MODIFYING CO-AUTHORSHIP FOR THE DIGITAL AGE: PAPARAZZI PHOTOGRAPHS AS JOINT WORKS

*Kelley Bregenzer**

ABSTRACT

Fame and photography: the two go hand in hand. Celebrities and the press, more specifically, paparazzi, have always maintained a mutually beneficial—if often unpleasant—relationship. But the rise of social media has given celebrities more control over their image and dented the once prosperous paparazzi industry. Celebrities often share images of themselves taken by the paparazzi on their own social media accounts without licensing the photos from the photographers—who have long been recognized as the rightful authors of a photograph under federal copyright law. In the last few years, paparazzi photographers have begun to file copyright infringement claims against celebrities, fashion designers, and public relations firms for sharing unlicensed images on social media. Most of these cases have settled out of court, but celebrities, backed by the public, are starting to fight back.

This Note proposes a modified interpretation of joint work under the Copyright Act of 1976 that would let a photographer retain the exclusive rights to own and transfer her photography while also granting celebrities a right to use the images on social media. This modified application of co-authorship draws inspiration from the incidental use doctrine recognized in the right to publicity.

Strict interpretations of authorship traditionally implemented in copyright law do not always make sense in the digital space. Every day, millions of unlicensed images are uploaded, shared, and re-shared on social media platforms. A modified view of joint work applied to

* J.D. Candidate, 2021, Drexel University Thomas R. Kline School of Law. I would like to thank my Note advisor, Professor Amy Landers, for sharing my enthusiasm for this topic, my family and friends for the unconditional support, and my classmates for their generous feedback. I would also like to thank the members of *Drexel Law Review* for their hard work.

celebrity-paparazzi cases could begin to bridge the vast chasm between the realities of twenty-first century communication and the ideals of copyright protection.

TABLE OF CONTENTS

INTRODUCTION

Gigi Hadid, a well-known fashion model, is no stranger to paparazzi-related lawsuits. But the well-traveled model is not suing paparazzi for trespass or harassment; no, Hadid—accompanied by a bevy of other celebrities—repeatedly finds herself on the receiving end of copyright infringement complaints.[1] To date, Hadid has been sued three separate times for sharing photographs of herself—taken by paparazzi photographers—to her social media accounts without license or permission.[2] When photo agency Xclusive-Lee, Inc. sought

1. *Gigi Hadid Is Being Sued for a Third Time for Posting Another's Photo on Her Instagram*, FASHION L. (Sept. 13, 2019), https://www.thefashionlaw.com/home/gigi-hadid-is-being-sued-for-a-third-time-for-posting-anothers-photo-on-her-instagram.

2. *Id.*

damages for copyright infringement after Hadid shared a photo of herself on her Instagram account, the case was eventually dismissed because Xclusive-Lee failed to secure the official copyright for the photo in time.[3] Despite prevailing on this technicality, Hadid's attorneys appeared ready to go the distance. In arguing that Hadid's sharing of the photo constituted fair use, counsel pointed to Hadid's contributions to the photo, including her pose, her decision to stop and smile for the photographers, her clothing, and her fame.[4] Indeed, it seems that a photographer's famous subject contributes significantly to the artistic work of a photograph, suggesting the *subject* is a "joint author."

Xclusive-Lee's suit puts the photo agency on a growing list of paparazzi taking legal action against celebrities and fashion brands for sharing their unlicensed photography on social media.[5] In the last few years alone, photographers or their representative agencies brought copyright complaints against the likes of Jennifer Lopez, Khloé Kardashian, and NFL star Odell Beckham Jr. for sharing photographs of themselves online without permission from the owners of the photographs.[6]

Generally, these paparazzi-initiated suits have been transient: very few cases have been tested in court, with most instances ending in settlement or dismissal.[7] But, the subjects of paparazzi

3. Xclusive-Lee, Inc. v. Hadid, No. 19-CV-520, 2019 U.S. Dist. LEXIS 119868, at *4–5, *8 (E.D.N.Y July 18, 2019); Paige Leskin, *The Copyright Lawsuit Accusing Gigi Hadid of Posting a Paparazzi Photo She Didn't Have the Rights to Has Been Thrown Out*, BUS. INSIDER (July 18, 2019, 4:29 PM), https://www.businessinsider.com/gigi-hadid-copyright-infringement-lawsuit-over-instagram-paparazzi-photo-dismissed-2019-7.

4. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 9–10, 12, *Xclusive-Lee, Inc.*, 2019 U.S. Dist. LEXIS 119868.

5. *See* Kelly-Leigh Cooper, *Why Celebrities Are Being Sued Over Images of Themselves*, BBC (Feb. 6, 2019), https://www.bbc.com/news/world-us-canada-47128788 (reporting on multiple lawsuits filed by photographers against various celebrities).

6. *See id.*

7. *See id.* For example, New York–based photographer Felipe Ramales voluntarily dismissed his copyright infringement suit against former Spice-Girl-turned-fashion-designer Victoria Beckham just one day after filing it. *See generally* Complaint, Ramales v. Victoria Beckham Inc., No. 1:19-cv-08650 (S.D.N.Y. Sept. 17, 2019); Notice of Voluntary Dismissal, *Ramales*, No. 1:19-cv-08650 (Sept. 18, 2019).

photos are starting to defend themselves.[8] After all, celebrities put a tremendous amount of work—not to mention money—into cultivating, maintaining, and promoting their image.[9] Notions of fairness, creativity, and profitability would seem to dictate that they, too, deserve some leeway to use photographs featuring themselves. It is time for the federal courts that exercise jurisdiction over copyright infringement claims to come to terms with the complex realities of online image-sharing and the changing perceptions of authorship and ownership in the internet age.[10] The recent slew of paparazzi-versus-public-figure lawsuits present the courts with an opportunity to fashion a workable solution to address these realities. This Note argues that should any of these lawsuits proceed past the pleading stage, courts should apply a modified co-authorship analysis, which maintains photographers' exclusive rights to own and transfer their photography while also granting celebrities a right to use the images on social media.[11]

The ubiquity of social media raises questions of "joint authorship" for *many* online creators and figures. For example, photographers have successfully rallied social media sites to

8. Odell Beckham Jr. filed suit against Splash News and Picture Agency, LLC, after the agency purchased photos of Beckham at his personal residence taken by photographer Miles Diggs. *See generally* Complaint for Declaratory Relief and Damages, Beckham v. Splash News & Picture Agency, LLC, No. 18-cv-1001 (E.D. La. Feb. 1, 2018). Beckham Jr., who was recovering from ankle surgery, shared a photo taken by Diggs on his Instagram account. *Id.* When Splash News sent a demand letter to Beckham Jr. alleging copyright infringement and demanded $40,000 as settlement, Beckham Jr. filed a complaint alleging intrusion of solitude, public disclosure of private facts, appropriation of likeness, and seeking a declaratory judgment relieving Beckham of liability for infringement. *Id.*

9. See generally SHARON MARCUS, THE DRAMA OF CELEBRITY (2019), for an exhaustive look at the production of fame. Marcus sees fame as a complex concept manufactured and maintained by celebrities, media, and the public. Her book examines various tactics employed by both modern and former celebrities to exercise control over their public image. *Id.* See also *Why Being a Celebrity Is Big Business*, KNOWLEDGE@WHARTON (Sept. 19, 2019), https://knowledge.wharton.upenn.edu/article/celebrity-culture-big-business, for audio and a transcript of Marcus discussing her book on the Knowledge@Warton Podcast.

10. *See* Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1040–41, 1047–49 (2017).

11. *See infra* Part IV.

suspend fan accounts,[12] which are social media accounts carefully curated and obsessively monitored by fans of a particular celebrity, show, musician, etc. Similarly, fashion photographers circulated a #NoFreePhotos hashtag on Twitter in 2017, lamenting the fact that the subjects of their photos—"street-style" influencers—were sharing the photographers' images online.[13] Social media influencers[14] and street-style bloggers may be more likely than their celebrity counterparts to lack the resources to defend litigation,[15] but they produce artistic and valuable work nonetheless. Celebrities have the means and influence to question the norms associated with copyrighted photography and the realities of content sharing on the web.[16] A significant push on their end has the potential to reframe the discussion of joint authorship, which could further impact lesser-known internet entrepreneurs.[17]

12. *See* France Svistovski, *Has Copyright Infringement Gone Viral: A Look at Celebrities, the Paparazzi, & Fan Accounts*, FORDHAM INTELL. PROP. MEDIA & ENT. L. J.: BLOG (Feb. 11, 2019), http://www.fordhamiplj.org/2019/02/11/has-copyright-infringement-gone-viral-a-look-at-celebrities-the-paparazzi-fan-accounts.

13. Elizabeth Paton, *Street-Style Photographers Unite To Proclaim #NoFreePhotos*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/fashion/milan-fashion-week-street-style-photographers.html.

14. *See generally What Is an Influencer?*, INFLUENCER MKTG. HUB, https://influencermarketinghub.com/what-is-an-influencer/ (Oct. 15, 2020) (explaining what a "social media influencer" is).

15. The average salary of an "influencer" ranges from $30,000 to $100,000. Audrey Conklin, *How Much Money Do Social Media Influencers Make*, FOX BUS. (Mar. 11, 2020), https://www.foxbusiness.com/lifestyle/social-media-influencer-pay. Meanwhile, the average cost of copyright litigation can run between $415,000 to $710,000, depending on whether the case goes to trial. Thomas F. Nowland, *How Much Does an Intellectual Property Lawsuit Cost?*, NOWLAND L. (Feb. 22, 2020), https://www.nowlandlaw.com/how-much-does-an-intellectual-property-lawsuit-cost/. Gigi Hadid, on the other hand, earns an average of $9.5 million per year. *See* Natalie Robehmed, *Highest-Paid Models: 2018 Kendall Jenner Leads with $22.5 Million*, FORBES (Dec. 13, 2018, 9:45 AM), https://www.forbes.com/sites/natalierobehmed/2018/12/13/highest-paid-models-2018-kendall-jenner-leads-with-22-5-million/#6bc24f593ddf.

