COPYRIGHT AND EMBEDDING: A MULTI-METHOD APPROACH TO ANALYZING COPYRIGHT'S THREAT TO FREE SHAREABILITY

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ABSTRACT

Isabela M. Palmieri: Copyright and Embedding: A Multi-Method Approach Analyzing Copyright's Threat to Free Shareability
(Under the direction of Amanda Reid)

This thesis is designed to explore the effect that changes to interpretations of copyright law, platforms' User Agreements, and platforms' technological design have on embedding, a content-sharing tool. First, this study identifies which major social media platforms facilitate embedding by providing users with embed codes. Employing a legal case analysis of statutory interpretation of copyright law, this study then assesses whether embedding of copyrighted content can constitute infringement of the public display right. Next, this study analyzes what licenses users are required to grant to the platform and/or third-party users via User Agreements by employing a latent content analysis. This study highlights a new wave of district court decisions that have found that embedding copyrighted content could constitute copyright infringement. However, platforms' User Agreements and technological features largely suggest that sharing content interplatform is both permissible and encouraged. This study lays out the central considerations to any policymaking about embedding.

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CHAPTER 1: INTRODUCTION

As technological affordances have changed and evolved, social media users are now bumping up against the borders of copyright infringement.[1] Jurisprudential developments in the interpretation of copyright law are causing friction to an otherwise seamless, freely available tool for shareability: embedding. For purposes of this study, embedding is defined as a type of link that uses HTML (HyperText Mark-up Language) instructions to visually integrate content on a single webpage.[2] The embedded content is usually stored in a server different from the linking website's server, thereby saving digital space for the hosting website because a copy of the embedded content is not made.[3] For purposes of the present analysis, this technological feature is important because it allows users to share a work without making a copy of the work.

Embedding has become an essential feature of the Internet used by social media platforms, blogs, news articles, and other web services.[4] For example, copyright reporter Aaron Moss demonstrated how he used Instagram's embed code to embed the following image[5]:

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[1] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 5 (2018).

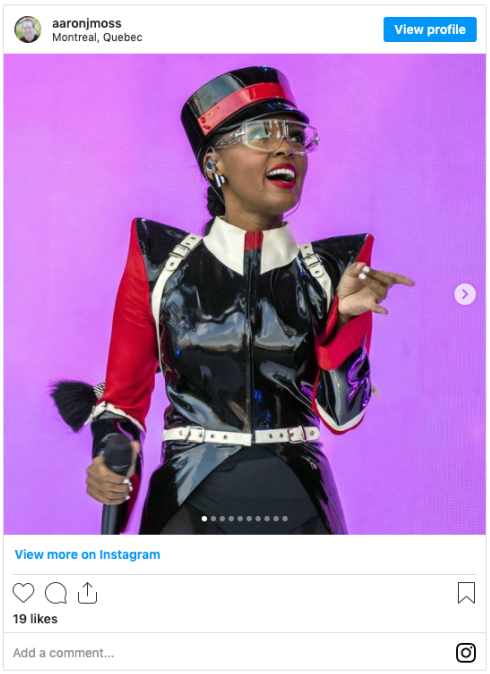
[2] *See* Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018) ("'Embedding' an image on a webpage is the act of a coder intentionally adding a specific 'embed' code to the HTML instructions that incorporates an image, hosted on a third-party server, onto a webpage. To embed an image, the coder or web designer would add an 'embed code' to the HTML instructions; this code directs the browser to the third-party server to retrieve the image.").

[3] Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 YALE J.L. & TECH. 227, 235 (2019).

[4] *Id.*

[5] Aaron Moss, *Is It Legal to Embed Public Instagram Photos on Your Website?*, COPYRIGHT LATELY (Sept. 10, 2020), https://copyrightlately.com/legal-embed-instagram-photos-website/.

Here's an example of how embedded content looks to a website visitor vs. content that is served up directly. Below is a concert photograph I took of Janelle Monáe as it appears on my personal Instagram, using embed code.



Here's an example of the same image, served up on this website:

Janelle Monáe / Photo by Aaron Moss

As discussed in greater detail below, many social media platforms facilitate the embedding of platform content outside the platform. This activity is facilitated by providing "embed codes" for content through a code generator built into the platform's application programming interface (API).[6] Through this practice, social media platforms are able to reinforce their walled gardens, while still allowing spill overs of content. Embedding is key to granting

[6] *See* Patrick Shawn Hearn, *What Does Embed Mean?*, LIFEWIRE TECH FOR HUMS. https://www.lifewire.com/what-does-embed-mean-4773663 (last updated Dec. 2, 2019) (explaining how embedded content works depending on a user's privacy settings or platform's built-in code generator); Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 443 (2019); Michael J. Lambert, *Examining the Embedding Evolution: Counseling Clients on Safely Embedding Copyrighted Materials,* 35 COMM. LAW. 7, 7 (2020).

such spill overs yet allowing sharing on a leash.[7] This tethered sharing is meaningful—especially as the platforms' walled gardens are becoming more porous. These affordances allow sharing content without making a copy of the content, and this suggests the significance of copyright's display right may be underappreciated. This present study picks up on that thread by examining copyright's threat to free shareability.

Professors Richard A. Peterson and Anand Narasimhan noted that "[l]aw and regulation create the groundrules that shape how creative fields develop" and changes in technology can destabilize exchange of information."[8] Although changes in all areas of intellectual property law can affect society's exchange of information and culture production, copyright law can have an outsized impact in the cultural industries because copyright law creates artificial scarcity of cultural goods by limiting the right to copy.[9] Therefore, researching copyright's potential to destabilize free embedding is crucial to inform any policy making about embedding.

Embedding, when using content protected by copyright, constitutes one of the potentially infringing behaviors in which users engage online. However, changes in judicial interpretation of copyright law that affect embedding can destabilize content-sharing practices online[10] Technological affordances that allow for visual integrations, such as embedding, can be

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[7] *See, e.g.*, Jon Porter, *Twitter Change Leaves Huge Gaps in Websites*, VERGE (Apr. 6, 2022, 7:18 AM) https://www.theverge.com/2022/4/6/23012913/twitter-tweet-embeds-deleted-tweets-empty-iframe-broken ("Twitter has made a small but significant change to how deleted tweets are shown when they're embedded in third-party websites. Since at least the end of March the social media network has started showing a blank box on external sites when an embedded tweet has been deleted. . . . It's a big change from how Twitter used to handle deleted-yet-embedded tweets, when it would preserve the original unformatted text. With this recent change, that text is now gone, leaving a hole inside any story that embedded it.").

[8] Richard A. Peterson & Anand Narasimhan, *The Production of Culture Perspective*, 30 ANN. REV. SOCIO. 311, 314 (2004).

[9] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 164–65 (4th ed. 2019).

[10] *See infra* discussion in Section 2.3.

problematic when the use (1) implicates the exclusive right to publicly display, (2) is not a fair use, and (3) is not a licensed use.

In 2007, the Ninth Circuit Court of Appeals in *Perfect 10, Inc. v. Amazon.com, Inc.*[11] held that an entity cannot be held liable for violation of the display right if it does not actually store the copyrighted work in its own server.[12] This holding is commonly referred to as the "server test." For the decade following the decision in *Perfect 10*, almost all courts that considered technology practices similar to embedding in the context of the display right adopted the server test.[13] Recently, however, three lower courts have questioned this doctrine.[14] Since *Perfect 10*, one judge from the Northern District of Texas[15] and two judges from the Southern District of New York[16] have rejected *Perfect 10*'s interpretation of the Copyright Act and the server test's applicability to embedding cases. The difference between both approaches seems to lie on whether physical possession of a copy of the copyrighted work is a necessary element to "display

[11] 508 F.3d 1146 (9th Cir. 2007).

[12] *Id.* at 1155.

[13] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 426 (2019). Professor Ginsburg and co-author cite to *Live Nation Motor Sports, Inc. v. Davis*, as the only decision from 2007 to 2017 that departed from the server test. Ginsburg & Budiardjo at 426 n.38; *see also* Live Nation Motor Sports, Inc. v. Davis, No. 3:06-CV-276-L, 2007 WL 79311, at *4 (N.D. Tex. Jan. 9, 2007).

[14] *See,* Leader's Institute, LLC v. Jackson, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017); Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018); Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

[15] Leader's Institute, LLC v. Jackson, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017).

[16] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018); Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

a copy of the work" as established by the 1976 Copyright Act. If this jurisprudential shift takes hold, copyright law may turn free embedding into fared[17] embedding.

A recent decision by the Southern District of New York illustrates the pressing nature of this matter. Subsequent to this study's data gathering, the district court issued a new decision in *McGucken v. Newsweek*,[18] where the court considered an embedded photograph of an ephemeral lake.[19] The court denied both the plaintiff's and the defendant's summary judgement motions, finding the following: (1) the defendant "displayed" plaintiff's work for purposes of the Copyright Act;[20] (2) reasonable fact finders could disagree on whether Instagram's User Agreement granted the defendant a sublicense to embed;[21] (3) reasonable fact finders could disagree on whether Instagram granted the defendant an implied sublicense by providing an API embed tool;[22] and (4) the court was unable to determine as a matter of law that the defendant's embedding constituted fair use.[23] Because of this decision's recentness, it is not included in the analysis of studied cases.

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[17] The author uses the term "fared use" while acknowledging there is no compulsory license for embedding. The term is meant to convey that users would either have to pay for a license—or be excluded from use—absent an applicable defense or exception. *See, e.g.*, Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998) (proposing that "fared use would subject copyrighted material in a digital intermedia to a reciprocal quasi-compulsory license"); *see also* Wendy J. Gordon & Daniel Bahls, Symposium, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 621 ("'Fared use' is use for which a license is purchased . . . ."); Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814, 1825 (2011) ("Some saw no great evil in substituting 'fared use' for 'fair use,' but most disagreed sharply.").

[18] McGucken v. Newsweek, No. 1:19-cv-09617 (S.D.N.Y. Mar. 21, 2022).

[19] *Id.* at 2. For a screenshot of the embedded image, see *infra* Chapter 6, fig. 3.

[20] McGucken v. Newsweek, No. 1:19-cv-09617, slip op. at 11–14 (S.D.N.Y. Mar. 21, 2022).

[21] *Id.* at 14–18.

[22] *Id.* at 18–20.

[23] *Id.* at 20.

However, the threshold issues in the most recent *McGucken v. Newsweek* decision are directly relevant to this study's purpose. This study explores not only statutory interpretation of relevant sections of the Copyright Act, but also social media platforms' facilitation of embedding and their User Agreements. These three concepts are important to this analysis because copyright law, User Agreements, and technological affordances can influence a user's behavior online. Professor Corinne Tan supports this point in her 2018 book *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features*, writing a thorough analysis of how users' behavior online is regulated by an intersection of copyright law, terms of service, and technological features.[24] Tan argues social media users are "nudged" to create content, but the incompatibilities between copyright law and a platform's User Agreement and technological features give users "mixed signals and conflicting expectations" regarding the legitimacy of their content-generative activities, and in so doing, regularly putting users at risk of copyright infringement.[25]

Inspired by Tan's research, this study addresses three main concerns: (1) how many social media platforms facilitate embedding through their technological affordances; (2) current developments in the law that address whether unauthorized embedding of copyrighted content violates the Copyright Act; and (3) how many social media platforms address the proprietary rights of users in user-generated content in the platform's User Agreement. Based on the findings from research questions 1, 2 and 3, this study analyzes whether copyright threatens free embedding, and what that suggests about embedding as a content-sharing tool.

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[24] *See generally* CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES (2018).

[25] *Id.* at 199–200.

This thesis proceeds as follows. Chapters 2 and 3 provide foundational background, including an overview of technology's effect to the information economy in Chapter 2 and background in copyright law in Chapter 3. Chapter 4 then discusses this study's research questions and methodology. This study's results are discussed in Chapters 5, 6, 7, and 8. Finally, Chapter 9 concludes by discussing future areas of research and limitations.

CHAPTER 2: THEORY OF SHARING AND CULTURE-MAKING

The Internet and social media have changed the way in which we communicate. By permeating our daily habits, technology has not only made common tasks easier, but it has also allowed us to instantly connect with others, access a wide array of information, and share ideas publicly and seamlessly. Social media users can now create, modify, and share content at a speed that was not imagined when the existing laws meant to protect copyrighted works were written.

Recently, judicial interpretations of the 1976 Copyright Act have raised questions about the permissibility of embedding—a content-sharing tool that allows for the visual integration of content on a single webpage. As previously mentioned, Peterson and Narasimhan note that "changes in communication technology profoundly destabilize and create new opportunities in art and culture" since technology currently has virtually absolute control over our communication methods.[26] Thus, any policymaking that affects content-sharing technology can potentially alter the status quo of—but also create new opportunities in—information sharing. Therefore, this study's purpose is to examine the embedding as a content-sharing tool by examining copyright law, social media platforms' User Agreement,[27] and platforms' facilitation of embedding. To contextually frame embedding and its effect on culture and information

[26] Richard A. Peterson & Anand Narasimhan, *The Production of Culture Perspective*, 30 ANN. REV. SOCIO. 311, 314 (2004).

[27] For the purposes of this study, each platform's "User Agreement" includes any platform terms, policies, or guidelines that regulate user behavior, such as the Terms of Service/Use Agreement, Community Standards and any additional policies that are incorporated through the Service/Use Agreement.

sharing, this chapter provides a brief overview of information production and technology's effect to the information economy.

The ability to rapidly share information has been both celebrated and criticized. The changes in our cultural industries as a result of technology have been characterized differently in scholarship, with *digital optimists* overstating the benefits of digitization of information[28] and *digital realists* highlighting the societal harms of digital culture.[29] This chapter addresses these divergent arguments in the literature. That theoretical background sets a foundation to discuss how sharing has become central to our information production today. This chapter addresses the benefit in information sharing, but also recognizes some shortfalls of a networked information economy. Finally, this chapter discusses social media's role in the networked information economy and where embedding fits into today's popular information-sharing practices.

2.1 Digital Optimists and the Value of Sharing in a Networked Information Economy

According to Hesmondhalgh, digital optimists associate "information technology with individual freedom, autonomy and decentralization."[30] Hesmondhalgh identifies the work of Professor Yochai Benkler, *The Wealth of Networks*, as a "classic version of the optimistic view that digital technologies were transforming culture and communication for the better."[31] The

[28] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 263 (4th ed. 2019). Hesmondhalgh uses the term "digital optimists" to refer to scholars that "overstat[e] the impact and potential of new communication technologies" and are often "blind . . . to potential dangers, problems and abuses." *Id.* at 263.

[29] *See id.* at 273–90. Hesmondhalgh does not use the term "digital realists." But the term "digital pessimists" has often been used in the literature to describe the opposing side of digital optimism. *See, e.g.*, Tatiana Leshkevich & Anna Motazhanets, *Digital Determination and Manipulative Strategies*, 329 ADVANCES SOC. SCI., EDUC. & HUMANS. RSCH. 1160, 1660 (2019). Digital pessimists refer to scholars that "emphasize the negative effects of digitalization and hidden manipulative strategies." *Id.*; *see also* Anka Mihajlov Projopović, *Media and Technology: Digital Optimists and Digital Pessimists*, 16 PHIL., SOCIO., PSYCH. & HIST. 117, 118–20 (2017). This study refers to such scholars as digital realists.

[30] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 264 (4th ed. 2019).

[31] *Id.* at 269.

following sections explore the arguments in Benkler's work and the benefits of sharing information.

2.1.1 The Networked Information Economy

In the twentieth century, the term "information economy" was coined to describe the economics of the commercialized production and distribution of mass media.[32] Advances in technologies such as the radio and television allowed in part for the commercialization of the production and exchange of information.[33] As a result, commercial and professional producers were largely responsible for the production of culture, knowledge, and information.[34] In his book, Benkler refers to this period as the "industrial information economy" due to the period's focus on "capital-intensive production and distribution techniques."[35]

The introduction of the personal computer and the Internet once again transformed the production, distribution, and consumption of information.[36] According to Benkler, the "radical decentralization of intelligence" and the "centrality of information, knowledge, culture, and ideas" made possible by the digitization of information has shifted the industrial information

[32] *See* YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 31 (2006); *see also* MARC URI PORAT, THE INFORMATION ECONOMY 4 (1977) (defining the primary and secondary information sectors of the economy).

[33] YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 29 (2006). Although advances in technology were partly responsible for this change, David Hesmondhalgh argues that attributing changes to our cultural industries as entirely a result of technological advances reduces the complexity of additional factors, such as political and economic factors. *See* DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 110–31 (4th ed. 2019).

[34] YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 30 (2006).

[35] *Id.* at 32.

[36] *See* YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 32 (2006).

economy into a "networked information economy."[37] Different than in an industrial information economy, the production of information and culture in a networked information economy became decentralized and based on cooperation and sharing among hundreds of millions of users.[38]

Computers decreased cost of the production and exchange of information, thereby making the dissemination of information from consumer to consumer not only possible but accessible to the public. [39] In a networked information economy, the mass dissemination of information is no longer exclusive to professional producers or commercial distributers.[40] Instead, the digitization of information allows for the shareability of content and ideas directly from author to consumer or consumer to consumer.[41] In so doing, the digitization of information has facilitated "the rapid globalization of culture."[42] It has also allowed for decentralized and collaborative production of information, what Benkler calls "commons-based peer production."[43]

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[37] *Id.*

[38] *Id.* at 32–33.

[39] *See* YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 52 (2006).

[40] Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 2 (2004).

[41] *See id.* at 2; *see also* Pamela Samuelson, *Digital Information, Digital Networks & The Public Domain*, *in* DUKE UNIV. L. SCH., CONFERENCE ON THE PUBLIC DOMAIN 80, 85 (2021).

[42] Richard A. Peterson & Anand Narasimhan, *The Production of Culture Perspective*, 30 ANN. REV. SOCIO. 311, 314 (2004).

[43] Benkler defines "commons-based peer production" as a "new modality of organizing production" that is "radically decentralized, collaborative, and nonproprietary; based on sharing resources and outputs among widely distributed, loosely connected individuals who cooperate with each other without relying on either market signals or managerial commands." YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 60 (2006). Benkler refers to "commons" as "a particular institutional form of structuring the rights to access, use, and control resources." *Id.* According to Benkler, peer production refers to "production systems that depend on individual action that is self-selected and decentralized, rather than hierarchically assigned. *Id.* at 62.

No longer prohibited by high market costs or driven by advertising, peer production and consumer-to-consumer dissemination have become central to our society's culture making and production of information in the networked information economy.[44] According to Professor Jessica Liman, the "explosive growth" of consumer-to-consumer dissemination is a result of people's desire to share.[45] She notes that the networked information economy is "largely a gift economy."[46] Benkler agrees, noting that the "hallmark" of commons-based peer production is the "collaboration among large groups of individuals . . . who cooperate effectively to provide information, knowledge or cultural goods without relying on either market pricing or managerial hierarchies to coordinate their common enterprise."[47]

Distinguishing the industrial information economy, digital optimists argue the networked information economy facilitates a more culturally rich information ecosystem by enabling the sharing ideas, art, and knowledge.[48] Benkler notes that peer production and sharing of information "creates the opportunities for greater autonomous action, a more critical culture, a more discursively engaged and better informed republic, and perhaps a more equitable global community."[49] Accordingly, the ability for culture to be shared without the mediation of

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[44] YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 56 (2006).

[45] Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 8 (2004).

[46] *Id.*

[47] Yochai Benkler & Helen Nissenbaum, *Commons-based Peer Production and Virtue*, 14 J. POL. PHIL. 394, 394 (2006).

[48] *See* YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 55 (2006).

[49] *Id.* at 92.

professional and commercial producers results in an information economy that is more diverse and inclusive.

2.1.2 Sharing to Advance Creative Process, Human Development, and Democratic Culture

According to digital optimists, sharing of information is beneficial because it enhances access to cultural works, thereby supporting further cultural production and meaning making.[50] In this view, the sharing of information, knowledge, and experience is essential (1) to the creative process, (2) to foster human development, and (3) to advance a democratic culture. This section discusses each in turn.

One camp of scholarship discussing cultural production suggests that sharing is part of the creative process and is essential to innovation.[51] For example, as the scholarship by Julie Cohen proposes, no individual is exclusively an author or consumer of creative works.[52] Instead, creativity and authorship are a result of the interplay between being a user/consumer of cultural works and an author.[53] Creativity and innovation, therefore, are a result of imitation, collaboration, and appropriation. Creating is a complex process of consuming cultural works, sharing those cultural works with others, and then at some point experimenting with creating new works. Based on this understanding, sharing is therefore essential to creation.

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[50] *See* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 12 (2004) ("What makes this economy so astonishingly useful is information sharing. . . .).

[51] *See, e.g.*, YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 92, 115 (2006).

[52] JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 69, 84 (2012).

[53] *Id.*

Additionally, sharing content, ideas, opinions, and experiences has the power to foster human development.[54] After all, people create not only for self-fulfillment or economic incentive, but to share experiences and meaning. Sharing can foster human development because sharing is a way in which we connect with others. One of the central purposes of culture is to create shared meaning and access to culture is essential to human development.

Lastly, sharing can advance a democratic culture.[55] As discussed by Professor Jack Balkin, democratic culture refers to the freedom to engage in cultural production and participation.[56] Balkin notes that cultural democracy is as important to a free society as democratic self-governance, especially in the digital age.[57] But the ability to participate in culture relates not just to the consumption of cultural works but also the exchange—sharing—of cultural works, ideas, and opinions.[58] As Balkin notes, the networked information economy advances cultural democracy because its "arrangement of cultural power and production" allows for "a vast number of people [to] participate in the production and alteration of culture."[59] Sharing can advance democratic culture because it helps us find like-minded people, debate ideas, and create shared meaning. Thus, consistent with Balkin's scholarship is the idea that to be free to share is to have cultural freedom to participate in cultural production and consumption.

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[54] MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 64 (2012).

[55] *See* YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 2 (2006) ("This new freedom holds great practical promise: as a dimension of individual freedom; as a platform for better democratic participation; as a medium to foster a more critical and self-reflective culture; and, in an increasingly information-dependent global economy, as a mechanism to achieve improvements in human development everywhere.").

[56] Jack M. Balkin*, Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1060 (2016).

[57] *Id.*

[58] *Id.* at 1055.

[59] *Id.* at 1060.

2.2 Digital Realists and Implications of Digital Culture

It cannot be ignored that digital culture has produced harms in addition to benefits.[60] As noted by research fellow Henry Fraser, the benefits of a networked information economy are "qualified and contingent."[61] For example, Fraser recites significant harms caused by online communities, including cyberbullying and the proliferation of fake news.[62] Our networked information economy has also fostered widespread surveillance capitalism and facilitated "extreme concentration of wealth and power in the hands of a few internet platforms."[63]

After the publication of *The Wealth of Networks*, Benkler revised his optimism in the networked information economy, recognizing that its "design characteristics" that facilitated "decentralized entrepreneurial activity and expressive individual work, as well as extensive participatory activity," also enabled cybercrime, malice, and accumulation of power.[64] Similar to Fraser, Hesmondhalgh notes six problems with digital culture often overlooked by digital optimists: (1) unequal access and skill, (2) concentration of power and circulation, (3) commercialization and advertising, (4) surveillance and datafication, (5) free or unpaid labor, and (6) IT giants.[65] This section addresses three of these issues—unequal access and skill,

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[60] *See, e.g.*, Henry Fraser, *The Disappointments of Networks*, 19 CHICAGO-KENT J. INTELL. PROP. 1, 8 (2020) ("[O]nline free content economies have produced many benefits, but they have also contributed to distributions of wealth and communicative power, and conditions in the marketplace of ideas . . . .").

[61] *Id.* at 66.

[62] *Id.* at 6.

[63] *Id.* at 6.

[64] Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDALUS 18, 19–20 (2016).

[65] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 274 (4th ed. 2019).

concentration of power and circulation, and surveillance and datafication. It also addresses misinformation and disinformation.

First, although there is broader access to the internet, Hesmondhalgh argues different forms of inequality and access still exist, such as different levels of skill that may impede online engagement.[66] According to Hesmondhalgh, access to the internet at home is not equal to access to digital culture.[67] This "digital divide" he argues, relates to different skills, confidence, and motivations between users to make use of new technologies.[68] Similarly, Fraser rejects the notion that a "high rate of participation" equals a broad and inclusive "power to exert a meaningful influence on culture and discourse."[69]

Second, Hesmondhalgh challenges the digital optimist view that information sharing is now decentralized.[70] For example, although information sharing is no longer restricted to professional producers and commercial distributers, tech giants Google and Facebook directly influence most Internet traffic.[71] Also, while the networked information economy allows for the participation of millions of voices, it also facilitates widespread surveillance of behavior online and disclosure of personal information.[72] Hesmondhalgh argues this dichotomy calls into

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[66] *Id.* at 274–75

[67] *Id.*

[68] *Id.* at 275.

[69] *See, e.g.*, Henry Fraser, *The Disappointments of Networks*, 19 CHICAGO-KENT J. INTELL. PROP. 1, 18 (2020)

[70] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 276 (4th ed. 2019).

[71] Anthony Cuthbertson, *Who Controls the Internet? Facebook and Google Dominance Could Cause the "Death of the Web"*, NEWSWEEK (Nov. 2, 2017, 9:45 AM) https://www.newsweek.com/facebook-google-internet-traffic-net-neutrality-monopoly-699286.

[72] *See, e.g.*, Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018) https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html.

question not only concerns of privacy and intrusion, but also concerns of social and cultural power.[73] Finally, with the excessive increase in information sharing, we have also seen a prolific spread of mis- and disinformation online.[74]

Fraser argues that the absence of strong copyright enforcement online produces "structural risks" that reinforce "asymmetries of wealth and cultural power," resulting in some of the harms discussed above.[75] In addition to these harms, an inadequately calibrated copyright policy risks a shallow culture if creators are unable to monetize their creations and recoup investments. Authors who are not adequately rewarded for their creations may lose the incentive to create.

2.3 Social Media, Embedding, and Copyright Law

For better or for worse, social media platforms have played a significant role in the expansion of digital culture.[76] Although the word "platform" has been used in a multitude of ways in scholarly literature,[77] the relevant definition of platform as it relates to the networked information economy is the one described by Professor Julie Cohen in her seminal article *Law for the Platform Economy*. A platform refers to "a site of encounter where interactions are

[73] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 282 (4th ed. 2019).

[74] *See* Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RSCH. CTR. (Oct. 19, 2017) https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/.

[75] *See, e.g.*, Henry Fraser, *The Disappointments of Networks*, 19 CHICAGO-KENT J. INTELL. PROP. 1, 12 (2020).

[76] *See* DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 274 (4th ed. 2019) ("The cultural industries, collectively and individually, now compete with other new ways of spending time that have developed with the rise of digital networks—most notably social media.").

[77] *See, e.g.*, Tarleton Gillespie, *The Politics of 'Platforms'*, 12 NEW MEDIA & SOC'Y 347 (2010) (discussing four "semantic" territories in which the word platform has taken a different meaning).

materially and algorithmically intermediated," including both economic, and social or cultural activity.[78] Aligned with this definition, the term platform describes digital media intermediaries.

Platforms have made the shareability of information seamless because they have integrated the production, distribution, and exhibition of information by serving as central distributors and exhibitors of content.[79] In fact, Cohen noted that platforms are the "core organizational form" of the networked information economy.[80] As a result, platforms have rapidly been changing Benkler's theory of "free" and decentralized sharing in the networked information economy. The "network" in a networked information economy, Cohen noted, is becoming "a network of platforms" where "access and use are intermediated from beginning to end."[81] Platforms have provided access but have also exploited the benefits of a new information ecosystem to impose "technological and political authority."[82] Thus, the networked information economy—run almost entirely by platforms—is not free of cultural intermediation.

However, it is undeniable that platforms have facilitated group making and information sharing. With a sharp increase in social networking platforms that promote interpersonal connection, social media platforms—as they are commonly called—have permeated our social and cultural spheres.[83] As Professor José Van Dijck notes, "[t]he sharing of content enhances connectedness between people and also helps many acquire a (global) stage for public

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[78] Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 136 (2017).

[79] PHILIP NAPOLI, SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE 8 (2018).

[80] Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 135 (2017).

[81] *Id.* at 143.

[82] *Id.* at 145; *see also* Tarleton Gillespie, *The Politics of 'Platforms'*, 12 NEW MEDIA & SOC'Y 347 (2010).

[83] JOSÉ VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 8 (2013).

viewing."[84] Thus, this pro-social utility exists notwithstanding concerns about serious societal implications of misinformation, data breaches, and platform mediation.

Social media platforms are designed to maximize sharing and engagement—good or bad.[85] Its interfaces invite users to share thoughts, photos, videos, articles, and more. One specific sharing tool is embedding; viz., a link that uses HTML instructions to visually integrate content on a single webpage without creating a copy.[86] Embedding is a process through which people share photographs, images, and content with others. It can also be used as a tool through which we comment on social and political issues. To maximize sharing and engagement,[87] social media platforms have facilitated embedding because sharing content is a core element to their business strategy. However, current developments in copyright law are causing friction to an otherwise seamless, freely available content-sharing tool.

As previously mentioned in this chapter, changes to technology and the law can destabilize communication practices online.[88] Professor Lawrence Lessig in his book *Code 2.0* introduced a theoretical model of cyberspace that outlined four modalities regulating online

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[84] *See id.* at 35.

[85] *See id.* at 41–42

[86] MADELINE SCHACHTER & JOEL KURTZBERG, LAW OF INTERNET SPEECH 935 (3d ed. 2008).

[87] *See* Kiely Kuligowski, *How to Embed Social Media Feeds on Your Website*, BUS. NEWS DAILY https://www.businessnewsdaily.com/10673-embed-social-media-website.html#:~:text=Social%20media%20embedding%20is%20the,to%20organize%20your%20social%20media. (last updated Feb. 28, 2020) ("Embedding your social media is a no-brainer for boosting engagement."); *see also* Toni Hopponen, *Why Do Brands Add Social Media Feeds to Websites?*, FLOCKER (Dec. 12, 2021) https://flockler.com/blog/social-media-feed-on-website-benefits ("Here are the key benefits of embedding a social media feed on a website: 1. Increase time spent on site 2. Grow the number of followers on social media channels 3. Build engagement and reach on social media channels 4. Increase sales with social proof.").

[88] Richard A. Peterson & Anand Narasimhan, *The Production of Culture Perspective*, 30 ANN. REV. SOCIO. 311, 314 (2004).

behavior: the law, social norms, the market, and architecture.[89] Although these constraints do not operate independently, the laws and architecture are the most relevant constraints to this study. Laws, such as copyright law, regulate behavior in cyberspace by threatening consequences if the law is violated.[90] On the other hand, the code or software that makes up the architecture of cyberspace can quite literally make some online behavior "possible or impossible."[91] In this study, the relevant architectural feature is embedding. As Lessig noted, changes in any one of the constraints can affect the balance of the whole model, either by steering changes to another modality or by affecting online behavior.[92]

One example of a change in the law affecting other constraints in cyberspace is response from social media platforms to the enactment of the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act (SESTA/FOSTA). Passed as an amendment to Section 230 of the Communications Decency Act, SESTA/FOSTA promised to address online sex trafficking by creating liability for online platforms.[93] Immediately after the SESTA/FOSTA passage, numerous websites censored and banned parts of their platforms, shutting down popular tools sex workers use to conduct business.[94] Although SESTA/FOSTA

[89] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 123 (2d ed. 2006).

