

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD HARBUS,

Plaintiff,

v.

MANHATTAN INSTITUTE FOR POLICY
RESEARCH, INC.,

Defendant.

1:19-CV-06124

REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

SHAPIRO ARATO BACH LLP
Cynthia S. Arato
Erin M. James
500 Fifth Avenue, 40th Floor
New York, NY 10110
Tel: (212) 257-4882
Fax: (212) 202-6417
carato@shapiroarato.com
ejames@shapiroarato.com

Attorneys for Defendant

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I. THE MISREPRESENTATIONS IN PLAINTIFF'S OPPOSITION

A. Plaintiff Misrepresents The Standard On This Motion

Plaintiff's counsel knowingly misrepresents the law in contending that courts do not grant motions to dismiss on fair-use grounds except in cases involving parody or art appropriation. Pls.' Opposition, Dkt. 24, ("Opp."), at 6. Plaintiff's counsel's own docket disproves counsel's false assertion. Indeed, Plaintiff's counsel is a prolific filer of copyright cases; his cases have nothing to do with either parody or art appropriation; and numerous judges have dismissed his cases on fair use grounds **at the pleading stage**. *See, e.g., Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537, 548 (S.D.N.Y. 2019) (dismissing claim because it was "evident on the face of the First Amended Complaint" that defendant's use of photograph on its website was "fair as a matter of law"); *Clark v. Transp. Alts., Inc.*, No. 18-cv-9985 (VM), 2019 WL 1448448, at *2, *5 (S.D.N.Y. Mar. 18, 2019) (same where fairness of defendant's use of plaintiff's photographs on its website was clear from "side-by-side" analysis of the two works); Order & Transcript, *Kanongataa v. Am. Broadcastingcompanies, Inc.*, No. 16-cv-7382 (LAK) (S.D.N.Y. Feb. 15, 2017), ECF Nos. 32, 34 (dismissing claim because defendants' use of video in news report was "squarely within the preambulatory portion of Section 107"); *Stridiron v. Cmty. Broads., LLC*, No. 5:19-CV-108 (MAD/ATB), 2019 WL2569863, at *4 (N.Y.D.Y. June 21, 2019) (plaintiff's counsel is a "prolific filer" who has "regularly been found to have failed to comply with court orders"). Contrary to Plaintiff's counsel's misrepresentation, copyright claims of any type, covering any use, should be dismissed at the pleading stage where, as here, the fairness of the use is established by the complaint or judicially noticeable facts.¹

¹ *See Oyewole v. Ora*, 291 F. Supp. 3d 422 (S.D.N.Y. 2018) (dismissing on fair use grounds use of poetry phrase in songs), *aff'd* 776 F. App'x 42 (2d Cir. 2019); *see also Bell v. Magna Times, LLC*, No. 2:18CV 1896579, 2019 WL 1896579 (D. Utah April 29, 2019) (same for poem used in

B. Plaintiff Misrepresents The Allegations of The First Amended Complaint

Plaintiff's opposition misrepresents the subject matter of Plaintiff's claim by insinuating that the First Amended Complaint ("FAC") challenges the supposed use of the *entirety* of Plaintiff's Photograph on the Institute's *Facebook* page. Opp. at 4; *see id.* at 2, 8, 9, 14. The FAC alleges no such use, nor could Plaintiff have alleged such a use in good faith since the Institute did not post the Photograph on its Facebook page. Rather, the FAC alleges that the Institute displayed the Photograph on the Institute's *Website* and (not its Facebook page), and Plaintiff's opposition implicitly concedes that this Website display included just the bottom of the Photograph, substantially darkened and overlaid with text. FAC ¶ 15; FAC, Ex. C (depicting the cropped and darkened Website use); Opp. at 2 ("[N]or did Defendant make any aesthetic alternations to Plaintiff's Photograph (at least as displayed on Defendant's facebook page).").² Plaintiff's opposition ignores this truncated Website display, even though it is the gravamen of Plaintiff's actual claim.

