Twitter Infringement

Feb 23, 2018

Categories:

Publications

If you embed a tweet on your website, you could be committing copyright infringement by violating a copyright owner's exclusive display right. At least that is what a federal court in the Southern District of New York ruled on February 15, breaking with existing precedent. The decision is significant because the court's reasoning is not limited to embedded tweets, but also implicates other forms of in-line linking,[1] which is commonplace on the internet. The opinion, *Goldman v. Breitbart News Network LLC et al*, 1:17-CV-03144, (S.D.N.Y. Feb. 15, 2018) is available here.

Background

On July 2, 2016, plaintiff Justin Goldman snapped a photograph of Tom Brady, Danny Ainge, president of basketball operations for the NBA's Boston Celtics, and several Celtics players heading to the team's pitch meeting with Kevin Durant (the "Photo"). Goldman later uploaded the Photo to his Snapchat Story. The Photo then went "viral," traveling through several levels of social media platforms—and finally onto Twitter, where it was uploaded and tweeted by several users. Several news outlets and blogs published articles featuring the Photo. Each of the defendants' websites prominently featured the Photo by "embedding" a tweet containing the Photo into a news article. The articles were all focused on the issue of whether the Celtics would successfully recruit basketball player Kevin Durant and if Tom Brady would help to seal the deal. *Spoiler alert*: They didn't; Kevin Durant currently plays for the Golden State Warriors.

Goldman sued several of these news organizations for copyright infringement. None of the news outlets or blogs downloaded or copied the Photo from Twitter or otherwise saved a copy of the Photo on their own servers. Instead, each news outlet or blog made the Photo visible in their articles by "embedding" it. To embed a photo, a website coder adds a photo's embed code to its website's HTML instructions. The embed code directs the user's browser to the third-party server to retrieve the image. A user accessing a news organization's website with an embedded image sees a

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seamlessly integrated webpage, a mix of text and the embedded image, although the underlying image is hosted at another location. Twitter as well as Facebook and YouTube provide embed codes to their users so that they can easily embed photos onto their web pages.

Court rejects Ninth Circuit's "Server Test"

Defendants filed a motion for summary judgment, arguing that the Court should adopt the reasoning of other courts and apply the "Server Test" to define the scope of a copyright owner's display right. Under the "Server Test," which is the law of the Ninth Circuit, a website owner is liable for direct copyright infringement if an image is hosted on the website owner's own server. However, if an image is embedded or linked to from a third-party server, there is no direct copyright infringement under the "Server Test," even though the image is visible on the website owner's website.

The New York Court rejected the "Server Test," finding no support in the text of the Copyright Act that possession is required in order to display an image. The fact that each defendant took active steps to put a process in place so that the Photo could be displayed within the body of their respective news stories was enough for liability.

Despite rejection of the "Server Test," the litigation is ongoing and liability for copyright infringement is far from certain

The decision could be appealed once the remaining issues are adjudicated, which could be some time from now because the trial on the remaining issues is not scheduled to begin until January 2019. In the meantime, although at first glance one may believe that the court's opinion in *Goldman* is unworkable and likely to upend how the internet operates—at least with regard to cases brought in the Southern District of New York— the true impact of it may not be so significant. In this case, even though the court ruled that the defendants had violated the copyright owner's exclusive right to display the Photo when they embedded it into news stories on their websites, the case is far from over.

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Among other things, the court has not yet weighed in on a "number of unresolved strong defenses to liability," separate from the issue of whether the display right had been violated, including a "very serious and strong fair use defense." In this case, the Photo was part of the news story—evidence that the Celtics were courting Kevin Durant and had used famous football quarterback Tom Brady as part of their pitch to him. Also, defendants may have license defenses to assert.

Practical considerations

For embedding or in-line linking outside of the *Goldman* case, website operators and users should keep in mind that the Photo tweeted in the *Goldman* case had not been uploaded to Twitter by its copyright owner. When an image is uploaded to Twitter (and other social media platforms) by its owner, the owner often grants the platform a broad license to use that image. In many cases, this broad license allows for embedding by the social media platform's users. In essence, by uploading an image to Twitter or another social media platform, the copyright owner grants platform users, which include news organizations and bloggers, the right to embed uploaded images into their news articles. Twitter even makes instructions available on its website to developers on how to "bring your pick of content from Twitter into your website articles."

Going forward, it makes sense to review the legal terms on each social media platform to determine if the platform explicitly allows embedding of user content. If the answer is yes, when a content owner uploads an image, he is granting a license to such users for the embed. That leaves the question of how you know when the user who uploaded an image owns the copyright in that image. This is important because a user who uploads and then tweets an image can only grant to Twitter (and other social media platforms) rights that he or she actually has in an image. If an image is uploaded by someone who doesn't own it, then it is likely that he or she does not have the authority to grant the right to embed.

There are several practical steps that a website operator can take to try to figure out whether an uploaded image was uploaded by the image's copyright owner. For example, has the tweet or image gone

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"viral?" If it has gone viral, then check to see if the image has been uploaded by multiple accounts—this is almost always the case with viral images—or if the context would give you reason to suspect that someone other than the copyright owner uploaded it.

If any red flags are raised, it makes sense to perform some additional due diligence to determine whether the user who uploaded the photo is the copyright owner. If you cannot easily make that determination, consider obtaining a similar photo from one of the major photo licensing organizations, which typically warrant that they have secured all rights necessary to grant the license.

If no similar photo is available, consider running your article without the photo by including a description of the photo instead. After the *Goldman* litigation began, many of the defendant news organizations kept their articles online without the Photo, instead writing that Tom Brady had been seen in the Hamptons with Celtic management and players during the time the Celtics were making their pitch to Kevin Durant. That Tom Brady was involved in the Celtic pitch meeting is a fact, which is not protected by Goldman's copyright in the photo. In essence, tell instead of show.

A final, riskier approach would be to contact the person who uploaded the image and ask for permission to use the photo. On Twitter this is often done in the "replies" to the tweet. This approach is risky because a requestor is extremely unlikely to obtain a contractual warranty from a user in a Twitter conversation—especially when the requestor is asking to use the photo for nothing. Even if such warranty could be obtained, if there is a problem, these contractual protections are only so good as the user's ability to pay. Of course, if you choose this approach, you should perform the due diligence discussed above to determine if the uploader is the copyright owner. Finally, when this approach has been observed on social media, the user often responds to the first inquiry or two, but stops responding to subsequent requests, leaving the requestor back where he or she started—having to make the determination to rely on the social media platform's license or not use the photo at all.

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For questions about this case, contact any attorney in Frost Brown Todd's Intellectual Property Law and Litigation Practice Group.

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[1] In-line links should be distinguished from traditional hyperlinks. When a user clicks on a hyperlink, the user leaves the website the user is currently viewing and is transported to another website. In contrast, an in-line link refers to a process in which a web page incorporates by reference content stored on a second website such that the content on the second website appears to be displayed on the web page that the user is currently viewing.

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