

**United States Court of Appeals
for the Ninth Circuit**

PERFECT 10, INC.,

Plaintiff-Appellant-Cross-Appellee,

– v. –

GOOGLE, INC.,

Defendant-Appellee-Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, CENTRAL
DISTRICT OF CALIFORNIA, HON. A. HOWARD MATZ, USDC NO. CV 04-9484
AHM (SHX) CONSOLIDATED WITH CV 05-4753 AHM (SHX)

**BRIEF FOR *AMICI CURIAE* AMERICAN SOCIETY OF
MEDIA PHOTOGRAPHERS, INC., PICTURE ARCHIVE
COUNCIL OF AMERICA, INC., BRITISH ASSOCIATION OF
PICTURE LIBRARIES AND AGENCIES, INC., STOCK
ARTISTS ALLIANCE, THE GRAPHIC ARTISTS GUILD,
AMERICAN SOCIETY OF PICTURE PROFESSIONALS AND
NATIONAL PRESS PHOTOGRAPHERS, IN SUPPORT OF
PERFECT 10 ON THE ISSUE OF GOOGLE'S LIABILITY FOR
THE DISPLAY OF FULL-SIZE IMAGES**

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RULE 26.1 STATEMENT OF PROPOSED *AMICI CURIAE*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed *amici curiae*, American Society of Media Photographers, Inc., the Picture Archive Council of America, Inc., the British Association of Picture Libraries and Agencies, Stock Artists Alliance, Professional Photographers of America, the Graphic Artists Guild, the American Society of Picture Professionals and the National Press Photographers Association hereby state that none of these entities has a parent corporation, and that no publicly held corporation owns 10% or more of their respective stock.

Dated: New York, NY
June 6, 2006

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PRELIMINARY STATEMENT

The American Society of Media Photographers, Inc. (ASMP), the Picture Archive Council of America, Inc. (PACA), the British Association of Picture Libraries and Agencies (BAPLA) Stock Artists Alliance (SAA), Professional Photographers of America (PPA) the Graphic Artists Guild (GAG or the “Guild”), the American Society of Picture Professionals (ASPP), and the National Press Photographers Association (NPPA) respectfully submit this brief *amici curiae* in support of Plaintiff-Appellant and Cross-Appellee’s Perfect 10, Inc. (“P10”) Appeal.¹

This brief is limited to the district court’s denial, in part, of plaintiff’s motion for a preliminary injunction to enjoin Google’s in-line linking and framing of full-size images on Google’s own website. The district court held that Google’s use of technology to frame full size images on its website did not violate plaintiff’s exclusive right of display under the Copyright Act because the images framed by Google did not reside on Google’s servers. *Amici* believe that the district court erred in its determination that “framing” does not violate the copyright owner’s exclusive right to public display under Section 106 of the Copyright Act. *Amici* further believe that the court’s error will lead to increased infringements of copyrighted images for

¹ Pursuant to FRAP 29(a), all parties have consented to the filing of this brief by *amici curiae*.

which there will be no remedy, if this portion of the decision is permitted to stand. *Amici* take no position with respect to the other copyright issues raised in this appeal and cross appeal.

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The American Society of Media Photographers (originally the Society of Magazine Photographers and later the American Society of Magazine Photographers), is the leading trade association for photographers who photograph primarily for publication. ASMP promotes photographers' rights, educates photographers in better business practices, produces business publications for photographers and helps buyers find professional photographers. ASMP was founded in 1944 by a handful of the world's leading photojournalists and now has more than 5000 members around the world. The ASMP is recognized internationally for its leadership role.

The Picture Archive Council of America, Inc. is a non-profit trade association initially founded in 1951 and known under its trade name PACA. PACA is comprised of over 150 stock photography companies, individuals and other corporate entities across the world.

The British Association of Picture Libraries and Agencies is the UK trade association for picture libraries. It has over 400 members and represents the vast majority of commercial picture libraries and agencies in

the UK (collectively over 400,000 photographers). Companies range from small specialists to multinationals, collectively managing in excess of 350 million images.

