



DISPLAYING LENITY: WHY COURTS SHOULD ADOPT A PRESUMPTION AGAINST COPYRIGHT INFRINGEMENT FOR EMBEDDING AND THE DISPLAY RIGHT

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* J.D. Candidate, Rutgers Law School, May 2022. I would like to thank my faculty advisor, Professor Rachel Godsil, for her feedback and guidance during the writing process, as well as Law Review members for their hard work during the editing process. I am especially grateful for the encouragement and support from my partner, Ned Terrace, and from my family. I could not have completed this Note without you.

INTRODUCTION

In February 2021, a local television station in Oklahoma City published an article on its website about a severe winter storm gripping the state, adding updates throughout the day in response to changing weather conditions.¹ In its 2:30 PM update to the article, the station included a Twitter post from a highway patrol official that contained three photos of a storm-related car crash outside of the city.² The station added the Twitter post to its article using a type of hyperlink called an “embedded link.”³ A visitor to the station’s website would see the article’s headline, the article’s text, and—thanks to the embedded link—the official’s Twitter post containing photos of the crash.

Now imagine that the official did not take the photos. Instead, she posted them to Twitter without permission from the photographer. Can the photographer sue the station, as opposed to the official, for copyright infringement?

The Copyright Act of 1976 (the “Copyright Act”) bestows six exclusive rights upon copyright owners.⁴ Among these rights is the display right, which is the right “to display the copyrighted work publicly.”⁵ The question presented by this example is whether embedding violates a copyright owner’s display right, and the answer requires courts to apply laws written in the 1970s to practices made possible by subsequent technological changes.⁶

Embedded links differ from other forms of hyperlinks in how they deliver the linked content to viewers of a webpage. “Surface links” refer the webpage viewer to the homepage of another website and require the viewer to take an action—click—to see the linked content.⁷ “Deep links” refer the webpage viewer deeper into another website, connecting the

1. See KOCO Staff, *Frigid Wind Chills Expected Monday Following Day of Heavy Snowfall, Crashes*, KOCO-TV (Feb. 15, 2021, 5:00 AM), <https://www.koco.com/article/winter-storm-brings-heavy-snow-causing-hazardous-driving-conditions-across-oklahoma/35500508> (showing a Twitter post from a highway patrol official with photos in the article’s 2:30 PM update).

2. See *id.*

3. The process of adding an embedded link is also known as “embedding.” See *infra* note 10 and accompanying text. Twitter allows users to embed tweets through its platform. *How to Embed a Tweet on Your Website or Blog*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/how-to-embed-a-tweet> (last visited Mar. 2, 2022).

4. 17 U.S.C. § 106.

5. 17 U.S.C. § 106(5).

6. See Kathryn Penick, Commentary, *The Life Cycle of Copyright Law: A Push for Copyright Reform*, 21 TUL. J. TECH. & INTELL. PROP. 71, 74, 77–78 (2019).

7. Alain Strowel & Nicolas Ide, *Liability with Regard to Hyperlinks*, 24 COLUM.-VLA J.L. & ARTS 403, 407–09 (2001).

viewer to another website's interior webpage; they also require the viewer to click to see the linked content.⁸ Framing presents a webpage viewer with the content of a *second* webpage, framed by the logo and the company that operates the first webpage.⁹ Finally, in-line linking, or embedding, presents a webpage viewer with elements from another webpage, like an image, without requiring the webpage viewer to click.¹⁰

Embedding presents a question of line-drawing: courts must determine whether the embedding party has done enough to satisfy the statutory standard for (1) displaying a copyrighted work and (2) doing so publicly.¹¹ Because embedding is so common, this unsettled area of copyright law has the potential to expose masses of internet users to liability.¹²

Two cases highlight why courts have reached opposite conclusions about whether embedding violates the display right: *Perfect 10, Inc. v. Amazon.com, Inc. ("Perfect 10")*¹³ and *Goldman v. Breitbart News Network, LLC ("Goldman")*.¹⁴ In *Perfect 10*, the Ninth Circuit held that a legally cognizable display required a party to store a copy of the copyrighted image on its server.¹⁵ Because a website that embedded or in-line linked to an image did not store the image on its server, it did not "display" the image for the purposes of the display right; this made further consideration of when a display is "public" unnecessary.¹⁶ Roughly a decade later in *Goldman*, the Southern District of New York relied on legislative history to determine that embedding violated the display right.¹⁷ Instead of focusing on the location of the copy in a server,

8. *Id.* at 407. Like surface links, deep links require action on the part of the user. *Id.* at 409.

9. *Id.* at 407–08.

10. *Id.* at 408–09; see also U.S. COPYRIGHT OFF., THE MAKING AVAILABLE RIGHT IN THE UNITED STATES: A REPORT OF THE REGISTER OF COPYRIGHTS 48 n.237 (2016) ("[I]nline linking, or embedding, displays digital content within the linking website by serving it up from the original server, giving the impression that the content belongs to the linking website.").

11. See *infra* Section I.A.

12. Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 422 n.22 (2019) (citing *The State of Social Embeds*, SAMDESK.IO (2016), <https://perma.cc/N6KP-SX8Z>) ("One recent study found that approximately one in four online news articles included an embedded link to a social media post.").

13. 508 F.3d 1146 (9th Cir. 2007).

14. 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

15. *Perfect 10, Inc.*, 508 F.3d at 1160.

16. *Id.* at 1161 & n.7.

17. 302 F. Supp. 3d at 586, 589. The Southern District of New York considered whether embedding violated the display right for a second time in July 2021. *Nicklen v. Sinclair Broad. Grp., Inc.*, No. 20-CV-10300, 2021 WL 3239510, at *2–3 (S.D.N.Y. July 30, 2021).

the court emphasized that the Copyright Act's definitions of "display" and "publicly" involved processes and found that the process of embedding satisfied both definitions.¹⁸

This Note evaluates whether liability for copyright infringement should attach to embedding. The first section examines the statutory text, legislative history, and the Constitution's Intellectual Property Clause to develop a deeper understanding of the display right.¹⁹ It underscores that the statutory text does not specify how to determine *who* displays the copyrighted work when multiple parties are involved.²⁰ The second section analyzes how courts have applied the Copyright Act's reproduction and performance rights to new technologies.²¹

The third section details the evolution of the display right in the internet context.²² It examines a court-developed doctrine seeking to separate direct from secondary infringement liability and the judicial treatment of embedding over time.²³ The fourth section uses public choice theory to explain why economic forces incentivize special interest groups to influence copyright law, and highlights theories of interpreting copyright laws that account for this influence.²⁴

Finally, the fifth section argues that courts should not defer to the Copyright Act's legislative history when construing ambiguous provisions of the display right.²⁵ By doing so, courts hand more power to the special interest groups that crafted the Copyright Act, to the detriment of members of the public who did not exert the same influence.²⁶ This section argues that courts should instead apply a rule of lenity that prevents them from finding that embedding infringes a copyright owner's display right.²⁷ Courts thus act as a counterweight to the interest groups that dominated the drafting process when the statutory text is unclear, while ultimately allowing Congress to respond legislatively and resolve the ambiguities.²⁸

18. *Goldman*, 302 F. Supp. 3d at 588, 593–94. The crux of the court's analysis seems to collapse both the determinations of display and the public nature of said display into one: "[i]t is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown." *Id.* at 594.

19. *See infra* Section I.

20. *See infra* Section I.A.

21. *See infra* Section II.

22. *See infra* Section III.

23. *See infra* Section III.

24. *See infra* Section IV.

25. *See infra* Section V.

26. *See infra* Section V.

27. *See infra* Section V.

28. *See infra* Section V.

I. UNDERSTANDING THE DISPLAY RIGHT

The Copyright Act grants copyright owners the exclusive right to “display the copyrighted work publicly.”²⁹ The display right did not exist before 1976.³⁰ While unveiled by Congress as part of its effort to protect copyrighted works against technological innovations enabling infringement,³¹ the boundaries of this right have remained relatively untested.³² This section examines the statutory text, legislative history, and the Constitution’s intellectual property clause to better understand what the right protects.

A. *Statutory Text*

The display right implicates two statutorily defined terms: “display” and “publicly.” Starting with the first term, “[t]o ‘display’ a work means to show a copy of it, either directly or by means of . . . any other device or process”³³ While the Copyright Act does not define “copy,” it defines the plural of the word: “‘Copies’ are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³⁴ The definition of “copies” in turn triggers the requirement for fixation: “[a] work is ‘fixed’

29. 17 U.S.C. § 106(5). The exclusive rights, including the display right, are subject to several limitations. *See, e.g., id.* § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following”); *id.* § 110 (providing that certain performances and displays do not infringe).

30. *See* H.R. REP. NO. 94-1476, at 63 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5676 (explaining that the 1976 Act offered the “first explicit statutory recognition in American copyright law” of an exclusive display right).

31. *See id.* at 47 (noting the “significant changes in technology” since the inception of U.S. copyright law that have led to new ways to violate copyright owners’ exclusive rights, including those of reproduction and dissemination). Around the passage of the Copyright Act of 1976, the Register of Copyrights described it as making “fundamental changes” to U.S. copyright law that made the Act as “radical” as the first American copyright statute. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858–59 (1987) (quoting Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977)).

32. *See* 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, 84 (2001); *see also* Jie Lian, Note, *Twitters Beware: The Display and Performance Rights*, 21 YALE J.L. & TECH. 227, 245 (2019) (“[T]he display right issue has rarely been adjudicated.”). In fact, based on a survey of Westlaw, the Supreme Court has yet to rule on the merits of a case focused on the violation of the public display right.

33. 17 U.S.C. § 101.

34. *Id.* Congress omitted “phonorecords”—material objects in which some sounds are fixed—from the fixed objects that constitute copies, but that is not relevant to the analysis of the display right. *Id.* A copy also includes the original work. *Id.*

in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”³⁵ When connected, the above definitions overlap, sometimes in confusing ways: for example, a copy cannot exist without fixation, which cannot occur without a copy.³⁶

While the statute declares that a party that shows a copy of a copyrighted work by means of a process sufficiently “displays” the work,³⁷ it leaves unclear how that applies to situations in which multiple parties utilize processes that ultimately show a work.³⁸ In the context of embedding, does the embedding process show the work as well as the process involved in posting the image online? That is, for the purposes of the Copyright Act, who is the legally cognizable displayer: the embedding party or the party that posted the photo to the internet?

