

A QUARTERBACK, A SNAPCHAT, AND THE FUTURE OF  
COPYRIGHT LAW ON THE INTERNET

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I. INTRODUCTION

In 2016, Justin Goldman took a photo on Snapchat of Tom Brady—then the quarterback of the New England Patriots—and Danny Ainge—then the General Manager of the Boston Celtics—while in the Hamptons.<sup>1</sup> Goldman then uploaded the photo to his Snapchat story.<sup>2</sup> From there, the photo went viral, ultimately ending up on several Twitter account profiles and several news websites, including *The Boston Globe*, and *Breitbart News*.<sup>3</sup> The sports world began to speculate that Brady was meeting with Ainge in an attempt to entice National Basketball Association star, Kevin Durant, to come to play for the Boston Celtics.<sup>4</sup> While this may sound like the plotline of an ESPN “30 for 30,” it became the impetus for a case that sent shockwaves through copyright jurisprudence.

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\* J.D., 2022, Seton Hall University School of Law. B.A., *cum laude*, 2017, The George Washington University. I would like to thank my adviser, Professor Opderbeck, for all his guidance on this subject, as well as all the members of Volumes 45 and 46 of the *Legislative Journal* for helping this Comment come to fruition. Thank you also to all my friends and family who have supported me throughout my law school journey, specifically my parents, Tom and Lisa; my sister, Anna; my girlfriend, Shayna Koczur; my Covid-lockdown Zoom study group, Michael Wuest, Bryan Castro, and Hyisheem Calier; and my *Law Review* counterpart, Trip Connors. Special thanks to all of the Editorial Board of Volume 46 for your support both with this Comment and the administration of the Journal as a whole.

<sup>1</sup> Kai Falkenberg, *Settlement of Suit Over Tom Brady Photo Leaves Major Online Copyright Issue Unresolved*, FORBES (May 29, 2019, 4:46 PM), <https://www.forbes.com/sites/kaifalkenberg/2019/05/29/settlement-of-suit-over-tom-brady-photo-leaves-major-online-copyright-issue-unresolved/#663c845f5695>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

To use the Internet in the twenty-first century is to share content. There are two technological components to content sharing. The first is called “framing,” which refers to “the process by which information from one computer appears to frame and annotate the in-line linked content from another computer.”<sup>5</sup> This process is seen when one views a full-sized image on a search engine; it appears that the image is set on the website that the user is viewing, but it actually is mirroring information from a third site.<sup>6</sup> Framing can also be seen when one embeds content from a third source onto their own webpage or content, such as a retweet on Twitter.<sup>7</sup> The second technological component of content sharing occurs when the webpage sharing the framed content goes through a process called “in-line linking,” to instruct the browser to “incorporate content from different computers into a single window.”<sup>8</sup>

One need not have any social media accounts to come across framed content. It is commonplace now for online news articles to frame individuals’ Twitter posts to display reactions to topics including sports,<sup>9</sup> politics,<sup>10</sup> and even news from the President of the United States.<sup>11</sup> News sources will frequently frame social media posts into their own articles, allowing the viewer to observe the original content in the context of the news sources’ article; if the reader so desires, they may click on the framed content to go to the original source directly.<sup>12</sup> Even more common than framing content in articles is the use of news aggregation services, where a website or search engine compiles the links of various news sources and frames them within its own news

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<sup>5</sup> Nimmer on Copyright § 12B.01(A)(2)(b) (2020).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ali Thanawalla, *Giants, MLB Twitter Reacts to Dodger’s Game 4 Loss to Rays*, YAHOO!SPORTS (Oct. 25, 2020, 11:14 PM), <https://perma.cc/L2J6-EFUC?type=image>.

<sup>10</sup> Emma Specter, *Twitter Had Plenty of Thoughts on the Vice-Presidential Debate*, VOGUE (Oct. 8, 2020), <https://perma.cc/NZK3-FTU4?type=image>.

<sup>11</sup> Mike Isaac, *How Facebook and Twitter Handled Trump’s ‘Don’t Be Afraid of Covid’ Post*, N.Y. TIMES (Oct. 5, 2020), <https://perma.cc/9EKZ-9PCE?type=image>.

<sup>12</sup> Thanawalla, *supra* note 9; Specter, *supra* note 10; Isaac, *supra* note 11.

section.<sup>13</sup> News companies are certainly not the only Internet users that partake in framing and linking, as individuals on their own social media accounts frequently do the same. It is the essence of the modern Internet that content is easily distributed.

Naturally, the sharing of another author's works gives rise to copyright questions, such as whether it is an infringement of the author's exclusive rights to display their work through framing.<sup>14</sup> From 2007 until Goldman's Snapchat in 2016, courts generally held that in-line linking and framing were not infringements of copyright as long as the one sharing did not download the content and repost it as his or her own.<sup>15</sup> In recent years, however, this doctrine, called the "Server Test," has been called into question, culminating in the holding in Goldman's lawsuit that the news outlets that embedded tweets featuring Goldman's photo violated his copyright interests in the photo.<sup>16</sup> The dispute over the status of the doctrine invites the question of whether an individual can be held liable for embedding another's content, and its resolution may have serious implications for one of the most commonplace activities on the Internet.<sup>17</sup>

In Part II, this Comment will analyze the jurisprudence of the Server Test and its rise and fall in utilization. Part III will analyze the various approaches that may be employed in moving away from the test. Part IV will discuss the implied license doctrine and anti-circumvention measures, how they are used on the Internet, and how they can be used to balance the interests of original authors and those wishing to share content on the Internet. This Comment will conclude by arguing that a continuation of the implied license doctrine with anti-circumvention measures is the best way to address

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<sup>13</sup> See, e.g., *Search Results for "COVID-19"*, GOOGLE NEWS (Jan. 5, 2021, 9:23 AM), <https://perma.cc/KGH5-84CQ>.

<sup>14</sup> See generally 17 U.S.C. § 106 (providing the exclusive rights of a copyright holder, including the right to display the work).

<sup>15</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

<sup>16</sup> *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018). The Court found that it was immaterial that the embedded Tweet itself was on the server and belonged to an unrelated third-party; the defendants were still held liable for infringement. *Id.* at 586.

<sup>17</sup> Krista L. Cox, *Does Sharing a Link to Online Content Amount to Copyright Infringement?*, ABOVE THE LAW (Nov. 2, 2017, 1:25 PM), <https://abovethelaw.com/2017/11/does-sharing-a-link-to-online-content-amount-to-copyright-infringement/>.

copyrightability in the rapidly changing world of the Internet.

