UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELLIOT McGUCKEN,

                              Plaintiff,

                    -v.-

NEWSWEEK LLC,

                              Defendant.

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19 Civ. 9617 (KPF)

**OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

Plaintiff Elliot McGucken is a fine art photographer based in Los Angeles, California.  In March 2019, Plaintiff visited Death Valley National Park to take photographs.  During that trip, Plaintiff photographed a rare ephemeral lake that appeared in the park and subsequently shared that photograph on Instagram.  Defendant Newsweek published an article about the ephemeral lake, and embedded in the article the photograph that Plaintiff had posted on Instagram.  Thereafter, Plaintiff brought this action for copyright infringement, alleging that Defendant had reproduced and displayed his photograph on its website without his consent.

By Opinion and Order dated June 1, 2020, the Court dismissed Plaintiff's claims for contributory and vicarious infringement, but allowed his claim for direct copyright infringement and his prayer for enhanced damages to go forward.  *See McGucken* v. *Newsweek LLC*, 464 F. Supp. 3d 594 (S.D.N.Y. 2020) ("*McGucken I*"), *reconsideration denied*, No. 19 Civ. 9617 (KPF), 2020 WL 6135733 (S.D.N.Y. Oct. 19, 2020) ("*McGucken II*").  Now before the Court are the parties' cross-motions for summary judgment with respect to Plaintiff's

remaining claim.  Plaintiff asks this Court to find Defendant liable for copyright

infringement and willful infringement, such that the case would proceed to trial

solely on the issue of damages.  Defendant asks this Court to find as a matter

of law that the embedding of the Instagram post did not actually infringe any of

Plaintiff's exclusive rights under the Copyright Act; that it had a license to

embed Plaintiff's Instagram post; or, alternatively, that its use of the Instagram

post constituted fair use.  For the reasons that follow, the Court denies both

motions.

## BACKGROUND[1]

### A.    Factual Background

### 1.    The Photograph

In March 2019, Plaintiff, a fine art photographer based in Los Angeles,

California, posted several photographs of the ephemeral lake he observed in

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[1]    This Opinion draws on evidence from Plaintiff's Statement of Undisputed Facts
Pursuant to Local Civil Rule 56.1 ("Pl. 56.1" (Dkt. #56)); Defendant's Response and
Counter-Statement of Material Facts Pursuant to Local Civil Rule 56.1(b) ("Def. 56.1
Reply" (Dkt. #68 at 8-13)); Defendant's Statement of Undisputed Material Facts
Pursuant to Local Civil Rule 56.1(a) ("Def. 56.1" (Dkt. #68 at 1-8)); and Plaintiff's
Response and Counter-Statement of Material Facts Pursuant to Local Civil Rule 56.1(b)
("Pl. 56.1 Reply" (Dkt. #72)).  The Court also considers the Declaration of Elliot
McGucken in support of Plaintiff's motion ("McGucken Decl." (Dkt. #57)) and the
exhibits attached thereto; the Declaration of Scott Alan Burroughs in support of
Plaintiff's motion ("Burroughs Decl." (Dkt. #60)) and the exhibits attached thereto; and
the Declaration of Sara Gates in support of Defendant's motion ("Gates Decl." (Dkt.
#67)) and the exhibits attached thereto.

For ease of reference, the Court refers to Plaintiff's Memorandum of Law in Support of
His Motion for Summary Judgment as "Pl. Br." (Dkt. #55); to Defendant's Memorandum
of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to
Plaintiff's Motion for Summary Judgment as "Def. Br." (Dkt. #65); to Plaintiff's
Memorandum of Law in Opposition to Defendant's Cross-Motion for Summary
Judgment and Reply to Defendant's Opposition to Plaintiff's Motion for Summary
Judgment as "Pl. Opp." (Dkt. #71); and to Defendant's Reply Memorandum of Law in
Further Support of Its Cross-Motion for Summary Judgment as "Def. Reply" (Dkt. #73).

Death Valley, California to his public Instagram account.  (Pl. 56.1 ¶ 1; Def. 56.1 ¶¶ 2, 11).  Several news outlets used one or more of Plaintiff's photographs in their coverage of the ephemeral lake.  (Def. 56.1 ¶ 19). Defendant contacted Plaintiff to request permission to upload one of Plaintiff's photographs of the ephemeral lake (the "Photograph") to the Newsweek website, but Plaintiff did not respond.  (Def. 56.1 ¶ 25; McGucken Decl., Ex. 3).

