

Leading Internet Case Law Publishes Article by Andrew Lustigman and Morgan Spina on Copyright Infringement for Embedded Photos

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Olshan's Advertising, Marketing & Promotions Practice Group chair Andrew Lustigman and Olshan associate Morgan Spina published an article in *Leading Internet Case Law* entitled "Court Rules Embedded Photos on Websites May Constitute Copyright Infringement." Citing *Goldman v. Breitbart News Network, LLC* (decided in S.D.N.Y. in February 2018), a significant decision in which the Court ruled that the act of embedding a photograph contained in a social media post on a third party website may constitute copyright infringement, the article explores the ways in which this ruling affects how Internet users may interact with different online platforms. In the case, Judge Katherine B. Forrest found that several news outlets violated a photographer's copyright when they embedded a tweet displaying the photographer's image on their own webpages, a ubiquitous practice in the digital age. "Although the practical implications of this ruling remain to be seen," Mr. Lustigman and Ms. Spina explain, "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." They go on to describe the Server Test, which states 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." Despite the Server Test's bearing on a critical 2007 Ninth Circuit decision, the Court in the *Goldman* case found it inapplicable based on the technology involved. Instead, "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." The Court concluded that the defendants "actively took steps to 'display' the image," thereby infringing upon the photographer's exclusive copyright. Significantly defying the Server Test, the Court held that "mere technical distinctions invisible to the user should not be the lynchpin on which copyright

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liability lies.” The Court has certified its decision for interlocutory appeal to the Second Circuit, and Mr. Lustigman and Ms. Spina advise that “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.”