

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<p>NORTH JERSEY MEDIA GROUP INC.,</p> <p><i>Plaintiff,</i></p> <p>v.</p> <p>SARHPAC, SARAH PALIN <i>and</i> JOHN DOE NOS. 1-5,</p> <p><i>Defendants.</i></p>	<p>1:13-CV-06494-AKH</p>
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MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANTS
SARHPAC AND SARAH PALIN TO DISMISS THE AMENDED COMPLAINT

Ronald D. Coleman (RC 3875)
GOETZ FITZPATRICK LLP
One Penn Plaza—Suite 3100
New York, NY 10119
(212) 695-8100
rcoleman@goetzfitz.com
*Attorneys for Defendants
Sarahpac and
Sarah Palin*

Of Counsel:
John J. Tiemessen (*Pro Hac Vice Application Pending*)
CLAPP PETERSON TIEMESSEN THORSNESS
AND JOHNSON LLC
411 Fourth Avenue—Suite 300
Fairbanks, Alaska 99701

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PRELIMINARY STATEMENT

Defendants SarahPAC and Sarah Palin submits this Memorandum of Law in support of their motion to dismiss the Amended Complaint on grounds of improper venue or *forum non conveniens* (as incorporated into 28 U.S.C. § 1404(a) and for failure to state a claim for which relief can be granted.

The Amended Complaint alleges copyright and trademark infringement arising out of defendant's use on Facebook, as a thumbnail to a post commemorating the anniversary of the September 11th attacks, of its iconic photograph depicting three New York City firefighters raising the American flag over the smoldering debris of the World Trade Center (the "WTC Flag Raising Photograph"). Plaintiff North Jersey Media Group, Inc. ("Jersey Media"), which holds the copyright in the photo, makes two claims based on the alleged, and trivial, use of this image by defendants. The first, of course, is copyright infringement, which is addressed below. The second claim is a fantastic one for false designation of origin under the Lanham Act, based on the allegation that "defendants' unauthorized use of [Jersey Media]'s WTC Flag Raising Photograph on defendants' websites falsely designates the origin" of that photo and is "likely to cause confusion."

As an initial matter, the venue of this lawsuit makes no sense at all. Plaintiff Jersey Media is a New Jersey corporation. Its sole place of business is in New Jersey. What it does in New Jersey is publish two New Jersey newspapers. While a mere river – the Hudson – runs through the straight line from plaintiff to this courthouse, the distance traversed to reach defendants, whose connection to this District is utterly tenuous, is, respectively, hundreds of miles to one and transcontinental to the other.

One defendant, SarahPAC, is a political action group organized in Arlington, Virginia, having its principle place business in the Commonwealth of Virginia. The other, Sarah Palin, is the well-known former governor of the State of Alaska, formerly the Republican nominee for Vice President, who is herself a resident of Alaska. In short, a New Jersey newspaper has chosen New York as the forum to sue defendants located in distant states, based on conduct with no particular connection to this District besides the subject matter of the photograph—a consideration that is irrelevant for purposes of venue. Defendants therefore seek dismissal under Fed. R. Civ. P. 12(b)(3) on the ground of improper venue or, in the alternative, for transfer of this action to an appropriate forum.

The Amended Complaint was not only filed in the wrong place; it should never have been filed at all. It is fatally deficient on the law as well and, barring dismissal under Fed. R. Civ. P. 12(b)(3), this Court or a transferee court can, defendants submit, and should dismiss it for failure to state a claim. Plaintiff's characterization of a copyright infringement claim arising from the use of a photograph into an unfair competition case is so plainly meritless that little argument is, as shown below, necessary to dispose of it. Moreover, plaintiff's copyright claim is groundless because the alleged use of plaintiff's photograph in reduced, cropped form to provide visual and historical context to a Facebook post memorializing the September 11th attacks is not copyright infringement.

STATEMENT OF FACTS¹

Plaintiff Jersey Media, a New Jersey corporation with its principal place of business in Woodland Park, New Jersey, publishes two New Jersey daily newspapers and numerous weekly community newspapers in New Jersey as well as websites found at the URL's

¹ All facts set forth herein are taken from the Amended Complaint unless otherwise noted.

www.northjersey.com and www.Bergen.com (the latter a reference to Bergen County, New Jersey). It is the owner of the registered copyright for the WTC Flag Raising Photograph that is the subject matter of this litigation. The WTC Flag Raising Photograph has become an iconic image that has received international attention.

