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Defendants CBS Broadcasting Inc. and CBS Interactive Inc. (collectively, “Defendants” or “CBS”) respectfully submit this memorandum in support of their motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This case arises in connection with CBS’s fleeting incidental display of a photograph taken by Plaintiff Steven Hirsch of an accused stalker that appeared in a 2010 news report in the *New York Post* (the “*Post*”). Seven years later, the CBS News program *48 Hours* reported on more accusations involving the same stalker. *48 Hours* included a two-second display of the *Post* article, and incidentally included a portion of Hirsch’s photo within the article as an example of prior news coverage garnered by the stalker. Hirsch now asserts claims for copyright infringement and removal of copyright management information arising from *48 Hours*’s trivial partial inclusion of his photo when it showed the *Post* article. Hirsch’s claims fail and should be dismissed because, among other reasons, CBS’s use of his work was *de minimis* and a fair use.

STATEMENT OF FACTS

On April 2, 2010, Hirsch, a New York City-based photojournalist, took a photograph of Justin Massler, a man accused of stalking Ivanka Trump, on the street outside of a courthouse (the “Photo”). *See* Compl. ¶¶ 5, 8 & Ex. A. Hirsch licensed the Photo to the *Post*, which used it that same day as part of an article about the case entitled “Ivanka’s stalker ordeal featured crazed talk, threats and bloody pix” (the “Article”). *See id.* ¶ 9 & Ex. B. The Article, including the Photo within it, was published online at www.nypost.com. *See id.* ¶ 9.

CBS produces and distributes the award-winning news program *48 Hours*. *See id.* ¶ 6. As part of that program, on or about February 25, 2017, CBS telecast and made available online an episode titled *Stalked*. *See id.* ¶¶ 12, 14; Declaration of Thomas B. Sullivan dated May 5,

2017 (“Sullivan Decl.”), Ex. 1 at 3:40-50.¹ In Part 2 of that episode, *48 Hours* correspondent Erin Moriarty reported on the phenomenon of stalking, with a particular focus on Massler. *See* Sullivan Decl., Ex. 1 at 8:50-16:00. Massler not only stalked Ivanka Trump in 2010, but later stalked an art gallery owner named Lenora Claire. *See id.* at 8:50-13:45. When discussing Massler’s stalking of Claire, the *48 Hours* report described how Massler’s stalking behavior had previously been the subject of widespread news reporting. Moriarty stated that Massler “already made headlines once in 2010 for pursuing this woman, Ivanka Trump,” *see id.* at 13:35-45, and that “[i]t was a huge story in 2010 when Massler targeted Trump with a barrage of ominous emails and tweets,” *id.* at 14:27-36. After these statements were made, the *48 Hours* report showed examples of how this “huge story” had been covered by the media, with images of several news articles shown on the screen, including from the *New York Daily News*, the blog *Gothamist*, and the *Post*, *id.* at 14:27-15:14.

The *Post* Article, which included the Photo, *see* Compl., Ex. C, was on screen for approximately two seconds, and was shown slowly rotating during the entire time it was visible. *See* Sullivan Decl., Ex. 1 at 15:12-14. Neither the entire Article nor the entire Photo were shown on screen—only about half the Photo appeared. *See id.*; Compl. Ex. C. Because the entire Photo and Article were not shown, Hirsch’s photo credit, which appeared in a part of the Article not on

¹ The *48 Hours* report was presented in two parts. Plaintiff’s claim focuses on Part 2 of the report. *See* Compl., Ex. C. Exhibit 1 is a true and correct copy of Part 2 of the *48 Hours* report. *See* Sullivan Decl. ¶ 2. The Court may consider the *48 Hours* report on a motion to dismiss. The *48 Hours* segment is incorporated by reference in the Complaint, including a screenshot of the segment, and Plaintiff clearly relied upon it in bringing his suit, *see* Compl. ¶¶ 12, 14 & Ex. C. Courts routinely consider such materials on a motion to dismiss. *See, e.g. McDonald v. West*, 138 F. Supp. 3d 448, 453 (S.D.N.Y. 2015), *aff’d*, 669 F. App’x 59, 60-61 (2d Cir. 2016); *Williams v. A & E Television Networks*, 122 F. Supp. 3d 157, 159 & n.1 (S.D.N.Y. 2015); *Edwards v. Raymond*, 22 F. Supp. 3d 293, 297 (S.D.N.Y. 2014). Thus, this case is unlike *Playboy Enterprises International Inc. v. Mediatakeout.com LLC*, No. 15 Civ. 7053 (PAE), 2016 WL 1023321 (S.D.N.Y. Mar. 8, 2016), where this Court declined to consider on a motion to dismiss an article which was not attached, incorporated or integrated into the pleadings and which was provided only with defendant’s reply brief, *see id.* at *3-4.

screen, was not shown by *48 Hours*. See Sullivan Decl., Ex. 1 at 15:12-14; Compl. ¶ 26 & Exs. B, C.