A violation of the display right requires a *public* display.³⁹ The Copyright Act’s definition of “publicly” applies to both performance and display rights and includes two clauses: one for the analog world and one for the digital world.⁴⁰ Under the first clause, to display a copyrighted work “publicly” means to “display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”⁴¹

Courts have relied on the second definition, known as the “Transmit Clause,” in cases involving the internet.⁴² The Transmit Clause states

35. *Id.*

36. *See id.* (stating that “[c]opies” are material objects in which a work is “fixed,” which requires an embodiment in a copy).

37. *See id.*

38. The Supreme Court grappled with this ambiguity in the context of the performance right. *See Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 438–39 (2014) (“Considered alone, the language of the Act does not clearly indicate when an entity ‘perform[s]’ (or ‘transmit[s]’) and when it merely supplies equipment that allows others to do so.”).

39. 17 U.S.C. § 106(5). Courts only reach this inquiry if a party has already satisfied the definition of “display.” *Id.*

40. *See id.* § 101 (providing two definitions for the public nature of a performance of display, which appear to apply to in-person and digital scenarios, respectively).

41. *Id.*

42. *Compare Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 435–36 (2014) (defining the Transmit Clause as the right to “transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.”), with 17 U.S.C. § 101 (defining “publicly” in two ways, the second of which is “to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”).

“[t]o perform or display a work ‘publicly’ means . . . to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process”⁴³ Congress further defined “transmit” as “communicat[ing a display] by any device or process whereby images or sounds are received beyond the place from which they are sent.”⁴⁴ Putting the two definitions together, the Transmit Clause captures a party that uses two devices or processes to ultimately deliver the display to the public.⁴⁵ While the Transmit Clause sweeps broadly, it is limited by the definition of “display.”⁴⁶ Many activities may fall within the scope of the Transmit Clause, but only those that first satisfy the definition of “display” infringe the display right.⁴⁷

B. Legislative History

The Copyright Act is noteworthy because its lengthy legislative history⁴⁸ reveals that Congress itself did not draft much of the statutory language, as Professor Jessica Litman detailed in a seminal 1987 article.⁴⁹ Instead, Congress designed, funded, and supervised a series of negotiations between special interest groups—third parties with economic interests in copyright—to draft the statutory language, all of which the legislative history documented.⁵⁰ This was by no means a simple delegation of lawmaking by members of Congress to interest groups; during the 21 years it took to enact a new copyright law, they “encouraged, cajoled, bullied, and threatened the parties through continuing negotiations,” helped the parties reach “[v]iable compromises,” and ultimately rejected amendments they felt would ruin the compromises.⁵¹ Congress codified word-for-word several of the

43. 17 U.S.C. § 101.

44. *Id.*

45. For example, a version of the Transmit Clause that incorporates the definition of “transmit” provides that to perform or display a copyrighted work “publicly” means to communicate a display of the work by any device or process whereby images or sounds are received beyond the place from which they are sent to the public, by means of any device or process. *See id.*

46. *See id.*

47. *See id.*

48. *See* Litman, *supra* note 31, at 865 (“The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.”).

49. *Id.* at 860–61.

50. *Id.* at 861–62, 862 n.38.

51. *Id.* at 871, 878.

compromises between special interest groups.⁵² Sometimes, the only explanation from Congress about the merits of the proffered provision was that it emerged from the compromise.⁵³ This makes relying on legislative history to interpret unclear provisions of the Act difficult because of the lack of a key assumption in such analyses: that the legislative history evinces the intent of members of Congress.⁵⁴

Nonetheless, courts have continued to rely on legislative history in interpreting the display right, and so a brief overview is helpful.⁵⁵ Legislative history indicates the drafters of the Copyright Act were concerned with public digital transmissions.⁵⁶ On the display side, in granting copyright owners an additional right, a 1976 House report described it as recognizing the “exclusive right to show a copyrighted work, or an image of it, to the public.”⁵⁷ The drafters elaborated that a display would include “the projection of an image on a screen or other surface by any method” or “the transmission of an image by electronic or other means.”⁵⁸ Of note, while the statutory definition of “display” does not explicitly include transmissions—something presumably within the drafters’ power given their decision to use the term “transmit” in the definition of “publicly”—legislative history explaining “display” appears to cover transmissions.⁵⁹

On the public nature of the display, the 1976 House report emphasized that the concept of transmissions captured radio and television broadcasts, but was not limited to those forms of

52. *Id.* at 869, 877.

53. *Id.* at 878–79. Fair use provides an example. The statutory language is a “verbatim” translation of the compromise struck by the interest groups involved. *Id.* at 877. However, while the interest groups agreed on the compromise’s language, they did not agree on the compromise’s meaning. *Id.* That the interest groups agreed not to agree on the meaning of the language is striking, given how fair use represents one of just two ways for “interests that lacked the bargaining power to negotiate a specific exemption” to escape copyright liability. *Id.* at 886.

54. *Id.* at 864–65.

55. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 589 (S.D.N.Y. 2018) (showing how the court turns to legislative history after laying out the statutory definitions). Professor Litman suggests that courts comb through legislative history to unearth the meaning of the compromises struck by interest groups in seeking guidance on what provisions mean. *See Litman, supra* note 31, at 903–04.

56. *See Reese, supra* note 32, at 92. Since the definition of “publicly” invokes the term “transmit,” the legislative history appears to emphasize the term “publicly” in the display right. *See* 17 U.S.C. § 101.

57. H.R. REP. NO. 94-1476, at 63 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5676. However, when Congress committed the right to text, it substituted the word “image” for one with statutory meaning, “copy.” *See* 17 U.S.C. § 101 (defining the term “display”).

58. H.R. REP. NO. 94-1476, at 64.

59. *Compare id.*, with 17 U.S.C. § 101.

communications media.⁶⁰ The drafters appeared to envision a far-reaching right that would allow the copyright owner to sue any party that subsequently transmitted its legally cognizable display to the public for infringement.⁶¹ However, the drafters acknowledged their limited ability to forecast how this new exclusive right would develop, noting that “[t]he existence or extent of this right under the present statute is uncertain and subject to challenge.”⁶²

C. *The Intellectual Property Clause*

Congress derives its ability to create copyright law from the Intellectual Property Clause (“IP Clause”) of the Constitution, which reads: “[t]he Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶³ This is a limited grant of power.⁶⁴ The IP Clause gives Congress the power to create copyright laws giving owners exclusive rights only insofar as those rights promote the progress of science.⁶⁵

60. H.R. REP. NO. 94-1476, at 64 (“Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission.’”). The various reports and hearings that make up the Copyright Act’s legislative history repeatedly use the term “image” instead of “copy” when describing the display right. For example, in a 1965 hearing, the Register of Copyrights stated: “[u]nder the bill this would be an infringement only if the image of the work is transmitted beyond the location of the computer in which the copy is stored.” Reese, *supra* note 32, at 100. The Second Circuit, however, has questioned the relevance of legislative materials from the 1960s given the years that lapsed before the 1976 Act passed. See *Cartoon Network L.P. v. C.S.C. Holdings, Inc.*, 536 F.3d 121, 135 (2d Cir. 2008) (“We question how much deference this report [from 1967] deserves.”).

61. H.R. REP. NO. 94-1476, at 63 (“[T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.”). Professor Kimberlianne Podlas characterized the logic in the House report as circular, noting that the drafters effectively used the definition of “publicly” to define the term “display.” See Kimberlianne Podlas, *Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement*, 6 HARV. J. SPORTS & ENT. L. 41, 55 (2015) (“Essentially, the Transmit Clause provides that one can perform or display by transmitting, or circularly, a transmission of a copyrighted work constitutes a performance or display of it.”).

62. H.R. REP. NO. 94-1476, at 63.

63. U.S. CONST. art. I, § 8, cl. 8; *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020) (calling clause 8 the Intellectual Property Clause).

64. See W. Michael Schuster, *Public Choice Theory, the Constitution, and Public Understanding of the Copyright System*, 51 U.C. DAVIS L. REV. 2247, 2256–57 (2018). The IP Clause is the only such grant of power thus limited by “a specific statement of legislative purpose.” *Id.* at 2256.

65. See *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (explaining that the Framers of the Constitution thus bestowed upon Congress a “qualified authority” to create patent laws

The Copyright Act fulfills this constitutional imperative by balancing authors' need for economic incentives with the public's need to access copyrighted works.⁶⁶ Put differently, Congress rewards copyright owners for creative activity by giving them time-limited rights, which encourages them to continue working in ways that benefit the public.⁶⁷ But while economic incentives for authors are crucial in ultimately ensuring "the [p]rogress of [s]cience" through public consumption of copyrighted works, the incentives remain the means, not the ends, of copyright legislation.⁶⁸ This balancing underscores the American view that copyright is not a natural right that would grant the author absolute ownership of their copyrighted works, but rather a way to achieve a utilitarian goal of enriching the public by "permitting authors to reap the rewards of their creative efforts."⁶⁹ Indeed, the text of the Constitution eliminates the possibility that American copyright is a natural right: the Intellectual Property Clause states that the authors' exclusive right to their writings only exists if Congress enacts a statute saying so, and the exclusive right is limited by time.⁷⁰

only in the furtherance of promoting the progress of the useful arts). When translated to copyright laws, that means the Constitution only permits Congress to create laws to promote the progress of science, because the constitutional text "Progress of Science" refers to Congress's copyright authority. See Schuster, *supra* note 64, at 2258; *Golan v. Holder*, 565 U.S. 302, 324 (2012) ("Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts.").

66. See R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 577 (2003) ("Copyright law is often viewed as a balance of providing authors with sufficient incentives to create their works and maximizing public access to those works."). The Supreme Court in 2012 determined that incentivizing the creation of works is not the only way for Congress to satisfy its constitutional mandate to promote the progress of science; incentivizing the dissemination also suffices. *Golan*, 565 U.S. at 326–27.

67. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The sole interest of the United States and the primary object in conferring the monopoly, this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'").

68. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'").

69. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990). Europe has a different approach to copyright law than the United States—one that is more focused on natural rights and thus more protective of intellectual property rights. See Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 574 & n.27 (2006). This fundamental mismatch complicates attempts to harmonize American and European copyright laws, which drove the congressional act in *Eldred v. Ashcroft*. See *id.* at 573–74; *Eldred v. Ashcroft*, 537 U.S. 186, 188 (2003); see also *infra* notes 189–94 and accompanying text.

70. See Leval, *supra* note 69, at 1108.

II. EXAMINING THE COPYRIGHT ACT'S OTHER EXCLUSIVE RIGHTS

The display right invokes two subsequently defined terms: “display” and “publicly.”⁷¹ The statutory term “display” involves copies, and the centrality of copies to potential infringement links the reproduction and display rights.⁷² The statutory term “publicly” appears in both the performance and display rights, linking the two through jurisprudence on the Transmit Clause.⁷³ This section helps define the contours of the display right by exploring the statutory connections between the display right and the reproduction and performance rights.

