

Court Reviews Fair Use Protection for Publishers Embedding Social Media Posts

by Steve Kramarsky & John R. Millson

The early internet was created to facilitate the robust sharing of information among the research institutions and military facilities that were its first nodes. As the network grew, it retained that character and became the foundation for new ways to access and share information—including what we now know as the Web and various social media services. Almost all these services were designed around an ethos of making content as widely and easily accessible as possible, and in the social media world, an entire sharing economy arose, with its own “currency”—engagement (itself based on sharing and reposting).

Perhaps predictably, as these services have grown in scope and became more integral to everyday life, their character has transformed as well. While social media is still used to keep up with friends and family or explore personal interests, it has also become a primary source of news, commercial announcements, brand-building, and advertising for companies and individual “influencers” alike.

That change in character, from purely social communication to a mixture of the social and commercial, has had knock-on effects for courts applying traditional legal principles. Notably, the application of the Copyright Law has had to evolve in recent years to reflect the changes in the way social media is used. The increase in commercial use has caused some courts, including those in New York, to recognize a need to protect content owners even as the services themselves encourage sharing. On the one hand, the social media ecosystem generates a great deal of “newsworthy” content which, as discussed below, is a factor in determining whether use is permissible. On the other, the fact that content creators may retain an expected commercial interest in their posts may trigger enhanced Copyright protection. A recent case in the Southern District of New York analyzed those issues under the “fair use” doctrine. *Whiddon v. BuzzFeed*, 2022 WL 1655584 (S.D.N.Y. Oct. 31, 2022).

Embedded Content

The *Whiddon* case involved a claim that embedding screenshots of photographs from Instagram in a BuzzFeed article constituted copyright infringement. Much of the appeal of social media platforms comes from exactly that type of sharing. Content cannot become “viral” unless it is shared and re-shared, and social media platforms earn ad revenues and grow through widely-shared, user-generated content. Historically, embedded content was not viewed as a potential infringement. In a 2007 decision (*Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir., 2007)), the Ninth Circuit articulated the “server test” which held generally that publication, and thus infringement, could only occur from the server originally hosting the material and not from a mere link to that material, even if the link generated an image on

another site. Under the server test, BuzzFeed's embedding of an Instagram post in an article on its own website would not be infringement, because the original content was hosted on a separate server.

But a series of decisions from New York federal courts beginning in 2018 rejected the server test, holding that a link to content from another site *could* constitute re-publication and be the basis for an infringement claim. These cases analyze potential infringement under the fair use doctrine, and although the decisions thus far have nearly universally found embedded content to be non-infringing, the potential for a contrary result is very much alive.

The Fair Use Doctrine

Under §107 of the Copyright Act, the “fair use” of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research,” even without authorization, does not constitute infringement. 17 U.S.C. §107. Fair use is intended to encourage expressive forms by excepting uses intended to express new meaning from actions for copyright infringement. See *NXIVM v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004)

Courts consider four non-exclusive statutory factors when determining whether an otherwise infringing use is fair: the “purpose and character” of the new work; the nature of the copyrighted work; the amount and substantiality of the copying; and the potential impact on the market for the copyrighted work. The first factor, often considered the most significant, analyzes the “purpose and character” of the allegedly infringing work (here, the article that includes an embedded link to a social media post) to determine whether it is sufficiently different from the copyrighted work to label the use transformative. The court must determine what the creator of the allegedly infringing work intended to express, and whether that new work serves a purpose sufficiently different from that of the original work to be protected. Generally, there is a strong presumption in favor of the first factor “where the use serves to illustrate criticism, commentary, or a news story about that work” (as opposed to merely reproducing the work without commentary). *Barcroft Media, Ltd. v. Coed Media Grp.*, 297 F. Supp. 3d 339, 359 (S.D.N.Y. 2017).

But the determination of whether a use is “transformative” still requires a complex analysis of the purpose and character of the underlying work, and that can be challenging for a court, particularly in the context of social media. What is the “purpose” of a post by a social media “influencer,” who may have both social and commercial ends in mind? Judge McMahon’s analysis in *Whiddon* provides a detailed analysis of the current state of the law.

‘Whiddon v. BuzzFeed’

On June 6, 2022, Lindsay Grace Whiddon, a professional photographer based in Tennessee, brought an

action in the Southern District of New York alleging that BuzzFeed had infringed her copyright by embedding an Instagram post containing photographs she had taken of Tiffany Mitchell, a social media influencer posted three years earlier. The Instagram posts depicted Mitchell “posing in front of a motorcycle” and “being cared for in the aftermath of a motorcycle accident.” The Instagram post “generated a great deal of controversy on social media.” *Whiddon*, at *1.

In August 2019, BuzzFeed posted an article titled “An Influencer Is Defending Her Decision To Post a Photo Shoot of Her Motorcycle Accident on Instagram.” The article detailed Mitchell’s accident and discussed the social media controversy surrounding her post, including allegations that the accident was staged, that the post “glorified” the accident, and that the placement of a “SmartWater” bottle in one photograph suggested marketing and product placement in poor taste. The article embedded Mitchell’s Instagram post, displaying all three of Whiddon’s photographs.

Whiddon sued for infringement, and BuzzFeed moved to dismiss, arguing that its inclusion of the embedded content was protected by fair use. On Oct. 31, 2022, Judge McMahon granted BuzzFeed’s motion, holding that under the fair use doctrine, BuzzFeed was “obviously entitled to reproduce the photographs.” *Whiddon*, at *1-2.