16. *See* Robehmed, *supra* note 15; *see also* Mary Hanbury, *The 35 Celebrities and Athletes Who Make the Most Money per Instagram Post, Ranked*, INSIDER (July 23, 2019, 8:27 AM), https://www.insider.com/kylie-jenner-ariana-grande-beyonce-instagrams-biggest-earners-2019-2019-7 (listing the celebrities who are paid in excess of six figures per each Instagram post).

17. Neel Chatterjee, a partner at Goodwin Procter who specializes in high-profile intellectual property conflicts, stated, "[i]t's going to take someone like a Kardashian who has tons of money . . . litigating these questions. It very well may take someone like that to actually fight this stuff." Cooper, *supra* note 5.

This Note argues that in certain instances, celebrities should share a modified version of joint authorship of paparazzi photos with the photographers themselves, and as such, the subjects of these photos should be afforded the chance to prevail in judgment against photographers who bring suits against them for sharing the resulting images online. Part I examines the current state of affairs, looking at the eruption of online copyright infringement suits filed against celebrities and major brands within the past few years. Part II discusses the development of modern co-authorship under the Copyright Act of 1976. Part III illustrates the need for a form of co-authorship between paparazzi photographers and their photo subjects by examining the business of fame and the realities of online content sharing. Part IV proposes a switch back to a broader interpretation of joint work and suggests a limited form of co-authorship inspired by the incidental use doctrine seen in the right of publicity. Finally, Part V looks at the possible effects a successful defense of co-authorship could have on less-famous internet entrepreneurs, fashion brands, the public relations industry, and the public at large.

I. FLASHBULBS AND LAWSUITS: THE BATTLE FOR CREATIVE CONTROL

For years, paparazzi and their photo subjects engaged in an often contentious, symbiotic relationship.[18] Photographers fed a public hungry for a glimpse behind the carefully orchestrated glamour of Hollywood[19]—and were paid handsomely for it.[20]

18. *See* Andrew Mendelson, *Why Paparazzi Are Good for Us*, TIME (June 27, 2014), https://time.com/3810226/ (characterizing the relationship among celebrities and paparazzi as an "ongoing struggle" between an invasion of privacy and control of self-image).

19. *Id.*

20. *See* Claudia Rosenbaum, *How the Fast Times of the Paparazzi Came to a Screeching Halt*, BUZZFEED NEWS (Oct. 15, 2015, 5:08 PM) [hereinafter Rosenbaum (2015)], https://www.buzzfeednews.com/article/claudiarosenbaum/downfall-of-the-paparazzi.

Celebrities relied on photographers for press and exposure.[21] While some may find the public's fascination with fame and wealth uncomfortable, the fascination and its cultural impact pervades nonetheless.[22]

The proliferation of social media offered celebrities and the brands who sought them as spokespersons greater control over their own narratives, and in doing so, dealt a major blow to the paparazzi industry.[23] Industry experts speculate that financial hardships play a role in the spike of photo agency lawsuits against celebrities and brands for copyright infringement.[24] For instance, celebrity photographer Giles Harrison stated, "I personally believe that the agencies are making so little money on directly selling the images to people that they have to resort to essentially shaking down celebrities to make money."[25]

Since 2017, photographers and photo agencies have initiated more than twenty suits against celebrities, brands, and communications agencies.[26] The list includes famous defendants such as 50 Cent, Jessica Simpson,[27] and Ariana Grande.[28] Many of the suits follow the same general pattern: celebrity posts photographer's photo (featuring themselves) on social media without permission; photographer files suit for

21. *See* Christina Anderson, *Are the Paparazzi Just Doing Their Job, or Are They Overstepping Their Boundaries*?, HUFFPOST (Jan. 16, 2013, 12:02 PM), https://www.huffpost.com/entry/paparazzi-boundaries_n_2473951.

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

23. *See* Rosenbaum (2015), *supra* note 20.

24. Claudia Rosenbaum, *Celebrities Are Being Sued for Posting Paparazzi Photos of Themselves on Social Media*, BUZZFEED NEWS (Dec. 26, 2018, 6:06 PM) [hereinafter Rosenbaum (2018)], https://www.buzzfeednews.com/article/claudiarosenbaum/celebrities-sued-paparazzi-photos-social-media.

25. *Id.*

26. *From Bella and Gigi Hadid and Goop to Virgil Abloh: A Running List of Paparazzi Copyright Suits*, FASHION L. (Feb. 21, 2020) [hereinafter *A Running List*], https://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits/.

27. Rosenbaum (2018), *supra* note 24.

28. Legal Ent. Contributor, *Ariana Grande Hit with Lawsuit for Posting Paparazzi Photo of Herself*, FORBES (May 14, 2019, 8:38 PM), https://www.forbes.com/sites/legalentertainment/2019/05/14/ariana-grande-hit-with-lawsuit-for-posting-paparazzi-photo-of-herself/.

copyright infringement; the parties settle out of court.[29] While few celebrities have fought back legally, several have voiced their displeasure with the current trend of litigation. Kim Kardashian West, for example, informed her fans via Twitter that she hired her own photographer to take pictures while she was out and that unless otherwise noted, she owned all the photography on her social media accounts.[30] No stranger to social media,[31] Kardashian West offered a realistic take on the nature of image sharing on social platforms: "Btw since the paparazzi agencies won't allow the fans to repost, all of my pics are taken by my own photog and you guys can always repost whatever you want."[32]

Gigi Hadid, for her part, doesn't appear to be caving to the paparazzi's legal threats.[33] On the heels of her legal battle with Xclusive-Lee,[34] Hadid noted that the embattled photograph taken by Xclusive-Lee's photographer was captured as she left a work-related event and that she decided to stop, smile, and pose for the photo because she understood doing so to be part of her job, remarking that the event was an "appropriate" one for press attendance.[35] After noting that most of her experiences with paparazzi have not been consensual and elaborating on the mental and physical dangers paparazzi culture presents,

29. *A Running List, supra* note 26; *see also* Rosenbaum (2018), *supra* note 24.

30. Kim Kardashian West (@KimKardashian), TWITTER (Feb. 6, 2019, 9:59 PM), https://twitter.com/KimKardashian/status/1093343487335059458.

31. *See* Natalie Robehmed, *Kim Kardashian West, Mobile Mogul: The Forbes Cover Story*, FORBES (July 11, 2016, 9:50 AM), https://www.forbes.com/sites/natalierobehmed/2016/07/11/kim-kardashian-mobile-mogul-the-forbes-cover-story/.

32. Kardashian West, *supra* note 30.

33. *See supra* text accompanying notes 1–5. On September 13, 2019, another lawsuit was brought against Hadid, this time by photographer Robert O'Neil who sued Hadid for sharing an unlicensed photo of singer Zayn Malik on her Instagram story. Complaint at ¶¶ 1, 11, O'Neil v. Hadid, No. 19-cv-8522 (S.D.N.Y. Sept. 13, 2019). O'Neil voluntarily dismissed the Complaint after both parties reached an agreement. Notice of Voluntary Dismissal, *O'Neil*, No. 19-cv-08522 (Jan. 2, 2020).

34. *See supra* notes 1–3 and accompanying text.

35. Gigi Hadid (@gigihadid), INSTAGRAM (Oct. 18, 2018), https://www.instagram.com/p/BpF_uK_nivH/.

Hadid explained that she herself found the photo in question on Twitter without any attribution.[36]

Like Kardashian West, Hadid's words illustrate the nature of image sharing online:

> [F]or someone to take a situation where I was trying to be open, and sue me for a photo I FOUND ON TWITTER . . . for a photo he has already been paid for by whatever outlet put it on online . . . is absurd. I had no way of knowing which of the 15+ photographers outside that day took these exact photos . . . . [T]o all the fans who are getting their accounts taken down or being sued themselves, please know that if I could help more I would, and I think about you all the time.[37]

Strict adherence to narrow conceptions of authorship can sometimes lead to counterintuitive results. "I have to license my own image which blows my mind,"[38] Khloé Kardashian tweeted after settling out of court with the photographer who captured a photo of Kardashian while out in public, which she later shared on her Instagram account. "They can legally stalk me and harass me and then on top of it all I can't even use the pictures of myself they take LOL . . . ."[39] Neel Chatterjee, a partner at Goodwin Procter[40] who specializes in high-profile intellectual property conflicts, offered some legal credence to Kardashian's words:

> It's just one of those things that offends common sense . . . . If someone's harassing me and takes a photograph of me and I happen to like the picture

36. *Id.*

37. *Id.*

38. Khloé Kardashian (@KhloeKardashian), TWITTER (Aug. 19, 2018, 6:23 PM), https://twitter.com/khloekardashian/status/1031305587869372416.

39. Khloé Kardashian (@KhloeKardashian), TWITTER (Aug. 19, 2018, 6:13 PM), https://twitter.com/khloekardashian/status/1031303111543934976.

40. *Neel Chatterjee*, GOODWIN, https://www.goodwinlaw.com/professionals/c/chatterjee-neel (last visited Dec. 29, 2020).

> and want to make use of it, after they harassed me and made money from me—now they can sue me for that?[41]

Traditional applications of copyright law, however, protect not only photographers' right to take photos of celebrities while out in public but also their full-ownership rights (or their parent company's contractual ownership right) to the resulting photos.[42] In practice, though, copyright law has failed to keep pace with the proliferation of social media and courts have provided only vague and oft-impractical guidance on the complexities of applying intellectual property principles to the digital space.[43] The nature of online communication promotes sharing and re-sharing.[44] So it follows that courts may need to approach questions of online intellectual property with a more functionalist, rather than formalist, lens.[45]

Perhaps wealthy celebrities—who can likely afford to license photography or hire their own photographers—don't command much sympathy for "stealing" intellectual property. However, these prominent figures might just be the well-suited warriors necessary to more closely align copyright jurisprudence with the realities of content-sharing in the digital sphere.