[90] *Id.* at 124.

[91] *Id.* at 125. Architecture relates to the "the software and hardware that make cyberspace what it is." *Id.* at 124.

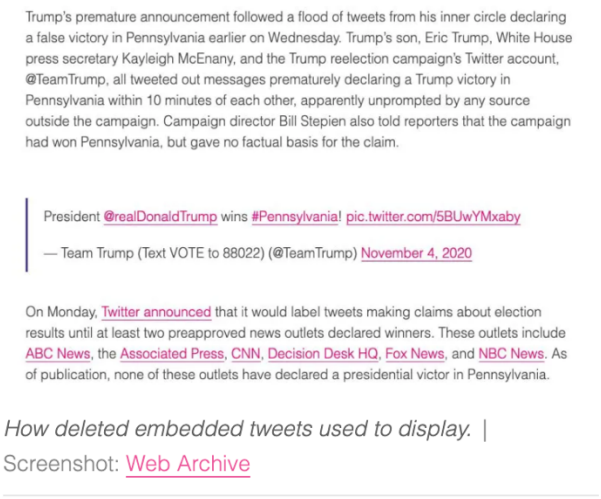
[92] *See id.* at 124–35.

[93] Act of April 11, 2018, Pub. L. No. 115-164, 132 Stat. 1253.

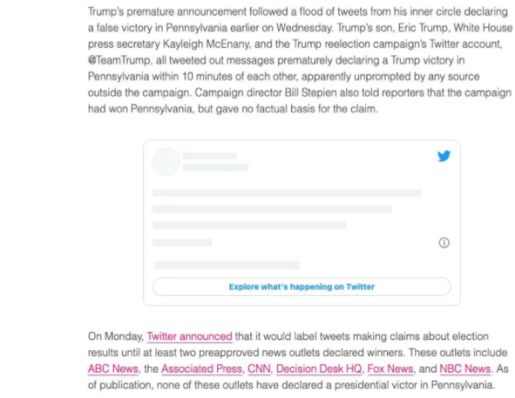
[94] Evan Greer, *Want To Fix Big Tech? Stop Ignoring Sex Workers*, DAILY BEAST (Mar. 24, 2022, 4:48 AM) https://www.thedailybeast.com/want-to-fix-big-tech-stop-ignoring-sex-workers?via=twitter_page.

simply amended § 230 so that its safe harbor would have no effect on sex trafficking laws, platforms proactively began censoring and deleting content in response to the bill.[95]

One example of the destabilizing effect of platforms' change to their architecture is Twitter's recent update that erases embedded tweets when the original tweet has been deleted. Before this change, tweets that had been embedded by third parties but were later deleted by the user would preserve the tweet's original content, albeit without the original format.[96] Now, if a user deletes a tweet that has been embedded onto a third-party website, the text is gone, "leaving a hole inside any story that embedded it."[97] Reporter Jon Porter illustrates this change with the following visual:



How deleted embedded tweets used to display. | Screenshot: Web Archive



How they display now. | Screenshot: *The Verge*

[95] Aja Romano, *A New Law Intended To Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom (Jul. 8, 2018, 1:08 PM).

[96] Jon Porter, *Twitter Change Leaves Huge Gaps in Websites*, VERGE (Apr. 6, 2022, 7:18 AM) https://www.theverge.com/2022/4/6/23012913/twitter-tweet-embeds-deleted-tweets-empty-iframe-broken.

[97] *Id.*

Some reporters have claimed this change will result in "journalism websites having incomprehensible stories,"[98] and others have argued this change is "unethical" because it "prevents journalists from documenting and quoting that material reliably."[99] Ironically, some commentators have said it "make[s] a lot more sense for reporters to use screenshots of tweets rather than embeds going forward."[100]

Social media platforms could have a similar response to a change in copyright law affecting embedding. As Lessig's scholarship illustrates, changes to settled expectations, especially legal ones, about the shareability of content online can disrupt other modalities in cyberspace—such as social media platforms' architecture—and user behavior online. Such a shift can have distributive effects to society's exchange of information and culture production because so much of today's culture making happens online. The impact can be especially outsized if a change is made to copyright law because copyright law creates artificial scarcity of cultural goods by limiting the right to copy.[101] Hesmondhalgh notes: "Copyright is rightly understood in [political economy] approaches as the main means by which culture becomes commodified."[102] Accordingly, changes to copyright law that affect embedding, if not carefully considered in light of the purpose of copyright, can impact content-sharing practices online.

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[98] John Martin, *Twitter Removing Embeds of Deleted Tweets May Threaten Journalism*, iTECHPOST (Apr. 07, 2022) https://www.itechpost.com/articles/109896/20220407/twitter-removing-embeds-deleted-tweets-threatens-journalism.htm.

[99] Ryne Hager, *Twitter's Changes to Embedded Tweets Are Putting Its News Reputation at Risk*, ANDROID POLICE (Apri. 6, 2022) https://www.androidpolice.com/twitter-delete-tweet-embeds/.

[100] Mike Masnick (@mmasnick), TWITTER (Apr. 6, 2022, 2:40 PM) https://twitter.com/mmasnick/status/1511775764881977349. If reporters take screenshots of tweets rather than embed them, they would be making a copy of the tweet, subjecting them to potential copyright infringement claims if any of the content in the tweet is protected by copyright. *See infra* Section 3.3.1.

[101] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 164–65 (4th ed. 2019).

[102] *Id.* at 165.

Therefore, researching copyright's potential to destabilize free embedding is crucial to inform any policymaking about embedding.

CHAPTER 3: BACKGROUND ON COPYRIGHT

This chapter provides a brief background on copyright law, its policy justifications, and how copyright law may affect embedding.

3.1 Policy Justification for Copyright Law

The U.S. Constitution gives Congress the power to grant "Authors . . . the exclusive right to their respective writings" for a limited time.[103] At the end of this limited time,[104] the work enters the public domain where others are free to use, replicate, modify, and build upon the original work.

The most common policy justification to copyright law is the theory that copyright serves as an incentive for authors to create. The U.S. Constitution directly supports this theory. The "Patent and Copyright Clause" of the Constitution states as follows: "The Congress shall have power . . . *to promote the progress of science and useful arts*, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[105] Thus, the limited monopoly granted to authors through copyright law is intended to "promote the progress of science." This language frames copyright "in terms of spurring cultural and

[103] U.S. CONST. art. I § 8 cl. 8.

[104] Copyright duration is set by statutory law. *See* 17 U.S.C. § 301–305.

[105] U.S. CONST. art. I § 8 cl. 8 (emphasis added).

intellectual progress,"[106] embedding in it some aspect that copyright should serve the public good by advancing art and culture.

The U.S. Supreme Court has reiterated this justification of copyright in its opinions.[107] In *Sony Corporation of America v. Universal City Studios, Inc.*, the Supreme Court noted:

> [Copyright law] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[108]

However, the Court noted copyright's monopoly must ultimately serve the public good.[109] While the Court recognized that "the immediate effect" of copyright law is to reward the author, the "ultimate aim" is to "stimulate artistic creativity for the general public good."[110] Thus copyright incentivizes authors to create, and the public ultimately benefits from that creation.

This policy justification for copyright is also supported in legal scholarship. For example, Professor Tarleton Gillespie describes copyright's purpose as ensuring "the sustenance of art, knowledge, and culture" by "offering authors legal property rights over their work so they may

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[106] TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE 22 (2007).

[107] According to the U.S. Supreme Court, copyright is only justified so long as it serves an "engine of free expression." *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589–90 (1985) ("The copyright laws serve as the 'engine of free expression,' only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas. To ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right."). Copyright laws are in tension with the First Amendment because copyright law regulates speech. Lawrence Lessig, *Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 525 (1999). However, such regulation of speech is only justified if copyright protections last only as long as necessary to incentivize creation. *See id.* at 526.

[108] 464 U.S. 417, 429 (1984).

[109] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

[110] *Id.*

enjoy a profit from its circulation."[111] Similarly, Professor James Boyle describes copyright law as a "self-regulating cultural policy in which the right to exclude others from one's original expression fuels a vibrant public sphere indirectly driven by popular demand." [112] Thus, under this policy justification, copyright law feeds the public domain so that the public make use of the work and enhance society's art, culture, and knowledge.

3.2 The Public Domain

In the absence of copyright protection, a work is dedicated to the "public domain" or "commons."[113] Copyright's limited monopoly, Lessig notes, reflects "a commitment to an intellectual commons"[114] because after copyright protection ends, the works enter the public domain and are free to be used by the public at large. In the simplest terms, the public domain refers to material that is not protected by intellectual property rights.[115] Similarly, a "commons" is a resource to which individuals have access and can use without restriction.[116] Although there are some differences between each concept,[117] for the purposes of this study it is enough to recognize that both refer to materials or resources to which the public has access and can use without fear of copyright infringement.

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[111] TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE 21 (2007).

[112] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 7 (2008).

[113] *See id.* at 38 (referring to "public domain" and "commons" as opposites of copyright protection).

[114] *See* Lawrence Lessig, *Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 526 (1999).

[115] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 38 (2008).

[116] Lawrence Lessig, *Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 526 (1999); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 39 (2008).

[117] *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 39 (2008).

The public domain is the source of culture making because it is made up of material that can be freely replicated, modified, and built upon.[118] As Hesmondhalgh notes: "Cultural creativity is to some extent *dependent* on the public domain because acts of creation often operate by (sometimes unconscious) borrowing from and referring to other works."[119] The public domain is the cloth from which our shared understanding of the world is built. It feeds creativity and innovation, and the shareability of content has made that creativity and innovation more effective and accessible. As Professor Samuelson notes, the digitization and shareability of information "makes the public domain more effective and robust."[120]

Although it seems the Internet has no bounds, the public domain—digital or not—has its limits. As it is evident by the public domain, without copyright law, things would be freely shareable.[121] But does copyright law interfere with shareability? Copyright law incentivizes creation but also acts as a gatekeeper to creation of new content and access to knowledge.[122] Hesmondhalgh notes that while industrialization and digitization of culture has expanded the circulation of creative works, the continuous lengthening of copyright terms has restricted access

[118] *Id.* ("[T]he public domain is the basis for our art, our science, and our self-understanding. It is the raw material from which we make new inventions and create new cultural works.").

[119] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 169 (4th ed. 2019).

[120] *See* Pamela Samuelson, *Digital Information, Digital Networks & The Public Domain*, *in* DUKE UNIV. L. SCH., CONFERENCE ON THE PUBLIC DOMAIN 80, 85 (2021).

[121] *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 39–40 (2008) ("But for all the material in the public domain, where no intellectual property right is necessary, . . . [a]ll of us can use the same store of information, innovation, and free culture. It will be available at its cost of reproduction—close to zero—and we can all build upon it without interfering with each other.").

[122] *Id.* at 7; *see also* DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 169 (4th ed. 2019) ("Copyright, intended to foster creativity, has in many cases become an almost bizarre restriction on it.").

to them.[123] Whether current copyright law has struck the right balance between incentivizing creation and fueling culture making has been a popular subject of scholarly debate.[124]

This study seeks to understand whether copyright interferes with digital shareability by analyzing whether copyright law may interfere with free embedding. Emerging jurisprudence has held unauthorized embedding of copyrighted content constitutes copyright infringement. The next section provides a brief overview of copyright law concepts that are central to this study

3.3 The 1976 Copyright Act

Under the 1976 Copyright Act, copyright protection arises "in original works of authorship fixed in any tangible medium of expression."[125] The Supreme Court has clarified that a work is sufficiently "original" if the work is the independent work of the author, and the work displays "some minimal level of creativity."[126] The term "works of authorship" is broadly construed.[127]

3.3.1 Copyright's Bundle of Rights

Copyright law grants copyright holders six exclusive rights: the right (1) to reproduce their work; (2) to prepare derivative works based on their work; (3) to distribute copies of the work to the public; (4) to perform the work publicly, if applicable; (5) to display the copyrighted work publicly, if applicable; (6) and, in the case of sound recordings, to perform the work

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[123] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 169 (4th ed. 2019).

[124] *See e.g.,* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

[125] 17 U.S.C. § 102(a).

[126] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991).

[127] 17 U.S.C. § 102(a)(1)–(8) ("Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").

publicly through digital transmission.[128] Under the 1976 Copyright Act, these rights vest in the author at the time of creation of the original work.[129]

Certain behaviors online—such as posting content—possibly infringe on more than one exclusive right. For example, when someone posts a work online, they have likely reproduced, distributed, and publicly performed or displayed the work.[130] Developments in sharing technology, however, has made this less clear because users can share content without making a copy of the work. One sharing practice—and the focus of this study—that may not implicate multiple rights is embedding. As previously mentioned, embedding is a type of link that uses HTML instructions to visually integrate content on a single webpage without making a copy of the embedded content. Because embedding involves the digital, "no-copy" transmission of content, it most often implicates the display right of copyright holders, but it may not implicate the reproduction or distribution right.

The reproduction right grants the copyright holder an exclusive right to "reproduce the copyrighted work in copies or phonorecords."[131] "Copies" refer to "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[132] Thus, digital copies can infringe on the reproduction right.[133] Under current

[128] 17 U.S.C. § 106.

[129] Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 598 (1985).

[130] *See, e.g.*, Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 19 (2004).

[131] 17 U.S.C. § 106(1).

[132] 17 U.S.C. § 101.

jurisprudence, embedding does not implicate the reproduction right because the content remains on the original server, and embedding such content does not create a fixed copy embodied in a material object.[134] Although some litigants have argued embedding infringes on their reproduction right,[135] no court has reached the merits of this argument.

Related to the reproduction right is the right of distribution. The distribution right grants the copyright holder the exclusive right to "distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[136] Under this right, the copyright holder has the exclusive right to sell, give away, rent, or lend the copyrighted work to the public. As with the reproduction right, embedding content does not implicate the distribution right because embedding content does not result in a "sale or other transfer of ownership" of that material.[137]

The display right, on the other hand, may be implicated by embedding. The display right grants the copyright holder the exclusive right to "display the copyrighted work publicly."[138] To "display" a copyrighted work under the Copyright Act is to "show a copy of it, either directly or

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[133] *See generally* Cartoon Network LP, LLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (analyzing whether "buffer copies" are embodied in a medium for more than a transitory duration to constitute a "copy" under the reproduction right).

[134] *See* Kimberlianne Podlas*, Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement*, 6 HARV. J. SPORTS. & ENT. L. 41, 50 (2015) ("[S]imply viewing, listening to, reading on-line, or watching a visual display of a copyrighted work does not infringe on the reproduction right, because no new tangible, permanent copy of the work is made.").

[135] *See, e.g.*, McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 599 (S.D.N.Y. 2020); Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 580 (S.D.N.Y. 2020).

[136] 17 U.S.C. § 106(3).

[137] *See id.*; *see, also.,* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over Ram "Copies"*, 2001 U. ILL. L. REV. 83, 127 (2001).

[138] 17 U.S.C. § 106(5).

by means of a film, slide, television image, or any other device or process."[139] Additionally, the display right is only infringed upon if the work is displayed "publicly."[140] To display a work "publicly" can mean one of two things. A work is displayed publicly if it is displayed in "a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[141] A work is also displayed publicly if it is transmitted or displayed "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." [142] As recently interpreted by the Ninth Circuit in *Bell v. Willmott Storage Services, LLC*, this definition only requires the display to be "open" to the public, regardless of whether anyone actually viewed it.[143]

Whether embedding implicates the display right remains an open question.[144] The law used to be settled on this matter. In 2007, the Ninth Circuit Court of Appeals in *Perfect 10, Inc. v. Amazon.com, Inc*,[145] held that an entity cannot be held liable for violation of the display right if it does not actually store the copyrighted work in its own server.[146] This is commonly referred to as the "server test," and it is further explored in Chapter 6. For the decade following the

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[139] 17 U.S.C. § 101.

[140] 17 U.S.C. § 106(5).

[141] 17 U.S.C. § 101.

[142] *Id.*

[143] *See* Bell v. Wilmott Storage Servs., LLC, 12 F.4th 1065, 1074 (2021) ("The Copyright Act does not require proof that the protected work was actually viewed by anyone.").

[144] *See infra* Chapter 5 discussion on embedding

[145] 508 F.3d 1146 (9th Cir. 2007).

[146] *Id.* at 1155.

decision in *Perfect 10*, almost all courts that considered sharing practices (similar to embedding in the context of the display right) have adopted the server test.[147] Recently, however, lower courts have questioned this doctrine.[148] This study seeks to explore these new developments and analyze whether embedding infringes on a copyright holder's display right, even if the content remains in a third-party server.

3.3.2 Fair Use

Litigants have argued that the practice of embedding content constitutes fair use.[149] Under § 107 of the Copyright Act, the fair use of a copyrighted work is not an infringement of copyright.[150] By allowing certain uses to constitute "fair use"—and therefore noninfringing—the fair use doctrine advances the purpose of copyright to serve the public good in promoting knowledge and culture.[151]

In evaluating whether the use of a copyrighted work constitutes fair use, the statute enumerates four factors to be considered:

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[147] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 426 (2019). Professor Ginsburg and co-author cite to *Live Nation Motor Sports, Inc. v. Davis*, as the only decision from 2007 to 2017 that departed from the server test. *Id.* at 426 n.38; *see also* Live Nation Motor Sports, Inc. v. Davis, No. 3:06-CV-276-L, 2007 WL 79311, at *4 (N.D. Tex. Jan. 9, 2007) (PARENTHETICAL HERE).

[148] *See, e.g.*, Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

[149] *See* McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 604 (S.D.N.Y. 2020) (defendant argues its use of the photograph was fair); Goldman v. Breitbart News, 302 F. Supp. 3d 585 (S.D.N.Y. 2018) ("There is also a very serious and strong fair use defense . . . .").

[150] 17 U.S.C. § 107.

[151] Jane C. Ginsburg, *Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity*, *in* THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE 20 (Susy Frankel & Daniel Gervais, eds.) (Colum. Pub. L. Rsch., Workinh Paper No. 13-338, 2013), https://doi.org/10.1017/CBO9781107477179.004 ("[T]he traditional fair use inquiry balances the new expressive use (promoting the second-comer's authorship) against the first author's returns for her intellectual labours. The public interest advances through care for the second author and feeding of the first.").

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[152]

The factors must be weighed together and in light of the purposes of copyright.[153] Since fair use is a defense to copyright infringement, it is evaluated on a case-by-case basis. Therefore, one court's conclusion that the embedding of a copyrighted image constituted fair use does not provide a blanket fair use defense to all embedding of copyrighted content. However, any holdings that embedding constitutes fair use could be used persuasively; thus, this study also explores whether embedding is fair use.[154]

3.3.3 Copyright Licensing

The 1976 Copyright Act authorized the divisibility of copyright, which was previously unavailable to copyright holders.[155] Although the initially vested rights of copyright holders are exclusive, the copyright holder may now grant others any of its rights to the copyrighted content through exclusive and nonexclusive licenses—express or implied.[156] Under 17 U.S.C. § 201(d),

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[152] 17 U.S.C. § 107.

[153] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

[154] *See supra* Chapter 6.

[155] Act of Oct. 19, 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2598.

[156] 17 U.S.C. § 201(d) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106 . . ., may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.").

the ownership of a copyright and any of its exclusive rights may be transferred in whole or in part and owned separately.[157] A copyright holder may also permit a licensee to grant a sublicense, thereby forfeiting any copyright infringement suit against the use of the copyrighted work by the licensee and sublicensee, so long as the use is within the terms of the license.[158]

The divisibility of copyright, Litman argued, has "transformed the U.S. copyright system from one designed to ensure the enhancement of the public domain to one designed to support the indefinite proprietary treatment of articulated thought."[159] It has created the possibility that to use a copyrighted work, one must require multiple licenses since the exclusive rights to a copyrighted work can be transferred in parts.[160] For example, suppose you see a picture on a website that you wish to post to your Facebook, but the picture is protected by copyright. You can do so by taking a screenshot of the picture (reproducing the work) and posting it to your public Facebook (displaying the work). If the rights to reproduction and display to the original picture are held by two different people, you would have to seek two different licenses to post the copyrighted picture to your Facebook, absent an applicable limitation or exception. But unless the rights holders are explicitly identified on the website, it may be difficult to find all the rights holders from whom one would obtain a license.[161]

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[157] 17 U.S.C. § 201(d).

[158] Sinclair v. Ziff Davis, LLC, 454 F. Supp. 3d 342, 344 (S.D.N.Y. 2020).

[159] Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 18 (2004).

[160] *Id.*

[161] *Id.*

As the above example illustrates, the Internet exacerbates the transaction costs that can arise from the divisibility of copyright.[162] When content is posted online, it potentially implicates the reproduction, distribution, and display or performance rights.[163] Therefore, when someone is making use of a work online to which they do not own the copyright and absent an exclusion or limitation, they must seek authorization of the copyright holder of the underlying work and its exclusive rights, or they risk liability for copyright infringement. If the rights to the work have been divvied to multiple different owners and limitations or exceptions do not apply, obtaining the required authorizations to share a copyrighted work becomes very difficult.[164]

The divisibility of copyright becomes particularly relevant when a copyrighted work is posted to a social media platform. Platforms have attempted to minimize direct copyright infringement liability by requiring users to expressly grant intellectual property licenses to the platform via the User Agreement.[165] Additionally, litigants have used a platform's User Agreement as a defense to online behavior that potentially infringed on copyright.[166] Accordingly, this study seeks to explore if and to what extent a platform's User Agreement grants licenses and sublicenses to the platform and third-party users to use user-generated content.

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[162] *Id.* at 19–20.

[163] *Id.*

[164] *See id.* at 21.

[165] Instagram, for example, states in its Terms of Service that when a user shares, posts, or uploads copyrighted content "on or in connection with" Instagram, they grant the platform "a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of [their] content." INSTAGRAM, INSTAGRAM'S TERMS OF SERVICE https://help.instagram.com/581066165581870.

[166] *See* Sinclair v. Ziff Davis, LLC, 454 F. Supp. 3d 342 (S.D.N.Y. 2020).

CHAPTER 4: RESEARCH QUESTIONS AND METHODOLOGY

4.1 Research Questions

This study seeks to answer four main research questions:

RQ_1: **Which of the major social media platforms facilitate embedding by providing users with *embed codes* to platform content?**

RQ_2: **What does the prevailing jurisprudence under the 1976 Copyright Act suggest about whether embedding of copyrighted content via major social media platforms constitutes an infringement of the public display right?**

RQ_3: **In each platform's User Agreement, what express licenses or sub-licenses are granted to the platform and/or third-party users as they relate to a copyright holder's exclusive rights?**

RQ_4: **What does the permissibility of embedding copyrighted content, the facilitation of embedding by platforms, and the licenses granted in a platform's User Agreement suggest about the future of embedding as a content-sharing tool?**

4.2 Justification for Scope

4.2.1 Social Media Platforms

This study is focused on certain aspects of social media platforms, therefore a discussion of the various definitions of social media is helpful. This study relies on that discussion to narrow the platforms that will be surveyed in this study. As explored below, there are several definitions that co-exist and are broadly accepted in literature.[167] The term "social media" is often used as a blanket term to define web services from online platforms (such as Facebook) to

[167] Thomas Aichner, Matthias Grunfelder, Oswin Maurer & Deni Jegeni, *Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019*, 24 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 215, 220 (2021).

virtual worlds (such as Second Life).[168] Defining social media is particularly challenging because of the speed at which technology expands and evolves. [169] Additionally, some of social media's defining characteristics share similarities with more traditional technologies that facilitate collaboration and communication, such as the telephone; [170] it would thus be hard to define social media solely based on its communicative and collaborative characteristics. Differentiating social media platforms from other kinds of communicative technology can be challenging. Professor Chi Thi Phuong Duong has identified six elements of social media that distinguishes it from traditional media: (1) creation and dissemination of content; (2) interactivity; (3) convergence; (4) speed; (5) cost; and (6) reach.[171] These elements are helpful to frame a definition for social media.

Research shows that the definition of social media has changed considerably from 1994 to now.[172] Today, there are several definitions of social media that co-exist and are broadly accepted in literature.[173] Even policymakers have taken a stab at defining social media. A Florida statute defines "social media platform" as "any information service, system, Internet search engine, or access software provider that [p]rovides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site," and has at least

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[168] *Id.* at 215.

[169] Jonathan A. Obar & Steven S. Wildman, *Social Media Definition and the Governance Challenge—An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746 (2015).

[170] *Id.*

[171] Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 115 (2020).

[172] Thomas Aichner, Matthias Grunfelder, Oswin Maurer & Deni Jegeni, *Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019*, 24 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 215, 215 (2021).

[173] *Id.* at 220.

"annual gross revenues in excess of $100 million" or "100 million monthly individual platform participants globally," subject to additional qualifications.[174] In comparison, a Texas statute defines "social media platform" as "an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images."[175] Other states that also have statutory definitions of social media include California, Connecticut, Indiana, Kansas, Maine, Oklahoma, Rhode Island, and Tennessee.[176]

To reach a comprehensive understanding of the definition of social media, this study relies on literature from several disciplines, including communications, business, and law. Professor Jonathan Obar and co-author Steven Wildman define social media as Web 2.0 applications that rely on user-generated content and user-specific profiles to facilitate social networks online by connecting user profiles to each other.[177] Similarly, Professor José van Dijck defined social media as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content."[178]

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[174] FLA. STAT. § 501.2041(1)(g) (2021). Additionally, to qualify as a social media platform, the entity must do business in Florida and operate "as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity." *Id.*

[175] TEX. BUS. & COM. CODE ANN. § 120.001(1) (West 2021).

[176] CAL. GOV'T CODE § 6218.05(g) (West 2022); CONN. GEN. STAT. § 9-601(31) (2021).; IND. CODE § 4-2-6-15.5(1) (2021); KAN. STAT. § 25-4153a(c) (2021); ME. REV. STAT. tit. 26, § 615.4 (2021); OKLA. STAT. tit. 74, § 840-8.1A.1. (2021); 16 R.I. GEN. LAWS § 16-103-1(1) (2021); TENN. CODE § 40-39-202 (2021).

[177] Jonathan A. Obar & Steven S. Wildman, *Social Media Definition and the Governance Challenge—An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 747 (2015).

[178] JOSÉ VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 4 (2013).; *see also* Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 114 (2020) ("Social media is generally a category of Internet-based applications that draw on Web 2.0's ideological and technological. Social media provides the ability for its users to communicate, create, edit, and share online contents. These contents can be text, photo, video, sound, or a mixture of all.").

Social media can therefore be characterized as Web 2.0 applications that rely on the creation and exchange of user-generated content to facilitate social networks online by connecting user profiles to each other quickly and cheaply. Before diving into the different categories of social media, each of these characteristics will be discussed in detail below.

As Professors Andreas Kaplan and Michael Haenlein note, Web 2.0 refers to the change in the World Wide Web from being a place where content was individually created and published by editors or content creators to a place where content is "continuously modified by all users in a participatory and collaborative fashion."[179] Web 2.0 has also enabled people to connect with each other as well as other entities such as interest groups, companies, and brands.[180]

Due to its collaborative nature, Web 2.0 allows for the wide dissemination and sharing of user-generated content, which Kaplan and Haenlein describe as "the various forms of media content that are publicly available and created by end-users."[181] They identify three characteristics of user-generated content. User-generated content must be (1) "published either on a publicly accessible website or on a social networking site accessible to a selected group of people"; (2) "show a certain amount of creative effort"; and (3) "needs to have been created outside of professional routines and practices."[182] The first characteristic excludes from the definition of user-generated content any content exchanged through e-mails or instant

[179] Andreas M. Kaplan & Michel Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010).

[180] Russell Newman, Victor Chang, Robert John Walters, & Gary Brian Wills, *Web2.0—The Past and the Future*, 36 INT'L J. INFO. MGMT. 591, 591 (2016).

[181] Andreas M. Kaplan & Michel Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010).

[182] *Id.*

messages,[183] which generally tend to be shared in a private or restricted space. The second characteristic excludes "replications of already existing content," but fails to specify how much creative effort is required.[184] The third characteristic excludes content created "with a commercial market context in mind,"[185] but fails to specify why such content cannot be classified as user generated. This third criterion is especially underinclusive because "social media platforms diminish the distinction between the amateur and the professional content creator."[186] Thus, user-generated content is best understood broadly—as any content posted or shared by users on a publicly accessible social media site.[187]

While a uniform definition of social media is helpful for research, not all social media are created equal. For example, Duong identified six different types of social media, each with different technological affordances: social networking sites, blogs, forums, sharing websites, social bookmarking, podcasts and wikis.[188] These categories are similar to the ones identified by Kaplan and Haenlein.[189] Table 1 below identifies six different categories of social media based on these two models.

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[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 3 (2018).

[187] The term "publicly accessible" is meant to encompass restricted groups on social media sites that are accessible to selected users but is not meant to encompass communication through instant messaging or e-mail.

[188] Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 118–21 (2020).

[189] *See* Andreas M. Kaplan & Michel Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 62–64 (2010) (identifying the six different categories of social media as social networking sites, collaborative projects, blogs, content communities, virtual game worlds, and virtual social worlds).

TABLE 1. CATEGORIES OF SOCIAL MEDIA PLATFORMS

Type of Social Media Platform	Examples	Description
Social Networking Site	Facebook, LinkedIn	Web-based service that enables users to create a public or semi-public profile, connect with other users on the platform and share content on the platform
Blog, Microblog	Blogger, WordPress	Personal web pages about particular subjects, usually arranged in reverse chronological order
Forum	Reddit	Online communities that allow visitors to read and share common topics
Sharing Website/Content Communities	YouTube, Pinterest	Web-based service used mainly to exchange content between users, but that do not require users to create profiles to view content on the website
Virtual Worlds	World of War Craft, Second Life	Virtual worlds that replicate a 3-D environment where users interact with each other through avatars
Wiki/Collaborative Projects	Wikipedia	Web services that enable users to update, edit, and delete content jointly and simultaneously

Despite the differences illustrated above, it is difficult to separate social networking websites from sharing websites/content communities.[190] Social networking sites focus on the connection of users, while content communities focus on the exchange of user-generated content. However, social networking websites and content communities are not mutually exclusive.[191] Take Instagram, for example. Instagram is an application that enables users to edit and share photos or videos onto their personal profile. However, a user can make their Instagram public (viewable by any user) or private (viewable only by authorized users). Additionally, users can connect with

[190] Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 119 (2020).

[191] *See, e.g.*, Mihajlo Babovic, Note, *The Emperor's New Digital Clothes: The Illusion of Copyrights in Social Media*, 6 CYBARIS INTELL. PROP. L. REV. 138, 141–42 (2015) ("[S]ocial networking websites will always include [user-generated content], but a social media site will not always include the type of community categorized as a social networking website.").

other profiles by "following" them and by exchanging private messages. Thus, Instagram could qualify as both a social networking website and a content community. This is true for several other platforms, including Facebook.