A. *Reproduction Right*

The reproduction right grants the copyright owner the exclusive right “to reproduce the copyrighted work in copies or phonorecords.”⁷⁴ While Congress did not define the verb “reproduce,” the definitions of “copies” and “phonorecords” reveal the right’s dependance on fixation: embodiment in a material object in a way that permits others to see it.⁷⁵ Simply put, the reproduction right prevents the copying at the heart of copyright law.⁷⁶

Courts have translated the reproduction right to the digital context.⁷⁷ They have assessed the reproduction right’s applicability to technological services that were new at the time, like file sharing services in the music industry and digital systems that record television shows.⁷⁸ Courts have also determined that downloading or uploading an image to a computer’s server creates a copy of it, violating the reproduction right.⁷⁹ When a

71. See *supra* Section I.A.

72. See 17 U.S.C. § 101. Both the reproduction right and display right invoke copies. See *id.* §§ 101, 106(5). The reproduction right requires copies in the text of the right itself, see *id.* § 106(1), while the display right requires copies as a second-order condition: in the definition of the term “display.” See *id.* §§ 101, 106(5); see also Reese, *supra* note 32, at 102.

73. See Podlas, *supra* note 61, at 54.

74. 17 U.S.C. § 106(1).

75. See *id.* § 101; see also *Capitol Recs., LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013), *aff’d*, 910 F.3d 649 (2d Cir. 2018) (“Thus, the plain text of the Copyright Act makes clear that reproduction occurs when a copyrighted work is fixed in a new material object.”).

76. In that sense, the reproduction right is “the most fundamental of the copyright rights available to a copyright holder.” *Healthcare Advocs., Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 636 (E.D. Pa. 2007). Indeed, it leads the Copyright Act’s list of the six exclusive rights. See 17 U.S.C. § 106(1).

77. See, e.g., *Capitol Recs.*, 934 F. Supp. 2d at 648.

78. See, e.g., *id.* at 648 (music file sharing); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008) (DVRs).

79. *APL Microscopic, LLC v. United States*, 144 Fed. Cl. 489, 495 (2019). “By uploading the photograph onto its server, NASA created a ‘copy’ of the Work, which was then ‘fixed’

party subsequently displays an unlawfully made copy, the plaintiff may sue under both the reproduction and display rights.⁸⁰ For example, if Twitter User B posts to her public account a photo she downloaded from Photographer A's website without permission, she might face liability for both reproducing the photo when she downloaded it to her computer and displaying the photo publicly when she posted it to Twitter.⁸¹

Courts have even gone so far as to hold that *temporary* copies, like those made in random access memory ("RAM"), constitute copies for the purposes of the Copyright Act,⁸² though some scholars have criticized this conclusion.⁸³ In *MAI Systems Corp. v. Peak Computer, Inc.*, the Ninth Circuit analyzed whether the defendant computer service company violated the plaintiff's copyrighted software by loading a disk of the plaintiff's software into a computer, which created a copy within the computer's RAM.⁸⁴ The defendant argued that the copy was not actionable because it was not fixed—because the copy was temporary—an argument the Ninth Circuit rejected.⁸⁵ While the "generally accepted" proposition that loading software into a computer created a copy for the purposes of the Copyright Act did not specify that it applied to all storage facilities within the computer, the Ninth Circuit held it could fairly extend the proposition to RAM.⁸⁶

Professor Reese argued that the RAM copy doctrine contradicted the text of the law, which stated a copy exists only if fixed "for a period of more than transitory duration."⁸⁷ Fixation did not exist in RAM, he continued, because the period of storage in RAM was brief.⁸⁸ The material stored was "often quickly replaced" and "volatile" because RAM temporarily stored, in order to process, all data necessary for the

in NASA's server and capable of being 'perceived, reproduced, or otherwise communicated,'" thus infringing the reproduction right. *Id.*; see also *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 517–18 (9th Cir. 1993).

80. Reese, *supra* note 32, at 107. Professor Reese argues that because of the overlap of the reproduction and display rights in instances involving unlawfully made copies, the display right is more useful to copyright owners when dealing with lawfully made copies. See *id.* (describing the display right in relation to lawfully made copies as presenting copyright owners the "only opportunity to control the displaying party's activity").

81. *Id.*

82. *MAI Sys.*, 991 F.2d at 519 (holding that "the loading of software into the RAM creates a copy under the Copyright Act").

83. See Reese, *supra* note 32, at 84; Jessica Litman, *Fetishizing Copies*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXPECTATIONS* 107, 113–14 (Ruth L. Okediji ed., 2017).

84. *MAI Sys.*, 991 F.2d at 518–19.

85. *Id.* at 518.

86. *Id.* at 519.

87. Reese, *supra* note 32, at 139–40.

88. *Id.*

operation of a computer.⁸⁹ Further, Professor Litman argued that courts' embrace of the RAM copy doctrine turned the reproduction right into "an all-purpose use right" that would effectively attach liability to *private* performances or displays—acts that the text of the Copyright Act did not bring within infringing activities—and significantly reduced the rights of the public.⁹⁰

B. Performance Right

Congress amended the performance right and created the Transmit Clause in 1976 to reject two Supreme Court decisions that excused cable companies from infringement liability for delivering local television broadcasts to their subscribers.⁹¹ The performance right gives a copyright owner the exclusive right to "perform the copyrighted work publicly."⁹² Like the display right, this reduces to two subsequently defined terms: "perform" and "publicly."⁹³ A party "perform[s]" a copyrighted movie or audiovisual work by "show[ing] its images in any sequence or . . . mak[ing] the sounds accompanying it audible."⁹⁴ Liability under the performance right only results from *public* performances, as defined by the Transmit Clause in the digital context.⁹⁵ However, a key difference exists between the performance and display rights: the performance right does not involve the use of copies.⁹⁶ Where the performance right proscribes showing an *image* of a copyrighted movie or audiovisual work, the display right proscribes showing a *copy* of a copyrighted work.⁹⁷

In a case involving a streaming television service, *American Broadcasting Companies, Inc. v. Aereo, Inc.*, the Court applied the performance right to new technology.⁹⁸ Aereo enabled its customers to

89. *Id.* at 138–39.

90. *See* Litman, *supra* note 83, at 118.

91. *See* *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 439, 441–42 (2014) ("In 1976 Congress amended the Copyright Act in large part to reject the Court's holdings in *Fortnightly* and *Teleprompter*").

92. 17 U.S.C. § 106(4).

93. *See supra* Section I.A.

94. 17 U.S.C. § 101 (defining "perform").

95. *Id.* (defining "publicly" in two clauses, the second of which is the Transmit Clause); *id.* § 106(4); *id.* § 501(b).

96. *See id.* § 101 (showing that the definition of "perform" lacks the term "copy").

97. *See id.* (comparing the definition of "perform" with that of "display"). Because the drafters chose to invoke the term *copy* in the display right rather the term *image* that they employ elsewhere, one theory of interpretation requires that courts give the choice meaning in interpreting the display right. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 28 (2018) (explaining the rule against surplusage).

98. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 435–36 (2014).

watch television over the internet through a system of antennae that, at the request of customers, transmitted the broadcasts to their devices.⁹⁹ The Court relied on the reasons motivating Congress to expand the performance right in 1976—namely, to capture cable companies—to conclude that Aereo’s technologically advanced service nonetheless resembled a cable company and also performed within the meaning of the Copyright Act.¹⁰⁰ Justice Scalia, in dissent, criticized this conclusion because of Aereo’s lack of volitional conduct.¹⁰¹

The Court further concluded that Aereo’s performance was public.¹⁰² In doing so, it rejected Aereo’s argument that any performance was private because of the way in which it transmitted the broadcast: it used an individual antenna for each subscriber’s request to deliver the broadcast to the subscriber, in contrast with the single antenna employed by the older cable companies for all subscribers.¹⁰³ The Court once again deemphasized the technological differences separating Aereo’s service from those of the cable companies that Congress specifically brought within the performance right’s zone of infringement, arguing that technological differences should not matter “in terms of Congress’ regulatory objectives.”¹⁰⁴ However, it cautioned that while congressional intent justified a broad application of the performance right “to cable companies and their equivalents,” courts should not apply its “limited holding” to other technologies.¹⁰⁵

III. JUDICIAL TREATMENT OF THE DISPLAY RIGHT

The ability to link to webpages is essential to the usefulness of the internet.¹⁰⁶ Linking by third parties, however, has made it more difficult to determine who has violated the display right: the embedding party or the party that posted the work online and serves the work directly to the viewer of the embedding party’s website.¹⁰⁷ In early cases, determining what party displayed the copyrighted work was not difficult because

99. See Kevin W. Delaney, *Aereo, the Public Performance Right, and the Future of Broadcasting*, 42 RUTGERS COMPUT. & TECH. L.J. 19, 22–23 (2016).

100. *Am. Broad. Cos.*, 573 U.S. at 441, 443–44.

101. See *id.* at 456 (Scalia, J., dissenting); see also *infra* Section III.B.

102. *Am. Broad. Cos.*, 573 U.S. at 448–49.

103. See *id.* at 446.

104. *Id.*

105. *Id.* at 449–51.

106. Strowel & Ide, *supra* note 7, at 404 (“The practice of linking web pages to others helps users, by means of successive references, to find the information that they are seeking, thus overcoming the difficulty of the incredible dissemination of information available on the Web.”).

107. See *infra* Section III.C.1.

many violations resulted from in-person displays, which likely alleviated the problem of determining who displayed.¹⁰⁸ For example, in the first reported case after the display right went into effect, a district court found that the defendant displayed the plaintiff's copyrighted wicker mirrors by exhibiting its versions of the wicker mirrors at a trade show.¹⁰⁹ The following section examines how judicial analysis of the display right has evolved online.

A. Bulletin Board Service Cases

Some of the earliest display right cases regarding digital content involved the computer bulletin board system ("BBS"), which was a precursor to social networks on the internet like Facebook and Twitter.¹¹⁰ These BBS cases have influenced recent opinions written by courts analyzing embedding.

