

The Second Circuit Reaffirms Volitional Conduct is Needed for Direct Copyright Infringement

The Second Circuit confirms volitional conduct is needed to hold internet service providers liable for direct copyright infringement—it just disagrees what “volitional conduct” actually means.

BWP Media USA, Inc. v. Polyvore, Inc. partially revived a copyright suit against a now-defunct website that provided users a “Clipper” tool to take images from other sources to create and share photo collages on its site. Apart from these “clipped” images that users uploaded themselves, BWP claimed the website was liable for direct infringement for its own copying and display of BWP’s protected celebrity photos. After finding no evidence the website acted volitionally, the Southern District of New York dismissed BWP’s direct infringement claim.

On appeal, the Second Circuit swiftly rejected BWP’s claim that the U.S. Supreme Court abrogated the volitional conduct requirement, but did reverse the dismissal of the direct infringement claim because there was a dispute of material fact regarding whether the website created copies of BWP’s photos that its users did not request. However, the panel disagreed in three concurring opinions about how a district court should apply the volitional conduct requirement when assessing direct infringement claims. In a lengthy lead opinion, Circuit Judge Walker explained that volitional conduct involves an ISP’s choice to engage in an act that causes infringement. For his part, Circuit Judge Newman likened volitional conduct to proximate causation, an analysis that Judge Walker expressed reservations in applying to the strict liability regime of direct copyright infringement. Judge Poole declined to chime-in on that point, but did express concerns with Judge Walker’s reasoning that an ISP would not be deemed to act volitionally if it made only one copy of a work at a user’s request.

While the decision to engage in an act may very well also satisfy causation, the Southern District of New York will need to conduct additional fact-finding to resolve the volitional conduct inquiry.