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Two Cases Raise New Copyright Infringement Concerns for Internet Linking

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Modern communications platforms are often designed to maximize sharing of information, but this can produce vexing questions under copyright law, much of which remains rooted in traditional concepts of distribution and publication. An example is in-line linking, also called framing or embedding – code on one page that links to content (often images or videos) hosted elsewhere to produce an embedded view.

Although U.S. law grants copyright owners exclusive display rights under 17 U.S.C. § 106(5), in-line linking was generally considered not to directly infringe these rights because embedded links merely provided instructions on how and where to access content, as opposed to providing the content itself for display. But two recent district court cases found that in-line linking or embedding can constitute direct infringement of display rights, creating new uncertainty over the ubiquitous practice.

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Prior Analyses Found Display Rights Not Infringed by In-Line Linking

The programming language that underlies much of the Internet and social media systems, Hypertext Markup Language ("HTML"), allows linking so that users can easily and seamlessly embed instructions to display content from a variety of different sources on a single webpage. Examples of these instructions include the short URLs generated by Twitter or Facebook for embedding tweets or posts into other webpages or posts.

The leading case holding that in-line linking does not directly infringe display rights is *Perfect 10, Inc. v. Amazon.com, Inc.*[1] In that case, the U.S. Court of Appeals for the Ninth Circuit examined a webpage that "in-line links to or frames the electronic information" posted online by a third party, but which "does not store and serve the electronic information."[2] The webpage in question included HTML instructions linking to third-party content, but did not store, transmit, or otherwise provide a copy of the content.[3] Instead, the end user's browser followed the HTML instructions to directly download and display the content from other websites.

The Ninth Circuit concluded that transmitting HTML instructions directing a browser to content "is not equivalent to showing a copy" for purposes of the exclusive display right.[4] The "HTML instructions are lines of text, not a photographic image" and "do not themselves cause infringing images to appear."[5] As the court explained: "The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the . . . image. It is this interaction that causes an . . . image to appear on the user's computer screen."[6]

Because the only information transmitted was essentially an address for the content, the Ninth Circuit found that such linking may raise contributory liability issues but "does not constitute direct infringement of the copyright owner's display rights."[7]

A Pair of New Cases Finds Possible Direct Infringement from Embedded Links

More recently, however, two district courts – one in the U.S. District Court for the Southern District of New York and another in the U.S. District Court for the Northern District of California – have rejected the *Perfect 10* rationale and found that embedded links can directly infringe a copyright owner's display rights.

The first case, *Goldman v. Breitbart News Network, LLC*,[8] involved a photograph of quarterback Tom Brady posted on Twitter and subsequently embedded in multiple articles about Brady's efforts to help recruit basketball player Kevin Durant.[9] The photographer sued the publishers of the articles, claiming that they directly violated his exclusive display rights.[10] The defendants moved for summary judgment on the direct copyright infringement claims.

As in *Perfect 10*, none of the defendants in *Goldman* actually copied, saved, or transmitted the photo itself.[11] Instead, the defendants' articles pasted HTML instructions (in at least some instances obtained from Twitter itself) linking to the tweet containing the photograph.[12] And, as in *Perfect 10*, the end users' browsers in *Goldman* directly downloaded and displayed the photograph not from defendants but a third-party source, Twitter.[13] Despite these similarities, however, the *Goldman* court reached the opposite conclusion and ruled that the embedded links "violated plaintiff's exclusive display right."[14]

First, the *Goldman* opinion reasoned that under the Copyright Act, an image can be displayed indirectly, without the defendant ever having transmitted the image.[15] Under this view, a defendant need not possess or transmit an image to display it; rather, sending a reference to the location of the image (e.g., an HTML link) is equivalent to sending the image itself.[16]

Although *Goldman* and *Free Speech Systems* have yet to be tested in other district courts, the cases represent (depending on one's viewpoint) either a worrisome new direction for or a worthy safeguard against in-line linking and embedding.

Second, the *Goldman* opinion stated that the Supreme Court's decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*,[17] establishes "that liability should not hinge on invisible, technical processes imperceptible to the viewer," evidently referring to where the images are hosted and how they are transmitted to the end user.[18]

Third, the *Goldman* opinion expressly rejected the analytical framework of *Perfect 10*, noting its view that the Copyright Act did not require possession of a work to display it. The court also distinguished *Perfect 10* as being narrowly applicable to cases involving search engines or where user actions prompt the display of embedded images.[19]

Although the defendants and *amici* in *Goldman* raised concerns about the "tremendous chilling effect on the core functionality of the web" and "radically change[d] linking practices" that could stem from a ruling that embedded linking directly infringes display rights, the court found such fears unjustified, denied the defendants' motion for summary judgment and granted partial summary in favor of the plaintiff.[20]

A second case, *Free Speech Systems, LLC v. Menzel*,[21] also declined to apply the *Perfect 10* analysis, albeit in a different procedural posture. *Free Speech Systems* was a declaratory judgment action filed by a website that published a post featuring nine photographs taken by the defendant photographer.[22] The photographer counterclaimed for direct copyright infringement, and the website moved to dismiss those claims based on *Perfect 10*, arguing that the post in dispute merely "pointed" to images hosted at the photographer's own server and that the website "did not itself store any of the photographs at issue."[23]

The court denied the website's motion to dismiss the direct infringement claim, suggesting that *Perfect 10* has no application beyond the context of search engines, and noting that the website identified "no case applying

the *Perfect 10* server test outside of the context of search engines."[24]

Moreover, the *Free Speech Systems* opinion noted other cases – *Goldman* in particular – that "refused to apply the *Perfect 10* server test outside of that context."[25] The court ultimately declined to reach the issue of the location of the photographs because the underlying code for the post, which would show where the photos were hosted, was not attached to the declaratory judgment complaint.

Future Uncertainty for Internet Linking

Although *Goldman* and *Free Speech Systems* have yet to be tested in other district courts, the cases represent (depending on one's viewpoint) either a worrisome new direction for or a worthy safeguard against in-line linking and embedding. The cases involved technical situations highly analogous to *Perfect 10* – content linked/embedded on the defendant's website but hosted elsewhere – yet two district courts reached a conclusion opposite the Ninth Circuit.

At the very least, these cases should prompt careful reevaluation by stakeholders about the potential risks arising from the widespread practice of in-line linking and embedding third-party content as copyright law strives to keep pace with rapidly-changing technologies.

Notes

1. *Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146 (9th Cir. 2007).
2. *Id.* at 1159.
3. *Id.* at 1161.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Goldman v. Breitbart News Network, LLC,* 302 F. Supp. 3d 585 (S.D.N.Y. 2018).
9. *Id.* at 586-87.
10. *Id.* at 586.
11. *Id.* at 587.
12. *Id.* at 587, 593-94.
13. *Id.* at 587 ("[T]his code directs the browser to the third-party server to retrieve the image.").
14. *Id.* at 586.
15. *See Goldman*, 302 F. Supp. 3d at 593-94.
16. *See id.* (suggesting that any process "result[ing] in a transmission of the photos so that they could be visibly shown" is a display).
17. *American Broadcasting Cos., Inc. v. Aereo, Inc.,* 134 S. Ct. 2498 (2014).
18. *Id.* at 595.
19. *See id.* at 595-96.
20. *See Goldman*, 302 F. Supp. 3d at 596.
21. *Free Speech Systems, LLC v. Menzel*, 390 F. Supp. 3d 1162 (N.D. Cal. 2019).
22. *Id.* at 1166-67.
23. *Id.*
24. *Id.* at 1171-72.
25. *Id.* at 1172.