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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAWRENCE SCHWARTZWALD,

Plaintiff,

v.

OATH INC.,

Defendant.

No. 19-CV-9938 (RA)

OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiff Lawrence Schwartzwald brings this action against Defendant Oath Inc., which owns and operates www.HuffPost.com, alleging copyright infringement in violation of Section 501 of the Copyright Act, 17 U.S.C. § 101 *et seq.* Schwartzwald asserts that Oath unlawfully reproduced a photograph he took of the actor Jon Hamm (the “Photograph”) without seeking his authorization or paying him a licensing fee. The Photograph, which Schwartzwald alleges “illustrates what Jon Hamm looks like wearing trousers in public while he walks down the street, ostensibly without any underwear,” Dkt. 15 ¶ 16, was subsequently included in altered form in a Huffington Post article entitled, *25 Things You Wish Your Hadn’t Learned In 2013 And Must Forget in 2014*, *id.* ¶ 19 & Ex. B. Now before the Court is Oath’s motion to dismiss Schwartzwald’s First Amended Complaint (“FAC”) pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Court agrees with Oath that its use of the Photograph is protected by the fair use doctrine. Oath’s motion is therefore granted.

FACTUAL BACKGROUND

Except where otherwise noted, the following facts are drawn from Schwartzwald’s FAC

and the exhibits attached thereto, and are assumed to be true for purposes of this motion. *See Myun–Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60, 65 (2d Cir. 2018).

Schwartzwald is a New York-based professional photographer who licenses his photographs to online and print media for a fee. FAC ¶¶ 1, 5. Oath is a for-profit media company that owns and operates the website www.HuffPost.com. *Id.* ¶¶ 6-10.

Schwartzwald took the Photograph of the actor Jon Hamm walking down the street while carrying a shopping bag and holding the hand of his then-girlfriend, the actress Jennifer Westfeld. *Id.* ¶ 11 & Ex. A; Dkt. 17 (“MTD”) at 6. Schwartzwald alleges that the Photograph “illustrates what Jon Hamm looks like wearing trousers in public while he walks down the street, ostensibly without any underwear.” *Id.* ¶ 16. He further contends that he “took the Photograph for the purpose of commercial news reporting.” *Id.* ¶ 14.



Schwartzwald licensed the Photograph to Splash News & Picture Agency, a New York-based stock photography agency that sub-licenses Schwartzwald's photographs to third-party media outlets. *Id.* ¶ 12. He also licensed it to the New York Daily News and other third-party media outlets “for the purpose of commercial news reporting.” *Id.* ¶¶ 13, 15.

On December 27, 2013, Oath ran an article on www.HuffPost.com entitled, *25 Things You Wish You Hadn't Learned in 2013 and Must Forget in 2014*. *Id.* ¶ 19 & Ex. B. The article begins:

2013 will be noted for a number of positive, enlightening and informative moments that took place across the cultural spectrum. People discovered, spoke truth to power and risked their lives to get information to the public. But there was also a poop cruise, outrage over butt-shaking and E-list celebrities clinging to fame by doing porn. You were alright, 2013, but we could have gone without learning ...

Id. at Ex B. The article proceeds to list 25 events or trends of 2013 that the authors “could have gone without learning.” *Id.* Each event or trend is accompanied by a short paragraph of commentary; twelve are also accompanied by photographs. *Id.* Some of the items in the list—such as former New York congressman Anthony Weiner's explicit text messages—are salacious. *Id.* Others—such as the discovery that “[d]inosaur erotica is a thing that exists”—border on the absurd. *Id.* A few—such as the contention that “[p]eople freak out way more over TV deaths than they do over ones in the world we actually live in”—are darker. *Id.* A number of the items focus on viral moments involving celebrities, such as the assertion that “the nation flipped a collective shit” when pop star Miley Cyrus “twerked” at the MTV Video Music Awards. *Id.*

At issue in this case is an item in the list entitled, “Some ad men don't do underwear.”

Id. The text below the heading reads:

This year has been a busy one for “Mad Men” star Jon Hamm's privates. Apparently he's very blessed south of the border, and he, or those who examine photographs of him, really want you to know that. Hamm says he wants people to

stop talking about his loins, but it might help if he'd put on some underwear.

Id. Following the text is a cropped version of the Photograph that excludes approximately half of the image, including the girlfriend with whom Hamm is walking (the “Oath Photograph”). *Id.* Superimposed over Hamm’s groin area—the portion of the Photograph that allegedly “illustrates what Jon Hamm looks like wearing trousers . . . without any underwear”—is a black box containing the words “Image Loading” in white text. *Id.* ¶ 16 & Ex B.



Oath did not license the Photograph from Schwartzwald, nor did it obtain his permission or consent to publish the Photograph. *Id.* ¶ 24. Schwartzwald registered the Photograph with the United States Copyright Office on May 18, 2017—more than three years after Oath published the article.¹ *Id.* ¶ 18. The Photograph was given the registration number VA 2-053-227. *Id.*

¹ The FAC states that a copy of the registration is attached as Exhibit B and that Oath’s article is attached as Exhibit

The registration states that the Photograph was first published on July 9, 2012. Schwartzwald alleges that he discovered Oath's article in April 2018. *Id.* ¶ 25.

PROCEDURAL HISTORY

Schwartzwald filed this action on October 28, 2019. Dkt. 1. After Oath filed a motion to dismiss on December 20, 2019, Dkt. 9, Schwartzwald filed the FAC on January 10, 2020, Dkt. 15. Oath filed the motion to dismiss the FAC now before the Court on January 24, 2020, arguing that it did not infringe Schwartzwald's copyright because its use of the Photograph constitutes fair use under copyright law. Dkts. 16-17. Schwartzwald filed a memorandum in opposition to Oath's motion on February 7, 2020, Dkt. 18, to which Oath replied on February 14, 2020, Dkt. 19. The Court held oral argument on July 7, 2020.

LEGAL STANDARD

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a Rule 12(b)(6) motion, the question is "not whether [the plaintiff] will ultimately prevail," but "whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 529–30 (2011) (citation omitted). In answering this question, the Court must "accept[] all factual allegations as true, but 'giv[e] no effect to legal conclusions couched as

C. *Id.* Exhibit B to the FAC, however, is Oath's article, not the copyright registration, and there is no Exhibit C. The Court nonetheless deems the copyright registration, which is publicly available at <https://cocatalog.loc.gov>, incorporated into the FAC by reference. See *BankUnited, N.A. v. Merritt Envtl. Consulting Corp.*, 360 F. Supp. 3d 172, 183 (S.D.N.Y. 2018) ("To be incorporated by reference, the complaint must make a clear, definite and substantial reference to the documents.") (internal quotation marks and citations omitted).

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