Hunley v. Instagram, LLC: The Diminishing of Photographers' Display Rights

I. OVERVIEW

After covering the 2016 presidential election campaign and the 2020 Black Lives Matter protests, photographers Hunley and Brauer found their Instagram-viral but copyright-protected photographs accompanying online news articles in Buzzfeed News and Time Magazine.[1] Normally, having your photograph displayed by a major publication would be great achievement; however, neither Hunley nor Brauer had licensed their copyright-protected photographs to these online publications.[2] As a result, Hunley and Brauer never received compensation for the use of their photographs.[3]

Hunley and Brauer's photographs were able to appear with online articles through an embedding technique called "in-line linking," which enables a photograph stored on one server to be displayed and linked to from a webpage on a different server.[4] Both Hunley and Brauer had posted the photographs to their public Instagram pages, and Instagram allows third parties to "in-line link" photographs from its server onto websites located on different servers.[5]

Hunley and Brauer brought suit against Instagram for secondary infringement, arguing that Instagram's embedding tools enabled Buzzfeed News and Time Magazine to display the copyrighted photographs without first seeking licenses.[6] The district court held that Instagram was not be liable for secondary infringement because the embedded photographs do not display copies of the underlying images

1. Hunley v. Instagram, LLC, 73 F.4th 1060, 1065 (9th Cir. 2023).
2. *Id.* at 1066.
3. *See id.*
4. *Id.* at 1066, 69.
5. *Id.* at 1066-67.
6. *Id.* at 1067.

according to the "Server Test."[7] Hunley and Brauer appealed.[8] The United States Court of Appeals for the Ninth Circuit *held* that under the "Server Test," Instagram was not secondarily liable for copyright infringement because an embedded photograph not on the user's server is not sufficiently fixed to be a displayed copy under the plain language of the Copyright Act of 1976. *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1065-67 (9th Cir. 2023).

II. BACKGROUND

The United States Copyright Act protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[9] The owner of a particular work protected by copyright is entitled to the exclusive right to display copies of their work.[10] A "copy" under the Copyright Act is a material object in which a work is fixed by "any method now known or later developed," from which the work can be "perceived, reproduced, or otherwise communicated."[11] Copies can either be directly communicated or communicated with the aid of a "machine or device."[12]

For a work or a copy to be sufficiently "fixed," it must be embodied in a way that is sufficiently permanent or stable enough to be "perceived, reproduced, or otherwise communicated" for a duration of time that is "more than a transitory."[13] In 1976, Congress added the "transmit clause" to the definition of "fixed" to account for developing audiovisual technology.[14] The "transmit clause" provides that sounds, images, or copies being transmitted are "fixed" if the fixation of the work is made "simultaneously with its transmission."[15]

The Ninth Circuit interpreted has the transmit clause with respect to Google image searches, holding that a copy of an image being transmitted from a third-party website is not fixed on the web browser unless a copy

7. *Id.*
8. *Id.* at 1067-68.
9. The Copyright Act of 1976, 17 U.S.C. § 102 (1976).
10. 17 U.S.C. §§ 106(1)-(3), (5).
11. 17 U.S.C. § 101.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

of the image is stored on the browser's server.[16] In *Perfect 10, Inc. v. Amazon.com, Inc.*, a pornography subscription website sought a preliminary injunction to stop Google from publicly displaying its images on Google's image search engine.[17] The Ninth Circuit reasoned that since Google merely linked users to third-party websites that stored copies of copyright protected photos and did not store copies of these protected photos on their own server, that Google was not liable for copyright infringement.[18] The requirement that an image must be stored on a computer's server to be considered a fixed copy whose display constitutes copyright infringement was coined the "Server Test."[19]

Seven years after the development of the Server Test, the Supreme Court declined to acknowledge or utilize the Server Test in *American Broadcasting Companies, Inc. v. Aereo Inc.*, a case involving the transmission of copyright-protected television broadcasts onto a webpage.[20] *Aereo* concerned a business that stored hundreds of antennas in a central location and used them to detect television broadcasts and then retransmit the broadcasts on their website for subscribers.[21] The Supreme Court examined whether Aereo "performed" the copyrighted works within the meaning of the Copyright Act and whether Aereo performed the works "publicly" within the meaning of the act's transmit clause.[22]

