

DIGITAL MEDIA COMMITTEE

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Have You Been Framed? The Future of Embedding Copyrighted Content on the Internet

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The practice of “framing” content online, by which one website’s content is shown within a frame of another website, is one of the cornerstones of the modern internet’s functionality. Beginning in the 1990s, the practice led content owners to bring lawsuits against web services that would frame their copyrighted content, beginning in the text era and evolving with the growth of the internet itself to include photographs, videos, and other types of copyrightable multimedia online.¹ As framing has matured over time into a more seamless experience wherein the entirety of the third party content may appear on-screen within a borderless frame (and, later, fully embedded within the website using the third party content), the complaints of copyright owners have been held at bay by case law, placing the onus for infringement on the website hosting the copyrighted content, rather than on the website framing it.²



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affirmed as precedential case law, *Goldman* has the potential to destabilize the information sharing ecosystem to a degree that would shake the internet to its core, undermining one of the key practices of modern online information exchange and dialogue. However, the case also presents a fresh opportunity to reconsider the reach of copyright’s public display right with respect to online content in light of rapidly evolving technological, legal, and policy considerations.

In the case at hand, plaintiff Justin Goldman originally uploaded a photograph of New England Patriots quarterback Tom Brady and others in East Hampton, New York to his personal Snapchat Story.⁵ The photo quickly went viral, and several Twitter users reposted the photo in tweets that the defendants—a range of news websites including Breitbart, Time, the *Boston Globe*, and Yahoo—embedded on their own sites to display Goldman’s photo, using Twitter’s publicly available embed code.⁶ Importantly, the full size photo was visible without the news websites users’ having to click on a hyperlink, or a thumbnail, in order to view the photo.⁷ Goldman then sued the news websites for copyright infringement, alleging that they violated the exclusive public display right inherent in his copyright in the photo. In February, Judge Forrest agreed with Goldman, finding that Goldman’s public display right was infringed, and issued summary judgment on that issue.⁸ The key factor was whether images shown on one website (here, the defendants’ news websites) but stored on another website’s server (here, Twitter) implicated the public display right.⁹ It is interesting to note that Twitter, the hosting website, did not itself have permission from Goldman to store the photograph: the Twitter users who uploaded Goldman’s Snapchat photo to Twitter’s service did so without authorization.

The *Goldman* Case

Understandably, then, the February 2018 decision in *Goldman v. Breitbart News Network LLC*³ (Goldman) in the U.S. District Court for the Southern District of New York, in which the court held that “embedding” on one’s own website copyrighted content hosted on another website can be copyright infringement, has aroused great apprehension in the digital media community. U.S. District Judge Katherine B. Forrest opened her opinion by writing: “When the Copyright Act was amended in 1976, the words ‘tweet,’ ‘viral,’ and ‘embed’ invoked thoughts of a bird, a disease, and a reporter. . . . In answering questions with previously un contemplated technologies, however, the Court must not be distracted by new terms or new forms of content, but turn instead to familiar guiding principles of copyright.”⁴ The ruling has called into question the widespread practice of embedding digital media on the internet, which is used on nearly every website that participates in public dialogue.

The U.S. Court of Appeals for the Second Circuit in July 2018 declined to hear an interlocutory appeal of the district court’s summary judgment ruling, and sent the case back down for further proceedings. If ultimately

Embedding Content—Historical Perspective

The practice of embedding content from third-party online service providers, especially platforms delivering

user-generated content, such as Twitter and YouTube, has become a keystone practice of the modern digital media landscape. These platforms provide the ability to embed as a fundamental feature of their services, allowing for sharing and reposting of content that, as in *Goldman*, can proliferate virally with no further action on the part of the platforms or the users who uploaded the content. This practice has flourished in large part due to a perception of legality based upon the 2007 decision of the U.S. Court of Appeals for the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*,¹⁰ which established the so-called “server test” for online copyright infringement. In *Perfect 10*, the plaintiff copyright owner sued Google and other tech companies, alleging that their search engines’ display of the plaintiff’s photos in image search results constituted direct infringement of the plaintiff’s public display and distribution rights.¹¹ The search engines provided thumbnail versions stored on the search engine operators’ servers of the plaintiff’s copyrighted images, and also allowed for display of the full size images via the process of “in-line linking” and “framing,” which are precursors to the practice of embedding.¹² In-line linking is the process by which a webpage directs a user’s browser to incorporate content from different computers into a single window.¹³ Framing refers to the process by which information from one computer appears to frame and annotate the in-line linked content from another computer.¹⁴

