

**In the Supreme Court of the United States**

---

ELLIOT MCGUCKEN,

*Petitioner,*

v.

VALNET, INC., A CANADIAN CORPORATION, DBA THETRAVEL.COM,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

---

**BRIEF OF AMICI CURIAE**

**AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS,  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,  
AMERICAN PHOTOGRAPHIC ARTISTS,  
AMERICAN SOCIETY FOR COLLECTIVE RIGHTS LICENSING,  
DIGITAL MEDIA LICENSING ASSOCIATION,  
PROFESSIONAL PHOTOGRAPHERS OF AMERICA,  
AND NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION  
IN SUPPORT OF PETITIONER**

---

Mickey H. Osterreicher

*General Counsel*

Alicia Wagner Calzada

*Deputy General Counsel*

NATIONAL PRESS

PHOTOGRAPHERS ASSOCIATION

120 Hooper Street

Athens, GA 30602

(716) 983-7800

lawyer@nppa.org

advocacy@nppa.org

Thomas B. Maddrey

*Chief Executive Officer and*

*Counsel of Record*

AMERICAN SOCIETY OF

MEDIA PHOTOGRAPHERS

4 Embarcadero Center, Ste. 1400

San Francisco, CA 94111

(844) 762-3386

maddrey@asmp.org

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT.....	8
I.    Certiorari Should be Granted Because the Legal Fiction of the “Server Test” Should be Abrogated, and This Matter is the Most Appropriate Vehicle for the Court to end the Ninth’s Circuit’s Bizarre Misreading of the Display Right, and end the Resulting Circuit Split.....	8
A.  The Server Test Should be Abrogated .....	8
B.  The Intervening Years Since Perfect 10 Have Clarified the Flaws in the Judicially Created Rule .....	12
CONCLUSION.....	16

# TABLE OF AUTHORITIES

Page

## CASES

<i>ABC, Inc. v. Aereo, Inc.</i> , 573 U.S. 431 (2014) .....	4, 9, 14
<i>Bates v. United States</i> , 522 U.S. 23, 118 S. Ct. 285 (1997) .....	11
<i>Bowery v. Sites</i> , 2024 WL 3416038 (D. Utah July 15, 2024) .....	11
<i>Flava Works, Inc. v. Gunter</i> , 2011 WL 3876910 (N.D. Ill., 2011) .....	12
<i>Free Speech Sys., LLC v. Menzel</i> , 390 F. Supp. 3d 1162 (N.D. Cal. 2019) .....	13
<i>Goldman v. Breitbart News Network, LLC</i> , 302 F. Supp.3d 585 (S.D.N.Y. 2018) ...	7, 9, 12, 13
<i>Groff v. DeJoy</i> , 143 S. Ct. 2279 (2023) .....	10, 11
<i>Hunley v. Instagram, LLC</i> , 73 F.4th 1060 (9th Cir. 2023).....	4, 5, 13
<i>McGucken v. Newsweek LLC</i> , No. 19 Civ. 9617 (KPF), 2022 WL 836786 (S.D.N.Y. Mar. 21, 2022) .....	9, 11
<i>N.Y. Times Co. v. Tasini</i> , 533 U.S. 483 (2001) .....	14
<i>Nicklen v. Sinclair Broad. Grp., Inc.</i> , 551 F. Supp. 3d 188 (SDNY 2021) .....	9, 12
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007) .....	4-8, 10, 12, 13

**TABLE OF AUTHORITIES – Continued**

Page

<i>Prepared Food Photos, Inc. v. Chicken Joes, LLC</i> , 2024 WL 382529 (S.D.N.Y. Feb. 1, 2024).....	11
<i>Sears, Roebuck &amp; Co. v. Stiffel Co.</i> , 376 U.S. 225 (1964) .....	9
<i>Syntek Semiconductor Co. v. Microchip Tech. Inc.</i> , 307 F.3d 775 (9th Cir. 2002) .....	9
<i>The Leader’s Institute, LLC v. Jackson</i> , 2017 WL 5629514 (N.D.TX, 2017) .....	9, 12