As both Kardashian West and Hadid referenced, so-called "fan accounts" have become another target for paparazzi ire.[46] Photographers have successfully petitioned the various social media platforms to suspend user accounts dedicated to

41. Cooper, *supra* note 5.

42. *See* The Copyright Act of 1976, 17 U.S.C. §§ 102(a)(5), 201(a); *see also* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (noting the expansiveness of material the public considers "newsworthy" and is thus subject to First Amendment protection and confirming the freedom of the press to report on private individuals upon public exposure).

43. Daniel Doft, *Facebook, Twitter, and the Wild West of IP Enforcement on Social Media: Weighing the Merits of a Uniform Dispute Resolution Policy*, 49 J. MARSHALL L. REV. 959, 1001 (2016).

44. Levinson, *supra* note 10, at 1040–42, 1044–45.

45. *See* Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J. L. & TECH. 469, 470–71 (2015) (exploring the idea that the methods of statutory interpretation employed by judges overseeing copyright cases often play a crucial role in the outcome of a case).

46. *See* Svistovski, *supra* note 12.

curating often copyright-protected photos of their favorite celebrities.[47]

Individuals are not the sole targets of recent paparazzi lawsuits; photographers and photo agencies have set sights on major fashion labels and public relations firms as well.[48] For example, paparazzo Robert Barbera filed suit against Mode Public Relations in the Southern District of New York on September 17, 2019, after the PR agency shared a photo of Bella Hadid (Gigi Hadid's sister, also an influential fashion model) on Mode's Instagram account.[49] The photo features Hadid strutting down what appears to be a city sidewalk at night, bright lights in the distance, wearing sunglasses.[50] Hadid sports a sweater from the New York–based womenswear brand Hesperios.[51] Mode captioned the photo "I wear my sunglasses at night (also @hesperios)," tagging the Hesperios Instagram account.[52] On its website, Mode lists Hesperios as one of its clients.[53] One could argue that both Barbera and Hadid made artistic contributions to the photo: Barbera, by composing the shot, and presumably, choosing where to photograph his subject and Hadid, by choosing her outfit and deciding to wear sunglasses at night in public while glancing askew from the camera.[54] Mode, which has since removed the photograph from its Instagram account,[55] may have a harder time claiming co-

47. *Id*. While Instagram allows users to maintain fan accounts, the accounts cannot share content that infringes on someone else's rights. *Can I Create an Instagram Account Dedicated to a Public Figure, Celebrity, Brand, or Organization?*, INSTAGRAM, https://help.instagram.com/1140918252762216?helpref (last visited Dec. 29, 2020).

48. *A Running List, supra* note 26 (noting companies sued for copyright infringement include Alexander Wang, Fenty Beauty Corporation, Marc Jacobs, Mode Public Relations, CBS Interactive, and IMG Worldwide).

49. *Id.*; Complaint, Barbera v. Mode Public Relations LLC, No. 1:19-cv-08636 (S.D.N.Y. Sept. 17, 2019).

50. Complaint, at Exhibit B, *Barbera*, 1:19-cv-08636.

51. *Id.*

52. *Id.*

53. MODEWORLD, https://modeworld.com/pages/clients (last visited Dec. 29, 2020).

54. *A Running List, supra* note 26.

55. *See generally* MODEWORLD (@modeworld), INSTAGRAM, https://www.instagram.com/modeworld (last visited Dec. 29, 2020).

authorship than Hadid herself. Nevertheless, the question remains: can a public relations agency significantly contribute to the artistic value of a photograph? Say Mode provided Hadid with a free Hesperios sweater, knowing that if she were photographed wearing the sweater, its client would receive press and notoriety. In a world where the construction of fame itself can be seen as an artform,[56] deciding the confines and contours of authorship feels more complex than ever.

The last few years have seen fashion labels feel the sting of paparazzi-based legal action as well. Roughly six months after bringing legal action against Mode Public Relations, Barbera filed another complaint against major fashion label Versace.[57] Barbera alleged that Versace posted two photographs he had taken of Jennifer Lopez, clad head-to-toe in Versace, on the fashion label's Instagram account.[58] Like many before it, the case quickly settled out of court.[59] Similar suits have been levied against designer Virgil Abloh, womenswear brand Adeam, Alexander Wang, Marc Jacobs and Christian Siriano.[60]

Most cases have settled out of court, often for $10,000–$20,000, which is not an exorbitant amount for extremely wealthy stars or companies to absorb.[61] But not everyone is going down without a fight. On January 6, 2020, the Italian fashion house Moschino launched a vehement counterattack against Splash News and Picture Agency.[62] Splash News sued

56. Corinna Coors, *Morality, Utility, Reality? Justifying Celebrity Rights in the 21st Century*, 44 SYRACUSE J. INT'L L. & COM. 215, 218–19 (2017) (citing sociologist Neal Gabler's argument that "celebrities perform functions of art by means of [a] story.").

57. *See generally* Complaint, Barbera v. Versace USA, Inc., No. 1:19-cv-03563 (S.D.N.Y. Apr. 22, 2019).

58. *Id.* at ¶¶ 7–12. In addition to copyright infringement, Barbera also accused Versace of manipulating the integrity of the photos' copyright by removing Barbera's copyright information from the photos before posting them. *Id.* at ¶¶ 19–24.

59. *See generally* Memo Endorsement on re: 12 Notice of Settlement Filed by Robert Barbera, *Barbera*, No. 1:19-cv-03563 (June 13, 2019).

60. *A Running List*, *supra* note 26.

61. Cooper, *supra* note 5.

62. *See generally* Answer and Counterclaims by Defendant Moschino S.P.A. to Complaint, Splash News & Picture Agency, LLC v. Moschino S.P.A., No. 2:19-cv-9220 (C.D. Cal. Jan. 6, 2020) [hereinafter Moschino Answer and Counterclaims].

Moschino, the brand's creative director Jeremy Scott, and popular singer Cardi B for copyright infringement after all three parties shared images of Cardi B wearing a Moschino dress while out in public on their respective social media accounts.[63] Moschino swung back, alleging forty-five affirmative defenses, ranging from fair use to insufficient creativity.[64] Moschino also accused Splash News itself of infringing upon an original work of art—the elaborate and ornamental dress designed by Scott and worn by Cardi B.[65] By taking the photo, Moschino alleged, the Splash News photographer created a derivative work[66] without Moschino's permission.[67] In March 2020, the parties reached a stipulation and the case was dismissed with prejudice.[68] But if Moschino's resistance to liability is any sign, there are more battles to come.

Beyond the legal consequences though, photographers might soon realize that conceding joint authorship is simply good business for a struggling industry. The paparazzi have a public relations problem: despite the fact that they have provided the public and large media companies with content for decades, celebrities continue to wage a longstanding war against the photographers who document their lives.[69] And although the public consumes both fame and imagery more than ever

63. Complaint at ¶ 13, *Moschino S.P.A.*, No. 2:19-cv-9220 (Oct. 26, 2019).

64. Moschino Answer and Counterclaims, *supra* note 62, at 10–19.

65. *Id.* at 23–25.

66. According to The Copyright Act of 1976, a "derivative work" is

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101.

67. Moschino Answer and Counterclaims, *supra* note 62, at 23–25.

68. Order to Dismiss with Prejudice, *Moschino S.P.A.*, No. 2:19-cv-9220 (Mar. 27, 2020).

69. *See, e.g.*, Maria Puente, *Celebs Push Back Against the Paparazzi*, USA TODAY (Mar. 28, 2014, 4:56 PM), https://www.usatoday.com/story/life/people/2014/03/22/celebs-push-back-against-the-paparazzi/6186163/; Dan Edmund, *14 Times When Celebs Had Enough of the Paparazzi*, BUZZNICK (Aug. 27, 2020, 8:10 AM), https://www.buzznicked.com/celebrities-versus-paparazzi/.

before,[70] public perception of the paparazzi remains negative.[71] This omnipresent distaste for the industry and its practices suggests a bleak future for its subsistence when combined with the economic downturn in its profitability and the rise of user-generated image-sharing online.[72]

Perhaps celebrity photographers might find themselves on greener turf if they—gasp—worked in tandem (or at least in legal harmony) with their famous subjects. The concept of joint authorship only remains relevant absent a contractual agreement between the authors.[73] Prior arrangements between celebrities (or fashion brands and communications agencies) and paparazzi photographers or photo companies could potentially result in larger profits and more exposure for both parties.[74] A few digitally-savvy photographers have even suggested as much.[75] "I think you should be flattered that a celebrity thinks your photo is good enough to be posted on their social media," said celebrity photographer Giles Harrison.[76] Harrison, an industry veteran, sees the occasional copyright infringement as a mere minor byproduct of the job.[77] Harrison, however, surely remains in the minority among his peers, some of whom show no signs of abandoning their copyright

70. *See* ALLISON SCHRAGER, AN ECONOMIST WALKS INTO A BROTHEL 71 (2019) ("Digital media increased the demand for celebrity photographs but decreased the price media companies were willing to pay for them."); John Herrman, *It's Almost 2019. Do You Know Where Your Photos Are?*, N.Y. TIMES (Nov. 29, 2018), https://www.nytimes.com/2018/11/29/style/digital-photo-storage-purge.html.

71. *See* KIM MCNAMARA, PAPARAZZI, MEDIA PRACTICES AND CELEBRITY CULTURE 10 (2016).

72. *See* SCHRAGER, *supra* note 70.

73. Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) ("[A]s with all contract matters, parties may minimize subsequent disputes by formalizing their agreement in a contract.").

74. *See e.g.*, Kardashian West, *supra* note 30; *see* Allie Jones, *What Do the Paparazzi Do When the Stars Are Quarantined?*, N.Y. TIMES, https://www.nytimes.com/2020/05/20/style/paparazzi-celebrity-photos.html (May 25, 2020) (noting that some celebrities already engage in arrangements with paparazzi, but both celebrities and paparazzi are loath to talk about such arrangements); Seija Rankin, *The Art of the Staged Paparazzi Photo: How Celebrity Couples Look So in Love*, E ONLINE (Mar. 1, 2017, 2:00 PM), https://www.eonline.com/news/832995 (discussing how celebrities use informal arrangements with paparazzi to drum up publicity).