While one should be cautious to generalize social media, Professor Jane Ginsburg and co-author Luke Budiardjo emphasize that it remains true that social media is "built entirely on the value of sharing of platform content: users who share and reshare content redistribute and republish attractive third-party content to larger and larger audiences." [192] Thus, the most relevant focus for this study was on content communities—those platforms that facilitate posting, sharing, and modifying of user-generated content—even if they may contain characteristics akin to another social media category. Outside the scope of this study were social media platforms that focus primarily on the connection and communication between users, even if they may facilitate some sharing of content, such as Virtual Worlds or Forums.

Acknowledging these differences is important because previous research into the effects of social media has generally failed to recognize the difference across social media platforms, especially in the context of misinformation.[193] One study found that variations across the "architectural features and affordances" of different platforms "have consequences for how users encounter content."[194] Thus, keeping these differences in mind is important to avoid over-generalizations of social media with different technological affordances.

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[192] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 440 (2019).

[193] Yannis Theocharis et al., *Does the Platform Matter? Social Media and COVID-19 Conspiracy Theory Beliefs in 17 Countries*, 2021 NEW MEDIA & SOC'Y 1, 3 (2021) ("Although the role of social media in the spread of conspiracy theories and other kinds of misinformation has received much attention, a key deficit in previous research is the lack of distinction between different types of social media.")

[194] *Id.* at 17.

Previous researchers into copyright and User Agreements have broadened the scope of their research to include a wide range of websites that focus on "user-contributed" content, such as websites focusing on music, art, and video, to include "a variety of different types of content creation."[195] Since the focus of this study was not only on User Agreements, but also on embedding content online, this study focused on social media platforms that primarily focus on the creation and exchange of user-generated content. For example, this means this study focused on content communities such as YouTube and Pinterest, but not on virtual worlds, such as Second Life. If a platform qualifies as both a content community and another category, such as a social networking platform, such platform qualified as a content community for the purposes of this study.

To identify the platforms which were to be the focus this study, this study first cross-referenced Statistica's global listing of the most popular social media platforms based on active user accounts and the Pew Research Center's report on the most common social media platforms reported by American adults. Statistica's reporting has reliably been used in Obar and Wildman's research into the definition of social media.[196] The social media report from Pew Research Center was conducted by surveying 1,501 U.S. adults over cellphone and landline phone and is weighed to be representative of the U.S. adult population.[197] Additionally, the Pew Research Center's report of social media usage in American adults is particularly relevant for this study

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[195] Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, CONF. ON COMPUT.-SUPPORTED COOP. WORK & SOC. COMPUTING, Feb. 2016, at 1452.

[196] Jonathan A. Obar & Steven S. Wildman, *Social Media Definition and the Governance Challenge—An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746 (2015).

[197] BROOKE AUXIER & MONICA ANDERSON, PEW RSCH. CTR., SOCIAL MEDIA USE IN 2021 2 (2021) https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/04/PI_2021.04.07_Social-Media-Use_FINAL.pdf.

because this study will focus on U.S. copyright law. By cross-referencing these two lists, this study can identify popular social media platforms measured by both active user accounts and by self-reported use.

Focusing on platforms with a large number of active users is justified because at least one U.S. jurisdiction (Florida) and one international jurisdiction (European Union) have recognized the social impact of social media platforms with multi-million users. As previously mentioned, Florida inserted into its definition of social media the requirement that a platform must have either a statutorily-defined minimum annual gross revenue or "100 million monthly individual platform participants globally" to be subject to the statute.[198] Additionally, in the EU, the proposed Digital Services Act specifies certain responsibilities for "very large online platforms"—platforms reaching more than 10% of 450 million users in Europe.[199]

Based on data from Statistica, Table 2 below lists the top seventeen most popular social media platforms worldwide as of January 2022, ranked by number of active users[200]:

[198] FLA. STAT. § 501.2041(1)(g) (2021).

[199] *The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, EUROPEAN COMM'N https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment_en#which-providers-are-covered.

[200] *Most Popular Social Networks Worldwide as of October 2021, Ranked by Number of Active Users*, STATISTICA (Oct. 2021) https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

TABLE 2. MOST POPULAR SOCIAL MEDIA PLATFORMS WORLDWIDE BY ACTIVE USER ACCOUNTS

Service	Accounts (millions)
Facebook	2,910
YouTube	2,562
WhatsApp	2,000
Instagram	1,478
Weixin/WeChat	1,263
TikTok	1,000
Facebook Messenger	988
Douyin	600
QQ	574
Sina Wibo	573
Snapchat	557
Telegram	550
Pinterest	444
Twitter	436
Kuaishou	506
Reddit	430
Quora	300

Based on the most recent data from the Pew Research Center, Table 3 lists the most common social media platforms based on the percentage of American adults who say they use each platform as of February of 2021[201]:

TABLE 3. MOST COMMON SOCIAL MEDIA PLATFORMS BY PERCENTAGE OF REPORTED USE BY U.S. ADULTS

Service	Percentage of U.S. Adults
YouTube	81%
Facebook	69%
Instagram	40%
Pinterest	31%
LinkedIn	28%
Snapchat	25%
Twitter	23%
WhatsApp	23%
TikTok	21%
Reddit	18%
Nextdoor	13%

[201] *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/#which-social-media-platforms-are-most-common?menuItem=b14b718d-7ab6-46f4-b447-0abd510f4180.

After narrowing the selection to the platforms that appear in both lists, this author identified under which social media category each platform classifies based on the definitions in Table 1. Table 4 reflects this categorization.

TABLE 4. MOST COMMON SOCIAL MEDIA PLATFORMS BY WORLDWIDE ACTIVE USERS AND BY U.S. SELF-REPORTED USE

Service	Social Media Category
YouTube	Content Community
Facebook	Social networking platform
Instagram	Content community; social networking platform
Pinterest	Content community
Snapchat	Social networking platform
Twitter	Social networking platform
WhatsApp	Social networking platform
TikTok	Content community
Reddit	Forum

Tan and Duong classify YouTube, Instagram, and Pinterest as content communities because those platforms focus on the dissemination of media content.[202] This author has classified TikTok as a content community because its focus is on the sharing of short videos with other users, which is similar to YouTube and Instagram. Tan, Duong, Kaplan, and Haenlin all classify Facebook as a social networking platform.[203] Professor Duong classified Twitter as a social networking platform.[204] This study classified Snapchat and WhatsApp as social networking platforms because both of those platforms require users to have a user profile to use

[202] *See* CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 27 (2018); Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 120 (2020).

[203] *See* CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 27 (2018); Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 118 (2020); Andreas M. Kaplan & Michel Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 63 (2010).

[204] *See* Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112, 118 (2020).

the platforms and they focus on the exchange of text and content between individual users, or a group of users, rather than posting to a wider community. This study classified Reddit as a forum because Reddit facilitates several online communities that allows users to share common interest topics.[205]

Because this study is concerned with embedding copyrighted content, the platforms that will be the subject of this study will be those platforms that operate as content communities or as content communities and another category—in short, the platforms where the creation and exchange of user-generated content is most pervasive. That is not to say that other kinds of platforms do not contain user-generated content, but this study is concerned with the platforms where the exchange of user-generated content is encouraged to be disseminated widely and publicly.

Although Facebook and Twitter are classified as social networking platforms, both platforms will still be subjects of this study. To begin with, both platforms encourage the posting and sharing of user-generated content, such as text, photos, and videos. Additionally, both platforms allow individuals to view Facebook or Twitter pages without creating a profile or downloading the application, features that are common to content communities and that Snapchat and WhatsApp do not provide. Finally, Twitter and Facebook were the subjects of recent litigation regarding the embedding of copyrighted content,[206] making both appropriate platforms to be a subject of this study. Considering all of the criteria discussed above, Table 5 reflects the six platforms that were subjects of this study:

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[205] Professor Duong classifies Reddit as a "social bookmarking" platform. *See id.* at 121. However, for the purposes of this study, forums and social bookmarkings have been grouped together.

[206] Goldman v. Breitbart News Network, LLC, 2018 WL 911340 (S.D.N.Y. Feb. 15, 2018). Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

TABLE 5. PLATFORMS CHOSEN FOR THIS STUDY BASED ON CATEGORY, PERCENTAGE OF U.S. ADULT USERS AND NUMBER OF ACTIVE ACCOUNTS

Service	Social Media Category	Percentage of U.S. Adults Users	Number of Active User Accounts Worldwide
YouTube	Content community	81%	2,562 million
Facebook	Social networking platform	69%	2,910 million
Instagram	Content community, social networking platform	40%	1,478 million
Twitter	Social networking platform	23%	436 million
Pinterest	Content community	31%	444 million
TikTok	Content community	21%	1,000 million

4.2.2 Copyright's Sixth Exclusive Right

RQ_3 asks what licenses or sub-licenses are granted to the platform and/or third-party users as they relate to a copyright holder's exclusive rights. Justified by the following section, RQ_3 does not take into consideration the exclusive right granted to copyright holders under 17 U.S.C. § 106(6). When the 1976 Copyright Act was enacted, it only included the rights to reproduction, adaption, distribution, performance, and display.[207] Added to the Copyright Act two decades later,[208] Section 106(6) of the Copyright Act grants a copyright holder the exclusive right, "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[209] Section 106(6) is subject to several limitations set forth in § 114 of

[207] The exclusive right to perform sound recordings was added to the Copyright Act in 1995 by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336 (codified as amended at 17 U.S.C. § 106(6)).

[208] *Id.*

[209] 17 U.S.C. § 106(6).

the Act.[210] Due to § 114's complexity[211] and narrow applicability,[212] this study did not consider whether platforms' User Agreements granted any licenses relating § 106(6).

4.3 Methodology

This study was guided by the research methods set forth below.

RQ_1: **Which of the major social media platforms facilitate embedding by providing users with *embed codes* to platform content?**

First, this study sought to identify how many of the six social media platforms facilitate the embedding of content by providing embed codes through a built-in generator in their API. Of the six social media platforms within the scope of this study, this author operationalized which ones allow users to easily embed content originating on their platform by providing embed codes to platform content. This author created an account for each social media platform being analyzed and examined posts within the platform to see whether the platform gives the user an option to "embed" a post found on the platform's newsfeed.

Of the social media platforms that provide an embed code, this study then identified which platforms allow users to disable this feature on their personal posts. This study browsed each platform's user settings to identify which technological features within the platform a user can disable. This author also identified which platforms provide step-by-step instructions on how to embed content from the platform using the platform's API. This study searched through each platform's "Help Center" for articles with the word "embed."

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[210] 17 U.S.C. § 114.

[211] The copyright treatise "Patry on Copyright" notes that Section 114 alone is over "21 single-spaced, printed pages" stipulating "voluminous limitations" to § 106(6) that are "both vague and maddeningly detailed." 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:82 (2022).

[212] Section 106(6) grants an exclusive right only to an interactive subscription digital audio transmission service. *See* 17 U.S.C. § 114(d)(1)(A) (exempting noninteractive, nonsubscription broadcast transmission); *see also* 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:82 (2022).

RQ$_2$: **What does the prevailing jurisprudence under the 1976 Copyright Act suggest about whether embedding of copyrighted content via major social media platforms constitutes an infringement of the public display right?**

This author answered this question by conducting a legal case analysis of statutory interpretation of the relevant sections of the Copyright Act applicable to embedding, specifically sections 17 U.S.C. § 106(5) (display right) and 17 U.S.C. § 107 (fair use). This author focused the analysis on these sections because the display right[213] is at the center of cases considering embedding and fair use provides a defense to the potentially infringing practice. The U.S. Supreme Court has not addressed this question, therefore the scope of the analysis included federal circuit court of appeals and district court opinions. This author analyzed whether recent developments in the law regarding the legality of embedding copyrighted content have changed foundational understandings of copyright's display right and fair use.

Relevant circuit court of appeals and district court opinions were located using both Thomson Reuter's Westlaw Edge and Lexis+ database, and results are current as of March 2, 2022. As previously mentioned, the law used to be settled on this matter,[214] when in *Perfect 10, Inc. v. Amazon.com, Inc*, the Ninth Circuit Court of Appeals held that an entity cannot be held liable for violation of the display right if it does not actually store the copyrighted work in its own server.[215] Since recent cases have diverged from *Perfect 10*, this author began the search

[213] Although some litigants have argued embedding infringes on their reproduction right, no court has reached the merits of this argument.

[214] In December of 2007, the Ninth Circuit Court of Appeals in *Perfect 10, Inc. v. Amazon.com, Inc*, held that an entity cannot be held liable for violation of the display right if it does not actually store the copyrighted work in its own server. 508 F.3d 1146, 1155 (9th Cir. 2007). This is commonly referred to as the "server test." For the decade following the decision in *Perfect 10*, almost all courts that considered framing or in-line linking in the context of the display right adopted the server test. Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 426 (2019).

[215] *Perfect 10*, 508 F.3d at 1155.

query by looking at *Perfect 10*'s 3,877 citing references on Thomson Reuter's Westlaw Edge database. This author then narrowed the search results to federal cases. This returned a result of 541 cases. Then, this author searched within the results with the Boolean search query "(embed! or "in-line link!" OR "in line link!") /p display" to identify any cases discussing embedding and the display right. This process returned 20 search results. This author narrowed down the results to relevant cases by omitting (1) cases that were no longer good law and (2) cases where embedding content online was not an issue in the controversy. This process returned the following four cases: (1) *Nicklen v. Sinclair Broadcast Group, Inc.*, (2) *Goldman v. Breitbart News Network, LLC*, (3) *Flava Works, Inc. v. Gunter*, and (4) *Hunley v. Instagram*.

Next, this author ran a Boolean search on Westlaw with the following query: copyright AND (embed! or "in-line link!" OR "in line link!") /p display. This returned 100 search results. This author narrowed the results to federal cases decided after December 03, 2007, the date *Perfect 10* was decided. This returned 76 results. This author omitted any cases that are no longer good law or where embedding content online was not an issue to the controversy. This process returned the following seven cases: (1) *Flava Works, Inc. v. Gunter*, (2) *Goldman v. Breitbart News Network, LLC*, (3) *Nicklen v. Sinclair Broadcast Group, Inc.*, (4) *Hunley v. Instagram*, (5) *Sinclair v. Ziff Davis, LLC*, (6) *McGucken v. Newsweek LLC*, *Walsh v. Townsquare Media, Inc.*, and (7) *Boesen v. United Sports Publications, Ltd*.

Next, this author used Lexis+'s "Shepard's" tool on § 106 of the Copyright Act to look at courts' treatment of subsections. Here, this author narrowed the search results to courts' treatment of the display right, § 106(5). As above, this author narrowed the results to federal cases decided after December 03, 2007. This author then searched within results with the following search query: (embed! or "in-line link!" OR "in line link!") /p display. This process

returned six search results—only three of which had not been overturned and where embedding content online was an issue to the controversy: (1) *Goldman v. Breitbart News Network, LLC*, (2) *Nicklen v. Sinclair Broadcast Group, Inc.*, and (3) *Hunley v. Instagram*.

As a last measure, this author searched for relevant cases via secondary sources such as legal news articles, law review articles, and copyright treatises. First, this author searched through the Technology & Marketing Law Blog[216] for any articles related to embedding and the display right by using "embed" in the blog's search bar. This author specifically looked for articles discussing cases this author had not already found, and this author found an article[217] reporting on *Boesen v. United Sports Publications, Ltd.*, which this author had already found. Next, this author searched for law review articles discussing embedding and the display right by narrowing the search to secondary sources on Westlaw and using the following search query: 'copyright' AND 'embed!' AND 'display'. Similar to above, this author searched for law review articles published after the Ninth Circuit's decision in *Perfect 10* and reviewed the top ten results. This process returned the case: *Leader's Institute, LLC v. Jackson*. Finally, this author reviewed a reputable treatise—Patry on Copyright—for any relevant entries discussing embedding and the display right by looking through the treatise's table of contents. This author reviewed § 15:7 titled "Infringement of the display right—Case law—Framing, linking, and

[216] This is Professor Eric Goldman's Blog. Eric Goldman is a Professor of Law at Santa Clara University School of Law who specializes in internet law, intellectual property, and marketing. https://law.scu.edu/faculty/profile/goldman-eric/.

[217] Venkat Balasbramani, *Another Court Says Embedding Instagram Photos May Be Fair Use*—Boesen v. United Sports, TECH. & MKTG. L. BLOG (Dec. 7, 2020) https://blog.ericgoldman.org/archives/2020/12/another-court-says-embedding-instagram-photos-may-be-fair-use-boesen-v-united-sports.htm.

embedding," which discussed cases this author had already found.[218] *Boesen v. United Sports Publications* and *Leader's Institute, LLC v. Jackson* are both unpublished cases. Although these cases are unreported, this author included them in the analysis because both had been flagged by copyright scholars as cases signaling a shift in copyright jurisprudence as applied to embedding and in-line linking.[219]

As a result of various research attempts, this author identified the following ten cases to be analyzed in this study:

1. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).
2. *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).
3. *Leader's Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017).
4. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).
5. *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020).
6. *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594 (S.D.N.Y. 2020).
7. *Sinclair v. Ziff Davis, LLC*, 454 F. Supp. 3d 342 (S.D.N.Y. 2020).
8. *Boesen v. United Sports Publications, Ltd.*, No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020).

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[218] 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 15:7 (2021). This section discusses, at length, *Perfect 10*, *Leader's inst., LLC v. Jackson*, *Goldman v. Breitbart News Network, LLC*, *Sinclair v. Ziff Davis*, and *McGucken v. Newsweek, LLC*. *Id.*

[219] *See* Venkat Balasbramani, *Another Court Says Embedding Instagram Photos May Be Fair Use*—Boesen v. United Sports, TECH. & MKTG. L. BLOG (Dec. 7, 2020) https://blog.ericgoldman.org/archives/2020/12/another-court-says-embedding-instagram-photos-may-be-fair-use-boesen-v-united-sports.htm (discussing *Boesen*); Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 426 (2019) (discussing *Jackson* as the first of a series of cases to reject the server rule in almost a decade).

9. *Nicklen v. Sinclair Broadcast Group, Inc.*, No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).
10. *Hunley v. Instagram, LLC*, No. 21-cv-03778-CRB, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021).

RQ3: **In each platform's User Agreement, what express licenses or sub-licenses are granted to the platform and/or third-party users as they relate to a copyright holder's exclusive rights?**

This research question asks what licenses or sub-licenses are granted in the platforms' User Agreement to platforms and third-party users as they relate to a copyright holder's exclusive rights. Usually, a user's behavior is bound not only by a platform's Terms of Service/User Agreement, but also by additional policies. For example, Facebook's Terms of Service states the following: "You may not use our Products to do or share anything [t]hat violates these Terms, our Community Standards, and other terms and policies that apply to your use of our products."[220] Accordingly, for the purposes of this study, each platform's "User Agreement" includes any platform terms, policies, or guidelines that regulate user behavior, such as the Terms of Service/Use Agreement, Community Standards and any additional policies that are incorporated through the Service/Use Agreement.

First, this study identified each platform's User Agreement by using Google search engine with the following query: "[platform] terms of service." Because platforms' User Agreements are frequently updated, this author downloaded each User Agreement as a PDF to ensure that it would not be subject to platform modification. The User Agreements studied here are those that were publicly available on the platform website as of February 15, 2022. As

[220] *Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php (Jan. 4, 2022).

explained below, RQ_3 was answered by taking a latent approach to a qualitative content analysis of the User Agreements of the platforms analyzed in this study.

Professors Sarah E. Shannon and Hsiu-Fang Hsieh describe a qualitative content analysis as focusing on the "subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns."[221] They explain latent content analysis within the context of a summative content analysis. The professors define a summative approach to content analysis as "identifying and quantifying certain words or content in text with the purpose of understanding the contextual use of the words or content."[222] A summative content analysis is more fitting when the purpose of the study is to interpret the contextual meaning of specific words or content, rather than analyzing the data as a whole.[223] Since this study is only concerned with the portions of the User Agreement that address licenses or sub-licenses to user-generated content, a summative content analysis would be appropriate. However, a summative content analysis contains both qualitative and quantitative aspects, since it usually begins by identifying and quantifying occurrences of the relevant words in the text.[224] Since this study is concerned with what licenses are granted pursuant to the User Agreement, the quantification of words or phrases does not add to the legal interpretation of the contracts. Thus, this study employs only the qualitative portion of a summative content analysis—a latent content analysis.

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[221] Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RSCH. 1277, 1278 (2005).

[222] *Id.* at 1283.

[223] *Id.* at 1286.

[224] *Id.* at 1285.

A latent content analysis, according to Hsieh and Shannon, "refers to the process of interpretation of content" and "discovering underlying meanings of the words or the content."[225] A latent content analysis adopts a deductive, or directive, approach for determining initial codes, meaning it relies on existing theory and prior research to develop a coding scheme.[226] Using this approach, this author determined initial codes based on the research of Professors Casey Fiesler, Cliff Lampe, and Amy Bruckman. In their research, they analyzed the User Agreements for thirty different websites and compared them to user expectations and opinions of copyright policies.[227] This author then refined the coding scheme based on an initial analysis of the documents. Accordingly, this author used the following codes to identify relevant passages that address copyright licensing and rights: copyright, license, link, reproduce, perform, modify, adapt, transform, distribute, display, advertising, use, share, copy.

For this study, this author identified the occurrence of copyright licensing terms by identifying passages in each platform's User Agreement that relate to copyright licensing, and ownership of and interaction with user-generated content—including any right to use, copy, share, modify, adapt, display, and distribute content. This author scanned each of the User Agreements with the search function in *Adobe Acrobat Reader DC* for the presence of the predetermined, abovementioned codes. This author highlighted any passage that used one of the terms above. This author then analyzed the content of each passage and removed from the pool

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[225] *Id.* at 1284–86; *see also* U.H. Graneheim & B. Lundman, *Qualitative Content Analysis in Nursing Research: Concepts, Procedures and Measures To Achieve Trustworthiness*, 24 NURSE EDUC. TODAY 105, 106 (2004).

[226] *See* Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RSCH. 1277, 1281 (2005); Kevin M. Roessger, *Toward a Taxonomy of Meaning Making: A Critical Ltent Content Analysis of Peer-reviewed Publications in Adult Education*, 31 NEW HORIZONS ADULT EDUC. & HUM. RES. DEV. 4, 6 (2019).

[227] Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, CONF. ON COMPUT.-SUPPORTED COOP. WORK & SOC. COMPUTING, Feb. 2016, at 1454.

any false positives—any passages that did not relate to copyright licensing or to the ownership or use of user-generated content.

Mainly, RQ_3 is concerned with whether the platform and other users are allowed to participate in intraplatform and interplatform sharing[228] of the user's uploaded content. This study structured the analysis by answering two main questions:(1) whether licenses were expressly granted to the platform and (2) whether sublicenses were expressly granted to third parties under the platform's User Agreement.

RQ_{3a}: Which, if any, exclusive rights of a copyright holder are expressly licensed to the social media platform under the User Agreement of the platform?

This question was answered by identifying what exclusive rights in uploaded content the user is required to grant the platform when agreeing to a platform's User Agreement. As explained in Section 4.2.2 of this Chapter, this research question only considered the exclusive rights to reproduce, prepare derivative works, distribute, and publicly display or perform. Additionally, this question inquiry analyzed the duration of any licensed rights.

RQ_{3b}: Which, if any, exclusive rights of a copyright holder are expressly licensed to third-party users under the User Agreement of the platform?

This questioned was answered by identifying what rights in uploaded content the user is required to grant other users when agreeing to a platform's User Agreement. This question's scope was limited to third-party users of the platform and did not include a platform's business contractors.[229]

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[228] *See infra* Chapter 5.

[229] Through their User Agreement, platforms often grant their business contractors licenses to use a user's content "to deliver or improve the main service or supplement it with additional functionalities." Leo Pascault, Bernd Justin Jutte, Guido Noto La Diega & Giuliana Priora, *Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online* Services, EUR. INTELL. PROP. REV. (June 15, 2020) (forthcoming) (manuscript at 4). Although such sublicense may be problematic, *see id.*, it is beyond the scope of this study.

RQ_4: **What does the permissibility of embedding copyrighted content, the facilitation of embedding by platforms, and the licenses granted in a platform's User Agreement suggest about the future of embedding as a content-sharing tool?**

This last research question is answered by analyzing the findings from RQ_1, RQ_2, and RQ_3 and discussing the results in light of the value of shareability and purposes of copyright law.

CHAPTER 5: FACILITATION OF EMBEDDING BY PLATFORMS

The threshold issue addressed in this chapter centers on which of the six social media platforms facilitate the embedding of content by providing embed codes through a built-in generator in their API. Interestingly, the findings reveals that all six platforms offer users easily accessible embedding tools. But before discussing the results, this chapter discusses the taxonomy of sharing content online and provides a brief overview of different digital content-sharing practices.

5.1 Taxonomy of Sharing Content Online and Embedding

As with differences in the types of social media, there are different types of engagement behavior online. At the most basic level, there are differences between *content creation*, *content consumption*, and *content interaction*.[230] *Content creation* refers to active behavior like posting, uploading, or sharing content.[231] *Content consumption* refers to passive behavior like viewing or accessing content. *Content interaction* refers to behaviors like commenting, liking, or reacting to content. Users usually engage in content creation, consumption, and interaction, but only content creation—where one is either creating, altering, or sharing content—implicates copyright.

This study borrows from Ginsburg and Budiardjo's scholarship establishing a taxonomy of content sharing. Ginsburg and Budiardjo differentiate between content sharing, intranetwork

[230] *See, e.g.*, Jonathan A. Obar & Steven S. Wildman, *Social Media Definition and the Governance Challenge—An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 747 (2015) (comparing content consumption and content interaction).

[231] Authors Obar and Wildman classify "sharing" content as content consumption. *Id*. However, sharing content can include activities that resemble content creation—such as including a user's own commentary to the shared content. Thus, sharing content is more appropriately classified as content creation, rather than consumption.

sharing, and off-platform sharing.[232] *Content sharing* refers to "activities that place content onto social media platforms."[233] Users engage in content sharing by posting their own content or by "posting hyperlinks to content that [they] . . . find elsewhere on the Internet."[234] Ginsburg and Budiardjo refer to *intranetwork sharing* as "activities that redisseminate content *within* social media platforms."[235] To reflect the scope of this study, this study will refer to intranetwork sharing as *intraplatform sharing*. Intraplatform sharing can be done by both users and platforms. Users engage in intraplatform sharing when they "'reshare' content that other users have already placed on the platform, thereby redisplaying that content to other users . . . ."[236] Social media platforms engage in intraplatform sharing when it "republish[es] user-generated content and posts by algorithmically promoting content through their social media networks."[237] Ginsburg and Budiardjo refer to *off-platform sharing* as "activities that display or perform content residing on a social media platform *outside* the platform, or third-party sites."[238] To reflect the scope of this study, this study will refer to off-platform sharing as *interplatform sharing*.

Users and platforms can engage in content sharing, intraplatform sharing, and interplatform sharing by linking, embedding, or framing content online. However, when a user links, embeds, or frames copyrighted content without the authorization of the copyright holder,

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[232] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 440 (2019).

[233] *Id.*

[234] *Id.* at 440–41.

[235] *Id.* at 440.

[236] *Id.* at 441.

[237] *Id.* at 442.

[238] *Id.* at 440.

that user is potentially committing copyright infringement. The following section defines each of these practices, highlighting the differences, similarities, and legal implications between them.

5.1.1 Definition of Linking, Framing, and Embedding

Because copyright protection does not differentiate between original works created online or offline,[239] any practice online that results in the creation of a fixed, original work—or that uses, shares, borrows from, or modifies an original work—is subject to the rights and limitations of copyright law. As social media's footprint has grown so large, users are regularly bumping up against the borders of copyright infringement.[240] Embedding, when using content protected by copyright, constitutes one of the potentially infringing behaviors in which users engage online. Although this study is concerned with embedding specifically, this section also discusses the technological aspects of linking and framing because embedding is a form of linking and is closely related to framing. Discussing and comparing all three practices allows for a deeper understanding of embedding. Since some doctrines of copyright law rely on technical details of where content is stored online,[241] this section provides a brief overview of the technical aspects of website creation.

Websites are hosted in web servers[242] and are accessible through web browsers, such as Firefox, Internet Explorer, Safari, or Chrome.[243] Websites are programmed through HyperText

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[239] *See* 17 U.S.C. § 102.

[240] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 5 (2018).

[241] An example of this is the server test, which will be discussed in more detail later. The server test holds that the display right is only infringed upon if a copy of the content is stored in the infringing party's server. Perfect 10, Inc. v. Amazon, 508 F. 3d 1146, 1159–61 (9th Cir. 2007).

[242] JOHN DUCKETT, HTML & CSS: DESIGN AND BUILD WEBSITES 7 (2011) ("Web servers are special computers that are constantly connected to the Internet, and are optimized to send web pages out to people who request them.").

Mark-up Language (HTML), which is a series of *tags* that determine the structure of the webpage, such as text, images, and other multimedia files.[244] HTML allows for the creation of links, which take webpage visitors from one page to another.[245]

Put simply, a ***link*** is a connection between two places on the web that when clicked can take the user to a different place on the Internet or bring the content from another site to the user's browser.[246] A link has two ends, called *anchors*—the *source* anchor and the *destination* or *target* anchor—specifying where to take the user once the link is clicked.[247] An *internal link* or *intralink* takes a user from one webpage to another within the same website, while an *external link* or *cross-origin* link takes a user from one webpage to another on an entirely different website.[248] Common type of links include links from one webpage to a different webpage, links from one page to a different page on the same website, and links from one part of a webpage to another part of the same webpage.[249] Links are thus "the defining feature of the web" because

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[243] *Id.*

[244] Harvard, *Linking, Framing, Meta Tags, and Caching*, Intellectual Property in Cyberspace (2000) https://cyber.harvard.edu/property00/metatags/main.html#Intro (last visited Mar. 15, 2022).

[245] JOHN DUCKETT, HTML & CSS: DESIGN AND BUILD WEBSITES 28 (2011).

[246] Subcomm. on Interactive Servs., Comm. on the L. of Com. in Cyberspace, *Web-Linking Agreements: Contracting Strategies and Model Provisions*, 1997 A.B.A. SEC. BUS. L. 1 [hereinafter *Web-Linking*] (defining link as a "place on the displayed web page that, when the user points the computer mouse on it and clicks, sends the user to another web page or site").

[247] *Links*, HTML 4.01 SPECIFICATION (Mar. 27, 2018), https://www.w3.org/TR/REC-html40/struct/links.html; Alexander Tsoutsanis, *Why Copyright and Linking Can Tango*, 2014 J. INTELL. PROP. L. & PRAC. 1, 3 (2014) (referring to the "destination" anchor as "target" anchor").

