

Embedded Videos — Fair Use or Infringement? What the Latest Court Decision Means for Publishers

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In early December 2025, the Southern District of New York issued a decision in *Level 12 Productions, LLC v. Mediaite, LLC*. The holding highlights a growing risk for publishers and businesses that use embedded social media content in their online publications – a widely used practice among a multitude of media companies.

This case concerns two videos created by journalist Brendan Gutenschwager, both of which are owned by Plaintiff Level 12 Productions. Defendant Mediaite embedded these videos in articles without obtaining licenses from the plaintiff. The first video showed an anti-immigration rally outside New York City's Gracie Mansion; the second captured celebrity couple Chrissy Teigen and John Legend walking through a protest at a White House Correspondents' Dinner. Mediaite's use of the latter video also included commentary by pundit Megyn Kelly during the playing of the video. Both videos were registered with the U.S. Copyright Office. Mediaite argued that its embedding of these videos did not constitute infringement under the Ninth Circuit's "server test" and claimed its use was fair use. The Ninth Circuit's "server test" doctrine holds that a website does not infringe when it embeds protected material hosted on a third-party server, because the site never creates or stores a copy of the work. Instead, a user's browser is merely directed to retrieve it from its original source. In other words, embedded video is considered to be equivalent to linking to a source rather than a public display as defined by the Copyright Act. The Second Circuit has previously declined to adopt the Ninth Circuit's server test in prior disputes involving similar uses of embedded video.

Judge Vargas followed the Second Circuit's precedent, rejecting the server test and reaffirming that embedded video constitutes a public display under 17 U.S.C. § 101 even if the content itself is hosted on a third-party server. Regarding fair use, the court reached different conclusions for the two videos. In video one, the court did not overturn the lower court's holding, which found no fair use. For video two, however, the court held that Mediaite's use was fair, since Mediaite embedded the copyright-protected video in a manner featuring Megyn Kelly's commentary on the same, and thus the copyright-protected material was effectively transformed.

The fact that media publishers cannot rely on the Ninth Circuit's server test in the Second Circuit, while not surprising, remains significant, as it limits publishers' ability to embed media in online publications without a license. On the other hand, this holding does little to affect either Circuit's application of highly contextual fair use analyses. Courts will still look for a transformative purpose to establish that a use is fair.

For publishers and media outlets, the takeaway is clear: audit your embedding practices and treat embedded social media content as you would any other copyrighted material. When in doubt, secure a license, especially if the embedded content is central to your story but not the subject of commentary.

