

Professional Perspective

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Celebrity Fair Use of Paparazzi Photographs

Contributed by [Nathan Sabri](#), Morrison & Foerster

The plot is by now familiar: a celebrity steps out of their apartment and their picture is snapped by someone without permission. When it surfaces online, the celebrity likes the shot or wants to comment on it. They re-post it on social media themselves. And just like that, the factual background for another *Paparazzo v. Celebrity* complaint is written.

Early in May 2022, Emily Ratajkowski settled one such case that she had litigated for several years. Soon after, Anna Kendrick quickly settled a similar matter. Theirs followed dozens of others. Dua Lipa, Jennifer Hudson, Jennifer Lopez, Ariana Grande, Gigi Hadid, Khloe Kardashian, and many more have similarly found themselves appearing as defendants in copyright litigation for posting photographs of themselves on social media.

This article examines the nuances of fair use claims through the context of copyright lawsuits involving high-profile defendants, and how celebrities might be able to take advantage of the law to republish their likeness.

Copyright Owner v. Subject

Intellectual property practitioners know that the copyrights to a photograph are owned not by the subject, but by the photographer. Nevertheless, to many, something feels wrong about the result. How can it be that an actor or musician not only has no ability to control their own images or prevent others from profiting from unauthorized ambush photography, but can even be liable for using photographs of themselves?

Some celebrities have tried fighting back. Gigi Hadid, for example, moved to dismiss the complaint against her on, *inter alia*, the bases of fair use and implied license. The court in Hadid's case ultimately did not reach these defenses, however, as it dismissed the case for lack of standing.

Emily Ratajkowski moved for summary judgment and argued, among other things, that there was nothing creative about the photograph of her—and therefore it did not qualify for copyright protection at all—and her social media post qualified as fair use. The court rejected the first argument, finding that the photograph met the “extremely low” standard for originality. As to the second, it found that material issues of fact as to fair use prevented a finding of summary judgment for either party.

Unsurprisingly, the vast majority of these cases settle before any substantive argument is filed—like Kendrick's case. Even the few that make it further—such as Ratajkowski's more recently settled matter—provide little in the way of final guidance to practitioners. This leaves an open question for cases that proceed further: If a celebrity does not want to pay off the paparazzo, how much can they count on fair use to save them?

Fair Use Factors

The fair use factors are reflected in Section 107 of the Copyright Act: the purpose and character of the use, including whether the use is commercial or for nonprofit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the whole, and the effects of the use on the potential market for the copyrighted work.

Nature of Copyrighted Work

Although no single factor is dispositive, the second factor—“nature of the copyrighted work”—is simultaneously the most compelling and the most interesting in this fact pattern. The Supreme Court has stated that this factor “calls for recognition that some works are closer to the core of intended copyright protection than others.” Commentators often abbreviate this factor to consider whether the work is factual or creative, and published or unpublished.

Whether it is technically “factual” or “creative,” and “published” or “unpublished,” is a hastily taken photograph in which the photographer's only creative decision is whether or not to take the photograph “close[] to the core of intended copyright protection”? The backdrop is where the subject chose to step out. Their appearance is what they chose for the day. Their pose is part of their natural movement or how they chose to stand. The paparazzo does not even choose when to take the picture—they must take it whenever their unwilling subjects reveal themselves.

The *Ratajkowski* court acknowledged the points above and described the photograph as “essentially factual,” but nevertheless concluded with no analysis that the factor weighed in favor of the plaintiff, albeit “only marginally.” The defendants had argued that the factor was of “limited usefulness” because the photograph had been used for a transformative purpose. But this may be the key factor in these disputes.

After all, how can a news story containing countless decisions as to word choice, organization, ordering of events, and even what aspects of the story to present and what to leave out entirely be entitled to less protection under the fair use analysis than a surreptitious snapshot of a celebrity with no creative input at all? A news story is at its core a recitation of unprotected facts, but as the *Ratajkowski* court acknowledged, these types of photographs are also “essentially factual,” albeit visual.

The remaining factors may not weigh strongly in the photographer's favor. If the celebrity is thinking about this in advance, the following factors may even help their case even further.

Purpose & Character of Use

Anything the re-poster can do to make the posting more of a commentary or more transformative will influence this factor in their favor. Hadid was only able to argue that her re-posting made no effort to commercially exploit the photograph and was therefore of a different nature.

Ratajkowski had a stronger argument, as she had added the words “mood forever” and was able to argue not only that she did not directly commercialize her use, but that she was commenting on her relationship with the media. The *Ratajkowski* court found that overall, however, it was unable to resolve this factor at the summary judgment stage.

Amount & Substantiality of Portion Used

If a re-poster does want to comment on a photograph, they can shift the third factor slightly in their favor by using as little of the photograph as possible. But multiple courts have acknowledged that if use of the entire photograph is necessary to achieve the commentary, it should not weigh against the defendant.

Market Effect

This factor may hinge on defining the market appropriately. The *Ratajkowski* court found that the relevant market was that of individuals licensing photographs from paparazzi to post on their social media accounts, but then expected Ratajkowski to prove a negative: that such a market generally does not exist—or that the plaintiff could not extend into it.

Hadid took the bold position that there was no impact on any market because the ability to post the picture was specific and personal to her, whereas any other parties wishing to post the picture would still have to license it. The *Hadid* court did not reach this issue, as it decided the case on a procedural ground—the plaintiff's failure to register the copyright before filing suit.

The photographer has an easy response to both of those positions: if the public can see the image on the celebrity's social media page, there will be no draw to an outlet that might otherwise pay the photographer for the image. But if the celebrity posts the image to something temporary—Instagram Stories, for example, which Ratajkowski did—that argument is significantly undercut.

Conclusion

Paparazzi—by their nature—ambush celebrities, and surreptitious photographs are certainly not going away anytime soon. With the rise and persistence of social media, neither is the desire to re-post and comment on one's own images.

But, argued correctly, the doctrine of fair use is well situated to handle these seemingly unfair cases. And with some forethought, a celebrity who wants to comment on and regain control of their own likeness may be able to make their case even stronger.