

No. _____

IN THE
Supreme Court of the United States

ELLIOT MCGUCKEN,

Petitioner,

v.

VALNET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 106(5) of the Copyright Act states that the copyright owner of a pictorial work has the exclusive right to control how the work is publicly displayed. 17 U.S.C. § 106(5). “Anyone who violates any of the exclusive rights of the copyright owner in Section 106 ... is an infringer of the copyright”. 17 U.S.C. § 501(a) (cleaned up).

Contrary to those provisions, the Ninth Circuit has granted website operators blanket immunity from infringement of the display right in Section 106(5). Specifically, in the Ninth Circuit, a website operator who publicly displays the copyrighted pictorial work of an author, without authorization, is *not* liable for copyright infringement if the website operator displays the work using the technological process of “link embedding” rather than the technological process of “image hosting”. Every court outside the Ninth Circuit to consider the issue has rejected the Ninth Circuit’s approach.

The Question Presented is:

Whether the exclusive right to publicly display a copyrighted work, 17 U.S.C. § 106(5), is infringed when a website operator publicly shows a copyrighted work without authorization, regardless of the technological process used to show the work.

PARTIES TO THE PROCEEDING

Petitioner Elliot McGucken was the plaintiff-appellant below.

Respondent Valnet, Inc. was the defendant-appellee below.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

McGucken v. Valnet, Inc., No. 2:23-cv-06753-
JLS-SSC (Jan. 24, 2024)

United States Court of Appeals (9th Cir.):

McGucken v. Valnet, Inc., No. 24-511 (Dec.
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Elliot McGucken, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App., *infra*, 1a-4a) is unreported and available at 2024 WL 5166624 (9th Cir. Dec. 19, 2024). The order of the United States District Court for the Central District of California (App., *infra*, 5a-10a) is unreported and available at 2024 WL 350559 (C.D. Cal. Jan. 24, 2024). The order of the Ninth Circuit Court of Appeals denying the petition for rehearing en banc (App., *infra*, 11a-12a) is unreported.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 19, 2024. The Ninth Circuit's order denying the petition for rehearing en banc was entered on January 31, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 106 of Title 17 of the United States Code provides:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Section 101 of Title 17 of the United States Code provides in relevant part:

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

To “display” a work means to show a copy of it, either directly or by means of a film, slide,

television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

To perform or display a work “publicly” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

STATEMENT

Petitioner Dr. Elliot McGucken, an acclaimed photographer, brought a claim for copyright infringement against Respondent. Dr. McGucken alleged that Respondent publicly displayed on its travel website numerous of Dr. McGucken’s copyrighted photographs without his consent. The district court accepted as true Dr. McGucken’s allegations that he owned the copyrights to the photographs at issue; that Respondent had no license or other permission to use the photographs at issue; and that Respondent nonetheless showed the photographs to users of its for-profit travel website as

a means to promote its business. Despite accepting those premises as true, the district court dismissed Dr. McGucken’s complaint, holding that the Ninth Circuit’s so-called “Server Test” foreclosed Dr. McGucken’s claims as a matter of law.

The Ninth Circuit affirmed the dismissal and denied a petition for rehearing en banc, further cementing the Server Test as controlling law in the Ninth Circuit. This appeal challenges the legal viability of the Server Test.

Announced by the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the Server Test immunizes certain infringers based on **how** they display a copyrighted image on a website:

- If a website publisher displays an image by “using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory”, that is infringement. *Perfect 10*, 508 F.3d at 1160.
- If, on the other hand, the same website publisher shows exactly the same image to exactly the same user by “embedding” a link to it—a technological process by which the website’s backend HTML code “gives the address of the image to the user’s browser” and the browser “interacts with the [third-party] computer that stores the” computer code that represents the image—that is not infringement. *Id.* at 1161.
- According to the Ninth Circuit, because the computer code of the image remains on a third party’s server and is not fixed in the memory of the

website operator's computer, the copyrighted image somehow is not "displayed" to the user of the operator's website (even though that is where the user sees the image), and there is no infringement of the display right.

This case and its challenge to the Ninth Circuit's Server Test meet virtually every criteria for *certiorari* review:

First, it presents a clear legal question that has divided the federal courts. The Ninth Circuit invented the Server Test in 2007. Since then, district courts in the Second, Fifth and Tenth Circuits have rejected it. *See Bowery v. Sites*, 2024 WL 3416038, at *9-10 (D. Utah July 15, 2024) (concluding that the server test is "unpersuasive" and that such conclusion is "compelled by the text of the Copyright Act"); *Prepared Food Photos, Inc. v. Chicken Joes, LLC*, 2024 WL 382529, at *1 (S.D.N.Y. Feb. 1, 2024) (rejecting the server test); *McGucken v. Newsweek LLC*, 2022 WL 836786, at *5-6 (S.D.N.Y. Mar. 21, 2022) (refusing defendant's invitation to apply the server test and noting "that [it] has not been widely adopted outside of the Ninth Circuit"); *Nicklen v. Sinclair Broadcasting Grp. Inc.*, 551 F. Supp. 3d 188, 195 (S.D.N.Y. 2021) (same, and suggesting alternatively that the server test only apply to search engines or a website that requires its users to click the embedded link before viewing the image); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 595-96 (S.D.N.Y. 2018) (same); *Leader's Inst. LLC v. Jackson*, 2017 WL 5629514, at *10-11 (N.D. Tex. Nov. 22, 2017) (refusing to apply the server test).

