The Conflict between the Copyright of Paparazzi and the Right of Publicity of Celebrities

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Abstract

This article explores the use of paparazzi photographs by celebrities. This issue is within the realm of copyright infringement but also engages the right of publicity as celebrities are using photographs of themselves on social media. The potential for preemption results in the right of publicity being a secondary consideration. Nonetheless, analyzing copyright against the right of publicity reveals that the relationship between the paparazzi and the celebrities is symbiotic. This article analyses whether the interests of these parties can be reconciled by existing copyright concepts such as fair use, implied license, and joint authorship. A distinction is made between candid, posed, and staged photographs to argue that implied license is the most viable defense, but would be limited to staged photographs due to the collaboration between the celebrity and the paparazzo. Three of the four use factors weigh in favor of the paparazzi, and joint authorship is likely to be rejected due to policy implications. The potential of a personal use exception and compulsory license are considered, but ultimately, allowing market forces to regulate is the most viable approach. This article concludes that the interests cannot be reconciled, but the paparazzi strengthen the right of publicity of the celebrities by increasing identifiability, which in turn supports claims against evocative uses of persona.

Introduction

In September 2016, Khloe Kardashian posted a photograph of herself on her Instagram account.[1] While the practice of celebrities posting paparazzi photographs of themselves is not unusual, this was one of the first known instances of a celebrity being sued for copyright infringement for doing so. Xposure Photos (UK) Ltd. filed a claim against Kardashian on April 25, 2017, in the Central District Court of California.[2] A similar claim was lodged a few months later, on September 5, 2017, against supermodel Gigi Hadid. Hadid posted a paparazzi photograph of herself on two of her social media accounts. The photograph featured Hadid in a customized Adidas jacket and received millions of "likes" from Hadid's followers. The photographer, Peter Cepeda, captured the image in July 2016 and licensed it to the Daily Mail UK and other publications. Cepeda brought a claim for copyright infringement against Hadid's reproduction of the photograph.[3] Cepeda's claim was the first of three copyright claims that Hadid has faced thus far.[4] In what has become a family affair, the famous siblings of the defendants in question, Kim Kardashian and Bella Hadid, have also been sued by paparazzi for copyright infringement for posting photographs of themselves.[5]

Paparazzi and/or their respective agencies suing celebrities for posting photographs of themselves is a trend that was established in 2017 and has continued to grow in popularity. By May 2020, at least nineteen celebrities have been sued by paparazzi and/or their agencies.[6] It is unknown how many others have been approached and agreed to pay license fees to avoid a claim being filed. While seeking permission to post a photograph of oneself may seem counterintuitive, it is necessary, as the individual is unlikely to be the owner of the copyright in the photograph. This unique situation brings two main interests to the forefront: the copyright held by the photographer and the right of publicity of the individual.

While the right of publicity does not shield an individual against copyright infringement, the existence and development of this right on a state-wide basis indicates that the law has afforded a level of control to individuals over the portrayal of their persona that cannot be overlooked. Since the right of publicity was recognized in the

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1 Francesca Wallace, *Khloe Kardashian is being sued for posting picture of Khloe Kardashian*, VOUGE AUSTRALIA (Apr. 28, 2017), https://www.vogue.com.au/celebrity/news/khloe-kardashian-is-being-sued-for-posting-a-picture-of-khloe-kardashian/news-story/f5fa4169702ee1d0aa585fa2c8327590.

2 Complaint at 5, Xposure Photos UK, Ltd. v. Kardashian, No. 2:17-cv-03088-DSF-MRW (C.D. Cal. Apr. 25, 2017), ECF No. 1.

3 Complaint at 6, Cepeda v. Hadid, 1:17-cv-00989-LMB-MSN (E.D. Va. Sept. 5, 2017), ECF No. 1.

4 *See id.*; Complaint at 5, Xclusive-Lee, Inc. v. Hadid, 1:19-cv-00520-PKC-CLP (E.D.N.Y. Jan. 28, 2019), ECF No. 1; Complaint at 3, O'Neil v. Hadid, 1:19-cv-8522 (S.D.N.Y. Sept. 13, 2019), ECF No. 1 (all asserting copyright claims against Gigi Hadid).

5 Complaint at 6, Xposure Photo Agency, Inc. v. Hadid, 2:19-cv-10587 (C.D. Cal. Dec. 15, 2019), ECF. No. 1; Complaint at 2–3, Mishiev v. Hadid, 1:20-cv-00959 (S.D.N.Y. Feb. 4, 2020), ECF No. 1; Complaint at 3, Bolden v. Skims Body, Inc., 2:20-cv-365 (E.D.N.Y. Jan. 22, 2020), ECF No. 1.

6 See *infra* Section 2 (displaying a Timeline of Claims).

1953 case of *Haelan Laboratories v. Topps Chewing Gum*,[7] the right has expanded to protect various aspects of persona such as voice, name, likeness, extending to "identity" in its widest conception in California.[8] The right applies post-mortem in twenty-six states,[9] allowing the heirs to control the commercialization of the deceased persona after the death of the individual. California, where the majority of right-of-publicity claims are made, has a post-mortem right of publicity with a seventy-year duration. This term mirrors the copyright term of seventy years after the death of an author.[10] The wide breadth of the right of publicity means that there is potential for clashes with federal copyright. The trends of celebrities with valuable rights of publicity being sued for posting photographs of themselves present an opportunity to explore the relationship between copyright and publicity rights.

Cases on this issue between paparazzi and celebrities are usually settled, which means courts have not had the opportunity to undertake an in-depth analysis into how these rights should be balanced. The purpose of this article is to consider whether a celebrity's right of publicity can be reconciled with the copyright of photographers. The conceptual balancing of these rights can have far reaching consequences for both celebrities and paparazzi. Immediately, the balancing could potentially limit the way celebrities interact with their audiences on social media. On the other hand, a balance could afford celebrities greater control over their persona that would reduce the value of paparazzi photographs, thus having a negative economic impact on the paparazzi industry. In the long term, such balancing can impact the commercialization strategy of the estates of deceased celebrities and paparazzi, particularly in situations where a post-mortem right of publicity exists alongside a federal copyright.

In exploring the issue at hand, this article makes two assumptions. Firstly, it assumes that paparazzi photographs meet the originality criteria for copyright protection. This is an issue that can be debated due to the nature of paparazzi photographs as the cameras used can generate up to 14 shots in a second.[11] This provides a question of whether they satisfy the minimum degree of creativity as set out in *Feist Publications, Inc. v. Rural Telephone Service Co*.[12] However, such a debate is beyond the scope of this article. Rather, the article will consider whether celebrities might be considered joint authors for the value they add to the images. Secondly, it is assumed that both copyright and the right of publicity will continue to exist, regardless of

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7 Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

8 Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 JEFFREY S. MOORAD SPORTS L.J. 481, 584–86 (2012).

9 THOMAS MCCARTHY & ROGER SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 9:17 (Thomson Reuters 2020).

10 United States Copyright Office, *How Long Does Copyright Protection Last?*, COPYRIGHT.GOV, https://www.copyright.gov/help/faq/faq-duration.html (last visited Nov. 14, 2021).

11 Amanda Gonzalez Burton, *The Rise of Paparazzo v. Celebrity Lawsuits: Is Copyright Law Fair?*, JIPEL BLOG (Nov. 6, 2019), https://blog.jipel.law.nyu.edu/2019/11/the-rise-of-paparazzo-v-celebrity-lawsuits-is-copyright-law-fair/ (citing *What Does Frames Per Second Mean?*, SHUTTER MUSE, https://shuttermuse.com/glossary/frames-per-second/ (last visited Nov. 14, 2021)).

12 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345–46 (1991).

whether they can be justified. The justifications of these rights have been comprehensively examined by others in the field.[13] With regards to scope, this article only considers situations where individuals post photographs of themselves. This article does not consider the use of photographs by Fashion Houses of celebrities wearing their designs, as occurred in *Splash News and Picture Agency, LLC. v. Moschino S.P.A.*,[14] or the use of photographs by fan accounts.[15]

In considering whether the interests protected by copyright and the right of publicity can be reconciled, this article is comprised of seven sections. The first section considers the interests of paparazzi and celebrities. The second section sets out a timeline of claims brought against celebrities and conducts a literature review. This literature review will make it clear that there is much to be discussed on this topic, as existing literature has identified the issue. However, only a handful of articles have considered how this issue might be resolved. The third section examines the right of publicity and copyright. The fourth section contextualizes the issue by considering how social media is used by celebrities, and the fifth section applies existing law. Despite the dearth of cases, there are certain copyright exceptions that may be applicable including fair use, implied license, and joint ownership. It will be argued that none of these defenses are likely to prevail. The sixth section sets out a hierarchy of rights by exploring the pre-emption of the right of publicity by copyright. While pre-

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[13] *See generally* Stacey Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006); Mark McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. OF PITT. L. REV. 225 (2005); Hazel Carty, *Advertising, publicity rights and English Law*, 3 INTELL. PROP. QUARTERLY 209 (2004); Roberta Kwall, *Fame*, 73 IND. L.J. 1 (1997); Oliver Goodenough, *Retheorising Privacy and Publicity*, 1 INTELL. PROP. QUARTERLY 37 (1997). Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129 (1994); Sheldon Halpern, *Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1994); Mark Grady, *A Positive Economic Theory of the Tight of Publicity*, 1 UCLA ENT. L. REV. 97 (1994); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125 (1993); Lawrence Becker, *Deserving to Own Intellectual Property*, 68 CHICAGO-KENT L. REV. 609, (1992); Rosemary Coombe, *Author/Izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L. J. 365 (1991); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287(1989); Richard Posner, *The right of privacy*, 12 GA. L. REV. (1978); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEXAS L. REV. 637 (1972); Melville Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203 (1954).

[14] Complaint at 3, Splash News & Picture Agency, LLC. v. Moschino S.P.A., No. 2:19-cv-09220 (C.D. Cal. Oct. 26, 2019), ECF. No. 1. This case settled on January 30, 2020. TFL, *Moschino Responds to Paparazzi Photo Lawsuit: You Infringed Our Copyright in the Jacket*, FASHION LAW (Jan. 27, 2020), https://www.thefashionlaw.com/moschino-responds-to-paparazzi-photo-lawsuit-you-infringed-our-copyright-in-the-jacket/.

[15] TFL, *The Kardashians' Instagram Fan Accounts Are Embroiled in a Copyright Mess*, FASHION LAW (Aug 27, 2018), https://www.thefashionlaw.com/khloe-kardashian-named-in-copyright-infringement-suit-over-instagram-photo/; *see* Kelley Bregenzer, Note, *Modifying Co-Authorship for the Digital Age: Paparazzi Photographs as Joint Works Notes*, 13 DREXEL L. REV. 449, 453 (2020) (considering of how the issue of fashion houses, and public relations firms posting paparazzi photographs can be addressed via joint authorship).

emption in this field is rare, it is necessary to explore this issue to delineate the boundaries of the rights, as any proposed changes must consider that copyright is federal, whereas the right of publicity is state-based. Finally, the seventh section will address potential solutions to the problem, including introducing a new exception or limitation, utilizing a compulsory license, or leaving the law as it stands. The article concludes that the most suitable approach is to leave the law as it stands, as this protects the paparazzi's copyright while recognizing the role of paparazzi in strengthening the celebrity's right of publicity.

Section 1: The Interests of Paparazzi and Celebrities

Interests of Paparazzi

The goal of paparazzi is to capture a photograph of a celebrity. Paparazzi then tend to license these photographs to an agency which will deal with news sources.[16] The paparazzo will receive a percentage of the royalties from the photograph, generally ranging from 20–70%.[17] More popular paparazzi may be able to license their photographs directly to news sources.[18] The rise of social media has increased the appetite for celebrity content, but the ability of celebrities to share photographs of themselves has decreased the value of paparazzi photographs.[19] As such, photography agencies introduced subscription services for news sources, allowing them access to multiple photographs instead of individual photographs.[20] In turn, paparazzi have seen a decrease in revenue.[21] This decrease can be linked to the rise of copyright infringement lawsuits, as paparazzi and their photo agencies seek to protect a commodity that is constantly decreasing in value.[22] Arguably, allowing these potentially infringing uses to go unchecked could lead to a proliferation of the occurrence, as news sources might copy the photograph from a celebrity's social media rather than seeking a license, as occurred in *Simpson*.[23]

One could suggest that protecting the interests of paparazzi is of minimal

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16 Allison Schrager, *The 'golden years' of paparazzi have mostly gone*, BBC (Apr. 24, 2019), https://www.bbc.com/worklife/article/20190423-how-the-paparazzi-make-their-money.

17 *Id.*

18 *Id.*

19 *Id.*; Jeanne Fromer, *The New Copyright Opportunist*, 67 J. OF THE COPYRIGHT SOCIETY OF THE USA 1, 8–11 (2020).

20 Tom Rasmussen, *Why the paparazzi are suing celebrities over Instagram pics*, I-D (May 17, 2019), https://i-d.vice.com/en_us/article/a3xkmb/why-the-paparazzi-are-suing-celebrities-over-instagram-pics.

21 *Id.*

22 TFL, *What Does the Growing Number of Paparazzi Lawsuits Say About the Fashion Industry?*, FASHION LAW (Oct. 28, 2019), https://www.thefashionlaw.com/what-does-the-growing-number-of-paparazzi-lawsuits-say-about-the-fashion-industry/. It should be noted that this blog posts looks at the phenomenon of brands posting paparazzi photographs of celebrities wearing their clothes. While this the issue being examined in this article is celebrities posting photographs of themselves, brands also contribute to the problem by using photographs without compensation.

23 Complaint at 3–6, Splash News & Picture Agency, LLC. v. Simpson, 2:18-cv-00591-R-JEM (C.D. Cal. Jan. 23, 2018), ECF No. 1.

importance considering the intrusive nature of paparazzi.[24] However, celebrities and their agents often tip paparazzi off as to their whereabouts when they are trying to establish their popularity.[25] This exposure may be unwanted once the celebrity is easily recognizable and has achieved success, but it cannot be denied that paparazzi aid in the promotion of emerging stars.[26] Furthermore, celebrities may tip off paparazzi in order to control the nature of photographs that are published.[27] This way, celebrities can ensure that they are looking their best, and they can also capitalize on a product placement opportunity.[28]

It is worth distinguishing between various types of paparazzi photographs. Photographs where the celebrity is captured unaware of the photographer can be considered candid, whereas photographs where the celebrity poses, smiles, or otherwise consents to the photograph can be considered posed. Where the celebrity has a greater degree of involvement by providing information of their whereabouts to the paparazzi and, thus, deliberately seeks to be photographed, the photographs can be labelled as staged.[29] Differentiating between these different categories can be difficult without information on how the photograph was captured, as staged photographs may deliberately appear candid.

In addition to the symbiotic relationship between paparazzi and celebrities,[30] the public's desire to consume celebrity culture makes paparazzi photographs valuable, despite the decrease in value discussed above.[31] If there was no demand, then paparazzi would not go to the lengths that they do to secure unrequested photographs (although, as noted, some photographs are staged). The position of celebrities in society

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[24] *See* Dayna Berkowitz, *Stop the 'Nazzi': Why the United States Needs a Full Ban on Paparazzi Photographs of Children of Celebrities*, 37 LOY. L.A. ENT. L. REV. 175, 195–97 (2017) (discussing how the right of privacy may conflict with actions stemming from paparazzi First Amendment rights); Emily Rehm, *Breaking News And Breaking The Law: Reining In California's Criminalization Of Paparazzi And The Intent To Photograph*, 46 SW. L. REV. 469, 483–85 (2017) (discussing methods to curb the intrusive nature of paparazzi tactics); Andrew Mendelson, *Paparazzi*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF JOURNALISM STUDIES 2 (Tim Vos & Folker Hanusch eds., 2019).

[25] Kendra Ackerman, *15 Celebs Who Have Been Caught Tipping The Paparazzi Off*, THINGS (Jan. 8, 2018), https://www.thethings.com/15-celebs-caught-tipping-paparazzi-off/; Darla Murray, *A Paparazzo Explains How Staged Celebrity Photos Really Work*, COSMOPOLITAN (Jun. 16, 2016), https://www.cosmopolitan.com/entertainment/celebs/q-and-a/a60015/paparazzo-explains-staged-celebrity-photos/; Stephanie Marcus, *Celebrities Call The Paparazzi On Themselves Sometimes, Obviously*, HUFFINGTON POST (Apr. 18, 2014), https://www.huffpost.com/entry/celebrities-call-paparazzi_n_5175348.

[26] Ackerman, *supra* note 25; Murray, *supra* note 25; Marcus *supra* note 25.

[27] Jennifer Buhl, *12 Things I Wish I Knew Before Becoming a Paparazzo*, COSMOPOLITAN (Aug. 28, 2015), https://www.cosmopolitan.com/career/a45449/things-i-wish-i-knew-before-becoming-paparazzi/.

[28] Murray, *supra* note 25.

[29] *Id*.

[30] Fromer, *supra* note 19.

[31] Markus Wohlfeil, Anthony Patterson & Stephen J. Gould, *The Allure of Celebrities: Unpacking Their Polysemic Consumer Appeal*, 53 EUR. J. OF MKTG. 2025, 2026–28 (2019).

necessitates a level of exposure. The law has recognized this in limiting the privacy and defamation protection available to celebrities by making it more challenging to succeed on these claims.[32] In contrast, the right of publicity, born out of the inadequacies of privacy law, is strengthened by the increased exposure and, by extension, the identifiability of the famous individual.

Interests of Celebrities

Celebrities use paparazzi photographs of themselves to connect with fans, strengthening the parasocial relationships. As described by Vanity Fair, "What began with reality television migrated onto our phones, that sense of intimate and immediate connection to people we really only know through screens."[33] Celebrity social media accounts often have a commercial aim: to promote the celebrity and therefore increase the value of the celebrity as a commodity.[34] While social media accounts may also be used for political purposes, advocacy (for example, several celebrities called for people to "stay home" during the Covid-19 pandemic),[35] and for recreational use, ultimately, the commercial power of the celebrity is linked to the size of their fan base. Celebrities thus post photographs of themselves to keep connected to their fans and to grow their presence.

A study conducted by Eyal, Te'eni-Harari, and Katz, examined posts of twenty-four celebrities popular amongst Israeli teens. They found that "[t]he most common

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[32] Famous individuals have a lesser expectation of privacy. *See* Carlisle v. Fawcett Publ'ns, Inc., 20 Cal. Rptr. 405, 414 (Ct. App. 1962):

> [T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and wide-spread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public, for instance, actors and actresses, professional athletes, public officers, noted inventors, explorers, war heroes, may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons.

Additionally, an intrusion into the private life of a famous individual may be justified on the basis of "legitimate public concern." *See* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975):

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper become a matter of community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern . . . .

For a defamation claim, a public figure must prove "actual malice": New York Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

[33] Richard Lawson, *There Is No Good Celebrity Content Right Now*, VANITY FAIR (Apr. 1, 2020), https://www.vanityfair.com/hollywood/2020/04/celebrity-coronavirus-social-media.

[34] TFL, *"Every One of Minaj's Instagram Posts is Fundamentally Promotional," Splash News Claims in New Suit*, FASHION LAW (Jul. 8, 2019), https://www.thefashionlaw.com/every-one-of-minajs-instagram-posts-is-fundamentally-promotional-splash-news-claims-in-new-suit/.

