

DURIE TANGRI LLP
RAGESH K. TANGRI (SBN 159477)
rtangri@durietangri.com
JOSEPH C. GRATZ (SBN 240676)
jgratz@durietangri.com
ANNIE A. LEE (SBN 328802)
alee@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

DURIE TANGRI LLP
ALLYSON R. BENNETT (SBN 302090)
abennett@durietangri.com
953 East 3rd Street
Los Angeles, CA 90013
Telephone: 213-992-4499
Facsimile: 415-236-6300

Attorneys for Defendant
INSTAGRAM, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALEXIS HUNLEY, et al.,

Plaintiffs,

v.

INSTAGRAM, LLC,

Defendant.

Case No. 3:21-cv-03778-CRB

**DEFENDANT INSTAGRAM, LLC'S NOTICE
OF MOTION AND MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: January 28, 2022

Time: 10:00 a.m.

Ctrlm: 6

Judge: Honorable Charles R. Breyer

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE THAT on January 28, 2022, in Courtroom 6 on the 17th floor of the above court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Instagram, LLC (“Instagram”), by and through its attorneys of record, will and hereby does move the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted. This motion is based on the pleadings and papers on file in this action, the following memorandum of points and authorities, and any further papers, evidence or argument as may be submitted in connection with this motion.

Dated: November 19, 2021

DURIE TANGRI LLP

By: /s/ Joseph C. Gratz
JOSEPH C. GRATZ

Attorneys for Defendant
INSTAGRAM, LLC

TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	1
II. BACKGROUND	1
III. LEGAL STANDARD.....	2
IV. ARGUMENT	2
A. The Court’s Reasons for Dismissing Plaintiffs’ Original Complaint Apply with Equal Force to the First Amended Complaint	2
1. Plaintiffs’ legal arguments are contrary to Ninth Circuit law.....	3
2. Plaintiffs’ new factual allegations do not change the Server Test analysis.	3
3. That the Server Test is not mentioned in Instagram’s Terms of Use is not a “factual issue.”	4
B. Leave to Amend Would be Futile.....	5
V. CONCLUSION.....	5

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Adkins v. Apple Inc.</i> , 147 F. Supp. 3d 913 (N.D. Cal. 2014)	3
<i>Allen v. City of Beverly Hills</i> , 911 F.2d 367 (9th Cir. 1990)	5
<i>AmerisourceBergen Corp. v. Dialysist West, Inc.</i> , 465 F.3d 946 (9th Cir. 2006)	5
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	2, 3
<i>Bauer v. Tacey Goss, P.S.</i> , No. C 12-00876 JSW, 2012 WL 2838834 (N.D. Cal. July 10, 2012)	5
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	2
<i>Curry v. Yelp Inc.</i> , 876 F.3d 1219 (9th Cir. 2017)	2
<i>Farhang v. Indian Inst. Of Tech., Kharagpur</i> , 2010 WL 3504897 (N.D. Cal. Sep. 7, 2010)	3
<i>Gieseke v. Bank of America, N.A.</i> , No. 13-cv-04772-JST, 2014 WL 3737970 (N.D. Cal. 2014)	5
<i>Perfect 10, Inc. v. Amazon, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	1, 2, 4, 5
<i>Salameh v. Tarsadia Hotel</i> , 726 F.3d 1124 (9th Cir. 2013)	5

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court previously dismissed all of Plaintiffs' claims as barred by the Ninth Circuit's Server Test as articulated in *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007). *See* Order Granting Motion to Dismiss ("MTD Order"), ECF No. 27 at 2-3. This Court held that Plaintiffs failed to allege direct infringement for their secondary liability claims against Instagram because Plaintiffs had affirmatively alleged that third-party website embedders like BuzzFeed and Time do not store the copyrighted works on their own servers. *Id.* Plaintiffs' First Amended Complaint ("FAC"), ECF No. 28, does not contain **any** new factual allegations to change either that analysis or the result. Instead, Plaintiffs' new allegations consist of a slew of improper legal argument contrary to Ninth Circuit law, and new characterizations of the **exact same** technical embedding process alleged in the dismissed complaint.

If Plaintiffs want to challenge the wisdom of the Server Test, they can raise it with the Ninth Circuit. But Plaintiffs should not be permitted to waste the Court's limited resources by filing serial amended complaints that are subject to dismissal for the exact same reasons. Plaintiffs' FAC should be dismissed without leave to amend.

II. BACKGROUND

On May 19, 2021, Plaintiffs brought this action alleging secondary copyright liability against Instagram for Instagram posts that were embedded on third-party websites like BuzzFeed and Time. In their original complaint, Plaintiffs alleged that in an embedded post, it is Instagram's servers that host and transmit the allegedly infringing content, without the copyrighted works ever being saved on the servers of the third-party websites. *See* Compl. ¶ 34, ECF No. 1, ("'[E]mbedding' is a technical process by which a copyrighted work can be made visible and displayed **without the copyrighted work being saved on the server of the third-party website.**") (emphasis added); *id.* at. ¶ 35 ("Put another way, 'embedding' a photograph or video on a webpage is the act of a technical web coder adding a specific 'embed' code to the HTML instructions that incorporates a photograph or video, **hosted in this case on Instagram's server**, to be displayed on a third-party webpage that the third-party controls with regard to the other text, photos or videos around the embedded work.") (emphasis added). On September 17,

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.