



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Stephen Yang,

Plaintiff,

–v–

Mic Network, Inc.,

Defendant.

18-cv-7628 (AJN)

OPINION & ORDER

ALISON J. NATHAN, District Judge:

Plaintiff brought this action in 2018 for copyright infringement, alleging that Mic Network used his photograph without authorization. Defendant then moved to dismiss and, in September 2019, the Court granted that motion in full and dismissed Plaintiff’s complaint with prejudice. After that decision, Plaintiff moved for reconsideration of the Court’s opinion, and Defendant moved for attorney’s fees and sanctions. For the reasons that follow, the Court denies Plaintiff’s motion for reconsideration and denies Defendant’s motion for fees and sanctions.

I. BACKGROUND

Plaintiff Stephen Yang is a professional photographer who licenses his photos to online and print media for a fee. Complaint, Dkt. No. 17, ¶ 5. In April 2017, Plaintiff took a photograph of Dan Rochkind (the Photograph). Compl. ¶ 7. The Photograph was then licensed to the *New York Post*, which ran an article entitled *Why I Don't Date Hot Women Anymore* about Rochkind and his dating life (the Post Article). Compl. ¶ 8; Dkt. No. 17-2. The Post Article featured the Photograph. Compl. ¶ 8.

Soon after, Defendant Mic Network posted an article entitled *Twitter is skewering the 'New York Post' for a piece on why a man "won't date hot women"* (the Mic Article). Compl.

¶ 11; Dkt. No. 17-4. The Mic Article includes not the full Photograph, but rather a screenshot of the Post Article, which includes the headline of the Post Article, the author's name, the date, and roughly the top half of the photograph (the Screenshot). Compl. ¶¶ 11–12; Dkt. No. 17-4. Defendant did not license the Photograph, nor did it have Plaintiff's permission or consent to publish the Photograph. Compl. ¶ 13.

In August 2018, Plaintiff filed this suit for copyright infringement. Dkt. No. 1. After Defendant moved to dismiss, Plaintiff filed an amended complaint, which is the operative pleading in this case. *See* Dkt. No. 17. Defendant then renewed its motion to dismiss on the grounds that Defendant's use of the Photograph was protected by the fair-use doctrine. Dkt. No. 19.

On September 24, 2019, the Court granted Defendant's motion and dismissed the complaint with prejudice. *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019). The Court reasoned that Defendant's use was protected as fair, primarily because it was transformative in several respects. *Id.* at 542–545. Following the Court's decision, Plaintiff moved for reconsideration. Dkt. No. 28. Defendant then moved for attorney's fees and sanctions. Dkt. No. 30. These two motions are now before the Court.

II. PLAINTIFF'S MOTION FOR RECONSIDERATION IS DENIED

A motion for reconsideration should be granted only if the movant identifies “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted). “The decision to grant or deny a motion for reconsideration is within the sound discretion of the district court.” *Corines v. Am. Physicians Ins. Tr.*, 769 F. Supp. 2d 584, 594 (S.D.N.Y. 2011). “Reconsideration of a previous order by the court is an ‘extraordinary remedy to be employed sparingly in the interests

of finality and conservation of scarce judicial resources.” *RST (2005) Inc. v. Research in Motion Ltd.*, 597 F. Supp. 2d 362, 365 (S.D.N.Y. 2009) (quoting *In re Health Mgmt. Sys., Inc. Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)). A motion for reconsideration is not a “vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a ‘second bite at the apple.’” *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998); see also *Weiss v. El Al Isr. Airlines, Ltd.*, 471 F. Supp. 2d 356, 358 (S.D.N.Y. 2006) (“A motion for reconsideration is not an opportunity for a losing party to advance new arguments to supplant those that failed in the prior briefing of the issue.”). The standard for granting a motion for reconsideration “is strict and reconsideration is generally denied.” *Weiss v. City of New York*, No. 96-cv-8281 (LTS), 2003 WL 21414309, at *1 (S.D.N.Y. June 19, 2003).