“There are crucial distinctions between the type of in-line linking and framing that the search engines in Perfect 10 carried out via their HTML code versus the embedding of full size images that has become common practice via Twitter and other platforms.”

The Ninth Circuit held in *Perfect 10* that a search engine did not display a copy of full-size infringing images for purposes of the Copyright Act when the search engine framed in-line linked images that appeared on a user’s computer screen, even though the search engine operator’s separate communication of its stored thumbnail images directly infringed the public display right.¹⁵ It found that providing HTML instructions to retrieve an image from elsewhere was not equivalent to showing a copy of that image.¹⁶ The court found that the search engine’s code contained HTML instructions communicating where to find the full-size images, but the search engine operator did not itself distribute copies of the infringing photographs.¹⁷ The court wrote: “Google may facilitate the user’s access to infringing images. However, such assistance raises only contributory liability issues . . . and does not constitute direct infringement of the copyright owner’s display rights.”¹⁸ *Perfect 10* argued that Google displayed a copy of the full-size images by framing the

full size images, which gave the impression that Google was showing the image within a single Google webpage, but the court responded: “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.”¹⁹

Goldman Holding and Rationale

There are crucial distinctions between the type of in-line linking and framing that the search engines in *Perfect 10* carried out via their HTML code versus the embedding of full-size images that has become common practice via Twitter and other platforms. Judge Forrest delved into these distinctions in *Goldman* and found the server test was neither applicable to the embedding-related facts at hand nor “adequately grounded in the text of the Copyright Act.”²⁰

Judge Forrest found “no indication” in the text or legislative history of the Copyright Act that possessing a copy of an infringing image is a prerequisite to displaying it.²¹ The Ninth Circuit’s *Perfect 10* analysis hinged on whether the defendant search engine operators “copied” the image to be displayed and stored the copies on their own servers.²² However, Judge Forrest stated that in framing the analysis this way, the Ninth Circuit erroneously collapsed the display right in § 106(5) of the Copyright Act into the reproduction right in § 106(1).²³ Judge Forrest further wrote: “*Perfect 10* was heavily informed by two factors—the fact that the defendant operated a search engine, and the fact that the user made an active choice to click on an image before it was displayed—that suggest that such a broad reading is neither appropriate nor desirable.” In contrast to the in-line linking and framing of the search engines in *Perfect 10*, the *Goldman* news website defendants presented Goldman’s full-size photo seamlessly woven into the total overall appearance of their own websites. Judge Forrest wrote of this distinction:

In *Perfect 10*, Google’s search engine provided a service whereby the user navigated from webpage to webpage, with Google’s assistance. This is manifestly 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. Both the nature of Google Search Engine, as compared to the defendant websites, and the volitional act taken by users of the services, provide a sharp contrast to the facts at hand.²⁴

The distinctions Judge Forrest drew between *Perfect 10*’s server test and the facts of *Goldman* came under fire from technology advocacy organizations such as the Electronic Frontier Foundation (EFF) and Public Knowl-

edge, which together submitted an amicus brief in the district court in support of the defendants and the application of the server test in the case.²⁵ Following Judge Forrest's decision, the EFF issued a statement warning that "[i]f adopted by other courts, this legally and technically misguided decision would threaten millions of ordinary Internet users with infringement liability."²⁶ The EFF claimed Judge Forrest's logic in *Goldman* extended to all in-line linking, not just embedding.²⁷ An outpouring of anxiety in the digital media world followed, with news websites and blogs sounding alarms of the consequences the public (but especially those websites themselves) would face as a result of the *Goldman* decision.²⁸ Other legal commentators, however, found little reason to panic in the face of *Goldman*, given the potential defenses to infringement liability that have not yet played out, which could involve a license defense, the safe harbors of the Digital Millennium Copyright Act (DMCA), and/or fair use.²⁹ The *Goldman* litigation will next proceed in a separate second phase to deal with remaining issues, including such potential defenses.³⁰