## II. THE SERVER TEST: *PERFECT TEN* AND *GOLDMAN*

The Server Test has its origins in the Ninth Circuit case, *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>18</sup> The plaintiff, Perfect Ten, was an adult entertainment company that presented photos of naked models.<sup>19</sup> The company offered a subscription that allowed users to access additional photos in a “member’s area.”<sup>20</sup> Image results on Google framed photos that were not in the member’s area, but still on Perfect 10’s website, on Google’s results page.<sup>21</sup> After a while, though, the results began to frame photos that were originally in Perfect 10’s member section but were posted without permission on third-party websites.<sup>22</sup> This meant that when a user clicked the thumbnail on the image results page, their browser would frame an image from the infringing website, not that of Perfect 10.<sup>23</sup> The issue presented to the Ninth Circuit was whether Google and Amazon—which had an image results page of its own powered by Google<sup>24</sup>—could be enjoined from “copying, reproducing, distributing, publicly displaying, adapting or otherwise infringing” photographs from Perfect 10’s website by linking to a third-party website that provides the full image without authorization.”<sup>25</sup>

In interpreting this question, the *Perfect 10* court discussed the Server Test, describing it as:

[A] computer owner that stores an image as electronic information and serves that electronic information directly to the user (‘i.e., physically sending ones and zeroes over the [I]nternet to the user’s browser’) is displaying the electronic information in violation of a copyright holder’s

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<sup>18</sup> *Perfect 10*, 508 F.3d at 1157.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Perfect 10*, 508 F.3d at 1157.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

exclusive display right. Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.<sup>26</sup>

In other words, linking and framing a photo, especially on a search engine, is not copyright infringement. If the person sharing the content, however, downloads the photo and then reposts it as their own, then he or she is infringing a copyright. This concept can be contextualized as the difference between retweeting an individual's Twitter post with a photo and saving the photo from the original post and attaching it to a separate, new tweet.<sup>27</sup> In applying the Server Test, the court examined the definition of "display,"<sup>28</sup> "copies,"<sup>29</sup> and "fixed"<sup>30</sup> under the United States Copyright Act of 1976 ("Copyright Act").<sup>31</sup> In examining these definitions, the *Perfect 10* court determined that

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<sup>26</sup> *Id.* at 1159 (citing *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006) (internal citations omitted)).

<sup>27</sup> See generally *Retweet FAQs: What is a Retweet?*, TWITTER (Jan. 6, 2021, 3:51 PM), <https://perma.cc/BQK9-2NZR>; *How To Post Photos or GIFs on Twitter*, TWITTER (Jan. 6, 2021, 4:41 PM), <https://perma.cc/8GAH-HXEZ> (providing instructions for posting photos on Twitter).

<sup>28</sup> 17 U.S.C. § 101 ("To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially").

<sup>29</sup> *Id.*

"Copies" are material objects, other than phonorecords, 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. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

<sup>30</sup> *Id.*

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, 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. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

<sup>31</sup> *Perfect 10*, 508 F.3d at 1160.

an image stored on a computer constitutes a copy of the work, pursuant to the Copyright Act and, as such, copying the work occurs when the data—the “ones and zeroes”—is transferred from the storage of one computer to the storage of another.<sup>32</sup> According to the court, Google did not infringe on Perfect 10’s exclusive right to display the full-sized versions of Perfect 10’s copyrighted photos because the photos were not fixed on a Google-owned and operated hard drive.<sup>33</sup> This is the Server Test in its purest form being used to exonerate a search engine for its framing.<sup>34</sup>

The Server Test was the prevailing standard for approximately a decade until the Southern District of New York addressed the issue of Justin Goldman’s photo of Tom Brady in the decision of *Goldman v. Breitbart News Network, LLC*.<sup>35</sup> There, in a claim for infringement of Goldman’s display rights, the plaintiff argued that “he never publicly released or licensed his photograph [of Tom Brady].”<sup>36</sup> The defendants did not save the original photo from Goldman’s Snapchat story on their own computers; the photo was stored on servers owned and operated by several social media sites, including Snapchat, Reddit, and, Twitter—which were not parties in the case.<sup>37</sup> The defendants only framed the plaintiff’s photo from those sources on their own respective websites.<sup>38</sup> Therefore, the defendants argued on

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<sup>32</sup> *Id.* at 1159–60.

<sup>33</sup> *Id.* at 1160; 17 U.S.C. § 106. The Server Test was only applicable to the full-sized versions of the photos that appear on the screen when a user clicks on a photo’s thumbnail. The thumbnails themselves were stored on Google’s servers, and thus constituted a prima facie case of infringement. The court, however, found that the thumbnails constituted a fair use under 17 U.S.C. § 107; *Perfect 10*, 508 F.3d at 1160, 1163–69.

<sup>34</sup> *Perfect 10*, 508 F.3d at 1162.

<sup>35</sup> *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, S.D.N.Y. 2018); Falkenberg, *supra* note 1.

<sup>36</sup> *Goldman*, 302 F. Supp. 3d at 586; 17 U.S.C. § 106.

<sup>37</sup> *Goldman*, 302 F. Supp. 3d at 586. Several individuals did save and repost the photo on their respective Twitter accounts. *Id.*; see, e.g., Bobby Manning (@RealBobManning), TWITTER (Jul. 2, 2016 3:25 PM), <https://twitter.com/realbobmanning/status/749323081953533952?lang=en> (providing an example of one of the Tweets). Several defendants settled after a dismissal of summary judgment, and the case was voluntarily dismissed for the two remaining defendants (Oath and Heavy.com) after Goldman determined that the matter was “no longer worth litigating.” Falkenberg, *supra* note 1.

<sup>38</sup> *Goldman*, 302 F. Supp. 3d at 587.

motion for partial summary judgment that they were “simply provid[ing] ‘instructions’ for the user to navigate to a third-party server on which the photo resided.”<sup>39</sup> As such, the defendants contended that the Server Test should apply and protect them against any claim of infringement.<sup>40</sup> Writing as amicus in support of the plaintiffs, various media photographic societies and associations wrote to the court warning that adoption of the broad Server Test would have a “‘devastating’ economic impact on photography and visual artwork licensing industries,” eliminate any incentives to pay a licensing fee as a website, and thus “‘deprive content creators of the resources necessary to invest in further creation.’”<sup>41</sup>

With the amici’s concerns in mind, Judge Forrest, writing for the *Goldman* court, rejected the defendants’ invocation of the Server Test, citing the string of scattered caselaw on the subject that illustrated a growing hesitancy by some courts to apply the test.<sup>42</sup> Then, Judge Forrest considered the legislative history, agreeing with the plaintiff that the Copyright Act’s plain language, coupled with subsequent jurisprudence from the Supreme Court, provides no basis for a rule that “the physical location or possession of an image [may be used] to determine who may or may not have ‘displayed’ a work within the meaning

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<sup>39</sup> *Id.* at 593.

<sup>40</sup> *Id.* at 590.

<sup>41</sup> *Id.* at 593. The organizations that wrote as amicus included: “Getty Images, the American Society of Media Photographers, Digital Media Licensing Association, National Press Photographers Association, and North American Nature Photography Association.” *Id.* at 593 n.5.

