

Inline Linking Put to the Test: District Court Questions Server Test and Creates Potential Circuit Split in *Goldman v. Breitbart News Network, LLC*

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Introduction

In this era of social media and an intensely competitive 24-hour news cycle, many media companies routinely rely upon a decade-old legal theory that inline linking to a social media or blog post or third-party website is immunized from a claim of copyright infringement as long as the underlying content is not stored on *their* server. A recent decision out of the Southern District of New York threatens to upend this long-established practice.

The legal justification for inline linking of third-party content springs from the Ninth Circuit's decision in *Perfect 10 v. Amazon.com Inc. et al.*, 508 F.3d 1146 (9th Cir. 2007). In that case, the Ninth Circuit adopted a bright line rule, known as the "server test," finding that since the inline link was merely giving the computer instructions to show the image as it appeared on the third-party's website, there was no copy on display. Recently, however, the legality of how media companies inline link to content on third-party websites or social media posts has been called into question by the ruling in *Goldman v. Breitbart News Network, LLC*, Case No. 1:17-cv-03144-KBF, 2018 WL 911340 (S.D.N.Y. February 15, 2018).

In *Goldman*, Judge Katherine Forrest of the Southern District of New York rejected the server test and found that various media outlets' inline linking to a copyrighted image in a Tweet was not immunized from a finding of copyright infringement. *Goldman*, if upheld on appeal, could significantly lessen the velocity by which social media posts go viral, particularly if social media companies disable functionality that allows users to embed third-party posts in the user's own post. Such may be the result if copyright plaintiffs begin targeting *en masse* any user who embeds an allegedly infringing image in their own post. Judging by the number of copyright infringement litigations commenced each day in connection with alleged unauthorized use of copyrighted images even before *Goldman*, an influx of litigation (in the Second Circuit at least) may be inevitable if the decision stands.

Given the potential impact of this decision, this Article seeks to give some background and perspective on *Goldman*. First, we will look at the development of "the server test," which has been the legal standard for inline linking for the last decade. Second, we will review and explain the unexpected analysis in *Goldman*, as well as the introduction of what could be labeled "the click test." Finally, we will consider some potential implications of *Goldman*, as well as issues related to inline linking practices if the decision were to be upheld.

Perfect 10 and the Server Test

Goldman stands in direct contradiction of the Ninth Circuit’s decision in *Perfect 10, Inc. v. Amazon.com Inc. et al.*, 508 F.3d 1146 (9th Cir. 2007).¹ In *Perfect 10*, the court was confronted with the issue of whether Google’s display of copyrighted images in its Google image search results constituted copyright infringement. In partially reversing the lower court, the Ninth Circuit developed what has become known as “the server test.”

Perfect 10 was and still is an adult subscription website in the business of nude photography. *Id.* at 1157. Google, as all but the least tech savvy are by now well aware, offers not only word or text searches, but also the ability to search for images. In Google’s search function, the images were not actually copied or stored by Google, but displayed through inline linking to the server or website where the images were stored. Google explained that its image search only creates “instructions” for the user to access a third-party website – it does not actually store or copy the image. *Id.* at 1156-57. However, *Perfect 10* argued that because users of Google’s image search were allowed to see images of its copyrighted nudes, Google was infringing and violating its right of display. *Id.*

The Ninth Circuit reasoned that “based on the plain language of the statute, a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory.” *Id.* at 1160. The Ninth Circuit, relying on the technical reality of how inline linking functions, explained that inline (or embedded) linking is not a display of a “copy” of an image because the copy remains on the server. *Id.* In other words, although the image appeared and was visible to the user viewing the search results, the copy of the image was not actually *stored* on Google’s server, but on a third-party server that had copied the original images, and therefore was not “fixed in a tangible medium” by Google.

Additionally, the court explicitly rejected the import of how the image appeared to the viewer, noting that “while in-line linking and framing may cause some computer users to believe they are viewing a single Google webpage, the Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion.” *Id.* at 1161. The court found that because the inline link was merely giving the computer instructions to show the image as it appeared on the third-party’s website, and it was not stored on Google’s server, there was no copy on display. *Id.* at 1162. Therefore, according to the Ninth Circuit’s server test, liability for copyright infringement rests *not* on the party that inline links to a copy of an image, but rather on the party that stores the copy of the image on its server.

