement and the existence (or lack thereof) of a presumption against commercial uses. Bouchat advocates for a rule that would mean the appearance of a copyrighted logo or other artwork captured incidentally and unavoidably in the course of a non-fictional narrative constitutes copyright infringement. Bouchat argues that this Court decided this issue and

applied just such a rule in *Bouchat IV*. But Bouchat exaggerates the scope of this Court's holding in *Bouchat IV* in a manner that would greatly impinge on documentarians' (and other creators') ability and willingness to engage in crucial cultural commentary.

Bouchat's arguments depend on an improperly narrow interpretation of transformative use, and ultimately turn the fair use analysis into a single factor test of whether or not a use is commercial. Neither the case law generally, nor this *8 Court's decision in *Bouchat IV*, supports Bouchat's position. The district court rightly rejected Bouchat's claims, and this Court should affirm.

1. Bouchat's Broad Reading of *Bouchat IV* Contradicts Supreme Court Precedent On Transformativeness and Commerciality

Copyright plays a vital role in incentivizing the creation of expressive works, enriching our culture with everything from lighthearted entertainment to serious non-fiction works that spark literary and social change. Indeed, as the Supreme Court has repeatedly emphasized, “the Framers intended copyright itself to be the engine of free expression.” *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). The fair use doctrine is designed to ensure, however, that copyright does not itself encroach on free expression. It is a critical “First Amendment safeguard [],” *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003), designed to prevent copyright law from stifling the very creativity copyright law is meant to encourage. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). The four non-exclusive factors listed in Section 107 of the Copyright Act guide the Court's fair use decision-making. See 17 U.S.C. § 107. No one factor is determinative; rather, the factors must be “weighed together, in light of the purposes of copyright” to incentivize the creation of new expression. See *9 *Campbell*, 510 U.S. at 578 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110-11 (1990)).

The first factor analyzed in the fair use test is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). As the Supreme Court teaches in *Campbell*, and as this Court recognized in *Bouchat IV*, the focus of the first factor is on whether the use is “transformative”—whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”—or instead simply “supersede [s] the objects” of the original. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 Fed. Cas. 342, 348 (1841)); *Bouchat IV*, 619 F.3d at 309-10. Works that use the original “in a different manner or for a different purpose” can be transformative. *Bouchat IV*, 619 F.3d at 309-10 (quoting *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630, 638 (4th Cir. 2009) (quoting Leval, *supra*, at 1111)). Much creative culture is iterative; new works often do not arise in a vacuum, but rather are influenced by and draw upon the creative works that came before. As the Supreme Court held in *Campbell*, highly transformative works lie at the heart of fair use's protection: they are the new expression that copyright law is meant to promote. See *Campbell*, 510 U.S. at 579. Thus, a new work's transformativeness weighs heavily in the four-factor fair use inquiry. *Id.*

*10 Bouchat's reading of *Bouchat IV* directly contradicts this aspect of *Campbell*, and threatens the free speech values at the heart of fair use. Bouchat attempts to leverage *Bouchat IV* to reduce well-established protections for historical uses by narrowing the scope of transformativeness and reintroducing a now-invalid presumption against commercial uses the Supreme Court expressly rejected in *Campbell*.

a. Courts Have Consistently Found the Appropriate Use of Copyrighted Works in Historical, Biographical, and Other Non-Fiction Works to be Transformative, Particularly Where Necessary to Accurately Portray History

As noted above, the transformativeness inquiry asks whether the new work “adds something new”—such as new expression or a differing purpose—or instead “supersede[s] the objects” of the original. Section 107's examples—criticism, comment, news reporting, teaching, scholarship, and research—may guide the inquiry, but they do not fully delimit it. *Campbell*, 510 U.S. at 584.

Applying *Campbell*, courts across the country have held that the use of copyrighted works in the context of historical, biographical, and other non-fictional works may be transformative, especially where necessary to accurately portray history.

