NO. 24-00511

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELLIOT MCGUCKEN, Dr., an individual,

PLAINTIFF-APPELLANT,

v.

VALNET, INC., a Canadian Corporation,
individually doing business as TheTravel.com,

DEFENDANT- APPELLEE.

On Appeal from the United States District Court
for the Central District of California
Case no. 2:23-CV-06753-JLS-SSC
The Honorable Josephine L. Staton

BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, AND AUTHORS ALLIANCE IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici Electronic Frontier Foundation, Computer & Communications Industry Association, American Library Association, Association of Research Libraries, and Authors Alliance state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: May 22, 2024

By: /s/ *Mitchell L. Stoltz*
Mitchell L. Stoltz

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STATEMENT OF INTEREST OF AMICI[1]

The Electronic Frontier Foundation ("EFF") is a San Francisco-based, member-supported, nonprofit civil liberties organization. EFF has worked for over 30 years to protect fundamental rights in the digital world. With tens of thousands of dues-paying members, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to digital technologies. EFF, its members, and the broader community of technology users they represent have a strong interest in a copyright system that promotes progress by safeguarding freedom of expression and access to knowledge.

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.[2]

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[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amici certify that no person or entity, other than amicus curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

[2] A list of CCIA members is available at https://www.ccianet.org/members.

The American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of about 50,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of Research Libraries ("ARL") is an association of 127 research libraries in the United States and Canada. ARL promotes equitable access to and effective use of recorded knowledge in support of teaching and research. ALA and ARL work collaboratively on copyright issues through the Library Copyright Alliance.

Collectively, ALA and ARL represent over 100,000 libraries in the United States. They share a strong interest in the balanced application of copyright law to digital uses. Librarians routinely use hyperlinks in information products they create, such as bibliographies. They also assist library users, particularly scholars and students, in the development of research papers that employ hyperlinks

Authors Alliance is a 501(c)(3) non-profit that seeks to advance the interests of authors who want to serve the public good by sharing their creations broadly. Authors Alliance has over 2,700 members, including academic authors, novelists, narrative nonfiction authors, journalists, and other authors who share its mission. As part of its work, Authors Alliance creates educational resources for authors, including a series of book-length guides to legal issues in writing and regular blog

posts. The ability to link to other sources within these materials is crucial to their efficacy in a digital environment. Linking similarly allows authors to more easily access and cite multiple sources of information, simplifying the research process and enhancing their scholarship. A decision that introduces liability for linking would hamper Authors Alliance's ability to provide guidance to authors and detract from their ability to freely create new works of authorship.

INTRODUCTION

Seventeen years ago, this Court adopted an accurate and practical application of the Copyright Act's public display right to images on the internet. In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Court held that the owner of a web server that actually transmits an image to users can be directly liable for the public display of that image, while the owner of a server that merely directs users to an image hosted elsewhere is, at most, secondarily liable. 508 F.3d 1146, 1160 (9th Cir. 2007). This rule, known as the server test, is consistent with the text and history of the Copyright Act. The server test remains binding precedent in this Circuit. *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1062 (9th Cir. 2023). Beyond that, the server test has proved to be a workable rule, relied on by millions of people as they use one of the internet's basic functions—linking information from multiple sources.

Overruling the server test would cause a staggering increase in liability risk for internet users by making common acts of linking subject to copyright's strict

liability regime. The result would be to make linking a legally fraught activity, discouraging its use except by the well-resourced and the reckless. This, in turn, would significantly diminish the internet's utility as a tool for disseminating knowledge—a result at odds with copyright law's Constitutional purpose "to Promote the Progress of Science."

Amici are organizations that advocate for different kinds of internet users. United in our concern for preserving one of the fundamental functions of the internet, we submit this brief to explain what linking is, why it is important, and why overruling or narrowing the server test would severely limit its use, to the detriment of all kinds of internet users.