75. Jones, *supra* note 74.

76. Rosenbaum (2018), *supra* note 24.

77. *Id.*

infringement lawsuits anytime soon.[78] Only the future can tell whether celebrities and photographers will ever implicitly or explicitly agree among themselves on a solution that makes sense for all parties. And until the courts say otherwise, an outdated model of authorship dictates image sharing online, arguably leaving many creative contributors vulnerable to copyright infringement suits.

One thing remains clear—the way both famous and non-famous individuals alike share photos online does not always jive with traditional interpretations of copyright law.[79] While the vast chasm between the realities of the digital age and interpretations of copyright law may take decades to bridge, celebrities could play an influential role in shrinking the divide by fighting for joint authorship rights.

II. JOINT AUTHORSHIP

A determination of co-authorship is important because it precludes joint authors from bringing copyright infringement claims against one another.[80] Co-authors share ownership rights in their joint work as tenants-in-common.[81] In other words, each co-author has an independent right to use and license the work, each may initiate a cause of action against an infringer without joining co-authors, and each may transfer her rights in the copyright.[82] This Note examines major decisions from the U.S. Courts of Appeal for the Ninth and Second Circuits to illustrate modern applications of joint authorship. These circuits are

78. *Id.*

79. *See infra* Section III.A.

80. Brod v. Gen. Publ'g Grp., Inc., 32 F. App'x 231, 234 (9th Cir. 2002); *see also* Nancy Perkins Spyke, *The Joint Work Dilemma: The Separately Copyrightable Contribution Requirement and Co-Ownership Principles*, 40 J. COPYRIGHT SOC'Y U.S.A. 463, 483 (1993).

81. *See* Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007) ("'authors of a joint work are co-owners of copyright in the work' . . . are to 'be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits.'") (internal citations omitted) (quoting 17 U.S.C. § 201(a) and H.R. Rep. No. 94-1476, at 121 (1976)).

82. 2 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 9.03[1][b] (Matthew Bender, rev. ed. 2019).

home to New York City and Los Angeles, meccas of fame, and, consequently, where the majority of paparazzi suits have been filed.[83] Most federal courts, however, have adopted similar interpretations of joint authorship.[84]

The concept of authorship has long served as the keystone of American copyright law.[85] The Copyright Act of 1976 affixes copyright protection to "original works of authorship fixed in any tangible medium of expression" including "pictorial" works.[86] The "author" or "authors" of a work protected under the statute become the copyright owners and receive exclusive rights to, among others, reproduce, transfer and distribute the copyrighted work.[87] The Act also notes that "authors of a joint work are co-owners of copyright in the work."[88] Under section 101 of the Act, a "joint work" is one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[89] Through statutory interpretation, courts have done most of the legwork to determine exactly what joint work—and joint authorship—look like.[90]

A. *The Intent Element*

As scholars have noted, modern judicial precedents have often been at odds with the legislative history and purpose of

83. Kenneth A. Plevan, *The Second Circuit and the Development of Intellectual Property Law: The First 25 Years*, 85 FORDHAM L. REV. 143, 144 (2016).

84. *See* George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted To Protect Co-authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 80, 93 (1993); Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 144–45 (2002).

85. Shun-ling Chen, *Collaborative Authorship: From Folklore to the Wikiborg*, 2011 U. ILL. J. L. TECH. & POL'Y 131, 132 (2011).

86. The Copyright Act of 1976, 17 U.S.C. § 102(a)(5).

87. *Id.* §§ 201(a), 106(1)–(6).

88. *Id.* § 201(a).

89. *Id.* § 101.

90. Said, *supra* note 45 (noting the determination of co-authorship is often a question of law that is considered within the interpretive control of the court without the need for a jury decision).

the Copyright Act.[91] The concept of joint authorship remained murky after the passage of the Copyright Act and resulted in differences of interpretation among the federal appellate courts.[92] A glance at the legislative history accompanying the Copyright Act provides some insight into the meaning of the joint authorship intent element of section 101. When Congress wrote the Act, it intended to limit "joint work" to works where the contributor's desire to have his or her efforts contribute to a single end could be evidenced at the time of the creation.[93] The House Report attempted to add some further clarity to the timeliness of the intent element:

> [A]lthough a novelist, playwright, or songwriter may write a work with the hope or expectation that it will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention was behind the writing of the work for motion picture use.[94]

While neither the text of the statute nor the legislative history explicitly require contributors to recognize one another as co-authors,[95] many courts began to read such a requirement into the statute in the early nineties. Most notably, in *Childress v. Taylor* the Second Circuit held that each contributor must intend to be a joint author, in addition to the intent to create a unitary, inseparable whole, in order for a work to obtain joint-ownership status.[96] In his opinion, Judge Newman argued that interpreting the statute as requiring only the intent to create an inseparable finished work would create such a broad definition

91. *See, e.g.*, Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 255 (2001).

92. *See* Michael Landau, *Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation*, 54 IDEA 157, 172 (2014).

93. *Id.* at 166–67 ("[T]he desire to make the contributions part of a single end product must be evidenced at the time of creation.").

94. *Id.* (citing H.R. REP. NO. 1476, at 120).

95. *See id.* at 160; *see also* VerSteeg, *supra* note 84, at 142–44.

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

for joint authorship that such a construction could not possibly be what Congress envisioned.[97] Nearly every court since *Childress* has embraced the dual-intent requirement, aptly referred to as the *Childress* Rule.[98]

The *Childress* Rule imposes a significant burden on the party seeking joint authorship—and indeed would make it difficult for a court to grant a celebrity's request for joint authorship of a paparazzo photo. In *Aalmuhammed v. Lee*, the Ninth Circuit embraced perhaps an even more stringent analysis for joint authorship. The court in *Aalmuhammed* echoed the Second Circuit's determination that both parties must manifest intent to be co-authors, rather than just the intent to create a unitary work.[99] Additionally, the court noted, the party asserting co-authorship has the burden of showing that she "superintends" the work, exercising a certain amount of control over the product.[100] For example, the superintendent of a photograph would be the one who forms the picture and places the subjects—the general "mastermind" or "inventive" behind the work.[101]

These strict applications have not been spared significant criticism and have been challenged in the context of contemporary media.[102] In fact, some commentators have argued that the *Childress* approach is plain unrealistic, if not incompatible with Congress's determination that the economic incentives created by copyright law encourage creativity and innovation.[103] Mary LaFrance, professor of law at William S. Boyd School of Law, found the *Childress* court's new framing of

97. *Id.*

98. VerSteeg, *supra* note 84, at 144.

99. Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000).

100. *See id.*

101. *Id.*

102. *See, e.g.*, LaFrance, *supra* note 91; Landau, *supra* note 92, at 181–82, 198; Recent Case, Thomson v. Larson, *147 F.3d 195 (2d Cir. 1998)*, 112 HARV. L. REV. 964, 966–67 (1999); Seth F. Gorman, *Who Owns the Movies?: Joint Authorship Under the Copyright Act of 1976 After* Childress v. Taylor *and* Thomson v. Larson, 7 UCLA ENT. L. REV. 1, 28–32 (1999); 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2.1, at 4–15 (3d ed. 2005).

103. LaFrance, *supra* note 91, at 198, 224.

the intent element devoid of any persuasive authoritative precedent.[104] The purpose of the Copyright Act of 1976, LaFrance notes, was to "encourage creation and dissemination of original expression that will ultimately enrich the public domain."[105] In many cases, a joint authorship test which requires each party to have actual intent to be a co-author, as opposed to the mere intent to create a unitary work, deprives persons who make significant creative contributions to a work of authorship rights.[106] Without authorship rights, or the potential for economic gain, the Act fails to provide these artists with either monetary or legal incentive to continue making creative contributions.[107]

In cases such as *Childress* and its progeny, the emphasis has been removed from the artists' subjective intent during the creative process and instead placed on the artists' intent regarding the relationship among themselves.[108] While courts may have read such a relational element into copyright law in an attempt to make applications of the law simpler, such a test places an additional fact-finding burden on trial courts.[109] Even where each party's relational intent is clear, the additional scrutiny applied by the *Aalmuhammed* court requires fact-finding regarding the "dominant" author and dictates that the dominant author's relational intent governs.[110] This results in factually complex situations making determinations of authorship even more difficult. And in situations where two artists each intend to be sole authors of a unitary work, this formulation could force courts to award sole authorship to the party making a greater contribution in terms of control or material provided.[111] Such a result directly contradicts the rule

104. *Id.* at 222–23.
105. *Id.* at 201.
106. *Id.* at 255.
107. *Id.* at 201–02.
108. *Id.* at 255.
109. *Id.*
110. *Id.* at 255–56.
111. *See id.* at 231–32.

that joint authors are not required to make equal contributions.[112] Additionally, requiring all parties to define, or at least manifest, the nature of their working relationship with others prior to engaging in the creative process can simply be at odds with the organic processes of creativity. Collaboration is often unformulaic, with parties making contributions to the unitary work without ever first considering or discussing their ownership rights.[113] Nevertheless, both the Second and Ninth Circuits have reaffirmed holdings requiring an intent to be co-authors as recently as 2015,[114] and 2010,[115] respectively.

B. *The "Independently Copyrightable" Element*

The Copyright Act is noticeably silent as to a quantitative, or any other, requirement of how much work each artist must contribute to the solitary work in order to be considered a joint author.[116] Further, the statute lacks any requirement that each individual contribute an equal amount of effort.[117] The late professor Melville Nimmer argued that each contributor must make more than a de minimis contribution, but that the statute lacked any requirement that each author's contribution needed to be an independently copyrightable expression.[118] Such an

112. *Id.*; *see infra* Section II.B.

113. Commentator George Hutchinson describes such a concern as the heart of the authorship problem:

> Collaboration is a process that is not easily defined. Depending on the discipline, it can denote a multitude of creative processes involving many participants all contributing different degrees of expressions. A system that allows one collaborator to dictate the intent of the parties ex post facto is less than insightful. It blurs the distinction between the intent to share ownership and the intent to create joint work. Consequently, the rights of certain collaborators inevitably fall through the cracks.

Hutchinson, *supra* note 84, at 93.

114. *See* 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 255 (2d Cir. 2015).