Defendant SarahPAC is a federally registered political action committee with its principal place of business in Arlington, Virginia and defendant Sarah Palin, its principal, is a resident of Alaska.

As shown on Exhibit C to the Amended Complaint, on September 11, 2013 defendants, or a person acting under their authority, caused a small reproduction of a portion of the WTC Flag Raising Photograph to be displayed on the Sarah Palin Facebook profile page found at www.facebook.com/sarahpalin. It was displayed in connection with a post consisting of two words, “Never forget.” This Facebook posting automatically caused the same image to be shown – still smaller – on a corresponding “widget” displayed on the www.sarahpac.com website (the “Facebook Widget”), as shown in Exhibit B. The Facebook Widget, bearing the title “Find us on Facebook,” displayed miniature versions of all posts on the Sarah Palin profile page, including the one set forth in Exhibit C.

On or about September 12, 2013, NJMG, through its counsel, purported to give “electronic notice” of its objection to this use of the WTC Flag Raising Photograph to defendants through the novel method of sending a message “via the ‘Contact Us’ tool on www.sarahpac.com. The Amended Complaint also states that on about September 12, 2013, NJMG, through its counsel, sent a letter, by priority overnight mail, to SarahPAC and Sarah Palin informing them of the alleged infringement, and does not allege that the image remained online any later than the very next day, September 13, 2013.

LEGAL ARGUMENT

I. VENUE IN THIS COURT IS IMPROPER OR IT IS AN INCONVENIENT FORUM, AND THIS ACTION SHOULD BE DISMISSED OR TRANSFERRED TO AN APPROPRIATE VENUE

a. The Amended Complaint does not allege facts demonstrating that venue in this District is proper.

If venue is improper in the district court where the action was filed, as here, the Court may, within its discretion under 28 USC § 1406(a), dismiss the action or transfer the action to any district in which it can be brought to promote the interest of justice. *Minnette v. Time Warner*, 997 F. 2d 1023 (2d Cir. 1993). With allegations respecting jurisdiction the burden is on plaintiffs properly to plead, and on challenge to demonstrate, that venue in this District is proper. *Garg v. Winterthur*, 2007 WL 136263 (S.D.N.Y. 2007); *Cartier v. Micha*, 2007 WL 1187188 (S.D.N.Y. 2007). Plaintiff has not met the basic standard of pleading venue, and, it is submitted, could not do so even upon additional submissions.

The applicable statute, 28 U.S.C. § 1391(b) provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Paragraph 3 of the Amended Complaint is the sole factual basis of plaintiff's allegation of venue, and it is insufficient as a matter of law. It merely recites the venue statute but sets forth neither a specific provision of that statute nor any factual basis for the conclusory formulation that "Upon information and belief, venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400(a)." In fact, the standards of that statute are not met by this allegation of venue, neither in the Amended Complaint nor in the facts.

Courts require, just as with any other pleading matter, more than conclusory allegations when pleading venue. Thus in *G.F.C. Fashions, Ltd. v. Goody's Family Clothing, Inc.*, 1998 WL 78292, 3 (S.D.N.Y. 1998), this Court found that a conclusory allegation of facts giving rise to venue, i.e., “(1) that “a substantial part of the events or omissions giving rise to the claims herein occurred in this district” and (2) that plaintiff’s “actions have had, and continue to have, an impact on interstate commerce and on commerce within the state of New York . . . do not alone support a finding of venue,” which in *G.F.C. Fashions* was premised on § 1392. Both the absence of any facts on which to base venue and specific allegations that could provide a proper basis for venue are absent here as well.

Jersey Media relies on 28 U.S.C. §§ 1391 and 1400(a). Presumably, under each of these statutes, plaintiff – which has declined to be specific – relies on their respective provisions permitting venue in any District “in which the defendant or his agent resides or may be found.” But it is nowhere alleged that the Southern District of New York is a District in which “any defendant may be found” or even that either defendant resides here or is amenable to service here. *See, e.g., Jackson v. American Brokers Conduit*, 2010 WL 2034508, 2 (S.D.N.Y. 2010) (dismissing claim based on improper venue).