The Stock Artists Alliance is the only non-profit trade association dedicated specifically to protecting the rights of stock photographers. Founded in 2001, SAA's over 500 members are professional stock photographers and small business owners represented by every major stock distributor worldwide. Primarily based in the United States, SAA also has strong international participation, with members from Afghanistan to Vietnam.

Stock photography (or illustration) is a term of art used to describe existing imagery that is available to users after obtaining a license and payment of a fee. Stock photography is a significant source of imagery for a variety of businesses. Stock photographs and illustrations are published in all print media, including books, magazines, and newspapers, and are used in promotional and advertising campaigns by advertising agencies on behalf of their clients. In addition to print, stock images are used in all forms of media including website designs, incorporated into documentary films, television and movies. Wherever an image is published, broadcast or displayed, if it was not created by an artist or photographer on assignment for a client, it

was likely obtained from a stock image archive. While there are no official figures, it is estimated that the stock image licensing industry is a \$2 billion industry world wide.

The Graphic Artists Guild is an independent labor union representing 2200 graphic artists and designers, illustrators, cartoonists, animators, website designers, surface designers, packaging designers, artists' representatives and art educators. The Guild was founded in Detroit, MI in 1969. The Guild promotes and protects the economic interests of its members. It is committed to improving conditions for all creators of graphic art and raising standards for the entire industry. The Guild is a national union that embraces creators at all level of skill and expertise who produce graphic art intended for presentation as originals or reproduction.

The Professional Photographers of America, the world's largest photographic trade association, represents some 17,000 photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising and art.

The American Society of Picture Professionals is a community of image experts committed to sharing their experience and knowledge throughout the industry. This non-profit association provides professional

networking and educational opportunities for those who create, edit, research, license, manage or publish pictures.

The National Press Photographers Association is an association of 9,500 news photographers and related professionals. NPPA is dedicated to the advancement of photojournalism, its creation, editing and distribution, in all news media. NPPA vigorously promotes freedom of the press in all its forms.

ASMP, BAPLA, GAG, PACA, PPA, SAA, ASPP and NPPA represent hundreds of thousands of photographers and other artists and manage the licensing of many millions of images. Copyright education and the enforcement of copyright is a significant aspect of the mission for all *amici*. Accordingly, *amici* are intimately involved in the protection of photographers' and other artists' interests, including by bringing claims against third parties for copyright infringement when photographs or illustrations are used either without a license or beyond the scope of the license terms. This involvement provides a keen awareness of both the practical and legal ramifications of the lower court's decision in this matter.

The *amici curiae* are united in their concern about the district court's failure to find that Google infringed the plaintiff's exclusive right to publicly display its images when Google framed full-size images belonging to the

plaintiff, extracted from other websites. This brief describes the court's legal error in analyzing the statutory right of public display and how the district court's decision will have a severe economic impact on the photography and visual artwork licensing industry if permitted to stand.

Visual artists have an inherent interest in ensuring that their works are protected by the copyright laws as written, and that the courts do not sacrifice the economic viability of the entire profession in the name of developing technology. The consequences of the court's error as to the public display right are truly enormous, and were explicitly foreseen by Congress when drafting the broad language of the statutory definitions concerning display. The court's novel and insupportably narrow definition of display cannot be allowed to stand.

The Internet has had a radical impact on how most industries market and sell their products and services, and the photographic and visual artwork industry has not been left out of this transformation. Before the Internet, physical transparencies and prints were aggregated and organized by subject matter in file cabinets which were accessed by in-house or free-lance researchers, fulfilling requests by publishers and advertisers. Now, photographs and illustrations are often stored in a digital format that can be searched online using keywords to find the appropriate images. When

purchased legitimately, licensors can control an image's use and the boundaries of the terms of the license agreement.

Amici are united in their belief that effective copyright enforcement and the ability to collect fees for unauthorized uses are essential in order to maintain the value of photographs and artwork and the ability of photographers and other artists to earn an income from their profession. *Amici* are further united in the belief that the lower court's decision to effectively eviscerate the Copyright Act's "display" right in the digital media context will seriously undermine the ability of artists and photographers to control the use and licensing of their artwork, and accordingly the ability of artists to earn a living – with the ill-deserved benefit accruing to one of the most profitable corporations in America.

