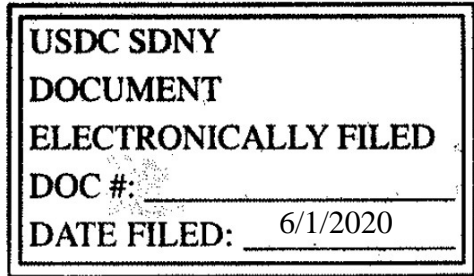


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
REBECCA FAY WALSH,

Plaintiff,

- against -

TOWNSQUARE MEDIA, INC.,

Defendant.
-----X

19-CV-4958 (VSB)

OPINION & ORDER

Appearances:

Richard Liebowitz
Liebowitz Law Firm, PLLC
Valley Stream, New York
Counsel for Plaintiff

Rachel F. Strom
James E. Doherty
Davis Wright Tremaine LLP
New York, New York
Counsel for Defendant

VERNON S. BRODERICK, United States District Judge:

Plaintiff Rebecca Fay Walsh brings this action against Townsquare Media, Inc., asserting a claim of copyright infringement in connection with Defendant’s unlicensed publication in an online article (the “Article”) of a copyrighted photograph (the “Photograph”) taken by Plaintiff. Before me is Defendant’s motion for judgment on the pleadings. Because Defendant’s publication of the Photograph constituted fair use, Defendant’s motion for judgment on the pleadings is GRANTED.

I. Factual Background¹

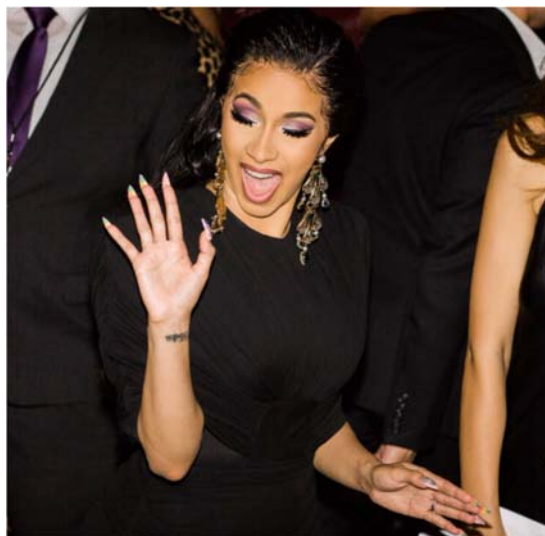
Plaintiff is a Brooklyn-based professional photographer who licenses her photographs to online and print media for a fee. (Am. Compl. ¶ 5.)² Defendant is a Delaware-incorporated business that owns and operates an online website called XXL Mag (“XXL”), located at the URL www.XXLMag.com. (*Id.* ¶¶ 6–7.)

On September 5, 2018, Plaintiff photographed rapper and celebrity Cardi B at a Tom Ford Fashion show in New York City. (*Id.* ¶ 10.) At around the time of the fashion show, she captured numerous photographs of Cardi B, and then made them available for license through Getty Images, a stock photography agency. (*Id.* ¶ 15; *id.* Ex. C). Among those photographs is the one at issue in this action, reproduced below in resized but uncropped form:

