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PERSPECTIVE

## In role reversal, celebrities defend against paparazzi suits

By Neel Chatterjee

Who doesn't flip cringe-worthy celebrity Kodak moments in tabloids while waiting in the grocery checkout line? Burned into our contemporary consciousness are memories like a newly bald Britney Spears charging an umbrella into a photographer's windshield as he filmed her infamous meltdown. Even legal blows, like the \$550,000 settlement that Jennifer Anniston won against the paparazzo who snapped her tanning topless have inched on cliché. But now, in an ironic shift, it's paparazzi who slap celebrities with lawsuits for use of their quasi-stalker photos.

These lawsuits result from an evolving attitude towards unplanned photo-ops spread on social media. The minute someone like Kylie Jenner shares a shot of herself stepping out of Starbucks while sipping her Venti passion tea lemonade, thousands retweet and repost it. Those invasive photographers that celebrities once detested are the same people that capture these off-guard gems. And for Instagram royalty, like Kylie or Ariana Grande, every impromptu photoshoot is an opportunity to satiate their 100+ million followers with every nook and cranny of their mundanely exciting lives.

Seeing a quick way to make a bunch of bucks, the paparazzi are suing celebrities to squeeze every penny out of these impromptu pictures. The photographers are armed with the long-standing rule that copyright law gives exclusive rights to the person behind the camera, not the subject of the

photo. Celebrities are now fighting back and wading into uncharted copyright waters.

Gigi Hadid is one of the most recent victims of a paparazzi lawsuit. In October 2018, the supermodel struck one of her signature million-dollar poses to a photographer stalking her outside a New York building. Months after she posted the picture on Instagram to her substantial following. The cameraman's agency sued her and sought statutory damages of up to \$150,000 for copyright infringement. Hadid fought back, asserting a number of legal theories.

Hadid first asserted she was a co-author of the work. She relied upon a 2nd U.S. Circuit



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Gigi Hadid backstage at the Brandon Maxwell spring 2019 show at Classic Car Club during New York Fashion Week, Sept. 8, 2018.



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Court of Appeals decision, which found that a jury could find joint-authorship of photographs where a fashion designer selected the models and their poses. This argument, in many ways, presents as many questions as answers.

Joint works, as defined by the U.S. Copyright Act, are prepared by two or more authors who intend to merge their individual contributions into an inseparable unitary whole. The 2nd Circuit, in *Thompson v. Larson*, 147 F. 3d 195 (2d Cir. 1998), suggested several factual considerations for co-authorship in the absence of a written contract. Among the considerations are that the co-authorship claimant must prove that each co-author made independently copyrightable contributions and that the co-authors fully intended to be co-authors.

In the photography context, a

person, "who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be," can be found an author. In *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), the 2nd Circuit considered "the poses, the shading, [and] the expressions," in a picture to be "original elements of creative expression."

As a 35-time *Vogue* cover veteran, Hadid may have the creative control factor on her side. However, the paparazzi's physical control over the photo could work against an assertion of ownership. And, of course, the joint intent requirement may be a real challenge.

But the potential problem with this theory is the candid and unplanned nature of so many paparazzi pictures. If someone didn't pose and a photographer merely takes an impromptu picture

of Liam Hemsworth drinking a kale shake while eating arugula salad sprinkled with Acai, it is hard for the “Hunger Games” star to assert a joint authorship right.

Also, joint authorship is not without risks. In fact, it is a two way street. When joint authorship is found, parties are each allowed to exploit the work subject to an accounting to the other of the profits associated with the work. In other words, an argument can be made that the parties will need to share equally in the profits generated from the photograph. Since stars arguably profit from their social media posts, shared ownership could provoke similar litigation trying to claim the commercial benefits from the celebrities. The comparable profitability from exploitation of the picture by the paparazzi is minimal, at best.

Fair use, it turns out, may be a better defense. Fair use protects alleged infringer for the use of copyrighted materials for criticism, comment, news reporting and other purposes. In deciding fair use, courts are supposed to consider the purpose and character of the use, whether the use is commercial, the nature of the work, the amount of work used, and the effect on the potential market. Some cases have found copyright protection lower for pictures taken on the fly, namely without poses, special lighting and the like. And if the person reposting the picture adds meaningful commentary and uses it for a noncommercial purpose, a fair use argument may exist.

Although Hadid argued that her post was fair use, the argument misses the point of fair use and the way case law has addressed paparazzi types of pictures. She argued that but-for her creative contributions, the photograph would not exist, and that copyright’s goal to promote the creation of photographs “would be better served by allowing [Ms. Hadid’s] use than by preventing it.” The court did not address this argument at the motion to dismiss phase. In any event, her argument appeared to miss the point of fair use which is much more about the nature of the use rather than the level of creative contribution by the photographer and the celebrity.

Hadid’s team also argued that she had an implied license to use the photo. This argument does not seem to have legs. Implied licenses are generally limited to narrow circumstances “where one party created a work at the other’s request and handed it over.” Hadid’s argument appeared to emphasize that because Gigi consented to being photographed and has an active social media presence, the paparazzo should have known he was authorizing her to at least display the photo online in exchange. However, celebrities may have a tough time convincing courts that paparazzi shoot invasive photos only to surrender them to the person with the greatest audience for such pictures.

A final strategy that celebrities can use is the powerful counterclaim. The relationship between paparazzi copyrights and

the individual right of publicity is fuzzy at best. From a basic right vs. wrong perspective, it just seems wrong that a copyright holder can seek compensation for a photograph of a person but the person who was photographed has no rights.

Cleveland Browns wide-receiver Odell Beckham Jr. brought a case pressing a theory that his publicity rights were violated by the paparazzi. He alleged that he posted paparazzi photos to social media “in furtherance of his right to publicity.” Instead of waiting for the inevitable paparazzi lawsuit, Beckham sought a declaratory judgment that he did not infringe on the paparazzi’s copyright. The right to publicity, at its core, is the right to control the commercial use of one’s own identity. However, no court has ever found that this entitlement overrules the exclusive rights enjoyed by copyright owners. As has been the trend, the parties agreed to drop the case before the court could issue a substantive ruling.

In the end, neither legal precedent nor principles seem squarely on the stars side despite the injustice of it all. But at least one pop culture icon has neutered the legal quandary. In addition to suing the Kardashian dynasty directly, agencies repeatedly had Kardashian fan pages taken down for infringing posts. To eliminate the issue altogether, Kim Kardashian, ever the businesswoman, tweeted that she hired a personal paparazzo to take all of her social media photos. Fan praise for her heroism as well as

shady eye-rolling GIFs littered the tweet’s response thread. Regardless of what Kardashian’s devotees and haters think of her solution, one thing is for sure: monetizing legal rights over images that spread at the whim of retweets, reposts, and screenshots may continue to proliferate in the same way was social media sharing.

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