

## **Emily Ratajkowski v. The Paparazzi: A Look at Requirements for Originality**

With the recent attention on the Free Britney movement, the detrimental impact pervasive paparazzi attention on celebrities has gained attention and criticism. The paparazzi takes photos of celebrities doing mundane tasks just so they can be sold to the highest bidders – all in pursuit of selling magazines and news articles. However, as much as magazines would like us to believe it, celebrities are not “just like us.” Most of us are aware of when our photo is being taken, and it is certainly not the common human experience to have someone always ready and lurking to capture images of everyday individuals.

Emily Ratajkowski, a London-born model and actress, is faced with the same plight as many A-list celebrities; she is unable to escape the paparazzi. Ratajkowski has previously [written about her life](#) as a model and how it can be [dissociative to not own or control her own image](#). This experience is exacerbated by the fact that she is currently [being sued by Robert O’Neil](#). O’Neil is a paparazzi photographer who took a photo of Ratajkowski outside a flower shop. She later posted this photo on an Instagram story—lasting only 24 hours—after adding flower emojis and a caption that read “mood forever.” O’Neil alleges copyright infringement because she did not receive permission to post the photograph.

The Observer published an [article](#) at the beginning of October explaining that the case had moved past the summary judgment stage and was getting closer to trial. Judge Analisa Torres granted in part and denied in part both parties’ motions for summary judgment. The article states that Judge Torres “determined that the photo Ratajkowski had posted met the ‘extremely low’ standard for copyright originality.” However, this is a misstatement of the district court’s decision. Rather, Judge Torres found that O’Neil’s photo met the minimum threshold for originality.

Under the 1976 Copyright Act, to get copyright protection the work must be original and fixed in a tangible medium of expression that can be perceived or reproduced. [17 U.S.C. §102\(a\)](#). Section 101, however, does not define what it means for a work to be original. When discussing originality, then, case law proves to be the most useful for a proper analysis. Under *Feist*, the work does not need to be a work of creative genius, but rather must possess a “modicum of creativity.” It is important that the author also made some kind of choice, so while data and facts are not copyrightable, the selection and arrangement of the facts can be.

Keeping in mind that the threshold to meet originality for purposes of copyrightability is extremely low, *Mannion v. Coors Brewing Co.* provides photographs with protection when there is creativity in the timing, rendition, or creation of the subject. Originality in the rendition includes things such as the angle of the shot, the exposure, or development techniques. Originality in the timing involves the photographer’s timing decisions that allowed them to capture the image. Originality in the creation of the subject can include staging still life objects or posing models.

Ratajkowski sought summary judgment, in part arguing that the photo O’Neil took of her was not original. This is a particularly hard argument to make considering the threshold for originality. The district court denied this motion for summary judgment and considered *Feist* and *Mannion*, among other cases, in determining that O’Neil’s photo was original. The reasoning included the fact that O’Neil “selected his location, lighting, equipment, and settings based on the location and timing.” Questions remain about whether the photo of Ratajkowski falls under the doctrine of fair use, or if her caption and use of emojis counts as commentary on the photo and the paparazzi in general.

A question that arises from this case, and others like it over the years, is whether the level of originality should be raised to protect celebrities from the paparazzi. Of course, this would require that the threshold is raised for all people. But a heightened standard could help with protection for people generally from unsolicited photos of themselves being used in a variety of ways. As a matter of copyright law, this would require that more than a modicum of creativity would be required, at least in photography. A line could be drawn that distinguishes between unsolicited photos taken of people with little thought as to angle or time of day. For example, the paparazzi will take photos of celebrities regardless of the time of day and thus, do not work to creatively take their photos; they are merely worried about capturing a clear photo that they can sell. These types of photos, which arguably lack any creative intent, would be differentiated from instances where photographers make choices pertaining to the lighting, pose, or background.

Summary: Adapted from an assignment for Professor Fishman's Copyright Class, this blog post addresses the growing number of cases of paparazzi who are suing celebrities that post their images on social media. Emily Ratajkowski has been an outspoken supporter for tighter control on paparazzi and their invasive techniques. This post suggests that there could be changes in the copyright originality requirements that allow for protection of celebrities and the use of their image.

About the Author: Emmy is a 2L at Vanderbilt Law School and a member of the Journal of Entertainment and Technology Law along with other organizations like VBA, Ambassadors, and Christian Legal Society. She has an interest in copyright and trademark matters and will practice in Atlanta this summer.