

Federal Judge Finds Copyright Issues “Embedded” in Social Media Re-Posts

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Judge Jed Rakoff of the Southern District of New York recently denied a motion to dismiss in a copyright dispute involving the unlicensed “embedding” of a social media video. In doing so, the court explicitly and definitively rejected the Ninth Circuit’s “server rule,” under which the Ninth Circuit held that re-posting of online content does not constitute a separate act of infringement where the infringing copy is stored only on third party servers. Instead, Judge Rakoff held that by re-posting the copyrighted content online, defendants had implicated plaintiffs’ exclusive display right – regardless of whether they created and stored a copy on their own servers. The opinion states that to hold otherwise would be to “make[] the display right merely a subset of the reproduction right.” [*Nicklen v. Sinclair Broadcast Group, Inc., et al.*](#)

Plaintiff Paul Nicklen is a photographer who captured footage of a starving polar bear and posted the video to his social media accounts. Several news outlets and online publishers, including defendants Sinclair Broadcast Group, embedded the video in online articles without first obtaining from Nicklen a license to use the footage.

To embed a social media post is to integrate the post from a social media platform into a third-party website – essentially, to re-post social media content in a way that links back to the original post. Embedding does not create or store an additional copy of the material on the embedder’s server. While embedding posts has become a commonplace practice, there still exist major questions about the copyright implications of doing so.

Plaintiff Nicklen alleged that by embedding his video into their news articles, defendants infringed his exclusive reproduction, distribution, and display rights. Defendants moved to dismiss, arguing that embedding a video does not “display” the video within the meaning of the Copyright Act.[\[1\]](#)

Judge Rakoff held that the Copyright Act defines the display right very broadly, and in a way that is “technology-neutral”; “[t]he right is concerned not with how a work is shown, but that a work is shown.” As a result, the court found it was of no consequence that embedding technology did not exist in 1976, when Congress crafted the display right. Quoting the legislative history of the Act, the court noted the display right in its final form encompasses “not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.” Because embedding a video “show[s] the video or individual images of the video nonsequentially by means of a device or process,” the court determined it falls squarely within the display right.

Nevertheless, defendants argued the court should adopt the Ninth Circuit’s “server rule.” According to defendants, embedding does not constitute a “display,” because when a website publisher embeds content, the content remains on a third-party’s server, and is not fixed in the memory of the embedder’s computer. The court was unpersuaded. It found “[t]he server rule is contrary to the text and legislative history of the Copyright Act” because the Act defines display as “to show a copy of” a work – “not ‘to make and then show a copy of the copyrighted work.’” In other words, the court found adopting the server rule would improperly collapse the display right into the reproduction right.

In rejecting the server rule here, the court cabined the Ninth Circuit’s prior application of the server rule to two specific facts: (1) the defendant there operated a search engine, and (2) the copyrighted images were only displayed if a user affirmatively clicked on a link. In contrast, here, the defendant did not operate a search engine, and no user intervention was required to display images from plaintiff’s copyrighted video. Users were met with a still image from the video as soon as they opened defendant’s article, whether or not they clicked to play the video. “When a user ‘opens up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not,’” the court determined the server rule is “inapt.”

Judge Rakoff's decision is consistent with a previous decision out of the Southern District of New York, considering the same question. In [Goldman v. Breitbart](#), plaintiff Justin Goldman took a photograph of New England Patriots quarterback Tom Brady and uploaded it to his own Snapchat story. The photo went "viral," and various news outlets embedded Tweets featuring the photo. Granting partial summary judgment in favor of plaintiff Goldman, Judge Katherine Forrest held "the plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the Copyright Act." Judge Forrest rejected the idea that the difference between infringement and non-infringement should hinge on "invisible technological details," rather than on the publisher's intent and the effects of the publisher's actions.

The debates over social media embedding are unlikely to slow down anytime soon, as new cases continue to be filed and courts endeavor to reconcile the evolving technology with the language and scope of the Copyright Act.

[\[1\]](#) Defendants also argued that the video's inclusion in the article was fair use. However, the Court declined to resolve the question of fair use at the motion to dismiss stage, because it is highly "fact-driven" and "context-sensitive."

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