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The Fifth Circuit Rejects the “Server Test” for Assessing Violations of the Copyright Act’s Exclusive Right of Public Display and Announces the “Transmit Requirement”

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On August 27, 2026, in *Emmerich Newspapers, Inc. v. Particle Media, Inc.*,¹ the United States Court of Appeals for the Fifth Circuit declined to adopt the “server test” long used in the Ninth Circuit to evaluate claimed violations of the exclusive right of public display arising out of in-line linking or embedding third-party copyrighted content in websites and announced instead what it called the “transmit requirement.”² The implications of this new test, however, are not dire for website operators that have long relied on the server test to embed copyrighted content without taking a license by linking to the web page of an authorized source of that content. As the Fifth Circuit recognized, “[a]lthough we take different routes to get there, both the server test and the test we announce end up in a similar place: a website cannot transmit a work that it does not have.”³ Thus, in the Fifth Circuit, website operators that merely link to web pages operated by authorized sources of copyrighted content do not violate the exclusive right of public display, even if they frame that embedded content within their own web pages.

On interlocutory appeal from a summary judgment decision by the United States District Court for the Southern District of Mississippi that was mostly in favor of Particle Media, the appellate court was tasked with answering not only whether the server test is the proper standard to apply to copyright infringement claims, but also whether web page uniform resource locators (“URLs”) that identify the location of a website can constitute copyright management information (“CMI”), subject to the safeguards of the Digital Millennium Copyright Act (“DMCA”), and if so, whether the intentional removal of a URL constitutes a violation of the prohibition against the unauthorized removal of CMI in Section 1202(b)(1) of the DMCA. While the Fifth Circuit answered the first question in the negative, it was less definitive on the second question. The appellate court found that the DMCA does not foreclose URLs from ever constituting CMI, but due to their functional purpose, the bar is high. The court held that the question is a fact-specific inquiry requiring further analysis by the district court in the first instance. While the Fifth Circuit provided a framework for analysis, it expressed no opinion on the ultimate outcome of Emmerich’s claims and “[left] open future challenges to come in this space.”⁴

I. Factual Background and the District Court’s Decision

Emmerich, the owner and publisher of 26 print and online publications serving Mississippi, Arkansas, and Louisiana sued Particle Media, a news aggregator based in California, for copyright infringement. Particle Media operates NewsBreak, a news aggregator website and application that links to and shows its users news content from various publications, including those operated by Emmerich. Newsbreak collects national and local news into a single newsfeed for its users. From the Newsbreak newsfeed, users see a thumbnail image of the article and can click it to link to that article. When they do so, Newsbreak “creates an empty frame within its own page and fills the frame according to the instructions it receives from the link; that is, the link connects to the address of the server for the relevant article webpage and receives instructions from that server.”⁵ The frame is typically populated with the entirety of the linked web page. Emmerich claimed that the way in which Particle Media frames Emmerich articles violates the exclusive right of public display to its own copyrighted content provided by Section 106(5) of the Copyright Act.⁶ Emmerich also claimed that the URLs for the web pages containing its content were CMI and that Particle Media had intentionally removed that CMI when in-line linking to Emmerich content within Particle Media’s own user interface.

Some Emmerich articles had been displayed in “Full-Text View,” which involved full reproductions by Particle Media on the linking web page, purportedly due to a glitch. The district court granted summary judgment to Emmerich on its infringement claims arising out of Full-Text View.⁷ With respect to those Emmerich articles visible on Particle Media’s site in “Framed View,” the district court applied the Ninth Circuit’s server test and held on summary judgment that because Particle Media did not have copies of Emmerich content stored on its own server and instead only linked to Emmerich’s server, Particle Media’s framed exhibition of Emmerich’s content did not infringe Emmerich’s exclusive right of public display.⁸ The district court also found that URLs primarily serve as a functional reference for locating addresses on the internet and therefore do not contain the markers necessary to constitute CMI.⁹ Because the district court found that Framed View articles were not infringing and the URLs for articles shown in Full-Text View were not CMI, it did not reach the question of whether Particle Media’s removal of the URLs violated Section 1202(b)(1)’s prohibition against intentional removal of CMI.¹⁰