This case comes to the Court on a motion to dismiss and presents a pure legal issue with no factual disputes; for that reason, it is a pristine vehicle for the Court to decide the scope of the Copyright Act's display right and how that right should be enforced on the internet.

Second, the Server Test runs afoul of the statutory text of the Copyright Act. The 1976 Act confers both an exclusive right “to reproduce the copyrighted work in copies”, § 106(1) and, separately, an exclusive right “to display the copyrighted work publicly”, § 106(5). In the Ninth Circuit alone, a website cannot be liable for infringing the exclusive right to publicly display an image without first infringing the exclusive right to reproduce it (by making a copy of the image and storing that copy on its own server). *Perfect 10*, 508 F.3d at 1161. As a result, the Server Test renders the substantive display right—a right expressly adopted by Congress as a right additional to and beyond the separate right of reproduction—mere surplusage. Accordingly, this Court should correct the Ninth Circuit's fundamental error of law, and give effect to both exclusive rights as proscribed by Congress.

Third, the decisions below and in *Perfect 10* conflict with this Court's holding in *American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014). There, this Court reaffirmed that the proper focus of copyright law is on what the observer of a copyrighted work sees or hears, not on the background technological process that produces what is seen or heard. In *Aereo*, the Court rejected arguments that an alleged infringer (there, of the performance right)

could avoid liability on the basis that, although its service was used to distribute a copyrighted work, it was not “performing” the work publicly because, as a technological matter, by contrast to a television broadcaster, it only transmitted programs by a complicated antenna system when prompted to do so by an individual viewer. The Court declined to immunize infringement on the basis of that technical distinction, which it explained was “invisible to subscriber and broadcaster alike” and by which Aereo “perform[ed] the same work”; “show[ed] the same images and ma[de] audible the same sounds.” *Aereo*, 573 U.S. at 448; *see also Goldman*, 302 F. Supp. 3d at 589-590 (citing *Aereo* and refusing to apply the Server Test on these grounds); *Nicklen*, 551 F. Supp. 3d at 195 (same). Aereo itself was held to “perform” under the Copyright Act, even though its only function was to communicate a “work’s images and sounds” from a third party’s performance “to the subscriber, by means of a ‘device or process’”. *Aereo*, 573 U.S. at 445.

The Server Test cannot be squared with *Aereo*’s holding. The Server Test rests entirely on the nature of the background technological process used to show the copyrighted images and, specifically, on the technicality that an embedded link points the user’s web browser to an author’s image housed elsewhere (rather than to a file on the operator’s own computer server). But that is a distinction rejected as immaterial in *Aereo*—just as Aereo itself “performed” by showing users third-party broadcasts, website operators themselves “display” by showing users images hosted by third-party computers. As in *Aereo*, a website user cannot tell, and the infringer gets the same result, whether the image is housed on the

website or is being accessed by an embedded link. There is no way to square the decisions below or in *Perfect 10* with the reasoning of the Court in *Aereo*.

Fourth, the issue is exceedingly important. Respondent and its *amici* admit that millions of websites would infringe millions of copyrighted works but for the Server Test. Whether millions of website operators should continue to receive a free pass to infringe works they did not create is an enormously important question for authors, operators, and users alike. Below, 17 individuals and entities submitted *amicus* briefs arguing for or against rehearing en banc. An issue that is so hotly debated that affects so many people and entities—and on which there is disagreement in the courts below—should be decided by this Court.

Fifth, absent this Court’s review, copyright law in this country will remain fragmented, with authors suing in the Ninth Circuit receiving less substantive copyright protection than authors able to sue elsewhere. That is directly contrary to Congress’s repeated direction that copyright law should be uniform across the nation.

In short, this case is an obvious candidate for the Court’s review and *certiorari* should be granted.

I. Background

This Court has “ma[d]e clear that the federal policy expressed in Art. I, § 8, cl. 8, is to have ‘national uniformity in patent and copyright laws’, a policy bolstered by Acts of Congress[.]” *Goldstein v. California*, 412 U.S. 546, 573 (1973) (quoting *Sears*,

Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 n.7 (1964)). One of the primary, express aims of the Copyright Act of 1976 was to federally preempt the complex amalgamation of statutes and state laws previously governing copyright law, in favor of “national uniformity in copyright protection” consistent with “basic constitutional aims”. S. Rep. No. 94-473, 94th Cong., 1st Sess. 112-13 (1975); see also *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (explaining that two of Congress’s purposes in enacting federal copyright law have been: “(1) to render [it] uniform and certain . . . ; and (2) to prevent [] forum shopping”).

