

Southern District of New York: Designer's Own Clothes No Cover-Up for Copyright Infringement

By Julia Belagorudsky

Iantosca v. Elie Tahari (No. 19-cv-04527 (S.D.N.Y. Sept. 18, 2020))

With facts that were largely uncontested, the decision in *Iantosca v. Elie Tahari*) concisely addressed (and rejected) Tahari's affirmative defenses that its reposting of a professional photographer's photograph of a digital-content creator in head-to-toe Elie Tahari garb was not copyright infringement because (1) its use was fair use, [More](#)

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With facts that were largely uncontested, the decision in *Iantosca v. Elie Tahari*) concisely addressed (and rejected) Tahari's affirmative defenses that its reposting of a professional photographer's photograph of a digital-content creator in head-to-toe Elie Tahari garb was not copyright infringement because (1) its use was fair use, (2) its use amounted to *de minimis* use of the photo, and (3) the photograph depicts a model wearing defendant's clothing line and the photographer was credited in the caption.

The photograph at issue was of digital content creator Linh Niller Huyn, and was taken by photographer and plaintiff Mark Iantosca during New York Fashion Week in February 2019. Iantosca subsequently posted the image to his Facebook and Twitter profiles. Tahari then posted Iantosca's photograph on its social media account with the caption: "@linhniller caught us in our footsteps wearing head to toe

#ElieTahari. We loved how she styled the whole look.” The caption credited lantosca in a way common on social media, by using an image of a camera with a colon to indicate the photographer.

In granting lantosca’s motion for summary judgment, the Court first dispensed with Tahari’s argument that lantosca did not have a valid copyright registration for the photograph at issue. In fact, the Court even took the unusual step to *sua sponte* order certified deposit copies of the works on file under the stated copyright registration number to confirm that a copyright registration had issued for the photograph at issue. The Court then proceeded to reject each of Tahari’s affirmative defenses.

First, the Court held that not only did Tahari fail to substantiate its fair use defense, each of the four fair use factors outlined in Section 107 of the Copyright Act weighed in favor of lantosca: (i) Tahari’s use was nothing more than a “commercial use” intended to advertise and sell its clothing, which was in no way transformative; (ii) the photograph is a typical “creative” work that is entitled to copyright protection; (iii) Tahari reposted the photograph without modification, so the “amount and substantiality” of the use weighed in lantosca’s favor; and (iv) the unauthorized posting of the photograph invaded lantosca’s statutory right to license his copyrighted work to others for reproduction. *Id.* at 10-11.

Second, the Court rejected Tahari’s *de minimis* defense which argued, without support, that reposting another’s picture has become commonplace on social media. The Court found that if this unsupported contention were credited, it would represent a “seismic shift in copyright protection.” *Id.* at 11.

Third, the Court rejected Tahari’s position that it had a right to use lantosca’s photograph because it credited lantosca in the caption and because it hired the model to wear Defendant’s clothing. The Court dispensed with this defense by stating, “attribution is not a defense against copyright infringement.” *Id.* Additionally, the Court held that because Tahari reposted an identical copy of lantosca’s photograph, Tahari’s “argument that the model is wearing Defendant’s clothing line has no bearing on liability for copyright infringement.” *Id.* at 12. A conference was then set to discuss the resolution of damage.

This decision illustrates that claims of copyright infringement in the context of social media will be evaluated and decided by the same rules and precedents developed in the context of more traditional mediums, and those posting and creating social media content must be mindful of these existing precedents.