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Potential Defense: Terms of Service Implied License

The potential defenses the news websites could raise include the possibility of a license to use the photo based on Twitter and/or Snapchat's terms of service. Both services provide that users retain ownership in the content they post online via the services, subject to a grant of certain license rights to the services. Regarding the rights that Snapchat users grant to the service in content they upload and make publicly available via the service, Snapchat's terms of service provide:

[Y]ou . . . grant us a perpetual license to create derivative works from, promote, exhibit, broadcast, syndicate, sublicense, publicly perform, and publicly display Public Content in any form and in any and all media or distribution methods (now known or later developed).³¹

For content posted privately, however, the terms of service include only a more limited license (also applicable to public content) which provides:

[Y]ou grant Snap Inc. and our affiliates a worldwide, royalty-free, sublicensable,

and transferable license to host, store, use, display, reproduce, modify, adapt, edit, publish, and distribute that content. This license is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones.³²

While these terms provide the *right* to Snapchat itself to sublicense content, they include no explicit *grant* of any sublicense to other third parties like the defendant news websites, and the terms applicable to privately posted content include a more limited sublicensing right that would not permit sublicenses to news websites for their public use of the content. In January 2018 plaintiff Goldman submitted to the court an endorsed letter, stating:

When I posted my Tom Brady photo to Snapchat, I did so through Snapchat's "My Story" option. It was and is my understanding that "My Story" postings can only be seen by the specific people I have authorized in advance to see those postings. I can't say now how many people were authorized by me to see my "My Story" postings at that time, but I can say that that number does not exceed 90, and could well have been fewer. I had no intention of making the Photo available to anyone else beyond those authorized to see my "My Story" postings and I do not believe I did so. When I posted the Photo to Snapchat, I had a choice to post it either to "My Story," which is limited to those I authorize to see it, or to "Our Story," which would be accessible to the public at large, without restriction. *I deliberately chose the "My Story" option, because I did not want the general public to have access to it. If I did, I would have posted it to a different platform, such as Twitter, or Facebook or Instagram, where it could have been seen without restriction.* I did not want that and did not do that. And I did not authorize any of the people who did have access to my "My Story" posting to share it elsewhere.³³

Accordingly, the broader grant of rights in public content included in the Snapchat terms of service are not likely to provide much help to the news website defendants in claiming a license to use the photo.

Meanwhile, Twitter's terms of service contain a grant of rights provision comparable to Snapchat's, but with a key difference:

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive,

royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). This license authorizes us to make your Content available to the rest of the world *and to let others do the same*.³⁴

Here, the defendants could attempt to rely on the Twitter terms of service to claim that they had a reasonable expectation of having license to embed the tweet, perhaps as third-party beneficiaries of the terms as an agreement between Twitter and the users that tweeted Goldman's photo.

However, in 2013 another judge in the Southern District of New York closely examined the applicability of the same license grant in Twitter's contemporaneous terms of service to photographer Daniel Morel's copyright infringement claims against Agence France Presse (AFP) and Getty Images for downloading Morel's photos of the then-recent earthquake in Haiti from Twitter and reselling the photos to others.³⁵ In that case (*Morel*), the court granted summary judgment to the photographer on the license defense in January 2013, saying that the terms of service did not grant a license for the defendants' infringing conduct.³⁶ Later that year, a jury awarded Morel \$1.2 million against the defendants in the case.³⁷

The alleged infringing conduct in the *Morel* case was more egregious than in the *Goldman* case, given that the Morel defendants were actually taking Morel's photos off Twitter and licensing them out to others as though they owned the rights, not merely redisplaying the full images via Twitter itself. Additionally, Morel posted those photos to Twitter himself through an app called TwitPic, in contrast to the Goldman embedded tweet photos, which were posted by other Twitter users without Goldman's authorization. Nonetheless, the *Morel* court's analysis of the Twitter terms of service as applied to the photos in suit is instructive in considering potential defenses for the Goldman defendants' conduct.