115. *See* Ahanchian v. Xenon Pictures, Inc., 403 Fed. App'x 166, 169 (9th Cir. 2010).

116. The Copyright Act of 1976, 17 U.S.C. § 101.

117. Landau, *supra* note 92, at 167–68.

118. LaFrance, *supra* note 91, at 196; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07[3][a] (Matthew Bender, rev. ed. 2020).

interpretation could allow a party contributing ideas or information to enjoy co-authorship rights.[119]

Today, Nimmer's interpretation has largely fallen out of favor. Most courts require the work of each contributor to be independently copyrightable in its own right in order for that artist to be considered a joint author.[120] This rationale rests on a concern that too many creative contributors would make copyright law unworkable and impractical.[121] It appears, however, that Nimmer's more malleable construction of joint authorship might actually make more sense in the modern world, where online communication more easily facilitates and even encourages collaborative work.[122]

Additionally, Nimmer's view may more closely align with both the purposes of the Copyright Act, as well as Congress's legislative intent. Specifically, the House Report on revisions to the Copyright Act suggests that Congress intentionally provided separate definitions for "joint work" and "collective work."[123] Section 101 defines "collective work" as one "in which a number of contributions, *constituting separate and independent works in themselves*, are assembled into a collective whole."[124] The House Report offers the following:

> [A] work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the

119. LaFrance, *supra* note 91, at 196.

120. MILGRIM, *supra* note 82, § 9.03[1][b]; Perkins Spyke, *supra* note 80, at 481.

121. *See* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070 (7th Cir. 1994).

122. *See* OECD, ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT 216 (2015), https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf.

123. LaFrance, *supra* note 91, at 210.

124. The Copyright Act of 1976, 17 U.S.C. § 101 (emphasis added).

> parts themselves may be either "inseparable" (as the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song). The definition of "joint work" is to be contrasted with the definition of "collective work," also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of "separate and independent works . . . into a collective whole."[125]

Thus, it appears that Congress intended for the analysis of joint authorship to focus primarily on the process and intent of the work and was not particularly concerned with the ability of each contribution to be independently copyrightable.

Just like the dual-intent requirement, the independently-copyrightable requirement is a relatively new one. In fact, earlier courts seemed to take the words "inseparable" and "interdependent" at face value.[126] In 1990, the Ninth Circuit took a sharp pivot in *Ashton-Tate Corp. v. Ross*.[127] The court grappled with the question of whether each contribution to a joint work need be copyrightable, admitting that the area of law was unsettled.[128] Ultimately, the court decided that where an artist failed to fix his contributions to the joint work into a tangible expression, his contribution was merely an "idea" and the artist was not a joint author.[129] This decision resulted in Richard Ross, who had provided the defendant with a hand-written list of user commands for a new computer spreadsheet program, without any recourse.[130] Faced with new (at the time), complex and multi-authored computer programs, the court appears to have chosen administrability and clear lines over a

125. H.R. REP. NO. 94-1476, at 120 (1976).

126. For an early discussion of joint work preceding the Copyright Act of 1976, see Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

127. Ashton-Tate Corp. v. Ross, 916 F.2d 516 (9th Cir. 1990).

128. *Id.* at 520–21.

129. *Id.* at 521.

130. *Id.* at 517.

case-by-case analysis of an artist's contributions to an interdependent work. Law, as it often does, evolved throughout the years to meet pressing challenges facing the courts. Today, the courts are faced with a new challenge: reconciling online image-sharing with copyright law. Another shift in the interpretation of joint work, this time back to a broader definition, provides a promising starting point.

III. THE REALITIES OF CONTEMPORARY IMAGE SHARING AND THE BUSINESS OF FAME

A. *Whose Photo Is It Anyway?*

The very nature of social media and online communication in general encourages sharing, modifying, and co-creating content in ways that the foundational builders of intellectual property law likely could have never imagined.[131] The strict interpretations of joint ownership discussed above beg reconsideration when applied to online communication and celebrity culture. The photograph's significance in today's cultural ecosystem means something entirely different than it did when the first known photograph was captured in 1826.[132] With the advent of faster, cheaper cameras, many of which are built right into our cell phones, humans communicate through photography more than ever before.[133] On social media, users are expected to engage with content shared by others and have

131. *See* Chen, *supra* note 85, at 133 ("In recent years, information and communication technologies have facilitated collaboration in an unprecedented scale, resulting in massive collaborative projects such as Wikipedia . . . .").

132. *See* Press Release, Harry Ransom Ctr., Univ. of Texas at Austin, Results of Scientific Study on the First Photograph Unveiled During "At First Light, Niépce and the Dawn of Photography" (Nov. 21, 2003), https://www.hrc.utexas.edu/press/releases/2003/scientific-study-first-photograph.html.

133. *See* Caroline Cakebread, *People Will Take 1.2 Trillion Digital Photos This Year—Thanks to Smart Phones*, BUS. INSIDER (Aug. 31, 2017, 7:50 PM), https://www.businessinsider.com/12-trillion-photos-to-be-taken-in-2017-thanks-to-smartphones-chart-2017-8.

become accustomed to a culture of collaboration with massive numbers of images shared and re-shared every day.[134]

The tension between traditional notions of copyright law and consumer usage of social media has come to a head in recent years.[135] During a brief scroll through Instagram, it is hardly unlikely that a user will encounter the same image twice.[136] In fact, photos of celebrities out and about in public are so commonplace on social media and image-sharing sites like Buzzfeed that users can be forgiven for thinking that such content is free for the taking.[137] Some commentators have noted that online communities which used to be marked by user-generated content—original content created by the poster and shared online—are now largely comprised of user-found content.[138] In fact, in 2013, Pew Research Center's Internet Project found that "47% of adult internet users take photos or videos that they have found online and repost them on sites designed for sharing images with many people."[139]

One could argue that celebrities and fashion companies, armed with legal counsel, should know better than the average consumer and should be aware of the issues inherent in sharing unlicensed imagery online. But it appears that something arguably more powerful than the threat of legal recourse has taken hold of online image-sharing: normative changes. Even where users are aware of copyright restrictions, they continue to ignore them and act within the new social norms dictated by the shifting culture and infrastructure of mass

134. Levinson, *supra* note 10, at 1040–41.

135. *Id.*

136. *See id.* at 1044–45.

137. *See id.* at 1058.

138. *Id.* at 1047–49.

139. Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW RSCH. CTR. (Oct. 28, 2013), https://www.pewresearch.org/internet/2013/10/28/photo-and-video-sharing-grow-online/. These numbers have invariably expanded since then. *See e.g.*, *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/ (showing a steady rise in all content sharing on social media platforms).

communication.[140] The internet has also changed both celebrity and consumer culture in paramount ways. No longer are consumers dependent on magazines, movies, tabloids, and traditional advertising to see what influential figures are wearing, eating, and selling; they have access to such information at the touch of a screen, for free.[141] Celebrities—and fashion brands and public relations agencies—are merely adapting to the shifting economy, offering consumers the content they interact with the most.[142]

What does this all mean in terms of co-authorship? Perhaps the digital world necessitates reconsideration of American jurisprudence's steadfast adherence to narrow conceptions of authorship.[143] Considering copyright law's built-in incentives to further creativity,[144] do the courts' relatively recent requirements of an intent to act as co-authors and that each contribution be independently copyrightable really serve that purpose? After all, it does not seem manifestly unreasonable that any user—not just a famous one—should be able to share an image of themselves online without fear of legal

140. *Id.* This could also be the result of the Digital Millennium Copyright Act (DMCA), which offers DMCA takedown procedures as a remedy for copyright infringement online. Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c). Takedown procedures offer a quick and free solution for creators who feel their work has been improperly shared. Perhaps the threat of an image being removed due to a takedown notice is not a sufficient deterrent for those sharing copyrighted imagery, especially when compared to the threat of legal action. See generally, Peter S. Menell, *Part II: Donald C. Memorial Lecture this American Copyright Life: Reflections on Re-equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235 (2014), for a thoughtful reflection on the public's plummeting perception of copyright law.

141. *See* MCNAMARA, *supra* note 71, at 159–63.

142. *Id.* at 159.

143. *See* John Tehranian, *Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance*, 68 HASTINGS L.J. 1319, 1321–24 (2017) (discussing the prominence of "authorship" in American copyright law, the traditional view that authorship rests with the person who fixes work into a tangible medium, and the issues traditional view presents in the digital age).

144. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); *see also* LaFrance, *supra* note 91, at 201–02 (arguing that a joint authorship test that deprives those who make significant creative contributions of authorial status—and therefore economic reward—discourages further creative collaborative efforts).

repercussions. The Supreme Court itself has outlined the importance of shifting copyright law to align with new developments: "From its beginning, the law of copyright has developed in response to significant changes in technology."[145] Even with the rapid changes in technology, legal precedent remains firmly in favor of paparazzi photographers as the sole authors of celebrity photos.[146] Yet the question remains: have the courts made copyright law less workable within the framework of the twenty-first century through their creation of a rigid standard of co-authorship?

B. *The Business of Fame*

The question of whether fame or celebrity in and of itself should be legally protected remains a contentious one.[147] Some states, such as California and New York, recognize a right of publicity.[148] But the right of publicity arises from the right to privacy, not property law.[149] These laws prevent photographers from benefitting commercially off of a public figure's likeness, name, or image without permission.[150] The right of publicity does not prevent photographers from selling photos of celebrities taken while they are out in public for non-commercial purposes.[151] Rights of privacy do not supersede constitutional protections of free press and speech absent knowing or reckless falsity, especially in cases where a newsworthy figure is involved.[152] So while certain areas of law

145. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

146. *See supra* Part II; *see also* Tehranian, *supra* note 143, at 1335.

147. *See generally* Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J. L. & ARTS 157, 158 (2015) ("Currently, the lower courts are in disarray about how to treat the right of publicity, especially when it comes into conflict with First Amendment rights to create noncommercial expression, or with copyright law.").

148. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2020); CAL. CIV. CODE § 3344 (West 2020).