[248] NOLO, *Connecting to Other Websites*, STAN. LIBRARIES https://fairuse.stanford.edu/overview/website-permissions/linking/ (last visited Mar. 15, 2022); Alexander Tsoutsanis, *Why Copyright and Linking Can Tango*, 2014 J. INTELL. PROP. L. & PRAC. 1, 3 (2014) ("The target can either be a resource of the same origin, for example within the same website ('intralinks') or of different origin, for example to a different website ('cross-origin links').").

[249] JOHN DUCKETT, HTML & CSS: DESIGN AND BUILD WEBSITES 75 (2011).

they enable "the very idea of browsing or surfing" by letting users quickly navigate from one web page to another.[250]

One specific type of link between webpages is ***framing***, which can be rudimentarily summarized as a "tool web designers use to subdivide the viewer's browser and display multiple pages (or multiple types of content) on one screen."[251] By using different frames, a website can display content from external websites while maintaining its own navigation controls and advertising on the same page.[252] As with the other linking techniques, this can be done by altering the HTML code to display multiple different frames.[253] These different frames can be either different HTML documents from one another, or different sections of the same HTML document.[254]

Another type of link and the focus of this study is ***embedding***, a type of link that uses HTML instructions to visually integrate content on a single webpage, whether that content is stored in the webpage's own server or that of a third party.[255] Because the embedded content is stored in a server different from the linking website's server, embedding saves digital space for the hosting website.[256] Although the embedded content originates from a different source than

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[250] *Id.*

[251] Jonathan Bailey, *Rethinking Embedding and Framing*, PLAGIARISM TODAY, (Mar. 23, 2021) https://www.plagiarismtoday.com/2021/03/23/rethinking-embedding-and-framing/.

[252] Subcomm. on Interactive Servs., Comm. on the L. of Com. in Cyberspace, *Web-Linking Agreements: Contracting Strategies and Model Provisions*, 1997 A.B.A. SEC. BUS. L. 8.

[253] *Id.*

[254] *Id.* at 48.

[255] MADELINE SCHACHTER & JOEL KURTZBERG, LAW OF INTERNET SPEECH 935 (3d ed. 2008).

[256] Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 YALE J.L. & TECH. 227, 235 (2019).

the webpage being viewed, the content is visually integrated into the linking webpage.[257] Embedded content *may* look different than hosted content, but it does not necessarily have to be. Depending on how the code is written, embedded content can be visually indistinguishable from hosted content. On the HTML level, a district court recently explained how embedding works:

> When including a photograph on a web page, the HTML code instructs the browser how and where to place the photograph. . . . [T]he HTML code could instruct the browser either to retrieve the photograph from the webpage's own server or to retrieve it from a third-party server.
>
> "Embedding" an image on a webpage is the act of a coder intentionally adding a specific "embed" code to the HTML instructions that incorporates an image, hosted on a third-party server, onto a webpage. . . . The result: a seamlessly integrated webpage, a mix of text and images, although the underlying images may be hosted in varying locations.[258]

Because embedding allows content to be displayed—as opposed to a simple link— some rights holders have argued this practice constitutes copyright infringement.[259]

As long as the hosting website does not have any usage restrictions implemented on its service, anyone can embed content from the website by writing an HTML embed code.[260] As depicted in Figure 1 below, many social media platforms facilitate the embedding of platform content outside the platform by providing *embed codes* to the content through a code generator built into the platform's application programming interface (API).[261] As such, embedding has

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[257] MADELINE SCHACHTER & JOEL KURTZBERG, LAW OF INTERNET SPEECH 935 (3d ed. 2008).

[258] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018).

[259] *See supra* to Chapter 4.

[260] *See* Patrick Shawn Hearn, *What Does Embed Mean?*, LIFEWIRE TECH FOR HUMS. https://www.lifewire.com/what-does-embed-mean-4773663 (last updated Dec. 2, 2019) (explaining how embedded content works depending on a user's privacy settings or platform's built-in code generator).

[261] *See id.*; Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 443 (2019); Michael J. Lambert, *Examining the Embedding Evolution: Counseling Clients on Safely Embedding Copyrighted Materials,* 35 COMM. LAW. 7, 7 (2020).

become an essential feature of the Internet used not only by social media platforms, but also blogs, news articles, and other web services.[262] Because of embedding's popularity online and the recent litigation over the practice's legality, this study mainly focuses on embedding content, as opposed to other linking practices.

5.1.2 Comparing and Contrasting Linking Practices

Although at its most basic level a link is a connection between two places on the web, each linking technique discussed above connects the user to content in different ways, triggering different legal implications. Attorney Alexander Toustsanis illustrates the difference between these kinds of links with a *push-pull* metaphor. Tousanis notes that simple links "'push' or redirect a user from one website to another," while embedded and framed links "'pull[]' or retrieve[] content from another server, while the user stays on the same 'source' website."[263] By pulling the content to the user, an embedded link discourages the reader from accessing the original source of the content.

Another difference between these links is in the context each link provides about the target anchor. Ginsburg and Budiardjo explain that framed content retains context from the source website because it includes "any explanatory text, advertisements or attribution information."[264] However, embedded content not only excludes context from the source website but also places the embedded content in a new context.[265]

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[262] Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 YALE J.L. & TECH. 227, 235 (2019).

[263] Alexander Tsoutsanis, *Why Copyright and Linking Can Tango*, 2014 J. INTELL. PROP. L. & PRAC. 1, 3 (2014).

[264] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 435–36 (2019).

[265] *Id.*

Although it provides more context than embedding, framing does not come without its problems. Framing may retain some context from the source website, but a web designer may "superimpose his paid advertisements and logos over the advertisements and logos of the appropriated site."[266] This can be problematic because it may imply an "affiliation, endorsement or sponsorship" between the advertisers of the framing website and the website being framed.[267]

Legal implications can arise out of each of these practices if the linked, embedded, or framed content is protected by copyright and a user does not have authorization to use the content. This study seeks to explore the extent to which embedding content, specifically, infringes on the rights of copyright holders because, as previously mentioned, some platforms have facilitated embedding by providing embed codes to content. If unauthorized embedding of copyrighted content constitutes copyright infringement, platforms that continue to provide embed codes would be facilitating a practice that makes infringing on copyright faster and simpler. As discussed in Chapters 6 and 8, this can give rise to secondary liability claims, which could result in platforms disabling their embedding features or carefully crafting terms in User Agreements to minimize any copyright infringement liability.

5.2 Platforms Encouraging Embedding

RQ_1: **Which of the major social media platforms facilitate embedding by providing users with *embed codes* to platform content?**

This research question seeks to identify how many of the six social media platforms facilitate the embedding of content by providing embed codes through a built-in generator in their API. This study answered this question by examining posts within the platform to see

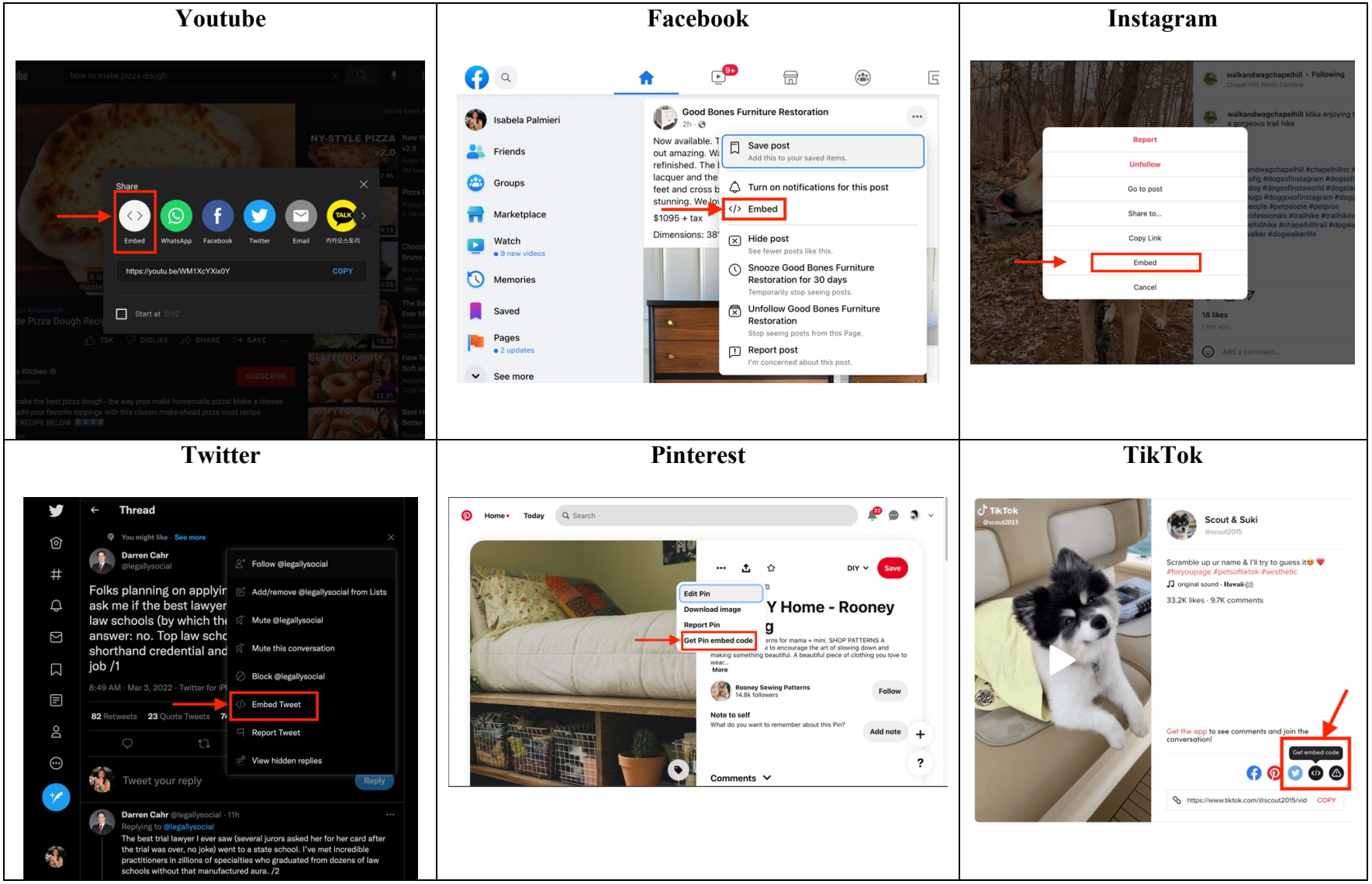
[266] Rosaleen P. Morris, Note, *Be Careful to Whom You Link: How the Internet Practices of Hyperlinking and Framing Pose New Challenges to Established Trademark and Copyright Law*, 30 RUTGERS L.J. 247, 250 (1998).

[267] *Id.*

whether the platform gives the user an option to embed a post found on the platform's newsfeed. Of the social media platforms that provided an embed code, this author then identified which platforms allow users to disable this feature on their personal posts. This study also analyzed which platforms provided step-by-step instructions on how to embed content from the platform by using the platform's *embed button*.

All six platforms facilitate embedding by providing the embed codes to the posts on their platform. Refer to the table below for a visual depiction of each platform's embed button.

FIGURE 1. ILLUSTRATION OF SOCIAL MEDIA PLATFORMS' EMBED BUTTONS



On YouTube, Facebook, Twitter, Instagram, and TikTok the embed feature is restricted by a user's privacy settings. These platforms do not provide embed codes on posts from private accounts.[268] However, YouTube and Instagram explicitly provide public profiles the option of disabling the embed feature on their posts without changing their privacy settings.[269] For Twitter, Facebook, and TikTok a user can only disable embedding by changing their account from public to private. On Pinterest, an embed button is unavailable for pins in a "secret board,"[270] but a user cannot disable the embed function on all public pins.

TABLE 6. AVAILABILITY OF AN EMBED BUTTON, INSTRUCTIONS ON HOW TO EMBED, AND USER'S ABILITY TO DISABLE EMBED FEATURE

	Provides Embed Button	Provides Step-by-Step Instructions to Embed	Allows Public Accounts to Disable Embedding Feature
YouTube	☑	☑	☑
Facebook	☑	☑	
Instagram	☑	☑	☑
Twitter	☑	☑	
Pinterest	☑		
TikTok	☑	☑	

[268] *See, e.g.*, *What Are Embeds on Instagram and How Can I Embed an Instagram Post or Profile?*, INSTAGRAM: HELP CENTER https://help.instagram.com/620154495870484?fbclid=IwAR17VJdEtg289UdFAHMHQl_UFZoDUCzbFAFSGOem2H8hUb60MVXFJV2dsxE.

[269] *See Embed Videos & Playlists*, YOUTUBE HELP https://support.google.com/youtube/answer/171780?hl=en#zippy=%2Cturn-on-privacy-enhanced-mode%2Cturn-off-embedding-for-your-videos; *What Are Embeds on Instagram and How Can I Embed an Instagram Post or Profile?*, INSTAGRAM: HELP CENTER https://help.instagram.com/620154495870484?fbclid=IwAR17VJdEtg289UdFAHMHQl_UFZoDUCzbFAFSGOem2H8hUb60MVXFJV2dsxE

[270] A secret board on Pinterest relates to a board that is only viewable by the user.

As depicted above, five of the six platforms' Help Center—YouTube's,[271] Facebook's,[272] Twitter's,[273] Instagram's,[274] and TikTok's[275]—provide step-by-step instructions on how to embed posts from their platforms onto third-party websites.

Conclusion

In answering RQ1, this study found that all social media platforms offer easy tools to embed content. And most provide instructions to users on how to embed. But only two platforms allow public accounts to disable the embedding feature. The ubiquity of this affordance may be explained by its desirability. These embedding tools are desirable for users because they enable sharing without requiring technical expertise. Moreover, these embedding tools are desirable for platforms because they enable users to share content while allowing platforms to maintain a leash on the content.[276]

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[271] *Embed Videos & Playlists*, YOUTUBE HELP https://support.google.com/youtube/answer/171780?hl=en#zippy=%2Cturn-on-privacy-enhanced-mode%2Cturn-off-embedding-for-your-videos.

[272] *How Do I Embed a Video From Facebook Onto a Website?*, HELP CENTER https://www.facebook.com/help/1570724596499071/?helpref=search&query=embed&search_session_id=bc2e55c64c51ca819e786f3e84525128&sr=0.

[273] *How To Embed a Tweet on Your Website or Blog*, HELP CENTER, https://help.twitter.com/en/using-twitter/how-to-embed-a-tweet.

[274] *What Are Embeds on Instagram and How Can I Embed an Instagram Post or Profile?*, INSTAGRAM: HELP CENTER https://help.instagram.com/620154495870484?fbclid=IwAR17VJdEtg289UdFAHMHQl_UFZoDUCzbFAFSGOem2H8hUb60MVXFJV2dsxE.

[275] *Embed Videos: Introduction*, TIKTOK FOR DEVELOPERS, https://developers.tiktok.com/doc/embed-videos#:~:text=You%20can%20get%20the%20embed,pictured%20in%20the%20following%20photo.&text=Once%20you%20have%20clicked%20on,the%20HTML%20code%20will%20prompt.

[276] *See* Jon Porter, *Twitter Change Leaves Huge Gaps in Websites*, VERGE (Apr. 6, 2022, 7:18 AM) https://www.theverge.com/2022/4/6/23012913/twitter-tweet-embeds-deleted-tweets-empty-iframe-broken

CHAPTER 6: EMBEDDING UNDER THE 1976 COPYRIGHT ACT

Emerging jurisprudence has held unauthorized embedding of copyrighted content constitutes copyright infringement, which may impact free embedding online. Accordingly, this chapter addresses the following research question:

RQ_2: **What does the prevailing jurisprudence under the 1976 Copyright Act suggest about whether embedding of copyrighted content via major social media platforms constitutes an infringement of the public display right?**

Before discussing relevant findings, this chapter provides a brief overview of relevant sections of the 1976 Copyright Act.

A copyright holder has a bundle of exclusive rights. Although some litigants have argued embedding infringes on their reproduction right,[277] no court has reached the merits of this argument. Accordingly, this study only takes into consideration the display right because the display right is at the center of cases considering embedding. The display right grants the copyright holder the exclusive right to "display the copyrighted work publicly."[278] To "display" a copyrighted work under the Copyright Act is to "show a copy of it, either directly or by means of a film, slide, television image, or any other device or process."[279] "Copies" refer to "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with

[277] *See, e.g.*, McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 599 (S.D.N.Y. 2020); Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 580 (S.D.N.Y. 2020).

[278] 17 U.S.C. § 106(5).

[279] 17 U.S.C. § 101.

the aid of a machine or device."[280] Additionally, the display right is only infringed upon if the work is displayed "publicly."[281] To display a work "publicly" can mean one of two things. A work is displayed publicly if it is displayed in "a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[282] A work is also displayed publicly if it is transmitted or displayed "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." [283]

This study seeks to explore whether copyright law threatens free embedding—and thereby social media platforms' facilitation of content sharing—by analyzing whether embedding copyrighted content online without the authorization of the copyright holder violates the 1976 Copyright Act. Accordingly, Section 6.1 of this chapter discusses the Ninth Circuit's decision in *Perfect 10, Inc. v. Amazon.com, Inc.* as a framework for the analysis of new interpretations of the display right. This new interpretation is discussed in Section 6.2 by comparing the opinions in *Leader's Institute, LLC v. Jackson*, *Goldman v. Breitbart News Network, LLC*, and *Nicklen v. Sinclair Broadcast Group, Inc*. After reviewing the courts' analysis of whether embedding is potentially an infringement of the display right, Section 6.3 discusses fair use in the context of embedding through the analysis of four cases: *Nicklen v. Sinclair Broadcast Group, Inc*., *Walsh v. Townsquare Media, Inc*., *McGucken v. Newsweek LLC*,

[280] 17 U.S.C. § 101.

[281] 17 U.S.C. § 106(5).

[282] 17 U.S.C. § 101.

[283] 17 U.S.C. § 101.

and *Boesen v. United Sports Publications, Ltd.* Next, Section 6.4 briefly discusses sublicenses by analyzing *McGucken v. Newsweek LLC* and *Sinclair v. Ziff Davis, LLC*. Finally, Section 6.5 discusses the issue of secondary liability by analyzing *Hunley v. Instagram*, *Perfect 10, Inc. v. Amazon.com, Inc*., and *Flava Works, Inc. v. Gunter*.

6.1 The Server Test

As previously mentioned, the law used to be settled on whether unauthorized in-line linking of a copyrighted image constituted copyright infringement. In 2007, the Ninth Circuit Court of Appeals in *Perfect 10, Inc. v. Amazon.com, Inc* instituted the "server test,"[284] holding that an entity cannot be held liable for violation of the display right if it does not actually store the copyrighted work in its own server.[285] For the decade following the decision in *Perfect 10*, almost all courts that considered framing in the context of the display right adopted the server test.[286] To fully appreciate how the server test has influenced recent copyright analyses related to embedding, this section provides an in-depth discussion of *Perfect 10*.

Perfect 10, Inc., a marketer and seller of copyrighted images of nude models, sued Google Inc., for copyright infringement due to Google Image Search's use of thumbnail images and framing of Perfect 10's images.[287] In response to a user's search query, Google Image

[284] 508 F.3d 1146, 1155 (9th Cir. 2007).

[285] *Id.*

[286] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 426 (2019). Professor Ginsburg and co-author cite to *Live Nation Motor Sports, Inc. v. Davis* as the only decision from 2007 to 2017 that departed from the server test. *Id.* at 426 n.38; *see also* Live Nation Motor Sports, Inc. v. Davis, No. 3:06-CV-276-L, 2007 WL 79311, at *4 (N.D. Tex. Jan. 9, 2007).

[287] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1155–57 (9th Cir. 2007).

Search provided search results in the form of small images called "thumbnails."[288] If a user clicked on the thumbnail, a framed webpage would appear, displaying information from Google and the thumbnail at the top and the full-sized version of the image on the bottom.[289] Although Google stored the thumbnails in its server, it did not store the full-sized images.[290] The full-sized images remained in the website publisher's server; Google simply framed the pictures using HTML instructions.[291] Perfect 10's images of nude models were only available to paying subscribers.[292] However, some websites republished Perfect 10's images without consent, which made the images available and searchable by Google Image Search.[293]

Perfect 10 sued Google for copyright infringement alleging that Google's thumbnails and framing of Perfect 10's full-sized images infringed on its display and distribution rights.[294] The district court granted in part and denied in part Perfect 10's motion for a preliminary injunction.[295] Google appealed, and the district court temporarily stayed the preliminary injunction.[296]

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[288] *Id.* at 1155.

[289] *Id.* 1155–56.

[290] *Id.*

[291] *Id.* at 1156.

[292] *Id.* at 1157.

[293] *Id.*

[294] *Id.* at 1157–59.

[295] *Id.* at 1157.

[296] *Id.*

The Ninth Circuit Court of Appeals began its analysis of the display right by considering the definitions of "display" and "copies" under the Copyright Act.[297] Within the context of digital images, the court held that a digital picture "is fixed in a tangible medium of expression, for the purposes of the Copyright Act, when embodied (i.e., stored) in a computer's server (or hard disk, or other storage device)."[298] Thus, a person only "displays" an image for the purposes of the Copyright Act if the person "displays [it] by using a computer to fill a computer screen with a copy of the photographic image *fixed in the computer's memory*."[299] Based on this definition, the court held that Google made copies of the thumbnail versions of Perfect 10's images, but not the full-sized images because Google only stored the thumbnails in its server.[300]

The Ninth Circuit expressly rejected the notion that HTML instructions to a picture could constitute a copy.[301] The court reasoned that HTML instructions were text, not photos, and only gave users "the address of the image" rather than causing the infringing image to appear.[302] The court further noted that it is the interaction between a browser and a computer that causes the display of an image, rather than the HTML instructions themselves.[303]

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[297] *Id.* at 1160.

[298] *Id.* (internal quotations omitted) (citing Mai Sys. Corp. v. Peal Comput., Inc., 991 F.2d 511, 517–18 (9th Cir. 1993) (defining a computer copy to be one that is stored in the computer's memory)).

[299] *Id.* (emphasis added).

[300] *Id.*

[301] *Id.* at 1161

[302] *Id.*

[303] *Id.*

The circuit court also rejected Perfect 10's argument that Google's framing of the full-sized images constituted an infringing public display or performance under the Copyright Act.[304] In a footnote, the court noted that Google's framing of the full-sized images did not meet the Copyright Act's definition of displaying and performing a work publicly because "Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself."[305]

Accordingly, the Ninth Circuit held Google's use of Perfect 10's full sized images did not infringe on Perfect 10's display right because the photos were not stored in Google's server.[306] Additionally, because the court concluded that Google did not make copies of the full-sized images, it did not infringe on Perfect 10's distribution right.[307] However, the court held Google's use of the thumbnail images implicated Perfect 10's display right, but the use was fair.[308]

6.2 Reconsideration of the Server Test

Since *Perfect 10*, one judge in the Northern District of Texas and two judges in the Southern District of New York have rejected *Perfect 10*'s interpretation of the Copyright Act and the server test's applicability to embedding cases. In November of 2017, Judge Jane Boyle in

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[304] *Id.*

[304] *Id.*

[305] *Id.* at 1161 n.7.

[306] *Id.* at 1159–62.

[307] *Id.* at 1162.

[308] *Id.* at 1163–68.

Leader's Institute, LLC v. Jackson,[309] rejected the server test's interpretation of the display right and held plaintiffs' framing constituted a display.[310] In February of 2018, Judge Katherine Forrest in *Goldman v. Breitbart News Network, LLC*,[311] explicitly rejected the server test[312] and held that defendant's embedded image violated the display right.[313] Three years later in July of 2021, Judge Jed Rakoff in *Nicklen v. Sinclair Broadcast Group, Inc.*[314] rejected the applicability of the server test.[315] An in-depth analysis of the three opinions suggests that the district court judges differentiated their respective analyses from *Perfect 10* along three axis: (1) The server test was not "adequately grounded" in the language of the Copyright Act; (2) the server test is inconsistent with the legislative history of the Copyright Act; and (3) Embedding cases are factually different from *Perfect 10*.

[309] No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017).

[310] *Id.* at *10 ("And to the extent *Perfect 10* makes actual possession of a copy a necessary condition to violating a copyright owner's exclusive right to display her copyrighted works, the Court respectfully disagrees with the Ninth Circuit.").

[311] 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

[312] *Id.* at 596 ("In sum, the Court here does not apply the Server Test. It is neither appropriate to the specific facts of this case, nor, this Court believes, adequately grounded in the text of the Copyright Act. It therefore does not and should not control the outcome here.").

[313] *Id.* at 593–95. Plaintiff in this case, Justin Goldman, took a photograph of Tom brady and uploaded it to his Snapchat Story. *Id.* at 586. The photo went viral, and several users uploaded it to Twitter. *Id.* at 587. Defendants were online news outlets who embedded the photo alongside an article about whether Tom Brady would help the Boston Celtics recruit basketball player Kevin Durant. *Id.*

[314] No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

[315] *Id.* at *4 ("The server rule is contrary to the text and legislative history of the Copyright Act. . . . Thus, *Perfect 10*'s test is a poor fit for this case, and the Court declines to adopt it."). Plaintiff in Nicklen was a photographer and filmmaker who filmed a video of an emaciated polar bear in the Canadian Arctic. *Id.* at *1 Plaintiff posted the video to his Instagram and Facebook accounts. *Id*. Defendant, Sinclair Broadcast Group, published an article titled "starving polar bear goes viral in heartbreaking video" and embedded Plaintiff's video to the article. *Id.* Plaintiff sued Defendants alleging they infringed on his reproduction, distribution, and display rights by embedding his video. *Id.* at *2.

First, all three district court judges rejected *Perfect 10*'s interpretation of the display right by analyzing the language in the Copyright Act.[316] Interpreting the Copyright Act's definition of display with a dictionary definition,[317] Judge Rakoff in *Nicklen* concluded that under its "plain meaning," the display right is violated when someone "without authorization causes a copy of the work, or individual images of the work, to be seen—whether directly or by means of any device or process known in 1976 or developed thereafter."[318] In *Goldman*, Judge Forrest cited to the Copyright Act's "Transmit Clause" to highlight that the display right includes the right to "transmit or otherwise communicate . . . a display of the work . . . to the public, by means of any device or process"—a device that is "now known or later developed."[319] Similarly, Judge Boyle in *Jackson* cited the Copyright Act's definition of display to conclude the plaintiffs had displayed defendant's website by "showing a copy of the works via a process."[320]

Second, the district judges in the Southern District of New York then relied on the legislative history of the 1976 amendments to the Copyright Act—specifically the House Report—to discuss the scope of the display right.[321] In *Goldman*, Judge Forrest noted "Congress cast a very wide net" when drafting the display right, suggesting that the display right encompasses embedding albeit that technology was not available at the time of the Copyright

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[316] *Jackson*, 2017 WL 5629514, at *11; *Goldman*, 302 F. Supp. 3d at 589; *Nicklen*, 2021 WL 3239510, at *3.

[317] For the definition of display under the Copyright Act, see 17 U.S.C. § 101 (defining display as "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process"). Judge Rakoff then coupled this definition with Merriam-Webster's definition of "to show"—"to cause or permit to be seen." *Nicklen*, 2021 WL 3239510, at *3 (quoting *Show*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/show (last visited July 27, 2021)).

[318] *Nicklen*, 2021 WL 3239510, at *3.

[319] *Goldman*, 302 F. Supp. 3d at 589 (quoting 17 U.S.C. § 101).

[320] *Jackson*, 2017 WL 5629514, at *10 (internal quotations and citation omitted).

[321] *Goldman*, 302 F. Supp. 3d at 589; *Nicklen*, 2021 WL 3239510, at *3; *see also* H.R. Rep. 94-1476, 47 (1476).

Act's amendment.[322] In support of this point, Judge Forrest cited to the House Report accompanying the Act, reasoning Congress intended "transmission" to include "[e]ach and every method by which the images or sounds comprising a performance or display are picked up and conveyed."[323]

In *Nicklen*, Judge Rakoff interpreted the House Report's definition of display to mean that the display right is "technology-neutral," adding that the display right "is concerned not with how a work is shown, but that a work is shown."[324] As to the definition of display, the House Report noted the following:

> "[D]isplay" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.[325]

To further support Congress's alleged intent that the amended Copyright Act would encompass new technologies like embedding, Judge Forrest in *Goldman* cites to a passage from the House Report that states the display right is infringed if "the image were transmitted *by any method* (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere."[326] In addition, Judge Forrest cites to the testimony of the Register of Copyrights, who "highlight[ed] the importance of the display right in light of changing technology" and warned Congress of "information storage and retrieval devices" that could ultimately provide access "to a single copy of a work by transmission of electronic

[322] *See Goldman*, 302 F. Supp. 3d at 589.

[323] H.R. Rep. 94-1476, 47, 64 (1476).

[324] *Nicklen*, 2021 WL 3239510, at *3 (emphasis in the original).

[325] H.R. Rep. 94-1476, 47, 64 (1476).

[326] H.R. Rep. 94-1476, 47, 80 (1476) (emphasis added).

images."[327] Based on this language, both judges concluded that embedding a work constitutes a display of that work because "to embed" is "to show" the work "by means of a device or process."[328]

All three judges suggest that the server test's reliance on the "possession of an image" is incompatible with the text and history of the Copyright Act. To support his conclusion that the display right does not necessitate a copy of the copyrighted work, Judge Boyle in *Jackson* compared embedding to the following example: "A person that went into a movie theater and used a video camera connected to the internet to broadcast a movie to the public would clearly be committing copyright infringement even though the person did not herself have a copy of the movie."[329] Judge Boyle then compared framing to a "live feed" of the copyrighted work.[330] Similar to Judge Boyle in *Jackson*, Judge Rakoff in *Nicklen* noted that the Copyright Act "defines to display as 'to show a copy of a work,' not 'to make and then show a copy of the copyrighted work.'"[331] Additionally, Judge Rakoff contended *Perfect 10*'s requirement that an image be stored differentiates between "showing a copy possessed by the infringer and . . . a copy possessed by someone else," which he noted is an inexistent distinction in the Copyright Act.[332] Judge Forrest in *Goldman* similarly concluded that to display a copyrighted work one

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[327] *Goldman*, 302 F. Supp. 3d at 589 (citing H. Comm. On the Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 25 (Comm. Print. 1965)).

[328] *Nicklen*, 2021 WL 3239510, at *3; *see also Goldman*, 302 F. Supp. 3d at 594.

[329] Leader's Institute, LLC v. Jackson, No. 3:14-CV-3572-B, 2017 WL 5629514 at *11 (N.D. Tex. Nov. 22, 2017) (internal citations omitted).

[330] *Id.*

[331] *Nicklen*, 2021 WL 3239510, at *4 (citation omitted).

