

Is Your Website Content Infringing? Fifth Circuit Rebuffs “Server Test” in Online Embedding Case

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For nearly twenty years, the Ninth Circuit’s “server test” was the only appellate standard for determining whether embedded online content infringes a copyright owner’s public display right. The Fifth Circuit has now weighed in, rejecting the “server test” but reaching substantially the same result. In a copyright case between a news publisher and a news aggregator site, the Fifth Circuit concluded that a website embedding copyrighted content from another site does not directly infringe when it merely directs a user’s browser to retrieve that content transmitted by the copyright owner’s server, which retains the ability to permit or reject the request. ([Emmerich Newspapers, Inc. v. Particle Media, Inc.](#), No. 25-60550 (5th Cir. Aug. 27, 2026)). The court boiled it down to this: “*connecting* does not equate to *displaying*.”

While users likely do not perceive whether embedded content is hosted locally or displayed from its original source, this distinction can affect potential liability. On the whole, courts outside the Ninth Circuit have not adopted the “server test.” Under the “server test” [adopted by the Ninth Circuit in 2007](#), whether a website publisher is directly liable for infringement of the public display right turns on whether the image is hosted on the publisher’s own server or is embedded or linked from a third-party server. *Emmerich* is therefore significant as the first circuit-level decision to reject the server test, even though its transmission-focused analysis produced substantially the same result for the embedding practice before it.

Ultimately, *Emmerich* is generally favorable to embedding practices but enhances several existing diligence considerations for publishers and aggregators.

Embedding Generally

Embedding, or inline linking to outside content that remains on the source’s server, is a common web practice. Embedding generally refers to presenting third-party online content – typically images, videos, social media posts, or entire webpages – within another website or app. In a typical embed, the user’s browser retrieves the content directly from the third party’s server even though, to the user, it appears seamlessly within the embedding site; this differs from copying and rehosting the content on the embedding site’s own server. That technical distinction has become central to determining whether the embedding site itself “displays” the work for copyright purposes.

The *Emmerich* Case

Emmerich Newspapers, Inc., a news publisher, sued Particle Media, Inc. , which operates NewsBreak, a news aggregation website and app. For non-partner publishers, including Emmerich, NewsBreak generally displayed a story and a link to the original source in its newsfeed. When a user selected an Emmerich article, NewsBreak opened an in-app “Framed View” (or a nested window) in which the live Emmerich webpage appeared within the NewsBreak interface, but the article itself was retrieved from Emmerich’s server. This allowed the user to read the destination page without visibly leaving NewsBreak, alongside NewsBreaks ads and other elements. According to Emmerich’s [amended complaint](#), Particle’s practices “hijacked Emmerich’s user engagement.”

In a suit reminiscent of 1990s early internet “framing” cases, Emmerich claimed that Particle framed or displayed its articles through inline links within Particle’s interface, infringing Emmerich’s exclusive public display right under the Copyright Act. In 2025 a Mississippi district court [granted](#) partial summary judgment to Particle on Emmerich’s Framed View claim, holding under the server test that Particle did not directly infringe Emmerich’s public display right because the NewsBreak app only showed content that was stored and served by Emmerich’s servers.

The Fifth Circuit’s “Transmit Requirement”

On interlocutory appeal, the Fifth Circuit held that the server test rests on “weak statutory footing.” Under the Ninth Circuit’s server test, a defendant does not “display” a work unless it stores and serves a copy from its own server. Before *Emmerich*, no other circuit had expressly disavowed the server test, though the [Second Circuit sidestepped it in an April 2026 ruling](#) because the defendant declined to litigate the issue and instead focused its appeal on other grounds. Other district courts in recent years, such as a [New York district court in 2018](#), have declined to adopt it. Three years later, in the *Nicklen* case (also out of the Southern District of New York), Judge Rakoff went further, holding that the server rule “is contrary to the text and legislative history of the Copyright Act” and would “make[] the display right merely a subset of the reproduction right” (see our prior posts [here](#) and [here](#)). The server test remains good law in the Ninth Circuit, recently reaffirmed in the 2023 *Hunley* decision. Until the *Emmerich* case, the Fifth Circuit had not addressed it.