149. Tushnet, *supra* note 147, at 159.

150. N.Y. CIV. RIGHTS LAW §§ 50–51; CAL. CIV. CODE § 3344.

151. *See* Ann-Margret v. High Soc'y Mag., Inc., 498 F. Supp. 401, 406 (S.D.N.Y. 1980).

152. *See* Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

find inherent value in celebrity,[153] intellectual property jurisprudence does not recognize a celebrity persona as protectable. This seems fundamentally unfair.

Celebrities contribute to the progress of art and society, whether the public at large would like to admit it or not. Celebrities hold both commercial value and symbolic cultural importance.[154] The social significance of carefully constructed celebrity personas lies in the affective meanings audiences associate with the celebrity image.[155] Social scholars agree that audiences view celebrities as personifications of certain values: glamour, desire, strength, focus, heroism, human transcendence, and beauty.[156] Additionally, celebrities influence commercial consumer decisions and the economy in general so much that scholars have coined the phrase "celebrity as commodity" to define the phenomenon.[157] Public bemoaning about the oppressive omnipresence of celebrity culture aside, everyday life would look and feel vastly different without celebrities. Our decisions about what clothes to wear,[158] what to

153. There is no federal right of publicity. Further, "[a]lthough many states recognize that everyone has a right of publicity, some only recognize celebrity rights." Michael J. Hoisington, *Celebrities Sue Over Unauthorized Use of Identity*, HIGGS, FLETCHER, & MACK LLP (Aug. 2020), https://higgslaw.com/celebrities-sue-over-unauthorized-use-of-identity/. In the absence of a uniform framework, a celebrity's persona may go unprotected. *See* Lynne M.J. Boisineau, *Intellectual Property Law: The Right of Publicity and Social Media Revolution*, 30 GP SOLO, no. 3, May-June 2013, at 66, 66 ("The state-to-state differences in the treatment of right-of-publicity claims may lead to different outcomes.").

154. 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, 292 (2010); *see also* Charles Kurzman, Chelise Anderson, Clinton Key, Youn Ok Lee, Mairead Moloney, Alexis Silver & Maria W. Van Ryn, *Celebrity Status*, 25 SOCIO. THEORY 347, 353 (2007) ("Unlike earlier status groups, celebrities are a creature of capitalism: they involve the commodification of reputation . . . .").

155. Tan, *supra* note 154.

156. *Id.* at 292–94.

157. *Id.* at 295.

158. *See, e.g.*, STEAL HER STYLE, https://stealherstyle.net/ (last visited Dec. 30, 2020); Angela Velasquez, *Industry Talks of Change but Celebrities and Fashion Weeks Continue to Influence Consumers*, SOURCING J. (Aug. 18, 2020, 11:30 AM), https://sourcingjournal.com/denim/denim-trends/lyst-beyonce-cardi-b-animal-print-david-beckham-copenhagen-fashion-week-226187/; *The Most Iconic Hairstyles of All Time*, MARIE CLAIRE (Aug. 28, 2015, 3:39 PM), https://www.marieclaire.co.uk/beauty/hair/most-iconic-celebrity-hairstyles-238260; Ed Pilkington, *'Paris*

eat,[159] where to eat,[160] what to watch,[161] and what cars to drive,[162] to name a few, would change. Even further, the way we see, understand, and construct the world around us would be different as well.[163] Given their significance in society, courts can surely craft a remedy allowing celebrities to share others' photos of themselves on social media while still respecting photographers' intellectual property rights.

Hilton Syndrome' Strikes California Animal Shelters, GUARDIAN (Dec. 10, 2009, 11:54 AM), https://www.theguardian.com/world/2009/dec/10/chihuahuas-paris-hilton-syndrome (pet as accessory trend); Faith Xue, *From 1500 to 2015: The Fascinating History of Contouring*, BYRDIE (Oct. 5, 2017), https://www.byrdie.com/history-of-contouring (noting how Kim Kardashian popularized the contouring technique).

159. *See, e.g.*, Lora Jones, *Veganism: Why Are Vegan Diets on the Rise?*, BBC (Jan. 2, 2020), https://www.bbc.com/news/business-44488051 (explaining how celebrities and influencers played a role in the recent vegan trend); Cydney Henderson, *Travis Scott's Custom Reese's Puffs Cereal Box Collaboration Sold Out in 30 Seconds*, USA TODAY (June 25, 2019, 11:54 PM), https://www.usatoday.com/story/life/entertainthis/2019/06/25/travis-scott-reeses-puffs-box-collaboration-sold-out-30-seconds/1567173001/; Jess Bolluyt, *Weird Food Trends Celebrities Made Famous*, SHOWBIZ CHEATSHEET (Jan. 8, 2018), https://www.cheatsheet.com/culture/weird-food-trends-celebrities-made-famous.html/.

160. *See, e.g.*, Olivia Harrison, *The Ultimate Guide to Dining Like the Kardashians*, REFINERY29, https://www.refinery29.com/en-us/2016/06/111400/kardashians-favorite-restaurants (Apr. 19, 2018, 2:00 PM); *Celebrity Restaurant Sightings: See the Hot Spots Where the Stars Are Dining—2019,* PEOPLE (Feb. 25, 2020, 4:18 PM), https://people.com/food/celebrity-restaurants-sightings-summer-2018/; Sade Mills, *McDonald's Collaborates With Travis Scott, Quickly Becomes Trending Topic on Twitter*, LAS VEGAS NEWS (Sept. 9, 2020), https://news3lv.com/news/local/mcdonalds-collaborates-with-travis-scott-quickly-becomes-trending-topic-on-twitter; Pamela DeLoatch, *The Price Is Right: Why Food, Drink Brands Spend Big Money for Celebrity Endorsers*, FOODDIVE (Aug. 16, 2018), https://www.fooddive.com/news/the-price-is-right-why-food-drink-brands-spend-big-money-for-celebrity-en/526618/.

161. *See, e.g.*, Claudia Willen, *17 Movies Recommended by Celebrities to Watch on Netflix*, INSIDER (Apr. 22, 2020, 11:05 AM), https://www.insider.com/celebrities-favorite-movies-netflix-watch; *Here's What Your Favorite Celebrities Are Binge-Watching While Stuck at Home*, ENT. WKLY, https://ew.com/tv/celeb-binge-tv-movies-quaran-stream/ (Apr. 18, 2020, 1:24 PM); Stephen Follows, *Do You Need a Famous Actor To Get Your Film into Cinemas?*, STEPHEN FOLLOWS (Sept. 30, 2019), https://stephenfollows.com/do-you-need-a-famous-actor-to-get-your-film-into-cinemas/ ("Consumers respond to branding, feeling safe to try new things when they come under the banner of an already trusted brand. . . . A famous cast can help elevate a film from being 'just another comedy' to 'that comedy starring Mel Gibson and Marky Mark.'").

162. *See, e.g.*, *Tesla, Musk Shine From Free Celebrity Marketing, but Will It Last?*, AUTO. NEWS (Oct. 22, 2015, 1:00 AM), https://www.autonews.com/article/20151022/RETAIL03/151029937/tesla-musk-shine-from-free-celebrity-marketing-but-will-it-last; Steven Symes, *Check Out These 12 Celebrities' Cars For Sale Right Now*, MOTORIOUS (June 12, 2020, 11:00 AM), https://www.motorious.com/articles/features-3/12-celebrities-cars-for-sale/.

163. *See* Coors, *supra* note 56, at 218–19 (discussing sociologist Neal Gabler's view that celebrities provide narratives for certain values, and through their storytelling function in society, create a feeling of common experience).

IV. CELEBRITIES AND PAPARAZZI: CO-AUTHORS OF A NEW KIND

A. *A Modern Application of Traditional Co-Authorship*

In applying copyright law to cases taking place in the digital sphere, courts have explored the doctrine of Fair Use to accommodate the realities of online communication,[164] but have not given as much deference to varying conceptions of authorship.[165] So how would it look if one of these paparazzi suits were to make it past the pleading stages? Well, convincing courts to accept co-authorship, as the concept is *currently* interpreted, as a solution for the onslaught of paparazzi-initiated lawsuits will be an uphill battle for attorneys representing famous defendants. Armed with favorable legal precedent,[166] photographers and photo agencies will no doubt continue to fight for exclusive rights to the imagery they create. Co-authorship would not strip celebrity photographers of their rights, as magazines, websites, and other publications would still need to license imagery in order to use their images.[167] But co-authorship would mean that the celebrities themselves would also be entitled to a pro rata share of the profits.[168] Similarly, celebrities could also sell the rights to the photos to publications and they would be obligated to split the resulting profits with the co-authors.[169] Of course, granting ownership rights to multiple owners complicates the administrability of ownership rights, transferability, and profit allocation.

Additionally, given the complicated intersection of First Amendment jurisprudence and copyright law, courts may be reticent to extend the rights of co-authorship to famous photo

164. *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Caroline E. Kim, *Insta-Fringement: What is Fair Use on Social Media?* 18 J. MARSHALL REV. INTELL. PROP. L. 102, 106–08 (2018).

165. Chen, *supra* note 85, at 144 (2011) (discussing how courts treat joint authorship as an exception, not a rule, and construe the concept of joint work narrowly).

166. *See supra* notes 96–101, 114–15, 127–30 and accompanying text.

167. *See* NIMMER & NIMMER, *supra* note 118, § 6.12[B].

168. *Id.*

169. MILGRIM, *supra* note 82, § 9.03[1][b].

subjects for fear of violating First Amendment protections of freedom of speech and of the press.

