

# That Post Could Cost You: Copyright Infringement Claims Continue for Social Media Posts

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## 7th Edition: Trends in Marketing Communications Law

What do Kim Kardashian, Amy Schumer, LeBron James, Gigi Hadid, and the brands Versace, Fenty and Moschino all have in common? Each has been sued for copyright infringement after posting on their social media channels photographs owned by paparazzi and various photography agencies. Gigi Hadid was sued multiple times after posting photographs of herself and of her boyfriend to her personal Instagram account. Similarly, fashion brand Versace was sued after posting red carpet photographs of Jennifer Lopez wearing the brand's clothing. And Amy Schumer was sued for copyright infringement after posting a photograph of herself wearing a sweatshirt that she designed and pushing her son in a stroller. The comedian's Instagram post encouraged followers to purchase the shirt on her website. This trend has continued throughout 2020, with a flurry of claims brought by many photographers and photo agencies.

Marketers who wish to avoid costly lawsuits must remember what these celebrities and brands have seemingly overlooked: simply because a person or a company's products are depicted in a photograph does not provide a legal right to use that photograph. Rather, under the Copyright Act, the "author" of a photograph (typically, the photographer who took the photograph or the photography agency for whom the photographer works) owns the copyright and controls the exclusive right to allow others to use the photograph.

Although a few celebrities and brands asserted various arguments in their defense, all of these lawsuits have settled before a court could pass on the merits of these defenses. For example, Gigi Hadid filed a motion to dismiss a lawsuit brought by the photo agency Xclusive after she posted a photograph of herself on her Instagram account. Hadid argued that because she stopped, smiled and posed when the photographer approached her on the street, she contributed to the protectable elements of the photograph and increased its value, and, therefore, had an implied license to use the photograph. In addition, Hadid claimed that her post on Instagram constituted a fair use and was not infringing. However, the court never addressed these arguments because the case was dismissed on the ground that Xclusive failed to register its copyright in the photograph, which is required before filing an infringement lawsuit.

Ultimately, brands and celebrities should refrain from posting paparazzi photographs to their social media channels (or using them in any other capacity), unless they have received permission to do so.

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## Key Takeaways

- The photographer or the photography agency (and not the subject of the photograph) is the owner of the copyright in the photograph, and has the exclusive right to license its use.
  - Marketers should refrain from using photographs of their products in social media posts or otherwise, unless they have permission from the copyright owner of those photographs.
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