ARGUMENT

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Trachtenberg v. Dep’t of Educ.*, 937 F. Supp. 2d 460, 465 (S.D.N.Y. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (additional marks and citation omitted)). The “[f]actual allegations must be enough to raise a right to relief above the speculative level,” and the complaint must plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [plaintiff’s claim].” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

On a motion to dismiss, in addition to the facts alleged in the pleadings, a court may consider “documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” *Samuels v. Air Transport Local 504*, 992 F.2d 12, 15 (2d Cir. 1993). “In copyright infringement actions, the works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or descriptions of the works contained in the pleadings.” *Peter v. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (internal marks and citations omitted).

I.

**THE COMPLAINT FAILS TO STATE A
CLAIM FOR COPYRIGHT INFRINGEMENT**

A. CBS’s Copying of the Photo Was *De Minimis*

“The legal maxim ‘*de minimis non curat lex*’—‘the law does not concern itself with trifles’—applies in the copyright context. . . . [I]f the copying is *de minimis* and so ‘trivial’ as to fall below the quantitative threshold of substantial similarity, the copying is not actionable.” *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (citations omitted); *see, e.g., Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (“where the unauthorized use of a copyrighted work is *de minimis*, no cause of action will lie for copyright infringement”). Here, Hirsch’s infringement claim fails because CBS’s use of the Photo was so trivial as to be not actionable.

To establish a copyright claim, a plaintiff must allege that “substantial similarity” exists between his or her work and that of the defendant. *Castle Rock Enterm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998). Substantial similarity “requires that the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred.” *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). Trivial or *de minimis* copying “fall[s] below” this quantitative threshold and is thus non-actionable. *Sandoval*, 147 F.3d at 217; *see also Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“The *de minimis* doctrine essentially provides that where unauthorized copying is sufficiently trivial, the law will not impose legal consequences.” (internal marks and citations omitted)).²

² Where the works in question are either attached to a plaintiff’s complaint or incorporated by reference therein, “it is entirely appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss, because the court has before it all

In deciding whether the quantitative threshold of substantial similarity is met, “courts often look to the amount of the copyrighted work that was copied, as well as (in cases involving visual works), the observability of the copyrighted work in the allegedly infringing work.” *Sandoval*, 147 F.3d at 217. To evaluate observability, courts consider “the length of time the copyrighted work is observable as well as factors such as focus, lighting, camera angles, and prominence.” *Gottlieb Dev.*, 590 F. Supp. 2d at 632; *see, e.g., Sandoval*, 143 F.3d at 217 (“Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work . . .”).

By any measure, CBS’s use of the Photo was trivial. It consisted of only approximately two seconds out of a more than forty-three minute episode. *See* Sullivan Decl., Ex. 1. The Photo was displayed only in part, and was rotating the entire time it was on screen. It was shown only incidentally in the context of the *Post* Article of which it was part, was never displayed in full, and never took up the entire screen. *See id.* at 15:12-14; *see also* Compl., Ex. C.

This use is similar to that found to be *de minimis* by other courts—in fact, courts have found *de minimis* use even where the use in question made up a larger percentage of the total time of the allegedly infringing work. For example, in *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620 (S.D. Tex. 2007), the court found that the unauthorized use of a photograph of Arnold Palmer for “two to three seconds at the end of the thirty-second commercial” was not actionable, *id.* at 641. Similarly, in *Gottlieb*, the court ruled that the defendant’s use of the plaintiff’s artwork in a movie for “a few seconds at a time” over the course of a three-and-a-half-minute scene (which was itself part of a longer movie), was *de minimis*, 590 F. Supp. 2d at 630, that is necessary in order to make such an evaluation.” *Peter F. Gaito Architecture*, 602 F.3d at 64. “If, in making that evaluation, the district court determines that the two works are not substantially similar as a matter of law, the district court can properly conclude that the plaintiff’s complaint, together with the works incorporated therein, do not plausibly give rise to an entitlement to relief.” *Id.* (internal marks and citations omitted).

632-33; *see, e.g., Gordon v. Nextel Commc 'ns*, 345 F.3d 922, 924 (6th Cir. 2003) (2.3 second display of drawing of a root canal procedure shown during a television commercial was *de minimis* and “falls below the quantitative threshold of actionable copying.”).