In *Morel*, defendant AFP argued that by posting his photos on Twitter, Morel subjected those photos to the Twitter terms of service, and those terms of service provided AFP with a license to use the photos.³⁸ The Twitter terms of service at that time contained a provision for rights in uploaded content, similar to the currently-in-effect terms of service referenced above, which stated in part: "This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what's yours is yours & you own your content."³⁹ Specifically, AFP claimed to be a third-party beneficiary of the terms of service agreement between Morel and Twitter.⁴⁰ U.S. District Judge Alison J. Nathan disagreed, writing: "[T]his is the fatal flaw in AFP's argument: it fails to recognize that even if some re-uses of con-

tent posted on Twitter may be permissible, this does not necessarily require a general license to use this content as AFP has."⁴¹ Judge Nathan explained:

[T]he plain language of the Twitter TOS does not support finding a license covering AFP's conduct, even as a third-party beneficiary. As Judge Pauley already explained, the Twitter TOS spell out expressly the entities to whom a license is granted, namely Twitter and its partners—and AFP does not contend that it is one of Twitter's "partners." Construing the Twitter TOS to provide an unrestrained, third-party license to remove content from Twitter and commercially license that content would be a gross expansion of the terms of the Twitter TOS.⁴²

Similarly, the Twitter terms of service that will apply to the *Goldman* case will not likely support a license defense on the defendant news websites' part. Although the *Goldman* defendants were not explicitly removing and reselling the photo Goldman took, as the *Morel* defendants were, the *Goldman* defendants were similarly disassociating the photo from its original context on Twitter and using it for commercial gain in a manner that would normally require a license from the photographer. Additionally, Morel himself intentionally posted his photos on Twitter. Conversely, Goldman uploaded his photo to Snapchat, thinking it was visible only privately, and never agreed to the unauthorized Twitter users' public upload of the photo.

Potential Defense: DMCA § 512 Safe Harbors

The *Goldman* defendants will also likely assert a defense based on the § 512 safe harbors of the DMCA.⁴³ The safe harbor of § 512(c), which applies to user-generated content uploaded to online service providers, is the defense that Twitter would rely on in the event Goldman had sued it. This safe harbor establishes a notice-and-takedown procedure to initially resolve claims of copyright infringement without litigation, via platforms' removal of user-uploaded content at the request of a copyright holder.⁴⁴ The *Goldman* defendants, however, are not user-generated platforms like Twitter or other social media services: they are traditional purveyors of news and journalism. Accordingly, it is unlikely that these websites will be able to rely on the § 512(c) safe harbor.

Instead, the defendants may potentially assert that § 512(d) of the DMCA—which applies to "information location tools" like search engines—protects their conduct via the external linking aspect of the embedding process.⁴⁵ This safe harbor provides: "A service provider shall not be liable . . . for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infring-

ing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link," subject to certain restrictions.⁴⁶ The service provider must not have actual knowledge that the material or activity is infringing; in the absence of such actual knowledge, must not be aware of facts or circumstances from which infringing activity is apparent; or, upon obtaining such knowledge or awareness, must act expeditiously to remove or disable access to the material.⁴⁷ The service provider must not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.⁴⁸ Finally, upon notification of claimed infringement the service provider must expeditiously remove or disable access to the allegedly infringing material.⁴⁹

"In the 2017 case Barcroft Media, Ltd. v. Coed Media Grp., LLC, the plaintiffs were purveyors of entertainment journalism who owned copyrights in celebrity and human interest photographs, while the defendant ran celebrity gossip and entertainment websites and displayed 12 of the plaintiffs' images on its sites without any licenses."

