

Court of Appeals Docket No. 06-55406  
Consolidated with Docket Nos. 06-55425 and 06-55405

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**PERFECT 10, INC.,**

Plaintiff, Appellant, and Cross-Appellee

vs.

**GOOGLE INC.,**

Defendant, Appellee, and 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)

---

**FIRST BRIEF ON CROSS-APPEAL OF PLAINTIFF -  
APPELLANT/CROSS-APPELLEE PERFECT 10, INC.**

---

Russell J. Frackman (Bar No. 49087)  
Jeffrey D. Goldman (Bar No. 155589)  
Mitchell, Silberberg & Knupp LLP  
11377 West Olympic Boulevard  
Los Angeles, California 90064  
Telephone: (310) 312-2000  
Facsimile: (310) 312-3100

Daniel J. Cooper (Bar No. 198460)  
General Counsel,  
Perfect 10, Inc.  
72 Beverly Park Drive  
Beverly Hills, California 90210  
Telephone: (310) 205-9817  
Facsimile: (310) 205-9638

Jeffrey N. Mausner (Bar No. 122385)  
Berman, Mausner & Resser  
11601 Wilshire Boulevard, Suite 600  
Los Angeles, California 90025-1742  
Telephone: (310) 473-3333  
Facsimile: (310) 473-8303

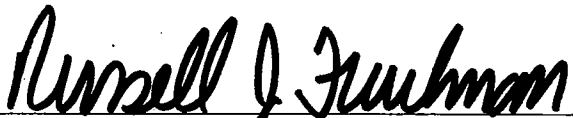
*Attorneys for Plaintiff/Appellant and Cross-Appellee Perfect 10, Inc.*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, plaintiff, appellant, and cross-appellee, Perfect 10, Inc., certifies that it has no parent or subsidiary corporations. Neither Perfect 10, Inc., nor any entity affiliated with it has issued shares to the public.

DATED: May 30, 2006

Respectfully submitted,

By 

Russell J. Frackman  
Jeffrey D. Goldman  
Mitchell Silberberg & Knupp LLP

Daniel J. Cooper  
General Counsel, Perfect 10, Inc.

Jeffrey N. Mausner  
Berman, Mausner & Resser,  
A Law Corporation

## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
I. STATEMENT OF JURISDICTION.....	3
II. STATEMENT OF ISSUES.....	4
III. STATEMENT OF THE CASE.....	5
IV. STATEMENT OF FACTS .....	5
A. P10’s Business and Intellectual Property.....	5
B. Google’s Business and Its Infringement of P10 Images.....	5
1. Google Copies P10 Images to Create “Thumbnails”.....	6
2. Google Displays and Distributes P10 Images.....	7
3. Google Receives Revenue From Infringing Websites.....	9
4. Google’s Web Search Results Return Millions of Links to Infringing Websites From Which Google Receives Revenue.....	10
5. Google Publishes Hundreds of P10 Passwords .....	10
C. Google’s Refusal to Respond to Notices of Infringement .....	11
V SUMMARY OF ARGUMENT .....	12
VI. ARGUMENT .....	14
A. Standard of Review .....	14
B. Google Directly Infringes P10’s Exclusive Display and Distribution Rights by Causing Full-Size Images to Be Displayed and Available for Downloading.....	14
1. The District Court Ignored the Copyright Act’s Broad Definition of “Display”.....	15
2. The District Court Erroneously Required Infringing Reproduction as a Prerequisite to Infringing Display.....	18

**TABLE OF CONTENTS (cont.)**

	<b><u>Page</u></b>
3. The District Court Substituted Its Own (Incorrect) Policy Judgment as the Rationale for a New Definition of “Display” .....	22
4. Google Distributes P10 Copyrighted Images by Making Them Available to the Public.....	28
C. Google Is Secondarily Liable for Infringement By Both Third-Party Websites and Google Users .....	28
1. Google Is Liable for Contributory Infringement .....	30
a. Google Has Knowledge of Direct Infringement...	30
b. Google Materially Contributes to Direct Infringement.....	31
(i) Google Provides the “Site And Facilities” for, and a Road Map to, Direct Infringement.....	31
(ii) Google Provides the Audience and Financial Support for Direct Infringers .....	36
(iii) Google’s Failure to Remove Infringing P10 Images After Notice Constitutes Contribution .....	37
(iv) The Construct of the DMCA Reflects That Google Contributes to Infringement..	38
(v) Google Materially Contributes to Infringement by Providing Confidential Usernames/Passwords.....	39
2. Google Is Vicariously Liable .....	40
a. Google Receives a Direct Financial Benefit From Direct Infringement.....	40
b. Google Has the Right and Ability to Control Infringement.....	41
(i) Google Exercises Absolute Control Over the Images and Links It Displays on Its Website.....	41

**TABLE OF CONTENTS (cont.)**

	<b><u>Page</u></b>
(ii) The Right and Ability to Control Does Not Require That a Secondary Infringer Be Able to Stop Direct Infringement Completely .....	45
(iii) The District Court Ignored Google’s Contractual Right to Control Infringement.....	48
D. The Preliminary Injunction Entered By The District Court Does Not Provide Effective Relief Against Infringement .....	49
CONCLUSION .....	52

## TABLE OF AUTHORITIES

Cases	<u>Page(s)</u>
<u>A&amp;M Records, Inc. v. Napster, Inc.</u> , 239 F.3d 1004 (9th Cir. 2001) .....	<i>passim</i>
<u>A&amp;M Records, Inc. v. Napster, Inc.</u> , 284 F.3d 1091 (9th Cir. 2002) .....	50, 51
<u>A&amp;M Records, Inc. v. Napster, Inc.</u> , 114 F. Supp. 2d 896 (C.D. Cal. 2000) .....	32, 34, 41
<u>In re Aimster</u> , 334 F.3d 643 (7th Cir. 2003) .....	24, 39
<u>Arista Records, Inc. v. MP3Board, Inc.</u> , No. 00 Civ. 4660, 2002 WL 1997918 (S.D.N.Y., Aug. 29, 2002).....	39
<u>Artuz v. Bennett</u> , 531 U.S. 4 (2000).....	22
<u>Baxter v. MCA, Inc.</u> , 812 F.3d 421 (9th Cir. 1987) .....	24
<u>Cable/Home Communication Corp. v. Network Productions, Inc.</u> , 902 F.2d 829 (11th Cir. 1990) .....	37
<u>Casella v. Morris</u> , 820 F.2d 362 (11th Cir. 1987) .....	35
<u>Columbia Pictures Indus., Inc. v. Aveco, Inc.</u> , 800 F.2d 59 (3d Cir. 1986) .....	31
<u>Columbia Pictures Indus., Inc. v. Redd Horne, Inc.</u> , 749 F.2d 154 (3d Cir. 1984) .....	37
<u>Costello Publishing Co. v. Rotelle</u> , 670 F.2d 1035 (D.C. Cir. 1981).....	28
<u>David v. Showtime/The Movie Channel, Inc.</u> , 697 F. Supp. 752 (S.D.N.Y. 1988) .....	17
<u>Educational Testing Serv. v. Simon</u> , 95 F. Supp. 2d 1081 (C.D. Cal. 1999) .....	23

**TABLE OF AUTHORITIES (cont.)**

	<b><u>Page(s)</u></b>
<u>Fonovisa, Inc. v. Cherry Auction, Inc.</u> , 76 F.3d 259 (9th Cir. 1996) .....	<i>passim</i>
<u>Fonovisa, Inc. v. Cherry Auction, Inc.</u> , 847 F. Supp. 1492 (E.D. Cal. 1994) .....	46
<u>Fonovisa, Inc. v. Napster, Inc.</u> , No. 3:01-CV-02669, 2002 WL 398676 (N.D. Cal., Jan. 28, 2002) .....	32
<u>Foti v. City of Menlo Park</u> , 146 F.3d 629 (9th Cir. 1998) .....	14
<u>Gershwin Publishing Corp. v. Columbia Artists Management, Inc.</u> , 443 F.2d 1159 (2d Cir. 1971) .....	36, 45
<u>Gorbach v. Reno</u> , 219 F.3d 1087 (9th Cir. 2000) .....	14
<u>Hard Rock Café Int’l (USA) v. Morton</u> , 1999 WL 717995 (S.D.N.Y. Sept. 9, 1999) .....	18
<u>Harper &amp; Row Publishers, Inc. v. Nation Enters.</u> , 471 U.S. 539 (1985).....	27
<u>Hotaling v. Church of Latter-Day Saints</u> , 118 F.3d 199 (4th Cir. 1997) .....	28, 30
<u>Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc.</u> , 593 F. Supp. 808 (D. Minn. 1984).....	17
<u>Kelly v. Arriba Soft Corp.</u> , 336 F.3d 811 (9th Cir. 2003) .....	18, 21, 25, 38
<u>Kelly v. Arriba Soft Corp.</u> , 280 F.3d 934 (9th Cir. 2002) .....	21
<u>Kelly v. Arriba Soft Corp.</u> , 77 F. Supp. 2d 1116 (C.D. Cal. 1999).....	45
<u>MAI Systems v. Peak Computer</u> , 991 F.2d 511 (9th Cir. 1993) .....	29

**TABLE OF AUTHORITIES (cont.)**

	<b><u>Page(s)</u></b>
<u>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,</u> 125 S. Ct. 2781 (2005).....	38, 45
<u>New York Times Co. v. Tasini,</u> 533 U.S. 483 (2001).....	19
<u>Nishon Keizai Shimbun, Inc. v. Comline Business Data, Inc.,</u> 166 F.3d 65 (2d Cir. 1999) .....	24
<u>Perfect 10, Inc. v. Cybernet Ventures, Inc.,</u> 213 F. Supp. 2d 1146 (C.D. Cal. 2001).....	20
<u>Playboy Enters., Inc. v. Frena,</u> 839 F. Supp. 1552 (M.D. Fla. 1993).....	19, 27
<u>Playboy Enters., Inc. v. Webbworld, Inc.,</u> 968 F. Supp. 1171 (N.D. Tex. 1997) .....	47
<u>Playboy Enters., Inc. v. Webbworld, Inc.,</u> 991 F. Supp. 543 (N.D. Tex. 1997) .....	20, 28, 42, 51
<u>Playboy Enters., Inc., v. Russ Hardenburgh, Inc.,</u> 982 F. Supp 503 (N.D. Ohio 1997) .....	20
<u>Playboy Enters., Inc. v. Starware Pub. Corp.,</u> 900 F. Supp. 433 (S.D. Fla. 1995).....	19
<u>PolyGram Int'l Publishing, Inc. v. Nevada/TIG, Inc.,</u> 855 F. Supp. 1314 (D. Mass. 1994).....	46
<u>RCA/Ariola, Int'l, Inc. v. Thomas &amp; Grayston Co.,</u> 845 F.2d 773 (8th Cir. 1988) .....	29, 48
<u>Religious Technology Ctr. v. Netcom Online Communication Serv.,</u> 907 F. Supp. 1361 (N.D. Cal. 1995).....	37, 48
<u>Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.,</u> 256 F. Supp. 399 (S.D.N.Y. 1966) .....	37
<u>Search King, Inc. v. Google Tech., Inc.,</u> No. Civ 02-1457, 2003 WL 21464568 (W.D. Okla., May 27, 2003) .....	41