SUMMARY OF ARGUMENT

The starting point for analyzing any allegation of copyright infringement is the language of the Copyright Act. With respect to Google's alleged infringement of the public display right in connection with the in-line links of the infringing full-size images, the court below completely abdicated its responsibility to apply the definitions set forth in the Act. Instead, the court reduced its analysis to a thinly-reasoned and seemingly

outcome-driven choice between a so-called “server test” urged on it by Google and a so-called “incorporation test” urged on it by Perfect 10.

The court’s decision nowhere measured Google’s conduct against the only relevant standard: Did Google “display” the full-size images, as that term is defined in the Copyright Act? Had the lower court done so, the result could not have been the same. As described below, the language of the Act, supported by its legislative history, demonstrates unequivocally that Google “transmits or otherwise communicates” the display of full-size images to the public by causing the display to recur on a user’s screen by means of a “device or process.” Google therefore violates the public display right in the full-size images, regardless of the physical location of the copies thus communicated. The lower court’s failure to apply the language of the statute, as written and as intended by Congress, was reversible error.

ARGUMENT

I. Under the Relevant Statutory Definitions, Google’s In-line Links Violate the Display Right

The Copyright Act provides the exclusive right to the owner of a copyright, “in the case of . . . pictorial [or] graphic . . . works . . . to display the copyrighted work publicly.” 17 U.S.C. § 106(5). The term “display a

work” is defined as “to show a copy² of it, either directly or by means of . . . any . . . device or process.” 17 U.S.C. § 101.

The Copyright Act states that to display a work “publicly” is “to transmit or otherwise *communicate a . . . 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.” 17 U.S.C. § 101 (emphasis added).

Section 101 further defines “transmit a display” as “to *communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent*” (emphasis added). Google’s showing of

² Section 101 defines “Copies” as “material objects . . . in which a work is fixed . . . from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101. In the online context, the image, residing on the server from which the transmission originates, is fixed and capable of being reproduced. Accordingly, that image qualifies as a “copy” of the work capable of being displayed. The display itself does not have to be fixed, just the original “copy.” For example, projecting an image over the airwaves onto a distant screen would be displaying it, though the resulting projection would not be “fixed.” See House Report at 62 (“Reproduction” under clause (1) of section 106 is to be distinguished from “display” under clause (5). For a work to be “reproduced,” its fixation in tangible form must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Thus, Congress recognized that the showing of images on a screen or tube could violate clause (5), even though it would not violate clause (1), if, as here, the resulting display were public).

images over the Internet allows members of the public to receive them in separate places at separate times, and is therefore a public display of the works. Accordingly, under the language of the statute, Google's act of communicating the display of a work "beyond the place from which it is sent" is itself a public display of the work, and indeed constitutes a "transmission" by Google, even if the "place from which it is sent" is not a Google server.

Thus, the remaining issue is whether *Google* "communicates" the display of the work, as used in the Copyright Act, when it frames or in-line³ links the work, even if the image resides on a third-party server. The statute clearly answers that question in the affirmative. A display is "communicated" whenever "images or sounds are *received* beyond the place from which they are sent" by means of any "device or process." 17 U.S.C.

³ As described by the plaintiff-appellant in its brief, when a user clicks on a reduced-size image displayed by Google, Google displays a second page, divided into a small upper portion and a large lower portion. The upper portion re-displays the reduced-size image accompanied by a link (titled "See full-size image") encouraging the user to view the full size image, along with the message: "Image may be scaled down and ***subject to copyright.***" The lower portion (or "window") displays a significant portion of the website from which Google retrieved the image, which in many cases, is a full size image. Through this process, known as "in-line linking" or "framing," Google displays a full-size infringing image from a third party website to a user who stays at google.com. Even though the website is technically hosted by a third party, the viewer is able to view the enhanced image extracted from the website in which the image is incorporated.