The *Goldman* defendants' DMCA defense would be likely to turn on the second requirement noted above in § 512(d)(2): the news websites likely derived a financial benefit from the infringing activity via increases in viewer traffic to their sites and, presumably, the sale of advertising displayed on the pages including Goldman's photo. Since the websites certainly had the choice of what images to display in their articles, they would also have had the right and ability to control the infringing activity. Thus, this factor would likely defeat a § 512(d) DMCA defense. Of course, if Goldman had sent Twitter the requisite DMCA § 512(c) notification of infringement, and if the notice-and-takedown process had proceeded as usual, Twitter would have removed Goldman's photo from its infringing users' Tweets, which process would have also automatically removed the photo as it appeared when embedded into the defendants' websites.

Potential Defense: Fair Use

Finally, the *Goldman* defendants are likely to argue that their use of the photo for news reporting purposes qualifies as fair use, thereby insulating them from infringement liability.⁵⁰ The Copyright Act enumerates certain uses of copyrighted content, including news reporting, that may qualify as fair use, and lays out a four-factor test for courts to determine whether an infringing use is fair.⁵¹ The four factors include: (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.⁵² In this case, the photo clearly had great news value in the sports media world, as evidenced by the defendants' publication of the photo in their news articles, but newsworthiness alone is insufficient to support a finding of fair use.

While the fair use analysis is a case-by-case analysis heavily dependent on the facts of each matter, two recent fair use court decisions in the Southern District of New York illustrate how the test plays out in similar fact patterns involving news websites' unauthorized publication of celebrity photographs.⁵³ These decisions, which could serve as potential persuasive authority for plaintiff Goldman's position, suggest that fair use will not be available as a defense here. In the 2017 case *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, the plaintiffs were purveyors of entertainment journalism who owned copyrights in celebrity and human interest photographs, while the defendant ran celebrity gossip and entertainment websites and displayed 12 of the plaintiffs' images on its sites without any licenses.⁵⁴ The court found that the defendants' use of the celebrity photos was not fair use.⁵⁵ The first factor—the purpose and character of the infringing work—weighed strongly against the defendant because the defendant displayed the photos in the same manner and for the same purpose as they were originally intended to be used.⁵⁶ The court held that the use was not transformative criticism or commentary because the defendants' articles did not comment on, criticize, or report news about the images themselves. Instead, the court found the defendant made commercial use of the photos as illustrative aids because the photos depicted the subjects described in its articles.⁵⁷ The court noted that celebrity photos "are fleetingly relevant and have limited staying power (and therefore market power) beyond a short window in which they offer timely news and gossip about their subjects."⁵⁸ The second factor—the nature of the copyrighted work—weighed slightly in the defendant's favor because the photographs were essentially factual in nature.⁵⁹ The third factor—the amount and substantiality of the portion used—weighed against the defendant because the defendant displayed all or most of each original photo on its website.⁶⁰ The final factor—the effect of the use upon the potential market for the original—weighed against the defendant because the defendant displayed the photos for the very purpose for which they were originally intended, and thus the use "usurped the function of the original works in the market."⁶¹ The court noted that if the defendant's practice of using celebrity and human interest photographs without licensing "were to become widespread, it is intuitive that the market for such images would diminish correspondingly."⁶²

Meanwhile, in the 2016 case *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, the plaintiff owned copyrights in photographs of celebrities that it licensed to print and online publications, while the defendant ran a for-profit website that presented celebrity gossip news and evaluated the truthfulness of gossip stories published by third parties.⁶³ The court ruled that the defendant's unauthorized, commercial use of the photos did not constitute fair use because the photographs were specifically taken to be used by celebrity news outlets and the defendant used the photographs for the precise reasons they were created.⁶⁴ While the second statutory factor, the nature of the work, weighed slightly in the defendant's favor because the photographs were taken to document their subjects rather than as creative art pieces, the court found that the remaining three factors to weigh against fair use.⁶⁵ The court found that the defendant added no new meaning or expression to the images, but simply used the photos to illustrate its stories in the same manner as websites that paid to display the photos.⁶⁶

"Twitter encourages its users to tweet, retweet, and embed content with gusto, and indeed the platform is built entirely on the value of such sharing. The network effects generated by proliferation of shared content online serve many legitimate public interests, as the EFF and others have reiterated."