ARGUMENT

I. LINKING, INCLUDING INLINE LINKING, IS FUNDAMENTAL TO THE OPERATION OF THE INTERNET.

A. A Web Page Is A Collection Of Resources, Often Linked From Different Sources.

A web page is not, and never has been, equivalent to a printed page. By design and in practice, web pages combine content from multiple sources, assembled on demand. For each user, at each viewing, what is actually displayed is determined by the choices of three different actors: the user, the operator of the web page's server, and the operator of the image's server.

At its core, the web consists of a set of technologies that act as a global file

retrieval system, allowing users connected to the internet to retrieve content stored on remote servers anywhere in the world. When a user visits a web page, such as by typing a web address like "https://www.wikipedia.org" into a browser (e.g., Chrome, Firefox, or Safari), their computer sends a request to that web address. The server at that address responds by sending a text file written in the "Hypertext Markup Language" (HTML). That file includes, among other things, words to be displayed and links to additional content. Each link contains the internet address of the additional content, which may reside on the same server or a different one.

Because an HTML file is text, it cannot contain images. Instead, it *refers* to images according to their web addresses. This is called linking. For instance, the website at www.eff.org could refer to an image www.eff.org/logo.jpg, if there were such an image. This address translates to "the file called logo.jpg on the server named www.eff.org."

A browser or other software on the user's device interprets the HTML file according to the user's instructions.[3] A browser may behave as the website operator expects, or the user may have set other preferences. A user may have specified that text shall be displayed in a more readable font, or that content from known advertisers should not be displayed, or that audio should not be played. Many people

[3] Internet technologists sometimes refer to a browser or similar software as a "user agent," literally a software program acting as an agent of the user.

with visual impairments configure their browsers to not retrieve images at all, as do some people operating with very slow Internet connections. Many security- and privacy-related browser add-ons cause the browser not to retrieve some images and other content. Many email services decline to retrieve images unless the user affirmatively indicates they wish to do so. Some browsers, like the Friendly Browser family of apps,[4] even combine selected information, including images and video, from multiple websites and present them in a different format. Other common software programs, such as the "curl" utility, don't display the contents of websites at all, but rather save them to a hard drive or pass them to other programs for analysis.

To the browser software, and indeed to the user, the difference between a standard link and an inline link is not material. A typical default is to display a standard link as a bit of blue, underlined text that the user can click to retrieve the linked material, while an inline link is automatically retrieved and inserted into the page being viewed. But those defaults are simply suggestions to users, who can and often do choose to handle links differently.

In the example above, the HTML file and the image are on the same server, located at www.eff.org. But the www.eff.org HTML file could just as easily refer to an image stored elsewhere on the internet, such as www.whitehouse.gov/image1.jpg. In either case, if the browser attempts to retrieve that image, it will use the web

[4] Friendly, https://friendly.io/ (accessed May 20, 2024).

address of the image to contact the hosting server and request the image associated with that address. Assuming such a file exists, and assuming the server is configured to respond to such a request, the server would transmit the image file to the user's computer, and their browser would decide whether and how to present it on-screen.

Whoever controls a server dictates whether and how that server responds to requests for files. In the hypothetical case where the page at www.eff.org includes a reference to www.whitehouse.gov/image1.jpg, whoever controls the whitehouse.gov server determines the contents of that "image1.jpg" file. If that web address initially pointed to a picture of the White House at the time that www.eff.org linked to it, but the operator of the whitehouse.gov server changes it so that "image1.jpg" is now a picture of the President, then the server will transmit a picture of the President when it receives that request from a user's browser.

Likewise, the person who runs a server has the power to decide which files are available to which requesters. For instance, many servers have private files. If your computer asks the server to provide such a file, it will politely decline (this is one cause of error messages such as "Error 403: Forbidden"). Some servers refuse requests for individual images out of the context of the web page the image originally appeared on. Other servers refuse requests from certain parts of the world, or any request that does not come from a trusted computer. In our example, if the operator of the whitehouse.gov server configures the server to refuse requests for individual

images, the server will return an error when asked for "image1.jpg," and the page at www.eff.org will appear with a blank space where a photo was expected.

