ARE Copyright Alert: California Court Differs from NY - Applies Server Test to Rule That Embedding Posts Does Not Constitute Copyright Infringement

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Is it copyright infringement to embed a link to a work posted on Instagram? Two recent courts, in two different circuits, have come to opposite conclusions.

In a nutshell, the legal question asks if it's copyright infringement when an online use, such as in an article, simply copies an Instagram page link (or Twitter, Facebook, etc.) to the work, often posted by the copyright owner him/herself, rather than copying and posting the work itself.

Defendants argue that they don't infringe because copyright infringement requires "copying," and if they never copy the photo, *but instead only copy a link to the photo*, they technically don't infringe. Put another way, the image never moves from the Instagram/Twitter/Facebook server, and so "copying/infringement" never occurs.

As we discussed over the summer, Judge Rakoff in *Nicklen v. Sinclair Broadcasting Group*, *Inc*, recently held that embedding a post is a "display" within the meaning of the Copyright Act and thus constitutes copyright infringement. *Nicklen v. Sinclair Broadcast Group, Inc.*, No. 20-cv-10300 (JSR), 2021 U.S. Dist. LEXIS 142768 (S.D.N.Y. July 30, 2021) ("Nicklen"). Judge Rakoff explicitly rejected the 9th Circuit's server test in his ruling, reasoning that the display of the image, not the location of the data which makes up the image, is the relevant metric.

Judge Charles Breyer, a judge in the Northern District of California, has now ruled the other way. *Alexis Hunley v. Instagram, LLC*, No. 21-cv-03778-CRB, 2021 U.S. Dist. LEXIS 177667 (N.D. Cal. Sept. 17, 2021) ("Hunley"). Breyer's opinion followed the server test as laid out by the 9th Circuit in *Perfect 10Inc. v. Amazon.com*, *Inc.,* 508 F.3d 1146 (9th Cir. 2007), and rejected the claim that merely embedding an image through Instagram's API constitutes copyright infringement.

It remains to be seen how courts in other circuits will rule on the matter.

Background

In *Hunley*, plaintiffs Alexis Hunley and Matthew Brauer are freelance photographers who used Instagram to share photos and videos. Hunley and Brauer's posts have been frequently embedded in third party webpages using Instagram's API.

Hunley and Brauer sued Instagram as part of a class action, alleging that Instagram encouraged third parties to embed copyrighted works and is thus vicariously liable. Instagram moved to dismiss the suit on the grounds that, *inter alia*, embedding Instagram posts does not constitute copyright infringement.

Discussion

All parties agreed that the case hinged on "a single legal question", namely, whether or not embedding images without physically storing them on a third-party server constitutes a display of the embedded image. Answering this question, the court ruled that simply embedding images using Instagram's API does not constitute copyright infringement, and granted Instagram's motion to dismiss.

The court reached its answer by applying 9th Circuit precedent as laid out in *Perfect 10,* which considered embedded images in the context of search engine results.

As the court noted, *Perfect 10* relied primarily upon the language of the Copyright Act. According to the Act, it is copyright infringement to "display" an image, which means to "show a copy of it". "Copies", in turn, are "material objects … in which a work is fixed … and from which the work can be perceived." A work is not fixed (and thus not a copy) unless it is "sufficiently permanent or stable to permit it to be perceived … for a period of more than a transitory duration." Applying this language, as laid out in *Perfect 10*, unless an image or video is stored on a third-party's physical server, then it is not "fixed." And, because it is not fixed, the embedded image is not a "copy", and as such is not technically a display.

Accordingly, according to the court, because using Instagram's API does not store the image on the third-party's server, displaying embedded images on third party webpages through the API does not constitute infringement on the part of third parties.

Hunley, citing Rakoff's opinion in *Nicklen,* argued that the court should cabin *Perfect 10* to search engine results alone, and refuse to apply the server test.

As we previously noted, the court in *Nicklen*, like the court in *Perfect 10*, relied heavily upon the plain text of the statute. However, the court in *Nicklen* rejected the server test, reasoning that, because, under the Copyright Act, the protection for authors is both broad, encompassing not just "the first copy… but any copy of the work" as well as "technology-neutral," extending to "any device or process," using an API to embed images without permission constituted copying.

The court, however, discarded Rakoff's interpretation, noting that, unlike courts in the Southern District of New York, it was "not free to ignore Ninth Circuit Precedent."

Furthermore, while Hunley urged that the Supreme Court's 2014 decision in *Aereo* overturned *Perfect 10*, the court held that, because *Aereo* dealt with ambiguous language surrounding the "performance right," the present case was distinguishable.

Conclusion

The court's holding means that the applicable rule may depend on the jurisdiction, leaving nationwide publishers with difficult choices as they develop content acquisition strategies.

We will continue to monitor and report on the use of embedded Instagram posts of photographs and videos. In the meantime, please feel free to contact us to learn more.

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