[332] *Nicklen*, 2021 WL 3239510, at *4.

does not to possess a copy. [333] Specifically, Judge Forrest cited the Supreme Court's decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*,[334] to support the principle that "mere technical distinctions invisible to the user"—such as where an image is stored— "should not be the lynchpin on which copyright liability lies."[335]

Both judges in the Southern District of New York rejected *Perfect 10*'s notion that HTML instructions, in an of themselves, do not constitute a display. Since the Copyright Act defines display as showing a copy through "any device or process," Judge Forrest in *Goldman* concluded that embedding constitutes a process through which someone displays content.[336] Judge Forrest noted:

> It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown. Most directly this was accomplished by the act of including the code in the overall design of their webpage; that is, embedding. Properly understood, the steps necessary to embed a Tweet are accomplished by the defendant website; these steps constitute a process. The plain language of the Copyright Act calls for no more.[337]

Similarly, Judge Rakoff in *Nicklen* contended that an embed code, or HTML instructions, is simply "an information retrieval system" that "falls square within the display right" because it allows a work to be seen.[338]

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[333] *Goldman*, 302 F. Supp. 3d at 593.

[334] 573 U.S. 431, 442–44 (2014) (holding a provider of broadcast television programming streamed over the Internet "performed" copyrighted content even though the technology operated based on the user's choice).

[335] *Goldman*, 302 F. Supp. 3d at 595.

[336] *Goldman*, 302 F. Supp. 3d at 594.

[337] *Goldman*, 302 F. Supp. 3d at 594

[338] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510 at *3 (S.D.N.Y. July 30, 2021).

Finally, all three judges concluded the current cases were factually different from *Perfect 10* in two ways. First, the defendant in *Perfect 10*, Google, operated a search engine.[339] In *Goldman*, Judge Forrest noted that the public benefit arising from search engines played an important role in the Ninth Circuit's decision to not hold Google liable for copyright infringement.[340] Neither *Goldman* nor *Nicklen* involved search engines.[341] Second, the user in *Perfect 10* made an active choice to click on the image before it was displayed.[342] In *Goldman*, Judge Forrest noted this fact "was paramount" to the Ninth Circuit's conclusion that Google merely directed the user to a third-party display of the image at the user's request, rather than actually displaying the image.[343] To Judge Forrest, this was significantly different than a user who views the embedded work "whether he or she asked for it, looked for it, clicked on it, or not."[344] Similarly, in *Nicklen*, Judge Rakoff found the *Perfect 10*'s approach "inapt" when there is "no user intervention" in the displaying of the embedded work.[345]

Although not explicitly, Judge Boyle in *Jackson* also found this factual difference to be persuasive. In *Jackson*, Judge Boyle distinguished *Perfect 10* from the case at hand by differentiating the framing in *Jackson* from the framing in *Perfect 10*.[346] The court noted:

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[339] *Goldman*, 302 F. Supp. 3d at 594–96; *Nicklen*, 2021 WL 3239510, at *4.

[340] *Goldman*, 302 F. Supp. 3d at 595–96.

[341] *Id.; Nicklen*, 2021 WL 3239510, at *4

[342] *Goldman*, 302 F. Supp. 3d at 594–96; *Nicklen*, 2021 WL 3239510, at *4.

[343] *Goldman*, 302 F. Supp. 3d at 596; *Nicklen*, 2021 WL 3239510, at *4; *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161 n.7 (9th Cir. 2007).

[344] *Goldman*, 302 F. Supp. 3d at 595–96.

[345] *Nicklen*, 2021 WL 3239510, at *4.

[346] Leader's Institute, LLC v. Jackson, No. 3:14-CV-3572-B, 2017 WL 5629514 at *11 (N.D. Tex. Nov. 22, 2017).

> Google did not actually display infringing images but instead provided links for users to access sites that displayed infringing images. Although the infringing content appeared under a Google banner, the user was essentially navigating to an infringing website to view Perfect 10's photos. The same is not true of users who visited the accused TLI websites. Upon visiting one of the TLI sites, a user would necessarily see Magnovo's content. Unlike Google, TLI did not merely provide a link by which users could access Magnovo content but instead displayed Magnovo's content as if it were its own.[347]

Judge Boyle therefore found that a user's participation in the display of the images differentiated the framing in *Perfect 10* from the one in *Jackson*.[348]

As recently as September of 2021, one other case expressly considered the applicability of the server test to embedding photos and videos. In *Hunley v. Instagram*,[349] the Northern District of California considered whether the server test applied to plaintiff's claim of secondary liability for copyright infringement arising out of embedding copyrighted content.[350] Because the Northern District of California is in the Ninth Circuit, it must apply *Perfect10* "absent a contrary Ninth Circuit or Supreme Court ruling."[351] Accordingly, the district court applied the server test and found embedding did not violate the display right.[352]

Addressing policy concerns, the judges in *Goldman* and in *Nicklen* rejected the argument that liability for embedding as a violation of the display right would significantly change linking

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[347] *Id.* (internal citation omitted).

[348] *See id.*

[349] No. 21-cv-03778-CRB, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021).

[350] *Id.* at *1–*2

[351] *Id.* at *2. The plaintiffs in *Hunley* asserted the Supreme Court's decision in *American Broadcasting Cos. v. Aereo, Inc.* was irreconcilable with *Perfect10*. *Id*. The court rejected this argument, noting that *Aereo* dealt with the performance right, and not the display right. *Id.* at *2–*3.

[352] *Id.* at *2.

practices online.[353] In *Nicklen*, Judge Rakoff briefly addressed arguments that claimed a reversal of the server rule would "impose far-reaching and ruinous liability, supposedly grinding the internet to a halt;" he concluded, without elaborating, that such arguments are farfetched "speculations."[354] Similarly, Judge Forrest in *Goldman* noted there is "a very serious and strong fair use defense" to the defendant's embedding.[355] The next section considers the fair use doctrine as applied to embedding cases.

6.3 Fair Use

Litigants have argued that the practice of embedding content constitutes fair use.[356] Under § 107 of the Copyright Act, the fair use of a copyrighted work is not an infringement of copyright.[357] By allowing certain uses to constitute "fair use"—and therefore not infringe—the fair use doctrine advances the purpose of copyright to serve the public good in promoting knowledge and culture.[358]

In evaluating whether the use of a copyrighted work constitutes fair use, four factors must be considered:

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[353] *Goldman*, 302 F. Supp. 3d at 596 ("The Court does not view the results of its decision as having such dire consequences."); *Nicklen*, 2021 WL 3239510, at *5 ("Proponents of the server rule suggest that a contrary rule would impose far-reaching and ruinous liability, supposedly grinding the internet to a halt. These speculations seem farfetched, but are, in any case, just speculations.").

[354] *Nicklen*, 2021 WL 3239510, at *4.

[355] *Goldman*, 302 F. Supp. 3d at 596.

[356] *See. e.g.*, McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 604 (S.D.N.Y. 2020) (defendant argues its use of the photograph was fair).

[357] 17 U.S.C. § 107.

[358] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" (citing Stewart v. Abend, 495 U.S. 207, 236 (1990))).

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[359]

The factors must be weighed together and in light of the purposes of copyright,[360] which, as interpreted by the Supreme Court, is to promote the progress of science and the arts and to serve the welfare of the public.[361]

Fair use is decided on a case-by-case basis;[362] thus, it is helpful to briefly recount the facts of the cases to be discussed.

[359] 17 U.S.C. § 107.

[360] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

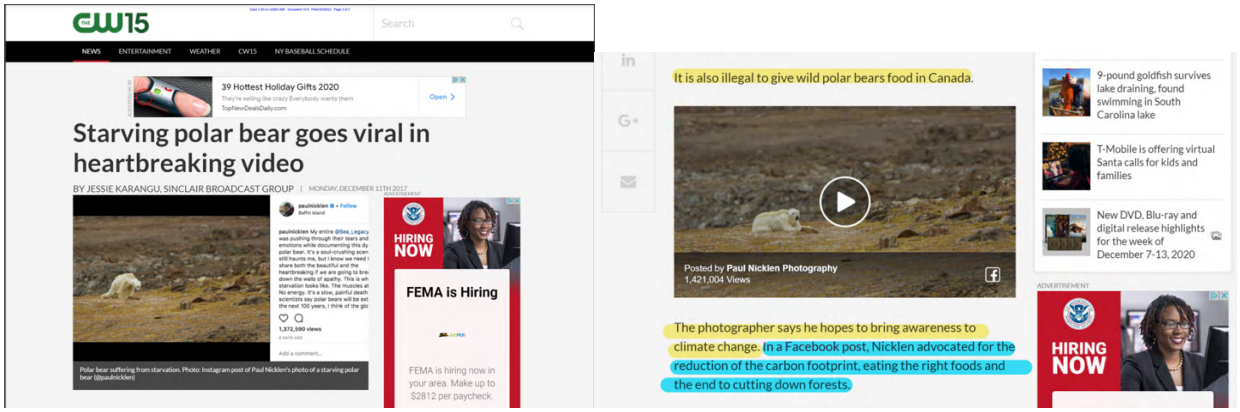
[361] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also supra* Chapter 4.

[362] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) ("The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.").

a. *Nicklen v. Sinclair Broadcast Group*

In *Nicklen v. Sinclair Broadcast Group*,[363] the plaintiff Paul Nicklen was a photographer and filmmaker who filmed a video of an emaciated polar bear in the Canadian Arctic.[364] Nicklen posted the video to his Instagram and Facebook accounts.[365] Defendant, Sinclair Broadcast Group, published an article titled "starving polar bear goes viral in heartbreaking video" and embedded Nicklen's video to the article.[366] Nicklen sued Sinclair Broadcast Group alleging they infringed on his copyright by embedding his video.[367]

FIGURE 2. EMBEDDED VIDEO IN *NICKLEN V. SINCLAIR BROADCAST GROUP*



Source: Second Amended Complaint at Ex. 5, *Nicklen v. Sinclair Broad. Grp.*, No. 20-CV-10300, 2021 WL 3239510 at *1 (S.D.N.Y. July 30, 2021).

[363] No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

[364] *Id.* at *1.

[365] *Id.*

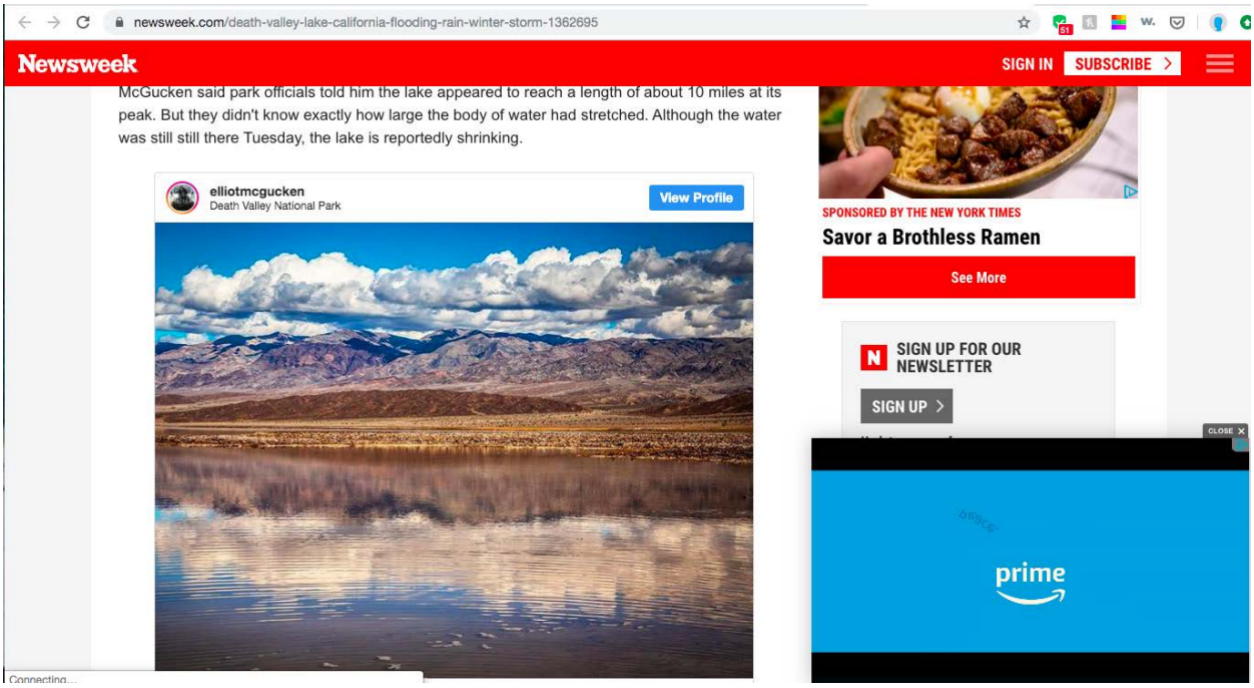
[366] *Id.*

[367] *Id.* at *2.

b. *McGucken v. Newsweek LLC*

In *McGucken v. Newsweek LLC*,[368] the plaintiff Elliot McGucken photographed landscapes and seascapes.[369] He posted a pictured of an ephemeral lake in Death Valley National Park, California, to his Instagram account.[370] Defendant, Newsweek, published an article about the ephemeral lake and embedded Plaintiff's Instagram post to the article.[371] McGucken sued Newsweek for copyright infringement.[372]

FIGURE 3. EMBEDDED IMAGE IN *MCGUCKEN V. NEWSWEEK LLC*



Source: Complaint at Ex. A, *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594 (S.D.N.Y. 2020) (No. 1:19-cv-09617-KPF).

[368] 464 F. Supp. 3d 594 (S.D.N.Y. 2020).

[369] *Id.* at 599.

[370] *Id.*

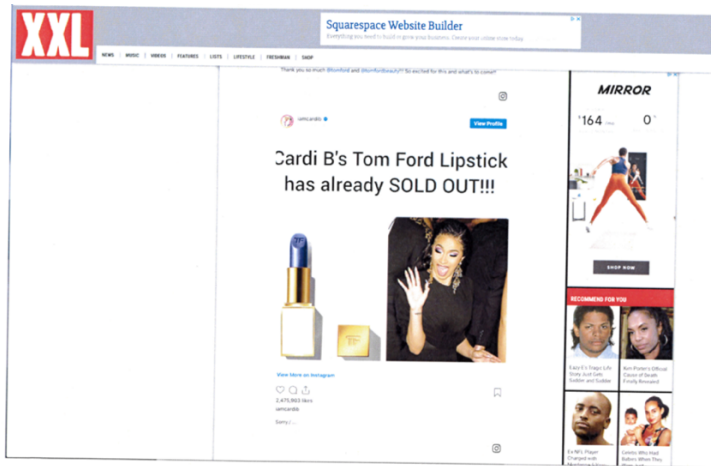
[371] *Id.*

[372] *Id.*

c. *Walsh v. Townsquare Media, Inc.*

In *Walsh v. Townsquare Media, Inc.*,[373] the plaintiff was a professional photographer who photographed Cardi B and then made the photos available for license.[374] The defendant operated XXL Mag, an online website.[375] The defendant published an article titled "Cardi B Partners with Tom Ford for New Lipstick Shade" and embedded Cardi B's Instagram post, which included a composite image of the Tom Ford Lipstick and the plaintiff's photograph.[376] The article described Tom Ford's decision to name a lipstick shade after Cardi B and the "heated debate" in the Instagram announcement.[377] The photographer sued the publisher of the online article for infringement arising out of the unauthorized embedding of the photographer's photo.[378]

FIGURE 4. EMBEDDED IMAGE IN *WALSH V. TOWNSQUARE MEDIA, INC.*



Source: Complaint at Ex. B, *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570, 575 (S.D.N.Y. 2020) (No. 1:19-cv-4598).

[373] 464 F. Supp. 3d 570 (S.D.N.Y. 2020).

[374] *Id.* at 575.

[375] *Id.*

[376] *Id.* at 577.

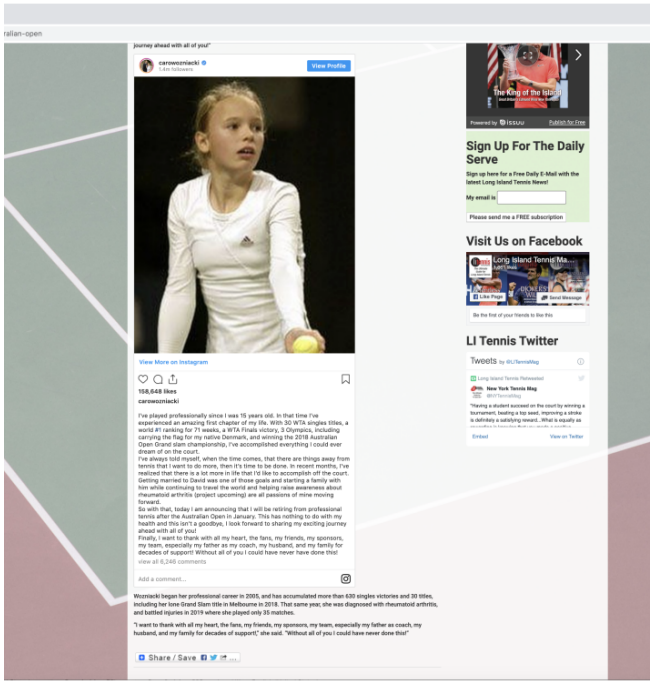
[377] *Id.* at 576–77.

[378] *Id.* at 570.

d. *Boesen v. United Sports Publications, Ltd.*

In *Boesen v. United Sports Publications, Ltd.*,[379] professional tennis play Caroline Wozniacki announced her retirement through an Instagram post of a photo of herself taken by the plaintiff, Michael Boesen.[380] The defendant, Unites Sports Publications, Ltd., published an article reporting on Wozniacki's retirement announcement with an embedded picture of her Instagram post.[381] Boesen filed a lawsuit claiming infringement of her reproduction and display rights.[382]

FIGURE 5. EMBEDDED IMAGE IN *BOESEN V. UNITED SPORTS PUBLICATIONS, LTD.*



Source: Complaint at Ex. B, *Boesen v. United Sports Publications*, LTD, No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020).

[379] No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020).

[380] *Id.* at *1

[381] *Id.* at *1–*2.

[382] *Id.* at *2.

All four cases considered whether embedding the content constituted fair use. The table below reflects the outcomes of each court's fair use analysis.

TABLE 7. OUTCOMES OF COURTS' FAIR USE ANALYSIS BY FACTOR

	Purpose and Character of the Use	**Nature of Copyrighted Work**	**Amount and Substantiality of Portion Used**	**Effect of Use on the Market**	**Conclusion in Light of Purpose of Copyright**
Nicklen v. Sinclair Broadcast Group	In Favor of Fair Use	Neutral	Against Fair Use	Against Fair Use	Unresolved[383]
McGucken v. Newsweek LLC	Against Fair Use	Neutral	Neutral	Against Fair Use	Unresolved[384]
Walsh v. Townsquare Media, Inc.	In Favor of Fair Use	In Favor of Fair Use	In Favor of Fair Use	In Favor of Fair Use	In Favor of Fair Use
Boesen v. United Sports Publications, Ltd.	In Favor of Fair Use	In Favor of Fair Use	In Favor of Fair Use	In Favor of Fair Use	In Favor of Fair Use

The Purpose and Character of the Use

Under the Copyright Act, the first factor considers "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[385]

[383] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *7 (S.D.N.Y. July 30, 2021). ("The Sinclair Defendants' fair use affirmative defense cannot be resolved at this stage. . . . [T] the Court's fair use analysis would benefit from a better-developed factual record . . . .").

[384] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 609 (S.D.N.Y. 2020) ("In sum, the Court finds that the first and fourth factors favor Plaintiff, while the second and third factors are neutral. Under these circumstances, it is not possible for the Court to conclude that Defendant's use of the Photograph was fair as a matter of law. Accordingly, Defendant's motion to dismiss based on its alleged fair use of the Photograph is denied.").

[385] 17 U.S.C. § 107(1).

Transformative

The focus of this factor is "whether and to what extent the new work is transformative."[386] A work is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[387] Although this factor also considers commercialism and bad faith, "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use."[388]

In cases considering whether embedding content in a news article is transformative, the gravamen of the district courts' analyses seemed to fall on whether the embedded content was the subject of the accompanying article or merely operating as an illustrative tool. In *Nicklen*, where the court considered an embedded video of an emaciated polar bear, the court found the use to be transformative because the defendants used the video to accompany an article about the video's popularity rather than to "illustrate an independent story about polar bears or environmentalism."[389]

Similarly in *Walsh*, where the court considered an embedded image of Cardi B, the court found the use to be transformative because the picture "was the very thing the article was reporting on," rather than just an illustration of Cardi B at the Tom Ford fashion show.[390] The court noted: "Cardi B's making and dissemination of the Post, not the image that was posted,

[386] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[387] *Id.*

[388] *Id.*

[389] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *5 (S.D.N.Y. July 30, 2021).

[390] Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 581–82 (S.D.N.Y. 2020).

was 'itself the subject of the story.'"[391] To the court, it was important that the embedded image retained "the entire Instagram Post still bearing the rest of the elements of the image that Cardi B had posted—the header and the photo of the Tom Ford lipstick—along with Cardi B's caption and various Instagram standard links, making clear that the subject of the image was the Post, not the Photograph."[392]

In *Boesen*, where the court considered an embedded image of tennis player Caroline Wozniazki, the court relied on the reasoning in *Walsh* and found the defendant's embedding of the image was transformative because the picture was not used as a "'generic image' of Wozniazki, nor to depict her playing tennis at a young age."[393] Like the defendant in *Walsh*, United Sports Publications' article "reported on Woznizki's retirement announcement and the fact that it took place on Instagram."[394] The court rejected Boesen's argument that there were not enough facts to support that defendant's use as transformative, concluding it was "obvious" that the purpose of the article was to report on Wozniacki's retirement announcement and "[n]o further factual development could change that determination."[395] Additionally, the court found it made "no sense" for Boesen's photograph to be "an illustrative device" to the article because the photo depicts Wozniacki as a young teenager rather than "at a podium announcing her retirement."[396]

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[391] *Id.* at 582.

[392] *Id.* at 584.

[393] Boesen v. United Sports Publ'ns, LTD, No. 20-CV-1552, 2020 WL 6393010, at *4 (E.D.N.Y. Nov. 2, 2020).

[394] *Id.*

[395] *Id.*

[396] *Id.* at *5.

In contrast, in *McGucken*, where the court considered an embedded image of an ephemeral lake, the court found the defendant's use to be nontransformative because the picture was "an illustrative aid depicting the subject of the Article"—the ephemeral lake—rather than itself being the focus of the article.[397] Here, the plaintiff posted the picture "as an illustration of a phenomenon he observed," which the court considered to be the same use for which defendant embedded plaintiff's picture—as an illustration.[398] Additionally, the court noted that "the mere addition of some token commentary is not enough to transform the use of a photograph when that photograph is not itself the focus of the article."[399]

Commercial Use

This first fair use factor also requires the consideration of whether the work has a commercial or nonprofit purpose. As articulated by the U.S. Supreme Court, the "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[400] For example, because the Sinclair Broadcast Group in *Nicklen* operate a for-profit news business and did not pay the licensing fee to use Nicklen's video of the polar bear, the district court found the use to be commercial.[401] However, the more transformative the work, the less its commercial purpose weighs against a finding of fair use.[402] For example, in *Walsh*,

[397] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 606 (S.D.N.Y. 2020).

[398] *Id.*

[399] *Id.*

[400] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

[401] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *5 (S.D.N.Y. July 30, 2021).

[402] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

the court conceded that the news publisher who embedded Cardi B's Instagram post was a for-profit publisher, but it ultimately concluded that the use's transformativeness outweighed the commercial nature of the use.[403] Similarly in *Boesen*, the court concluded that United Sports Publications' status as a "for-profit publisher" did not diminish the use's transformative nature.[404] In response to the plaintiff's motion for reconsideration, the court reaffirmed its decision and found that a display of advertisements next to the embedded picture did not constitute a commercial use such that it would defeat the use's transformativeness.[405] The court noted: "Merely displaying advertisements next to news reporting on a copyrighted work falls far short of using that work in an advertisement itself . . . ."[406]

Bad Faith

According to the U.S. Supreme Court, courts are also instructed to consider whether the defendants acted in bad faith under factor one.[407] None of the four district court opinions here found evidence of bad faith in the defendants' use of embedded content.[408] Additionally, the court in *Nicklen* expressly rejected the argument that unlicensed and unauthorized use of copyrighted work is in and of itself evidence of bad faith.[409]

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[403] Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 585 (S.D.N.Y. 2020).

[404] Boesen v. United Sports Publ'ns, LTD, No. 20-CV-1552, 2020 WL 6393010, at *4 (E.D.N.Y. Nov. 2, 2020).

[405] Boesen v. United Sports Publ'ns, LTD. No. 20-CV-1552, 2020 WL 7625222, at *3 (E.D.N.Y. Dec. 22, 2020).

[406] *Id.*

[407] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)

[408] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *6 (S.D.N.Y. July 30, 2021). ("Finally, there is no indication of bad faith."); McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 607 (S.D.N.Y. 2020) ("[T]here is nothing in the pleadings to suggest one way or another whether Defendant acted in good faith or bad faith."); *see Walsh*, 464 F. Supp. 3d at 580–85; *Boesen*, 2020 WL 6393010, at *3 n.3.

[409] *Nicklen,* 2021 WL 3239510, at *6.

As to the overall weight of factor one, the courts in *Nicklen*, *Walsh*, and *Boesen* found the use of the embedded image to be transformative and therefore the first factor favored fair use.[410] The court in *McGucken*, however, found this factor to weigh against fair use because defendant's use was both nontransformative and commercial.[411]

As previously mentioned, factor one hinges mostly on whether the use is transformative. According to the U.S. Supreme Court, a work can be transformative if it (1) adds a different purpose or character ("transformative purpose"); or (2) adds new expression to the work ("transformative expression").[412] The cases above demonstrate that embedding most often adds a transformative purpose to the work, rather than add transformative expression, because the images remain unchanged when embedded in the articles. Courts could find an embedded image adds new expression to the original work by retaining the features of the platform—such as captions, headers, or platform-standard links—although that is unlikely. For example, one commentator argued that because "embedding displays the information in an unaltered form from its original source," it "virtually eliminates the possibility for embedding to constitute fair use."[413] The decisions discussed here show it is not impossible for embedding to constitute fair use. However, they do show the focus of transformativeness as applied to embedding is in whether the use adds new purpose or meaning to the copyrighted work, rather than whether the embedding adds new expression.

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[410] *Id.* at *5; *Walsh*, 464 F. Supp. 3d at 585; *Boesen*, 2020 WL 6393010, at *4.

[411] *McGucken*, 464 F. Supp. 3d at 606–07.

[412] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[413] Marta Rocha, Note, *The Brewing Battle: Copyright vs. Linking*, 35 BERKELEY TECH. L.J. 1179, 1189 (2020).

The Nature of the Copyrighted Work

Under the Copyright Act, the second factor considers the "nature of the copyrighted work."[414] This factor focuses both on whether the work is creative or factual, and whether the work is published.[415] The scope of fair use is narrower for works that are creative and unpublished.[416] Although two district courts in this study found this factor weighed slightly in favor of fair use, this factor was not determinative in the overall fair use analysis in any of the four cases.

In *Walsh*, the court found the picture contained "'both informational and creative elements': it was taken to 'document [its] subject,' a celebrity, but also displays some 'technical skill and aesthetic judgment.'"[417] Additionally, since Cardi B had previously published the picture on Instagram, the *Walsh* court found this factor weighed in favor of fair use.[418] Similar to the court in *Walsh*, the court in *Boesen* concluded the photograph of Wozniazki included "both informational and creative elements," but it was already published; thus, this factor weighed "slightly" in favor of fair use.[419]

In contrast, both *Nicklen* and *McGucken* found this factor weighed neither for nor against fair use. In *Nicklen*, the court found this factor was neutral because Nicklen's video of the

[414] 17 U.S.C. § 107(2).

[415] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563–64 (1985).

[416] *Id.*

[417] *Walsh*, 464 F. Supp. 3d at 585 (citing BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 408 (S.D.N.Y. 2016)).

[418] *Id.* at 585.

[419] Boesen v. United Sports Publ'ns, LTD, No. 20-CV-1552, 2020 WL 6393010, at *5 (E.D.N.Y. Nov. 2, 2020).

emaciated polar bear was both creative and informative.[420] Similarly in *McGucken*, the court found the photograph of the ephemeral lake was creative, but it was previously published on Instagram, which made the second factor "essentially a wash."[421]

Embedded content is often embedded from a public platform, thus the embedded work will often be considered "published" for purposes of copyright law.[422] Additionally, embedding cases often relate to embedded images and videos, which can be both creative and informative. Thus, this factor may be neutral in the overall conclusion of whether embedding is fair.

The Amount and Substantiality of the Portion Used

Under the Copyright Act, the third factor considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[423] According to the U.S. Supreme Court, this factor balances "the quantity and value of the materials used . . . in relation to the purpose of the copying."[424] Additionally, the Second Circuit has noted this factor considers "the proportion of the original work used, and not how much of the secondary work comprises the original,[425] in addition to whether no more work was taken than is necessary.[426]

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[420] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *6 (S.D.N.Y. July 30, 2021).

[421] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 608 (S.D.N.Y. 2020).

[422] *See* Jonathan Bailey, *Is Your Website Published or Unpublished?*, PLAGIARISM TODAY (Apr. 7, 2022) https://www.plagiarismtoday.com/2022/04/07/is-your-website-published-or-unpublished/ ("[I]f you post your work to a web page with social media buttons, an open license or even just tools to aid in printing or emailing, the work is likely considered to be published."). *Cf.* Deborah R. Gerhardt, *Copyright Publication on the Internet*, 60 IDEA: INTELL. PROP. L. REV. 1 (2020) (discussing when Internet distribution constitutes publication).

[423] 17 U.S.C. § 107(3).

[424] Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 586 (1994) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)).

[425] Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013).

Of the four cases discussed here, this factor had the most variance in the district courts' conclusions, two courts finding this factor to weigh in favor of fair use, one court finding this factor was neutral, and one court finding this factor weighed against fair use. In *Nicklen*, the defendants embedded the entire video of the polar bear.[427] The *Nicklen* court found that the defendants could have "conveyed the Video's virality" through a "single image of the emaciated bear" or "a screenshot of the number of likes or views the video received" rather than the entire work.[428] The court therefore found the defendants reproduced the "heart" of the work and this factor weighed against a finding of fair use.[429] In *McGucken*, Newsweek embedded the entire picture of the ephemeral lake, but the court said it was "difficult . . . to see how less than the entirety of the Photograph could have been used."[430] Thus, the court found this factor to weigh neither for nor against fair use.[431]

In contrast, the courts in *Walsh* and *Boesen* found this factor weighed in favor of fair use. The defendant in *Walsh* embedded the entirety of Cardi B's Instagram post, but the court found no more was taken than necessary.[432] To support its conclusion, the *Walsh* court noted Cardi B's post was "the only image that could have accomplished [the] journalistic objective of describing

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[426] Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2d Cir. 2014) ("The third factor asks whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the first factor.").

[427] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *6 (S.D.N.Y. July 30, 2021).

[428] *Id.*

[429] *Id.*

[430] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 608 (S.D.N.Y. 2020).

