

**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**

---

**BRIEF OF AMICUS CURIAE  
NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS  
IN SUPPORT OF PETITIONER**

---

Steven T. Lowe, Esq.  
*Counsel of Record*  
LOWE & ASSOCIATES  
8383 Wilshire Boulevard  
Suite 1038  
Los Angeles, CA 90211  
(310) 477-5811  
steven@lowelaw.com

Nelson A. Campbell, Esq.  
LEFAN LAW, PC  
8383 Wilshire Boulevard  
Suite 970  
Los Angeles, CA 90211  
(213) 290-1091  
nelson@lefanlaw.com  
Amanda E. Mell, Esq.  
VOLUNTEER ATTORNEY FOR NSEAL  
(213) 302-8798  
projects@nseal.org

---

April 16, 2025

*Counsel for Amicus Curiae*

---

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF THE AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. Certiorari Should be Granted Because Courts Throughout the Country are Divided on How to Interpret the Display Right, and This Extremely Important Interpretation of the Copyright Act Requires Supreme Court Resolution.....	4
A. The Ninth Circuit Created a Novel Prerequisite to Finding That Website Publishers Infringed the 106(5) Display Right.....	4
B. Courts Nationwide Find That the Ninth Circuit’s Server Test Conflicts with the Copyright Act.....	6
C. While the Ninth Circuit Found That the Server Test Does Not Conflate the Display and Reproduction Rights, That Is Against the Weight of Authority.....	9
II. Certiorari Is Warranted Where Courts in the Ninth Circuit Have Questioned the Applicability of the Server Test and Explicitly Stated That the Question Requires Supreme Court Intervention .....	11

**TABLE OF CONTENTS – Continued**

	Page
III. Certiorari Is Warranted Because There Are Multiple Conflicting Interpretations of the Supreme Court Decision in <i>American Broadcasting Co. v. Aereo</i> , 573 U.S. 431 (2014) with Respect to Whether One Can Avoid Liability for Copyright Infringement by Embedding a Creative Work .....	13
IV. Nationwide Clarity and Consistency Regarding Embedding is Critical to the Interests of Creators .....	15
CONCLUSION.....	18

# TABLE OF AUTHORITIES

Page

## CASES

<i>American Broadcasting Co. v. Aereo</i> , 573 U.S. 431 (2014) .....	3, 13, 14, 15
<i>Andy Warhol Found. for the Visual Arts, Inc.</i> <i>v. Goldsmith</i> , 598 U.S. 508 (2023) .....	2, 16
<i>Bowery v. Sites</i> , No. 2:21-CV-00567-DBB-JCB, 2024 WL 3416038 (D. Utah July 15, 2024) ..	6, 8, 9
<i>Flava Works, Inc. v. Gunter</i> , 2011 WL 3876910 (N.D. Ill. Sept. 1, 2011), vacated, 689 F.3d 754 (7th Cir. 2012) .....	10
<i>Free Speech Sys., LLC v. Menzel</i> , 390 F.Supp.3d 1162 (N.D. Cal. 2019) .....	11, 12
<i>Golan v. Holder</i> , 565 U.S. 302 (2012) .....	2
<i>Goldman v. Breitbart News Network, LLC</i> , 302 F.Supp.3d 585 (S.D.N.Y. 2018).....	6, 7, 10, 14, 15
<i>Hunley v. Instagram, LLC</i> , 73 F.4th 1060 (9th Cir. 2023).....	3, 5, 6, 9-17
<i>Leader’s Institute, LLC v. Jackson</i> , No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017) .....	9, 10, 16
<i>Lynk Media LLC v. IHeartMedia, Inc.</i> , No. SA-24-CV-00691-JKP, 2025 WL 208768 (W.D. Tex. Jan. 14, 2025) .....	9
<i>MAI Sys. Corp. v. Peak Computer, Inc.</i> , 991 F.2d 511 (9th Cir. 1993) .....	5

