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A new defense for news sites embedding copyrighted photos: fair use

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(Reuters) - There's been a lot of recent copyright litigation in the federal courts of New York over so-called embedded images, in which a news website reproduces a social media post that contains a copyrighted photograph. I told you last summer about Manhattan judges opining in [Sinclair v. Mashable \(2020 WL 3450136\)](#) and [McGucken v. Newsweek \(2020 WL 2836427\)](#) on difficult, fact-specific questions about whether Instagram's user agreements grant sublicenses to reproduce the work of photographers who post their work publicly on the social media site.

But now photographers have to worry about another defense: fair use.

On Monday, U.S. District Judge Allyne Ross of Central Islip, N.Y., ruled in *Boesen v. United Sports Publications* that the online tennis magazine was engaged in fair use when it embedded an Instagram post in which tennis player Carolyn Wozniacki announced her retirement. Wozniacki's post included a cropped, low-resolution photograph of her as a young player. United Sports included that photograph in its story by reproducing Wozniacki's Instagram post.

Danish photographer Michael Boesen, who took the photo Wozniacki posted, sued the tennis news website for copyright infringement in March. His lawyer, Richard Liebowitz of the Liebowitz Law Firm, argued that the website was not engaged in fair use when it reproduced the photograph because it was simply using the image to illustrate its story about Wozniacki's retirement. Merely embedding the image by reproducing Wozniacki's Instagram post, Liebowitz argued, is not transforming its use.

"While it may be common practice for commercial news organizations to embed social media posts, the federal courts should not be suspending the statutory protections accorded to photographers merely because a news organization wants to report on what's popular on social media," Boesen's brief argued. "Defendant could have reported on Wozniacki's social media announcement without using the actual photograph, or could have provided a textual hyperlink back to the original Instagram post."

United Sports' lawyers from Falcon Rappaport & Berkman responded that the story was about Wozniacki Instagram announcement of her retirement – so, by definition, its reproduction of the photograph as it appeared in Wozniacki's Instagram post was transformative. "The Instagram post is the story," the brief said.

Judge Ross agreed in Monday's decision. The article, she said, did not reproduce the photograph to show Wozniacki as a tennis player or even a young player. It embedded the Instagram post with the photo, the judge said, "because 'the fact that (Wozniacki) had disseminated' that post 'was the very thing the article was reporting on.'"

The Central Islip judge relied heavily on a ruling in June by U.S. District Judge Vernon Broderick of Manhattan in [Walsh v. Townsquare Media \(2020 WL 2837009\)](#). In that case, the photographer Rebecca Fay Walsh sued a celebrity news site for embedding an Instagram post by the rap star Cardi B, announcing that her lipstick line with Tom Ford had sold out. Cardi B's post included a photo taken by Walsh. Judge Broderick dismissed the case, holding that the news at issue in the Townsquare report was itself Cardi B's Instagram post, so it was fair use to embed the post containing Walsh's photo of the rap star.

In the Boesen decision, Judge Ross emphasized that her ruling and the Walsh decision do not give publishers free rein to reproduce copyrighted photos that appear on Instagram or other social media sites. Her "narrow" conclusion, she said, "draws a line that balances photographers' interest in protecting their copyrights with reporters' interest in covering social media events."

Boesen counsel Liebowitz said in an email that his client will "pursue the necessary remedies" to reverse Judge Ross' decision. "Allowing media companies to profit from the exploitation of a protected photograph, to report on what celebrities are posting to Instagram, is nothing more than a technical end run around the Copyright Act," he said.

The case is Boesen v. United Sports Publications, No. 2:20-cv-01552 in the Eastern District of New York.

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