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SCOTUS Showdown Will Have to Wait as Second Circuit Denies Petition to Review SDNY Rejection of Server Test for Copyright Infringement

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Client Alert

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On July 17, 2018, in a barely four-line Mandate, the U.S. Court of Appeals for the Second Circuit denied a Petition for leave to appeal an interlocutory order by the Southern District of New York's Judge Katherine B. Forrest that rejected defendants' motion for partial summary judgment in a case involving the embedding of an image, delaying what ultimately may be a showdown at the Supreme Court. With little fanfare, and without explaining its rationale, the Second Circuit found that an immediate appeal is unwarranted. The Court merely cited to the case of *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 23-25 (2d Cir. 1990), a case that ironically granted leave to appeal. The denial of the petition for leave to appeal now allows the case to proceed and delays clarification to an industry of internet sites that rely on linking as part of their business model.

For a factual recitation of the underlying issues and an explanation of Judge Forrest's decision, as well as the certification of her Opinion for Interlocutory Appeal, refer to our prior articles on *Goldman v. Breitbart News Network et al.*, SDNY Case No.17-CV-03144. *See* **February 28** and **March 20**.

In essence, though, the case involves a claim of copyright infringement by a

photographer who had taken a photograph of popular sports figures Tom Brady and Danny Ainge (relevant at the time to a story about whether the Boston Celtics were using Tom Brady to help recruit an NBA star player), and then uploaded the photos to the photographer's Snapchat story. The photo went viral, passing through several social media platforms, including Twitter. A majority of the defendants in the copyright suit had not copied or saved the photo on their own servers, but instead had coded their sites to display articles through a technical process known as embedding.

In the trial court, defendants sought partial summary judgment, relying on the Ninth Circuit Server Test. Joined by *amici*, the defendants had argued in the trial court that to hold that embedding content without downloading it to one's server could constitute infringement would "cause a tremendous chilling effect on the core functionality of the web," and would "radically change linking practices, and thereby transform the Internet as we know it." Judge Forrest disagreed and rejected the Server Test, reasoning that her decision would not have such dire consequences, since there were "unresolved strong defenses to liability," and therefore "numerous viable claims should not follow." The defendants had petitioned for leave to file an interlocutory appeal to resolve this controlling question of law deemed critical to online publishers.

For now, while the Ninth Circuit appears to continue to follow the Server Test established by *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the law in the Second Circuit is now uncertain. It remains to be seen whether other plaintiffs seize the opportunity to file similar suits while the law remains unsettled. The potential showdown at the Supreme Court is postponed as we wait to see if the plaintiff in *Goldman* can even prevail in his infringement case before an appeal is taken to the Second Circuit.