[431] *Id.*

[432] Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 586 (S.D.N.Y. 2020).

a social media story and providing readers with the relevant posts."[433] Relying on *Walsh*, the *Boesen* court concluded that "[o]nly reproducing that post could achieve [the] aim" of "inform[ing] readers about Wozniazki's retirement announcement on social media."[434] Additionally, since Wozniacki herself chose to crop plaintiff's image before posting it to her Instagram, "defendant did not control how the photograph was presented."[435] Accordingly, the court found this factor weighed in favor of fair use.[436]

When a work is embedded, the image is embedded in full. This means that for the third factor to weigh in favor of fair use in embedding cases, the inquiry hinges on whether the use is proportional to the purpose of the embedding—because the entirely of work will be used. As illustrated by the decisions discussed above, district courts are split as to whether the embedding of the image is proportional to the purpose of the use.

The Effect of the Use on the Market

Under the Copyright Act, the fourth and final factor considers "the effect of the use upon the potential market for or value of the copyrighted work."[437] This factor considers actual or potential harm to both the market of the original copyrighted work and a market for derivative works.[438] If the use of the copyrighted work is for a commercial purpose, its use is

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[433] *Id.*

[434] Boesen v. United Sports Publ'ns, LTD, No. 20-CV-1552, 2020 WL 6393010, at *6 (E.D.N.Y. Nov. 2, 2020).

[435] *Id.*

[436] *Id.*

[437] 17 U.S.C. § 107(4).

[438] Sony Corps. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."); *Harper*, 471 U.S. at 568 ("This inquiry must take account not only of harm to the original but also of harm to the market for derivative works.").

"presumptively an unfair exploitation of the monopoly privilege" and market harm need not be demonstrated.[439] However, this presumption only applies to a "mere duplication" or "market replacement" of the original copy for commercial purposes.[440] When the use is transformative, market harm may not be presumed and must instead be demonstrated.[441]

Of the four cases analyzed here, two courts found this factor weighed against fair use and two courts found this factor weighed in favor of fair use. Both the *Nicklen* and *McGucken* courts found this factor to weigh against a finding of fair use. Although the court in *Nicklen* found that the defendant's use would not be an adequate substitute for the original video of the polar bear, it found that the defendant's unlicensed use would harm the licensing market for plaintiff's video.[442] Thus, in *Nicklen*, this factor weighed against fair use.[443] Similarly, the court in *McGucken* found this factor weighed against fair use.[444] Because the court in *McGucken* found the defendant's embedding of plaintiff's ephemeral lake picture to be both commercial and nontransformative, there was a presumption of market harm for the purposes of this factor.[445]

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[439] *Sony*, 464 U.S. at 451 ("[A] although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. . . . If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.").

[440] Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 591 (1994) ("No 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes.").

[441] *Id.* ("But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.").

[442] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *7 (S.D.N.Y. July 30, 2021).

[443] *Id.*

[444] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 609 (S.D.N.Y. 2020).

[445] *Id.*

However, the *McGucken* court did not explicitly consider whether unlicensed use constituted harm to the plaintiff's licensing market.

In contrast to both *Nicklen* and *McGucken*, the court in *Walsh* found this factor weighed in favor of fair use because there was little chance someone would purchase Cardi B's post instead of the original photograph.[446] The court noted: "Here, because the Photograph did not appear on its own, but as part of the Post, alongside text and another image, it is implausible that Defendant's use would compete with Plaintiff's business or affect the market or value of her work."[447] Thus, the *Walsh* court concluded there was no harm to the plaintiff's current or potential licensing market for the original picture.[448]

Relying on *Walsh*, the court in *Boesen* found that the defendant's use of the picture of Wozniazki "would be a poor substitute for the original" because it was a cropped low-resolution version of the photo that was accompanied by text and retained Instagram's elements.[449] Thus, this factor favored a finding of fair use.[450] In response to the plaintiff's motion for reconsideration, the court reaffirmed its conclusion that there was little market harm.[451] It rejected the plaintiff's loop-hole argument that a finding of fair use for embedded photographs would allow "media organizations to avoid paying for copyrighted content by simply re-

[446] Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 586 (S.D.N.Y. 2020).

[447] *Id.*

[448] *Id.*

[449] Boesen v. United Sports Publ'ns, LTD, No. 20-CV-1552, 2020 WL 6393010, at *6 (E.D.N.Y. Nov. 2, 2020).

[450] *Id.*

[451] No. 20-CV-1552, 2020 WL 7625222 at *3 (E.D.N.Y. Dec. 22, 2020).

publishing social media posts."[452] The court explicitly narrowed its market harm analysis "to embedding Instagram posts when reporting on the posts themselves."[453] The court noted: "This is a small fraction of media organizations' news coverage such that allowing fair use in that narrow subset of cases does not come close to usurping the licensing market for stand-alone photographs."[454]

As the cases above illustrate, embedded content often retains the platforms' elements from which the content was posted (e.g., the original header and caption). By retaining these platform elements, it is likely the embedded work is a poor substitute for the original work. However, as one court has found, the unlicensed embedding of images or videos alone can constitute market harm.[455] Thus, when market harm exists in embedding cases, a copyright holder's licensing market—as opposed to a derivative or potential market—seems to be affected the most.

Conclusion in Light of the Purpose of Copyright

As previously mentioned, all four fair use factors must be weighed together and in light of the purposes of copyright,[456] which, as interpreted by the U.S. Supreme Court, is to promote the progress of knowledge and culture and to serve the welfare of the public.[457] Of the four cases

[452] *Id.* at *3 n.5.

[453] *Id.* at *4.

[454] *Id.* at *3.

[455] *See* Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *7 (S.D.N.Y. July 30, 2021).

[456] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

[457] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also supra* Chapter 4.

analyzed here, two concluded the use was fair as a matter of law and two left the issue unresolved.

Two courts, in *Nicklen* and *McGucken*, left the matter unresolved because of the cases procedural posture. Both *Nicklen* and *McGucken* were decided on defendants' motion to dismiss.[458] To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[459] A claim is plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[460] Because fair use is a "mixed question of law and fact,"[461] courts have determined, as a matter of law, whether a use was fair in a motion to dismiss if "discovery would not provide any additional relevant information' and '[a]ll that is necessary for the court to make a determination as to fair use are the two [works] at issue.'"[462] It is thus more common for fair use inquiries to be resolved at the summary judgement stage, rather than on a motion to dismiss.[463] Accordingly, the *Nicklen* court noted "the Court's fair use analysis would benefit form a better-

[458] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 602 (S.D.N.Y. 2020); Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *2 (S.D.N.Y. July 30, 2021).

[459] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and quotation marks omitted).

[460] *Id.*

[461] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

[462] May v. Sony Music Entert., 399 F. Supp. 3d 169, 188 (S.D.N.Y. 2019) (quoting Arrow Prods., Ltd. v. Weinstein Co., 44 F. Supp. 3d 359, 368 (S.D.N.Y 2014)).

[463] TCA Television Corp. v. McCollum, 839 F.3d 168, 178 (2d Cir. 2016) ("Courts most frequently address a proffered fair use defense at summary judgment."); BWP Media USA, Inc. v. Gossip Cop Media, LLC, 87 F. Supp. 3d 499 (S.D.N.Y. 2015) ("The Court thus finds that it is possible to resolve the fair use inquiry on a motion to dismiss under certain circumstances, but observes that there is a dearth of cases granting such a motion.").

developed factual record" and concluded it could not resolve the issue on a motion to dismiss.[464] Similarly, the court in *McGucken* found it was "not possible," in the motion to dismiss stage, for the court to find the use was fair as a matter of law.[465]

In contrast, the court in *Walsh* found that the defendant's embedding of Cardi B's Instagram was transformative, reasonable, both creative and informational, and harmless to the plaintiff's market for licensing the original work.[466] Accordingly, the court found the defendant's embedding of Cardi B's Instagram post to constitute fair use as a matter of law.[467] Similarly, the court in *Boesen* dismissed the plaintiff's complaint for failure to state a claim because all fair use factors supported the defendant's fair use defense.[468]

6.4 Sublicense

In addition to claiming fair use, litigants have also claimed that users have granted them sublicenses to embed content posted on the platform pursuant to the platform's User Agreement. This was the case in *McGucken*, where the defendant moved to dismiss under the defense of fair use and that Instagram's User Agreement granted Newsweek a sublicense to use McGucken's photo of the ephemeral lake.[469] Although the court "acknowledge[d] that it may be possible to

[464] Nicklen v. Sinclair Broad. Grp., Inc., No. 20-CV-10300, 2021 WL 3239510, at *7 (S.D.N.Y. July 30, 2021).

[465] McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 609 (S.D.N.Y. 2020).

[466] Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 586 (S.D.N.Y. 2020).

[467] *Id.*

[468] Boesen v. United Sports Publ'ns, LTD, No. 20-CV-1552, 2020 WL 6393010, at *6 (E.D.N.Y. Nov. 2, 2020).

[469] *McGucken*, 464 F. Supp. 3d at 603.

read Instagram's various terms and policies to grant a sublicense to embedders," the court found that, on a motion to dismiss, it could not find the defendant acted pursuant to a sublicense.[470]

In *Sinclair v. Ziff Davis*,[471] defendant Mashable similarly argued that it embedded a photo pursuant to a valid license from Instagram.[472] The plaintiff in *Sinclair* was a professional photographer who posted an image titled "Child, Bride, Mother/Child Marriage in Guatemala" to her public Instagram account.[473] Defendant Mashable contacted the plaintiff and offered $50 for licensing rights to the photograph, which the plaintiff declined.[474] Mashable then published an article about female photographers and embedded the plaintiff's photo to the article, in addition to other images.[475] When Mashable refused to take down the plaintiff's photograph and compensate her at the plaintiff's request, she sued them.[476] Mashable argued that it embedded the photograph pursuant to a valid sublicense from Instagram.[477]

After analyzing Instagram's User Agreement, the district court found that the plaintiff had expressly granted the platform the right to sublicense her content when she created an Instagram account and accepted its terms of use.[478] The court found that because the plaintiff had

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[470] *Id.* at 604.

[471] 454 F. Supp. 3d 342 (S.D.N.Y. 2020).

[472] *Id.* at 344.

[473] *Id.* at 343.

[474] *Id.*

[475] *Id.*

[476] *Id.* at 344.

[477] *Id.*

[478] *Id.*

posted the picture in her public[479] Instagram account, she agreed to allow Mashable, "as Instagram's sublicensee" to embed her picture.[480] Accordingly, Mashable embedded plaintiff's picture pursuant to a valid sublicense.[481]

The *Sinclair* court revised its opinion after the decision in *McGucken*, the plaintiff's motion for reconsideration,[482] and Instagram's strong, but perhaps unrelated, denial that it had granted Mashable a sublicense.[483] The court reaffirmed in part its previous holding that the plaintiff, by agreeing to Instagram's User Agreement, had authorized the platform to grant users of Instagram's API a sublicense to embed content interplatform.[484] However, the court revised part of its holding, "finding that the pleadings contain insufficient evidence that Instagram exercised its right to grant a sublicense to Mashable."[485] Accordingly, the *Sinclair* court held the copyright claim against Mashable could not be dismissed based on the sublicense defense.[486] The lawsuit settled before any court could rule further on the merits of the matter.[487]

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[479] Courts are still wrestling with how to interpret one's privacy settings on social media in the context of both copyright and privacy law. *See, e.g.*, Goldman v. Breitbart News Network, LLC 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018) ("[T]here are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account."); Commonwealth v. Carrasquillo, No. 13122, slip op. (Mass. Feb. 7, 2022) (concluding the defendant had no constitutionally protected expectation of privacy in social media).

[480] *Sinclair*, 454 F. Supp. 3d at 345.

[481] *Id.*

[482] Sinclair v. Ziff Davis LLC, No. 18-CV-790, 2020 WL 3450136 (S.D.N.Y. June 24, 2020).

[483] Timothy B. Lee, *Instagram Just Threw Users Of Its Embedding API Under the Bus*, ARSTECHNICA (June 4, 2020) https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/.

[484] Sinclair v. Ziff Davis LLC, No. 18-CV-790, 2020 WL 3450136, at *1 (S.D.N.Y. June 24, 2020).

[485] *Id.*

[486] *Id.* at *2.

[487] Bill Donahue, *Mashable Settles Copyright Fight Over Instagram Embeds*, LAW360 (Feb. 10, 2021) https://www.law360.com/articles/1354269.

Chapter 7, addressing RQ_3, discusses social media platforms' User Agreements.

6.5 Secondary or Contributory Liability

Another theme that has emerged in recent embedding cases is whether and to what extent online intermediaries are secondarily liable for a third-party's embedding. Online intermediaries can be found secondarily liable under the theory of contributory or vicarious liability.[488] The U.S. Supreme Court has articulated the following interpretation of secondary liability: "One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[489] However, a finding of secondary liability first requires a finding of direct infringement.[490] Thus, whether online intermediaries can be held secondarily liable for the embedding of third parties relies first on an affirmative holding that the particular embedding constitutes copyright infringement.

Courts have not considered the issue of secondary liability for embedding that is considered infringing. In *Hunley v. Instagram*—the only case to consider secondary liability for embedding—the plaintiff asserted Instagram was secondarily liable for copyright infringement because its embedding tool "enable[d] third-party websites to display copyrighted photos or videos posted to an Instagram account."[491] However, the court applied *Perfect 10* and found third parties who embed copyrighted content did not infringe on Instagram users' display right; thus,

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[488] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, 545 U.S. 913, 930 (2005) (internal citations omitted).

[489] *Id.* (internal citations omitted).

[490] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 n.2 (2d Cir. 2001) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.").

[491] No. 21-cv-03778-CRB, 2021 WL 4243385, at *1 (N.D. Cal. Sept. 17, 2021).

without a showing of direct infringement by a third party, the court dismissed Hunley's secondary liability claims.[492]

Two other cases, *Perfect 10* and *Flava Works, Inc. v. Gunter*, addressed whether online intermediaries could be secondarily liable for framing and in-line linking to infringing content. The difference between *Hunley* versus *Perfect 10* and *Flava Works* is in the secondary liability for embedding itself that is found to be infringing, as opposed to secondary liability for embedding infringing content. *Perfect 10* and *Flava Works* are discussed below.

In *Perfect 10*, Perfect 10 argued Google was secondarily liable for its framing of infringing full-sized images.[493] The Ninth Circuit concluded it was undisputed that third parties directly infringed on Perfect 10's reproduction, display, and distribution rights.[494] The court then considered whether Google was contributorily or vicariously liable.[495] The Ninth Circuit held that Google could not be held contributorily liable "solely because the design of its search engine facilitates such infringement . . . [or] solely because it did not develop technology that would enable its search engine to automatically avoid infringing images.[496] However, the court added "Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps."[497] Since there were still

[492] *Id.* at *1, *3.

[493] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168–69 (9th Cir. 2007).

[494] *Id.* at 1170.

[495] *Id.* at 1170–75.

[496] *Id.* at 1170.

[497] *Id.* at 1172.

unresolved factual claims, the Ninth Circuit remanded without deciding the claim.[498] As to the vicarious infringement claim, the court held Perfect 10 had not met its burden of showing Google had "the right and ability to stop or limit the infringing activities of third party websites" and that "Google derives a direct financial benefit from such activities."[499]

In *Flava Works v. Gunter*,[500] the Seventh Circuit held a social bookmarking platform could not be held contributorily liable for embedding videos that were found to be infringing.[501] Flava Works, Inc., produced and distributed pornographic videos, which were only available to paying consumers.[502] By paying to access Flava's videos, the user was able to download the video to their personal computer, but agreed not to copy, transmit, or sell the video.[503] Some of Flava's videos were available on myVidster—a social bookmarking network—because the platform allows patrons to "bookmark" them on myVidster.[504] Once a user bookmarks a video on myVidster from a third-party source, that video is automatically embedded onto a myVidster we page.[505] MyVidster's main webpage contains several thumbnails of the videos that have been bookmarked by users.[506] As the court noted, myVidster was "providing a connection between the

[498] *Id.* at 1173.

[499] *Id.*

[500] 689 F.3d 754 (7th Cir. 2012).

[501] *Id.* at 758.

[502] *Id.* at 755–56.

[503] *Id.* at 756.

[504] *Id.*

[505] *Id.*

[506] *Id.*

server that hosts the video and the computer of myVidster's visitor."[507] The court compares this connection to a "telephone exchange."[508]

Flava Works argued myVidster was a contributory infringer for facilitating a connection to infringing videos and therefore encouraging the subscribers of myVidster to "circumvent Flava's pay wall."[509] The court rejected this argument, noting "unless those visitors copy the videos they are viewing on the infringers' websites, myVidster isn't increasing the amount of infringement. . . . The facilitator of conduct that doesn't infringe copyright is not a contributory infringer."[510] The court noted myVidster could be liable for inducing infringement if myVidster were inviting users to post or bookmark infringing content, but there was no evidence this was the case.[511]

Conclusion

Recent district court cases like *Jackson*, *Goldman*, and *Nicklen* suggest a nascent trend rejecting the server test. Those cases illustrate the disagreement between courts and the difference in interpretation of the Copyright Act's statutory language. The Ninth Circuit has interpreted the display right to necessitate physical possession of a copy of the work, while emerging case law suggests the display right only requires the transmission of a copy of the work. The difference between both approaches seem to lie on whether physical possession of a

[507] *Id.* at 757.

[508] *Id.*

[509] *Id.*

[510] *Id.* at 757–58.

[511] *Id.* at 758–59.

copy of the copyrighted work is a necessary element to "display a copy of the work" as established by the 1976 Copyright Act.

Of the four cases that considered whether embedding constituted fair use, a few predictable patterns emerge. All cases seemed to agree that whether the embedded image is transformative depends on whether the accompanying article reports on the contents of the picture rather than on the publication of the picture itself. As to the third factor, all cases considered the embedding of a work in its entirety, which the district courts were split as to whether that weighed in favor, neutrally, or against fair use. Finally, market harm seemed contingent on whether the embedded image or video were potential substitutes for the original work, but at least one court found the unlicensed embedding of a photograph to be harmful to its licensing market. Two of the cases, *Nicklen* and *McGucken*, left the overall conclusion of fair use unresolved due to the cases' procedural posture, which is common in fair use cases. However, based on the courts' discussions and the weight they assigned each factor, the scale seemed to tip against a finding of fair use absent a change in the factual record. The other two cases, *Walsh* and *Boesen*, found as a matter of law that the embedding of content was fair.

The issue of whether users grant other, third-party users a sublicense to use posted content will be further explored in Chapter 7, but as *McGucken* and *Sinclair* demonstrate, there is a valid argument that users grant licenses and sublicensee to other users when they agree to a platform's User Agreement.

As to secondary liability, not enough courts have considered the merits of the issue for any affirmative pattern to emerge. As previously mentioned, whether online intermediaries can be held secondarily liable for the embedding of third parties relies first on an affirmative holding the particular embedding constitutes copyright infringement. If *Perfect 10* and *Flava Works* are

any indication—and assuming embedding can constitute direct infringement—social media platforms will likely not be held secondarily liable simply because the design of their API facilitates embedding, but they could be held liable if such a design "invites" users to embed. Chapter 6 discussed in further detail how all social media platforms studied here facilitate users to embed by providing HTML codes, but courts have yet to weigh in on whether such facilitation rises to a level of encouragement or invitation so as to result in secondary liability.

CHAPTER 7: LICENSES IN PLATFORM'S TERMS OF SERVICE

The threshold issue addressed in this chapter centers on the licenses or sub-licenses that are expressly granted in the platforms' User Agreements to platforms and third-party users as they relate to a copyright holder's exclusive rights. Before discussing the results of the relevant research question, this chapter gives a brief overview of User Agreements, their enforceability, and policy concerns regarding their enforcement.

7.1 User Agreements, Clickwrap, and Copyright Infringement Liability

Although copyright holders have the right to exclude others from certain statutorily-prescribed uses of their works, the copyright holder may grant permitted uses of a copyrighted work through a license—express or implied.[512] A copyright holder may also permit a licensee to grant a sublicense, thereby forsaking any copyright infringement suit against the use of the copyrighted work by the licensee and sublicensee, so long as the use is within the terms of the license.[513] The consequences of such a grant of rights, and the copyright holder's loss of the ability to further restrict "downstream" uses falling within the scope of the grant, become particularly relevant when a copyrighted work is posted to a social media platform. As discussed in the next section, social media platforms have attempted to minimize their liability for copyright infringement by requiring users to expressly grant intellectual property licenses to the

[512] 17 U.S.C. § 201(d) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106 . . ., may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.").

[513] Sinclair v. Ziff Davis, LLC, 454 F. Supp. 3d 342, 344 (S.D.N.Y. 2020).

platform in their User Agreement. This effectively makes the consent to license a condition of service.[514] While a user could plausibly grant an implied license, this study sought to explore if and to what extent a platform's User Agreement *expressly* requires users to grant licenses and sublicenses to the platform and third-party users.

Put simply, the User Agreement sets out the rules of the social media game. The User Agreement is a contract establishing the terms, conditions, and obligations to which platform users are required to agree when using the platform, including terms addressing liability and intellectual property.[515] Relevant to this study are the copyright terms and policies in a platform's User Agreement.

User Agreements are usually *clickwrap*, *browsewrap*, or *hybridwrap* license agreements. *Clickwrap* license agreements are agreements "that condition access to a site on consent as manifested through the click of a mouse."[516] *Browsewrap* agreements, in contrast, are made available to the user somewhere on the website, but the user is not required to click a button and accept the terms to use the service.[517] Some scholars have argued that many social media User Agreements are actually *hybridwrap* agreements because they have characteristics of both

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[514] *See, e.g.*, Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 464 (2019) ("One can expect that these platforms will design Terms of Service contracts which will govern the linking permissions of the user-generated content uploaded to the platform by requiring users to agree expressly to a limited waiver of their rights of public display and performance on-platform."); Melissa de Zwart, *Contractual Communities: Effective Governance of Virtual Worlds*, 33 U. S. WALES L.J. 605, 626 (2010) ("Providers have responded to emerging issues with changes to the [end user license agreement], constantly tweaking and revising it to accommodate and address issues as they arise . . . .").

[515] TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 46 (2018).

[516] MADELINE SCHACHTER & JOEL KURTZBERG, LAW OF INTERNET SPEECH 906 (3d ed. 2008).

[517] CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 190 (8th ed. 2016).

browsewrap and clickwrap—users may be presented with a hyperlink or notice of the terms of service, but not the entire agreement.[518]

Scholars have noted User Agreements are "the contract of adhesion for the digital era"[519]— "a standardized form contract offered to consumers of goods and services on essentially a take-it-or-leave-it basis, without affording the consumer a realistic opportunity to bargain."[520] However, courts have generally upheld these licenses as enforceable, as long as users are given reasonable notice and a clear opportunity to read the agreement before agreeing to be bound by its terms.[521] Michael Karanicolas, Executive Director of the UCLA Institute for Technology Law & Policy, noted that courts' reliance on parties' "duty to read" contracts is "fundamentally disconnected from the realities of modern living due to the sheer volume of contracting text that accompanies nearly every transaction."[522]

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[518] Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOLEDO L. REV. 1, 13 (2021); *see also* Matt Meinel, Recent Development, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180, 187–88 (2016).

[519] Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 321 (1999); *see also* Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOLEDO L. REV. 1, 10–12 (2021).

[520] Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 321 (1999).

[521] *See, e.g.*, Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248, 1256 (10th Cir. 2012) ("Courts evaluate whether a clickwrap agreement's terms were clearly presented to the consumer, the consumer had an opportunity to read the agreement, and the consumer manifested an unambiguous acceptance of the terms."); Specht v. Netscape Comms. Corp., 306 F.3d 17, 29–30 (2d Cir. 2002) ("[A] consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms . . . ."). For a more detailed discussion on courts' treatment of the enforceability of clickwrap, browsewrap, and hybridwrap license, see generally Matt Meinel, Recent Development, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180, 187–88 (2016).

[522] Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOLEDO L. REV. 1, 10–11 (2021).

While legally enforceable, there is scholarly support for the proposition that clickwrap licenses are against public policy due to the uneven bargaining power between the parties[523]—in the case of this study, between the platforms and users. Tan, for example, argues that a platform's User Agreement "reflect the unilateral interests of the social media platforms . . . at the expense of their users."[524] She also notes that some User Agreements have incompatibilities with copyright law, compromising users' compliance with copyright law when they create content.[525] Professor Jonathan Obar and co-author Lior Magalashvili note that clickwrap licenses employ manipulative designs by focusing on "service sign-up instead of user engagement with online consent materials."[526] Similarly, Obar and Anne Oeldorf-Hirsch argue that clickwraps often steer users to "circumvent consent materials" by directing them "away from policies that might encourage dissent and ensure users stay in fast lanes to monetized sections of services."[527]

Researchers have also found that, not surprisingly, users rarely read the User Agreement. One study employed by Obar and Oeldorf-Hirsch found that 74% of participants did not read the User Agreement of the study's fictitious platform "NameDrop" before agreeing to them.[528] Of

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[523] *See, e.g.*, Michael L. Rustad & Thomas H. Koenig, *Empirical Study: Wolves of The World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1446 (2014) ("Nearly all consumer contracts are based on mass-produced, nonnegotiable forms. . . . Furthermore, consumers often have no real alternative but to assent to mass-market contracts.").

[524] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 99 (2018).

[525] *Id.* at 128.

[526] Jonathan A. Obar & Lior Magalashvili, The Clickwrap as Platform Governance: Assessing the Frequency of Manipulative Interface Designs During Digital Service Sign-Up 2 (Aug. 2, 2021) (unpublished paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898254.

[527] Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media*, 2018 SOCIAL MEDIA + SOC'Y 1, 1.

[528] Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO., COMMC'N & SOC'Y 128, 135 (2020).

the participants who did read the policies, 96% spent less than five minutes reading; based on the User Agreement's word count, these documents should have taken fifteen to seventeen minutes to read.[529] Karanicolas notes this is not due to disinterest or negligence on behalf of the user.[530] For example, a 2008 study calculated that if an American user were to read privacy policies word-for-word each time they visited a website, the user would spend 244 hours and $3,534 annually.[531] Thus, Karanicolas argues the lengthy terms, complex language, and "technically sophisticated jargon" makes User Agreements nearly impossible for the average user to read.[532]

As such, research in this area has called for improved readability, clarity, and design in User Agreements.[533] In January of 2022, Congresswoman Lori Trahan, and Senators Bill Cassidy and Ben Ray Luján introduced into Congress the Terms-of-Service Labeling, Design and Readability Act ("TLDR Act").[534] The TLDR Act would require commercial websites and mobile apps to create a summary of their terms-of-service that is concise, readable, and easily

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[529] *Id.* at 137.

[530] Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOLEDO L. REV. 1, 11 (2021).

[531] Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J.L. & POL'Y FOR INFO. SOC'Y 543, 563–65 (2008).

[532] *Id.*

[533] *See, e.g.*, Melissa de Zwart, *Contractual Communities: Effective Governance of Virtual Worlds*, 33 U. S. WALES L.J. 605, 625 (2010) (encouraging platforms to clearly identify any "relevant intellectual property rights and the contractual allocation of those rights between platform providers and users" in their User Agreement to ensure platforms to do "revert to code to enforce their control"); Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, CONF. ON COMPUT.-SUPPORTED COOP. WORK & SOC. COMPUTING, Feb. 2016, at 1459 (suggesting websites should consider the particular need of their users and employ "[a]n understanding of not only what the term *means* but what the site actually *means to do*" with users' content); Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1638–39 (2011) (proposing that website design should be considered enforceable promises in addition to a website's User Agreement).

[534] S. 3501, 117th Cong. (2022).

located on the website.[535] The act would authorize the Federal Trade Commission (FTC) to treat a violation of the TLDR Act as an unfair or deceptive trade practice.[536] According to a statement by Representative Trahan, this bill is a push against the unequal bargaining power (or lack thereof) between consumer and platform and the lack of readability and accessibility of lengthy User Agreements.[537]

As discussed above, many User Agreements have the potential to affect not only users' proprietary rights in their content, but also their behavior online through manipulative designs that can either enhance or obscure awareness of consent materials, including copyright terms. This study therefore focused not only on platforms' technological affordances that allow users to embed content, but also whether and how copyright is addressed in the platforms' User Agreements. Because of already existing scholarship addressing User Agreement's readability and user perception,[538] this study does not evaluate the readability of the User Agreements studied here. Additionally, research has already addressed User Agreement clauses regarding indemnification,[539] limitation of liability,[540] governing law and jurisdiction,[541] arbitration,[542] and

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[535] *Id.*

[536] *Id.*

[537] Karl Bode, *New "TLDR" Bill Requires Companies Provide Synopsis of Overlong Predatory Terms of Service*, TECHDIRT (Jan. 14, 2022) https://www.techdirt.com/articles/20220113/11382448276/new-tldr-bill-requires-companies-provide-synopsis-overlong-predatory-terms-service.shtml; *see also* Cristiano Lima, *No One Reads the Terms of Service. Lawmakers Want To Fix That with a New "TLDR" Bill*, WASH. POST (Jan. 13, 2022) https://www.washingtonpost.com/politics/2022/01/13/no-one-reads-terms-service-lawmakers-want-fix-that-with-new-tldr-bill/.

[538] Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, CONF. ON COMPUT.-SUPPORTED COOP. WORK & SOC. COMPUTING, Feb. 2016, at 1450.

[539] *See, e.g.*, CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 105–07 (2018).

[540] *See, e.g.*, *id.*

forum selection.[543] This study is thus concerned solely with the copyright terms in the User Agreements. Accordingly, this chapter addresses the following research question:

RQ$_3$: **In each platform's User Agreement, what express licenses or sub-licenses are granted to the platform and/or third-party users as they relate to a copyright holder's exclusive rights?**

A license is a creature of contract, and, as such, the permissions included therein end when the agreement granting the license terminates.[544] Thus, this analysis focuses primarily on the scope and duration of the licenses expressly granted in a platform's User Agreement. Addressing the scope and duration of the license expressly granted in the User Agreement is critical because any use of a copyrighted work that goes beyond the scope or duration of a license may constitute copyright infringement.[545] A license's scope refers to the rights granted therein. Thus, the inquiry of this research question centers on the licenses or sub-licenses that a platform's User Agreement requires the consenting user to grant to the platform and to other, third-party users in posted content.[546]

To address this question, this study conducted a latent content analysis[547] of copyright terms in each platform's User Agreement. This study focused specifically on the scope and

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[541] *See, e.g.*, *id.* at 107–11.

[542] *See, e.g.*, Madeleine Patton, Note, *How To Protect Users' Copyright Rights in the Age of Social Media Platforms and Their Unread Terms of Service*, 53 U. S.F. L. REV. 463, 477–78 (2019).

[543] *See, e.g.*, *id.*

[544] LICENSING OF INTELLECTUAL PROPERTY § 1A.01 (2022).

[545] *Id.*

[546] Here, "consenting user" refers to a user that has agreed to the platform's User Agreement. "Posted content" refers to the content posted by the consenting user.

