University of Georgia Law

Journal of Intellectual Property Law

Volume 27 | Issue 2 Article 7

Feeling Cute, Might [Have To] Delete Later: Defending Against the Modern Day Copyright Troll

Austin Joseph
University of Georgia School of Law

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl

 Part of the Intellectual Property Law Commons

Recommended Citation

Austin Joseph, *Feeling Cute, Might [Have To] Delete Later: Defending Against the Modern Day Copyright Troll*, 27 J. INTELL. PROP. L. 329 ().
Available at: https://digitalcommons.law.uga.edu/jipl/vol27/iss2/7

This Notes is brought to you for free and open access by Digital Commons @ Georgia Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ Georgia Law. Please share how you have benefited from this access For more information, please contact tstriepe@uga.edu.

Feeling Cute, Might [Have To] Delete Later: Defending Against the Modern Day Copyright Troll

Cover Page Footnote

J.D. Candidate, 2021, University of Georgia School of Law.

This notes is available in Journal of Intellectual Property Law: https://digitalcommons.law.uga.edu/jipl/vol27/iss2/7

FEELING CUTE, MIGHT [HAVE TO] DELETE LATER: DEFENDING AGAINST THE MODERN DAY COPYRIGHT TROLL

*Austin Joseph**

*J.D. Candidate, 2021, University of Georgia School of Law.

Published by Digital Commons @ Georgia Law,

TABLE OF CONTENTS

I. INTRODUCTION

"I don't think pictures have any value today: anyone can take them, cameras have developed so much that you don't need to learn any technique, and that kills the value of a picture. It's a new generation."[1] The rise of social media and the Internet has depreciated the value of paparazzi.[2] Because paparazzi seek to remain desirable, the infamous act of "copyright trolling" has developed as a means to sustain their monetary needs.[3]

"Copyright trolling" permits paparazzi to bring federal action against celebrities who post a paparazzi's picture without first paying to license the photo.[4] Typically, a photographer will capture a celebrity in a candid moment, such as walking on the streets of New York City, and will post the photo online. Upon seeing the photograph online and liking how it looks, a celebrity will then often post the picture to his or her social media account without first paying the licensing fee (likely without knowing that he or she needed to do so since it is a photo of him or her). Once the photographer sees this, the photographer will bring a copyright infringement claim against the celebrity for posting their photograph on social media without first paying the license fee. Wanting to avoid the time and expense of litigation, most celebrities then settle with the photographer—sometimes to the tune of several tens, if not hundreds, of thousands of dollars.[5]

Throughout the past two years alone, multiple celebrities, including Gigi Hadid, Odell Beckham Jr., and Khloe Kardashian, have been sued by paparazzi for sharing pictures of themselves.[6] Objections have been raised in an attempt to recognize that celebrities should have a right to use pictures of their own person.[7] With the trend moving toward the monetization of social media, developments in technology, and faster sharing capabilities, paparazzi can expect to fight an uphill battle. If this is the case, it is likely "copyright trolling" will continue in order to subsidize the lack of need for professional paparazzi.

---

[1] CLÉMENT CHÉROUX, CAMILLE LENGLOIS, VÉRA LÉON & MAX BONHOMME, HAZARDS OF THE TRADE: INTERVIEWS WITH PAPARAZZI, *reprinted in* PAPARAZZI! PHOTOGRAPHERS, STARS, AND ARTISTS 39 (Clément Chéroux ed., 2014).

[2] MICHAEL GUERRIN, THE MARKET FOR PAPARAZZI PICTURES, *reprinted in* PAPARAZZI! PHOTOGRAPHERS, STARS, AND ARTISTS 57 (Clément Chéroux ed., 2014).

[3] *See* Kelly-Leigh Cooper, *Why Celebrities are Being Sued Over Images of Themselves*, BBC NEWS (Feb. 6, 2019), https://www.bbc.com/news/world-us-canada-47128788 ("Mr. Chatterjee says these are becoming known within the industry as 'copyright trolling.").

[4] *Id.*

[5] *See id.* ("'You'll see people offering to settle for say $10-20,000,' he says, 'Which seems like a lot of money, but in context of litigation costs it's really not that much – especially for these high profile figures.'").

[6] *Id.*

[7] *See id.* ("'If someone's harassing me and takes a photograph of me and I happen to like the picture and want to make use of it, after they harassed me and made money from me – now they can sue me?'").

The concept of "copyright trolling" is controversial because courts have yet to determine a solution. Celebrities usually settle the cases because litigation can be costly and time-consuming.[8] Further, while the Copyright Act of 1976 controls the copyright landscape, Congress could not have foreseen the rise in social media; therefore, courts will be hard-pressed to find an accurate solution. Based on the statute's current state, copyright trolls have a decent argument for infringement. But their arguments are not necessarily bullet-proof. Famous individuals sued for posting pictures of themselves can defend their actions by asserting a variety of colorable defenses.

This Note analyzes the harms of "copyright trolling" and proposes defenses and solutions, such as implied licenses for celebrities or new business tactics for photographers. Importantly, this Note will not address First Amendment issues regarding the right to publicity and press. While the notion of freedom of the press is essential to our democracy, it will not be examined in this Note because most celebrities would not argue that paparazzi should be banished as a profession. This is because paparazzi help celebrities gauge their level of fame: the more paparazzi that desire a celebrity's picture, the more famous she becomes, resulting in more money for the celebrity. Therefore, the Note will instead focus on copyright laws and how the Copyright Act of 1976 can better operate in the current media-based culture. Additionally, this Note will also propose defenses for future cases in which celebrities might try and fight back against copyright trolls.

This Note is organized in a way that first provides context on how this issue arose. The Background Section of this Note discusses the cultural fascination regarding celebrities and the historical rise of paparazzi. It also explores the recent phenomenon of "copyright trolling" and Gigi Hadid's recently settled case. This section concludes by examining the historical context of the Copyright Act of 1976 and the relevant sections applicable to copyright infringement. The Analysis Section of this Note discusses potential defenses, some of which have been posed before the court and others of which have not. Along with drawbacks and counter-arguments to the aforementioned defenses, this Note will also propose possible amendments to the Copyright Act of 1976. Finally, the Note will conclude with a look into the future and a new business model both celebrities and paparazzi could benefit from.

[8] *See id.* ("'You'll see people offering to settle for say $10-20,000,' he says, 'Which seems like a lot of money but in context of litigation costs it's really not that much. . . .'") (quoting Neel Chatterjee).

II. BACKGROUND

A. CELEBRITIES: A CULTURAL PHENOMENON

"[F]amous figures are famous for something: their achievements are recognized by others as worthy, so their fame is a byproduct."[9] Celebrities began their ascent into the public eye in the eighteenth century.[10] This notoriety is directly linked to the rise in mass media distribution through newspapers beginning in the early 1800s.[11] While newspapers originally spoke of wartime heroes and commendable inventions, the issues discussed soon turned to entertainers.[12]

Our human desire to know more about celebrities has a variety of beginnings. First, there is an idea that knowing more about someone of high-status may rub off on the individual.[13] Further, by "knowing what is going on with high-status individuals, you'd be better able to navigate the social scene."[14] If people knew the latest gossip and who is popular, they may be able to climb the social ladder more easily. Moreover, knowing more about celebrities allows individuals to live vicariously through them and their luxurious lives.[15]

The long history of celebrity culture demonstrates that people are invested in the lives of famous figures. For instance, take Kate Middleton and the Royal Family. Duchess Kate and her family are not from America, yet many Americans yearn for the story of a normal woman being pursued by a prince.[16] These fascinations are human nature and likely will not disappear in the near future because most people will not typically see a celebrity out and about; therefore, viewers must rely solely on photographs or other sources of media to see celebrities.