C. Plaintiff Misrepresents The Nature Of Defendant's Use

Plaintiff falsely suggests that the Institute published an independent news story about Governor Cuomo and "shoplifted" the Photograph to illustrate such work.³ But the Institute did

newspaper article and on newspaper's website); *Mizioznikov v. Forte*, No. 16-61616-Civ-Scola, 2017 WL 5642383 (S.D. Fla. Mar. 27, 2017) (same for photograph in legal pleadings).

² Plaintiff's opposition cites to paragraphs 12 and 13 and Ex. C of the FAC to support Plaintiff's statement that "Defendant used the entirety of the Photograph on its Facebook page." Opp. at 4; *see id.* at 8, 14. Neither Paragraphs 12 and 13 nor Ex. C have anything to do with the Institute's Facebook page: they concern a "share" function on the Institute's Website, which allowed users to share the Institute's Website post on the *user's* Facebook page. *See* FAC ¶¶ 12-13 & Ex. C. Indeed, Exhibit C shows Plaintiff's counsel attempting to "share" the Website post on *his* own Facebook page.

³ Opp. at 1 (claiming the Institute "used the Photograph to illustrate a story about the identical subject matter depicted in the Photograph[]"); *id.* at 2, 17 (claiming the Institute used the Photograph to save itself the cost of creating new content); *id.* at 11 ("Defendant used the

not purport to publish an independent news story about Governor Cuomo. It displayed a New York Post Op-Ed to highlight how a noteworthy newspaper had published an Op-Ed which one of the Institute’s own research fellows had authored.⁴ It is clear from this unique setting that the Institute did not use the Photograph to depict that work’s contents (Governor Cuomo giving a speech). Rather, it used the Photograph (or parts of the Photograph) to illustrate how the Institute’s work appeared in the Post.

* * * *

Viewed in this proper context, the FAC should be dismissed because all four statutory factors support fair use.

II. THE FAIR USE FACTORS ALL FAVOR A FINDING OF FAIR USE

A. No Discovery Is Needed To Find That The First Factor Favors Fair Use

1. The Institute Used The Photograph For A New And Different Purpose

Plaintiff’s contention that the Institute neither commented on the Photograph nor made it the subject of the Op-Ed (Opp. at 8-11) ignores (1) Second Circuit precedent that commentary is not necessary for fair use; and (2) the purpose behind the Institute’s use. *See Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting teaching, scholarship, and research) identified in the preamble to the statute.”).

Photograph to merely illustrate a news story about the subject matter depicted in the Photograph.”).

⁴ There is no dispute that the Institute was fully within its rights to display the text of the Op-Ed which its own fellow had authored, despite the opposition’s many contrary insinuations. *See* Opp. at 4, 6, 10, 13, 15 (labeling the display an “Infringing Article”).

The Institute displayed the Op-Ed, with the Photograph, in the library section of its Website to educate the public about the Institute’s not-for-profit work and how the Op-Ed was published by the Post. Given this purpose, there was no reason for the Institute to provide “commentary” on the Op-Ed or the Photograph or to make either the “subject” of an original article. Indeed, that would have defeated the very purpose behind the Institute’s use, which was to convey how the Post published the Op-Ed. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (recognizing that “the need to convey information to the public accurately may in some instances make it desirable and constant with copyright law . . . to faithfully reproduce an original work without alteration”).

