

## NOTE

### IMPERFECT PRECEDENT: APPLYING THE PROPER PERSPECTIVE TO COPYRIGHT

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Copyright law only works when it successfully balances two objectives: incentivizing authors to produce creative works and ensuring the public has access to enjoy those works. Technology has advanced significantly since passage of the Copyright Act of 1976, and both the dramatic expansion of the internet and digitization of creative works have repeatedly challenged the law in pursuing those ends. The internet has presented a fundamental question to courts who must decide whether to view conduct through the lens of the virtual reality of the internet or the physical reality that allows the internet to function. This seemingly innocuous decision, often made without significant consideration of the differences, is sometimes decisive for a case.

The Ninth Circuit faces just such a case in *Hunley v. Instagram, LLC*. Several photographers, risking life and limb to capture front-line events of the George Floyd protests occurring across the nation, posted their hard-won photos on their Instagram accounts. BuzzFeed, writing a story on the protests, scraped the works off Instagram and embedded them in its story without consent or compensation of the photographers. Bound by the Server Test, circuit precedent requiring courts to focus on highly technical factors of the internet, the district court dismissed Hunley's infringement case without properly balancing the core objectives of copyright law.

The flaw in the court's reasoning rests in its choice of perspective. By focusing on technical details, instead of the parties' conduct, the court fails to consider the purpose and intent of copyright law. It neglects the reality of how the public experiences the internet, and who the public gives credit for the content it consumes. The court also opens itself up to errors by tackling topics far outside its comfort zone. Copyright law was designed to achieve and maintain balance despite advances in technology, and courts would better honor that end by focusing on the conduct of the parties, not the technological details. This Note explores the different perspectives courts can choose when confronted by cases involving the internet, and then it shows why the Server Test is a flawed interpretation of the Copyright Act in need of revision. It concludes by presenting alternative reasoning and

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statutory tools, including implied license and fair use, that would better allow courts to resolve controversies involving copyright on the internet.

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## INTRODUCTION

Copyright law aims to encourage both the creation and dissemination of creative works.<sup>1</sup> From the formation of the nation, Congress and the courts have been challenged to balance protecting public access to creative works and, through adequate incentives for their authors, promoting the creation of such works.<sup>2</sup> If authors' rights become too powerful, then costs for members of the public to access creative works increase, and future authors may be inhibited by the existence of current works.<sup>3</sup> On the other hand, if the public becomes too free to use authors' works, then there are insufficient opportunities for authors to recoup the costs involved in producing new works, resulting in fewer creative works to protect.<sup>4</sup> Society benefits from an appropriate balancing of these two, sometimes competing, aims of copyright law.<sup>5</sup>

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1. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

2. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

3. Eric Crampton, *Why Shouldn't Copyright Be Infinite?*, ELEC. FRONTIER FOUND. (Sept. 1, 2015), <https://www.eff.org/deeplinks/2015/08/why-shouldnt-copyright-be-infinite> [<https://perma.cc/QM43-QVMC>].

4. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

5. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (noting that while copyright law is “intended to motivate the creative activity of authors,” such private motivation must ultimately “stimulate artistic creativity for the general public good”) (first quoting *Sony Corp. of Am.*, 464 U.S. at 429; then quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

In the Ninth Circuit, current precedent has tilted the scale in favor of public access. While seeking to provide certainty and predictability for companies doing business on the internet,<sup>6</sup> the Ninth Circuit adopted a bright-line rule that has dramatically weakened the rights of authors. The rule, known today as the “Server Test,” states that an online service provider linking or displaying a creative work *cannot* commit copyright infringement if it does not possess a copy of the work on its own servers.<sup>7</sup>

The Ninth Circuit’s ruling was well intended, but it demonstrates a recurring challenge in analyzing cases involving the internet: the choice of factual perspective—between the physical, technical reality and the virtual reality—can distort legal outcomes.<sup>8</sup> Before courts balance public access and creator incentives, they must first agree on the relevant facts of the case. Since the Server Test requires courts to begin their analysis by focusing on technical details—whether the third party possesses a copy on its own server<sup>9</sup>—the rule itself distorts outcomes of copyright infringement cases.

*Hunley v. Instagram, LLC*<sup>10</sup> illustrates how the Server Test, by requiring courts to focus on a technical perspective, can lead courts astray from copyright’s fundamental objectives. Professional photographers, having risked life and limb to capture the George Floyd protests, posted their photos on their websites and social media accounts to promote their work and seek licensing opportunities.<sup>11</sup> When their photos were later embedded on a news site without their consent, the court’s application of the Server Test denied the photographers the right to control the further reproduction, display, and distribution of their work on the internet.<sup>12</sup> Where Congress aimed to encourage dissemination of creative works by guaranteeing authors they would retain certain rights after the initial release,<sup>13</sup> the court instead punished the photographers for sharing their works on the internet.

The district court’s order in *Hunley* is contrary to the congressional intent behind the Copyright Act of 1976, and courts

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6. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007).

7. *Id.* at 1159–61.

8. Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 361 (2003).

9. *See Perfect 10*, 508 F.3d at 1159–61.

10. No. 21-cv-03778, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021), *aff’d*, 73 F.4th 1060 (9th Cir. 2023).

11. First Amended Complaint ¶¶ 1, 14–18, *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844 (S.D.N.Y. Sept. 30, 2021), 2021 WL 9526816.

12. *Instagram*, 2021 WL 4243385, at \*2–3.

13. *See supra* note 2 and accompanying text.

should avoid the pitfall of focusing too much on technical details when deciding copyright cases on the internet. Part I of this Note examines the introduction of the Server Test in *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>14</sup> and reviews its impact on the *Hunley* litigation. Part II attacks the application of the Server Test to *Hunley* by considering (1) an experiential, holistic perspective, (2) a technical, statutory perspective, and (3) the public policy objectives of copyright law. Part III argues the boundaries of copyright infringement should be set by other doctrinal vehicles—fair use and implied license—and the proper course of action on rehearing is to abrogate the Server Test announced in *Perfect 10* and to remand *Hunley* under a new rule.

#### I. THE NINTH CIRCUIT INTRODUCES THE SERVER TEST TO COPYRIGHT LAW

To put the *Hunley* court’s decision in context, this Note begins by discussing the exclusive rights reserved to authors by copyright law. It then examines how the Server Test limited those rights and the cold reception courts in other circuits have given the rule in recent years.<sup>15</sup> These courts prefer an alternative test—incorporation—to evaluate infringement of the display right.<sup>16</sup>

In the dispute at hand, events have already been litigated in both New York and California. Alexis Hunley filed her lawsuit alleging direct infringement of the photographers’ rights, against BuzzFeed, Inc., in the Southern District of New York in late 2020.<sup>17</sup> Seven months later, Hunley filed a class action lawsuit alleging secondary infringement against Instagram, Inc.<sup>18</sup> Each case is discussed in turn.

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14. 508 F.3d 1146.

15. See, e.g., *Leader’s Inst., LLC v. Jackson*, No. 3:14-CV-3572, 2017 WL 5629514, at \*10–11 (N.D. Tex. Nov. 22, 2017); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 595–96 (S.D.N.Y. 2018).

16. Under the Incorporation Test, courts are more concerned with the processing and presentation of works, not “invisible, technical processes imperceptible to the viewer.” *Goldman*, 302 F. Supp. 3d at 590–91, 594–95.

17. *Hunley v. BuzzFeed, Inc.*, No. 1:20-CV-08844, 2021 WL 4482101, at \*1 (S.D.N.Y. Sept. 30, 2021).

18. Complaint for Damages Based on Copyright Infringement, *Hunley v. Instagram, LLC*, No. 21-cv-03778 (N.D. Cal. Sept 17, 2021), *aff’d*, 73 F.4th 1060 (9th Cir. 2023).

*A. Reproduction, Distribution, or Display of a Copyrighted Work  
without Permission Constitutes Direct Infringement*

The framers of the Constitution, recognizing the importance of fostering creative works to the people of the nation, granted Congress the power to “promote the Progress of Science and useful Arts” through the granting of certain rights to authors.<sup>19</sup> Embedded within this power is a delicate balancing act, whereby Congress aims to promote creative endeavors for the benefit of society by rewarding authors with time-limited exclusive rights.<sup>20</sup> Under the Copyright Act of 1976, authors of original works are granted six exclusive rights.<sup>21</sup> Among others, authors maintain the exclusive rights to “reproduce the copyrighted work in copies,” “to distribute copies . . . to the public,” and “to display the copyrighted work publicly.”<sup>22</sup> When another party violates any of these rights, they commit direct copyright infringement.

The exclusive right to display a copyrighted work is controversial in the internet context. Per the statute, to display a work is “to show a copy of it, either directly or by means of a . . . device or process.”<sup>23</sup> “Showing” a work occurs when a party transmits a digital file representing the work to another party.<sup>24</sup> Historically, when creative works were physical objects, it was arguably impossible to show a work without first possessing a copy.<sup>25</sup> The interconnectivity of the internet has removed this limitation, allowing website hosts to show works residing on servers they do not control.<sup>26</sup> The question now is whether infringement of the display right is possible in the absence of initial possession of a “copy” of a copyrighted work. Courts analyzing this question have come to opposing conclusions.<sup>27</sup>

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19. U.S. CONST. art. I, § 8, cl. 8.

20. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (“[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”).

21. 17 U.S.C. § 106.

22. *Id.*

23. 17 U.S.C. § 101.

24. See *Nicklen v. Sinclair Broad. Grp., Inc.*, 551 F. Supp. 3d 188, 194 (S.D.N.Y. 2021).

25. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007). Copies are “material objects,” and thus must be in a party’s physical possession to be shown. *Id.*

26. Only through digitization may copies be shown to others without physical possession. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 498 (2001) (finding that, in the electronic context, copies may be distributed electronically).

27. Compare *Perfect 10*, 508 F.3d at 1160–61, with *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018). In many respects, the display right is to digital works what the distribution right is to physical works. The

### 1. THE NINTH CIRCUIT ANNOUNCES THE SERVER TEST, HOLDING EMBEDDED LINKS CANNOT INFRINGE THE DISPLAY RIGHT

Under the Server Test announced by the Ninth Circuit, direct copyright infringement cannot occur so long as the alleged infringer does not itself possess and transmit a “copy” of an original work.<sup>28</sup> In *Perfect 10, Inc. v. Amazon.com, Inc.*, an adult media website named Perfect 10 sued Google and Amazon, alleging that Google’s image search functionality infringed its copyrights when it returned “embedded” links to full-size images of models hosted on Perfect 10’s website.<sup>29</sup> An important aspect of the case was that Google’s search technology not only linked to Perfect 10’s website, but also to other websites who were displaying Perfect 10’s images without its permission.<sup>30</sup> Perfect 10 failed in its claim with respect to Google’s embedded links.<sup>31</sup> The court considered the links Google provided to images hosted on both Perfect 10’s website and infringing websites and found that, regardless of where Google found the image, since the images displayed to users resided on *someone else’s server* and not Google’s own computers, Google was not responsible for displaying a copy to the public.<sup>32</sup> Thus the Server Test was borne of the Ninth Circuit’s focus on a technical detail.