II. The Ninth Circuit’s Server Test and Its Uneven Application in Other Jurisdictions

The United States Court of Appeals for the Ninth Circuit has long held that, for purposes of copyright law, online content is publicly displayed by the entity that stores and serves the image. Under the server test, “the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.”¹¹ This server test was first adopted in *Perfect 10, Inc. v. Amazon.com, Inc.*, in which the circuit court addressed Google’s practice of “inline linking” of full-size copyrighted images hosted elsewhere on the internet. The court held that embedding such links did not constitute a public display within the meaning of the Copyright Act, even when those images were viewable within the Google search interface.¹² The court distinguished between making and storing copies, which could lead to liability, and merely providing hypertext markup language (HTML) instructions that directed the user’s browser to a different website that stored and displayed the full-size image. Numerous courts subsequently followed the server test, and the practice of embedding links without taking separate licenses has become widespread.

The apparent consensus was disrupted by a federal court in New York in 2018 in *Goldman v. Breitbart News Network, LLC*.¹³ The court there considered the liability of multiple news organizations for embedding into their websites links to a copyrighted photo of Tom Brady on Twitter that had gone viral. The conduct challenged by Goldman did not involve any downloading, copying, or storage of the photo on the part of the defendants. Instead, the defendants merely coded their websites to direct users’ browsers to Twitter, where the content was hosted, to retrieve the image. The *Goldman* court expressly disagreed with the Ninth Circuit’s server test, finding that the defendants’ embedding of the photo constituted a public display within the meaning of the Copyright Act insofar as the defendants had taken active steps to allow the image to be shown. The *Goldman* court noted that “mere technical distinctions invisible to the user should not be the lynchpin on which copyright liability lies.”¹⁴ Following the court’s decision, most of the media defendants settled prior to trial, and the plaintiff voluntarily dismissed the case as to the remaining two defendants.

A second federal court in New York also declined to follow the Ninth Circuit’s server test in 2021 in *Nicklen v. Sinclair Broadcast Group, Inc.*¹⁵ *Nicklen*, like *Goldman*, involved a news media defendant embedding a link to copyrighted material that had been posted on social media.¹⁶ The plaintiff, a filmmaker, had posted a video of an emaciated polar bear in the Canadian Arctic to his Instagram and Facebook pages. The video went viral, and the defendant, Sinclair, published an article about the virality of the video. The article contained an embedded link with HTML code that directed users to the plaintiff’s own posts of the video on Instagram or Facebook. Sinclair encouraged the court to follow the server test, but the court declined to do so, finding the test to be contrary to both the text and the legislative history of the Copyright Act by collapsing the display right into the reproduction right.

Federal courts in California, however, have reached the opposite conclusion from the *Goldman* and *Nicklen* courts on whether embedded links violate the exclusive right of public display and continue to embrace the server test. In *Hunley v. Instagram, LLC*, the district court rejected the plaintiff’s attempt to hold Instagram secondarily liable for copyright infringement for enabling third-party websites to embed links to photographs posted by the plaintiff on her Instagram page.¹⁷ The district court concluded it had to reach that decision because, unlike the *Goldman* and

Nicklen courts, it was bound by the Ninth Circuit's decision in *Perfect 10*.¹⁸ On appeal, the Ninth Circuit affirmed both the lower court decision and its embrace of *Perfect 10* and the server test. The appellate court declined to limit the holding of *Perfect 10* to the factual context of search engines, and it rejected Hunley's contentions that the text of the Copyright Act and policy considerations warranted a different outcome in that broader setting.¹⁹

Prior to the Fifth Circuit's decision in *Emmerich*, no other circuit courts had weighed in on the utility of the server test, and in district courts outside the Ninth Circuit, more recent results have been mixed. For example, in *Great Bowery v. Best Little Sites*, a district court in Utah declared that it found the server test unpersuasive and held that the defendants, by embedding links to photographs hosted on a third-party server in an article they published on an internet website, had infringed the plaintiff's exclusive right of display.²⁰ And in *Leader's Institute, LLC v. Jackson*, a district court in Texas "respectfully disagree[d] with the Ninth Circuit" and concluded that framing copyrighted content without permission via embedded links violated the copyright owner's exclusive right of display, even though the alleged infringer never possessed a copy of the content in question.²¹ In contrast, while acknowledging several of the lower court decisions in other jurisdictions that had declined to follow *Perfect 10*, the district court in *Emmerich* had been "persuaded ... that the server test is the more reasonable interpretation of the plain language of the statute."²²