Taken together, these two celebrity photo fair use cases provide an unwelcome outlook for the *Goldman* defendant news websites' fair use argument. It is unlikely that the news websites will be able to rely on their news reporting activities to defend their uses of Goldman's photo, because as with many celebrity photos, the photo itself was the news: the appearance of Tom Brady in a particular location was essentially the entirety of the news value of the photograph. The websites will likely argue that their reporting and commentary in relation to the photograph, which was focused on Brady's alleged efforts to recruit the National Basketball Association star Kevin Durant to play for the Boston Celtics, added value and context to the image alone, transforming it into something more than simply a reproduction of the original. Additionally, they will likely argue the original image here was not subject to a commercial market for licensing, since Goldman is not a professional photographer or paparazzi seeking to license his image to media outlets, but rather a private citizen who was claiming that his private photo was unlawfully used.

However, these arguments are likely to prove unavailing, like those of the defendants in the recent celebrity photo precedent cases, when the four fair use factors

are applied to the facts of *Goldman*. Regarding the nature and purpose of the new use, like the *Barcroft* and *BWP* defendants, the *Goldman* news website defendants were using the photo for the same purpose for which it was originally created: the revelation of heretofore unknown celebrity news. Thus, it is unlikely that the embedding of the photo will be considered transformative in relation to the first factor of the test. The photo was documentary rather than artistic, so the second factor may weigh slightly in favor of the defendants, given the factual nature of their news reporting efforts. However, the entire photograph was displayed on the defendants' websites, so the third factor will weigh against the defendants. The fourth factor will likely weigh against the defendants as well, because they opted to embed the photo, rather than to pay for a license to use it as news websites would customarily do, thereby diminishing any potential economic market for Goldman's original photo.⁶⁷

Conclusion

In conclusion, it is worth considering that *Goldman* presents more than a potentially chaotic nightmare for the future of copyright infringement liability in online communication. This case may instead be a prime opportunity for all stakeholders in the digital media industries, which rely so heavily on copyright, to consider how broadly we wish the scope of copyright to reach in our modern information ecosystem, and how strict limitations must remain on the rights thereby granted to creators. Twitter encourages its users to tweet, retweet, and embed content with gusto, and indeed the platform is built entirely on the value of such sharing. The network effects generated by proliferation of shared content online serve many legitimate public interests, as the EFF and others have reiterated. However, those network effects invariably benefit platforms more than individual content creators or consumers. Recalibrating the reach of copyright's public display right online as *Goldman* has done may be an overdue balancing act necessary to restore a measure of control and compensation to the creators generating the value inherent in any copyrighted content, compared to those who may wish to disseminate said content and thus capitalize on that inherent value.

Endnotes

1. See, e.g., Frank C. Gomez, *Washington Post v. Total News, Inc.*, 13 Berkeley Tech. L.J. 21 (1998) (analyzing in depth an action, which later settled, in which the *Washington Post* sued an online news service that was framing the text of copyrighted *Post* articles without permission on its own website).
2. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (establishing the so-called "server test" for online copyright infringement). See *infra* at n.10.
3. 302 F. Supp. 3d 585 (S.D.N.Y. 2018).
4. *Id.* at 585-86.
5. *Id.* at 586-87.
6. *Id.*