SOFA Entm't, Inc. v. Dodger Prods., Inc., No. 2:08-cv-02616, slip op. at *8 (9th Cir. Mar. 11, 2013) (producer's use of seven-second clip from *The Ed Sullivan Show* in the musical *Jersey Boys* to mark a historical point in the Four Seasons' career was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (book publisher's use of Grateful Dead concert posters in illustrated history of the band was transformative where publisher used the posters as "as historical artifacts to document and represent the actual occurrence" of events); *Warren*, 645 F.Supp.2d at 419 (use of artist's work in biography/retrospective chronicling his career held transformative); *Monster Commc'ns., Inc. v. Turner Broad Sys., Inc.*, 935 F.Supp. 490, 493-94 (S.D.N.Y. 1996) (television network's use of approximately one minute of boxing footage was transformative in biography of Muhammad Ali); *Hofheinz v. AMC Prods., Inc.*, 147 F.Supp.2d 127, 137 (E.D.N.Y. 2001) (television network's use of film clips from monster movies in documentary about that film genre held transformative); *Hofheinz*, 146 F.Supp.2d at 446-47 (television network's use of film clips from actor's early motion picture appearances in feature-length biography held transformative).

Courts also recognize that fair use protection is especially important where it would be impossible to create a work of non-fiction without depicting the copyrighted works--even when works are depicted in their entirety. *See, e.g., Ty, Inc v. Publ'ns Int'l Ltd*, 292 F.3d 512, 521 (7th Cir. 2002) (copyright on appearance of stuffed toys should not create second monopoly in collector's *12 guides). To permit a copyright owner control on the facts of such cases would be to allow the copyright owner *de facto* control over facts--something the Supreme Court has consistently found impermissible; copyright permits control over *expression*, not facts or ideas. *See Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., Inc.*, 499 U.S. 340, 345-46 (1991); *see also Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003).

The Ninth Circuit's recent decision in *SOFA Entertainment* demonstrates how settled the question of fair use is for historical uses similar to those at issue here, and it underscores the weakness of Bouchat's claims. In *SOFA*, the plaintiff challenged the producer of the musical *Jersey Boys*' use of a seven-second clip from *The Ed Sullivan Show* to mark a historical juncture in the Four Seasons' career. The Court of Appeals not only affirmed the grant of summary judgment in the defendant's favor, it also affirmed the award of attorneys' fees to the defendant. *SOFA Ent'mt, Inc.*, No. 2:08-cv-02616, slip op. at *12-13. Finding the use "undoubtedly 'fair' " (*id.* at *6) and the plaintiff's case objectively unreasonable, the Ninth Circuit affirmed the award of attorneys' fees to discourage "lawsuits of this nature ... [which] have a chilling effect on creativity insofar as they discourage the fair use of existing works in the creation of new ones." *Id.* at *12-13.

*13 *Amici's* members rely on this firmly established body of law when they create documentaries and other biographical and historical works. So established is the practice that insurance providers are now willing to insure filmmakers' unlicensed uses of copyrighted material to document history and accurately depict reality. *See* Comment of Int'l Documentary Ass'n et al, *In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Sys. for Access Control Techs.*, Docket No. RM 2011-07 at *6 (Dec. 1, 2011) (describing "errors and omissions" ("E&O") insurance). Adopting Bouchat's rule would upend *amici's* ability to rely on these cases and create a great deal of practical confusion, thereby jeopardizing individual filmmakers' ability to procure insurance. Without insurance, many filmmakers would simply be unable to disseminate their works to the public. *See id.* ("Today, all film distributors require that documentary filmmakers obtain E&O insurance prior to distribution.") And without the *possibility* of insurance, many filmmakers would simply never create their works. Both of these outcomes are completely out of step with free speech values and the purpose of copyright law.

Creators must be able to use copyrighted material as historical artifacts and to accurately depict real world scenes and events in the telling of new and engaging stories that lend insight into our world and contribute to public learning. Filmmakers, biographers, historians, and many others rely on these materials in *14 their new works to draw insights and meaning from historical or biographical events. To allow copyright owners to control historical facts in the way Bouchat seeks would be to allow them control over the history itself--history cannot be retold accurately, objectively, and from different perspectives when an interested party maintains the power to squelch its telling. Weighty speech interests would be significantly negatively affected by such control.

b. Bouchat Ignores the Context of the Use and *Bouchat IV*'s Acceptance of Incidental Historical Uses Made for Their Factual Content

In *Bouchat IV*, this Court recognized what most other courts to consider the matter have: using copyrighted material for its “factual content” can, in appropriate circumstances, be a non-infringing, transformative use. See *Bouchat IV*, 619 F.3d at 313-16 (“The season tickets and the player photos adorned with the logo are displayed to represent the inaugural season and the team's first draft picks. In this way, the logo is used ‘not for its expressive content, but rather for its ... factual content.’”) (quoting *Bond*, 317 F.3d at 396); see also *Bill Graham Archives*, 448 F.3d at 609 (publisher's use of Grateful Dead posters as “historical artifacts to document and represent the actual occurrence of Grateful Dead concert events” was “plainly different” than the original purpose for which the posters were created); *SOFA Entm't, Inc.*, No. 2:08-cv-02616, slip op. at *8-9 (defendants' use *15 of *Ed Sullivan* clip was not for its own entertainment value but as a “biographical anchor” to tell the story of the Four Seasons).