**TABLE OF AUTHORITIES (cont.)**

	<b><u>Page(s)</u></b>
<u>Sega Enters., Ltd. v. MAPHIA,</u> 857 F.Supp. 679 (N.D. Cal. 1994).....	26
<u>Sega Enters., Ltd. v. MAPHIA,</u> 948 F. Supp. 923 (N.D. Cal. 1996).....	32
<u>Shapiro, Bernstein &amp; Co. v. H.L. Green Co.,</u> 316 F.2d 304 (2d Cir. 1963) .....	40
<u>Sony Corp. of America v. Universal City Studios, Inc.,</u> 464 U.S. 417 (1984).....	28
<u>Tillema v. Long,</u> 253 F.3d 494 (9th Cir. 2001) .....	22
<u>UMG Recordings, Inc. v. Sinnott,</u> 300 F. Supp. 2d 993 (E.D. Cal. 2004) .....	46
<u>United States v. Davidson,</u> 246 F.3d 1240 (9th Cir. 2001) .....	22
<u>Wall Data, Inc. v. Los Angeles County,</u> No. 03-56559, Slip Op. at 5373 (9th Cir. May 17, 2006) .....	24
<u>WGN Continental Broadcasting Co., v. United Video, Inc.,</u> 693 F.2d 622 (7th Cir. 1982) .....	17, 24
<u>Worldwide Church of God v. Philadelphia Church of God, Inc.,</u> 227 F.3d 1110 (9th Cir. 2000) .....	27

**Statutes**

17 U.S.C. §101.....	15, 16
17 U.S.C. §106.....	14, 28
17 U.S.C. §501(a).....	19
17 U.S.C. §502(a).....	52
17 U.S.C. §512(c)(3)(A).....	11

**TABLE OF AUTHORITIES (cont.)**

	<b><u>Page(s)</u></b>
17 U.S.C §512(d).....	2, 38, 51
17 U.S.C §512(i)(A) .....	38
17 U.S.C. §512(j)(1)(A).....	49
28 U.S.C. §1292(a)(1) .....	3
28 U.S.C. §1331.....	3
28 U.S.C. §1338(a).....	3

**Rules**

Fed. R. App. P. 4.....	3
------------------------	---

**Other Authorities**

3 M.&D. Nimmer, Nimmer On Copyright (2005 ed.) .....	21, 26, 31
H.R. Rep. No. 105-551(II) at 58 (1998) .....	38
H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966).....	16, 19
H.R. Rep. No. 94-1476 (1976) .....	16, 19
J. Ginsburg, “How Copyright Got a Bad Name for Itself,” 26 Colum. J. L. & Arts 61 (2002).....	22
Letter from Register of Copyrights, <u>reprinted in</u> Cong. Rec. at E812 (February 14, 2001) .....	19
S. Rep. No. 94-473 (1975).....	17, 19
Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. (1965).....	18

## INTRODUCTION

Plaintiff Perfect 10, Inc. (“P10”) appeals from the District Court’s denial, in part, of a motion for preliminary injunction seeking to prevent massive, ongoing copyright infringement. P10 publishes the magazine “Perfect 10” and owns the subscription website [perfect10.com](http://perfect10.com). Perfect 10 Magazine and [perfect10.com](http://perfect10.com) feature copyrighted images of beautiful “natural” models. ERG1268.<sup>1</sup> Defendant Google Inc. is the world’s third most visited website. ERG137¶18;ERG199. Under the guise of providing a “search function” and despite receiving extensive notice of infringement, Google *directly copies, distributes, and displays* thousands of P10’s copyrighted images, and publishes confidential usernames/passwords to P10’s website. Google aggregates, and makes available to Google users, P10 images by selecting, copying, and displaying reduced-size (“thumbnail”) images obtained from *infringing* websites, and by in-line linking and framing full-size images on Google’s own website. Google links the P10 images it copies and displays, as well as its text web search results, to infringing third-party websites that themselves display thousands of additional infringing P10 images, and from which Google often derives advertising revenue.

The District Court found Google’s copying and display of thumbnail images was likely infringing, and should be preliminarily enjoined. However, the Court found Google’s in-line linking and framing of P10’s full-size images was not a display because Google did not also copy those

---

<sup>1</sup> “ERG” refers to the Excerpts of Record for this appeal. “ERA” refers to the Excerpts of Record in the related Amazon appeal. The number immediately after “ERG” is the page number of the Excerpts of Record. Paragraph numbers are designated by “¶”; line numbers by “ln.” Certain portions of the ERG are highlighted for the Court’s convenience.

images onto its servers. The District Court also held that Google likely was not contributorily or vicariously liable for knowingly linking to infringing content.

In denying P10's motion as to Google's display of full-size images, the District Court failed to even cite the broad definition of "display" in the Copyright Act. Instead the Court substituted its own policy determination and novel "server" test, requiring that a defendant violate the *reproduction* right (by copying images onto its own server) as a necessary condition to finding the *display* right violated. This "bright line" test is without precedent and erroneously conflates the act of copying and storing images with displaying them. Regardless of where the images are stored, Google displays to users full-size P10 images from its own website by a technological process or device (in-line linking), plainly satisfying the statutory definition of "display."

The District Court also applied incorrect legal standards to P10's secondary infringement claims. As to contributory infringement, the District Court assumed Google had actual knowledge of infringement, but narrowly construed Google's contribution to the infringing activity by ignoring, among other things, Google's location, selection, and aggregation of thousands of infringing P10 images for its users, its provision of an audience for infringing websites, its business partnership with infringing advertising affiliates, and its knowing, unauthorized distribution of passwords and usernames providing access to P10's website. Moreover, by overlooking another form of contribution – Google's failure to disable access to infringing content after notice – the District Court upset the balance between search engines and copyright holders embodied in Section 512(d) of the Digital Millennium Copyright Act ("DMCA").

As to vicarious infringement, the District Court found that Google received a direct financial benefit from infringement, but incorrectly defined the ability to control infringement as requiring the ability to completely eliminate direct infringement on the Internet, rather than to limit the infringing images and links on Google's own index and system, over which Google admittedly possesses ultimate control.

The District Court's rulings are harbingers of enormous harm to copyright holders. P10's motion narrowly sought to stop Google's giveaway of *specified* P10 copyrighted images. Such relief is necessary to protect the copyrighted works that are the foundation of P10's business, but will not affect the non-infringing operation of Google's search engine.

#### **I. STATEMENT OF JURISDICTION**

The District Court had federal question jurisdiction under 28 U.S.C. §§1331 and 1338(a). ERG2. The Order Granting In Part and Denying In Part Perfect 10's Motion for Preliminary Injunction Against Google was entered on February 21, 2006, ERG1267-1314, and is reported at 416 F.Supp.2d 828. P10 timely filed its Notice of Appeal on March 20, 2006, pursuant to Fed.R.App.P. 4. ERG1315-1321. Google filed its Notice of Cross-Appeal on March 22, 2006. On May 9, 2006, the District Court entered a Preliminary Injunction Order, implementing its Order Granting In Part Perfect 10's Motion for Preliminary Injunction. ERG1358-1364. P10 timely filed a Notice of Appeal from the May 9 Order on May 22, 2006. ERG1435-1439. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

## II. STATEMENT OF ISSUES

1. Did the District Court err by holding that Google's in-line linking and framing of infringing P10 images on its own website was not an infringing "display" (or "distribution") under the Copyright Act?

2. Did the District Court err in concluding that Google does not "materially contribute" to infringement, where, *inter alia*, Google searches out, selects, organizes, aggregates, and makes available at one location, [google.com](http://google.com), thousands of P10 images from websites it knows are infringing, provides an audience for these infringing websites, organizes search results to favor its infringing advertising partners, refuses to disable access to infringing works after notice, and provides infringing images even when the websites from which those images were obtained no longer offer them?

3. Did the District Court err in concluding that Google does not have the "right and ability to control" infringement and, therefore, is not vicariously liable, where, *inter alia*, Google controls which images and websites it provides in its search results, in what order and with what frequency, can remove links to infringing websites and infringing images, provides advertisements to and shares revenue with infringing websites, and has the absolute contractual right to terminate its advertising partnership with the infringing websites?

4. Did the District Court err in finding that Google was not likely liable for knowingly publishing usernames and passwords which allow unauthorized access to all P10 images at P10's subscription website?

### III. STATEMENT OF THE CASE

This is an appeal from the Order entered on February 21, 2006, Granting In Part and Denying In Part Perfect 10's Motion for Preliminary Injunction Against Google, on its claims for copyright infringement. ERG1267-1314. On May 9, 2006, the District Court entered its Preliminary Injunction. ERG1358-1364 (from which P10 also has appealed.) A consolidated appeal is pending from the denial of P10's motion for preliminary injunction against Amazon.com and A9.com, which will be separately briefed.

### IV. STATEMENT OF FACTS

#### A. P10's Business and Intellectual Property

P10's well-known entertainment magazine "Perfect 10" and subscription website, perfect10.com, feature high-quality, unique photographs of "natural" models. ERG1296(footnote15),1268. P10 has invested over \$36,000,000, and substantial time and effort to create its magazine (which sells for \$7.99 per issue), website (which charges \$25.50 per month for access), and videos, and to produce approximately 6,000 high-quality copyrighted images. ERG135¶11;ERG136-137¶16. Each month, P10 also sells several thousand reduced-sized images for cellular phone download. Other than its cellular phone distribution partner's website, no third-party website is authorized to copy, display, or distribute P10's copyrighted images. ERG1269(ln14-16).

#### B. Google's Business and Its Infringement of P10 Images

Google.com is the third most visited website on the Internet. ERG137¶18,ERG199. Among other services, Google provides a "Web Search" and an "Image Search." ERG137¶¶19-20. Web Search, Google's

traditional search function, provides text listings for, and links to, webpages Google determines relate to search terms input by users. Through its newer Image Search, Google displays images that it selects and copies from third-party websites. ERG137-139¶¶19-22;ERG188-189¶144;ERG219,1044-1070. Google does not charge users for searching; it derives almost all its revenue by selling search-related advertising. ERG139¶24;ERG206-208,1272(ln15-16).

### 1. Google Copies P10 Images to Create “Thumbnails”

“Google admits creating and storing thumbnail copies of P10’s full-size images (found on third-party websites), as well as *displaying* those thumbnails as search results on Google Image Search...” ERG1275(ln10-13) (emphasis added). Google obtains these images from infringing websites through its proprietary crawler (“Googlebot”) and algorithm programmed to locate, select, and index images by analyzing “the text on the page adjacent to the image content, the image caption, and dozens of other factors to determine the image content.” ERG138¶21(c);ERG203-204. Google copies the infringing images and then stores reduced-size versions on its servers. ERG1275(ln10-13);ERG887(RFA24).

Google’s collection of images is not exhaustive; it represents only those images (and links) on the Internet that Google chooses to include in its index and database. ERG880. Google controls which images appear on its website as a result of searches on particular terms, and can delete from its database infringing images associated with specific URLs. ERG897 (RFA265),891-895,898-899. (“URL” stands for “Uniform Resource Locator,” a sequence of characters that determines the location of a webpage on the Internet.) Google also can refrain from linking to known infringing



websites or URLs. ERG895;ERG187-188¶¶141-142;ERG789-797.<sup>2</sup>

## 2. Google Displays and Distributes P10 Images

Through Image Search, Google displays and distributes, without consent, over 1,000 of P10's best copyrighted images. ERG139¶23; ERG908¶18. Google displays P10 images in several ways, as demonstrated in the audiovisual CD, "Google Experience." ERG219; see also ERG141-144.

**The first infringing page: "thumbnail" images.** As the District Court found, "Google does 'display' thumbnails of P10's copyrighted images." ERG1288(ln18-22),1275(ln10-13). When a user types the name of a P10 model into Google's search box, presses "enter," and then clicks "Images," Google displays up to twenty reduced-size P10 images on the user's computer screen. (Additional images may be displayed on additional pages.) ERG141-145¶¶27-37;ERG219-221;ERG1030-1070. These images are comparable to those available to perfect10.com subscribers, and are the same size and clarity as versions sold by P10 for download and display on cellular phones. ERG861¶6;ERG151-152¶¶54-56;ERG289-298. Indeed, Google *promotes* the downloading of such images on cellular phones and provides instructions to enable users to do so. ERG151¶55;ERG289-290.