§ 101. If Google provides a “process” which allows this remote reception to occur, then Google communicates (and, by definition, transmits) the display.

The legislative history of the “display” definitions confirms that the term “communicate” was intended to reach conduct such as Google’s here, regardless of the location of the physical copy being displayed:

Under the definitions of “perform,” “display,” “publicly,” and “transmit” now in section 101, the 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*. Thus, for example: a singer is performing when he sings a song; a broadcasting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a community antenna service is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he plays a phonorecord embodying the performance or *communicates* the performance by turning on a receiving set.

H.R. Rep. No. 83, at 27 (1967) (emphasis added).

The 1967 House Report further confirms that a display is “communicated” whenever it is “made to recur,” stating that “any act by which the initial ‘performance’ or ‘display’ is transmitted, repeated or *made to recur* would itself be a performance or display under the bill.” *Id.* (emphasis added).

Accordingly, the drafters of the statute made the display right purposefully broad, to include “[e]ach and every method by which the images . . . comprising a . . . display are picked up and conveyed,” as long as the image reaches the public. H.R. Rep. No. 94-1476 at 64 (1976). The reason that the right was drafted so broadly was so it could encompass changing technology, specifically including the coming computer age, with networks of information storage and retrieval devices. In that regard, the House Report specifically states that the language was drafted broadly enough “to include all conceivable forms and combinations of wire[d] and wireless communications media, including but by no means limited to radio and television broadcasting as we know them.” *Id.* Specifically referring to computer systems, the report states that “[t]he display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.” *Id.* at 80.

Accordingly, Google’s activities here “display” the full size P10 images by providing a “process” through which the image is made to “recur” on the user’s screen. Under the statute, it is simply irrelevant whether Google also possesses or controls the physical copy from which the

communication is made. If a person can “communicate” a musical performance by turning on a radio, as Congress explicitly contemplated, then Google need not host an image on its own server in order to “communicate” a display of that image.

II. The Legislative History Confirms That Congress Intended Its Definitions to Apply In the Online Context

The drafters of the Copyright Act were well aware of the coming computer age, and the ability for data retrieval to change way in which copyrighted works were disseminated. They drafted the expansive statutory definitions of “display” and “transmit” with the express intention that these definitions would apply to activities such as Google’s.

A. The Congressional Committee Reports

As stated by the House Committee on the Judiciary, the intentionally broad language of the Copyright Act’s display right was drafted to cover all developing technologies which result in the work being displayed to the public. The committee report accompanying H.R. 4347 stated:

Although it was touched on rather lightly at the hearings, the problem of computer uses of copyrighted material has attracted increasing attention and controversy in recent months. Recognizing the profound impact that information storage and retrieval devices seem destined to have on authorship, communications, and human life itself, the Committee is also

aware of the dangers of legislating prematurely in this area of exploding technology.

In the context of Section 106, the Committee believes that, instead of trying to deal explicitly with computer uses, the statute should be *general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works.*

Hearings on S. 597 Before the Subcommittee on Patent, Trademark and Copyrights, of the Senate Comm. on the Judiciary, 91st Congr. 1st Sess. 79 (1967) (quoting the committee report accompanying H.R. 4347 at 53)(emphasis added).

Thus, the drafters of the Copyright Act recognized “the profound impact that information storage and retrieval devices seem destined to have on authorship [and] communications” *Id.* They designed a law that would be broad enough to reach new technologies, specifically including the information retrieval technology at issue in this case. The district court erroneously and inexplicably disregarded the statute and its history.