Photographs were not disseminated commercially until the 1880s, and, even then, they were black and white.[17] At the turn of the century, journalists started to focus on highlighting individual success via "profiled personalities, [] public affairs, and crucially, the more personal aspects of [people's] lives."[18] Soon, film

---

[9] ELLIS CASHMORE, CELEBRITY/CULTURE 23 (2nd ed. 2014).

[10] *See id.* at 24("'In the first half of the eighteenth century, a process occurred by which a nascent culture of celebrity began to form side by side with an existing culture of fame.'") (quoting Stella Tillyard).

[11] *Id.* at 25.

[12] *Id.*

[13] Stephanie Pappas, *Oscar Psychology: Why Celebrities Fascinate Us*, LIVE SCIENCE (Feb. 24, 2012), https://www.livescience.com/18649-oscar-psychology-celebrity-worship.html.

[14] *Id.*

[15] *See* Sheila Kohler, *Why are We Fascinated by Celebrities*, PSYCHOLOGY TODAY (Aug. 23, 2014), https://www.psychologytoday.com/us/blog/dreaming-freud/201408/why-are-we-fascinated-celebrities ("We love to identify with someone who seems to lead a perfect life...").

[16] *See* Caroline Bologna, *Here's Why Americas Are So Obsessed With The Royals*, HUFFPOST (Jan. 11, 2018, 3:28PM), https://www.huffpost.com/entry/british-royal-family-obsession_n_5a4b0788e4b025f99e1d0a4b.

[17] CASHMORE, *supra* note 9, at 26.

[18] *Id.* at 28.

and industrialization led to public reliance on photography and journalism to receive news—particularly in regards to famous figures.[19] With this, the door was left open for the position of paparazzi. A paparazzi photographer could fulfill the reader's interest in celebrities while also filling their pockets.

B. THE RISE OF PAPARAZZI

The term "paparazzi" is likely coined from the film *La Dolce Vita*.[20] In this film, Federico Fellini's character, Paparazzo, collected pictures of celebrities.[21] This behavior was swiftly recreated outside the cinema as the profession quickly made strides. With cinema on the rise, people became enamored with the glamorous actors and actresses in Hollywood's films. Now, "paparazzi" and "photographer" are often interchangeable, though it didn't begin that way.[22]

As the public's appreciation for celebrities' lives outside of film grew, people began to crave pictures and news of celebrities' normal lives. The impromptu pictures then began to cover several of the papers.[23] The consumers craved the shot because the celebrity did not know the photographer was present. This "uncontrollable voyeurism" created a "visual form of gossip."[24] This peak inside another's life, one that is presumably more extravagant and luxurious, stimulated the already natural human curiosity.[25] Because readers were no longer satisfied with text, the rise in consumerism and star culture gave the paparazzi a lucrative position.[26]

While the paparazzi's work represented glamorous people, the celebrities would likely argue that paparazzi were anything but glamorous. From the outside, paparazzi were believed to be cowardly and willing to do anything to "earn money off celebrities' backs."[27] Paparazzi were indeed reporters, but they were

---

[19] *See* Ross Collins, *A Brief History of Photography and Photojournalism*, NORTH DAKOTA STATE UNIVERSITY, https://www.ndsu.edu/pubweb/~rcollins/242photojournalism/historyofphotography.html (last visited Apr. 15, 2020).

[20] CLÉMENT CHÉROUX, THIRTEEN AND A HALF THEORIES ON THE CONCEPT OF PAPARAZZI PHOTOGRAPHY, *reprinted in* PAPARAZZI! PHOTOGRAPHERS, STARS, AND ARTISTS 12 (Clément Chéroux ed., 2014); *see also* Maureen Callahan, *50 Years of Paparazzi*, NEW YORK POST (Feb. 7, 2010), https://nypost.com/2010/02/07/50-years-of-paparazzi/ ("This month's 50th anniversary of Federico Fellini's cinematic masterpiece 'La Dolce Vita' also marks a half-century of another pop-cultural phenomenon: The paparazzi, first introduced . . . by the movie itself.").

[21] Callahan, *supra* note 20.

[22] CHÉROUX, *supra* note 20, at 11.

[23] *See generally* Daniel Ganninger, The Origin of the Paparazzi, MEDIUM (Feb. 6, 2019), https://medium.com/knowledge-stew/the-origin-of-the-paparazzi-8834f56c3463 ("Magazines were looking for pictures of celebrities that weren't staged, and they were prepared to offer a healthy payment to those that could get them candid pictures…").

[24] CHÉROUX, *supra* note 20, at 14.

[25] *See id.* at 13 ("[The paparazzi] are the spontaneous product of a very human curiosity and doubtless as old as humanity itself.").

[26] *Id.* at 14.

[27] *Id.* at 15.

believed to represent a lesser approach as paparazzi were not getting awards for their work.[28] Rather, their accolades were in the form of provocateur recognition such as snapping the most scandalous shots.

In the early 60s, "the shot" was the incredibly public infidelity between Elizabeth Taylor and Richard Burton.[29] Now, it's pictures of famous women exposed for the world to see.[30] Here, multiple women have been photographed in compromising positions simply by exiting their vehicle.[31] As this behavior continues, the deep divide between love and hate furthers between the paparazzi and celebrity. On one hand, the paparazzi gave celebrities a spotlight; on the other, the paparazzi brought light when darkness would have been preferred.[32]

C. CELEBRITIES VS. PAPARAZZI: FIGHTING THE COPYRIGHT TROLLS

Within the past couple years, celebrities have begun to fight back against the copyright trolls.[33] Trolls include any individual or entity that frequently target celebrities who post pictures of themselves on social media by asserting copyright infringement. They are considered trolls because they typically search the Internet and bring claims against multiple celebrities. Gigi Hadid, American supermodel, led the charge as she litigated a case against a paparazzi agency suing her for direct copyright infringement, along with contributory infringement.[34] In Hadid's case, Hadid walked out of a building where she smiled and posed for the photographer.[35] The following day, after seeing the photo online, Hadid reposted a cropped version of the photo on her personal Instagram account.[36] Months later, X-clusive Lee, Inc. brought suit against Hadid, seeking the maximum amount possible under the Copyright Act, which totaled $150,000.[37] Hadid

---

[28] *See id.* ("A 'paparazzi' category does not exist in the important international prizes for photojournalism. . .and with good reason. . .").

[29] *See Oh Snap! 20 Landmark Paparazzi Moments*, ROLLING STONE (Apr. 17, 2014), https://www.rollingstone.com/culture/culture-lists/oh-snap-20-landmark-paparazzi-moments-10313/elizabeth-taylor-and-richard-burton-go-public-129879/.

[30] CHÉROUX, *supra* note 20, at 16.

[31] *Id.*

[32] *Id.* at 11 ("To satisfy the public's curiosity, the paparazzi want to cast full light on celebrities even when they are nowhere near a spotlight.").

[33] *See* Cooper, *supra* note 3.

[34] Xclusive-Lee, Inc. v. Hadid, No. 19-CV-520 (PKC) (CLP), 2019 WL 3281013 at *1 (E.D.N.Y. July 18, 2019); *see also* The Fashion Law, *Gigi Hadid is Being Sued for a Third Time for Posting Another's Photo on Her Instagram*, THE FASHION LAW (Sept. 13, 2019), https://www.thefashionlaw.com/gigi-hadid-is-being-sued-for-a-third-time-for-posting-anothers-photo-on-her-instagram/ (referencing case no. 1:19-cv-08522 filed in the Southern District of New York and case no. 1:17-cv-00989 in the Eastern District of Virginia).

[35] Xclusive-Lee, 19-CV-520 (PKC) (CLP), 2019 WL 3281013 (E.D.N.Y. July 18, 2019) at *1.