Still other servers determine what contents they will serve at the moment the content is requested. For example, a server may transmit, on request, a photo or video from a live camera feed, depicting events happening at that moment. And servers that are part of an advertising network respond to requests for images by conducting an auction of advertisers, which occurs in milliseconds. The image that is given in response to the request is determined by the advertiser with the winning bid and is usually impossible to predict in advance.

Ultimately, the server that receives a request for a file controls what content to provide and whether to provide it at all to each requestor. Whatever content it provides travels directly across the internet to the requestor; it does not pass through the control or awareness of the website that included a link to the file. In the example above, the server at www.eff.org does not know whether or how the server at www.whitehouse.gov will respond to the request for "image1.jpg."

If the third-party server does provide an image, the user's browser decides whether and how to present it. As described above, configuring a browser not to display certain images, or to wait for an affirmative request from the human user before displaying an image, are common and expected scenarios.

It is, of course, also common for browsers to depict images on a web page

without accompanying information about what server provided them, unless a user clicks on the image for additional information. Thus, many users experience web pages as seamless collections of content, regardless of whether that content comes from different sources. This, too, is an ordinary and expected functionality of web browsers that people use to experience the internet. It is not a nefarious or misleading practice. And as the examples above demonstrate, it has been a central feature of the web long before the social media embeds challenged by the Appellant here were invented.

B. The Analog Equivalent Of Online Images Illustrates How Websites Are Different From Print Publications.

To better understand how the above process works, imagine that a reporter, Wanda, has written a story about a safety issue in Toyota cars. She prints paper copies of the story, but she doesn't have her own image to illustrate it. She recalls that her friend Sally, a photographer, does have such an image. So, Wanda leaves a rectangle of space in her article, with the instructions "Cut out this rectangle, then ask Sally for picture #3, and peer at it through the opening." Ronald, the reader, gets a copy of the article and decides to follow the instructions. He goes to Sally, asks her for picture #3, and she lifts up a picture of a Toyota. Ronald holds up Wanda's article and sees the picture through the cut-out. Meanwhile, Wanda is across town, unaware of whether Ronald visited Sally, whether Sally agreed to his request, or whether "picture #3" is still the photo it was when she last visited Sally.

In the online context, Wanda is the website creator, and Sally operates the server where images may be found. Wanda tells readers like Ronald where to go and what image to ask for, and Sally decides how to respond to the request. Although this physical analogy sounds silly, it accurately depicts what goes on every time an internet user views a web page with inline links, and it illustrates why a web page is not, and is not perceived as, the equivalent of a printed publication.

C. Many Uses Of The Internet Depend On Inline Linking.

Inline linking is ubiquitous. Its common uses go far beyond the facts of this appeal (images hosted at Instagram being "embedded" in Valnet's articles) or the search engine at issue in *Perfect 10 v. Amazon.com*. As described above, online advertising, a major source of revenue for "free" content of all kinds, depends on inline linking of advertisement images selected in real time at each request.[5] Users of online forums and discussion boards, including sites that serve neighborhoods, causes, civic organizations, or hobbies, include inline linked images in their posts. Communication platforms based on text chats, such as Slack and Discord, typically insert inline links displaying images retrieved from a website every time a user posts a website address in a chat (as do social networks like Facebook and X/Twitter).

There is no practical distinction between these uses and the "social media

[5] *See* Natasha Singer, *Your Online Attention, Bought in an Instant*, The New York Times (Nov. 17, 2012), https://www.nytimes.com/2012/11/18/technology/your-online-attention-bought-in-an-instant-by-advertisers.html.

embeds" in travel articles that are the subject of this appeal. Nor is there any basis in the text of the Copyright Act for drawing such a distinction. In all of these use cases, it is the owner of the server that stores the image who has ultimate control over whether an image is served, and when, and to whom. And in all of these cases, the owner of the website that provides the inline link only suggests that the user view the image.