B. The Statements of the Register of Copyrights

The testimony of the Register of Copyrights during the hearings that led to the passage of the Copyright Act further confirms that the court below erred in its narrow interpretation of the display right. The Register of Copyrights testified that “the definition is intended to cover every transmission, retransmission, or other communication of a performance which reaches ‘the public.’” 1965 Supplementary Register’s Report on the

General Revision of the U.S. Copyright Law, at 25 (1965). This was not limited to only cover the originating source that may be storing the image, but also “any other transmitter who picks up his signals and passes them on.” *Id.* at 24. Thus, the Register made clear that “storage” of the work at issue was not considered to be a requirement under the language of the Act. Further, the “method” of locating and furthering the images was intended to broadly cover the changing technology. The Register stated that it was intended “to cover every method by which the images . . . can be picked up and conveyed to the public.” *Id.*

The breadth of this language was, in part, due to the awareness that the changing technology was going to make “showing” a copy of the work equally as important as reproduction of that copy, and thus an essential independent right of the copyright holder. As the Register of Copyrights stated:

Since the *Report* was issued in 1961 we have become increasingly aware of the enormous potential importance of showing, rather than distributing, copies as a means of disseminating an author’s work. In addition to improved projection equipment, the use of closed- and open-circuit television for presenting images of graphic and textual material to large audiences of spectators could, in the near future, have drastic effects upon copyright owners’ rights. Equally if not more significant for the future are the implications of information storage and retrieval devices; when linked together by communications satellites or other means, these could

eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images. It is not inconceivable that, in certain areas at least, “exhibition” may take over from “reproduction” of “copies” as the means of presenting authors’ works to the public, and we are now convinced that a basic right of public exhibition should be expressly recognized in the statute.

Id. at 20.

The Register’s testimony makes clear that the statutory right to display a work is intended to cover activities that are not necessarily also “reproduction” of “copies” of the work, as the lower court erroneously required. Rather, the language is intended to be broad, and cover any “method” by which the images are “picked up and conveyed to the public” regardless of whether the alleged infringer made any actual reproduction of the work.

C. The Industry Testimony Provided To Congress

The testimony from affected industries at the 1965 Congressional hearings leading to the statutory “display” language further confirms that the broad definitions were specifically drafted to reach the online environment. As the copyright counsel for the American Textbook Publishers Institute stated at the hearings, “a technological revolution in the world of authorship and book publishing is not imminent, is not prospective, but has already occurred. The computer age is here. The mechanisms of information

storage and retrieval are in use. The devices of photoduplication are commonplace, economically feasible, convenient and in constant use.” *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcommittee No. 3 on the H. Comm. on the Judiciary, 89th Congr. 1st Sess. 1420 (1965) (statement of Mrs. Bella L. Linden, Representing the American Textbook Publishers Institute). The witness further advised Congress that computers, when connected to the new “network” systems being built, could make “possible automatic location and reproduction either on a screen or on paper the pages of a book or journal located in a central storage miles away.” *Id.* at 1427.*

Another representative of the American Textbook Publishers Institute stated at the 1967 hearings that “It is contemplated that in these systems, *a central computer will store copyrighted works*, and that they will be transmitted by wire to hundreds of individuals’ console screens upon demand. In a system of this kind, the only copy exists in the computer. It is merely *displayed* on the console screen to be read at leisure by the user. The computer in effect becomes the library.” *Copyright Law Revision: Hearings on S. 597 Before the Subcommittee on Patents, Trademarks and Copyrights, of the Senate Comm. on the Judiciary, 91st Congr. 1st Sess. 85 (1967)*

(statement of Mr. Lee Deighton, Representing the American Textbook Publishers Institute)(emphasis added).

The same witness made clear that the breadth of the statutory definition was a vital consideration for supporters of the bill: “It is precisely because the bill before you is in fact ‘general in terms and broad enough to allow for future changes’ that book publishers can lend it their support. We would view with alarm any amendment which would permit the further encroachment by devices, machines, or processes – to use the language of the bill before you – ‘now known or later to be developed.’ The use of copyrighted material without permission and without payment in transmission by television or computer as previously proposed constitutes a serious threat to authors and publishers.” *Id.* at 84 (quoting the committee report accompanying H.R. 4347 at 53).

