



to link or not to link: embedding content and copyright infringement

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A few weeks ago, we **reported** on *Nicklen v. Sinclair Broad. Co.*, a case out of the Southern District of New York that expressly rejected the "server test" established by the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007). The server test sets forth a limitation for when a copyrighted work is "displayed" on a computer, and provides that the copyright owner's exclusive public display right under 17 U.S.C. § 106(5) can only be violated if the alleged infringer stores a copy of the work on its own server. This limitation effectively insulates from liability those who "embed" an image or video online without authorization but who do not store the image or video themselves. The server test has significant implications in the world of social media, where embedding is such a prevalent practice. The *Nicklen* court's express rejection of the server test reflects a trend in recent caselaw that could potentially lead to a circuit split if the issue reaches the Second Circuit...

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