

## The Embedded Tweets Battle: Everything You Need To Know

By **Bill Donahue**

*Law360 (April 18, 2018, 10:17 PM EDT)* -- A controversial ruling on embedded tweets is headed for an immediate appeal, setting up what will be a closely watched case over the tension between copyright law and technological change. As the appeal gets underway, here's everything you need to know.

### What's All This About a Ruling?

Back in February, a New York federal judge ruled that Time Inc., The Boston Globe, Breitbart and other online publishers had infringed a photographer's copyright by embedding tweets that featured unauthorized copies of his photo of NFL quarterback Tom Brady in news stories on their websites.

Last month, the judge agreed to allow an immediate appeal to the Second Circuit.

The February ruling dealt with the issue of so-called inline linking — a type of link that allows a site to embed the actual content from a different site onto their own. It's how news sites feature clips from YouTube or images from Instagram on their own page.

The process has become widespread in recent years, but according to Mark Sableman of Thompson Coburn LLP, it has always raised more complicated questions for copyright attorneys than traditional linking.

"Inline links are different, and more troublesome, for several reasons," said Sableman, who has been writing on linking issues for years.

"They involve images, and every photographer claims his or her image is inherently valuable," he said. "And an inline link takes an image from the linked-to site, and displays that image seamlessly on the linked site, as if it were part of that site."

Some courts have ruled the practice legal, but in the February decision, U.S. District Judge Katherine B. Forrest went decisively the other way. The advent of "uncontemplated technologies" that allowed images to be "shared with dizzying speed," she said, did not trump "familiar guiding principles of copyright."

No matter how it got there, Forrest said, showing it on a website violated a copyright owner's exclusive right to display their work.

"When defendants caused the embedded Tweets to appear on their websites, their actions violated plaintiff's exclusive display right," the judge wrote. "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."

### **Was This a Novel Approach?**

It certainly split with the highest-profile ruling to date on the issue.

That would be *Perfect 10 v. Google Inc.*, the landmark 2007 decision that greenlighted the core functionality of Google's now-ubiquitous image search engine. In that ruling, the Ninth Circuit said Google's presentation of images through inline linking did not infringe the display rights of copyright owners because the photos were stored elsewhere.

That ruling established the so-called server test: That as long as content was hosted on a third-party server, an inline link presenting the same content elsewhere did not infringe copyright.

That ruling came to be accepted by many in the media as the law of land, but in February, Judge Forrest spent pages explaining that the case law was not nearly as settled as those companies believed.

"I believe that many media companies were under a general impression that the 'server test' was the current state of thinking on this issue, but as the district court described, the foundation for that impression is not well-established," said Jeffrey D. Neuburger of Proskauer Rose LLP.

### **Why Did the Court Depart From That Approach?**

Put simply, when it came to photos on the web, Judge Forrest was more concerned about the ends than the means — about what viewers see, not about how it got there.

The ruling was philosophically guided by the U.S. Supreme Court's 2014 ruling in *ABC v. Aereo*, a decision that rejected technical distinctions in favor of the end results. Although Aereo, a streaming service, technically offered consumers access to individual antennae that they could use, the justices said it looked enough like a cable provider to violate copyright law.

After a lengthy recounting of the Aereo ruling, Judge Forrest applied the same approach to inline linking. If a publication chooses to display an image on its page, the photo might be stored somewhere else, but the end result is the same, she said.

"The principles that undergird the Aereo decision — chief among them that mere technical distinctions invisible to the user should not be the [linchpin] on which copyright liability lies — apply with equal vigor here," the judge wrote.

### **You Said the Ruling Was Controversial.**

Ahead of the February ruling, many sites had come to treat the "server test" as the law of the land. Social media services like Twitter provide tools to easily allow publications to embed content on their sites, and few thought that inline linking might lead to liability.

Whether or not that assumption was correct, a ruling rejecting the server test could dramatically change

the way content is shared on the internet, forcing sites to immediately reconsider the widespread use of embedded content.

"It's extremely disruptive, because all of a sudden everyone is a potential infringer," said John Crittenden of Cooley LLP. "Potentially, you would have to get permission from an author every time you link."

The media companies involved in the case have warned that the ruling will have "dramatic, far-reaching practical implications for all online publishers, social media and content platforms, and Internet users." A group of newspaper publishers, in an amicus brief, said the ruling endangers "an essential part of the modern online ecosystem."

The ruling could also lead to more so-called copyright trolls — plaintiffs or attorneys who create something of a business model out of filing a high number of infringement lawsuits. The court system has already seen a spike in cases against media sites over the use of photos; recently, a federal judge labeled as a troll an attorney who has lodged 500 such cases in one district over the past two years.

"This creates more potential for copyright trolling," Crittenden said. "Every lawyer who does copyright work has gotten the demand letters from the usual plaintiffs counsel. This case gives them another weapon in their arsenal."

Of course, the ruling isn't controversial to Justin Goldman, the photographer who won the ruling, or various groups that have filed their own briefs supporting him.

Goldman has said the reaction to the case is nothing more than the "horror" that media companies feel at "the prospect of now maybe having to pay for what for over a decade they could simply take for free." Photo licensing giant Getty and groups representing photographers have echoed that argument, calling the fears about the ruling unfounded.

"Enforcing the Copyright Act as written would not interfere with the robust sharing of information that the Internet enables, consistent with the balance that Congress struck between such sharing and the rights of copyright owners," the groups wrote.

### **What's Up Next?**

Last month, in a ruling that called it a "high-profile, high-impact copyright case," Judge Forrest agreed to certify the ruling for an interlocutory, or immediate, appeal to the Second Circuit.

"The court credits the parties' representations that its [February ruling] created tremendous uncertainty for online publishers," she wrote. "In this case, the embedded image was hosted on Twitter; given the frequency with which embedded images are 'retweeted,' the resolution of this legal question has an impact beyond this case."

The decision for a quick appeal means that a big ruling on the central issue in the case may come within a year. The case has yet to be docketed at the Second Circuit, but typical scheduling would see the case briefed over the next few months and argued later in the year.

"The judge knows she's potentially opened a Pandora's box here, so she wants to give everyone a

chance to take it up to the Second Circuit," Crittenden said. "If that court sides with her we have a circuit split, and then the Supreme Court can sort it out."

--Editing by Brian Baresch and Catherine Sum.

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