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Court rules embedded photos on websites may constitute copyright infringement

Goldman v. Breitbart News Network LLC, 2018 WL 911340 (S.D.N.Y. 2018)

A New York federal Court has recently ruled that embedding a photograph contained in a social media posting on a third party website could result in a copyright infringement liability, raising questions as to how internet users may interact with different platforms moving forward. In *Goldman v. Breitbart News Network LLC*, Judge Katherine B. Forrest found that several news outlets acted in violation of a photographer's copyright when they embedded a tweet displaying the photographer's image on their own webpages. As the practice of embedding tweets and other social media postings on websites has become commonplace, this ruling has garnered reactions from various stakeholders as to the potential ramifications of the ruling moving forward. Although the practical implications of this ruling remain to be seen, and the outcome of an appeal is as yet unknown, this decision does reflect the ongoing conflict between rapidly evolving technologies and the legal system's inconsistent attempts at keeping pace.

The hotly disputed question in *Goldman* was whether defendants' embedding of the photograph on their own webpages constituted an infringement of Goldman's copyright, which gives Goldman the exclusive right to display his photograph (among other exclusive rights), even though defendants did not at any point download and copy the image.

Background of the case

The facts underlying the case originated in July 2016. Plaintiff Justin Goldman took a photograph of NFL player Tom Brady, basketball executive Danny Ainge, and others on a street in East Hampton, New York. Goldman uploaded the photograph to his personal Snapchat Story which quickly went 'viral' as the photograph was repeatedly 'shared' on multiple social media platforms, including Twitter.

Online news outlets and blogs subsequently published articles discussing whether Tom Brady was assisting the Boston Celtics in recruiting basketball player Kevin Durant. Many of the articles featured Goldman's Snapchat photograph in the form of an embedded tweet. Goldman took issue with this use of his photograph and brought a copyright infringement suit against those online news outlets and blogs.

Assessing the potential impact of the decision requires a basic comprehension of the technical process of 'embedding.' Embedding is the process that allows a webpage to display an image that is hosted on a third party server, essentially providing a link to the image on a third party website. As a result, the user views the webpage in its entirety, but the images themselves may be hosted on a third party site.

In *Goldman*, the Court provided the following explanation as to the technical process of embedding: "A webpage is made up of a series of instructions [...] These instructions are saved to a server [...] and when a user wishes to view a webpage, his or her computer's browser connects with the server [...] [that] instructs the browser on how to arrange the webpage on the user's computer [...] When including a photograph on a webpage [...] the HTML code [from the server] could instruct the browser either to retrieve the photograph

from the webpage's own server or to retrieve it from a third party server."

The hotly disputed question in *Goldman* was whether defendants' embedding of the photograph on their own webpages constituted an infringement of Goldman's copyright, which gives Goldman the exclusive right to display his photograph (among other exclusive rights), even though defendants did not at any point download and copy the image. Rather, defendants provided a link to the original image on their own webpages as it was posted on Twitter; however, the image itself could be seen on defendants' websites.

In considering different technology, courts have applied various tests to determine whether the repurposing of copyrighted images online constitutes infringement. As technology has evolved, lawyers have sought to apply those tests to the technology at hand.

The 'Server Test'

A leading test is the 'Server Test.' It has been applied by different courts, and as argued by defendants, in seemingly analogous situations. The Server Test provides that when determining if a website publisher is potentially liable for copyright infringement based on the display of an image on its webpage, the core issue rests on whether the image is hosted on the publisher's own server, or whether it is embedded or linked from a third party server. It follows that where the image is merely embedded or linked from a third party server, under the Server Test, the webpage publisher is not liable for copyright infringement pertaining to that image.

The defendants in *Goldman* relied on a landmark Ninth Circuit decision in which the Server Test was applied. In *Perfect 10 v. Amazon.com, Inc.*¹, the Ninth Circuit considered a claim of infringement of the

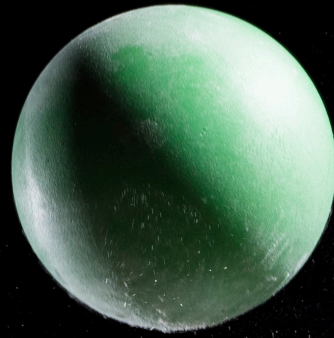
display right against Google based on the Google Image Search. There were two separate issues at play: whether the thumbnail images that are automatically displayed when a user conducts a Google Image search constituted infringement of the copyright owner's display right, and whether display of the full size images that appeared on the user's screen after clicking on the image constituted infringement of the copyright owner's display right. Importantly, the thumbnail images were stored on Google's server, but the full size images were stored on third party servers and linked on the Google search results through a process similar to embedding.

The *Perfect 10* Court held the thumbnail images to be infringing as they were stored on Google's server, and contrastingly found that the full size images stored on third party servers were not infringing.

