



## ARE Copyright Alert: New York Federal Court Finds Embedded Instagram Post Is Fair Use

Author(s): Chester Rothstein, Herbert A. Blassengale, IV

In a series of alerts our firm issued in [April](#) and [July](#) of this year, we reported on the fast-changing law surrounding whether it is copyright fair use to embed Instagram posts, where the underlying Instagram posts include copyrighted works.

Our prior alerts noted that perhaps in response to *Sinclair v. Ziff Davis LLC* and *McGucken v. Newsweek LLC*, Instagram had changed its policy to no longer encourage embedding posts, and we concluded that “the ultimate rule to live by is anything but clear.”

We now report on a November 2, 2020 decision from the Eastern District of New York, which found fair use and granted a sports news publisher’s Motion to Dismiss a Complaint by a photographer. See *Boesen v. United Sports Publ'ns, Ltd.*, No. 20-CV-1552 (ARR) (SIL), 2020 U.S. Dist. LEXIS 203682 (E.D.N.Y. Nov. 2, 2020) (“Boesen”).

### Background

In a fairly narrow holding, the Boeson Court held that the following was fair use: the defendant, United Sports Publications Ltd., a sports news publisher, ran an article on a tennis magazine's website that covered the retirement of professional tennis player Caroline Wozniacki, and in particular noting her career and that the retirement was announced on social media, namely Instagram.

The article also embedded the original Wozniacki Instagram post, which featured a cropped low-resolution version of the plaintiff's photograph of Wozniacki playing tennis at a young age. The plaintiff, professional Denmark-based photographer Michael Boeson, filed a copyright infringement suit against the defendant United Sports Publication Ltd.

### Discussion

Judge Ross of the Eastern District of New York granted the defendant's Motion to Dismiss, finding that the fair use defense was established on the face of the complaint.



Focusing on the “purpose and character of use” factor of the copyright fair use test, the court held this factor strongly favored the defendant. The court reasoned that use of the photo was “transformative,” in that the article created a new meaning for the photograph.

The court noted that the article did not merely present the copyrighted image, but instead since the post was itself a subject of the article (namely that this tennis player announced her retirement on the Instagram platform), it transformed the function of the work in the new context.

On its face, the defendant’s article reported Wozniacki’s retirement announcement and the very fact that her retirement took place on Instagram. Thus emphasizing that the article embedded the Instagram post announcing Wozniacki’s retirement only incidentally included the photograph. The court emphasized that the only way the defendant could inform its readers about Wozniack’s choice to announce her retirement on social media was by reproducing that post.

Because the photograph did not appear on its own, but as part of the post alongside the text, the court also decided that it would be implausible that the defendant’s use would compete with the plaintiff’s business or affect the market or value of his work.

Comparing the Sinclair and McGucken cases (which were the subjects of our prior alerts), one might conclude that the pendulum is swinging back in favor of fair use – but we think the finer point is simply that no matter what the general rule is, if you are writing about an Instagram post, then without distinguishing facts it may be fair use to embed that very post in your writing.

We will continue to monitor and report on the use of embedded Instagram posts of photographs. In the meantime, please feel free to contact us to learn more.

[Chester Rothstein](#) is a partner, and Herbert A. Blassengale, IV is a law clerk at Amster, Rothstein & Ebenstein LLP. Their practices focus on all facets of intellectual property, including copyright and trademark litigation associated with social media. They can be reached at [crothstein@arelaw.com](mailto:crothstein@arelaw.com) and [hblassengale@arelaw.com](mailto:hblassengale@arelaw.com).