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Purloined photos of pop star's secret wedding a copyright violation, court rules

Majority rules sale of wedding photos was copyright infringement

By John Roemer

When purloined photos of a Latina pop star's secret wedding landed on the cover of a Spanish language gossip magazine, it was a shocking scandal that was news even to the groom's mother.

It was also a copyright violation, according to a divided 9th U.S. Circuit Court of Appeals panel. On Tuesday, voting 2-1, it reversed U.S. District Judge Manuel L. Real of Los Angeles, who had held that publication of the images was fair use under the Copyright Act of 1976.

The panel sent the case back to Real for further litigation on unresolved issues not part of the appeal.

"The tantalizing and even newsworthy interest in the photos does not trump a balancing of the fair use factors," wrote Circuit Judge M. Margaret McKeown for the panel majority in an opinion that as she said "reads like a telenovela."

"Simply put," McKeown added, defendant Maya Magazines Inc. "did not sustain its burden of establishing that its wholesale commercial use of the previously unpublished photos constituted fair use." *Monge v. Maya Magazines Inc.*, 2012 DJDAR 11250.

Puerto Rico-born Noelia Lorenzo Monge, a pop singer-songwriter and model known widely as Noelia, married Jorge Reynoso, her manager and a music producer, at a Las Vegas wedding chapel in a clandestine ceremony in January 2007, the opinion recounted. To protect the bride's image as a young, single superstar, the couple limited attendance to the minister and two chapel employees, who took photos of the event using Monge's camera.

The marriage stayed secret for almost two years. In 2008, paparazzo Oscar Viqueira, who sometimes served as a driver for the couple during their visits to Miami, lent them his car. When Reynoso returned the vehicle, Viqueira said he found a memory stick in the ashtray containing the wedding photos, which he sold to Maya for \$1,500.

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The company splashed the images over the cover and a two-page spread inside its popular TVNotas title. Reynoso's mother called, berating him for getting married without telling her, the opinion said. Still intent on secrecy, Reynoso denied the marriage to his own mother, but in vain - she'd seen the photos, and so had TVNotas' other readers.

The couple registered copyrights on the photos and sued Maya for copyright infringement and misappropriation of likeness. Real dismissed the misappropriation claim, struck the couple's claim for statutory damages under the Copyright Act and granted Maya's motion for summary judgment plus attorney fees and costs.

McKeown's opinion, joined by Senior U.S. District Judge Rudi M. Brewster of San Diego, sitting by designation, included a history of the difficulty of the fair use doctrine.

In evaluating a fair use defense to a copyright claim, courts apply a four-factor test that considers, among other things, whether the use transforms the original work.

McKeown's analysis of the factors to be considered in fair use cases found that Maya's publication of the photos did not transform them but did cash in on their commercial value and did negatively affect their future marketability. "Simply because the works were yet unpublished did not give Maya a license to pull the trigger and blow the couple's cover," she wrote.

Dissenting, Circuit Judge Milan D. Smith Jr. contended that the majority undermines a free press. "Although newsworthiness alone is insufficient to invoke fair use," he wrote, "public figures should not be able to hide behind the cloak of copyright to prevent the news media from exposing their fallacies."

Andrew P. Bridges, a Fenwick & West LLP partner specializing in copyright and trademark litigation who was not involved in the case, praised McKeown as "a deep thinker in copyright law" but said he sided with the dissent. "This is really a trade secrets case, and the photos were the exposure of the secret," he said. "It puts undue pressure on copyright doctrine to dress up a trade secrets case as copyright, and it results in distortions in the analysis."

Another outside observer, Dale Cendali, who heads Kirkland & Ellis LLP's copyright, trademark and Internet practice group, said, "The majority's analysis of fair use is consistent with a long line of cases recognizing that photographs are copyrighted works entitled to protection, and this particular use was not fair use under the facts at issue."

Michael D. Kuznetsky of Universal City's Kuznetsky Law Group PC, representing the plaintiffs, said, "My clients feel vindicated. The district judge made the wrong decision. We knew all along that Maya's publication of the photos was not protected by fair use."

Maya's defense lawyer, Angela C. Agrusa, a partner at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP in Los Angeles, said she preferred the dissent.

"There remain other defenses we think will be resolved in our favor when we return to district court," she added. "We believe we have a strong First Amendment defense and a waiver defense in which the plaintiffs' conduct constituted a waiver of the right to assert ownership." Agrusa declined to elaborate.