Alternatively, Section 1391(b)(2) permits an action to be brought in a judicial district in which “a substantial part of the events or omissions giving rise to the claim occurred.” The key words under §1391(b)(2) are “a substantial part,” as the Second Circuit Court of Appeals explained in *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353 (2d Cir. 2005):

[W]e caution district courts to take seriously the adjective “substantial.” We are required to construe the venue statute strictly. *See Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953). That means for venue to be proper, significant events or omissions material to the plaintiff’s claim must have occurred in the district in question, even if other material events occurred elsewhere. **It would be error, for**

instance, to treat the venue statute's "substantial part" test as mirroring the minimum contacts test employed in personal jurisdiction inquiries.

417 F.3d at 357 (emphasis added). Thus, to establish venue in a trademark action, it has been held that the defendant must have aimed its marketing and advertising at the district or have sold its infringing goods there. *See, D'Anton Jos, S.L. v. Doll Factory, Inc.*, 937 F. Supp. 320, 321-22 (S.D.N.Y. 1996). And in copyright matters, it has been established in this Circuit that it is not the place where a work is created, much less where its owner resides, that defines "substantiality." Rather, the focus is on the defendant's actions:

Plaintiff argues that venue is appropriate in this district under 28 U.S.C. § 1391(b)(2) because the Subject Work was created here, and "such creation is obviously a 'substantial part' of the underlying action" for copyright infringement and misappropriation. Defendant responds that:

[T]he events giving rise to the claim (i.e., defendant's access and alleged infringement of the subject work) occurred in New York City and New Jersey, hundreds of miles away from this District. The fact that the subject work was created in Buffalo is irrelevant and an erroneous interpretation of the "giving rise" clause of § 1391(b)(2).

The phrase "events or omissions giving rise to the claim" in 28 U.S.C. § 1391(b)(2) suggests a focus on the actions of the defendant, not on those of the plaintiff. For this reason, plaintiff's reliance upon this section fails.

Gaines, Emhof, Metzler & Kriner v. Nisberg, 843 F. Supp. 851, 854 (W.D.N.Y. 1994) (citation omitted). Here, of course, unlike in *Gaines*, not even the plaintiff Jersey Media claims to have anything to do with New York; and, again, neither is it alleged that either defendant did anything in this District relating to these claims. Absent any of these, venue here is inappropriate.

Ultimately, the law governing venue does not merely defer to a plaintiff's forum-shopping preferences or the location of its lawyers. "When venue is challenged, it is the plaintiff's burden to prove that it is proper pursuant to 28 U.S.C. § 1391." *Greenblatt v. Gluck*, 265 F. Supp. 2d 346, 352 (S.D.N.Y. 2003), *citing Friedman v. Revenue Mgmt. of New York, Inc.*,

38 F.3d 668, 672 (2d Cir.1994). In *Greenblatt* this Court dismissed on venue grounds, in part, an amended complaint which, like this one, “does not allege that a substantial part of the events or omissions occurred in this district, nor does the dispute involve any property located in this district.” Here, too, dismissal is appropriate on these same grounds.

b. Alternatively, venue in this District is improper and the Court should order transfer to an appropriate District.

28 U.S.C. § 1404(a) provides in part that “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” As the Supreme Court explained only two weeks ago, “Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer.” *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 12-929, 2013 WL 6231157 (U.S. Dec. 3, 2013) at *11, explaining:

In the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations. Ordinarily, the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve “the convenience of parties and witnesses” and otherwise promote “the interest of justice.” § 1404(a).

Id.

Here there is no plausible ground on which Jersey Media can assert, or has alleged, that litigating its claims in the Southern District of New York is more convenient for either itself, whose operations are entirely in New Jersey, or defendants, who reside and transact the majority of their business in Alaska. Jersey Media certainly has no grounds for asserting that doing so would otherwise promote the interest of justice. In contrast, the District of Alaska is the ideal

choice for transfer because both the defendants conduct a substantial part of the events giving rise to these claims – i.e., the alleged posting of the Facebook item using the photo as a thumbnail occurred there, not here.

With regards to the balance of convenience, this Court considers such factors as “(1) the convenience of witnesses; (2) the convenience of the parties; (3) the locus of operative facts; (4) the location of relevant documents and relative ease of access to sources of proof; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the forum's familiarity with the governing law; (7) the relative financial means of the parties; (8) the weight afforded plaintiff's choice of forum; and (9) trial efficiency and the interests of justice generally.” *AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F.Supp.2d 525, 528 (S.D.N.Y. 2004) (citation omitted). Virtually all these factors favor transfer to the District of Alaska.