**TABLE OF AUTHORITIES – Continued**

Page

<i>Mazer v. Stein</i> , 347 U.S. 201 (1954) .....	2
<i>McGucken v. Newsweek LLC</i> , No. 19 CIV. 9617 (KPF), 2022 WL 836786 (S.D.N.Y. Mar. 21, 2022) .....	6, 8
<i>Nicklen v. Sinclair Broadcast Group, Inc.</i> , 551 F.Supp.3d 188 (S.D.N.Y. 2021) .....	6, 7, 8, 10, 15, 16
<i>Perfect 10 v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007) .....	3, 5, 6, 9-11, 13, 16
<i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> , 572 U.S. 663 (2014) .....	1, 2
<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (2012) .....	2
<i>Unicolors, Inc. v. H&amp;M Hennes &amp; Mauritz, L. P.</i> , 142 S. Ct. 941 (2022) .....	2
<i>Warner Chappell Music, Inc. v. Nealy</i> , 601 S.Ct. 366 (2024) .....	2

**STATUTES**

17 U.S.C. § 101 .....	5, 6, 7, 8, 9, 13
17 U.S.C. § 106(1) .....	9
17 U.S.C. § 106(5) .....	2, 3, 5, 9

# TABLE OF AUTHORITIES – Continued

Page

## JUDICIAL RULES

Sup. Ct. R. 37.2 .....	1
Sup. Ct. R. 37.6 .....	1

## OTHER AUTHORITIES

Aaron Moss, <i>Is it Legal to Embed Instagram Photos on Your Website?</i> (July 22, 2020), <a href="https://copyrightlately.com/legal-embed-instagram-photos-website/">https:// copyrightlately.com/legal-embed- instagram-photos-website/</a> .....	16
H.R. Rep. No. 94-1476 (1976) .....	4, 8
Shaleen J. Patel & Mike Hobbs, <i>To Embed or Not to Embed - That Is the Question</i> (Nov. 23, 2020), <a href="https://www.law.com/2020/11/23/to-embed-or-not-to-embed-that-is-the-question/">https://www. law.com/2020/11/23/to-embed-or-not-to- embed-that-is-the-question/</a> .....	16



## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

This Brief is filed in accordance with Supreme Court Rule 37.2.

**NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS (“NSEAL”)**, *previously known as the CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS*, is a non-profit 501(c)(3) organization, founded in 2013, devoted to safeguarding the interests of creative professionals in the entertainment industry through dedicated legal advocacy. This national organization is comprised of attorneys across the United States who represent authors, screenwriters, songwriters, musicians, and other creative professionals in the entertainment and arts industries. Its members have litigated thousands of entertainment and art cases in trial and appellate courts throughout the country, including many of the most important recent copyright, art, and entertainment cases, and have advised scores of creative professionals on litigation, licensing, and intellectual property strategy. Its members have also argued for and obtained crucial decisions at the appellate court level in cases involving artists’ rights and entertainment law. The organization has submitted *amicus* briefs in support of the prevailing party in four previous cases in this court, *viz.*, *Petrella v. Metro-Goldwyn-*

---

<sup>1</sup> In accordance with Sup. Ct. R. 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, its members, or its counsel have made a monetary contribution intended to fund the preparation or submission of this brief. In addition, amicus curiae notified the parties of its intent to file in accordance with Sup. Ct. R. 37.2.

*Mayer, Inc.*, 572 U.S. 663 (2014); *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S. Ct. 941 (2022); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023); and *Warner Chappell Music, Inc. v. Nealy*, 601 S.Ct. 366 (2024), all of which involved important issues of copyright law, and all of which reached conclusions consistent with the reasoning in NSEAL’s briefs.



## SUMMARY OF ARGUMENT

In 1976, Congress updated the Copyright Act to encompass emerging technologies such as television, broadcasting, and computer software. This iteration of the Act aimed to account for new methods of creation, exploitation, and infringement of creative works. Although the Copyright Act was designed to incentivize innovation and protect creators by prioritizing their consent and compensation over unauthorized exploitation,<sup>2</sup> the Ninth Circuit’s interpretation of the Section 106(5) public display right in *McGucken v. Valnet*,<sup>3</sup> and prior cases, directly undermines that goal. The Ninth Circuit unfairly permits website owners to infringe upon a right reserved for copyright owners: the exclusive right to publicly display their works.

---

<sup>2</sup> See *Golan v. Holder*, 565 U.S. 302, 349-50 (2012) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (2012) and *Mazer v. Stein*, 347 U.S. 201 (1954) for the proposition that copyright law is intended to promote the public policy of motivating the creativity of authors and other artists.)

<sup>3</sup> *McGucken v. Valnet*, No. 24-511, 2024 WL 5166624 (9th Cir. Dec. 19, 2024).



