

Second Circuit Calls Foul On Unauthorized Use of Michael Jordan Video

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Michael Jordan is best known for his offensive skills, but his defense was an underrated aspect of his play; he was 1998 Defensive Player of the Year, after all. So it's fitting that he features prominently in a recent decision from the Second Circuit Court of Appeals in which three (or maybe two) defenses to claims of copyright infringement were at issue: (1) fair use; (2) *de minimis* use; and (3) license. While the District Court thought all of those defenses passed muster and doomed the plaintiff's claims, only the third scored for the defendant on appeal. Oh, and let's not forget that there were other celebrities making prominent cameos in this opinion – Grandmaster Melle Mel, Eminem and Fifty Cent – as

if we were courtside at the Garden at the turn of the last century.

Our story opens in 2015, when plaintiff Delray Richardson found himself in the right place at the right time – if by “right place” we mean the site of a brawl between a “gang member” (Richardson’s characterization) and one of Michael Jordan’s bodyguards. Richardson happened to be present and recorded the fight that was broken up by none other than Jordan himself. Richardson took his video, which is grainy and only 45 seconds long, and published it in 2015. But no one seems to have noticed, or cared, at least at the time.

Fast forward to 2023, when the DailyLoud, a hip-hop blog, shared the video on X and claimed that the two fight participants were actually rapper Wack 100 and YouTube personality Charleston White, who the DailyLoud asserted was on site but just out of the video frame. White denied this allegation, but the controversy was such that defendant Townsquare Media published an article about it on Townsquare’s online hip-hop news publication XXL, under the headline “Michael Jordan Intervenes in Heated Confrontation Involving Wack 100 in Viral Video From 2015 – Watch.” (Aside: How “viral” could this video have been if no one noticed it for eight years? Just sayin.) The Townsquare article embedded the DailyLoud’s X post, including its republication of the entire Jordan video shot by Richardson. And a screenshot from the video was used as the background for the Townsquare headline. That screenshot, per the Second Circuit, “shows Jordan towering over the person claimed to be Wack 100 to his right and using his right arm to restrain that person from moving toward Jordan’s left; it could plausibly be inferred that Jordan was keeping that person away from someone standing to Jordan’s left outside the frame of the image.”

But the unauthorized use of his Michael Jordan video was not Richardson’s only beef with Townsquare. Sometime after 2015, Richardson and an entity called The Art of Dialogue interviewed the legendary rapper Grandmaster Melle Mel. A roughly three-minute excerpt of that interview was published on YouTube in 2023 by The Art of Dialogue, entitled “Eminem Being White Is The Reason He’s A Top 5 Rapper Of All Time. If He Were Black He’d Be Average!” Townsquare promptly published an article on XXL about Melle Mel’s criticism of Eminem by, again, embedding the video from The Art of Dialogue’s YouTube channel, and yet another screenshot from that video was used as the background for the Townsquare headline, along with an image of Eminem. Two days later, after Fifty Cent came to Eminem’s defense, Townsquare published another article on this feud, once again embedding the Melle Mel video from The Art of Dialogue’s YouTube channel, but with a different screenshot from the same video and an image of Fifty Cent.

The Jordan video article and the Melle Mel articles prompted Richardson to go on offense against Townsquare and sue it for copyright infringement in the Southern District of New York. But District Judge Hellerstein ejected Richardson from the courthouse by granting Townsquare’s motion for judgment on the pleadings, holding that its use of the Jordan video were fair; the screenshots were *de minimis* uses that did not give rise to liability; and the use of the Melle Mel video was properly licensed from YouTube.

Undaunted, Richardson took his claims to a higher court and scored wins on two of the three defenses Townsquare asserted, and that the District Court accepted.

