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Grabbing a Tweet or Facebook Post – The New Danger

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Understanding the case that will “transform the Internet as we know it”

Introduction

After that photo company sent a demand letter for \$5,000, you agreed to never again grab images off of Google. Instead, you turned to Twitter or YouTube or Facebook and grabbed the embed code and put it on your website. What could go wrong, after all, they make the embedding code so easy to access...

Despite the fact that copyright law finds its origins in the U.S. Constitution, it is far from an established doctrine. Never has this been more obvious than when Tom Brady, Twitter and Breitbart News collided in a case that will likely change the way companies across the country address linking social media in websites.

Copyright law collides with the internet. The internet loses.

In *Goldman v. Breitbart News Network*, the plaintiff took a photo of New England Patriots’ quarterback Tom Brady with Boston Celtics’ general manager in East Hampton New York, leading to speculation that Brady was involved in recruiting Kevin Durant to play for the Celtics. This image was then embedded in websites by multiple defendant news organizations including Breitbart, Time and Vox.

Embedding an image on a webpage requires a person to place a code with an HTML instruction on a website. The instruction then pulls the image into the website but never places it on the server that hosts the website. The image remains on the original location and is visually linked into a frame on the second website.

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As they embedded the image, none of the defendants downloaded, copied or stored the actual image on their servers or devices. The images came directly from content stored on the Twitter servers. The defendants used that to argue that they never copied the image and supported their position with several prominent copyright cases including *Perfect 10 v. Amazon* (where linking was found to not infringe under copyright law, creating what is known as the “server test” with infringement coming only when the materials are found residing on a company’s own server).

Turning her back on what many consider “well-established law,” Judge Forrest of the Southern District of New York held that embedding an image from Twitter was displaying the image in a manner that infringed copyright law. The location of the image, on Breitbart’s server or on Twitter’s, did not matter.

What does this mean to copyright law?

This decision has been celebrated by entertainment companies and photographers who create content and has been vilified as the end of publishing as we know it by news organizations.

The “good” news:

For those who create content, it means that your images and material that becomes framed in another website or platform are protected by copyright law regardless of whether the company saves it to their system or not.

For those who share breaking news, images from other sources, or social media streams, you may be infringing the creator’s content.

But wait:

The judge also noted that the ruling wasn’t the end of the case. Breitbart, Vox, Time and the others still have the opportunity to establish that their use was “fair use.” Under the fair use analysis, an infringer can be allowed limited use of the copyright-protected material without acquiring permission. This is a detailed legal analysis that assesses: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. A media company using an image like Tom Brady’s photo might still avoid paying significant sums to the copyright holder, but only after a protracted legal challenge.

But what does this mean to me?

At this time, *Goldman* does not control in Michigan, but there is a significant risk that (1) content could be created by someone who could file in New York or other states abiding by this rule, or (2) this decision will be adopted in other jurisdictions. If widely adopted, this opinion will make additional training on the use of social media and content available through online searches a must. Any company creating online content will need to consider heightened scrutiny in reviewing materials

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incorporating such images and may need to engage legal counsel in risky cases.

What do I do?

To minimize risks

- Understand the content you hope to link to the website. It is important to know whether the poster is likely the owner of the copyright. If you are obtaining it from the source, it is more likely that the content owner would be able to directly grant permission.
- Seek permission. Once you have identified the poster of the content, seek permission to repost or retweet.
- Request a Fair Use Opinion if the material is high risk or controversial. The Goldman opinion left open the door that infringing content might be “fair use” under the four-factor analysis. Engage counsel to assess the risk of infringement and the likelihood of success of a fair use analysis.

Butzel Long is ready and available to help with a fair use analysis and review of online materials. For more information, please contact the authors of this bulletin or your Butzel Long Media, Technology, or Intellectual Property attorney.

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