In promoting national uniformity of the copyright laws, Congress set forth clear, exclusive rights for each copyright holder: reproduction, public performance, public display, creation of derivative works, and distribution. 17 U.S.C. § 106. Congress specified that “[t]o ‘display’ a work means to show a copy of it, ***either directly or*** by means of a film, slide, television image, ***or any other device or process*** or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” 17 U.S.C. § 101 (emphasis added).

Conscious that Section 106(5) “represent[ed] the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public”, H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 63 (1976), Congress deliberately crafted a broad display right. The display right was initially drafted as “analogous to the traditional common-law right of first publication in a literary work, or to the moral

right of divulgation in continental law, [where] that right would cease as soon as a copy of the work was transferred.” R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM “Copies”*, 2001 U. Ill. L. Rev. 83, 95 (2001). But Congress ultimately rejected that approach, extending the display right “not only [to] the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.” H.R. Rep. No. 94-1476, at 63.

Congress further established that the display right was not concerned with *how* a work is shown, but *whether* a work is shown, intending to encompass “[e]ach and every method by which the images . . . comprising a . . . display are picked up and conveyed”. *Id.* at 64. Thus, to “display” a work within the meaning of the Act includes direct displays, as well as those effectuated by any “device or process”, defined to include those “now known or later developed”, 17 U.S.C. § 101.

Specified devices and processes then known broadly included “the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.” H.R. Rep. No. 94-1476, at 64. Further, “the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for

example, or by a computer system) from one place to members of the public located elsewhere.” *Id.* at 80.

Presciently, the Register of Copyrights testified as follows during hearings preceding the passage of the 1976 Act: “[I]nformation storage and retrieval devices; when linked together by communications satellites or other means, [] could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images.... [W]e are now convinced that a basic right of public exhibition should be expressly recognized in the statute.” H. Comm. on the Judiciary, 89th Cong., *Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, at 20 (Comm. Print 1965).

“[T]he definition [of the display right] is intended to cover every transmission, retransmission, or other communication of [the image]”, including “any other transmitter who picks up his signals and passes them on”. *Id.* at 25.

The decision in *Perfect 10* ignores the text and legislative history of the Copyright Act. There, the Ninth Circuit distinguished between website publishers that display an image by “fill[ing] a computer screen with a copy of the photographic image” stored on the website publisher’s own server, and those that display it via embedded HTML instructions that direct the user’s browser to a third-party location. 508 F.3d at 1160. It held that only the former constitutes infringement because, as for the latter, a defendant never “store[s] the photographic images”. *Id.* But Section 106(5) codified a *display*

right, not a *storage* right. The Server Test adopted in the *Perfect 10* decision is incompatible with the Copyright Act, as it excuses an infringing public display merely because of the technological means employed by the would-be infringer to display.

It is likewise irreconcilable with an express holding of this Court. The Court made clear, in *Aereo*, that copyright law is concerned with the experience of the end-user who observes the copyrighted work, and not with the background technological process that produces such display. *Aereo*, 573 U.S. at 444 (“We do not see how this single difference, invisible to subscriber and broadcaster alike” transforms infringing activity to innocent conduct). But excusing infringement on the basis of a single, invisible difference in the technology used to display an image is precisely the requirement of the Server Test.

II. Facts and procedural history

1. Petitioner Dr. Elliot McGucken is an award-winning nature and landscape photographer. Petitioner created, owns and registered the copyrights for the 36 photographs at issue here. App. 2a, 6a. Respondent Valnet, Inc. owns and operates a for-profit travel website, “www.thetravel.com”. *Id.*

2. On August 17, 2023, Petitioner filed suit against Respondent in the United States District Court for the Central District of California. App. 5a-10a. Petitioner alleged that Respondent infringed his copyrights by—without authorization—displaying photographs taken from his Instagram account in online articles advertising travel destinations. *Id.*

Petitioner sought injunctive relief, profits, damages, fees and costs under the Copyright Act. *Id.*

The district court granted Respondent's motion to dismiss. *Id.* at 9a-10a. The district court concluded that the Ninth Circuit's "Server Test" foreclosed Petitioner's infringement claim as a matter of law because, although Respondent showed Petitioner's copyrighted works on its website, those works were "embedded" (shown to users via HTML instructions directing a user's browser to retrieve computer code of the image from a third-party's server), rather than hosted (shown to users via HTML instructions directing a user's browser to retrieve computer code of the image from Respondent's own server). *Id.* at 7a-9a. The district court rejected Petitioner's arguments urging departure from the Server Test, reasoning that it was "not free to disregard binding precedent". *Id.* at 8a.