<sup>42</sup> *See id.* at 591–92 (citing *Flava Works, Inc v. Gunter*, 2011 WL 3876910, at \*4 (N.D. Ill. Sept. 1, 2011) (“In our view, a website’s servers need not actually store a copy of the work in order to ‘display’ it.”)), (citing *Live Face on Web, LLC v. Biblio Holdings LLC* 2016 U.S. Dist. LEXIS 124198 (S.D.N.Y. Sept. 12, 2016) (questioning whether there was valid authority to apply any version of the Server Test)), (citing *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (stating that the displaying “photographic images on a computer may implicate the display right, though infringement hinges, in part, on where the image was hosted” before denying summary judgment) (internal emphasis omitted)), (citing *MyPlayCity, Inc v. Conduit Ltd.*, 2012 U.S. Dist. LEXIS 47313 (S.D.N.Y. Mar. 30, 2012) (stating defendant cannot be liable because plaintiff’s server was what disseminated copies of its copyrighted games)), (citing *Pearson Education, Inc. v. Ishayev*, 963 F. Supp. 2d 239 (S.D.N.Y. 2013) (relying on *Perfect 10* to hold that standard text hyperlinks were not use of infringing content)).

of the Copyright Act.”<sup>43</sup> In support of its conclusion, the court looked to the definition of “display,” under Section 101 of the Copyright Act, finding the statutory language of “by means of any device or process” material to the operative text.<sup>44</sup> The same section of the Copyright Act defines a “device,” “machine,” and “process” to be “one[s] now known or later developed.”<sup>45</sup> The court found the definition to connote a broader interpretation of “display,” meaning that the *Perfect 10* court’s narrower reading was insufficient for modern uses of the Internet.<sup>46</sup> Instead, embedding a link on a website belonging to a defendant is an affirmative step that is taken to accomplish transmission.<sup>47</sup> Therefore, this constitutes a “process” under Section 101.<sup>48</sup>

The *Goldman* court finished its analysis by noting that parts of the Copyright Act contemplate that displaying a work could occur without possessing the work itself.<sup>49</sup> For example, Section 110(5)(A) exempts from liability small businesses that turn on radios or televisions for the entertainment of their customers.<sup>50</sup> Such an exemption being considered necessary, when it is clear that merely turning on a radio or television is not making or storing a copy, shows that the drafters of the Copyright Act did not believe that a copy must be made or stored in order to display a work.<sup>51</sup> Examining the alternative, Judge Forrest stated that even if making or storing a copy were required, the *Perfect 10* court only applied the Server Test in the context of Internet search engines.<sup>52</sup> Nothing suggests that this doctrine must be extended to any defendant that is not a search engine, such as a news website.<sup>53</sup> The court concluded that “when defendants caused the embedded Tweets to appear on their

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<sup>43</sup> *Id.* at 593.

<sup>44</sup> *Id.* (citing 17 U.S.C. § 101, (defining “display”).

<sup>45</sup> 17 U.S.C. § 101 (defining “device,” “machine,” or “process”).

<sup>46</sup> *Goldman*, 302 F. Supp. 3d at 593.

<sup>47</sup> *Id.* at 594.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 595.

<sup>50</sup> *Id.* (citing 17 U.S.C. § 110(5)(A)).

<sup>51</sup> *Id.*

<sup>52</sup> *Goldman*, 302 F. Supp. 3d at 595–96.

<sup>53</sup> *Id.* at 596. Judge Forrest, despite analyzing the alternative, reaffirmed her stance that the doctrine is not “adequately grounded in the text of the Copyright Act.” *Id.*



websites, their actions violated the plaintiff's exclusive display right; the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result."<sup>54</sup> As a result, summary judgment was granted in favor of Goldman, disrupting the copyright world's understanding of framed content.<sup>55</sup>

In 2019, the Northern District of California—within the same circuit as *Perfect 10*—further confounded the legal authority of the Server Test in the case of *Free Speech Sys., LLC v. Menzel*.<sup>56</sup> There, the original author, Peter Menzel, took photographs of weekly food purchases made by families around the world and published them in a book titled: *Hungry Planet: What the World Really Eats*.<sup>57</sup> He registered a copyright for the book.<sup>58</sup> Some of the photos were then posted on his website with licenses to media outlets that required “a textual credit or metadata reflecting the authorship and ownership.”<sup>59</sup> In other words, Menzel's license required that he receive photo credit if someone used his work. Free Speech Systems (“FSS”) is the owner of InfoWars, a right-wing conspiratorial news outlet run by Alex Jones.<sup>60</sup> FSS took the photos from Menzel's book and posted them on InfoWars' website in a post called “Amazing Photos Show What the World Really Eats.”<sup>61</sup> Menzel did not provide prior authorization for this post, and while InfoWars attributed the photographs to Menzel's book, it did not credit Menzel directly.<sup>62</sup>

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<sup>54</sup> *Id.* at 586.

<sup>55</sup> *Id.* at 596; Falkenberg, *supra* note 1.

<sup>56</sup> See *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162 (N.D. Cal. 2019).

<sup>57</sup> *Id.* at 1166.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1167.; see *About Alex Jones*, INFOWARS, (Jan. 7, 2021, 12:52 PM), <https://perma.cc/K86M-XRJF>; see also *Don't Get Fooled By These Fake News Sites*, CBS NEWS, (Jan. 7, 2021, 1:02 PM), <https://perma.cc/QTN6-9FTV>.

<sup>61</sup> *Free Speech Sys.*, 390 F. Supp. 3d at 1167.

<sup>62</sup> *Id.*

In denying FSS's motion to dismiss Menzel's claim of direct infringement, the *Menzel* court did not apply the Server Test, stating that it chose not to do so because FSS did not present any Ninth Circuit case that applied the test outside of the context of Internet search engines.<sup>63</sup> The court further explained that, even if the test were applicable in this context, the caselaw was insufficient to take judicial notice of the fact that the "underlying code" pointed solely to Menzel's website, and the images were not saved on the servers of InfoWars.<sup>64</sup> Therefore, the Server Test was unavailable to FSS as a defense against direct infringement.<sup>65</sup> *Menzel* is significant because it shows that the Server Test faces scrutiny in the very circuit it was conceived. Furthermore, it shows the weakened status of the doctrine's application in modern jurisprudence.

### III. REPLACING THE SERVER TEST

The arguments addressed by the amici in *Goldman* are contentious in the world of the Internet.<sup>66</sup> It is a challenge for legislators to find a way to balance the exclusive rights of authors with the interest of sharing content on the Internet.<sup>67</sup> This issue is not unique to the United States. The European Union ("EU"), for example, implemented measures that avoid forcing courts to run an analysis that would resemble the Server Test in its recent passage of the *Directive on Copyright and Related Rights in the Digital Single Market*.<sup>68</sup> This directive represents a view that is significantly more pro-author to the detriment of users and sharers.<sup>69</sup> Article 15, for example, requires that EU Member States shall "provide that the authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press

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<sup>63</sup> *Id.* at 1172.

<sup>64</sup> *Id.*

<sup>65</sup> The court did grant FSS's motion to dismiss on a contributory infringement claim. *Id.* at 1173.

<sup>66</sup> *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018).