The Court rejected Aereo's argument that its antennas were merely enhancing the viewer's ability to receive the broadcaster's signals, noting that Congress enacted the transmit clause in large part to overturn two prior rulings that used the same "performance" argument as Aereo.[23]

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

17. *Id.* at 1157. Google image search automatically indexed and displayed thumbnail versions of Perfect 10's copyrighted photographs and linked to copies of Perfect 10's photographs that had been published on third-party websites without Perfect 10's authorization. *Id.* The Google image search displays of Perfect 10's photographs affected the profitability of Perfect 10's business model, which centered around selling subscriptions for access to their photographs of nude models. *Id.*

18. *Id.* at 1160-61.

19. *Id.* at 1159.

20. 573 U.S. 431, 436-37 (2014).

21. *Id.*

22. *Id.* at 438. The defendant Aereo argued that their antennas were merely enhancing the viewer's ability to receive the broadcaster's signals, taking publicly released programs and carrying them to additional viewers via private channels. *Id.* Therefore, the broadcaster not Aereo was purportedly "performing" the copyrighted work. *Id.*

23. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399-400 (1968) (determining that a CATV provider was more like a viewer than a broadcaster because its system merely enhances the viewer's capacity to receive the broadcaster's signals); *see also* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 412-13 (1974) ("[T]he reception and

Additionally, the Court reasoned that under the transmit clause, to "perform" an audiovisual work means to "show its images in any sequence or to make the sounds accompanying it audible."[24] Therefore, the Court held that both the broadcasters and Aereo were "performing" the copyrighted works according to the plain language of the transmit clause.[25] The Supreme Court also held that Aereo performed the copyrighted works publicly and reasoned that an entity can transmit a performance through multiple, discrete transmissions.[26]

Several federal district courts followed the Supreme Court's analysis in *Aereo* rather than using the Server Test to decide whether websites which embedded copyrighted images on their pages were liable for copyright infringement.[27] For example, in *Goldman v. Breitbart News Network, LLC*, the District Court for the Southern District of New York declined to adopt the Server Test.[28] The *Goldman* court held that considering (1) the plain language of the Copyright Act, (2) the legislative history of the transmit clause, and (3) the *Aereo* decision, there is no basis for a rule that allows the physical location or possession of an image to determine who may or may not have displayed or performed a work.[29] The court reasoned that the transmit clause was drafted with the intent to sweep broadly and included processes such as embedding.[30] Analyzing the plain language of the transmit clause, the court determined that if to display an image is to communicate that image or a copy of that image "by any device or process in which images are received beyond the place

rechanneling of broadcast television signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate user.").

24. 17 U.S.C. § 101.

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

26. *Id.*

27. *See, e.g.*, McGucken v. Newsweek, No. 19 Civ. 9617, 2022 WL 836786 (S.D.N.Y Mar. 21, 2022) (rejecting the Server Test); Nicklen v. Sinclair Broad. Grp., Inc., 551 F. Supp. 3d 188, 195 (S.D.N.Y 2021) (rejecting the Server Test); Goldman v. Breitbart, 302 F. Supp. 3d 585, 593 (S.D.N.Y 2018) (holding that publishing an embedded tweet featuring Tom Brady was sufficient for direct infringement, even if Twitter did not store or host the infringing image); Leader's Inst., LLC v. Jackson, No. 3:14-CV-3572, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017) ("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.").

28. *Goldman*, 302 F. Supp. 3d at 596.

29. *Id.* In *Goldman*, the defendant, Breitbart News, embedded plaintiff's copyrighted photograph on their website to accompany an online news article. *Id.* at 586-87. The district court held that the defendant was liable for copyright infringement, despite never having stored the photograph on their server, because the defendant put a process in place that resulted in the transmission of photograph that was visibly displayed to the public. *Id.* at 593.