[547] A latent content analysis focuses on interpreting content and discovering the underlying meaning of that content. *See supra* Chapter 4.

duration of licenses expressly granted by a consenting user to the platform and to third parties under the platform's User Agreement. Importantly, this study confined the interpretation of each User Agreement to the four corners of the document because several jurisdictions limit contract interpretation strictly to the language of the document unless the language is ambiguous as a matter of law.[548]

Importantly, of the platform User Agreements this study analyzed, most (*n=5*) of the platforms expressly prohibit users from posting content that infringes on copyright.[549] Thus, by agreeing to the User Agreement, users are certifying that they are posting content under color of title, under color of license, or under fair use. Additionally, none of the studied platforms claims ownership of posted content in their User Agreement,[550] which explains why each platform must ask the user to grant a license to use posted content. However, licensing only works to the extent that the user holds rights that can be licensed. The next two sections consider the scope and duration of licenses expressly granted to the platform and to third-party users.

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[548] *See, e.g.*, Tillery v. D.C. Contract Appeals Bd., 912 A.2d 1169, 1176 (D.C. 2006) ("The proper interpretation of a contract, including whether a contract is ambiguous, is a legal question . . . . In determining whether a contract is ambiguous, we examine the document on its face, giving the language used its plain meaning."); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 398 (8th ed. 2016) ("Courts often state that the 'plain meaning' of the language of a contract should govern and that extrinsic evidence is admissible only if the court concludes that the contract is ambiguous.").

[549] *Compare Terms of Service*, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/static?template=terms, *and Terms of Service*, TIKTOK, https://www.tiktok.com/legal/terms-of-service?lang=en (Feb. 2019), *and Terms of Service*, FACEBOOK https://www.facebook.com/terms.php (Jan. 4, 2022), *and Twitter Terms of Service*, TWITTER (Aug. 19, 2021) https://twitter.com/en/tos, *and Terms of Use*, INSTAGRAM, https://help.instagram.com/581066165581870 (Jan. 4, 2022), *with Terms of Service*, PINTEREST (May 1, 2018) https://policy.pinterest.com/en/terms-of-service.

[550] *Terms of Service*, FACEBOOK, *supra* note 523; *Twitter Terms of Service*, TWITTER, *supra* note 523; *Terms of Service*, TIKTOK, *supra* note 523; *Terms of Use*, INSTAGRAM, *supra* note 523; *Terms of Service*, YOUTUBE, *supra* note 523; *Terms of Service*, PINTEREST, *supra* note 523.

7.2 Licenses Expressly Granted to the Platform in the User Agreement

RQ_{3a}: Which, if any, exclusive rights of a copyright holder are expressly licensed to the social media platform under the User Agreement of the platform?

TABLE 8. EXCLUSIVE RIGHTS EXPRESSLY LICENSED TO PLATFORMS

	Reproduce	Derivative Works	Distribute	Publicly Display/ Perform
YouTube	☑	☑	☑	☑
Facebook	☑	☑	☑	☑
Instagram	☑	☑	☑	☑
Twitter	☑	☑	☑	☑
Pinterest	☑	☑	☑	☑
TikTok	☑	☑	☑	☑

Legend: [Green Check] = right has been expressly non-exclusively licensed in User Agreement; [Orange Check] = right has been expressly non-exclusively licensed in User Agreement but has been qualified or restricted by the user's privacy setting; [Purple Check] = right has been expressly non-exclusively licensed in User Agreement but has been qualified or restricted by platform's business purpose.

Pursuant to all the analyzed platforms' User Agreements, users are required to grant licenses to the platforms with respect to at least five of copyright's six exclusive rights in any posted content: (1) right to reproduce the content; (2) the right to create derivative works based on the content; (3) the right to distribute the content; (4) the right to publicly display the content; or (5) the right to perform the content publicly (in the case of musical or audiovisual content). As discussed in the Chapter 4,[551] copyright's sixth exclusive right[552] is beyond the scope of this study. Importantly, all the licenses granted by consenting users to the studied platforms under their User Agreement are non-exclusive, meaning that each license granted to the platform does not preclude the user from granting licenses to the exclusive rights to multiple parties.[553]

[551] *See supra* Chapter 4.

[552] Copyright's sixth exclusive right is the right to publicly perform digital audio transmissions. 17 U.S.C. § 106(6).

[553] Licensing of Intellectual Property § 1A.01[5]

Some of the platforms' User Agreements qualify the license granted according to the user's privacy settings or the platform's business purpose. For example, Facebook's and Instagram's User Agreements license exclusive rights to the platform "consistent with [the user's] privacy and application settings."[554] Both Instagram and Facebook outline how a user can change their privacy settings on the platform, but neither elaborate on how a user's privacy setting restricts the platforms' license in effect. On the other hand, YouTube's User Agreement state that users grant YouTube a license to exclusive rights "in connection with [YouTube] and YouTube's . . . business, including for the purpose of promoting and redistributing part or all of the service."[555] Similarly, Pinterest qualifies the license granted to the platform as "solely for the purposes of operating, developing, providing, and using Pinterest."[556] In comparison, a user grants TikTok an "*unconditional* irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide license." Even with qualifications based on a user's privacy settings or the platform's business purpose, these licenses remain broad, and their limits are undefined.

7.3 Licenses Expressly Granted to Third-Party Users in the User Agreement

For third-party users to be granted rights via a license between the user and the platform, the license granted in the User Agreement must either specify other users as parties to the license or identify other users as third-party beneficiaries.[557] Thus, in analyzing the major platforms'

[554] *Terms of Service*, FACEBOOK, *supra* note 523; *Terms of Use*, INSTAGRAM, *supra* note 523.

[555] *Terms of Service*, YOUTUBE, *supra* note 523.

[556] *Terms of Service*, PINTEREST, *supra* note 523.

[557] Licensing of Intellectual Property § 1A.01 (explaining that "[s]ince a license only grants rights to the specific legal entities that are party to it, the license must . . . specify[] that that licensee's affiliates are parties or third-party beneficiaries . . .").

User Agreements, this study focused not only on the rights granted to third-party users, but also on the contract language specifying other users as third-party beneficiaries of the grant of rights.

RQ_{3b}: Which, if any, exclusive rights of a copyright holder are expressly licensed to third-party users under the User Agreement of the platform?

TABLE 9. EXCLUSIVE RIGHTS EXPRESSLY LICENSED TO THIRD-PARTY USERS

	Reproduce	Derivative Works	Distribute	Publicly Display/ Perform
YouTube	☑	☑	☑	☑
Facebook	-	-	-	-
Instagram	-	-	-	-
Twitter	-	-	-	-
Pinterest	☑	☑	☑	☑
TikTok	☑	☑	☑	☑

Legend: [Yellow Check] = right has been expressly non-exclusively licensed in User Agreement but has been qualified or restricted to use as enabled by a feature of the Service; [Purple Check] = right has been expressly non-exclusively licensed in User Agreement but has been qualified or restricted by platform's business purpose; [Pink Check]= platform has been expressly granted permission to sublicense exclusive rights to third-party users;[-] = User Agreement is silent as to the use of content by third-party users.

Only YouTube and Pinterest expressly grant third-party users licenses to posted content. Both YouTube and Pinterest qualify such license. YouTube's User Agreement state that users grant other YouTube users a license to "access your Content through the Service, and to use that Content, including to reproduce, distribute, prepare derivative works, display, and perform it." However, third parties may do so *"only as enabled by a feature of the Service (such as video playback or embeds)*." Importantly, YouTube states that "this license does not grant any rights or permissions for a user to make use of your Content *independent* of the Service."[558] Similarly, Pinterest's User Agreement requires the user to grant to "Pinterest and *our users* a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, store, display, reproduce, save, modify, create derivative works, perform, and distribute your User Content *on Pinterest*

[558] *Terms of Service*, YOUTUBE, *supra* note 523.

. . . ."[559] However, that use is qualified because Pinterest states the license is "solely for the purposes of operating, developing, providing, and using Pinterest."[560]

On the other hand, TikTok's User Agreement identify other users as intended third-party beneficiaries of content posted by the consenting user. When agreeing to TikTok's User Agreement, a user expressly grants the platform the right to "authorize other users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented."[561] Thus, the licenses in the YouTube and Pinterest User Agreements represented in the table above have been designated as qualified.

7.4 Duration of Licenses Granted in the User Agreement

Whenever a license ends, the permission granted therein also ends. Thus, this section analyzes the duration of the licenses granted in the studied platform's respective User Agreement, as identified in sections 7.2 and 7.3 above.

[559] *Terms of Service*, PINTEREST, *supra* note 523.

[560] *Id.*

[561] *Terms of Service*, TIKTOK, *supra* note 523.

TABLE 10. DURATION OF LICENSES EXPRESSLY GRANTED IN THE USER AGREEMENT

	When does the license end?	User Agreement Language
YouTube	**Ambiguous**	"The licenses granted by you continue **for a commercially reasonable period of time** after you remove or delete your Content from the Service. You understand and agree, however, that YouTube may retain, but not display, distribute, or perform, server copies of your videos that have been removed or deleted."
Facebook	**When content is deleted**	"This license will end **when your content is deleted from our systems**. . . . [A]ll content posted to your personal account will by deleted if you delete your account [but] . . . [a]ccount deletion does not automatically delete content that you post as an admin of a page or content that you create collectively with other users . . . ."[562]
Instagram	**When content is deleted**	"This license will end **when your content is deleted from our systems**. You can delete content individually or all at once by deleting your account."
Twitter	**Ambiguous**	"You may end your legal agreement with Twitter at any time **by deactivating your accounts and discontinuing your use of the Services**. . . . In all such cases, the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: 2, 3, 5, and 6."[563] Section 3 includes the grant of rights to the platform in user content, and it survives termination of the Terms.
Pinterest	**Ambiguous**	"Following termination or deactivation of your account, or if you remove any User Content from Pinterest, we may keep your User Content for a reasonable period of time for backup, archival, or audit purposes. Pinterest and its users may retain and continue to use, store, display, reproduce, re-pin, modify, create derivative works, perform, and distribute any of your User Content that other users have stored or shared on Pinterest."
TikTok	**Perpetual**	"[B]y submitting User Content via the Services, you hereby grant us an unconditional irrevocable, non-exclusive, royalty-free, fully transferable, **perpetual** worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise other users of the Services . . . ."

[562] *Terms of Service*, FACEBOOK, *supra* note 523.

[563] *Twitter Terms of Service*, TWITTER, *supra* note 523.

Most of the six studied platforms do not clearly specify the duration of the licenses granted in their respective User Agreement. However, a platform's failure to clearly specify the duration of the granted license does not automatically make the license perpetual.[564] On the one hand, TikTok's User Agreement require the consenting user to grant the platform an "unconditional," "irrevocable," and "perpetual" license to user content, which can be easily interpreted as a never-ending license. Unlike TikTok, all the other platforms' licenses seem to end at some point, but the exact point in time at which the license terminates is unclear.

Facebook's and Instagram's licenses end when the consenting user's content is deleted from these platforms' systems, but Facebook has made it clear that simply deleting the user's content from their own profile is not enough. The duration of the license granted under YouTube's User Agreement is less clear, stating that the license continues "for a commercially reasonable period of time" after removal or deletion of content. Similar to YouTube, Pinterest's User Agreement states that the platform may keep the consenting user's content "for a reasonable period of time for backup, archival, or audit purposes" after termination or deactivation of the user's account. However, the license granted under Pinterest's User Agreement still survives any termination by the user, because Pinterest reserves the right to use the terminating user's content that "other users have stored or shared on Pinterest" prior to termination.[565]

The duration of each user's license under Twitter's User Agreement is also unclear. Section 4 of Twitter's User Agreement states that any user may end their legal agreement with

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[564] Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 237 (2d Cir. 2008) ("In the absence of a clear provision, courts are reluctant to declare a perpetual license as a matter of law.").

[565] *Terms of Service*, PINTEREST, *supra* note 523.

Twitter by terminating the account and discontinuing use of Twitter.[566] However, Section 4 also states that some sections survive the termination of the Agreement—sections 2,3,5, and 6—including section 3, which grants Twitter the rights to posted content.[567] Thus, under Section 4, the licenses remain in effect after a user has terminated their Twitter account and the User Agreement is silent as to when that would end. However, of the sections that survive the termination of the Terms, the User Agreement fails to include Section 4 itself, meaning Section 4 (stipulating the survival clauses) does not remain in effect after the User Agreement is terminated. Thus, while it seems clear that Twitter intends for all of these enumerated sections to survive, there is nevertheless a valid argument that none of the terms survive termination of the agreement.

7.5 Intraplatform and Interplatform Sharing

Reasonable minds can differ on whether the respective User Agreement of each studied platform permits the platform and third-party users to share via intra- and interplatform sharing. However, based on the language of each of the six studied platforms' User Agreement, some educated, practical inferences can be made as to whether any of the licenses granted allow for intra- and interplatform sharing. In other words, while there may be room for alternative interpretations of the User Agreements, Table 11 below reflects this study's interpretation of the contractual language.

[566] *Twitter Terms of Service*, TWITTER, *supra* note 523.

[567] *Id.*

TABLE 11. LICENSES TO SHARE VIA INTRAPLATFORM AND INTERPLATFORM

	Intraplatform sharing by platform	Intraplatform sharing by other users	Interplatform sharing by platform	Interplatform sharing by other users
YouTube	☑	☑	☑	☑
Facebook	☑	☑	☑	☑
Instagram	☑	☑	☑	☑
Twitter	☑	☑	☑	☑
Pinterest	☑	☑	Ambiguous	Ambiguous
TikTok	☑	☑	☑	☑

Legend: [Green Check] = sharing is allowed; [Orange Check] = sharing is allowed but is restricted by the user's privacy setting; [Yellow Check] = sharing is allowed but has been qualified or restricted to sharing as enabled by a feature of the Service.

All six of the studied platforms allow intraplatform sharing by both the platform and other consenting users, subject to a few conditions. This finding is consistent with the reality that sharing is part and parcel of the social media "experience," and has contributed to the thriving of social media.[568] Thus, it would be strange if a platform disallowed sharing among users within the platform.

Interestingly, five of the six analyzed platforms also allow interplatform sharing by the platform itself. This is a fair interpretation—and not surprising—considering the platforms require users to grant the platform a license to exercise at least five of the subscriber's exclusive rights in posted content. As discussed above, some platforms qualify such license, but the licenses are broad and include no limitation as to where the content can be shared (*i.e.*, within the platform, between platforms, or entirely outside any social media platform).

Of the six studied platforms, Pinterest is arguably the only exception. Pinterest users grant third-party users the same rights it grants Pinterest: to "use, store, display, reproduce, save, modify, create derivative works, perform, and distribute . . . Content *on Pinterest*." Thus,

[568] *See supra* Chapter 2.

Pinterest's User Agreement certainly allows for intraplatform sharing for both the platform and other consenting users, but it is ambiguous as to whether the User Agreement allows interplatform sharing. That is, it is unclear as to whether the clause "on Pinterest" refers only to the specific, posted content—as in the licensed rights apply only to content posted on Pinterest, but without limitation otherwise—or whether it serves as a restriction on the rights granted—as in Pinterest and other users can only use the content while engaging in permitted social-media activities on the Pinterest platform. Thus, interplatform use of posted content by either Pinterest or another user is not expressly prohibited, but the issue remains ambiguous.

Aside from Pinterest, it is clear that the other five studied platforms allow interplatform sharing by other users. TikTok's policy is the least restrictive. TikTok's User Agreement state that TikTok users may "extract all or any portion of User Content created by another user to produce additional User Content. . . . and transmit [it] through the Services." This can be interpreted to allow for intraplatform sharing of content by other users. Additionally, a TikTok user must grant the platform the right to authorize others to "transmit your User Content in any format *and on any platform, either now known or hereinafter invented*."[569]

Although Twitter's User Agreement only requires the consenting user to expressly grant licenses in posted content to the platform, Twitter summarizes its license as follows: "This license authorizes us to make your content available to the rest of the world and *to let others do the same*."[570] Additionally, Twitter expressly addresses embedding in their Privacy Policy:

> *By publicly posting content, you are directing us to disclose that information . . . including through our APIs, and directing those accessing the information through our APIs to do the same.* To facilitate the fast global dissemination of

[569] *Terms of Service*, TIKTOK, *supra* note 523 (emphasis added).

[570] *Twitter Terms of Service*, TWITTER, *supra* note 523.

> Tweets to people around the world, we use technology like . . . *embeds* to make that information available to websites, apps, and others for their use— for example, *displaying Tweets on a news website* . . . .[571]

Thus, Twitter expressly allows intra- and interplatform sharing by both the platform and other users. Since the paragraph includes the language "by public posting," intra- and interplatform sharing on Twitter has been categorized as restricted by a user's privacy settings depicted above in Table 12.

Instagram's and Facebook's User Agreements allow intra- and interplatform sharing by the respective platforms themselves and by other users, consistent with a user's privacy settings. For example, Facebook's User Agreement expressly states that Facebook is allowed to "store, copy, and share" the user's content with others, including service providers and other Meta Products used by the user.[572] Thus, Facebook is allowed to share a consenting user's posted content both intra- and interplatform. Instagram's Data Policy states that users should be cautious of content they designate as *public* because other users can "choose to share it with others on and off our Products."[573] Additionally, the Data Policy states that public content "can be seen, accessed, *reshared* or downloaded through third-party services such as search engines, APIs, and offline media such as TV, and by apps, websites and other services that integrate with our Products."[574] Facebook's Data Policy includes similar language.[575] Thus, other Facebook users are authorized to share public content intra- and interplatform.

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[571] *Twitter Privacy Policy*, TWITTER (Aug. 19, 2021) https://twitter.com/en/privacy (emphasis added).

[572] *Terms of Service*, FACEBOOK, *supra* note 523.

[573] *Data Policy*, INSTAGRAM: HELP CENTER https://help.instagram.com/519522125107875/?maybe_redirect_pol=0 (Jan. 4, 2022).

[574] *Id.*

[575] Include Facebook's language here. *Terms of Service*, FACEBOOK, *supra* note 523.

YouTube allows third-party users to use and share a consenting user's content intra- and interplatform, as well, but subject to certain, specified conditions. As mentioned above, YouTube's User Agreement mention that third-party users may use and share a consenting user's content but only as enabled by a feature of YouTube, "such as video playback or embeds."[576] However, YouTube clarifies that "this license does not grant any rights or permissions for a user to make use of your Content independent of the Service."[577] YouTube does not include this limiting language in regard to YouTube's own authorization to share its consenting users' posted content.

Conclusion

As one of my law professors says: "There is no such thing as a 'standard form license agreement.'"[578] As the analysis in this chapter has shown, that is indeed the case for the licenses granted by users under social media platforms' User Agreements. The only two platforms whose language were mimetic were Facebook and Instagram, which can easily be explained by the fact that both are now owned by the same company.[579] The language in all of the other studied platforms' User Agreements were different from those of Facebook and Instagram and different from each other.

Of the six analyzed platforms, none claims ownership of a consenting user's posted content. But all six of the platforms require users to grant the platform a license to exercise at least five of the exclusive rights in the user's content. It should be noted that licensing only

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[576] *Terms of Service*, YOUTUBE, *supra* note 523.

[577] *Id.*

[578] Professor M. Christopher Bolen, Adjunct Professor of Law, University of North Carolina School of Law.

[579] *What Are Meta Products?*, FACEBOOK: HELP CENTER https://www.facebook.com/help/1561485474074139

works to the extent that a user holds rights that can be licensed. Thus, although users are required to grant broad licenses to the platforms to use posted content, users only do so to the extent they hold any rights in the content that they post in the first place.

Some platforms qualify that license based on a user's privacy settings or the platform's business purpose, but the licenses remain broad and ill-defined. On the other hand, only three of the studied platforms expressly grant rights to third-party users or identify other users as third-party beneficiaries. Aside from TikTok, YouTube, and Pinterest, the three other platforms are silent as to whether other users are granted licenses to any of the exclusive rights in the content the consenting user posts.

Although most licenses granted in the six studied platforms' User Agreements have a limited duration, three of the platforms' language is ambiguous as to when the licenses end. Only one platform's User Agreement—TikTok's—define licenses granted therein as perpetual. Facebook and Instagram have the most explicit duration, specifying the licenses end whenever a user deletes posted content from the platform. However, both platforms explicitly state that content is not automatically deleted, and the licenses persist in a user's content that others have already shared at the time of termination. Thus, a license may still survive, albeit in a confined manner, even after a user has taken steps to delete their content in effort to terminate the license.

All six of the studied platforms' User Agreements allow intraplatform sharing by the platforms themselves and by other users. Three platforms restrict intrasharing based on a user's privacy settings, while one restricts intrasharing as enabled by a feature of the service. Aside from Pinterest, one can conclude that the remaining five studied platforms allow interplatform sharing to some extent by the platform and by other users.

As with intraplatform sharing, interplatform sharing can be restricted based on a user's privacy settings or a feature of the service. Only Pinterest's language was ambiguous as to whether it allows interplatform sharing by the platform or other users. The results of this research question are consistent with the district courts' analysis in *Sinclair v. Ziff Davis*.[580] As discussed in Chapter 6, the district court in *Sinclair* found that the plaintiff, by agreeing to Instagram's User Agreement, had authorized Instagram to grant third-party users of the platform's API a sublicense to embed content interplatform.[581] Although the *Sinclair* court ultimately found there was insufficient evidence that Instagram exercised its right to grant a sublicense to the defendant,[582] the *Sinclair* court's analysis and the findings of this chapter demonstrate that the respective User Agreements of five out of the six studied platforms—including Instagram's—allow interplatform sharing by third-party users.

[580] 454 F. Supp. 3d 342, 344 (S.D.N.Y. 2020).

[581] Sinclair v. Ziff Davis LLC, No. 18-CV-790, 2020 WL 3450136, at *1 (S.D.N.Y. June 24, 2020). The results of this research are also partly consistent with the most recent decision in *McGucken v. Newsweek*, finding that a reasonable factfinder could conclude Instagram's User Agreement grants third-party users sublicenses to embed content interplatform. No. 1:19-cv-09617, slip op. at 14–18 (S.D.N.Y. 2022). However, the court also found that a reasonable factfinder could conclude Instagram's User Agreement *did not* grant such sublicenses. *Id.* at 18.

[582] Sinclair v. Ziff Davis LLC, No. 18-CV-790, 2020 WL 3450136, at *1 (S.D.N.Y. June 24, 2020).

CHAPTER 8: EMBEDDING, COPYRIGHT LAW, AND USER AGREEMENTS

RQ_4: What does the permissibility of embedding copyrighted content, the facilitation of embedding by platforms, and the licenses granted in a platform's User Agreement suggest about the future of embedding as a content-sharing tool?

To address this question, this study analyzed the findings of RQ_1, RQ_2, and RQ_3 in light of the value of shareability and purposes of copyright law. Section 8.1 of this chapter discusses the findings of the legal case analysis (RQ_2). Sections 8.2 discusses the findings of RQ_1 and RQ_3 together. Finally, Section 8.3 analyzes the study's overall findings in light of the value of shareability and purposes of copyright law.

As discussed in Chapter 2, a change to copyright's ecosystem—which includes not only the law, but also norms, market forces, and platform architecture—can impact society's content-sharing behaviors.[583] This study focused on two main constraints: law and architecture. Identifying changes in interpretation of copyright law that may destabilize embedding as a content-sharing tool is therefore essential to inform policymaking.

Although changes in intellectual property law can affect society's exchange of information and culture production, copyright law can have an outsized impact in the cultural industries because copyright law creates artificial scarcity of cultural goods by limiting the right to copy.[584] To assess an emerging change in copyright law, this study conducted a legal case analysis of statutory interpretation of the relevant sections of the Copyright Act. As discussed in

[583] *See supra* Chapter 2.

[584] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 164–65 (4th ed. 2019).

Chapter 6, this study analyzed what the prevailing jurisprudence under the 1976 Copyright Act suggests about whether embedding of copyrighted content via major social media platforms constitutes an infringement of the public display right. The findings are briefly summarized below, followed by a discussion.

8.1 RQ_2 Findings and Discussion

Recent developments in judicial interpretation of copyright law suggest copyright could impact to free embedding, transforming a content-sharing tool from free to fared.[585] Several recent district court cases—like *Jackson*, *Goldman*, and *Nicklen*—have rejected the Ninth Circuit's server test and have found that embedding copyrighted content could constitute copyright infringement. If appealed and upheld by the Second and Seventh circuit courts, this could create a circuit split on the correct interpretation the display right. The 1976 Copyright Act defines "display" as "to show a copy" of the copyrighted work.[586] The crux of the split in the above interpretations of the Copyright Act is whether "to show a copy" of the work requires the physical possession of a copy (server test) or simply a transmission of a copy ("incorporation test"[587]). On the one hand, under the server test, the Ninth Circuit interprets a violation of the display right as necessitating possession of a copy of the copyright work. Advocates of the incorporation test have argued that the server test collapses the display right into the reproduction

[585] *See, e.g.*, Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998) (proposing that "fared use would subject copyrighted material in a digital intermedia to a reciprocal quasi-compulsory license").

[586] 17 U.S.C. § 101.

[587] *See, e.g.,* Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007); Daniel Reinke, Note, *The Incorporation Test: Putting the Public Display Right Back Online*, 47 AIPLA Q.J. 579, 590 (2019).

right by deeming possession of a copy a necessary element of the display right.[588] The Ninth Circuit explicitly rejected this argument in *Perfect 10*.[589] In contrast, if adopting the incorporation test's interpretation of the Copyright Act in the event of a circuit split, the Second and Seventh Circuits would interpret a violation of the display right to require only a transmission of a copy of the work.

This difference in interpretation has a direct effect on whether embedding can constitute a violation of the display right. As scholars have noted, *Perfect 10*'s server rule "effectively immunized" intra- and interplatform sharing "from direct infringement claims because, while the practices do result in the generation of new online displays of the shared content, they do not generate additional copies of that content."[590] In contrast, a violation of the display right under the incorporation test would only ask whether the alleged infringer (1) transmitted a display of the copyrighted work (2) by means of any device or process.[591] If this jurisprudential trend takes hold, it may impact content sharing online absent an applicable defense or exception because an interpretation of the display right that only requires the transmission of a copy of the work could

[588] Daniel Reinke, Note, *The Incorporation Test: Putting the Public Display Right Back Online*, 47 AIPLA Q.J. 579, 595 (2019) ("However, by requiring possession on the defendant's server of the infringing work, the server test violates this canon of construction and conflates the public display right with several other exclusive rights which do require possession such as the distribution, reproduction, or public performance rights.").

[589] Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146, 1161 (9th Cir. 2007) ("Nor does our ruling that a computer owner does not display a copy of an image when it communicates only the HTML address of the copy erroneously collapse the display right in section 106(5) into the reproduction right set forth in section 106(1). Nothing in the Copyright Act prevents the various rights protected in section 106 from overlapping.").

[590] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 443 (2019)

[591] *Id.*

threaten not only interplatform sharing, but also intraplatform sharing, since intraplatform sharing still results in a transmission of the work, albeit within the platform.[592]

As shown by the findings in Chapter 6, fair use may not be a practical or predictable defense to protect embedding. To begin with, of the four cases that considered whether embedding constituted fair use, a few predictable patterns emerge. All four cases seemed to demonstrate that whether the embedded image is transformative depends on whether the accompanying article reports on the contents of the picture rather than the publication of the picture itself. Additionally, market harm seemed contingent on whether the embedded image was a potential substitute for the original work, but at least one court found the unlicensed embedding of a photograph to be harmful to its licensing market. Finally, two of the cases, *Nicklen* and *McGucken*, left the overall conclusion of fair use unresolved at the motion to dismiss stage, which is common in fair use cases.

Fair use cases must be decided on a case-by-case basis, instilling a measure of uncertainty and unpredictability in fair use outcomes. One court's conclusion that the embedding of a copyrighted image constituted fair use does not provide a blanket fair use defense to all embedding of copyrighted content. Although some scholars have rejected the notion that fair use is unpredictable,[593] there are too few fair use cases as applied to embedding for a reliable pattern to be drawn. Putting the lack of predictability aside, courts often treat fair use as a defense, making litigation a necessary precursor to fair use. Considering the volume of cultural material

[592] *Id.* at 444 ("One might define a 'share' or a 'retweet' as a retransmission of the original user's post—the sharing user essentially 'amplif[ies]' the initial broadcast by pushing the content out to an additional class of social media users. And the Supreme Court's decision in *American Broadcasting Companies v. Aereo* clearly indicates that the amplification of a preexisting broadcast constitutes an act of 'performance.'" (citing 573 U.S. 431, 438–43 (2014)).

[593] *See generally* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2015); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008).

online and ease with which content can be embedded, litigation is not an efficient remedy to determine hundreds of thousands—if not millions—of fair use claims from content embedders. Additionally, even if some instances of embedding are fair, social media platforms could still choose to disable all embedding features to avoid the legal and economic risk of secondary liability for copyright infringement.[594]

If the U.S. Supreme Court were to adopt the Ninth Circuit's server test, our inquiry would end here; embedding would not create a copy of the work and therefore, under the server test, would not be copyright infringement. On the other hand, if the Court were to adopt the incorporation test, embedding could constitute copyright infringement because it transmits a copy of the work, unless the use was considered fair, or another exception applied. Unfortunately, as previously noted, fair use would be a weak protector of embedding because it is a defense to a claim of copyright infringement, and it can only be evaluated on a case-by-case basis.

8.2 RQ_1 and RQ_3 Findings and Discussion

The uncertain state of copyright law regarding embedding stands in stark contrast to the platforms' User Agreements and technological features, which largely suggest that sharing content interplatform is not only permissible but also encouraged. This observation is not new;

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[594] For example, the company Printful refused a customer's design due to its "resemblance" to the Lay's logo, noting:

> We understand that this is a custom-made design, and you have intended it to fall under the fair use/parody laws, however, the design may not avoid infringement because of the close resemblance of the Lay's logo. Typically whether this sort of content falls under the fair use policy or parody laws can be determined in court. This may pose a risk for us as a business which we would like to avoid and which is why we have refused to print this design.

Aram Sinnreich (@aram), TWITTER (Jan. 12, 2022, 11:00 AM) https://twitter.com/aram/status/1481295051917443077.

Professor Corinne Tan outlined the inconsistencies between copyright law, User Agreements, and content-sharing technologies in her 2018 book *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features*.[595] This study has added to her research—and confirmed her conclusion—by focusing on one content-generative technology: embedding. Consistent with Tan's finding, Chapter 5 of this study illustrated how the platforms' designs facilitate embedding by providing built-in generators in their API and articles with step-by-step instructions on how to embed content on the platform. Additionally, Chapter 7 discussed how users grant broad rights to the platforms to make use of their content. It is less clear to what extent social media users grant exclusive rights to other users via the User Agreement, but a careful reading of the language in most of the studied User Agreements leads to an educated conclusion that other users are free to share public information interplatform. However, the language of these User Agreements is insufficiently clear such that reasonable minds can differ as to the correct interpretation of the contract.[596] Thus, the contractual language of a platform's User Agreement is in large part unreliable as a defense to embedding because of its ambiguity.