Nor, as described above, is there a significant difference between inline links to images and other types of links, which are present on nearly every web page, anywhere on the internet.

Websites' ability to assemble content from multiple sources on the internet using linking is part of what makes the web an indispensable medium for spreading knowledge. Inline linking, unlike the printed page, allows for visual information collected and stored by different people and organizations to be assembled and presented to users in real time, on request.

II. THIS COURT SHOULD NOT ENDANGER THE ABILITY TO LINK AND EMBED BY ABANDONING THE SERVER TEST.

In the analog world, a person is free to tell others where they may view a third party's display of a copyrighted work, without being directly liable for infringement if that display turns out to be unlawful. The server test is the straightforward application of the same principle in the online context, which is one reason it has been widely embraced. It should govern here as well.

A. The Server Test Is The Correct Statutory Interpretation Of The Display Right In The Internet Environment.

1. The server test is rooted in the text of the copyright act.

Decades after the enactment of the 1976 Copyright Act, the internet presented seemingly novel questions of who could infringe the Act's public display right and in what circumstances. Because copyright law is a creature of statute, infringement analysis must begin with the statutory language. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). "[T]he statute is cast in terms of *activities* that are reserved to the copyright owner. It follows that an infringer must *actually engage* in one of those activities in order to directly violate the statute." *Playboy Enters., Inc. v. Russ Hardenburgh, Inc*., 982 F. Supp. 503, 512 (N.D. Ohio 1997) (emphasis in original).

In *Perfect 10*, this Court determined that these questions could be resolved by reference to the statutory language assigning liability to the party that "show[s] a copy" of a work, noting that a copy is a "material object[] . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Perfect 10*, 508 F.3d at 1160; 17 U.S.C. § 101. Mindful of the technical realities of linking, this Court correctly concluded that inline linking to an image hosted on a third-party server cannot be a direct infringement of the public display right because the linking party does not itself show a copy:

> Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act . . . and thus cannot communicate a copy. Instead of communicating a copy of the image, Google provides HTML instructions [via inline linking] that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy.

Perfect 10, 508 F.3d at 1160-61.

Appellant's proposed approach, by contrast, defies logic—as well as the text of the Copyright Act—by holding directly liable actors who do not possess and cannot transmit or communicate a copy of a work. Appellant's approach would hold website operators strictly liable based on what website visitors see after their browsers retrieve images from third-party servers, even though the operators are not in control of what users see. The statutory text provides no basis for the proposition that simply pointing a visitor to the location where a copyrighted work might be found is a direct infringement.

That the statutory definition of a "display" includes one made "by means of a film, slide, television image, or any other device or process" does not transform the *suggestion* that a user request and view a third-party image into a *communication* of that image. 17 U.S.C. § 101. As described above, when a web page contains an inline link to an image hosted by a third party, the choices of three actors—the website owner, the owner of the server hosting the image, and the reader—interact to determine whether and how an image is displayed. The phrase "any device or

process" indicates Congress's indifference to the type of *technology* employed, but it cannot be stretched to encompass a chain of causality that depends on the choices of two additional *actors*, even if some of those choices are automated by the software they use.

2. The legislative history of the public display right supports the server test.

The examples mentioned in the legislative history of Section 106(5) reinforce the conclusion that the public display right extends only to those who are directly engaged in transmitting displays and performances:

> Thus, for example, a singer is performing when he or she sings a song; a broadcasting network is performing when it *transmits* his or her performance (whether simultaneously or from records); a local broadcaster is performing when it *transmits* the network broadcast; a cable television system is performing when it *retransmits* the broadcast to its subscribers; and any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