Because CBS’s use of the Photo was *de minimis*, this claim should be dismissed.

B. CBS’s Display of the Photo Was a Fair Use

Hirsch’s infringement claim is also subject to dismissal on the separate ground that the challenged use of his image was a non-infringing fair use. *See* 17 U.S.C. § 107 (“the fair use of a copyrighted work . . . is not an infringement of copyright”).

Courts in this Circuit have affirmed that copyright infringement claims may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) where a comparison of the two works at issue is sufficient to decide the question of fair use. *See, e.g., TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016) (“this court has acknowledged the possibility of fair use being so clearly established by a complaint as to support dismissal of a copyright infringement claim”), *petition for cert. filed*, No. 16-1258 (U.S. Apr. 18, 2017); *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (citing with approval *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (affirming dismissal of a copyright claim on fair use grounds)); *Scott v. WorldStarHipHop, Inc.*, No. 10 Civ. 9538 (PKC) (RLE), 2011 WL 5082410, at *8 (S.D.N.Y. Oct. 25, 2011) (Fair use may be raised at the motion to dismiss stage if it “appears on the face of the complaint.” (quoting *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998)), *vacated on other grounds by* 2011 WL 13079877 (S.D.N.Y. Dec. 12, 2011).

This is precisely the type of case that is ripe for dismissal now. The Complaint, together with the evidence attached thereto as exhibits or incorporated by reference, is all that is needed to decide the question of fair use. They show that the fleeting depiction of the Photo was used for

news reporting and commentary; was used transformatively; was factual in nature; was of a previously published work; represented a fraction of the original Photo; and was not a substitute for the original. Consequently, this Court should simply apply the statutory factors to the pleadings, and find fair use as a matter of law.

The Copyright Act specifies four non-exclusive factors that must be considered to determine whether a particular use is fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the market for the original. This is “an open-ended and context-sensitive inquiry.” *Cariou*, 714 F.3d at 705 (citations omitted). The “ultimate test of fair use, therefore, is whether the copyright law’s goal of ‘promoting the Progress of Science and useful Arts’ . . . would be better served by allowing the use than by preventing it.” *Castle Rock*, 150 F.3d at 141 (brackets, quotation, and citations omitted). As shown below, all four factors weigh in Defendants’ favor here.

1. The Purpose and Character of CBS’s Use Favors a Finding of Fair Use

The first statutory factor, the purpose and character of the use, is “[t]he heart of the fair use inquiry.” *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (quoting *Davis*, 246 F.3d at 174). Courts have developed three guidelines for applying this factor. They are: (1) whether the material was used for any of the favored purposes specifically mentioned in the statute, and (2) whether the defendant used the material for a meaningfully different or “transformative” purpose than the original. If so, then (3) whether the defendant is a for-profit or non-profit entity deserves little consideration. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478 (2d Cir. 2004). These guidelines overwhelmingly favor a finding of fair use here, as a matter of law.

a. CBS used the Photo for news reporting and comment

As discussed above, CBS briefly displayed the Photo during an in-depth *48 Hours* report about the phenomenon of stalking. As part of this news reporting, the episode discussed media coverage of the earlier prosecution of Justin Massler for stalking Ivanka Trump in 2010, and showed examples from 2010 of how this “huge story” had then “made headlines.” *See Sullivan Decl.*, Ex. 1 at 13:35-45, 14:27-15:14. It was in this context that the *Post* Article containing Hirsch’s Photo was presented as an example – and Hirsch’s Photo was thereby displayed.

“News reporting” and “comment” are favored uses under the Copyright Act, specifically identified as likely fair use. *See* 17 U.S.C. § 107; *TCA Television Corp.*, 839 F.3d at 179 (“[T]he uses identified by Congress in the preamble to § 107” are “‘most appropriate’ for a purpose of character finding indicative of fair use.” (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1][a] (2016))). The Second Circuit has repeatedly held that where a defendant’s use is one of the uses identified in § 107, there will be a “strong presumption that factor one favors the defendant.” *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991); *see also NXIVM Corp.*, 364 F.3d at 477 (same); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992) (same). That presumption clearly applies to CBS’s brief use of the Photo here.