Determining whether a use is made for its “factual content” necessarily depends on the context in which the material is used. Examining the context and purpose of the use is the key to determining whether a use is transformative because it is precisely the context that provides new insights, meaning and message. This is the crucial breathing space fair use provides to document, depict, and discuss historic events. Bouchat ignores the context and purpose of the use and calls for a blanket rule that would mean copyrighted material cannot be used even if incidentally and unavoidably captured in the telling of a historical, non-fiction narrative. The law is not so constrained, and *Bouchat IV* does not hold otherwise.

Bouchat tries to bury this Court's analysis of the specific use's context by generalizing and asserting that the documentary videos at issue here--the Top Ten Series: Draft Classes and Draft Busts Episodes, and the Sound FX Series: Ray Lewis Episode (collectively, the “Documentaries”)--are the same as the highlight films in *Bouchat IV* simply because the Documentaries contain depictions of the infringing logo on the players' uniforms and the films are displayed in a commercial context. Petr. Br. at 47-48. But the reasons the Court found the highlight videos infringing in *Bouchat IV* do not apply to the works at issue here. There, the Court held that the highlight films were not transformative because it *16 concluded Defendants had not altered the context in which the logo appeared to differentiate it from the original infringing use. *Bouchat IV*, 619 F.3d at 309.³

Here, by contrast, and as the district court correctly found, the Documentaries add significant content and context to the video and stills utilized therein. See *Bouchat v. NFL Props. L.L.C., et al.*, Case No. 1:12-cv-01495, slip op. at *23-28 (D. Md. Nov. 19, 2012). The Documentaries are not like the highlight films because they are biographies and historical narratives in which the Flying B Logo necessarily and fleetingly appears as an incidental historical artifact. *Id.* at *23-24. The district court correctly found, “Each use in these films adds something new by representing factual content, documenting and commenting on historical events, or functioning as a biography or career retrospective.” *Id.* at *25 26.

To expect documentarians, biographers, news reporters, and others to “airbrush history” by artificially removing such incidental, fleeting uses in order to avoid a claim of copyright infringement, as Bouchat does, is troubling at best, and a flagrant denial of important speech rights at worst. Just as it would be difficult to *17 produce a television biography of an actor that accurately illustrates the arc of his career without using clips from his work, see *Hofheinz*, 146 F.Supp.2d at 446-47, so too would it be impossible to tell any story about the NFL, the Ravens, any individual player on the Ravens, or even the story of a player totally orthogonal to the Ravens organization whose team simply happened to play the Ravens between 1996 and 1998 without incidentally showing the Flying B Logo. See also *Monster Commc'ns., Inc.*, 935 F.Supp. at 493-94 (television network's use of boxing footage was transformative in biography of Muhammad Ali).

c. Bouchat's Conclusions Hinge On Commerciality, a Presumption the Supreme Court Rejected in *Campbell*

Bouchat's brief makes clear that the only distinction between what the Court held was not infringing in *Bouchat IV* (the Ravens' display of photos and tickets at its corporate headquarters) and the conduct Bouchat claims infringes here, is whether it is undertaken as part of a commercial endeavor. Petr. Br. at 35-39. Bouchat argues that a use's commercial character is the defining

factor in the fair use analysis, but that suggestion is directly contrary to Supreme Court precedent and is not what this Court held in *Bouchat IV*.

In *Campbell*, the Supreme Court expressly rejected a presumption against fair use when the defendant's work is commercial in nature. *18 *Campbell*, 510 U.S. at 584 (it was “error” for lower court to “apply[] a presumption that every commercial use of copyrighted material is presumptively.. unfair.”) (internal citations and quotation marks omitted). Rather, commerciality is simply a single point of analysis in one of four statutory factors, balanced with the other factors in light of copyright's purpose, and where, as here, the secondary work is highly transformative, its commercial nature weighs even less in the analysis. See *id.* at 579 (“[t]he more transformative the new work, the less will be the significance of other factors, like commercialism”). *Campbell's* rejection of this presumption has been recognized time and again by the Circuit courts. See *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477-78 (2d Cir. 2004); *Bill Graham Archives*, 448 F.3d at 612; *SOFA Entm't, Inc.*, No. 2:08-cv-02616, slip op. at *9; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001). See also Michael Donaldson, *Refuge From The Storm: A Fair Use Safe Harbor For Non-Fiction Works*, 59 J. Copyright Soc'y 477, 515-16 (2012) (collecting fair use decisions involving non-fiction works and concluding commerciality did not affect the outcome in any case).