“The convenience of party and nonparty witnesses is usually the most important consideration in deciding a motion to transfer venue.” *AEC One Stop Group, Inc.*, 326 F. Supp. 5. Based on the Amended Complaint, which is premised mainly on the existence of a copyright-protected photograph, the vast majority of the factual “moving parts” concern actions allegedly taken by defendants, whose operations are largely in Alaska, which implicates several of the above factors. Even respecting allegations of infringement that takes place outside of Alaska, the relevant witnesses would still likely be in Alaska; if not, there is no reason to believe they would be in New York City.

As to the location of relevant evidence and documents, it is well established that “In infringement cases, the bulk of the relevant evidence usually comes from the accused infringer.” *AEC One Stop Group*, 326 F. Supp. 2d at 530. This would, for the same reasons, apply here as well. Similarly, “The power of the district courts to compel attendance of unwilling witnesses is

not unlimited.” *Amick v. American Exp. Travel Related Services Co., Inc.*, 09 Civ. 9780 (AKH) (S.D.N.Y, Jan. 26, 2010), 2010 WL 307579 (transferring case to district where witnesses are likely to be found and attendance of witnesses can be compelled).

In short, there is every reason to transfer this case, if not dismissed on the ground of the Amended Complaint’s utter failure to allege a basis for venue, to the District of Alaska.

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED FOR FALSE DESIGNATION OF ORIGIN.

Courts will dismiss claims under the Lanham Act which, like the second count of the Amended Complaint, are “no more than a claim of copyright infringement dressed up in the guise of the Lanham Act.” *Atrium Grp. De Ediciones Y Publicaciones, S.L. v. Harry N. Abrams, Inc.*, 565 F. Supp. 2d 505, 511 (S.D.N.Y. 2008). The Court should do so here, where plaintiff Jersey Media has simply recast its copyright infringement claim as a violation of 15 U.S.C. § 1125(a)(1)(A) on the ground that defendants’ use of their photo “falsely designates the origin of the WTC Flag Raising Photograph by displaying the SarahPAC.com logo” and that this use “falsely represent[s] that SarahPAC.com owns the WTC Flag Raising Copyright.” [Amended Complaint ¶¶ 23-25.] This theory of recovery, by which “origin” has been conflated with “copyright,” has been repeatedly rejected, especially since the Supreme Court’s ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S.Ct. 2041, 156 L.Ed.2d 18 (2003). As this Court recently explained in *Pearson Educ., Inc. v. Boundless Learning, Inc.*, 919 F. Supp. 2d 434 (S.D.N.Y. 2013):

The Court's holding in *Dastar* addressed . . . the applicability of section 43(a)(1)(A) to reverse passing off claims, which occurs when a producer misrepresents someone else's goods as his or her goods. . . . The Court grounded its holding in what it ruled was the “natural understanding” of section 43(a)(1)(A)'s phrase “origin of goods.” *See id.* at 32–32, 37, 123 S.Ct. 2041. It

concluded, in short, that although this phrase does not extend to the originator of the idea that the goods embody, it does reach beyond geographic origin to origin of production of the physical goods at issue. *See id.* at 32, 37, 123 S.Ct. 2041.

Id. at 438. In *Pearson Educ.*, the Court declined to extend the rule of *Dastar* to false advertising claims, which are premised on “misrepresentation of “the nature, characteristics, [or] qualities” of goods in commercial advertising or promotion under § 1125(a)(1)(B)).” *Id.* But Jersey Media’s Lanham Act claim does not sound in false advertising, only in misrepresentation of “origin.” And as the *Pearson Educ.* Court acknowledged, the inapplicability of such claims to capture the supposed “origin,” i.e., copyright owner of a creative work in tandem with a copyright claim, is completely uncontroversial. For this reason, the rule of *Dastar* and the cases applying it to claims such as this mandates dismissal of Jersey Media’s false designation of origin claim.

