IRWIN IP
INTELLECTUAL PROPERTY LITIGATION
IP CASE OF THE WEEK

'Embedding' copyrighted works on a website is not infringement, holds Ninth Circuit

***Hunley et al. v. Instagram, LLC*, 2023 WL 4554649 (9th Cir. July 17, 2023)**

By: Edward Runyan & Ted Mahan | July 25, 2023

By choosing to 'embed' social media posts, *BuzzFeed News* and *Time* avoided copyright liability due to unauthorized display of two photographers' Instagram content. Embedding occurs when a website links to content from another website to display on the site, without re-storing the content. In *Hunley v. Instagram*, the Ninth Circuit affirmed dismissal of the secondary infringement claims against Instagram because the embedded content did not constitute direct infringement under circuit precedent. Did the Ninth Circuit provide a roadmap for a website to put any copyrighted images, videos, or music on their site without any liability as long as it is embedded?

Hunley owns the copyright to a photograph related to the Black Lives Matter protests; co-appellant Brauer owns the copyright to a photograph and an accompanying written post related to then-candidate Hilary Clinton. Both works were included in Instagram posts, where Instagram holds a license to display the content. *BuzzFeed* and *Time* 'embedded' the copyrighted works on their sites, using Instagram's embedding software tool to add a block of code that renders the posts. Importantly, copies were not hosted or stored on *Buzzfeed*'s or *Time*'s websites with the embedded content. Thus, explained the court, display of the photographs does not meet the statutory definition for "display[ing] a copy" under *Perfect 10 v. Amazon*.

Reviewing application of its *Perfect 10* Server Test, the court reasoned that *BuzzFeed* and *Time* "wrote the HTML instructions that caused browsers to show" the copyrighted works, but "under *Perfect 10* these instructions did not constitute 'display [of] a copy'". The court stated that such embedding instructions did not include storing of the work, so no direct infringement existed. Without direct infringement, the photographers' claims that Instagram was liable for indirect infringement failed.

Hunley's argument that the Server Test should be limited to search engines or automated indexes was rejected due to factual distinctions in the cases argued by Hunley. Hunley also argued that *Perfect 10* was overturned by the Supreme Court's decision in *American Broadcasting Company v. Aereo*, 573 U.S. 431 (2014). The court was unpersuaded, concluding that the right to public performance at issue in *Aereo* involved a provision of the Copyright Act related to retransmission liability, a separate question from what constitutes "display" of a "copy".

To a website user, a site looks identical regardless of whether an image is stored or embedded, which provides an avenue for avoiding copyright liability. However, website owners should be aware that whoever is hosting the content could delete or change it, which could obviously lead to an unintended result for site visitors. Outside the Ninth Circuit, the viability of the Server Test remains in question.