Now & Next
Intellectual Property Alert

July 9, 2025

Supreme Court declines to resolve looming split on embedded content rights

By Michael W. Gray and Natalie Ann Northup

The "Server Test" lives on as the Supreme Court declines review in *McGucken v. Valnet*, deepening legal uncertainty over copyright liability for embedded content.

What's the impact?

- By declining to review *McGucken v. Valnet*, the Supreme Court leaves the Ninth Circuit's "Server Test" as the standard for online copyright infringement involving embedded content.
- Legal uncertainty persists nationwide as courts outside the Ninth Circuit apply different standards, increasing risk for publishers and content creators.

In a closely watched copyright case, the US. Supreme Court declined to review *McGucken v. Valnet, Inc.*, a Ninth Circuit decision reaffirming the "Server Test" as the controlling standard for evaluating online copyright infringement claims involving embedded content. The decision preserves fundamentally divergent approaches between the Ninth Circuit and district courts within the Second Circuit and leaves digital publishers navigating a fractured legal landscape.

Dr. McGucken files copyright infringement lawsuits

Dr. Elliot McGucken is a physicist, educator, and photographer known for capturing natural phenomena and scenic landscapes. His photography has been seen by audiences around the world, earning him recognition as a highly regarded and widely known photographer. Since 2018, McGucken has initiated over 50 copyright infringement lawsuits, primarily targeting media organizations using his digital photographs without permission.

Most of McGucken's lawsuits have been filed in district courts within the Ninth Circuit, where many tech companies and publishers operate. However, he has also brought claims in a district court within the Second Circuit, possibly with an eye toward challenging the Ninth Circuit's long-standing "Server Test."

Ninth Circuit's "Server Test"

The "Server Test" originates from the Ninth Circuit's 2007 decision in *Perfect 10, Inc. v. Amazon.com, Inc.*, where the court addressed whether Google's image search results infringed copyright by displaying thumbnail images hosted on third-party servers. The court held that to "display" a copyrighted image under 17 U.S.C. § 106(5), a website must host and serve the image from its own server.

In practical terms:

- No infringement under the "Server Test": If a website embeds or links to an image hosted on a third-party server, the website is not "displaying" the image for copyright purposes.
- Infringement occurs: If the website stores and serves the image from its own server, constituting reproduction or display.

Critics consider this test overly narrow, particularly in light of evolving technologies that make embedding functionally indistinguishable from displaying hosted content. Nevertheless, it has remained a binding precedent in the Ninth Circuit for nearly two decades, offering a predictable safe harbor for technology platforms, aggregators, and media outlets operating there.

McGucken v. Newsweek (S.D.N.Y.): Embedding as "display"

In *McGucken v. Newsweek*, filed in the Southern District of New York in 2019, McGucken alleged that Newsweek infringed his copyright by embedding an Instagram photo, depicting a rare desert lake in Death Valley, into a digital article without authorization. The image was not downloaded or hosted on Newsweek's servers; instead, it was embedded using Instagram's native API.

Newsweek moved for summary judgment, urging the court to adopt the Ninth Circuit's "Server Test." However, the district court rejected that approach, finding that the act of embedding a photo can constitute a public display under the Copyright Act, regardless of where the file is hosted.

With this reasoning, the district court declined to adopt the "Server Test" by denying Newsweek's defense in its motion for summary judgement. The court emphasized that the Copyright Act defines a "display" as showing a work directly or "by means of any device or process," and embedding code falls squarely within that definition. The court also left unresolved the question of whether Instagram's terms of service grant users an implied license, instead emphasizing that factual disputes precluded summary judgment.

Following summary judgement, the case settled, joining the line of cases[1] in which the Southern District of New York has refused to apply the "Server Test."

This summary judgment decision opened the door for more embedding-based infringement suits in the Second Circuit, particularly against media companies relying on third-party-hosted images to illustrate their online content.

McGucken v. Valnet (C.D. Cal. & 9th Cir.)

In a later case filed in the Central District of California,[2] McGucken sued Valnet Inc., a Canadian publisher that operates online entertainment sites such as Screen Rant. McGucken alleged that Valnet embedded several of his Instagram photographs into celebrity-focused articles without authorization.

Valnet filed a motion to dismiss, arguing that under the Ninth Circuit's "Server Test," embedding does not constitute a "display" for purposes of copyright infringement. On January 26, 2024, the district court granted the motion, finding that Valnet did not store or serve the photos directly.