### 2. DISTRICT COURTS IN THE SECOND CIRCUIT DISAGREE

Other circuits, most notably the Second Circuit, have declined to follow the Ninth Circuit’s lead on the “embedded link” question and instead define display as the act of “incorporating” a work on a website (the “Incorporation Test”).<sup>33</sup> In *Nicklen v. Sinclair Broadcast Group*,

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right is implicated when a party communicates a copy to the public (people not in the immediate proximity of the copy). Courts disagree on whether such communication must originate from a copy currently in the party’s possession. The courts that believe communication is possible without possession point out that if possession is a threshold requirement, then the display right becomes consumed within the reproduction right. *Nicklen*, 551 F. Supp. 3d at 195.

28. *Perfect 10*, 508 F.3d at 1159–62.

29. *Id.* at 1157. Embedding, or “in-line linking”, occurs when a party integrates a copyrighted work into their website by including code that references a copy outside of the website itself. Jane C. Ginsburg & Luke Ali Budiardjo, *Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives*, 41 COLUM. J.L. & ARTS 153, 155 & n.1 (2018).

30. *Perfect 10*, 508 F.3d at 1157.

31. *Id.* at 1159–62.

32. *Id.* at 1160–62.

33. *See, e.g., Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 587, 590 (S.D.N.Y. 2018).

*Inc.*,<sup>34</sup> a nature photographer captured a video of an emaciated polar bear and posted it on his Instagram and Facebook accounts.<sup>35</sup> Sinclair Broadcast Group then published an article on its website featuring the video, ignoring the photographer's instruction to contact his news company to procure a license for commercial use.<sup>36</sup> Sinclair embedded the entire video in its website by using the "embed code" provided by Instagram, so the page appeared to contain the video while in fact it was playing from Instagram's servers—the source where the photographer had originally uploaded it.<sup>37</sup>

Because the video was playing from Instagram, and not Sinclair's servers, Sinclair would have been safe from infringement claims under the Server Test, but the court applied the Incorporation Test instead.<sup>38</sup> Calling the Server Test "contrary to the text and legislative history of the Copyright Act,"<sup>39</sup> the court decided that the display right is implicated *any* time a copyrighted work is shown, not just when the alleged infringer shows a copy in its possession.<sup>40</sup> Rather than allow the Server Test to force authors to "surrender[] control over how, when, and by whom their work is subsequently shown" as soon as they post their work on the internet, the court adopted a rule more protective of authors' rights even after "public" display online.<sup>41</sup>

The Ninth Circuit, by applying a technical perspective, determined that a party must first possess a copy of a work in order to display it, while courts in the Second Circuit held there is no requirement of possession to display a work.<sup>42</sup> Under the Server Test, a lack of initial possession becomes dispositive and no display has occurred,<sup>43</sup> thus there is no reason to explore further whether the conduct in question complies with the Copyright Act. But in the view of the courts of the Second Circuit, merely causing the work to appear on viewers' computer screens is sufficient to implicate the display right, regardless of where the original copy is located.<sup>44</sup> The disagreement among the federal courts on this issue takes center stage in Hunley's litigation.

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34. 551 F. Supp. 3d 188 (S.D.N.Y. 2021).

35. *Id.* at 191–92.

36. *Id.*

37. *Id.* at 192, 194.

38. *Id.* at 194–96.

39. *Id.* at 195.

40. *Id.* at 194–96.

41. *Id.* at 195–96.

42. *See supra* note 27 and accompanying text.

43. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007).

44. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593–94 (S.D.N.Y. 2018).



*B. Hunley's Litigation Brought the Opposing Views Face to Face*

Alexis Hunley's lawsuits brought the courts' conflicting viewpoints regarding the display right to the forefront. Central to Hunley's case is whether a party who "embeds" a link to copyrighted material on the internet without license or consent has committed copyright infringement.<sup>45</sup> The Southern District of New York denied defendant BuzzFeed's motion to dismiss based on its conclusion that embedded linking *could* constitute direct infringement of the author's copyright.<sup>46</sup> On the other hand, the Northern District of California, bound by Ninth Circuit precedent established in *Perfect 10*, answered that embedded linking *could not* constitute direct infringement.<sup>47</sup>

1. A NEW YORK COURT FOUND POTENTIAL INFRINGEMENT FOR EMBEDDED LINKS

In the aftermath of George Floyd's murder at the hands of police, protests erupted in cities around the country.<sup>48</sup> Amidst all the chaos, six Black photojournalists (of which Alexis Hunley was one) managed to capture frontline photographs of the protests and publish them on their Instagram accounts, hoping to share them with their audiences and drum up licensing interest from media companies.<sup>49</sup> Interest in the photographs indeed followed, but not as the photographers intended. Without their knowledge or consent, BuzzFeed published an article on its website on June 3, 2020, titled "17 Powerful Pictures Of The Protests Through The Eyes of Black Photographers" that contained the photographers' works.<sup>50</sup> The six photographers filed a lawsuit in New York alleging direct infringement of their exclusive rights to reproduce and distribute their photographs to the public.<sup>51</sup> In response, BuzzFeed argued that its use of the photographs constituted fair use—reporting the news—and that embedded linking could not constitute copyright infringement.<sup>52</sup> After the district court denied BuzzFeed's motion to

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45. *Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385, at \*2 (N.D. Cal. Sept. 17, 2021), *aff'd*, 73 F.4th 1060 (9th Cir. 2023).

46. *See Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844, 2021 WL 4482101, at \*2–4 (S.D.N.Y. Sept. 30, 2021).

47. *Instagram*, 2021 WL 4243385, at \*2.

48. Complaint for Damages Based on Copyright Infringement, *supra* note 18, ¶ 11.

49. First Amended Complaint, *supra* note 11, ¶¶ 1, 14–17.

50. *Id.* ¶ 75.

51. *Id.* ¶¶ 109–12.

52. Defendant's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint, and in the Alternative, Sever the First Amended Complaint

dismiss, giving little credence to the second argument, the parties eventually settled before trial.<sup>53</sup>

## 2. A CALIFORNIA COURT DISMISSED HUNLEY'S CLAIM OF SECONDARY INFRINGEMENT

In addition to the direct infringement actions granted explicitly by the statute, courts may also impose secondary liability on parties who have not personally violated a copyright holder's exclusive rights.<sup>54</sup> Under the theory of contributory infringement, a party "who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."<sup>55</sup> Courts have characterized a contributory infringer as one who "was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner."<sup>56</sup> In *Perfect 10*, the Ninth Circuit stated a test for contributory liability requiring a company to have (1) actual knowledge of (2) specific infringing works on its systems, and (3) the ability to prevent further damage to the copyright holder (4) through simple measures that were not taken.<sup>57</sup> In addition to contributory infringement, a party who knowingly allows its systems to be used for copyright infringement, in a manner that demonstrates intent to promote the infringing acts, may be found liable for inducement of copyright infringement.<sup>58</sup> However, in order to prevail

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and Strike Allegations at 12–13, *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844 (S.D.N.Y. Sept. 30, 2021), 2021 WL 9526811 (urging the New York court to adopt the Server Test).

53. *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844, 2021 WL 4482101 (S.D.N.Y. Sept. 30, 2021) (denying motion to dismiss); Stipulation of Dismissal with Prejudice as to Plaintiff Alexis Hunley, *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844 (S.D.N.Y. Apr. 11, 2022). In light of recent rulings in *Goldman* and *Nicklen*, the Southern District of New York's disregard for the argument of noninfringement under the Server Test is not surprising.

54. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A] (2023) [hereinafter 3 NIMMER ON COPYRIGHT].

55. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

56. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 (1984) (footnote omitted).

57. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007).

58. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005).

on a secondary infringement theory, the complaining party *must* first establish an underlying instance of direct copyright infringement.<sup>59</sup>

While Alexis Hunley’s first lawsuit was playing out in New York, she filed a second lawsuit in California against Instagram.<sup>60</sup> The plaintiffs here alleged not that Instagram had directly infringed their copyright, but rather that the company had willfully allowed—even encouraged—the rights of its users to be infringed from the year 2013 to 2020.<sup>61</sup> The disputed conduct was publishing the Instagram Application Programming Interface (API) which allows third parties to embed links to works hosted on the platform without notifying or receiving permission from the user who posted the work.<sup>62</sup> Upon a motion to dismiss, the central question for the district court was whether “some underlying direct infringement by a third party” could be found to support the allegations of secondary infringement.<sup>63</sup> Bound by current Ninth Circuit law, the district court applied the Server Test and held that the acts taken by BuzzFeed and other media companies—the same acts the New York court found could constitute direct infringement if proven—could *not* be direct infringement of the owners’ copyrights in the Ninth Circuit.<sup>64</sup> With no direct copyright infringement alleged in the complaint, the district court dismissed the lawsuit and stated the plaintiff “is free to present [an] argument to the Ninth Circuit and the Supreme Court” if it believes the Server Test misinterprets the Copyright Act.<sup>65</sup> Alexis Hunley took the court’s offer and filed her appeal.<sup>66</sup>

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59. *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 591 F. Supp. 2d 1098, 1104 (N.D. Cal. 2008).

60. *Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021), *aff’d*, 73 F.4th 1060 (9th Cir. 2023).

61. Complaint for Damages Based on Copyright Infringement, *supra* note 18, ¶¶ 1, 5.

62. *Id.* ¶¶ 1–2.

63. *Instagram*, 2021 WL 4243385, at \*1 (quoting *Louis Vuitton*, 591 F. Supp. 2d at 1104).

64. *Id.* at \*1–2. BuzzFeed used the Instagram API to embed photos on its website, and since the photos were neither in BuzzFeed’s possession nor located on BuzzFeed’s servers, the conduct was not copyright infringement. *Id.* See also *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844, 2021 WL 4482101 (S.D.N.Y. Sept. 30, 2021) (discussing the conduct of the third parties at issue in the case).

65. *Instagram*, 2021 WL 4243385, at \*3.

66. *Hunley v. Instagram, LLC*, 73 F.4th 1060 (9th Cir. 2023). On initial appeal, a Ninth Circuit panel—also bound by the rule in *Perfect 10*—affirmed the district court’s decision. *Id.* at 1072, 1076–77. A petition for rehearing en banc has been filed. Appellants Petition for Rehearing En Banc, *Hunley v. Instagram, LLC*, 73 F.4th 1060 (9th Cir. Aug. 28, 2023) (No. 22-15293), ECF No. 61.

The district court's conclusion, while legally correct under current Ninth Circuit law, is unsatisfying because it deprives the photographers of control over their works. The root of the issue in the Ninth Circuit is the Server Test itself, so Part II of this Note takes a fresh look at the reasoning and consequences of the current bright-line rule. Part III recommends a different approach to the challenges the Ninth Circuit faced, using other tools in the court's toolbox, that better aligns with Congress's objectives. This Note then applies the suggested approach to arrive at just outcomes.

