

Boesen v. United Sports Publs., Ltd.

**No. 20-CV-1552 (ARR) (SIL), 2020 U.S. Dist. LEXIS 240935 (E.D.N.Y. Nov. 2, 2020),
reconsideration denied by 2020 U.S. Dist. LEXIS 240935 (Dec. 22, 2020)**

Year	2020
Court	United States District Court for the Eastern District of New York
Key Facts	Plaintiff, Michael Barrett Boesen, a professional photographer, owns the copyright in a photograph that he took in 2002 of professional tennis player Caroline Wozniacki. On December 6, 2019, Wozniacki announced her retirement from professional tennis in a post on her personal Instagram account, using a cropped, low-resolution version of the photograph in the post. That same day, Defendant United Sports Publications Ltd. (“United Sports”) published an online article reporting on Wozniacki’s announcement and summarizing her tennis career, and included Wozniacki’s Instagram post as an embedded link. Boesen filed a copyright infringement suit against United Sports. United Sports filed a motion to dismiss, asserting fair use.
Issue	Whether embedding a social media post containing an unlicensed photograph in an online news article discussing the post is fair use.
Holding	Considering the first fair use factor, the purpose and character of the use, the court found that United Sports’ use was sufficiently transformative that this factor strongly favored fair use. United Sports did not use the photograph as a “generic image” of Wozniacki to accompany the article or to “depict her playing tennis at a young age,” but rather because the article was reporting on the Instagram post and the Instagram post included the photograph. The court also noted that United Sports’ status as a for-profit publisher by itself did not demonstrate that the use of this specific photography was commercial. The second factor, the nature of the copyrighted work, favored fair use slightly, because the photograph contains both informational and creative elements, and was previously published. The third factor, the amount and substantiality of the portion used, favored fair use because it was necessary to use photograph as it appeared in the Instagram post to report on the Instagram post. The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, also favored fair use because the photograph did not appear on its own, but as part of a social media post, which included Wozniacki’s avatar, profile name, and additional text, making United Sports’ use unlikely to affect or compete in the market for the original. Furthermore, the low-resolution, cropped version would also be a poor substitute for the original. Because all four factors favored fair use, the court dismissed the complaint. The court subsequently denied Boesen’s motion for rehearing, concluding that in her previous decision she applied caselaw reasonably, evaluated the commercial purpose adequately, and analyzed market harm sufficiently.
Tags	Internet/Digitization; News reporting; Photograph
Outcome	Fair use found

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