**STATUTES**

17 U.S.C. § 101.....	5, 10, 11, 14
17 U.S.C. § 106(4) .....	14
17 U.S.C. § 106(5) .....	10, 14
17 U.S.C. § 108.....	12
26 U.S.C. § 501(c)(6) .....	1, 2
H.R. Rep. 94-1476, 47, 64 (1976) .....	9, 13

**JUDICIAL RULES**

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

**TABLE OF AUTHORITIES – Continued**

Page

**OTHER AUTHORITIES**

Donna Moritz,

*How to Use Visual Content to Drive More Traffic*, Social Media Examiner ( March 26, 2015) <https://www.socialmediaexaminer.com/use-visual-content-to-drive-more-traffic/> .....

7

Matthew Jones,

*The Complete History of Social Media: A Timeline of the Invention of Online Networking*, Hist. Cooperative (June 16, 2015), <https://historycooperative.org/the-history-of-social-media/> .....

4



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

The AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (“ASMP”) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers who earn their living by making photographs intended for publication, licensing fees, and other compensation derived from the bundle of rights arising under the Copyright Act. With more than 7,000 Members nationwide working in every genre of photography, ASMP is a leading trade organization representing professional photographers’ interests.

The NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution of copyrighted works. NPPA’s members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

---

<sup>1</sup> In accordance with Sup. Ct. R. 37.6, counsel for amici 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 amici curiae, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. This amicus brief is being filed 10 days prior to the deadline and thus constitutes notice to the parties in accordance with Sup. Ct. R. 37.2.

AMERICAN PHOTOGRAPHIC ARTISTS (“APA”) is 501(c)(6) not-for-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

The AMERICAN SOCIETY FOR COLLECTIVE RIGHTS LICENSING (“ASCRL”) is the largest not-for-profit trade association in the United States for photographers and illustrators with over 50,000 members and is the largest collective management society in the United States for this constituency. ASCRL distributes millions of dollars each year in collective rights revenue to U.S. and foreign authors with works published in the United States. ASCRL is a zealous defender of the primary rights of photographers and illustrators and promotes the collective administration of secondary rights as a means of advancing and preserving the marketplace for its photographer and illustrator members.

DIGITAL MEDIA LICENSING ASSOCIATION (“DMLA”) founded in 1951 is a not-for-profit trade association that represents the interests of entities in North America and internationally that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual to editorial and commercial users. As part of its mission DMLA has been advocating to protect copyright and to ensure fair licensing standards exist.

The NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION (“NANPA”) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography (both stills and video) as an artistic medium for the documentation, celebration, and protection of the natural world. NANPA is a critical

advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

PROFESSIONAL PHOTOGRAPHERS OF AMERICA (PPA), the world's largest photographic trade association, represents over 33,000 photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected.

Each of these entities represent copyrights-holding content creators whose works appear displayed on varied platforms across the internet and world. The livelihoods of many of those members depend on the full protections of U.S. Copyright law, including a copyright holders' exclusive "display right," and each *amici* have a compelling interest in ensuring the equitable and correct application of U.S. copyright law to the Internet with a uniform and consistent approach across all federal circuits.





## SUMMARY OF THE ARGUMENT

Supreme Court reversal in this case is the only feasible way to end the “server test,” a legal fiction in the Ninth Circuit that has interfered with the display rights of photographers for eighteen years. The server test: (1) conflicts with the plain language of the Copyright Act; (2) directly contradicts this Court’s recent instruction in *ABC, Inc. v Aereo, Inc.*, that behind-the-scenes technology which is “invisible to subscriber and broadcaster alike,” cannot be used to evade copyright law<sup>2</sup>; and, (3) has led to a circuit split in copyright law. The Ninth Circuit stands alone in its radical refusal to recognize the exclusive display right granted to copyright holders, and it has repeatedly declined to conduct an *en banc* review of its server test, even in the face of clear direction in *Aereo*,<sup>3</sup> truly leaving this Court as the one of last resort.