3. The court of appeals denied Petitioner's motion for an initial hearing en banc and summarily affirmed. *Id.* at 1a-4a. Rejecting Petitioner's arguments that "the Server Test should be overruled or substantially cabined", *id.* at 3a, the court of appeals reaffirmed its understanding that "based on the plain language of the statute, a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory". *Id.* The court reasoned that "[b]ecause [Respondent's] website contained only embedded references to [Petitioner's] Instagram posts, ... under the Server Test [Respondent] did not infringe [Petitioner's] display rights." *Id.* at 4a. The court of appeals then denied

Petitioner’s petition for panel rehearing or rehearing en banc. *Id.* at 11a-12a.

Nothing in the Copyright Act—or this Court’s precedent—permits this result. Every other court to opine on the Server Test has rejected it. In only the Ninth Circuit, would-be infringers are immunized because they do not “display” a work unless they also make a copy of it. That atextual and easily-evadable technicality is one that Respondents and their supporting amici below have admitted facilitates infringements by “millions of website operators”. Dkt. 31.1, Br. of Amicus Curiae Google, LLC 3. As explained below, because the Server Test effectively transmogrifies the display right into the limited right of first publication that Congress expressly rejected, it is inconsistent with the Copyright Act and prior decision of this Court.

REASONS FOR GRANTING THE PETITION

This case is a straightforward candidate for certiorari. It presents the important question of whether the exclusive right to publicly display a copyrighted work is infringed when a website employs technical means to display a copyright image without storing that image on its own servers. The Ninth Circuit stands alone in holding that website images are “displayed” within the meaning of the Copyright Act only “by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory”. *Perfect 10*, 508 F.3d at 1160. That holding is contrary to the text and purpose of the Copyright Act and has opened a loophole for infringers, who have taken advantage of it in droves. This case, which arises from a motion to dismiss based

on this sole legal issue, is a pristine vehicle to correct the Ninth Circuit. The petition for a writ of certiorari should be granted.

I. The Server Test Is Inconsistent with the Text of the Copyright Act, Congress’s Intent and This Court’s Decision in *Aereo*.

1. As multiple courts outside the Ninth Circuit have recognized, the text of the Copyright Act, Congress’s deliberations in passing the Act and this Court’s *Aereo* decision show that the Server Test, and the technical distinction on which it relies to immunize infringement, is error.

2. In the 1976 Act, Congress conferred a bundle of “exclusive rights” upon copyright owners, including the exclusive right “to display the copyrighted work publicly”. 17 U.S.C. § 106(5). Congress specified in the Act’s Transmit Clause that to “display a work ‘publicly’ means ... to transmit or otherwise communicate a ... display of the work ... to the public, by means of any device or process”. 17 U.S.C. § 101. And Congress further defined a “device or process” as “one now known or later developed”, to account broadly for technological advancement. *Id.* That definition leaves no room for the Ninth Circuit to carve out embedding, which is a “device or process” to show an image, from copyright liability.

The Server Test runs afoul of the text of the Act in other ways too.

First, it improperly conflates the exclusive right of reproduction and the exclusive right of display. The Act confers, separately, both an exclusive right “to

reproduce the copyrighted work in copies”, § 106(1), and an exclusive right “to display the copyrighted work publicly”, § 106(5).

But, under the Server Test, a website can only infringe the display right if it first makes a reproduction of an image and stores it on its own server. *See Perfect 10*, 508 F.3d at 1160-62. Yet there is “no indication in the text or legislative history of the Act that possessing a copy of an infringing image is a prerequisite to displaying it.” *Goldman*, 302 F. Supp. 3d at 595. Rather, the Act is clear: (i) “[a]nyone who violates **any** of the exclusive rights of the copyright owner as provided by section[] 106 ... is an infringer of the copyright”, 17 U.S.C. § 501(a) (emphasis added); and (ii) to display a work is “to show a copy of it”, 17 U.S.C. § 101, **not** “to make, store, and then to show a copy of it”.

Courts and scholars have noted this incongruity. *See Goldman*, 302 F. Supp. 3d at 595; *see also Nicklen*, 551 F. Supp. 3d at 195 (finding that the Server Test incorrectly “makes the display right merely a subset of the reproduction right”); Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?*, 32 Colum. J. L. & Arts 417, 430 (2019) (explaining that the Server Test “convert[s] the display right into an atrophied appendage of the reproduction right” and thereby “ignores Congress’s endeavor to ensure that the full ‘bundle’ of exclusive rights will address evolving modes of exploitation of works”).

The Ninth Circuit’s conception of display collapses the display right into the reproduction right. Under the Server Test, one cannot display (Section

106(5)) without first reproducing (Section 106(1)), which makes the display right mere surplusage. That, of course, violates the “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks and citation omitted); *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (statutes should be read consistent with “the interpretive principle that every clause and word of a statute should have meaning” (citation omitted)); *Corley v. United States*, 556 U.S. 303, 314 (2009) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative” (citation omitted)). Those principles of statutory construction have special force where, as here, an interpretation would eliminate an entire substantive right expressly adopted by Congress.