### **The second infringing page: thumbnails plus full-size images.**

When a user clicks on a reduced-size image displayed by Google, Google

---

<sup>2</sup> Google's unauthorized copying of images for Image Search differs significantly from "Google Video," a search function enabling users to search for videos. Google claims videos become part of Google Video only if the owners of the rights affirmatively upload the videos to Google. ERG189-190¶¶146-148;ERA802-803 ("as the content owner, you decide whether you'd like to give away your video for free or charge a price you set for it."). Google reviews videos to "remov[e] ... obvious copyright violations...." ERG807.

displays a second page, divided into a smaller upper portion and a larger lower portion. The upper portion again 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.*” (emphasis added). When a user clicks the “See full-size image” link, the image appears in isolation.

ERG146¶39;ERG235.

The lower portion (or “window”) displays a page of the infringing website from which Google copied the image, which in many cases is a full-size image. ERG141-142¶¶27-30;ERG219;ERG145-146¶¶38-39;ERG233-235. Through this process, known as “in-line linking” or “framing,” Google displays a full-size infringing image from an infringing third-party website to a user who remains at google.com. ERG141-149¶¶27-47;ERG233-269. The District Court acknowledged “[t]here is no dispute that Google ‘in-line links’ to and/or ‘frames’” such infringing content, and that “Google’s in-line linking causes the appearance of [P10’s] copyrighted content on Google’s webpage, even though that content may have been stored on and served by third-party websites.” ERG1279(ln8-9);ERG1285(ln26-28). Both Google and the District Court described Google’s showing of images through in-line linking as a “display.” ERG1267(ln24-25);ERG138¶21(a);ERG203.

In-line linking also often enables users to navigate through and view different pages of the third-party website (displaying other infringing P10 images) while the reduced-size P10 image remains at the top of the screen, and while the user remains on Google’s website. ERG146¶40;ERG236-239;ERG148-149¶47;ERG265-269;ERG219.

**The infringing “cache” links.** When a user conducts a Web Search using the name of a P10 model, text listings of webpages are returned. With

most listings, Google provides a “cache link,” which Google says displays a “snapshot” of the third-party website when Google “crawled” it on a prior date. These “snapshots” often display full-size P10 images. ERG149-150, ¶¶48-51; ERG271-287; ERG1092-1104. Some full-size P10 images are displayed by Google’s cache for over a year and continue to be displayed even after being removed from the infringing website from which Google obtained them. ERG149-150 ¶¶50-51; ERG271-287.

### 3. Google Receives Revenue From Infringing Websites

Google links infringing P10 images to infringing websites with which Google has partnered and from which it receives revenue through its “AdSense” program. Google selects and places advertisements on third-party websites (which Google calls its “network,” ERG207) that are targeted to the websites’ content.<sup>3</sup> When those advertisements (frequently identified as “Ads by Gooooogle”) are clicked on, Google receives revenue from the advertisers which it shares with the infringing websites. ERG139-141 ¶¶24-25; ERG206-218. When Google users click on reduced-size P10 images displayed by Google, Google provides a window to an infringing website that frequently is a Google AdSense partner displaying full-size infringing P10 images *next to* advertisements provided by Google. ERG153-154 ¶¶61-62; ERG302-326. Google advertisements also are displayed adjacent to full size P10 images that Google caches, and on websites it links to that provide perfect10.com passwords. ERG155 ¶64; ERG349-352; ERG918 ¶46; ERG1137-1138. The District Court summarized the mutually beneficial financial arrangement between Google and infringing AdSense websites as

---

<sup>3</sup> Google’s AdSense contracts (before being amended after litigation commenced) provided that Google “reviews” AdSense websites and “monitor(s) sites after they begin running Google ads under this program.” ERG140 ¶25(d); ERG212.

follows: “If third-party websites that contain infringing copies of P10 photographs are also AdSense partners, Google will serve advertisements on those sites and split the revenue generated from users who click on the Google-served advertisements.” ERG1292(ln4-7). Google receives billions of dollars a year from its AdSense program. ERG139¶24;ERG207. The District Court determined that “*Google clearly benefits financially from third parties’ displays of P10’s photos*” and “*its financial benefit is direct.*” (emphasis added.) ERG1309(ln15-19).

#### **4. Google’s Web Search Results Return Millions of Links to Infringing Websites From Which Google Receives Revenue**

Google’s Web Search returns millions of links to Google AdSense websites that infringe P10 copyrights, even after P10 provided to Google repeated notice of infringement. ERG916-917¶¶41-44;ERG1125;ERG942-965. Google orders its Web Search results to favor Google AdSense partners.<sup>4</sup> Google has absolute control over the links in its Web Search index and database, and can prevent URLs from appearing in Web Search results. ERG880,897(RFA265);ERG891-895,898-899.

#### **5. Google Publishes Hundreds of P10 Passwords**

Paid subscribers to perfect10.com receive a unique username and password to access P10’s copyrighted images. These username/password

---

<sup>4</sup> For example, 953 of 988 Web Search results (96.5%) for P10 model “Alena Drazna” linked to infringing Google AdSense partners; 966 of 994 Web Search results (97%) for P10 model “Nathalie de Nostuejouis” linked to infringing Google AdSense partners. No results linked to perfect10.com. ERG155-159¶¶65-75;ERG355-375;ERG917¶44;ERG942-965,1126-1130;ERG919¶48;ERG1140-1145. Google provides more than 100 times as many links to certain infringing Google AdSense websites as Yahoo! or MSN. ERG156-157¶¶69-70;ERG367.

combinations are provided without authorization by third-party hacking websites, to which Google provides thousands of links, including to Google advertising partners. Through Web Search, Google also publishes hundreds of P10 username/password combinations on [google.com](http://google.com) despite repeated notice from P10 that Google is providing unauthorized access to [perfect10.com](http://perfect10.com). ERG178-181¶¶119-126;ERG747-780;ERG918¶46; ERG1137-1139.

**C. Google's Refusal to Respond to Notices of Infringement**

Commencing May 2004, P10 sent Google 37 detailed notices of infringement, covering more than 7,000 infringing URLs. ERG904¶10; ERG159-163¶¶76-89;ERG377-568. These notices identified specific infringing images Google displayed, specific infringing webpages to which Google linked, and the source of the P10 images. ERG161-162¶86; ERG166¶97. Although Google's direct display and distribution of infringing images by Image Search does not qualify for safe harbor under the DMCA (which applies to "referring or linking users" to another "online location"), P10's notices complied with DMCA "take down" requirements. 17 U.S.C. §512(c)(3)(A),(d). ERG159-163¶¶76-88;ERG377-568.

When P10 filed its motion for preliminary injunction, Google was displaying at least 1,043 P10 images from the same infringing websites identified in notices, having displayed some images for over 400 days after notice. ERG165-170¶¶96-102;ERG601-673. Even after P10 provided to Google approximately 665 infringing images as hard copy exhibits in its motion, Google continued to display virtually all of them. ERG904-908¶¶13-18;ERG926-1091. Google also failed to expeditiously remove infringing links from its Web Search results after notice. ERG908-909¶19;ERG1092-1104;ERG916-917¶¶42-43;ERG1125.

## V. SUMMARY OF ARGUMENT

**Direct Display and Distribution.** Google causes full-size P10 images to appear on Google's website (and users' computer screens) by a technological process known as "in-line linking." That is a "display" under the plain language of the Copyright Act. However, the District Court did not mention the Copyright Act's definition of "display," and instead created an unprecedented "server" test that requires a defendant to reproduce and store ("serve") a copyrighted work in order to "display" it. In doing so, the District Court made a subjective (and incorrect) policy determination and overlooked that the display right is a separate, exclusive right, and its infringement has never required a concurrent infringement of the reproduction right.

The District Court also erroneously held that only the party that originally transmits a copyrighted work has infringed the distribution right, and failed to recognize that anyone in the chain of distribution is an infringer.

**Contributory Infringement.** The District Court limited its analysis of secondary liability to Google's contribution to the direct infringement by third-party infringing websites. The Court erred by not separately considering Google's contribution to direct infringement by millions of Google users, who the Court recognized likely were infringing by downloading and transmitting copies of P10 images obtained through Image or Web Search.

The District Court also misapplied this Court's precedent by finding that Google did not materially contribute to the infringement of third-party websites even though, among other things, Google (i) searches out,

organizes, and aggregates in one place, thousands of P10 images from disparate infringing websites located throughout the Internet; (ii) allows users to view full-size infringing P10 images while remaining on google.com; (iii) provides an audience for infringing websites; (iv) provides the infringing images even when some originating websites no longer do so; (v) provides financial support to infringing websites; (vi) fails to disable access to infringing images after notice; (vii) biases search results so that searches on P10 model names often lead almost exclusively to infringing Google advertising partners; and (viii) provides username/password combinations that allow users to gain unauthorized access to all the images on P10's website.

**Vicarious Liability.** In determining if Google had the requisite right and ability to control infringing conduct, the District Court wrongly defined the “premises” which Google had to “control” as the Internet, rather than the environment that Google indisputably controls-- *Google's own index, search results, and website*. Google controls the selection, organization, and number of images it displays from infringing websites in its Image Search results, the websites it links those images to, its in-line linking and “See full-size image” features, and the number of links it provides to infringing websites in its Web Search results.

The Court also incorrectly limited the “right and ability to control” by requiring that the secondary infringer have the power to completely eliminate the direct infringement. “Control” means that the secondary infringer can limit direct infringement, which Google clearly can. Finally, the Court ignored that the right and ability to control can be either practical *or* legal. Google not only has the practical ability to control infringement by deleting infringing images from its servers and by deleting links to

infringing websites, it also has the ability to control infringement by exercising its contractual right to monitor and terminate infringing Google AdSense websites.

## VI. ARGUMENT

### A. Standard of Review

On appeal from the denial of a preliminary injunction, where, as here, “a District Court’s ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance,’ the court may undertake ‘plenary review of [the] issues’ rather than ‘limit its review in a case of this kind to abuse of discretion.’” Gorbach v. Reno, 219 F.3d 1087, 1091 (9th Cir. 2000) (*en banc*); see Foti v. City of Menlo Park, 146 F.3d 629, 634-35 (9th Cir. 1998) (“Although we review a district court’s decision to deny a motion for a preliminary injunction for an abuse of discretion...we review the legal issues underlying the district court’s decision *de novo*.”).

### B. Google Directly Infringes P10’s Exclusive Display and Distribution Rights by Causing Full-Size Images to Be Displayed and Available for Downloading

Among the exclusive rights embodied in a copyright are the rights to “display the copyrighted work publicly,” 17 U.S.C. §106(5), and the right to “reproduce the copyrighted work in copies.” *Id.*, §106(1). The District Court correctly found that Google “displays” thousands of infringing P10 *reduced-size* images. ERG1288(ln18-19). But the Court refused to extend its ruling to the *full-size* P10 images that Google causes to be displayed to users while they remain at Google’s website, based solely on the technical happenstance that Google displays these images through “in-line linking” or



“framing.” The Court’s distinction was based on what it termed its “server” test: Google copies the reduced-sized images onto its own server before displaying them, but does not make copies of the full-size images before displaying them. ERG1288. The District Court erred in several ways.