[35] Lawson, *supra* note 33.

subject addressed in the posts . . . was the celebrities' professional lives, including pictures from television series sets, reflection on a recent performance, etc. . . . The second most common topic in celebrity posts was self-promotion, including information about upcoming concerts or appearances by the celebrity."[36] Posts about personal lives, promotion of goods indirectly associated with the celebrity, and political and social causes were the third, fourth, and fifth most common respectively.[37]

Celebrities have the ability to post photographs which they have paid for or have taken themselves (such as selfies) on their social media. Yet, they persistently post paparazzi photographs, which indicates that they consider these photographs to be of some value. For attendance at events, the celebrity may like the professional nature of the photography. For their daily lives, celebrities may enjoy the candid nature of the photographs because it allows fans a seemingly intimate connection. However, the commercial element is still present in the choice to post paparazzi photographs as consumers may think that the outfits worn in the paparazzi photograph were purchased by the celebrity, even if they are wearing the outfit as part of a sponsorship agreement with a brand.[38] As such, the celebrity benefits from the work of the paparazzi by deliberately flouting copyright law. This indicates that although in some cases the paparazzi may be an unwanted intrusion, celebrities who post the photographs may not by wholly opposed to the symbiotic relationship between themselves and the paparazzi.

Can these Interests be Reconciled?

Both the paparazzi and the celebrities have financial interests at stake. This is the core of the copyright dispute. The paparazzi want to protect the value of the photograph, receive the license fee, and deter other celebrities and news sources from future infringement. The celebrity wants to use the photograph of themselves to strengthen the parasocial relationship, ultimately resulting in greater commercial gain. It is unsurprising that the celebrity feels that they should have the right to post photographs of themselves considering the expansive protection that they have been afforded by the right of publicity, as discussed in Section 3. However, it is important to underscore that celebrities are able to protect their persona, rather than control the use of copyright work in which they appear. This will be clarified by the discussion on preemption in Section 6.

While celebrities are opposed to the copyright restrictions on posting photographs of themselves, it would be remiss not to consider that celebrities may have their own copyright that they also want to protect. Musicians, actors, and reality

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[36] Keren Eyal, Tali Te'eni-Harari & Keshet Katz, *A Content Analysis of Teen-Favoured Celebrities' Posts on Social Networking Sites: Implications for Parasocial Relationships and Fame-Valuation*, 14 J. OF PSYCH. RSCH. ON CYBERSPACE 1, 8 (2020).

[37] *Id.*

[38] Dan Rice, Andrew Kuo & Rebecca Rast, *Peripheral Endorsement: How Perceptual Congruence With Celebrities Can Benefit Brands*, 44 ADVANCES IN CONSUMER RESEARCH 231, 231–32 (2016).

television stars are all involved in the creation of copyright protected works. Even if they do not own copyright directly, they may benefit from royalties for the distribution of works in which they appear or have contributed to. In a way, the celebrities' actions are hypocritical considering they are often litigious when it comes to the right of publicity or copyright infringement of their own works. However, it cannot be denied that the celebrity is what makes the copyright protected paparazzi photograph valuable.

The ultimate question then is whether these commercial interests can and should be reconciled. Before this question can be answered, it is necessary to examine the claims that have been brought thus far and the applicable law. The next section conducts a literature review on this topic.

Section 2: Claims and Approaches in Existing Literature

The first known copyright infringement claim brought by a paparazzi against a celebrity, Khloe Kardashian, for posting a photograph of herself, occurred in April 2017. This case was settled out of court, and Kardashian appears to have altered her behavior since then. On August 19, 2018, a fan tweeted Kardashian asking: "[A]re you going to post photos of your Versace look?," referring to an outfit Kardashian wore on the previous day while going to dinner with boyfriend Tristan Thompson.[39] Kardashian responded:

> Yes!! I have to license some of the images first. A paparazzi sued me in the past for reposting an image of MYSELF. So now it takes just a little longer because I have to go and license the images so they don't get my [money].[40] MAKES NO SENSE.[41]

Other celebrities apparently have not learnt from Kardashian's experience as twenty-two celebrities have been sued thus far.[42] This section provides a timeline of claims brought from 2017 to 2020 and a short statement of the facts.[43] Most claims settle out of court, with the exception of *Xclusive-Lee, Inc. v. Hadid*,[44] which was dismissed. The claims in the timeline have been settled unless otherwise stated. After the timeline has been outlined, there will be a brief discussion of the claims.

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39 Allie Fansanella, *Khloe Kardashian Stuns For Date Night With Tristan Thompson*, Footwear News (Aug. 19, 2018), https://footwearnews.com/2018/fashion/celebrity-style/khloe-kardashian-versace-outfit-sexy-pumps-tristan-thompson-date-night-1202665040/.

40 In the actual twitter post, Kardashian used an emoji to signify "money."

41 Khloe Kardashian (@khloekardashian), TWITTER (Aug. 19, 2018), https://twitter.com/khloekardashian/status/1031301266910015488?lang=en.

42 Some celebrities have been sued multiple times. As of April 2021, 28 claims had been brought against 22 celebrities. *See infra* Section 2 (Timeline of Claims).

43 The Fashion Law published a list of cases brought by paparazzi against celebrities and fashion houses for copyright infringement. It should be noted that the list in this article only includes claims brought against celebrities as claims brought against fashion houses is beyond the scope of this article. TFL, *From Bella and Gigi Hadid and Goop to Virgil Abloh and Marc Jacobs: A Running List of Paparazzi Copyright Suits*, FASHION LAW (Feb. 21, 2020), https://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits/.

44 Xclusive-Lee, Inc. v. Hadid, No. 19-cv-520, 2019 WL 3281013, at *4 (E.D.N.Y. Jul. 18, 2019).

Following this, the sparse literature on the area will be considered. As this is a new issue, there has not been much writing to date, making it ripe for exploration.

Timeline of Claims

2017

April 25th—*Xposure Photo (UK), Ltd. v. Kardashian*.[45] Khloe Kardashian was sued for posting photograph of herself going to dinner with her boyfriend Tristan Thompson on Instagram.[46]

September 7th—*Cepeda v. Hadid*.[47] Gigi Hadid was sued for posting a photograph of herself going to work wearing an Adidas jacket altered to read "Hadid" on her Instagram and Twitter accounts.[48]

September 30th—*Pasatieri v. G-Unit Records, Inc. and Curtis Jackson*.[49] 50 Cent was sued by a photographer for posting photographs on social media to promote his new television show and headphones.[50]

December 4th—*BackGrid USA, Inc. v. Angela Renèe White*.[51] Blac Chyna was sued for posting photographs of herself, Rob Kardashian, and their son, on her Instagram account on two occasions. Chyna also used one of the photographs to endorse a fashion house.[52]

2018

January 23rd—*Splash News and Picture Agency, LLC. v. Simpson*.[53] Jessica Simpson was sued for posting several photos of herself exiting the Bowery Hotel in

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45 Complaint at 1, Xposure Photos UK, Ltd. v. Kardashian, No. 2:17-cv-03088-DSF-MRW (C.D. Cal. Apr. 25, 2017), ECF No. 1.

46 TFL, *supra* note 15.

47 Complaint at 5, Cepeda v. Hadid, 1:17-cv-00989-LMB-MSN (E.D. Va. Jan. 28, 2017), ECF No. 1.

48 TFL, *Gigi Hadid, IMG Models Slapped with Copyright Infringement Lawsuit Over Instagram Post*, FASHION LAW (Nov. 9, 2017), https://www.thefashionlaw.com/gigi-hadid-img-models-slapped-with-copyright-infringement-lawsuit-over-instagram-post/.

49 Complaint at 3, Pasatieri v. G-Unit Records, Inc., 1:17-cv-07487-PAE (S.D.N.Y Sept. 30, 2017), ECF No. 1.

50 Carl Lamarre, *50 Cent Sued by Photographer for Posting Unlicensed Photos on Instagram: Report*, BILLBOARD (Mar. 10, 2017), https://www.billboard.com/articles/columns/hip-hop/7982031/50-cent-lawsuit-unlicensed-photos-instagram.

51 Complaint at 4–6, BackGrid USA, Inc. v. White, 2:17-cv-08748-FMO-KS (C.D. Cal. Dec. 4, 2017), ECF No. 1.

52 Ryan Naumann, *Black Chyna Settles Paparazzi Lawsuit Days After Trying to Drag Rob Kardashian and Mark Zuckerberg Into Case*, YAHOO NEWS (Jun. 7, 2019), https://news.yahoo.com/blac-chyna-settles-paparazzi-lawsuit-141100446.html.

53 Complaint at 3–6, Splash News & Picture Agency, LLC. v. Simpson, 2:18-cv-00591-R-JEM (C.D. Cal. Jan. 23, 2018), ECF No. 1.

New York on her Instagram account.[54]

February 1st—*Beckham v. Splash News and Picture Agency, LLC.*[55] In a turn of events, this claim was brought by Odell Beckham for extortion as a counterclaim against copyright infringement.[56]

2019

January 28th—*Xclusive-Lee, Inc. v. Hadid*.[57] **Dismissed.** Gigi Hadid was sued for posting photograph of herself in New York to her Instagram account.[58] This claim went further than the other claims presented in this timeline as a Memorandum in Support of an Order to Dismiss was filed, and an Order to Dismiss was granted in favor of the defendant on the basis that the plaintiff did not have the necessary copyright registration required to bring a claim.[59]

May 13th—*Barbera v. Grandari, Inc. and Ariana Grande.*[60] Ariana Grande was sued for posting two photographs of herself carrying a bag with the word "Sweetener," the title of her new album. She posted the photographs to her Instagram account to celebrate the release of her album.[61]

July 5th—*Splash News and Picture Agency, LLC v. Onika Tanya Maraj*.[62] **Ongoing—jury trial set for June 2021.** Nicki Minaj was sued for posting seven photos of herself on her Instagram account.[63] In 2020, the case was transferred to a different judge, so the case number was updated.[64]

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54 Ashley Cullins, *Jessica Simpson Sued for Posting Paparazzo's Picture of Herself on Instagram*, HOLLYWOOD REPORTER (Jan. 24, 2018), https://www.hollywoodreporter.com/thr-esq/jessica-simpson-sued-posting-paparazzos-picture-instagram-1077942.

55 Complaint at 8–11, Beckham v. Splash News & Picture Agency, LLC, 2:18-cv-01001-JTM-JCW (E.D. La. Feb. 1, 2018), ECF No. 1.

56 Eriq Gardner, *NFL Star Alleges in Lawsuit That Paparazzi Agency Is Extorting Him and Other Celebrities*, HOLLYWOOD REPORTER (Feb. 1, 2018), https://www.hollywoodreporter.com/thr-esq/nfl-star-alleges-lawsuit-paparazzi-agency-is-extorting-him-celebrities-1081084.

57 Complaint at 5, Xclusive-Lee, Inc. v. Hadid, 1:19-cv-00520-PKC-CLP (E.D.N.Y. Jan. 28, 2019), ECF No. 1

58 Paige Leskin, *The Copyright Lawsuit Accusing Gigi Hadid of Posting a Paparazzi Photo She Didn't Have the Rights to Has Been Thrown Out*, BUSINESS INSIDER (Jul. 18, 2019), https://www.businessinsider.com/gigi-hadid-copyright-infringement-lawsuit-over-instagram-paparazzi-photo-dismissed-2019-7.

59 Xclusive-Lee, Inc. v. Hadid, No. 19-cv-520, 2019 WL 3281013, at *4 (E.D.N.Y. Jul. 18, 2019).

60 Complaint at 2–3, Barbera v. Grande, 1:19-cv-04349-PKC (S.D.N.Y. May 13, 2019), ECF No. 1.

61 Layla Iichi, *Ariana Grande Settles Lawsuit Over Instagram Photos*, WWD (Jul. 31, 2019), https://wwd.com/fashion-news/fashion-scoops/ariana-grande-settles-instagram-lawsuit-1203230459/.

62 Complaint at 5–6, Splash News & Picture Agency, LLC. v. Maraj, 2:19-cv-05822-RGK-JEM (C.D. Cal. Jul. 5, 2019), ECF No. 1.

63 TLF, *supra* note 34.

64 *See* Complaint at 1, Splash News & Picture Agency, LLC. v. Maraj, 2:20-cv-00551-RGK-JEM (C.D. Cal. Jan. 19, 2020), ECF No. 1 (displaying the complaint as filed under new docket number following the transfer).

September 13th—*O'Neil v. Hadid*.[65] Rather than posting a photograph of herself, Hadid was sued for posting a photograph of her boyfriend, Zayn Malik, walking in New York, on her Instagram story. Hadid added the words, "Muze" and "My Manz" along with three stickers to the photograph.[66]

September 17th—*Ramales v. Victoria Beckham, Inc., VB Beauty (US) LLC*.[67] Victoria Beckham was sued for posting a photograph of herself in New York on her Instagram story. The suit was voluntarily dismissed without prejudice the day after it was filed. "The Fashion Law" suggests that this indicates the case was settled out of court. [68]

October 5th—*Splash News and Picture Agency, LLC. v. Jennifer Lopez*.[69] Jennifer Lopez was sued for posting a photograph of herself and her and boyfriend Alex Rodriguez in New York on her Instagram story.[70]

October 16th—*Barbera v. Justin Bieber Brands*.[71] Justin Bieber was sued for posting a photo of himself and his friend in a car on his Instagram account.[72]

October 21st—*Sandberg v. Jonas Brothers LLC*.[73] The Jonas Brothers were sued for posting photographs of themselves on their social media accounts without obtaining a license from the photographer.[74]

October 23rd—*O'Neil v. Ratajkowski*.[75] Emily Ratajkowski was sued for

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65 Complaint at 3, O'Neil v. Hadid, 1:19-cv-8522 (S.D.N.Y. Sept. 13, 2019), ECF No. 1.

66 Elizabeth Rosner, *Gigi Hadid sued for posting paparazzi photo of ex Zayn Malik*, PAGE SIX (Sept. 13, 2019), https://pagesix.com/2019/09/13/gigi-hadid-sued-for-posting-paparazzi-photo-of-ex-zayn-malik/.

67 Complaint at 3, Ramales v. Victoria Beckham, Inc., 1:19-cv-08650-JSR (S.D.N.Y. Sept. 17, 2019), ECF No. 1.

68 TFL, *The Latest Celebrity to be Named in a Paparazzi-Filed Copyright Lawsuit? Victoria Beckham*, FASHION LAW (Sept. 18, 2020), https://thefashionlaw.squarespace.com/home/the-latest-celebrity-named-in-a-paparazzi-filed-copyright-lawsuit-victoria-beckham.

69 Complaint at 4, Splash News & Picture Agency, LLC. v. Lopez, 2:19-cv-08598-DDP-AFM (C.D. Cal. Oct. 5, 2019), ECF No. 1.

70 Ryan Naumann, *Jennifer Lopez Settles $150,000 Legal Battle Over Alex Rodriguez Days Before Super Bowl*, MSN (Jan. 31, 2020), https://www.msn.com/en-us/sports/nfl/jennifer-lopez-settles-dollar150000-legal-battle-over-alex-rodriguez-days-before-super-bowl/ar-BBZyiG0.

71 Complaint at 3, Barbera v. Justin Bieber Brands, LLC, 1:19-cv-09532 (S.D.N.Y. Oct. 16, 2019), ECF No. 1.

72 Olivia Petter, *Justin Bieber is reportedly being sued for sharing a paparazzi photo on Instagram without credit*, BUS. INSIDER (Oct. 18, 2019), https://www.insider.com/justin-bieber-paparazzi-lawsuit-sharing-photo-on-instagram-2019-10.

73 Complaint at 3–4, Sandberg v. Jonas Brothers Enters. LLC, 1:19-cv-09679-CM (S.D.N.Y. Oct. 21, 2019), ECF No. 1.

74 Ryan Naumann, *Jonas Brothers Settle $150,000 Legal Battle Over Instagram Posts*, YAHOO ENT. (Jan. 24, 2020), https://www.yahoo.com/entertainment/jonas-brothers-settle-150-000-174146353.html.

75 Complaint at 2–3, O'Neil v. Ratajkowski, 1:19-cv-09769-AT (S.D.N.Y. Oct. 23, 2019), ECF No. 1.

posting a photograph herself holding flowers in New York on her Instagram story.[76]

October 30th—*BackGrid USA, Inc. v. Katheryn Hudson.*[77] **Ongoing.** Katy Perry posted a photograph of herself to her Instagram account on October 30th, 2016. The copyright holder requested that she buy a license for the photo in July 2017. They continued to contact her about the license but after several unsuccessful attempts, they sued her in October 2019.[78] She filed a Motion to Dismiss in February 2020, which was not granted. The court urged the parties to settle out of court.[79]

December 15th—*Splash News and Picture Agency, LLC. v. Liam Hemsworth*.[80] Liam Hesmworth was sued for posting a photograph of himself that was taken while he was on set for an upcoming movie, "Isn't It Romantic."[81]

December 15th—*Xposure Photo Agency, Inc. v. Rebel Wilson*. Rebel Wilson was sued for posting photographs of herself and Anne Hathaway filming the movie "The Hustle" that were published in the Daily Mail in 2018.[82]

December 15th—*Xposure Photo Agency, Inc. v. Isabella Khiar Hadid.*[83] **Ongoing.** Bella Hadid was sued for posting five photographs of her at various events to her Instagram account between September 6th, 2016, and June 17th, 2018.[84]

2020

January 6th—*Barbera v. Grandari, Inc. and Ariana Grande*.[85] **Ongoing.** Ariana Grande was sued for a second time by the same paparazzi who sued her the previous

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[76] Daniella Scott, *Emily Ratajkowski is being sued for $150k over an Instagram post*, COSMOPOLITAN (Nov. 25, 2019), https://www.cosmopolitan.com/uk/entertainment/a29584922/emily-ratajkowski-sued-instagram-post/.

[77] Complaint at 5, BackGrid USA, Inc. v. Hudson, 2:19-cv-09309-AB-MRW (C.D. Cal. Oct. 29, 2019), ECF No. 1.

[78] Juliette Jagger, *Katy Perry Sued For Copyright Infringement After Posting a Paparazzi Photo of Herself on Instagram*, CELEBRITY ACCESS (Nov. 1, 2019), https://celebrityaccess.com/2019/11/01/katy-perry-sued-for-copyright-infringement-after-posting-a-paparazzi-photo-of-herself-on-instagram/.

[79] Chris Cooke, *Katy Perry photo-theft lawsuit to proceed but judge urges an out of court settlement*, COMPLETE MUSIC UPDATE (Mar. 20, 2020), https://completemusicupdate.com/article/katy-perry-photo-theft-lawsuit-to-proceed-but-judge-urges-an-out-of-court-settlement/.

[80] Complaint at 5, Splash News & Picture Agency, LLC v. Hemsworth, 2:19-cv-10584-CAS-AFM (C.D. Cal. Dec. 15, 2019), ECF No. 1.

[81] Ryan Naumann, *Liam Hemsworth Settles $150,000 Lawsuit Over An Instagram Post*, BLAST (Mar. 18, 2020), https://theblast.com/c/liam-hemsworth-settles-150000-lawsuit-instagram-photo-isnt-it-romantic-miley-cyrus.

[82] World Entertainment News Network, *Rebel Wilson sued over paparazzi photos on Instagram*, REGINA LEADER-POST (Dec. 18, 2019), https://leaderpost.com/entertainment/celebrity/rebel-wilson-sued-over-paparazzi-photos-on-instagram/wcm/3db14a71-a7a5-4bdc-8f99-a6413ffdc18f/.

[83] Complaint at 6, Xposure Photo Agency, Inc. v. Hadid, 2:19-cv-10587 (C.D. Cal. Dec. 15, 2019), ECF No. 1.

[84] TFL, *Bella Hadid is Being Sued Over Her "Systemic Piracy" of Copyright-Protected Paparazzi Photos*, FASHION LAW (Dec. 17, 2019), https://www.thefashionlaw.com/bella-hadid-is-being-sued-for-posting-5-copyright-protected-paparazzi-photos-of-herself-to-her-instagram/.