On March 14, 2019, Defendant published on its website an article titled "Huge Lake Appears in Death Valley, One of the Hottest, Driest Places on Earth" (the "Article").  The Article incorporated one of Plaintiff's Instagram posts of the ephemeral lake (the "Instagram Post") through a process known as embedding.  (*See* Gates Decl., Ex. K).[2]  On April 1, 2019, Plaintiff registered the Photograph with the United States Copyright Office and received the registration number VA 2-145-698.  (McGucken Decl., Ex. 2).  Two days later, on April 3, 2019, Plaintiff's counsel sent a cease-and-desist letter to Defendant, providing notice that Defendant's use of the Photograph infringed on his copyright and requesting that Defendant remove the Photograph from the

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[2]      As explained by Judge Kimba Wood, and as this Court quoted in *McGucken I,*

> Embedding allows a website coder to incorporate content, such as an image, that is located on a third-party's server, into the coder's website.  When an individual visits a website that includes an "embed code," the user's internet browser is directed to retrieve the embedded content from the third-party server and display it on the website.  As a result of this process, the user sees the embedded content on the website, even though the content is actually hosted on a third-party's server, rather than on the server that hosts the website.

*Sinclair* v. *Ziff Davis, LLC*, No. 18 Civ. 790 (KMW), 2020 WL 1847841, at *1 (S.D.N.Y. Apr. 13, 2020) (internal citations omitted), *adhered to in part on reconsideration,* 2020 WL 3450136 (S.D.N.Y. June 24, 2020).

Article.  (Burroughs Decl., Ex. 5).  It is unclear whether Defendant, in fact, received this letter, because Defendant's email system returned to Plaintiff a message indicating that there was a "permanent error" associated with the email address to which Plaintiff had sent the letter.  (*Id.* at ¶ 4; *see also id.,* Ex. 6).  Plaintiff's counsel attempted to send the letter to this email address two additional times, but received the same "permanent error" response each time. (*Id.* at ¶ 4).  Defendant did not remove the Photograph from its site until after this lawsuit was filed.  (*Id.*).

> ### 2.    Instagram's Agreements and Policies[3]

As in *McGucken I,* resolution of the parties' cross-motions requires discussion of the various agreements governing the parties' use of Instagram.

All Instagram users must agree to Instagram's Terms of Use in order to use the platform.  (Gates Decl., Ex. Q at 2).  The Terms of Use provide, in relevant part:

> [W]hen you share, post, or upload content that is covered by intellectual property rights …, you hereby grant to [Instagram] a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings).

(*Id.* at 6).

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[3]    The Court quotes from the versions of these documents in effect during the relevant time period.

The Terms of Use also provide that users "must agree to the Data Policy to use Instagram." (Gates Decl., Ex. Q at 4).  The Data Policy describes how information on Instagram is shared with others and informs users that,

> When you share and communicate using our Products, you choose the audience for what you share. ... Public information can be seen by anyone, on or off our Products[.]  This includes your Instagram username [and] any information you share with a public audience[.] You, other people using [Instagram], and we can provide access to or send public information to anyone on or off our products, including ... through tools and APIs.  Public information can also be seen, accessed, reshared, or downloaded through third-party services such as search engines, APIs, and offline media such as TV, and by apps, websites, and other services that integrate with our Products.

(*Id.*, Ex. R at 8).[4]

The use of Instagram's API is subject to Instagram's Platform Policy. (Gates Decl., Ex. Q at 7 ("[Y]our use of our API is subject to our Platform Policy.")).  The Platform Policy defines Instagram's "Platform" as "a set of APIs, [Software Development Kits ('SDKs')], plugins, code, specifications, documentation, technology, and services (such as content) that enable others, including application developers and website operators, to retrieve data from Instagram or provide data to [Instagram]."  (*See id.*, Ex. S ("Platform Policy") at 2).  According to the Platform Policy, the Platform is provided "to help broadcasters and publishers discover content, get digital rights to media, and

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[4]  An "API" or "application programming interface," is a service that "enable[s] users to access and share content posted by other users whose accounts are set to 'public' mode."  *McGucken I*, 464 F. Supp. 3d at 601 n.3 (quoting *Sinclair*, 454 F. Supp. 3d at 344).

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