## II. APPLYING THE SERVER TEST LEADS TO UNJUST RESULTS

The Server Test requires courts to adopt a technical perspective that shifts the balance between public access and incentivizing content creation too far in favor of access to creative works. The bright-line rule for copyright infringement means that so long as a service provider does not explicitly make copies of copyrighted works on its own servers, the provider may embed and display copyrighted works with immunity from the copyright owners.<sup>67</sup> While the rule may provide clarity and efficiency in many cases that otherwise would require difficult analysis by courts,<sup>68</sup> the cost to authors' abilities to control the use of their works is too great. Some courts have gone so far as to state the rule misconstrues the plain text of the Copyright Act.<sup>69</sup>

This Part assesses the Server Test under three different analytical structures to show how it fails to properly balance public access and authors' rights. First, it looks at the subject of copyright infringement on the internet from an experiential, holistic perspective and concludes that courts should prefer this perspective over a technical approach where Section 106 rights are concerned. Second, it reexamines the nature of the internet and its technical interaction with copyright statutes, concluding that the Ninth Circuit's technical analysis was flawed. Third, it argues that courts attempting to apply the Server Test do not serve the policy objectives of Congress.

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67. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007).

68. See Ginsburg & Budiardjo, *supra* note 29, at 188; Robert A. McFarlane, *The Ninth Circuit Lands a "Perfect 10" Applying Copyright Law to the Internet*, 38 GOLDEN GATE U. L. REV. 381, 404–06 (2008).

69. *Nicklen v. Sinclair Broad. Grp., Inc.*, 551 F. Supp. 3d 188, 195 (S.D.N.Y. 2021).

A. *The Choice of Factual Perspective Can Be Dispositive in Cases Involving the Internet*

Perspective is a critical consideration when applying the law to the internet.<sup>70</sup> There are commonly two perspectives to the facts in a litigated event on the internet: an internal (or virtual reality) perspective representing the experiences of a party engaged in the internet conduct, and a technical perspective representing the views of a party focused on the physical details.<sup>71</sup> A court applying one perspective will interpret the facts of a case in legally significant different ways than a court applying the other perspective.<sup>72</sup> As a result, when a court chooses the version of the facts aligning with a particular perspective, the court simultaneously chooses how the law will apply to those facts, and thus chooses the outcome of the case.<sup>73</sup>

For example, consider a scenario where a person attempts to defraud a local bank by sending an e-mail containing fraudulent wire instructions. The case may be examined through the internal perspective of the fraudster, or through the technical perspective of the intermediary responsible for delivering the e-mail. The federal wire fraud statute is only implicated if the criminal conduct involves interstate commerce,<sup>74</sup> so a key question is whether the conduct crosses state lines. The answer depends on perspective. If the court adopts the internal perspective of the criminal actor, the fraudster believes they have sent a message to a business in their community. Under their view, their conduct is no different than if they walked into the bank and handed an employee a document with fraudulent information. They do not perceive that they have crossed state lines.

However, when the inner workings of the internet are taken into consideration, the application of a technical perspective gives a different result. A court applying the perspective of the e-mail service provider will recognize that, to deliver the message, the user first uploaded their message to the service provider's server.<sup>75</sup> That computer sent the message to the bank's e-mail provider, another server

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70. See Kerr, *supra* note 8, at 360–61.

71. *Id.* at 359–63.

72. *Id.* at 364–77.

73. *Id.* at 362.

74. 18 U.S.C. § 1343 (“Whoever . . . transmits or causes to be transmitted by means of wire, radio, or television communication in *interstate* or foreign commerce”) (emphasis added).

75. See *How Does an Email Message Flow from Sending to Delivery?*, MESSAGEBIRD (June 6, 2018), <https://messagebird.com/guides/o/email-message-flow-sending-delivery?sp=true> [https://perma.cc/DAJ7-VXEB].

on the internet.<sup>76</sup> Finally, the bank employee downloaded the message onto their computer at the local bank.<sup>77</sup> Depending on the physical location of those intermediate servers, the fraudster's e-mail message may have crossed state lines and implicated the federal law.<sup>78</sup> Analogous perspective conflicts crop up in a variety of areas of law that involve technology and the internet, including copyright law, which may lead to numerous issues and counterintuitive or even absurd results.<sup>79</sup>

### 1. APPLYING A TECHNICAL PERSPECTIVE TO *HUNLEY* FAILS TO RECOGNIZE THE REALITIES OF CONDUCTING BUSINESS ON THE INTERNET

The choice of how to interpret the facts in *Hunley* determines the outcome, regardless of the conduct and culpability of the parties involved. Under the precedent of the Server Test, district courts in the Ninth Circuit start with a technical perspective to copyright infringement on the internet.<sup>80</sup> The court must address the threshold issue of whether BuzzFeed hosts a tangible copy of the photograph on its own servers.<sup>81</sup> With its focus solely on this technical element, the court quickly—and correctly—determined that BuzzFeed was displaying a photograph hosted by Instagram, not hosting the photograph itself.<sup>82</sup> Under this view of the facts, a visitor to BuzzFeed's website is merely told where to retrieve the image, their browser subsequently downloads it from a non-infringing location, and then their browser displays the

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76. *See id.*

77. *See id.*

78. This analysis does not even consider the various networking equipment making up the internet that allows the servers to communicate with each other. There may be dozens of different electronic devices, in dozens of different physical locations, involved in delivering that one e-mail message. *See generally* Kevin Jackson, *Network Monitoring Basics: What Are Routers and Switches?*, FORTRA (Dec. 15, 2016), <https://www.fortra.com/resources/articles/network-monitoring-basics-what-are-routers-and-switches> [https://perma.cc/ZH6L-4J7C].

79. Kerr, *supra* note 8, at 364–79.

80. Courts in the Ninth Circuit may never even consider the conduct in the case beyond the purely technical question of whether the allegedly infringing copy resides on the defendant's server. *See Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385, at \*1–2 (N.D. Cal. Sept. 17, 2021), *aff'd*, 73 F.4th 1060 (9th Cir. 2023); *Miller v. 4Internet, LLC*, No. 18-cv-02097, 2022 WL 2438815, at \*2–3 (D. Nev. July 5, 2022).

81. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007).

82. *Instagram*, 2021 WL 4243385, at \*1–2.

image on their screen.<sup>83</sup> Since BuzzFeed did not make and host an unauthorized copy, nor distribute that copy to visitors, it could not be liable for direct copyright infringement.<sup>84</sup>

The court's approach fails to consider the internal perspective of those engaging with the internet.<sup>85</sup> Under an internal perspective, visiting BuzzFeed's website is akin to reading a newspaper or magazine—real life vehicles for receiving the news. The website's main page serves as a cover page, and as the reader clicks on headlines to navigate to individual articles, they are effectively flipping the pages of the newspaper. Upon choosing to view the article about the George Floyd protests, the reader is presented with several pages of content, filled with both text and photographs, informing them about the events.<sup>86</sup>

From this internal perspective, the technical details are invisible and arguably irrelevant.<sup>87</sup> The reader has no recognition that any individual photograph is coming from one server or another<sup>88</sup>—in fact, some images on the page are likely coming from BuzzFeed's server, others are coming from Instagram, and still others may be coming from other sources.<sup>89</sup> To the reader's eye, BuzzFeed simply presents the article that they chose to view, and the reader associates the entire experience with BuzzFeed as the provider. If BuzzFeed presents interesting stories and compelling photography, the reader may click on other headlines or return the next day to get more news.<sup>90</sup>

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83. *Id.* See also *Perfect 10*, 508 F.3d at 1160–61.

84. *Instagram*, 2021 WL 4243385, at \*1–2. See also *Perfect 10*, 508 F.3d at 1160–61.

85. The approach also fails to consider the internal perspective of the BuzzFeed employees who published the article. The people responsible made conscious choices to publish newsworthy content and supplement it with copyrighted works they found on the internet. When their conduct is evaluated in the absence of the technical loophole introduced by the Server Test, the conclusion that they have improperly borrowed copyrighted photographs seems inevitable. See *infra* Section II.B.1.

86. Gabriel H. Sanchez, *Here Are Powerful Pictures of the Protests Through the Eyes of Black Photographers*, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/gabrielsanchez/powerful-pictures-protest-black-photographers-instagram> [<https://perma.cc/JWK9-QCP9?type=image>] (Oct. 29, 2020, 8:09 PM).

87. Kerr, *supra* note 8, at 359–60.

88. *Id.*

89. As of the time of writing, examining the HTML of the article page at the center of the lawsuit revealed the page contains images hosted by [buzzfeed.com](https://www.buzzfeed.com), [instagram.com](https://www.instagram.com), [google.com](https://www.google.com), and [taboola.com](https://www.taboola.com). Sanchez, *supra* note 86.

90. Note that BuzzFeed derives its ad-based revenue from each of these user clicks and return visits, so this is commercial activity. See Neil Kokemuller, *Advertising Based Revenue Model*, CHRON, <https://smallbusiness.chron.com/advertising-based-revenue-model-71672.html>

Of course, the key point is that this is *exactly* how BuzzFeed wants the reader to experience their site. They want the reader to build up positive experiences and goodwill towards BuzzFeed as a news reporter and content aggregator.<sup>91</sup> When they are successful, readers return and click on more content, driving up BuzzFeed's click counts and associated ad revenue.<sup>92</sup> Furthermore, when we consider the original copyright infringement question with this perspective of the facts, there is no dispute that the real-world equivalent of BuzzFeed's actions—printing a newspaper that contained unlicensed copyrighted works within one of its articles—would violate both the reproduction and distribution rights of the copyright owner.<sup>93</sup> It is not obvious to the reader, who assumes BuzzFeed is responsible for selecting and providing the content in the article, that the analogous online conduct should not also violate the copyright owner's rights.<sup>94</sup> By ignoring the realities of BuzzFeed's business model and choosing the technical perspective instead, the court forecloses this line of analogy to real-world behaviors and artificially resolves the case on an invisible technicality.

## 2. COURTS SHOULD CHOOSE THE INTERNAL PERSPECTIVE IN COPYRIGHT CASES

When confronted with the critical choice of two perspectives in *Hunley*,<sup>95</sup> the court should choose the internal perspective of BuzzFeed. To choose between perspectives, Orin Kerr argues courts should follow a two-step process.<sup>96</sup> First, a court should consider whether the statute

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[<https://perma.cc/M9HY-LC37>]; Gennaro Cuofano, *How Does BuzzFeed Make Money? The BuzzFeed Business Model in a Nutshell*, FOURWEEKMBA (Sept. 23, 2023), <https://fourweekmba.com/how-does-buzzfeed-make-money/#:~:text=Advertising%20Partnerships%3A%20BuzzFeed%20collaborates%20with,while%20promoting%20products%20and%20services> [<https://perma.cc/6EEC-2D6E>].

