

**Ferdman v. CBS Interactive Inc.**  
**No. 17 Civ. 1317 (PGG) (S.D.N.Y. Sept. 24, 2018)**

Year	2018
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff Steven Ferdman is a photographer who licenses his photographs to publishers for a fee. GameSpot, an online publication of Defendant CBS Interactive Inc., features information about video games and related entertainment. While the movie <i>Spider-Man: Homecoming</i> was being filmed, Ferdman took photographs of the production, including of the actor Tom Holland. Ferdman uploaded the photographs to a licensing service. Around that same time, GameSpot published two articles about the movie, each featuring at least one photograph taken by Plaintiff. The first article included a photograph of Holland that was taken by Plaintiff and that Holland had posted to his Instagram account (“Holland Photograph”). The second article featured a gallery of images, including seven of Plaintiff’s photographs, which GameSpot claimed it believed “had been made available for use by the media” (“Gallery Photographs”).
Issue	Whether a website’s use of copyrighted photographs in online articles is a fair use.
Holding	The District Court granted Plaintiff’s motion for summary judgment on Defendant’s fair use defense as to the Gallery Photographs. The court concluded that the first factor, purpose and character of the use, weighed in favor of Ferdman. The court rejected Defendant’s argument that its use was transformative because the photographs were used for news reporting and commenting, holding that, rather than providing new information or insight, the intention of the news article was “simply [to show] that the photographs exist.” On the Holland photograph, the court concluded that the use may have been “somewhat transformative” because GameSpot “injected some ‘new meaning or message’ into the photograph by reporting that the actor himself had posted the photograph and had provided commentary on it,” but was not so transformative to constitute fair use as a matter of law. Relatedly, the court also found that Defendant’s status as a for-profit entity weighed against a finding of fair use but was not dispositive. The second factor, nature of the copyrighted work, supported a fair use finding. Plaintiff was merely “photographing the events around him as they occurred.” The court also noted that the photographs had been published at the time of Defendant’s use. The third factor, amount and substantiality of the portion used, was neutral. The court noted that a photograph is inherently harder to excerpt than other types of works. The final factor, effect of the use upon the potential market, weighed against fair use. With respect to both categories of photographs, “Defendant’s use of the photographs in its articles is a clear substitute for the market use of Plaintiff’s photographs.” Balancing the factors, the court held that “fair use is unavailable as a matter of law” as to the Gallery Photographs. With respect to the Holland Photograph, the court held that material questions of fact exist with respect to whether the use was transformative, which could potentially tip the balance of factors toward a finding of fair use.
Tags	Second Circuit, Photograph, Review/Commentary, Internet/Digitization, News reporting
Outcome	Preliminary ruling, fair use not found, mixed result