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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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LAWRENCE MARANO,	:	
	:	
Plaintiff,	:	19-CV-8606 (VEC)
	:	
-against-	:	<u>OPINION AND ORDER</u>
	:	
THE METROPOLITAN MUSEUM OF ART,	:	
	:	
Defendant.	:	
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VALERIE CAPRONI, United States District Judge:

Plaintiff Lawrence Marano (“Marano” or “Plaintiff”) sued the Metropolitan Museum of Art (“Met” or “Defendant”) for willful copyright infringement under Sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106, 501. Compl. (Dkt. 1) ¶¶ 13–15. The Court ordered Plaintiff to show cause why this case should not be dismissed under the fair use exception of the Copyright Act, 17 U.S.C. § 107. (Dkt. 5). As detailed below, because Plaintiff has failed to show why the Met’s use of his photograph (the “Photo”) is not protected by the fair use exception, the case is DISMISSED.

**BACKGROUND<sup>1</sup>**

Plaintiff is a Florida-based professional photographer who owns the copyright to the Photo, a photograph of Eddie Van Halen (“Van Halen”) performing at a concert. Compl. ¶¶ 5,

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<sup>1</sup> The facts are based on the allegations contained in the Complaint, materials attached to the Complaint, and the Met’s “Play It Loud” online exhibition (*see* <https://www.metmuseum.org/exhibitions/listings/2019/play-it-loud>). The Court accepts all well-pled, non-conclusory factual allegations in the pleadings as true and draws all reasonable inferences in the light most favorable to Plaintiff. *Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). The Court considers the Met’s online exhibition *in toto* because the Complaint references it repeatedly and provides screenshots from it, it is critical to Plaintiff’s allegations, and neither party contests the website’s accuracy. *See* Compl. ¶¶ 6, 10–11, 13; Compl., Ex. B (Dkt. 1-2); *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.” (quotations omitted)); *Stephens v. Trump Org. LLC*, 205 F. Supp. 3d 305, 310 n.7 (E.D.N.Y. 2016) (taking judicial notice of “the website hosted at ‘trumpestates.com’” where screenshots of the

7–8; Compl., Ex. A (Dkt. 1-1). The Met is a nonprofit museum that “collects, studies, conserves, and presents significant works of art across all times and cultures in order to connect people to creativity, knowledge, and ideas.” Steinman Decl., Ex. A (Dkt. 15-1); *see* Corporate Disclosure Statement (Dkt. 11).<sup>2</sup> Plaintiff alleges that the Met infringed his copyright by posting the Photo to the museum’s website.<sup>3</sup> Compl. ¶¶ 10, 13; Compl., Ex. B (Dkt. 1-2).

The Met included the Photo in its online catalogue for the “Play It Loud: Instruments of Rock & Roll” exhibition,<sup>4</sup> which “examine[d] the instruments of rock and roll” from “[o]ne of the most important artistic movements of the twentieth century.” Steinman Decl., Ex. B (Dkt. 15-2). The online catalogue corresponds to the physical exhibition previously displayed in a gallery at the museum and is freely accessible. *Id.* To browse the online catalogue, visitors start on a landing page and from there can proceed to three main sub-pages—“Exhibition Overview,” “Exhibition Galleries,” and “Exhibition Objects”—that provide interpretive text, photographs, and multimedia presentations about the instruments that were in the exhibition. *Id.*

To reach Plaintiff’s copyrighted Photo, a visitor must first navigate to “Exhibition Objects,” which lists as thumbnails the 185 objects that were on physical display in the museum

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website’s contents were submitted to the court “without any party raising any dispute as to the website’s authenticity”). The Court refers to excerpts of the online exhibition attached to the declaration of Linda Steinman dated October 23, 2019 (“Steinman Decl.”) (Dkt. 15).

<sup>2</sup> The Court takes judicial notice of Defendant’s Corporate Disclosure Statement, which certifies that “Defendant THE METROPOLITAN MUSEUM OF ART is a 501(c)(3) organization with no corporate parents or publicly held shares.” *See Garcia v. Salvation Army*, 918 F.3d 997, 1002 n.9 (9th Cir. 2019) (taking judicial notice of the Salvation Army’s nonprofit status).

<sup>3</sup> In his response to the Court’s Order to Show Cause, Plaintiff asserts that the Met used the Photo in the brick and mortar museum as well as in the online catalogue for the exhibition. Pl. Resp. (Dkt. 9) at 1. That might be true, but the Complaint includes no allegations regarding use of the Photo at the Met; it complains only of use of the Photo as part of the online catalogue. That said, this decision would be the same even if the Complaint alleged misuse of the Photo in the physical exhibition also.