H.R. Rep. No. 94-1476, at 63 (1976) (emphasis added). In the first and last of these examples—the singer and the individual operating the receiving set—public performance liability would arise under the "public place" clause of the statutory definition.[6] The remaining three examples—the broadcast network, the local broadcaster, and the cable system—all implicate the "transmit" clause, and

[6] "To perform or display a work 'publicly' means . . . to perform or display it at a place open to the public . . . ." 17 U.S.C. § 101.

infringement is expressly tied to the act of "transmitting" or "retransmitting" the performance to the public.[7]

Similarly, the 1976 House Report explains that "[e]ach and every method by which the images or sounds comprising a performance or display are *picked up and conveyed* is a 'transmission,' and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106." *Id.* at 64 (emphasis added). Again, the focus is on the act of transmission ("picked up and conveyed"), rather than on more indirect forms of causation.

Notably absent from the legislative history surrounding the enactment of Section 106(5) is any example suggesting direct infringement liability under the "transmit clause" for a person who does not themselves transmit a performance or display. In particular, there is no example of direct infringement stemming from the provision of information about where an infringing performance or display may be witnessed (let alone instructions to find a *non-infringing* display, as in this appeal).

The reason for the absence of such examples is straightforward: When the 1976 Copyright Act was passed, copyright law had already developed secondary liability doctrines to address these situations in a balanced manner. *See, e.g.*, *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1163 (2d

[7] "To perform or display a work 'publicly' means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public. . . ." 17 U.S.C. § 101.

Cir. 1971) (imposing secondary liability on concert promoter for its "pervasive participation" in infringing public performances); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 405 (S.D.N.Y. 1966) (applying secondary liability doctrines to advertising agency, radio station, and fulfillment service who were facilitating sales of infringing sound recordings). Such doctrines are the only appropriate basis for copyright liability, if any, in public display cases where the alleged infringer does not actually communicate the work in question.

3. The server test does not collapse the public display and reproduction rights.

The server test does not improperly merge the public display and reproduction rights. This Court already considered and rejected that argument in *Perfect 10,* 508 F.3d at 1161; *see Hunley*, 73 F.4th at 1072. And rightly so—Appellant's argument is factually incorrect and overlooks the long tradition of overlap between the two exclusive rights.

First, the server test does not require "a 'reproduction' in addition to a 'display.'" *Contra* Appellant's Br. at 17. The server test imposes liability for infringement of the public display right on the entity that is "physically sending ones and zeroes over the internet to the user's browser"—in other words, on the entity that is "transmitting or otherwise communicating" the display. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 839 (C.D. Ca. 2006), *rev'd in part on other grounds sub nom. Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007). No additional

infringement of the reproduction right need be shown. For example, if someone points a streaming webcam at one of McGucken's photographs and thereby transmits an infringing display of it over the internet, liability under the server test would be triggered irrespective of whether the reproduction right has also been violated.

Of course, in many circumstances involving the transmission of digital copies over computer networks, the reproduction right may also be separately infringed. This type of overlap in exclusive rights is far from unusual. As this Court observed in *Perfect 10*, proving infringement of the derivative works right, for example, in some contexts will require showing infringement of the reproduction right as well. 508 F.3d at 1161. Moreover, the substantial overlap between the public display and reproduction rights in particular is nothing new. According to a leading scholarly treatment,

> despite the drafters' prediction of its "great importance," the display right to date has been probably the least important of the copyright owner's rights, with respect to both television transmissions and the computer networks, such as the Internet, that the drafters foresaw as the main area for exercise of the display right. Instead, the display right has been overshadowed by the reproduction right. There is a substantial relationship between the display right and the reproduction right, and the particular technology used to transmit displays to the public will determine whether the display right offers copyright owners significant independent control over such transmissions or is merely a sometimes useful strategic complement to the control over such transmissions that the reproduction right provides.