**1. The District Court Ignored the Copyright Act’s Broad Definition of “Display”**

The District Court acknowledged that Google causes users to see full-size P10 images without leaving Google’s website: “*Google’s in-line linking causes the appearance of [P10’s] copyrighted content on Google’s webpage.*” ER1285(ln26-28). The Court even termed Google’s conduct a “display” when framing the issue: “That issue, in a nutshell, is: does a search engine ... not infringe when, through in-line linking, it *displays* copyrighted images served by another website?” ERG1267 (emphasis added).<sup>5</sup> Google likewise described its in-line linking as a “display” (“the bottom frame *displays* the image in its original context.”) ERG202 (highlighted). See also ERG138¶21(a); ERG203 (“... click on the thumbnail version of the picture you want to view. This *displays* a larger version of the image.”) (emphasis added). Yet the District Court held that Google’s “display” of full-size images by in-line linking does not constitute “display” under the Copyright Act. ERG1288.

In reaching this conclusion, the District Court did not mention or cite the definition of “display” in the Copyright Act. Instead, the Court constructed a new definition for purposes of determining whether a website displays images. Under this “server” test, a website “displays” content *only*

---

<sup>5</sup> There was no dispute that the display was “public.” 17 U.S.C. §101 (a work is displayed publicly “whether the members of the public capable of receiving the ... display receive it in the same place or in separate places and at the same time or at different times”).

if it actually engages in “the act of *storing* [the] content” itself. ERG1287 (emphasis added). The District Court’s reasoning means that although Google causes the full-size infringing P10 images to appear on its users’ computer screens and to appear to be on Google’s website (by instructing the user’s browser what images to retrieve and where and how to display them), Google is not engaged in a display. Under the District Court’s construct, a website could display, by in-line linking, thousands of infringing images or videos and sell advertising around them, without liability.

The District Court’s narrow definition of display, focusing on where the images are stored rather than where and at whose direction the images are displayed, is inconsistent with the broad definition of display in the Copyright Act: “*to show a copy ... either directly or indirectly or by means of a film, slide, television image or any other device or process.*” 17 U.S.C. §101 (emphasis added). The definition of “display a work ‘publicly’” similarly includes “to transmit *or otherwise communicate* a ... display of the work ... *by means of any device or process...*” *Id.* (emphasis added); see H.R. Rep. No. 2237, 89th Cong., 2d Sess. at 57 (1966) (“*In addition to the direct showings of a copy of a work, ‘display’ would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube or similar viewing apparatus connected with any sort of information and storage retrieval system*”) (emphasis added); H.R. Rep. No. 94-1476 at 80 (“The display right precludes unauthorized transmission of the display from one place to another, for example, by a computer system.”).

The legislative history further makes clear that it is irrelevant that Google’s display of full-size images is transmitted by in-line linking of a

third-party website's "initial" display: "[T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public"; thus "*any act by which the initial ... display is transmitted, repeated, or made to recur would itself be...a display.*" H.R. Rep. No. 94-1476 at 71 (1976) (emphasis added). Further, "[e]ach and every method by which images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public *in any form*, the case comes within the scope of clauses (4) or (5) of section 106." S. Rep. No. 94-473 at 60 (1975) (emphasis added); see WGN Continental Broadcasting Co., v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982) ("the Copyright Act defines 'perform or display...publicly' broadly enough to encompass indirect transmission to the ultimate public"); Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc., 593 F. Supp. 808, 812 (D. Minn. 1984) (Copyright Act covers indirect as well as direct transmissions to the public); David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759 (S.D.N.Y. 1988) ("Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience.").

Google's in-line linking of thousands of P10 copyrighted images falls squarely within the definition of display and the intended scope of the display right. This Court described in-line linking as follows:

"In-line linking allows one to import a graphic from a source website and incorporate it in one's own website, creating the appearance that the in-lined graphic is a seamless part of the second web page. The in-line link instructs the user's browser to retrieve the linked-to image from the source website and display it on the user's screen, but

does so without leaving the linking document. Thus, the linking party can incorporate the linked image into its own content.” (footnotes omitted).

Kelly v. Arriba Soft Corp., 336 F.3d 811, 816 (9th Cir. 2003); see Hard Rock Café Int’l (USA) v. Morton, 1999 WL 717995 (S.D.N.Y., Sept. 9, 1999) (“Through framing, the Hard Rock Hotel Mark and the Tunes site are combined together into a single visual presentation...”)

By in-line linking and framing, Google necessarily is either “directly or indirectly” “show[ing] a copy” of P10’s full-size images through a “device” or “process” which, in the words of the District Court, “causes the appearance of [P10’s] copyrighted content on Google’s webpage.” ERG1285(ln26-28). Google’s in-line linking cannot accurately be characterized other than as an infringing display.

## **2. The District Court Erroneously Required Infringing Reproduction as a Prerequisite to Infringing Display**

The legislative history of the 1976 Copyright Act (which added the display right) confirms that the display right was not intended to be subsumed by the reproduction right, but was to be a broad, separate right. A new display right was considered necessary by the Copyright Office because new technologies “could eventually provide ... individuals with access to a single copy of a work by transmission of electronic images,” making the threat to copyrighted works by widespread display more harmful than by unauthorized reproduction. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. at 20-21 (1965). Congress found that:

“With the growing use of projection equipment, closed and open circuit television, and *computers* for displaying images of textual and graphic material to ‘audiences’ or

‘readers,’ this [display] right is certain to assume great importance to copyright owners. ... The committee is aware that in the future electronic images may take the place of printed copies in some situations, and has dealt with the problem by amendments in sections 109 and 110, and *without mixing the separate concepts of ‘reproduction’ and ‘display.’*” H.R. Rep. No. 2237 at 55-56 (emphasis added).

\* \* \*

“‘Reproduction’ under clause (1) of section 106 is to be distinguished from ‘display’ under clause (5). ... Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).” *Id.* at 53; S. Rep. No. 94-473 at 58; H.R. Rep. No. 94-1476 at 69.

See New York Times Co. v. Tasini, 533 U.S. 483, 498 n.8 (2001), citing Letter from Register of Copyrights, reprinted in Cong. Rec. at E812 (February 14, 2001) (“[T]he fact remains that the Act enumerates several separate rights of copyright owners, and the public display right is independent of the reproduction and distribution rights.”)

The District Court’s “server” test precludes a finding of infringement of the display right unless the reproduction right also is violated. This contravenes the basic tenet that anyone “who violates *any* of the exclusive rights of the copyright owner” is an infringer. 17 U.S.C. §501(a) (emphasis added). The District Court’s “server” test effects a significant and problematic change in the law. Other than the District Court’s opinion, no case (or treatise) has found the reproduction and display rights necessarily co-extensive, or that indirectly causing a display could not be actionable. See, e.g., Playboy Enters., Inc. v. Starware Pub. Corp., 900 F.Supp. 433, 437-38 (S.D. Fla. 1995) (“The copyright claimant need not prove who used the copyrighted work to create the copy sold by Defendant. That Defendant did not itself create the copy is no defense.”); Playboy Enters., Inc. v. Frena,

839 F.Supp. 1552, 1556-57 (M.D. Fla. 1993) (“[t]here is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself.”).

In attempting to conform its “server” test to the statutory mandate and existing precedent, the Court only reinforced that the reproduction and display rights are separate copyright interests. The Court cited some of the cases that found infringement of the display right by the same conduct engaged in by Google, *i.e.*, directing a user’s browser to retrieve and display infringing images. The Court then attempted to distinguish their holdings by noting that in those cases the reproduction right *also* was infringed.

ERG1282.<sup>6</sup> This reasoning ignored that in each case, the violation of the display right was acknowledged to be a separate act of infringement.

Playboy Enters., Inc. v. Webworld, Inc., 991 F.Supp. 543, 551-52 (N.D. Tex. 1997) (defendant reproduced, distributed *and* displayed plaintiff’s copyrighted images, the latter when it “allowed ... subscribers to view copyrighted works on their computer monitors while online”); Playboy Enters., Inc., v. Russ Hardenburgh, Inc., 982 F.Supp 503, 513 (N.D. Ohio 1997) (“defendants themselves engaged in *two* of the activities reserved for copyright owners ... defendants distributed *and* displayed copies of photographs”); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146, 1168 (C.D. Cal. 2001) (“defendants must actively engage in *one* of the activities recognized by the Copyright Act....”) (emphasis added).

---

<sup>6</sup> The District Court also cited several unpublished cases for the proposition that linking does not implicate copyright, but acknowledged they were “distinguishable” in that in “none of them did the defendant actually *display* anything.... In contrast, Google’s in-line linking causes the appearance of copyrighted content on Google’s webpage.” ERG1285(ln26-28) (emphasis in original).

The District Court also discussed (and speculated about) this Court's decision in Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) ("Kelly I"), amended, 336 F.3d 811 (9th Cir. 2003) ("Kelly II"). Relying on the statutory definition of "display," Kelly I held that in-line linking was an infringing display. Kelly I, at 947 ("Arriba actively participated in displaying Kelly's images by trolling the web, finding Kelly's images, and then having its program in-line link and frame those images within its own web site."). That part of Kelly I was vacated because the district court had procedurally erred in addressing this issue. Kelly II at 822. However, there is no indication that "the panel no longer believed in the substance" of its previous ruling. ERG1284(ln13-14). Indeed, in Kelly II, this Court continued to refer to in-line linking as a "display." E.g., Kelly II at 816. ("The in-line link instructs the user's browser to retrieve the linked-to image from the source website and *display* it on the user's screen, but does so without leaving the linking document."). Kelly II at 822 ("the district court should not have reached whether Arriba's *display* of Kelly's images is a fair use") (emphasis added).<sup>7</sup>

---

<sup>7</sup> Nimmer's criticism of Kelly I (cited by the District Court, ERG1284), was grounded on facts completely different from those here: "the only reason that defendant Arriba could deep link to plaintiff Kelly's photographs is that Kelly had himself made them available for browsing by loading them onto the Internet." 3 M.&D. Nimmer, Nimmer On Copyright, §12B.01[A][2] at 121B-16-17 (2005 ed.). Leaving aside that copyright holders may display their copyrighted works without waiving their display right, the display by P10 was limited to paid subscribers. ERG136-137¶¶16-17. In Kelly I, Arriba Soft linked to Kelly's website where he made non-infringing copies of his images available for free. In contrast, Google displays P10's images by in-line linking to third-party infringing websites. ERG158-159¶¶74-75; ERG373-375. The District Court also failed to recognize the view that Kelly I "appropriately balances the public interest in the vibrant development of the Internet as a tool for locating information on the one hand, with protecting authors' emerging digital markets...on the

**3. The District Court Substituted Its Own (Incorrect) Policy Judgment as the Rationale for a New Definition of “Display”**

The District Court’s “server” test substituted the Court’s own (incorrect) policy judgment for the statutory definition. See United States v. Davidson, 246 F.3d 1240, 1246 (9th Cir. 2001) (court may not “rewrite [a] statute based on [its] notions of appropriate policy.”). “[W]here, as here, the text of a statute provides only one ‘permissible interpretation,’ arguments based on policy ‘are beside the point,’ as ‘it is not the province of this Court to rewrite the statute to accommodate them.’” Tillema v. Long, 253 F.3d 494, 500 (9th Cir. 2001), quoting Artuz v. Bennett, 531 U.S. 4, 10 (2000). In any event, the District Court’s “server” test is incorrect policy. Contrary to the Court’s view that it maintains “the delicate balance for which copyright law strives...between encouraging the creation of creative works and encouraging the dissemination of information” (ERG1288(ln6-8)), the “server” test tilts this delicate balance in a manner disastrous for copyright holders.

