Harmless Sharing or Copyright Infringement?

Businesses today – and, by extension, their attorneys – face a complicated dynamic when it comes to social media use. Needless to say, a social media presence has become an essential part of doing business in the digital era for many brands and individuals. But at the same time, the legal risks posed by posting on and engaging with social media have grown and may at times seem unpredictable.

This sense of unpredictability results, at least in part, from the uneasy coexistence of copyright law and social media. The sharing culture established by social media is in significant tension with the regime of property rights established by copyright law, which requires a valid license to copy, publish, or distribute content created by someone else.

This article explores two recent copyright litigation trends resulting from this tension: first, a recent spate of lawsuits claiming the subjects of paparazzi photos who posted the images to Instagram without authorization infringed the owners' copyrights in the photos, and second, recent opinions calling into doubt the legality of "embedding," a widely used technological feature that enables social media posts to be re-shared by other users across platforms.

These litigations make plain the widening gap between social media users' practices of reposting and sharing content, and the copyright law as written and enforced. They also illustrate the dynamic state of the law in this area, as courts grapple with reconciling new technology with well-established copyright principles. Further, these suits highlight the unintentional primacy of Terms of Service agreements in resolving copyright disputes – and may galvanize a necessary re-examination of both those Terms of Service agreements and their role in determining copyright infringement.

Copyright law challenges the easy sharing ethos of social media

Copyright law and social media coexist in a delicate balance. Copyright is grounded in the mechanism of restricting content – by establishing a marketable right in the use of creative expression, copyright law promotes creation and encourages its proliferation. This "engine of free expression" theory of copyright law undergirds much of the law's development and justification.

Social media platforms, and the norms they have inspired, present a unique challenge to copyright law. As scholars have noted – and as any social media user can attest – social media platforms have shifted the consumption habits of today's society from a market culture to a sharing culture by encouraging users to share freely both original and third-party content. Matters are further complicated by the powerful economic incentives that now exist for

sharing content on social media – namely, individuals and businesses alike are able to generate advertising revenues from their social media content. This is combined with the fact that social media use is governed by Terms of Service that potentially create licenses for certain kinds of content sharing, but which are rarely read (and often poorly understood), and which even courts can interpret differently, as discussed in further detail below.

Paparazzi suits reflect the tension between copyright law and social media

Since 2017, paparazzi have brought a number of high-profile copyright infringement lawsuits for a seemingly innocuous use of social media: people, or brands, posting pictures of themselves, their products, or their properties. Specifically, these lawsuits result from individuals or companies reposting photographs without license or authorization from the copyright owner. The list of celebrities and companies subject to these suits is long and expanding, but some notable examples include model Gigi Hadid, who was sued for posting a paparazzi photo of herself without licensing it on her Instagram page; pop singer Katy Perry, whose post of a snapshot of herself donning a Halloween costume landed her in a spooky situation with the paparazzo who took the photo; and fashion brand Marc Jacobs, which used a paparazzi photo of a model wearing a Marc Jacobs sweatshirt to promote its product in a "street-style"-esq Instagram post, only to end up with costly and potentially time-consuming legal proceedings brought by the paparazzo behind the shot.

These suits reveal a fundamental disconnect between copyright law on the books and the practice of content sharing on social media: as counterintuitive as it may seem to non-copyright lawyers, one does not have the right to use a photo simply because it is a photo of oneself or something one makes or owns. This may seem unfair where the original photograph itself has value only because of one's presence in the photo, as is the case with many of the celebrities who have been sued. But the law is clear: the copyright in the photo is held by the individual who took it (at least initially) and it is the author's prerogative to grant authorization – and, likely, demand payment – for any use of the photo, including something as casual as an Instagram post. Moreover, the Copyright Act is a strict liability statute. That means that anyone who violates its bounds, whether innocently or intentionally, is liable for the infringement. This feature of copyright law is all the more dangerous in the internet context, where norms and expectations often do not line up with the letter of the law.

That said, these paparazzi cases have settled outside of court, which may indicate the aversion of the copyright owners to testing the potential implied license and fair use defenses that would almost certainly be mounted.

Embedding disputes highlight the growing importance of social media platforms' Terms of Service

A more legally and technically complex strand in recent copyright litigation centers on the sharing of third-party content using the "embed" feature prevalent across social media. "Embedding" allows an online user to incorporate a work posted on social media without technically copying the image from its source. For years, the presumed legality of this feature has depended on this seemingly minor technological nuance: specifically the fact that, when one *embeds* content that has been posted online, the content is shared without technically being copied because the content itself remains hosted on the original server. This distinction served as the touchstone in the Ninth Circuit's Perfect 10 v. Amazon.com nc.decision, which established the "server test," according to which direct infringement of the display right requires that a defendant actually host the infringing content on its server.

The server test became the accepted standard and crucially informed the development of embedding technology. Following the widespread adoption by courts of the server rule in the years after Perfect 10, tech companies built their apps and platforms relying on the rule's shield against copyright liability, which allowed them to promote successful models of content distribution and social networking consistent with the server test. In turn, this inevitably led social media users to rely on embedding technologies as well.

Against this backdrop, the 2018 S.D.N.Y. decision in Goldman v. Breitbart News Network LLC, which rejected the Ninth Circuit's server test, stands out as a dramatic reversal, albeit one that some commentators see as more in keeping with the principles of copyright law. Dismissing the technical nuance on which the server test relied, the Goldman court was swayed by the fact that a viewer could see the infringed work without clicking out of the defendant's website.

Following the Goldman decision, the state of the law on embedding is uncertain. First, courts in the Second and Ninth Circuits appear to be split on the issue of whether embedding violates a copyright holder's display right, which creates a difficult situation for tech companies and social media users. Second, two recent cases on the issue in the S.D.N.Y. – McGucken v. Newsweek and Sinclair v. Ziff Davis – reach different results on the legality of embedding based on the courts' interpretations of the Terms of Service of the website at issue.

Implicitly embracing the Goldman court's determination, these cases did not address the server test – which ultimately resulted in a new primacy for Terms of Service agreements. The Sinclair opinion, issued on April 13, 2020, explained that the news site Mashable was not liable for an Instagram embed because the plaintiff-photographer had agreed to Instagram's Terms of Service, and these terms granted a valid sublicense to third parties, such as Mashable. Soon after, on June 1, the McGucken opinion reached the opposite conclusion about Instagram's

Terms of Service, announcing that "[a]lthough Instagram's various terms and policies clearly foresee the possibility of entities…using web embeds to share other users' content…none of them expressly grants a sublicense to those who embed publicly posted content." Thus, the McGucken court determined that, at the motion to dismiss stage, it could not find that an implied sublicense existed as a matter of law.

But unlike established legal precedent, Terms of Service are easily alterable by the technology companies who write them, and changes may go unnoticed by users. This element adds a further aspect of volatility to the latest development in embedding case law. That said, on June 4, 2020, mere days after the McGuckendecision was announced, Instagram itself entered the fray when it announced that its Terms do not provide users of its embedding API a copyright license to display embedded images on other websites.

While the law is far from settled on these issues, the moral of the story is clear: before sharing anything on social media, ensure that you are the rights holder, or have a valid license, even if the subject of that post is you or your brand.

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