UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

QUENTON GALVIN AND JACOB MEISTER,

Plaintiffs,

v.

ILLINOIS REPUBLICAN PARTY, ILLINOIS HOUSE REPUBLICAN ORGANIZATION, RODERICK DROBINSKI, FRIENDS OF ROD DROBINSKI, JAMESTOWN ASSOCIATES, LLC, AND MAJORITY STRATEGIES, INC.,

Defendants.

No. 14 C 10490
Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

Plaintiffs Quenton Galvin and Jacob Meister ("Plaintiffs") filed a twenty-six count complaint against Defendants Illinois Republican Party, Illinois House Republican Organization, Roderick Drobinski, Friends of Rod Drobinski, Jamestown Associates, LLC, and Majority Strategies, Inc. alleging copyright infringement, civil conspiracy, appropriation of image, false light, and defamation. Defendant Jamestown Associates was dismissed by stipulation. The remaining Defendants ("Defendants") now move to dismiss Counts I-VII of Plaintiff's complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, Defendants' motion to dismiss is granted.

I. FACTUAL BACKGROUND

In early October 2014, Defendants Illinois Republican Party, Illinois House Republican Organization, Roderick Drobinski, Friends of Rod Drobinski, and Majority Strategies, Inc. intentionally authorized, printed, and mailed several thousand 8.5 by 17-inch flyers with two copies of an altered picture of Plaintiff Jacob Meister. The original picture (the "Photograph") depicts Plaintiff Meister driving a convertible in a political parade with a poster on the side of the car advertising Sam Yingling, a Democratic member of the Illinois House of Representatives who was

running for re-election. The Photograph was taken and copyrighted by Plaintiff Quenton Galvin, a professional photographer who authorized Sam Yingling to post the Photograph on his campaign website.

Without the permission of the photographer, Galvin, or the subject, Meister, Defendants electronically copied the Photograph from Mr. Yingling's website and altered it to appear as though Mr. Meister was driving away from the Illinois State Capitol with stolen money in the backseat and hundred dollar bills flying out of the open convertible. Defendants believed that the man driving the car was Representative Yingling rather than Plaintiff Meister, a private individual, and intended to criticize Mr. Yingling's fiscal policies.

Plaintiffs incorporated two slightly different versions of the altered Photograph in a flyer (the "Flyer") promoting Roderick Drobinski, a candidate running for State Representative opposite Sam Yingling. Superimposed above or beside the altered photographs are the words: "Mr. Yingling Went to Springfield . . . And Fiscal Responsibility Went Out the Window" and "Career Politician Sam Yingling in the Driver's Seat as Illinois Speeds Towards Higher Taxes, More Wasteful Spending, and More Jobs Lost." Defendants mailed the Flyer to several thousand potential voters leading up to the Illinois State Representative election.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) does not test the merits of a claim; rather, it tests the sufficiency of the complaint. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In deciding a 12(b)(6) motion, the court accepts all well-pleaded facts as true, and draws all reasonable inferences in favor of the plaintiff. *Id.* at 1521. To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "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." *Id.* "While legal conclusions can provide the framework of a

complaint, they must be supported by factual allegations." *Id*. at 679.

A plaintiff may state a claim even though there is a defense to that claim, and courts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (citing *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir.2005). Still, when all relevant facts are presented, the court may properly dismiss a case before discovery on the basis of an affirmative defense. *See id.*

III. DISCUSSION

A. Copyright Infringement and Civil Conspiracy (Counts I-VII)

Plaintiffs claim that Defendants infringed Plaintiff Galvin's copyright in violation of the U.S. Copyright Act, 17 U.S.C. § 501 by intentionally authorizing, printing, and mailing several thousand Flyers using two copies of the Photograph without Plaintiff Galvin's permission. Defendants do not dispute that Plaintiffs have adequately pled a claim of copyright infringement, as the complaint establishes the two necessary elements: (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Rather, Defendants assert an affirmative defense on the ground that the Photograph was used in the Flyer for the purpose of criticism and commentary and thus constitutes a fair use under 17 U.S.C. § 107. As with any affirmative defense, the Defendants carry the burden of proving that their unauthorized use of the Photograph constitutes a fair use. *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003).