The Ninth Circuit invented its judicial exception to Copyright in 2007 in *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>4</sup> Through this unprecedented idea, the court granted online publishers the right to display copy-

---

<sup>2</sup> *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 444 (2014)

<sup>3</sup> *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1072-73 (9th Cir. 2023).

<sup>4</sup> 508 F.3d 1146 (9th Cir. 2007). The server test was invented before social media as we know it existed: Facebook became publicly available in 2006 and eclipsed its predecessor MySpace in 2008; Twitter started in 2006; and Instagram in 2010. See Matthew Jones, *The Complete History of Social Media: A Timeline of the Invention of Online Networking* (Hist. Cooperative June 16, 2015), <https://historycooperative.org/the-history-of-social-media/>.

righted photos without authorization, so long as the publisher doesn't store a copy of the photograph on their servers. Through computer code, embedding "allows users to see the [photo] itself—not merely the address—on the embedding website without navigating away from the site." *Hunley v. Instagram, LLC*, 73 F.4th at 1064 (explaining the process of embedding in detail). The infringing website displays the image without having a physical copy of the work on the publisher's own server. *Id.* There should be no question that this process (also called "in-line linking" and "framing") meets the statutory definition of "display." It "show[s] a copy of [a work], either directly or by means of . . . any . . . device or process." 17 U.S.C. § 101.

The Ninth Circuit server test rule causes a lack of uniformity in copyright law. Copyright holders and copyright users have no clarity on whether embedding is a valid unauthorized display of a copyrighted work and the answer to the question depends on venue. Further, a copyright holder who obtains a judgment for infringement in New York cannot obtain a judgment for contributory infringement from a third-party enabler in California.

*Perfect Ten* involved the embedding of thumbnail-sized images (very low resolution) in a search engine, but in the eighteen years since, the Ninth Circuit has not narrowed or limited the application of its unique law, while the file size and resolution of the images being displayed has increased exponentially. Instead, it has expanded its application of the server test to include any unauthorized display of a photograph—at any size and in any context—so long as the display is achieved through the behind-the-scenes technological magic of embedding. Indeed, the case at bar is about

the infringing display of full-sized images on a travel website, lifted from the copyright holder’s Instagram page via embedding.

Even if this Court ultimately determines that the server test might be fair use in the context of search engines or thumbnails, there can be no doubt that the wholesale application of the server test rule to any embedded online display violates the plain language of the Copyright Act and its grant of exclusive display rights.

Billions of internet publishers have gained the commercial benefit of embedding, and they have done so rather than “consider the ownership and licensing status of the image . . . and whether fair use or another exception to copyright would apply.”<sup>5</sup> In other words, while the business model of most publishers involves the expense of creating and properly licensing copyrighted works, an untold number of online publishers have ignored copyright and relied on the server-test freebie since *Perfect Ten*. During that time period, the companies that embed images—whether social media companies, or individual publishers like the respondent in this case—have made extensive profits without paying licensing fees to the individuals and companies that invested in the creation of those images. It should be little wonder that with these two competing business models, the enormous profitability of social media and other tech giants has coincided with the decline in profitability of news organizations, photographers and other artists who invest their time,

---

<sup>5</sup> Brief of Amicus Curiae Electronic Frontier Foundation, et al., Supporting Appellees at 26-27, *McGucken v Valnet*, Case No. 24-511, Docket No. 33 (Ninth Cir. filed May 22, 2024).

money and talent to create such images which drive pageviews.<sup>6</sup>

Respondents and their allies concede that the principle behind the server test doesn't exist in the analog world, and only fits in the context of embedding code.<sup>7</sup> When Congress passed the 1979 Copyright Act, the embryonic stage of the internet didn't include images, let alone the capability to embed an image, and the technology that allowed photographs to be converted into digital files only came into wide use in the 1990's. But it was never the job of the Ninth Circuit to judicially rewrite the Copyright Act to grant an exception for new ways of displaying images. This is why all courts that have considered the server test outside of the Ninth Circuit have expressly dismissed it. Congress created an express exclusive right of display for copyright holders and there is no other possible interpretation of the plain language of the Act that authorizes infringing display through embedding. As Judge Forrest so insightfully noted, "the Court must not be distracted by new terms or new forms of content, but turn instead to familiar guiding principles of copyright."<sup>8</sup>