Finally, the Server Test undermines Congress’s deliberate extension of the display right “not only [to] the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public”. H.R. Rep. No. 94-1476, at 63. Under the Server Test, once a copyrighted image is posted anywhere on the internet for the first time, would-be infringers are free to display it without consent, so long as they use the technical embedding process to display the work. The display right provides no recourse in such instances. But that changes the display right Congress codified into the limited right of first publication that Congress expressly rejected. *Supra* p. 8.

“[I]t cannot be that the Copyright Act grants authors an exclusive right to display their work publicly only if that public is not online.” *Nicklen*, 551 F. Supp. 3d at 196. Stated differently, it cannot be that authors possess only a limited right of first publication online, whereas authors who publish elsewhere maintain control over how their works are later displayed. Yet that is exactly the law in the Ninth Circuit.

3. The Server Test is all the more inappropriate because Congress has shown that it knows how to create exceptions to infringement when that is its intent. For example, Title II of the “Sonny Bono Copyright Term Extension Act” exempted small businesses such as bars, cafes and restaurants from § 106(4)-(5) liability for playing radio and television broadcast programs for their customers. Pub. L. No. 105-298, 112 Stat. 2827, 2830-34 (1998); *see also* 17 U.S.C. § 110(B); Todd B. Tatelman, Cong. Rsch. Serv., RS21107, *Copyright Law’s “Small Business Exception”: Public performance exemptions for certain establishments* (2003). To turn on the radio or television does not, of course, make or store a copy of the publicly performed or displayed content. Yet, absent the express exception, the small businesses would have been infringing. If infringement required making or possessing a copy of a copyrighted work before performing or displaying it publicly, as the Server Test instructs, Congress would have had no need to draft this exemption. *Goldman*, 302 F. Supp. 3d at 595. That it did adopt the exemption shows that the Server Test is wrong.

4. The error of the Server Test is also clear from the congressional record. Congress recognized that “technical advances ha[d] generated new industries and new methods for the reproduction and dissemination of copyrighted works”. H.R. Rep. No. 94-1476, at 47. Congress therefore included a broad, non-exhaustive list of then-known devices and processes to “display” copyrighted works in the Act.

Conscious that still new advances would follow, Congress did not intend that the Act would “freeze the scope of copyrightable technology”. *Id.* at 51. Instead, the Act’s ethos was that “the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by *any method* (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.” *Id.* at 80 (emphasis added); *see also* H. Comm. on the Judiciary, 89th Cong., *supra* p. 11, at 24-25 (“[T]he definition [of the display right] is intended to cover every transmission, retransmission, or other communication of [the image]”, including “any other transmitter who picks up his signals and passes them on.”). Contrary to this intent to situate evolving technology, the Server Test carves out from the display right displaying by embedding.

Today, with the advent and proliferation of social media, the publication of copyrighted images online is ubiquitous. It is the primary way many authors reach their audiences and potential clients. Robbing those authors of the ability to control how their works are displayed, in the very medium in which they themselves publish and reach clients, eviscerates the

value of the copyright protection that Congress intended to create and protect.

5. This Court already has rejected the theoretical underpinnings of the Server Test, having held that the Copyright Act does not permit exceptions to infringement based on technological distinctions in how works are shown. *Aereo*, 573 U.S. 431 (2014).

In *Aereo*, the Court assessed a copyright holder’s exclusive right to *perform* a copyrighted work publicly, 17 U.S.C. § 106(4), defined—similarly to the exclusive right to *display* a copyrighted work publicly—as “to transmit ... a performance ... of the work ... to the public, by means of any device or process”, 17 U.S.C. § 101. *Aereo* sold a service allowing subscribers to watch broadcast television over the internet. A user would visit *Aereo*’s website and select a third party’s on-air broadcast, then *Aereo*’s servers would select an antenna, tune it to the selected on-air broadcast and transmit a copy of the broadcast picked up by the antenna to the user on its webpage. *Aereo*, 573 U.S. at 436-37. *Aereo* argued that because it was simply an intermediary between a third-party’s broadcast and the user, it was not itself transmitting a performance within the meaning of the Act, and, even if it was, it was not doing so publicly. *Id.* at 438.

This Court rejected *Aereo*’s arguments. It held that showing users the copyrighted works was a direct “performance” by *Aereo*, even though *Aereo*’s service merely “communicate[d]’ to the subscriber, by means of a ‘device or process’ ... images and sounds” previously broadcast over the air by third parties. *Id.* at 445. “[W]hether *Aereo* transmits from the same or

separate copies, it performs the same work; it shows the same images and makes audible the same sounds.” *Id.* at 448; *see also Nicklen*, 551 F. Supp. 3d at 195 (citing this proposition in *Aereo* to reject the Server Test). The technological distinctions *Aereo* attempted to draw were “invisible to subscriber and broadcaster alike” and “concern[ed] not the nature of the service that *Aereo* provides so much as the technological manner in which it provides the service”. *Id.* at 444, 451; *see also Goldman*, 302 F. Supp. 3d at 590, 594 (finding this reasoning in *Aereo* “strongly support[s]” rejecting the Server Test).

