

Fifth Circuit Rejects “Server Test” and Adopts “Transmit Requirement” for Online Copyright Claims

By Michael J. Lambert | September 3, 2026

RELATED PRACTICES Intellectual Property Litigation, Media and Entertainment Litigation, Social Media, Copyright, Intellectual Property

Emmerich Newspapers, Inc. v. Particle Media, Inc., No. 25-60550, 2026 WL 2530247 (5th Cir. Aug. 27, 2026)

In a case of first impression, the Fifth Circuit declined to adopt the Ninth Circuit’s “Server Test” for evaluating copyright infringement of the public display right under 17 U.S.C. § 106(5). Instead, it adopted the “transmit requirement,” which asks who transmitted the copyrighted content and whether the transmission was permitted, rather than who stored the content on its server.

Applying that framework, the Fifth Circuit held that NewsBreak, a news aggregator website, did not directly infringe Emmerich’s display right by embedding Emmerich articles because Emmerich, not NewsBreak, transmitted the embedded content to users. NewsBreak merely directed users’ browsers to retrieve and display content stored on Emmerich’s servers.

The Fifth Circuit noted that although its test focuses on transmission and permission, while the “Server Test” focuses on storage and “fixation,” both tests “end up in a similar place: a website cannot transmit a work that it does not have.”

The Fifth Circuit also held that URLs may qualify as “copyright management information” (CMI) under the Digital Millennium Copyright Act (DMCA).

Background: Emmerich Newspapers publishes over 26 local news publications in the South. Particle Media operates NewsBreak, which aggregates and embeds news articles from other sources on its website and app.

Embedding, sometimes called “in-line linking,” is the practice of displaying content, such as social media posts, images or videos, on a webpage without copying or hosting the content on the webpage. Instead, HTML code in the webpage instructs a user’s browser to retrieve the content from the original source and display it within the webpage.

Emmerich claimed that NewsBreak (1) infringed its public display right by including thumbnail images of Emmerich articles in its newsfeed, which users could click to view within the frame of the NewsBreak app and (2) violated the DMCA by displaying full-text articles under NewsBreak URLs instead of Emmerich’s.

NewsBreak argued that embedding Emmerich’s articles was permitted under the “Server Test” because the articles were not stored on its server and only linked to Emmerich’s server. Under the “Server Test,” a website does not directly infringe the public display right by embedding a work because it is not storing the work on its own servers; it is merely providing HTML instructions that tell a user’s browser to retrieve a work stored on another server.

Media companies and content aggregators relied on the Ninth Circuit's reasoning as a legal shield for embedding. However, many decisions over the last decade have cast doubt on the viability of the "Server Test." See, e.g., *Leader's Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018). Courts have found embedding can violate the display right even if it does not violate the reproduction right.

Procedural Background: The Southern District of Mississippi partially granted and partially denied both parties' motions for summary judgment. On interlocutory appeal, the Fifth Circuit addressed two certified questions: (1) whether the "Server Test" governs copyright display claims online, and (2) whether URLs can constitute CMI under the DMCA.

Fifth Circuit's Decision: Judge Stephen Higginson, joined by Judges Carolyn King and Stuart Kyle Duncan, explained that the "Server Test" rests on "weak statutory footing" and that the analysis should focus on public transmission, not merely where content is "fixed." The Court adopted the "transmit requirement," which asks (1) where the transmission of content originates and (2) whether the source permitted transmission of content. When a webpage merely provides the platform through which users receive content transmitted by another party, it is not a direct infringer.

On the facts presented, NewsBreak did not directly infringe Emmerich's display right because Emmerich's server transmitted the content and controlled whether users could receive it. The Court found that URLs may qualify as CMI in certain circumstances.

Key Takeaways:

- **The "Transmit Requirement," not the "Server Test," applies in the Fifth Circuit.** The Fifth Circuit's two-part framework asks: (1) where the transmission of content originates and (2) whether the source permitted transmission of content. When the copyright owner's server sends the content and controls whether users receive it, a webpage that merely directs the user's browser — or hosts a platform that receives content transmitted from the copyright owner — has not itself transmitted or displayed the work and is not a direct infringer.
- **Different reasoning, similar outcomes.** The Fifth Circuit wrote that its reasoning "does not create friction" with other courts and that the transmit requirement will "likely provide similar results as the Server Test in many ways." Both tests "seek to limit the broad display right in accordance with the statutory text."
- **Embedding is not always permissible.** The Court cautioned that its holding "should not be understood to mean that embedding will always be permissible." The Copyright Act provides other safeguards to protect a copyright owner's rights, including the right to bring direct infringement claims based on other exclusive rights. Secondary liability may be implicated when content is transmitted from an unauthorized source.
- **Copyright owners can implement technical protections.** The Court explained that copyright owners can use paywalls, meta tags, HTML blocking and other technical measures to prevent unauthorized embedding. These controls help establish whether a transmission was permitted and provide owners a practical way to reject requests.
- **U.S. Supreme Court review is possible.** The varied approaches across circuits and district courts may increase the likelihood that the Supreme Court will eventually address the proper framework for considering the public display right online.
- **URLs may qualify as CMI — but there is a "high bar."** The Fifth Circuit found that URLs could constitute CMI under the DMCA. However, because URLs primarily serve a functional, locational purpose, they must "clearly convey" the statutory characteristics of CMI. Domain

names alone that do not identify the copyright owner, and website descriptors that do not include the title of a copyrighted work are insufficient.

Conclusion: Although it relied on a different statutory basis, the Fifth Circuit has joined the Ninth Circuit in finding that embedding, generally, does not infringe the display right. The Fifth Circuit’s “transmit requirement” protects embedding copyrighted content from a direct display claim *if* the transmission of the copyrighted work comes from a party who has rights to the work *and* authorizes transmission. Embedding could still run afoul of other exclusive rights, such as the reproduction and public performance rights, under certain circumstances. Copyright owners are not without recourse — they can use technical measures to prevent their works from being transmitted.

Ultimately, embedding remains risky, especially for national media companies and content aggregators that could be sued in one of the many jurisdictions that have not adopted the “Server Test” or “transmit requirement.” Until the Supreme Court sets a national standard or Congress amends the Copyright Act, this uncertainty will remain. As always, the best way to mitigate risk is to obtain written consent from a copyright holder or hyperlink to the content.