UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ESTHER WILDER,

Plaintiff,

OPINION AND ORDER

22-cv-1254 (PKC)

-against-

SARAH HOILAND,

Defendant.

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CASTEL, U.S.D.J.

Plaintiff Esther Wilder and defendant Sarah Hoiland filed cross-motions for summary judgment in this copyright infringement case. In an Opinion and Order of February 1, 2024 (ECF 85 (the "Order")), this Court granted summary judgment to Hoiland, concluding that she had made a fair use of Wilder's work. The Court also concluded that there were genuine issues of material fact about Wilder's ownership of the copyright that precluded granting her motion for summary judgment on her claim of copyright infringement. The Clerk of Court entered judgment accordingly on February 2, 2024. (ECF 86.)

On February 13, 2024, Hoiland submitted a request to the Court for a two-week extension of time to file her motion for attorneys' fees and costs under 17 U.S.C. § 504 and Rule 54(d). (ECF 87.) Hoiland requested the adjournment of this deadline, consented to by Wilder, because they were "in discussions to determine whether this matter can be settled without further Court proceedings, and the parties believe that a short extension of the current deadline will help facilitate those discussions." (Id.) The Court granted this request. (ECF 88.) On March 1,

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Wilder, represented by new counsel, filed a motion asking the Court to alter or amend its judgment pursuant to Rule 59(e), Fed. R. Civ. P. (ECF 94.) Hoiland also filed a motion seeking an award of attorneys' fees on March 1. (ECF 91.) After Wilder filed her motion under Rule 59(e), Hoiland sought to "withdraw" her motion for attorneys' fees because it would be "rendered premature" by the Rule 59(e) motion. (ECF 101.) Wilder filed opposition briefing to Hoiland's attorneys' fees motion, to which Hoiland replied. (ECF 98, 99, 100, 103, 104.)

For the reasons set forth below, Wilder's motion pursuant to Rule 59(e) will be denied. Hoiland's motion for attorneys' fees will also be denied.

I. WILDER'S MOTION TO ALTER OR AMEND THE JUDGMENT

The standards for motion for reconsideration under Local Rule 6.3 and altering or amending a judgment under Rule 59(e), Fed. R. Civ. P, are "identical." Burke v. Solomon Acosta & FASCore/Great West & MTA/NYC Transit Authority, 2009 WL 10696111, at *1 (S.D.N.Y. Apr. 23, 2009) (Castel, J.), affirmed sub nom. Burke v. Acosta, 377 F. App'x 52 (2d Cir. 2010) (summary order) (citation omitted). Motions to alter or amend a judgment are held to strict standards, "and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transportation, Inc., 70 F.3d 255, 257 (2d Cir. 1995) (citations omitted). Motions to alter or amend a judgment are not vehicles for the moving party to relitigate an issue the Court has already decided. Cordero v. Astrue, 574 F. Supp. 2d 373, 380 (S.D.N.Y. 2008) (Marrero, J.); see also Shrader, 70 F.3d at 257.

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A motion for reconsideration may be granted based upon "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Virgin Atlantic Airways, Ltd. v. National Mediation Board, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks and citation omitted); see also NEM Re Receivables, LLC v. Fortress Re, Inc., 187 F. Supp. 3d 390, 396-97 (S.D.N.Y. 2016) (Marrero, J.) (analyzing a motion for reconsideration under Rule 59(e), Fed. R. Civ. P., and Local Rule 6.3 under these three grounds). "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" Exxon Shipping Company v. Baker, 554 U.S. 471, 486 n.5 (2008) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). See also Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012), as amended (July 13, 2012) (citations omitted) ("It is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple'. . . .").

Conceding that she is not offering any intervening change in law or newly discovered evidence, Wilder argues that the Court's judgment should be amended based on "clear error" and "manifest injustice." (ECF 95 at 7.) She urges the Court to reverse its grant of summary judgment to Hoiland on her fair use affirmative defense and to instead grant summary judgment in her favor on her copyright infringement claim. (Id.) For the reasons explained below, the Court declines to amend or alter its judgment. Wilder's motion will be denied.

