

November 4, 2019

**VIA FAX**

Honorable Katherine Polk Failla  
United States District Court  
Southern District of New York  
40 Foley Square  
New York, NY 10007-1312

Re: *Polaris Images Corp. v. Entech Media Group, LLC*, 1:19-cv-08208

Dear Judge Failla:

We represent Plaintiff Polaris Images Corp. (“Plaintiff”) in the above-captioned case and write in opposition to Defendant Entech Media Group, LLC (“Defendant”)’s motion for a pre-motion conference to dismiss the complaint under Fed.R.Civ. P. 12(b)(6). Plaintiff responds to each point as follows:

First, Defendant argues that Polaris is a non-exclusive licensee because Rachel Dolezal published the image to Instagram. This is irrelevant. Dolezal entered an exclusive licensing agreement with Polaris. If Dolezal has violated that agreement, then such dispute exists between Polaris and Dolezal, but that does not absolve Defendant for liability for copyright infringement. Moreover, Defendant cannot show that it has the unfettered right to re-publish images it poaches from Instagram.

Second, Dolezal holds a valid copyright registration, bearing number VA 2-163-244 with effective date of July 20, 2019. *See* Complaint, para. 9. Accordingly, as exclusive agent, Polaris has standing to sue. The cases cited by Defendant involve plaintiffs who have not obtained a valid copyright registration certificate from the U.S. Copyright Office and are therefore inapposite.

Third, the fair use defense is borderline frivolous. Defendant admits that its secondary use “was a direct copy of the news itself, the Instagram Post, which contained the Subject Image, and was used strictly for the purpose of conveying information to the public accurately.” [Dkt. #13, p. 3] By Defendant’s own admission, it did nothing to transform the work, such as by adding commentary directed at the photograph. Instead, it just photocopied from a pre-existing work and re-published it on its commercial website. That is not fair use.

In *Otto v. Hearst Communications, Inc.*, 17-cv-4712 (GHW), where Hearst expropriated a photograph from Instagram and re-published it in a news article without first obtaining permission from the photographer, Judge Woods rejected the fair use defense and found Hearst liable for copyright infringement. Judge Woods noted:

"Stealing a copyrighted photograph to illustrate a news article, without adding new understanding or meaning to the work, does not transform its purpose—regardless of whether that photograph was created for commercial or personal use . . ."

"It would be antithetical to the purposes of copyright protection to allow media companies to steal personal images and benefit from the fair use defense by simply inserting the photo in an article which only recites factual information—much of which can be gleaned from the photograph itself."

Similarly, in *Hirsch v. Complex Media, Inc.*, 18-cv-5488 (CM), Chief Judge McMahon denied the defendant's motion to dismiss the complaint on fair use, relyin in part on this Court's decision in *Gossip Cop*. The Chief Judge noted:

Complex misunderstands the nature of the transformative effect inquiry. Section 107 provides that the display of a copyrighted image may be transformative "where the use serves to illustrative criticism, commentary, or a news story about that work." *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339,352 (S.D.N.Y. 2017) (citing 17 U.S.C. § 107) (emphasis in original). It does not apply where images are used simply as "illustrative aids" depicting the subjects described in a news article. *Id.*; see also *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 404-05 (S.D.N.Y. 2016). Complex has not established that its Video did anything more than merely describe the subject of Hirsch's Photograph, newsworthy or not. That conduct alone does not suffice as transformative. "Newsworthy contents will rarely justify unlicensed reproduction; were it otherwise, photojournalists would be unable to license photos, and would effectively be out of a job." *BWP Media USA*, 196 F. Supp. 3d at 406 n.6.

Based on the foregoing, the motion for a pre-motion conference should be denied.

Respectfully Submitted,

/s/**richardliebowitz**/  
Richard Liebowitz

*Counsel for Plaintiff*