McGucken appealed to the Ninth Circuit, perhaps hoping to generate a resolve whether by persuading the court that the test does not apply under the current technological and factual landscape, or by urging it to abandon the test altogether.[3] On December 19, 2024, the Ninth Circuit affirmed the dismissal, holding that the "Server Test" remains controlling precedent. The

---

[1] *Goldman v. Breitbart News Network LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018); *Nicklen v. Sinclair Broadcast Group, Inc.*, 551 F. Supp. 3d 188 (S.D.N.Y. 2021).

[2] *McGucken v. Valnet Inc.*, No. 2:21-cv-05706-SVW-SK, 2022 WL 2981553 (C.D. Cal. July 25, 2022).

[3] *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436 (5th Cir. 2017); *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012)); *Great Bowery v. Best Little Sites*, Case No. 2:21-cv-00567-DBB-JCB, 2024 WL 3416038 (D. Utah Jul. 15, 2024).

panel found no compelling reason to revisit *Perfect 10* and, accordingly, declined to address the reasoning articulated in *Newsweek*.

Several amici weighed in during the appellate process. Advocacy groups supporting McGucken, such as the American Photographic Artists and American Society of Media Photographers, urged the court to reject the "Server Test" as outdated. Meanwhile, a coalition of technology and library organizations, including Google, Pinterest, the Electronic Frontier Foundation, and the American Library Association, filed briefs defending the "Server Test" as vital to maintaining the open web.

The Supreme Court's April 28, 2025, denial of certiorari left the "Server Test" intact in the Ninth Circuit, without resolving the conflicts among the Ninth Circuit and the various district courts.

Do other circuits rely on the "Server Test"?

The law remains unsettled in other circuits. Courts in the Fifth, Seventh, and Tenth Circuits have not definitively adopted the "Server Test," nor have they expressly rejected it. Instead, they apply varied analyses that focus on whether a "public display" under 17 U.S.C. § 106(5) occurred, often emphasizing each case's factual and technical context.

- In the Fifth Circuit, while not directly ruling on the "Server Test," the court in *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436 (5th Cir. 2017), emphasized the factual nature of infringement involving online images and refrained from adopting a bright-line rule.
- In the Seventh Circuit, courts have occasionally referenced embedding and inline linking (e.g., *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012)) but did so in the context of contributory and vicarious infringement rather than directly assessing the "Server Test." The court focused on user conduct and inducement rather than whether embedding infringed the display right.
- In *Great Bowery v. Best Little Sites*, Case No. 2:21-cv-00567-DBB-JCB, 2024 WL 3416038 (D. Utah, Jul. 15, 2024), the court held that copyright infringement can occur through embedding images hosted on third-party servers. The court ruled that the right to publicly display a work includes showing it by embedding, even without control over the hosting server, differing from the Ninth Circuit's more limited approach. "The court now finds the '[S]erver' [T]est to be unpersuasive."

Likely because of the absence of clear rulings, courts in these circuits tend to resolve disputes involving embedded content using fact-specific inquiries, examining, for instance, how the content is presented to users, the defendant's level of control over it, and the economic impact, without fully embracing the "Server Test" or its rejection.

Implications for content owners and online publishers

The Supreme Court's inaction has major implications for how content creators, media publishers, and digital platforms approach and enforce their rights in embedded content:

- **In the Ninth Circuit**: Embedding remains shielded under the "Server Test" unless the content is hosted by the publisher. This gives technology companies and publishers more flexibility when using publicly accessible content, particularly from social media platforms.
- **In the Second Circuit**: Embedding can constitute a public display under the Copyright Act, exposing companies to infringement risk, even without downloading or directly hosting the image.
- **In other circuits**: The law remains unsettled. Courts in the Fifth, Seventh, and Tenth Circuits have not adopted a definitive position; instead, they use varied analyses focused on "public display" and factual context.

Given this uncertainty, content creators seeking to enforce their rights should carefully analyze potential venues, while media organizations must carefully assess their exposure and policies on embedding.

Until Congress or the Supreme Court resolves the looming split, online publishers and content owners must navigate an increasingly fragmented legal regime.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Michael W. Gray
213.629.6192
mgray@nixonpeabody.com

Natalie Ann Northup
312.977.9200
nnorthup@nixonpeabody.com