<sup>67</sup> *Id.*

<sup>68</sup> Council Directive 2019/790, 2019 (L 130/92) (EC).

<sup>69</sup> *Id.* at art. 15, 17.

publications by information society service providers.”<sup>70</sup> Some have dubbed this provision the “link tax.”<sup>71</sup> Moreover, Article 17 requires that an online content sharing service provider must first obtain authorization from the authors before communicating the work to the public.<sup>72</sup> This directive represents a more rigid approach to enforcing copyright law in the digital sphere that puts the interests of the authors much more significantly before those who wish to share content.

The EU stated that a key purpose of the Directive is to achieve a “well-functioning marketplace for copyright,” supporting a “reinforced position of right holders to negotiate and be remunerated for the online exploitation of their content of video-sharing platforms” and “[r]emuneration of authors and performers via new transparency rules.”<sup>73</sup> While these policies seem to be fair on their face, they are actually counterintuitive, as users of the Internet often post content with the hope that it ultimately be shared.<sup>74</sup> More concerning, however, is the response from the service providers affected by this directive. When Articles 15 and 17 were first proposed, Google lobbied heavily against them, stating that the company was “very concerned” about the possible payment rule and would consider the possibility of shutting down Google News in EU countries because of it.<sup>75</sup> This would not be a first for Google, in 2014 the tech company terminated the service in Spain when the Spanish Government tried to pass a similar law.<sup>76</sup> Over three years after the passage of the Council Directive, link tax included, no news

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<sup>70</sup> *Id.* at art. 15(5). This prohibition does not extend to “private or non-commercial” uses of publications made by individual users. *Id.* at art 15(1).

<sup>71</sup> Luca Handley, *Google Warns Its News Site Could Shut Down in Europe If a New “Link Tax” Goes Ahead*, CNBC (Nov. 19, 2018, 12:04 PM), <https://perma.cc/8PCE-CGBU>.

<sup>72</sup> Council Directive, *supra* note 68, at art 17(1).

<sup>73</sup> European Comm’n, *Policy: Modernisation of the EU Copyright Rules*, EUROPEAN COMM’N, AN OFFICIAL EU WEBSITE (Jan. 7, 2021, 8:29 PM), <https://perma.cc/486M-QBH6>.

<sup>74</sup> Steve Olenky, *7 Ways to Up Your Chances of Going Viral on Social Media*, FORBES (Feb. 6, 2018, 3:59 PM), <https://perma.cc/TP6L-6UCN> (“[social media sites] have also made it substantially easier to develop a following by going viral”).

<sup>75</sup> Handley, *supra* note 71.

<sup>76</sup> Isobel Asher Hamilton, *Google is Prepared to Ruthlessly Shut Down its News Service If It Is Stung by Sweeping New European Internet Laws*, BUSINESS INSIDER (Nov. 19, 2018, 6:36 AM), <https://perma.cc/9SDG-MWYG>.

has emerged of Google closing its service.<sup>77</sup> Regardless, Google's concerns reflect a concern of many service providers, especially news aggregation sites, and show the overall issue with unapologetically pro-author policies.<sup>78</sup> Focusing too heavily on protecting the author's rights at the expense of those who are responsible for the dissemination of content online threatens to legislate away an important element of the Internet. If Google is any indicator, implementing a system such as the one used in Spain in the United States would likely be highly unpopular.

As *Goldman* and *Menzel* show, continuing adherence to the Server Test as controlling authority in framing cases is unlikely. An alternate solution is, therefore, necessary.

A. *Using the Digital Millennium Copyright Act's Safe Harbor*

Title II of the Digital Millennium Copyright Act ("DMCA") is called the Online Copyright Infringement Liability Limitation Act.<sup>79</sup> Adding one section to the Copyright Act, it has the purpose of encouraging authors to make their work "readily available" on the Internet and provides "reasonable assurance that they will be protected against massive piracy."<sup>80</sup> The new provision in the Copyright Act contains a safe harbor for Internet service providers that remove infringing materials upon receiving a valid "take-down notice."<sup>81</sup> For the safe harbor to shield the service provider, several elements must be met.<sup>82</sup> The DMCA was

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<sup>77</sup> Council Directive, *supra* note 68.

<sup>78</sup> See Mike Cherney, *Facebook Reaches Deal with Australia to Restore News*, WALL ST. J. (Feb. 23, 2021, 4:32 AM), <https://perma.cc/5ZL2-8BDJ> (discussing Facebook reaching a deal with Australia after pulling news from platform in the country after legislation passed requiring Facebook and Google to pay for content created by traditional media companies).

<sup>79</sup> Nimmer, *supra* note 5 at (C)(1).

<sup>80</sup> Nimmer, *supra* note 5 at (C)(1); see generally 17 U.S.C. § 512.

<sup>81</sup> 1 ASSOC.'S GUIDE TO THE PRAC. OF COPYRIGHT L. § 4.01 (2019); see 17 U.S.C. § 512(k)(1)(A) (defining "service provider" as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received").

<sup>82</sup> See 17 U.S.C. § 512(c)(1)(A). Protection from safe harbor requires service provider not having actual knowledge of the allegedly infringing material or activity using same, not being aware of facts or circumstances where the infringement is apparent, acting expeditiously to remove or disable access to material upon receiving knowledge or awareness of the material or activities, not

the United States' attempt in the 1990s to address the tension mentioned by *Goldman's amici*.<sup>83</sup> If service providers were granted some shields from liability, they would be less hesitant about allowing content to be posted on their websites and would be better equipped to avoid the “suing out of existence” issue that concerned *Goldman's amici* and Nimmer.<sup>84</sup>

Some commentators believe that the DMCA would be an effective replacement for the Server Test. One reason is that Section 512(d) of the DMCA would shield service providers from liability for “referring or linking users to an online location containing infringing material or infringing activity.”<sup>85</sup> This approach only works, however, if the courts interpret the DMCA to cover embedded hyperlinks that frame an author's content on the service provider's website.<sup>86</sup> It is not guaranteed that courts will automatically extend Section 512(d) to cover such links because the statute itself explicitly describes links that direct users away from the service provider's site.<sup>87</sup> Embedding infringing material on a service provider's website is what the defendants in *Goldman* had done.<sup>88</sup>

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receiving financial benefits directly attributable to the infringing activity if it can control the activity, and posting contact information for a designated agent in a public spot on the website and providing same information to the Copyright Office with appropriate identifying information. *Id.*

<sup>83</sup> See *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018); Nimmer *supra* note 5, at (C)(1) (ease of sharing digital works may give copyright owners pause before posting works on the Internet, but “having a profusion of copyrighted works available will not serve anyone's interest if the Internet's backbone and infrastructure are sued out of existence for involvement in purportedly aiding copyright infringement.”); see also Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (stating in preamble that DMCA was intended “to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty”).

<sup>84</sup> See *Goldman*, 302 F. Supp. 3d at 593; Nimmer, *supra* note 5 at (C)(1).