Since *Perfect 10 v. Amazon.com, Inc.*,<sup>4</sup> courts within the Ninth Circuit have extended the Server Test beyond the narrow context of search engines to apply to nearly all websites that in-line link (now called “embedding”) creative works without the copyright holder’s permission,<sup>5</sup> effectively immunizing widespread infringement as long as the infringer does not store copies of the copyrighted works. In practice, the Server Test allows websites to display copyrighted content as if it were their own, frequently stripping creators of attribution, licensing opportunities, and control over how, when, and by whom their works are displayed.

The Ninth Circuit’s Server Test has unilaterally decimated a fundamental and undisputed right of copyright owners, such as artists, who rely on digital public displays of their work to promote and profit from their creative endeavors.

However, district courts across the United States have disagreed about the legitimacy of the Ninth Circuit’s Server Test, considering the language, intent, and legislative history of the Copyright Act, and the impact of *American Broadcasting Co. v. Aereo*.<sup>6</sup> The Ninth Circuit itself has cast doubt on the continued viability of the Server Test. See § II below.

This growing split in authority has resulted in a fractured and unpredictable legal landscape, where conflicting interpretations of the Section 106(5) display right lead to inconsistent copyright protections and

---

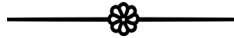
<sup>4</sup> *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>5</sup> *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1069-71 (9th Cir. 2023).

<sup>6</sup> *American Broadcasting Co. v. Aereo*, 573 U.S. 431 (2014).

inefficiencies in enforcement. This disarray jeopardizes the core purpose of the Copyright Act: uniform protection of creative expression.

Accordingly, this Court should grant the Petition to resolve these conflicting interpretations and prevent inconsistent enforcement of copyright holders' right to display their works publicly.



## ARGUMENT

### **I. Certiorari Should be Granted Because Courts Throughout the Country are Divided on How to Interpret the Display Right, and This Extremely Important Interpretation of the Copyright Act Requires Supreme Court Resolution**

#### **A. The Ninth Circuit Created a Novel Prerequisite to Finding That Website Publishers Infringed the 106(5) Display Right**

One of the six exclusive rights reserved for copyright owners is the right “to display the copyrighted work publicly.” 17 U.S.C. § 106. The right to display a work is reserved for the owner so they can control how the public sees and experiences the work.

Intentionally drafting the display right broadly, Congress defined a display as “any further act by which [the initial] rendition or showing is transmitted or communicated to the public.” H.R. Rep. No. 94-1476, 63 (1976). This includes “the transmission of an image by electronic or other means.” *Id.* at 64.

One method of electronically transmitting or communicating a work to the public is through a process known as “embedding,” whereby a website’s HTML instructions direct a user’s browser to retrieve an image from its host server. Embedded images are “in-line linked images that appear on a user’s computer screen.” *Perfect 10*, 508 F.3d at 1160. “Embedding therefore allows users to see the [embedded] content itself . . . on the embedding website without navigating away from the site.” *Hunley*, 73 F.4th at 1064.

In 2007, the Ninth Circuit determined whether a website publisher that embedded images infringed upon a copyright owner’s display right. The Ninth Circuit interpreted the Copyright Act’s fixation requirement to mean that a work is fixed in a tangible medium of expression “when embodied (*i.e.* stored) in a computer’s server” and that the “image stored in the computer is the ‘copy’ of the work for purposes of copyright law.” *Perfect 10*, 508 F.3d at 1160 (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517–18 (9th Cir. 1993)). In applying this definition to the Copyright Act’s display right, the Ninth Circuit created a novel requirement: to infringe upon a copyright holder’s display right online, the copyrighted work displayed by the infringer must also be “fixed” or stored in the infringing computer’s memory or server. *Id.* (citing 17 U.S.C. § 101). The “requirement that a copy be ‘fixed in the computer’s memory’ has come to be known as the ‘Server Test.’” *Hunley*, 73 F.4th at 1069 (citing *Perfect 10*, 508 F.3d at 1159). This additional judicially created requirement effectively deprives creators of the ability to enforce their rights under Section 106(5) by allowing third parties to infringe upon the owner’s statutory rights with impunity.