[85] Complaint at 3, Barbera v. Grande, 1:20-cv-00116-PAE-BCM (S.D.N.Y. Jan. 6, 2020), ECF No. 1.

year. Grande posted a photograph of herself and a friend in New York. Grande was wearing a T-shirt which depicted her album cover. In the previous claim, she was photographed carrying a bag with the name of the album cover.[86]

January 22nd—*Bolden v. Skims Body, Inc. and Kim Kardashian*.[87] **Ongoing.** Kim Kardashian was the third Kardashian/Jenner sister to be sued for copyright infringement. Kim posted a photograph of her and Kanye West at a party in 2018 on her Instagram.[88]

February 4th—*Mishiev v. Hadid*.[89] Bella Hadid was sued for the second time in two months by a different photographer. Hadid posted a photograph of herself on Instagram with the caption, "@zendaya made this hat so I shall wear this hat until I can no longer wear this hat anymore @tommyhilfiger."[90]

March 17th—*Mitchell v. James*.[91] LeBron James was sued for posting a photograph himself taken during a basketball game on his Instagram account.[92] The paparazzi sued for $150,000. James countersued for an infringement of his right of publicity for the paparazzo's posting of photographs of James on his website. The parties reached a confidential settlement.[93]

March 31st—*Angela Ma v. Kendall Jenner, Inc. and Kendall Jenner*.[94] **Ongoing.** Kendall Jenner was sued for posting a video of herself in New York to her Instagram account.[95]

April 7th—*Ramales v. Cloudette, LLC. and Amy Schumer*.[96] Amy Schumer was

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86 Ryan Naumann, *Ariana Grande Sued For Second Time By Same Man, Accused Of Failing To Learn Her Lesson*, BLAST (Jan. 7, 2020), https://theblast.com/c/ariana-grande-sued-again-photographer-instagram-photo-sweetener-new-music-lawsuit-ripped-off-artist.

87 Complaint at 3, Bolden v. Skims Body, Inc., 2:20-cv-365 (E.D.N.Y. Jan 22, 2020), ECF No. 1.

88 Marsha Silva, *Kim Kardashian Sued by Paparazzi Photographer for Posting a Picture of Herself and Kanye West on Instagram*, DIGITAL MUSIC NEWS (Jan. 24, 2020), https://www.digitalmusicnews.com/2020/01/24/kim-kardashian-kanye-west-photo-sued/.

89 Complaint at 2–3, Mishiev v. Hadid, 1:20-cv-00959 (S.D.N.Y. Feb. 4, 2020), ECF No. 1.

90 Usman Dawood, *Supermodel Bella Hadid Sued by Photographer for Posting Picture of Herself on Instagram*, FStoppers (Mar. 13, 2020), https://fstoppers.com/legal/supermodel-bella-hadid-sued-photographer-posting-picture-herself-instagram-463585#comment-587239.

91 Complaint at 2–3, Mitchell v. James, 1:20-cv-02374-RA (S.D.N.Y. Mar. 17, 2020), ECF No. 1.

92 Ryan Naumann, *LeBron James Sued For $150,000 Over Facebook Post*, BLAST (Mar. 18, 2020), https://theblast.com/c/lebron-james-sued-facebook-post-photo-150000-photographer-nba.

93 Libby Peterson, *6 Copyright Infringement Cases Photographers Should Know About*, RANGEFINDER (Jan. 27, 2021), https://www.rangefinderonline.com/news-features/business-marketing/copyright-infringement-cases-photographers/.

94 Complaint at 4, Ma v. Kendall Jenner, Inc., 2:20-cv-03011-MCS-MRW (C.D. Cal. Mar. 31, 2020), ECF No. 1.

95 Milord A. Keshishian, *Kendall Jenner Sued For Copyright Infringement by Paparazzi for Posting Instagram Video*, LOS ANGELES INTELLECTUAL PROPERTY TRADEMARK ATTORNEY BLOG (Apr. 1, 2020), https://www.iptrademarkattorney.com/instagram-copyright-infringement-copyright-troll-dmca-kendall-jenner/.

96 Complaint at 3, Ramales v. Schumer, 1:20-cv-02890-LJL (S.D.N.Y. Apr. 7, 2020), ECF No. 1.

sued for posting two photographs of herself and her son in New York. In the photos, Schumer was wearing a sweatshirt which said, "Plus Size Brain." Her company, Cloudette LLC, was also named as a defendant as the photograph was used in connection with sale of the sweatshirt on the company's website.

April 20th—*Sands v. Lopez*.[97] Jennifer Lopez was sued for copyright infringement a second time by a different photographer, just three months after settling the claim brought by Splash News.[98] The photograph in question showed Lopez dressed as character "Harlee" from her film, "Shades of Blue."[99]

May 20th—*Ramales v. JHud Productions, Inc.*[100] Jennifer Hudson was sued for posting a photograph of herself wearing a pink outfit to commemorate the end of 2019. She removed the photographer's watermark from the photo and did not seek a copyright license.[101]

June 25th—*Chosen Figure LLV v. Smiley Miley, Inc*.[102] Miley Cyrus was sued for posting a photograph of herself leaving a Marc Jacobs fashion show to her Instagram account.

Literature Review

The above list illustrates the claims that have been brought by paparazzi or their agencies against celebrities for copyright infringement. While the first claim was brought in 2017, the trend did not take off until 2019. This has continued in to 2020 where seven claims had been brought as of May 20, 2020. This trend tapered off in 2020, probably due to the Covid-19 pandemic. Since this is a recent trend, there is little academic literature on the issue. While there are a number of articles which discuss the copyright in individuals' posts on social media platforms, this is usually written from a perspective of the terms imposed by the platform. For example, Georgiades examined the Terms of Use of Twitter, Instagram and Facebook.[103] She noted that all of these platforms "have non-exclusive, transferable, worldwide, royalty-free, sub-licensable licenses."[104] There are a handful articles that are of relevance to the

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97 Complaint at 3, Sands v. Lopez, 1:20-cv-03126-PGG (S.D.N.Y. Apr. 20, 2020), ECF No. 1.

98 Pamela Avila, *Jennifer Lopez Sued for $150,000 Over an Instagram Photo*, E ONLINE (Apr. 20, 2020), https://www.eonline.com/ap/news/1142965/jennifer-lopez-sued-for-150-000-over-an-instagram-photo.

99 Chelsea Ritschel, *Jennifer Lopez Sued for $150K By Photographer Over Instagram*, INDEPENDENT (Apr. 21, 2020), https://www.independent.co.uk/life-style/jennifer-lopez-sued-copyright-infringement-photographer-instagram-lawsuit-a9477236.html.

100 Complaint at 3–4, Ramales v. JHud Productions, Inc., 1:20-cv-03927-LLS (S.D.N.Y. May 20, 2020), ECF No. 1.

101 Stephanie Guerilus, *Jennifer Hudson Sued by Photographer for $175k over Instagram Post*, GRIO (May 22, 2020), https://thegrio.com/2020/05/22/jennifer-hudson-sued-photographer-instagram/.

102 Complaint at 3, Chosen Figure LLC v. Smiley Miley, Inc., 1:20-cv-04831-LAK (S.D.N.Y. Jun. 23, 2020), ECF No. 1.

103 Eugenia Georgiades, *Reusing Images Uploaded Online: How Social Networks Contracts Facilitate the Misuse of Personal Images*, 40 EUR. INTELL. PROP. REV. 435, 435 (2018).

104 *Id.* at 438.

topic at hand. Bosher,[105] Yeşiloğlu,[106] Fromer,[107] Kim,[108] Joseph,[109] and Bregenzer,[110] have all considered the claim by against Gigi Hadid by Xclsuive-Lee, which has been the only claim of this type to date that was dismissed rather than settled out of court.[111] While this case was dismissed because the photograph in question had not received the copyright registration necessary for a claim, it has been the subject of analysis since Hadid's lawyer filed a defense in support.[112] These articles will now briefly be discussed.

Kim suggested that the application of fair use is difficult to decipher and that social media makes the application more questionable. She proposed amending Section 107 of the U.S. Copyright Act to include a section that explains the various factors of fair use in order to make copyright law more accessible to social media users.[113] Fromer adopted a broader perspective and highlighted the various considerations that come into play when a claim for copyright infringement is brought by paparazzi against a celebrity.[114] She explained that there is a relationship of dependency between both paparazzi and celebrity. The paparazzi need the photographs for their livelihood, but the celebrities benefit from the media attention.[115] The role of paparazzi in conjunction with the role of the media in delivering celebrity news is now complemented by social media which allows celebrities to directly disseminate information about themselves. This has decreased paparazzi's licensing opportunities. Emphasizing a contextual approach, Fromer concluded that "[a] clinical application of copyright doctrine does not offer up an answer as to infringement and the specific industry and economic dynamics, as informed by copyright policy, help fill in the gaps."[116]

Bosher has published two articles on copyright infringement on social media.

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[105] Hayleigh Bosher, *Key Issues Around Copyright and Social Media: Ownership, Infringement and Liability*, 15 J. OF INTELL. PROP. L. & PRAC. 123, 128 (2020).

[106] Hayley Bosher & Sevil Yeşiloğlu, *An Analysis of the Fundamental Tensions Between Copyright and Social Media: The Legal Implications of Sharing Images on Instagram*, 33 INT'L REV. OF L., COMP. & TECH. 164, 177 (2019).

[107] Fromer, *supra* note 19, at 10.

[108] Caroline Kim, *Insta-Fringement: What is a Fair Use on Social Media?*, 18 MARSHALL REV. INTELL. PROP. L. 102, 116 (2018).

[109] Austin Joseph, *Feeling Cute, Might [Have to] Delete Later: Defending against The Modern Day Copyright Troll Notes*, 27 J. OF INTELL. PROP. L. 329, 335 (2019).

[110] Kelley Bregenzer, Note, *Modifying Co-Authorship for the Digital Age: Paparazzi Photographs as Joint Works Notes*, 13 DREXEL L. REV. 449, 450–54 (2020).

[111] Xclusive-Lee, Inc. v. Hadid, No. 19-cv-520, 2019 WL 3281013, at *4 (E.D.N.Y. Jul. 18, 2019).

[112] Mem. of Law in Supp. of Def.'s Mot. to Dismiss at 6, Xclusive-Lee, Inc. v. Hadid, No. 19-cv-520, 2019 WL 3281013 (E.D.N.Y. Jul. 18, 2019), ECF No. 15.

[113] Kim, *supra* note 108, at 124.

[114] Fromer, *supra* note 19, at 7 ("A court can better answer the question of infringement writ large by looking at the paparazzi photography industry, social media economics, and the complicated dynamic between paparazzi and celebrities.").

[115] *Id*.

[116] Fromer, *supra* note 19, at 13.

Alongside Yeşiloğlu, they argued that copyright is at odds with social media as copyright restricts what can be done to a work, whereas social media is based on sharing.[117] The purpose of this restriction is to incentivize the creation of new works.[118] However, social media thrives on the dissemination of existing works, sometimes with alterations such as additional text, filters, cropping, or stickers: tools provided by the social media platform.[119] This can potentially give rise to a new, copyright-protected derivative work.[120] However, this derivative work would still be an infringement if it is substantially similar to the original work. Bosher and Yeşiloğlu suggested that social media platforms should take more steps to make users aware of the possibility of liability for using third party images.[121] Greater awareness might be helpful for an ordinary user to understand how copyright works. However, celebrities have continued to post copyrighted content on their accounts despite the publicity surrounding the claims brought for such actions. It is hard to believe that major celebrities are still ignorant of the potential for infringement proceedings considering that numerous celebrities have been sued.

Bosher subsequently considered ownership of material posted on social media, copyright infringement, and liability.[122] She briefly summarized the defenses of fair use, joint ownership, and implied license.[123] Bosher suggested that Hadid's use of the photograph is unlikely to be considered transformative despite the fact that it was cropped and was allegedly used for non-commercial purposes, and thus, the fair use defense would be unlikely to succeed.[124] She suggested that joint ownership might succeed since Hadid contributed to the original elements of the work, and that there is a possibility for a license to be implied based on the same facts.[125] However, no in-depth analysis was conducted into any of these defenses. The purpose of the article was to highlight current key copyright issues in social media, and thus it also considered the threshold for originality in the technological age, as well as self-regulation and platform liability.

Joseph conducted analysis on the aforementioned defenses and considered whether there is a need to amend the copyright act to reflect the social media era. His article provided a background on the history of celebrities and paparazzi, and the declining value of paparazzi photographs which has led to paparazzi suing celebrities for unauthorized use of photos, described as "copyright trolling."[126] Joseph speculates that fair use, implied license, and joint authorship might be potential defenses, but does not definitively conclude as to the likelihood of success.

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[117] Bosher & Yeşiloğlu, *supra* note 106.
[118] *Id.* at 167.
[119] *Id.* at 175.
[120] *Id.*
[121] *Id.* at 181–82.
[122] Bosher, *supra* note 105.
[123] *Id.* at 129–32.
[124] *Id.* at 129.
[125] *Id.* at 130–131, 133.
[126] Joseph, *supra* note 109, at 333–38.

In terms of the first fair use factor, he considers that although Hadid's use of the work was not transformative, the post was not of monetary value.[127] As to the second factor, the copyright work was factual and any creative element was contributed by Hadid posing for the paparazzi.[128] The third factor on the "amount and substantiality" would prove challenging since a photograph is the work in question, but there was no effect on the market under the fourth factor because the photograph was already published and posted to a personal Instagram account.[129] In examining the implied license defense, Joseph suggests that an implied license may occur when the celebrity poses for the photograph as this could be considered a request for the work, and that delivery occurs once the picture is posted online.[130] As to joint authorship, he considers Hadid's contribution but notes there are varying approaches to joint authorship. If the "independently copyrightable" standard is applied, Hadid's posing would be insufficient, so the argument would have to focus on the creative choices of styling.[131] Joseph recognizes the apprehension of granting celebrities licenses to use photographs and suggests that the Copyright Act should be amended for the digital age, but more immediately, celebrities could hire their own photographers, as Kim Kardashian has done, as this approach would benefit both parties.[132]

The application of copyright law in the digital age is also considered by Bregenzer's article, which focuses on modifying the joint authorship defense. The modification suggested by Bregenzer is twofold in that it seeks to give greater weight to the legislative history of the defense, which she argues has been misconstrued by courts,[133] and it also seeks to consider modern sharing in the age of social media and the value of celebrity.[134] Bregenzer suggests that the celebrity should be considered a joint author due to the creative contribution that makes the photograph valuable. Unlike the traditional approach to joint authorship, celebrities would have a non-exclusive license to post the photograph on social media for non-commercial uses.[135] The photographer would maintain control over the exclusive rights, and profits, thus protecting the photographer, quelling fears of censorship raised by the idea of giving the subject matter of the photograph control and allowing the celebrity to benefit from their contribution to the work in question.[136]

Another helpful article for the issue at hand actually predates the first claim. Ingles' 2010 article examined the tension between the post-mortem right of publicity,

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[127] *Id.* at 340–41.
[128] *Id.* at 341–42.
[129] *Id.* at 342–44.
[130] *Id.* at 344–47.
[131] *Id.* at 348–49.
[132] *Id.* at 349–55.
[133] Bregenzer, *supra* note 110, at 463–70.
[134] *Id.* at 471–76.
[135] *Id.* at 477–88.
[136] *Id.*

and copyright owned by the estates of deceased photographers.[137] Ingles' examination is a step removed from the current issue as "the celebrity's estate is suing the photographer's estate (rather than the celebrity suing the photographer) . . . such postulation of the parties creates adversaries of those who never actually contributed any sweat equity to the work."[138] It is a different iteration of the issue as the celebrity's estate and photographer's estate butt heads over which has control over the photograph. Whereas the issue being explored presently is the interest of a celebrity to control her commercialization juxtaposed against the copyright vested in the photograph.

If cases had successfully resolved the post-mortem issue, courts today might have had guidance as to how to balance competing interests should a claim elevate to trial. In line with Fromer, it is worth considering the contextual reality of the issue as there is a symbiotic relationship between paparazzi and celebrities.[139] Unfortunately, as Ingles pointed out, courts have avoided assessing the strength of the post-mortem claims.[140] In *Brown v. ACMI Pop Div*., James Brown's estate sued the copyright holder of photographs for right of publicity infringement by licensing the photographs for commercial purposes.[141] The court refused a motion to dismiss but did not address the issue of the competing right. In *Shaw Family Archives Ltd. v. CMG Worldwide*, the dispute was as to whether a deceased photographer's estate could commercialize photographs of deceased celebrity Marilyn Monroe.[142] Monroe's estate, her acting coach, argued that he had the sole right to commercialize the photographs via the descendible right of publicity. This right was not weighed against copyright because the court found that in fact, Monroe, domiciled in New York at the time of her death, did not have a descendible right of publicity. Ingles favors protecting the estate of the photographer over the celebrity but suggests that "deceased celebrities" estates should have a right to bring suit but only when an image is used distastefully (not whenever an image is merely used).[143]

While Ingles' analysis is comprehensive, the issue of post-mortem rights is important, yet tangential, to the claims being brought today. The rise of social media poses a novel challenge to copyright, as recognized by the aforementioned authors. The culture of sharing is contrary to the restrictions placed by copyright law. Even if the dissemination function of copyright is considered, this function serves to encourage works to be distributed in a way that respects copyright. Celebrities sharing photographs of themselves appears to infringe the rights of reproduction and performance

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137 Matthew S. Ingles, *Picture This: Resolving the Conflict between Post-mortem Celebrity Publicity Rights and Deceased Photographers' Copyrighted Images*, 40 SETON HALL L. REV. 311, 333–40 (2010).

138 *Id.* at 313.

139 Fromer, *supra* note 19, at 7 (2020).

140 *See generally* Brown v. ACMI Pop Div., 873 N.E.2d 954 (Ill. App. Ct. 2007); Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939(CM), 2008 U.S. Dist. LEXIS 67529 (S.D.N.Y. Sept. 2, 2008).

141 *Brown*, 873 N.E.2d at 955–57.

142 *Shaw*, 2008 U.S. Dist. LEXIS 67529, at *3–8.

143 Ingles, *supra* note 137, at 338.

(communication to the public) and yet, as Fromer mentioned, the symbiotic relationship is not something that should be ignored. Recognizing this relationship necessarily leads to a consideration of the celebrity's right of publicity despite the fact that this is not a defense to copyright infringement. The consideration is rather in the form of recognizing that the law has provided a certain level of control to individuals over their persona. The right of publicity and copyright will be examined in the next section.

Section 3: An Overview of the Right of Publicity and Copyright

This section will provide the necessary foundational information to compare the right of publicity and copyright before contextualizing the use of celebrity photographs on social media, namely Instagram, in Section 4. It should be noted from the outset that the stand alone right of publicity is more contained than copyright, as copyright consists of several economic and moral rights.[144] The reproduction right in copyright will form the focus of that subsection as this is the right the paparazzi claim is infringed when celebrities post photographs of themselves on social media.

The Right of Publicity

The right of publicity was initially recognized by Judge Frank in the case of *Haelan Laboratories v. Topps Chewing Gum*.[145] Both parties were chewing gum manufacturers that also manufactured baseball cards to be sold with their gum. The plaintiff had entered into exclusive licenses with baseball players to use their images for a certain period of time. Within that period, the defendant had secured licenses for the images of the baseball players through an agent as well as an independent third party. The court held that where the defendant had secured licenses through their agent, there was an action for inducement of breach of contract. However, where the licenses were secured through the third party, acting independently, there was no inducement.

The plaintiff argued that, as the exclusive licensee, it had a proprietary right which should be enforced against the defendant. Whereas the defendant contended that the plaintiff had contracted for a mere release of liability from the personal right to privacy to use the images without infringement. It was against this contention that the plaintiff's rights were personal in nature, and thus not enforceable against the defendant, that Judge Frank issued the now famous statement:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag

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[144] *See generally* WILLIAM PATRY, PATRY ON COPYRIGHT (Thomson Reuters Mar. 2020 update ed. 2020); HOWARD B. ABRAMS & TYLER T. OCHOA, THE LAW OF COPYRIGHT (Thomson Reuters Oct. 2020 update ed. 2020).

