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Meaghan H. Kent, Linda J. Zirkelbach and Matthew Julyan

Federal Courts Split on 'Server Test' in Copyright Infringement Cases Involving Embedded Images

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Earlier this week, the U.S. District Court for the Western District of Texas joined a number of other federal district courts that have challenged, narrowed, or simply rejected the applicability of the “server test,” established by the Ninth Circuit to insulate website owners from copyright infringement liability absent direct copying and storage of infringing website materials on the defendant’s own server.

On July 29, in *Urbanimage Media Ltd. v. IHeartMedia, Inc.*, the court held that the plaintiff’s claim for copyright infringement based on the defendant’s website’s unauthorized display of a copyrighted photograph was sufficiently pled to survive defendant’s motion to dismiss, and explicitly rejected defendant’s argument that the image was merely embedded from a third-party server, and not stored on and displayed from defendant’s own computer or server.

This decision, like the others referenced below, highlight the differing jurisdictional risks associated with the use of embedded or in-linked content on the Internet and the need to approach any such use with caution.

The dispute in *Urbanimage* centers around a photograph taken by Adrian Boot in 1990 of Tom Waits, which was subsequently registered with the U.S. Copyright Office and then fully assigned to Urbanimage Media Ltd. for down-stream commercial licensing and enforcement. In July 2021, IHeartMedia's Denver-based radio affiliate's website embedded a screengrab of a YouTube video that featured the Tom Waits photograph owned by Urbanimage. Relying on the Ninth Circuit's "server test," IHeartMedia moved to dismiss the copyright infringement claims and argued that the embedded screengrab does not violate Urbanimage's exclusive display rights, an argument that the Western District of Texas rejected.

What Is the 'Server Test' in Copyright Infringement Law?

Under the server test, first announced in *Perfect 10, Inc. v. Amazon.com, Inc.*, , liability for the unauthorized display of copyrighted works is determined based on how a copyrighted image is displayed on a website. In *Perfect 10*, the Ninth Circuit created and applied this test and held that Google could be found liable for copyright infringement based on its display of thumbnail images of Perfect 10's images that were stored and communicated to users from Google's computers.

Conversely, the court held that Google could not be held liable

under the “server test” for images not stored on its computers or servers, but rather embedded from the webhost’s server. Given that embedded or in-linked video merely represents “HTML instructions that direct a user’s browser to a website publisher’s computer that stores the full-size photographic image,” the Ninth Circuit rejected this sort of passive display as a viable basis for infringement liability.

Simply put, under the Ninth Circuit’s server test, website owners are not liable for infringement where the display of copyrighted works is embedded or in-linked from a third-party’s server, whereas liability may exist where the website owner’s computer or server stores a copy of the image and communicates that copy to users directly.

In *Urbanimage*, IHeartMedia argued that applying the Ninth Circuit’s server test, “it has not infringed the Act because the embedded video remains on a third-party’s server and is not fixed in [Defendant’s] servers and thus is not a display.” The Western District of Texas disagreed: “a display of a work occurs when it is caused to be seen, **regardless of the method of display**” (emphasis added). In short, the court reasoned that a defendant need not possess a physical copy of the copyrighted work to “display” that work.

Federal Courts Disagree on Server Test and Embedded Content Liability

Even prior to *Urbanimage*, other district courts have similarly disagreed with the sweeping application of the server test to

circumvent copyright liability simply through the use of embedded or in-linked website content. For example, in *Goldman v. Breitbart News Network, LLC*, the Southern District of New York indicated its skepticism “that *Perfect 10* correctly interprets the display rights of the Copyright Act” and held that the online news outlet could be held liable for articles that made photographs visible solely through embedding them into the website.

The *Goldman* court, explained that “mere technical distinctions invisible to the user should not be the lynchpin on which copyright liability lies.” The Southern District of New York again reached a similar decision in *McGucken v. Newsweek*, where the court declined to apply the server test and noted “that [it] has not been widely adopted outside of the Ninth Circuit.” The District Court of Utah likewise held in *Great Bowery v. Best Little Sites*, that the server test was “unpersuasive” and that the text of the Copyright Act compelled against its application.

Reservations concerning the applicability of the server test persist even within the Ninth Circuit, as at least one court has cited to *Goldman* as support for the fact the server test is inapplicable outside the context of search engines. However, the Ninth Circuit subsequently clarified that the server test is not limited to search engines in *Hunley v. Instagram* and held in favor of applying the server test to preclude infringement liability. Thus, at least within the Ninth Circuit, the server test remains relatively strong.

Supreme Court Declines to Review Server Test Copyright Case

As set forth above, while the server test continues to be the law in the Ninth Circuit, it has been rejected by a number of courts in other jurisdictions. The U.S. Supreme Court recently declined to resolve this uncertainty when the high court decided not to grant a petition for a writ of certiorari filed by Dr. McGucken seeking a review of the United States Court of Appeals for the Ninth Circuit's decision to uphold the dismissal of his copyright infringement claims against Valnet, Inc. based on the server test.

Given there is no imminent resolution of this issue by the U.S. Supreme Court, content creators and website owners will continue to struggle with uncertainty when it comes to liability for embedding which currently is likely to be determined by the jurisdiction in which any litigation is decided.

If you or your organization have questions about the Server Test or other copyright issues, please contact the authors.

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