R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected*

Solution to the Controversy over RAM "Copies", 2001 U. Ill. L. Rev. 83, 102 (2001). Notwithstanding this overlap, the public display right can still be separately asserted in ways that provide strategic value to copyright owners in particular cases. For example, it may bestow remedial advantages, revive time-barred claims, or establish personal jurisdiction. *See id.* at 111-13.

B. The Server Test Is Equitable, Easy To Apply, And Provides Internet Users With Legal Certainty.

The Supreme Court has identified "the 'vast democratic forums of the Internet' in general and social media in particular" as crucial vehicles for free expression. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997) (citation omitted)). The emergence of those forums has depended, in significant part, on the legal certainty the server test provides. The server test sensibly divides liability for infringement, assigning strict liability to the entity that is actually hosting the content and "serving" it to the rest of the internet. That entity is best positioned to know whether the content is lawful, has the strongest incentive to take it down if it finds otherwise, and has the ability to do so. Third parties that direct people to that content can be held secondarily liable if additional factors are present, such as "purposeful, culpable" conduct to encourage infringement. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 915-16 (2005); *see id.* at 930. Absent those additional factors, third parties generally are not well-positioned to determine whether the content is

lawful, can't control its original context, and aren't empowered to actually take it offline.

The server test's clear lines encourage users and website operators to create interesting and informed content that contains links to other sites, leading to a better-informed and more diverse public sphere. E-commerce sites can employ embedded links to enable consumers to comparison shop. Publishers can display advertisements selected in real time for their readers. And libraries, educators, and government agencies can use links to inform and empower their users.

Equally importantly, the server test provides legal certainty to service providers that allow user-supplied content to reside on their sites. Thanks to that certainty, a blogger can embed social media posts commenting on particular news events to show the development of a story. An educator can embed images of famous works of art to illustrate a particular style. And an email sender can embed an image, and have that email forwarded to hundreds or thousands of people.

C. Overruling The Server Test Would Endanger Many Uses Of The Internet.

In contrast to the server test, Appellant's approach would cause a tsunami of liability risk for websites large and small.

No principled textual or policy distinction separates Valnet's use of embedded images from the billions of links shared by web publishers, libraries, bloggers, and regular internet users every day. A link is an information location and retrieval tool,

regardless of whether it is provided as part of a search engine result, as in the *Perfect 10* cases; a pointer to visual information to illustrate a travel blog, as in this appeal; as part of the delivery of an advertisement whose display funds the operation of a website; or for countless other uses. Attempting to restrict the server test to the facts of *Perfect 10* still implicates many if not all uses of linking.

A finding that all or even a significant subset of image links on the internet are subject to strict liability as public displays of copyrighted works would represent a massive expansion of liability. Countless links still on the internet today were created against the backdrop of the clear rule this Court put forward in *Perfect 10*. If that rule is withdrawn, every link to a third-party server that could lead to a photograph being shown could potentially trigger an infringement suit and the possibility of statutory damages of up to $150,000 for each embedded link. 17 U.S.C. § 504(c)(2). As statutory damages do not require proof of actual harm, the universe of links that would become serious liability risks is not limited to those that point to commercially valuable images. *See L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998).

Under the server test, the providers of these billions of links are subject to a secondary liability regime, under which they must avoid knowingly contributing to, inducing, or directing another's infringement. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007). If this Court were to withdraw the server

test, strict liability would apply, and the costs of mitigating liability risk for each link would multiply. Before placing a link, a website owner would need to consider the ownership and licensing status of the image their link points to, and whether fair use or another exception to copyright would apply. And the information needed to adequately consider these questions is likely to be less available to a potential linker than to the site actually hosting the image.

The difficulty of risk mitigation is especially significant due to the lack of control a website owner has over the content they link to. A linked image can be changed by the owner of the server hosting the image at any time, without warning. Absent the server test, substituting a new image could instantly create strict liability for every linker. Part I of this brief described a hypothetical scenario in which a reference on EFF's website to an image on the White House website might initially point to a picture of the White House but later point to a picture of the President. The operator of whitehouse.gov, not EFF, would control which image is served. Now imagine that the initial White House image—the one EFF intended to link to—was in the public domain, but the replacement image of the President was an in-copyright work for which EFF had no display license. Absent a finding of fair use or another defense to liability, EFF could find itself on the hook for infringing copyright in an image it was not even aware of.

