

# Inline Links to Unlicensed Third-Party Content Now May Be Copyright Infringement

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## 5th Edition: Trends in Marketing Communications Law

For years, copyright attorneys throughout the country have relied on a decision from a Federal appellate court in the 9th Circuit (California and surrounding states) to advise clients that they may safely place on their websites unlicensed photos, videos and other copyrighted content taken from third-party websites, so long as that content appears on their sites only through “inline links” to the third-party sites. Following that guidance, website operators have displayed and performed unlicensed YouTube videos, news photos, social media posts and other third-party content on their sites, and have avoided copyright infringement claims and liability for doing so because they did not copy that content onto their own web servers and instead provided that content by posting the file address (i.e., inline link) of the page where the content is stored on its original web server.

As of February 2018, however, this right of website operators to make unauthorized use of third-party content is gone. A Federal District court in New York has ruled that there is no legal distinction between a website providing third-party content via its own web server and a website providing that same content via inline link, and that in both instances the website’s use of that content is subject to the copyright rights of the content owner. The court explicitly rejected the 9th Circuit “server test,” stating that a website operator’s liability for allowing site visitors to view unlicensed third-party content should not turn on the superficial technical issue of whether the content is hosted on the site’s own web server or hosted on a third-party server. Although this decision is legal precedent only in a narrow swath of New York counties, its practical effect is nationwide because any U.S. website should be accessible in New York and, thus, subject to the case’s restrictive view of inline linking.

It is worth noting that the facts of this case, while interesting, are by no means unusual: The plaintiff posted to his Snapchat account a photo of Tom Brady. Although the account was for private access only, the photo went viral and was posted by third parties to Twitter. News outlets then embedded the photo on their websites via inline link to the third-party Tweets. The plaintiff sued the news outlets for their unauthorized online display of the photo. The commonness of the defendants’ actions illustrates that this case should impact all websites that, until now, have been unhesitatingly displaying and performing unlicensed third-party content through inline links.

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## Key Takeaways

- Inline linking is no longer a workaround for licensing third-party content.
- A website operator’s use of unlicensed third-party content still may be defensible under fair use, *de minimis* use and the Digital Millennium Copyright Act (DMCA) safe harbor. If the content was posted with a “share” icon it also may be defensible as “licensed” by the content owner.
- If the New York case is reversed on appeal, the 9th Circuit “server test” will continue to govern, until another case successfully attacks it.

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## **Related People**

**Ashima A. Dayal**

Partner

212 468 4912

[adayal@dglaw.com](mailto:adayal@dglaw.com)