Granting celebrities co-authorship status might open the door for other public figures, and possibly even government officials, to seek out co-authorship status as well. Each co-author can transfer rights to a work without the permission of the others.[170] But co-authors can certainly still influence one another. For example, photographer Brendan Smialowski captured images of former president George W. Bush sharing a hard candy with former first-lady Michelle Obama at his father's funeral.[171] The image proved newsworthy as several outlets ran the photo, sparking conversations about the unusual friendship.[172] If, for example, Bush wanted to suppress the publication of the image for political reasons, he might be more inclined to use his sway as a co-author to convince Smialowski or even news outlets to enjoin publication of the photo. Government restriction of newsworthy material is, of course, unconstitutional.[173]

Given the traditionally strict application of co-authorship rights, it is not terribly difficult to predict how courts would rule should one of these cases make it to trial. When photographers capture a photo of a celebrity, they intend for their efforts—the composition, timing and physical labor that goes into taking a photograph— to merge with the subject's efforts—stylistic choices concerning wardrobe, hair, makeup, and posing—to create the resulting photograph. Less tangible, but equally crucial elements, such as the subject's fame and her decision to "be seen" at a certain place or venue, contribute to the artistic and commercial value of the work. While these

170. Benjamin E. Jaffe, *Rebutting the Equality Principle: Adapting the Co-Tenancy Law Model To Enhance the Remedies Available to Joint Copyright Owners*, 32 CARDOZO L. REV. 1549, 1555 (2011).

171. Meghan Keneally, *A Blink-and-You'll-Miss-it-Moment Between George W. Bush and Michelle Obama at His Dad's Funeral*, ABC NEWS (Dec. 5, 2018, 1:33 PM), https://abcnews.go.com/Politics/blink-miss-moment-george-bush-michelle-obama-dads/story?id=59625279.

172. *Id.*; Ashley May, *George W. Bush Handed Michelle Obama Something at Father's Funeral. What Was It?*, USA TODAY (Dec. 5, 2018, 12:07 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/12/05/george-w-bush-gives-michelle-obama-mint-cough-drop-funeral/2214563002/.

173. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

celebrity contributions might have been enough to satisfy Congress' original definition of joint authorship, they would not suffice today to qualify the photo subject as a joint author.

In order for celebrities to assert co-authorship rights of paparazzi photos of themselves under today's existing interpretation of joint work, they would effectively have to assert several points. First, that what they contribute to a photo, which in essence is their celebrity and the elements there within, is independently copyrightable. Second, celebrities must embrace the fact that when they step outside at certain times and in certain places, they objectively manifest intent to be photographed in a certain manner, i.e. the intent to co-author paparazzi photos in conjunction with photographers. Lastly, and perhaps the biggest challenge, celebrities would have to offer proof establishing the photographer's intent to serve as co-author as well.

In order for each co-author's contribution to be independently copyrightable, the Copyright Act demands that that contribution be an "original work[] of authorship fixed in any tangible medium of expression."[174] To satisfy the originality requirement, a work must exhibit at least a minimum amount of creativity.[175] Courts often cite a photographer's selection of background, photo composition, lighting, shading, angle, and camera settings as satisfactory of the creativity element in photographs.[176] Concepts or ideas are not entitled to copyright protection,[177] however, so the creativity a celebrity puts into their "image" or "brand"" as abstract, intangible concepts does not satisfy the fixed and originality requirements of copyright protection.[178] But why not? Cultivating and maintaining fame is

174. The Copyright Act of 1976, 17 U.S.C. § 102(a).

175. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

176. Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. L. & TECH. 327, 353 (2012).

177. § 102(b).

178. *See id.*

an art, an important one in a society where the stories of individuals frame our collective cultural understanding.[179]

Paparazzi recognize the control and creativity necessary to create celebrity. In 1995, paparazzo Mitch Gerber observed as much:

> It's not like it used to be. Years ago people didn't care if you took photos of them eating or blowing their nose. Now they're cautious because of all the TV shows and news magazines out there. Stars don't want to be caught in real-life situations. I tried to sell long-lens photos of Michael J. Fox with his sons, and two magazines said if they were to publish them, they would never get a photo with Fox again. The big-shot celebrities are all doing that now.[180]

Today, celebrities employ entire teams of professionals to help create and enhance their fame—including but certainly not limited to publicists and a fully-staffed "glam squad."[181] In a sense, a celebrity acts as creative director of her image, managing all aspects of her fame and directing a team around her. The selections and decisions a celebrity makes while cultivating her artform—fame—certainly involve creativity. For example, in recent years, Kim Kardashian West overhauled her wardrobe, swapping her glamorous frocks for sweatshirts and sneakers.[182] Photos of Kardashian West and her sisters out

179. Jill Neimark, *The Culture of Celebrity*, PSYCH. TODAY, https://www.psychologytoday.com/us/articles/199505/the-culture-celebrity (June 9, 2016) ("Increasingly, our national passions, cultural watersheds, sexual mores, gender and racial battles, and political climate are viewed through the ever-shifting kaleidoscope of stories about people. As a result, our whole culture has come to be defined in terms of the personal, as seen through the celebrities of the week or month.").

180. *Id.*

181. For example, Kim Kardashian West employs a team of stylists, and she spends roughly two hours in hair and makeup before heading out the door. Natalie Lukaitis, *This Is How Long It Takes Kim Kardashian To Get Ready (and How Much It Costs*), MARIE CLAIRE (June 1, 2016, 10:25 AM), https://www.marieclaire.co.uk/news/beauty-news/kim-kardashian-s-make-up-routine-takes-this-long-and-costs-this-much-7266.

182. *It Seems Kim Kardashian Has Adopted a Uniform*, YAHOO (Sept. 19, 2017), https://www.yahoo.com/lifestyle/seems-kim-kardashian-adopted-uniform-211618808.html.

in public in more laidback—albeit still designer—looks spread across the web.[183] Sales of athleisure rocketed in recent years.[184] It seems counterintuitive for courts to find creativity in a photographer's choice of angle and composition of a photo without also recognizing the creative choices Kardashian West exhibits as the subject of those photos.

Celebrities would not have a terribly difficult time proving a manifestation of intent to co-author the photos they share on social media. In fact, one could argue that the very act of a celebrity sharing a paparazzo's photo on her digital accounts serves as prima facie evidence that she intended for such a photo to be taken in that manner.[185] For years, many celebrities waged a well-documented[186] war against the notion that they wanted anything to do with paparazzi. In fact, many still do.[187] Others, however, have embraced such public photography as an essential cog in the publicity machine.[188] Celebrities are wise to the power of the press; media have long speculated that some famous folks go as far as directly tipping off photographers to their location.[189] In the 2000s, paparazzi photographers made huge profits from often-unflattering photos of celebrities

183. *See, e.g.*, Nicole Akhtarzad Eshaghpour, *Kylie Jenner's Trick To Make Sweatpants Look Expensive*, WHO WHAT WEAR (Feb. 19, 2016), https://www.whowhatwear.com/kylie-jenner-sweatpants-style; Alyssa Norwin, *18 Times the KarJenners Looked Sexy & Stylish in Sweats: Kim Kardashian & More*, HOLLYWOOD LIFE (Apr. 19, 2020, 8:15 AM), https://hollywoodlife.com/feature/kardashians-wearing-sweats-fashion-photos-4010823/.

184. Andria Cheng, *More Signs the Athleisure Trend Isn't Slowing Anytime Soon*, FORBES (Sept. 26, 2019, 5:43 PM), https://www.forbes.com/sites/andriacheng/2019/09/26/more-signs-the-athleisure-trend-isnt-slowing-any-time-soon/#427728b61691 ("U.S. sales of sport leisure footwear, including athletic-inspired casual sneakers and skate shoes, rose 7% in the 12 months through August, according to a study by market research firm NPD Group . . . . In contrast, high heels and other fashion styles declined 5% while technical performance footwear sales fell 7%.").

185. *See supra* Section II.A.

186. *See* Harriet Ryan, *Celebs Seek Tougher Rules on Paparazzi*, L.A. TIMES (Aug. 1, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-aug-01-me-paparazzi1-story.html.

187. Kat George, *8 Times Celebrities Stood Up to the Paparazzi*, BUSTLE (Jan. 5, 2016), https://www.bustle.com/articles/133389-8-times-celebrities-stood-up-to-the-paparazzi.

188. *See* MCNAMARA, *supra* note 71, at 78–80.

189. Stephanie Marcus, *Celebrities Call the Paparazzi on Themselves Sometimes, Obviously*, HUFFPOST, https://www.huffpost.com/entry/celebrities-call-paparazzi_n_5175348 (May 8, 2014).

caught off-guard and clearly attempting to enjoy some privacy.[190] These photos stand in stark contrast to the quasi-candid and polished-looking paparazzi photographs that celebrities share on their social media.

Even if celebrities could establish the individually copyrightable element and their intent to serve as co-authors, providing objective proof that photographers, too, intended to co-author the photos seems unlikely. But a legal opinion could offer insight into the court's rationale. Would the court at least acknowledge the fact that social media users often create and share content in a manner that contradicts legal understandings of co-authorship? Would the court concede that some ideals associated with copyright no longer make sense in a digital world? Would the court be willing to address the public's opinion that paparazzi should not be allowed to recover damages from the very stars they photograph?[191]

B. *Modified Co-Authorship with a Right To Use*

This section proposes a new interpretation and application of co-authorship. Courts should interpret co-authorship broadly, allowing celebrities—and all-purpose public figures[192]—to assert a defense of modified co-authorship limited to a right to use. The new modified version of co-authorship would allow celebrities to share images of themselves on their own social media accounts. In order to assert this defense, celebrities would still have to satisfy the definition of a joint work as described by The Copyright Act: "[A] work prepared by two or

190. *See* SCHRAGER, *supra* note 70, at 69–71.

191. A glance at the comment section accompanying posts and stories about these paparazzi lawsuits almost inevitably features a majority of pro-celebrity comments, along with many general exclamations of the unfairness of this particular application of copyright law. See, for example, the comment section of Gigi Hadid's Instagram post. Hadid, *supra* note 35. Of course, courts are not obliged to take public opinion into account when making decisions. When they do so, however, it can offer insight into their logic and reasoning.

192. An "all-purpose public figure" in the context of defamation suits generally includes public officials, persons of great influence in public affairs, and celebrities in the entertainment and sports world. James C. Mitchell, *The Accidental Purist: Reclaiming the* Gertz *All-Purpose Public Figure Doctrine in the Age of "Celebrity Journalism"*, 22 LOY. L.A. ENT. L. REV. 559, 559 (2002).

more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[193] Federal courts must interpret this definition more broadly than they have in the past few decades.