[36] *Id.*

[37] Memorandum of Law in Support of Defendant's Motion to Dismiss at 3, Xclusive-Lee v. Hadid, No. 19-CV-520 (PKC) (CLP), 2019 WL 3281013 (E.D.N.Y. July 18, 2019).

presented various defenses, but the court did not reach these arguments because the court dismissed the case.[38] Xclusive-Lee never received an approved copyright application prior to bringing the suit; therefore, it was barred from filing an action in the first place.[39] Though the potential to establish precedent over the matter seemed imminent, celebrities must wait until another fellow celebrity decides to litigate.

Before detailing potential remedies to a problem, it is important to understand who the "enemy" entails. In this case, the celebrities' adversaries are paparazzi members, along with the individuals purchasing the license to the photos taken by the photographers. These individuals, or entities in some cases, skim social media waiting for a famous account to post an unlicensed photo.[40] These copyright trolls are "more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or service."[41] The consequences of this behavior is staggering.

Attorneys can make themselves and their clients a lot of money simply by litigating in sheer volumes.[42] Take, for example, New York copyright attorney Richard Liebowitz. In addition to suing celebrities for copyright infringement, Liebowitz also sues media outlets that post unlicensed photos, whether or not the outlet intended to steal the photo.[43] Knowing that most do not wish to spend the time or money litigating the infringement claim in court, Liebowitz is able to negotiate from a high starting price.[44] Liebowitz is then able to repeat this process over and over again in order to make a profit.

While some might characterize Liebowitz's work as a noble effort to obtain justice for the hard-working photographer, others characterize Liebowitz's conduct as simple extortion.[45] Opponents label Liebowitz a "troll" and accuse Liebowitz of acting in bad faith.[46] The same opponents assert that attorneys who continuously bring such claims are taking advantage of the system[47]—a system that was not made for social media and instantaneous sharing.

---

[38] Xclusive-Lee, 19-CV-520 (PKC) (CLP), 2019 WL 3281013 (E.D.N.Y. July 18, 2019) at *10.

[39] *See Id.* at *6.

[40] *See* Matthew Sag, Article, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015) ("The paradigmatic troll plays a numbers game in which it targets hundreds or thousands of defendants, seeking quick settlements priced just low enough that it is less expensive [to litigate].").

[41] *Id.*

[42] *See* Justin Peters, *Why Every Media Company Fears Richard Liebowitz*, SLATE (May 24, 2018), https://slate.com/news-and-politics/2018/05/richard-liebowitz-why-media-companies-fear-and-photographers-love-this-guy.html.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

Because attorneys, such as Liebowitz, are filing claims in such large quantities, the likely result is crowded courtrooms. Courts are beginning to recognize this behavior and the harm it has in flooding the courts.[48] As social media sharing continues, courts will see more of these cases on their dockets so long as the attorneys and photographers can expect a payday. Courts should want to dissuade, rather than encourage, such frivolous litigation.

Now that celebrities and attorneys are aware of copyright trolls and their intentions, they can formulate defenses. As mentioned before, all potential defenses are considered novel because celebrities are not fully litigating the suits.[49] The result of *Xclusive-Lee v. Hadid* was highly anticipated because Hadid presented a couple arguments that had not been previously analyzed by the courts.[50]

In Hadid's Memorandum of Law in Support of Defendant's Motion to Dismiss, Hadid posed two unique defenses that this Note will consider in more detail.[51] Before asserting these two defenses, however, Hadid first argued that Xclusive Lee did not meet the base requirements to claim copyright infringement.[52] She then claimed that even if Xclusive Lee had met the requirements necessary to assert copyright infringement, she had two appropriate defenses: fair use and implied licenses.[53]

Claiming a fair use defense, Hadid went through the four fair use factors as laid out by 17 U.S.C. § 107.[54] Hadid argued that her post was transformative, and, even if the court found that it was not transformative, she did not use the post for commercial purposes.[55] Further, she declared that the photographer did not express an idea or theme through the picture, which would make it unoriginal.[56] Finally, she asserted that, by posting the picture, she did not deprive the photographer of financial gain.[57] While some could argue Hadid's use of the four

---

[48] *See* Oscar Michelen, *Court Labels Attorney as "Copyright Troll" and Fines Him $10,000 Over Frivolous Case Involving Photograph*, COURTROOM STRATEGY (Mar. 13, 2018), https://courtroomstrategy.com/2018/03/court-labels-attorney-as-copyright-troll-and-fines-him-10000-over-frivolous-case-involving-photograph/.

[49] *See* Cooper, *supra* note 3 ("Of the lawsuits filed against celebrities so far, many have been dismissed or settled before being litigated to resolution.").

[50] *See* Joe Patrice, *Gigi Hadid Wants to Change Copyright Law and She Has a Point*, ABOVE THE LAW (June 25, 2019), https://abovethelaw.com/2019/06/gigi-hadid-wants-to-change-copyright-law-and-she-has-a-point/ ("In the end, this case may or may not be a winner for Hadid but she's making some strong points about the fundamental unfairness of the system that too many lawyers and academics uncritically defend.").

[51] Memorandum of Law, *supra* note 37.

[52] Memorandum of Law, *supra* note 37, at 3.

[53] *Id.*

[54] *Id.* at 8-12.

[55] *Id.* at 8.

[56] *Id.* at 9.

[57] *Id.* at 11.

factors is unpersuasive, others could argue that Congress did not intend to promote copyright trolling; therefore, a fair use argument should be considered.[58]

In case her fair use argument failed, Hadid also asserted that she had an implied license to share the photograph of herself.[59] She argued that by stopping and posing for the camera, her contribution to the picture created a "meeting of the minds."[60] Under this theory of contract law, Hadid would be permitted to share the picture since she had some form of authorship.[61] While Xclusive Lee argued that Hadid's implied license argument would cause a massive expansion of implied license powers, this oversimplifies her argument.[62] She could arguably employ other jurisdictions' tests to meet the implied license standards.

These are just two of several potential claims against copyright trolls. Other attorneys are sure to expand on these strategies as more litigants bring attempt resolve the conflict between copyright trolls and celebrities.

D. THE COPYRIGHT ACT OF 1976: WHERE IT STANDS NOW

The origins of copyright law stem from the creation and distribution of information via the printing press.[63] This need for copyright protection found its way to America through Article I, Section 8, Clause 8 of the United States Constitution.[64] Legislation soon implemented the Copyright Act of 1790, which permitted authors to print, publish, and protect their work for a period of fourteen years.[65]

From 1790 until 1909, copyright law was molded through seminal case law and statutory revisions.[66] In 1909, Congress recognized the importance of protecting musical works and extended the duration of protection from fourteen years to twenty-eight years.[67] Many years later, Congress enacted the 1976 revision of the Copyright Act, which serves as the basis of United States copyright

---

[58] *See* James Sammataro, *Gigi Hadid, Heroine of the Copyright Revolution?*, HOLLYWOOD REPORTER (July 24, 2019), https://www.hollywoodreporter.com/thr-esq/gigi-hadid-heroine-copyright-revolution-guest-column-1226378("Legislators accepted and codified sufficient wiggle room for considerations of equity and reason.").

[59] Memorandum of Law, *supra* note 37, at 12.

[60] *Id.* at 13.

[61] *Id.*

[62] Plaintiff's Opposition and Accompanying Memorandum of Law to Defendant's Motion to Dismiss at 6, Xclusive-Lee v. Hadid, No. 1:19-cv-005020-PKC-CLP, 2019 WL 3281013 (E.D.N.Y. July 18, 2019).

[63] *Copyright Timeline: A History of Copyright in the United States*, ASSOCIATION OF RESEARCH LIBRARIES, https://www.arl.org/copyright-timeline/ (last visited Oct. 9, 2019).

[64] *See id.* ("[The Congress shall have power]. . .to promote the progress of science and useful arts, by securing…to authors and investors the exclusive right to their respective writings and discoveries.") (quoting Article I, Section 8, Clause 8 of the United States Constitution).