Because the Institute was not seeking to create its own news article (something its fellow had just done), Plaintiff’s photojournalism/commentary cases are inapposite. *See* Opp. 8-11. In those cases, the defendants—for-profit news or media agencies—used copyrighted photographs taken from pre-existing sources to illustrate their own articles about the photographs’ subjects. It is for this reason that courts in these cases conclude that the defendants used the various plaintiffs’ copyrighted photographs “in the same manner and for the same purpose as they were originally intended to be used.” *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 399, 351-52 (S.D.N.Y. 2017).⁵

⁵ *See Ferdman v. CBS Interactive Inc.*, 342 F. Supp. 3d 515, 534 (S.D.N.Y. 2018) (defendant used copyrighted image “solely to present the content of that image”); *Barcroft*, 297 F. Supp. 3d at 352 (defendant used copyrighted images as “illustrative aids because they depicted the subjects described in the articles”); *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 87 F. Supp. 499, 507 (S.D.N.Y. 2015) (defendant reproduced copyrighted photo in “precisely the same context in which it was originally deployed”); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 185-86 (D. Mass. 2007) (defendant’s broadcast of photograph was for same news reporting purpose as original photograph); *Psyhoyos v. Nat’l Examiner*, No. 97 Civ. 7624 (JSM), 1998 WL 336655, at *3 (S.D.N.Y. June 22, 1998) (defendant used photo to “show what it depicts . . . how an art car looks”); *see also Murphy v. Millennium Radio Grp. LLC*, 650 F.3d

Here, the Institute did not use the Photograph for the same purpose as Plaintiff or the New York Post. Plaintiff created the Photograph to show “what Gov. Cuomo looked like delivering a speech in front of the Tappan Zee bridges” and to license the image to the news media to do the same. Opp. at 9; *see* FAC ¶ 5. The Institute did not use the Photograph to that end. Indeed, neither Governor Cuomo nor the Tappan Zee bridges are even visible in the version of the Photograph displayed on the Institute’s Website—a fact Plaintiff ignores but that belies his argument that the Institute used the Photograph for the “*exact same purpose*” as Plaintiff. Opp. at 1 (emphasis original); *see* FAC, Ex. C. The different messages are self-evident. The Photograph’s message is “here is Governor Cuomo” whereas the Institute’s message is “here is what we accomplished.”

Nor did the Institute use the Photograph in the same manner as Plaintiff or the New York Post because the Institute did not publish the Photograph in a media publication; it displayed the Photograph on the library section of its Website, which houses all the Institute’s work.

2. The Institute’s Use Was Not Commercial

The Institute’s use of the Photograph in the library section of the Website is not commercial simply because the Institute engages in standard fundraising and sells various books and periodicals on other areas of its site. Opp. at 12. For the Institute’s use to be commercial, the Institute has to “profit from exploitation of the copyrighted material” itself. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *see also Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (first factor may disfavor fair use “when the secondary use can fairly be characterized as a form of ‘commercial exploitation’”). Here,

295, 306 (3d Cir. 2011) (like the plaintiff, the defendant used copyrighted image to “inform[] the public” about a newsworthy fact).

Plaintiff does not contend that the Institute (1) used the Photograph to solicit donations or advertise sales of unrelated printed material or (2) otherwise sought to financially benefit specifically from its use of the work. The non-commercial nature of the Institute's use thus favors fair use. *See Clark*, 2019 WL 1448448, at *4 (first factor cut in favor of fair use where defendant used photograph for "non-commercial purposes—an opinion post on a non-profit organization's blog").

3. Plaintiff's "Bad Faith" Issue Is A Red-Herring

Plaintiff does not need discovery to determine whether the Institute failed to "consult[] with counsel knowledgeable about copyright law" and thus acted in "bad faith." *Opp.* at 12-13.

As an initial matter, this Court need not evaluate any supposed bad faith to find that the Institute's use is fair. As the Second Circuit has explained, the bad faith of a defendant "contributes little to fair use analysis" and is not "conclusive of the fair use question, or even of the first factor." *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 & n.2 (2004); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (questioning role of "alleged infringer's state of mind" in fair-use analysis). Given its limited utility, courts tend to consider bad faith only where the defendant engaged in wrongful conduct extending beyond a defendant's infringement—or even its knowing infringement. Plaintiff alleges no such additional wrongdoing here. *See, e.g., Harper*, 471 U.S. at 563 (defendants knowingly procured purloined manuscript to preempt plaintiff's publication right); *NXIVM Corp.*, 364 F.3d at 477 (defendants knew or likely knew that unpublished manuscript which they copied was acquired through breach of non-disclosure agreement); *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992) (defendant removed plaintiff's copyright mark before creating sculpture that copied plaintiff's photograph); *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (defendant attempted to pass off his

assistant’s work as “his own, substituting his name as author in place of hers”).