In a less esoteric vein, plaintiff has failed far more fundamentally to state a claim for false representation of origin because it has not pled the elements of such a claim. Section 1125(a)(1)(A), or § 43(a), does not create a generic “misrepresentation of origin” tort untethered to facts or consumer expectations. Rather, as the court explained in dismissing a similar claim in *Genometrica Research Inc. v. Gorbovitski*, 11-CV-05802 ADS AKT, 2013 WL 394892 (E.D.N.Y. Jan. 31, 2013), “when § 43(a) is used to allege false designation of origin, it is being used as a vehicle for assertion of traditional claims of infringement of trademarks as discussed above, where courts have applied the traditional rules of trademarks so that a protectable mark is required.” What are those “rules”? No more, but no less, than an allegation that (1) the plaintiff has a protectable trademark and (2) the defendant’s use of **that mark** is likely to confuse consumers as to the sponsorship or origin of the goods. *See, N. Atl. Operating Co., Inc. v.*

Evergreen Distributors, LLC, 86 Fed. R. Serv. 3d 1165 (E.D.N.Y. 2013); *J.T. Colby & Co., Inc. v. Apple Inc.*, 11 CIV. 4060 DLC, 2013 WL 1903883 (S.D.N.Y. May 8, 2013).

Jersey Media's Amended Complaint does not allege, even in conclusory fashion, the existence of a trademark. Indeed, no one reading the Amended Complaint has any way of divining what that trademark might be. "The Plaintiffs have not alleged in the Amended Complaint that they have a protectable mark . . . Therefore, although the Plaintiffs allege that . . . the Defendants are falsely designating the origin as to the affiliation, connection, and association between the [their product] and [Plaintiff's product], and this purposefully trades on the goodwill associated with [Plaintiff], this is insufficient to state a claim for false designation of origin." *Genometrica Research Inc. v. Gorbovitski*, *id.* at *14. The same should apply here for the same reason: Where there is not even the allegation of the existence of a trademark, there is no false designation of origin, and the second count of the Amended Complaint should be dismissed.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED FOR COPYRIGHT INFRINGEMENT.

The Amended Complaint alleges two acts of copyright infringement, set out in ¶ 12 as follows:

Defendants have, without permission, posted a copy of the WTC Flag Raising Photograph on their web pages, including at least www.sarahpac.com. a copy of which is annexed as Exhibit B, and www.facebook.com/sarahpalin, a copy of which is annexed as Exhibit C. . . .

The Amended Complaint's reference to Exhibit B yields little obvious evidence of this alleged use, but by all indications the reference is to Figure A below, which, below the added words "Never forget," shows a blurry, indented monochrome square that appears to depict a miniscule version of the WTC Flag Raising Photograph.

In fact, to the extent it can at all be discerned, the square shown consists of approximately three-fifths of the content, albeit much reduced in size, of the WTC Flag Raising Photograph, which as demonstrated in Exhibit A to the Amended Complaint is rectangular and oriented to the “portrait” (as opposed to “landscape”) format. In the miniature, square version, one of the most compelling components of the original composition – the vertical sweep of the image that guides the eye upward from the stolid “base” of the three fireman to the promise of a soaring makeshift flagpole, set against the steaming wreckage of the World Trade Center – is absent.