This testimony illustrates beyond peradventure that when drafting the 1976 Copyright Act, Congress was fully advised by the relevant constituent parties as to the coming age of “information storage and retrieval,” and drafted the language of the statute to apply specifically to the growing use of computer networks. With an awareness of the growing use of networks of information storage and retrieval devices, Congress very consciously drafted the broad display right language in the Copyright Act. By adopting such

broad display right language, Congress assuaged copyright holders' concerns over the ability of computers to make an "automatic location and reproduction . . . on a screen" of a copyrighted work. *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcommittee No. 3 on the H. Comm. on the Judiciary, 89th Congr. 1st Sess. 1427 (1965)*. Google's in-line linking is exactly the type of "automatic location and reproduction . . . on a screen" that concerned copyright holders at the time of the hearings, and that the Copyright Act display right was designed to address. *Id.*

III. The Location of the Displayed Copy Is Not Relevant Under the Copyright Act.

As the statutory language and legislative history demonstrate, the dispositive issue in defining display is the result: are members of the public able to view a work? The precise inner workings of the process which brings about this result were of no concern to Congress; indeed, Congress expressly excluded any such considerations from its broad definitions. The focus of the drafters was on the reception of the image by the public, and the possible harm that such distant viewing might do to the copyright owner, not the path of the signal from its point of origin to the end user, or the location of the physical copy from which the display is made to recur.

A recent U.S. Supreme Court decision applied a similar pragmatic approach to the question of online display of textual works in *New York Times Company, Inc. v. Tasini*, 533 U.S. 483 (2001). In *Tasini*, the Supreme Court held that certain online databases, though technically incorporating the entirety of various printed publications, presented them to the viewer as if they were isolated articles and thus the databases were not a protected “revision” of the original publications under § 201(c). Writing for a 7-2 majority, Justice Ginsburg adopted a practical, user-centered approach and focused upon how the work was presented to the viewer, not on the internal mechanics of storage and retrieval. The Court stated that “[i]n determining whether the Articles [are a privileged reproduction], we focus on the Articles as presented to, and perceptible by, the user of the Database.” *Id.* at 499. The Court stated the issue was “whether the database itself *perceptibly* presents the author’s contribution as part of a revision of the collective work.” *Id.* at 504 (emphasis added).

Similarly, here the Court should look to how the “display” of the Perfect 10 image is perceived by the user. Specifically, Google’s framing of the image perceptibly presents it to the user with a Google header. Accordingly it appears to be displayed on a Google webpage.

IV. The District Court's Analysis Is Inconsistent with the Statutory Scheme

Requiring the storage of the content in order to accomplish a “display” of the work, as the district court does, not only conflicts with the statutory structure which recognizes display right as an independent right of the copyright holder under § 106, separate from the reproduction right; it is also at odds with several other statutory provisions that contemplate actionable “transmissions” by persons who do not possess or control the tangible copy from which the transmission is made.

For example, Section 110(5)(A) creates an exemption to the display right, stating that it is not an infringement to display or perform a work by receiving it on a single home apparatus, unless various other conditions are met.⁴ This provision was passed by Congress to protect copyright owners following the United States Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), in which the Court, prior to the 1976 Act, found no infringement of copyright when a small, ‘fast-food’ restaurant broadcast musical performances that were overheard by the public

⁴ The Act states that, within certain limitations, the following is *not* an infringement: “communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless – (i) a direct charge is made to see or hear the transmission; or (ii) the transmission thus received is further transmitted to the public.” 17 U.S.C. § 110(5)(A).

during their short stays at the establishment. *Cf. Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1037 (D. Mont. 1990) (finding infringement under new Act where “sit-down” restaurant broadcast radio programs into its lobby and dining room).

The House Judiciary Committee’s Report on the § 110(5) exemption states:

[T]he clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers’ enjoyment, but it would impose liability where the proprietor has a commercial “sound system” installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.

H. R. Rep. No. 94-1476 at 87 (1976), *as reprinted in* 1976 U. S. Code Cong. & Admin. News 5701.

Clearly, Congress enacted this exemption because it recognized that without it, “commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers’ enjoyment,” would otherwise be displaying or performing the work, as the broad statutory definitions provide. However, under the lower court’s interpretation of “display,” which requires storage of the work, a proprietor’s turning on a radio or television for customers would not be

considered a display or performance, and therefore would not call for an exemption. The district court's interpretation of the definition of "display" simply cannot be reconciled with this statutory exemption.