So, too, here. Whether a webpage displays photographs from the same or separate copies, *it* displays the work; it shows the same images to the same users via the same interface. Any technological distinction is “invisible” to user and photographer alike and concerns not the nature of the photograph that the websites display, so much as the technological manner in which they are displayed.

At bottom, *Aereo* reaffirmed the Court’s long-held direction that copyrighted material is to be analyzed “as presented to, and perceptible by, [a] user”. *New York Times Co. v. Tasini*, 533 U.S. 483, 499 (2001) (citing 17 U.S.C. §§ 101-102) (“In determining whether the Articles have been reproduced and distributed ... we focus on the Articles as presented to, and perceptible by, the user of the Databases”). Here, the photographs are so seamlessly integrated into Respondent’s webpage that a user cannot distinguish between an embedded image and a stored image. Both infringe the display right because the website is where the images are shown. *See* 17 U.S.C. § 101.

II. The Question Presented Is Exceptionally Important and Warrants Review in This Case.

1. The question presented is a recurring one of substantial legal and practical importance. Petitioner and Respondent are in agreement that the Server Test currently permits website operators to show copyrighted images without authorization across millions of websites. The Server Test has failed to account for the realities of the digital age, where the internet is a primary medium for communication, commerce and entertainment, and online content sharing is ubiquitous. The Server Test has disrupted the balance adopted by Congress in the Copyright Act, and in so doing has undermined the value of copyright holders' works. The Server Test not only diminishes the incentive for creators to share their works online, but also creates legal uncertainty across conflicting jurisdictions. Addressing this issue is essential to ensuring robust protection for copyrighted works and maintaining the integrity and consistency of copyright law in an increasingly digital world.

2. Only the Ninth Circuit endorses the Server Test. District courts in the Second, Fifth and Tenth Circuits have directly and uniformly rejected it. See *Bowery*, 2024 WL 3416038, at *9-10 (concluding that the server test is “unpersuasive” and that such conclusion is “compelled by the text of the Copyright Act”); *Prepared Food Photos*, 2024 WL 382529, at *1 (rejecting the server test); *Newsweek*, 2022 WL 836786, at *5-6 (refusing defendant’s invitation to apply the server test and noting “that [it] has not been widely adopted outside of the Ninth Circuit”); *Nicklen*,

551 F. Supp. 3d at 195 (same, and suggesting alternatively that the server test only apply to search engines or a website that requires its users to click the embedded link before viewing the image); *Goldman*, 302 F. Supp. 3d at 592-93 (same); *Leader's Inst. LLC*, 2017 WL 5629514, at *10-11 (refusing to apply the server test).

An author who must sue in the Ninth Circuit should not enjoy less copyright protection than one able to sue elsewhere.

3. Below, Respondent and its *amici* raised policy arguments that they suggested have been endorsed by the Ninth Circuit to justify the endurance of the Server Test. Those policy arguments are wrong. But, in all events, they are best made to Congress. The Server Test is incompatible with the text and purpose of the Copyright Act as currently drafted and as explained by this Court in *Aereo*. “It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... in order to give the public *appropriate access* to their work product.” *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003) (emphasis added) (citing *Sony Corp. Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). Indeed, the number of *amici* below (17)—and the fervor with which they have argued for and against the Server Test—only reinforce that this case is a prime candidate for *certiorari* to determine whether the Ninth Circuit overstepped its bounds.

4. This case is an ideal vehicle for the Court to decide the question presented. The question presented was the singular contested issue and wholly dispositive on the motion to dismiss in the district

court, App. 7a, as well as the appeal therefrom in the court of appeals, *id.* at 3a. The record below is succinct, the alleged facts relevant only as context for the lower courts' decisions, and the case is otherwise free of any encumbrances that might frustrate this Court's resolution of the question presented. The Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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March 28, 2025

APPENDIX

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**APPENDIX A — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED DECEMBER 19, 2024**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-511

D.C. No. 2:23-cv-06753-JLS-SSC

ELLIOT MCGUCKEN, DR., AN INDIVIDUAL,

Plaintiff-Appellant,

v.

VALNET, INC., A CANADIAN CORPORATION,
INDIVIDUALLY DOING BUSINESS AS
THETRAVEL.COM,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted November 6, 2024*
Pasadena, California

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Before: W. FLETCHER and CALLAHAN, Circuit Judges, and MÁRQUEZ, District Judge.**

MEMORANDUM***

Appellant, Dr. Elliot McGucken, is a landscape photographer. Appellee, Valnet, Inc., owns and operates the website “www.thetravel.com.” McGucken alleges that Valnet violated his copyrights in 36 photographs when Valnet embedded McGucken’s Instagram posts on its site. Because McGucken’s claims are foreclosed by controlling precedent, we affirm the district court’s Rule 12(b)(6) dismissal of McGucken’s complaint.

