

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
YUNGHI KIM and CONTACT PRESS
IMAGES, INC.,

Plaintiffs,

-against-

FOX NEWS NETWORK, LLC,

Defendant.

ANALISA TORRES, District Judge:

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13 Civ. 4589 (AT)

**MEMORANDUM
AND ORDER**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant moves to dismiss the amended complaint alleging copyright infringement. For the following reasons, the motion is DENIED.

BACKGROUND

Plaintiffs, Yunghi Kim and Contact Press Images, Inc., allege that Defendant, Fox News Network, LLC, made unauthorized copies of and displayed Kim's copyrighted photograph in a video aired on Defendant's cable television channel and posted on Defendant's website. Defendant contends that the video constitutes "fair use" as defined by Section 107 of the Copyright Act. Defendant argues that, because a fair use purportedly appears on the face of the complaint and in the video, this action should be dismissed pursuant to Rule 12(b)(6).¹

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient factual allegations in the complaint that, accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff is not required to provide "detailed factual allegations" in the

¹ Defendant has provided the Court with a copy of the photograph and video segment. Plaintiffs concede that they explicitly relied on the segment in the amended complaint. Pl. Mem. vii, ECF No. 21. Accordingly, the Court considers these works for purposes of Defendants' motion to dismiss. See *Int'l Audiotext Network, Inc. v. Am. Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995).

complaint, but must assert “more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. In addition, the facts pleaded in the complaint “must be enough to raise a right to relief above the speculative level.” *Id.* On a 12(b)(6) motion to dismiss, a district court may consider only the complaint, documents attached to the complaint, matters of which a court can take judicial notice, documents possessed by plaintiffs, or documents that plaintiffs knew about and relied upon. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). A district court considering a Rule 12(b)(6) motion must accept all factual allegations in the complaint as true, while also drawing all reasonable inferences in favor of the nonmoving party. *ATSI Commc’ns, Inc.*, 493 F.3d 87, 98 (2d Cir. 2007).

DISCUSSION

Fair use is an affirmative defense, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994), and is, therefore, not appropriate for determination on a Rule 12(b)(6) motion unless the defense appears on the face of the complaint. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998). “[F]air use is a mixed question of law and fact.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Section 107 of the Copyright Act provides that “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. The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work. *Harper & Row*, 471 U.S. at 560-61. Thus, a fair use defense appears on the face of a complaint where the

complaint contains unambiguous factual allegations sufficient to enable the district court to evaluate each of these four factors. *See Katz v. Chevaldina*, 900 F. Supp. 2d 1314, 1315-16 (S.D. Fla. 2012) (“The court’s determination involves weighing at least four statutory factors, which usually requires making factual findings or relying on undisputed or admitted material facts.”).

Contrary to Defendant’s contention, a fair use defense does not appear on the face of the amended complaint and in the video. Without additional discovery, the Court cannot assess whether Defendant’s use was transformative, whether the purpose of Defendant’s use was news reporting, or whether it was more commercial in nature. In addition, the amended complaint provides no basis to determine whether Defendant’s use negatively impacted the market for Plaintiffs’ work. *See Campbell*, 510 U.S. at 590 (“[P]roponent [of fair use] would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”). Defendant’s fair use defense may ultimately prevail at the summary judgment stage, but the facts necessary to establish fair use have yet to be developed.

Although, as Defendant points out, fair use cases have been decided on Rule 12(b)(6) motions, *see, e.g., Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991 (E.D. Wis. 2011), *aff’d*, 682 F.3d 687 (7th Cir. 2012); *Scott v. WorldStarHipHop, Inc.*, 10 Civ. 9538 (PKC), 2011 WL 5082410, at *8 (S.D.N.Y. Oct. 25, 2011), this case is distinguishable. In *Brownmark*, the court was able to determine that defendants’ video was a fair use parody by viewing and comparing the two disputed works. 682 F.3d at 692. Similarly, in *WorldStarHipHop*, the face of the complaint alleged that the copyrighted video was used as evidence in a litigation, which, as a matter of law, was “a circumscribed, noncommercial use necessitated by plaintiff’s actions.” 2011 WL 5082410, at *8. In both cases, additional discovery and fact-finding were unnecessary

because the fair use defense was obvious from viewing the disputed work. Here, the Court cannot conclude that Defendant's use is unambiguously noncommercial, transformative, and for news purposes, as Defendant asserts, simply by viewing the video. The nature and purpose of the segment is open to dispute; further discovery is required. *See Wright v. Warner Books, Inc.*, 953 F.2d 731, 735 (2d Cir. 1991) (given the "fact-driven nature of the fair use determination," district courts should be cautious about resolving fair use disputes even at the summary judgment stage); *see also M. Shanken Commc'ns, Inc. v. Cigar500.com*, 07 Civ. 7371 (JGK), 2008 WL 2696168, at *10 (S.D.N.Y. July 7, 2008) (issues of material fact as to impact of defendants' use on market for plaintiff's work could not be resolved on a motion to dismiss).

CONCLUSION

Accordingly, Defendant's motion to dismiss is DENIED. The Clerk of the Court is directed to terminate the motion at ECF No. 15.

SO ORDERED.

Dated: March 18, 2014
New York, New York



ANALISA TORRES
United States District Judge