[65] *Id.*

[66] *See id.*

[67] *Id.*

law today. This revision included a new term of protection,[68] remedies for infringement, a registration requirement, and a fair use defense.[69]

Certain sections of the Copyright Act tend to come up more often in copyright infringement cases between celebrities and paparazzi. For example, 17 U.S.C. § 102(a) states that copyright protection is available "in original works of authorship fixed in any tangible medium of expression . . ." The same section goes on to list works classified as protected.[70] Further, the Act gives various remedies for copyright infringement including injunction,[71] damages,[72] and attorney's fees.[73] Defenses to copyright infringement are also provided through fair use.[74]

While some are satisfied with the current state of the Copyright Act, there are some academics and professionals in the legal field who would argue that sections of the Copyright Act should be amended in their entirety whereas others would suggest a less drastic approach, such as clarification through case law. It is important to point out, however, that clarification through case law is only possible so long as celebrities are willing to litigate these claims in court, and thus provide a template for future cases. Until then, courts must tackle this problem again and again with the current statute's form.

One issue courts must tackle is the lack of clear definitions to critical terms within the statute. For instance, the Copyright Act never gives a definition for "author" or "authorship", leaving courts to assume what this term means in a context that is constantly evolving.[75] Additionally, while the Act does describe "ownership", the owner of a copyright is not necessarily the author.[76] In the current conflict between celebrities and the paparazzi, this differentiation could matter a great deal to the court.

The present Copyright Act did not include social media sharing in its formation. How could it when it was last revised in 1976? While technology has vastly aided our economy and personal lives, laws must change to support these advances. If the issue persists without some form of legislative intervention, defense attorneys will need to pose an arsenal of arguments against the "trolls."

---

[68] *Id.* ("[It] extended the term of protection to life of the author plus 50 years (works for hire were protected for 75 years).").

[69] *Id.*

[70] 17 U.S.C. § 102(a)(2012).

[71] *Id.* § 502.

[72] *Id.* § 504.

[73] *Id.* § 505.

[74] *Id.* § 107.

[75] *See* John Tehranian, Article, *Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance*, 68 HASTINGS L.J. 1319 (2017) (analyzing the role of authorship in a copyright context); *see also* Sammataro, *supra* note 58 (discussing the novel defense of joint authorship as described in the Copyright Act).

[76] *See* 17 U.S.C. § 201 (2012).

III. ANALYSIS

A. DEFENDING AGAINST THE COPYRIGHT TROLLS

1. Fair Use

"'Fair Use' is a defense that allows a court to avoid the rigid application of the Copyright Act when such application would stifle the very creativity the law was designed to foster."[77] When defending against a copyright infringement claim, fair use will likely be a defendant's first justification. If an alleged infringer can prove that the use of the copyrighted material was indeed a fair use, then no copyright infringement will be found.[78] Although the fair use argument has not been litigated in copyright trolling cases, Hadid's response to the lawsuit illustrates how celebrities might be able to assert a fair use defense by arguing that the celebrity's conduct aligns with the legislature's intent in § 107 of the Copyright Act.[79]

The Copyright Act sets out four factors in determining fair use. The analysis is always on a case-by-case basis and fact-specific.[80] The four factors include: "the purpose and character of the use. . ., the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, [and] the effect of the use upon the potential market for or value of the [] work."[81] Though facts may change depending on the celebrity and his or her use of the picture, celebrities may start their arguments against copyright trolls using these factors.

The first factor examines the character and purpose of the use, and specifically looks at whether monetary gains were made.[82] The overall purpose of the first factor is to determine whether the new work adds something new to the original piece, otherwise known as "transformative."[83] Further, the statute states that a court may look to the commercial or educational use of the recreation to determine what the character and purpose of the new work entails.[84] By using the word "including" in the statute, the legislature is likely insinuating that the commercial or educational use of the recreation is not dispositive in nature, rather, it is meant to aid a court's understanding of the purpose.[85]

---

[77] Rivera v. Mendez & Compania, 988 F.Supp.2d 159, 169 (D.P.R. 2013) (citing Stuart v. Abend, 495 U.S. 207 (1990)).

[78] 17 U.S.C. § 107 (2012).

[79] *See* Memorandum of Law, *supra* note 37, at 7-12.

[80] Blanch v. Koons, 467 F.3d 244, 251 (2nd Cir. 2006) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

[81] 17 U.S.C. § 107.

[82] *Id.*

[83] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)("[I]t asks, in other words, whether and to what extent the new work is 'transformative.'").

[84] 17 U.S.C. § 107(1) (2012).

[85] *Id.*

In Hadid's case, she did not argue that she transformed the piece or added something new.[86] Instead, Hadid argued that she did not post the picture for monetary gain or generate revenue from the post.[87] She also pointed to case law, which states that "transformative use is not absolutely necessary," which would give the lack of monetary value more importance.[88] Other celebrities battling copyright trolls can make similar arguments.

Although the case law suggests that transformative use is not necessary to meet this factor, celebrities can show transformative use by adding new expression, meaning, aesthetics, insights, or understandings.[89] This includes reposting the picture to criticize, comment, report news, educate, or research.[90] Social media permits users to caption their posts and photo. Depending on the details of the caption, a celebrity could argue that he or she is commenting or critiquing the photo. While this may seem like a stretch, a celebrity would likely need to lean more heavily on the lack of monetary value of the particular post. With that, the four factors are more akin to a balancing test, so this factor alone will not doom the celebrity's fair use case.[91]

The second factor scrutinizes "the nature of the copyrighted work."[92] First, "the scope of fair use is greater with respect to factual than non-factual works."[93] This is a likely result of more creativity being used to design non-factual works compared to factual based works. Further, an author may be able to better signify emotional or artistic elements in a non-factual piece. Courts have shown that copyright is meant to protect creativity and innovation, which is why facts typically cannot be copyrighted.[94] Paparazzi pictures should undergo this same analysis when determining whether the picture is more like a factual or non-factual work.

Here, Hadid argued that the paparazzi did not attempt to project an idea or emotion through the picture of her.[95] In fact, this wasn't a creative piece at all.

---

[86] Memorandum of Law, *supra* note 37, at 8.

[87] *Id.*

[88] *Id.* (quoting *Campbell*, 510 U.S. at 579).

[89] *See* Blanch v. Koons, 467 F.3d 244, 251 (2nd Cir. 2006) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)) ("[It] adds something new, with a further purpose or different character, altering the first new expression, meaning, or message. . .").

[90] *See id.* at 251-52 (stating that secondary use of a copyrightable work can be appropriate under the fair use doctrine so long as it adds something new to the piece).

[91] *See Fair Use*, COLUMBIA UNIVERSITY LIBRARIES, https://copyright.columbia.edu/basics/fair-use.html#factor3 (last visited Apr. 15, 2020) ("You still need to evaluate, apply, and weigh in the balance the [four factors].").

[92] 17 U.S.C. §107(2) (2012).

[93] Swatch Grp. Mgmt. Servs. v. Bloomberg, 756 F.3d 73, 89 (2nd Cir. 2014) (quoting New Era Publications Intern., ApS v. Carol Pub. Grp., 904 F.2d 152 (2nd Cir. 1990)).

[94] *See* Feist Publications v. Rural Telephone Service, 111 S.Ct. 1282, 1290 (1991) ("Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.").

[95] Memorandum of Law, *supra* note 37, at 9.