8.3 Analysis

As discussed in Chapter 3, the U.S. Constitution, U.S. Supreme Court, and several scholars agree that copyright law's purpose is to promote knowledge production and the progress of cultural and intellectual works. According to this policy justification, copyright law should provide enough protection to authors to incentivize new creation, but only do so to the extent that

[595] *See generally* CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES (2018).

[596] *See* McGucken v. Newsweek, No. 1:19-cv-09617, slip op. (S.D.N.Y. Mar. 21, 2022).

it does not hinder cultural production. These values may be in conflict, as the findings in this study illustrate.

While platforms have been facilitating embedding, emerging copyright jurisprudence threatens to change a free content-sharing tool into a fared content-sharing tool, restricting access to shareability to some portion of the population. That is not to say that copyright law is the antithesis to creation. Hesmondghalgh notes that creativity and commerce are not opposites; in fact, "some eye-opening, thought-provoking, funny and lovely works of culture have been produces as part of highly commercial systems."[597] However, Hesmondghalgh also argues that extensions to the scope and duration of copyright puts the private profit of copyright holders, most often corporations, ahead of the common good.[598]

Nonetheless, creators should be paid for their work,[599] and sharing does not have to be a negation of a creator's proprietary rights. Litman supports this argument, noting that sharing does not diverge with the purpose of copyright.[600] According to Litman, "widespread dissemination" of cultural works is just as much a purpose of copyright as "initial creation."[601] Although copyright law has advanced those goals by commodifying copies, Litman argues it is "exactly backward" to restrict widespread dissemination when sharing may be a more effective way to disseminate cultural works. [602] Afterall, copyright's purpose according to the U.S.

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[597] DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES 33 (4th ed. 2019).

[598] *Id.* at 169.

[599] *Id*.

[600] Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 30–31 (2004).

[601] *Id.*

[602] *Id.*

Supreme Court is to find the right balance between incentivizing creation, but also feeding the public domain.

If the jurisprudential shift discussed in Chapter 6 takes hold and embedding can constitute a violation of the display right, content-sharing via embedding may change in three ways. First, users would have to obtain a license from copyright holders to embed content or face copyright infringement liability, absent a fair use defense or other exception. Such licensing requirement could destabilize content-sharing via embedding because it would either (1) require users to pay for a license or (2) exclude users from embedding at all. In an extreme scenario, a change from free embedding into fared embedding could be a change into no embedding at all.

Second, if embedding violates the display right, social media platforms may cease to facilitate embedding. As seen in *Hunley v. Instagram*, discussed in Chapter 6, some litigants have argued that platforms are secondarily liable for copyright infringement because their embedding tool enabled others to display content from the platform onto third-party websites.[603] Whether online intermediaries can be held secondarily liable for the embedding of third parties relies first on an affirmative holding that embedding constitutes copyright infringement. Since the district court in *Hunley* applied the server test, it found there was no direct infringement for embedding and therefore no secondary liability.[604] No other court has analyzed this issue in the context of embedding. However, if the server rule were to be reversed and the incorporation test to be adopted, platforms that facilitate embedding by design could face increased claims of secondary liability and opt to remove embedding tools from their API to minimize such claims. For example, Instagram added the option to disable its embedding feature on public posts after a

[603] No. 21-cv-03778-CRB, 2021 WL 4243385, at *1 (N.D. Cal. Sept. 17, 2021).

[604] *Id.* at *1–*3.

concerted effort by two organizations in response to the '"the rampant problem' of third-parties using the embedding feature to bypass copyright protections."[605] Similarly, social media platforms could opt to disable the embedding tools from their API altogether if encouraged by public outcry or a change in the law that exposes them to liability.

Finally, social media platforms may alter their User Agreements to explicitly address embedding, either to expressly prohibit embedding from the platform or explicitly require consenting users to grant licenses to other, third-party users to embed posted content. If platforms were to opt for the latter, content creators may be hesitant to use a platform that requires them to grant other users such broad rights to their copyrighted content. However, as the findings in Chapter 7 illustrate, all users already grant the platform broad rights to use the content they post, and most users do not read the User Agreement to note the difference. Thus, a change in the User Agreements will likely not affect embedding practices online. Of course, this only ameliorates the problem when the user has rights in the posted content to grant in the first place. Nevertheless, in those instances where users have licensable rights, revising the User Agreement changes the viability of copyright infringement claims arising out of embedding of copyrighted work.

[605] Jaron Schneider, *Instagram Users Can Now Prevent Others from Embedding Their Photos*, PETAPIXEL (Dec. 17, 2021) https://petapixel.com/2021/12/17/instagram-users-can-now-prevent-others-from-embedding-their-photos/.

CHAPTER 9: LIMITATIONS, AREAS OF FUTURE RESEARCH, AND CONCLUSION

Before concluding, this chapter addresses the study's limitations and areas of future research.

9.1 Limitations

This study has two main limitations. The first limitation is the fact that a majority of the recent court cases being analyzed do not create binding precedent for future litigants because the opinions are district court opinions. This means that the rulings in each case only hold persuasive power to new cases brought before the court.[606] However, these opinions are still relevant because they suggest a possible shift in a legal doctrine that was previously settled. Additionally, these opinions can be appealed and the resulting decisions by the circuit courts of appeal will be binding, possibly resulting in circuit splits.

A second limitation to this study is its scope. As discussed above, other researchers have expanded their scope to study user-generated content in several different kinds of platforms, including but not limited to social media. Since recent court cases regarding embedding content and copyright infringement have involved social media platforms,[607] this study is mainly concerned with the technological affordances and User Agreements of those platforms that focus on the creation and exchange of user-generated content. With that being said, the legal analysis

[606] *See, e.g.*, Nat'l Union Fire Ins. Co. v. Allfirst Bank, 282 F. Supp. 2d 339, 351 (D. Md. 2003) ("No decision of a district court judge is technically binding on another district court judge, even within the same district; however, opinions of other district judges are persuasive authority entitled to substantial deference.").

[607] *See generally* Sinclair v. Ziff Davis, LLC, 454 F. Supp. 3d 342 (S.D.N.Y. 2020) (addressing whether Instagram grants users sublicenses to embed content); Boesen v. United Sports Publ'ns, Ltd., No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (addressing an Instagram post embedded on a sports news website).

as to whether unauthorized embedding of copyrighted content infringes on a copyright holder's exclusive rights is still relevant to platforms not addressed in this study because if unauthorized embedding of content constitutes copyright infringement, it may affect content-sharing practices across all platforms.

9.2 Areas of Future Research

The findings in this research have generated other research questions upon which future research can be built. In this section, this study discusses three main areas of future research: (1) rights of publicity in User Agreements; (2) user perception on the legality of embedding; and (3) effect of platforms' provision of embed codes on the frequency of embedding.

9.2.1 Rights of Publicity in User Agreements

As discussed in Chapter 7, this study focused strictly on the copyright terms of User Agreements. However, User Agreements could also require consenting users to grant platforms rights of publicity. For example, TikTok's User Agreement requires consenting users to grant the platform a "license to use your name, image, voice, and likeness to identify you as the source of any of your User Content . . . ."[608] A carefully crafted User Agreement that authorizes the platform to use the consenting user's identity for commercial gain can completely preclude the user from bringing a right of publicity infringement claim because consent is a complete defense to such a claim.[609] Thus, future research can expand on this study's latent content analysis of User Agreements to analyze whether consenting users are required to grant the platforms rights of publicity.

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[608] *Terms of Service*, TIKTOK, *supra* note 523.

[609] Cydney Tune & Lori Levine, *The Right of Publicity and Social Media: A Challenging Collision*, 35 LICENSING J. 13, 16–17 (2015).

9.2.2 User Perception of the Legality of Embedding

Recently, scholars have researched the relationship between the language in User Agreements and user perceptions of how their content can be used online.[610] Similarly, other ways to build upon the research in this study is to survey social media users on their perception of whether embedding infringes on copyright. Since some platforms facilitate embedding, others can build upon this research to see whether users make assumptions about the legality of a certain sharing practice based on a platform's facilitation of that practice.

9.2.3 Effect of Platforms' Provision of Embed Codes on the Frequency of Embedding

Finally, future empirical research can be done to analyze the effect of platforms' provision of embed codes on the frequency of embedding. Embedding has been possible for years because it relies on basic HTML. However, an open question is whether the embedding of images and videos has increased since platforms started providing embed codes. Although no small feat, empirical data addressing this question would better illustrate how the facilitation of embedding by platforms has impacted online shareability.

Conclusion

As social media's footprint has grown, users are now bumping up against the borders of copyright infringement when posting content online.[611] This study addressed three main concerns: (1) how many social media platforms facilitate embedding through their technological affordances; (2) current developments in the law that address whether unauthorized embedding of copyrighted content violates the Copyright Act; and (3) how many social media platforms

[610] *See* Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, CONF. ON COMPUT.-SUPPORTED COOP. WORK & SOC. COMPUTING, Feb. 2016, at 1450.

[611] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 5 (2018).

address the proprietary rights of users in user-generated content in the platform's User Agreement. Based on the findings from research questions 1, 2 and 3, this study analyzed whether copyright threatens free embedding, and what that suggests about embedding as a content-sharing tool.

As discussed in Chapter 3, copyright law's purpose is to promote knowledge production and the progress of cultural and intellectual works. And as the discussion in Chapter 2 illustrates, changes to copyright law, to platforms' architecture, or to established expectations of free content-sharing could have a destabilizing effect in the sharing of information.

Jurisprudential developments in copyright law are causing friction to embedding, an otherwise seamless, freely available content-sharing tool. Employing a legal case analysis of statutory interpretation of the Copyright Act, this study highlighted in Chapter 6 a new wave of district court decisions that have rejected the Ninth Circuit's server test and have found that embedding copyrighted content could constitute a violation of the display right. Namely, those district court cases held that actual possession of a copy of the work was not a necessary element for a violation of the display right, and therefore, embedding constituted a display. That same legal case analysis showed that the differentiation in the courts' analysis of fair use as applied to embedding cases creates more uncertainty than clarity. It also identified that social media platforms could risk increased claims of secondary liability if embedding can constitute an infringing display.

The research results from Chapter 5 and 7 demonstrate that the uncertain state of copyright law regarding embedding stands in stark contrast to the platforms' User Agreements and technological features, which largely suggest that sharing content interplatform is not only permissible but also encouraged. Employing a latent content analysis to six platforms' User

Agreements, Chapter 7 concluded most platforms' User Agreements allow for interplatform sharing (and therefore embedding) by other, third-party users. However, reasonable minds can differ as to the correct interpretation of the contractual language.[612]

Finally, Chapter 8 identified three main changes that may occur as a result of a shift in the judicial interpretation of the display right. First, users would have to obtain a license from copyright holders to embed content or they would face copyright infringement liability, absent a fair use defense or other exception. Free embedding would then turn into fared embedding, which could result in a rise of infringing behavior or a halt to embedding practices. Second, if embedding violates the display right, social media platforms may cease to facilitate embedding to minimize secondary liability for copyright infringement. Finally, social media platforms may alter their User Agreements to explicitly address embedding, either to expressly prohibit embedding from the platform or explicitly require consenting users to grant licenses to other, third-party users to embed posted content.

This study has provided foundational research to inform future policymaking proposals. A number of scholars have presented solutions to the problems identified in this study, such as advocating for judicial adoption of the incorporation test[613] or a statutory exemption for embedding.[614] Others have argued that current, already-existing protections such as the DMCA and express or implied licenses provide enough protection to content embedders such that a

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[612] *See McGucken.*

[613] *See* Daniel Reinke, Note, *The Incorporation Test: Putting the Public Display Right Back Online*, 47 AIPLA Q.J. 579, 592 (2019).

[614] *See* Jie Lian, *Twitters Beware: The Display and Performance Rights*, 21 YALE J.L. & TECH. 227 (2019).

reversal of the server rule would have minimal impact.[615] However, as theorized by Lessig, any changes in the modalities studied here (law and architecture) can affect the regulation of cyberspace, including online behavior. Although areas of future research remain open, this study has laid out the central considerations to any policymaking about embedding: copyright law, platforms' technological tools, and platforms' User Agreements.

[615] *See generally* Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417 (2019).

REFERENCES

CASES AND LEGAL DOCUMENTS

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2d Cir. 2001).

American Broadcasting Cos., Inc. v. Aereo, Inc., 573 U.S. 431 (2014).

Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Bell v. Wilmott Storage Servs., LLC, 12 F.4th 1065 (2021).

Boesen v. United Sports Publications, Ltd., No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020).

Boesen v. United Sports Publ'ns, LTD. No. 20-CV-1552, 2020 WL 7625222, at *3 (E.D.N.Y. Dec. 22, 2020).

BWP Media USA, Inc. v. Gossip Cop Media, LLC, 87 F. Supp. 3d 499 (S.D.N.Y. 2015).

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

Cartoon Network LP, LLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

Commonwealth v. Carrasquillo, No. 13122, slip op. (Mass. Feb. 7, 2022).

Complaint at Ex. A, McGucken v. Newsweek LLC, 464 F. Supp. 3d 594 (S.D.N.Y. 2020) (No. 1:19-cv-09617-KPF).

Complaint at Ex. B, Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 575 (S.D.N.Y. 2020) (No. 1:19-cv-4598).

Complaint at Ex. B, Boesen v. United Sports Publications, LTD, No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020).

Chapman v. N.Y. State Div. for Youth, 546 F.3d 230 (2d Cir. 2008).

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012).

Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248 (10th Cir. 2012).

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

Hunley v. Instagram, LLC, No. 21-cv-03778-CRB, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021).

Leader's Inst., LLC v. Jackson, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017).

Live Nation Motor Sports, Inc. v. Davis, No. 3:06-CV-276-L, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007).

Nicklen v. Sinclair Broadcast Group, Inc., No. 20-CV-10300, 2021 WL 3239510 (S.D.N.Y. July 30, 2021).

May v. Sony Music Entert., 399 F. Supp. 3d 169 (S.D.N.Y. 2019).

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, 545 U.S. 913 (2005).

McGucken v. Newsweek LLC, 464 F. Supp. 3d 594 (S.D.N.Y. 2020).

McGucken v. Newsweek, No. 1:19-cv-09617, slip op. (S.D.N.Y. Mar. 21, 2022).

Nat'l Union Fire Ins. Co. v. Allfirst Bank, 282 F. Supp. 2d 339 (D. Md. 2003).

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

Second Amended Complaint at Ex. 5, Nicklen v. Sinclair Broad. Grp., No. 20-CV-10300, 2021 WL 3239510 at *1 (S.D.N.Y. July 30, 2021).

Sinclair v. Ziff Davis, LLC, 454 F. Supp. 3d 342 (S.D.N.Y. 2020).

Sinclair v. Ziff Davis LLC, No. 18-CV-790, 2020 WL 3450136, at *1 (S.D.N.Y. June 24, 2020).

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

Specht v. Netscape Comms. Corp., 306 F.3d 17 (2d Cir. 2002).

TCA Television Corp. v. McCollum, 839 F.3d 168 (2d Cir. 2016).

Tillery v. D.C. Contract Appeals Bd., 912 A.2d 1169 (D.C. 2006).

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570 (S.D.N.Y. 2020).

STATUTES AND CONSTITUTION

17 U.S.C. § 101.

17 U.S.C. § 102.

17 U.S.C. § 106.

17 U.S.C. § 107.

17 U.S.C. § 114.

17 U.S.C. § 201(d).

17 U.S.C. § 301–305.

Act of Oct. 19, 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2598.

Act of April 11, 2018, Pub. L. No. 115-164, 132 Stat. 1253.

Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336 (codified as amended at 17 U.S.C. § 106(6)).

CAL. GOV'T CODE § 6218.05(g) (West 2022)

CONN. GEN. STAT. § 9-601(31) (2021).

FLA. STAT. § 501.2041(1)(g) (2021).

IND. CODE § 4-2-6-15.5(1) (2021).

KAN. STAT. § 25-4153a(c) (2021).

ME. REV. STAT. tit. 26, § 615.4 (2021).

OKLA. STAT. tit. 74, § 840-8.1A.1. (2021).

16 R.I. GEN. LAWS § 16-103-1(1) (2021).

TENN. CODE § 40-39-202 (2021).

TEX. BUS. & COM. CODE ANN. § 120.001(1) (West 2021).

U.S. CONST. art. I § 8 cl. 8.

NEWS ARTICLES AND ONLINE SOURCES

Aaron Moss, *Is It Legal to Embed Public Instagram Photos on Your Website?*, Copyright Lately (Sept. 10, 2020), https://copyrightlately.com/legal-embed-instagram-photos-website/.

Aja Romano, *A New Law Intended To Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom (Jul. 8, 2018, 1:08 PM).

Anthony Cuthbertson, *Who Controls the Internet? Facebook and Google Dominance Could Cause the "Death of the Web"*, NEWSWEEK (Nov. 2, 2017, 9:45 AM) https://www.newsweek.com/facebook-google-internet-traffic-net-neutrality-monopoly-699286.

Bill Donahue, *Mashable Settles Copyright Fight Over Instagram Embeds*, LAW360 (Feb. 10, 2021) https://www.law360.com/articles/1354269.

BROOKE AUXIER & MONICA ANDERSON, PEW RSCH. CTR., SOCIAL MEDIA USE IN 2021 (2021) https://www.pewresearch.org/internet/wpcontent/uploads/sites/9/2021/04/PI_2021.04.07_Social-Media-Use_FINAL.pdf.

Cristiano Lima, *No One Reads the Terms of Service. Lawmakers Want To Fix That with a New "TLDR" Bill*, WASH. POST (Jan. 13, 2022) https://www.washingtonpost.com/politics/2022/01/13/no-one-reads-terms-service-lawmakers-want-fix-that-with-new-tldr-bill/.

Data Policy, INSTAGRAM: HELP CENTER https://help.instagram.com/519522125107875/?maybe_redirect_pol=0 (Jan. 4, 2022).

Embed Videos & Playlists, YOUTUBE HELP https://support.google.com/youtube/answer/171780?hl=en#zippy=%2Cturn-on-privacy-enhanced-mode%2Cturn-off-embedding-for-your-videos.

Embed Videos: Introduction, TIKTOK FOR DEVELOPERS, https://developers.tiktok.com/doc/embed-videos#:~:text=You%20can%20get%20the%20embed,pictured%20in%20the%20following%20photo.&text=Once%20you%20have%20clicked%20on,the%20HTML%20code%20will%20prompt.

Evan Greer, *Want To Fix Big Tech? Stop Ignoring Sex Workers*, DAILY BEAST (Mar. 24, 2022, 4:48 AM) https://www.thedailybeast.com/want-to-fix-big-tech-stop-ignoring-sex-workers?via=twitter_page.

Harvard, *Linking, Framing, Meta Tags, and Caching*, Intellectual Property in Cyberspace (2000) https://cyber.harvard.edu/property00/metatags/main.html#Intro (last visited Mar. 15, 2022).

How Do I Embed a Video From Facebook Onto a Website?, HELP CENTER https://www.facebook.com/help/1570724596499071/?helpref=search&query=embed&search_session_id=bc2e55c64c51ca819e786f3e84525128&sr=0.

How To Embed a Tweet on Your Website or Blog, HELP CENTER, https://help.twitter.com/en/using-twitter/how-to-embed-a-tweet.

Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RSCH. CTR. (Oct. 19, 2017) https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/.

Jaron Schneider, *Instagram Users Can Now Prevent Others from Embedding Their Photos*, PETAPIXEL (Dec. 17, 2021) https://petapixel.com/2021/12/17/instagram-users-can-now-prevent-others-from-embedding-their-photos/.

John Martin, *Twitter Removing Embeds of Deleted Tweets May Threaten Journalism*, ITECHPOST (Apr. 07, 2022) https://www.itechpost.com/articles/109896/20220407/twitter-removing-embeds-deleted-tweets-threatens-journalism.htm.

Jon Porter, *Twitter Change Leaves Huge Gaps in Websites*, Verge (Apr. 6, 2022, 7:18 AM) https://www.theverge.com/2022/4/6/23012913/twitter-tweet-embeds-deleted-tweets-empty-iframe-broken.

Jonathan Bailey, *Is Your Website Published or Unpublished?*, PLAGIARISM TODAY (Apr. 7, 2022) https://www.plagiarismtoday.com/2022/04/07/is-your-website-published-or-unpublished/.

Jonathan Bailey, *Rethinking Embedding and Framing*, PLAGIARISM TODAY, (Mar. 23, 2021) https://www.plagiarismtoday.com/2021/03/23/rethinking-embedding-and-framing/.

Karl Bode, *New "TLDR" Bill Requires Companies Provide Synopsis of Overlong Predatory Terms of Service*, TECHDIRT (Jan. 14, 2022) https://www.techdirt.com/articles/20220113/11382448276/new-tldr-bill-requires-companies-provide-synopsis-overlong-predatory-terms-service.shtml.

Kiely Kuligowski, *How to Embed Social Media Feeds on Your Website*, BUS. NEWS DAILY https://www.businessnewsdaily.com/10673-embed-social-media-website.html#:~:text=Social%20media%20embedding%20is%20the,to%20organize%20your%20social%20media (last updated Feb. 28, 2020).

Links, HTML 4.01 SPECIFICATION (Mar. 27, 2018), https://www.w3.org/TR/REC-html40/struct/links.html.

Mike Masnick (@mmasnick), TWITTER (Apr. 6, 2022, 2:40 PM) https://twitter.com/mmasnick/status/1511775764881977349.

Most Popular Social Networks Worldwide as of October 2021, Ranked by Number of Active

Users, STATISTICA (Oct. 2021) https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018) https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html.

NOLO, *Connecting to Other Websites*, STAN. LIBRARIES https://fairuse.stanford.edu/overview/website-permissions/linking/ (last visited Mar. 15, 2022).

Patrick Shawn Hearn, *What Does Embed Mean?*, LIFEWIRE TECH FOR HUMS. https://www.lifewire.com/what-does-embed-mean-4773663 (last updated Dec. 2, 2019).

Ryne Hager, *Twitter's Changes to Embedded Tweets Are Putting Its News Reputation at Risk*, ANDROID POLICE (Apri. 6, 2022) https://www.androidpolice.com/twitter-delete-tweet-embeds/.

Social Media Fact Sheet, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/#which-social-media-platforms-are-most-common?menuItem=b14b718d-7ab6-46f4-b447-0abd510f4180.

Terms of Service, FACEBOOK, https://www.facebook.com/terms.php (Jan. 4, 2022).

Terms of Service, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/static?template=terms.

Terms of Service, TIKTOK, https://www.tiktok.com/legal/terms-of-service?lang=en (Feb. 2019).

Terms of Service, PINTEREST (May 1, 2018) https://policy.pinterest.com/en/terms-of-service.

Terms of Use, INSTAGRAM, https://help.instagram.com/581066165581870 (Jan. 4, 2022).

The Digital Services Act: Ensuring a Safe and Accountable Online Environment, EUROPEAN COMM'N https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment_en#which-providers-are-covered.

Timothy B. Lee, *Instagram Just Threw Users Of Its Embedding API Under the Bus*, ARSTECHNICA (June 4, 2020) https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/.

Toni Hopponen, *Why Do Brands Add Social Media Feeds to Websites?*, FLOCKER (Dec. 12, 2021) https://flockler.com/blog/social-media-feed-on-website-benefits.

Twitter Terms of Service, TWITTER (Aug. 19, 2021) https://twitter.com/en/tos.

Twitter Privacy Policy, TWITTER (Aug. 19, 2021) https://twitter.com/en/privacy.

Venkat Balasbramani, *Another Court Says Embedding Instagram Photos May Be Fair Use—* Boesen v. United Sports, TECH. & MKTG. L. BLOG (Dec. 7, 2020) https://blog.ericgoldman.org/archives/2020/12/another-court-says-embedding-instagram-photos-may-be-fair-use-boesen-v-united-sports.htm.

What Are Embeds on Instagram and How Can I Embed an Instagram Post or Profile?, INSTAGRAM: HELP CENTER https://help.instagram.com/620154495870484?fbclid=IwAR17VJdEtg289UdFAHMHQl_UFZoDUCzbFAFSGOem2H8hUb60MVXFJV2dsxE.

What Are Meta Products?, FACEBOOK: HELP CENTER https://www.facebook.com/help/1561485474074139.

BOOKS AND TREATISES

4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:82 (2022).

5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 15:7 (2021).

LICENSING OF INTELLECTUAL PROPERTY § 1A.01.

CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (8th ed. 2016).

CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES (2018).

DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES (4th ed. 2019).

JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008).

JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012).

JOHN DUCKETT, HTML & CSS: DESIGN AND BUILD WEBSITES (2011).

JOSÉ VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 8 (2013).

LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 (2d ed. 2006).

MADELINE SCHACHTER & JOEL KURTZBERG, LAW OF INTERNET SPEECH (3d ed. 2008).

MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012).

MARC URI PORAT, THE INFORMATION ECONOMY (1977).

PHILIP NAPOLI, SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE 8 (2018).

TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018).

TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE (2007).

YOKAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

SCHOLARLY ARTICLES

Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J.L. & POL'Y FOR INFO. SOC'Y 543 (2008).

Alexander Tsoutsanis, *Why Copyright and Linking Can Tango*, 2014 J. INTELL. PROP. L. & PRAC. 1, 3 (2014).

Andreas M. Kaplan & Michel Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59 (2010).

Anka Mihajlov Projopović, *Media and Technology: Digital Optimists and Digital Pessimists*, 16 PHIL., SOCIO., PSYCH. & HIST. 117 (2017).

Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008).

Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 (1999).

Chi Thi Phuong Duong, *Social Media. A Literature Review*, 13 J. MEDIA RSCH. 112 (2020).

Casey Fiesler, Cliff Lampe & Amy S. Bruckman, *Reality and Perception of Copyright Terms of Service for Online Content Creation*, CONF. ON COMPUT.-SUPPORTED COOP. WORK & SOC. COMPUTING, Feb. 2016.

Cydney Tune & Lori Levine, *The Right of Publicity and Social Media: A Challenging Collision*, 35 LICENSING J. 13, 16–17 (2015).

Daniel Reinke, Note, *The Incorporation Test: Putting the Public Display Right Back Online*, 47 AIPLA Q.J. 579, 590 (2019).

Deborah R. Gerhardt, *Copyright Publication on the Internet*, 60 IDEA: INTELL. PROP. L. REV. 1

(2020).

Henry Fraser, *The Disappointments of Networks*, 19 CHICAGO-KENT J. INTELL. PROP. 1 (2020).

Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RSCH. 1277 (2005).

Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053 (2016).

Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417 (2019).

Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004).

Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 YALE J.L. & TECH. 227, 235 (2019).

Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media*, 2018 SOCIAL MEDIA + SOC'Y 1.

Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO., COMMC'N & SOC'Y 128 (2020).

Jonathan A. Obar & Lior Magalashvili, The Clickwrap as Platform Governance: Assessing the Frequency of Manipulative Interface Designs During Digital Service Sign-Up 2 (Aug. 2, 2021) (unpublished paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898254.

Jonathan A. Obar & Steven S. Wildman, *Social Media Definition and the Governance Challenge—An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745 (2015).

Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133 (2017).

Leo Pascault, Bernd Justin Jutte, Guido Noto La Diega & Giuliana Priora, *Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online* Services, EUR. INTELL. PROP. REV. (June 15, 2020) (forthcoming).

Kevin M. Roessger, *Toward a Taxonomy of Meaning Making: A Critical Ltent Content Analysis of Peer-reviewed Publications in Adult Education*, 31 NEW HORIZONS ADULT EDUC. & HUM. RES. DEV. 4 (2019).

Kimberlianne Podlas, *Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement*, 6 HARV. J. SPORTS. & ENT. L. 41, 50 (2015).

Lawrence Lessig, *Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

Madeleine Patton, Note, *How To Protect Users' Copyright Rights in the Age of Social Media Platforms and Their Unread Terms of Service*, 53 U. S.F. L. REV. 463 (2019).

Marta Rocha, Note, *The Brewing Battle: Copyright vs. Linking*, 35 BERKELEY TECH. L.J. 1179 (2020).

Matt Meinel, Recent Development, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180 (2016).

Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2015).

Melissa de Zwart, *Contractual Communities: Effective Governance of Virtual Worlds*, 33 U. S. WALES L.J. 605 (2010).

Michael J. Lambert, *Examining the Embedding Evolution: Counseling Clients on Safely Embedding Copyrighted Materials,* 35 COMM. LAW. 7 (2020).

Michael L. Rustad & Thomas H. Koenig, *Empirical Study: Wolves of The World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431 (2014).

Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOLEDO L. REV. 1 (2021).

Mihajlo Babovic, Note, *The Emperor's New Digital Clothes: The Illusion of Copyrights in Social Media*, 6 CYBARIS INTELL. PROP. L. REV. 138 (2015).

Pamela Samuelson, *Digital Information, Digital Networks & The Public Domain*, *in* DUKE UNIV. L. SCH., CONFERENCE ON THE PUBLIC DOMAIN 80, 85 (2021).

Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over Ram "Copies"*, 2001 U. ILL. L. REV. 83, 127 (2001).

Richard A. Peterson & Anand Narasimhan, *The Production of Culture Perspective*, 30 ANN. REV. SOCIO. 311 (2004).

Rosaleen P. Morris, Note, *Be Careful to Whom You Link: How the Internet Practices of Hyperlinking and Framing Pose New Challenges to Established Trademark and Copyright Law*, 30 RUTGERS L.J. 247, 250 (1998).

Russell Newman, Victor Chang, Robert John Walters, & Gary Brian Wills, *Web2.0—The Past and the Future*, 36 INT'L J. INFO. MGMT. 591 (2016).

Subcomm. on Interactive Servs., Comm. on the L. of Com. in Cyberspace, *Web-Linking Agreements: Contracting Strategies and Model Provisions*, 1997 A.B.A. SEC. BUS. L. 1

Tatiana Leshkevich & Anna Motazhanets, *Digital Determination and Manipulative Strategies*, 329 ADVANCES SOC. SCI., EDUC. & HUMANS. RSCH. 1160 (2019).

Tarleton Gillespie, *The Politics of 'Platforms'*, 12 NEW MEDIA & SOC'Y 347 (2010).

Thomas Aichner, Matthias Grunfelder, Oswin Maurer & Deni Jegeni, *Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019*, 24 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 215 (2021).

Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

U.H. Graneheim & B. Lundman, *Qualitative Content Analysis in Nursing Research: Concepts, Procedures and Measures To Achieve Trustworthiness*, 24 NURSE EDUC. TODAY 105, 106 (2004).

Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814, 1825 (2011).

Wendy J. Gordon & Daniel Bahls, Symposium, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 621.

Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635 (2011).

Yannis Theocharis et al., *Does the Platform Matter? Social Media and COVID-19 Conspiracy Theory Beliefs in 17 Countries*, 2021 NEW MEDIA & SOC'Y 1, 3 (2021).

Yochai Benkler & Helen Nissenbaum, *Commons-based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006).

Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDALUS 18 (2016).