Cooley

Bloggers Beware: New York Federal Court Holds In-Line Linking May Be Copyright Infringement

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On February 15, 2018, a federal district judge in New York City ruled that in-line linking constitutes prima facie copyright infringement, an alarming decision inconsistent with appeals court precedent in California and other parts of the country. The ruling, in a case a photographer brought over the viral sharing of links to his copyrighted photo of New England Patriots quarterback Tom Brady, opens up any person or platform that re-tweets, re-posts, re-blogs or embeds any article, photo or video to a potential lawsuit, vastly expanding the scope of copyright liability for online users.

The Copyright Act

Copyright law protects "original works of authorship fixed in any tangible medium of expression," which includes, relevant here, “literary works" (articles), "pictorial works" (photographs) and "audiovisual works" (videos). 17 U.S.C. § 102(a). A copyright owner has several "exclusive rights," including the exclusive right to "display the copyrighted work publicly." 17 U.S.C. § 106(5). The Copyright Act’s Transmit Clause states that a copyright owner has the exclusive right to "transmit or otherwise communicate … a display of the work … to the public, by means of any device or process." 17 U.S.C. § 101.

How courts have applied the Copyright Act to in-line linking

In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the US Court of Appeals for the Ninth Circuit (which includes California and other Western states) adopted the so-called "Server Test," holding that in-line linking constitutes a public display only when the defendant hosts the photo on its server. Perfect 10 had objected to others' display of its copyrighted images on their websites without authorization. The court held that simply linking to images on Perfect 10’s server was not infringement. But thumbnails of those images that Google created and stored on its own server were prima facie infringements, although the court deemed them to be fair uses.

The US Court of Appeals for the Seventh Circuit (Illinois, Indiana and Wisconsin) followed the Perfect 10 decision in *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012), as have several district courts.

Goldman v. Breitbart

But the US District Court for the Southern District of New York departed from all this precedent in *Goldman v. Breitbart News Network, LLC, et. al,* No. 17-CV-3144 (KBF), 2018 WL 911340 (S.D.N.Y. Feb. 15, 2018), explicitly rejecting the Server Test, and finding that a website operator need not host an image to be liable for copyright infringement.

Plaintiff Justin Goldman's copyrighted photo of Tom Brady went viral – rapidly moving from Snapchat to Reddit to Twitter – and finally making its way onto the websites of the defendants, who embedded a tweet with the photo alongside an article about Brady. Although the defendants never hosted the photo on their own servers, Goldman claimed that by embedding the photo in the article, they violated his exclusive right to display his photo under Section 106(5) of the Copyright Act.

The court, rejecting and distinguishing the Ninth Circuit's *Perfect 10* decision, found that it was enough for purposes of copyright infringement if a defendant takes "active steps to put a process in place that result[s] in a transmission of the photos so that they [can] be visibly shown […] that is, embedding," and that by embedding tweets on their websites, defendants violated plaintiff's exclusive display right. The fact that an unrelated third party, Twitter, hosted the image, "does not shield them from this result."

Practical implications of *Goldman*

The *Goldman* decision, if not reversed on appeal by the US Court of Appeals for the Second Circuit, has alarming implications for online users. Under its reasoning, anyone displaying photos from Twitter, videos from YouTube or articles from Facebook, is committing prima facie copyright infringement. This decision, if upheld and adopted by other courts, could potentially open the floodgates for copyright litigation and abuse by copyright trolls.

Conclusion

If the decision is appealed and the Second Circuit affirms it, the conflict between it and the Seventh and Ninth Circuits could send the issue to the US Supreme Court. In the meantime, while *Goldman* is still good law, social media platforms and users, bloggers, vloggers and online news outlets must be wary of their potential exposure to copyright infringement liability in the Southern District of New York.