However, courts outside of the Ninth Circuit consistently reject the Server Test as inconsistent with the text and legislative history of the Copyright Act. *See, e.g., Bowery v. Sites*, No. 2:21-CV-00567-DBB-JCB, 2024 WL 3416038, at \*9 (D. Utah July 15, 2024); *Goldman v. Breitbart News Network, LLC*, 302 F.Supp.3d 585, 593 (S.D.N.Y. 2018); *Nicklen v. Sinclair Broadcast Group, Inc.*, 551 F.Supp.3d 188, 195 (S.D.N.Y. 2021); and *McGucken v. Newsweek LLC*, No. 19 CIV. 9617 (KPF), 2022 WL 836786, at \*6 (S.D.N.Y. Mar. 21, 2022).

### **B. Courts Nationwide Find That the Ninth Circuit’s Server Test Conflicts with the Copyright Act**

In *Perfect 10*, the district court found that a computer owner shows a copy of the copyrighted work “by means of a . . . device or process when the owner uses the computer to fill the computer screen with the photographic image stored on that computer, or by communicating the stored image electronically to another person’s computer.” 508 F.3d at 1160 (citing 17 U.S.C. § 101). The Ninth Circuit later affirmed that, based on the district court’s reasoning in *Perfect 10*, embedding websites must “‘store’ an image or video” to “‘communicate a copy’ of the image or video[.]” *Hunley*, 73 F.4th at 1067 (citing *Perfect 10*, 508 F.3d at 1160-61). However, for good reason, this reading of the Copyright Act has been rejected by numerous courts outside of the Ninth Circuit.

In evaluating the Ninth Circuit’s Server Test, the court in *Goldman v. Breitbart* of the Southern District of New York saw “nothing in either the text or purpose of the Copyright Act” suggesting “that possession of

an image is necessary in order to display it.” 302 F.Supp.3d at 593-94. In fact, the *Goldman* court concluded that “the purpose and language of the Act support the opposite view” because the definitions of public display and transmitting a display in 17 U.S.C. § 101 were “plainly drafted with the intent to sweep broadly.” *Id.* at 593 (citing 17 U.S.C. § 101). In other words, if the authors of the Copyright Act had intended to limit violations of the display right to infringers who store a copy of the work, they would have placed that limitation in the statute. The *Goldman* court also found that to “transmit a display is to ‘communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent,’” finding that the steps necessary to embed a creative work constitute a process under the Copyright Act whereby the work is displayed to the public. *Id.* at 593-94. (quoting 17 U.S.C. § 101) (emphasis in original).

Similarly, in *Nicklen v. Sinclair Broadcast Group, Inc.*, the Southern District of New York reaffirmed its disapproval of the Server Test. 551 F.Supp.3d at 195. The *Nicklen* court found that:

[U]nder the plain meaning of the Copyright Act, a defendant violates an author’s exclusive right to display an audiovisual work publicly when the defendant without authorization causes a copy of the work, or individual images of the work, to be seen—whether directly or by means of any device or process known in 1976 or developed thereafter.

*Id.* at 194. The court went on to reason that the display right is “technology-neutral” and that a display includes “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 or retrieval system.” *Id.* (quoting H.R. Rep. No. 94-1476, 64 (1976)). In sum, *Nicklen* held that although the Server Test “distinguishes between showing a copy possessed by the infringer and showing a copy possessed by someone else,” as long as a copy of a work is shown, “the Copyright Act makes no such distinction.” *Id.* at 195.

Again, in *McGucken v Newsweek*, the Southern District of New York relied on the plain definitions of the Copyright Act, as well as H.R. Rep. 94-1476, 47, 51 (1976), to reaffirm that an infringer does not have to possess or store a copy of a work in order to infringe upon a copyright owner’s display right. *McGucken v. Newsweek LLC*, No. 19 CIV. 9617 (KPF), 2022 WL 836786, at \*5-6 (S.D.N.Y. Mar. 21, 2022). Citing *Nicklen*, the district court concluded that the “Copyright Act makes clear . . . that to ‘show a copy’ is to display it.” *Id.* at \*6 (citing *Nicklen*, 551 F.Supp. 3d at 195; 17 U.S.C. § 101). The court reasoned that “in considering the display right, Congress cast a very wide net, intending to include ‘[e]ach and every method by which the images . . . comprising a . . . display are picked up and conveyed,’ assuming that they reach the public.” *Id.* (citing H.R. Rep. 94-1476, 64 (1976)).

