

**O’Neil v. Ratajkowski**  
**No. 19 CIV. 9769 (AT), 2021 WL 4443259 (S.D.N.Y. Sept. 28, 2021)**

Year	2021
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff, Robert O’Neil, a paparazzi photographer, photographed professional model and actress Defendant Emily Ratajkowski leaving a flower shop holding a bouquet covering her face on September 13, 2019. O’Neil registered the copyright in the photograph and uploaded the photograph to his agency Splash News, which posted the photograph online for licensing. The photograph earned O’Neil minimal income. Ratajkowski posted the photograph to her Instagram Stories and added the caption “mood forever” to the bottom of the post. The post automatically deleted in 24 hours. O’Neil filed a claim for copyright infringement and the parties each moved for summary judgment on whether posting the photograph was fair use.
Issue	Whether a celebrity’s use of an unlicensed paparazzi photograph of herself in a captioned social media post that disappeared after 24 hours is fair use.
Holding	Considering the first fair use factor, the purpose and character of the use, the court found there to be a genuine issue of material fact as to whether Ratajkowski’s use was transformative. The court observed that a jury could either view the photograph and Ratajkowski’s caption as commentary on her attempts to hide from paparazzi, which would be transformative, or as a photograph that “merely showcases [her] clothes, location, and pose at that time,” which would serve the same purpose as the original. The court noted that while Ratajkowski did not earn any money from the post, her Instagram account is a commercial enterprise. Considering bad faith, the court noted there was no evidence that Ratajkowski personally removed copyright attribution from the photograph, knew that it was copyrighted, or that she took it directly from Splash News. The second factor, the nature of the copyrighted work, marginally disfavored fair use because while photographs are creative, this particular photograph was “essentially factual in nature” because O’Neil captured Ratajkowski in public and did not direct her in any way to achieve his artistic vision. The third factor, the amount and substantiality of the portion used, slightly disfavored fair use because Ratajkowski used more of the photograph than necessary for her claimed purpose of commenting on intrusive paparazzi. However, the court noted this factor is given less weight because Ratajkowski posted the photograph to her Instagram Stories, where it appeared for only 24 hours. On the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, the court found issues of material fact remained because there was no information in the record regarding the market for individuals licensing paparazzi photographs to post on social media. Because the court found issues of material fact with respect to the first and fourth factors and found the second and third factors weighed only marginally against fair use, the court denied both parties’ motions for summary judgment regarding fair use.
Tags	Internet/Digitization; Photograph; Review/Commentary
Outcome	Preliminary finding; fair use not found

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