[145] Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

> "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[146]

Despite the court's hesitance to categorize the right as "property," the fact that the claim was brought by the exclusive licensee, rather than the baseball players featured on the card, indicates the right assumed a proprietary nature from the outset.[147] According to McCarthy, this nature has been confirmed in subsequent cases, academic writing, statutes, and the 1995 Restatement of Unfair Competition as well as the 1977 Restatement of Tort.[148]

The right of publicity is now recognized in thirty-three states, either by statute or common law.[149] The post-mortem right is recognized by twenty-six of these states.[150] The shortest post-mortem term of twenty years is used in Virginia, and the longest term of one-hundred years is used in Oklahoma and Indiana.[151] The elements of persona protected by the right of publicity vary by state. Some states employ a statutory list of elements, whereas others have developed the scope of the right via common law. California, home to many celebrities, recognizes both a common law and statutory right of publicity. While the list provided by the statutory right is broad, protecting "name, voice, signature, photograph, or likeness,"[152] the common law right goes beyond this to protect "identity."

The plaintiff must prove that he or she is "identifiable" from the use of the protected element of persona. The Third Restatement of Unfair Competition underlines the importance of identifiability: "The use must therefore be sufficient to identify the person whose identity the defendant is alleged to have appropriated."[153] Proving

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146 *Id.* at 868.

147 William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406–07 (1960) ("The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identify. It seems quite pointless to dispute over whether such a right is to be classified as 'property.'").

148 MCCARTHY, *supra* note 9, at § 10:8.

149 *Id.* at § 6.2 (listing the States which recognise the right of publicity). These States are: Alabama, Arizona, Arkansas, California, Connecticut, Indiana, Florida, Georgia, Hawaii, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. *Id.*

150 *Id.* at § 9:17.

151 *Id.*

152 *See, e.g.*, CAL. CIV. CODE § 3344 (outlining penal damages for "[a]ny person who knowingly uses anothers name, voice, signature, photograph, or likeness, in any manner . . . without such person's prior consent").

153 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. L. INST.1995).

identifiability is usually unproblematic as only more than a *de minimis* number of people must be able to identify the plaintiff.[154] Fifteen percent was considered to be more than de minimis in *Henley v. Dillard Dept Stores*.[155] In states where "identity" is protected, evocative uses of persona can be considered to identify the plaintiff. For example, a distinctive race car satisfied the identification requirement in *Motschenbacher.*[156]

In one of the most famous right of publicity cases, *White v. Samsung*, the court was tasked with considering whether Vanna White's right of publicity had been infringed by a robotic imitation of her.[157] The robot wore a red dress, sported a blonde wig, and was poised against the *Wheel of Fortune*.[158] The scene was intended to convey that Samsung would still exist in the future, even when White's role has been filled by a robot counterpart. The court found that the robot did not constitute "likeness" within the meaning of the statute since a robot with mechanical features was used as opposed to a mannequin modelled after White.[159] However, the court made reference to *Carson v. Here's Johnny Portable Toilets*, where a television host had successfully claimed that the phrase used to introduce him, "Here's Johnny," had formed part of his identity.[160] In *Carson*, the court stated that '[i]f the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."[161] The court in *White* applied this reasoning and held that:

> It is not important how the defendant appropriated the plaintiff's identity, but whether the defendant has done so. . . . The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.[162]

California thus affords expansive protection to individuals through both a common law and statutory right. While there is no "fame requirement," this right is most valuable to celebrities who have earning power by virtue of their popularity, particularly in the age of influencer marketing.[163]

Since most of the claims against celebrities have been brought in California and New York, it is worth noting that New York is unique in its approach to the right of publicity, as it mimics Prosser's fourth privacy tort: protection against

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154 MCCARTHY, *supra* note 9, at § 3:10.
155 Henley v. Dillard Dept. Stores, 46 F. Supp. 2d 587, 595 (N.D. Tex. 1999).
156 Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974).
157 White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1397–98 (1992).
158 *Id.*
159 *Id.*
160 Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 832–34 (1983).
161 *Id.* at 835.
162 *White*, 971 F.2d at 1398–99.
163 Werner Geyser, *What is Influencer Marketing: An in Depth Look at Marketing's Next Big Thing*, INFLUENCER MARKETING HUB (Jul. 14, 2021) *available at* https://influencermarketinghub.com/what-is-influencer-marketing/.

misappropriation of personality.[164] As such, persona protection in New York protects the commercial value of individuals but does so under the Right of Privacy enshrined in Sections 50–51 of the New York Civil Rights Laws. Section 50 indicates that infringement of the right to privacy is a misdemeanor.[165] The more frequently used Section 51 provides an action for injunction and damages for using an individual's portrait, picture, or voice for advertising purposes or for the purpose of trade.[166] It should be noted that New York introduced a post-mortem right of publicity in November 2020. This post-mortem right will apply to performers and personalities who die on or after May 21st, 2021.[167]

While New York is more limited in scope of persona that is protected as compared to California, the statutory right affords protection to the most commonly used aspects of persona. In addition, the federal Lanham Act can offer protection to aspects of persona which are not protected under the statute if used in a way that implies false endorsement. The Lanham Act action is not addressed in this article since the focus is on the right of publicity, but it is worth noting that the practical consequence of this action is that it can fill the "gaps" left by New York's approach to the right of publicity.

All state rights of publicity have limitations to their application. The right of publicity affords an individual commercial control of his or her persona.[168] As such, the right protects against unauthorized commercial uses, most commonly advertising and merchandising. There is often an express or implied exception for works of news which include newspapers and magazines. This is because the First Amendment provides strict protection to these mediums of information. Occupying a middle ground are so-called "expressive works," which include art, movies, video games, comic books, etc. There are three tests that are applied to expressive works: the Predominant Use Test (which is limited to Missouri), The Rogers Test (used in the Sixth Circuit), and the most popular Transformative Use Test.[169] This test was borrowed from copyright law to determine how to balance the right to free speech against the right of publicity. It was originally transplanted in 2001 in the case of *Comedy III Prods. v. Saderup*.[170]

In *Comedy III*, charcoal lithographs of the Three Stooges were in question. The

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164 Prosser, *supra* note 147, at 401–07.

165 N.Y. CIV. RIGHTS LAW § 50.

166 N.Y. CIV. RIGHTS LAW § 51.

167 N.Y. CIV. RIGHTS LAW § 50(f).

168 Claims for damages are usually for financial loss but some courts have considered damages for emotional distress. *See* Grant v. Esquire, Inc., 367 F. Supp. 876, 880 (S.D.N.Y.1973) (discussing that the right to privacy "permits a private individual to recover damages for injured feelings and general embarrassment if for purposes of trade he is unjustifiably subjected to the harsh and-to him-unwelcome glare of publicity"); Waits v. Frito- Lay Inc., 978 F.2d 1093, 1103 (9th Cir. 1992) (recognizing "it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment, and mental distress.").

169 MCCARTHY, *supra* note 9, at § 8:23.

170 Comedy III Prods. v. Saderup, 21 P.3d 797, 802–11 (2001).

court considered importing the fair use defense from copyright,[171] but felt that a wholesale transplantation was not feasible. Of the four fair use factors outlined in Section 107 of the United States Code,[172] "[a]t least two of the factors employed in the fair use test, 'the nature of the copyrighted work' and 'the amount and substantially of the portion used' seem particularly designed to be applied to the partial copyright of works of authorship."[173] However, the court felt that the "purpose and character of the work" was a worthwhile enquiry to determine whether the right of publicity infringed an expressive work.[174] This factor of the fair use test was termed "transformative use" in *Campbell v. Acuff-Rose Music Inc*.[175] The *Comedy III* court considered that the right of publicity, copyright, and the First Amendment all have a common goal of encouraging free expression and creativity.[176] Thus, applying a "transformative use" analysis would further this goal.[177]

There are five factors used by the court to determine whether a use of persona is transformative and thus immunized from a right of publicity claim:

> i. Literal depictions are unlikely to be transformative. Conventional artistic choices are not enough.
> ii. If the celebrity image is "the very sum and substance" of the work rather than the "raw materials from which an original work is synthesized" it is unlikely to be transformative.
> iii. Work which is "primarily the defendant's own expression rather than the celebrity's likeness" is likely to be transformative.
> iv. It needs to be considered whether the elements that dominate the work are literal and imitative or creative based on quantitative assessment.

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[171] This idea has been discussed in literature. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L.J. 635, 650–57 (1995); Randall T.E. Coyne, T*oward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 812–20 (1988).

[172] Copyright Act of 1976, 17 U.S.C. § 107.

> Limitations on exclusive rights: Fair Use: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[173] *Comedy III Prods.*, 21 P.3d at 807–08.

[174] *Id.*

[175] Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 579 (1994).

[176] *Comedy III Prods.*, 21 P.3d at 808.

[177] *Id.*

> v. If the marketability of the work is primarily a result of the celebrity depicted, it is unlikely to satisfy the test.[178]

The charcoal lithographs of the Three Stooges failed the transformative use test as the value of the lithographs was derived from the portrait of the Three Stooges:

> Without denying that all portraiture involves the making of artistic choices, we find it equally undeniable . . . that when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity.[179]

In comparing the application of transformative use with copyright law, the court stated, "the artist depicting the celebrity must contribute something more than a 'merely trivial' variation, [but must create] something recognizably 'his own' in order to qualify for legal protection."[180]

Taking the elements together, a claim for a right of publicity can be made out if there is a commercial use of persona in which the plaintiff is identifiable. What can be protected as persona depends on the state in question and can be ascertained by examining the relevant statute or common law authorities. If the use of persona is for news purposes, it will be exempted from the right of publicity. But if the use is in an expressive work, the transformative use test will be applied to determine whether there is an available defense based on Freedom of Speech.

As it relates to the issue at hand, the use of photographs of celebrities by news agencies is exempted from liability. This facilitates the paparazzi industry. If use by news agencies was an infringement, it is less likely that there would be a market for the photographs. It should be noted that it is the use of the photograph, rather than the mere capturing of the image, that can incur liability. As such, even where the use of the photograph is commercial, for example, in an advertisement, the paparazzo would not be liable for selling the photograph to the user. Thus, paparazzi are generally shielded from the right of publicity as they sell the photographs to the user, and the user is often a news agency. A celebrity could pursue an entity which makes commercial use of a paparazzo photograph, but the paparazzo would still not be liable.

Copyright

Copyright has a history which significantly predates the right of publicity. The breadth of this field makes it difficult to provide a comprehensive history. As such, this section focuses on the elements of copyright that are most relevant to the issue at hand. The recognition of copyright in the United States as well as the originality requirement will be outlined to provide a starting point from which the rights can be assessed. The reproduction right under Section 106 of the U.S. Copyright Act is the most relevant right to the issue at hand, as paparazzi claim that their copyright

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[178] *Id.* at 808–10.
[179] *Id.*
[180] *Id.*

protected photographs have been reproduced without permission. The focus will then shift to fair use, implied license, and joint authorship, as these are defenses of copyright infringement that are most likely to be of relevance to defendants in the paparazzi photograph cases.

While the right of publicity is a development of the twentieth century, copyright in the U.S. finds its origins in the eigthteenth century.[181] The first state copyright law was introduced in Connecticut in 1783.[182] Shortly after, copyright was enshrined in the U.S. Constitution under Article 1, Section 8, Clause 8: to "Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[183] Based off the UK's Statue of Anne (1709), the first American Copyright Act was enacted on May 31, 1790, and entitled, "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."[184]

The Copyright Act in its infantile stages protected only books, maps, and charts, a much more limited selection than what is currently outlined under Section 102 of the Copyright Act 1976: literary works; musical works; dramatics works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audio-visual works; sound recordings; and architectural works.[185] The term of copyright has increased from the original fourteen years to seventy years after the death of the author.[186] Copyright will only vest in the aforementioned works if they are "fixed" and satisfy the originality requirement. To be "fixed," the work must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[187]

This originality requirement was present from inception, as the exclusive rights granted by Congress could only be granted for a limited time to the author of the work.[188] The concept has since been explained by the courts. The Supreme Court in

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[181] It should be noted that copyright was recognized in colonial America. *See* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1171–78 (1982).

[182] United States Copyright Office, *A Brief History of Copyright in the United States*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/ (last visited Nov. 14, 2021).

[183] U.S CONST. art. I, § 8, cl. 8.

[184] United States Copyright Office, *supra* note 182.

[185] United States Copyright Office, *Copyright Law of the United States*, COPYRIGHT.GOV, https://www.copyright.gov/title17/ (last visited Nov. 14, 2021).

[186] United States Copyright Office,, *supra* note 10 ("For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.").

[187] Copyright Act of 1976, 17 U.S.C. § 101.

[188] L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 368 (2000).

Feist explained that "[o]riginality is a constitutional requirement."[189] In supporting this assertion, the Court referred to the previous Supreme Court cases of *The Trade-Mark Cases*[190] and *Burrow-Giles Lithographic Society*,[191] where the Court defined "authors" and "writings," thus making it "unmistakably clear that these terms presuppose a degree of originality."[192] Additionally, in 1985, the Supreme Court stated that the goal of copyright law is both to increase the spread of knowledge, and to incentivize the creation of works.[193] This incentivization is linked to the originality requirement.[194]

Originality has two components.[195] The first is that the work be the independent creation of the author.[196] This means that "the author has not copied his or her work from someone else, since obviously a copier is not a creator, much less an 'independent' creator."[197] With regards to the second component, "a degree of creativity," Patry advises that "[t]here is no relationship between independent creation and the degree of creativity required for a work to be original."[198] "Independent creation" is assessed as a "modicum of creativity."[199] This standard was explained by the Supreme Court in 1991 in the case of *Feist*: "To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious.'"[200] In distinguishing creativity from novelty, Justice O'Connor went on to state, "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[201] Once a work satisfies the originality requirement, it will be protected by copyright. However, for a valid claim for copyright infringement, the work must be registered in accordance with Section 412.[202] The failure to register the work is what

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189 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346 (1991).

190 Trade–Mark Cases, 100 U.S. 82, 93–94 (1879).

191 Burrow–Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56–58 (1884).

192 *Feist Publ'ns*, 499 U.S. at 346.

193 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545–46 (1985).

194 *Id.* ("We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest.").

195 *Feist Publ'ns*, 499 U.S. at 345. ("Original, as the term used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

196 *Id.*

197 PATRY, *supra* note 144, at § 3:28.

198 *Id.* at § 3:31.

199 *Feist Publ'ns*, 499 U.S. at 346.

200 *Id.* at 345. It should be noted that before *Feist*, derivate works were subject to a higher standard of originality. However, the standard of originality as explained in *Feist* now applies to all works equally. PATRY, *supra* note 144, at § 3:32.

201 *Feist Publ'ns*, 499 U.S. at 345.

202 17 U.S.C. § 412. *See also* Pierre Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–09 (1990) (discussing copyright litigation involving fair use claims).

led to summary judgment in favor of the defendant in *Xclusive-Lee, Inc. v. Hadid*.[203]

The Copyright Act has undergone several amendments to delineate both economic and moral rights under Section 106 and Section 106A, respectively. Most relevantly for this article, the right of reproduction under Section 106(1) gives the author of the work the exclusive right to reproduce the copyright work. Abrams and Ochoa describe this right as the "oldest and perhaps most intuitive right in copyright; indeed, copyright is its very namesake."[204] To infringe this right, a copy, in the form of a material object, must be made. Material objects are described as "fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[205] In other words, making a non-transient copy is a potential infringement.

For an action for infringement, the work in question must be subject to copyright protection. This means that it must meet the fixation and originality requirements and be within the copyright term (not expired). For standing to bring a claim, the claimant must be the legal or beneficial owner of the copyright.[206] Additionally, the copyright must be registered.[207] If these requirements are met, the court will assess whether the allegedly infringing work is "substantially similar" to the work in question.[208] However, the similarity must be a result of the copying. Similarity per se is not protected, as a work may be an independent creation and thus not violate the exclusive rights.[209] The copying does not have to be wholesale, but rather, the protected expression must be copied[210] as copyright does not extend to ideas.[211] In assessing similarity, both a quantitative and qualitative analysis is undertaken.[212] It should be noted that there are two parts of this assessment of copying. The first is whether copying has occurred as opposed to independent creation. Expert testimony may be admitted for this

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[203] Xclusive-Lee, Inc. v. Hadid, No. 19-cv-520, 2019 WL 3281013, at *4 (E.D.N.Y. Jul. 18, 2019).

[204] ABRAMS & OCHOA, *supra* note 144, at § 5:7.

[205] Copyright Act of 1976, 17 U.S.C. § 101 (providing definitions).

[206] Copyright Act of 1976, 17 U.S.C. § 501(c), (d).

[207] Copyright Act of 1976, 17 U.S.C. § 411.

[208] ABRAMS & OCHOA, *supra* note 144, at § 14:5.

[209] *Id.* at § 14:9; *see* Procter & Gamble Co. v. Colgate Palmolive Co., 199 F.3d 74, 77–78 (2d Cir. 1999) (displaying when a competitor's toothpaste advertisement, which featured a demonstration, was considered to have been independently created).

[210] ABRAMS & OCHOA, *supra* note 144, at § 14:21.

[211] Copyright Act of 1976, 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."). The elusive idea/expression distinction has been the subject of much debate. Abrams and Ochoa note that, "[t]he gradation between what is an idea and what is an expression of that idea is an often subtle question of degree rather than a sharp dichotomy. Thus the courts have been confronted with the difficult task of not only deciding cases but formulating approportionate rationales and tests for determining whether the allegedly infringing work has copied the protected expression of a copyrighted work rather than the unprotected ideas." ABRAMS & OCHOA, *supra* note 144, at § 14:21.

[212] ABRAMS & OCHOA, supra note 144, at §§ 14:16, 14:24.

assessment. The second part, for which expert testimony is inadmissible, is whether the copying "infringed the protected expression of the plaintiff's work."[213] There is no "intent" requirement for infringement, which means that the popular phrase often posted under YouTube videos, "No copyright infringement intended," carries no weight in court.[214]

There are limitations to the exclusive rights in section 106 and 106A which are outlined in Sections 107 through 122. Of particular concern is the defense of "Fair Use" under Section 107.

Fair use

Fair use can be deployed if a copyright work is used for the purposes of "criticism, comment, news reporting, teaching, scholarship, or research."[215] There are four statutory factors[216] that are taken into account in assessing fair use. These are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors.[217]

Of the four factors listed above, factor one and three have infiltrated the right of publicity through the transformative-use test described in the previous sub-section.[218] Factor one was originally termed "productive use," until Judge Leval published his seminal article suggesting guiding principles for the assessment of fair use.[219] The transformative-use test was applied in the Supreme Court case of *Campbell v. Acuff-Rose Music Inc*.[220] Justice Souter noted the weight of the transformative use; "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[221] This factor is closely tied to the categories of fair use indicated in the preamble of the section. In addressing whether the use of the work is transformative, it will be considered whether the use accomplishes one of the purposes previously mentioned.[222]

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213 *Id.* at § 14:36.
214 *Id.* at § 14:7.
215 Copyright Act of 1976, 17 U.S.C. § 107.
216 Fair Use was founded in common law to further the Constitutional goals of copyright law. PATRY, *supra* note 144, at § 1:2.
217 Copyright Act of 1976, 17 U.S.C. § 107(1)–(4).
218 PATRY, *supra* note 144, at §§ 3.1, 5.2.
219 Leval, *supra* note 202.
220 Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 579 (1994).
221 *Id.* at 1170.
222 PATRY, *supra* note 144, at § 3.1.