Even more importantly, this particular news broadcast reflected the archetypical example of a fair use because the existence of the *Post* Article that contained the Photo was what was newsworthy and historically significant for the *48 Hours* report. As the Second Circuit has explained, “the case for a fair use defense would be extremely strong” were a “TV news program” to use visual works to comment upon their significance. *Ringgold*, 126 F.3d at 79. That is exactly what happened here. The brief inclusion of the *Post* Article was used to show viewers exactly what prior reporting about the notorious stalker Massler had looked like.

b. CBS's use of the Photo was transformative

The most important factor in the fair use analysis is whether the secondary use was transformative. *See Bill Graham Archives v. Dorling Kindersely Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (“Most important to the court’s analysis of the first factor is the ‘transformative’ nature of the work.”). Transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579 (citation omitted); *see also Keeling v. Hars*, 809 F.3d 43, 53 (2d Cir. 2015) (“As a legal matter, the four factors do not each carry equal weight . . . indeed, some may not be relevant at all. . . . [T]he first factor—‘the purpose and character of the use,’ 17 U.S.C. § 107—lies at the ‘heart of the inquiry’ . . . while the other three factors are much less important.”), *cert. denied*, 136 S. Ct. 2519 (2016).

A work is ‘transformative’ when the new work does not “merely supersede[] the objects of the original creation” but “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message[.]” *Campbell*, 510 U.S. at 579 (citations omitted). Where a different use “provide[s] a social benefit,” it is more likely to be transformative. *Id.* “If the secondary use adds value to the original—if [the original] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Castle Rock*, 150 F.3d at 142 (internal marks and citation omitted). In the case of news reporting, “[c]ourts often find [transformation] by emphasizing the altered purpose or context of the work, as evidenced by surrounding commentary or criticism.” *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014). “For a use to be fair,

it ‘must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.’” *Cariou*, 714 F.3d at 706 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)).

A comparison between the Photo and the *48 Hours* report makes clear the highly transformative nature of CBS’s use. The Photo was used by Hirsch to depict Massler, and by the *Post* to report on the court hearing that had taken place the day the image was taken. *48 Hours* displayed the Photo for an entirely different purpose. It showed the Photo *in the context of the Post Article*, along with other examples of reporting about the Massler case, to inform the public and comment on the extensive amount of news coverage Massler’s case had received at the time, and to place Massler’s recent activity in historical context. *48 Hours* added to the Photo by surrounding it with video and commentary about the coverage the case received as part of a broader discussion of Massler’s history of stalking.

CBS’s use of the Photo in the context of the *Post Article*, to show the very media coverage it was commenting and reporting on, is precisely the kind of use that courts repeatedly have deemed “transformative.” *See Michaels v. Internet Entm’t Grp., Inc.*, No. CV 98-0583 DDP (CWx), 1998 WL 882848, at *12 (C.D. Cal. Sept. 11, 1998) (“if a television station used another station’s film in a story about the other station’s report, rather than presenting the film as its own news footage, the purpose and character of the use would be transformative”). For example, in *Baraban v. Time Warner, Inc.*, No. 99 Civ. 1569 (JSM), 2000 WL 358375 (S.D.N.Y. Apr. 6, 2000), a photographer whose image was used in a pro-nuclear energy advertisement sued the publisher of a book “criticiz[ing] both the nuclear energy industry and a complacent public for their response to nuclear disasters” for copyright infringement after the book reproduced a copy of the advertisement, along with criticism by the book’s author of “both the form and

substance of the ad.” *Id.* at *1. The court ruled that the first factor weighed heavily in favor of fair use because “[t]he photo is part of a newsworthy advertisement that comments on an issue of public importance” and “the defendants are allowed to quote or reproduce a reasonable portion of that commentary in order to respond to it.” *Id.* at *4. Similarly, in *Kane v. Comedy Partners*, No. 00 Civ. 158 (GBD), 2003 WL 22383387, at *4 (S.D.N.Y. Oct. 16, 2003), *aff’d* 98 F. App’x. 73 (2d Cir. 2004), the court found that *The Daily Show*’s use of a brief clip from a public access television show, accompanied by derisive commentary, was transformative, as “defendants sought to critically examine the quality of” the show. Other courts have reached similar conclusions. *See Bill Graham Archives*, 448 F.3d at 609 (use of concert posters in an illustrated history of the Grateful Dead was transformative because while the images were originally used for “artistic expression and promotion,” the book used them as “historical artifacts to document and represent the actual occurrence of Grateful Dead concert events”); *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402, 418 (E.D. Pa. 2009) (use of magazine covers in a biography about the artist who drew them was transformative because the covers were utilized “as several examples of those many different productions in order to pay homage to his artistic accomplishments”); *see also Blanch*, 467 F.3d at 253 (finding use of image “as fodder for . . . commentary on the social and aesthetic consequences of mass media” was transformative); *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 446-47 (S.D.N.Y. 2001) (use of twenty second clip of a film trailer in a biographical film about the actor Peter Graves “was not shown to recreate the creative expression reposing in plaintiff’s film, it was for the transformative purpose of enabling the viewer to understand the actor’s modest beginnings in the film business”); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 137 (E.D.N.Y. 2001) (“While plaintiff’s copyrighted movies aimed to entertain their audience, defendants’