Taking a broad view, the Middle District of Florida in 1993 indicated that any party that contributed to the public appearance of copyrighted works, even unknowingly, violated the display right.¹¹¹ In *Playboy Enterprises, Inc. v. Frena*, Playboy magazine sued the operator of a subscription computer BBS, defendant Frena, for displaying 170 unauthorized copies of Playboy's photos.¹¹² While Frena admitted that the photos appeared on his BBS, he argued that his subscribers, not he, uploaded the photos to the BBS¹¹³—an argument over *who* displayed the photos in question. But the court quickly determined that Frena displayed the copyrighted images, citing the Copyright Act's legislative history and noting that "[t]he concept of display is broad" enough to capture Frena's actions.¹¹⁴

108. See Reese, *supra* note 32, at 103–06.

109. *Id.* at 105 & n.88 (citing *Burwood Prods. Co. v. Marsel Mirror & Glass Prods., Inc.*, 468 F. Supp. 1215, 1218 n.4 (N.D. Ill. 1979)).

110. See Kevin Driscoll, *Social Media's Dial-Up Ancestor: The Bulletin Board System*, IEEE SPECTRUM (Oct. 24, 2016, 3:00 PM), <https://spectrum.ieee.org/tech-history/cyberspace/social-medias-dialup-ancestor-the-bulletin-board-system> (comparing computer BBS to social media platforms). Commentators and courts also refer to the computer BBS as the computerized bulletin board system. *Id.*

111. *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) ("Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement.").

112. *Id.* at 1554.

113. *Id.*

114. See *id.* at 1556–57; 17 U.S.C. § 101. The court further determined that the defendant displayed the work publicly based on the first statutory definition of the term. *Playboy Enters., Inc.*, 839 F. Supp. at 1557. However, Congress rejected parts of this opinion when enacting the Digital Millennium Copyright Act. *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622 (4th Cir. 2001) (quoting legislative history, stating it overruled

Soon after, however, some courts began to reason that a display required purposeful action by the defendant. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, the Northern District of California focused on the passive roles of the defendant internet service provider and defendant computer BBS operator: acting as conduits for their subscribers' infringing activities.¹¹⁵ The court determined copyright infringement requires "some element of volition or causation" that did not exist in the case at hand, where the defendants "merely" provided a system that allowed others to infringe.¹¹⁶ The court's language helped create the volitional conduct requirement—a judicial doctrine developed to distinguish direct from secondary copyright infringement.¹¹⁷ The court further determined that the BBS subscriber could have posted his infringing content through any other BBS operator and internet provider with the same result.¹¹⁸ Thus, it made no sense to attach liability to this BBS operator and this internet provider for public display because of the lack of causation between their actions and the ultimate infringement.¹¹⁹

The Northern District of Ohio in *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.* found that the defendants engaged in purposeful action by encouraging their subscribers to upload adult photographs and instituting a screening policy in which their employees curated the uploaded images.¹²⁰ Thus, the BBS had transformed from a passive entity into an "active participant[] in the process of copyright infringement."¹²¹ The court held the defendant BBS operator liable for infringement of Playboy Magazine's display right.¹²²

Similarly, the court in *Playboy Enterprises, Inc. v. Webworld, Inc.* found that the defendants engaged in purposeful action—becoming more

aspects of *Frena* that suggested "passive, automatic acts" by service providers constituted direct infringement).

115. 907 F. Supp. 1361, 1365–66, 1372, 1381–82 (N.D. Cal. 1995).

116. *Id.* at 1370 (explaining the analysis as applied to the reproduction right). The court later said the plaintiff's allegation of violation of the display right suffered from "the same problem of causation." *Id.* at 1372.

117. See Dallas T. Bullard, Note, *The Revolution Was Not Televised: Examining Copyright Doctrine After Aereo*, 30 BERKELEY TECH. L.J. 899, 906 (2015); *infra* Section III.B.

118. *Religious Tech. Ctr.*, 907 F. Supp. at 1372.

119. *Id.*

120. 982 F. Supp. 503, 512–13 (N.D. Ohio 1997).

121. *Id.* at 513.

122. *Id.* The defendants only appeared to dispute the public nature of the displays, arguing that those displays were private because subscribers could only view the images on their home computers with the help of software. *Id.* at 509. The court rejected this view, finding that the defendants displayed the images publicly based on the first definition of "publicly." *Id.* at 513.

than passive conduits—when they essentially created a store.¹²³ They operated a service that would download images from certain adult-oriented internet forums to one of their servers, create thumbnail versions of the images, and allow subscribers to download both the thumbnail and full-size versions of the images for a monthly fee through a website called Netpics.¹²⁴ Furthermore, the defendants exercised control over the source of the images, directing their automated system to gather photos from internet forums likely to contain infringing content.¹²⁵

B. Emergence of Volitional Conduct

The last section illustrates how courts began to develop the theory of volitional conduct in the 1990s,¹²⁶ as they sought to distinguish direct from secondary infringers in connection with copyright infringement claims against entities with third-party users.¹²⁷ The difference between direct and secondary infringement depends on whether the party infringed itself or helped another party infringe.¹²⁸

The Supreme Court has never directly discussed volitional conduct in a majority opinion.¹²⁹ The only direct invocation of the concept in a Supreme Court opinion appeared in Justice Scalia's dissent in *Aereo*.¹³⁰ Nevertheless, lower courts have pointed to language from the Court's

123. See *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 543, 552 (N.D. Tex. 1997), *aff'd*, No. 98-10097, 1999 WL 25053, at *1 (5th Cir. Jan. 8, 1999).

124. *Id.* at 549–50. Typically, the defendants “stored and displayed about 40,000 to 70,000 images at any given time.” *Id.* at 550.

125. *Id.* at 552 (“The evidence unequivocally shows that Webworld electronically reproduced, distributed, and displayed PEI’s protected images.”).

126. *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (explaining that copyright infringement involves “some element of volition or causation”).

127. See Delaney, *supra* note 99, at 49 (internet providers like Netcom); Bullard, *supra* note 117, at 906 (automated systems); Robert C. Denicola, *Volition and Copyright Infringement*, 37 CARDOZO L. REV. 1259, 1272 (2016) (copying systems). Some courts now even state volitional conduct as a requirement for copyright infringement. See *Perfect 10, Inc. v. Giganeews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017).

128. Delaney, *supra* note 99, at 46.

129. See Denicola, *supra* note 127, at 1260.

130. *Id.* (citing *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2513 (2014) (Scalia, J., dissenting)). A Westlaw search of “volition!” and “copyright” revealed no cases since *Aereo*. That the Court has not mentioned volitional conduct in a majority opinion has not stopped circuit courts from requiring it, and a 2017 decision in which the Fifth Circuit adopted the volitional conduct requirement noted that the judicial trend is towards adoption. See *BWP Media USA, Inc. v. T&S Software Assocs., Inc.*, 852 F.3d 436, 439, 444 (5th Cir. 2017).

1984 decision in *Sony v. Universal City Studios* when explaining the need for volitional conduct to establish direct liability.¹³¹

Courts have invoked the volitional conduct doctrine in different ways, making it hard to distill it into a general rule.¹³² For example, neither the difference between human or automated decision-making nor the determination of what party selects the copyrighted work for reproduction or display consistently explains the doctrine.¹³³ Instead, Professor Robert Denicola argued that volitional conduct exists when the owner of a copying system can directly prevent the infringement from occurring without policing third parties.¹³⁴ In other words, volitional conduct required a “connection between the system owner and the copyrighted work that is sufficient to permit the owner to control infringements without the necessity of monitoring the behavior of third parties.”¹³⁵

C. *Judicial Analysis of Embedding and Similar Forms of Linking*

The Ninth Circuit in *Perfect 10* was the first circuit court to directly consider whether actions like embedding violated the display right.¹³⁶ Several embedding lawsuits emerged within the Ninth Circuit,¹³⁷ where

131. See, e.g., *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (citing *Sony* as support for the proposition that direct infringement “requires *conduct* by a person who causes in some meaningful way an infringement” as opposed to knowledge). The *Sony* case involved a copyright infringement claim against a manufacturer of home video recorders. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 419–20 (1984).

132. Denicola, *supra* note 127, at 1273–76.

133. *Id.*

134. *Id.* at 1276. This theory fits with dicta in the case that first invoked the idea of volitional conduct to excuse from infringement liability an internet provider that lacked the ability to control its subscribers’ actions. See *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995).

135. Denicola, *supra* note 127, at 1295.

136. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 590–591 (S.D.N.Y. 2018) (explaining that only the Ninth Circuit and Seventh Circuit have discussed the issue, in that order). The Ninth Circuit had considered the issue a few years earlier in *Kelly v. Arriba Soft Corp.*, though it later withdrew the opinion. See *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 841 (C.D. Cal. 2006), *aff’d in part, rev’d in part sub nom.* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); see also *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *amended by* 336 F.3d 811 (9th Cir. 2003).

137. Many lawsuits involved passive defendants that showed images via embedding or in-line linking in response to requests from users. See, e.g., *Perfect 10, Inc. v. Yandex N.V.*, No. C 12-01521, 2013 WL 1899851, at *1 (N.D. Cal. May 7, 2013) (applying the test to a search engine). In 2019, a California district court refused to apply the server test in response to a claim of infringement of the display right in the context of an editorial website that appeared to embed images stored on another website’s servers, noting that courts inside and outside of the Ninth Circuit have not applied the server test in the context of a

Perfect 10 governs violations of the display right.¹³⁸ Outside the Ninth Circuit, however, adoption of the Ninth Circuit's reasoning has been uneven. *Goldman v. Breitbart News Network* strongly criticized *Perfect 10* and declined to apply it to acts of embedding carried out by news organizations¹³⁹—an approach that has since proved influential in the Southern District of New York.¹⁴⁰ The following subsection details the *Perfect 10* decision, highlights the subsequent opinions that endorsed it, and analyzes why certain courts rejected it, including *Goldman*.

1. The *Perfect 10* Decision

In *Perfect 10*, the plaintiff operated a website that allowed subscribers to view its copyrighted images of nude models.¹⁴¹ Unfortunately, some websites republished *Perfect 10*'s images without permission.¹⁴² *Perfect 10* alleged that defendant Google violated its display right when, in response to a user's query, Google presented the *Perfect 10* images, hosted on the other websites, in its search results through a process called in-line linking,¹⁴³ which is essentially the same as embedding.¹⁴⁴

The Ninth Circuit began with the statutory text.¹⁴⁵ As relevant here, the Copyright Act defines "display" as showing a copy of a copyrighted work by means of a device or process.¹⁴⁶ The court determined that a

news website. See *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019).

138. *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484, 2010 WL 9479060, at *6 (C.D. Cal. July 30, 2010) ("The server test is now binding Ninth Circuit precedent, and it is not within this Court's power to revise it.").

139. *Goldman*, 302 F. Supp. 3d at 596 ("In sum, the Court here does not apply [*Perfect 10*'s] Server Test. It is neither appropriate to the specific facts of this case, nor, this Court believes, adequately grounded in the text of the Copyright Act.").