91. As opposed to giving credit and sharing the goodwill with the underlying content providers. See Neil Kokemuller, *Advertising Models vs. Subscription Models*, CHRON, <https://smallbusiness.chron.com/advertising-models-vs-subscription-models-70238.html> [<https://perma.cc/3SWK-XTGZ>].

92. *Id.*; Kokemuller, *supra* note 90.

93. If the newspaper prints physical copies of the original work, then the act of delivering the newspaper qualifies as distribution of the work. Fair use considerations aside, this constitutes direct infringement. Cf. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 498 (2001).

94. See Kerr, *supra* note 8, at 386–87. See also Ginsburg & Budiardjo, *supra* note 29, at 185–86.

95. See also Kerr, *supra* note 8, at 381.

96. *Id.* at 389–401.



or legal doctrine at issue explicitly or implicitly expresses a preference for one perspective over the other.<sup>97</sup> If the first step does not provide clarity, the court should favor the perspective of the party the law aims to regulate.<sup>98</sup> In the sample wire fraud scenario discussed earlier,<sup>99</sup> assuming the wire fraud statute does not express a preference for either perspective, the statute may be read as regulating the conduct of fraudulent actors, so the fraudster’s internal perspective should be favored.

Applying Kerr’s test to *Hunley*, both steps direct the court towards applying an internal perspective. Since its introduction in 1976, Section 106 of the Copyright Act has been designed to be technology agnostic—to focus on the substance of how copyrighted works are used, regardless of advances in technology that change the specific mechanisms of use.<sup>100</sup> In *Sony Corporation of America v. Universal City Studios, Inc.*,<sup>101</sup> the Supreme Court decided the use of VCRs to record broadcast television shows, though technically making copies of copyrighted works, was acceptable because the owners of the devices were merely “time-shifting” their enjoyment of the broadcast.<sup>102</sup> In *ABC, Inc. v. Aereo, Inc.*,<sup>103</sup> the Supreme Court held that a company providing access to television broadcasts on the internet provided the same function as a cable TV provider, regardless of technical differences.<sup>104</sup> Determinations of infringement under Section 106 are based on perceived behavior, not technical details.<sup>105</sup> Thus, the statute and legislative intent have expressed an implicit preference for the internal perspective of people using (reproducing, distributing, or displaying) copyrighted works.<sup>106</sup>

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97. *Id.* at 391–96, 400.

98. *Id.* at 396–400.

99. *Supra* notes 74–78 and accompanying text.

100. See Ginsburg & Budiardjo, *supra* note 29, at 185–86; Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?*, 42 COLUM. J.L. & ARTS 417, 419–20 (2019); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 588–89 (S.D.N.Y. 2018).

101. 464 U.S. 417 (1984).

102. *Id.* at 421.

103. 573 U.S. 431 (2014).

104. *Id.* at 448–51 (“Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service.”).

105. *Id.*

106. Kerr, in his article on perspective, concludes that copyright infringement as a whole should be evaluated from an external, technical perspective. Kerr, *supra* note 8, at 393–94. However, this conclusion was based on a superficial analysis of Section 117 of the Copyright Act, which specifically targets incidental copyright infringement associated with how computers operate. *Id.* Applying this conclusion to

Analysis of the party that Section 106 regulates also leads to an internal perspective. The statutes in Section 106 do not aim to limit the rights of copyright owners: they aim to regulate the use of copyrighted works by unauthorized parties.<sup>107</sup> Given the circumstances presented in *Hunley*, courts should favor the perspective of BuzzFeed—the regulated party—as a content publisher. As BuzzFeed is actively engaged in selecting and publishing a copyrighted work to the public, its conduct should be evaluated under an internal perspective, contrary to the outcome achieved when the court applies the Server Test.

*B. The Copyright Act Does Not Support the Server Test under a Technical Perspective*

Even when adopting a technical perspective, by viewing the details under a sufficiently close lens, applying the Server Test leads to a statutorily incorrect outcome. This Section sets aside the question of which perspective is more appropriate and, for the sake of argument, accepts the court's choice at face value. In doing so, however, it reveals important technical details the court overlooked and ultimately leads to a different conclusion.

1. HOSTING A WEBSITE INVOLVES MAKING COPIES

The justifications of the Server Test in *Perfect 10* are based on a finding that embedding a work does not involve a copy, but it is not possible to share content on the internet without making copies. Under the court's view of the facts, the interaction begins when a user conducts an image search on Google's website.<sup>108</sup> The user's web browser sends a request to Google's servers, and Google responds by displaying a screen full of preview images that match the search criteria.<sup>109</sup> When the user clicks on a preview image to request the full-size image, their browser sends another request to Google's servers.<sup>110</sup> Google's servers respond with HTML code containing an internet address for the full-size image, which is hosted on someone

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the entire act, despite many sections having nothing to do with computers or the internet, is an overgeneralization. Individual sections should be evaluated independently, considering their text, scheme, and legislative intent.

107. See 17 U.S.C. § 106. (“[T]he owner of copyright . . . has the *exclusive* rights.”) (emphasis added).

108. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007).

109. *Id.*

110. *Id.* at 1155.

else's server<sup>111</sup>—usually an authorized copy on the copyright owner's server or a service the owner uploaded the image to. The user's browser retrieves the full-size image from the authorized location and displays it on the user's screen.<sup>112</sup>

Applying the Ninth Circuit's technical analysis to *Hunley*, arriving at an analogous perspective of the facts is certainly plausible. The user visits BuzzFeed's website and clicks on the protest headline. Their browser sends a request to BuzzFeed's server for the article on the protests, and BuzzFeed's server responds with the text of the article. Within the text of the article are HTML code snippets that include the addresses of the copyrighted photographs hosted by Instagram.<sup>113</sup> The user's browser downloads the photographs directly from the authorized location on Instagram's servers and displays them on the user's screen.

However, as with many high-tech interactions, this analysis glosses over a few important details.<sup>114</sup> In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,<sup>115</sup> a court in the Ninth Circuit previously held that volitional acts are an important aspect of finding parties on the internet liable for copyright infringement.<sup>116</sup> We need to consider each party's active,

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111. *Id.*

112. *Id.* at 1155–56.

113. First Amended Complaint, *supra* note 11, ¶ 19. In the initial appeal, a Ninth Circuit panel examined the HTML code and emphasized the apparent technical differences between displaying an image hosted by the website and embedding an image. *See Hunley v. Instagram, LLC*, 73 F.4th 1060, 1063–64 (9th Cir. 2023). While the presented embed code appears quite different on the surface, the panel failed to appreciate that over ninety-five percent of the cited code is related to formatting the image on the screen, not rendering it from Instagram. *See id.* When the embed code is distilled down to elements related only to rendering the image, some of which is buried in JavaScript code, the technical functionality is much closer to the proposed infringing usage. The panel also overlooks, in its infringement example, that a simple change to `` would also avoid direct infringement under the Server Test because that code also directs the browser to download from a server other than the website host.

114. As a general matter, courts attempting to make decisions based on highly technical nuances may be prone to make mistakes due to incomplete factual details or understanding. As computer systems and the internet get more complex in the future, this trend is likely to become even more of an issue if case law focuses on those details. *See, e.g.,* Sara Brown, *Machine Learning, Explained*, MIT (Apr. 21, 2021), <https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained> [<https://perma.cc/BZ36-PS5S>] (noting that in the context of artificial intelligence “[u]nderstanding why a model does what it does is actually a very difficult question”). The practical realities of judicial practice thus provide another reason to prefer internal perspectives that focus on conduct instead.

115. 907 F. Supp. 1361 (N.D. Cal. 1995).

116. *Id.* at 1370.

decisionmaking contributions to the conduct.<sup>117</sup> With volition in mind, consider that articles on the internet do not write themselves—a journalist at BuzzFeed first wrote the article on the George Floyd protests, identified the artwork the photographers had shared on Instagram as good supplemental material for that article, and sent the article to their editor.<sup>118</sup> The editor approved the article and directed a programmer to build the article page on BuzzFeed’s website.<sup>119</sup> Included in the instructions to the programmer would be the addresses for the copyrighted works on their owners’ Instagram accounts.<sup>120</sup> Between the author, the editor, and other staff at BuzzFeed, someone should be responsible for ensuring licenses have been acquired for copyrighted works in their articles, and that clearly did not occur in this case.<sup>121</sup>

Later in the process, after the user has clicked on the article, there are a few more steps between receiving the HTML code snippets and displaying the photographs on screen. After the user’s browser receives the article text and addresses for the photographs (along with all other graphical images on the page), it sends a series of requests to Instagram’s servers for the photograph images.<sup>122</sup> In response to each request, Instagram transmits a file containing the image back to the user’s browser.<sup>123</sup> The user’s browser then saves the image file in an area of the user’s computer known as the browser cache.<sup>124</sup> When the browser has received the article text and all the image files for the article page, it finally renders the article on screen, displaying the text and the image files saved on the computer.<sup>125</sup> The image files

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117. *See id.*

118. *Cf. Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 594 (S.D.N.Y. 2018); *Nicklen v. Sinclair Broad Grp., Inc.*, 551 F. Supp. 3d 188, 194 (S.D.N.Y. 2021).

119. *How to Start a News Website in 12 Easy Steps*, GRAVITEC (Nov. 11, 2019), <https://gravitec.net/blog/how-to-start-a-news-website-in-12-easy-steps/> [https://perma.cc/37QG-9UDF].

120. *See How to Code a Website: A Step-by-Step Guide*, COLUM. ENG’G, <https://bootcamp.cvn.columbia.edu/blog/how-to-code-a-website> [https://perma.cc/Y4LT-V5JE]; *Goldman*, 302 F. Supp. 3d at 587.

121. *See* First Amended Complaint, *supra* note 11, ¶ 19.

122. *See What Is a Web Browser?*, MOZILLA, <https://www.mozilla.org/en-US/firefox/browsers/what-is-a-browser/> [https://perma.cc/U7NS-N5SW].

123. Margret Munganyinka, *Understanding Browser Caching*, SECTION.IO (Mar. 30, 2021), <https://www.section.io/engineering-education/understanding-browser-caching/> [https://perma.cc/FSY2-AP7A].

124. *Id.*

125. *What Is a Browser Cache, and Why Is It Important?*, BIGCOMMERCE, <https://www.bigcommerce.com/ecommerce-answers/what-browser-cache-and-why-it-important/> [https://perma.cc/4WLF-LPE9]. Just because browsers today behave in this

themselves may remain in the browser cache for days, weeks, or even months, so if the user returns to the same article the images do not need to be downloaded a second time, speeding up the rendering of the page and reducing traffic on the internet.<sup>126</sup> All of these details happen within a fraction of a second, with no input or direction beyond clicking on the article headline, so it is inappropriate to associate any volitional conduct with the user—BuzzFeed has orchestrated the entire interaction.

