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August 24, 2022

Via ECF
The Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
500 Pearl Street, Room 2220
New York, NY 10007

Re: *MCM Group 22 LLC v. Perry, et al.*, Case No. 22-cv-06157-PGG

Dear Judge Gardephe,

I have the pleasure of representing defendants Lyndon Perry and Criston Violette in the above-referenced matter. Pursuant to Your Honor's Individual Rules of Practice, Civil Cases, § IV(A), I am requesting a pre-motion conference as to a proposed motion to dismiss under Fed. R. Civ. P. 12(b)(1), (2) and (6).[1] I am also requesting a pre-motion conference with respect to a motion for sanctions under Fed. R. Civ. P. 11 as to the claims against Defendant Violette. Plaintiff MCM Group 22, LLC, has not yet consented to either motion, but it has offered to dismiss Mr. Violette upon being provided certain documents. Defendants are willing to provide these, but as there is a deadline to respond to the Complaint, Defendants are seeking a pre-motion conference to ensure no rights are lost.

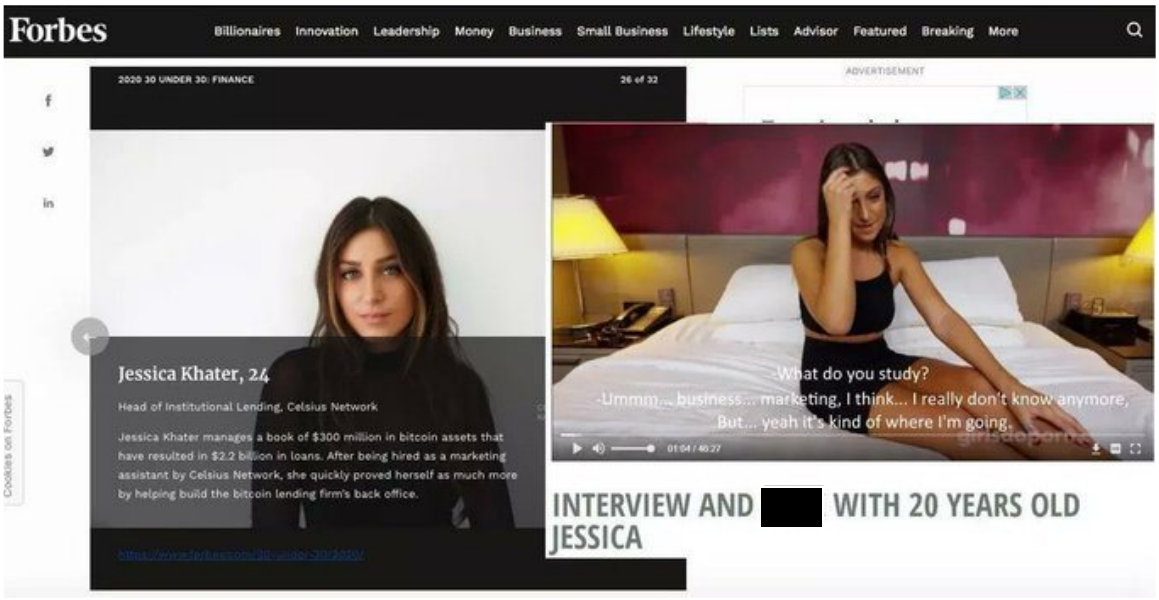
The grounds for the motions are as follows:

Briefly, Plaintiff asserts that it is the owner of the copyright in a certain video by virtue of an assignment from Jessica Khater,[2] who appeared in that video and claims to have obtained the copyright interest by virtue of December 14, 2021, restitution order in the matter if *United States v. Ruben Andre Garcia*, Case No. 19-CR-4488 (S.D. Cal.), pursuant to 18 U.S.C. § 1593. Plaintiff alleges Ms. Khater was one of the victims of the "Girls Do Porn" enterprise in which young women were persuaded to perform in an adult movie, but misled into believing it would not be published in the United States.

[1] Venue is also improper under Rule 12(b)(3) and 28 U.S.C. § 1391(b) as none of the defendants reside in this district, none of the alleged events or omissions occurred in this district, and the defendants are susceptible to jurisdiction in the Western District of Washington. However, courts frequently transfer actions brought in the wrong venue, and dismissal of this meritless action is the preferred outcome.