<sup>85</sup> Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?*, 42 COLUM. J. L. & ARTS 417, 445–46 (Summer 2019); see also, 17 U.S.C. § 512(d) (applying safe harbor for “infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory index, reference, pointer, or hypertext link”).

<sup>86</sup> Ginsburg, *supra* note 85, at 445–46.

<sup>87</sup> 17 U.S.C. § 512(d) (“referring or linking users to an online location containing infringing material or infringing activity”).

<sup>88</sup> *Goldman*, 302 F. Supp. 3d at 586. Judge Forrest did mention that there was

Another reason that commentators believe that the DMCA would be an effective replacement for the Server Test is due to the existence of Section 512(c), which provides a shield from infringement liability for the storage “at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.”<sup>89</sup> Some argue that “material” here should be interpreted broadly to include links.<sup>90</sup> This would provide a benefit to service providers such that they would have no proactive duty to seek out infringing material posted by users of their sites, absent constructive knowledge of the presence of infringing materials.<sup>91</sup> One weakness of this approach, however, is that it only addresses the liability of qualifying service providers.<sup>92</sup> A common social media user may still face liability, and while lawsuits against single social media users are rare because it is more costly than simply filing a take-down notice to the service provider,<sup>93</sup> this does not detract from the necessity of addressing the legal questions surrounding liability for all Internet users.<sup>94</sup>

Another issue with using the DMCA as a replacement for the Server Test is that it does not clarify what constitutes infringement; it only addresses shields for what would otherwise be infringement.<sup>95</sup> In *Perfect 10*, the court used the Sever Test to determine whether infringement existed in the first place.<sup>96</sup> It was not an affirmative defense.<sup>97</sup> With the DMCA as a

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the possibility that a DMCA defense may be successful in similar cases. *Id.* at 596.

<sup>89</sup> 17 U.S.C. § 512(c). Certain conditions must be met in order to qualify for this safe harbor; see 17 U.S.C. § 512(c)(1)(A); Ginsburg, *supra* note 85, at 460.

<sup>90</sup> Ginsburg, *supra* note 85, at 460.

<sup>91</sup> Ginsburg, *supra* note 85, at 461.

<sup>92</sup> Ginsburg, *supra* note 85, at 457; See also Jie Lian, *Twitter Users Beware: The Display and Performance Rights*, 21 YALE J. L. & TECH. 227, 263–64 (2019).

<sup>93</sup> Ginsburg, *supra* note 85, at 457–58.

<sup>94</sup> One commentator stated that under § 512(d), if the social media user shares content through links on platforms that do not cache copies of content that a user links to, the DMCA may provide a defense in “the unlikely claim of direct infringement.” Ginsburg, *supra* note 85, at 458. This, however, seems to be an overly complicated approach because a user is not likely to know what the platforms they are utilizing caches and what they do not cache.

<sup>95</sup> Lian, *supra* note 92, at 264–65.

<sup>96</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159–60 (9th Cir. 2007) (citing *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006)).

<sup>97</sup> *Id.*

replacement approach, there appears to be a presumption of infringement.<sup>98</sup> Additionally, the level of knowledge necessary to eliminate the availability of the safe harbor can be interpreted differently by the various circuits. This may impede the development of a swift and orderly replacement of the Server Test doctrine that proponents of this use of the DMCA support.<sup>99</sup>

While the DMCA protects authors from needing to file actions against each infringing user and can provide protection for those who, in good faith, host or refer users to places with infringing materials, it is insufficient as a basis for determining what constitutes infringement itself and threatens to be overinclusive in scope and effect. Additionally, even if it were able to definitively define infringement and constructive knowledge, questions remain as to whether courts would accept that Section 512(d) extends to embedded content in addition to referential links. Therefore, the DMCA is not the appropriate replacement for the Server Test.

### B. *The Fair Use Defense as a Solution*

One approach to replacing the Server Test could be the fair use defense, codified in Section 107 of the Copyright Act.<sup>100</sup> The defense permits certain uses that would otherwise be an infringement of an author's exclusive rights.<sup>101</sup> There are four factors that courts must weigh when confronted with a fair use issue:

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<sup>98</sup> Lian, *supra* note 92, at 263–64.

<sup>99</sup> Lian, *supra* note 92, at 264–65. Outside the purview of this Comment, this also threatens to insufficiently protect the First Amendment rights of those who embed content because the risk-averse service providers may have minimum internal standards set to determine the threshold required to remove content. *Id.* at 265. In so doing, the DMCA for the purpose of replacing the Server Test threatens to be overinclusive and remove large amounts of non-infringing content.

<sup>100</sup> 17 U.S.C. § 107 (“Limitations on exclusive rights: Fair use”).

<sup>101</sup> *Id.* (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>102</sup>

This defense was successfully argued in *Perfect 10*, where the thumbnails that were stored on Google's servers constituted fair use.<sup>103</sup> Although it was successfully raised in a similar issue to framing, using the fair use defense will not serve as an adequate replacement for the Server Test.<sup>104</sup>

First, the defense of fair use will be an inefficient means of addressing the issue of framing. As an affirmative defense that deliberately calls for a highly fact-specific analysis, relying on it to proactively define whether a specific act of framing is copyright infringement would encourage an act-first, ask-later environment that would not provide any structural remedy to the question.<sup>105</sup> Additionally, the fair use defense is unevenly interpreted among the circuits; reliance on a doctrine with such uncertainty in addressing the already confusing question of framing is unlikely to promote clarity.<sup>106</sup>

Second, even if the fair use doctrine were an accepted standard for determining whether framing is a copyright infringement, it is not guaranteed that mere embedding of

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<sup>102</sup> *Id.*

<sup>103</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163–69 (9th Cir. 2007).

<sup>104</sup> Recall that in *Perfect 10*, the Server Test was only applied to the photos that appeared once a thumbnail was clicked. *Perfect 10*, 508 F.3d at 1160, 1163–69. See generally Caroline E. Kim, *Insta-Infringement: What is a Fair Use on Social Media?*, 18 J. MARSHALL REV. INTELL. PROP. L. 102, 121 (2018) (calling for a restatement or comment to Section 107 to clarify fair use on social media).

<sup>105</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); Ginsburg, *supra* note 85, at 430 n.64; Ryan McNamara, *Technically, It Wasn't Me: How a Questionable Finding of Copyright Infringement May Chill Journalism in the Social Media Age*, 93 TUL. L. REV. 1259 (May 2019) (“The United States Supreme Court has directed lower courts to evaluate a defendant's claim of fair use on an ad hoc basis, which has led to unpredictable results.”).