## 2. SHOWING COPIES TO WEBSITE VISITORS INFRINGES THE DISPLAY RIGHT

Glossing over technical details, like choosing an improper perspective, leads to an improper legal outcome. Under the Ninth Circuit’s analysis, violating the display right requires the alleged infringer to (1) make and store a copy of the copyrighted work on its own servers, then (2) communicate that copy to the public.<sup>127</sup> So long as the image communicated to the public is an authorized copy of the work, and not a copy stored on the host server, then no infringement can occur.<sup>128</sup> In *Perfect 10*, since Google was merely directing the user’s browser to an authorized location to download the image, it was not communicating a copy (but rather an authorized original), and the court ended its analysis there.<sup>129</sup> Applying the same reasoning to *Hunley*, the court’s superficial analysis concludes that BuzzFeed merely

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manner does not rule out the technical feasibility of a “cacheless browser” that downloads images from servers on the internet directly into RAM, then renders them on screen from this temporary memory. While such a browser mechanism would require the user to download all images on the page upon every visit, it would theoretically defeat the requirement that a “copy” be non-transitory. The memory copy would be wiped out and overwritten within minutes, likely by the next page the user visited. In the absence of a “copy,” there would be no infringement. As internet bandwidth increases in the future, it is plausible that the benefits of storing copies of images in a browser cache become insignificant, and that such a mechanism becomes the default behavior. This hypothetical scenario brings us back to the *Aereo* case—should such a nuanced technical distinction, completely invisible to the user and disconnected from the conduct of the host, change the legal outcome such that the host’s embedded link becomes legally authorized? The Supreme Court has already spoken on the matter, and it stated that the legal outcome should not change based on technical details of this nature. See *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 448–51 (2014).

126. *What Is a Browser Cache, and Why Is It Important?*, *supra* note 125.

127. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007).

128. See *id.*

129. See *id.*

directed the user's browser to the authorized location, Instagram, and never communicated a copy to the public.<sup>130</sup>

*a. Hosting a Website Creates Unauthorized Copies Every Time the Site Is Visited*

With these critical details included, the statutory requirements for infringement of the display right have been met. "Display" of a copyrighted work occurs whenever a "copy" is shown to the public;<sup>131</sup> there is no statutory basis for the requirement that the copy exist prior to transmission, nor that the copy reside on the website host's server.<sup>132</sup> Taken literally, the HTML code on the article page, written by a programmer at BuzzFeed's direction, instructs the user's browser to retrieve and make a copy of the original work in the user's browser cache.<sup>133</sup> Only after the browser makes a copy on the user's computer does the browser, again per BuzzFeed's HTML instruction, render the page and show the copyrighted image to the user, a member of the public.<sup>134</sup> That copy is not transitory—it could live on the user's computer for months.<sup>135</sup> The user did not make any conscious choice to retrieve and make a copy of a copyrighted work; they merely chose to read an article that BuzzFeed promoted to them. Only the employees at BuzzFeed were involved in the volitional decisions to make a copy on each visiting user's computer.<sup>136</sup> On this basis, BuzzFeed violated the photographer's exclusive rights to reproduction and distribution, in addition to the display right.<sup>137</sup>

Furthermore, some courts have taken the stance that there need not be an unauthorized copy to infringe on the display right under Section 106(5).<sup>138</sup> As written, the statute merely requires the unauthorized

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130. *Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385, at \*1–2 (N.D. Cal. Sept. 17, 2021), *aff'd*, 73 F.4th 1060 (9th Cir. 2023).

131. 17 U.S.C. § 101 (defining "copies" and "display").

132. Ginsburg & Budiardjo, *supra* note 29, at 180–82.

133. Munganyinka, *supra* note 123.

134. *What Is a Browser Cache, and Why Is It Important?*, *supra* note 125.

135. *Id.*

136. See *How to Start a News Website in 12 Easy Steps*, *supra* note 119. Once a webpage is coded and published on the internet, the only interactive choice a visitor makes is to view the page. No decisions are made regarding how the content will display on their screen.

137. The copy was made by BuzzFeed—operating without a license—and is not merely transitory, which violated the reproduction right. And it was at BuzzFeed's explicit direction that copies are made and effectively distributed to every member of the public who visits the article page. See 17 U.S.C. §§ 106(1), (3).

138. *McGucken v. Newsweek LLC*, 19 Civ. 9617, 2022 WL 836786, at \*5–6 (S.D.N.Y. Mar. 21, 2022). See also *Nicklen v. Sinclair Broad. Grp., Inc.*, 551 F.

showing of a copy to the public, and since the *original* work is a copy under Section 101, communication of the original work to the public constitutes a display.<sup>139</sup> The question is whether BuzzFeed facilitated the showing of an original work through a device or process,<sup>140</sup> and arguably, BuzzFeed directly arranged for the showing of the original “copy” without the author’s consent.

*b. Display of Cache Copies Is Infringement, but Not by Website Visitors*

The court could have left open the potential of infringement related to browser cache copies while avoiding concerns about allegations against website visitors by considering implied licenses. Interestingly, the Ninth Circuit was very much aware of the copies created in the browser cache when it announced its ruling in *Perfect 10*.<sup>141</sup> The court agreed with the district court’s assessment that any such copies, however, constituted a fair use *by the visitor* because it was necessary for the effective operation of the internet.<sup>142</sup> Thus, the court reasoned, cache copies could not form the basis for direct copyright infringement.<sup>143</sup> The Ninth Circuit takes an improperly narrow view of the browser cache process. Most pointedly, the court simultaneously claims that (1) no copy is made and communicated by the website host, and (2) there is a copy made by the visitor, but that act is a fair use.<sup>144</sup> But this is inconsistent on two fronts. First, either a copy is made, or it isn’t, and the court clearly recognizes a copy is made in the process of visiting a webpage. Second, the court associates this copy with the visitor, a party lacking any volition related to displaying the copy, not the website host orchestrating the visitor’s experience. Fair use may

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Supp. 3d 188, 195 (S.D.N.Y. 2021) (arguing that requiring more than a showing “makes the display right merely a subset of the reproduction right”).

139. See *McGucken*, 2022 WL 836786, at \*6 (“[T]he Copyright Act defines ‘display’ as ‘to show a copy of’ a work . . . not ‘to make and then show a copy of the copyrighted work.’”) (quoting *Nicklen*, 551 F. Supp. 3d at 195).

140. The Copyright Act of 1976 was intended to be flexible with technology, so any “device or process” that can render an image file for a user may be implicated by the statute. *Id.* at \*5 (emphasis omitted) (quoting *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 588 (S.D.N.Y. 2018)).

141. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007).

142. *Id.* at 1169–70. For further discussion of the criteria for fair use, see *infra* Section III.B.

143. See *Perfect 10*, 508 F.3d at 1170.

144. Compare *id.* at 1161 (“Instead of communicating a copy of the image Google provides HTML instructions . . .”), with *id.* at 1169 (“Local caching by the browsers of individual users is noncommercial, transformative, and no more than necessary . . . . The copying function performed automatically . . .”).

protect the visitor, but what does that have to do with the volitional conduct of the website host? This copy is made according to the direction of the website host and its programming team,<sup>145</sup> not the visitor, so this mischaracterization is crucial. If the creation and use of the browser cache copy can be fairly attributed to the website host, then the court's basis for summarily finding no infringement under its technical perspective is defeated.

The court seems concerned about holdings that would treat general use of the internet as infringement, but rather than attempting to reconcile what technically occurs through a fair use lens, the distinction between the parties involved becomes clear when considered in the implied license context. An author grants an express license when they make an agreement, in writing, for another party to use their work in some manner.<sup>146</sup> An implied license to use a copyrighted work is created when it may be reasonably inferred from the copyright owner's conduct that such use should be permitted.<sup>147</sup> Because viewing an image on the internet necessarily requires the visitor's browser to download a copy in the browser cache to display it on screen,<sup>148</sup> the copyright owner's act of publishing the work on the internet necessarily contemplates visitors making browser cache copies. Visitors should be granted an implied license to make cache copies while viewing the author's website or Instagram account, for the sole purpose of viewing

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145. *Supra* notes 116–121 and accompanying text.

146. 3 NIMMER ON COPYRIGHT, *supra* note 54, § 10.03[A]. When a license is in writing, the author dictates the scope and duration of the licensed use, and exceeding the scope of the license is infringement. *See Beasley v. John Wiley & Sons, Inc.*, 56 F. Supp. 3d 937, 943 (N.D. Ill. 2014). On the internet, it is common for service providers to claim licenses in their terms of service allowing the use of any works uploaded into their systems in exchange for the services offered to the author. *See, e.g., Meta Platform Terms* § 2.b.i.1, FACEBOOK, [https://developers.facebook.com/terms/dfc\\_platform\\_terms/](https://developers.facebook.com/terms/dfc_platform_terms/) [<https://perma.cc/N9QF-2T93>] (“[L]icense to: host, use, distribute, modify, run, copy, publicly perform or display . . .”). Such licenses are arguably necessary to permit the platform to operate as intended, allowing the platform to serve as a middleman and display copyrighted works to visitors to the site. Nonetheless, platform providers claim licenses that go well beyond the minimum required, presumably to limit potential liability.

147. Historically, implied licenses have only been recognized in cases where the author was hired to create a work for an intended purpose, and courts granted the hiring party the license to use the work despite the absence of an express license. Jacqui Lipton, *Implied Licenses in Copyright Law*, AUTHOR'S ALL. (May 27, 2020), <https://www.authorsalliance.org/2020/05/27/implied-licenses-in-copyright-law/> [<https://perma.cc/4ETJ-JASQ>]. More recently, some courts have taken a more holistic view that recognizes an implied license when the parties' conduct, taken as a whole, supports the intent to grant a license. *See, e.g., Jose Luis Pelaez, Inc. v. McGraw-Hill Glob. Educ. Holdings LLC*, 399 F. Supp. 3d 120, 141–42 (S.D.N.Y. 2019).

148. *What Is a Browser Cache, and Why Is it Important?*, *supra* note 125.



the work through that context. Because the visitors are granted implied licenses, there can be no copyright infringement and there is no need to consider whether fair use should apply to their conduct.<sup>149</sup>

On the other hand, implied licenses are not without limits.<sup>150</sup> In this case, the implied license is exceeded if the visitor chooses to extract the copy from their browser cache and share it with their friends or post it on their own website.<sup>151</sup> Similarly, the implied license is granted to the visitor only, and no such implied license extends to a third party choosing to include the work within the context of their own website. In fact, Instagram's platform policy expressly stated that no such license is granted to parties choosing to embed copyrighted works, and such uses are only authorized if the party has negotiated an appropriate license from the owner.<sup>152</sup> Applying the implied license approach, rather than characterizing browser cache copies as fair use, cleanly serves the court's objective in protecting website visitors from allegations of infringement.

*C. The Server Test Fails to Adequately Incentivize Authors to Share Their Works*

In copyright law cases, courts must always be conscious of balancing the public's competing interests in incentivizing creators and in the efficient dissemination of creative works.<sup>153</sup> As shown above,

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149. See *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 323 (1st Cir. 2017).

