

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL NICKLEN and CHRISTINA
MITTERMEIER,

Plaintiffs,

-against-

SINCLAIR BROADCAST GROUP,
INC., et al.,

Defendants.

20-cv-10300 (JSR)

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiff Paul Nicklen captured footage of a starving polar bear and posted the video to his Instagram and Facebook accounts. Dozens of news outlets and online publishers, including Sinclair Broadcast Group, Inc. and its affiliates (collectively, the "Sinclair Defendants"), embedded the video in online articles without first obtaining a license. Nicklen then sued the Sinclair Defendants for copyright infringement. The Sinclair Defendants now move to dismiss the Second Amended Complaint, arguing that embedding a video does not "display" the video within the meaning of the Copyright Act and that the video's inclusion in an article about the video's popularity was fair use. For the reasons that follow, the Court denies the motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Allegations

The following allegations are presumed true for purposes of the motion to dismiss. Paul Nicklen is a Canadian nature photographer, filmmaker, and founder of the nonprofit conservationist organization SeaLegacy. Second Am. Compl. ("SAC"), ECF No. 72, at ¶¶ 2, 9. Nicklen is the author and registered copyright owner of a video of an emaciated polar bear wandering the Canadian Arctic ("the Video"). See SAC ¶¶ 159, 169; see also SAC, Exs. 4, 4A. On December 5, 2017, Nicklen posted the Video to his Instagram and Facebook accounts. SAC ¶ 5; see also SAC, Ex. 7. In a caption, Nicklen urged his social media followers to consider the "haunt[ing]" and "soul-crushing scene" and to take steps to mitigate the harms of climate change. SAC, Ex. 7. Nicklen added that "[w]e must reduce our carbon footprint, eat the right food, stop cutting down our forests, and begin putting the Earth -- our home -- first." Id. He then invited his followers to "join us at @sea_legacy as we search for and implement solutions for the oceans and the animals that rely on them -- including us humans." Id. Finally, the caption noted that the Video "is exclusively managed by Caters News" and directed those seeking "[t]o license or use [the Video] in a commercial player" to contact Caters News. Id.; see also SAC ¶ 5.

Sinclair Broadcast Group, Inc. is a Maryland-based media conglomerate that owns "over 200" local television stations and 118 wholly owned subsidiaries nationwide ("Sinclair Affiliates"). SAC ¶¶ 11-12; SAC, Ex. 2.; see also Def. Mot., ECF No. 78, at 1. On or around December 11, 2017, Sinclair Broadcast Group published an article titled "Starving polar bear goes viral in heartbreaking video." SAC, Ex. 5. Sinclair Broadcast Group included the Video in this article using the Instagram or Facebook application programming interface ("API") embed tool. Id. at ¶ 158. Sinclair Broadcast Group "embedded" the Video by including in its website an HTML code provided by Instagram or Facebook that directed web browsers to retrieve the Video from the Instagram or Facebook server for viewing on Sinclair's website. See SAC ¶¶ 158-60. The Video appeared within the body of the Sinclair article even when a reader took no action to retrieve the Video or to navigate to Nicklen's Facebook or Instagram account, and even when a reader did not have a Facebook or Instagram account. Id. at ¶¶ 160-61.

The Sinclair Broadcast Group article opens by stating that "[a] photograph of a polar bear is grabbing attention as it shows the animal slowly succumbing to starvation." SAC, Ex. 6. The article goes on to repeat quotes Nicklen gave to National Geographic and to explain that Nicklen "advocated for the reduction of the carbon footprint," quoting the portion of Nicklen's Instagram caption that described the polar bear population's

battle against extinction. Id. The article closes by noting that “[t]he video has already reached over 1 million views on Facebook.” Id. Nicklen alleges upon information and belief that this Sinclair Broadcast Group article was reposted -- and the Video was re-embedded -- on all television station websites operated by the Sinclair Defendants. SAC ¶ 170.

Though Nicklen provided licensing information in the text of his Instagram post, the Sinclair Defendants did not obtain a license or Nicklen’s consent before embedding the Video. SAC ¶¶ 162, 285. On or about December 8, 2020, Nicklen sent the Sinclair Affiliates a takedown notice, but the Video remains displayed on television station websites owned by Sinclair Broadcast Group, Inc. and Sinclair Affiliates. SAC ¶¶ 170, 178.

II. Procedural Background

Nicklen and Christina Mittermeier¹ sued the Sinclair Defendants, among others, for copyright infringement. ECF No. 7. Nicklen filed a First Amended Complaint adding class allegations. See ECF No. 11. Nicklen then filed a Second Amended Complaint, identifying each Sinclair affiliate and the URL of each infringing article. See ECF No. 72.

¹ Co-plaintiff Christina Mittermeier, a photographer who took a still photograph of the same polar bear that was also widely embedded on online news sites, does not allege that the Sinclair Defendants embedded her photo. See SAC ¶¶ 277-78. As such, the Court does not discuss factual allegations and claims relevant only to Mittermeier.

In the operative complaint, Nicklen alleges that by embedding Nicklen's copyrighted video on Sinclair websites using the Instagram or Facebook API, the Sinclair Defendants infringed his exclusive reproduction, distribution, and display rights in violation of 17 U.S.C. §§ 106(1), (3), and (5). See SAC ¶¶ 284-85. Nicklen alleges in the alternative that Sinclair Broadcast Group is liable for inducing the copyright infringement of its affiliates. Id. at ¶¶ 291-95. The Sinclair Defendants move to dismiss the Second Amended Complaint. ECF No. 85.

LEGAL STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6), the Court "accept[s] all factual allegations in the complaint as true, and draw[s] all reasonable inferences in the plaintiffs' favor." Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 61 (2d Cir. 2010) (quoting Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009)). "Threadbare recitals of the elements of a cause of action" and conclusory allegations are not presumed true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Disregarding legal conclusions couched as fact, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Dane v. UnitedHealthcare Ins. Co., 974 F.3d 183, 188 (2d Cir. 2020) (quoting Iqbal, 556 U.S. at 678). A claim for relief is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable

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