<sup>4</sup> The online catalogue can be found at <https://www.metmuseum.org/exhibitions/listings/2019/play-it-loud>. The Photo itself is posted to <https://www.metmuseum.org/art/collection/search/752454>. Compl. ¶ 10; Compl., Ex. B. As of the date of this Opinion, both webpages are up and available.

as part of the “Play It Loud” exhibition. Steinman Decl., Ex. D (Dkt. 15-4). Visitors must then click on the “Frankenstein” guitar thumbnail—the guitar designed and assembled by Van Halen. The following page displays two paragraphs on the left side with historical and technical information about the guitar.<sup>5</sup> Compl., Ex. B; Steinman Decl., Ex. E (Dkt. 15-5). To the right of that text there is a large photograph of the guitar and three smaller thumbnail photographs beneath it. The third thumbnail photograph is the copyrighted Photo;<sup>6</sup> the other two are photographs of the “Frankenstein” guitar on display in the gallery. Visitors can view a larger version of any of the three photographs by clicking on it. Beneath the historical text and the photos, the page includes another section of text devoted to “Object Details”; that section provides basic information about the guitar, including, *inter alia*, the materials it was made of and its dimensions.

On September 16, 2019, Plaintiff filed his Complaint, and on September 18, 2019, the Court ordered him to show cause why this action should not be dismissed under the fair use exception of the Copyright Act, 17 U.S.C. § 107. Both parties have submitted responsive briefs to the Court’s order. Pl. Resp. (Dkt. 9); Def. Reply (Dkt. 14); Pl. Sur-Reply (Dkt. 16).

## DISCUSSION

Section 106 of the Copyright Act grants copyright holders certain exclusive rights over their original works, including the right “to reproduce the copyrighted work in copies or phonorecords” and the right “to display the copyrighted work publicly.” 17 U.S.C. § 106.

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<sup>5</sup> For example, the background text explains that the “Frankenstein” guitar “was pieced together by Eddie Van Halen from modified factory seconds and mismatched odd-lot parts, then spray-painted. It represents an effort to combine some of the most desirable elements of Gibson and Fender guitars into a single instrument that was not commercially available at the time. Van Halen was continually striving to achieve the ultimate guitar for tone, playability, dependability, and functionality. . . . One of the most recognizable guitars of all time, it spawned legions of copies from other manufacturers and inspired generations of fans to design their own instruments.” Compl., Ex. B; Steinman Decl., Ex. E.

<sup>6</sup> The Photo is now credited to Plaintiff. *Compare* Compl., Ex. B, *with* Steinman Decl., Ex. E.

Assuming for the sake of argument that Plaintiff possesses the copyright and that the Met's copying of the Photo was unauthorized, the sole issue before the Court is whether the fair use doctrine warrants dismissal of the Complaint.

## I. Standard of Review

Because this action is still in the pleadings stage, and because the parties' submissions are limited to the four corners of the Complaint and incorporated materials, the Court will apply the standards applicable to a Rule 12(b)(6) motion to dismiss. To survive a motion to dismiss, "a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief."

*Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). "[A] complaint does not need to contain detailed or elaborate factual allegations, but only allegations sufficient to raise an entitlement to relief above the speculative level." *Keiler v. Harlequin Enters. Ltd.*, 751 F.3d 64, 70 (2d Cir. 2014). The Court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the light most favorable to the plaintiff. *Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). The Court is not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). The Court may also consider "facts stated on the face of the complaint, . . . documents appended to the complaint or incorporated in the complaint by reference, and . . . matters of which judicial notice may be taken." *Graham v. Prince*, 265 F. Supp. 3d 366, 376 (S.D.N.Y. 2017) (quotation omitted); *see also supra* note 1.

## II. Fair Use Analysis

The fair use doctrine is a statutory exception to copyright infringement. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006). As codified in the

Copyright Act, “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. To determine whether a particular use is fair use, courts engage in a case-by-case evaluation using four statutory factors in light of the purposes of copyright. *Bill Graham*, 448 F.3d at 608. The factors to be considered include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. Although a court must weigh all the factors, the first—in particular a use’s “transformativeness”—is most important and “has a significant impact on the remainder of the fair use inquiry.” *Prince*, 265 F. Supp. 3d at 380.

Fair use is a “mixed question of fact and law,” necessitating “an open-ended and context-sensitive inquiry.” *Id.* at 376 (quotation omitted). For that reason, courts generally wait until the summary judgement phase to address fair use, *id.* at 377, but dismissal of a copyright infringement claim is warranted where fair use is clearly established on the face of the complaint, *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016). In this case, Plaintiff does not object to addressing fair use at this stage of the proceedings.<sup>7</sup> Even if he did, cases in which transformativeness can be determined by doing a side-by-side comparison of the original

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<sup>7</sup> Plaintiff acknowledges that “[a] court ‘may conclude as a matter of law that the challenged use does not qualify as a fair use of the copyrighted work.’” Pl. Resp. at 2 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

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