140. While *Goldman* is a district court opinion (the Southern District of New York) and not binding elsewhere, its influence has already affected litigation in the copyright-heavy Second Circuit. Two cases in the Southern District of New York involving copyright claims over embedded photos did not discuss whether embedding constitutes infringement, instead focusing on defenses like licenses and fair use. See *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 603–04 (S.D.N.Y. 2020); *Sinclair v. Ziff Davis, LLC*, No. 18-CV-790, 2020 WL 3450136, at *1 (S.D.N.Y. June 24, 2020).

141. *Perfect 10, Inc.*, 508 F.3d at 1157.

142. *Id.*

143. See *id.*

144. Lawyers treat "in-line linking" and "embedding" interchangeably. See THE MAKING AVAILABLE RIGHT IN THE UNITED STATES, *supra* note 10, at 48 n.237 ("[I]nline linking, or embedding, displays digital content within the linking website by serving it up from the original server, giving the impression that the content belongs to the linking website.").

145. See *Perfect 10, Inc.*, 508 F.3d at 1160.

146. *Id.*

legally cognizable display required the use of a copy and, based on existing case law, that a copy existed on a computer once saved or stored on the computer's server.¹⁴⁷ The court identified the owner of the computer containing a copy of the copyrighted work as the party that "displayed" it for the purposes of the Copyright Act.¹⁴⁸ In particular, "[t]he computer owner shows a copy 'by means of a . . . device or process' when the owner uses the computer to fill the computer screen with the photographic image stored on that computer, or by communicating the stored image electronically to another person's computer."¹⁴⁹ Because in-line linking did not involve storing an image on a server, the Ninth Circuit held that in-line linking, or embedding for the purposes of this Note, could not "display" within the meaning of the Copyright Act.¹⁵⁰ This became known as the server test.¹⁵¹

The Ninth Circuit distinguished between a display, which shows a copy of a copyrighted work through a device or process, and embedding, which directs a website viewer's browser to interact with the computer that stores a copy of a copyrighted work.¹⁵² The latter, the court argued, cannot cause a display without the participation of the computer that stores the copyrighted work, exposing the party engaging in in-line linking to at most contributory liability.¹⁵³ Because the court resolved the question of copyright infringement based on the definition of "display,"¹⁵⁴ it did not go on to further analyze the Transmit Clause in the body of the opinion.¹⁵⁵ In a footnote, however, the Ninth Circuit dismissed the claim that embedding satisfied the definition of "publicly" because embedding

147. *See id.*; *see also* *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 517–19 (9th Cir. 1993). The reasoning in *MAI Systems*, which says a copy exists only if a copyrighted work is stored on a computer, has been widely adopted. *See* *Grady v. Iacullo*, No. 13-cv-00624, 2016 WL 1559134, at *6 (D. Colo. April 18, 2016) (explaining that the reasoning "has been adopted by other Circuit Courts" and the court in the instant case saw "no reason" for holding otherwise). But this is a watered-down version of *MAI Systems*, which held that a copy exists even when stored *temporarily* in the computer's RAM—the RAM copy doctrine—as opposed to the subsequent gloss that it exists when stored in more stable forms of a computer's storage. *See* Litman, *supra* note 83, at 117 (footnote omitted) ("Some courts adopted the 9th Circuit's reasoning, although many decisions purporting to follow the decision applied it to indisputably fixed copies of software installed on computers and saved in durable computer storage.").

148. *Perfect 10, Inc.*, 508 F.3d at 1160.

149. *Id.* (quoting 17 U.S.C. § 101).

150. *See id.*

151. "[T]he 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." *Id.* at 1159 (describing the test as the "server test").

152. *See id.* at 1160–61.

153. *See id.* at 1161.

154. *Id.* at 1160.

155. *See id.* at 1160–61.

transmitted an address, rather than a display of the work, as required by statute.¹⁵⁶

2. Opinions that Followed *Perfect 10*'s Approach

Several courts outside of the Ninth Circuit have embraced *Perfect 10*'s logic.¹⁵⁷ The Seventh Circuit did so in *Flava Works v. Gunter*.¹⁵⁸ Writing for the court, Judge Posner cited *Perfect 10* while analyzing the public performance right and linking; in particular, he noted that linking to a video hosted by another website did not transmit or communicate the video because linking merely transmitted or communicated a web address.¹⁵⁹ The Northern District of Illinois in *Leveyfilm, Inc. v. Fox Sports Interactive Media* cited *Flava Works* and *Perfect 10* when considering whether the defendant's sports website violated the plaintiff's display right by linking to a third party website that contained the plaintiff's copyrighted photo.¹⁶⁰ The court held that, without evidence that the defendant saved the image to its servers, it could not find a violation of the display right.¹⁶¹

Similarly, in *MidlevelU, Inc. v. ACI Information Group*, the Southern District of Florida adopted the Ninth Circuit's server test.¹⁶² The defendant allegedly embedded the plaintiff's articles, allowing visitors to the defendant's website to read the text of the plaintiff's articles.¹⁶³ Because the parties disputed whether the defendant stored the plaintiff's articles on its server, the court could not grant the defendant's motion for summary judgment—emphasizing that the existence of a copyrighted work on a party's server determined whether that party violated the display right.¹⁶⁴

156. *Id.* at 1161 n.7 (“Google’s activities do not meet this definition [of “publicly”] because Google transmits or communicates only an address which directs a user’s browser to the location where a copy of the full-size image is displayed.”).

157. Ginsburg & Budiardjo, *supra* note 12, at 420.

158. *See Flava Works, Inc. v. Gunter*, 689 F.3d 754, 754 (7th Cir. 2012).

159. *See id.* at 761 (“[M]yVidster is giving web surfers addresses where they can find entertainment.”). Judge Posner’s language about transmitting and communicating comes from the definition of the term “publicly,” which appears in both the performance and display rights. *See* 17 U.S.C. § 106(4)–(5).

160. *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, No. 13 C 4664, 2014 WL 3368893, at *4–5 (N.D. Ill. July 8, 2014).

161. *Id.* at *5.

162. *MidlevelU, Inc. v. ACI Info. Grp.*, No. 18-80843, 2019 WL 7371835, at *1, *3 (S.D. Fla. Sept. 10, 2019).

163. *Id.* Technically, the court analyzed in-line linking and framing rather than embedding, but as this Note discusses, the three forms of linking are similar. *See supra* note 144 and accompanying text.

164. *MidlevelU*, 2019 WL 7371835, at *4.

3. Opinions that Rejected *Perfect 10*'s Approach

In the wake of *Perfect 10*, some courts focused on the way in which a party used embedding to determine liability. In other words, these courts found that not all acts of embedding were the same. The Northern District of Illinois in *Flava Works v. Gunter*, whose decision was later vacated by the Seventh Circuit, considered whether the defendants' video bookmarking service contributorily infringed upon the plaintiff's copyrighted works and declined to apply the Ninth Circuit's server test.¹⁶⁵ It distinguished the automated process in *Perfect 10*, in which Google's image search engine automatically showed images through in-line linking in response to queries from users, from the curatorial process used by the defendants' users, who "personally select[ed] and submit[ted] videos for inline linking/embedding" on the defendants' website.¹⁶⁶ Thus, the court indicated that the Ninth Circuit's method of determining who displays a copyrighted work for the purposes of the Copyright Act—the server test—only applied for instances of automated embedding.¹⁶⁷

Similarly, in *The Leader's Institute v. Jackson*, the Northern District of Texas distinguished its case from *Perfect 10* because the parties in the case before it used embedding in a way that gave their visitors no choice: visitors to the plaintiffs' website automatically saw the defendants' content.¹⁶⁸ In contrast, in *Perfect 10*, visitors to Google's website chose to

165. *Flava Works, Inc. v. Gunter*, No. 10 C 6517, 2011 WL 3876910, at *1, *4 (N.D. Ill. Sept. 1, 2011), *vacated*, 689 F.3d 754 (7th Cir. 2012). The district court reconsidered its decision to preliminarily enjoin the defendants from infringing the plaintiffs' copyrights because of the likelihood that plaintiffs would succeed in establishing contributory copyright infringement, *id.* at *1, based on a violation of the plaintiffs' display right, *id.* at *4. The defendants argued that because the first element of the contributory infringement cause of action includes establishing *direct* infringement by a third party, and because *Perfect 10*'s server test applies to the third-party actions in question (its users' actions), the court could at most find the third parties liable for *contributory* infringement. *Id.* at *1. Thus, the defendants argued, they could not be held liable for contributory infringement themselves. *Id.*

166. *Id.* at *3.

167. *Id.* at *4 (emphasis added) ("To the extent that *Perfect 10* can be read to stand for the proposition that inline linking can *never* cause a display of images or videos that would give rise to a claim of direct copyright infringement, we respectfully disagree."). The court ultimately declined to apply the server test because of the lack of automation involved. *Id.* at *3.

168. *Leader's Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514, at *11 (N.D. Tex. Nov. 22, 2017). The form of linking actually involved in *Leader's Institute*—framing—resembles embedding and in-line linking. See Jane C. Ginsburg & Luke Ali Budiardjo, *Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives*, 41 COLUM. J.L. & ARTS 153, 155 n.1 (2018) ("The terms 'in-line linking' and 'framing' are conceptually very similar."). This Note

search for a particular photo.¹⁶⁹ The court in *Leader's Institute* determined that the plaintiffs' decision to use embedding to show their website visitors specific content made all the difference,¹⁷⁰ allowing for copyright infringement liability to attach.¹⁷¹

The Southern District of New York in *Goldman v. Breitbart News Network, LLC* also noted the way in which the defendant news organizations used embedding, but that was not the crux of the court's opinion.¹⁷² The copyrighted work in question was a photo belonging to plaintiff Justin Goldman, who spotted football player Tom Brady and others on the street and posted a photo of them to Snapchat.¹⁷³ Social media users subsequently posted Goldman's photo to Twitter.¹⁷⁴ Goldman sued several news organizations after they embedded Twitter posts containing his photo in their articles about Tom Brady's efforts to help recruit basketball player Kevin Durant for the Boston Celtics.¹⁷⁵

The court held that the defendants infringed the plaintiff's display right by embedding.¹⁷⁶ It emphasized that the statutory definitions of "display" and "publicly" could both involve processes and found that the process of embedding satisfied both definitions because it "resulted in a

has chosen to use the term embedding in this case for simplicity. Finally, the display right issue arose unusually: the court considered the defendants' counterclaim alleging that the plaintiffs displayed their copyrighted website and photo. *Leader's Inst.*, 2017 WL 5629514, at *3, *10.

