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IP FRONTIERS

Embedding a Tweet could now constitute copyright infringement

When we browse a website containing an image, that image may be retrieved from a third party, rather than from the author of the website. Sometimes, unbeknownst to the website author, the linked image infringes someone else's copyright in that image. U.S. copyright law protects all works of original expression, including images such as photographs, paintings, drawings and even computer graphics. Copyright protection attaches the moment the work is fixed in tangible form, whether fixed on paper, a canvas, or as a computer file. While registration of the copyright is preferred and provides several significant advantages, registration is not necessary for copyright protection to vest.

For more than a decade and originally from the 2007 Ninth Circuit case of *Perfect 10 v. Amazon*, courts have consistently held that when someone links to a third-party work that results in a copyrighted work being displayed, the linker isn't responsible for that infringement (unless they do something beyond just linking). In these circumstances, liability has resided with the entity that hosts the copyrighted work and not someone who simply links to the work, probably doesn't know it's infringing, and isn't ultimately in control of what content the server will provide when a browser contacts it. The "server test" thereby provides a clear and easy-to-administer rule to follow to avoid infringement, and has therefore served the foundation of the modern internet.

To fully appreciate the issue, an understating as to the process of viewing such embedded or linked content is helpful. When users visit a web page, their computers send a request to that web page's address for a text file written in "Hyper-Text Markup Language" (HTML). That HTML text file includes words to be displayed and web addresses of additional content such as images. HTML files are text only and don't contain images. They only reference images according to their web address via in-line linking. The server at the linked web address may transmit an image in response to such a request, but the original web page does not.

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In a departure from the well-established "server text" precedent, the U.S. District Court Southern District of New York ruled this past Thursday that one could infringe a copyright simply by embedding a tweet in a web page. The logic of the ruling applies to all in-line linking, not just embedding tweets, thereby reopening previously settled questions about whether a simple link to material uploaded or hosted by a third party can constitute copyright infringement. If adopted by other courts, this decision would threaten millions of ordinary internet users with copyright infringement liability.

The case[1] revolved around various websites, including that of Breitbart, Time, Yahoo, the Herald, the Boston Globe and the New England Sports Network. These website published stories with an embedded tweet containing a photo taken by Justin Goldman of NFL star Tom Brady, Boston Celtics general manager Danny Ainge and others on a street in 2016. Shortly after taking the photo, Justin Goldman uploaded the photo to Snapchat. The photo went viral, with others uploading it to Twitter. The various news organizations embedded the tweets from the third-parties with the photo/image in stories about whether the Celtics would successfully recruit basketball all-star Kevin Durant, and if Brady would help to seal the deal. Goldman, working with Getty Images, sued the news outlets claiming infringement in his copyright to the photo.

Judge Katherine Forrest rejected the Ninth Circuit's "server test" based, in part, on a surprising approach to the process of embedding. The opinion describes the simple process of embedding a tweet or image in a way that puts publishers, not servers, in the drivers' seat: "[W]hen defendants caused the embedded Tweets to appear on their websites, their actions violated plaintiff's exclusive display right; the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result."

In the opinion, Judge Forrest analyzed what Congress meant when it conferred display rights, saying lawmakers "cast a very wide net" even with technologies not yet invented. "The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the Copyright Act," the Judge writes. Forrest added, "Nowhere does the Copyright Act suggest that possession of an image is necessary in order to display it. Indeed, the purpose and language of the Act support the opposite

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view."

Judge Forrest then tackled *Perfect 10* and other copyright precedent that applied the "server test" to determine liability. The opinion points to how the defendants actively took steps to display the Tom Brady photo by including code in the design of their webpages. "In *Perfect 10*, Google's search engine provided a service whereby the user navigated from webpage to webpage, with Google's assistance," stated the opinion. "This is manifestly not the same as opening up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not. Both the nature of Google Search Engine, as compared to the defendant websites, and the volitional act taken by users of the services, provide a sharp contrast to the facts at hand." Judge Forrest also noted instruction from other copyright decisions, such as *ABC v. Aereo*, that one should not be absolved of liability upon purely technical distinctions.

Judge Forrest noted that outside of the Ninth Circuit (California and surrounding states), the "server test" has not been widely adopted. The Court was thereby free to either depart from the "server test" or hold that the "server test" is not applicable to the particular facts of this case.

Prior to the decision, the defendants warned that such a holding would "cause a tremendous chilling effect on the core functionality of the web." Indeed, the ruling could mean millions of people are now committing copyright infringement every day. This decision is sure to be controversial and could prove quite consequential, too — potentially disrupting the way that news outlets use Twitter and embed and link copyrighted content.

However, the decision doesn't necessarily mean the public has lost the ability to link and embed copyrighted material. In the opinion, Judge Forrest noted a number of unresolved strong affirmative defenses to liability. "In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account," Forrest writes. "Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement."

If this ruling is appealed (which is likely), the Second Circuit will have to consider whether to follow the *Perfect 10* "server test" or Judge Forrest's new rule.

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[1] Justin Goldman v. Breitbart News Network, LLC, Heavy, Inc., Time, Inc., Yahoo, Inc., Vox Media, Inc., Gannett Company, Inc., Herald Media, Inc., Boston Globe Media Partners, Inc., and New England Sports Network, Inc., Case No. 1:17-cv-03144-KBF. The decision can be found at https://www.eff.org/files/2018/02/15/goldman_v_breitbart_-_opinion.pdf