Again contrary to the Ninth Circuit’s interpretation of the Act, the Utah district court in *Bowery v. Sites* found that “the plain text of the Act makes clear that “[t]o “display” a work means to *show* a copy of it, either directly or by . . . *any other device or process*,” and the word “show” is not defined in the Copyright

Act, nor does anything “in its ordinary meaning necessitate[] physical possession or control.” *Bowery*, 2024 WL 3416038, at \*9 (quoting 17 U.S.C. § 101) (emphasis in original).

District courts in the Fifth Circuit have also not adopted the Ninth Circuit’s Server Test. *See Lynk Media LLC v. IHeartMedia, Inc.*, No. SA-24-CV-00691-JKP, 2025 WL 208768, at \*3 (W.D. Tex. Jan. 14, 2025); *Leader’s Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514, at \*10-11 (N.D. Tex. Nov. 22, 2017). In *Leader’s Institute, LLC v. Jackson*, the Northern District of Texas explicitly rejected the Server Test and found that a person need only show a copy of a copyrighted work via a “process,” and transmit or communicate that display to the public, to violate a copyright owner’s display right. *Leader’s Inst., LLC*, 2017 WL 5629514, at \*10-11. The court emphasized that “the text of the Copyright Act does not make actual possession of a copy of a work a prerequisite for infringement.” *Id.* at \*11 (citing 17 U.S.C. § 101). This is obviously the most reasonable interpretation of Section 106 of the Copyright Act.

### **C. While the Ninth Circuit Found That the Server Test Does Not Conflate the Display and Reproduction Rights, That Is Against the Weight of Authority**

In *Perfect 10*, the Ninth Circuit firmly stated that the Server Test does not improperly collapse the section 106(5) display right into the section 106(1) reproduction right. *See Perfect 10*, 508 F.3d. at 1161.

However, sixteen years later, when the plaintiff in *Hunley* challenged the Ninth Circuit’s above-mentioned finding, the Ninth Circuit declined to

address the issue at all. *Hunley*, 73 F.4th at 1072. The *Hunley* court merely stated that it could not overrule *Perfect 10* “[e]ven if [they] thought, in retrospect, that *Perfect 10* created some inconsistencies with other provisions of the Copyright Act.” *Id.*

Courts outside of the Ninth Circuit consistently find that the Server Test erroneously collapsed the display right into the reproduction right. *See Nicklen*, 551 F. Supp. 3d at 195 (“The Ninth Circuit’s approach, under which no display is possible unless the alleged infringer has also stored a copy of the work on the infringer’s computer, makes the display right merely a subset of the reproduction right”); *Goldman*, 302 F. Supp. 3d at 595 (finding that the Server Test improperly collapsed the display right into the reproduction right by making possession of a copy of an infringing work a prerequisite to displaying the work); *Leader’s Inst., LLC*, 2017 WL 5629514, at \*11 (“to the extent *Perfect 10* makes actual possession of a copy a necessary condition to violating a copyright owner’s exclusive right to display her copyrighted works, the Court respectfully disagrees with the Ninth Circuit” (citing *Flava Works, Inc. v. Gunter*, 2011 WL 3876910, at \*4 (N.D. Ill. Sept. 1, 2011), vacated, 689 F.3d 754 (7th Cir. 2012))).



## II. Certiorari Is Warranted Where Courts in the Ninth Circuit Have Questioned the Applicability of the Server Test and Explicitly Stated That the Question Requires Supreme Court Intervention

The Ninth Circuit’s continued reliance on the Server Test has come under increasing scrutiny, even within the Ninth Circuit itself. *See Hunley*, 73 F.4th at 1075 (noting criticism of the Server Test but adhering to precedent); *Free Speech Sys., LLC v. Menzel*, 390 F.Supp.3d 1162, 1172 (N.D. Cal. 2019) (acknowledging criticism of the Server Test).

Despite mounting criticism, the Ninth Circuit has continued to apply the Server Test in cases such as *Hunley*, 73 F.4th 1060. However, in *Hunley*, the Ninth Circuit itself acknowledged growing criticism of the Server Test, conceding that any reevaluation of *Perfect 10* would require an en banc review or Supreme Court intervention. *Id.* at 1084. The Ninth Circuit’s recognition of its own precedent’s shortcomings serves as an implicit admission that the Server Test is misaligned with modern content-sharing realities.

Yet, bound by precedent, the court deferred the issue rather than reconsidering the test’s validity. *Id.* at 1076 (“We cannot foreclose the possibility that some future panel may conclude that there are ways to display a copy other than to store it on a server. But it is not our role to craft a policy solution and rewrite the law to our tastes. We can only apply the law as it currently exists.”) (emphasis in original). This hesitation underscores the need for the Supreme Court to step in and resolve this important issue of copyright law interpretation.