<sup>106</sup> McNamara, *supra* note 105 at 1259.



another author's work would satisfy the elements of the defense. For instance, a principal analysis that is required for the defense is determining whether a copied work is "transformative."<sup>107</sup> Depending on the circuit, this can be a high bar. For example, in the Second Circuit—the circuit in which the Southern District of New York decided *Goldman*—the transformative standard frequently turns on whether the original work serves as "raw material' in the furtherance of distinct creative or communicative objectives."<sup>108</sup> While transformative use is not the only factor, and while it is possible for a copying to be fair use without being transformative, it can render the other factors less important.<sup>109</sup> Given this high bar and the different applications of the various circuits, it is unclear whether the mere recreating of a post on a third-party website, as was done in *Goldman*, would satisfy the elements of the defense. At best, it is a highly cumbersome approach for replacing the Server Test.

### C. Statutory Exemptions from Liability

While the DMCA and Fair Use defense prove to be ineffective replacements for the Server Test, other remedies, such as a carveout in the Copyright Act, remain. Some suggest adding such a carveout through an amendment to Section 110 of the Copyright Act.<sup>110</sup> Section 110 provides limitations on the performance and display rights enumerated in Section 106 of the Copyright Act.<sup>111</sup> Section 106 expressly lists Section 110 as a limiting section of its provisions.<sup>112</sup> As such, Section 110 states

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<sup>107</sup> *Campbell*, 510 U.S. at 579 (asking whether the work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'").

<sup>108</sup> *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006); *see also Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (determining that a work was transformative because it was "fundamentally different and new compared to [the original work]").

<sup>109</sup> *Campbell*, 510 U.S. at 579.

<sup>110</sup> 17 U.S.C. § 110 ("Limitations on Exclusive Rights: Exemption of Certain Performances and Displays.").

<sup>111</sup> *See* 17 U.S.C. § 106(5) (stating the copyright owner has the exclusive right to undertake and authorize the display of the copyrighted work publicly).

<sup>112</sup> *Id.* ("[s]ubject to sections 107 through 122").

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that it is “[n]otwithstanding the provisions of section 106.”<sup>113</sup> Therefore, this section would be a logical place to implement an exemption on the performance and display exclusive rights.<sup>114</sup>

One commentator suggested adding a clause to the end of Section 110.<sup>115</sup> It would read:

Notwithstanding the provisions of section 106, the following are not infringements of copyright . . .  
(12) performance or display of a work on a computing device in a digital network through a webpage embedding the work unless (A)(i) the owner of the work implements a technological protocol to prevent others from unauthorized access to the work and (ii) the operator of the webpage knows or has reason to know the work is protected by the technological protocol and bypasses the technological protocol to embed the work without the owner’s authorization; or (B) the operator of the webpage knows or has reason to know the embedded work is an infringing copy that is not exempted [under this section].<sup>116</sup>

Such a provision would create a presumption of legitimacy for all framing, rebuttable only if the embedded material circumvents technological measures and the webpage operator knew or should have known that such protocols were in place.<sup>117</sup> The principal issue with such an amendment to the Copyright Act is that it introduces a statutory knowledge element to the idea of infringement, which many courts consider to be a strict liability issue.<sup>118</sup> Adding a knowledge factor to a test that typically

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<sup>113</sup> 17 U.S.C. § 110.

<sup>114</sup> See Lian, *supra* note 92, at 269–70.

<sup>115</sup> See Lian, *supra* note 92, at 269.

<sup>116</sup> Lian, *supra* note 92, at 269–70.

<sup>117</sup> See Lian, *supra* note 92, at 271.

<sup>118</sup> See *Boehm v. Zimprich*, 68 F. Supp. 3d 969, 977 (W.D. Wis. 2014) (“Copyright infringement is a strict liability offense: a defendant is liable for infringement regardless of whether he intended to infringe.”); see also *Costar Grp., Inc. v. LoopNet, Inc.*, 106 F. Supp. 2d 780, 787 (D. Md. 2000) (“Distinction between negligent and intentional infringement is irrelevant for purposes of

foregoes that analysis threatens to create scattered results throughout the circuits, similar to the constructive knowledge requirement under the DMCA approach above. While the anti-circumvention element is a good approach to this issue, its function within this statute creates a rigid and bright-line policy for a very rapidly changing field.<sup>119</sup> Therefore, it should be coupled with the implied license doctrine, discussed below.

#### IV. Proposed Solution: Continuing the Use of the Implied License Doctrine and Incorporating Anti-Circumvention Measures

The Internet, like technology generally, is ever-evolving and, as such, should not be subject to bright-line rules that could become obsolete in only a few years. A judicial approach, coupled with statutory anti-circumvention measures, is a good way to balance the interests of authors and service providers while being able to adjust quickly to new technology.

An implied license, as the name suggests, is a license that is implied based on objective conduct required to appropriately enjoy the use of a work.<sup>120</sup> Usually, one who receives a copyrighted work through proper means “also receives an implied, nonexclusive license to copy, adapt, perform or display it to the extent necessary to accomplish the purpose for which the work was acquired from the copyright owner.”<sup>121</sup> Such licenses may be granted orally or when the “totality of the parties’

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liability”); *Educational Testing Serv. v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (“No need to prove anything about a defendant’s mental state to establish copyright infringement; it is a strict liability tort.”); *Innovation Ventures, LLC v. Ultimate One Distrib. Corp.*, No. 12-CV-5354 (KAM) (RLM), 2017 U.S. Dist. LEXIS 223536, \*43-44 (E.D.N.Y. Mar. 21, 2017) (“trademark infringement and copyright infringement are strict liability offenses, such that there is no requirement of knowledge or willfulness to establish liability. However, a finding of willfulness with respect to trademark or copyright infringement may warrant an enhancement in awarding statutory damages”).

<sup>119</sup> See discussion of anti-circumvention, *infra* note 150.

<sup>120</sup> U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACS, § 1008.3(D) (3d ed. 2017) (citing *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558 n.8 (9th Cir. 1990) (“finding an implied license where the author created special effects for a horror movie and stated that the footage would be used for this purpose in both a written agreement and in its application to register the footage”)).

<sup>121</sup> 1 Milgrim on Licensing § 5.41 (2022).

conduct” indicates an intent to grant such permission.<sup>122</sup> One common example of this doctrine is handing over architectural plans to a construction company to build a structure.<sup>123</sup> While there is contention about what judges should look for when they are examining the existence of an implied license, three elements have enjoyed varying acceptance throughout the circuits.<sup>124</sup> In general, they are: (1) a licensee calls for the creation of a work; (2) a licensor creates the work and delivers it to the licensee; and (3) the licensor intends that the licensee will copy and distribute the work.<sup>125</sup> The various circuits do not consider that to be a settled test, however, as some opt for the simple “totality of conduct” analysis.<sup>126</sup> The Fourth Circuit, for example, also analyzes whether the creators’ conduct alone indicates that the use of the material without the creator’s involvement or consent was permissible.<sup>127</sup> Other courts have held that there is no requirement of direct contact between the licensor and licensee for there to be an implied license.<sup>128</sup>

Some limiting characteristics of implied licenses are that objection can be used as a valid means to rebut the creation of such a license.<sup>129</sup> Similarly, failure to file a suit for infringement of copyright does not constitute the grant of an implied license.<sup>130</sup> Additionally, the scope of an implied license is typically narrow and restricted to the purpose that the licensor and licensee would reasonably expect to constitute the intended purpose.<sup>131</sup>

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<sup>122</sup> 3 Nimmer on Copyright § 10.03(7) (2022).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (citing *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 516 (4th Cir. 2002)).