Documentary aims to educate the viewing public of the impact that [two film executives] had on the movie industry.”); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1535 & n.2 (C.D. Cal. 1985) (Rev. Jerry Falwell was entitled to distribute copies of an insulting parody about himself “in order effectively to give his views of the derogatory statements it contained,” as the “the ad parody must be seen to be appreciated”), *aff’d*, 796 F.2d 1148 (9th Cir. 1986).

Because CBS’s use clearly was transformative, this element—the “heart of the inquiry” into fair use—weighs heavily in Defendants’ favor.

c. CBS’s status as a for-profit entity is not relevant

Finally, the first fair use factor considers whether the allegedly infringing work has a commercial or nonprofit educational purpose. *Cariou*, 714 F.3d at 708. However, the Supreme Court has made clear that where material is used for a transformative purpose favored by § 107, the defendant’s status as a commercial entity does not create any presumption of unfairness. *Campbell*, 510 U.S. at 584; *see also NXIVM Corp.*, 364 F.3d at 477 (“The Supreme Court in *Campbell* rejected the notion that the commercial nature of the use could by itself be a dispositive consideration.”). That is because “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting . . . are generally conducted for profit.” *Campbell*, 510 U.S. at 584 (internal marks and citation omitted); *see also Cariou*, 714 F.3d at 708 (same); *Swatch*, 756 F.3d at 83 (recognizing that “almost all” media enterprises are commercial and therefore assigning “relatively little weight” to this factor); *Castle Rock*, 150 F.3d at 142 (“[We] do not give much weight to the fact that the secondary use was for commercial gain.”); *Kane*, 2003 WL 22383387, at *3 (“[T]he Supreme Court has discounted the force of commerciality in applying a fair use analysis.”).

Where, as here, the allegedly infringing work clearly is transformative, the “commercial”

factor is of little significance. “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579. Courts in this Circuit repeatedly have deemed this factor largely irrelevant to the fair use analysis where a work was transformative. *See, e.g., Authors Guild v. Google, Inc.*, 804 F.3d 202, 219 (2d Cir. 2015) (commercial motivation deemed of little significance where there was a “highly convincing transformative purpose, together with the absence of significant substitutive competition.”), *cert. denied*, 136 S. Ct. 1658 (2016); *Blanch*, 467 F.3d at 244 (where the new work was substantially transformative, “[w]e therefore discount the secondary commercial nature of the use.” (internal marks and citation omitted)); *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 393-94 (S.D.N.Y. 2014) (commerciality less significant where the work was transformative); *Arrow Prods., Ltd. v. Weinstein Co.*, 44 F. Supp. 3d 359, 370 (S.D.N.Y. 2014) (“[T]he court does not place very much significance on this part of the first fair-use factor given the transformative nature of the work.”).

2. The Nature of the Copyrighted Work Weighs in Favor of Fair Use

The second factor in the fair use analysis is the nature of the copyrighted work. Courts consider “(1) whether the work is expressive or creative, . . . with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.” *Blanch*, 467 F.3d at 256 (quoting 2 Howard B. Abrams, *The Law of Copyright* § 15:52 (2006)). Here, both elements weigh heavily in favor of fair use.

As to the first element, whether the work is expressive or creative, the underlying Photo is a factual depiction of Massler outside the courthouse after he has been freed on bail, as is shown by the *Post*’s use of the Photo for informational purposes. *See* Compl., Ex. B. This weighs in favor of fair use. “[T]he more informational or functional the plaintiff’s work, the

broader should be the scope of the fair use defense.” *Nimmer on Copyright* § 13.05[A][2][a]. See also *TCA Television Corp.*, 839 F.3d at 184 (“[T]he secondary user of noncreative information can more readily claim fair use based on the law’s recognition of ‘a greater need to disseminate factual works than works of fiction or fantasy[.]’” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985))); *Authors Guild*, 804 F.3d at 220 & n.21 (explaining that factual works “often present well justified fair uses” because “there is often occasion to test the accuracy of, to rely on, or to repeat their factual propositions,” which “may reasonably require quotation”); *Castle Rock*, 150 F.3d at 143-44; *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) (“There is a public interest in receiving information concerning the world in which we live. The more newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information.”).