¹ The following facts are taken from the Amended Complaint and its accompanying exhibits, as well as the PDF of the full Article that has been submitted by Defendant. I assume the factual allegations set forth in those submissions to be true for purposes of this motion. *See Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007); *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (A complaint is “deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. . . . Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.” (internal quotations and citations omitted)); *see Fed. R. Civ. P. 10(c)* (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”). As discussed in further detail in this section, Defendant contends, and Plaintiff does not dispute, that the original Article had three embedded images, the third of which contained a portion of the Photograph. (Ans. Ex. C.) Plaintiff attached to the Amended Complaint a partial screenshot of the Article as it appeared online, with the headline, article text, and the first embedded image. (*See* Am. Compl. Ex. D.) Plaintiff separately includes a screenshot of the third embedded image—the one that contained the Photograph—as Exhibit C. (*See id.* Ex. C.) Defendant submitted, as Exhibit C to the Declaration of Rachel F. Strom, a screenshot of the entire Article, featuring the same text as Plaintiff’s version but including all three embedded images. (*See* Doc. 16-3.) Plaintiff does not contest the authenticity or accuracy of these screenshots or suggest that I should not consider them. In light of these facts, and in light of the fact that Plaintiff relies extensively on the Article—as the source of the publication of the Photograph that gave rise to its claims—I consider Defendant’s more complete version of the Article. I also find it appropriate to consider the current version of the Article as it appears online, given that Plaintiff herself provided the URL and makes an allegation about the Article in its current form, making it “integral” to her Complaint, *Chambers*, 282 F.3d 147. (*See* Am. Compl. ¶¶ 13, 17; *Cardi B Partners with Tom Ford for New Lipstick Shade*, XXL Mag, <https://www.xxlmag.com/news/2018/09/cardi-b-tom-ford-lipstick-shade-named-after-her/> (last visited April 2, 2020).) Moreover, “[i]t is generally proper to take judicial notice of articles and [websites] published on the [i]nternet.” *Harty v. Nyack Motor Hotel Inc.*, No. 19-CV-1322 (KMK), 2020 WL 1140783, at *3 (S.D.N.Y. Mar. 9, 2020) (quoting *Magnoni v. Smith & Laqueria, LLP*, 701 F. Supp. 2d 497, 501 (S.D.N.Y. 2010), *aff’d*, 483 F. App’x 613 (2d Cir. 2012), and collecting cases). My references to Plaintiff’s allegations should not be construed as a finding as to their veracity, and I make no such findings.

Ans.” refers to Defendant’s Answer to the Amended Complaint, filed on July 31, 2019. (Doc. 12.)

² “Am. Compl.” refers to the Amended Complaint, filed on July 17, 2019. (Doc. 11.)



(*Id.* Ex. A.) Plaintiff has a copyright to the Photograph, which is registered with the United States Copyright Office. (*Id.* ¶ 11.)

On September 10, 2018, Townsquare ran an article on XXL Mag entitled *CardiB Partners with Tom Ford for New Lipstick Shade*, available at the URL <https://www.xxlmag.com/news/2018/09/cardi-b-tom-ford-lipstick-shade-named-after-her/>. (*Id.*

¶ 13.) The text of the Article read as follows:

Cardi B is having a busy 2018 New York Fashion Week. After allegedly getting into a fight with Nicki Minaj, the *Invasion of Privacy* rapper is now getting her own shade of lipstick from Tom Ford.

The Tom Ford Beauty brand broke the news on Sunday (Sept. 9), posting an image of the bold blue shade and Cardi’s name on Instagram. “Meet Cardi. #TFBOYSANDGIRLS #TFLIP #TOMFORDBEAUTY,” the caption of the post reads.

Cardi also celebrated the news on IG³, re-posting the Tom Ford post and adding, “Thank you so much @tomford and @tomfordbeatuy!!! So excited for this and what’s to come.”

Just the latest shade in Tom Ford’s Lips & Boys collection, the new Cardi shade follows the brand’s trend of naming lipsticks after other celebrities such as Julianne [Moore], Dakota [Johnson] and Naomi [Campbell]. There’s no word yet when the lipstick inspired by Cardi will be released.

³ “IG” is apparently a shorthand for “Instagram,” a social media platform on which users post photographs and captions.

As expected, the decision to name a lipstick after Cardi following the New York Fashion Week incident has led to a heated debate on the original Instagram post. While some fans were excited about the upcoming product, other's felt that Cardi doesn't deserve to have a lipstick named after her.

But Cardi doesn't seemed to bothered by that. In another Instagram post, the rapper claimed the upcoming lipstick has already sold out, adding, "Sorry :/....."

In footage from the fight, the "Be Careful" rapper can be seen throwing a shoe in the direction of someone, although it's hard to make out if it's actually Minaj. Cardi can also be heard yelling at someone for talking about her daughter, Kulture. "Write some shit about my daughter again," Cardi says.

While it was reported that Bardi's fight was with the *Queen* artist, Cardi reportedly ended up fighting former *Love & Hip Hop: New York* star Rah Ali.