Further cracks in the Server Test's foundation have emerged at the district court level. In *Free Speech Systems*, the Northern District of California openly questioned whether the Server Test should extend beyond its original context of search engines and acknowledged that several courts outside of the Ninth Circuit decline to adopt the Server Test. *Free Speech Sys.*, 390 F. Supp. 3d at 1172-73. The court allowed a copyright infringement claim to proceed past a motion to dismiss despite the defendant's reliance on the Server Test, signaling growing judicial discomfort with applying this rule to modern digital content-sharing platforms. *Id.* at 1173. This ruling reflects an increasing unwillingness to accept the Server Test's limitations, even within the Ninth Circuit. *Id.*

Taken together, *Hunley* and *Free Speech Systems* expose the Server Test's inherent weaknesses and the Ninth Circuit's own uncertainty about its continued viability. *See Hunley*, 73 F.4th at 1075-76; *Free Speech Sys.*, 390 F.Supp.3d at 1172-73. *Hunley* acknowledges the need for Supreme Court intervention, while *Free Speech Systems* signals lower courts' reluctance to extend the test beyond its original scope. *See Hunley*, 73 F.4th at 1084; *Free Speech Sys.*, 390 F.Supp. 3d at 1173. This judicial split underscores the urgent need for a definitive ruling to ensure a consistent and fair application of copyright law.

### **III. Certiorari Is Warranted Because There Are Multiple Conflicting Interpretations of the Supreme Court Decision in *American Broadcasting Co. v. Aereo*, 573 U.S. 431 (2014) with Respect to Whether One Can Avoid Liability for Copyright Infringement by Embedding a Creative Work**

In *American Broadcasting Co. v. Aereo*, (“*Aereo*”), this Court determined that Aereo was liable for infringing upon American Broadcasting Co.’s public performance right based on the retransmission of a broadcast. *Aereo*, 573 U.S. at 450-51 (2014). In reaching this determination, the Court analyzed the Transmit Clause, which Section 101 of the Copyright Act applies to public performances *and public displays*, and found that the technical aspects of re-transmitting were irrelevant to a finding of copyright infringement where the same images and sounds were communicated to multiple members of the public. *Id.* at 445-48; 17 U.S.C. § 101. Additionally, the Court reasoned that user perception of the identical re-broadcast was relevant to a finding of copyright infringement. *Aereo*, 573 U.S. at 448.

When presented with the argument that *Perfect 10* and the Server Test were inconsistent with *Aereo*, the Ninth Circuit in *Hunley* explicitly rejected the contention that *Perfect 10* and the corresponding Server Test were overruled by implication in *Aereo*. *Hunley*, 73 F.4th at 1072-76. In making this determination, the Ninth Circuit relied heavily on the fact that *Aereo* involved the public performance right, not the display right that is at issue in the Server Test. *Id.* at 1074. Moreover, the Ninth Circuit reasoned that *Aereo* “clarified who is liable for retransmitting . . . to facilitate

access to a display,” but “did not address what it means to transmit a copy.” *Id.*

However, courts in the Second Circuit, namely the Southern District of New York, take the opposite view of the Ninth Circuit when interpreting *Aereo*. In *Goldman*, the Southern District of New York faced similar facts as the Ninth Circuit in *Hunley*. The court engaged in an analysis and ultimately found *Aereo*’s language instructive. *Goldman*, 302 F. Supp. 3d at 594. In stark contrast to the Ninth Circuit, which concluded that the Supreme Court’s language in *Aereo* was irrelevant to the display right, the Southern District of New York held that:

The language the Court used there to describe invisible technological details applies equally well here: “This difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into a ‘copy shop that provides patrons with a library card.’”

*Id.* (quoting *Aereo*, 573 U.S. at 443).

*Goldman* further found that “the Court’s holding eschewed the notion that Aereo should be absolved of liability based upon purely technical distinctions” and “the principles that undergird the Aereo decision—chief among them that mere technical distinctions invisible to the user should not be the lynchpin on which copyright liability lies—apply with equal vigor here.” *Id.* at 594-95. (emphasis added).