Under the Copyright Act, the exclusive rights afforded to copyright owners do not extend to "fair uses" of copyrighted works. § 107. Therefore, anyone who makes a fair use of a copyrighted work is not an infringer of the copyright with respect to such use. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). There is no statutory definition or formula for establishing a fair use, but Congress listed "criticism, comment, [and] news reporting . . ." in the preamble of § 107 as paradigmatic examples of fair uses. *Harper & Row Publ'rs, Inc. v. Nation*

Enterprises, 471 U.S. 539, 592 (1985). In addition to these illustrations, Congress codified the following four factors, which courts must consider when analyzing an unauthorized use under § 107:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

U.S. Copyright Act, 17 U.S.C. § 107.

These factors are not exhaustive and represent common law jurisprudence, which Congress expected to evolve over time. *See Harper & Row*, 471 U.S. at 595 n.19. Since fair use defies precise definition, courts must analyze fair use defenses on a case-by-case basis, keeping in mind the goal of copyright protection at large—that is, "[t]o promote the Progress of Science and useful Arts . . ..". U.S. Const., Art. I, § 8, cl. 8.

As a preliminary matter, Defendants' motion to dismiss based on an affirmative defense is procedurally appropriate at this juncture.[1] It is well established that courts should refrain from granting Rule 12(b)(6) motions on affirmative defenses that turn on facts not before the court, *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012), and that the fair use defense usually implicates questions of law and fact. *Harper & Row*, 471 U.S. at 549. However, a court "may conclude as a matter of law that the challenged use [does] or does not qualify as a fair use of the copyrighted work" when the facts on record are "sufficient to evaluate each of the [fair use] statutory factors." *Id.* at 560 (internal quotations and citations omitted). Such is the case here.

Plaintiff's claim is limited to the production and distribution of a single, allegedly infringing

[1] As the Seventh Circuit has repeatedly cautioned, the proper heading for motions on the basis of affirmative defenses is Rule 12(c) because an affirmative defense is external to the complaint. *See Brownmark Films*, 682 F.3d at 690 n.1. I am nonetheless ruling on the instant affirmative defense under the Rule 12(b)(6) heading, but future litigants should take heed of the Seventh Circuit's exhortation.

work, and both the original work and its unauthorized reproduction are attached to the complaint, allowing side-by-side review. *See Brownmark Films*, 682 F.3d at 690 (stating that despite defendants' arguments to the contrary, "the only two pieces of evidence needed to decide the question of fair use in this case are the original version of [the copyrighted episode] and the [allegedly infringing] episode at issue."). Given the limited nature of the present claim and the sufficiency of the allegations in and attachments to the complaint, the Court can evaluate each of the fair use factors at this juncture.[2]

1. The Purpose and Character of Defendants' Use.

The first factor to be considered in the fair use determination is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). The Supreme Court explained that the goal of this investigation is to see "whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal quotations and citations omitted).

Defendants argue that the purpose and character of the Flyer is wholly unrelated and altogether different from the purpose of the Photograph, making their work "highly transformative." A cursory look at the two works confirms that the Photograph was created to document the campaign parade of Representative Yingling, while the Flyer was created to lambast his politics. Their difference in purpose is obvious. In the words of the Supreme Court in *Campbell*, the Flyer "transformed" the Photograph by giving it "new meaning [and] message" through political criticism. *Id. See also Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592, at *5 (N.D. Cal. Feb. 25,

[2] Plaintiffs argue that discovery is needed to resolve disputes regarding material facts, such as the commercial value of the Flyer, before the Court can properly rule as a matter of law on the sufficiency of Defendants' affirmative defense. Even taking any such disputed facts in Plaintiffs' favor, the Court would not alter the outcome of the instant fair use analysis.

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