The Ninth Circuit is not the only Circuit to approve of the server test. In 2012, Judge Richard Posner of the Seventh Circuit penned *Flava Works, Inc. v. Gunter, et al.*, 689 F.3d 754 (7th Cir. 2012), citing *Perfect 10* approvingly and reversing the lower court’s grant of a preliminary injunction. In *Flava Works*, the Seventh Circuit was confronted with a subscription pornographic video website (there is a theme emerging here: pornography has been a bit of boon to copyright lawyers) that claimed inline linking of its videos by the social network/bookmarking site, myVidster, infringed its copyright under a contributory infringement theory. The Seventh Circuit, embracing the Ninth Circuit’s server test, held that myVidster did not infringe on Flava

¹ In full disclosure, attorneys from Kilpatrick Townsend represented Amazon in *Perfect 10*.

Works’ reproduction and distribution rights under the Copyright Act, nor did it induce such infringement. The court reasoned that because myVidster did not make “copies” by storing the videos on its server, but instead only “made connections” allowing the embedded links to appear, albeit framed by myVidster, it did not commit copyright infringement. *Id.* at 757.

In its analysis, the Court further noted that it was irrelevant that the embedded inline links made the videos “appear” to be on myVidster’s website. *Id.* at 756.² The Court also found that there was no contributory infringement because, despite the negative impact that myVidster’s website had on Flava Works’ business, the visitor’s act of bypassing Flava Works’ pay wall was the “equivalent to stealing a copyrighted book from a bookstore and reading it. That is a bad thing to do (in either case) but it is not copyright infringement. The infringer is the [Flava Works’] customer ... who copied [the] copyrighted video by uploading it to the Internet.” *Id.* at 757. In other words, someone may have infringed by copying Flava Works’ videos, but neither myVidster’s inline link, which displayed the video to the user, nor the user was liable for that act.

Between *Perfect 10* and *Flava Works*, the server test has, for the past ten years, been the default analytical framework when assessing use of third-party content in the digital age. The server test has doubtlessly had the practical effect of facilitating the sharing of information and creating a bright line rule that the media industry and internet users alike could easily look to in order to determine and assess the risks of liability.³ In other words, as long as media companies inline linked to third-party URLs and did not *store* any copyrighted content on its own server, then the liability rested with the server, not the downstream user that used the link—this was considered well settled law.

Goldman and the Click Test

In 2016, it was clear that Kevin Durant was leaving the Oklahoma City Thunder, but the burning question was where he would end up. So, it was big news when Patriot’s quarterback Tom Brady was spotted with the Celtic’s General Manager, Danny Ainge, walking through the Hamptons in advance of the team’s scheduled meeting with Durant. Justin Goldman snapped a picture of this event and posted the image in his Snapchat story; the image was then Tweeted by some of Goldman’s followers, and ultimately, went viral. These viral Tweets were picked up by various news and media agencies and embedded in their stories reporting on the meeting and the possibility the Celtics were using Brady to woo Durant. Goldman then brought suit against the media outlets, including Time, Yahoo, Vox Media, the Herald, and the Boston Globe, among

² The court noted that the user “may think, therefore, that he’s seeing the video on myVidster’s website. But actually the video is being transmitted directly from the server on which the video is stored to the viewer’s computer.” *Flava Works*, 689 F.3d at 756.