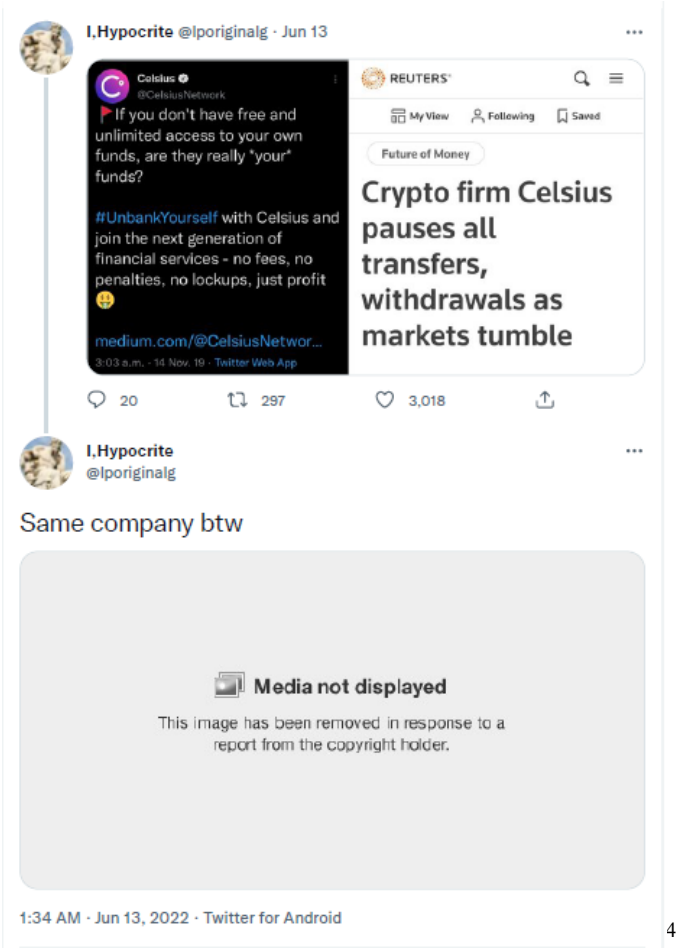
[2] The Complaint references her as "Jane Doe", but her name appears in the alleged infringement. The alleged infringement is a part of the Complaint under Rule 10(c), and it is subject to judicial notice. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002) ("[A] complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.") In reproducing the alleged infringement in this letter, the undersigned has redacted an expletive.

Plaintiff claims that Mr. Perry (or, alternatively, Mr. Violette), published a single frame of that video on Twitter, thereby infringing on the copyright. Specifically, the alleged infringement was of a single frame of the video, wherein a fully-clothed Ms. Khater is asked what she studies, and she responds "Ummm…business…marketing. I think… I really don't know anymore, but…yeah it's kind of where I'm going." And that frame is superimposed on her appearance in the Forbes 30 Under 30 for 2020, highlighting her management of a book of $300 million in bitcoin assets for Celsius Network: [3]



It was placed in context in a discussion about Celsius Network and the Reuters news "Crypto firm Celsius pauses all transfer, withdrawals as markets tumble". The Twitter account at issue used the above collage containing the still of Ms. Khater with the comment "Same company btw":

[3] The accompanying text reads "Head of institutional lending at Celsius Network, Jessica Khater manages a book of $300 million in bitcoin assets that have resulted in $2.2 billion in loans. After being hired as a marketing assistant by Celsius Network, she quickly proved herself as much more by helping build the bitcoin lending firm's back office."



[4]

The legal bases for the anticipated motions are as follows:

1) The plaintiff lacks standing because the restitution order could not transfer copyright. To the extent the restitution order purported to transfer copyright, it is invalid. Involuntary copyright transfer is precluded by 17 U.S.C. § 201(e).[5] There is no exception for a restitution order. Dismissal is, therefore, warranted under Rules 12(b)(1) & (6).

