

Second Circuit Sidesteps “Server Test” in Embedded Video Copyright Ruling, Highlighting How Platform Terms Matter

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On April 23, 2026, the Second Circuit issued a multi-part decision addressing copyright infringement claims involving a website’s embedding of social media video posts and display of video screenshots, reversing the lower court’s dismissal of the complaint. ([Richardson v. Townsquare Media, Inc.](#), No. 25-291 (2d Cir. Apr. 23, 2026)). Setting aside the appeal court’s fair use and de minimis copy findings, the court expressly declined to adopt the Ninth Circuit’s “server test,” which provides that a website “displays” a copyrighted image or video only if it stores and serves the content from its own server and that embedded content from another site does not constitute actionable copying.

Embedding or inline linking to outside content is a common practice for websites or blogs, and the opinion calls attention to the due diligence web publishers perform before displaying social media or user-generated content containing photos or videos. One additional reminder from this decision is that a social media platform’s terms of service can differ on the scope of the platform-facing license and downstream user rights, impacting the infringement risk for embedding user-posted content under this court’s analysis. This decision suggests that scrutiny of the applicable terms and policies is a prudent practice before embedding a social media post and republishing on a third-party site.

Embedding Generally

Embedding (or inline linking) allows a third-party website to display content hosted elsewhere without storing it locally. The third-party site inserts code—often an embed code, iframe or script—that causes the user’s browser to retrieve content directly from the original source. The result is a seamlessly integrated webpage, with a mix of text and images, although the underlying images or video content may be hosted in varying locations. Unlike hyperlinks, embedding displays media directly within the page rather than directing readers to click through to another site. News websites and blogs often embed social media posts this way, allowing the original content to appear while still being delivered from the source platform (though, if the original post is taken down, the embedded content disappears).

While users likely do not perceive whether embedded content is hosted locally or displayed from its original source, this distinction can affect liability. Courts have reached [different conclusions on whether embedding constitutes copying under the Copyright Act](#). Under the “server test” [adopted by the Ninth Circuit in 2007](#), whether a website publisher is directly liable for infringement turns on whether the image is hosted on the publisher’s own server, or is embedded or linked from a third-party server.

The Townsquare Media Decision

Videographer Delray Richardson (“Plaintiff”) sued media company Townsquare Media, Inc. (“Townsquare”) after its hip-hop site XXL used three categories of his content: (1) an embedded X post containing his viral 2015 video (“2015 Video”); (2) an embedded YouTube interview with a rapper that Richardson had recorded (“YouTube Interview Video”); and (3) screenshots from the videos as headline images. The district court [dismissed](#) the case, finding fair use as to the 2015 Video, de minimis use as to the screenshots, and a license defense as to the YouTube Interview Video.

The Second Circuit [affirmed](#) in part and vacated in part. It held that dismissal based on fair use at the pleading stage was improper as to the Townsquare’s republication of the entire 2015 Video because, among other things, such republication could have made it “a plausible market substitute for the video itself.” It also held that, at the pleading stage, Townsquare’s use of the screenshots were not de minimis, as “Townsquare prominently displayed the screenshots, which are clearly recognizable as taken from the embedded videos (as Townsquare *intended* them to be), to communicate the subject matter of its articles.”

However, the court affirmed dismissal as to the YouTube Interview Video, concluding that YouTube's terms "unambiguously" granted a license that covers Townsquare's embedding.

Implications

Second Circuit and the Server Test

A comment from our [prior post](#) about a 2018 New York district court decision declining to adopt the server test remains relevant: "This decision may be an awakening of sorts for web publishers who have been under the impression that...they enjoyed near-free reign to inline link to user posts and display outside content on their own websites without fear of liability, as long as they used the source platform's embed tool and didn't host such content on their own servers."

Here, as noted by the court, Townsquare "does not take a position on [the server test]" and instead assumed its embedding constitutes actionable use for the purposes of the appeal. Thus, the court had "no occasion to resolve the issue," leaving intact the status quo: multiple district courts within the Second Circuit have declined to adopt the server test (which remains precedent in the Ninth Circuit).

Terms Matter: The Source of the Embed Is Relevant

In affirming dismissal of the infringement claim for the YouTube Interview Video but reaching a different conclusion for the 2015 Video, the Second Circuit highlighted an important consideration: the source of the content. The 2015 Video had been posted on X and republished via inline link; the YouTube Interview Video was published on YouTube and embedded using YouTube's tools. These differences influenced the litigation stance (fair use vs. license defense) and the outcome of the appeal.

X: Your Rights and Grant of Rights in the Content.

- "In choosing to...post..., you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display, upload, download, and distribute such Content...in any and all media or distribution methods now known or later developed, for any purpose. [] This license authorizes us to make your Content available to the rest of the world and to let others do the same."

YouTube: License to YouTube; License to Other Users

- “By providing Content to the Service, you grant to YouTube a worldwide, non-exclusive, royalty-free, sublicensable and transferable license to use that Content...in connection with the Service....”
- **“You also grant each other user of the Service a worldwide, non-exclusive, royalty-free license to access your Content through the Service,** and to use that Content, including to reproduce, distribute, prepare derivative works, display, and perform it, only as enabled by a feature of the Service (such as video playback or embeds).” [emphasis added]

As the court outlined, YouTube uses a two-step structure: (1) users grant a broad license to YouTube, *and* (2) a separate, direct license to every other user, limited to uses enabled by Service features like playback or embeds. It appears that X uses a more platform-centric approach: users grant X a broad license with sublicensing rights, and X may make content available to others subject to X’s terms.

Indeed, one New York district court rejected a web publisher’s license defense in an infringement case involving embedded Twitter videos:

“By their express language, Twitter’s terms grant a license to use content only to Twitter, and grant Twitter only the right to sublicense to others. [...] So even if X’s[/Twitter’s] Terms of Service establish that [Plaintiff] granted a license to X[/Twitter] by posting the Video[s], they do not establish that X[/Twitter] granted a sublicense to [Defendant]. [...] Defendant points to no judicial decision finding an express license under Twitter’s User Agreement or under any similarly worded terms of service.” [citations omitted]

([Lynk Media, LLC v. Independent Digital News and Media, LLC](#), No. 24-00583 (S.D.N.Y. Sept. 29, 2025)).

In contrast, the *Townsquare* court found that YouTube’s terms granted it permission to sublicense and also provided a direct license to Townsquare, as a YouTube user, to embed Plaintiff’s video.

Practically, website operators should not automatically consider all social media embeds as carrying identical permissions. As *Townsquare* demonstrates (i.e., fair use rejected for the X video at the pleading stage, license defense accepted for the YouTube video), the content's source can, in part, determine infringement risk. This compounds the uncertainty over the "server test," which is good law in the Ninth Circuit but not necessarily beyond. Operators should therefore regularly review the source platform's terms, with particular attention to licenses granted to the users of the platform under such terms, before embedding third-party content and use only official embed tools.

[Related Professionals](#)

- **David A. Munkittrick**

Partner

- **Nicole Sockett**

Associate