III. The Fifth Circuit's Adoption of the Transmit Requirement and Guidance for Lower Courts Adjudicating DMCA Claims Based on Removal of URLs

A. The Transmit Requirement

The Fifth Circuit undertook a thorough textual analysis of the relevant provisions and nested definitions in the Copyright Act and concluded that the Ninth Circuit's server test was on "weak statutory footing."²³ While the server test focuses on the definition of "display," which requires showing a fixed work, the Fifth Circuit shifted its focus to the definition of displaying a work "publicly," which requires "transmitting" the work.²⁴ Quoting an amicus brief submitted by copyright scholars, the appellate court observed that "'embedding does not itself transmit or host the displayed copy'; it only 'directs a user's device to retrieve content from a third-party server that controls the transmission.'"²⁵ The court found that "a focus on the transmittal of the content, rather than on where the content is fixed, is most faithful to the plain meaning of the text, our court's relevant precedent, and the modern functioning of the internet."²⁶ Under its newly-announced "transmit requirement," lower courts in the Fifth Circuit must look to "where the transmission originates."²⁷ In fashioning this requirement, the Fifth Circuit emphasized that its analysis is similar to the Ninth Circuit's in that both seek to limit the display right in view of the Copyright Act's text and will generally lead to the same result.²⁸

The Fifth Circuit also emphasized that the linking website exercises no control over the linked content beyond the decision to direct its viewers to whatever content is stored by the copyright owner on the page to which it links. Moreover, copyright owners remain free to alter or remove that content or to take steps to prevent linking. While the appellate court acknowledged the awkwardness of combining the "opt-out" nature of many of the systems necessary for the modern internet to function with the "opt-in" nature of U.S. copyright law, the court nonetheless concluded that *Emmerich* had effectively permitted the transmissions from its own site to Newsbreak users.²⁹

Having answered, as a matter of law on interlocutory appeal, that the server test was not the proper standard and that the lower court should instead apply the transmit requirement on remand, the appellate court otherwise expressed no opinion on the ultimate resolution of *Emmerich*'s copyright infringement claims.

B. Guidance on Protection for URLs as Copyright Management Information

Emmerich's Section 1202 claims derive from Particle Media's display of certain *Emmerich* articles in Full-Text View, whereby the linked webpage was reproduced entirely on the linking webpage, rather than merely framed. In addition to asserting that articles reproduced and displayed in Full-Text View infringed its copyrights in the reproduced content, *Emmerich* asserted that the removal of *Emmerich* URLs from the associated web pages and the display of

those pages under Particle Media's own URLs constituted an unauthorized removal of CMI in violation of Section 1202(b)(1) of the DMCA.³⁰ As noted above, the district court had concluded that URLs are not CMI.

Given the interlocutory nature of its review, the Fifth Circuit limited its analysis to (1) whether URLs may be considered CMI under the DMCA and (2) if they are, whether the intentional removal of the URL constitutes a violation of DMCA Section 1202(b)(1). The appellate court noted at the outset that no court has found URLs to constitute CMI.³¹ Considering whether URLs meet the overarching statutory requirement that CMI must be "conveyed in connection with copies . . . or displays of a work, including in digital form,"³² the appellate court tasked itself with answering "whether URLs *convey* CMI or, said differently, whether URLs *impart* or *communicate* CMI."³³

The court concluded that when URLs only serve a locational purpose to direct users to a copyrighted work, they do not provide information inherent to the copyrighted work itself and do not constitute CMI.³⁴ The court was unwilling, however, to foreclose the possibility that URLs could constitute CMI in appropriate circumstances not presented before it.³⁵ For such future disputes, the appellate court provided lower courts with a checklist to guide their analyses. Before deciding that "URLs could possess the hallmarks of CMI," courts must consider "[1] whether the domain name corresponds with the copyright owner; [2] whether the copyright is over the website as a whole or specific pages; [3] whether the URL is sufficiently stable and not subject to change; and, above all, [4] whether the URLs are clearly being conveyed for the purpose of communicating a copyrighted work."³⁶ The appellate court left open the question of whether the alteration or removal of a URL that meets these criteria would constitute a violation of the DMCA.