In any event, this Court already has told Plaintiff’s counsel in a prior case that a defendant’s alleged failure to consult counsel is *not* indicative of bad faith. *See Otto v. Hearst Commc’ns Inc.*, 345 F. Supp. 3d 412, 429 n.3 (S.D.N.Y. 2018) (“The Court is not aware of any cases in this Circuit in which [the failure to consult counsel prior to publication] indicate[s] bad faith on Defendant’s part.”); *cf. Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (knowingly using a copyright work without permission does not constitute bad faith).⁶ For this reason, discovery on whether the Institute consulted with counsel would have no bearing on the Court’s analysis of the first fair use factor, regardless of what that discovery would show and even if the Court did need to evaluate “bad faith” to assess the factor.

B. The Second Factor Favors Fair Use

The Institute agrees that the second factor is not very important to the fair use analysis (Opp. at 14, n.1) although this factor does weigh in favor of the Institute because the Photograph is a factual and not a creative work. Plaintiff contends that this Court should find the Photograph “creative” simply because “it was created by a professional photographer.” Opp. at 14.⁷ Yet, even a professional photographer’s work is properly classified as factual where, as here, (1) it is

⁶ Here, Plaintiff’s counsel again misrepresents the law. Counsel cites *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 279 (6th Cir. 2009), and *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584 n.9 (6th Cir. 2007). But those cases discuss willful infringement for statutory damages purposes, not bad faith for fair use purposes.

⁷ Plaintiff offers no other justification for his contention, beyond citing cases recognizing that certain photographs can be creative. While the court in *Monster Communications, Inc. v. Turner Broadcasting*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996), recognized that “photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations,” the court explained that the fair-use analysis may tip in favor of a defendant when the defendant uses historical footage as opposed to a fanciful work. *Id.* Plaintiff’s other cases do not concern candid works of photojournalism used in news reporting, like the Photograph here. They concern either carefully posed or structured photographs or unpublished works.

not an “artistic representation[] designed primarily to express [the photographer’s] ideas, emotions, or feelings,” *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000); (2) the photographer “exercised no more than the minimum authorial decision-making” as to the primary elements of the photograph, *Fitzgerald* , 491 F. Supp. 2d at 188; and (3) the photographer shot the photograph for newsgathering purposes, *see North Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 620 (S.D.N.Y. 2015); *Galvin v. Illinois Republican Party*, 130 F. Supp. 3d 1187, 1194-95 (N.D. Ill. 2015). Here, Plaintiff admits that he created the Photograph to “show[] what Gov. Cuomo looked like delivering a speech” and thus to document Governor Cuomo at a public event. *Opp.* at 9.

The Photograph is factual, not creative, especially in light of the Post’s first publication of the work. *See Baraban v. Time Warner, Inc.*, No. 99 Civ 1569 (JSM), 2000 WL 358375, at *4 (S.D.N.Y. 2000) (prior publication of even creative photograph as part of a commentary on an issue of public importance prevents second factor from weighing decisively in plaintiff’s favor).

C. The Third Factor Favors Fair Use

The third factor favors fair use because the purpose of the Institute’s use—to depict the publication of the Op-Ed—allows the Institute to display *the entirety* of the Photograph. *See* Dkt. 20, at 12. Thus, even if the FAC had alleged that the Institute displayed the entirety of the Photograph on the Institute’s Facebook page, that use still would favor a finding of fair use.