The second factor considers the type of work in question.[223] This factor "has rarely played a significant role in the determination of a fair use dispute."[224] The publication status of the work was discussed by the Supreme Court in *Harper & Row, Publishers, Inc.*,[225] where the Court was held that, "[t]he nature of the interest at stake is highly relevant to whether a given use is fair. The unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use."[226] The focus on publication status prior to *Harper & Row* led Congress to affirm the previously mentioned holding by amending Section 107 to include the disclaimer at the end of the section (as shown in Section 107(4)).[227] While courts have considered whether the work is published or not,[228] the aim of this factor is to consider "whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements."[229]

The third factor considers how much of the work was copied and requires a qualitative rather than a quantitative analysis.[230] The assessment is to be made based on the plaintiff's work, rather than the defendant's work.[231] This is because the protection is geared towards the copyright holder. Judge Learned Hand succinctly explained this position: "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[232] The final factor considers the market impact of the work. This factor focuses on the potential licensing value of the work as well as the market for derivative works.[233] Excluded from consideration is the negative effect of use, for example, for the purpose of criticism.[234] The four fair use factors are not to be applied quantitatively, rather, they "are to be explored and weighed together in light of copyright's purpose of promoting science and the arts."[235]

While the fair use defense can be of potential use to celebrities, it is worth noting that the scope of copyright exceeds that of the right of publicity. Unlike the right of publicity, news is not immunized against copyright. Even if a copyright work is used to convey news, there is still a potential action for copyright infringement. As such, newspapers and magazines must secure a copyright license. This also applies to commercial and expressive uses of copyright works. While the concept of fair use is based

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223 Campbell, 510 U.S. at 586.
224 Authors Guild v. Google Inc., 804 F.3d 202, 220 (2d Cir. 2015).
225 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552–53 (1985).
226 *Id.* at 540.
227 Copyright Amendments Act of 1992, 102d Cong. (1992).
228 Leval, *supra* note 202, at 1118.
229 *Id.*
230 *Id.* at 1123.
231 *Harper & Row, Publishers, Inc.*, 471 U.S. at 565.
232 Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936).
233 *Harper & Row, Publishers, Inc.*, 471 U.S. at 568–69.
234 Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 579 (1994).
235 *Id.*

on First Amendment principles, the First Amendment cannot be deployed as a stand-alone defense.[236] The strength of copyright forms the basis of the claims of paparazzi against celebrities who post photographs of themselves on their social media accounts without securing the appropriate license. However, celebrities may argue that that there is an implied license that governs the relationship.

Implied license

Implied licenses are an affirmative defense to copyright infringement.[237] According to *Latimer*:

> An implied license is created when one
> (1) creates work at another's request;
> (2) delivers the work to that person; and
> (3) intends that the person copy and distribute the work.[238]

If the defendant did not request the creation of the work, there will be no implied license.[239] Traditionally, implied licenses will be found where the defendant hires the plaintiff to create copyright-protected work. For example, where an advertising firm hires a graphic artist to design a logo. The application of implied licenses was discussed in detail in the 2015 case of *Karlson v. Red Door Homes.*[240] In this case, Red Door Homes hired Karlson to create renderings of houses to illustrate what the houses would look like when they are built based on architectural plans. Red Door Homes used the plans in advertising and sold them to its clients. The Court of Appeal held that a nonexclusive license was implied into the relationship. In assessing the factors listed above, the court explained that Karlson created the renderings at Red Door Homes' request. Karlson was aware that the plans would be used and that the defendant would distribute the plans to their clients. The assessment of factors for finding an implied license has been described as a "meeting of minds,"[241] indicating that the intention of the parties must be assessed. An alternative scenario where intention plays a key role is that a joint authorship.

Joint authorship

"Joint work" is defined as "[a] work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[242] For a successful claim of joint authorship, the claimant must have made a contribution to the work that goes to the originality. A person who is not

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[236] PATRY, *supra* note 144, at § 1:2.50. Fair Use has been described as a built-in First Amendment accommodation[s]." Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[237] Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1114 (9th Cir. 2000).

[238] Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1235 (11th Cir. 2010).

[239] Glovaroma, Inc. v. Maljack Prods., Inc., No. 96 C 3985, 1998 WL 102742, at *2 (N.D. Ill. 1998) (mem. op.).

[240] Karlson v. Red Door Homes, LLC, 611 F. App'x 566, 569–71 (2015).

[241] N.A.D.A. Servs. Corp. v. Bus. Data of Virginia, Inc., 651 F. Supp. 44, 49 (E.D. Va. 1986) ("The creation of an implied license, as in the creation of an implied contract, requires a meeting of the minds.").

[242] Copyright Act of 1976, 17 U.S.C. § 101.

the photographer can potentially have a claim for joint authorship, as was explained in the case of *Gillespie v. AST Sportswear*.[243] However, there must be intention to create a joint work in order to establish joint authorship.[244]

The consequence of a joint work is that each author owns the work equally, regardless of the quantity of the individual contribution made.[245] There is no need to seek permission from the other joint owner to utilize the work.[246] As such, where joint ownership is found, a joint owner cannot be liable for infringement, even if the other joint owner objected to the use of the work. A joint owner can only claim against the other joint owner for an account of profits.[247]

The copyright issues discussed in this section are pertinent in considering the rights of paparazzi and celebrities. As the copyright holder, the paparazzo can pursue a claim for copyright infringement when celebrities post photographs of themselves without seeking authorization. There are three potential defenses that could be deployed: fair use, implied license, and joint authorship. Before considering the application of these defenses in Section 5 of this article, it is important to contextualize the issue by considering how celebrities use social media, as this will inform the analysis of existing law. At this point, it should be noted that if no defense is successful, the paparazzi will likely succeed on a claim of copyright infringement.

The relationship between the rights and why the situation is unique

The subsections above have outlined the right of publicity and the reproduction right under copyright law. Copyright protects the medium of expression, whereas the right of publicity protects elements of persona which may be captured in a copyright work. The relationship between the rights requires a third party to secure both copyright and right of publicity licenses when using a photograph featuring an individual for commercial or non-transformative expressive purposes. Only a copyright license is required when using the photograph for news purposes.

The trend of paparazzi and/or their agents suing celebrities for posting photographs of themselves is unique because it neutralizes the usually powerful right of publicity. When copyright and the right of publicity intersect, the issue is often that an entity has used a copyright protected work featuring an individual, without obtaining the individual or the estate's consent. Usually, the copyright license has been secured, which leads the uninformed user to think that they have taken the necessary precautions to avoid litigation. However, in the present circumstances, the subject of

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[243] Gillespie v. AST Sportswear, Inc., No. 97-cv-1911-PKL, 2001 WL 180147, at *4–5 (S.D.N.Y. 2001).

[244] Brod v. General Pub. Grp., Inc., 32 F. App'x 231, 235 (9th Cir. 2002); Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000); Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).

[245] Bencich v. Hoffman, 84 F. Supp. 2d 1053, 1055 (D. Ariz. 2000).

[246] Williams v. ARC Music Corp., 121 F.3d 720, 720 (9th Cir. 1997).

[247] Gaylord v. United States, 595 F.3d 1364, 1379 (Fed. Cir. 2010).

the photograph is being pursued by the copyright holder for failing to take a license. The right of publicity is a powerful tool that can be deployed against third parties, but it is not a defense to copyright infringement. And yet, the rapid development of the right of publicity from 1953 to present, and the ability of the right to protect against commercial and even expressive uses of persona, indicates that an individual's ability to control the commercialization of their persona has been accepted and even embraced by both courts and legislatures. On the other hand, the monopoly granted by copyright, while subject to defenses, is arguably broader than the right of publicity as it applies equally to all types of uses, whether for news, expressive, or commercial, subject to fair use. These two rights thus collide where an individual featured in a copyright work uses that work without securing a copyright license. However, section 6 will make it clear that despite the breath of the right of publicity, copyright reigns supreme in the hierarchy of rights.

Twenty-two celebrities have been pursued for copyright infringement so far.[248] The overview of the law provided in this section will inform the forthcoming sections as the application of existing defenses to copyright infringement are applied to the situation at hand. Additionally, the relationship between the rights will be explored before considering possible solutions to the conflict. Before this, the problem will be contextualized in Section 4.

Section 4: Contextualizing the Problem

Social Media Use by Celebrities and the Value of Photographs in Today's World

Prior to the rise of social media, fans who wanted to get a glimpse into the life of a celebrity would have to rely on magazines, newspapers, television talk shows, and radio interviews. According to Tan, "From the 19th to the 21st century, as each new medium appears, the human image it conveys is intensified and the number of individuals celebrated grows."[249] This statement accurately reflects the developments in media to the present, as social media has elevated celebrity access and adoration to unprecedented levels. Social media removed the middle man by allowing fans direct access to celebrities via the medium of photographs, videos, and posting of text, thus providing more fodder for parasocial relationships between fans desirous of information and their favorite celebrities.[250] Social media began with the creation of SixDegrees.com in 1996, but the concept gained traction in the early 2000s. MySpace, Facebook, YouTube, and Twitter were created in quick succession: 2003,

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[248] *See supra* Section 2 (Timeline of Claims).

[249] David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 945 (2008).

[250] Gayle Stever & Kevin Lawson, *Twitter as a Way for Celebrities to Communicate with Fans: Implications for the Study of Parasocial Interaction*, 15 N. Am. J. of Psych. 339, 349–50 (2013) ("A parasocial relationship is one where the fan or audience member knows the celebrity, although heretofore the 'knowing' has always been argued to be completely one-way and unreciprocated.").

2004, 2005, and 2006, respectively.[251]

MySpace was utilized by celebrities to host 'fan pages' which would contain brief biographical information and photographs used to promote the individual, typically a musician. MySpace was quickly overshadowed by Facebook, created in 2004. While Facebook's rapid development was facilitated by its greater functionality than MySpace (which was driven into obsolescence by Facebook), celebrities generally used and continue to use Facebook for the same "fan page" purpose as opposed to creating personal profiles which reveal intimate details of their lives. Similarly, YouTube was/is used to post promotional videos relating to the celebrity's occupation as well as interviews with the celebrity.

The advent of Twitter shifted the paradigm of interaction between fans and celebrities as some celebrities started their own accounts rather than relying on Public Relations firms, as is the norm for other social media platforms. The initial limit of 140 characters per tweet allowed individuals glimpses into the lives of celebrities, and was one of the early strategies of celebrities to undermine invasive paparazzi.[252] A 2013 study found that fans use Twitter to glean intimate information about celebrities that might not otherwise be available.[253] Twitter also broke the barrier between celebrities and fans, as some celebrities tweet replies to fans, although this is an infrequent occurrence.[254] The relationship is still described as parasocial, but the celebrity is more accessible than on the other mentioned platforms. According to Stever and Lawson, "Twitter gives one the sense of actually 'being there' with the celebrity and, as such, is possibly the most intimate form of media communication used to date by celebrities to connect with their fans."[255]

While Twitter has 129 million daily active users,[256] it has been overshadowed by Instagram. Instagram is a social media platform, launched in 2010, that allows users to share photos and videos of their lives. Unlike Twitter, which now limits Tweets to 280 characters (double the initial limit), Instagram facilitates captions of

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[251] Christopher McFadden, *A Chronological History of Social Media*, INTERESTING ENGINEERING (Jul. 2, 2020), https://interestingengineering.com/a-chronological-history-of-social-media. The most recent social media network is TikTok, which allows users to upload short videos, often based on lip-synced sound clips, as well as choregraphed dances. Sherisse Pham, *TikTok is winning over millennials and Instagram starts as its popularity explodes*, CNN (May 5, 2020), https://edition.cnn.com/2020/05/05/tech/tiktok-bytedance-coronavirus-intl-hnk/index.html; Travis Andrews, *Charli D'Amelio is TikTok's biggest star. She has no idea why.*, WASH. POST (May 26, 2020), https://www.washingtonpost.com/technology/2020/05/26/charli-damelio-tiktok-star/?arc404=true.

[252] Andy Greenberg, *Why Celebrities Twitter*, FORBES (Mar. 3, 2009) https://www.forbes.com/2009/03/03/twitter-celebrities-privacy-technology-internet_twitter.html#5dd4667c7446.

[253] Stever & Lawson, *supra* note 250.

[254] *Id.* at 349–52.

[255] *Id.* at 351.

[256] Hamza Shaban, *Twitter reveals its daily active user numbers for the first time*, WASH. POST (Feb. 7, 2019), https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/.

up to 2200 characters. Instagram has surpassed Twitter in popularity, boasting 1 billion users[257] (although still less than Facebook's 3 billion users[258]). Like all platforms, Instagram has evolved from its inception. Instagram originally allowed one photo to be uploaded per post,[259] but now accommodates ten photos per post, videos, "stories" and "live feeds". "Stories" are videos that appear on the user's profile for twenty-four hours and then disappear (an idea which arguably originated with SnapChat), unless saved as a "highlight." "Live feeds" allow a user to interact with followers in real time. In 2017, Instagram introduced the "shopping" feature which allows users to link to products on posts.[260] In 2019, it made shopping even more convenient by allowing purchases to be made without exiting the application via the "checkout" feature.[261]

The increasing commercial functionality of Instagram is a deliberate strategy to capitalize on the parasocial relationships valued by fans. Even before social media, McCracken recognized the potential of celebrities to transfer value to products in 1989.[262] The concept of value transfer has been studied both in the fields of marketing[263] and cultural studies.[264] David Tan, one of the foremost writers on law and cultural studies, has conducted comprehensive examinations into the role cultural studies should play in the assessment of fair use in copyright[265] and the right of publicity.[266] Tan referenced key literature from cultural studies and social psychology to draw a distinction between the celebrity persona as perceived by others, and the actual individual.[267] The celebrity persona is shaped by the media, reception of fans, restriction and access to personal information.[268] Traditionally, advertising would rely on the celebrity persona as a semiotic sign which would transfer certain values to the product

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257 *Instagram - About Us*, https://www.instagram.com/about/us/ (last visited Nov. 15, 2021).

258 *Facebook Company Information*, https://about.fb.com/company-info/ (last visited Nov. 15, 2021).

259 The year after Instagram launch Twitter introduced the ability to upload photographs and videos. Esteban Oritz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media.

260 *Turn on Instagram Shopping in the Instagram App*, https://help.instagram.com/1108695469241257?helpref=related (last visited Nov. 15, 2021).

261 *Introducing Check Out on Instagram*, https://about.instagram.com/blog/announcements/introducing-instagram-checkout (last visited Nov. 15, 2021).

262 Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. OF CONSUMER RSCH. 310, 315–17 (1989).

263 David Tan, *Semiotics and the Spectacle of Transformation in Copyright Law*, 30 INT'L J. FOR THE SEMIOTICS OF L. 593, 595–600 (2017).

264 *Id.*

265 *Id.*; David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the "Transformative Use" Doctrine Twenty-Five Years On*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 315 (2016).

266 David Tan, *Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity*, 9 VA. SPORTS & ENT. L.J. 272, 274 (2010); David Tan, *Much Ado about Evocation: A Cultural Analysis of Well-Knownness and the Right of Publicity*, 28 CARDOZO ARTS & ENT. L.J. 313, 317 (2010); Tan, *supra* note 249.

267 Tan, *supra* note 249, at 950–52.

268 Tan, *supra* note 266, at 337 ("In cultural studies, the celebrity personality may be seen as a commodity spectacle that is created and sustained by a combination of forces in advertising, marketing, public relations, and journalism.").

or service advertised, whereas mass media would attempt to reveal the actual individual, through planned interviews, public appearances, and more intrusively, gossip and paparazzi photographs featuring the celebrity's daily life.[269] Now, celebrities expose more of their personal lives, blurring the line between the celebrity persona and the individual, by posting photographs of daily activities on Instagram, attempting TikTok challenges, and tweeting musings about trivial occurrences. Even with this increase in dissemination of personal data, celebrities have a high level of control over how they curate their social media. Interactions with fans can still be classified as parasocial and yet:

> Despite the reality of not truly knowing celebrities, people feel as if they do know them intimately, often forming intense emotional and psychological connections to them. In these cases, media users establish parasocial relationships with distant media figures, which creates a false sense of friendship or intimacy. Thus, in the same way that consumers trust friends' recommendations, they trust the advice of a celebrity with whom they have a parasocial relationship.[270]

What then is the relationship between celebrities, paparazzi, and the respective rights of publicity and copyright in the age of social media? While the role of paparazzi has been minimized as celebrities exercise greater control over the dissemination of personal information, paparazzi continue to contribute to celebrities gaining wide recognition by inclusion of photos in magazines.[271] That celebrity photographs are still considered valuable by newspapers and magazines is apparent in the fact that the cases brought by celebrities thus far have been based on photographs which had previously been licensed to a news agency.[272]

By providing exposure for the celebrity, through candid, staged, or posed photographs,[273] the paparazzi contribute to celebrities having stronger rights of publicity claims by increasing visibility and by extension identifiability and evocation.[274] Identifiability is a necessary criterion in a successful right of publicity claim, and while it usually does not prove to be a hurdle, it links to evocative uses of celebrity. Evocative uses of persona utilize ways of dress, distinctive catch phrases, or other indicia that fall outside of the regular name and likeness categories. The greater the association between non-traditional indicia of persona to the celebrity, the more likely it is that

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269 Tan, *supra* note 249, at 953.

270 Jennifer Escalas & J. Bettman, *Connecting With Celebrities: How Consumers Appropriate Celebrity Meanings for a Sense of Belonging*, 46 J. OF ADVERT. 297, 306 (2017).

271 Tan, *supra* note 268, at 341.

272 *See supra* Section 2 (Timeline of Claims).

273 Candid photographs refer to when the celebrity was unaware of captured photograph. *Candid*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/candid (last visited Nov. 15, 2021). Posed photographs refer to when the the celebrity poses or smiles for the camera. *Posed*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/posed (last visited Nov. 15, 2021). Staged photographs refer to when the celebrity works with the paparazzi for the photograph. *Staged*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/staged (last visited Nov. 15, 2021).

274 Tan, *supra* note 268.

the right of publicity will extend to these indicia in states where the identity approach is used. Since national advertisers must consider the lowest common denominator, the California identity approach is likely to be relevant, and provides a high level of protection for the celebrity. The more popular the celebrity, the more valuable the paparazzi photograph, and the greater license fee can be charged for use of the copyright protected work.

The desire to consume celebrity has only increased, and paparazzi photographs reveal another glimpse into the lives of these famous individuals. It appears that even the celebrities approve of some paparazzi photographs, considering that they post them on their personal social media. A symbiotic relationship is thus present as the paparazzi contribute to the celebrity's increasing popularity, strengthening the potential application of the right of publicity by strengthening identifiability, while the increasing popularity in turn makes the paparazzi photograph more valuable, and allows for a higher license fee to be charged for the photograph.

Section 5: Application of Existing Law

The above section has demonstrated the value of photographs used by celebrities on social media, and the symbiotic relationship between celebrities and paparazzi. The conflict being explored in this article is of a recent nature, considering that Instagram has been in existence since 2010, but the first copyright infringement claim by a paparazzi against a celebrity was brought in 2017. Since the issue is somewhat novel in that there has been no decided case to provide guidance, this section will assess the defenses that can be used against a claim of copyright infringement where a celebrity posts a photograph of himself or herself. These are: fair use, implied license, and joint authorship. The requirements for each of these defenses were explained in Section 3.

Fair Use

Fair use has four statutory factors under Section 107, discussed in Section 3 of this article.[275] All four factors must be considered and evaluated together.[276] Factor one requires an assessment of "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes."[277] The claims for copyright infringement against celebrities have been based on them posting photographs of themselves to show what they were doing or wearing on a particular occasion. It is unlikely that such uses would be classified as "news reporting, research, criticism, comment" mentioned in the preamble of Section 107.