169. *Leader's Inst.*, 2017 WL 5629514, at *11 (citing *Perfect 10, Inc.*, 508 F.3d at 1160–61).

170. *Id.* ("Unlike Google, [plaintiffs] did not merely provide a link by which users could access [the defendants'] content but instead displayed [the defendants'] content as if it were [their] own.")

171. *Id.* at *10. When the plaintiffs used code to instruct visitors' browsers to retrieve code from the defendants' website, the plaintiffs engaged in a process that ultimately showed a copy of the copyrighted works, satisfying the definition of "display." *Id.* The court then utilized the definition of "publicly" to hold that the plaintiffs' display was public because it transmitted a display of the copyrighted works to the public through the same process, instructing visitors' browsers to frame the defendants' content. *Id.*

172. *Goldman v. Breitbart News Network*, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018) ("This is manifestly not the same as opening up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not.")

173. *Id.* at 586.

174. *Id.* at 587.

175. *Id.* at 586–87. At the time, Brady was the quarterback for the Patriots. See Rob Goldberg, *Tom Brady Says He's in 'Uncharted Territory' Entering 20th Year with Patriots*, BLEACHER REP. (Aug. 5, 2019), <https://bleacherreport.com/articles/2848576-tom-brady-says-hes-in-uncharted-territory-entering-20th-year-with-patriots>.

176. *Goldman*, 302 F. Supp. 3d. at 586.

transmission of the photos so that they could be visibly shown.”¹⁷⁷ In reaching its holding, it relied on excerpts from the Copyright Act’s legislative history describing various actions that would violate the display right that appeared to capture embedding.¹⁷⁸ For example, the court quoted a House report stating that a “display” under the Copyright Act would include “the projection of an image on a screen . . . by any method,”¹⁷⁹ and that a display would qualify as public, and infringing, “if the image were transmitted by any method (. . . for example, by a computer system) from one place to members of the public elsewhere.”¹⁸⁰ After analyzing the statutory text, it rejected the Ninth Circuit’s gloss that “possession of an image is necessary in order to display it.”¹⁸¹

The Southern District of New York again held that embedding violated the display right in July 2021.¹⁸² Plaintiff Paul Nicklen owned the copyright of a video he took depicting “an emaciated polar bear wandering the Canadian Arctic” that he subsequently posted to his social media accounts.¹⁸³ Sinclair Broadcast Group embedded Nicklen’s video in an article it published about the polar bear, taking advantage of an embedding tool provided by Instagram or Facebook.¹⁸⁴

The court began with the Copyright Act’s definition of “display” and, because the Copyright Act does not define “to show,” the court cited dictionary definitions to find that “to show” means “to cause or permit to be seen.”¹⁸⁵ Putting together its definitions, the court found that a defendant violates the display right “when the defendant without authorization causes a copy of the work, or individual images of the work, to be seen—whether directly or by means of any device or process known in 1976 or developed thereafter.”¹⁸⁶ The court then turned to the statute’s legislative history for further clarification of the display right’s broad scope.¹⁸⁷ In turning to the legislative history, it rejected the technicalities

177. *Id.* at 588–89, 594 (“[E]ach and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown. . . . The plain language of the Copyright Act calls for no more.”).

178. *Id.* at 589.

179. *Id.*

180. *Id.* at 594 (quoting H.R. REP. NO. 94–1476 at 64, 80 (1976)).

181. *Id.* at 593–94.

182. *Nicklen v. Sinclair Broad. Grp., Inc.*, No. 20-CV-10300, 2021 WL 3239510, at *2–3 (S.D.N.Y. July 30, 2021).

183. *Id.* at *1.

184. *Id.* (“Sinclair Broadcast Group included the [v]ideo in this article using the Instagram or Facebook application programming interface . . . embed tool.”).

185. *Id.* at *3; see 17 U.S.C. § 101 (not defining “to show”).

186. *Nicklen*, 2021 WL 3239510, at *3.

187. See *id.* (citing legislative history for the right’s breadth and examples of displays).

of the embedding process and the Ninth Circuit's emphasis on the location of the copy of the work.¹⁸⁸

IV. ANALYZING LAWS CREATED BY SPECIAL INTEREST GROUPS

Analyzing legislation in which special interest groups influence the statutory language is different from analyzing normal legislation. Public choice theory provides an economic framework for understanding why copyright law is particularly susceptible to special interest influence, apart from Congress's decision to create the Copyright Act based on bargains struck between interest groups. Based on public choice fundamentals, scholars have proposed methods of interpreting copyright laws that account for this special interest influence and arrive at more equitable outcomes. This section proceeds by distilling public choice theory and highlighting methods of statutory interpretation informed by public choice theory that focus on copyright law.

A. *Public Choice Theory*

Public choice theory seeks to explain legislative drafting through an economic lens.¹⁸⁹ That a statute benefits everyone, regardless of who contributed time, money, or mental energy to its passage, creates a free-rider problem—and a potential roadblock in the creation of legislation.¹⁹⁰ The involvement of a “compact interest group” that will benefit from the passage of the legislation at hand, however, unclogs the roads, so to speak.¹⁹¹ In particular, such an interest group has an incentive to back legislation despite the presence of free riders when the benefits are great and the costs, if large, are “widely diffused or imposed on politically impotent groups.”¹⁹² A guiding force behind public choice theory was the conclusion that a large group with diverse interests faces a bigger free rider problem and higher organizing costs than a small

188. *See id.* at *3–4. In particular, the court characterized the Ninth Circuit's server rule, which this note calls the server test, as incorrectly distinguishing between: (1) showing of a copy of a work that a party possesses and (2) showing of a copy of the work that a party does not possess. *See id.* at *4. In reality, however, the Ninth Circuit had found that the second situation was not a “showing” at all. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–61 (9th Cir. 2007) (explaining that Google did not “display” the photos in question within the meaning of the Copyright Act and instead merely communicated HTML instructions, the provision of which “is not equivalent to showing a copy”).

189. *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 10 (AEI–Brookings Joint Ctr. for Regul. Stud. ed., 2004).

190. *See id.*

191. *See id.* at 11.

192. *Id.*

group with homogenous interests, and will fare worse in the political process.¹⁹³ Put another way, the small interest group “will succeed in controlling government decision-makers much more effectively” than the large group.¹⁹⁴

Many scholars have relied on public choice theory to explain the expansion of intellectual property rights over time.¹⁹⁵ Public choice theory is especially useful in understanding the passage of new copyright laws that have extended the term of protection for new and existing copyrights.¹⁹⁶ The extension of the term of copyrights for existing works translates “almost entirely” to profits for copyright holders because they have already paid for the creation of their copyrighted work, giving copyright holders an incentive to help pass the legislation.¹⁹⁷ But what does the group opposed to the term extension stand to gain?¹⁹⁸ Nothing but a “competitive return” on works they have not yet created—a far cry from the “shower” of “economic rents,” or profits, that the copyright holders envision.¹⁹⁹ Another obstacle for the group opposed to the extension is its composition of diverse parties: industries that utilize copying, whose loss is immediate and significant, and the public, whose loss is in the future and spread out among many members.²⁰⁰

But public choice theory has failed to explain some of the nuances within copyright development. While it accounts for the “systematic imbalance” in copyright law that favors expanding copyright owners’ exclusive rights,²⁰¹ it does not account for the increased pace of rights

193. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 811 (2008).

194. Henry H. Perritt, Jr., *Cut in Tiny Pieces: Ensuring that Fragmented Ownership Does Not Chill Creativity*, 14 VAND. J. ENT. & TECH. L. 1, 76 n.397 (2011).

195. See, e.g., Kapczynski, *supra* note 193, at 820 (explaining that the “most widely accepted explanation” for the strengthening in intellectual property rights comes from public choice theory). In terms of quantifying the expansion of rights, Professor Landes and Judge Posner highlight an easy—but in their words, “very crude”—way of doing so: track the changes in the number of words making up the statutes. See LANDES & POSNER, *supra* note 189, at 2–3. This metric highlights the growth of copyright protections over time. *Id.*

196. See LANDES & POSNER, *supra* note 189, at 14–15.

197. *Id.* at 15.

198. *Id.*

199. *Id.* at 14–15.

200. See Kapczynski, *supra* note 193, at 820. The fact that the loss, or cost, to the public is distant means that some members might not even be aware they are at risk. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 L. & CONTEMP. PROBS. 173, 196 (2003).

201. Benkler, *supra* note 200, at 197. To be sure, alternative explanations exist for the strengthening of copyright rights, especially the breadth of those rights. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007). One such explanation is the unequal risk-reward structure—chiefly, the threat of “severe” infringement penalties—in copyright law that creates pressure on parties to seek

expansion in the last fifty years.²⁰² The rights of copyright holders have expanded dramatically since the 1970s,²⁰³ a decade that featured the passage of the Copyright Act of 1976—a fundamental revisioning of U.S. copyright law described at the time as “intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act.”²⁰⁴ Public choice theory also discounts the pushback from organizations that have grown to protect the public interest in copyright.²⁰⁵

B. Public Choice Theory and Statutory Interpretation

While public choice theory provides a way to understand the influence of special interest groups in setting U.S. copyright law, what effect, if any, that should have on how courts interpret the law is less clear. Some scholars have called for “close judicial scrutiny of legislation that expands exclusive private rights at the expense of the public domain” to correct for the lack of bargaining power held by the public.²⁰⁶ Professor Yochai Benkler in 2003 proposed that courts rely on the utilitarian nature of the IP Clause²⁰⁷ to counteract the legislative process, ultimately providing “a filter to limit Congress’s power to expand private

licenses for copyrighted work even when they may be able to use the work under the fair use doctrine. *See id.* Relying on fair use, however, has its drawbacks: it effectively involves “an intimidating and expensive” process that many users of copyrighted works would prefer to avoid. *Id.* at 889.

202. *See* Kapczynski, *supra* note 193, at 842.

203. *See* LANDES & POSNER, *supra* note 189, at 2 (using increases in word counts of intellectual property statutes as a measure of expanded rights). Professor Landes and Judge Posner point to a few reasons for the acceleration in the expansion of rights. Advances in technology have made digital copying fast, cheap, and easy, requiring copyright owners to push more aggressively for new legislation codifying their rights; this technological push provided the backdrop for the Digital Millennium Copyright Act in the 1990s. *Id.* at 21–22; *see also* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 383 (1995) (“Digitized information is easy to reproduce and less expensive to copy and distribute.”). But noneconomic factors help explain the quickened pace of rights expansion since the 1970s, according to Professor Landes and Judge Posner, especially “[f]ree-market ideology” that favored property rights and the decline in U.S. industrial competitiveness especially against countries like Japan. LANDES & POSNER, *supra* note 189, at 22, 24. This analysis, one of the most “sophisticated” accounts of public choice theory in intellectual property law, “ultimately treats ideology and context, and not material interests, as the fulcrum of change.” Kapczynski, *supra* note 193, at 843.

