

Courts Continue to Debate the Legal Status of Reposted Social Media Content

When Does Embedding and Displaying Create Liability under the Copyright Act?

BY HOWARD S. HOGAN AND CONNOR S. SULLIVAN

Photography and video-based social media applications continue to saturate our lives; everyone is a content creator. The courts are regularly asked to determine when third-party display of copyright protected content online constitutes an infringement of an author's copyright. Invariably, courts reach divergent answers to that question under different facts and circumstances. These disparate results have created confusion among social media creators and users.

The Copyright Act of 1976 enumerates the "exclusive rights" of copyright holders, including the right to "display" a work, meaning to "show a copy of it, either directly or by means of a film, slide, television image, or any other device or process."

Many internet platforms allow third parties to "embed" content their users post on other websites without creating or storing a copy of the content on that website. "Embed code" directs an "internet browser ... to retrieve the embedded content from [a] third-party server and display it on the website ... [allowing] the user [to] see[] the embedded content, ... even though the content is actually hosted on a third-party's server." (*Sinclair v. Ziff Davis, LLC*)

A recent decision in the Southern District of New York revisited whether embedding a copyright-protected picture originally posted on a social media platform constituted a "display" of



(Courtesy photos)

Howard Hogan (left) is a partner in the Washington, D.C. office and Connor Sullivan is an associate in the New York office of Gibson, Dunn & Crutcher.

that picture and therefore violated the original poster's copyright (*McGucken v. Newsweek LLC*). In *McGucken*, after the plaintiff posted a picture to his social media account, an online news magazine published an online article with the plaintiff's picture embedded. The original poster registered his photograph with the U.S. Copyright Office and sued for copyright infringement.

The online news magazine argued that its article did not "display" the plaintiff's picture in violation of the Copyright Act because it only used HTML code to direct users' browsers to retrieve and display the image that was actually

stored and hosted on the social media platform. According to the online news magazine, the “display” right of a copyright holder is only infringed if a third party stores a copy of a copyright-protected work on its own server and displays that copy.

The Ninth Circuit adopted this “server test” approach in *Perfect 10, Inc. v. Amazon.com, Inc.* Perfect 10 sold “copyrighted images of nude models”; when, as often occurred, these images were republished elsewhere on the Internet without authorization, the republished copies would be indexed by internet search engines and embedded in search results. The Ninth Circuit held that embedded images in search results did not impermissibly “display” the pictures because the search engine did not “store[] [the] image[s] as electronic information and serve[] that electronic information directly to the user;” it only “provide[d] HTML instructions that direct a user’s browser to a website publisher’s computer that stores the full-size photographic image.” In other words, because the search engine did not make and display a copy of the images on its own servers, the search engine did not “display” the images. In the *McGucken* case, the online news magazine relied on this “server test” to defend itself.

The court in *McGucken* rejected the Ninth Circuit’s approach, holding that the online news magazine’s embedded use of the picture was a “display.” The court reasoned that “[t]he Ninth Circuit’s approach, under which no display is possible unless the alleged infringer has also stored a copy of the work on the infringer’s computer” would mean that “a photographer who promotes his work” online “surrenders control over how, when, and by whom their work is subsequently shown—reducing the display right, effectively, to the limited right of first publication that the Copyright Act of 1976 rejects (*Nicklen v. Sinclair Broad*).

That an embedded image (or other content) *can* infringe the display right does not resolve whether a specific embedded image *does*. The *McGucken* court went on to consider whether the social media platform’s terms of use granted an express or implied sublicense for third parties to use posted content and whether embedding the picture was a protected fair use; the court found both issues required fact-finding and denied both parties’ cross-motions for summary judgment. But nonetheless, as a practical matter, the meaningful prospect of liability can effectively determine the outcome of disputes like this; in *McGucken*, the parties reached

a settlement three weeks after the Court held that embedding the picture was a “display” (see *McGucken v. Newsweek LLC*).

The threshold question remains whether embedding in a website content that was already posted elsewhere constitutes a display of that content. Like *McGucken*, other decisions have also rejected the Ninth Circuit’s “server test.” But still other district courts in recent years have adopted and applied the “server test” with respect to other exclusive rights such as reproduction and distribution. This question continues to bedevil social media users as courts in new jurisdictions and judicial circuits continue to weigh in on this debate.

A conclusive answer to this question awaits further development. Moreover, future technological developments—like the developing set of virtual or enhanced reality technologies that journalists and commentators often refer to as the “metaverse”—will no doubt further complicate the analysis of this core question of how far the Copyright Act’s exclusive rights should be applied online.

Howard S. Hogan is a partner in the Washington, D.C., office, and **Connor S. Sullivan** is an associate in the New York office of Gibson, Dunn & Crutcher.