Check out the Tom Ford Instagram post below.

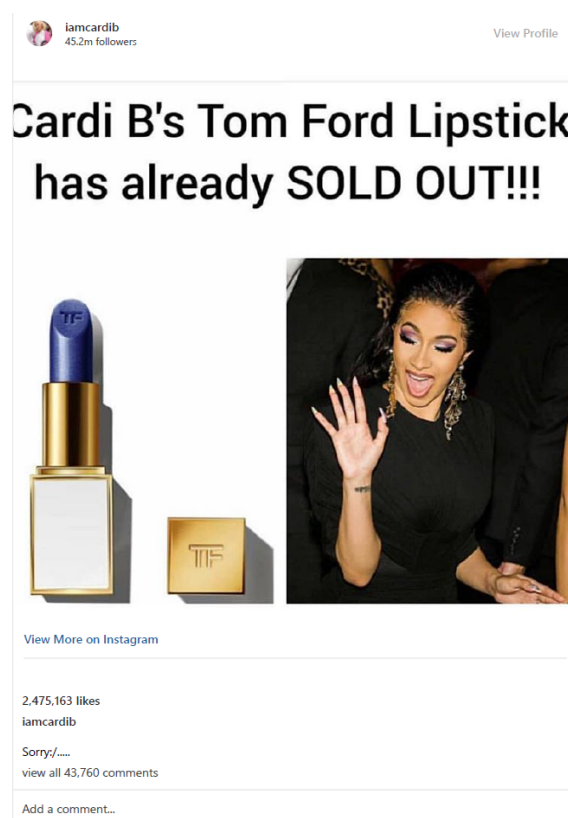
(Ans. Ex. C (alterations and errors in original).) Beneath the last sentence of the article, XXL Mag embedded the three Instagram posts that were described in the Article.⁴ (*Id.* ¶ 13; Ans. ¶ 13.) Plaintiff does not allege that the Post was embedded, alleging only that Defendant "expropriated" the Photograph and "displayed" it in the Article. (Am. Compl. ¶¶ 13, 15.) However, Defendant asserts that the Post was "embedded" (Ans. ¶ 13), and Plaintiff does not dispute this allegation. Moreover, in the current version of the Article, the two Instagram posts that remain displayed link directly to Instagram when clicked on, indicating they have been embedded. *See* Article, <https://www.xxlmag.com/news/2018/09/cardi-b-tom-ford-lipstick-shade-named-after-her/> (last visited April 2, 2020). The first post, by account "tomfordbeauty," announced the lipstick collaboration. (Strom Decl. Ex. C, at 3.)⁵ The second post, from Cardi

⁴ An "embedded" image is one that "hyperlink[s] . . . to [a] third-party website." *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018). "To embed an image, [a] coder or web designer . . . add[s] an 'embed code' to the HTML instructions; this code directs the browser to the third-party server to retrieve the image." *Id.* Thus, the image appears on the new page, but links to and remains hosted on the third-party server or website. *See id.*

⁵ "Strom Decl." refers to the Declaration of Rachel F. Strom in support of Defendant's motion for judgment on the pleadings, filed on August 9, 2019. (Doc. 16.)

B's account, reproduced the post by tomfordbeauty in a screenshot, and thanked Tom Ford and tomfordbeauty. (*Id.* at 4.) The third post (the "Post"), from Cardi B, was a composite image that consisted of an image of the Tom Ford lipstick on the left, the Photograph on the right, and a header reading "Cardi B's Tom Ford Lipstick has already SOLD OUT!!!" (*Id.* at 5.) Above the composite image was Cardi B's username, her follower count, and a link entitled "View Profile." (*Id.*) Below the composite image was a link entitled "View More on Instagram," the number of "likes," and Cardi B's caption for the post: "Sorry :/ ..." (*Id.* at 5.) Below the caption was a link entitled "view all [] comments" and below that, a link entitled "Add a comment" (*Id.*)

The Post appeared as follows:



(*Id.* Ex. C; Strom Decl. Ex. C.) After Plaintiff filed this lawsuit, Defendant removed the Post from the Article. (Am. Compl. ¶ 17.)

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