---

<sup>6</sup> Photos significantly increase page views and engagement on the internet. Content featuring relevant images tends to attract 94% more views. Visuals also improve social media engagement and sharing, as demonstrated by the increased shares and clicks on visual content. *See: How to Use Visual Content to Drive More Traffic*, Social Media Examiner <https://www.socialmediaexaminer.com/use-visual-content-to-drive-more-traffic/>

<sup>7</sup> *Id.* at 9-10 (describing a hypothetical analog equivalent they admit is absurd).

<sup>8</sup> *Goldman v. Breitbart News Network, LLC*, 302 F. Supp.3d 585 (S.D.N.Y. 2018)

Amici urge this Court to grant certiorari and reverse the court-created “server test.”



## ARGUMENT

### **I. Certiorari Should be Granted Because the Legal Fiction of the “Server Test” Should be Abrogated, and This Matter is the Most Appropriate Vehicle for the Court to end the Ninth’s Circuit’s Bizarre Misreading of the Display Right, and end the Resulting Circuit Split.**

At the core of this matter is an inequity that thousands of other copyright holders face in the chasm of a split between the Ninth Circuit and the lower courts of its sister circuits—the “server test”.

#### **A. The Server Test Should be Abrogated.**

The culprit, of course, is the aforementioned server test—the Ninth Circuit’s 18-year-old declaration that “where the image remains on third-party’s server and is not fixed in the memory of the infringer’s computer . . . embedding is not display.”<sup>9</sup> Under that test, courts in that Circuit effectively have been forced to authorize the use of any copyrighted work that can be displayed through embedding, even where the same use accomplished by a different means would be clear infringement. But courts outside of the Ninth

---

<sup>9</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159, 2507 (9th Cir. 2007).

Circuit offer no such shelter.<sup>10</sup> As such, copyright holders have appreciably greater protection outside the Ninth Circuit than within it and the server test has become an affront to the principle that the enforcement and protections of copyright be applied uniformly across the country.<sup>11</sup>

In 2014, this Court rejected the suggestion that a behind-the-scenes process shielded an infringer from liability with respect to broadcasts.<sup>12</sup> Courts across the country have similarly found that the use of the embedding process—invisible to publisher and viewer alike—to display content to the public violates the Copyright Act.<sup>13</sup> So long as the server test remains the law in the Ninth Circuit, it will continue to create substantial confusion among copyright holders and content users and perpetuate a federal system in which copyright protections are far less applicable exactly where they are needed most. It therefore should be abrogated.

---

<sup>10</sup> See, e.g., *The Leader's Institute, LLC v. Jackson*, 2017 WL 5629514, at\*10 (N.D.TX, 2017) (citation omitted), *Nicklen*, 551F. Supp. 3d at 195, *Goldman v. Breitbart News Network, LLC*, 302 F. Supp.3d 585, 587 (S.D.N.Y. 2018) *McGucken v. Newsweek LLC*, No. 19 CIV. 9617 (KPF), 2022 WL 836786, at \*6 (S.D.N.Y. Mar. 21, 2022), quoting H.R. Rep. 94-1476, 47, 64 (1976).

<sup>11</sup> *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (“Congressional intent to have national uniformity in copyright laws is clear.”) (citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n. 7 (1964)).

<sup>12</sup> *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. at 2507-08.

<sup>13</sup> See N. 16 *Supra*.

The question at the heart of the server test debate is the definition of “display” under the Copyright Act, and what constitutes a violation of the exclusive right “to display the copyrighted work publicly.” 17 U.S.C. § 106(5). The *Perfect 10* court held that a display of a copy in an entirely new context and location is not infringing if it is accomplished by embedding even where the identical display would be infringing if accomplished by the making of a new copy.

