



ARE Copyright Alert: New York Court Rules That Embedding Copyrighted Works Constitutes Copying Within the Meaning of the Copyright Act

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In a series of alerts published in 2020, we discussed the evolving law which governs embedding, through Instagram's API, Instagram photos on third-party websites. As we formerly discussed, [*Sinclair v. Ziff Davis LLC and McGucken v. Newsweek LLC*](#) rejected the argument that users of Instagram's API have an automatic sublicense to use copyrighted material. On the other hand, [*Boesen*](#) showed that fair use may allow news sites to embed photos, particularly where the sites are reporting on the posts themselves, and not the content depicted in them.

These cases did not resolve whether or not an embedded photograph or video constitutes a "display" of the work under the Copyright Act.

A recent decision by Judge Rakoff in the Southern District of New York reached this question, concluding that embedding a video through Instagram or Facebook's API, such that it plays on a news site, constitutes a "display" of the work and is thus infringement. *Nicklen v. Sinclair Broadcast Group, Inc.*, No. 20-cv-10300 (JSR), 2021 U.S. Dist. LEXIS 142768 (S.D.N.Y. July 30, 2021) ("Nicklen"). The court did not reach a conclusion as to whether or not such a use constitutes fair use, however.

Background

In *Nicklen*, Plaintiff Paul Nicklen, a nature photographer, posted a video of polar bears to both Facebook and Instagram. The video quickly became viral and Defendant Sinclair Broadcasting Group reported on this fact in an online article, embedding Nicklen's post (and thus allowing it to be viewed while on Sinclair's site) in the process.



Nicklen, and co-Plaintiff Christina Mittermeier, sued Sinclair for violating their copyright in the work, and Sinclair moved to dismiss the complaint on the grounds that 1) there was no infringement because Sinclair did not “display” the video and 2) the use of the video in the article was fair use.

Discussion

Considering Sinclair’s arguments, the court denied Sinclair’s motion to dismiss, holding that Sinclair infringed the Plaintiffs’ copyright and ‘displayed’ the video within the meaning of the Copyright Act, as well as that more facts were needed before a fair use analysis could be performed.

The court first held that Sinclair infringed Nicklen’s copyright under the plain meaning of the Copyright Act, which grants copyright holders the exclusive right to publicly display their work.

Under the plain meaning of the Act, “a defendant violates the author’s exclusive right to display an audiovisual work publicly when the defendant without authorization causes a copy of the work ... to be seen -- whether directly or by means of any device or process known in 1976 or developed thereafter.” This protection for authors is both broad, encompassing not just “the first copy... but any copy of the work” as well as “technology-neutral,” extending to “any device or process.”

As a result, the court concluded that embedding a post, which shows a copy of the work via an API, constitutes a display, and thus infringement, of the embedded work under the Copyright Act.

Sinclair argued that, because its website only stores html code which allows a viewer to view the video, the court should apply the so-called “server rule” used by the Ninth Circuit. Under this approach, because the actual files constituting the video are stored on Facebook and Instagram’s servers, and not Sinclair’s, the image is never actually “displayed” by Sinclair.



The court, however, rejected the server rule, reasoning that it is contrary to both the text and the legislative history of the Copyright Act and would undercut the ability of photographers or filmmakers who post online to control how their work is shown.

In a second portion of the opinion, the court also considered whether embedding the video in the article was fair use, coming to no definite conclusion.

On one hand, using the video in a news article describing the popularity of the video was transformative, favoring of finding of fair use. On the other hand, however, Sinclair used the entire video in the article and widespread use of embedding would significantly reduce the ability of Nicklen and other creators to license their work. Noting the early stage of the case, the court concluded that it needed further facts before it could come to a decision.

The court's holding further casts doubt on the applicability of the server rule, and reinforces that the availability of fair-use defenses in cases involving embedded posts may be heavily fact dependent.

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

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