150. *Id.*

151. 3 NIMMER ON COPYRIGHT, *supra* note 54, § 10.03[A][7]. The scope of the implied license is determined by the mutual intent of both the licensor and licensee, and the only use that may be reasonably implied from the author's conduct is that they expect visitors to view the photograph on their Instagram page and to share it using Instagram's platform tools.

152. Plaintiff's Memorandum of Law and Supporting Authorities in Opposition to Defendant BuzzFeed Inc.'s Motion to Dismiss the Amended Complaint, and in the Alternative, Sever the First Amended Complaint and Strike Allegations at 17, *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844 (S.D.N.Y. Sept. 30, 2021) 2021 WL 9526812, *Meta Platform Terms*, *supra* note 146, § 2.c.ii. It is worth noting that one argument in BuzzFeed's favor is that the photographers published their photos to their Instagram accounts after the Instagram API had been in existence for several years. Knowingly publishing copyrighted works to a service that a party is aware enables embedding of the published content could be construed as granting an implied license for such conduct.

153. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 844 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

applying an improper perspective can lead to unjust results,<sup>154</sup> and the same can be said about misapplying the law to the facts. The Server Test, while lauded for striking a sound balance and providing clarity of law on the internet,<sup>155</sup> is guilty of both faults. As a result, the Server Test does not adequately protect the rights of authors to incentivize sharing their works, and the application of the rule leads to absurd and unjust results.

On the surface, the rule seems like it should promote the public's ability to access creative works, but this conclusion is deceptive. As demonstrated in *Hunley*, the district court approved the widespread distribution of a photograph to people seeking news on the internet, and it did so without requiring any transaction costs, either negotiation or permission, between the photographer and the media company.<sup>156</sup> The media company merely embedded some HTML code into its article and the photograph was disseminated to every viewer of the article.<sup>157</sup> It is difficult to be much more efficient than that.

The challenge comes with determining limits on this right of further dissemination. In *Perfect 10*, the court permitted Google to assist members of the public looking for certain images in finding websites that provide the sought-after content.<sup>158</sup> In *Hunley*, there is no longer any intent to find a photographer, nor to facilitate a connection between the visitor and the photographer, but merely to display the work in support of the media company's ends.<sup>159</sup>

As the district court handling *Perfect 10* understood,<sup>160</sup> if this conduct is acceptable, then certain related scenarios must also be lawful. Consider a parallel case where instead of sharing the photograph on Instagram, Alexis Hunley had published the photograph on her own website and a server she owned to share it with her business network in search of a licensing opportunity. According to the Server Test, BuzzFeed would be permitted to embed a link to the photograph on Hunley's server, with the same resulting determination

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154. Kerr, *supra* note 8, at 357–58.

155. See McFarlane, *supra* note 68, at 407.

156. See *Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385, at \*1–2 (N.D. Cal. Sept. 17, 2021), *aff'd*, 73 F.4th 1060 (9th Cir. 2023).

157. *Id.*

158. *Perfect 10*, 416 F. Supp. 2d at 848 (“Google . . . does not profit from providing adult content, but from locating, managing, and making information generally more accessible.”).

159. First Amended Complaint, *supra* note 11, ¶ 19.

160. *Perfect 10*, 416 F. Supp. 2d at 839 (“As opposite ends of a spectrum, the server and incorporation tests both are susceptible to extreme or dubious results.”).

of legality, completely circumventing Hunley's business objective.<sup>161</sup> Worse, sharing Hunley's photograph directly also sends unsolicited internet traffic to her server and consumes her bandwidth and computing resources, all for no gain on her part. For comparison, Hunley might have displayed her photograph in an art studio. If a BuzzFeed agent visited the studio, snapped a photograph with his phone, then published the photograph without her permission, courts would certainly find an unauthorized reproduction and distribution of Hunley's work.<sup>162</sup> The only substantive difference is that the second scenario happens in the real world and requires the BuzzFeed agent to take their own picture (a copy they possess) rather than sharing Hunley's photograph directly.

Taking the example further, imagine a startup motion picture company working on a groundbreaking movie who happens to save in-development video clips on servers at their studio. As artists, not security analysts, they could make poor choices in how they setup their network, and suddenly it becomes possible for people on the internet to directly access the video clips. The only information people need is the address for the server and the video files' names. The company does not have a webpage, and it has never actively shared its work with anyone, but if BuzzFeed embeds a link to the in-development movie on its website, then according to the Ninth Circuit they have not violated any rights. Under the Server Test, so long as they link directly to the company's server, they are *not communicating from their own copy* and thus cannot be found to be infringing the company's display right.<sup>163</sup>

These scenarios have significant practical implications. Primarily, they mean that if an author is concerned with maintaining control of the exclusive rights associated with their original works, they may never publish them anywhere on the internet,<sup>164</sup> and arguably need to be careful even saving the work on computers connected to the internet. Adding a copyright notice to the work, or claiming that "all rights are reserved," becomes ineffective if everyone on the internet can view and use the work directly from its original source without needing further permission or consent. In cases where the content is embedded directly

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161. See *id.* (using the example of a website entitled "Infringing Content For All!" that the court admits would be immune from direct infringement).

162. Taking a picture of the printed photograph makes a copy in the agent's phone—an unauthorized reproduction. When the agent then uploads that copy onto a website or prints it in a magazine, they are either displaying or distributing the unauthorized copy.

163. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007).

164. See *Nicklen v. Sinclair Broad. Grp., Inc.*, 551 F. Supp. 3d 188, 195–96 (S.D.N.Y. 2021).

from private servers, third parties do not need to give credit to the author and may not even know who the author is. The cumulative result of this deprivation of authors' rights is that authors may stop sharing their work via the internet, depriving both the author and the public of an important channel for disseminating creative works.<sup>165</sup> This doomsday scenario has not visibly occurred in the fifteen years since *Perfect 10* was announced, and creation and sharing of works on the internet has exploded in the last decade.<sup>166</sup> Perhaps parties doing business on the internet also consider the rule unfair and do not see a need to push their luck with more extreme cases, or maybe they are simply cognizant of the fact the rule has not been widely adopted outside the Ninth Circuit. If more cases like *Hunley* resolve in favor of permitting free use of creative works, licensing models that have survived despite the Server Test may start to be seen more frequently as unnecessary transaction costs.<sup>167</sup>

### III. IMPROVING THE APPLICATION OF COPYRIGHT LAW ON THE INTERNET

Critique of the modern implications of the Server Test aside, this Note does not claim that the result in *Perfect 10* failed to serve the interests of a rapidly evolving internet as it was understood in 2007. The courts of the Ninth Circuit had valid concerns about restricting beneficial conduct on the internet if it ruled against Google and Amazon in that case.<sup>168</sup> Rather, this Note argues that the Server Test, as a bright-line rule focused on an exclusively technical perspective,<sup>169</sup> oversimplifies the balancing analysis that other copyright doctrines are better suited to handle. When parties commit copyright infringement, the fair use defense may be available to absolve them of liability.<sup>170</sup> By

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165. See Ginsburg & Budiardjo, *supra* note 100, at 423.

166. Hannah Ritchie, Edouard Mathieu, Max Roser & Esteban Ortiz-Ospina, *Internet, OUR WORLD IN DATA* (2023), <https://ourworldindata.org/internet> [<https://perma.cc/C53L-ZPEK?type=image>].

167. Also consider the distinction between quantity of creation and quality of creation—this phenomenon would first impact high quality works with legitimate licensing aspirations, not volume creators such as those found on social media platforms. Continued growth in quantity of content does not necessarily indicate high-quality authors have not withheld their work from the public.

168. See *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 840 (C.D. Cal. 2006) (“To adopt the incorporation test would cause a tremendous chilling effect on the core functionality of the web . . . .”) *aff’d in part, rev’d in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

169. See *supra* Section II.A.1.

170. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 13F.02–.17 (2023) [hereinafter 4 NIMMER ON COPYRIGHT].

focusing on an internal perspective and applying the fair use doctrine effectively, courts could have resolved both *Perfect 10* and *Hunley* in a manner that promotes the objectives of copyright law on the internet.

*A. Despite Flawed Reasoning, the Ninth Circuit Came to the Correct Result in Perfect 10*

Considering the facts before the Ninth Circuit in *Perfect 10*, and the potential ramifications to the internet more broadly, ruling in favor of Google and Amazon properly served the interests of copyright law on the internet. The court faced lawsuits alleging that Google Image Search—the tool that allows internet users to enter descriptive text and find related images scattered across the internet—was fundamentally flawed unless Google could derive a method for identifying unauthorized copyrighted works and removing them from its search results.<sup>171</sup> Since no such mechanism existed—and it is not at all clear how one could be built without significant input from copyright owners<sup>172</sup>—a finding that Google was liable for direct or contributory infringement may have required Google to alter the service significantly.<sup>173</sup>

1. GOOGLE'S WIN IN *PERFECT 10* SERVED THE PUBLIC'S INTERESTS

Faced with the potential outcomes of *Perfect 10*, the Ninth Circuit properly balanced the interests of public access and incentivizing creation of original works. By 2007, the internet had become an enormous venue for the exchange of ideas and information at an unprecedented scale.<sup>174</sup> Google Image Search, along with similar search engine tools, had become an essential means for the public to locate creative works and connect with their authors within that massive

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171. See *Perfect 10*, 508 F.3d at 1155, 1172. *Perfect 10* argued Google should be held contributorily liable for linking to infringing copies on the internet, whether it knew they were infringing or not. *Id.*

172. The court in *Perfect 10* remanded to answer the question of “whether there are reasonable and feasible means for Google to refrain from providing access to infringing images.” *Id.* at 1172–73.

173. Arguably, the only way Google could have avoided further liability would have been to cease showing image results to searches entirely and require users to click and leave Google's site to view the work. Even if that were possible, companies like *Perfect 10* may then argue that linking to infringing works sufficiently contributes to copyright infringement for liability to be found, merely shifting the point of dispute and tilting the balance toward owner's rights.

174. *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1110–11 (D. Nev. 2006) (“There are billions of Web pages accessible on the Internet.”). See also Ritchie, Mathieu, Roser & Ortiz-Ospina, *supra* note 166.

space.<sup>175</sup> Without search engine tools to guide visitors to what they are looking for, the internet is a nearly unnavigable collection of servers and website pages, and visitors are limited to only the sites they are already familiar with or those that are linked from the sites they know.<sup>176</sup>

Under these circumstances, it was quite reasonable for the court to decide that tools such as Google Image Search were necessary to allow the efficient dissemination of creative works to the public.<sup>177</sup> Technical rulings that limited the functionality of such tools would work against Congress's objective to disseminate creative works to the public.<sup>178</sup> Thus, without even considering the statutory text at issue, public policy arguments support a finding that Google's conduct furthers the public's interest in accessing creative works.