There is nothing in the language of the Act or elsewhere that compels that conclusion. Section 106 grants copyright holders the exclusive public display right for works such as photographs and videos. 17 U.S.C. § 106(5) (setting forth the exclusive right to “display the copyrighted work publicly”). One displays a work when he or she “show[s] a copy of it, either directly or by means of . . . any . . . device or process.” *Id.* § 101. There is nothing in the Act requiring that the party “show[ing] a copy” of a work must have made a new copy, or be storing that copy in order to be “displaying” the copy. Alternative methods of displaying a work, such as the embedding process, is specifically contemplated in the words “device or process”. 17 U.S.C. § 101.

When interpreting a statute, courts must “begin with, and ultimately heed, what a statute actually says.”<sup>14</sup> An exception to the display right for those who display an image but do not store a copy of it, adds an otherwise non-existent element to infringement of the display right, and violates the Supreme Court’s instruction that courts must “resist reading words or elements into a statute that do not appear on its

---

<sup>14</sup> *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023).

face.”<sup>15</sup> Further, in order to give ordinary meaning to the statutory definition of display as “to show a copy of it, either directly or” by “any other device or process,”<sup>16</sup> the display right must necessarily be implicated by embedding.<sup>17</sup> The copy being shown in an infringement of the display right can itself be infringing, but the copy being shown can also be an authorized copy. The definition given by Congress was “a” copy.

For that reason, courts outside of the Ninth Circuit have repeatedly followed the language of the Act and recognized that the display right is violated when a work is displayed in a new place without the copyright holder’s permission, regardless of how that display is accomplished.<sup>18</sup>

---

<sup>15</sup> *Bates v. United States*, 522 U.S. 23, 29, 118 S. Ct. 285, 290 (1997). As explained in *Bates*, Congress acts intentionally and purposefully in both its inclusion and exclusion of language in statutes. Given exceptions and defenses already in the Act, including the Digital Millennium Copyright Act, a court-created “server test” inserts a copying requirement for an infringement of the “display” right that Congress could have included, but intentionally did not.

<sup>16</sup> 17 U.S.C. § 101.

<sup>17</sup> See *Groff*, 143 S. Ct. at 2295.

<sup>18</sup> See, e.g., *Bowery v. Sites*, 2024 WL 3416038, at \*9-10 (D. Utah July 15, 2024) (rejecting the server test as “unpersuasive” and stating that its 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*, 2022WL836786, \*6 (SDNY 2022) (“[t]he 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, would seem to make the display right merely a subset of the reproduction right.”); *Nicklen v. Sinclair Broad. Grp., Inc.*, 551 F. Supp. 3d



## **B. The Intervening Years Since *Perfect 10* Have Clarified the Flaws in the Judicially Created Rule.**

When the Ninth Circuit decided *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>19</sup> eighteen years ago, during the earliest days of Web 2.0 when most of the internet was still a “read only” network with little to no opportunity to interact with web pages, the idea that content posted online could easily and seamlessly be “embedded” to an entirely different site or email without making a copy of it was not commonly understood. That court at that time understandably wanted to protect search engines just as, for example, 17 U.S.C. § 108 protects the ability of libraries and archives to use copyright materials in specific ways without permission from the copyright holder. A common goal of that era to be sure, although one that almost certainly could have been accomplished through the fair use doctrine or other principles. More importantly, revising the Copyright Act to achieve a certain goal is the purview of Congress, not the courts.

---

188, 195 (SDNY 2021) (finding the server test “contrary to the text and legislative history of the Copyright Act,”); *Goldman v. Breitbart News Network, LLC*, 302 F.Supp.3d 585 (SDNY 2018); *The Leaders Institute, LLC v. Jackson*, 2017 WL 5629514, at\*10-11 (NDTX, 2017) (“by framing the defendants' copyrighted works, the plaintiffs impermissibly displayed the works to the public . . . [a]nd 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”); *Flava Works, Inc. v. Gunter*, 2011 WL 3876910, at \*4 (N.D. Ill., 2011) (rejecting the Server Test).

<sup>19</sup> 508 F.3d 1146.