The District Court’s first rationale for the “server” test is that it “is based on what happens at the technological level....Persons who view the full-size ‘image in its original context’ (*i.e.*, the lower frame) after clicking on one of the thumbnails that Google Image Search aggregated, are not viewing images that Google has stored or served.” ERG1287. But, as discussed above, whether or not Google is “stor[ing]” or “serv[ing]” images is not determinative of whether Google is *displaying* them. This technological form over substance fails to recognize the reality of the way

---

other.” J. Ginsburg, “How Copyright Got a Bad Name for Itself,” 26 Colum.J.L.&Arts 61, 72-73 (2002).



users come to view these images. Users go to Google's website. It is Google that selects the infringing images and, through in-line linking, directs its users' browser to retrieve and display the infringing images while they remain on Google's website. And, it is Google that retains the user traffic and profits from the display.

The District Court's second policy justification for the "server" test is that it does not "flatly preclude liability" for in-line linking because a copyright holder may seek to impose secondary liability on a search engine. ERG1287. However, the "server" test would "flatly preclude" liability – direct or secondary – if there were no "initial direct infringer" (in the District Court's words). ERG1288. For example, if the only party serving the images were the copyright holder, and a third-party website displayed those images by in-line linking to the copyright holder's website, there would be no initial direct infringer and, necessarily, no secondary liability. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party."). See also Amazon Brief. Even were this not the case, secondary liability principles, which require proof of additional elements such as knowledge or control, are not a substitute for strict liability direct infringement. "There is no need to prove anything about a defendant's mental state to establish copyright infringement; it is a strict liability tort." Educational Testing Serv. v. Simon, 95 F.Supp.2d 1081, 1087 (C.D. Cal. 1999).

Even with an initial direct infringer, the District Court's concurrent and wholesale rejection of P10's secondary liability claims *does*, as a practical matter, "flatly preclude" liability for display by in-line linking. Under the District Court's secondary liability analysis, the only entities P10

may hold liable for the images “in-line linked” by Google are the itinerant third-party websites being framed, most of which are in foreign jurisdictions, cannot be located, and/or are judgment-proof. See In re Aimster, 334 F.3d 643, 645 (7th Cir. 2003) (“impracticality or futility of a copyright owner’s suing a multitude of individual infringers”); WGN Continental Broadcasting, 693 F.2d at 625 (noting that in the absence of direct liability of a cable system operator, a copyright holder’s only recourse would be more than a thousand individual lawsuits).

The District Court’s third justification for the “server” test was that “website operators can readily understand the server test and courts can apply it relatively easily.” ERG1287. But, as the Court conceded, its alternative “incorporation test, which would have courts look at the URL displayed in the browser’s address bar, also can be applied relatively easily.” Id. Significantly, the “server” test ignores that copyright law (including the fair use doctrine that the “server” test obviates) requires a *balancing* of interests, and abjures “bright line” tests of the type devised by the District Court, regardless of their ease of application. See Baxter v. MCA, Inc., 812 F.3d 421, 425 (9th Cir. 1987) (“no bright line rule exists” for infringement); Nishon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166 F.3d 65, 71 (2d Cir. 1999) (“Copyright law does not admit of simple, bright-line rules.”). In fact, the balance between copyright and technology is best maintained by applying the statutory definition of “display,” juxtaposed against the counterweight of the equitable fair use doctrine. Wall Data, Inc. v. Los Angeles County, No. 03-56559, Slip Op. at 5373 (9th Cir. May 17, 2006) (“We are mindful that fair use is a tool for adapting copyright law to brisk technological advances....”).

The District Court also obliquely opined that liability for infringing

display by in-line linking would “fail[] to acknowledge the interconnected nature of the web, both in its physical and logical connections and in its ability to aggregate and present content from multiple sources simultaneously.” ERG1287-1288. The reality, however, is the opposite. Because of the “interconnected nature of the web,” it is not necessary to store and copy content to display it. Kelly II, 336 F.3d at 816 (“the linking party can incorporate the linked image into its own content.”) It is the “server” test that disregards the interconnected nature of the Internet by creating an artificial distinction based on where content is *stored* instead of where it is *displayed*.

The District Court’s fourth policy rationale was that “the initial *direct* infringers are the websites that stole P10’s full-size images and posted them on the internet for all the world to see. P10 would not have filed suit but for their actions.” ERG1288. As noted above, this logic fails when works taken directly from the copyright holder’s website are displayed. Even where there are “initial direct infringers,” they generally are anonymous third-party websites. It is Google’s aggregation and display of thousands of disparate, stolen images on its vastly more popular and accessible website that causes P10 real harm. The third-party websites from which Google obtains infringing images typically do not have brand recognition or goodwill, and are found only because Google allows them to be found and permits users to view their infringing content without leaving the “safe” and familiar confines of Google’s website. ERG146¶40;ERG236-239;ERG148¶47; ERG265-269.

Finally, in absolving Google from direct liability for in-line linking, the District Court stated, “[m]erely to index the web so that users can more readily find the information they seek should not constitute direct

infringement...” ERG1288. To the extent Google is “indexing the web” when it indexes infringing websites providing P10 images, it is indexing *infringing websites*. Rather than conferring a public benefit (which copyright is designed to do), this function is antithetical to copyright. See Sega Enters., Ltd. v. MAPHIA, 857 F.Supp. 679, 687 (N.D. Cal. 1994) (“To invoke the fair use exception, an individual must possess an authorized copy of a literary work.”).

Moreover, Google is not “merely indexing the web.” In addition to displaying thumbnail images (which the District Court found infringing), Google displays full-size, marketable images on a *second* page. Google also displays these images (by its cache feature) when users cannot otherwise find them on the very websites indexed. ERG149-150¶¶50-51;ERG271-287. Prohibiting such conduct would not impair a search engine’s legitimate indexing functions. See 3 Nimmer §12B.05[A][2] at 12B-68 (concluding that DMCA safe harbor does not cover “wholesale copying of another’s work on the pretext that it is being undertaken solely to create a complete and faithful ‘index’ to that site”).

Ultimately, the consequences of the District Court’s policy-driven standard can be illustrated by examining its hypothetical applications of the “server” and “incorporation” tests. The District Court conceded the harmful consequences of the “server” test by hypothesizing a website that displayed all the infringing images it wanted, but did so by in-line linking rather than serving: “Under the server test, someone could create a website entitled ‘Infringing Content For All!’ with thousands of in-line links to images on other websites that serve the infringing content,” and that website “would be immune from claims of *direct* infringement because it does not actually *serve* the images.” ERG1281(ln13-15) (emphasis in original). Other than

the title of the service – “Google Image Search” instead of “Infringing Content for All!” – that is exactly what Google does – create thousands of in-line links to infringing P10 images on infringing websites, all available from [google.com](http://google.com). Even though the Court’s hypothetical website would have failed all of the fair use factors, under the District Court’s “server” test, fair use is immaterial, because no “display” is even taking place.<sup>8</sup>

Recognizing the inherent problems with its “server” test, the District Court resorted to the “chilling effect” it hypothesized would result from the “incorporation” test. The Court suggested that the “incorporation” test, which it rejected, could render directly liable a website that displayed a stolen image, via in-line linking, to help authorities identify initial infringers. ERG1281. However, this comparison reveals a crucial flaw in the District Court’s reasoning – it eliminates a fair use balance. The correct way to reconcile these two hypotheticals is to follow the statutory definition of “display,” qualified by the fair use defense. Both websites would then engage in a “display,” but the “Infringing Content For All!” website would fail a fair use analysis whereas the Good Samaritan website would not. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 550 n.3 (1985) (fair use is an “equitable rule of reason”).<sup>9</sup>

---

<sup>8</sup> Given the District Court’s ruling that Google’s display of thumbnails was not fair use, the same reasoning would *a fortiori* apply to full-size images, which directly supplant [perfect10.com](http://perfect10.com) and Perfect 10 Magazine. See, e.g., Frena, 839 F.Supp. at 1557-58 (rejecting fair use defense for unauthorized display of images on computer bulletin board); see also Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000) (use of entire work militates against fair use).

<sup>9</sup> The “server” test compels other anomalous results, including that Amazon is not liable for providing its users the same copyrighted thumbnail images for which Google is liable. That illogical result flows solely from the fact that Amazon pays Google to provide it infringing thumbnail images

#### 4. **Google Distributes P10 Copyrighted Images by Making Them Available to the Public**

Although violation of P10's display right alone requires injunctive relief, the District Court erred in determining that Google did not publicly distribute both thumbnail and full-size images. ERG1288-1289. By making the P10 images available to millions of users to download (without leaving Google's website ERG147-148¶¶44-45; ERG242-256), Google violated P10's distribution right. 17 U.S.C. §106(3); see Napster, 239 F.3d 1004, 1014 (9th Cir. 2001) (making music files available over the Internet is infringing distribution); Hotaling v. Church of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) (making unauthorized work available to public violates distribution right); Webbworld, 991 F.Supp. 551-52 (allowing users to download images via web browser is public distribution). The District Court's conclusion apparently was based on the fact that Google did not distribute the images from its own server and, therefore, "is not involved in the transfer." ERG1289. However, the District Court failed to recognize that *every* entity "involved" in the distribution chain is liable. See, e.g., Costello Publishing Co. v. Rotelle, 670 F.2d 1035, 1042 (D.C. Cir. 1981).

#### C. **Google Is Secondarily Liable for Infringement By Both Third-Party Websites and Google Users**<sup>10</sup>

Initially, the District Court's secondary infringement analysis is incomplete because the Court limited it to Google's facilitation of direct

---

from Google's server, rather than using Amazon's server. See Amazon Brief.

<sup>10</sup> As discussed above, Google's framing of full-size images is direct infringement. Alternatively, it may be analyzed under principles of secondary liability. See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 435 n.17 (1984) ("the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn.").

infringement by third-party websites that reproduced and displayed P10 images. ERG1301.<sup>11</sup> The Court discounted another large category of direct infringers aided by Google – its users who download and/or transmit copies of P10 images obtained through Image Search and, therefore, infringe P10’s reproduction and distribution rights. Napster, 239 F.3d at 1014. While the District Court found that it “is not unlikely that many [Google] users do just that,” it dismissed this infringing conduct by concluding that “P10 has not submitted evidence showing that individual users of Google themselves infringe P10’s copyrights.” ERG1300(ln20-24). This was error for several reasons.

First, the preliminary injunction standard is “*likely* success,” the very concept the District Court used to describe users’ activities (“it is not unlikely”). See Napster, 239 F.3d at 1021 (“copyright holders must provide the necessary documentation to show there is *likely* infringement”) (emphasis added). Second, there was evidence that infringing images were downloaded, e.g., “Downloads: 2128” (ERG964) and “Downloads: 104” (ERG949), including by P10. See, e.g., RCA/Ariola, Int’l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 781-82 (8th Cir. 1988) (direct infringement based on copying by plaintiff’s investigator).<sup>12</sup> Finally, Google Image Search provided its users with over 5,000 P10 images, with a “See full-size image” link to view and download full-size images, and over 4,000,000 Web Search links to infringing Google AdSense websites containing P10 images.

---

<sup>11</sup> Google is also liable for facilitating distribution of P10 images by infringing websites, which the District Court acknowledged directly infringed that right. ERG1288-1289.

<sup>12</sup> The District Court also mistakenly believed that users could view the infringing images without copying them. ERG1301(ln5-7). Viewing a P10 image on a computer screen necessitates the making of a copy. See MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 997, 1003 (9th Cir. 1993).

ERG924-925¶67;ERG916-917¶¶41-44;ERG1125. Under these circumstances, it is proper to infer that some Google users downloaded and/or transmitted P10 images. See Hotaling, 118 F.3d at 204 (“[N]o one can expect a copyright holder to prove particular instances of use by the public when the proof is impossible to provide because the infringing [defendant] has not kept records of public use.”).