IV. Key Takeaways

- Even though the Fifth Circuit declined to adopt the Ninth Circuit's server test, it embraced a similarly restrictive view of the scope of the exclusive right of public display in Section 106(5) of the Copyright Act and affirmed the ability of web site operators to link to and embed third-party web page content without incurring infringement liability.
- While the transmit requirement and the server test should generally lead to the same result, litigants need to be mindful of which test applies (or whether neither test is binding in the applicable jurisdiction) and tailor their case presentations accordingly.
- Technical measures such as paywalls, HTML embed-blocking, and crawler restrictions remain available to web site operators that do not want third parties to link to or embed their content. The Fifth Circuit placed considerable emphasis on the technical measures that web site operators can take to prevent links, the control they have over the content ultimately transmitted, and the protection afforded by Section 1201 of the DMCA against circumvention of technological measures to prevent access to a copyrighted work. The Fifth Circuit also cautioned that embedding through a link to an unauthorized source of content may give rise to secondary liability for infringement. Web site operators that link to unauthorized sources of copyrighted content are not immunized from potential liability as a result of this decision.
- Enlisting sophisticated amicus support to help the court answer complicated questions can be incredibly powerful. The Fifth Circuit relied repeatedly on a brief submitted by a group of copyright scholars, citing the brief in its opinion numerous times and quoting from it extensively.
- The path for DMCA claims based on URLs, while not completely foreclosed, is quite narrow. Copyright owners who want to preserve the ability to pursue DMCA claims based on URLs should make the domain correspond to the actual registered copyright owner, consider registering the content of individual web pages separately rather than as part of group registrations, use stable URLs, and build descriptors that track the title. Defendants should lean on the absence of these characteristics in assessing potential liability.

¹ __ F.4th __, 2026 WL 2530247 (5th Cir. Aug. 27, 2026).

² *Id.* at *12.

³ *Id.* at *10.

⁴ *Id.* at *24.

⁵ *Id.* at *3.

⁶ *See Emmerich Newspapers, Inc. v. Particle Media, Inc.*, 2022 WL 3222892, at *5 (S.D. Miss. Aug. 9, 2022).

⁷ *Id.* That ruling was not before the appellate court on interlocutory review.

⁸ *See Emmerich Newspapers, Inc. v. Particle Media, Inc.*, 2025 WL 2146609, at *13 (S.D. Miss. July 29, 2025).

⁹ *Id.* at *21–22.

¹⁰ *Id.*

¹¹ *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007).

¹² *Id.* at 1160–61.

¹³ *See* 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

¹⁴ *Id.* at 595; *see also Am. Broad Cos. v. Aereo, Inc.*, 573 U.S. 431, 444 (2014) (disregarding a technical distinction between cable system operators and an internet subscription service that “means nothing” to subscribers or to broadcasters in holding an internet service liable for infringing television broadcaster plaintiffs’ copyrights by enabling access to unauthorized internet streaming of broadcasters’ content).

¹⁵ 551 F. Supp. 3d 188 (S.D.N.Y. 2021).

¹⁶ *Id.* at 192.

¹⁷ *See* 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021).

¹⁸ *Id.* at *3.

¹⁹ *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1072–76 (9th Cir. 2023).

²⁰ 2024 WL 3416038, at *9–11 (D. Utah July 15, 2024).

²¹ 2017 WL 5629514, at *11 (N.D. Tex. Nov. 22, 2017).

²² 2025 WL 2146609, at *13.

²³ 2026 WL 2530247, at *6. The Fifth Circuit took particular issue with the server test’s fixation on the infringer’s possession of copyrighted content on its own server, which, the court asserted, “stretches the Copyright Act’s definition of a ‘fixed’ copy beyond what the plain language can support.” *Id.* at *11.

²⁴ *Id.* at *13.

²⁵ *Id.* at *12.

²⁶ *Id.* at *6.

²⁷ *Id.* at *12.

²⁸ *Id.* at *13.

²⁹ *Id.* at *14–16.

³⁰ *Id.* at *18.

³¹ *Id.*

³² 17 U.S.C. § 1202(c).

³³ 2026 WL 2530247 at *20.

³⁴ *Id.* at *21.

³⁵ *Id.* at *21–22.

³⁶ *Id.* at *23.

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