On fair use, the Second Circuit thought that the issue couldn't be assessed at such an early stage. Recall that there are four statutory fair use factors – (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the portion of the work used, relative to the whole; and (4) the effect of the alleged fair use on the market or value of the plaintiff's work. On the first factor, the Second Circuit thought the use of the Jordan video might qualify as transformative because Townsquare was reporting on the controversy about who was fighting with who in 2015, and that would have tilted this fair use factor in favor of Townsquare. But the problem for Townsquare was that when an article is published under the headline "Michael Jordan Intervenes in Heated Confrontation Involving Wack 100 in Viral Video From 2015 – Watch," without a lot of commentary about the video, the less transformative it becomes. Per the Second Circuit, "there is a difference between gesturing towards a transformative message and actually communicating that message," and given that Townsquare's article was (at least for purposes of a pre-discovery motion) for a commercial purpose, this factor didn't weigh that much in favor of Townsquare, if at all.

The second fair use factor did, because the Jordan video was both published and factual – characteristics that cases have held weigh in favor of fair use. But the third factor didn't, because Townsquare published the entire video and, for present purposes, its claims that it had to publish the entire video by embedding it on the XXL website were rejected by the Second Circuit. The last fair use factor was the killer for Townsquare, because it was possible that Townsquare's unauthorized use was a market substitute for Richardson's video. Indeed, if there were a market for the Jordan video (a big "if" that the Second Circuit said was an allegation that might not pan out), it's hard to see why anyone would pay Richardson for content they could obtain through Townsquare and XXL for free. So, given all of these uncertainties – and recognizing that Townsquare might have a better shot (from downtown?) after discovery – the Jordan video claims were sent back to the District Court.

So too were the claims about both the Jordan and Melle Mel screenshots, because the Second Circuit rejected application of the *de minimis* defense, which the court noted is less of a defense and more a failure by the plaintiff to establish a *prima facie* case of infringement. Essentially, there is a line of cases recognizing that when a copyrighted work is used in another work without authorization in a fleeting or insubstantial manner – usually to the point where the copyrighted work is not at all or barely recognizable – or when only a tiny fraction of the copyrighted work is used, there is insufficient similarity for an infringement claim to be viable. But here, the defense had no applicability. The screenshots of Jordan and Melle Mel were posted as the backdrops for the headlines of three articles and were readily recognizable and identifiable. It therefore didn't matter that one or two frames from the videos were used, especially in light of the protection the Copyright Act gives to "the individual images of a motion picture or other audiovisual work." 17 U.S.C. § 1065. So, Richardson's screenshot claims lived to see another day.

But not so his claim on the Melle Mel video, because of the decision by The Art of Dialogue to publish the interview on its YouTube channel. Perhaps unbeknownst to Richardson, if you upload a video to YouTube, you are granting not just a license to YouTube to publish your content on its site, but a license to other YouTube users to access your content and reproduce or distribute it so long as such secondary uses are “enabled” by YouTube – with video playback or embeds specifically covered by the license. Since all Townsquare did was embed the video as accessible on YouTube on the XXL page, through the YouTube player, the license provided Townsquare with a complete defense on Richardson’s infringement claim premised on unauthorized use of the Melle Mel video. (FYI – Townsquare didn’t argue that the license also covered the use of a screenshot from the video, presumably because that screenshot was not “enabled” by YouTube.)

So, what does this case tell us? Three things:

1. As has long been the case, it is very difficult to establish a fair use defense prior to the completion of discovery, at least in the Second Circuit.
2. The *de minimis* defense probably won’t apply if the plaintiff’s work, or a material portion of it, is readily recognizable in the accused work.
3. Copyright owners of audiovisual works who upload their content to YouTube are authorizing the use of that content anywhere, by anybody, so long as that subsequent use is “enabled” by YouTube.

Unfortunately, the decision doesn’t tell us who really was involved in the 2015 brawl; why the donnybrook occurred; what Michael Jordan thought of the whole affair; how Eminem reacted to criticism from Melle Mel; or why Fifty Cent jumped into the middle of this controversy. Sadly, while these are all things that most people would actually care about, intellectual property aficionados will have to be content with the clearly-articulated copyright law principles the Second Circuit has given us.