**1. Google Is Liable for Contributory Infringement**

“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer.” Napster, 239 F.3d at 1019; see Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).

**a. Google Has Knowledge of Direct Infringement**

The District Court “assumed” Google had actual knowledge of infringement. ERG1304(ln19-22). P10 provided 37 detailed notices of infringement, identifying over 7,000 infringing URLs. These notices provided the URL of the infringing webpage or the URL which Google placed under the infringing P10 image, the model name, and the location in Perfect 10 Magazine of the infringing image. ERG904¶10;ERG159-170¶¶76-102;ERG377-673. Additionally, P10 provided at least 665 hard copy printouts of the infringing images (in a number of cases with the corresponding image from Perfect 10 Magazine directly following each copy). Such notice establishes knowledge. See Napster, 239 F.3d at 1020 n.5; Fonovisa, 76 F.3d at 261, 264 (letters notifying swap meet organizers of vendors’ sale of infringing recordings). Nevertheless, Google did not remove the infringing images. ERG166(ln24-27);ERG904-909¶¶12-19;ERG926-1104;ERG241,245,253,573-583.



**b. Google Materially Contributes to Direct Infringement**

A defendant materially contributes to infringement if it “engages in personal conduct that encourages or assists in the infringement.” Napster, 239 F.3d at 1019 (quotations omitted). Material contribution can be provided in different ways, and a defendant need not be the sole contributing factor. 3 Nimmer § 12.04[A][2][a] at 12-79-81.

**(i) Google Provides the “Site And Facilities” for, and a Road Map to, Direct Infringement.**

Google searches out, organizes, and aggregates thousands of P10 images from disparate infringing websites, making a multitude of infringing P10 images of a particular model readily accessible to users. ERG1030-1070. It displays portions of infringing websites containing P10 images in a “frame” on Google’s website. ERG233,238. It provides the means to establish a connection between Google users’ computers and the infringing images Google selects to index and frame. Through its cache, it provides infringing images when the originating website does not. ERG149-150¶¶50-51;ERG271-287. It facilitates users’ downloading and distributing of infringing images, ERG147-148¶¶44-45;ERG242-256;ERG152-153¶¶59-60;ERG301. It thus literally provides the “site” for infringing activity and facilitates infringement by *both* the infringing websites and Google users. See Napster, 239 F.3d at 1022 (“without the support services defendant provides . . . users could not find and download the music they want with the ease of which defendants boast”); Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62 (3d Cir. 1986) (contribution by enabling users to directly infringe by playing copyrighted videos on VCRs in viewing rooms

provided by defendant). In essence, Google provides the road map to infringing images. See Sega Enters., Ltd. v. MAPHIA, 948 F.Supp. 923, 933 (N.D. Cal. 1996) (website that “provided a road map...for easy identification of [infringing video] games available for downloading” was contributory infringer).

The District Court’s view that Google “does not materially contribute to direct infringement in the ways or to the extent that Napster did,” ERG1306(In18-19), was both incorrect and misplaced. Napster’s conduct was not exhaustive of the ways a defendant can contribute. Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676 at \*7 (N.D.Cal. 2002) (“The conduct the district court singled out [in Napster] as ‘demonstrated infringing use’ is merely exemplary. It is not an exclusive list of conduct necessary to give rise to contributory liability.”) In some ways Google’s contribution is very similar to Napster’s, and in some ways far greater.

Like Google, Napster was a *search engine* directing and linking users to infringing materials. A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 905-06 (C.D. Cal. 2000) (defendant supplied a “proprietary search engine” providing a list of locations on the Internet where infringing copies could be obtained with one click). Like Google, “Napster provide[d] technical support for the indexing and searching of [infringing] files.” Napster, 239 F.3d at 1011. Like Google, Napster directed its users’ browsers to link their computers with other computers providing infringing works, even though the ultimate connection occurred “over the Internet.” Napster, 114 F.Supp.2d at 905, 907 (“The content of the actual [infringing] MP3 file is transferred over the Internet between users, not through the Napster servers.”).

Beyond these similarities, in many ways Google does considerably

*more* than Napster did to contribute to infringement:

- Napster did not affirmatively seek out and select the infringing works it indexed, but simply indexed whatever users decided to provide. Google searches for and selects the images and webpages it decides to index, determines how many images to display from each website in Image Search results, how many links it returns to each website in Web Search results, and in what order. ERG155-159¶¶65-75;ERG355-375;917¶44; ERG1126-1130;ERG916-917¶¶41-43;ERG1125;ERG919 ¶48;ERG1140-1145.
- Napster provided access to infringing works only from users who were online at the time. Google continues to provide infringing images (by its cache feature) even when the infringing websites have ceased doing so. ERG149-151¶¶49-51;ERG270-287.
- Napster did not directly provide any portion of infringing works, only a brief text link. Napster users had to use the link to obtain infringing works from a third-party computer. Google directly copies and displays thumbnail images, providing an “advertisement” and a “preview” of the full-size images, which it also frames, allowing users to remain at [google.com](http://google.com) while viewing multiple infringing images from multiple infringing websites. ERG144-149¶¶37-47;ERG220-269.
- Napster did not provide financial support for infringing activity and did not have a network of advertising partners. Google provides infringing AdSense websites with revenue and selects and places advertisements directly next to infringing images. In

providing search results, Google favors its infringing advertising affiliates and continues to provide millions of links to them after receiving notice of infringement. ERG139-141¶¶25;ERG209-218;ERG153¶¶61-62;ERG302-326;ERG916-918¶¶44-45;ERG1125-1136.

- Napster did not provide passwords to access and download copyrighted works. By publishing P10 passwords, Google enables its users to access and download not only individual works but thousands of copyrighted images on P10's website. ERG178-181¶¶119-124;ERG747-780.

Despite these facts, the District Court focused its contribution analysis almost solely on perceived factual distinctions between Google and Napster, which either do not exist or are legally irrelevant to the issue of contribution. For example, the Court stated that Napster enabled users to download music, whereas Google does not enable users to download images, since the “capacity to download images displayed as a result of Google Image Search is a function of the user’s *browser*, not Google.” ERG1305. But the ability to download infringing content in *both cases* is a function of the user’s browser – which is instructed where to retrieve (and in Google’s case, also display) infringing content from third-party locations. Napster, 114 F.Supp.2d at 905; Napster, 239 F.3d at 1012.

The District Court’s position that Napster was an “integrated service,” while Google Image Search is an “open, web-based service” (ERG1305) likewise is flawed. Like Napster, Google’s Image Search index is a closed system comprised of only images Google elects to display, in the order it elects to display them. The images which Google displays and the websites from which they are displayed are quite different from the images displayed

by other search engines. ERG187-188¶141;ERG789-797;ERG156-157¶¶69-70;ERG367. Google programs its computers to crawl selected websites and select certain images; its index is *not* tantamount to the Internet. If anything, Google is more “closed” than Napster, since Napster did not control which infringing recordings were indexed in its system or how they were indexed (i.e., named).

Similarly, the Court’s observation that “third-party websites exist...and at times infringe upon others’ copyrights irrespective of their inclusion in or exclusion from Google’s index,” misses the point. ERG1305. In Napster, the third parties that provided the infringing works also existed – and directly infringed – independent of Napster. But Napster, like Google, made the infringing works readily available and accessible. Moreover, infringing third-party websites otherwise would be unavailable to Google users who do not know of their existence or who cannot access them when the websites are “down” leaving the images available *only* through Google’s cache. ERG149-150¶¶49-51;ERG270-287;ERG180¶124;ERG755-773. In any event, that Google cannot stop infringing websites from continuing to exist is irrelevant to the *contribution* it provides. Casella v. Morris, 820 F.2d 362, 365 n.4 (11th Cir. 1987) (ability to control is not an element of contributory infringement).<sup>13</sup>

The fact that Napster was built largely on infringement while Google

---

<sup>13</sup> The other “distinctions” drawn by the District Court are equally inapposite. ERG1305-1306. Google users and AdSense partners also use Google’s proprietary software. Google links to and provides the means to connect to computers that provide infringing content. Google provides directions to users and promotes its Image Search, and supplies everything necessary to view and download images. Google requires its AdSense websites to register (and, by not requiring users to register, makes it impossible to terminate repeat infringers). ERG209-218;ERG145-150¶¶37-51;ERG220-287;ERG203-205.

provides a legitimate service in addition to its contribution to infringement, cannot substitute for a reasoned contribution analysis. P10 seeks only to stop Google's infringing activities – after notice – not its non-infringing activities. See Napster, 239 F.3d at 1019 (“plaintiffs did not seek to enjoin...non-infringing use of the Napster system.”).

**(ii) Google Provides the Audience and  
Financial Support for Direct Infringers**

Google further contributes to infringement by providing millions of customers for obscure and difficult-to-locate infringing websites. Google finds, copies, aggregates, and organizes by model name infringing images from those websites and provides the images it selects to Google users together with links to infringing websites. Additionally, even under the District Court's “server” test, the infringing images, *as framed by Google*, constitute direct infringements by third-party websites (since they are displayed from third-party *servers*). The audience for this infringing display is, by definition, Google users. Further, by licensing Image Search to others, including Amazon, Google is providing yet another audience – Amazon users – for the infringement it facilitates. The audience Google provides is both the “public” to which third-party infringing websites display *and* the individuals who directly infringe by downloading or transmitting the images Google makes available. See Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1163 (2d Cir. 1971) (contribution by creating the audience); Fonovisa, 76 F.3d at 264 (swap meet “actively strives to provide the environment and the market for counterfeit recording sales to thrive”).

Google's audience provides financial support to infringing websites, which necessarily depend on user traffic. Google also directly provides

financial support to infringing websites through its AdSense program, including through targeted advertisements it places on AdSense websites. The revenues from clicks on those advertisements by users who have been directed there by Google are shared with the infringing websites. ERG209-218. See Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 836, 847 (11th Cir. 1990) (contribution by publicizing, financially assisting, and demonstrating infringement); Columbia Pictures Indus., Inc. v. Redd Home, Inc., 749 F.2d 154, 160-61 (3d Cir. 1984) (providing administrative services for direct infringers is material contribution); see also Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F.Supp. 399, 401, 404 (S.D.N.Y. 1966) (advertising agency that placed advertisements for infringing works may be held liable).

**(iii) Google's Failure to Remove Infringing P10 Images After Notice Constitutes Contribution**

The District Court failed to consider that Google's failure to disable access to identified infringing images after notice was an additional (and itself sufficient) contribution to infringement. Despite its ability to delete search results from its index, Google failed to do so for P10 images specifically identified in notices. This, separately, constitutes contributory infringement. See Napster, 239 F.3d at 1021 ("We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement"); Religious Technology Ctr. v. Netcom Online Communication Serv., 907 F.Supp. 1361, 1374 (N.D. Cal. 1995) ("If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel [the] infringing

message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation”); see Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2781 (2005) (that defendants did not attempt to “diminish the infringing activity” evidenced unlawful objective).

**(iv) The Construct of the DMCA Reflects  
That Google Contributes to Infringement**

Search engines like Google are among the “service providers” subject to the DMCA. See 17 U.S.C §512(d); H. Rep. 105-551(II) at 58 (1998) (citing Yahoo!’s search engine as an example of an “information location tool” under §512(d)). The very structure of the Section 512(d) search engine exception presumes that knowingly “referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory index, ... or hypertext link” is contribution; as such, the DMCA provides a “safe harbor” *if*, among other things, a search engine expeditiously removes infringements after notice and terminates repeat infringers. 17 U.S.C. §§512(d)(3), 512(i)(A). Google did neither.