In the face of such enormous potential liability, many would fear to link to

anything. As the use of links became legally fraught, their use would dwindle. Moreover, the platforms upon which many users rely to share information would hesitate to allow many forms of user-generated content. To avoid the risk of liability, platforms might have to conduct a legal review of all such content to root out any links that could lead to direct liability. Given the cost of such a review, most would likely choose to avoid the risk altogether.

The potential for a fair use defense under 17 U.S.C. § 107 does not significantly mitigate this expansion of liability risk. Although the fair use doctrine is an indispensable protection for the legitimate activities of internet users, fair use can be expensive to determine and difficult to decide at the margins, and in light of those features, it can be difficult for users to predict. Moreover, rightsholders often have narrow views of what qualifies as fair use, which means that many may pursue legal action against colorable fair uses. The prospect of litigation will discourage users and platforms alike from taking the risk in all but the narrowest of circumstances.

III. THAT AN ALLEGED INFRINGER BENEFITS FROM A USE DOES NOT MEAN THE USE IS INFRINGING.

Appellant's theory of liability appears to be based on the incorrect assumption that the Copyright Act assigns to the rightsholder all of the economic value brought into being by a piece of creative work. It does not. In fact, approaching copyright in that way would do a disservice to the purpose of copyright law—"to Promote the

Progress of Science." U.S. Const. art. 1, § 8, cl. 8.

Copyright accomplishes its purpose by creating an economic incentive to produce creative work, but maximizing this incentive is not the ultimate goal of copyright. Rather, the "sole interest of the United States and the primary object in conferring the monopoly . . . lie in the general benefits derived by the public from the labors of authors." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

In keeping with that primary object, the Copyright Act sets many "uses" of copyrighted works beyond a rightsholder's control, requiring no permission or payment, when Congress has determined that doing so enriches the public while maintaining incentives to create. This explains why, for example, a rightsholder's exclusive right to distribute copies does not include a right to compensation when copies are resold. *See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908); 17 U.S.C. § 109. It explains why the Copyright Act preempts state laws that would broaden the exclusive rights of the copyright holder at the expense of the public, upsetting the balance Congress created. *See Sybersound Records, Inc. v. UAV Corp*., 517 F.3d 1137, 1150 (9th Cir. 2008). And it explains why the Copyright Act specifies six particular uses of a covered work that are reserved to the rightsholder, but does not include a general right of "use" such as appears in the Patent Act. *Compare* 17 U.S.C. § 106 *with* 35 U.S.C. § 271(a).

The scope of the public display right, which does not encompass the act of linking, is not a loophole in the Copyright Act. It is not an oversight by Congress for the courts to correct. The use of inline links can undoubtedly benefit the linking website and its readers, but neither that benefit nor a rightsholder's inability to capture its commercial value is grounds for expanding the scope of the public display right. Inline linking of photos on an advertising-supported website does not transform a non-infringing reference into an infringing public display.

CONCLUSION

Seventeen years ago, this Court correctly interpreted the scope of the Copyright Act's public display right as applied to the inline linking of images on web pages. That decision set a clear and workable norm for the internet. Overruling or limiting it here would imperil a core function of the web. This Court should affirm the district court and uphold the server test.

Dated: May 22, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief of Amici Curiae the Electronic Frontier Foundation, Computer & Communications Industry Association, American Library Association, Association of Research Libraries, and Authors Alliance in Support of Defendant - Appellee and Affirmance with the type-volume limitation of 9th Circuit Rule 32-1(a) and Fed. R. App. P. 29(a)(5) because this brief contains 6,008 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 22, 2024.

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