30. *Id.*

from which they are sent," the process of embedding should be considered a process that displays a protected work or copy of that protected work.[31]

III. COURT'S DECISION

In the noted case, the Ninth Circuit followed the Server Test as devised in *Perfect 10* to determine that Instagram was not secondarily liable for infringing on the copyrights of Hunley and Bauer's photographs.[32] The court reiterated its interpretation of the fixation requirement under the Copyright Act that led to the creation of the Server Test, and it determined that when images are not stored on a server, they are not fixed in a tangible medium of expression upon transmission.[33] Additionally, the court clarified that to display a copy of a photograph on a computer, the copy must be fixed in the computer's memory.[34]

Hunley and Brauer argued that the Server Test should not determine the outcome of this case because (1) the Server Test should only apply to search engines such as Google; (2) *Perfect 10* is inconsistent with the Copyright Act; (3) *Perfect 10* conflicts with the Supreme Court's subsequent decision in *Aereo*; and (4) public policy calls for overruling *Perfect 10* and the Server Test. The Ninth Circuit disagreed with all the plaintiffs' arguments in turn.[35] First, the Ninth Circuit determined that the Server Test's application is not limited to search engines or other automatic indexing platforms; rather, application of the Server Test depends on the method used for displaying a photo, not the context in which the photo is displayed.[36] The Ninth Circuit reasoned that the Server Test was not first articulated relying on the unique context of a search engine, but instead on the plain language of the Copyright Act that requires a copy to be fixed in a tangible medium of expression.[37]

Second, the Ninth Circuit refuted plaintiffs' argument that the Server Test is inconsistent with the Copyright Act.[38] plaintiffs asserted that given the context of the 1976 amendments to the Copyright Act, the Ninth

31. *Id.*

32. Hunley v. Instagram, LLC, 73 F.4th 1060, 1076-77 (9th Cir. 2023).

33. *Id.* at 1068-69.

34. *Id.* at 1069. If the copy is not fixed on the computer's memory, the computer is merely communicating an address which directs a user to the location where a copy of the image is displayed. *Id.*

35. *Id.* at 1070.

36. *Id.* at 1070-71.

37. *Id.* The Ninth Circuit also noted that subsequent to *Perfect 10*, they applied the Server Test outside the context of search engines to cases involving a storage service website and blogs. *Id.*

38. *Id.* at 1072.

Circuit's interpretation of "display" in *Perfect 10* was unnecessarily narrow.[39] While the Ninth Circuit noted that legislative history is not the law, it conceded that in retrospect, *Perfect 10* creates some inconsistencies with other provisions of the Copyright Act.[40] However, the Ninth Circuit determined that it is not free to overrule *Perfect 10* outside of an *en banc* proceeding without a change in the statute or an intervening Supreme Court decision.[41]

Third, the Ninth Circuit determined that *Aereo* was not an intervening Supreme Court decision regarding the Server Test.[42] Instead, the Ninth Circuit argued its holding in *Perfect 10* was consistent with the Supreme Court's holdings in *Aereo*.[43] A key difference between the two cases was that *Aereo* concerned performance rights, whereas *Perfect 10* and *Hunley* concern display rights.[44] While both performance and display are included in the transmit clause, the Ninth Circuit interprets the public display right to require an underlying copy.[45] Whereas to infringe a public performance right, the infringer need not show or perform a copy of the underlying work.[46] Therefore, *Aereo*'s holdings on retransmission of broadcasts does not overturn *Perfect 10* because *Perfect 10* dealt with the separate, predicate question of whether embedding constitutes a "display" of a "copy."[47]

Finally, while the Ninth Circuit acknowledged plaintiffs' policy concerns, it determined that it is the role of Congress—not of the courts—to craft a policy solution and amend the Copyright Act.[48] The court asserted that Instagram's embedding permissions promote innovation on an open internet.[49] Ultimately, the Ninth Circuit concluded that it is not a policymaker and that plaintiffs must petition for an *en banc* review of *Perfect 10*, seek further review in the Supreme Court, or seek legislative clarification from Congress.[50]

39. *Id.* at 1071-72
40. *Id.*
41. *Id.*
42. *Id.* at 1072-73.
43. *Id.* at 1073.
44. *Id.* at 1073-74.
45. *Id.* at 1074.
46. *Id.* at 1074-75.
47. *Id.* at 1075.; *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160-61 (9th Cir. 2007).
48. Hunley v. Instagram LLC, 73 F.4th at 1076.
49. *Id.*
50. *Id.*

IV. ANALYSIS

With the application of the Server Test, an embedded image is not considered a copy because it is not technically fixed in the operator's server. Such a narrow interpretation of the definition of fixation goes against the legislative intent of the Copyright Act and its 1976 amendments. The Copyright Act was enacted with the intent of incentivizing artists to create works by giving them exclusive rights to display, perform, and distribute their works for a limited time.[51] The 1976 amendments to the Copyright Act were added largely to account for advancements in audiovisual technology, and it was drafted using broad language to encompass technological processes not yet developed.[52] Therefore, the Ninth Circuit's insistence that the fixation requirement mandates that the work be stored on a computer's server to constitute infringement upon the copy's display is concernedly narrow.