There would be no reason for the Section 512(d) safe harbor if knowingly linking to infringing works did not otherwise result in contributory liability. As Google argued in its amicus brief in Kelly II, “[t]he ‘notice and takedown provisions’ of the Digital Millennium Copyright Act provide a solution for copyright owners concerned about search engines linking to third party sites that post infringing material. See 17 U.S.C. §512(d).” Amazon ERA729. However, by immunizing Google’s knowing linking to infringing third-party websites, the District Court effectively eliminated notice and takedown obligations for search engines, leaving P10



and other copyright holders without the “solution” Google touted. See Aimster, 334 F.3d at 655 (“The [DMCA] Act does not abolish contributory infringement. The common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’”).

**(v) Google Materially Contributes to  
Infringement by Providing Confidential  
Usernames/Passwords**

Google also materially contributes to infringement by providing, in response to the Web Search query “perfect10.com passwords,” username/password combinations allowing users to access perfect10.com and unlawfully download images.<sup>14</sup> See Arista Records, Inc. v. MP3Board, Inc., 2002 WL 1997918 at \*5-6 (S.D.N.Y., Aug. 29, 2002) (website that, among other things, published passwords enabling access to copyrighted material “directly assisted users in locating and downloading infringing files.”). Google continued to do so even after receiving specific notice identifying this unlawful conduct. At the same time, Google placed advertisements on its AdSense partner websites that also give away perfect10.com passwords. ER178-181¶¶119-126; ERG747-780; ERG918¶46; ERG1137-1139. This evidence was unchallenged in the District Court.

P10 contended that by knowingly providing P10 passwords, Google materially contributed to infringement by enabling users to enter P10’s website and make unauthorized copies of P10 images. The District Court misunderstood P10’s claim to be asserting *direct* infringement of

---

<sup>14</sup> Google also provides username/password combinations from its cache when the website from which it extracted this information is not accessible. ERG180-181¶124; ERG755-773.

usernames/passwords: “P10 has not demonstrated that it has any copyright interest in the two strings of characters that *other* individuals select when registering as members on perfect10.com.” ERG1278(footnote 9) (emphasis in original). But P10 never claimed a copyright interest in username/password combinations. The District Court never considered the claim P10 did assert.

## 2. Google Is Vicariously Liable

Vicarious liability attaches if a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” Napster, 239 F.3d at 1022, quoting Fonovisa, 76 F.3d at 262. Knowledge of direct infringement is not necessary. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (“When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials – even in the absence of actual knowledge that the copyright monopoly is being impaired...the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation”).

### a. Google Receives a Direct Financial Benefit From Direct Infringement

The District Court concluded that “Google clearly benefits financially from third parties’ display of P10’s photos....[I]ts financial benefit is direct.” ERG1309(ln15-19). However, the Court found P10 was not likely to establish Google’s right and ability to control infringing activity of third-party websites. This finding ignored the reality this Court has expressly recognized – control may be reflected by the practical ability to *limit* access to infringement *or* by the contractual right to *limit* infringement. Fonovisa, 76 F.3d at 262-63. As discussed below, Google can control direct

infringement by both third-party websites and Google users.

**b. Google Has the Right and Ability to Control Infringement**

**(i) Google Exercises Absolute Control Over the Images and Links It Displays on Its Website**

In defining the “premises” that Google can, and must, police and control, the District Court erroneously reasoned that Google functions in a boundless environment (the entire Internet) that is open and uncontrollable. ERG1310 (“Google does not exercise control over the environment in which it operates – i.e., the web.”). While Google may create its Image Search and its Web Search indices from websites on the Internet, the “environment” over which Google can and does exercise control is not the Internet; it is Google’s own indices and servers that contain images from and links to a discrete number of websites searched out and selected by Google. See Google Memorandum in Opposition to Motion for Preliminary Injunction, Search King, Inc. v. Google Tech., Inc. (Dec. 30, 2002) ERG880 (“And yet there are far more pages in existence on the Internet which Google does not include because of the technical challenges associated with the sheer size of the Internet...Google is under no obligation to include every web page on the Internet...Nor is Google obligated to maintain in its index any web pages it once decides to include.”); Search King, Inc. v. Google Tech., Inc., 2003 WL 21464568 at \*3-4 (W.D. Okla., May 27, 2003) (Google’s search algorithms reflect Google’s “subjective opinion”).

Napster, like Google, provided connections through which users accessed infringing works that were not on Napster servers. Napster, 114 F.Supp.2d at 907. But, as this Court found, Napster nevertheless

controlled *its own closed index of infringing song listings* that triggered vicarious liability: “Napster...has the ability to locate infringing material listed on its search indices, and the right to terminate users’ access to the system. The file name indices, therefore, are within the ‘premises’ that Napster has the ability to police.” Napster, 239 F.3d at 1024. Similarly, the “premises” that Google controls is not the Internet as a whole, but its own selection of images and website listings through which it provides access to infringing images.

Google’s right and ability to control is greater than Napster’s, since Napster’s index was populated by submissions from users who themselves affirmatively had to decide what infringing works to make available, how to name them, *and* when to make them available or cease making them available. Napster, 239 F.3d at 1012. In contrast, the subset of images and/or links in Google’s indices come to be there only because Google selects them for inclusion, decides how to index them, and determines which to return in response to search requests and when to delete them. See Webbworld, 991 F. Supp at 552-53 (“Webbworld exercised total dominion over the content of its site and the product it offered its clientele....Webbworld cannot now evade liability by claiming helplessness in the face of its ‘automatic’ operation.”).

Therefore, the District Court used the wrong parameter when finding that Google “lacks the ability to analyze *every image on the internet*...and determine whether a certain image *on the web* infringes someone’s copyright.” ERG1310(ln8-12)(emphasis added). When the analysis is properly focused on Google’s indices and search results available on its website, Google’s ability to control the relevant environment becomes plain. As Google admitted, “*Google can control which images will appear on*

*images.google.com as a result of a Google image search on a particular term...* ERG897(RFA265). Google “*has a method for preventing a URL from appearing as a link in Google web search results...*”

ERG891(RFA244)(emphasis added).

Additionally, by eliminating infringing images and links from its indices, Google would eliminate the direct infringement by third-party websites that occurs every time those websites display P10 images in the frame Google provides. The very link provided by Google in a frame, which Google completely controls, *is* the actual direct infringement by the third-party website. Eliminating this link also would eliminate the infringing reproductions made by *Google users* from the infringing images Google frames. See Napster, 239 F.3d at 1023 (“The ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise”).

The right and ability to control infringement need not be exercised in order to sustain vicarious liability. However, Google does exercise constant control over its indices and the content it provides, determining which images to copy and aggregating and organizing them by model name so they are readily available to Google users. ERG1030-1070. Google also controls every aspect of the way it provides that content. For example, Google places its logo adjacent to P10 images in its Image Search results instead of the P10 logo, and elects to link P10 images to its infringing advertising partner websites instead of the P10 website. ERG153-154¶¶61-62; ERG302-326; ERG159¶75; ERG373-375. Google organizes search results so that often almost all search queries on the names of P10 models link to infringing websites that are Google advertising partners while the same websites rarely are listed for the same searches on other search engines. ERG155-159¶¶65-

75;ERG355-375;ERG917¶44;ERG942-965;ERG1126-1130;ERG916-917¶¶41-43;ERG1125;ERG919¶48;ERG1140-1145. Google places “See full-size image” links in its Image Search results and includes code with its thumbnails so that when they are clicked on, Google users see full-size P10 infringing images in a frame while remaining at [google.com](http://google.com). ERG141-149¶¶27-47;ERG219-269. Google takes a “snapshot” of infringing webpages and makes infringing images available in its cache link adjacent to Google advertisements even when those images no longer are available on the original website. ERG149-150¶¶50-51;ERG155¶64;ERG271-287,350. Google reformats infringing P10 images so they may be displayed on cellular phones. ERG151¶55;ERG289-290.

Google also controls the actual content of its Image Search and Web Search results by editing and limiting them in a number of ways: it detects and deletes duplicate images, and claims to ensure that the highest quality images are presented first. ERG203-204. It suppresses specific URLs, limits the number and content of its search results, can cease maintaining in its index webpages that it previously included, and can “blacklist” specific websites previously indexed. ERG880. It “restricts” politically sensitive material in China, such as eliminating images of tanks that otherwise would appear on a search for “Tiananmen Square.” ERG1337-1340. It also provides a “tool for filtering certain kinds of images” to screen for sexual content. ERG203.

In light of all its involvement and control, Google’s refusal to police its own index for identified infringements – especially after repeated notice – gives rise to vicarious liability. See Napster, 239 F.3d at 1027 (defendant is “vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files in its search

index”); Gershwin, 443 F.2d at 1162 (“failure to police the conduct of the primary infringer” gives rise to liability); see also Kelly v. Arriba Soft Corp., 77 F.Supp.2d 1116, 1117 (C.D. Cal. 1999) (“After being notified of Plaintiff’s objections, [Defendant] removed the images from its database”).

**(ii) The Right and Ability to Control Does Not Require That a Secondary Infringer Be Able to Stop Direct Infringement Completely**

The second dispositive and related error in the District Court’s vicarious liability analysis was holding that, in order to possess the requisite right and ability to control, the secondary infringer effectively must be able to *eradicate* the direct infringement. The District Court erroneously held that the ability to limit infringement was not sufficient: “Google’s right and ability to remove infringing websites from its index would make it more difficult for such websites to be found on the web, but those sites would continue to exist anyway. Google cannot shut down infringing websites or prevent them from continuing to provide infringing content to the world.” ERG1310-1311.

This standard imposed by the District Court is directly contrary to the standard in this Circuit, recently reiterated by the Supreme Court: “One infringes ... vicariously by profiting from direct infringement while declining to exercise a right to stop *or limit it.*” Grokster, 125 S.Ct. at 2776 (emphasis added), citing Gershwin, 443 F.2d at 1162. In Fonovisa, this Court found a swap meet owner possessed the right and ability to control infringement by vendors, even though a vendor ejected from a particular swap meet remained free to go to another swap meet (or other venue) and sell infringing product. It was sufficient that the owner could limit the

vendor's infringing activity. 76 F.3d at 262-63. In Napster, the infringing recordings would remain available on users' computers and could be transferred, for example by another peer-to-peer service or another technology, even if Napster ceased its indexing of those infringing works. 239 F.3d at 1023-24. See also, e.g., UMG Recordings, Inc. v. Sinnott, 300 F.Supp.2d 993, 1001-02 (E.D. Cal. 2004) (summary judgment against owner/operator of flea market finding right and ability to control vendors within his own flea market).

Similarly, the right and ability to control does not require, as the District Court believed, the ability to exercise control over the decisions of infringing websites (or users) to engage in direct infringement in the first instance. In Fonovisa, for example, the flea market owners could not control whether vendors *made* infringing copies, only whether they sold infringing copies on flea market premises.<sup>15</sup> 76 F.3d at 262-63; see also PolyGram Int'l Publishing, Inc. v. Nevada/TIG, Inc., 855 F.Supp. 1314, 1326 (D. Mass. 1994) (right and ability to control does not require control over the "manner and means" of performing infringing works). This basic principle is as old as the doctrine of vicarious liability. See Fonovisa, 76 F.3d at 262 (citing the seminal "dancehall" cases, where the operator of an entertainment venue was liable for infringing performances in its "dancehall" even though the operator could not select the music performed).