First, the court considered the “purpose and character” of the use of the contested work, noting that “if the new work is ‘substantially transformative,’ the ‘other factors, including commercialism, are of less significance.’” *Whiddon*, at *5 (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)). The court considered two factors: whether the secondary use was “transformative” and whether it was “for commercial purposes.” As to the transformative element (which the court held was more significant), the court analyzed how the photographs were used in the BuzzFeed article.

The central inquiry was whether the photographs were used simply to “present the content of [those images]” or whether they enhanced the purpose of the article, which was to report on the controversy surrounding Mitchell’s Instagram post. The court held the latter, noting that “[b]y presenting the two sides of this controversy through the screenshots, the reader understands why the public ... reacted to the Post as it did.” In reaching that conclusion, the court noted that other courts in the Second Circuit had similarly found that “reporting on a controversial social media post is a sufficiently transformative purpose.” *Whiddon*, at *7 In short, because the *purpose* of the article was to report on a controversial event, the use of the copyrighted materials associated with that event was sufficiently transformative to outweigh the fact that BuzzFeed’s use was commercial. The court thus held that the first factor favored BuzzFeed.

Second, the court considered the “nature of the copyrighted work,” though it noted that factor “has rarely played a significant role” in the fair use analysis. The court noted that the photographs “clearly demonstrate features of creativity” and thus deserve some level of protection, but that “courts traditionally also afforded this factor little weight.” The court therefore found the second factor favored the plaintiff but it had “much less heft than the first.” *Whiddon*, at *9.

Third, the court considered “whether the quantity and value of the materials used, are reasonable in relation to the purpose of the copying.” The court found that, though *all* the copyrighted materials were used, that use was reasonable because all three photographs were necessary to provide the “full context of the subject of the controversy.” The court rejected plaintiff’s attempts to limit the scope of the permissible use. Plaintiff argued that “only the photograph displaying the SmartWater bottle was necessary to comment on the controversy about whether the Post was sponsored by SmartWater.” However, reviewing the article, the court noted that its subject was broader, covering several controversies arising out of Mitchell’s Instagram post. It held that, under those circumstances, “the need to convey information to the public accurately may ... make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration.” *Whiddon*, at *9.

Finally, the court considered “the effect of the use upon the potential market for or value for the copyrighted work.” Here, the court found that the complaint failed to allege that plaintiff had plans to commercialize her photos, which she permitted to be broadly shared on Instagram, particularly where plaintiff waited three years after the article was published to bring an action. The court distinguished the present case from a 2018 case finding that a photographer had the right to sell photographs of Donald Trump attending a wedding at Mar-a-Lago to “media outlets writing about the story.” *Otto v. Hearst Commc’ns*, 345 F. Supp. 3d 412, 432 (S.D.N.Y. 2018). Unlike in *Otto*, the court found that, at the time Whiddon took the photographs of Mitchell, she had no intention of licensing or marketing the photographs, there was not market for them, and there was no social media controversy about her, and thus no “market” for the photos in that context. Once the controversy arose, the court noted that it is unlikely Whiddon would have wanted to license her photographs for use in articles “raising public awareness of a controversy surrounding her friend” that would have subjected them both to “significant online controversy.” The court noted that, where a plaintiff has not intention to enter the market, the fourth factor weighs in favor of the defendant. On that basis, it held that the fourth factor favored BuzzFeed, and because three of four factors (including the important first factor) favored fair use, the court granted BuzzFeed’s motion to dismiss.

Marking to Market

The court’s analysis on the first three factors is consistent with recent analyses in the Second Circuit of similar claims involving embedded social media posts, though it is interesting that the court viewed the fair use issue as sufficiently settled to refer to the outcome as “obvious.” (Other courts reaching similar conclusions have been more circumspect and found that the issue was a close call.)

However, the court’s analysis of the fourth factor was of interest. As the court noted, there is some precedent for the idea that, fair use aside, artists should be entitled to some form of compensation for their work where there is a reasonable commercial market for stories about it. In finding that the photographs

in *Otto* were protectable and those in *Whiddon* were not, the court appears to be relying, at least in part, on the *original* purpose of the work. In the court's view, the *Otto* photographs were taken with commercial intent and the knowledge that there would be a market for photographs of Donald Trump's at a wedding. On the other hand, the *Whiddon* photos were taken for a friend to share widely, without compensation, on Instagram. The potential market developed only later, when the controversy arose, and the court held that Whiddon would have been unlikely to participate in that market for her own reasons.

That may seem a strange result at first blush. Why should it matter when the market developed or whether the photographer would have licensed them for a given article? The Copyright Act refers to the effect on the "potential market" for the work, so it is not obvious from its text that the timing should make a difference. But on further consideration of the purposes of Copyright law (and specifically the fair use exception), the court's logic makes sense. As hard as it may sometimes be to recall, intellectual property law is designed to promote and incentivize the creation and appropriate use of content. The photograph in *Otto* would likely never have been taken if not for the photographer's ability to license the work; the *Whiddon* photographs were taken to allow them to be shared on Instagram, a purpose that was accomplished regardless of BuzzFeed's use (and one that may even be promoted by it). The court's decision in *Whiddon* maximizes expression and encourages commentary and discussion, without depriving the artist of any incentive to create. That is, or should be, the ultimate goal of copyright law.

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