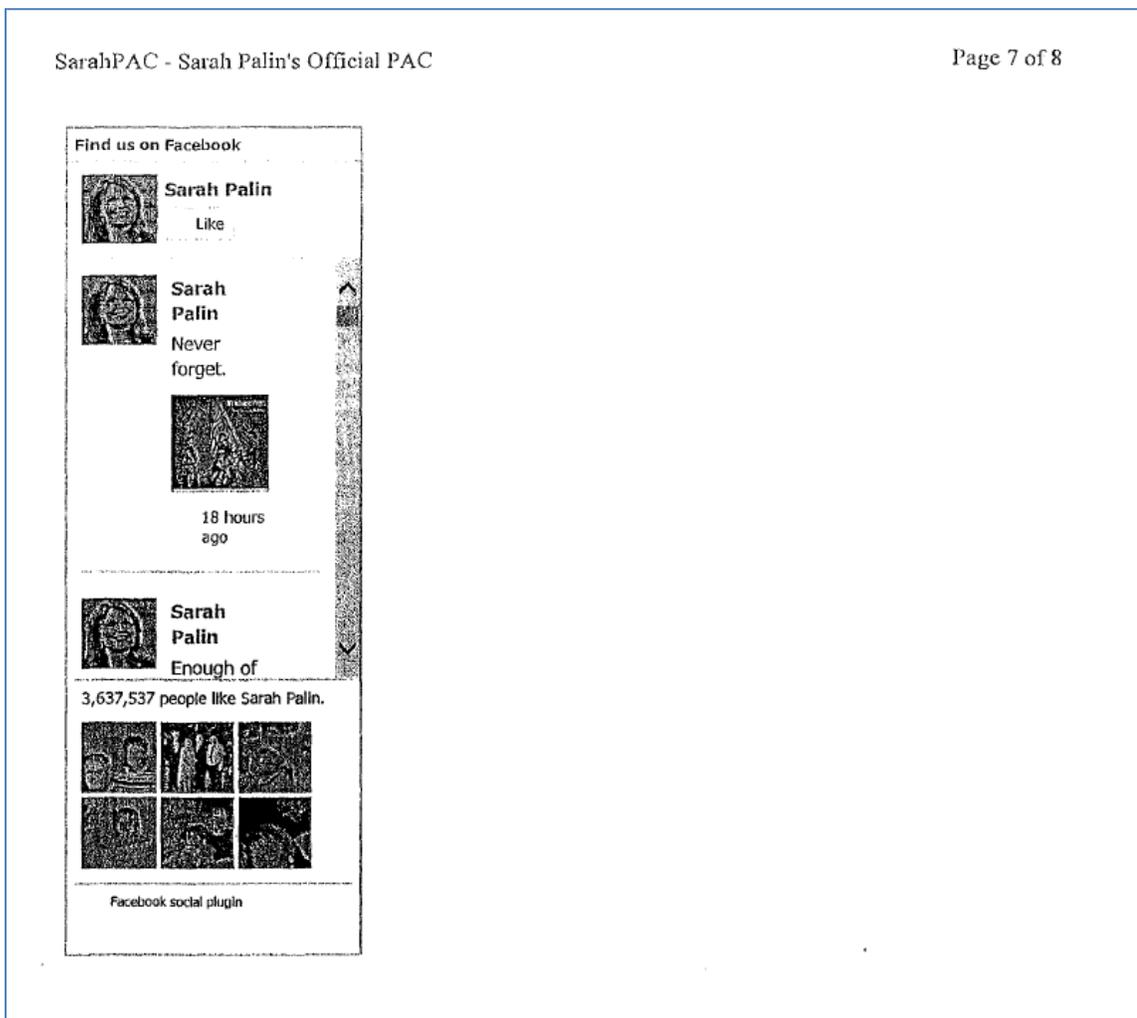


Exhibit C, in turn, which is reproduced below as well, more clearly appears to show the photograph as used on what is alleged to be, and appears to be, the Facebook page of defendant Sarah Palin:

Sarah Palin | Facebook Page 1 of 7

Email or Phone: Password:
 Keep me logged in Forgot your password?


Sarah Palin
3,637,587 likes · 154,607 talking about this

Politician
<http://www.SarahPalin.com/>

About Photos Likes **Notes** 390

Highlights

Sarah Palin
19 hours ago

Never forget.



Like · Comment · Share 20,635

Rayko Bhai, Don Roessel, Patti Weber and 120,628 others like this.
View previous comments 2 of 3,491

 Don Nicholas Lib's said there's not enough "diversity" in that picture. Funny, the buildings didn't feel that way when they fell.
7 minutes ago via mobile

 Paul J. Klosterman Let's roll!
2 minutes ago

Recent Posts by Others on Sarah Palin See All

 Joe Newby
Report: Obama's Syrian allies clamber little bit with fr...
3 minutes ago

 Kristi Kinn Becker
I'm hoping you could share this to the parents you know.....
10 minutes ago

 James Odell Kowish
I think you do a great job as a parent and with your politica...
59 minutes ago

More Posts

 Sarah Palin shared a link.
September 9

Enough of this foreign fiasco distraction. Got back to work. It is time to bomb Obamacare.
<http://youtu.be/hgtB/lnKDUE>

 Just Sayin'
youtube.be
SarahPalin.com

Like · Comment · Share 6,014

Linda David Ellis, Albert Curtis Sr., Larry W Smith and 64,228 others like this.
View previous comments 2 of 2,311

<https://www.facebook.com/sarahpalin> 9/12/2013

In this depiction of the WTC Flag Raising Photograph as well, while the figures in the image are easier to discern, the photograph is cropped and flattened in the same way as described above.