The continued existence and growth of search engine tools also support the objective of promoting creation of original works. Authors rely on revenue opportunities to support their creative efforts.<sup>179</sup> While motion picture studios, television networks, and major record labels have established channels to distribute their works, small independent creators must work hard to share their works and be recognized. The internet provided a huge leap forward in the ability of creators to share their work and connect with audiences around the world, and tools like Google Image Search help ensure the public finds creators they are interested in and want to support.<sup>180</sup>

In addition to enabling connections, the internet also led to the growth of new business models that support the creation of works. Popular content creators on YouTube can receive a share of advertising revenue when visitors view their work.<sup>181</sup> Creators on Instagram and Twitter are paid for mentioning products and brands they promote within their works.<sup>182</sup> These models only function because of platform

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175. See ROBIN JEWELER & BRIAN T. YEH, CONG. RSCH. SERV., RL33810, INTERNET SEARCH ENGINES: COPYRIGHT'S "FAIR USE" IN REPRODUCTION AND PUBLIC DISPLAY RIGHTS 11-12 (2008).

176. *Id.*; Marta Rocha, Note, *The Brewing Battle: Copyright vs. Linking*, 35 BERKELEY TECH. L.J. 1179, 1180-81 (2020).

177. *Perfect 10*, 416 F. Supp. 2d at 848-49.

178. Jeweler & Yeh, *supra* note 175, at 7-8, 8 n.32, 11.

179. Landes & Posner, *supra* note 4, at 325-26.

180. Rocha, *supra* note 176, at 1181.

181. Colleen Christison, *How to Become a (Well-Paid) Content Creator in 2023*, HOOTSUITE (Aug. 16, 2022), [https://blog.hootsuite.com/content-creator/#How\\_much\\_do\\_content\\_creators\\_get\\_paid\\_in\\_2022](https://blog.hootsuite.com/content-creator/#How_much_do_content_creators_get_paid_in_2022) [<https://perma.cc/97D7-KFUA>].

182. Colleen Christison, *How Much Do Influencers Make in 2023?*, HOOTSUITE (Oct. 3, 2022), <https://blog.hootsuite.com/how-much-do-influencers-make/> [<https://perma.cc/U54N-KV2Z>].

tools that help people find works (and their creators) that match their interests within the mass of content on the internet.<sup>183</sup> A finding by the Ninth Circuit that search engines infringe the work they locate would likely have impeded much of this economic opportunity for creators.

## 2. *PERFECT 10* PROMOTED STABILITY FOR BUSINESS ON THE INTERNET

By announcing a bright-line rule in *Perfect 10*, the Ninth Circuit created an environment where service providers on the internet could continue to operate and expand their businesses without fear of copyright infringement claims.<sup>184</sup> Early on, the internet was a litigious arena. Companies sued each other for providing links to pages on their websites without consent.<sup>185</sup> Content owners sued internet service providers because they allowed their customers to use the internet to commit copyright infringement.<sup>186</sup> Content owners sued online platforms because they became a vehicle for sharing infringing content.<sup>187</sup> In enacting the Digital Millennium Copyright Act, Congress clearly established that it wanted to offer some relief and predictability to business on the internet.<sup>188</sup> By creating the Server Test, the Ninth Circuit followed in Congress's footsteps and announced a simple-to-follow rule: companies are safe from copyright infringement claims if they do not store a copy of a copyrighted work on their own website.<sup>189</sup>

For almost fifteen years now, businesses on the internet have operated under that simple rule. Internet search engines like Google and Yahoo can freely direct visitors to destination websites and show previews of the content they will find when they get there. Media companies and mobile applications can link to newsworthy articles on other websites and show headline photos from the article to attract attention. Websites and people around the world are allowed to share and embed images showing Twitter and Instagram posts they find

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183. *See id.* Influencers make money based on the number of people that subscribe to their activity on the internet, which is facilitated by the use of search tools to connect people with influencers they are interested in following.

184. *See* Rocha, *supra* note 176, at 1202–04.

185. *See, e.g., Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99-7654, 2000 U.S. Dist. LEXIS 12987, at \*7–8 (C.D. Cal. Aug. 10, 2000).

186. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995).

187. *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010).

188. *Id.* at 519–20.

189. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007); Ginsburg & Budiardjo, *supra* note 29, at 177.

interesting without fear of infringing someone's copyrighted work. This clarity of expectations has helped the internet, and businesses that rely on the internet, expand to the massive source of information it is today.<sup>190</sup>

Abrogating the Server Test in favor of a different standard could create confusion and risk in any of the preceding activities—activities that people today have an established expectation of being completely lawful.<sup>191</sup> A ruling against Google in *Perfect 10* would have created a very different landscape for businesses on the internet.<sup>192</sup> A ruling against BuzzFeed and Instagram in *Hunley* may change the landscape as well. The Server Test is not required, however, as Congress recognized the need for limits on the exclusive rights of authors and provided mechanisms to approve uses that courts find further copyright law's objectives.<sup>193</sup>

#### *B. Fair Use Can Lead Courts to Just Results in Lieu of the Server Test*

When courts see a need to limit an author's exclusive rights to promote the broader objectives of copyright law, they may utilize fair use. Congress has authorized otherwise infringing uses that it considers a "fair use," including criticism, comment, teaching, and news reporting.<sup>194</sup> To determine whether a specific infringing use is fair, the Copyright Act provides four factors for courts to consider: (1) the purpose and character of the use, which includes whether the use is for commercial purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the original work used; and

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190. See Rocha, *supra* note 176, at 1180–81.

191. *Id.* at 1201–02.

192. See *id.* at 1202–03. *But see* Ginsburg & Budiardjo, *supra* note 100, at 474–75 (arguing that few behaviors on the internet would need to change if the Server Test was withdrawn today).

193. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose . . ."). In addition to the defenses discussed, some scholars have argued that Section 512(d) of the Digital Millennium Copyright Act (DMCA) would also limit the liability of parties embedding copyrighted works on the internet. See, e.g., Ginsburg & Budiardjo, *supra* note 100, at 459. This section provides a safe harbor for online service providers who inadvertently link to infringing content and is most commonly used to defend search engines such as Google. That said, arguments that the DMCA could directly protect individuals who "share" or otherwise link to infringing content are unpersuasive because individual platform users do not meet the requirements of "service providers" under the statute—they do not have repeat infringer policies or notice and takedown procedures. See 17 U.S.C. § 512(d).

194. 17 U.S.C. § 107.



(4) the effect of the use on the potential market for the copyrighted work.<sup>195</sup>

The evaluation of fair use is intended to provide the courts a flexible tool allowing them to balance the competing objectives of copyright law.<sup>196</sup> The factors are not assigned specific weights or importance. Rather, they set out general principles for courts to weigh based on the circumstances of the specific case.<sup>197</sup> Proper application of the doctrine allows courts to consider the impact of technology on creative works, and to ensure sufficient incentives to develop creative works remain while limiting protections that may otherwise constrain creation of new works.<sup>198</sup>

The first factor, the “purpose and character of the use,” has received a lot of judicial attention over the years, and today it is typically characterized as a determination of whether a use is “transformative.”<sup>199</sup> A transformative use “adds something new, with a further purpose or different character” that imbues the original work with “new expression, meaning, or message.”<sup>200</sup> For example, in *Perfect 10*, the adult website’s claim with respect to use of thumbnail images used in Google Image Search fell to Google’s fair use defense largely because the functionality and value they bring to users of the internet is completely different than the original images on Perfect 10’s website.<sup>201</sup> A determination that a use is transformative significantly reduces the significance of the second (nature of the work) and third (portion of the work) factors, and the use will generally be found to be fair unless it also supersedes the original work’s original purpose under the fourth factor.<sup>202</sup> By analyzing the parties’ conduct in *Hunley* and *Perfect 10* under fair use, courts can arrive at desirable conclusions that align with Congress’s objectives without creating the issues introduced by applying the Server Test.

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195. *Id.*

196. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021); *Sony Comput. Ent. Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1026. *See also* 4 NIMMER ON COPYRIGHT § 13F.09[D][3] (“The public interest constitutes another consideration that continually informs the fair use analysis . . .”).

197. *See Google*, 141 S. Ct. at 1198; *Sony*, 214 F.3d at 1026.

198. *Google*, 141 S. Ct. at 1198–99.

199. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); 4 NIMMER ON COPYRIGHT § 13F.05[B].

200. *Campbell*, 510 U.S. at 579.

201. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

202. *See Campbell*, 510 U.S. at 579.

1. APPLYING FAIR USE LEADS TO A JUST RESULT IN *HUNLEY*

In *Hunley*, the conduct to be examined is BuzzFeed embedding photographs of the George Floyd protests within a news article on those same protests.<sup>203</sup> Recall that the conduct was non-infringing under the Server Test, so the district court never had a need to consider fair use.<sup>204</sup> Analyzing the conduct under fair use, BuzzFeed's actions should be ineligible for the defense.

The first factor considers the character and purpose of the conduct, including its commercial nature. BuzzFeed embedded the photographs in the substance of its news article.<sup>205</sup> This was a commercial act because BuzzFeed derives revenue from producing interesting articles and attracting visitors to its website.<sup>206</sup> The use is not transformative because BuzzFeed has used the photographs for precisely the same purpose as the original work—to capture and report on the events at the protests.<sup>207</sup> The only significant defense BuzzFeed has is that it was using the photographs in reporting the news, which is one of the types of conduct often associated with fair use, but this is insufficient on its own to justify the conduct.<sup>208</sup> Given the blatantly commercial and non-transformative character of the use, this factor weighs against fair use.

The second factor considers the nature of the original copyrighted work. Photographs, because they capture real life events, are sometimes considered closer to facts than other types of expressive works.<sup>209</sup> Nonetheless, the capture of a quality photograph does include a range of artistic choices, including angles, lighting, composition, and

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203. First Amended Complaint, *supra* note 11, ¶ 1.

204. *Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385, at \*2-3 (N.D. Cal. Sept. 17, 2021), *aff'd*, 73 F.4th 1060 (9th Cir. 2023).

205. First Amended Complaint, *supra* note 11, ¶ 19.

206. *Id.* ¶ 66.

207. *Hunley v. BuzzFeed, Inc.*, No. 20-cv-08844 (S.D.N.Y. Sept. 30, 2021) (denying motion to dismiss).

208. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (stating the activities listed in Section 107 as examples of fair use are merely illustrative, not presumptive, and still subject to a factor analysis). Also consider that the standard within the news industry is to hire photographers to capture images of important events or to obtain licenses from those who capture newsworthy photographs, not to borrow copyrighted works without consent or compensation. *See, e.g., How Much Do Magazines (and Other Publications) Pay for Photos?*, FORMAT, <https://www.format.com/magazine/resources/photography/who-pays-photographers-jobs> [<https://perma.cc/K6FU-NWFA>]; *What Is a Freelance News Photographer and How to Become One*, ZIPRECRUITER, <https://www.ziprecruiter.com/career/Freelance-News-Photographer/What-Is-How-to-Become> [<https://perma.cc/L6JA-WPNE>].

