

**McGucken v. Newsweek LLC**  
**19 Civ. 9617 (KPF), 2020 U.S. Dist. LEXIS 96126 (S.D.N.Y. June 1, 2020)**

Year	2020
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff Elliot McGucken photographs landscapes and seascapes, which he posts to his public Instagram account. One of McGucken’s Instagram posts depicts a photograph he took of an ephemeral lake in Death Valley (the “Photograph”). The day after McGucken posted the Photograph, Defendant, Newsweek LLC, embedded the Instagram post of the Photograph in an online article about the same lake, titled “Huge Lake Appears in Death Valley, One of the Hottest, Driest Places on Earth.” Newsweek’s article notes McGucken took photographs of the lake and incorporates quotes from McGucken about the lake. McGucken brought an action for copyright infringement, alleging Newsweek reproduced and displayed the Photograph online without permission. Newsweek moved to dismiss, asserting McGucken’s public Instagram post granted Newsweek a valid sublicense to use the Photograph and, alternatively, its use constituted a fair use.
Issue	Whether embedding a photograph posted on social media in a news article to illustrate the subject of the photograph is fair use.
Holding	After determining there was insufficient evidence of an existing sublicense between Instagram and Newsweek, the court declined to dismiss the claim on the basis of fair use. The first factor, the purpose and character of the use, weighed against a finding of fair use because Newsweek used the Photograph as an “illustrative aid depicting the subject of the Article.” Merely adding “token commentary” where the subject of the article was the lake depicted in the Photograph, not the Photograph itself, did not imbue the image with new meaning. Additionally, Newsweek did not dispute its use was commercial in nature, which further weighed against fair use. The court held the second factor, the nature of the work, favored neither party. The Photograph’s “creative expression through its framing and coloration” weighed against fair use, while its prior publication weighed in favor of fair use. Similarly, the court found the third factor, the amount and substantiality of the work used, was neutral. When the work is a photograph, all or most of the photograph generally must be used to preserve its meaning. The fourth factor, the effect of the use upon the potential market for or value of the work, weighed against fair use. The district court applied a presumption of market harm because Newsweek’s use was both commercial and a duplication of the entirety of the Photograph. Despite McGucken having failed to present evidence of the existence of a market for or usurpation of such a market for the Photograph, Newsweek failed to present evidence that its use would not harm the market for the Photograph. Without “countervailing considerations,” Newsweek did not overcome the presumption.
Tags	Internet/Digitization; News Reporting; Photograph
Outcome	Preliminary ruling; Fair use not found

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