In addressing the third factor, the opposition essentially abandons (1) the Website, which is the primary focus of Plaintiff’s FAC and (2) the Institute’s Facebook share feature allowing the public to share the Website post, including the Photograph.⁸ For the same reasons set forth

⁸ As explained *supra* at n.2, the FAC does not allege that the Institute used the Photograph on its *own* Facebook page. Rather, it alleges only that the Institute “allowed others to share the Photograph on Facebook.” FAC ¶ 12. Even that is a misleading characterization, as anyone with

above, any share feature favors a finding of fair use, and Plaintiff does not contend otherwise. The opposition also has nothing to say about the Website which uses only a darkened, heavily cropped version of the bottom portion of the Photograph, overlaid with text. *See* FAC, Ex. C. That too favors fair use. *See Yang*, 405 F. Supp. 3d at 547 (third factor favored defendant because it used “a significantly cropped version of the Photograph”).

It is nonsensical for Plaintiff to argue that the Institute could have licensed *other* photographs of Governor Cuomo, since the purpose of the Institute’s use was to depict the Op-Ed as published by the New York Post, and the Post published the Op-Ed with the Photograph—and not another image. *See Campbell*, 510 U.S. at 586 (third factor evaluates whether “the quantity and value of the materials used are reasonable *in relation to the purpose of the copying*” (emphasis added)). Because the Institute could not have fulfilled its purpose by displaying an image that the Post did not use, the alleged availability of other images is irrelevant. *See Clark*, 2019 WL 1448448, at *4 (third factor favored fair use because only plaintiff’s work would have accomplished defendant’s purpose to show plaintiff’s photograph as “*used in the context of the Post Article . . .*” (emphasis original)). In any event, this Court should disregard on this motion to dismiss Plaintiff’s evidentiary submissions on this supposed topic.

D. The Fourth Factor Favors Fair Use

The fourth factor favors the Institute because Plaintiff (1) is not entitled to a presumption of market harm given the Institute’s noncommercial use and (2) proffers no facts indicating that he suffered actual market harm or that the Institute’s use could become widespread and adversely impact his licensing market. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417,

a passing understanding of Facebook can appreciate. The Institute allowed members of the public to share on their own Facebook page the Institute’s Website post and that post captured the Photograph.

450 (1984) (“A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”).

This Court should reject as implausible Plaintiff’s empty conclusions that the Institute’s Website use “diminished the licensing value” of the Photograph or “supplant[s]” Plaintiff’s news media market—the only market in which Plaintiff licenses his work. Opp. at 17; *see* FAC ¶ 5. The image as displayed on the Institute’s Website did not depict either Governor Cuomo or the Tappan Zee bridges and would therefore not be seen as a “significantly competing substitute.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Circ. 2015); *see Yang*, 405 F. Supp. 3d at 548 (concluding that it was “implausible that potential purchasers would opt to use the [secondary work] rather than license the original Photograph” where secondary use presented the work in a “cropped and composite manner”); *Clark*, 2019 WL 1448448, at *7 (secondary use did not “compete against” original because it “also contain[ed] the *Post* Article’s headline, author byline, and photographer credit”). Nor does Plaintiff explain why media outlets would seek the work from the Website’s Facebook share feature.

Finally, there is no risk of the Institute’s use becoming widespread and impairing the market for Plaintiff’s works nor would a finding of fair use grant non-profit organizations a blanket license to exploit any content they wish, as Plaintiff contends. Opp. at 2. This case concerns the narrow right of a non-profit think tank to showcase how its own advocacy work was published in the news media. There are a limited number of non-profit organizations in a position to replicate the Institute’s limited use and thus no possibility of the use becoming widespread or impairing any commercial licensing market for photojournalism.

CONCLUSION

The Court should grant Defendant’s motion and dismiss Plaintiff’s FAC with prejudice.

Dated: January 17, 2020
New York, New York

SHAPIRO ARATO BACH LLP

By: /s/ Cynthia S. Arato
Cynthia S. Arato
Erin M. James
500 Fifth Avenue, 40th Floor
New York, NY 10110
Tel: (212) 257-4882
Fax: (212) 202-6417
carato@shapiroarato.com
ejames@shapiroarato.com