The same logic applies to numerous other provisions of the Act, which exempt "transmissions" that the district court would not find to be transmissions at all. *See, e.g.*, § 111 ("secondary transmission of a performance or display"); § 118 ("performance or display" by noncommercial educational broadcast stations); § 119 ("secondary transmissions of a performance or display of a work embodied in a primary transmission"). Clearly the district court's assumption that a transmission can have only one actionable source, and that such source must only be the place where the physical copy of the work resides, is in error.

V. The District Court Ignores the Benefit Google Obtains

In addition to the district court's clear errors of statutory interpretation, its analysis ignores the practical, real-world consequences of permitting conduct like Google's in-line linking to continue. The *amici curiae* are extremely concerned that unforeseen, severe economic consequences to the visual artwork industry will result if unfettered in-line linking and framing of enhanced, large scale images is allowed to proliferate. The court's decision outlines for all website operators a way to

display large scale, high-quality images, branded as their own content, for no fee and with no legal risk. In short, the court adopts for the first time a technology driven and *technology specific* interpretation of the display right.

This interpretation rewards website operators who use technology to circumvent the actual “serving up” of full size images but who nonetheless obtain the commercial benefit of having the images enhance their own content. It also ignores the reality that a viewer will associate the large scale image with the website that framed the image and attribute the enjoyment of the image to the framing site and not the server site. This novel interpretation of “display” under the Copyright Act will only increase the unlicensed use of images to enhance the visual look of websites, and will decrease legitimate licensing, hurting both the image libraries and the artists whose works are distributed through them.

A third party, such as Google, which displays an image should not escape liability because of the technology it uses to make the display, when it clearly derives significant benefit from the activity. If Google wants to attract users to its site to view images, it must also accept the attendant risk of infringement, just as a restaurant owner does when it attracts patrons by playing music. One of the world’s most successful corporations cannot be heard to ask the court for a subsidy from the world’s artists.

VI. *Amici* Do Not Display Unprotected Online Images in Large Scale

While stock libraries and many artists display images on their websites for purposes of licensing, they rarely permit the display of large scale images without a proper license. Clients who desire to license images are generally permitted to browse and view small thumbnail images that bear identifying information such as the name of the artist, stock photo library or other source information. Clients may only use these thumbnail files under a limited "comp license," to be shown in sample form to the end client for possible selection in a final product. These low-resolution thumbnail images are usually watermarked and cannot be downloaded without entering into a license agreement. The license agreement defines the terms of use between the customer and the stock library. For example, a typical web use license permits the display of the image on the client's website, but only at a low resolution and limited to a pre-determined time period to reduce the risk of infringing uses.

Other stock libraries, photographers and other artists require each client to register online as a user, before the client can even access the database and browse thumbnails by entering in keywords to find images. These images are also displayed as watermarked, low resolution files, to

prevent infringement. Not until the license is actually purchased does a client have permission to access a higher resolution file without watermarks.

For a PACA member website, the database of browsable images looks materially different from the large scale images that Google or other visual search engines allow its viewers to enjoy through framing. For example, on the website of PACA and BAPLA member Getty Images, currently the largest provider of visual images on the Internet, a user cannot view large scale images without the associated identifying information, such as a caption, photographer credit, and search keywords. In the Google large scale view, an image is stripped of the identifying information and shown alone in a white Internet browser window.

While the Google image search database initially shows the image in thumbnail form, *amici* are most concerned about the option that permits viewers to view the enhanced image in large format.

As explained above, this enhanced view of the image is clearly a “display” as the term is defined by the Copyright Act. Google, or any other party that frames the image with its own content, is receiving the benefit of the enhanced image, without paying any license fee to the copyright owner or its representative. As described above, these images are specifically licensed by the copyright owner or stock library on its behalf, to enhance the

website and interest to the viewer. It is unlikely that a website without any graphic or visual images would attract many visitors.