Courts in this and other circuits have thus found that video or photographic depictions of real events weigh in favor of fair use—even when, as here, professional photographers made the images or recordings at issue. See, e.g., *Katz v. Google Inc.*, 802 F.3d 1178, 1183 (11th Cir. 2015) (because photo was “merely a candid shot in a public setting” factor weighed in favor of fair use); *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1195 (N.D. Ill. 2015) (candid image taken of politician at parade is a “factual photograph” which “weighs in favor of Defendants’ fair use”); *N. Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 619-20 (S.D.N.Y. 2015) (photograph of the attacks on the World Trade Center were “a non-fictional rendering” “created for news gathering or other non-artistic purposes” and therefore this factor weighed “in favor of fair use.”); *Katz v. Chevaldina*, No. 12-22211-CIV, 2014 WL 2815496, at *1, *8 (S.D. Fla. June 17, 2014) (where the work at issue was a candid picture of a man at basketball practice

and there was “no evidence that the photographer influenced, at all, the [subjects] activity, pose, expression or clothing” and the photograph conveyed no creative ideas, this factor weighed in favor of fair use), *aff’d sub nom. Katz v. Google Inc.*, 802 F.3d 1178. As in those cases, the factual, documentary nature of the Photo weighs in favor of fair use.

As to the second element, whether the work is unpublished, the Photo was published by the *Post*. See Compl. ¶ 9. Use of a published work is “more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.” *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003); see also *Harper & Row Publishers, Inc.*, 471 U.S. at 540; *Blanch*, 467 F.3d at 256. This element weighs heavily in favor of fair use.

3. The Amount and Substantiality of the Portion Used Weighs in Favor of Fair Use

As to the third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” 17 U.S.C. § 107, a court should consider not just the quantity used, but “whether the quantity and value of the materials used are reasonable in relation to the purpose of the copying.” *Cariou*, 714 F.3d at 710 (quoting *Blanch*, 467 F.3d at 257). The secondary use “‘must be [permitted] to ‘conjure up’ at least enough of the original’ to fulfill its transformative purpose.” *Id.* (quoting *Campbell*, 510 U.S. at 588); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998). With respect to photographs and similar visual works, even the copying of an entire work “does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.” *Bill Graham Archives*, 448 F.3d at 613.

Here, *48 Hours* used about half of the Photo. Compare Compl. Ex. B with *id.* Ex. C. The portion used, appearing in the context of the *Post* Article in which it was published, was reasonable and directly fulfilled the *48 Hours* report’s transformative purpose. As discussed above, *48 Hours* was informing viewers about the extensive news coverage surrounding

Massler's stalking of Ivanka Trump, and to engage in commentary about the coverage and the issue of stalking more broadly. This task required *48 Hours* to display examples of the reporting at issue. To accomplish this, *48 Hours* displayed a cropped version of the *Post* Article, including a partial version of the Photo. The Article (including the Photo) was on screen for a total of about two seconds. This use was "tailored to further its transformative purpose." *See Bill Graham Archive*, 448 F.3d at 613. That factor weighs heavily in favor of fair use. *See, e.g., NXIVM Corp.*, 364 F.3d at 481 (where the use was "reasonably necessary" "to support [defendant's] critical commentary," this factor favored fair use).

4. The Effect of the Use Upon the Potential Market Weighs in Favor of Fair Use

Finally, the fourth factor also weighs in favor of fair use because the two-second rotating partial depiction of the Photo shown during the *48 Hours* telecast clearly is no substitute for the original high quality print image. As the Second Circuit stated in *Cariou*, "[w]e have made clear that 'our concern is *not* whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.'" 714 F.3d at 708 (quoting *Blanch*, 467 F.3d at 258). A secondary use "usurps" the market "where the infringer's target audience and the nature of the infringing content is the same as the original." *Id.* at 709. In other words, "the focus . . . is on whether defendants are offering a market substitute for the original." *NXIVM Corp.*, 364 F.3d at 481. When conducting this analysis, "[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original." *Cariou*, 714 F.3d at 709 (citation omitted); *Bill Graham Archives*, 448 F.3d at 614-5 (secondary use does not affect the market for the original where it is "transformatively different from their original expressive purpose"); *Davis*, 246 F.3d at 175; *Castle Rock*, 150 F.3d at 145 n.11.