Bouchat IV follows this precedent by varying the weight given to commerciality when compared to the transformativeness of the Defendants' uses. The more transformative the work, the less heavily commerciality weighed in the analysis. See, e.g., *Bouchat IV*, 619 F.3d at 311 (“Because defendants' use of *19 *Bouchat's* logo is non-transformative, we have no hesitation in concluding that the commercial nature of the use weighs against a finding of fair use.”) (citing *Campbell*, 510 U.S. at 579).

Here Bouchat distorts *Bouchat IV* to resurrect the presumption that *Campbell* buried: he cites *Bouchat IV* for the proposition that “the core commercial purpose” of the Documentaries “does not align with the protected purposes of § 107,” Petr. Br. at 39 (quoting *Bouchat IV*, 619 F.3d at 308), and concludes on that basis that Defendants' use must not be fair. But *Campbell* refutes this exact presumption and also explains the preamble is a guide, not a limitation. *Campbell*, 510 U.S. at 579. Indeed, even the examples given in the preamble are frequently commercial. *Id.* at 584.

Bouchat further relies on a presumption against fair use in the commercial context--again, one emphatically *rejected* by the Supreme Court--to argue that the Ravens' stadium displays are not a fair use, although they use the Flying B Logo for exactly the same purpose as the displays at the Ravens' headquarters that this Court held were not infringing in *Bouchat IV*. The only difference here is that viewers generally need a ticket to access the stadium, whereas there is no admission fee to the Ravens' corporate lobby. But Bouchat misses the point. Petr. Br. at 4447. In *Bouchat IV*, the Court examined the purpose and context of the Defendants' use of the logo in a “museum-like” area of the Ravens' headquarters *20 dedicated to the history of the team. The Court held this display was transformative because its purpose was to celebrate the team's history and the logo was used for its factual content. That context provided transformative meaning and purpose to the use of the logo and was therefore not infringing. *Bouchat IV*, 619 F. 3d at 314, 316.

Furthermore, Bouchat mischaracterizes the extent to which this Court in *Bouchat IV* confined its holding on the transformativeness of the uses in the Ravens' headquarters to the mode of presentation utilized there--that is, the “museum-like setting.” The Supreme Court has made abundantly clear that the mode of presenting historical facts through copyrightable expression does not-- and should not--bear on the issue of whether a use is transformative. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. _____, 131 S.Ct. 2729, 2733 (2011) (“ ‘the basic principles of freedom of speech ... do not vary’ when a new and different communication medium appears”) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). *Bouchat IV* did not so hold and, in addition, the Supreme Court has long held that copyright protects expression regardless of its source or level of erudition. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); cf. *21 *Yankee Publ'g Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”). And despite Bouchat's ludicrous assertion to the contrary, Petr. Br. at 34, as long as the work is not “simply rebroadcast for entertainment purposes,” *Elvis Presley Enters., Inc. v. Passport Video*, 349 F. 3d 622, 629 (9th Cir.

2003), there is no requirement that a historical presentation, such as a documentary, be dull and lacking in entertainment value. After all, entertainment value is in the eye of the beholder--judgment of value, entertainment or otherwise, is not a province left solely to Bouchat or any court. See *Bleistein*, 188 U.S. at 251-52.

Commerciality is not the sledgehammer Bouchat takes it for, but a chisel: it may work at the edges of a problem, but, like any other fair use factor, cannot alone strike to the center.

