

Embedded Links Are Copyright Infringement, Court Finds

(February 20, 2018) The widespread practice of embedding links to images and videos on other sites is copyright infringement, according to a New York U.S. district court.

The court rejected the Ninth and Seventh Circuit's use of the "server test," which states there is no copyright infringement as long as the original image remains on the original server.

"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 district court opinion states.

The copyright infringement case concerns a photo of Tom Brady that went viral. Photographer Justin Goldman took an image of the quarterback in East Hampton and uploaded it to his Snapshot account. The defendants embedded tweets of the image on their websites. There is no dispute that the image was not located on the defendants' servers.

In the Perfect 10 case, the Ninth Circuit announced a "server test." As long as the image remained on the copyright owner's authorized server, the Ninth Circuit found no copyright infringement when a third party used a link to the original site.

In this case, the defendants cited the Perfect 10 case, arguing they "simply provided 'instructions' for the user to navigate to a third-party server on which the photo resided."

The trial court disagreed, noting it was "skeptical that Perfect 10 currently interprets the display right of the Copyright Act." In addition, the defendants "took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown." As a result, "when defendants caused the embedded Tweets to appear on their websites, their actions violated plaintiff's exclusive display right; that 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."

The finding would suggest that the common practice of embedding links in tweets, social media, and websites to copyrighted images may open the door to a potential lawsuit for copyright infringement.

Goldman v. Breitbart News Network, LLC et. al, USDC SDNY No. 17-cv 3144, filed February 15, 2018.

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