

Walsh v. Townsquare Media, Inc.

No. 19-CV-4958 (VSB), 2020 U.S. Dist. LEXIS 96090 (S.D.N.Y. June 1, 2020)

Year	2020
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiff, Rebecca Fay Walsh, a photographer who licenses her photographs to online and print media, asserted a claim of copyright infringement relating to the unlicensed publication of Walsh’s photograph of rapper Cardi B at New York Fashion Week in an article on the website XXL Mag (“XXL”), which is owned and operated by Defendant Townsquare Media. The article, entitled “Cardi B Partners with Tom Ford for New Lipstick Shade,” mentions the collaboration, but focuses on the ensuing reaction to the announcement by fans of Cardi B and a rival rapper on Instagram. XXL embedded three Instagram posts in the article: (1) a post by the Instagram account tomfordbeauty to advertise the lipstick; (2) a post by Cardi B reproducing the tomfordbeauty post and thanking Ford for the collaboration; and (3) a post by Cardi B containing a composite image of the lipstick next to Walsh’s photograph under a header announcing the lipstick had sold out, the number of “likes” received, and Cardi B’s caption “Sorry :/” (the “Post”). Defendant moved for judgment on the pleadings, asserting a fair use defense.
Issue	Whether embedding a social media post containing an unlicensed photograph in an online news article discussing the post is fair use.
Holding	The court found that the first factor, the purpose and character of the use, strongly favored a finding of fair use. XXL’s use of the photograph “was for an entirely different purpose than originally intended” because XXL “did not use the Photograph as a generic image of Cardi B to accompany an article about Cardi B,” but rather “published the Post, which incidentally contained the Photograph, because the Post—or put differently, the fact that Cardi B had disseminated the Post—was the very thing the Article was reporting on.” Further, without the embedded Post, the article “would have been nonsensical in appearance as well as potentially impossible, given that the Post is embedded and hyperlinked, rather than inserted as an image.” XXL’s potential profit from advertisements appearing with the article was outweighed by the transformative, news reporting use. The second factor, the nature of the copyrighted work, favored fair use because the Photograph contained both informational and creative elements, rendering the overall creativity “neutral,” and because the work was previously published by Cardi B. The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, also weighed in favor of fair use because there was “no reasonable substitute” for using the actual Instagram post in an article discussing the Instagram post. The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, also weighed in favor of fair use. Because the Post depicted the Photograph alongside another image and included the Instagram text and tags, it is “implausible” that XXL’s use would compete with Walsh’s licensing business or affect the market value for her photograph. Overall, the court held the use was fair and dismissed the case.
Tags	Internet/Digitization; News reporting; Photograph
Outcome	Fair use found

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