³ Indeed, digital rights groups approved of the *Perfect 10* decision because they believed the server test “provides strong guidelines for future development and avoids the kind of uncertainty that could chill start-ups trying to get the next great innovation off the ground.” Shultz, Jason, *P10 v. Google: Public Interest Prevails in Digital Copyright Showdown*, ELECTRONIC FRONTIER FOUNDATION, May 16, 2007, available at <https://www.eff.org/deeplinks/2007/05/p10-v-google-public-interest-prevails-digital-copyright-showdown> (last visited April 13, 2018). Notably, EFF also joined in an amicus brief in support of the media defendants in *Goldman*.

others, that had inline linked/embedded the Tweets containing his photo of Brady into their stories.⁴

It is significant that Goldman did not upload the image to Twitter. That act was done by one of his 90 or so Snapchat followers. This is an important distinction, because if Goldman had uploaded the photo to Twitter himself, he would have forfeited any copyright claim against the defendants because Twitter's terms of service provides Twitter with a broad license to make user content available to third parties and to allow others to do the same.⁵ In fact, most social-media platforms grant a spectrum of licenses depending on the settings of a user's account. For example, some social-media platforms let users choose whether to set their account to private or public – when an account is set to private, the license is relatively narrow in comparison to the broad license that applies to accounts with a public setting.

Therefore, because he did not upload his image to Twitter, Goldman claimed defendants had committed copyright infringement by violating his exclusive display right by inline linking/embedding the links to the *unauthorized* Tweets containing his image. The defendant media companies responded by invoking the server test, arguing that they could not have infringed simply by inline linking to the Tweets because no copy of the image was stored on their servers.

Ultimately, the parties filed cross-partial motions for summary judgment on the issue of whether inline linking could constitute copyright infringement. The defendants asserted that the server test was “well-settled law,” and both parties were joined by *amicus* briefs filed in support.⁶ However, the court disagreed and found that unless the defendants could establish a viable affirmative defense, of which the court opined there were several, they would be liable for infringement because embedding the link in their stories was a violation of Goldman's exclusive right of display. In coming to its decision, the court rejected the server test and questioned *Perfect 10's* reasoning, espousing instead a click test.

The court buttressed its conclusion by discussing the Supreme Court's decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014). In *Aereo*, the Supreme Court found that the defendant had engaged in an unauthorized public performance of television content, notwithstanding the defendant's creation of a complex content delivery system whereby it used thousands of separate antennas – each dedicated to a specific user – to transmit

⁴ Goldman has also brought a sister case to this action, *Goldman v. Advance Publications, Inc., et al.*, 1:16-cv-09031, (S.D.N.Y.); the case is currently stayed, pending the Second Circuit's decision in the *Goldman v. Breitbart, et al.* case.

⁵ See, e.g., Twitter's terms of service: <https://twitter.com/en/tos>. Twitter makes clear that any content posted in their platform is subject to a license authorizing them “to make [a user's] Content available to the rest of the world and to let others do the same.”

⁶ Notably, *amicus* briefs were filed by various photograph licensing groups such as Getty Images and the American Society of Media Photographers, amongst others, in opposition to the server test. And media rights groups, such as News Media Alliance and Electronic Frontier Foundation, etc., filed briefs in support of the server test. The *amici curiae* for both sides weighed in on whether to allow appeal to the Second Circuit as well; *amici* for the defendants argued that if *Goldman* is to stand, it would upend and directly affect media and internet practices that underpin everyday social media and internet use.

programming to customers. Aereo argued, unsuccessfully, that its system created only private one-to-one performances.

In *Goldman*, the court reasoned that although *Aereo* was only “obliquely” on point, it stood for the general proposition that “purely technical distinctions” are not sufficient to avoid liability when the output appears to be the same to the subscriber or user. *Goldman*, 2018 WL 911340, at *9. Thus, for the court, how the image “appears” to the user is more important than the technology that makes such an appearance happen. *i.e.*, defendants may have *technically* “embedded” the link – the court’s preferred term is embedding, although the term is synonymous with inline linking – but the result is the display of the copyrighted image to the reader of the article. *Id.* at *8. The court said that this is the crux of the display right, *i.e.*, how the image is displayed or appears to the user. *Id.* at *1. In other words, because the link to the Tweet was embedded by defendants, the court reasoned that defendants had violated *Goldman*’s “exclusive display right” and “the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) d[id] not shield them from this result.” *Id.* You will recall, as noted above, that both *Perfect 10* and *Flava Works* found this argument unconvincing.