209. *See Katz v. Google Inc.*, 802 F.3d 1178, 1183 (11th Cir. 2015).

subject matter, so photographs of events are usually entitled to thin copyright protection.<sup>210</sup>

The third factor considers the portion of the copyrighted work used. BuzzFeed embedded the entire photograph in its news article, but since the use of the entire work is typically required to make effective use of photographic works,<sup>211</sup> this factor only weighs slightly against BuzzFeed.

The fourth factor, often the most important,<sup>212</sup> considers the extent to which the market for the original work has been impacted by the infringing use. This factor considers not just the impact on the market by the specific infringing act, but what the impact would be if such conduct were permissible on a widespread basis.<sup>213</sup> Photographers capturing noteworthy current events, including the photographers in *Hunley*, often make a living by licensing their photographs to media companies for use in news stories.<sup>214</sup> By using the photograph in the same manner that the creator intended to license it, but without paying any licensing fee, the infringing use completely supersedes and deprives the author of the intended market for the original work. If such conduct is deemed permissible, few incentives would remain for media companies to license photographs that they can procure from elsewhere on the internet.<sup>215</sup> This factor weighs heavily against fair use. When taken together, the four factors weigh against fair use, so BuzzFeed's conduct should be found to be direct copyright infringement.

## 2. *PERFECT 10* COULD HAVE BEEN DECIDED ON FAIR USE

By examining the facts of *Perfect 10* under fair use, the Ninth Circuit could have reached the same desirable outcome regarding the legality of Google's conduct. The conduct in question is Google Image Search's practice of embedding images hosted on an original website (the "Host Site") in a frame on Google's site after visitors enter search terms that relate to those images.<sup>216</sup> The Ninth Circuit considered a nearly identical question with respect to the display of thumbnail

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210. *See id.*

211. *Id.* at 1183–84.

212. *Harper & Row*, 471 U.S. at 566.

213. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

214. First Amended Complaint, *supra* note 11, ¶ 18.

215. *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 428 (S.D.N.Y. 2018).

216. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 833–34 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

images within Google Image Search and held that act to be fair use.<sup>217</sup> The court could have applied similar reasoning to hold Google's embedding of images from the Host Site to be fair use as well.

Under the first factor, the character and purpose of use, the Ninth Circuit found that Google's use of smaller images to facilitate directing visitors to the Host Site was transformative.<sup>218</sup> Google does not display the image solely for its own gain, but rather with the intent of facilitating a connection between the searching visitor and the Host Site where the original work resides.<sup>219</sup> In many cases, the visitor seeing the image on Google's site is merely a gateway for a deeper relationship between the visitor and the Host Site. Considering the broadly beneficial nature of a search engine's role as a facilitator in providing efficient access to content on the internet, the court found that this factor heavily favored fair use.<sup>220</sup> The same reasoning favors a finding of transformative, fair use with respect to the embedded images. That conclusion renders the second and third factors, which would not weigh heavily in any event, much less important.<sup>221</sup>

Under the fourth factor, considering the impact on the market for the original work, Google's transformative use again prevails. The value in providing access to the original work is necessarily different than any purpose the author had in posting their work on the Host Site. Because Google's primary purpose is to connect visitors to the original work by providing a link to the Host Site,<sup>222</sup> the potential audience and market for the work can arguably only be increased because of Google's conduct. Given a transformative use that does not supersede the market for the original, the court should find fair use applies to Google's conduct. By applying the fair use doctrine in this manner, the Ninth Circuit could have allowed Google to continue providing search services unimpeded without the collateral cost to copyright owners' rights that accompanied the Server Test.

### 3. FAIR USE CAN PROVIDE PREDICTABLE RESULTS ON THE INTERNET

This Note has demonstrated how Fair Use could have allowed the courts to arrive at desirable results in both *Hunley* and *Perfect 10*

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217. *Perfect 10*, 508 F.3d 1146 at 1164–68.

218. *Id.* at 1164–67.

219. *See id.*

220. *Id.* at 1167.

221. *Id.* at 1166–68.

222. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 848 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

without relying on the Server Test, but valid questions remain around the application of the fair use doctrine in other cases. The doctrine is notorious for being unpredictable and inconsistently applied by courts, so much so that some practitioners advise their clients to avoid conduct that potentially relies on a determination of fair use.<sup>223</sup> Part of the reason for these issues is that the application of the doctrine is so fact specific and necessarily involves the balancing of multiple factors.<sup>224</sup>

While Congress may require courts to consider certain factors in applying the doctrine,<sup>225</sup> courts do have power over how they choose to interpret the facts in relevant cases.<sup>226</sup> By describing the facts of a case in a more general manner, a court's holding of fair use could apply to a range of scenarios beyond the narrow scope of the case at bar. With careful consideration of the presentation of the relevant facts, appellate courts could provide more consistency and confidence to companies on the internet operating in similar spaces to the litigants before the court. For example, using the facts of *Perfect 10*, the Ninth Circuit could have held that online service providers whose express purpose in embedding copyrighted works includes facilitating traffic to the owner of the copyrighted work are operating within fair use. Such a ruling would carve off all manner of search engines, content aggregators, and media companies who link to each other's content without need for further litigation,<sup>227</sup> while leaving intentional appropriation of copyrighted works for a self-serving purpose outside the safe harbor. Of course, if the courts start to effectively determine such criteria for fair use,

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223. Bruce E. Boyden, *The Surprisingly Confused History of Fair Use: Is It a Limit or a Defense or Both?*, MARQ. UNIV. L. SCH. FAC. BLOG (Oct. 9, 2022), <https://law.marquette.edu/facultyblog/2022/10/the-surprisingly-confused-history-of-fair-use-is-it-a-limit-or-a-defense-or-both/> [https://perma.cc/DUT7-8NF2] (“Fair use is both crucially important and profoundly murky.”).

224. *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142, 147 (2d Cir. 1984).

225. 17 U.S.C. § 107 (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include- . . .”).

226. Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion*, 37 J. LEGAL STUD. 1, 1–3 (2008) (“[T]rial courts can select, describe, and characterize the facts to which the law is applied with some freedom.”).

227. A search engine like Google is safe as long as it honors the role of connecting users with content, then directs the user to the content owner. “Listicle” sites like BuzzFeed can link to photos, news articles, social media posts, and anything else they find interesting, provided they show links (not unauthorized embeds) to the source pages who own the content. And companies like the *New York Times* can link to any newsworthy content on the internet that they want to discuss in a news article (again, they simply cannot embed misappropriated works owned by others, unless the use is otherwise fair).

Congress retains the ability to codify safe harbors it approves of, putting the issue to rest for entire industries.<sup>228</sup>

*C. The Ninth Circuit Should Grant Rehearing in Hunley  
and Abrogate the Server Test on Appeal*

People often say that hindsight is 20/20, and while a review of what could have been done fifteen years ago is instructive, there remains the matter of how *Hunley* should be resolved by the Ninth Circuit. This Note has argued extensively that the Server Test itself is flawed and represents an oversimplification of copyright law.<sup>229</sup> Despite multiple indications from the Supreme Court that copyright infringement cases under Section 106 should be evaluated from an internal perspective,<sup>230</sup> such analysis is presently foreclosed in the Ninth Circuit where embedded links are concerned. The existence of the rule requires courts to select and focus on a technical perspective in copyright infringement cases, potentially shortcutting their analysis or even determining the outcome entirely.<sup>231</sup> The rule thus restricts courts, including other Ninth Circuit panels,<sup>232</sup> from applying the proper analysis, including evaluating potential licenses or fair use, that Congress has called for. Short of a case making its way to the Supreme Court, the only way to resolve these issues is for the Ninth Circuit to abrogate the test as it was announced in *Perfect 10*.<sup>233</sup> *Hunley* should be accepted for rehearing en banc to correct the law within the circuit.<sup>234</sup>

After the Ninth Circuit abrogates the Server Test, the basis the district court had for dismissing *Hunley* no longer applies. In the

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228. Fair use itself began as a judicially created doctrine and was eventually codified by Congress in 1976. *See Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901) (“So, it has been decided that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author.”); *Diamond*, 745 F.2d at 147.

229. *See supra* Section II.B.

230. *See supra* notes 100–105 and accompanying text.

231. *See Hunley v. Instagram, LLC*, No. 21-cv-03778, 2021 WL 4243385, at \*2 (N.D. Cal. Sept. 17, 2021), *aff’d*, 73 F.4th 1060 (9th Cir. 2023).

232. *See Instagram*, 73 F.4th at 1072.

233. Other circuit courts have avoided taking up the issue on appeal (most notably the Second Circuit, *see supra* section I.B.1) allowing the district courts outside the Ninth Circuit to forge their own path thus far. The lack of direct disagreement among the circuit courts of appeals reduces the likelihood of the Supreme Court getting involved at this time.

234. Typically, circuit court panels are bound by precedent of other panels within the same circuit. *See Phillip M. Kannan, The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 755–56 (1993). Only through a hearing en banc may the *Perfect 10* decision be overturned. *Instagram*, 73 F.4th at 1072.

absence of a bright-line rule foreclosing a finding that BuzzFeed committed direct infringement, the district court is free to consider that question on its own full evaluation of the facts. If the court agrees with the Southern District of New York that infringement may have occurred, an analysis of whether Instagram, through its API, induced or contributed to that infringement may also be properly determined. It is beyond the scope of this Note to express an opinion on the ultimate outcome of the case, except to state that Alexis Hunley and her fellow photographers deserve their day in court.

#### CONCLUSION

*Hunley v. Instagram* provides a striking example of how courts can go awry when they limit their interpretation of the facts to an improper perspective. Because the Ninth Circuit focused on a highly technical perspective when it decided *Perfect 10* in 2007, the rule it announced opened the door for all manner of deceptive behavior on the internet. Companies were motivated to find technical approaches that strictly complied with the Server Test, and in so doing could rest assured they were secure against allegations of copyright infringement, even when deserving. In this extreme case, a media company committed acts that it fully understood would not have been permissible in an analog world, but since they operated on the internet, they met the criteria for noninfringement in the Ninth Circuit.

The issue in *Perfect 10* is not the result the Ninth Circuit sought, but merely the rule it announced. From the beginning, Congress intended copyright law to be technology agnostic—to evolve and adapt to advances in technology and how original works are created, communicated, and enjoyed. As the Supreme Court emphasized in *Aereo*, courts must avoid the trap of deciding cases on invisible details and focus on how the parties' conduct affects the balance of rights between authors and the public.<sup>235</sup> By analyzing infringement of Section 106 under an internal perspective, considering how actors experience the internet, and applying the fair use doctrine generously, courts can achieve outcomes that are both reasonable and predictable. These outcomes align with expectations rooted in both common law and the analog world. Google and other companies that have helped society benefit from a growing internet can be protected by vehicles such as implied license and fair use—they do not need artificial judicial protections built on technical workarounds. It is time for the Server Test, having improperly shielded companies on the internet for over

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235. See *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 448–51 (2014).

fifteen years, to be set aside so that balance can be restored to copyright law.