As shown above, CBS's use was highly transformative and cannot substitute for the

original. The *48 Hours* telecast showed a partial view of the Photo, in motion and at an angle, and as part of the *Post* Article in which it appeared. Such a copy cannot usurp the market for the original photo. *See, e.g., Kelly*, 336 F.3d at 822 (no effect on the market where there was “no way to view, create, or sell a clear, full-sized image” from defendant’s use); *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, No. 13 C 4664, 2014 WL 3368893, at *10 (N.D. Ill. July 8, 2014) (No effect on market where defendant “did not reproduce an original-quality copy of the photo, but instead used a copy of a copy that was already publicly available on the internet.”); *Calkins v. Playboy Enters. Int’l, Inc.*, 561 F. Supp. 2d 1136, 1141-43 (E.D. Cal. 2008) (“reproduced image does not fulfill the demand for the original” where “the image is significantly smaller and of lesser quality than the original Photograph.”). Moreover, where a use is transformative, as a matter of law, “copyright owners may not preempt exploitation of transformative markets” by claiming that they could have tried to charge a license fee. *Castle Rock*, 150 F.3d at 146 n.11; *Bill Graham Archives*, 448 F.3d at 614-15. Rather, where, as here, “Defendants have produced a transformative work that would otherwise qualify for fair use, and Defendant[s’] work does not interfere with the market for the original, the fourth factor favors the [D]efendants as a matter of law.” *Video-Cinema Films, Inc. v. CNN*, No. 98 Civ. 7128 (BSJ), 2001 WL 1518264, at *8 (S.D.N.Y. Nov. 28, 2001) (citing *Leibovitz*, 137 F.3d at 116-17). Consequently, this fourth fair use factor also weighs in Defendants’ favor.

In sum, based on the 12(b)(6) record, it is clear that all four statutory factors weigh heavily in favor of CBS’s defense of fair use. Balancing these factors and the allegations in the Complaint, it is clear that “the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing [Defendants’] use than by preventing it.” *Swatch*, 756 F.3d at 92 (citations omitted). The Complaint should be dismissed without leave to

amend because no attempt to plead could overcome Defendants' fair use defense.

II.
THE COMPLAINT FAILS TO STATE A CLAIM FOR
REMOVAL OF COPYRIGHT MANAGEMENT INFORMATION

A. Plaintiff's Copyright Management Information-Related Claim Should Be Dismissed Because CBS's Display of the Photo Was *De Minimis* and/or a Fair Use

Because CBS's use of the Photo was *de minimis* and a fair use, Hirsch's second claim for relief, for removal of copyright management information ("CMI") under Section 1202 of the Digital Millennium Copyright Act ("DMCA"), should also be dismissed.

The DMCA provides, in relevant part, that "[n]o person shall, without the authority of the copyright owner or the law -- (1) intentionally remove or alter any copyright management information, . . . having reasonable grounds to *know[] that it will induce, enable, facilitate, or conceal an infringement of any right* under this title." 17 U.S.C. § 1202(b) (emphases added). This provision requires a plaintiff to show that defendant knowingly removed or altered CMI with the *specific intent to facilitate infringement*.

Where a defendant's use of a copyrighted work is non-infringing because the use is *de minimis* or a fair use, there can be no liability under Section 1202. A defendant simply has "no motive to 'conceal' an infringement for which it would not be liable." *Leveyfilm*, 2014 WL 3368893, at *13; *see, e.g., Kennedy v. Gish, Sherwood & Friends, Inc.*, 143 F. Supp. 3d 898, 914 (E.D. Mo. 2015) ("The DMCA expressly states its operation is not intended to affect fair use rights. Thus, Gish's [fair] use of Kennedy's images [with CMI removed] *cannot be a violation*" of § 1202) (emphasis added) (citation omitted); *Leveyfilm*, 2014 WL 3368893, at *13 (where defendant's "purpose in using the photo is protected by the fair use defense, it is illogical to also conclude that [defendant] intended to contribute to or conceal an infringement" under § 1202); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 302 n.8 (3d Cir. 2011) ("[T]hose

intending to make fair use of a copyrighted work are unlikely to be liable under § 1202”).

Because CBS made *de minimis* or fair use of the Photo, it cannot be liable under Section 1202.

B. The Complaint More Broadly Fails To Plead Knowing Removal and Intent to Facilitate Infringement

Even absent a ruling that CBS’s use of the Photo was *de minimis* or a fair use, Hirsch’s DMCA claim should still be dismissed. As noted above, a DMCA claim only arises where a defendant has removed or distributed false CMI “knowing . . . that it will induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b). The provision requires a plaintiff to plead facts permitting a plausible inference that there was requisite intent; that is, that the defendant knowingly removed or altered CMI with the specific intent to facilitate infringement. 17 U.S.C. § 1202(b); *see also BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 609 (S.D.N.Y. 2010) (plaintiff bringing Section 1202 claim must plead “that the removal and/or alteration was done intentionally”). Where the plaintiff fails to include such factual allegations, his or her DMCA claim should be dismissed. *See Chevrestt v. Am. Media, Inc.*, 204 F. Supp. 3d 629, 631-32 (S.D.N.Y. 2016) (dismissing action for failure to allege “factual allegations supporting an inference that [defendant’s] CMI alteration or removal was done intentionally”).