Again, facing near identical facts to *Goldman and Hunley*, the Southern District of New York in *Nicklen* found embedding to infringe on a copyright holder's display right. *Nicklen*, 551 F.Supp. 3d at 193-196. *Nicklen* relied, in part, on *Aereo*'s holding "that, despite technological complexity concerning the 'behind-the-scenes' delivery of images, the defendant violated the exclusive right to 'show [an audiovisual work's] images in any sequence,' because 'whether Aereo transmits from the same or separate copies, it . . . shows the same images and makes audible the same sounds.'" *Id.* at 195 (quoting *Aereo*, 573 U.S. at 441-448).

#### **IV. Nationwide Clarity and Consistency Regarding Embedding is Critical to the Interests of Creators**

By pulling images, videos, and other media from third-party servers, embedding enables websites to share content without hosting it themselves. A recent study shows that nearly one in four online news articles contain embedded media.<sup>7</sup> However, even though the modern internet relies on embedding as a fundamental tool for displaying content across websites and social media platforms, a feature of the internet can be both an ordinary functionality of web browsers and copyright-infringing. The widespread practice of embedding operates within a fragmented legal framework, creating uncertainty for creators, platforms, and users.

The Ninth Circuit continues to apply the Server Test strictly, unfairly shielding infringers, who have

---

<sup>7</sup> See Shaleen J. Patel & Mike Hobbs, *To Embed or Not to Embed - That Is the Question* (Nov. 23, 2020), <https://www.law.com/2020/>

blatantly misappropriated intellectual property from creators (and their licensees), from liability unless they directly host the infringing content on their own servers. It takes only the application of common sense and a reasonable interpretation of Section 106 to conclude that infringers use embedding to copy with impunity. This Court previously closed a similar “loophole” in the fair use doctrine. *See generally Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

For these (and other) reasons, courts have noted that reliance on *Perfect 10* in copyright infringement cases outside the context of search engines is misplaced. *See Nicklen*, 551 F. Supp. 3d at 195 (holding that because the Ninth Circuit’s reasoning in *Perfect 10* applied to copyrighted images that were only displayed if a user clicked on a link, the Server Test was a “poor fit” for different facts); *see also Leader’s Inst., LLC*, 2017 WL 5629514, at \*11 (“Unlike Google, TLI did not merely provide a link by which users could access Magnovo content but instead displayed Magnovo’s content as if it were its own.”) While photographs in search engines are displayed alongside information about their websites of origin, “the embedding website appears to the user to have included the copyrighted material in its content.” *Hunley*, 73 F.4th at 1064.

These inconsistent interpretations of fundamental copyright law undermine the Copyright Act’s intent to provide nationwide uniformity and predictability in

---

11/23/to-embed-or-not-to-embed-that-is-the-question/; Aaron Moss, *Is it Legal to Embed Instagram Photos on Your Website?* (July 22, 2020), <https://copyrightlately.com/legal-embed-instagram-photos-website/>.

copyright enforcement. A divided legal landscape incentivizes infringers to exploit the Ninth Circuit's Server Test, allowing them to freely embed and display copyrighted works without authorization. As it stands, a lawyer representing an infringer, who misappropriated a creative work through embedding, could be negligent if they do not immediately seek declaratory relief in the Ninth Circuit, where their client could infringe with impunity, and vice versa for creators who would file in the Second Circuit. This strategic forum shopping further disadvantages creators, who must navigate complex jurisdictional differences to protect their rights.

Although the Ninth Circuit has downplayed the significance of user perception,<sup>8</sup> embedded images appear as if they were physically copied and displayed on the embedding website. To any member of the public, copies of the images appear fixed in both places, and “user perception is relevant to the fixation requirement—as mandated by the Copyright Act.” *Id.* at 1076.

---

<sup>8</sup> *Id.* at 1075-76.



## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Steven T. Lowe, Esq.

*Counsel of Record*

LOWE & ASSOCIATES

8383 Wilshire Boulevard

Suite 1038

Los Angeles, CA 90211

(310) 477-5811

steven@lowelaw.com

Nelson A. Campbell, Esq.

LEFAN LAW, PC

8383 Wilshire Boulevard

Suite 970

Los Angeles, CA 90211

(213) 290-1091

nelson@lefanlaw.com

Amanda E. Mell, Esq.

VOLUNTEER ATTORNEY FOR NSEAL

(213) 302-8798

projects@nseal.org

*Counsel for Amicus Curiae*

April 16, 2025