Plaintiff brings three arguments in favor of reconsideration, but none succeeds. First, he argues that the Court’s earlier decision “overlooked that Plaintiff’s copyrighted photograph is a separate and distinct asset from the New York Post article.” Pl. Br., Dkt. No. 29, at 3. Yang claims that this distinction warrants reconsideration of the Court’s conclusion that Defendant’s use was transformative under the first fair-use factor. To be sure, Plaintiff is correct that “Yang’s ownership interest resides in the Photograph itself,” not in the *New York Post* article. *Id.* at 3–5. However, the Court clearly and repeatedly distinguished between the Photograph and the Post Article. See, e.g., *Yang*, 405 F. Supp. 3d at 541. And as the Court made clear, “it is clear from the face of the Mic Article that it was using the Screenshot to identify the subject of controversy—the Post Article—and to illustrate why the article has been controversial.” *Id.* at 543. Courts have repeatedly found such uses to be transformative. See, e.g., *Barcroft Media*,

Ltd. v. Coed Media Grp., LLC, 297 F. Supp. 3d 339, 352 (S.D.N.Y. 2017). And the Court noted that “the Mic Article uses the Photograph to place Rochkind in a harshly negative light, while the original use of the Photograph [in the Post Article] placed him in a positive, or at least neutral light.” *Yang*, 405 F. Supp. 3d at 544–45. The Court thus recognized the distinction between the Photograph and the Post Article and nonetheless concluded that Defendant’s use of the Photograph was transformative. *Accord Clark v. Transp. Alts., Inc.*, No. 18-cv-9985 (VM), 2019 WL 1448448, at *2 (S.D.N.Y. Mar. 18, 2019). Indeed, the Court notes that Yang advanced a substantially similar argument in opposition to Defendant’s initial motion, and the Court rejected this position. *See* Dkt. No. 22 at 11–15.

Next, Plaintiff contends that the Court’s “transformative analysis [took] for granted that the New York Post article is a ‘serious’ piece of reporting . . . some may regard the New York Post Article as ‘tongue-in-cheek’ and satirical in its own right.” Pl. Br. at 5–7. However, Plaintiff did not advance this argument in opposition to the original motion, and the Court therefore need not consider it here. *See Analytical Surveys, Inc.*, 684 F.3d at 62; *see, e.g.*, Dkt. No. 22 at 17. And even if this argument was preserved, it would still fail, as the Mic Article would still—even accepting Plaintiff’s well-pleaded allegations as true—be criticizing the Post Article, its subject Rochkind, and how he was portrayed in the Article’s image and text. Defendant’s use would therefore still be transformative.

Finally, Plaintiff argues that the Court “overlooked [the] widespread use of the Photograph in a similar manner,” which “establishes a potential market in which Yang has an expectation to collect fees.” Pl. Br. at 7. Again, Yang advanced this argument in opposition to the motion to dismiss, and the Court rejected it. *Compare* Dkt. No. 22 at 22–24 *with Yang*, 405 F. Supp. 3d at 547–48. As the Court explained, “the Photograph does not appear on its own in

the Mic Article, but as part of a composite Screenshot including the Post Article's headline, the author's byline, and the date and time. In light of the cropped and composite manner in which the Mic Article presents the Photograph, it is implausible that potential purchasers would opt to use the Screenshot rather than license the original Photograph.” *Id.* at 548. Plaintiff has not presented any new reason, let alone a change in binding law or evidence of clear error, that would support reconsidering this result. *See Kolel Beth Yechiel Mechil of Tartikov*, 729 F.3d at 104. The Court thus rejects this argument as a basis for reconsideration.

* * * * *

Many of Yang’s arguments in support of his motion for reconsideration boil down to policy concerns. For example, he contends that the Court “opened Pandora’s box by allowing news publishers to steal photographs by means of ‘composite Screenshots.’” Pl. Br. at 5. And he argues that the Court’s decision allows “secondary publishers [to] just rip off whatever photographs they like based on some controversy raised by an accompanying literary work.” *Id.*

However, it is not the Court’s role to decide each copyright dispute as a matter of first impression based upon what would make good policy. Instead, the Court in its September 2019 Opinion applied binding Supreme Court and Second Circuit precedent to determine that Defendant’s use was fair and thus protected from liability. And in his motion for reconsideration, Plaintiff has not identified “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Kolel Beth Yechiel Mechil of Tartikov, Inc.*, 729 F.3d at 104. The Court thus denies his motion for reconsideration.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.