2. Bouchat Misapplies the Fourth Factor: No Factor Holds Precedence Over the Others

Bouchat further misstates fair use precedent in his discussion of the fourth factor. He declares the fourth factor (market effect) to be “undoubtedly the single most important element of fair use” analysis. Petr. Br. at 13 (citing *Harper & Row*, 471 U.S. at 566). Yet *Campbell* overruled *Harper & Row* on this very point and held all factors are to be weighed together. See *Campbell*, 510 U.S. at 590; *22 *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994). Under *Campbell*, “the importance of [the fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.” *Campbell*, 510 U.S. at 590 n.21. This variability is important because the more transformative a secondary work, the less it acts as a substitute for the original and therefore less weight is given to the fourth factor. Such transformative works with different expression, meaning and message are exactly the kind of works the Copyright Act is intended to promote. By rejecting the primacy of the fourth factor, the *Campbell* Court emphasized the need to weigh all factors together and to anchor the fair use determination to the ultimate goals of copyright. *Id.* at 578.

*23 C. *Bouchat IV's Limited Reach Must be Recognized: If Defendants' Uses Are Not Fair, It Is Only Because Defendants Originated the Infringement*

The warning issued by Judge Niemeyer in his dissent in *Bouchat IV* has come to fruition. Bouchat is “seek[ing] to blot out three years of Ravens football history,” *Bouchat IV*, 619 F.3d at 322-23 (Niemeyer, J., dissenting), in order to extract a “ransom” completely incommensurate with his work's value (which a jury found was zero). See *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514 (4th Cir. 2003) (affirming the jury's award of no damages); see also *Bouchat v. Bon-Ton Dep't Stores, Inc.*, 506 F.3d 315, 328 (4th Cir. 2007). As Judge Niemeyer noted in *Bouchat IV*:

[I]t would be grossly inequitable and would bear no relation to the true source of value in the memorabilia and video highlights at issue--namely, their status as historical artifacts--to allow Bouchat to leverage the incidental use of his copyrighted logo into control over the display of all images, video, and memorabilia from the first three years of Ravens history.

619 F.3d at 323 (Niemeyer, J., dissenting). If not appropriately limited, a holding that Defendants may not incorporate footage including incidental displays of the Flying B Logo could upset the settled expectations of historians, documentarians, and biographers everywhere, harming critical free speech rights and making it significantly more difficult, if not impossible, to create such works.

*24 To the extent the Court does not agree that Defendants should be permitted to release the Documentaries (or display historical memorabilia at the Ravens' stadium), it should at the very least make explicit the limited reach of its holding: Defendants' inability to display the Flying B Logo in various media is *party-specific* rather than *use-specific*. In other words, Defendants cannot claim fair use because they originated the infringement of the work, and not because there is anything presumptively or even arguably unfair about the particular types of uses at issue here.

This Court should take care not to issue a sweeping decision that could be read to suggest incidental and unavoidable depictions of copyrighted logos and other artwork in non-fiction works flunk the fair use test, or require any permission at all. Any

unclear language will be used by rights-holders to expand the scope of their rights--if not in the courts, then through cease-and-desist letters and other “bottom up” applications of the law. This will chill creators' speech and cause many to simply cut out copyrighted material needed to accurately document, depict, and discuss historic events. Fair use is already “famously ambiguous” and “the price of making the wrong call is [already] prohibitively high.” Gibson, *supra*, at 890. The Court should avoid compounding these problems by ensuring that the opinion's reach is appropriately cabined to the sliver of specific offending conduct sought to be enjoined.

*25 III. CONCLUSION

The right to use copyrighted material to document, depict, and discuss historic events is critical to documentary and other filmmakers, as well as news organizations, public broadcasters, television networks, and anyone who wants to present a truthful and accurate account of events in any audio or visual medium. This Court should reject Bouchat's arguments and ensure that its decision here does not imperil the important fair use rights that *amici* and many others have relied upon for years. *Amici* respectfully urge the Court to affirm the district court's grant of summary judgment to Defendants.

Footnotes

- 1 Defendants-Appellees consent to the filing of this brief. Bouchat does not consent. No party's counsel authored this brief in whole or in part, and no party or its counsel contributed money that was intended to fund preparing or submitting this brief. Nor did any other person contribute money that was intended to fund preparing or submitting this brief.
- 2 Trademark law also protects the type of use at issue here under a similar expressive fair use doctrine. That protection explicitly sounds in the First Amendment. See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (“[W]hen a trademark owner asserts a right to control how we express ourselves ... applying the traditional [likelihood-of-confusion] test fails to account for the full weight of the public's interest in free expression.”); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (“[I]n general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”).
- 3 Generally, *amici* respectfully disagree with the outcome of *Bouchat IV* and its holding that the incidental capture of the logo in the Ravens' historical highlight films is an infringement. Regardless, the holding in *Bouchat IV* does not preclude a finding that the uses at issue in this case are fair.