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# tenth circuit affirms fair use defense for documentary's use of video footage, clarifies post-*warhol* standard for transformativeness

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On April 30, 2026, the United States Court of Appeals for the Tenth Circuit issued a significant **published opinion** in *Whyte Monkee Productions, LLC v. Netflix, Inc.*, No. 22-6086, affirming summary judgment in favor of Netflix and its production partner Royal Goode Productions in a copyright infringement dispute arising from the 2020 documentary series *Tiger King: Murder, Mayhem and Madness*. The ruling is especially notable on two fronts: it applies the Supreme Court's 2023 decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* to a documentary-filmmaking context; and it confirms that documentary filmmakers need not "target" or directly comment on a copyrighted work in order to establish fair use.

Plaintiff Timothy Sepi worked as a videographer at the Gerald Wayne Interactive Zoological Park in Wynnewood, Oklahoma, operated by the colorful and controversial figure Joseph Maldonado-Passage, known as "Joe Exotic," featured in the *Tiger King* documentary. Sepi filmed eight videos during and after his employment at the Park with Exotic. Brief excerpts from these videos were used in portions of the seven-episode *Tiger King* documentary series, which the documentary's makers understood to be licensed through Exotic and/or through a successor owner of the Park. After Netflix released *Tiger King* in March 2020, Sepi registered copyrights in the videos and sued Netflix and Royal Goode for infringement, claiming to own all eight videos.

In April of 2022, the district court granted summary judgment to Defendants on two independent grounds. First, it found that seven of the videos were "works made for hire" under the Copyright Act because Sepi had filmed them within the scope of his employment at the Park, meaning Sepi never owned them. Second,

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it found that the documentary's use of the eighth video—repurposing snippets from a nearly 24-minute recording of the funeral of Joe Exotic's husband, deemed the "Funeral Video"—constituted fair use.

While Plaintiff's appeal to the Tenth Circuit was pending, in May 2023, the Supreme Court decided *Andy Warhol Foundation*, which refined prevailing standards for what counts as a "transformative" use of a work for determining "fair use" under the factors enumerated in the Copyright Act, 17 U.S.C. § 107.

The Tenth Circuit issued its initial opinion on March 27, 2024, affirming the district court's ruling on the seven work-for-hire videos, but reversing as to the Funeral Video. Specifically, the March 2024 opinion found that the documentary's use did not "target" or comment on Sepi's video itself, but instead used the Funeral Video to comment on Joe Exotic, and that under *Warhol*, such use was not "sufficiently transformative" to weigh in favor of fair use.

After Defendants, supported by several amici, petitioned for rehearing only as to the Funeral Video and fair use, the Court granted rehearing in May 2024, vacated its March 2024 opinion, and solicited further briefing on questions relating to *Warhol* and documentary filmmaking more broadly; it also heard further oral argument in July 2024.

On April 30, 2026, the Court issued a new, 79-page opinion affirming the district court in full, **including** as to its finding that any use of the Funeral Video in the *Tiger King* documentary was fair.

Once again, the Court affirmed the district court's summary judgment as to the seven videos based on the work-made-for-hire doctrine, holding that plaintiffs did not own those videos. As to the Funeral Video and fair use, the Court noted that the *Tiger King* series used at most 66 seconds of the nearly 24-minute video in a single episode of *Tiger King*, which represents approximately 2.58% of that episode and 0.35% of the entire series, and interspersed it with critical commentary from the mother of Exotic's husband. The Court went on to hold that all four statutory fair-use factors enumerated in section 107 favored Defendants:

- **Factor One (Purpose and Character of Use).** Holding that targeting or direct commentary on an original work is **not** required for a finding of transformative use, the Court found the documentary's use to be "significantly transformative." The Funeral Video was created to memorialize Travis Maldonado; Defendants used excerpts to "comment[] on Exotic's megalomania and showmanship and the milieu of big-cat breeders." That different purpose—and the insubstantial amount used—meant the use was justified in the broad sense of advancing copyright's goals without needing an independent justification such as parody or criticism of Sepi's video itself. The Court also declined to treat the commercial nature of Netflix's streaming platform as a significant counterweight, emphasizing that the relevant inquiry is commercial exploitation of the plaintiff's copyrighted work, not the secondary work as a whole.
- **Factor Two (Nature of the Copyrighted Work).** The court agreed with the district court that the Funeral Video is "more factual than creative." Sepi placed a camera on a tripod and let it run, sometimes panning or zooming, and did not edit the footage. The court also held that for fair-use purposes, the video had been "published" because it was livestreamed and posted publicly on the Joe Exotic TV YouTube channel, even if



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this did not constitute "publication" under the Copyright Act's formal definition.

- **Factor Three (Amount and Substantiality Used).** Defendants used approximately 66 seconds from a nearly 24-minute video—a "quantitatively insubstantial amount." The court also rejected Sepi's qualitative argument that the "heart" of the work was taken, finding Defendants copied no more than was reasonably necessary to illustrate Joe Exotic's behavior at the funeral for purposes of commentary.
- **Factor Four (Market Effect).** Sepi did not challenge the district court's finding that *Tiger King* is not a "market substitute" for the Funeral Video. He also failed to identify any specific derivative markets that use of the video in the *Tiger King* series might harm. The court agreed that while a fair-use proponent bears the burden on market impact, a defendant need not disprove harm to hypothetical or unidentified markets. Sepi's admissions that he had not licensed or attempted to license his work further undermined any showing of market harm.

The *Whyte Monkee* decision is a major post-*Warhol* fair-use opinion, and carries important implications across multiple areas:

- **Documentary filmmakers continue to receive meaningful protection.** The court confirmed that documentaries do not enjoy a categorical presumption of fair use, but when they use brief clips to comment on personalities or social phenomena—rather than to substitute for or supplant the original—courts will generally find the first factor, and often all factors, weighing in favor of fair use. The decision reinforces the ability of filmmakers to incorporate short clips of real-world events without necessarily obtaining a license for each.
- ***Warhol* does not require targeting or commentary on the original work.** The court squarely rejected the argument that, after *Warhol*, a secondary work must comment on or directly "target" the original copyrighted work for the first factor to favor fair use. *Warhol's* emphasis on justification and targeting applied in a context where the secondary use shared "the same or highly similar purpose" as the original. Where (as here) the secondary use has a markedly different objective purpose, it can be justified in a "broad sense" by advancing copyright's goals without any need to target or parody the source material.
- **Commerciality does not doom a fair-use defense.** The court underscored that commerciality is not evaluated based on the overall commercial success of the secondary work—even a globally streamed Netflix series. Instead, courts must assess whether the defendant commercially exploits the copyrighted material *itself* for gain, a standard that a brief, incidental clip will rarely satisfy.

The *Whyte Monkee* decision is a significant and welcome development for documentary filmmakers, news organizations, and other content creators who incorporate brief archival footage or clips in secondary works with purposes distinct from the originals. We will continue to monitor developments in this area.

*Note that Mitchell, Silberberg & Knupp represented defendants Netflix, Inc. and Royal Goode Productions in both the district court and the Court of Appeals proceedings.*