Plaintiff has not even attempted to meet this burden here. The Supreme Court has specifically instructed that *Iqbal*’s plausibility requirement *includes* pleading of “malice, intent, knowledge, or other conditions of a person’s mind.” *Iqbal*, 556 U.S. at 686-87 (“Rule 9 merely excuses a party from pleading [malice] under an elevated pleading standard. It does not give him license to evade the less rigid – though still operative – strictures of Rule 8”). Here, despite the clear dictates of *Iqbal-Twombly* and their progeny, Hirsch makes only boilerplate allegations of the requisite intent, tracking the language of the statute. *See* Compl. ¶¶ 27, 30. This is simply insufficient as a matter of law. *See Chevrestt*, 204 F. Supp. 3d at 632 (noting identical section of

complaint “contains no factual allegations supporting those conclusions (speculations?)”; *see generally Solana v. NYC Dep’t of Corr.*, No. 12 Civ. 3519 (ARR), 2012 WL 5466425, at *7 (E.D.N.Y. Nov. 8, 2012) (plaintiff’s bare allegation that defendants “knowingly, intentionally and purposely” caused his injuries, was insufficient to satisfy *Iqbal*); *Mitchell-White v. Nw. Airlines, Inc.*, No. 10 Civ. 2678 (RPP), 2011 WL 671630, at *4 (S.D.N.Y. Feb. 24, 2011) (plaintiff’s allegations that defendants “acted intentionally, willfully, and with malice,” unsupported by specific factual assertions, “falls short of the pleading standards set forth in *Iqbal*”), *aff’d* 446 F. App’x 316 (2d Cir. 2011).³

Defendants recognize that this Court has previously stated that “[c]ourts must be lenient in allowing scienter issues . . . to survive motions to dismiss” in this context. *See Fischer v. Forrest*, No. 14 Civ. 1304 (PAE), 2015 WL 195822, at *9 (S.D.N.Y. Jan. 13, 2015) (internal marks and citations omitted). However, the scienter requirement cannot be satisfied merely by pointing to the alleged infringement itself. *See, e.g., Gordon.*, 345 F.3d at 923, 927 (affirming district court conclusion that removal of CMI and distribution of copyright work did not suffice to establish “intent” to facilitate or conceal infringement). Unlike cases where courts, including this one, have previously allowed a DMCA claim to go forward, there are no allegations in the Complaint that CBS “was confronted or otherwise made aware of its allegedly infringing action.” *See Chevrestt*, 204 F. Supp. 3d at 632. For example, unlike in *Fischer*, where the complaint alleged that the defendant had published materials stripped of CMI over a three year

³ Hirsch’s claim that CBS intended to contribute to or conceal an infringement is made further implausible by the fact that CBS presented the Photo in the context of the *Post* Article in which it was published. *Cf. Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) (finding “[d]efendant did not have ‘reasonable grounds to know’ it would cause its users to infringe [p]laintiff’s copyrights” where defendant’s search engine provided the “name of the Web site from which [d]efendant obtained the image, where any associated copyright management information would be available”), *aff’d in part and rev’d in part on other grounds*, 336 F.3d 811. Any person looking at the *Post* Article itself would see the “gutter credit” that Plaintiff alleges constitutes CMI. *See* Compl. ¶ 25 & Ex. B at 2.

period and continued even after receiving a cease-and-desist letter, *see* 2015 WL 195822, at *9, the Complaint here alleges only a single act of infringement and no attempt to confront CBS about the use of the Photo. Given the obvious fair use nature of CBS's single challenged use of the Photo, the Complaint contains no facts from which to plausibly conclude that CBS knew it was infringing and intended to hide that infringement by omitting credit to Hirsch.

For this reason as well, Plaintiff's DMCA claim should therefore be dismissed.

CONCLUSION

For each and all of the foregoing reasons, Defendants respectfully request that this Court dismiss the complaint in its entirety with prejudice and grant such other relief as this Court deems appropriate.

Dated: New York, New York
May 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2017, a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT** was filed with the Court through the electronic filing system, which will automatically serve electronic notice of the same on all counsel of record.

/s/ Robert Penchina

Robert Penchina