The photographer did not pose, style, or direct her.[96] Further, this was a public setting where Hadid exited a building.[97] Hadid stated that there is no creativity here.[98] Rather, the photographer wanted a simple picture of Hadid, which Hadid posed for.[99] While Xclusive Lee argued that this was a highly expressive piece due to lighting, timing, and angles,[100] Hadid asserted that she added the creative nature through her pose and outfit—the same creative nature that legislatures intended to protect when the Copyright Act was created and revised.[101]

This idea of contribution will be addressed later, but Hadid's argument has fascinated the entertainment world because if a court were to agree, the decision could change the industry's relationship with paparazzi. This goes back to the creative aspect of a paparazzi's picture. The only thing that made this shot worthy of attention was the fact that Hadid—a celebrity—stopped and posed for the camera.[102]

While the opposing counsel criticized this argument, it brings up an important point.[103] Paparazzi are in a business of revealing the private lives of celebrities, and these pictures are desired because of the muse, likely not for the medium or the creator. If that is true, the legislature would likely intend for the celebrity, who intentionally posed for the picture, to have rights for their contribution to the picture.

It is important to note that this assertion would not permit hired models to have rights to photos, which have been contracted for, such as for a magazine cover shoot. The model and photographer are in agreement that the model will have no rights, which is also likely in a written contract. In a paparazzi-celebrity relationship, it is argued that there is a meeting of the minds, specifically, the model is using her skills to pose for the photographer who wants his photos seen by the model's fans.[104] The hired model and paparazzi-celebrity scenarios differ in that the hired model knows she will not have access to the photos in exchange for payment for her work. On the other hand, the paparazzi should arguably know that the celebrity will want to post a photo of herself since she is receiving no other compensation for that photo.

The third factor scrutinizes "the amount and substantiality" of the original copyrighted work compared to the user's recreation of the work. For this factor, "[t]he question is whether "the quantity and value of the materials used,' are

---

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 Plaintiff's Opposition and Accompanying Memorandum of Law to Defendant's Motion to Dismiss at 6, Xclusive-Lee v. Hadid, No. 1:19-cv-005020-PKC-CLP, 2019 WL 3281013 (E.D.N.Y. July 18, 2019).

101 Memorandum of Law, *supra* note 37, at 10.

102 Patrice, *supra* note 50.

103 *Id.*

104 *See* Memorandum of Law, *supra* note 37, at 13.

reasonable in relation to the purpose of the copying.'"[105] The court also determines whether the junior user took "the heart" of the original work.[106]

This factor would be harder for the celebrity to overcome because "the heart" of the photograph is the celebrity; therefore, by posting the picture of herself, the celebrity inherently posts the main target of the paparazzi's shot. While true, the factor's main goal is to determine the amount used by the celebrity. Could the celebrity argue that he or she only used a certain percentage of the original work to be considered as fair use? Hadid made this same argument. She claimed she only used 50% of the original picture, and the 50% she used focused on her contribution (i.e. her pose and outfit) rather than the photograph as a whole.[107] For a celebrity litigant to utilize this argument in the future, it must first be accepted that the celebrity indeed contributed to the paparazzi's picture by merely posing or doing something of the like.

Additionally, Hadid argued that she took "no more than necessary to capture [her] own contributions…".[108] Overall, the use of pictures and the third fair use factor is largely ambiguous because the whole picture is typically used.[109] Does this mean that pictures can never be used under fair use? Outside of Hadid's specific case, celebrities should have the opportunity to present their case for the third factor. They can do this by pointing to the percentage used, the contribution theory, and emphasis of the celebrity versus the paparazzi's "creative design" of the shot.

Finally, a court will determine the effect of the use on the market. Here, the court essentially measures the competition between the new work and the original work. Further, a court compares "the benefit that the public will derive if the use is permitted and the personal gain that the copyright owner will receive if the use is denied."[110] Finally, a copyright owner has the ability to prove this factor by showing he received some form of an economic harm.[111]

---

[105] Blanch v. Koons, 467 F.3d 244, 257 (2nd Cir. 2006)(quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

[106] *Measuring Fair Use: The Four Factors*, STANFORD UNIVERSITY LIBRARIES, https://fairuse.stanford.edu/overview/fair-use/four-factors/#the_amount_and_substantiality_of_the_portion_taken (last visited Nov. 2, 2019).

[107] Memorandum at Law, *supra* note 37, at 10.

[108] *Id.* at 11.

[109] *See Fair Use*, COLUMBIA UNIVERSITY LIBRARIES, https://copyright.columbia.edu/basics/fair-use.html#factor3 (last visited Nov. 2, 2019) ("Photographs and artwork often generate controversies, because a user usually needs the full image, or the full 'amount,' and this may not be a fair use. [A] court has ruled that a 'thumbnail' or low-resolution version of an image is a lesser 'amount.'").

[110] Richard Stim, *Fair use: The Four Factors Courts Consider in a Copyright Infringement Case*, NOLO, https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html (last visited Nov. 2, 2019).

[111] *See Fair Use Four Factor Analysis*, UNIVERSITY OF LOUISVILLE, https://louisville.edu/copyright/resources/four-factor-analysis (last visited Nov. 2, 2019).

Concluding her fair use argument, Hadid argued that she did not post the picture for any monetary gain; therefore, anyone who wanted the licensed picture would have to go through Xclusive Lee.[112] She further noted that she was not using the picture to try to endorse a product or encourage people to license the photo from her.[113] The photo is posted on her *personal* account, so fair use should apply to her in this sense.[114] She also asserted that she did not cause any market harm to Xclusive Lee or its use of the picture because the picture was already published—meaning she did not prevent people from viewing the photo via its website by posting the picture before Xclusive Lee had the opportunity to post it.[115] Moreover, Hadid pointed out that there was no evidence that Xclusive Lee lost revenue due to Hadid's post.[116]

The overall concept that the fourth factor seems to focus heavily on is whether the unlicensed post supersedes the original post. A celebrity could argue that the nature of an Instagram post on her personal page differs from a paparazzi style post. As noted above, the purpose of the paparazzi shot is to show the life of the celebrity through the eyes of an outsider. A post on an Instagram page symbolizes the individualized expression of the celebrity. While a consumer may follow Hadid on Instagram, he or she is likely still interested in gossip websites and magazines, even though the picture is posted on Hadid's page. Gossip magazines and websites arguably will continue purchasing licenses from agencies regardless of whether the celebrity posts the picture. Consumers of these goods want the pictures and the latest scoop on these celebrities, all of which is not contained on the celebrity's personal social media page.

Overall, the defense of fair use in this context is speculative in nature because celebrities have never litigated these types of claims to completion using fair use as an affirmative defense. While the facts may change, celebrities have a potential fair use argument so long as they post a picture of themselves, and the photo shows the celebrity posing for the camera. The pose may not be essential, but it bolsters the argument for fair use under a contribution theory.

2. Implied License

The idea of an implied nonexclusive license has been recognized by the courts as a defense against copyright infringement. Its purpose is to promote reasonable use of a copyrighted work in which an author or creator has signified through

[112] Memorandum of Law, *supra* note 37, at 11.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

his actions that the work may be used without suit.[117] An "[implied] nonexclusive license may be granted orally, or may even be implied from conduct."[118]

If an individual or entity is granted an implied license, it does not necessarily mean that there has been a transfer of ownership of the copyrighted work.[119] Instead, it acts solely as a license to use the copyrighted work without being sued for copyright infringement. A court is likely to focus on the conduct of the copyright owner; therefore, if the conduct is one which would permit a reasonable person to believe that there was an agreement, then an implied license should arise.[120]

While the implied nonexclusive license is like an implied contract and is recognizable by various jurisdictions, there are several factors that courts use with subtle variations.[121] The following factors utilized by the Ninth Circuit in *Effects Associates, Inc. v. Cohen* are not dispositive, but they help aid a court's decision in determining whether an implied license is present: (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.[122]

While courts such as the Ninth Circuit have utilized the above factors, other courts from different circuits have taken their own unique approach. For example, in *Pavlica v. Behr,*[123] the Federal District Court for the Southern District of New York presented a varied list of factors, including:

> (i) the copyright holder had knowledge of the defendant's conduct; (ii) the copyright holder's action manifesting its consent to the defendant's action was intended to be relied on, or the defendant had a right to believe it was so intended; (iii) the defendant was ignorant of the true state of the facts; and (iv) the defendant relied on the copyright holder's actions to its detriment[].[124]

---

[117] *See* Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 277 (2009) ("[T]he implied license doctrine functions as a means of allowing reasonable use of the work by one party . . . by attributing to the work's creator/copyright owner implicit consent for such use.").