<sup>128</sup> Nimmer § 10.03, *supra* note 122, at (7) (citing *National Ass’n for Stock Car Auto Racing, Inc. v. Scharle*, 356 F. Supp. 2d 515, 526–27 (E.D. Pa. 2005), *aff’d unpub.*, 184 Fed. App’x 270 (3d Cir. 2006) (“This court can find no case that injects a privity requirement into the implied license doctrine, and it declines to be the first to do so.”)).

<sup>129</sup> Licensing of Intellectual Property § 3.04 (2021).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (citing *Medeco Sec. Locks, Inc. v. Lock Tech. Corp.*, 199 U.S.P.Q. (BNA) 519, 524 (S.D.N.Y. 1976)).

In the context of the Internet, “a variety of factors may be relevant in determining whether a copyright owner published website content by impliedly authorizing users to make copies of that content.”<sup>132</sup> Such factors can include indications on the website that the work in question may be distributed by way of emailing, downloading, or saving; whether the author expressly reserved his or her exclusive rights in the work or expressly forbade reproduction or distribution of the work; whether barriers are deployed that prevent reproduction or distribution; and whether the author expressly permits certain activities, but not others.<sup>133</sup>

Following the ideas promulgated above, in *Field v. Google*,<sup>134</sup> the court held that “[c]onsent to use the copyrighted work need not be manifested verbally and may be inferred based on silence where the copyright holder knows of the use and encourages it.”<sup>135</sup> In this case, the plaintiff attempted to argue that Google was infringing on his exclusive rights of reproduction and distribution by allowing Internet users to access copies of his work that were stored in a repository.<sup>136</sup> In addition to finding estoppel and fair use, Judge Jones found that the implied license doctrine applied to this case because the original author “chose not to include the no-archive meta-tag on the pages of his site. He did so, knowing that Google would interpret the absence of the meta-tag as permission to allow access to the pages via ‘Cached’ links.”<sup>137</sup> Because the plaintiff knew that this was how Google works, and he knew that he could prevent such use through the meta tags on his website, his conduct would lead one to reasonably believe that a license was granted to Google for that use.<sup>138</sup>

The implied license doctrine is most threatened by the decision that was handed down in *Goldman* and would be similarly harmed by a move away from the Server Test in favor of

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<sup>132</sup> Compendium, *supra* note 120, at 1008.3(D).

<sup>133</sup> Compendium, *supra* note 120, at 1008.3(D).

<sup>134</sup> *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>135</sup> *Id.* at 1116.

<sup>136</sup> *Id.* at 1109.

<sup>137</sup> *Id.* at 1116.

<sup>138</sup> *Id.*

more aggressive pro-author policies, such as those seen in the EU.<sup>139</sup> It is, however, the best way to address the complexities of balancing the needs of the author with those of the content sharers because it allows judges to objectively look at situations to determine the conduct of the licensee and licensor. The largest issue, however, is the fact that implied licenses, being a function of contract law, are subject to the laws of individual states.<sup>140</sup> A more unified standard is needed.

Anti-circumvention is an idea that was discussed in the statutory exemption solution proposed above, as well as in *Field*.<sup>141</sup> It is the idea that an author who creates a technological barrier to his or her work to prevent it from being freely distributable and displayable can successfully rebut the argument that an implied license exists.<sup>142</sup> The author in *Field*, for example, knew that such a protection existed and that it would have prevented Google from indexing his page and contents had it been employed, but he chose not to use it.<sup>143</sup> The exact restriction was applying the meta-tag “robots.txt.”<sup>144</sup> Per Google’s developer website, Google uses “crawlers” to automatically discover and scan websites by jumping between links on the Internet.<sup>145</sup> The crawlers then index the links for framing on search result pages.<sup>146</sup> Using the “robots.txt” code in a website’s metadata allows a user to instruct these crawlers not to index certain parts of the website, or the website in its entirety.<sup>147</sup> For instance, if a company does not want the photos of employees on an “About Us” page to appear on Google Image results, it can use this code to prevent such use.<sup>148</sup> Because the plaintiff in *Field* did not use this mechanism, Google, through its crawlers,

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<sup>139</sup> Falkenburg, *supra* note 1.

<sup>140</sup> Licensing, *supra* note 129.

<sup>141</sup> See generally Lian, *supra* note 92.

<sup>142</sup> *Field*, 412 F. Supp. 2d at 1116.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1113–14.

<sup>145</sup> See generally Google Developers, *Overview of Google Crawlers (User Agents)*, GOOGLE SEARCH CENT. (Jan. 8, 2021, 4:10 pm), <https://perma.cc/XLE3-JNJW> (providing an overview of how Google crawlers work to discover and index search results).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

reasonably assumed that the entire page was fair to be indexed.<sup>149</sup>

It is not a radical idea to incorporate anti-circumvention measures into copyright law. Indeed, the Copyright Act already has such a measure in place.<sup>150</sup> Section 1201 provides that “no person shall circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>151</sup> The statute provides several exemptions from this that are set by the Librarian of Congress, which extend to “non-profit librarians, archives, and educational institutions” as well as certain law enforcement activities.<sup>152</sup> This was also a part of the DMCA, separate from the safe harbor provisions discussed earlier.<sup>153</sup> It is accompanied by various criminal and civil penalties as well.<sup>154</sup>

To circumvent under Section 1201, a prima facie case must be made that:

- (1) the defendant “circumvented a technological measure” by descrambling a scrambled work, decrypting an encrypted work, or otherwise avoided, bypassed, removed, deactivated, or impaired a technological measure, without the authority of the encrypted work’s copyright owner.
- (2) The encrypted work is within the scope of the DMCA, that is, protected under Title 17 of the United States Code.
- (3) The technological measure circumvented effectively controls access to the copyrighted work.<sup>155</sup>

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<sup>149</sup> *Field*, 412 F. Supp. 2d at 1116.

<sup>150</sup> *See* 17 U.S.C. § 1201(a)(1)(A).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at (d)–(e); *see also* APPENDIX C. *Report of Exemptions to the DMCA Anticircumvention Provision*, Section 1201, L. OF COMPUT. TECH. APPENDIX C (Dec. 2020) (providing one of the Librarian of Congress’ recent lists of exceptions).

<sup>153</sup> *See generally* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>154</sup> *See* 17 U.S.C. § 1203 (civil remedies include: injunction, impounding of violating device, damages, costs, attorney’s fees, and “remedial modification or destruction of [violating device]”); *see also* 17 U.S.C. § 1204 (criminal penalties include fines up to \$500,000 and imprisonment up to five years for first offense, and fines up to one-million-dollars and imprisonment up to ten years for each subsequent offense).

