

Court Case Finding that Embedded Photos Can Trigger Copyright Liability Certified for Appeal

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A New York federal district court has certified for appeal its recent decision in a pending case involving the unauthorized use of a photographer's photo by a number of media outlets, maintaining the spotlight on the issue of whether the online practice of embedding violates copyright law. [Goldman v. Breitbart News et al. \(SDNY Feb. 15, 2018, ruling certified Mar. 19,](#)

[2018\)](#).

Related Capabilities

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In 2016, plaintiff Justin Goldman snapped a photo of New England Patriots quarterback Tom Brady, while walking down the street in East Hampton with the Boston Celtics' general manager (the "Brady Photo"). Goldman then uploaded it to his Snapchat account. The Brady Photo was newsworthy because Brady was in East Hampton to help the Celtics recruit basketball player Kevin Durant, who was staying nearby. The Brady Photo was scraped from Goldman's Snapchat account, and posted to Reddit and then Twitter by a number of users, and the tweets were later embedded in a number of online

posts reporting on the story, all without Goldman's authorization. Goldman sued a number of the news outlets that had posted the Brady Photo, alleging that the embedding of his photo as part of their news stories violated his copyright rights in the photo.

The news outlets filed a motion for partial summary judgment on the issue of whether their embedding of the Tweet displaying Goldman's photo on their websites violated Goldman's copyright in his photo and, specifically, the right to display it.

The court in *Goldman* explained the technical process of embedding and, more specifically, the fact that the HTML source code of a webpage can either retrieve the photo to be displayed from the webpage's own server or from a third-party server, with the latter referring to embedding. Here, the news outlets and blog did not host the Brady Photo, but rather embedded the photo as hosted on Twitter. This method is widely used and, to date, had been legally acceptable based on what is referred to as the "Server Test." Under the Server Test, which has been upheld by the Ninth Circuit, websites that display copyrighted images without authorization are not liable if that image is retrieved from a third-party server and not hosted by the website's own server.

In *Goldman*, Judge Forrest rejected the application of that test, finding that it has not been widely adopted by all courts. Further, the court found that each defendant "took active steps" to embed the Brady Photo on their website, rendering it irrelevant where it was hosted, since the actions had the effect of transmitting an image to the public, regardless of the technological process (invisible to the viewer) for achieving that display.

The court did not accept the defendants' arguments that finding liability for any website that embedded content from another website would "cause a tremendous chilling effect on the core functionality of the web." The court left open whether Goldman had in fact authorized the public use of his photo by posting it on Snapchat account (for example, under Snapchat's terms of use), and whether defenses to copyright infringement such as a "very serious and strong fair use defense" and/or whether limitations on damages may exist.

The defendant media outlets immediately moved to certify the ruling against them. Judge Forrest, noting that her opinion "has created tremendous uncertainty for online publishers" and the "frequency with which embedded images are 'retweeted'", agreed to this request on March 19th.

The case will now go to the U.S. Court of Appeals for the Second Circuit. We will post further updates on this case as material developments occur.

Jeremy Elman recently launched his own blog called [Law of Technology](#). The blog focuses on the intersection of technology and law, and explores how dramatic advances in technology change the legal system, and how the legal system both advances and inhibits that change. We encourage you to check it out!