While the Ninth Circuit asserts that the Server Test is applicable beyond the context of search engines, there is a distinction between a search engine routing a user to a third party's webpage and an online newspaper showing a copyrighted image to accompany an online news article.[53] While viewers of an online newspaper can be routed to Instagram where the image is stored, the primary use of a news article is not to direct users to third party sites to view an image.[54] The online newspapers that traditionally would obtain a license from the photographers to display the images are now able to use embedding technology, enabled by Instagram, to show photographs in a manner that is more than merely transitory without violating copyright law.

In *Perfect 10*, the Ninth Circuit reasoned that the HTML instructions did not constitute a copy in part because the HTML instructions "do not themselves cause infringing images to appear on the user's computer screen . . . [but] gives the address of the image to the user's browser."[55] However, the photographs here are not just hyperlinks to the images; they are the images themselves embedded within online news articles

51. *See* Advisory Committee Notes.

52. H.R. Rep. 94-1476, 47, 51 (1976).

53. *See Hunley*, 73 F.4th at 1070.

54. When a third-party website such as an online news publication embeds an Instagram photo onto their page, the photograph is framed by a display that mirrors how the photograph is framed on Instagram's feed. When a visitor to the third-party site clicks on the linked and displayed photograph, they are taken to a display of the photograph on the Instagram profile the photograph was originally published on. *Id.* at 1064-65.

55. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161 (9th Cir. 2007).

appearing as they traditionally would in print newspapers.[56] While the Instagram framing can transport a user to the address where the image is stored, the image itself remains displayed on the newspapers webpage in a manner that exceeds a transitory link.[57]

While the Supreme Court noted that its holding in *Aereo* does not apply to technological innovations outside of the specific method of transmitting television programs before them, displaying a copyrighted television program on a webpage is notably similar to displaying a copyrighted photograph on a webpage.[58] In both cases, the alleged infringer increased the public's access to works performed or displayed by another source. In *Aereo*, the transmission was considered copyright infringement, but in *Hunley* the transmission was not.[59] While performance rights do not require the fixation of an underlying copy, the Ninth Circuit's narrow interpretation of fixation regarding display rights prohibits a substantially similar process from being considered copyright infringement.[60]

The Ninth Circuit's interpretation of fixation for displayed copies is so limited that district courts in other jurisdictions have explicitly rejected the Server Test; both circuit courts and the Supreme Court have not utilized it in cases with similar fact patterns.[61] Based on the *Hunley* opinion, it seems that the Ninth Circuit itself is leaning towards broadening the Server Test by acknowledging that in retrospect, certain aspects of its analysis in *Perfect 10* were inconsistent with the Copyright Act.[62] While the Ninth Circuit declined to expand its Server Test in *Hunley*, perhaps the test will be expanded in the future through one of the three channels the Ninth Circuit proposed to the plaintiffs: *en banc* review of *Perfect 10*, appeal to the Supreme Court, or clarification from Congress.[63] Expanding the analysis of the fixation requirement and

56. *Hunley*, 73 F.4th at 1065-66.
57. *Id.*
58. American Broadcasting Companies, Inc. v. Aereo Inc., 573 U.S. 431, 450 (2014).
59. *See id.* at 451; *see Hunley*, 73 F.4th at 1077.
60. *Hunley*, 73 F.4th at 1074.
61. *See generally id.* at 1071 (collecting cases); *see generally Aereo*, 573 U.S. at 431.
62. *Hunley*, 73 F.4th at 1072.
63. *Id.* at 1076.

examining the nature in which the transmission is presented would strengthen both the photographer's display right and the licensing business model in a world where technology innovates at an accelerated pace.

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