[118] I.A.E., Inc. v. Shaver, 74 F.3d 768,775 (7th Cir. 1996)(internal citations omitted).

[119] *Id.*

[120] Memorandum at Law, *supra* note 37, at 13 (quoting Joe Hand Promotions, Inc. v. Maupin, No. 15 Civ. 6355, 2018 WL 2417840, at *5 (E.D.N.Y. May 25, 2018)) (internal citations omitted).

[121] *I.A.E., Inc.*, 74 F.3d at 775-76.

[122] *Id.* at 776 (citing Effects Associates, Inc. v. Cohen, 908 F.2d 555, 558-59 (9th Cir. 1990)).

[123] 397 F.Supp.2d 519,527 (S.D.N.Y. 2005).

[124] Meaghan Kent, Katherine Dearing & Danae Tinelli, *Keeping Up with Copyright Infringement: Copyright, Celebrities, Paparazzi, and Social Media*, IPWATCHDOG (Oct. 30, 2019), https://www.ipwatchdog.com/2019/10/30/keeping-copyright-infringement-copyright-

While Hadid does not run through a specific list of factors, she manages to bring up points that can be viewed from the factors set out above. Hadid's argument suggests that her physical action of posing led to the valuable picture that the paparazzi photographer then captured.[125] She further claims that her contribution is inherently the aspect of the photo that the photographer and agency seek to protect.[126]

By applying these points to the factors laid out above, celebrities may have an argument that they have an implied nonexclusive license to paparazzi shots where they posed for the camera. The Ninth Circuit states that the person must request the creation of the work.[127] Hadid made the argument that she posed for the camera.[128] By posing for the camera, a court could conclude that Hadid requested the work since one typically only poses for a camera in which they have the option to use.[129] If Hadid knew that the picture would be posted online, could it be reasonably assumed that by posing for the picture, she believed that she could use the picture when it was eventually posted online?

Once the court looks at the licensee's actions, it will then examine the licensor, which would be the copyright holder. Here, it could be argued that by taking the picture of Hadid while she posed, the photographer was "manifest[ing] [his] consent to participate in their joint artistic work."[130] The court may also seek to determine whether the copyright owner "delivered" the product to the licensee.[131] Hadid could have plausibly made the argument that by posting the picture online, specifically in a modern, fast-paced sharing environment, the photographer delivered the photograph to Hadid.[132]

While the above factors and facts are applied to Hadid's case, this same argument outlined may foreshadow future famous defendants' ability to protect themselves from copyright trolls. Though the set of facts do not perfectly fit into the implied license factors set out by the Ninth Circuit or by the Southern District of New York in *Pavlica*, we must acknowledge that this type of case has never been fully litigated before. Therefore, this issue is rather novel for courts, and so courts have not had the full opportunity to understand the relationship between implied license and modern sharing capabilities on social media.

---

celebrities-paparazzi-social-media/id=115456/ (citing Pavlica v. Behr, 397 F.Supp.2d 519, 527 (S.D.N.Y. 2005)).

125 Memorandum at Law, *supra* note 37, at 13.

126 *Id.*

127 *I.A.E., Inc.*, 74 F.3d at 776.

128 Memorandum at Law, *supra* note 37, at 13.

129 Kent, Dearing & Tinelli, *supra* note 124.

130 *Id.*

131 *Id.*

132 *Id.*

3. Conditional/Limited License

The central theme of the implied license argument, along with the fair use concept, is that the license, and Hadid's ability to use the picture on her personal Instagram account, is limited solely to Hadid's account. Under this theory, Hadid could not use the photo to advertise any commodity or encourage viewers to act. If Hadid were to make money off of the post, then her arguments would be invalidated. There is a counterargument that Hadid's personal Instagram account is worth a monetary value, which is evident by advertisers' desire to have popular accounts depict use of their products. This value is determined based on the number of followers she has, which currently stands at 52.3 million followers.[133] With that, there is no evidence, and there likely cannot be evidence that this particular post affected the worth of her Instagram account. To suggest otherwise is highly speculative, and a court has no objective way to measure the worth of her Instagram before the photo was posted. The picture was relatively mundane compared to an eccentric photo shoot that she may do for a magazine or ad campaign.

Hadid's lack of financial gain from the post is important because the photographer's suit is cemented in the idea that Hadid took value away from him while gaining value herself. To suggest either, however, is speculative at best. By granting her an implied license rooted with the condition that she may not use the picture for financial gain would permit Hadid's use of the photo and require any other agency, magazine, or website to execute a licensing agreement through Xclusive Lee, not Hadid. The agency, such as Xclusive Lee, could determine if Hadid was endorsing through the picture because there are strict rules, which require a celebrity to accompany the endorsement post with several hashtags.[134] If Hadid did not accompany the post with the hashtags, it should be assumed that she is not being paid either by Instagram or the designers she is wearing within the photo.

On the flip side, Hadid could argue that the photographer is operating off an implied license himself.[135] The photographer is taking pictures of the celebrity, and he is able to employ the photographs however he chooses. As will be discussed later in this Note, if Congress gave public figures the ability to determine

---

[133] Gigi Hadid (@gigihadid), INSTAGRAM, https://www.instagram.com/gigihadid/?hl=en (last visited Apr. 11, 2020); *see also* Jonah Waterhouse, *The 20 Highest Paid Models on Instagram*, HARPER'S BAZAAR (Oct. 16, 2018, 12:59AM), https://www.harpersbazaar.com.au/fashion/highest-paid-instagram-models-17508 (suggesting that Gigi Hadid makes $300,000 per paid Instagram post).

[134] *See* Seija Rankin, How Celebrities Really Make Money on Instagram: Behind the Secret World of Social Media Sponsorship, E News (June 30, 2016 9:00AM), https://www.eonline.com/news/776628/how-celebrities-really-make-money-on-instagram-behind-the-secret-world-of-social-media-sponsorship ("There are several hashtags that come along with these big-money post, and A-listers need to use at least one of them.").

[135] *But see* Tehranian, *supra* note 75, at 1335 ("This would create a significant First Amendment problem, especially for individuals who are involved in matters of public interest but, for whatever reason, would rather not receive any press coverage.").

what pictures are taken, constitutional questions would arise.[136] While constitutional questions are not discussed in detail within this Note, it is necessary to distinguish a veto of all paparazzi pictures and the request for an implied license to post non-commercial pictures on a personal social media account. Under this approach, Hadid would likely not assert that she must approve every photographer's picture before it is sold to agencies and tabloids; rather, it is more likely that she would request the ability to post a picture of herself on her account for the purpose of interacting with her fans.

4. Joint Author/Co-Authorship

The Copyright Act defines a "joint work" 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."[137] This definition is the only source that courts may look to when determining whether two separate individuals have rights to a work. This is mostly due to the Copyright Act's lack of definition regarding an "author."[138] A majority of courts have declared that authorship necessitates more than mere creative contribution.[139] In fact, "[t]he author must have 'superintended the whole work,' served as the inventive mastermind and created the work by translating the idea into a fixed, tangible medium of expression."[140]

On its face, the above definitions would seemingly support the photographer since the photographer is likely considered the "inventive mastermind" over the celebrity.[141] But viewed differently, it is arguable that the celebrity's contribution is just as valuable as the click of the button. In reality, "[p]ersons other than the photographer can certainly have authorship rights in a photograph, based on their original contributions."[142] The main focus of the joint authors' work is the control behind the decisions.[143] Here, Hadid presented control over the picture through her conduct of posing. On top of contributing "independently

---

[136] *Id.* ("A reversal of this policy, which would be tantamount to empowering a performer veto, would have far-reaching consequences.").