The Fifth Circuit found fault with the server test’s rationale and reliance on the definition of “display,” which requires showing a fixed work. In the court’s view, the server test improperly transformed “fixed” into a requirement that an alleged infringer possess a copy on its own server. Instead, the court focused on the statutory definition of displaying a work “publicly,” which includes transmitting or otherwise communicating it to the public by any device or process. The question, then, was whether Particle transmitted the content by providing the platform on which it was viewed or whether *Emmerich* transmitted the content because it is the only party that hosted it on its server. The appeals court chose the latter approach.

Under the Fifth Circuit’s “transmit requirement,” the relevant questions therefore are:

1. Where did the transmission of the copyrighted content originate?
2. Was that transmission permitted? Put another way, was the transmission permitted or sent by an authorized source (often the copyright owner) that allowed it?

Applying this transmit requirement, the court concluded that Particle's Framed View did not itself transmit Emmerich's articles. NewsBreak supplied the instructions directing the user's browser to Emmerich's server, but Emmerich's server retained the content, controlled whether to respond, and transmitted the article to the user. As the court put it, "one cannot transmit content it does not have." To illustrate, the court analogized NewsBreak to a telephone switchboard operator: "In the same way a switchboard operator cannot connect a caller without the intended recipient picking up the phone and agreeing to be patched through, Particle cannot connect a user to Emmerich's content without Emmerich's transmittal of the content."

The appeals court further stated that pointing or directing a user's browser to request and receive the copyright owner's own copy does not involve transmitting the content:

"If the transmission must come from the content owner in order for a user to see any content at all, then no copyright liability exists for the linking site. If not, we must find where the transmission originates."

The court presented limiting principles to its holding and was careful to note that embedding may not always be permissible. Its analysis rested on circumstances in which:

- the copyrighted copy was transmitted by the copyright owner or another authorized source;
- the embedding site only makes an embedding request; and
- the source had the technological ability to permit or reject the request.

Because of the nature of the appeal, the court decided only the certified questions, remanding the case and expressing no opinion on the ultimate disposition of Emmerich's claims.

This May Be a Distinction Without a Difference

Fifth Circuit: "[W]e find that the operative word for analysis is 'transmit.' Although 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."

Arguably, the court's reasoning produced the same practical outcome as the server test but grounded the result in the statutory concept of transmission rather than the location of a stored copy. To web publishers and content aggregators, does it really matter if the Fifth and Ninth Circuits' copyright analysis was different if the end result was the same?

For conventional embedding, the practical differences may be limited. When an embed merely directs the user's browser to retrieve a work from the copyright owner's server, both approaches ordinarily produce the same answer, that the embedding site has not directly infringed the public display right.

The difference may matter at the margins. The server test supplies a relatively bright-line rule based on storage; the transmit requirement is more functional and potentially more fact-dependent, directing courts to examine the content's source, its technical path to the user, the authority of the transmitting source, and whether that source could permit or reject the request. The answer to those questions may produce uncertainty in future cases involving different architectures than the *Emmerich* case, or in instances such as API-delivery followed by republication, unauthorized third-party hosts, or the circumvention of technical measures or paywalls.

Implications on Diligence Practices

The decision does not likely suggest a wholesale new compliance program, but it makes several existing diligence practices more important.

For content publishers:

- Decide whether embedding is permitted and implement appropriate controls, such as anti-framing, anti-hotlinking, paywalls, or other server-side measures (including through the use of content delivery network provider controls). Publishers should also consider preserving server logs and configuration records documenting these controls and any attempted circumvention.
- Terms of use remain important, but in copyright cases, *Emmerich* gives factual significance to whether the publisher's server had the ability to accept or reject an embedding request. The opinion does not, however, establish that a publisher's failure to deploy blocking technology necessarily constitutes an implied copyright license.

For aggregators and other embedding sites:

- Consider mapping the actual technical flow and confirming that the user's browser retrieves the content directly from the source and that the aggregator is not retaining, caching or retransmitting a copy.
- Confirm that the source is authorized. Embedding material from the copyright owner's server is materially different from embedding an unauthorized copy posted by a third party. The Fifth Circuit cautioned, in dicta, that "if the content was not transmitted from a source authorized to display it, then secondary liability may be implicated."
- Consider whether the host site is imposing technical restrictions on embedding, such as paywalls, anti-framing code, authenticated links, or crawler exclusions.

Related Professionals

- **David A. Munkittrick**
Partner
- **Craig Whitney**
Partner