7. *Id.*
8. *Id.*
9. *Id.* The public display right established in the Copyright Act gives a copyright owner the exclusive right “in the case of . . . pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly.” 17 U.S.C. § 106(5). To “display” a pictorial work like a photograph means to “show a copy of it, either directly or by means of a film, slide, television image, or any other device or process.” 17 U.S.C. § 101. To display a work “publicly” means “(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.
10. 508 F.3d 1146 (9th Cir. 2007).
11. *Id.* at 1154.
12. *Id.* at 1155-56.
13. *Id.* at 1156.
14. *Id.*
15. *Id.* at 1159-61.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Goldman*, 302 F. Supp. 3d at 596.
21. *Id.* at 595.
22. *Id.*
23. *Id.*
24. *Id.* at 596.
25. The amicus brief is available at <https://www.eff.org/document/goldman-v-breitbart-eff-amicus-brief>.
26. Daniel Nazer, *Federal Judge Says Embedding a Tweet Can Be Copyright Infringement*, Electronic Frontier Foundation (Feb. 15, 2018), available at <https://www.eff.org/deeplinks/2018/02/federal-judge-says-embedding-tweet-can-be-copyright-infringement>.
27. *Id.*
28. See, e.g., Charles Duan, *Embed With the Devil*, Slate.com, (Feb. 21, 2018), available at <https://slate.com/technology/2018/02/a-court-rules-that-embedding-tweets-with-images-can-violate-copyright.html>; Cory Doctorow, *New York Federal judge rules that embedding tweets can violate copyright law*, BoingBoing.net, (Feb. 16, 2018), available at <https://boingboing.net/2018/02/16/return-of-remierdes.html>.
29. See, e.g., Tom Kulick, *Rethinking Linking: 3 Reasons Not To Panic About Embedded Links . . . Yet*, Abovethelaw.com (Feb. 26, 2018), available at <https://abovethelaw.com/2018/02/rethinking-linking-3-reasons-not-to-panic-about-embedded-links-yet/>; Marcus Chatteron, *What’s Next For Embedded Tweet Copyright Case*, Law360.com (April 11, 2018), available at <https://www.law360.com/articles/1031994>.
30. *Goldman*, 302 F. Supp. 3d at 586-87.
31. Snap Inc. Terms of Service, available at <https://www.snap.com/en-US/terms/>.
32. *Id.*
33. Endorsed letter filed in U.S. District Court for the Southern District of New York on January 17, 2018 (case no. 1:17cv3144, docket no. 164) (emphasis added).
34. Twitter Terms of Service, available at <https://twitter.com/en/tos> (emphasis added).
35. *Agence Fr. Presse v. Morel*, 934 F. Supp. 2d 547 (S.D.N.Y. 2013).
36. *Id.* at 561-64.
37. See PBS News Hour, *Photographer awarded \$1.2 million from media companies that lifted images off Twitter* (Nov. 25, 2013), available at <https://www.pbs.org/newshour/nation/in-landmark-copyright-case-photographer-awarded-12-million-from-media-companies-that-lifted-images-o>.
38. *Morel*, 934 F. Supp. 2d at 559.
39. *Id.* at 560.
40. *Id.* at 560-61.
41. *Id.* at 562.
42. *Id.*
43. 17 U.S.C. § 512.
44. See 17 U.S.C. § 512(c).
45. See 17 U.S.C. § 512(d).
46. *Id.*
47. 17 U.S.C. § 512(d)(1).
48. 17 U.S.C. § 512(d)(2).
49. 17 U.S.C. § 512(d)(3).
50. See 17 U.S.C. § 107.
51. The U.S. Supreme Court has held that this test “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) at 577-78.
52. 17 U.S.C. § 107.
53. See *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339 (S.D.N.Y. 2017); see also *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395 (S.D.N.Y. 2016).
54. *Barcroft*, 297 F. Supp. 3d at 346-47.
55. *Id.* at 355.
56. *Id.* at 351-53.
57. *Id.*
58. *Id.* at 352.
59. *Id.* at 353-54.
60. *Id.* at 354.
61. *Id.* at 355.
62. *Id.*
63. *BWP*, 196 F. Supp. 3d at 398.
64. *Id.* at 404-08.
65. *Id.*
66. *Id.*
67. It is worth reiterating that, instead of seeking to license the photo commercially like the celebrity photo copyright owners in the recent precedent cases, Goldman explicitly stated in his above-cited January 2018 endorsed letter to the court that he had wished for the photo to remain private.

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