204. Litman, *supra* note 31, at 858–59 (quoting Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.U. L. REV. 477, 479 (1977)).

205. *See infra* note 213.

206. Benkler, *supra* note 200, at 196.

207. *Id.* at 176.

information rights.”²⁰⁸ In particular, he argued that copyright laws must fail judicial scrutiny when they remove works from the public domain, thus increasing economic rewards for copyright owners, without also increasing the incentives for creative activity.²⁰⁹ However, his article predated the Supreme Court’s decision in *Eldred v. Ashcroft* in which the Court rejected the petitioners’ attempt to do just this.²¹⁰

In the years since, the Supreme Court has proved reluctant to invalidate copyright laws, much like other economic laws, on constitutional grounds.²¹¹ Given that dynamic, Professor Christina Bohannon proposed a theory of statutory interpretation that would allow courts to counterbalance the influence of special interests in copyright law.²¹² She focused on statutory ambiguities that exist when private-interest provisions, like the exclusive right to prepare derivative works, conflict with public-interest provisions, like the fair use defense.²¹³ Under her theory, copyright infringement claims arising from statutory ambiguities should fail.²¹⁴ Professor Bohannon’s rule of narrow construction would guide courts to interpret statutory ambiguities against the special interest groups that bargained among themselves for the statute’s provisions,²¹⁵ fitting with the traditional contract theory that ambiguities should be construed against the drafter.²¹⁶ Her theory also properly emphasized copyright law’s constitutional statement of

208. *Id.* at 196–97.

209. *See id.* at 200–01.

210. 537 U.S. 186, 192–95, 204 (2003). Petitioners unsuccessfully argued that the IP Clause’s grant of exclusive rights for “limited Times” limited Congress’s ability to extend the term of copyright protections by 20 years for existing and future copyrighted works. *Id.*

211. Bohannon, *supra* note 69, at 568 (describing the Court’s decision in *Eldred* as involving a constitutional issue, which “rarely” leads to the striking down of intellectual property laws).

212. *Id.* at 569 (“My thesis is that statutory construction is superior to constitutional adjudication for combating special-interest influence over the Copyright Act, and that courts committed to faithful interpretation of the law can and should take this influence into account in construing the Act.”).

213. *Id.* at 594. The Copyright Act gives copyright owners the exclusive right “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2). The statute further defines “derivative work” as including a work that has been transformed. 17 U.S.C. § 101. At the same time, the Copyright Act provides that certain “fair” uses of copyrighted works do not infringe and lays out a four-factor test for determining when a use is “fair.” 17 U.S.C. § 107. Professor Bohannon argues that the exclusive right to prepare derivative works cannot exist alongside the first fair use factor—the purpose and character of the use—because courts have described this factor as inquiring into whether the defendant’s work is transformative. Bohannon, *supra* note 69, at 595 (explaining how a transformative use is strong evidence for a finding of fair use).

214. *See* Bohannon, *supra* note 69, at 633–34.

215. *Id.* at 614–17.

216. *Id.* at 614.

purpose—“[t]o promote the Progress of Science”—that in the case of copyright law serves as a strong indicator of legislative meaning because it empowers Congress to create copyright laws.²¹⁷

In a similar vein, Professor Sepehr Shahshahani argued that courts, including the Supreme Court, should adopt a “copyright rule of lenity” in which they presume no copyright infringement exists when the law is ambiguous as it relates to claims against new technologies.²¹⁸ His proposed presumption arose from a game theory model that recognized the influence of resource-rich special interest groups in creating copyright legislation.²¹⁹ By resolving ambiguities in favor of the party lacking resources, Professor Shahshahani argued that courts would establish a more equitable baseline that should improve the prospects for legislative compromise.²²⁰ In contrast, a finding of infringement against the party lacking resources would likely drive that party out of business, preventing it from participating in the legislative process.²²¹ Ultimately, his model emphasized that judicial rulings are but an intermediate step in the copyright policy making process; these rulings form the basis from which Congress, influenced by lobbying, revises and creates the final policy.²²²

V. THE CASE FOR A RULE OF LENITY

Courts often interpret ambiguous statutory language by looking to the statute’s purpose.²²³ The judicial search for statutory purpose occurs in copyright law because the Copyright Act provides brief but expansive

217. *See id.* at 617.

218. Sepehr Shahshahani, *The Role of Courts in Technology Policy*, 61 J.L. & ECON. 37, 57 (2018).

219. *Id.* at 38–40, 56–57.

220. *Id.* at 57.

221. *Id.* Take the example of *Aereo*, discussed *supra* Section II.B. After the Supreme Court held that its service violated the petitioners’ performance rights, *Aereo* shut down—“suspend[ing] operations a few days after the Court’s decision.” Shahshahani, *supra* note 218, at 55. It has not since been able to successfully lobby Congress. *Id.*

222. Shahshahani, *supra* note 218, at 38.

223. The Supreme Court relied on statutory purpose in 2014 when deciding whether a streaming television service violated the performance right. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 450 (2014) (“We also note that courts often apply a statute’s highly general language in light of the statute’s basic purposes.”); *see supra* Section II.B. To be sure, theories of statutory interpretation abound. The Court in recent decades has begun by examining a statute’s words, generally giving those words their ordinary meaning. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921–22 (1992) (“[J]ustices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration to the statutory text and its ‘plain meaning.’”).

rights that trigger overlapping definitions.²²⁴ Because the display right debuted in the latest version of the Copyright Act, district courts cannot glean purpose by looking at how the right changed over time, a technique the Supreme Court has employed regularly.²²⁵ Instead, district courts interpreting the display right have relied on legislative history to divine the statute's purpose or intent—which typically results in an expansive interpretation of the exclusive right.²²⁶

This Note argues that judicial reliance on legislative history when construing the display right is improper given the unusual role that special interest groups played in drafting the Copyright Act.²²⁷ Within the context of this statute only, deferring to legislative history where the statutory text is ambiguous or silent effectively hands more power to the special interest groups that already dominated the statutory drafting process of the Copyright Act, at the expense of members of the public.²²⁸ Instead, this Note advocates applying a rule of lenity when the statutory text of the display right does not resolve a question presented to the courts, as the text fails to do when considering *who* sufficiently displays a copyrighted work.²²⁹ Therefore, when considering whether an embedding party violates a copyright owner's display right, this rule of lenity prevents courts from automatically finding copyright infringement.

A. *Statutory Interpretation that Acknowledges Special Interests*

This Note combines and adapts theories of statutory interpretation that account for the influence of special interests in American copyright

224. See *supra* Section I.A.

225. See, e.g., *Aereo*, 573 U.S. at 441 (explaining that previous Supreme Court holdings construing the performance right provided one motivation for the updated Copyright Act in 1976); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354–55 (1991) (noting how the drafters of the Copyright Act of 1976 changed its language to make the originality requirement explicit, responding to “sweat of the brow” decisions).

226. See, e.g., *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993); see *supra* Section I.B.

227. See *supra* Section I.B. This Note does not seek to embroil itself in the debate between the textualist and purposivist schools of statutory interpretation, which scholars have discussed extensively. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006). Instead, this Note confines its discussion to the forces behind the enactment of the Copyright Act of 1976.

228. 17 U.S.C. § 106.

229. Courts interpreting the display right in cases involving the liability of internet providers in the 1990s similarly grappled with the concept of who displayed a work in question. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1366–67, 1371–73 (N.D. Cal. 1995); see *supra* Section III.A.

law.²³⁰ The proposed rule of lenity, which institutes a presumption against copyright infringement,²³¹ assumes that special interest groups are likely to continue lobbying for stronger copyright protections while the public's interest in accessing a work is likely to remain less influential or represented by groups with varied interests.²³² That this dynamic has resulted in the strengthening of copyright laws over time underscores that interest groups seeking stronger protections are able to effectively communicate their concerns to policy-makers when they consider judicial decisions unfair.²³³ Indeed, construing ambiguities in a statute against its drafter—here, special interest groups—comports with contract theory.²³⁴

230. This Note draws on the scholarship of Professor Bohannon and Professor Shahshahani. See discussion *supra* Section IV.B.

231. Professor Shahshahani called this theory a “copyright rule of lenity.” See *supra* note 218 and accompanying text. Professor Bohannon’s theory of statutory interpretation invokes a presumption against infringement. See Bohannon, *supra* note 69, at 613–14.

232. To be sure, the public has been able to organize and assert its views. See Kapczynski, *supra* note 193, at 827. Groups advocating for public use in copyright issues like the Electronic Frontier Foundation (“EFF”) and Public Knowledge have emerged and grown in the years since the Copyright Act passed. Timothy B. Lee, *Why Mickey Mouse’s 1998 Copyright Extension Probably Won’t Happen Again*, ARS TECHNICA (Jan. 8, 2018, 8:00 AM), <https://arstechnica.com/tech-policy/2018/01/hollywood-says-its-not-planning-another-copyright-extension-push/>. In 2012, EFF, Wikipedia, Reddit, and even big internet companies like Google, protested two controversial bills aimed at strengthening copyright laws: the Stop Online Piracy Act (“SOPA”) and the Protect IP Act (“PIPA”). Vlad Savov, *The SOPA Blackout: Wikipedia, Reddit, Mozilla, Google, and Many Others Protest Proposed Law*, THE VERGE (Jan. 18, 2012, 12:10 AM), <https://www.theverge.com/2012/1/18/2715300/sopa-blackout-wikipedia-reddit-mozilla-google-protest>. Wikipedia, for instance, blacked out its website for an entire day in protest. *Id.* The laws did not pass, and the groups that organized to defeat SOPA and PIPA might do so again or become part of the negotiations for future copyright legislation. *Fight over Internet Law SOPA Left a ‘Lasting Legacy’*, NBC NEWS (Jan. 19, 2014, 4:01 AM), <https://www.nbcnews.com/tech/internet/fight-over-internet-law-sopa-left-lasting-legacy-n11866> (“The biggest legacy of SOPA’s defeat, however, may be the groups of dedicated activists it drew out of the woodwork.”). For example, in announcing the Copyright Alternative in Small-Claims Enforcement Act of 2020 (“the CASE Act”), the U.S. Copyright Office described it as “the result of a negotiated process among a number of consumer and industry groups.” *Congress Passes CASE Act of 2020 and Law Regarding Unauthorized Streaming Services*, U.S. COPYRIGHT OFF. (Dec. 22, 2020), <https://www.copyright.gov/newsnet/2020/866.html> (emphasis added).