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A. Hoiland's Use Was a Fair Use

Wilder's main contention in her Rule 59(e) motion is that Hoiland's use of the copyrighted text at issue (the "Unit 7H Text") was not transformative and that the Court therefore should not have concluded that her use was fair. (Id. at 8-17.) Wilder also argues that the Court "misapprehended" the context of Hoiland's use and asserts that the written slides themselves, rather than the presentation Hoiland gave using the written slides, were "all that mattered" to the fair use analysis. (Id. at 1, 9.)

But whether a use is transformative is not dispositive to the fair use analysis. Rather, it is an element of the analysis under the first factor, "the purpose and character of the use." See Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 538 (2023) (explaining that a "use's transformativeness may outweigh its commercial character" as part of the first factor analysis); Swatch Group Management Services Ltd. v. Bloomberg L.P., 756 F.3d 73, 84 (2d Cir. 2014) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) ("While a transformative use generally is more likely to qualify as fair use, 'transformative use is not absolutely necessary for a finding of fair use.'"); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 102 (2d Cir. 2014) (concluding that "providing access to the print-disabled is still a valid purpose under Factor One even though it is not transformative" and ultimately concluding use was fair).

Wilder herself concedes that transformativeness is not dispositive when she cites statistics about how often courts finding transformative uses "also held that the uses were fair." (ECF 105 at 7 (emphasis added) (citation omitted).) Even if Hoiland's use was not transformative, then, Wilder's confidence that the grant of summary judgment to Hoiland was error "as a matter of law" is misplaced. (ECF 95 at 17; see also id. ("Because Hoiland's Work

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Was Not Transformative, the Work Could Not Have Been a Fair Use.").) As Hoiland notes, the fair use standard is "flexible," Warhol, 598 U.S. at 527, and other factors in the fair use analysis also weighed in her favor, not just the "transformative" element. (ECF 97 at 7-8.) Under the first factor, the Court also concluded that Hoiland's non-commercial, educational use weighed in her favor (ECF 85 at 29, 35); the second factor, the nonfictional nature of the work, also weighed in favor of fair use (which Wilder essentially conceded) (id. at 36); and the fourth factor weighed in Hoiland's favor as well (id. at 40-44).[1] And although Wilder argues that the Court committed error by placing the burden on Wilder to show market harm under the fourth factor rather than on Hoiland, who had the burden of proving her affirmative defense, Wilder misunderstands the Court's opinion. (ECF 105 at 8 n.4.)) The Second Circuit has granted summary judgment in favor of defendants based on "essentially unrebutted" evidence in the record that showed the plaintiffs' claimed financial harm was speculative or unlikely, as was the case here. HathiTrust, 755 F.3d at 100–01; see also Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1264 (2d Cir. 1986) (finding fair use where plaintiff could not "credibly argue that the use of the quotations has harmed potential markets for her work" because she was "unable to point to a single piece of evidence portending future harm").

But the Court also declines to alter its conclusion that Hoiland's use was transformative. Even if the Court accepted Wilder's argument that it should have considered the written presentation alone, divorced from all reference to the oral component of Hoiland's

[1] Wilder is also not correct that Campbell "abrogated" the significance of the fourth factor. (ECF 105 at 7 n.3 (quoting Campbell, 510 U.S. at 590 n.21).) See, e.g., Authors Guild v. Google, 804 F.3d 202, 223 (2d Cir. 2015) (citing Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566 (1985)) ("Because copyright is a commercial doctrine whose objective is to stimulate creativity among potential authors by enabling them to earn money from their creations, the fourth factor is of great importance in making a fair use assessment."); Swatch, 756 F.3d at 90 (quoting Harper & Row, 471 U.S. at 566) (observing that "the Supreme Court described [the fourth] factor as 'undoubtedly the single most important element of fair use'"); Yang v. Mic Network Inc., 2022 WL 906513, at *1 (2d Cir. Mar. 29, 2022) (citations omitted) (summary order) ("The Supreme Court has stressed the importance of the first factor . . . and the fourth factor" of the fair use analysis).

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