The *Goldman* Court's decision

The defendants in *Goldman* implored the Court to apply the Server Test, consistent with the *Perfect 10* ruling. The Court, however, found the Server Test to be inapplicable based on the technology at issue. Instead, the Court focused on the way in which the potentially infringing image was presented to the user, as opposed to the behind-the-scenes technical way in which the image is stored. The *Goldman* Court interpreted the display right in the Copyright Act, finding that the statute does not at any point suggest that possession of an image is necessary in order to display the image.

In fact, the Court quoted the Copyright Act, defining displaying a work publicly as "to transmit [...] a [...] display of the work [...] by means of any device or process," and to transmit a display to mean to "communicate by any device or process whereby images or sounds are received beyond the place from



One party predicting “negative impact” is the Electronic Frontier Foundation (‘EFF’). It filed an *amicus brief* arguing that the abandonment of the Server Test would impact the “vitality of the Internet, and its utility as an engine of free expression and innovation.”

1. 508 F.3d 1146 (9th Cir. 2007).
2. The EFF describes itself as “a member-supported, non-profit public interest organization dedicated to protecting digital civil liberties and free expression.” Further, the EFF claims to promote “the sound development of copyright as a balanced legal regime that fosters creativity, innovation, and the spread of knowledge.”

continued

which they are sent.” Further, devices and processes are defined broadly to mean those “now known or later developed.” Based on these definitions, the Court found that the defendants “actively took steps to ‘display’ the image.” Thus, the Court found that copyright infringement ensued.

Specifically, the Court found 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,” and that “mere technical distinctions invisible to the user should not be the lynchpin on which copyright liability lies.” Therefore, the Court determined that the technical process of embedding and having an image stored on a third party server does not relieve the website publisher from copyright liability, as the webpage has actively utilised a process to display the image on its own webpage.

What is the real impact of the Goldman decision?

Depending on who you ask, this decision is either going to drastically and detrimentally affect the way in which the internet as a whole functions, or it is going to have a limited impact and simply allow copyright holders to protect their rights in the digital age.

One party predicting “negative impact” is the Electronic Frontier Foundation (“EFF”). It filed an *amicus brief* arguing that the abandonment of the Server Test would impact the “vitality of the Internet, and its utility as an engine of free expression and innovation².” The EFF proffered that in the analogue world, a person is able to direct another to a place where they can view a third party’s copyrighted work, and that embedding and in-linking merely reflects that same premise in the digital realm. The EFF argued that the Server Test provides a “straightforward application” of existing copyright principles and should continue to be applied in this case.

When examining the potential enduring impact of this decision, the EFF asserted

that a finding of copyright infringement in the context of embedding would have a drastic effect on the very function of the internet, specifically with regard to linking. The EFF argued that the Server Test provides a sense of certainty to internet users and website publishers with regard to potential liabilities when engaging in the widespread practice of linking and embedding content, and that abandonment of the Server Test would dramatically affect the way in which users interact with content on the internet.

In *Goldman*, however, the Court stated that it did not “view the results of its decision as having such dire consequences.” Specifically, the Court highlighted that numerous “strong defenses to liability” remain outstanding in the case, including questions of fair use, licensing and authorisation, and the overarching question as to whether Goldman “effectively released his image into the public domain when he posted it to his Snapchat account.”

Regarding the outstanding issue of authorisation, a distinguishing factor in this case may be that Goldman never authorised his photograph to be posted on Twitter in the first instance. Rather, Goldman privately shared this photograph to his Snapchat Story, and was subsequently unable to contain the way in which the photograph was distributed on Twitter and elsewhere. This could potentially be distinguished from a hypothetical case whereby a defendant embeds an image from Twitter that the photographer initially posted to the Twitter platform.

Although the true impact of this decision with regard to the manner in which internet users and website publishers interact with third party content remains to be seen, the abandonment of the Server Test has certainly put online news outlets and bloggers in a more precarious position regarding liability for copyright infringement. As it stands, those internet users that rely on the process of embedding in order

to feature certain content on their webpages are no longer able to rely solely on the Server Test as a protection against potential infringement actions, and the way in which embedding is perceived in the context of copyright infringement is, at best, uncertain.

Where to from here?

The Court, recognising the uncertainty created by its decision among online publishers and internet users, has certified its decision for interlocutory appeal to the Second Circuit.

Specifically, the Court noted the potential impact of its decision beyond the specific facts of this case, “given the frequency with which embedded images are ‘retweeted.’” The Court did leave open other issues, such as whether the defendants’ use of the photograph constituted “fair use,” whether the Digital Millennium Copyright Act insulated the defendants from liability, whether the image at issue was in the “public domain,” whether there were any implied or express licensing issues, and where there would be a limitation on damages based on innocent infringement.

The Court stated that although there are outstanding issues to be decided, that “the key issue in this case - whether there is copyright liability under the display right where a publisher ‘embeds’ an image hosted on a third party server - has already been decided,” and thus for the purposes of resolving this matter efficiently and providing clarity to online publishers and internet users, that it is proper to certify its decision for interlocutory appeal.

These issues will take some time to sort out. In the meantime, website publishers and internet users that regularly engage in the process of embedding other materials on their websites should keep abreast of the outcome on an interlocutory appeal in this case, in the hope of obtaining further clarity regarding the impact of the decision moving forward.