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[275] *See* Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal Comment*, 64 UCLA L. REV. 1038, 1069–75 (2017) (discussing how these factors should be interpreted in the social media environment and suggesting that social commentary should be considered transformative under the first factor, and attribution should be considered under the fourth factor). *Cf.* Eaton O'Neill, *Paparazzi/Blogger Face-off: Opportunity Knocking for a Fair Use Limit Notes and Recent Developments*, 26 CARDOZO ARTS & ENT. L.J. 535, 555 (2008) (discussing how fair dealing would be unlikely to succeed as a defence for bloggers who use paparazzi photographs).

[276] Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 576–80 (1994).

[277] Copyright Act of 1976, 17 U.S.C. § 107(1) (2012).

This does not preclude the use from being considered fair use as the aforementioned classifications are not exhaustive, but a work is more likely to be transformative if it is used for one of the purposes. According to Judge Newman, "[t]he weight ascribed to the 'purpose' factor involves a more refined assessment than the initial, fairly easy decision that a work serves a purpose illustrated by the categories listed in Section 107."[278]

In assessing the first factor of fair use, defendants in the claims brought by paparazzi usually use the photographs without alteration, or minimal alteration such as cropping and adding text and/or stickers. Since there is minimal alteration, the work is unlikely to be considered transformative. In *North Jersey Media Group v. Pirro*,[279] the court considered that a photograph posted to a Facebook in commemoration of 9/11 was not transformative. The changes made to the photograph included cropping, lower resolution, smaller scale, juxtaposition with another photograph, and inclusion of hashtag "#neverforget."[280] In contrast, the court drew reference to *Cariou v. Prince*,[281] where the court assessed that photographs which had been altered were transformative because the aesthetics, color, size, and settings were different; "Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work."[282] The alteration made by celebrities when they post Instagram photos are more akin to the facts of *Pirro* than *Cariou*. Even if more alterations are made, *Cariou* has been criticized by Ochoa and Abrams as "perhaps the greatest stretch a court has yet taken in finding a use to be transformative."[283]

It is unlikely that the use of celebrity photographs on their social media is likely to be transformative, but the commercial element under factor one also needs to be assessed.[284] While there was an erroneous holding which presumed that commercial use could not be fair use,[285] this error was corrected by the Supreme Court in *Campbell v. Acuff-Rose*.[286] Assessing the commercial use of the photographs posted by celebrities is likely to be a contentious issue when it eventually goes to trial. When a celebrity posts a photograph to social media, particularly Instagram, there is a

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[278] Twin Peaks Productions, Inc. v. Publ'ns Intern., Ltd., 996 F.2d 1366, 1374 (2d Cir. 1993).

[279] North Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605, 615–17 (2015).

[280] *Id.* at 615.

[281] Cariou v. Prince, 714 F.3d 694, 706 (2013).

[282] *Id.* at 706. It should be noted that the approach by *Cariou*, which focused on transformative use, was called into question. *See* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (2014) (noting that the other fair use factors should still be assessed).

[283] ABRAMS & OCHOA, *supra* note 144, at § 15:42.40.

[284] Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 569 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

[285] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, non-commercial uses are a different matter.").

[286] *Campbell*, 510 U.S. at 570.

potential for the use to be considered commercial because the celebrity uses social media as part of his or her endorsement deals. Where a celebrity has a "financial, employment, personal, or family relationship with a brand," this must be revealed in accordance with the Federal Trade Commission requirements.[287] This connection can be revealed by a statement, using hashtags such as "#sponsored," "#ad," or the "Branded Content" settings.[288] However, it is possible that celebrities are skirting these regulations by posting paparazzi photographs which appear more organic, and would not necessarily appear to be a paid endorsement. Even if the photograph in question may not be posted to endorse a particular brand or product, the use of the photograph might be considered commercial if the social media account is generally used for commercial purposes.

One could suggest that a celebrity's public Instagram account is always for commercial purposes as it is used to increase popularity and, by extension, perceived value to advertisers. The more followers a celebrity has, the greater the reach of his or her selling power. The celebrity will engage with fans by posting content. Paparazzi photographs, whether candid, posed, or staged, are a form of content that the celebrity uses to connect with fans. As stated in the Complaint for Copyright Infringement in *Splash News and Picture Agency v. Simpson:*

> Simpson uses her Instagram and Twitter feed for the purposes of promotion – specifically, to promote herself and her business interests, products, and ventures; to maintain and increase her visibility and desirability as an actress and singer; and to promote her persona itself, since Simpson's celebrity status and popularity is central to her ability to sell products and services. In short, every one of Simpson's Instagram posts is fundamentally promoting something to her 11.5 million followers.[289]

The Supreme Court in *Harper and Row* clarified that "[t]he crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[290] As such, the posting of a photograph, even if not directly commercial in itself, could have commercial potential. In relation to the photograph at the center of *Hadid,* the defendant in a social media post stated, "I posed/smiled for the photo because I understand that this is part of my job, this was an appropriate situation for 'the press' to attend, and also that this is how paparazzi make a living."[291] It is likely that the use of photographs would be considered both non-

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[287] Federal Trade Commission, *Disclosures 101 for Social Media Influencers,* FTC.GOV (Nov., 2019), https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers.

[288] *Branded Content on Instagram,* INSTAGRAM, https://help.instagram.com/116947042301556 (last visited Nov. 15, 2021).

[289] Complaint at 5, Splash News & Picture Agency, LLC. v. Simpson, 2:18-cv-00591-R-JEM (C.D. Cal. Jan. 23, 2018), ECF No. 1.

[290] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

[291] Kellie Ell, *Gigi Hadid Sued for Posting Instagram Photo Without Permission - Again,* WWD (Jan. 29, 2019), https://wwd.com/business-news/legal/gigi-hadid-copyright-infringement-case-1202991468/.

transformative due to limited alteration and be considered a commercial use. This weighs against a finding of fair use, but all the factors must be considered in this assessment.

The second fair use factor, "the nature of the copyrighted work"[292] is often glossed over as it tends to consider the distinction between published and non-published works.[293] However, Judge Leval posited that this dichotomy is not the only element to be considered; the nature of the work also needs to be assessed to determine whether it is the "type of material that copyright was designed to stimulate."[294] The second factor can thus be divided into whether a work is published or not, and whether a work is factual or expressive/creative.[295] A factual work is more likely to result in a finding of fair use.[296]

In applying the published/non-published element of the second factor to the paparazzi photographs, the photographs were taken from news sources, and were thus previously published works. However, the claims to date appear to be based on photographs that were licensed on a non-exclusive basis. This means there could be potential further licenses granted by the photographer. If the celebrity publishes the photograph herself, news agents might be less willing to take a license as the photograph has been viewed by the target audience of the news agent. Furthermore, the news agent might go as far as copying the photograph from the celebrity's Instagram, as occurred in *Splash News and Picture Agency v. Simpson.*[297] Since the photographs seem to be posted to celebrities' Instagram accounts at least a few days after the licensed photograph is published, this factor weighs in favor of fair use. This is because the nature of media today necessitates that news is published quickly. A photograph that is published will likely decrease significantly in licensing value within a few days, particularly if the news source has an online publication.

In terms of the expressive/creative vs. factual element of the second factor, Leval noted that "nearly all writings may benefit from copyright protection."[298] He distinguished between personal writing such as shopping lists and calendars as compared to novels as personal works should not get more protection by virtue of being unpublished as they are not the type of works that copyright tries to encourage.[299] In the *Memorandum of Law in Support*, Hadid asserted that the photograph in question was factual rather than creative because the photographer did not direct her or contribute

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[292] Copyright Act of 1976, 17 U.S.C. § 107(2).
[293] PATRY, *supra* note 144, at § 10:138.
[294] Leval, *supra* note 202, at 1119.
[295] ABRAMS & OCHOA, *supra* note 144, at § 15:52.
[296] *Id.*
[297] Complaint at 3–6, Splash News & Picture Agency, LLC. v. Simpson, 2:18-cv-00591-R-JEM (C.D. Cal. Jan. 23, 2018), ECF No. 1. It should be noted that a news agency copying a photograph from a celebrity's Instagram without the requisite license could also give rise to a copyright claim.
[298] Leval, *supra* note 202, at 1119.
[299] *Id.* at 1119–21.

to her role in the photograph. The nature of paparazzi photographs that try to capture the celebrity, even if the photograph is staged, is to convey information about the celebrity.

Staged photographs might be more likely to be considered creative if direction is provided by paparazzi. However, staged paparazzi photographs usually involve sharing of information, rather than composition in the way described in *Baraban v. Time Warner* where a photograph was composed with a "dramatic" angle.[300] In both *Pirro*[301] and *Otto*,[302] photographs of firefighters hoisting the American flag near the World Trade Center on 9/11 and the President crashing a wedding, respectively, were both considered factual. Similarly, paparazzi photographs should be considered factual. The second fair use factor weighs in favor of a finding of fair use as the work is factual and has been previously published.

The third fair use factor is "the amount and substantiality of the portion used in relation to the copyright work as a whole."[303] For the photographs at issue, this factor overlaps with factor one which considered transformative use. As previously stated, the whole photograph is often taken. In other instances, the photograph is cropped, but the "heart of the work"[304] is the image of the celebrity, and this is left intact, weighing this factor against fair use.[305] The fourth factor is "the effect of the use upon the potential market for or value of the copyrighted work." This was also already discussed in considering that the photograph had been previously published. It does indeed decrease the potential value of a license, weighing in favor of fair use. The fact that the license becomes less valuable after the first authorized publication is irrelevant for this factor, as only the allegedly infringing use is to be considered.

The overall assessment of fair use must be holistic. Factors one, three and four weigh against fair use. Factor two weighs in favor of fair use. The interrelationship between the factors was explained by the Supreme Court in *Campbell v. Acuff Rose* in assessing whether a substantial part of the work was copied without alteration:

> [I]t may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.[306]

Based on the factual scenario at hand, fair use is unlikely to be a successful defense because three of the factors weigh against such a finding. Celebrities use these photographs with minimum alteration and are gaining a commercial benefit by increasing their visibility and status. Even if the photograph itself is not used for a

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300 Baraban v. Time Warner, Inc., No. 99-civ-1569-JSM, 2000 WL 358375, *1 (S.D.N.Y. 2000).
301 North Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605, 620 (S.D.N.Y. 2015).
302 Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 430 (2018).
303 Copyright Act of 1976, 17 U.S.C. § 107(3).
304 PATRY, supra note 144, at § 10:141.
305 Often, it is necessary to take the "heart of the work" to achieve the categories of fair use. *See* PATRY, *supra* note 144, at § 10:141 (providing a full discussion of this practice regarding fair use).
306 Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 587–88 (1994).

commercial purpose, the social media account is aimed at commercializing the celebrity. While the photographs were previously published and would thus naturally have decreased in value, the celebrity's unauthorized publication can catalyze the decrease in value and deter news agencies that would have otherwise sought a license from doing so as the photograph is highly visible to the target audience.

Implied License

For an implied license to succeed, three conditions must be met. Firstly, the plaintiff must have created the work at the defendant's request.[307] This first element is unlikely to be met for candid and posed photographs. In candid photographs, the celebrity is not actively involved in the photography process. Even if the celebrity is aware that he or she will be photographed generally, this knowledge cannot be equated to a request. Posing for the camera also does not equate to a request for the work to be created as the celebrity is simply reacting to the paparazzi. Considering such a response as a request would equate consent to a request.[308] In contrast, staged photographs are created by request as the celebrity provides information so that he or she will be captured by the paparazzi. The paparazzi may be paid by the celebrity, adding further support for the request element, as money has often been exchanged for the copyright protected work where an implied license is found.[309]

Secondly, the plaintiff must have delivered the work to that defendant.[310] In none of the claims brought has the paparazzi delivered the work to the celebrity. Staged photographs may meet this condition if the photographs are in fact delivered, and because the photographs are staged by the celebrity, it is possible that such delivery can occur. However, delivery does not always result in an implied license since intent is a key requirement under the third condition, which requires that "the plaintiff intends that the person copies and distributes the work."[311] For an implied license to be successful, there must be a "meeting of minds." This means both parties must have agreed that the defendant had permission to use the work.[312]

Implied license is an ill-fitting defense for celebrities' candid and posed photos because it is unlikely that the meeting of the minds condition will be fulfilled. Implied

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307 Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1235 (11th Cir. 2010).

308 *But see* Joseph, *supra* note 109, at 346 (advancing a contrary argument on this issue).

309 Effects Associates, Inc. v. Cohen, 908 F.2d 555, 558–59 (9th Cir. 1990):

> Like the plaintiff in Oddo, Effects created a work at defendant's request and handed it over, intending that defendant copy and distribute it. To hold that Effects did not at the same time convey a license to use the footage in "The Stuff" would mean that plaintiff's contribution to the film was "of minimal value," a conclusion that can't be squared with the fact that Cohen paid Effects almost $56,000 for this footage. Accordingly, we conclude that Effects impliedly granted nonexclusive licenses to Cohen and his production company to incorporate the special effects footage into "The Stuff" and to New World Entertainment to distribute the film.

310 *Latimer*, 601 F.3d at 1235; Foad Consulting Grp. Inc. v. Azzalino, 270 F.3d 821, 835 (9th Cir. 2001).

311 *Latimer*, 601 F.3d at 1235.

312 Pavlica v. Behr, 397 F. Supp. 2d 519, 523 (S.D.N.Y. 2005).

licenses are found "only in narrow 'circumstances' where one party 'created a work at [the other's] request and handed it over, intend[ing] that [the other] copy and distribute it.'"[313] It is a viable defense for staged photographs. In some staged photographs, the celebrity is attempting to promote a product in a way that appears candid, with the aim for the photograph to be used by news outlets to promote the product.[314] The celebrity is paid by the brand, and the paparazzi is paid by the celebrity.[315] For these types of photographs, it is likely that an implied license will be found.

Joint Authorship

In the Memorandum of Law in Support of Defendant's Motion to Dismiss in *Xclusive-Lee v Hadid*,[316] an implied license was raised as a defense to copyright infringement. However, the phrasing of the defense was more akin to a claim for joint authorship. The Memorandum argued:

> She [Hadid] stopped to permit the photographer to take her picture and, by posing, contributed to the photograph's protectable elements. And in that moment, the photographer elected to take a photograph, which was indisputably made more valuable through Ms. Hadid's participation in its creation. In other words, only as a result of the mutual actions of Ms. Hadid and the photographer was a photograph of a smiling Ms. Hadid even possible.[317]

Hadid's contribution of posing raises the question of whether she could be considered a joint author. Joint authorship can be claimed where a work is "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[318] Joint authorship can be divided into two elements: expression and intent. In terms of expression, there has been misinterpretation in the case law as to what is required,[319] but Patry clarifies that Judge Newman's reference in *Childress v. Taylor* that each contribution of the joint authors be copyrightable,[320] "was merely referring to a requirement that each author contribute expression, not that each contribution also be independently copyrightable."[321] As such, the first element considers the originality requirement of copyright in terms of each author's contribution. The second element of intent has also caused difficulties, as *Childress* advanced a dual-intent interpretation,[322] which has been adopted by subsequent courts.[323] The rule of intent has been interpreted to require that both parties

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313 SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21, 25 (2nd Cir. 2000) (citing Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990)).

314 Murray, *supra* note 25.

315 *Id.*

316 Mem. of Law in Supp. of Def.'s Mot. to Dismiss at 6, Xclusive-Lee, Inc. v. Hadid, No. 19-cv-520, 2019 WL 3281013 (E.D.N.Y. Jul. 18, 2019), ECF No. 15.

317 *Id.*

318 Copyright Act of 1976, 17 U.S.C. § 101 (2012). It should be noted that the Copyright Act refers to "joint work" rather than joint authorship. *Id.*

319 Bregenzer, *supra* note 110.

320 Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).

321 PATRY, supra note 144, at § 5:15.

322 *Childress*, 945 F.2d at 508.

323 Bregenzer, *supra* note 110, at 464–68.

to intend to be joint authors and to create unity in their respective contributions.

Originality

In terms of what might constitute original elements of a photograph, the Supreme Court, in *Burrow-Giles* noted, "posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."[324] As noted *in Gillespie v. AST Sportswear*, "Persons other than the photographer can certainly have authorship rights in a photograph, based on their original contributions."[325] In the aforementioned case, the court found that the posing, selection of clothing, and lighting and camera angles defeated the plaintiff's summary judgment against the joint authorship defense.[326]

In candid photographs celebrities are captured unaware, going about their daily lives, and not actively participate in these photographs (unless it is in fact staged to appear candid).[327] The question then becomes whether the styling of a celebrity and curation of appearance could be considered expression.[328] Bregenzer posits that, "[c]elebrities employ entire teams of professional to help create and enhance their fame . . . The selections and decisions a celebrity makes while cultivating her art-form—fame—certainly involve creativity."[329] It is undeniable that the celebrity's appearance is often carefully cultivated to align with the celebrity's brand. In fact, one could go so far as to suggest that the celebrity's contribution might be considered to be more reflective of *Burrow-Giles* due to the concerted effort to craft the subject of the photograph compared to the quick capturing of paparazzi. While it could be argued that the choices made by the celebrity are not part of the photography process, the choices are made with the knowledge that the celebrity will likely be photographed.

It is arguable that the deliberate creative choices made by the celebrity should be considered as contributing to the originality of the photograph. While the celebrity is the valuable aspect of the photograph, it would be difficult to separate the individual from his or her curated appearance. Posed photographs, such as Hadid's, demonstrate a level of involvement by the subject matter. This level of involvement is higher

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[324] Burrow–Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884).

[325] Gillespie v. AST Sportswear, Inc., No. 97-cv-1911-PKL, 2001 WL 180147, at *6 (S.D.N.Y. 2001).

[326] *Id.* at *7.

[327] *See* John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J. OF L. & GENDER 343, 352–55 (2018) (discussing the development of fixation criteria and the social implications of copyright and the male gaze).

[328] *See* John Tehranian, *Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance*, 68 HASTINGS L.J. 1319, 1345–55 (2016) (discussing consideration of how the fixation requirement for copyright has been approached and should be approached by courts).

[329] Bregenzer, *supra* note 110, at 480.

in staged photographs where the celebrity has provided the paparazzi with information and knows that the paparazzi will photograph him or her. The choices made by the subject of the photograph are thus deliberate, from make-up and hairstyle to accessories, clothing, and even location and time of day. The potential for a finding of originality thus increases depending on the level of involvement of the celebrity from candid to staged.

Intent

The next element that must be considered for joint authorship is intent. For candid and posed photographs, even if the celebrity had indeed contributed to the original elements of the photograph, it is unlikely that the intent criteria would be met. Absent an intention of joint authorship, the court in *Gillipsie* suggested that "they can better divide their interests through contract negotiations."[330] Collaboration does not equate to joint authorship without intent,[331] even if the "contributions . . . merged into separable parts of a unitary whole."[332] Thus, deliberate poses, choices, or style, even if considered as contributing to originality, would not result in joint authorship absent the intent of both parties for there to be joint authorship. As stated in *Gillespie*, "the joint authors must intend to regard themselves as joint authors."[333]

Celebrities do not necessarily know which paparazzi will photograph them when they go outside. So, for candid and posed photographs, even if they have made creative choices that contribute to the originality of the photograph, there can be no intention. Gigi Hadid herself stated that, "I had no way of knowing which of the 15+ photographers outside that day took these exact photos."[334] To impute intention into non-staged photographs would mean that the intention would extend to every paparazzi that happens to take the photograph of the celebrity in question. Further, the paparazzi would not have intention of joint authorship for candid and posed photographs; they wait on the street to take a photograph when the celebrity appears. They will capture the photograph whether the celebrity is posing or not, whether the celebrity is looking good or bad, whether the celebrity is shielding their face, or whether there is any variation of the possible appearance of the celebrity. Even the equipment used by the paparazzi is geared towards getting as many shots as possible with no regard for working with the celebrity.[335] The intention from the outset is a sole authored work with the paparazzi as the author and the celebrity as the subject. The fact that the celebrity is what makes the photograph valuable does not equate to an intention for joint authorship.