McGucken filed a complaint alleging (1) direct copyright infringement; and (2) contributory and/or vicarious copyright infringement. Citing this Court’s “Server Test,” Valnet filed a Rule 12(b)(6) motion to dismiss. Valnet argued that because the “Subject Photographs, though appearing on Valnet’s website, were not actually copied or hosted by Valnet,” McGucken’s direct infringement claim failed as a matter of law. Valnet argued further that because there were no plausible allegations of direct infringement, McGucken’s contributory and vicarious liability claims also failed. The district court granted Valnet’s motion to dismiss.

** The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

On appeal, McGucken argues that the district court erred in its application of the Server Test. In the alternative, McGucken argues that the Server Test should be overruled or substantially cabined. Both arguments fail.

The Copyright Act promises creators the exclusive right “to display the copyrighted work publicly.” 17 U.S.C. § 106(5). To infringe the exclusive right to display, an unauthorized party must “show a copy of [the work], either directly or by means of a film, slide, television image, or any other device or process.” 17 U.S.C. § 101.

In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), we established what has become known as the Server Test to determine when a website infringes a copyright owner’s display right. 508 F.3d 1146 (9th Cir. 2007). In that case, Perfect 10 sued Google and Amazon for allegedly infringing copyrighted photographs. *Id.* at 1154. Google and Amazon had both embedded references to photographs owned by Perfect 10 on their websites. *Id.* at 1156, 1175. Perfect 10 insisted that these embedded references directly violated its display and distribution rights under the Copyright Act. *Id.* at 1159. We disagreed.

We wrote that “based on the plain language of the statute, a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory.” *Id.* at 1160. Therefore, embedded or “in-line linked images that appear on a user’s computer screen” do not directly infringe the display right. *Id.* We held that Perfect 10’s

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display rights were not violated because Amazon and Google did not host and transmit the images, but instead, merely embedded them. *Id.* at 1162. Sixteen years later, we affirmed the continued relevance of the Server Test in *Hunley v. Instagram*, 73 F.4th 1060 (9th Cir. 2023).

Because Valnet’s website contained only embedded references to McGucken’s Instagram posts, Valnet never displayed or distributed copies of the works to anyone on the internet. Thus, under the Server Test Valnet did not infringe McGucken’s display rights.

McGucken suggests that the Server Test “should be cabined to use in the search-engine context.” This argument was considered and rejected in *Hunley*. As we explained, “in articulating the Server Test, *Perfect 10* did not rely on the unique context of a search engine” but instead the method of embedding an image. *Hunley*, 73 F.4th at 1070.

Recognizing that our court overrules controlling precedent only in en banc proceedings, McGucken has moved for an initial hearing en banc. An initial hearing en banc is justified only when (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions, or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a). McGucken has failed to satisfy these criteria.

We **AFFIRM** the district court’s Rule 12(b)(6) dismissal and **DENY** the appellant’s motion for an initial hearing en banc. (Dkt. 9).

**APPENDIX B — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT
OF CALIFORNIA, FILED JANUARY 24, 2024**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:23-cv-06753-JLS-SSC
Title: Elliot McGucken v. Valnet, Inc. et al.
Date: January 24, 2024

Present: **Honorable JOSEPHINE L. STATON,
UNITED STATES DISTRICT JUDGE**

Gabby Garcia
Deputy Clerk

N/A
Court Reporter

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendant:
Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER
GRANTING DEFENDANTS MOTION TO DISMISS
(DOC. 15)**

Before the Court is Defendant Valnet, Inc.'s Motion to Dismiss. (Mot., Doc. 15.) Plaintiff Elliot McGucken opposed, and Defendant responded. (Opp., Doc. 18; Reply, Doc. 19.) The Court finds this matter appropriate for

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decision without oral argument, and the hearing set for January 19, 2024, at 10:30 a.m. is VACATED. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. For the following reasons, the Court GRANTS Defendant’s motion, DENIES leave to amend, and DISMISSES McGucken’s action WITH PREJUDICE.

I. BACKGROUND

Plaintiff McGucken is a nature and landscape photographer. (Compl., Doc. 1 ¶ 4.) Defendant Valnet operates a travel website. (*Id.* ¶ 5.) Valnet published certain articles on its website over several years that embedded some of McGucken’s Instagram posts and related photographs. (*See* Website Screenshots, Doc. 1-1.) McGucken alleges that Valnet’s embedding of his Instagram photos constitutes both direct and vicarious copyright infringement of his public-display rights as the copyright owner. (Compl. ¶¶ 16–28.) Valnet moved to dismiss, arguing that McGucken’s claims fail as a matter of law under the “server test.” (Mot. at 6–12.)