An approach more in line with Melville Nimmer's[194] better aligns with the legislative intent of Congress, the purposes of copyright law, and the normative practices of today. In Nimmer's formulation, the key element of a joint work is satisfied if both authors intend, at the time the work is executed, that the parts be combined into an integrated unit.[195] Many paparazzi photos pass Nimmer's formulation because many modern celebrities leave home and venture out into public intending to be photographed.[196] Likewise, photographers intend to capture photos of the rich and famous out in public.[197] Nor would this modified approach require that each artist prove their contribution to the unified work is independently copyrightable; instead, artists would merely have to show that their work merged into an inseparable whole. In order to create a paparazzo photo, photographers and celebrities contribute interdependent parts of the whole.[198] Thus, the photo does not exist without contributions from both parties.

Celebrities would not receive the full bundle of rights typically associated with co-authorship under this modified approach. Although technically considered a co-author, the celebrity would not receive the right to transfer the photo, and would not be entitled to a pro-rata share of any profit the photographer makes from the photo. The celebrity subject of the photo could share the image on any self-owned social media

193. The Copyright Act of 1976, 17 U.S.C. § 101.

194. 11 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 505 (Matthew Bender, rev. ed. 2019).

195. *Id.* § 505.1.

196. *See, e.g.*, Marcus, *supra* note 189.

197. *See id.*

198. *See* Marlie Williams, *Copyright Law on Paparazzi: Do Celebrities Own Their Own Image?* VIVID IP (July 15, 2019), https://www.vividip.com/news-notes/newlocation-6g3zg; *see also* Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 4, at 9–10.

profile. The celebrity would not receive the right to use the image on other forms of digital media or traditional media. The act of a celebrity sharing a paparazzo photo on a social media account could potentially decrease the value of that image should the photographer try to license said image for use in a magazine.[199] But given the already uncontrollable proliferation of paparazzi images on social media, such devaluation is unlikely. In fact, celebrities sometimes find the offending images of themselves on social media—usually already posted by a media company or a fan account—and decide to re-share it.[200] By the time a celebrity posts the photo, then, the photographer likely already licensed it to a ripe customer.[201]

A nod to the incidental use exception included in the right of publicity, this modified version of co-authorship makes relatively innocuous infringements of intellectual property unactionable for the sake of aligning the law with the realities of media. The incidental use doctrine holds that insignificant or fleeting use of a celebrity's name or image in an advertisement will not lead to liability where the use has only a de minimis commercial impact on the celebrity's ability to profit off her image.[202] Likewise, the right to use included in this modified interpretation of co-authorship would render the act of a celebrity sharing an image of herself on social media unactionable in situations where doing so would not significantly damage the image's commercial value.

This modified right of co-authorship would also mitigate First Amendment concerns.[203] Since public figures would *only* have a right to use, and would neither have the right to transfer,

199. *See* Ashley Cullins, *Paparazzi vs. Stars: Who Owns That Instagram Pic?* HOLLYWOOD REP. (Feb. 8, 2018, 6:00 AM), https://www.hollywoodreporter.com/thr-esq/paparazzi-stars-who-owns-instagram-pic-1081902.

200. *See supra* notes 35–37 (Hadid's Instagram).

201. *See* Cullins, *supra* note 199.

202. Thomas Phillip Boggess V, *Cause of Action for an Infringement of the Right of Publicity*, 31 CAUSES OF ACTION 2d. 121, §23 (2006); RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (AM. L. INST. 1977).

203. *See* Tushnet, *supra* note 147, at 158.

nor be entitled to a pro-rata share of any profit from the photo, it is unlikely famous figures would exert censorial pressure over publishers to either enjoin or limit the publication of certain images.

V. WHY CO-AUTHORSHIP MATTERS TODAY

"Who cares?" one might ask. Aside from the fact that celebrity culture and its impact on the marketplace has sufficiently permeated daily life, even for those who would rather avoid it altogether, how courts handle high-profile cases can inform future questions. In the digital world, where judicial interpretations can clash with the realities and expectations of online content-creators, any mere suggestion that courts may be willing to give credence to a wider view of authorship marks a major departure from the past, and possibly a concession to the future. If courts departed from precedent and recognized a defense of co-authorship in the tiny subset of cases involving celebrities and paparazzi, similar logic might be extended to other images.

Major fashion brands use social media to revolutionize the advertising and public relations industries.[204] Designers strategically foster relationships with celebrities and less-famous social media influencers.[205] The artistic value of fashion in the digital age goes beyond the creativity inherent in fashion design itself; designers must constantly craft increasingly innovative methods to cut through the clutter of information and reach consumers.[206] Savvy designers and the public

204. *See generally* Katie Hope, *How Social Media Is Transforming the Fashion Industry*, BBC (Feb. 5, 2016), https://www.bbc.com/news/business-35483480 ("[McKinsey's] latest research, based on analysis of 7,000 shoppers, found that three out of four luxury purchases, even if they still take place in shops, are influenced by what consumers see, do and hear online.").

205. *See* Brandon Brown, *How To Find, Build, and Sustain Influencer Relationships*, LEARNING HUB (May 19, 2020), https://learn.g2.com/influencer-relationships.

206. *See* Al Lautenslager, *8 Ways To Make Your Marketing Message Stand Out*, ENTREPRENEUR (July 1, 2014), https://www.entrepreneur.com/article/235120 ("Every day there are new messaging ideas and repurposed content from thought leaders and marketers of all types. If your messages are part of that clutter, your goal is to lift them above the clutter and get noticed.").

relations companies who represent them recognize that today's trendsetters are never truly off-duty and aim to swath them in apparel on the streets, in addition to on the red carpet.[207]

This shift in strategy resulted in greater accessibility for the masses.[208] Laurence Goldberg, a Partner at PR Consulting Los Angeles, represents brands such as Altuzarra and Acne.[209] Goldberg notes that over the years, brands began to send the firm more samples from their commercial collections—the clothes brands actually sell to the public, rather than the ones strictly shown on runways or red carpets.[210] Public relations (PR) firms strategically send celebrities designer items that fit the celebrity's image and can be worn in more casual, everyday settings.[211] This ingenious strategy seems to benefit not only the celebrity and the designer, but the paparazzi as well.[212] Online fashion sites and celebrity media began to give paparazzi images more coverage than the images received in tabloids.[213] Heather Magidsohn, who owns her own namesake PR firm, explains the tremendous creativity behind the scenes:

> The goal was never to do "street style" but it naturally has risen from dressing [celebrities] for their events. . . . They know they'll be photographed. . . . The beauty of an airport look is that it's all about a pared down, effortless and accessible style . . . . An airport shot can be evergreen, therefore every time the media is doing round-ups on how to achieve "airport

207. *See* Dhani Mau, *How Celebrity Dressing Works off the Red Carpet*, FASHIONISTA, https://fashionista.com/2017/09/dressing-celebrity-outfits-stylists-pr (Oct. 15, 2018).

208. *See id*. ("[W]ith stars and Instagirls stepping out in accessible, instantly available items more than ever, it's highly likely that they'll be able to move the needle just as well when it comes to sales.").

209. *Id.*

210. *Id.*

211. *See* Robin Mellery-Pratt, *For Emerging Designers, Celebrity Sells*, BUS. FASHION (Jan. 26, 2014, 4:19 PM), https://www.businessoffashion.com/community/voices/discussions/are-celebrity-labels-good-for-fashion/emerging-designers-celebrity-sells.

212. *See id.*

213. Mau, *supra* note 207.

> chic," the right look on the right talent runs, which equates to more brand mentions, links and ultimately sales. . . . After the product has left our showroom, the fun begins . . . . We scour hundreds of media and paparazzi sites, not to mention social media, to find the image of the celebrity in the product.[214]

Thus, while celebrities undoubtedly lend paparazzi photos value, so do the clothes they wear in the photos. Are these contributions enough to earn PR firms and fashion houses co-authorship status as well? The argument is a hard one to make, even under a more liberal interpretation of co-authorship. But not impossible. Each author, i.e., the photographer and the designer, intends for her contributions—the photographer's composition, angle and background and the designer's clothing and placement of clothing on the celebrity—to be merged into inseparable or interdependent parts of a unitary whole. Joint authorship limited by a right to use could potentially allow designers—and perhaps even PR firms—to share the fruits of their labor on social media without fear of being sued for copyright infringement.[215]

A flexible definition of joint work with a right to use could impact non-famous creators as well. For example, fashion bloggers routinely stand outside New York Fashion Week venues in their carefully-constructed outfits, waiting to be photographed by just one of the thousands of clicking cameras only to face accusations of copyright infringement should they find and share their own image online.[216] While this proposed modified right of co-authorship would only apply to all-purpose public figures for the time being, the omnipresence of

214. *Id.*

215. *See* Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 U. BALT. L. REV. 453, 474 (2019) (noting the failure of previous legislative attempts in protecting designers on social media).

216. *What Is the (Copyright) Law When It Comes to Street Style Photography?*, FASHION L. (Sept. 10, 2019), https://www.thefashionlaw.com/home/the-laws-at-play-for-street-style-photography.

online image sharing may necessitate gradual concessions to others as well.

CONCLUSION

Within the massive archive of copyright case law, decisions concerning joint work and co-authorship comprise only a minuscule filing folder. Courts have been reluctant to readdress conceptions of authorship that may further complicate the administration of an already-complex area of law. But the colossal evolutions of technology and communication that occurred over the past twenty years beg for an unorthodox solution. By allowing slight modifications to the tenet of joint work, courts may be able to fashion workable solutions that make more sense in the modern world, while still holding true to the purposes of the Copyright Act of 1976: fostering innovation and creativity to serve modern welfare. In fact, of the few joint work cases the federal courts of appeal have seen, several occurred during another major technological shift. When Web 1.0 shook up the way society communicated and created in the nineties and the early twenty-first century, courts faced novel questions with novel interpretations of co-authorship. It is time to do this again. How will courts respond when they finally decide to face the host of difficult questions waiting at the complex intersection of intellectual property, technology, free speech, and privacy law? Hopefully, with a willingness to concede to the realities of today and not the ideals of yesterday.