In contrast, the nature of staged photographs seems more likely to meet the joint authorship criteria. The provision of information to the paparazzi allows the

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330 *Gillespie*, 2001 WL 180147 at *4.
331 Kaplan v. Vincent, 937 F. Supp. 307, 316 (S.D.N.Y. 1996).
332 Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).
333 *Gillespie*, 2001 WL 180147 at *4.
334 Ell, *supra* note 291.
335 Burton, *supra* note 11.

photographer to prepare to capture the celebrity. The celebrity in turn makes deliberate choices of where he or she wants to be captured and will have premediated his or her actions accordingly. Celebrities may tip off paparazzi when they are trying to gain popularity, control their public image, and to capitalize on endorsement agreements by creating photographs which appear candid but are actually staged. For example, Addison Rae tipped off paparazzi during her New York trip in April 2021.[336] The motives behind tipping off the paparazzi and the paparazzi following through seems to suggest that there is intent to collaborate.

Problems with joint authorship

Joint authorship is unsuitable for candid and posed photographs due to the absence of intention. Staged photographs are more likely to avail of this defense, but it is unclear as to whether the court would accept the choices of the celebrity as satisfying originality, notwithstanding the requirement of a low modicum of creativity.[337] The intent element appears to be satisfied considering the collaborative nature of the work. However, joint authorship is unlikely to be approved by the court because it would have far-reaching implications for the world of photography as arguably, the act of working with a photographer would result in joint authorship. This would change the landscape of photography as it would vest rights in the subject of the photograph. The rights of the subject are more appropriately addressed under the right of publicity discussed in section 3. The implications of finding joint authorship in such circumstances would be that the subject and the photographer have shared rights in the photograph.

Bregenzer has suggested a modified approach to joint authorship that would better reflect Congress's intent of the legislative drafting process.[338] Her approach would protect the paparazzi by limiting the celebrities to posting photographs on social media, rather than bestowing equal rights that usually accrue to joint authors.[339] This in turn would address freedom of expression concerns about celebrities preventing publication of photographs.[340] While Bregenzer's approach is potentially viable, it is unlikely that joint authorship in its current form would be a successful defense.[341]

Assessment of the Copyright Defenses

This section has considered potential defenses that celebrities might deploy against claims of copyright infringement. Fair use is inappropriate for all types of photographs as the celebrity takes the photograph with minor alteration and uses it

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336 Oli Coleman, *Addison Rae tips off the paparazzi just like the old-school celebs did*, PAGE SIX (Apr. 5, 2021), https://pagesix.com/2021/04/05/addison-rae-tips-off-the-paparazzi-like-old-school-celebs/.

337 *Feist Pub'ns*, 499 U.S. at 340–41.

338 Bregenzer, *supra* note 110, at 477–84.

339 *Id.*

340 *Id.*

341 *See id.* (proposing a modified approach).

for commercial purposes in a way that competes with the market for the original work. Even though the work itself can be considered factual as opposed to expressive, declines in value after publication due to the fast pace of celebrity news dissemination, and has already been published, the assessment of the four fair use criteria weighs heavily in favor of the photographer.

Joint authorship and implied license are the most feasible defenses for staged photographs but are unlikely to succeed for candid and posed photographs, due to the intent element required by both defenses. In staged photographs, there is collaboration between the paparazzi and celebrity, but in candid photographs, this does not occur. For posed photographs, there is consent for the photograph to be taken, but there is neither intent for the photograph to be used by the celebrity, nor is there intent for the celebrity to be a joint author. Joint authorship would be unlikely to succeed due to policy reasons such as censorship and implications for the photography landscape, but implied license could be viable given the nature of staged photographs.

Since implied license is only likely to succeed for staged photographs, other approaches should be considered to determine whether the interests of paparazzi and celebrities can be reconciled. Any suggestion must be in compliance with the hierarchy of rights in order to avoid federal preemption, discussed in the next section, and should consider the symbiotic relationship of paparazzi and celebrities.

Section 6: The Hierarchy of Rights: Copyright and the Preemption of the Right of Publicity

Copyright is a federal law, enshrined in the Copyright Act.[342] The right of publicity is state based. Despite calls for a federal right of publicity,[343] it does not appear that such legislation is forthcoming. Due to the potential overlap between copyright and right of publicity, there has been much academic debate on how preemption should be approached.[344] While the right of publicity is infrequently preempted by

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[342] Copyright Act of 1976 (2012).

[343] Alex Berger, *Righting the Wrong of Publicity: A Novel Proposal for a Uniform Federal Right of Publicity Statute*, 66 HASTINGS L.J. 870, 866–68 (2014); Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should Be a Federal Law*, 20 UCLA ENT. L. REV. 189, 229 (2013); Sean D. Whaley, *I'm a Highway Star: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257, 260–66 (2008); INTA, *Board Resolutions U.S. Federal Right of Publicity*, INTERNATIONAL TRADEMARK ASSOCIATION (Mar. 3, 1998), https://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx.

[344] *See generally* Rebecca Tushnet, *Raising Walls against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539 (2016); Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 Colum. J.L. & Arts 441 (2015); Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J. OF L. & ARTS 157 (2014); Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165 (2010); Kristen E. Riccard, *Product Placement or Pure Entertainment - Critiquing a Copyright-Preemption Proposal*, 59 AM. U. L. REV. 427 (2009); James M Chadwick & Roxana Vatanparast, *The Copyright Act's Preemption of Right of Publicity Claims*, 25 Comm L. 3 (2007); Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 Vand. J. Ent. & Tech.

copyright, and the right of publicity serves a theoretical rather than a practical role in the issue at hand, it is necessary to understand preemption for two main reasons. Firstly, because it informs the parameters of any proposed solution. The hierarchy of the rights necessitates that any changes in the law are made within the realm of copyright to avoid preemption. Preemption would necessarily be an issue if an individual is granted an avenue to escape liability for copyright infringement based on the existence of the right of publicity.[345] The second reason that any change should be situated in copyright is the convenience factor. Since copyright is federal, a consistent approach to the battle of these two rights should be decided at the federal level. Otherwise, states would have to amend their individual right of publicity statutes and common law approaches. This could lead to inconsistency and different outcomes across states.

This section will briefly examine preemption of the right of publicity by copyright. It should be noted that the complexities of preemption have been comprehensively examined elsewhere. The goal of this section is to preclude any suggestions of the right of publicity being used as a tool by celebrities to shield against copyright infringement. It makes clear the hierarchy of the rights and why any solution must be based in the realm of copyright.

Overview of Preemption of the Right of Publicity by Copyright

Section 301 of the U.S. Copyright Act expressly provides for preemption of legal or equitable rights that are equivalent to rights under Section 106 and come within the subject matter of copyright under Sections102 and 103. Section 106 lists the exclusive rights of the copyright owner which include reproduction, creation of derivative works, distribution, performance, and display. Sections 102 and 103 confer protection on original works but preclude the protection of ideas. The Supremacy Clause of the Constitution also offers an avenue for preemption, termed "conflict" or "implied" preemption. Courts generally refer to express preemption under Section 301 of the U.S. Copyright Act in dealing with the clash between copyright and the right of publicity,[346] although there has been a great focus on conflict preemption in recent years.[347]

L. 1 (2007); P. Stephen Fardy, *Feet of Clay: How the Right Publicity Exception Undermines Copyright Act Preemption*, 12 TEX. INTELL. PROP. L.J. 443 (2003); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. Davis L. Rev. 199 (2002); Shelley Ross Saxer, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption Note*, 36 UCLA L. REV. 861 (1988); David Shipley, *Publicity never dies; it just fades away: The right of publicity and federal preemption*, 66 CORNELL L. REV. 673 (1981).

345 For example, if the right of publicity could be used to shield celebrities from liability for copyright infringement.

346 Guy Rub, Note, *A Less-Formalistic Copyright Preemption*, 24 J. OF INTELL. PROP. L. 329, 333–35 (2017).

347 Thomas F Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.OF L. & ARTS 165, 181 (2010).

Generally, "[c]opyright law does not expressly preempt the right of publicity because an individual's identity or persona is outside the subject matter of copyright. Yet in some situations . . . the right of publicity clashes with the exploitation of a defendant's copyright."[348] The main cases in which express preemption of the right of publicity by copyright has been considered are divided in this article into categories: recorded performances and evocations.[349] These cases will now be examined to illustrate the scope of express preemption before going on to consider implied/conflict preemption.

Express Preemption

Recorded performances

In terms of recorded performances, *Baltimore Orioles Inc. v. Major League Baseball Players Association*,[350] *Fleet v. CBS*,[351] and *Dryer v. National Football League*[352] all revolved around a similar issue: individuals in filmed performances contested the broadcast of these performances by the copyright holder. In *Baltimore Orioles*, the court found that the recording of the baseball games satisfied the first statutory preemption requirement as they were fixed in a tangible form.[353] Since the players claimed their right to publicity was infringed by broadcasting their performance, the claim was preempted as the broadcast was found to be equivalent to the right to perform an audio-visual work under the Copyright Act.[354] *Dryer*, based on similar facts, arrived at the same holding, twenty years after the ruling in *Baltimore Orioles*.[355] The *Dryer* court also reaffirmed the judgment of the lower court, which found that the films were considered expressive speech and were newsworthy and, thus, afforded First Amendment protection.[356] *Fleet* concerned actors who claimed their right of publicity had been infringed by the distribution of a film in which they had appeared. The claims were brought because the actors had not been fully compensated for their performances. Nonetheless, the court held that "[a] claim asserted

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348 Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1028 (3d Cir. 2008).

349 There are also other cases which do not fit into these categories, but such cases occur less frequently. For example, former college athletes have sued a website that sold non-exclusive licenses for photograph of the athletes for non-commercial art use. Maloney v. T3 Media, 853 F.3d 1004, 1018–20 (9th Cir. 2017). The claim was preempted. *Id.* at 1020. Additionally, the first sale doctrine has been incorporated into preemption analysis as a right-of-publicity claim against the resale of player cards and was found to be preempted. Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1448–49 (11th Cir. 1998).

350 Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 674–75 (7th Cir. 1986).

351 Fleet v. CBS Inc., 58 Cal. Rptr. 2d 645, 646–47 (1996).

352 Dryer v. The National Football League, 814 F.3d 938, 943–44 (8th Cir. 2016).

353 *Baltimore Orioles*, 805 F.2d at 675. It should be noted that while the holding that the recorded games were subject to copyright protection has not been contested, the way in which they arrived at that conclusion has been. *Fleet*, 50 Cal. Rptr. 2d at 652–53 (holding that the baseball game itself was subject to copyright protection).

354 *Baltimore Orioles*, 805 F.2d at 677.

355 *Id.*

356 *Dryer*, 814 F.3d at 941.

to prevent nothing more than the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed by copyright law and pre-empted."[357]

Drawing a line between preemption and a viable right of publicity claim often turns on whether the use of persona is considered commercial. This draws parallels with the First Amendment limitations on expressive and newsworthy uses of persona described in Section 3. According to Tushnet:

> [C]ourts think that allowing performers to control ordinary, non-advertising exploitation of a copyright would interfere too much with copyright owners' rights and allowing them to control ads generally doesn't. To put it another way, the right of publicity's core function is to control uses in advertising; copyright's core function is not.[358]

In instances where recorded performances are used in a commercial manner, most commonly, for advertising purposes, there will be no preemption. Hence, in *Facenda v. NFL Films*, the use of a voice recording to advertise an unrelated product was found to infringe the right of publicity.[359] Similarly, Judge Hug of the Ninth Circuit found that Abercrombie & Fitch's use of photographs of surfers to advertise its t-shirts was not preempted. The name and likeness of the individuals, which were captured in a copyright-protected photograph, were not works of authorship within the copyright act.[360] The claimants sought to protect their persona, and such protection was not available as an equivalent claim within the U.S. Copyright Act. In contrast, if the use of a copyright-protected recorded performance is non-commercial, it is likely to be protected by freedom of speech as well as preemption.

Evocation cases

The evocation cases have been the more controversial category, as right of publicity appears to have been elevated above copyright in some instances. The cases have been described as such because persona has not been directly misappropriated in the traditional sense of name or likeness. For instance, *White*[361] and *Wendt*[362] both involved robot imitations of famous individuals. *White*, previously discussed, featured a robot in a blonde wig and red dress on the *Wheel of Fortune* gameshow set.[363] While the robot evoked Vanna White, the purpose of the advertisement was to express that Samsung technology would still be relevant even when game show hosts were replaced by robots.[364] White prevailed in her right of publicity claim, but the creators of *Wheel of Fortune* would not have had a valid copyright claim, despite the fact that

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357 *Fleet*, 58 Cal. Rptr. 2d at 653.

358 Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J. OF L. & ARTS 157, 200–01 (2014).

359 Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1028 (3d Cir. 2008).

360 Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (2d Cir. 2001).

361 White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1397–98 (1992).

362 Wendt v. Host Int'l Inc., 125 F.3d 806, 809 (9th Cir. 1997).

363 *White*, 971 F.2d at 1396.

364 *Id.*

they created the show.[365] In an even more questionable case, the creators of *Cheers* television show granted a license to an airport restaurant to create a *Cheers*-themed restaurant.[366] As part of the theme, the licensees created two robots based on the main characters.[367] The actors who portrayed these characters claimed an infringement of the right of publicity.[368] The case was settled, but the Ninth Circuit held that the question of evocation and thus infringement could be put to a jury, indicating that the actors potentially had a viable claim. The court expressly rejected the preemption argument.[369]

Moving away from robots, *Midler*[370] and *Waits*[371] both involved the use of sound-alikes to recreate famous songs for the purposes of advertising. Since the claims were based on the protection of voice as an aspect of persona, rather than the use of the copyright protected song, preemption was denied. In *Midler*, the court held, "[a] voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any work of authorship."[372] This holding was reaffirmed in *Waits*.[373] The approach to evocation claims is summed up by the court in *Fleet*:

> [T]he right sought to be protected was not copyrightable—Clint Eastwood's likeness captured in a photograph; Kareem Abdul–Jabbar's former name; Bette Midler's distinctive vocal style; Vanna White's distinctive visual image, etc. The plaintiffs in those cases asserted no copyright claims *because they had none to assert*.[374]

This statement shows that courts are unlikely to find preemption unless what is being claimed is protection of a performance, rather than persona. Yet, the line between performance and persona for evocation cases appears to be very thin.

Conflict/Implied Preemption

Express preemption is grounded in Section 301 of the U.S. Copyright Act. Rothman indicates that express preemption is insufficient, but conflict/implied preemption under the Supremacy Clause of the Constitution could be used to clarify the

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365 *Id.* at 1397–99.

366 *Wendt*, 125 F.3d at 809–11.

367 *Id.* at 810.

368 *Id.*

369 *Id*. It should be noted that Judge Kosinski dissented at the Court of Appeals. Wendt v. Host International, Inc., 197 F.3d 1284, 1287 (9th Cir. 1999) ("The plaintiffs' right to control the use of their likeness is preempted by Paramount's right to exploit the [] characters however it sees fit. If [plaintiffs] wanted to control how [] characters were portrayed after they left the show, they should have negotiated for it beforehand.") ("The panel's refusal to recognize copyright preemption puts us in conflict with the Seventh Circuit in [*Baltimore Orioles*].").

370 Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).

371 Waits v Frito-Lay Inc., 978 F.2d 1093, 1098–99 (9th Cir. 1992).

372 *Midler*, 849 F.2d at 462.

373 *Waits*, 978 F.2d at 1100.

374 Fleet v. CBS Inc., 58 Cal. Rptr. 2d 645, 651 (1996) (emphasis original).

situation.[375] She suggests that the right of publicity should be limited to certain aspects of persona, such as likeness, image, voice, or name, rather than the idea of persona as espoused by protection that has been afforded to evocative uses of identity.[376] Rothman also proposes that where an individual has consented to appear in an original work, in which a performance was captured, the creator of that work should be free to use it.[377] She appears to be referring to televisions shows, broadcasts, movies, and works of a similar nature, as opposed to photographs. In explaining how this limitation should work, she gave the examples of *Orioles*[378] and *Fleet*.[379] Finally, Rothman suggests that if the individual consented to the creation of the copyright protected work, and the work is used in a way allowed by the U.S. Copyright Act, the right of publicity should be preempted.[380] She seems to be referring to the use of photographs for decorative and display purposes, such as in a restaurant or store, as opposed to the commercial use of advertising and merchandising that the right of publicity restricts.[381]

There have been a handful of cases which have considered the Supremacy Clause in determining preemption of the right of publicity, namely: *Facenda v. NFL Films Inc.*[382] *Brown v. Ames*.[383] The facts of *Facenda* have been outlined above. In conducting the conflict preemption analysis under the Supremacy Clause, the court adopted Nimmer's approach.[384] This approach considers the nature of the use of the work, i.e., commercial or non-commercial, and then goes on to consider what the plaintiff originally consented to in creating the work. The court held in *Facenda* that the work in question was used for a commercial purpose and that the plaintiff had consented to the creation of "films documenting NFL games, not an advertisement for a football video game."[385] As such, the claim was not preempted.[386]

In *Brown v. Ames,* the court found that express preemption under Section 301 did not apply.[387] *Brown* concerned the inclusion of the names and likenesses of the plaintiffs on CDs, posters, and videotapes.[388] The use of persona was licensed by the

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375 Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*,36 U.C. DAVIS L. REV. 199, 236–38 (2002).
376 *Id.* at 252.
377 *Id.* at 252.
378 *Id.* (citing Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 677 (7th Cir. 1986)).
379 *Fleet*, 58 Cal. Rptr. 2d at 1921.
380 Rothman, *supra* note 375, at 252.
381 *Id.* at 199.
382 Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1028 (3d Cir. 2008). This case also conducted preemption analysis based on 17 U.S.C. § 301, as explained above. *Id.*
383 Brown v. Ames, 201 F.3d 654, 659 (5th Cir. 2000)..
384 *Facenda*, 542 F.3d at 1029.
385 *Id.* at 1031.
386 *Id.*
387 *Brown*, 201 F.3d at 658.
388 *Id.* at 656–57.

defendant to another seller, but the appellants had not given permission for the use of persona for marketing purposes.[389] The court found that express preemption under Section 301 was not applicable because what was being claimed was the persona of the individuals, which was not protected by copyright.[390] They then went on to consider conflict preemption as the defendants argued that allowing the claim would undermine the purpose of copyright.[391] The court found that there was no preemption for three reasons.[392] The right of publicity furthers the objective of the U.S. Copyright Act to "support and encourage artistic and scientific endeavors."[393] The right to name and likeness is usually transferred in connection to the copyright according to industry practice.[394] And third, usually name or likeness can be used to "identify truthfully the creator of the goods."[395] The court concluded that "because the tort would currently not be sustainable against valid copyright holders, allowing the claim in this context does not impede the transfer of copyrights or the uniformity of the copyright system."[396]

In the recent case of *In re Jackson*,[397] the Second Circuit Court of Appeals embraced implied preemption, taking a similar approach to that advanced by Rothman and Post.[398] Curtis Jackson, aka "50 Cent," sued William Roberts, aka "Rick Ross," for using thirty seconds of Jackson's voice performing the song *In Da Club*, as well as the name "50 Cent: in the title of the song.[399] Judge Leval found that the claim was impliedly preempted based on two potential conflicts.[400] Firstly, allowing a claim that would impair the "publication, reproduction, or performance of a work that either refers explicitly to a real person or exhibits real persons in its performance" would hinder the enjoyment of rights under the U.S. Copyright Act by copyright holders and licensees.[401] Secondly, Leval stated that 50 Cent's right of publicity claim was a veiled attempt to control copyright.[402] His label, Shady/Aftermath Records, owns the copyright to the song. As such, while the label would have had a valid claim for copyright infringement, "the predominant focus of Jackson's claim is Robert's

389 *Id.* at 659.
390 *Id.* at 658.
391 *Id.* at 660.
392 *Id.*
393 *Id.*
394 *Id.*
395 *Id.*; MCCARTHY, *supra* note 9, at § 7:12.
396 *Brown*, 201 F.3d at 661.
397 In re Jackson, 972 F.3d 25, 33–42 (2d Cir. 2020).
398 Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J 86, 105–06 (2020).
399 *Jackson*, 972 F.3d at 33–34.
400 *Id.* at 33–35.
401 *Id.* at 39–40.
402 *Id.* at 39 ("The substantiality of Jackson's interest in his invocation of Connecticut's right of publicity is therefore minimal. Robert's mere reproduction of a sound that can be recognized as Jackson's voice, and his small discreet notation that correctly identifies Jackson as the artist of the sample played, do not violate any substantial state law publicity interest that Jackson possesses.").

unauthorized use of a copyright sound recording that Jackson has no legal right to control."[403] It should be noted that Judge Leval also found the claim would be expressly preempted under Section 301 of the U.S. Copyright Act.[404]

The Role of Preemption in the Paparazzi Photograph Issue

The situation being addressed by this article is unusual. In a typical claim, the plaintiff claims a right of publicity infringement against a third party who has appropriated their persona for commercial gain, or non-transformative expressive use. The alleged defendant might have secured the necessary copyright license but could still potentially infringe the right of publicity. The right of publicity as a strict liability right is a powerful tool for celebrities whose images have been used by third parties. In the copyright infringement claims brought by paparazzi, the right of publicity serves no useful practical purpose as the individual who possesses the right is being sued. Rather, it serves a theoretical role in considering how to balance the interests of the individual against the copyright of the photographer. A discussion of preemption where the right of publicity cannot be deployed might then be considered redundant, but this discussion is important because it makes it clear that any proposed change must come from the perspective of copyright.