Based on the facts set forth in the Amended Complaint, neither alleged use of the “WTC Flag Raising Photograph” constitutes copyright infringement, because the use described is a fair use. Among this Court’s most recent summaries of the well-established standards for the fair use defense in copyright is found in *FireSabre Consulting LLC v. Sheehy*, 11-CV-4719 CS, 2013 WL 5420977 (S.D.N.Y. Sept. 26, 2013) (internal quotes and citations omitted):

The fair use doctrine permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that law is designed to foster. The Copyright Act provides that the use or limited reproduction of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. . .

The Copyright Act directs courts to consider four factors when deciding whether particular conduct constitutes fair use: “(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(1)-(4). These statutory factors are not requirements; the party seeking a judgment of fair use need not show that every factor weighs in its favor, and the factors are non-exclusive. The fair use determination is an open-ended and context-sensitive inquiry, and while the fourth factor is the most important, no single factor is determinative. All are to be explored, and the results weighed together, in light of the purposes of copyright. If the use is otherwise fair, then no permission need be sought or granted. Being denied permission to use a work does not weigh against a finding of fair use.

Id. at *9. Defendants address these factors here in turn.

a. The purpose and nature of the use

The Amended Complaint is at pains to categorize the use of the patriotic and sentimental message of defendant’s alleged use of the WTC Flag Raising Photograph as somehow

“commercial” so as to get the best possible leverage in this first factor. It states in ¶18 that “Defendants have infringed NJMG’s WTC Flag Raising Copyright in violation of 17 U.S.C. § 501 by using it to promote Sarah Palin, and to raise money for SarahPAC. Specifically, the web page, www.sarahpac.com solicits and accepts financial contributions from supporters. Further, www.sarahpac.com accepts requests for Sarah Palin to make paid appearances at events, including media and campaign events. The web page www.facebook.com/sarahpalin contains a link to www.sarahpac.com.”

It is not the law, however, that wherever a publisher, website or other user of a protected work provides, as some aspect of its operations, an opportunity to contribute funds or even to engage in a transaction, that the **use** in question is itself transformed into a “commercial use.” As this Court recently explained in *Authors Guild, Inc. v. Google Inc.*, 05 CIV. 8136 DC, 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013) (Chin, C.J.):

It is true, of course, as plaintiffs argue, that Google is a for-profit entity and Google Books is largely a commercial enterprise. The fact that a use is commercial “tends to weigh against a finding of fair use.” . . . On the other hand, fair use has been found even where a defendant benefitted commercially from the unlicensed use of copyrighted works. *See, e.g., Blanch*, 467 F.3d at 253; *Bill Graham Archives*, 448 F.3d at 612. *See also Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir.1998) (observing that Second Circuit does “not give much weight to the fact that the secondary use was for commercial gain”). Here, Google does not sell the scans it has made of books for Google Books; it does not sell the snippets that it displays; and it does not run ads on the About the Book pages that contain snippets. It does not engage in the direct commercialization of copyrighted works. *See* 17 U.S.C. § 107(1). Google does, of course, benefit commercially in the sense that users are drawn to the Google websites by the ability to search Google Books. While this is a consideration to be acknowledged in weighing all the factors, even assuming Google’s principal motivation is profit, the fact is that Google Books serves several important educational purposes.

Accordingly, I conclude that the first factor strongly favors a finding of fair use.

See also, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006) (defendant did not use protected images “as such for commercial gain” but rather in a manner “incidental to the commercial biographical value” of the defendant’s own work which was sold commercially; finding non-commercial fair use). Under this analysis, the alleged use of a version of the WTC Flag Raising Photograph here is no less fair use than that of Google in its Google Books project, and arguably more, because it cannot be alleged that either defendant is a for-profit enterprise such as Google. As in *Authors Guild*, moreover, neither defendant sells reproductions or downloads, or even offers them for free, of the work or otherwise “engage[s] in direct commercialization” of the WTC Flag Raising Photograph. Moreover, the use itself – the juxtaposition of a cropped version of the photograph to highlight a message reading, “Never forget” – is entirely non-commercial. It does not urge or suggest making donations, even if a user, motivated in his own right to do so, may eventually find his way to the donation mechanism at www.sarahpac.com.

b. The nature of the copyrighted work

As the Amended Complaint acknowledges, the WTC Flag Raising Photograph is an iconic depiction of a compelling and unforgettable historical moment. This factor weighs in favor of the fair use defense, as this Court explained in *Monster Commc'ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996):

The second of the factors, the nature of the copyrighted work, focuses on the degree of creativity of the copyrighted work. “[T]he more creative the primary work, the more protection it should be accorded from copying.” *Amsinck v. Columbia Pictures Industries, Inc.*, 862 F.Supp. 1044, 1050 (S.D.N.Y.1994). Accord, 3 Nimmer § 13.05[A][2][a], at 13–174 to 175. . . .