II. LEGAL STANDARD

In deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, courts must accept as true all “well-pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Furthermore, courts must construe the facts in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). Moreover, the Court may not dismiss a complaint

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without leave to amend unless “it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988) (cleaned up).

III. ANALYSIS

The Court DIMISSES McGucken’s action. The “server test” forecloses McGucken’s direct-infringement claim as a matter of law, and McGucken concedes that his vicarious-infringement claim fails. (*See Opp.* at 2 n.2.)

A. Direct Infringement

A website that “embeds” a copyrighted image—*i.e.*, includes “HTML instructions that direct a user’s browser” to retrieve the image from a third-party’s server—does not “show[] a copy” of the photo for purposes of the Copyright Act and, therefore, does not infringe the copyright owner’s display rights. *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1160–61 (9th Cir. 2007); *see also Hunley v. Instagram, LLC*, 73 F.4th 1060, 1065 (9th Cir. 2023) (“Because [Defendants] embedded—but did not store—the underlying copyrighted photographs, they are not guilty of direct infringement.”).

McGucken makes three arguments for the inapplicability of the server test to this case; the Court rejects each.

First, McGucken argues that the server test does not extend beyond the search-engine context to reach

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“a media company embedding images from Instagram.” (Opp. at 5.) The Ninth Circuit has squarely rejected that argument. In *Hunley*, the court concluded that “[n]othing in *Perfect 10* or the cases following it limits its application to search engines.” *Hunley*, 73 F.4th at 1071. It then applied the server test to reject the plaintiffs’ argument that two media companies, *Time* and *Buzzfeed*, directly infringed on their display rights by embedding their Instagram photos. *See id* at 1077.

Second, McGucken argues that the server test “contravenes the language and policy of the [Copyright Act]” and has been “criticized and rejected outside the Ninth Circuit.” (Opp. at 5–13.) The Court is not free to disregard binding precedent simply because a litigant or other courts disagree with it. *See Hunley*, 73 F.4th at 1072 (“We will not consider these arguments in any detail because they are foreclosed by *Perfect 10*.”).

Third, McGucken argues that *Perfect 10*—which announced the server test—is inconsistent with the Supreme Court’s intervening decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014). (Opp. at 13–14.) The Ninth Circuit has already rejected this argument and concluded that *Perfect 10* is not “clearly irreconcilable” with *Aereo* in a manner that would allow a district court to disregard it. *See Hunley*, 73 F.4th at 1076 (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)).

*Appendix B***B. Leave to Amend**

The Court DENIES leave to amend. As an initial matter, McGucken seems to disclaim any desire to amend his complaint—stating that he “seeks instead to appeal the granting of Valnet’s motion rather than amend.” (Opp. at 3 n.4.) Moreover, there are no amendments that McGucken could make that would remove this action from the sweep of the server test. Therefore, “it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Karim-Panahi*, 839 F.2d at 623.

C. Interlocutory Appeal

In his opposition, McGucken asks the Court to certify this Order ruling on Valnet’s motion to dismiss for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Opp. at 18–21.) To begin, McGucken’s request is procedurally improper. *See* 28 U.S.C. § 1292(b) (requiring an “application . . . made . . . within ten days after the entry of the order” seeking to be appealed). More fundamentally, McGucken’s request is unnecessary since an order denying leave to amend and dismissing an entire action is a final order appealable pursuant to 28 U.S.C. § 1291. *See, e.g., In re Ford Motor Co./Citibank (S. Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).

IV. CONCLUSION

For the above reasons, the Court GRANTS Defendant’s motion, DENIES leave to amend, and DISMISSES

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Plaintiff's action WITH PREJUDICE. Additionally, Plaintiff's request to certify an interlocutory appeal is DENIED.

Initials of Deputy Clerk: gga

11a

**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED JANUARY 31, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-511

D.C. No. 2:23-cv-06753-JLS-SSC

Central District of California, Los Angeles

ELLIOT MCGUCKEN, DR., AN INDIVIDUAL,

Plaintiff-Appellant,

v.

VALNET, INC., A CANADIAN CORPORATION,
INDIVIDUALLY DOING BUSINESS AS
THETRAVEL.COM,

Defendant-Appellee.

ORDER

Before: W. FLETCHER and CALLAHAN, Circuit
Judges, and MÁRQUEZ, District Judge.*

Appellant filed a petition for panel rehearing or, in the
alternative, rehearing en banc on January 2, 2025 (Dkt.

* The Honorable Rosemary Márquez, United States District
Judge for the District of Arizona, sitting by designation.

Appendix C

Entry No. 55). The panel has unanimously voted to deny the petition for panel rehearing. Judge Callahan voted to deny the petition for rehearing en banc, and Judges Fletcher and Márquez so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing or rehearing en banc is **DENIED**.