It would not be possible to alter the current right of publicity to include a right to use a photograph of oneself which was captured by another, despite the fact that publicity has traditionally given the individual control over commercialization of his or her persona. Instead, the change would have to be located within the copyright sphere because of the doctrine of preemption and the federal nature of copyright law compared to the state-based nature of the right of publicity. This is noteworthy as courts must consider this in addressing these novel claims. Furthermore, courts would also have to keep this in consideration in weighing the post-mortem right of publicity and copyright possessed by estates. While this is a different iteration of the issue, the hierarchy of rights is still relevant and can have far reaching consequences for estate management that span beyond the current paparazzi issue. As demonstrated by the discussion above, there is potential for the right of publicity to overstep the federal law of copyright where the persona is manifested in a copyright protected work in an evocation claim. Altering the right of publicity to allow an individual greater control over a photograph than the photographer would certainly be preempted, likely under both express and conflict preemption. Under express preemption, the subject matter is clearly protected by copyright, and the right in question would be that of distribution. Under conflict preemption, the right of publicity could undermine the objective of Copyright law to "promote the progress of . . . useful arts."[405] While the "useful" aspect of paparazzi photographs is questionable, it is trite knowledge that the results of such pursuits are indeed protected copyright protection at this time.

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403 *Id.*

404 *Id.*

405 U.S CONST. art. I, § 8, cl. 8.

Section 7: Potential Approaches to the Problem

This section considers alternative approaches that could be taken to address issues at hand, having already considered existing copyright defenses. Ultimately, this section concludes that maintaining the status quo is the most feasible approach. While celebrities will not be pleased, altering the law to include a new exception or limitation would undermine the exclusive rights of copyright. Introducing a compulsory license could theoretically reconcile the interest of both parties, but in reality, the compulsory license under Section 115 of the U.S. Copyright Act has been heavily criticized and infrequently used, as parties enter into private deals regulated by market forces.[406] Introducing a compulsory license would thus be likely to be an entitlement against which bargaining could take place. But a more practical solution would be to leave the law as it is and wait for the courts to hold that posting a photograph of oneself is copyright infringement. This solution does not reconcile the interests of the paparazzi and the celebrity. However, the celebrity benefits from the symbiotic relationship with the paparazzi.

Personal Use Exception

Section 5 discussed the existing limitations of fair use, implied license, and joint authorship. A way to potentially solve the issues on behalf of celebrities would be to introduce an exception which allows for personal use of the copyright photograph featuring the individual. However, the discussion above indicates that celebrities' Instagram accounts often pursue commercial goals, so it would be difficult to describe this use as personal. Additionally, the U.S. Copyright Act does not have an explicit "personal use" exception.[407] Even if there was such an exception, social media is used for sharing. In the case of celebrities, the audience is often sizeable. For example, on Instagram, Gigi Hadid has 71.2 million followers, Khloe Kardashian has 197 million, and Ariana Grande has 277 million.[408] Posting a photograph that will be visible to large audiences should be considered a public use.

Any exception or limitation would have to be in accordance with the United States obligations under international treaties, namely the Berne Convention and the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs), which both have similar provisions. Article 9(2) of the Berne Convention states: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."[409] Similar wording is used in Article 13 of TRIPs.

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406 Peter DiCola & David Touve, *Licensing In the Shadow of Copyright*, 17 STAN. TECH. L. REV. 397, 454–56 (2014).

407 Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1871–72 (2007).

408 As of November 21, 2021.

409 *Berne Convention for the Protection of Literary and Artistic Works*, WIPO (Oct. 1, 2020), https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf. *See also TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh

It is unlikely that allowing the use of photographs by the individuals featured in them might constitute a "special case" as required by both treaties, as the aim of that provision is to indicate that any exception or limitation should be applied in narrow cases.[410] Even if this was considered a "special case," it is clear that such a provision would conflict with the normal exploitation the work as it would "enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e,, the copyright) and thereby deprive them of significant or tangible commercial gains."[411] This was made apparent in the previous discussion on fair use. Additionally, there would be a potential conflict with the legitimate interest as it could cause an "unreasonable loss of income."[412]

Compulsory License

This section suggests that compulsory licenses could potentially reconcile the interests of celebrities and paparazzi. Inevitably, paparazzi would be opposed to this idea as exclusive control over their works would be preferred. This approach recognizes the role of the celebrity in the value of the photograph, and the value embodied by the right of publicity, while still ensuring that the copyright holder can profit from their work. However, a compulsory license is more effective in theory, as in reality, the compulsory license under Section 115 of the U.S. Copyright Act of 1976 has been heavily criticized for being ineffective due to impracticality and administrative bureaucracy.[413]

What is a compulsory license?

A compulsory license gives the class to whom it applies the ability to use the copyright work in question without permission from the copyright holder.[414] A statutory fee must be paid in order to take advantage of the compulsory license.[415] The first compulsory license was introduced in the 1909 Copyright Act to prevent a monopoly of music publishers, which is now under Section 115 of the U.S. Copyright Act of 1976.[416] This mechanical license was updated in 1995 to suit the digital era.[417]

Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

410 *Analytical Index Annex 1C: Trade-Related Aspects of Intellectual Property Rights, Article 13 (Jurisprudence) 1.2.3*, WORLD TRADE ORGANIZATION 6 (Jun. 2021), https://www.wto.org/english/res_e/publications_e/ai17_e/trips_e.htm.

411 *Id.*

412 *Id.*

413 DiCola & Touve, *supra* note 406, at 431.

414 PATRY, supra note 144, at § 3:12.

415 *Id.*

416 Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMP. & HIGH TECH. L.J. 215, 217–21, 226 (2010).

417 Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Court, Internet and Intellectual Property of the House Committee on the Judiciary (2004).

Cover songs can be made under Section 115(a)(2), but the musical arrangement "shall not change the basic melody or fundamental character of the work . . . ."[418] If changes are made, the new song would be considered a derivative work and infringe the original song.

An advantage of introducing a compulsory license is that it would apply to a class rather than be assessed on a case-by-case basis as occurs with the fair use analysis.[419]

How would a compulsory license for paparazzi photographs work?

This license would only be afforded to celebrities featured in the photograph. This means that a celebrity would not be able to post a photograph of their friend or significant other. For example, the infringement suit brought against Hadid for posting a photograph of boyfriend Zayn Malik[420] would not be immunized from infringement as it would not qualify for a compulsory license. Furthermore, an individual would be required to attribute the source of the photograph, whether it is the individual paparazzi or the agency that owns the photograph. The ascribed fee for the proposed compulsory license should compensate the paparazzi for their work. The fee should be equal to what is paid by news sources as this would recognize the market value of the photograph.

Limitations and consequences of compulsory license approach

A significant hurdle of the compulsory license solution is that it would have to be introduced into the U.S. Copyright Act by Congress. This issue may not be on the forefront at this time, as it is a niche group of individuals who are affected. Also, copyright protection has grown over time, so introducing a compulsory license would be contrary to the development path of copyright.[421] However, it could be suggested that the right of publicity has also expanded and introducing a compulsory license would recognize the commercial value of the individual. But, as will be discussed further below, the commercial value of the celebrity is not currently impaired by the existing approach to copyright.

The compulsory license under Section 115 is rarely utilized.[422] The Harry Fox Agency issues significantly more mechanical licenses than the Copyright Office.[423] This suggests that it might be better to leave the negotiation to market forces. Introducing a license with cumbersome procedural requirements would be an ineffective use of time and resources. The private route facilitated by the Harry Fox Agency is not without fault, as mishandling of licensing arrangements led to lawsuits between

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418 Copyright Act 1976, 17 U.S.C. § 115(a)(2) (2012).
419 PATRY, *supra* note 144, at § 8:7.
420 Complaint at 1–4, O'Neil v. Hadid, 1:19-cv-8522 (S.D.N.Y. Sept. 13, 2019), ECF No. 1
421 Litman, *supra* note 407, at 1872.
422 Abrams, *supra* note 416, at 238–40.
423 *Id*.

various artistes and Spotify.[424] This mishandling partly spurred the introduction of The Music Modernization Act of 2018 which sought to simplify the process of compulsory licensing and established the Mechanical Licensing Collective. That being said, Harry Fox Agency has been selected as a partner of the Mechanical Licensing Collective.[425] It is yet to be seen how effective this new body will be, as it launches its services in 2021.[426]

A potential consequence of compulsory licensing is that it would further devalue the money paid by news sources for paparazzi photographs, as news sources would be aware that celebrities could have unfettered access to the photographs which they are paying for. This would make a news agency less willing to pay as the target market could view the photograph on the celebrity's social media account.

Another factor to note is that celebrities may be using photographs of themselves in certain outfits to fulfil product placement deals with brands. Thus, it is not just the celebrity benefitting. The brand is also gaining an advantage when the celebrity posts the photograph. It is worth noting that brands have also been sued for copyright infringement by paparazzi for posting photographs of celebrities wearing the brand's designs.[427] Even if a celebrity is not part of a product placement deal for a particular outfit, the commercial advantage gained by using the photograph must be accounted for. There must be a balance between the advantage gained by the celebrity, and by extension, the brand, and the copyright protection afforded to the paparazzi. A compulsory license would not be able to strike this balance in reality because of the cumbersome procedure required for compulsory licensing. Such procedure would deter celebrities from taking advantage of it, and/or inversely, it could devalue paparazzi photographs. The bureaucracy would essentially result in an entitlement against which bargains may be struck, which is unnecessary considering that such an entitlement already exists in the form of copyright law.

No Change: Let Market Forces Regulate

The simplest approach and in fact, the approach preferred by this article, is simply to do nothing. While this may seem anticlimactic, given the analysis that has been presented, it appears that the most effective way to reconcile the interests of both parties is to let the law as it stands direct the course of dealings between parties. "No change" does not mean that the status quo should be embraced wholesale. There are

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[424] Sarah Jeong, *A $1.8 Billion Spotify lawsuit is based on a law made for player pianos*, VERGE (Mar. 14, 2018), https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer.

[425] David Lowery, *MLC Selects as "Digital Services Provider" the Company that Sent Fraudulent License Notices to Songwriters*, TRICHORDIST (Nov. 27, 2019), https://thetrichordist.com/2019/11/27/mlc-selects-as-digital-services-provider-the-company-that-sent-fraudulent-license-notices-to-songwriters/.

[426] The Music Licensing Collective, *About the MLC*, MLC, https://www.themlc.com/our-story (last visited Nov. 14, 2021).

[427] The Fashion Law, *supra* note 22.

two predicted paths of development. The first path, and the one that is currently being followed, is that paparazzi and celebrities will arrive at out of court settlement agreements. The second path would be for a case to be fully litigated. Based on the analysis of existing copyright defenses, it is likely that the paparazzi would prevail in a claim of copyright infringement, and damages would be awarded, likely in the form of a lost license fee. Whichever path is followed, securing a license for use of a photograph would probably be less costly than facing a claim of copyright infringement. Khloe Kardashian has adopted this practice of licensing photographs due to previous lawsuits against her.[428] Kim Kardashian has hired a personal photographer to avoid copyright issues.[429]

Christopher Sprigman suggested that:

> What we really need is for a good defense lawyer to argue the equities – namely, that the photographer is figuratively biting the hand that feeds him – and a good judge to find, on that basis, that minimal statutory damages are due [assuming the photo is registered], and that the plaintiff should not recover attorney's fees. [That] would put an end to these suits right quick, considering that actual damages in these cases tend to be scant and difficult to prove.[430]

This article endorses Sprigman's view on the need for trial but disagrees on his stance regarding damages. Yes, the celebrity contributes to the value of the photograph, but as previously explained, the celebrity also depends on the paparazzi to increase visibility and popularity. Hence, up-and-coming celebrities may tip off the paparazzi as to their whereabouts. Furthermore, the use of paparazzi photographs by celebrities likely also benefits brands, perhaps in a way that avoids the Federal Trade Commission guidelines for influencers, which require endorsements and sponsorships to be disclosed. The candid[431] appearance of the photographs might convince consumers that the celebrity has chosen the outfit themselves, thus adding to the appeal. Even if damages for the lost license fee are minimal, a case which makes the occurrence of infringement clear would catalyze the practice of taking licenses to avoid litigation. Considering that celebrities continue to flout the law, awarding attorney's fees should not be so easily dismissed.

The "no change" approach raises questions about the role of the celebrity's right of publicity. It has been established that the right of publicity can be preempted by copyright due to the hierarchy of the rights. This does not mean that the right of publicity is unimportant. Rather, it means that the right of publicity cannot expanded to impinge on copyright. The right of publicity is of importance to the celebrity, and the historical development of the right as discussed in Section 3 indicates that the jurisprudence attaches a high level of importance to the protection of persona in

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[428] Khloe Kardashian (@khloekardashian), TWITTER (Aug. 19, 2018), https://twitter.com/khloekardashian/status/1031301266910015488?lang=en.

[429] Ramela Ohanian, *The Right to Do It for the 'Gram*, 13 LANDSLIDE 1, 9 (2020).

[430] The Fashion Law, *supra* note 68.

[431] As explained, celebrities sometimes work with paparazzi to stage photographs in a way that looks "unplanned."

commercial settings. The "no change" approach does not deny this importance. Rather, it argues that the current system does more to enhance the strength of the right of publicity than it does to undermine it. This is because an individual's right of publicity is enhanced by public exposure, as this aids in identifiability and strengthens the symbolism of the persona in the public's mind, making it easier to claim infringement via evocative uses. The celebrity still has a strong right which can be deployed against unauthorized commercial uses of persona, even though she cannot use the copyright protected paparazzi photographs without infringing copyright. Ultimately, the 'no change' approach suggests that the interest of paparazzi and celebrities are irreconcilable as the copyright interest of the paparazzi should prevail, contrary to the celebrities' desires to post photographs without seeking a license. But actually, this approach could strike a fair balance between celebrities who use their Instagram accounts to increase their earning potential and paparazzi who are instrumental in promoting celebrities.

Impact on Post-Mortem Rights

With regards to the consequences of the 'no change' approach, the position of the estates of celebrities and photographers raised by Ingles needs to be considered.[432] Ingles considered competing claims of estates holding copyright versus the right of publicity. While Ingles favored the estate of the photographer, this article suggests that these rights should be assessed in the same way that they would be with living individuals, keeping in mind the hierarchy of rights.

The estate of the celebrity would not have the authority to allow the use of photographs of famous individuals unless they had secured the necessary copyright license. This is uncontroversial as the analysis in this article has made it clear that even living celebrities are not entitled to use photographs of themselves under the current copyright regime. The estate of the photographers can license the copyright, but a right of publicity license would still need to be secured by the licensee to avoid falling foul of the right of publicity. Again, this is reflective of current practice. It is worth clarifying that the photographer's estate would not be responsible for seeking a right of publicity license. It is the user of the photograph that needs to ensure that the necessary right of publicity license and copyright license are secured before making a commercial use of the photograph.

Conclusion

This article considered the conflict between paparazzi and celebrities who post photographs without the requisite copyright licenses from the perspectives of the laws on copyright and right of publicity. While the right of publicity has expanded in the last seventy years to confer strong protection for persona, copyright's historical federal foundation has cemented it above the right of publicity in the hierarchy of rights.

[432] Ingles, *supra* note 137.

The issues discussed in this article are a sign of the times, as it reflects the popular usage of social media by celebrities for self-promotion. The dawn of social media altered the landscape of parasocial relationships between celebrities and fans in a way that could not have been envisioned when the right of publicity was gaining momentum in the 1980s and 1990s. The strength of the right of publicity and the inherent feeling that one should have a level of control over a photograph of oneself alongside ignorance of copyright law has contributed to the use of paparazzi photographs by celebrities without permission. However, this article has made it clear that the right of publicity is not a tool that can be deployed against a claim for copyright infringement.

A solution to this conflict must come from within the copyright sphere, but none of the copyright concepts of fair use, implied license, and joint authorship are likely to be successful against a copyright infringement claim brought by a paparazzi for candid and posed photographs. Implied license is viable for staged photographs, as is joint authorship. However, implied license is more likely to be favored over joint authorship due to the policy implications of joint authorship, which would vest control in the subject matter of the photograph. Such control is more suitably addressed under the right of publicity.

Considering that the existing copyright defenses are of limited applicability, potential changes to the law were explored to determine whether the interests of these two parties can be reconciled, keeping in mind that the parties are in a symbiotic relationship. Each depends on the other for financial prosperity. Introducing a personal use exception to the U.S. Copyright Act would not be feasible because it is unlikely to satisfy the criteria set out in the international treaties that the United States is a member of. Any use of a photograph on a celebrity's Instagram is likely to be commercial use since these social media profiles are targeted at increasing the celebrity's status and earning potential, so such use cannot be classified as "personal use." Furthermore, allowing a celebrity a license to use the photograph would erase the paparazzi's interest and would not provide a reconciliatory solution.

Therefore, a compulsory license was considered. This could theoretically solve the issue and reconcile both interests by ensuring the paparazzi is compensated and the celebrity has access to the photograph. However, the existing compulsory license system acts as an entitlement against which to bargain. Such entitlement already exists in the form of copyright law. Thus, the most feasible solution is to let the law and market forces solve these disputes. The interests of paparazzi and celebrities, while symbiotic, are opposite in terms of the celebrity wanting to use a photograph for free (except in staged photographs where the paparazzi may have been paid) versus a paparazzi wanting to be paid for a photograph. Ultimately, adopting this solution suggests that the interests of these two parties are irreconcilable under the current legal framework. With regards to this specific issue, this is accurate as copyright prevails against the celebrities' right of publicity interests. However, on a grander scale, the nature of the symbiotic relationship actually strengthens the right of publicity as paparazzi photographs increase the visibility and thus identifiability of a celebrity. The

more identifiable the celebrity, the stronger the right of publicity claim. While the current situation will only realistically be resolved in favor of the paparazzi as the copyright holder, the relationship of the parties is not so imbalanced as to require a change in favor of celebrities.