The court further supported its reasoning by concluding that embedding amounts to a “process” by which a display occurs. *Id.* at *8. And the processes and the technology that could create them in the future is something that was explicitly contemplated by the drafters of the Copyright Act. *Id.* Therefore, for the *Goldman* court, emphasis on where the copy is *stored* or who is in “possession” of it is irrelevant. *Id.* at *6. In so concluding, the court rejected the analytical undergirding of the server test. The court also noted that it was skeptical of the Ninth Circuit’s reading of the Copyright Act in *Perfect 10*. *Id.*

The court further concluded that even if *Perfect 10* was correct in its analysis of the server test, it was neither binding nor factually on point. The court distinguished the facts in *Perfect 10* in two ways. First, it said that unlike in *Perfect 10*, the defendants in *Goldman* were news/media outlets, not “search engines,” like Google. And second, the viewer, unlike in *Perfect 10*, did not make “an active choice to click on an image” to bring them to a third-party server. *Id.* at *9. Therefore, for the *Goldman* court, the server test was not applicable because the user did not have the option to either click or not to click the link to the third-party website.

The court emphasized that “the role of the user was paramount in the *Perfect 10* case” because in that case “Google’s search engine provided a service whereby the user navigated from webpage to webpage” and that is not the same as “opening up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not.” *Id.* at *10. For the court, the “volitional act taken by users” of Google to decide whether to click a link or not to go to the third-party website was inapposite to the facts in *Goldman*. *Id.* The court further noted that unlike in *Perfect 10*, here, the media outlets “actively took steps to ‘display’ the image” by choosing the content that would be displayed through the inline link. *Id.* at *8. Therefore, the court’s reasoning can be distilled into a click test for determining liability for inline linking – when a media outlet displays content via an inline link in a manner in which a user has the choice to click a URL link linking it back to the original content, then liability may not attach to the embedding party; however, where content is embedded so as to be on display without the need for the user or reader to make a choice whether to click back to the third-party server, the media company acts at its peril.

The court did note that there were several potential affirmative defenses that might still be available to defendants, such as: a fair use defense, a defense under the Digital Millennium Copyright Act, limitations on damages from innocent infringement, and whether Goldman effectively released his image into the public domain when he posted it to his Snapchat account, as well as potential questions as to licensing and authorization. However, the fact remains that in the Southern District of New York, the court has refused to apply the server test to inline linking.

Implications

The court's decision in *Goldman* has been certified for interlocutory appeal to the Second Circuit, and it is generally expected that the Second Circuit will accept the case for interlocutory appeal. The court noted in its order certifying interlocutory appeal that this decision is a "high-profile, high-impact copyright case" and "given the frequency with which embedded images are 'retweeted,' the resolution of this legal question has an impact beyond this case." *Goldman v. Breitbart News Network, LLC*, Case No. 1:17-cv-03144-KBF (S.D.N.Y. March 19, 2018). However, as the media industry anxiously awaits the outcome on appeal, there are several aspects of *Goldman* that media outlets should consider before inline linking.

First, it is important to note that the server test is still controlling in the Ninth Circuit, and *Flava Works* is still the law in the Seventh Circuit. However, as for the Southern District of New York, the court has made clear that it will analyze how the inline link *appears* to the user. If the reader or user has the choice as to whether or not to click it to take it to a third-party website, then the inline link to the image is likely not infringing. However, if the image is indistinguishable to the reader or user as either a copy of an image or an inline link to a third-party website, infringement is a distinct possibility. Therefore, before inline linking to third-party content, media outlets may wish to assess how their links appear to the reader and whether the reader is presented with a choice to click to the third-party site or not.

Second, as noted above, many social-media platforms grant a spectrum of licenses depending upon a user's account settings. Accordingly, one result of the *Goldman* decision, should it stand, would be to place additional significance on the manner in which a photo is posted to social media. For example, if a user with a private account shares content to his or her network and someone within that network with a public setting shares that content more broadly, third parties who thereafter inline link to the second poster's post may find themselves lacking a license defense in action brought by the first poster.

In today's fast paced social-media and news environment, there can be no question that the *Goldman* decision potentially significantly raises the stakes for the media industry. Only time will tell whether this is but a ripple on the copyright landscape or the first wave of a tsunami.