233. See *supra* Section IV.A. In discussing copyright revision in 2013, the Register of Copyrights described Congress’s key challenge as “keeping the public interest in the forefront of its thoughts, including how to define the public interest and who may speak for it.” Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 339 (2013).

234. Professor Bohannon made this observation in justifying her presumption against infringement. See *supra* notes 212–16 and accompanying text.

Not only has the influence of special interest groups strengthened copyright protections, but it has also narrowed the public's protections to two: the fair use doctrine—a costly and troublesome defense—and the fact and idea dichotomy.²³⁵ A presumption against copyright infringement within the display right will help level the playing field, which could lead to legislative compromises between more diverse groups of parties, including those representing the public interest.²³⁶ Viewed this way, the rule of lenity does not create final copyright policy.²³⁷ Instead, this rule honors the Supreme Court's recognition that Congress, not the courts, decides how to balance the incentives for authors with the benefit to the public that the Constitution requires.²³⁸

B. Rule of Lenity Applied to Embedding

The text of the Copyright Act gives a copyright owner the exclusive right to display her work publicly, attaching liability to parties that engage in unauthorized public displays.²³⁹ As it relates to embedding, an act of display involves showing a copy of a copyrighted work by means of a process.²⁴⁰ But the statutory text leaves a crucial component for liability unaddressed: how to determine *who* has shown the copy for the purposes of copyright infringement. Has the embedding party shown the copy or has the party that posted the copyrighted work to the internet shown the copy?²⁴¹ Because the Supreme Court has construed copyright law as recognizing both direct and secondary liability for infringement, this distinction is critical.²⁴² Thus, the statutory text reveals an ambiguity with respect to the display right.

235. Fair use and the fact and idea dichotomy are the only major limits on the copyright owner's monopoly on her works, and courts must consider them as "fundamental" policies of American copyright law. See Leval, *supra* note 69, at 1135–36. And the fair use affirmative defense is an "intimidating and expensive undertaking"—one that parties often seek to avoid. See Gibson, *supra* note 201, at 889 & n.12.

236. Shahshahani, *supra* note 218, at 57.

237. *Id.* at 38.

238. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

239. See 17 U.S.C. § 106(5).

240. See *id.* § 101 (defining "display").

241. See generally *id.*

242. While the text of the Copyright Act "does not expressly render anyone liable for infringement committed by another," the Court in *Sony Corp. of Am. v. Universal City Studios, Inc.* did not consider that absence of express language dispositive. *Sony*, 464 U.S. at 434–35. Just over twenty years later, the Court characterized the doctrines of secondary liability as well established, coming from common law. See *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005). Even Justice Scalia—perhaps the Court's most zealous textualist—treated the existence of the direct and secondary liability for copyright infringement as a given, despite its absence from the text of the statute. See *Am.*

The Copyright Act's drafting process—negotiations between special interest groups—counsels against relying on legislative history to discern congressional intent when faced with unclear statutory text, as many courts have done.²⁴³ Indeed, congressional intent may not have emerged, even when members of Congress reviewed the interest groups' drafts of copyright revisions, because “even the sponsors of copyright revision demonstrated little knowledge and few opinions about the substance of the bills they introduced.”²⁴⁴ Nor has the Copyright Office provided an authoritative interpretation of the display right as it relates to embedding in the form of rulemaking that would trigger deference to the agency interpretation.²⁴⁵

Applying a rule of lenity to the embedding context creates a bright-line rule—subject to rebuttal by Congress—that a party that embeds a copyrighted work has not violated the copyright owner's display right. Instead, the party that placed the photo on the internet has displayed it and may face liability for copyright infringement. And because a party's ability to post a photo online requires the use of a copy, the Ninth Circuit's server test fits with the rule of lenity: a party can only post a photo over which she has control, which means the copy must exist on her computer's server.²⁴⁶

In contrast, when faced with the display right's statutory ambiguity, the *Goldman* court attached liability to *any* party that took actions resembling those mentioned in the Copyright Act's legislative history, such as projecting an image on a screen by any method.²⁴⁷ The court found that embedding satisfied the statutory definitions of “display” and “publicly” because the embedding parties “took active steps” by including the embed codes for the copyrighted work in their webpage design—in other words, the parties used processes—that ultimately transmitted the

Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 452 (2014) (Scalia, J., dissenting); Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUSBLOG (Nov. 14, 2017, 10:48 AM), <https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/>.

243. See *supra* Section I.B.

244. Litman, *supra* note 31, at 865.

245. See Delaney, *supra* note 99, at 56 (explaining that the Copyright Office is a federal agency, which typically triggers *Chevron*-style deference); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (excluding informal agency interpretations in opinion letters from *Chevron* deference accorded to agency adjudications and notice-and-comment rulemaking). A search of the Copyright Office's rulemaking page did not uncover any final rules on the display right, let alone more specialized issues like embedding. See *Rulemakings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/> (last visited Mar. 2, 2022).

246. See Lee Burgunder & Barry Floyd, *The Future of Inline Web Designing After Perfect 10*, 17 TEX. INTELL. PROP. L.J. 1, 22 (2008).

247. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 589 (S.D.N.Y. 2018).

work to the public.²⁴⁸ This creates a slippery slope that would ensnare all forms of linking²⁴⁹—not just embedding—that make the internet so powerful.²⁵⁰ This approach would treat the steps to create surface and deep links, which allow users to navigate to the linked websites by clicking, the same as the steps to embed images; thus, a party that includes a deep link to another website containing infringing content would face copyright infringement liability.²⁵¹ If followed to its logical conclusion, this would imperil a critical component of the internet: references by linking.²⁵²

Analogizing images placed on the internet as existing on “the stage of a public auditorium” helps explain why applying a rule of lenity to embedding makes sense.²⁵³ The public auditorium’s stage is visible to those seated in the audience, which is everyone with internet access.²⁵⁴ A website designer who employs embedding acts as a conductor for the orchestra of images on the public stage, choosing to give an image a solo by embedding it in her webpage, or as Professors Burgunder and Floyd described, “illuminat[ing] materials that are already being displayed on the public stage.”²⁵⁵ In the case of a copyright owner who did *not* place the work on the stage of the public auditorium, the party that posts the photo for public consumption online—the individual users who uploaded the plaintiff’s photo to Twitter in *Goldman* or the websites that republished the plaintiff’s images without authorization in *Perfect 10*—is the party that displayed the photo for the purposes of the Copyright Act.²⁵⁶ Thus, analogizing the internet to a public auditorium helps courts determine *what party* has showed a copy of the protected work for the purposes of display right infringement.

Public policy also supports excluding embedding from copyright infringement liability. The news industry offers one example. News

248. *See id.* at 594 (“It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown.”).

249. Lian, *supra* note 32, at 248 (“If an embedded Tweet constitutes a process, is simple linking also part of the ‘process’ that may implicate the display and performance rights?”).

250. Strowel & Ide, *supra* note 7, at 404 (“The practice of linking web pages to others helps users, by means of successive references, to find the information that they are seeking, thus overcoming the difficulty of the incredible dissemination of information available on the Web.”).

251. *See id.* at 407–09 (summarizing the various forms of linking).

252. *See id.* at 404–05.

253. *See* Burgunder & Floyd, *supra* note 246, at 21.

254. *Id.* at 21–22.

255. *See id.* at 22.

256. *See id.* at 22 (“[O]nly the person who puts a copy on the public stage is making a display, while others merely point to it for customers to view.”); *see* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1154–55, 1162 (9th Cir. 2007).

publishers frequently embed social media posts with images in articles online as they seek to inform readers about current developments.²⁵⁷ The importance of referencing social media in news articles, regardless of whether it is accomplished by embedding, has grown as politicians and policymakers take directly to social media platforms to communicate their views.²⁵⁸ During breaking news events, like demonstrations or natural disasters, bystander footage posted to public social media platforms provides valuable information for the public.²⁵⁹ The Copyright Act itself recognizes the importance of news reporting, albeit in the preamble to the fair use defense to copyright infringement rather than in a straightforward exception to the exclusive rights.²⁶⁰

Embedding—like other types of linking that are so crucial to the functioning of the internet—helps achieve copyright law’s constitutional mandate to promote the progress of science.²⁶¹ Embedding helps disseminate information by highlighting content that a party has already posted publicly.²⁶² As the California district court explained in *Perfect 10*, its adoption of the server test and finding of no infringement attempted to maintain “the delicate balance for which copyright law strives—*i.e.*, between encouraging the creation of creative works and encouraging the dissemination of information.”²⁶³

CONCLUSION

The Copyright Act of 1976 gave copyright owners the right to display their copyrighted works publicly.²⁶⁴ This Note scrutinizes how courts have applied this new display right to a form of linking called embedding, which automatically presents a webpage visitor with elements, like photos, from another webpage.²⁶⁵ An examination of the statutory text reveals an ambiguity: the display right does not specify how to determine *who* displays the copyrighted work when multiple parties are involved,

257. Ginsburg & Budiardjo, *supra* note 12, at 422 n.22.

258. See *How Social Media Is Shaping Political Campaigns*, WHARTON SCH. OF THE UNIV. OF PA.: KNOWLEDGE@WHARTON (Aug. 17, 2020), <https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns/>.

259. See *supra* text accompanying notes 1–3.

260. See 17 U.S.C. § 107.

261. See U.S. CONST. art. I, § 8, cl. 8.

262. See *Golan v. Holder*, 565 U.S. 302, 326–27 (2012).

263. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 844 (C.D. Cal. 2006), *aff’d in part, rev’d in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007).

264. See 17 U.S.C. § 106(5).

265. See *supra* text accompanying notes 7–10.

like the embedding party and the party that posted the photo to the internet.²⁶⁶

The search for answers has led many courts to rely on the Copyright Act's legislative history.²⁶⁷ But such reliance on legislative history is improper because of the way Congress chose to draft the statute: through negotiations between special interest groups.²⁶⁸ Using legislative history as a tiebreaker entrenches the power of the special interest groups that essentially crafted the Copyright Act in the first place, at the expense of members of the public.²⁶⁹

This Note instead argues for courts to apply a rule of lenity, or presumption against infringement, to the display right when the statutory text is unclear. In doing so, courts act as a counterbalance to the legislative process in which special interest groups work to strengthen protections for copyright owners. As applied to the issue of embedding, the rule of lenity prevents courts from finding infringement of the display right.

266. *See supra* Section I.A.

267. *See supra* Section I.B.

268. *See supra* Section V.

269. *See id.*