In fact, “new, and not yet understood, technologies” were explicitly considered when the 1976 Copyright Act was passed. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d at 589. As Judge Forrest outlined in *Goldman*, Congress “‘Intend[ed] [the display right] to include each and every method by which the images . . . comprising a . . . display are picked up and conveyed,’ assuming that they reach the public.” Congress noted that “‘display’ would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means,” *Id.* (quoting H.R. Rep. 94-1476, 47, 51 (1976)). And the Register of Copyrights testified at the time that the display right definition is meant to include “any other transmitter who picks up [the originating source’s] signals and passes them on.” *Id.*

Times have dramatically changed since 2007, and technology has made the inconceivable ordinary. While courts within the Ninth Circuit have been obligated to follow the server test,<sup>20</sup> many other federal courts outside that circuit have clearly recognized that the display right is violated when a work is displayed in a new place without the copyright holder’s permission, regardless of which “process” is used to accomplish that display.

---

<sup>20</sup> Recently, a court in the Ninth Circuit questioned another defendant’s reliance on *Perfect 10*’s server test noting that they were unable to cite any “case applying the *Perfect 10* Server Test outside of the context of search engines” See *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019) (Orrick, J.). Indeed, there do not appear to have been any such cases, *Hunley v. Instagram* was the first. *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1070.

In recognizing that embedding violates a copyright holder’s display right, courts outside the Ninth Circuit have relied not only on the language of the Copyright Act, but this Court’s holding that to determine whether a work is infringed under the Copyright Act, a court must “focus on the [work] as presented to, and perceptible by” the public. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 499 (2001). In that regard, the Copyright Act is not concerned with the “behind-the-scenes way” that content is delivered, “invisibl[y]” to the recipient, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. at 2507-08, and such technical considerations are “not adequate to place [the defendant’s] activities outside the scope of the act.” *Id.* at 2511.

Although *Aereo* addressed the Copyright Act’s public performance right, the Act’s definitions of “display” and “perform” are nearly identical. 17 U.S.C. § 101 defines “perform” as “to recite, render, play, dance, or act [a work], either directly or by means of any device or process . . .” (emphasis added). The Act further defines “display” as “to show a copy of [a work], either directly or by means of . . . any . . . device or process . . .” (emphasis added). Further, the enumerated exclusive rights of “display” and “performance” that are protected by the Copyright Act are also nearly identical. Compare 17 U.S.C. § 106(5) (“. . . to display the copyrighted work publicly” (emphasis added)) with § 106(4) (“. . . to perform the copyrighted work publicly” (emphasis added))).

Proponents of the server test argue that embedding is akin to opening a physical window to permit viewing of what is already publicly displayed, but that argument belies reality. When we look at publicly displayed artwork through a window, we see that

artwork in the setting and context in which it was fixed. If someone directs us to the room in the Louvre where the Mona Lisa hangs, we will see it hanging in the *Salle des États*, surrounded by glass encasing, barriers, and other remarkable Venetian paintings on the adjacent walls such as The Wedding Feast at Cana by Veronese. If we look out a window at a sculpture in our neighbor's garden, we see that sculpture in the context of our neighbor's garden. If we look at a mural on a building, we see the mural in the context of the building, if not the block on which the building resides. But embedding permits a work to be entirely separated from the context in which its original copy resides, such that it appears in a new and different context divorced from its original display. The embedded display exists solely in the context of the embedder-infringer's making, and profits only the embedder-infringer.



## CONCLUSION

In the years since the server test was promulgated, the world has changed. Technology has changed. Yet the injury suffered by photographers like Dr. McGucken has not changed. *Amici* submit that the server test has harmed, and will continue to harm copyright holders who are seeking the clarity that only this Court can provide. The server test, once and for all, should be abrogated.

Respectfully submitted,

Thomas B. Maddrey

*Counsel of Record*

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

Chief Executive Officer

4 Embarcadero Ctr., Ste. 1400

San Francisco, CA 94111

maddrey@asmp.org

Mickey H. Osterreicher

*General Counsel*

Alicia Wagner Calzada

*Deputy General Counsel*

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

120 Hooper St.

Athens, GA 30602

(716) 983-7800

lawyer@nppa.org

advocacy@nppa.org

*Counsel for Amici Curiae*

April 21, 2025