

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXIS HUNLEY; MATTHEW
SCOTT BRAUER, Individually and
On Behalf of All Others Similarly
Situated,

Plaintiffs-Appellants,

v.

INSTAGRAM, LLC,

Defendant-Appellee.

No. 22-15293

D.C. No. 3:21-cv-
03778-CRB

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted February 6, 2023
San Francisco, California

Filed July 17, 2023

Before: Jay S. Bybee and Patrick J. Bumatay, Circuit
Judges, and Richard D. Bennett,* District Judge.

Opinion by Judge Bybee

* The Honorable Richard D. Bennett, United States District Judge for the
District of Maryland, sitting by designation.

SUMMARY**

Copyright

The panel affirmed the district court's dismissal of an action brought by two photographers under the Copyright Act alleging that Instagram, LLC, violated their exclusive display right by permitting third-party sites to embed the photographers' Instagram content.

The panel held that, under *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007), Instagram could not be liable for secondary infringement because embedding a photo does not "display a copy" of the underlying image. *Perfect 10* set forth the "Server Test," which provides that a copy of a photographic image is not displayed when it is not fixed in a computer's memory. The panel held that *Perfect 10* did not restrict the application of the Server Test to a specific type of website, such as search engines. Arguments that *Perfect 10* is inconsistent with the Copyright Act are foreclosed by *Perfect 10* outside of an en banc proceeding. And *Perfect 10* was not effectively overturned by *American Broadcasting Co. v. Aereo*, 573 U.S. 431 (2014), which held that a streaming provider infringed broadcasters' exclusive right of public performance.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Solomon B. Cera (argued) and Pamela A. Markert, Cera LLP, San Francisco, California; Todd Friedman and Adrian R. Bacon, Law Offices of Todd M. Friedman P.C., Woodland Hills, California; James H. Bartolomei III, Duncan Firm P.A., Little Rock, Arkansas; Bryan D. Hoben, Hoben Law, Peekskill, New York; for Plaintiffs-Appellants.

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Rebecca Tushnet, Lex Lumina PLLC, New York, New York, for Amici Curiae Google LLC, Pinterest Inc., Twitter Inc., and the Wikimedia Foundation Inc.

Amy Mason Saharia and D. Shayon Ghosh, Williams & Connolly LLP, Washington, D.C., for Amicus Curiae Internet Society.

Mitchell L. Stoltz and Cara Gagliano, Electronic Frontier Foundation, San Francisco, California; Alexandra Sternburg, Computer & Communications Industry Association, Washington, D.C.; Rachel B. Leswing, Authors

Alliance, Berkeley, California; for Amici Curiae Electronic Frontier Foundation, Computer & Communications Industry Association, American Library Association, Association of Research Libraries, Association of College & Research Libraries, Authors Alliance, and the Organization for Transformative Works.

OPINION

BYBEE, Circuit Judge:

This copyright dispute tests the limits of our holding in *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007) in light of the Supreme Court’s subsequent decision in *American Broadcasting Companies, Inc. v. Aereo*, 573 U.S. 431 (2014). Plaintiffs-appellees Alexis Hunley and Matthew Scott Brauer (collectively “Hunley”) are photographers who sued defendant Instagram for copyright infringement. Hunley alleges that Instagram violates their exclusive display right by permitting third-party sites to embed the photographers’ Instagram content. *See* 17 U.S.C. § 106(5). The district court held that Instagram could not be liable for secondary infringement because embedding a photo does not “display a copy” of the underlying images under *Perfect 10*.

We agree with the district court that *Perfect 10* forecloses relief in this case. Accordingly, we affirm.

I. FACTS AND PROCEEDINGS

A. *Facts*

1. The Background

Instagram is a social media platform where users share photo and video content to their followers. Users with public profiles grant Instagram a royalty-free sublicense to display their photos. Instagram’s infrastructure also allows third-party websites to “embed” public Instagram posts.

Embedding¹ is a method that allows a third-party website (the embedding website) to incorporate content directly from the website where it originally appeared (the host website). Websites are created using instructions written in Hypertext Markup Language (“HTML”). *Perfect 10*, 508 F.3d at 1155. HTML is a text-only code, meaning that the underlying HTML instructions cannot contain images. Instead, when a website wants to include an image, “the HTML instructions on the web[site] provide an address for where the images are stored, whether in the web[site] publisher’s computer or some other computer.” *Id.*

Users access a website through a web browser application. *Id.* When a web creator wants to include an image on a website, the web creator will write HTML instructions that direct the user’s web browser to retrieve the image from a specific location on a server and display it according to the website’s formatting requirements. When the image is located on the same server as the website, the HTML will include the file name of that image. So for example, if the National Parks Service wants to display a

¹ We have sometimes referred to embedding as “in-line linking” or “framing.”

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