---

<sup>15</sup> This Court reversed the Fonovisa district court's finding that the ability to control required "the power to supervise the direct infringers in the general course of business, e.g., what to sell, whom to hire, how much to charge." Fonovisa, Inc. v. Cherry Auction, Inc., 847 F.Supp. 1492, 1497 (E.D. Cal. 1994). The District Court here repeated that error when it stated: "If the phrase 'right and ability to control' means having substantial input into or authority over the decision to serve or continue to serve infringing content, Google lacks such right or ability." ERG1310(ln5-7).



The crucial distinction these cases recognize – that the right and ability to control is concerned with the secondary infringer’s ability to control its facilitating conduct (not the direct infringer’s decision to infringe) – was explained in Playboy Enterprises, Inc. v. Webworld, Inc., 968 F.Supp. 1171, 1177 (N.D. Tex. 1997):

*That defendants had no control over those responsible for originally uploading the infringing images onto the Internet is not relevant to the issue of defendants’ control over their infringing activity.* The only relevant question regarding the element of control is whether defendants had the right and ability to control what occurred on the Neptics’ website. The court finds that they did.” (emphasis added)

Since Google is the third most visited website, deletion of infringing images from its Image Search index and links to infringing websites from its Web Search index would significantly limit the infringing websites’ capacity to display to users, and financially benefit from, infringing content. The infringing websites indexed, framed, and linked to by Google typically have no brand recognition or goodwill. Once they are removed from Google’s indices and search results, their audiences will substantially decline and infringing activity will substantially decrease.

The District Court acknowledged that *“Google’s right and ability to remove infringing websites from its index would make it more difficult for such websites to be found on the web...”* ERG1310. This finding alone is sufficient to satisfy the right and ability to control requirement as enunciated by this Court and the Supreme Court. <sup>16</sup>

---

<sup>16</sup> The District Court avoided this direct precedent by relying on two trial court cases applying the “right and ability to control” in the context of the DMCA (not an issue here). ERG1311.

**(iii) The District Court Ignored Google's  
Contractual Right to Control  
Infringement**

This Court held that the contractual right to control infringement is “sufficient to satisfy the control requirement.” Fonovisa, 76 F.3d at 263 (“In practice, H.L. Green Company [defendant] was not actively involved in the sale of records and the concessionaire controlled and supervised the individual employees. Nevertheless, H.L. Green’s ability to police its concessionaire – which parallels Cherry Auction’s ability to police its vendors under Cherry Auction’s similarly broad contract with its vendors – was sufficient to satisfy the control requirement.”); see Netcom, 907 F.Supp. at 1376 (“Further evidence of Netcom’s right to restrict infringing activity is its prohibition of copyright infringement and its requirement that its subscribers indemnify it for any damage to third parties.”); RCA/Ariola, 845 F.2d at 782 (control over defendant’s retailers included “writing them letters instructing them on what uses of the copiers to permit.”); Napster, 239 F.3d at 1023 (Napster “expressly reserves ‘the right to refuse service and terminate accounts’”).

Google has the right to control its infringing AdSense partners through contracts that prohibit activity that “infringes on the rights of others” and provide Google the ability to “monitor” the websites and to “terminate” violators. ERG212-214. The District Court found that Google did not present evidence that it enforced these provisions. ERG1292. Had it enforced its contracts, Google could have significantly limited infringement.

**D. The Preliminary Injunction Entered By The District Court Does Not Provide Effective Relief Against Infringement**

On May 9, the District Court entered its Preliminary Injunction Order. The preliminary injunction does not provide P10 with relief from (a) Google's direct display by in-line linking or by its cache of thousands of full-size P10 images; (b) Google's knowingly linking to websites which infringe P10's copyrights and which, in many cases, are Google's advertising partners; or (c) Google's display of hundreds of perfect10.com passwords. The injunction sought by P10 to limit this secondary infringement was consistent with this Court's pronouncement that the burden in those cases be shared between the copyright holder and the defendant. Napster, 239 F.3d at 1027. By immunizing Google's linking activities, the District Court permitted massive infringement to continue and, at the same time, effectively eliminated the notice and takedown protections of the DMCA. See 17 U.S.C. §512(j)(1)(A) (injunction prohibiting access to infringing material or activity residing at a particular online site, or preventing infringement of specified material at a particular online location.)

The sole relief the District Court did provide – a burdensome process ostensibly designed to limit the directly infringing display of reduced-size images after notice – does nothing to *prevent* Google's direct infringement. First, Google will claim there is no clear language in the injunction prohibiting it from continuing to display the same P10 images, as long as it copies them from different infringing webpages or labels them with different "URLs."

Second, the District Court's injunction places an unfair burden on P10. Because it enjoins *direct* infringement, it should be sufficient for P10 to provide Google with P10's copyrighted images arranged by model name. Google should then be required to cease display of those images in response to Image Searches on those model names. Instead, the District Court required P10 to search for and find the infringing images, then to list the "Thumbnail Source URLs," selected by Google (many of which are approximately 200 characters),<sup>17</sup> and then search through its images to provide Google the file name of the matching image. This is a massive task involving thousands of P10 images.

Third, by its very design, the preliminary injunction cannot *prevent* infringement because it only obligates Google to act after infringement has occurred, *i.e.*, after there is an infringing display, after it has been located by P10, and after notice has been sent by P10.<sup>18</sup> Until then, Google is not obligated to remove infringing images or even to refrain from making and displaying multiple copies of the same infringing images. The injunction locks the barn door only after the horses have left. Google (and only Google) has access to its infringing images and its index *before* an infringing display is made, and only Google can *prevent* infringement before it happens.

This Court affirmed the injunction issued in Napster (after remand). A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002). That

---

<sup>17</sup> The District Court ordered P10 to provide what it described as a "Thumbnail Source URL," which appears in the user's browser when the thumbnail is clicked on. ERG1359.

<sup>18</sup> Given the timing inherent in the preliminary injunction, this could delay removal for 40 days (notice every 30 days and 10 days to remove) or longer if there is a "counter-notification" (the requirements for which are undefined and which triggers a court hearing before removal).

injunction, which required only limited notice by the copyright holder of a single infringement, also provided:

“The court anticipates that it may be easier for Napster to search the files available on its system at any particular time against lists of copyrighted recordings provided by plaintiffs. The court deems that the results of such a search provide Napster with ‘reasonable knowledge of specific infringing files’ as required by the Ninth Circuit.

\* \* \*

Once Napster ‘receives reasonable knowledge’ from any source ..., Napster shall... prevent such files from being included in the Napster index (thereby preventing access to the files...)

\* \* \*

Napster shall affirmatively search the names of all files being made available by all users...(prior to the names of the files being included in the Napster index)...,” No. 99-05183, 2001 WL 227083, \*1-2 (N.D. Cal., Mar. 5, 2001).

In affirming that injunction, this Court required Napster to do “everything feasible to block” infringement of which it had notice from any source, including “requiring the use of the new filtering mechanism” that Napster was to develop. See Napster, 284 F.3d at 1097 (“Napster has a duty to police its system in order to avoid vicarious infringement. Napster can police the system by searching its index of files containing a noticed copyrighted work.”); Webbworld, 991 F.Supp. at 553 (“Webbworld might simply have refrained from conducting business until it had developed software or a manual system of oversight to prevent, or at least to minimize the possibility of, copyright infringement”); see also 17 U.S.C. §512(d) (requiring disabling access to infringing works and activity).

Unlike Napster, Google is a direct infringer that can eliminate its own infringement. However, the preliminary injunction does not require it to do anything except react to notices. Instead of compelling Google to implement its own or third-party technology to limit infringement, the District Court merely suggested the parties could “stipulate” to such technology (ERG1364, ¶11). But, Google has no incentive to reach such a stipulation.

The District Court’s preliminary injunction fails on multiple levels to satisfy the mandate of the Copyright Act providing for injunctive relief “to prevent or restrain infringement.” 17 U.S.C. §502(a).

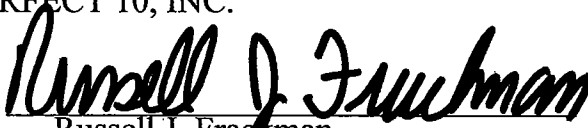
### CONCLUSION

P10 respectfully requests that this Court reverse those portions of the District Court’s Order denying P10’s Motion for Preliminary Injunction and modify the Preliminary Injunction Order to provide effective relief.

RUSSELL J. FRACKMAN  
JEFFREY D. GOLDMAN  
MITCHELL SILBERBERG & KNUPP LLP

JEFFREY N. MAUSNER  
BERMAN MAUSNER & RESSER

DANIEL J. COOPER  
PERFECT 10, INC.

By 

Russell J. Frackman  
Attorneys for Plaintiff- Appellant/  
Cross-Appellee Perfect 10, Inc.

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED.R.APP.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

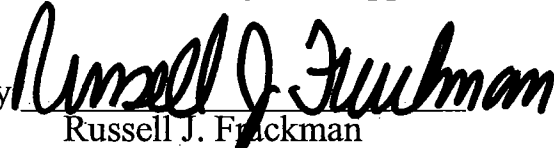
U.S. COURT OF APPEALS CASE NO. 06-55406

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 13,942 words.

Dated: May 30, 2006

Russell J. Frackman  
Jeffrey D. Goldman  
Mitchell Silberberg & Knupp LLP

By   
Russell J. Frackman  
Attorneys for Plaintiff-Appellant/  
Cross-Appellee Perfect 10, Inc.

## **STATEMENT OF RELATED CASES**


Plaintiff-Appellant/Cross-Appellee Perfect 10, Inc. is not aware of any related case on appeal to the Ninth Circuit.



**CERTIFICATE OF MAILING BY FEDEX**

I hereby certify that on May 30, 2006, I sent the FIRST BRIEF ON CROSS-APPEAL OF PLAINTIFF-APPELLANT/CROSS-APPELLEE PERFECT 10, INC. and EXCERPTS OF RECORD OF PLAINTIFF-APPELLANT/CROSS-APPELLEE PERFECT 10, INC. to the Clerk of the United States Court of Appeals for the Ninth Circuit via FedEx, for delivery to the following address:

Office of the Clerk  
U.S. Court of Appeals  
95 Seventh Street  
San Francisco, California 94103-1526

  
Andrea Petit

## CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2006, I sent two copies of the FIRST BRIEF ON CROSS-APPEAL OF PLAINTIFF-APPELLANT/CROSS-APPELLEE PERFECT 10, INC. and one copy of the EXCERPTS OF RECORD OF PLAINTIFF-APPELLANT/CROSS-APPELLEE PERFECT 10, INC. to each of the following via FedEx, for delivery to the following addresses:

Andrew Bridges, Esq.  
Jennifer Golinveaux, Esq.  
Winston & Strawn, LLP  
101 California Street  
San Francisco, California 94111

Mark T. Jansen, Esq.  
Townsend and Townsend and Crew  
Two Embarcadero Center, 8<sup>th</sup> Floor  
San Francisco, California 94111

A handwritten signature in cursive script that reads "Andrea Petit". The signature is written in black ink and is positioned above a horizontal line.

Andrea Petit

# ADDENDUM

## 17 U.S.C.A. § 101

includes any individual serving as an interim Copyright Royalty Judge under such section.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

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.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

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.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is--

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

## 17 U.S.C.A. § 101

of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

[ To perform or display a work "publicly" means--

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

Westlaw.

Page 1

17 U.S.C.A. § 106

Effective: November 02, 2002

• UNITED STATES CODE ANNOTATED  
TITLE 17. COPYRIGHTS  
CHAPTER 1--SUBJECT MATTER AND SCOPE OF COPYRIGHT  
→ § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Current through P.L. 109-221 approved 05-12-06

Copr. © 2006 Thomson/West. No. Claim to Orig. U.S. Govt. Works

END OF DOCUMENT

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