[137] 17 U.S.C. §101 (2012).

[138] Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000) ("The Copyright Act does not define 'author,' but it does define 'joint work'[.]").

[139] Sammataro, *supra* note 58.

[140] *Id.*

[141] *Id.*

[142] Gillespie v. AST Sportswear, Inc., No. 97 Civ.1911(PKL), 2001 U.S. Dist. WL 180147, at *6 (S.D.N.Y. Feb. 22, 2001).

[143] *See id.* ("Thus, a person need not hold the camera or push a button to be considered the author of a visual work, since one can exercise control over the content of a work without holding the camera.") (citing Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, No. 97 Civ. 9248, 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999)).

copyrightable" material, a potential joint author may only be required to simply contribute "some minimal degree of creativity."[144]

Though Hadid did not make the co-authorship argument, she could have asserted that she completed this requirement regarding minimal creativity through her decision to pose when she could have hidden her face and prevented the photographer from getting a valuable photo in the first place.[145] Courts may also look to audience appeal when examining joint authorship. Hadid's fans would clearly be interested in the picture if they are followers on her Instagram.[146]

If the jurisdiction in question focuses more on the "independent copyrightable contribution" rather than the contribution of creativity, then the court would have to determine whether a pose is copyrightable.[147] Admittedly, a court would not likely find that throwing up a peace sign while walking out of a building is copyrightable. In fact, there is case law that holds poses, such as yoga poses, are not copyrightable; therefore, it can be assumed that this would be likened to an even more offhand pose like walking out of a building.[148] With that, a celebrity should argue that her creative decisions regarding her wardrobe and the express decision to stop and pose for the photographer weigh more heavily than the need to also contribute something "independently copyrightable."

5. Protection of Celebrity Likeness

To reiterate, this Note does not give an in-depth analysis towards constitutional arguments; therefore, a celebrity's likeness compared to the press' right to publicize their work is not the main issue in this argument. Rather, the purpose of considering a celebrity's desire to protect her likeness is to give substance as to why a celebrity would want the ability to use the pictures discussed here. Though the courts have not permitted celebrities in the past to trademark their likeness,[149] this could change as technology and the social media landscape changes.

Typically, "[a] violation of the right of publicity occurs when a person's identity is used without consent, and that use is likely to cause injury."[150] Most celebrities would not bring this kind of action towards the photographer because they

---

144 Sammataro, *supra* note 58.

145 *See id.* ("Yet, she was not without control in the broader sense. She could have hurriedly buried her head. . .thus controlling whether the photographer had any opportunity to snap a valuable photo in the first place.").

146 *Id.* ("Under California (but not New York) law, the court also considers audience appeal in determining joint authorship analysis.").

147 Kent, Dearing & Tinelli, *supra* note 124.

148 *Id.*

149 Matt Whibley, *Celebrity and Trademark: Why Courts Should Recognize A Celebrity-Likeness-Mark*, 43 SW. L. REV. 121, 127 (2013) (" . . . 'there cannot be such an amorphous thing as a 'trademark' in a person's likeness which is infringed by another image of that person.'").

150 *Id.* at 123.

are not likely to use the picture to "cause injury" to the celebrity. That job will likely be given to the tabloids and blogs in which that photograph may accompany. While a celebrity may attempt to suggest that gossip magazines are often committing defamation, this is typically not a winning argument for the celebrity.[151] Further, celebrity likeness issues are not so relevant to the copyright dilemma between the celebrity and photographer, but it adds to the underlying hostility towards paparazzi as a collective group. It can also be used as a counterclaim against the copyright troll, but previous cases have also been settled outside of court;[152] therefore, it is not determinative whether this would work against a copyright troll.[153]

Overall, celebrities do have an interest in controlling the way they are perceived in the public. While many cannot control the gossip magazines, they have other ways of expanding and controlling their brands. One way of doing this is by directly interacting with their following through their social media, and this may include utilizing pictures that are taken of them where they have contributed to the work. If a celebrity is to employ this perspective of celebrity likeness protection in his or her argument, then he or she will have to tread carefully so as not to undermine a fair use argument. This dilemma will be discussed further below. Celebrities, like other protected entities, have an incentive to pursue all options available to them when promoting or protecting their brand.

B. POTENTIAL PUSHBACK

While any potential solution will have pushback from a variety of sources, it is important to consider how other parties may be affected if courts were to give celebrities and public figures this ability to post pictures of themselves, whether through fair use, implied licenses, or joint authorship theories. Throughout all of these defenses, the paparazzi member is likely to argue that these defenses condone copyright infringement. The paparazzi may also suggest that this would cause more litigation, blur lines, and undermine the Copyright Act as a whole.

Although these suggestions are not without some merit, courts should nevertheless find in favor of defendants asserting either a fair use, implied license, joint-authorship, or similar defense. First, the above defenses are not undermining copyright law; rather, these defenses recognize that social media norms demand recognition in the law. Further, from a theoretical perspective, it does not seem too attenuated to suggest that the public figure who permitted the photographer to get a shot would want to use the picture for personal reasons outside

---

151 *See* Leslie Gornstein, *Why Don't We Hear More About Celebs Suing Tabloids?*, EONLINE (Aug. 19, 2006), https://www.eonline.com/news/58182/why-don-t-we-hear-more-about-celebs-suing-tabloids (discussing celebrities' heightened burden of proving these types of cases and the litigation costs associated with these cases).

152 Kent, Dearing & Tinelli, *supra* note 124 ("A right of publicity counterclaim has also been used to combat these paparazzi lawsuits.").

153 *Id.*

of monetary gain. In terms of the implied license defense, critics have raised concerns that this would give celebrities the power to veto any and all pictures.[154] The same critics also suggest that the contribution theory may permit every person the ability to claim they contributed to the photo (e.g., the model's publicist or perhaps the fashion designer herself).[155] This is not necessarily true because it is not a matter of owning the copyright. If Hadid's argument is examined, one will see that she simply wants to be able to post the picture for non-economic reasons. While this piece discusses celebrity likeness to give context, a celebrity is not likely to attempt to utilize that theory to veto pictures. The argument that the above defenses will subvert copyright law by giving the subject of a photograph total control mischaracterizes the purpose of these defenses. In Hadid's case, she was not attempting to remove the picture; she merely wanted to post it. In copyright trolling cases such as the one Hadid has found herself mixed up in, it appears that the dog is biting the hand that feeds it when the agency sues the figure that helps the agency make money in the first place.

Overall, critics' apprehension to give celebrities permission to post photos without an express license is valid. Without taking into account the evolving market mixed with the background of paparazzi culture, it would seem as though celebrities like Hadid want to disregard the photographer's rights for the sake of their own gain. While facially this may look like the case, this is not so. There is a solution to this issue and there is an ability for both sides to ensure they come out as winners. Paparazzi can still be paid without copyright trolling celebrities for innocent uses of photos they have intentionally posed in.

C. TO AMEND OR NOT TO AMEND (THE COPYRIGHT ACT OF 1976 THAT IS)?

The current Copyright Act was a great feat because it enabled authors and creators to safely publish works without hesitation.[156] Nevertheless, the statute is not perfect and could use some important, if not critical, revisions. Because this version of the Copyright Act was not enacted with the new digital age in mind, it is time to update the terms, provide clarity to authors and users, and incorporate current issues within the confines of the Act.[157] The hope is that an

---

154 John Tehranian, *supra* note 75, at 1335.

155 *See id.* at 1336 ("'[C]opyright cherry picking,' which would enable any contributor from a costume designer down to an extra or best boy to claim copyright in random bits and pieces of a unitary motion picture without satisfying the requirements of the Copyright Act.") (quoting Garcia v. Google, Inc. (Garcia II), 786 F.3d 733, 737 (9th Cir. 2015)).

