

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

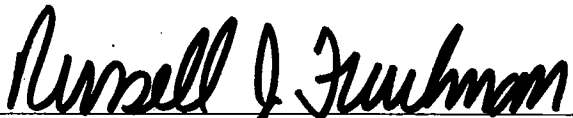
Attorneys for Plaintiff/Appellant and Cross-Appellee Perfect 10, Inc.

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

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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. Perfect 10 Magazine and perfect10.com feature copyrighted images of beautiful “natural” models. ERG1268.¹ 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

¹ “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, 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;ERG789-797.²

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

² 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.³ 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

³ 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.⁴ 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

⁴ 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 despite repeated notice from P10 that Google is providing unauthorized access to 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