Anyone who has seen any of the great pieces of photojournalism—for example, Alfred Eisenstadt's classic image of a thrilled sailor exuberantly kissing a woman in Times Square on V-J Day and the stirring photograph of U.S. Marines raising

the American flag atop Mount Surabachi on Iwo Jima – or, perhaps in some eyes, more artistic, but nevertheless representational, photography – such as Ansel Adams' work and the portraits of Yousuf Karsh – must acknowledge that photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations. Nevertheless, history has its demands. There is a public interest in receiving information concerning the world in which we live. The more newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information. Moreover, only a finite number of photographers capture images of a given historical event. . . . This of course is not to say that historical film footage loses all copyright protection only that its character as historical film footage may strengthen somewhat the hand of a fair use defendant as compared with an alleged infringer of a fanciful work or a work presented in a medium that offers a greater variety of forms of expression.

935 F. Supp. At 494-95 (footnotes omitted). Given the Amended Complaint's description of the work in question, and the fact that, as this Court observed in *Monster Commc'ns*, “only a finite number of photographers capture images of a given historical event,” this factor, too weighs in favor of a *prima facie* finding of fair use here. *See also, Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612-13 (2d Cir. 2006) (even where copyrighted images are creative artistic works, the degree of creativity is attenuated where the purpose of the secondary use “was to emphasize the images' historical rather than creative value”).

c. The amount and substantiality of the use

The use of the WTC Flag Raising Photograph set forth in the allegations of the Amended Complaint is, to be sure, not insubstantial. It is undoubtedly readily recognizable, despite its shrunken form and close crop, as the WTC Flag Raising Photograph. But recognizability is not the criterion by which the use of an historical image is necessarily judged, as set forth in the previous section concerning iconic historical images. For example, in *Bill Graham Archives, supra*, the Second Circuit declined to find that merely because posters and concert tickets

associated with the Grateful Dead musical group were, in a biography about the band, reproduced in whole, that this factor weighed against fair use:

Here, DK used BGA's images because the posters and tickets were historical artifacts that could document Grateful Dead concert events and provide a visual context for the accompanying text. To accomplish this use, DK displayed reduced versions of the original images and intermingled these visuals with text and original graphic art. As a consequence, even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size.

448 F.3d at 613. Again, application of the legal standard to the facts here leads to a finding favoring the fair use defense, for here too the WTC Flag Raising Photograph was used in reduced form merely “to provide a visual context for the accompanying text,” i.e., the simple message that the attacks of September 11th and the heroism of those whose sacrifices are evoked by an iconic image connected with that infamous day should not be forgotten.

d. The effect of the use upon the potential market for or value of the copyrighted work

The last statutory fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, obviously favors defendants here, because the Amended Complaint **does not even allege** that defendants’ utilization of the WTC Flag Raising Photograph on Facebook has had any effect whatsoever on the potential market for or value of that work.

In sum, the use alleged is a fair use because each and every fair use factor, when comparing the allegations of the Amended Complaint in light of the applicable case law, favors a finding of fair use here.

CONCLUSION

For all the foregoing reasons, this Court should dismiss the Amended Complaint herein on the grounds of improper venue and for failure to state a claim for which relief can be granted; or, in the alternative, transfer this matter to the United States District Court for the District of Alaska for further proceedings.

GOETZ FITZPATRICK LLP

By: 
Ronald D. Coleman (RC 3875)
One Penn Plaza—Suite 3100
New York, NY 10119
(212) 695-8100
rcoleman@goetzfitz.com
*Attorneys for Defendants
Sarahpac and
Sarah Palin*

Of Counsel:
John J. Tiemessen (*Pro Hac Vice Application Pending*)
CLAPP PETERSON TIEMESSEN THORSNESS
AND JOHNSON LLC
411 Fourth Avenue—Suite 300
Fairbanks, Alaska 99701

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