156 *See The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) (Statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office), available at https://www.copyright.gov/regstat/2013/regstat03202013.html. ("It took over two decades to negotiate, and was drafted to address analog issues and to bring the United States into better harmony with international standards, namely the Berne Convention.").

157 *See id.* ("I think it is time for Congress to think about the next great Copyright Act, which will need to be more forward thinking and flexible than before.").

update could continue to provide broad protection while simultaneously alleviating litigation between parties.

As discussed earlier, a revised copyright act could include a new definition for "author." Because social media has created situations that give rise to cases such as Hadid's, a written, yet flexible definition could help courts navigate future confusion. Furthermore, while the statute gives a definition of "joint author," this does not help solve the underlying definition of the singular individual. Is an "author" only someone who physically takes the picture? Is the "author" an individual who permits the artwork to be created in the first place? These are the types of questions the legislature will have to grapple with in order to create a definition that incentivizes creators to continue their work while also acknowledging the social media era.

Another question to consider is this: Does the revised Copyright Act continue to use the same form of fair use elements? In a modern world, individuals no longer need physical copies of works.[158] Instead, they have all of the information at their fingertips through digital formats, and they can quickly share, repost, or screenshot the information and post it to their own feed. As seen in Hadid's case and other fair use copyright actions regarding social media, the amount and substantiality of the portion used is typically always in favor of the original license holder. Would it be better to differentiate between fair use factors for physical works (books, artwork, sculptures) and digital media? There are issues that come with this proposal along with continuing in the current fair use factors.

Additionally, it is also helpful to examine whether it would benefit consumers and creators to create an implied license section in a revised version of the Copyright Act. While rooted in contract law, it could be beneficial to create a section describing an implied license in the Copyright Act itself. The purpose of the fair use factors is to better society by allowing individuals to study, comment, and critique the work.[159] Implied license could also hold this same purpose.

Generally, it would not be said that the current Copyright Act should be totally scrapped. Rather, Congress can keep the framework of the current copyright laws and incorporate digital age technology along with social media norms within the statute.[160] As it stands currently, the Copyright Act is too narrow and inflexible, which means that a statute not considering social media and advanced digital technology will further stifle growth for all parties.[161]

---

158 *Id.*

159 *See* 17 U.S.C. § 107 (2012).

160 *See The Register's Call for Updates to U.S. Copyright Law*, *supra* note 155 (Statement of Maria A. Pallante)("Congress does not need to start from scratch, as it has already laid the groundwork for many core issues.").

161 *Cf. id.* ("[C]onstituents want the Copyright Office to do better the things it already does, and to do a host of new things to help make the copyright law more functional—from administering a small copyright claims tribunal to offering arbitration or mediation services to issuing advisory opinions.").

D. A LOOK INTO THE FUTURE: HOW PAPARAZZI CAN EVOLVE

Members of the paparazzi are likely to argue that the defenses set out above will bring an end to their profession. With the shifting of the social media market along with a growth in technology, it is clear that paparazzi are fighting an uphill battle in keeping their profession relevant. Although bringing copyright infringement actions against celebrities can help to bring in additional income, it would serve the profession better to consider ways to make money outside of the courtroom.

Celebrities, like Kim Kardashian, have started hiring their own photographers—their own personal paparazzi.[162] By doing this, Kim Kardashian no longer has to contact an agency in order to post the photo. Instead, she has signed an agreement with the individual photographer giving her rights to all photos in consideration of the money she pays the photographer. Further, her fans and the fan accounts can post the photo without fear of suit, especially when Kardashian has given her fans the express permission to do exactly that.[163] Kardashian also instructed her followers to not post photos that were not expressly from her in order for her fans to avoid litigation threats from the same agencies bringing suit against celebrities.[164]

In addition to circumventing the licensing process with photographer agencies, Kardashian also has the ability to control what the images look like. This ability to control the photos lends itself to the protection of the celebrity's likeness and brand because he or she can dictate what the pictures look like before they are released via the celebrity's social media. Moreover, it is unknown whether Kardashian is selling these photos to the magazines and blogs herself through this hired photographer, but this would be an option to other celebrities that hire their own photographers.

This new business model would be the best situation for all parties involved, except the agencies employing photographers because individuals can be freelance rather than work for a company. In this model, celebrities get the protection of their brand, the freedom to post without anticipation of litigation, and the ability to permit fan accounts to repost the pictures without being sued. Celebrities like fan accounts, for the most part, because this is a way for fans to interact with a celebrity, plus it is more recognition for the celeb.

Individual photographers will also prosper in this model because they will likely be able to charge more and earn a steady income as compared to selling to agencies. This is likely true because a photographer can charge for giving up the license to sell to agencies, the costs for personally following the celeb, and the

---

162 Lucie Clark, *Kim Kardashian West Now Has Her Own Personal Paparazzo*, VOGUE (Feb. 7, 2019), https://www.vogue.com.au/celebrity/news/kim-kardashian-west-now-has-her-own-personal-paparazzo/news-story/53af3bdaafe1a508dddf33047711933a.

163 *Id.*

164 *Id.*

cost for editing if so required by the terms of the contract. A counter argument to the advancement of the individual photographer is that agencies are willing to pay big bucks when the photographer takes a photo of a celebrity in a scandalous moment. If a photographer is working for a celebrity, he will not be allowed to post or sell these photos assuming the contract stipulates full control on the part of the celebrity. But while a photographer may not be able to sell scandalous photos for a high profit under this model, the steady stream of income generated from their arrangement with a celebrity is likely more lucrative in the long-run; this is because there is no guarantee that a member of the paparazzi will ever catch a celebrity in a compromising position. Thus, the proposed model is likely to work better for both parties involved than the current model.

In sum, all parties involved must look to the evolution of the field in order to thrive in an ever-growing market. With new social media outlets expanding and shifting to meet consumer needs, the role of the paparazzi will shift along with it. While becoming a celebrity's personal paparazzi may not be the exhilarating, fast-paced environment it used to be at the inception of paparazzi culture, it would allow the continuation of income, which is likely what photographers in the paparazzi field are most concerned about.

IV. CONCLUSION

In the span of beginning this paper to now, multiple suits have been filed against celebrities by paparazzi or agencies for the very same act that led Hadid to litigation.[165] Because the current Copyright Act does not directly address social media issues, copyright trolls will continue to use the courts and the ambiguities of the Copyright Act to their advantage. While it is of immense importance to protect creators and authors, such as paparazzi, it is also crucial to recognize the contributions made by public figures.

Gigi Hadid is not the first, and clearly not the last celebrity to go toe-to-toe with a paparazzi agency; therefore, it is important for courts to prepare for future cases. In order to create precedent, it will take more than one brave celebrity like Hadid to continue the litigation, rather than settle. In the meantime, however, Congress has the ability to discuss potential solutions to a problem which is surely to grow. Social media is expanding, and it does not seem like that is slowing down. But if Congress is unwilling to act, then the paparazzi have the ability to adapt to the new age of social media themselves by changing their current business model and ceasing from filing frivolous lawsuits. Regardless of whether the Copyright Act is amended or the paparazzi change their business model, both

[165] *See* Tatiana Cirisano, *Justin Bieber Quickly Settles Copyright Lawsuit Over Paparazzi Photo*, BILLBOARD (Oct. 22, 2019), https://www.billboard.com/articles/business/8533732/justin-bieber-settles-copyright-lawsuit-paparazzi-photo-instagram; *see also* Maria Puente, *Jennifer Lopez Sued by Paparazzi Agency for Copyright Infringement*, USATODAY (Oct. 7, 2019), https://www.usatoday.com/story/entertainment/celebrities/2019/10/07/jennifer-lopez-sued-paparazzi-copyright-infringement/3900908002/.

photographers and celebrities alike must face the realities of an ever-growing technological culture. That way, the next celebrity who feels cute does not have to delete later.