<sup>155</sup> David Polin, *Cause of Action Under Digital Millennium Copyright Act for*

Circumvention needed to give rise to a violation of Section 1201 requires more than merely using deception to gain access.<sup>156</sup> The intent of the DMCA in this provision is to prevent those who seek profit by decoding encrypted codes or helping others do so.<sup>157</sup> In other words, it is not circumvention under Section 1201 for someone to borrow a friend's Wall Street Journal login information to gain access to the opinion section, but it would be circumvention to decrypt and copy the contents of a DVD.<sup>158</sup> A certain level of technological bypassing is required under this particular section, such as "descrambling, decrypting, avoiding, bypassing, removing, deactivating, or impairing a technological measure."<sup>159</sup>

Because of the stringent requirements of Section 1201 specifically, it is not the best replacement for the Server Test. It shows, however, that this is an available remedy that the Copyright Act has employed in the past, and it can inform the continuing application of the implied license doctrine. For instance, when an author sets some type of technological barrier, such as a paywall, the author can rebut the existence of an implied license to share the original content.

Any replacement of the Server Test in copyright law should include a balanced application of the implied license doctrine, using anti-circumvention measures to determine whether the author's conduct warrants a reasonable belief that such a license to share and embed the content was given. If the author places any such measures, courts should interpret that as conduct rebutting the presence of an implied license. If a user then embeds content by circumventing that mechanism, courts can interpret that as infringement.

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*Unauthorized Decryption or Trafficking in Decryption Technology*, 18 CAUSES OF ACTION 2D 225 (Nov. 2020).

<sup>156</sup> Brent A. Olson, *DMCA—Anti-Circumvention Under § 1201(a)(1)(A)*, 20A1 MINN. PRAC., BUS. LAW DESKBOOK § 16B:59 (Nov. 2021).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (citing *I.M.S. Inquiry Mgmt. Sys. v. Berkshire Info. Sys.*, 307 F. Supp. 2d 532, 522, 532 (S.D.N.Y. 2004)).



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One way to enshrine this in the Copyright Act would be an amendment to the DMCA with a provision stating something such as:

Embedding an author's work online is not an infringement of copyright unless the individual framing third-party content circumvents a technological device or process pursuant to section 1201 or otherwise makes publicly available a work that is shielded by a technological device or process. The absence of any such device or process shall constitute the granting of an implied license.

The inclusion of this provision removes the intent and knowledge element discussed above to place the standard more in line with the strict liability spirit of copyright infringement.<sup>160</sup> If codified as part of the Copyright Act through the DMCA, this provision would prevent different circuits from coming to different standards, providing uniformity. Additionally, removing the knowledge requirement eliminates the need to determine what constitutes constructive knowledge.<sup>161</sup>

A critique of this approach is that copyright law in the United States has largely been an “opt-in” system where the onus is on the one seeking to use another's work to receive the authorization, and the author himself or herself has to affirmatively do something to give such permission, such as grant an express license.<sup>162</sup> Some critics of extending the implied license doctrine in such a manner state that it would allow a norm of infringement to become standard practice, something that became an issue with Napster in the early 2000s.<sup>163</sup> But the nature of the Internet is, by default, a place where users freely browse unless they are restricted from doing so by content

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<sup>160</sup> See Lian, *supra* note 92, at 269–71.

<sup>161</sup> See generally Lian, *supra* note 92, at 265 (noting how various circuits have interpreted the DMCA's knowledge requirement differently).

<sup>162</sup> Monika Isia Jasiewicz, Comment, *Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators*, 122 YALE L. J. 837, 843 (2012).

<sup>163</sup> Lian, *supra* note 92, at 268 n.268.

creators.<sup>164</sup> Google's use of crawlers is further evidence of this system.<sup>165</sup> To require an opt-in system for all Internet content is to rework the entire functioning of the Internet far beyond what happened in the more unique instance of Napster.<sup>166</sup> Moreover, it is a mischaracterization of copyright law in the United States to say that it is exclusively an opt-in system where the author has no responsibility for protecting his or her exclusive rights.<sup>167</sup> For example, to bring an action for infringement of a commercially distributed work, an author must have registered with the U.S. Copyright Office and paid various fees.<sup>168</sup> Concerns that a continuation of the implied license doctrine supplemented with anti-circumvention measures would unjustly add greater responsibility to content creators are misstated.

## V. CONCLUSION

This Comment discussed the Server Test as it was used in *Perfect 10* and its falling out of favor among various courts within the United States. With the likely demise of the test, there is a gap in American copyright law concerning the liability that individuals, especially service providers such as news aggregators, face when framing the content of another author on their website. Some solutions have emerged in other governments, such as the EU's link tax, which would require service providers to pay compensation to authors for the benefit of linking to their articles. This scheme, however, has caused companies like Google to threaten to leave the news market in Europe altogether and, as such, would likely be equally unpopular in the United States.

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<sup>164</sup> Jasiewicz, *supra* note 162, at 843.

<sup>165</sup> Jasiewicz, *supra* note 162, at 844; *see* Google Developers, *supra* note 145.

<sup>166</sup> Lian, *supra* note 92, at 268 n.268 ("such unauthorized access [in Napster's case] clearly fell outside the legally accepted social norm").

<sup>167</sup> Jasiewicz, *supra* note 162, at 846–47.

<sup>168</sup> Jasiewicz, *supra* note 162, at 847; 17 U.S.C. § 408(f)(3)–(4) ("Effect of untimely application. An action under this chapter . . . for infringement of a work preregistered under this subsection . . . shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in the proper form [within various timeframes then given].").

Other commentators have also proposed mechanisms that currently exist in American copyright law to determine liability for those framing content. The DMCA's safe harbor provisions, for example, are one such mechanism. As discussed above, however, these mechanisms are not inclusive of average users' legal liability, threaten overinclusion by overly cautious service providers of non-infringing materials, and fail to address the central question of the definition of infringement in this context. Based on these concerns, utilizing the DMCA's safe harbor provisions would be an ineffective replacement for the Server Test.

Other suggestions involve statutory rights. For instance, one commentator discussed above touched on the idea of anti-circumvention but relied on the idea of a knowledge requirement for conduct to constitute infringement. Knowledge, however, is difficult to define, especially on the Internet, and it is contrary to the spirit of copyright infringement in general. Therefore, while an effective response to the abandonment of the Server Test is likely to include statutory language, it should remove any knowledge elements and be purely strict liability.

While there have been various proposed solutions, continuing use of the implied license doctrine and using anti-circumvention as a guidepost is the best mechanism for addressing this gap left by the Server Test. Shifting the onus of responsibility for protection to the author posting the work online is a more manageable framework for courts to interpret whether a copying is authorized because it is simpler for an original author to expressly forbid the copying or to place anti-circumvention processes around the work. Anti-circumvention can be a unified framework that judges can use to determine whether an implied license exists and whether the copier infringed on the author's exclusive rights. If the DMCA were to be amended to include a provision that more specifically speaks to anti-circumvention in the context of linking and embedding, it could serve as a sufficient legal test to address this issue.