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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANA ROMANOVA,	:		
	:		
	:	Plaintiff,	22-CV-8948 (VEC)
	:		
	:	-against-	<u>OPINION AND ORDER</u>
	:		
AMILUS INC.,	:		
	:		
	:	Defendant.	
-----	X		

VALERIE CAPRONI, United States District Judge:

Plaintiff Jana Romanova (“Plaintiff”) sued Amilus Inc. (“Defendant”) for willful copyright infringement under Section 501 of the Copyright Act, 17 U.S.C. § 501. Compl. ¶¶ 46–54, Dkt. 1. After Defendant failed to appear, Plaintiff moved for default judgment. *See* Dkts. 17–20. After a show-cause hearing, 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. *See* Dkt. 28. As detailed below, because Plaintiff has failed to show why Defendant’s use of Plaintiff’s photograph is not protected by the fair use exception, the case is DISMISSED.

BACKGROUND¹

Plaintiff is a professional photographer. Compl. ¶ 5.² Defendant is the registered owner of the website www.ap-ai.com (the “Website”), which “sells merchandise to the public.” *Id.* ¶¶ 3, 6, 18–20. Plaintiff owns the copyright to a photograph of a woman with a snake wrapped around her left wrist and another snake wrapped around a portion of her torso and arm (the “Photo”). *Id.* ¶¶ 21–23; *id.*, Ex. 1 (Dkt. 1-1). Plaintiff alleges that Defendant infringed her copyright by posting the Photo to the Website. Compl. ¶¶ 24–28; *id.*, Ex. 2 (Dkt. 1-2).

Plaintiff alleges that she registered the Photo with the United States Copyright Office (the “USCO”) on October 3, 2017, under Registration No. VA 2-071-921. Compl. ¶ 23. Plaintiff claims that she originally licensed the Photo for use in a National Geographic article about persons in Russia who owned snakes as household pets. *See* Pl. Decl. ¶ 12, Dkt. 31. “At its heart, the Photograph is a display of snakes as domesticated pets with their owner in Russia.” Pl. Mem. at 5, Dkt. 30. On December 26, 2019, Plaintiff alleges that she observed the Photo in an

¹ The facts are based on the allegations contained in the Complaint, materials attached to the Complaint, and Plaintiff’s filings in response to the Court’s order to show cause (Dkts. 30–31). In light of Defendant’s default, *see* Dkt. 12, Plaintiff’s properly pleaded allegations, except those relating to damages, are accepted as true. *See Goga v. Zim Am. Integrated Shipping Servs. Co.*, 2009 WL 320602, *1 (S.D.N.Y. Feb. 10, 2009) (citing *Cotton v. Slone*, 4 F.3d 176, 181 (2d Cir. 1993)). The Court considers Plaintiff’s descriptions and exhibits purporting to demonstrate Defendant’s alleged infringing use of the Photo *in toto*; the Complaint references Defendant’s use repeatedly, provides screenshots from it, and it is critical to Plaintiff’s Complaint. *See* Compl. ¶¶ 24–26, 30, 50; *id.*, Ex. 2 (Dkt. 1-2); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (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)).

² The Court notes that the Complaint alleges that Plaintiff is a citizen of The Netherlands, Compl. ¶ 5, but in the Declaration in Support of Plaintiff’s Response to the Court’s Order to Show Cause, Plaintiff claims to be a citizen of Russia, *see* Pl. Decl. ¶ 1, Dkt. 31.

article on the Website titled “Trending: Dogs, Cats . . . and Other Pets, to Start Off 2018” (the “Article”). Compl. ¶¶ 24–25.³

On October 20, 2022, Plaintiff filed the Complaint. Dkt. 1. After Defendant failed to appear or otherwise respond to the Complaint, Plaintiff initiated default judgment proceedings. *See* Dkt. 23. On January 27, 2023, this Court held a show cause hearing on Plaintiff’s motion; Defendant did not appear. *See id.*; Order, Dkt. 28. Following the hearing, the Court ordered Plaintiff to show cause why Defendant’s alleged infringing use of the Photograph fell outside the fair-use exception. *See* Order, Dkt. 28.⁴ On February 13, 2023, Plaintiff filed a memorandum of law and a declaration in response to the Court’s order. Dkts. 30–31 (“Pl. Mem.” and “Pl. Decl.”, respectively).

DISCUSSION

A Clerk’s entry of default against a defendant for failure to appear does not automatically entitle Plaintiff to default judgment. *See Goga v. Zim Am. Integrated Shipping Servs. Co.*, 2009 WL 320602, *2 (S.D.N.Y. Feb. 10, 2009) (quotation omitted). Before granting default judgment, the Court must be satisfied that the Complaint states a claim upon which relief can be granted. *McGlynn v. Cools, Inc.*, 2020 WL 6561658, at *5 (S.D.N.Y. July 1, 2020) (citing *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)), *report and recommendation adopted*, 2020 WL 5525745 (S.D.N.Y. Sept. 15, 2020). Accordingly, taking Plaintiff’s well-pleaded allegations as true, except those relating to damages, and Plaintiff’s additional uncontroverted factual proffers in support of her motion as true, Plaintiff still must state a claim

³ Plaintiff alleges that the infringing use can be found at the URL <https://www.aiap.com/publications/article/22624/trending-dogs-cats-and-other-pets-to-start.html>. Compl. ¶ 25.

⁴ Plaintiff’s counsel was also asked to provide supporting documentation for Plaintiff’s licensing use of the Photo in the event that the Court were to find Plaintiff entitled to any damages. *See* Order, Dkt. 28.

for relief. *See* Fed. R. Civ. P. 55(b); Fed. R. Civ. P. 8(b)(6); *Yahoo! Inc. v. XYZ Cos.*, 872 F. Supp. 2d 300, 303 (S.D.N.Y. 2011).

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. 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). The doctrine “allows for new transformative works that further the public discourse and the free exchange of ideas in order to promote science and the arts.” *Baraban v. Time Warner, Inc.*, 2000 WL 358375, at *2 (S.D.N.Y. Apr. 6, 2000). 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.

Although courts generally wait until summary judgment to address fair use, *Graham v. Prince*, 265 F. Supp. 3d 366, 377 (S.D.N.Y. 2017), 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).

I. Standard of Review

To survive dismissal, “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.” *Prince*, 265 F. Supp. 3d at 376 (quotation omitted); *see also supra* note 1. Assuming without deciding that Plaintiff possesses the copyright and that Defendant’s use of the Photo was unauthorized, if Defendant’s use falls within the fair use doctrine, then Plaintiff has failed to state a claim.

II. Fair Use Analysis

Fair use is a “mixed question of fact and law,” necessitating “an open-ended and context-sensitive inquiry.” *Prince*, 265 F. Supp. 3d at 376 (quotation omitted). 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 Archives*, 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.

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