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is embedding photos on a website copyright infringement? ninth circuit says no.

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In *Hunley v. Instagram, LLC*, — F.4th — (July 17, 2023), the Ninth Circuit thwarted another attempt to outlaw embedding (also called "in-line linking") of photographs. The court affirmed a district court's ruling that parties who embedded on their websites photographs from Instagram did not violate the plaintiff photographers' display right as set forth in 17 U.S.C. §106(5), and accordingly Instagram was not secondarily liable for copyright infringement. While the ruling provides some comfort for publishers that embed photographs on third-party sites, the law remains unsettled nationwide. This is the first appellate decision to address the issue of embedding, though a few district courts in other circuits have recently addressed the issue, as previously reported (here and here).

Plaintiffs, two photographers who posted their works on Instagram, brought a class action on behalf of other copyright owners whose works were "caused to be displayed via Instagram's embedding tool on a third party website without the copyright owner's consent." Two non-parties—BuzzFeed and Time—had embedded the plaintiffs' photographs on their websites to accompany news articles. Although the plaintiffs did not sue these entities, the plaintiffs claimed that those entities had infringed their copyrights. Leveraging this alleged "primary infringement," the plaintiffs sued Instagram as a secondary infringer for permitting the third parties to embed the photographs.

On a motion to dismiss, the district court had found that because the websites' act of embedding is not a violation of the display right pursuant to the "server test" set out in *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007), no secondary liability could arise—there was no primary infringement. That is, under the server test, the third-party websites could not have infringed because the photographs had never resided on their websites, but only on Instagram's site.

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The Ninth Circuit affirmed. The panel began by setting forth the lengthy computer code that allows for the incorporation of content from Instagram (including images and accompanying captions) seamlessly into articles. By using this code, the embedding website appears to the user to have included the copyrighted material in its content, when the copyrighted content is actually hosted by Instagram. The Court explained this key fact: "The embedding website appears to the user to have included the copyrighted material in its content. In reality, the embedding website has directed the reader's browser to retrieve the public Instagram account and juxtapose it on the embedding website."

The court next noted that under the Copyright Act, to "display" a work means to show a copy of it. Because the plaintiffs' works were never fixed in the memory of the third-party servers, BuzzFeed and Time were not primary infringers. In so holding, the Court concluded that *Perfect 10*'s server test is neither confined to particular types of sites such as search engines nor inconsistent with the Copyright Act or *American Broad. Co. v. Aereo*, 573 U.S. 431 (2014), in which the Supreme Court rejected a technological work-around Aereo had designed to appear to avoid the need for to obtain licenses to retransmit content.

Notably, in distinguishing *Aereo*, the Ninth Circuit pointed out that the display right (Section 106(5)) requires a tangible *copy* of a work to be shown. In contrast, the public performance right at issue in *Aereo* (Section 106(4)) only involves performance of a *work*. Based on this conclusion, a party that retransmits audiovisual or other performable works may not be able to rely on the server test to avoid liability.

The panel also referenced volitional conduct, opining that that third-party embedders—the alleged "direct infringers" —could not be liable for direct infringement, as they only passively provide access to content, rather than engaging in actual copying or displaying. As such, Instagram could not be secondarily liable for such conduct without direct infringement. The panel likewise rejected the concept that liability should arise because it may appear to the reader like embedded images are new copies (even though the "embedded" version of the Instagram content contains accompanying captions and indicia of Instagram as the source of such content), pointing to the fixation requirement in the Copyright Act, not a "perceptibility requirement." And finally, the court declined to follow the reasoning of other courts that have rejected the server test, most prominently district courts in the Second Circuit. Having rejected all of Hunley's legal arguments based on court's reading of the Copyright Act and precedent, the court also pointed out that policy arguments have no place in the courts.

While the time has not yet passed for petition for *en banc* review by the full Ninth Circuit of the legal issues, for now cases involving embedding or in-line linking—to the extent they involve the display right—are a dead letter if brought in the Ninth Circuit. It remains to be seen whether a circuit split will arise that may bring this issue to the Supreme Court of the United States. Until then, those who embed images should remain aware that the ability to embed remains an unsettled question nationwide, with the exception of the nine states and two territories in the Ninth Circuit.