

**McGucken v. Newsweek LLC**  
**19 Civ. 9617 (KPF), 2022 U.S. Dist. LEXIS 50231 (S.D.N.Y. Mar. 21, 2022)**

Year	2022
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff Elliot McGucken, a fine art photographer, posted several photographs he took of an ephemeral lake in Death Valley to his public Instagram account. Defendant, Newsweek LLC, contacted McGucken to request permission to upload one of these photographs (the “Photograph”) to its website, but McGucken did not respond. Newsweek subsequently embedded McGucken’s Instagram post of the Photograph in an online article about the ephemeral lake, titled “Huge Lake Appears in Death Valley, One of the Hottest, Driest Places on Earth.” McGucken brought an action for copyright infringement, alleging Newsweek reproduced and displayed the Photograph online without permission. After the court denied Newsweek’s motion to dismiss McGucken’s direct copyright infringement claim, both parties moved for summary judgment, and Newsweek again asserted that its use of the Photograph 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	For all four factors, the court concluded that a jury must resolve genuine issues of material fact before weighing and balancing the factors. The court concluded that the first factor, the purpose and character of the use, did not clearly favor either party. In the court’s view, a reasonable jury could find either that Newsweek’s use was transformative because the Photograph was used to report a newsworthy event and Newsweek added commentary or that the use was not transformative because it was a verbatim copy published with generic text. Because of unresolved factual disputes, the court could not determine on summary judgment the commerciality of the use and whether Newsweek acted in bad faith. The court explained that the second factor, the nature of the copyrighted work, was also unsuitable for summary judgment because, although the Photograph is creative, a jury could find that Newsweek’s use was transformative and did not interfere with McGucken’s ability to control the first public appearance of the work. The court found that the weight of the third factor, the amount and substantiality of the use, would also need to be determined by a jury relative to its assessment of the “transformative and distinctive purpose” of the use. Nonetheless, the court noted that “it is difficult . . . to see how [Newsweek] could have used less than the entirety of the Photograph.” The court concluded that the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, required a jury to resolve factual issues concerning the extent to which Newsweek’s embedding affected the media licensing and fine art markets for the Photograph. Ultimately, the court declined to determine fair use as a matter of law, and denied both parties’ summary judgment motions.
Tags	Internet/Digitization; News Reporting; Photograph
Outcome	Preliminary ruling; Fair use not found

Source: U.S. Copyright Office Fair Use Index. For more information, see <https://www.copyright.gov/fair-use>.