2) The plaintiff lacks standing because, even if a restitution order could transfer copyright, it did not transfer copyright from the copyright owners. The restitution order was against Ruben Andre Garcia. According to Plaintiff's own registration, which it filed as an exhibit, the author of the work is BLL Media, Inc. Thus, there is a break in the chain of title. Ms. Khater may have acquired whatever rights from

[4] Due to Plaintiff's improper DMCA takedown request, the collage was disabled by Twitter.

[5] Although Plaintiff advises that Mr. Garcia (not BLL Media) later joined in a motion to amend the restitution order, that motion was silent on the issue of copyright transfer.

Mr. Garcia she could have (even setting aside Section 201(e)), but that order is not against BLL Media, Inc., which is not a subject of that order. As the copyright registration admits BLL Media is the author, it was and remains the sole owner of the copyright.[6] Dismissal is, therefore, warranted under Rules 12(b)(1) & (6).

3) The publication of the single frame was fair use, warranting dismissal under Rule 12(b)(6). Notwithstanding the conclusory allegations in the complaint, the facts show that the single frame, discussing her uncertain plans to study business or marketing was placed into a collage with the Forbes 30 Under 30 for 2020 appearance, which discussed her management of a book of $300 million in assets for Celsius Network. And, that collage was published in the context of a discussion about Celsius, juxtaposing a tweet from Celsius and a Reuters article on Celsius pausing trading. This type of commentary and use is transformative.

   As to substantiality, the frame shows it was taken from a video 46 minutes and 27 seconds long. Assuming a standard frame rate of 30 frames per second, this means that it is 1/83,610 of the work. That is hardly a substantial portion of the work. And, it is well possible the work was shot and published at the higher-resolution 60 frames per second, making the still 1/167,220 of the work.

   Neither does the publication of the collage, containing the still, affect the potential market or value of the work. For one, there is no market—the video is not for sale or otherwise monetized by Plaintiff. Nor is it likely that someone would have purchased a copy of the video decided not to on account of the publication of the collage.

   Plaintiff's alleged use was not of a commercial nature. The image is not being sold and the tweet is not monetized. That it might somehow lead to income in some hypothetical scenario does not make the use commercial. Moreover, there is no reason why "overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use. Many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit." *Authors Guild v. Google, Inc*., 804 F.3d 202, 219 (2d Cir. 2015). Thus, fair use mandates dismissal.

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[6] Outside of the Complaint, Plaintiff has informed Defendants that it also claims copyright by virtue of a judgment in the matter of *Jane Doe Nos. 1-22 v. BLL Media, Inc., et al*., in the Superior Court of the State of California, San Diego, Case No. 37-2016-00019027-CU-FR-CTL. Apart from this conflicting with the claim made to the Copyright Office, it remains ineffective under Section 201(e).

4) To the extent Plaintiff claims statutory damages or attorneys' fees, such must be dismissed under Rule 12(b)(6). Under Copyright law, "no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work." 17 U.S.C. § 412. According to the registration, the work was first published in 2016, but it was not registered until July 14, 2022, which itself was one month after the alleged infringement. Thus, under no circumstances can Plaintiff be awarded statutory damages or attorneys' fees.

5) The Court lacks personal jurisdiction over Mr. Violette, warranting dismissal under Rule 12(b)(2).[7] The sole allegation regarding him is Plaintiff believes the "true" identity of Mr. Perry is Mr. Violette. Plaintiff makes this allegation "on information and belief". Plaintiff has no factual basis to support this assertion. Mr. Violette does not have a Twitter account, he does not use Twitter, and he does not have any involvement with the Twitter account in question. Twitter is not Mr. Violette's agent (and merely using Twitter would not give rise to personal jurisdiction in any event). Plaintiff has no probability of prevailing on this matter against Mr. Violette, and continuing to do so would be in violation of counsel's Rule 11 obligations.

In light of the foregoing, Defendants request a pre-motion conference in anticipation of their motions to dismiss and for sanctions. Thank you for your attention to this matter.

Sincerely,

/s/ Jay M. Wolman

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cc: Counsel of Record via ECF

[7] The assertion of personal jurisdiction over Mr. Perry is specious at best. However, Mr. Perry would prefer this be adjudicated on the merits.