Further, the large scale display of an image framed by a visual search engine interferes with the ability of *amici* to offer their clients exclusivity with respect to image usage. Many clients pay the stock library or artist a premium to prevent others from displaying or reproducing the same image during the period of exclusivity. This form of licensing is known as “rights managed” and requires the library or artist to maintain an accurate licensing history. The value of this exclusivity will be diminished if third parties such as Google can use the same images to sell advertising space through the AdSense Program by means of framing or in-line linking.

VII. The Right of Display Applies To the Enhanced Images Framed By the Visual Search Engine Regardless Where the Image Originated

The court’s adoption of the server test to determine if the display right has been violated, while perhaps convenient for technology companies that do not want to obtain permission for the use of visual images, ignores completely the market reality that the framing website, here Google, piggybacks on the use of the large scale image and essentially gets a free ride at the copyright holder’s expense. Contrary to the view of the district

court, *Opinion* at *21, this piggybacking of the third party website solely to view the large scale image is not copyright neutral.

If the “server” has taken a license for the image, that server is not infringing the display right of the copyright holder, and the search engine’s framing is the only infringing use. According to the district court, however, the framing search engine is free from any liability. Among its other errors, the district court’s decision ignores the fact that some of the server websites may have properly licensed the images that have been crawled and extracted by the visual search engine.

The server test created and adopted by the district court also disregards the fact that the viewer sees the display of the enhanced image as visually presented by Google. The identity of the server web site is not obvious nor is it intended to be obvious, as Google hides the server URL information within its own frame.

Also, the server test fails to acknowledge that in-line linking necessarily includes a display of a visual work on a new website. Analogies to a textual links are inapposite as a textual link functions more as an address or destination, pointing away from the website the user is viewing to another website. In contrast, in-line linking brings an image to the site the user is viewing regardless of whether the original person who uploaded the image

has given permission or not. Moreover, if a user right-clicks on the large scale image presented by Google, Google allows the image to be saved on the user's computer, printed, emailed, uploaded to a new website or set as background or wallpaper. Generally, none of these consumer uses are permitted without consent of the copyright owner and almost always require a license.

As photo libraries, photographers and other artists are in the business of licensing the display of images to website operators, unauthorized and unlicensed framing of images amounts to copyright infringement and a decrease in licensing income for those rightfully entitled to reap the rewards of their labor. The district court's decision maps out precisely how website operators can benefit from and commercially use the labors and works of artists without paying the rightful owners. The lower court's erroneous interpretation of the Copyright Act will necessarily have a dramatic and deleterious impact on those who create and license visual artwork.

CONCLUSION

For the reasons set forth above, the *amici curiae* respectfully request that this Court reverse those portions of the district court's order denying in part P10's Motion for Preliminary Injunction with respect to Google's in-line linking and framing.

Dated: New York, NY
June 6, 2006

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P.
32(a)(C) AND CIRCUIT RULE 32-1**

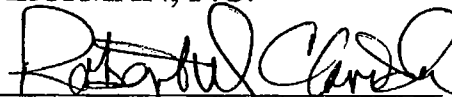
U.S. COURT OF APPEALS CASE NO. 06-55406

Consolidated with Nos. 06-55425 and 06-55405

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I
certify that the attached brief is proportionately spaced, has a typeface of 14
points and contains 6727 words.

Dated: New York, NY
June 6, 2006

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NELSON CABAN being duly sworn, depose and say that deponent is not a party to **1154 ST. LAWRENCE AVE. BRONX, NY 10472** 18 years of age and resides at the address shown above or at

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deponent served the within: **Brief for Amici Curiae American Society Of Media Photographers, Inc., Picture Archive Council Of America, Inc., British Association Of Picture Libraries And Agencies, Inc., Stock Artists Alliance, The Graphic Artists Guild, American Society Of Picture Professionals and National Press Photographers, In Support Of Perfect 10 on the issue of Google's Liability For The Display Of Full-Size Images**

upon:

SEE ATTACHED LIST

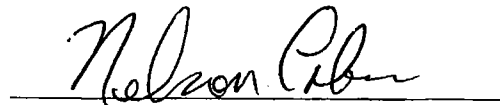
the address(es) designated by said attorney(s) for that purpose by depositing 2 true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on

JUN 06 2006



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