

No. 06-55405
Consolidated with Nos. 06-55406 and 06-55425

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

PERFECT 10, INC.
Plaintiff-Appellant-Cross-Appellee,

v.

GOOGLE, INC.,
Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Honorable A. Howard Matz, United States District Court Judge
(No. CV 04-9484 AHM (SHx), consolidated with No. CV 05-4753 AHM
(SHx))

**BRIEF OF *AMICI CURIAE* NETCOALITION, COMPUTER &
COMMUNICATIONS INDUSTRY ASSOCIATION, U.S. INTERNET
SERVICE PROVIDER ASSOCIATION, CONSUMER
ELECTRONICS ASSOCIATION, HOME RECORDING RIGHTS
COALITION, INFORMATION TECHNOLOGY ASSOCIATION OF
AMERICA, AND INTERNET COMMERCE COALITION
IN SUPPORT OF GOOGLE, INC.
AND URGING AFFIRMANCE IN PART AND REVERSAL IN PART**

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle, NW, 8th Floor
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com
Counsel for Amici Curiae

July 20, 2006

CORPORATE DISCLOSURE STATEMENT OF AMICI¹

Pursuant to Fed. R. App. P. 26.1, *amici* NetCoalition, the Computer and Communications Industry Association (CCIA), the U.S. Internet Service Provider Association (USISPA), the Consumer Electronics Association (CEA), the Home Recording Rights Coalition (HRRC), the Information Technology Association of America (ITAA), and the Internet Commerce Coalition (ICC) state that none of these entities has a parent corporation and that no publicly held corporation holds 10% or more of their respective stock.

/s/ Jonathan Band

Jonathan Band

Jonathan Band PLLC

21 Dupont Circle, NW, 8th Floor

Washington, D.C. 20036

(202) 296-5675

jband@policybandwidth.com

July 20, 2006

¹ Information on the members of these associations may be found at netcoalition.com, ccianet.org, usispa.org, ce.org, hrrc.org, and itaa.org. Google, Inc. is a member of NetCoalition and CCIA.

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INTEREST OF AMICI²

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on legislative and administrative proposals affecting the online realm.

The Computer & Communications Industry Association's members participate in the computer, information technology, and telecommunications industries. Its companies employ nearly one million people and generate annual revenues exceeding \$200 billion.

The U.S. Internet Service Provider Association is a national trade association that represents the common policy and legal concerns of the major Internet service providers (ISPs), portal companies, and network providers.

The Consumer Electronics Association is the preeminent trade association of the U.S. consumer electronics industry. Its more than 2,100 corporate members contribute over \$125 billion to the U.S. economy.

The Home Recording Rights Coalition includes retailers, manufacturers, consumers, and professional servicers of consumer electronics products.

² All parties have consented to the filing of this brief.

The Information Technology Association of America represents the policy interests of approximately 350 information technology companies. It is the secretariat for the World Information Technology and Services Alliance, a consortium of information and communications technology industry associations from almost 70 economies, representing over 15,000 IT companies worldwide.

The Internet Commerce Coalition is a coalition of leading ISPs, e-commerce companies, and trade associations in the United States.

Members of *amici* include companies that provide Internet search services, that supply products and services to Internet search firms, and that rely on Internet search technology to conduct their business. The District Court's rulings concerning in-line linking and secondary liability are consistent with long-standing copyright principles and are helpful to the operation of Internet search firms. Accordingly, *amici* support their affirmance.

At the same time, the District Court's holding that Google's display of thumbnail images in its search results is not a fair use is a significant departure from this Court's decision in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)(*Kelly*). The District Court's failure to apply *Kelly* correctly threatens to disrupt the ability of companies to provide Internet

search and other online services to end users. *Amici* therefore urge this Court to overturn the District Court's determination that Google's display of thumbnail images was not a fair use.

SUMMARY OF ARGUMENT

This case addresses the value of a principal tool by which the public finds information on the Internet: search engines. The District Court held that Google's presentation of thumbnail images in its search results is not a fair use, thereby threatening the continued availability of these crucial tools. While recognizing the critical role that text and image search provides in the digital economy, the lower court gave that role insufficient weight in the fair use analysis.

(1) The District Court's flawed fair use analysis reached a result contrary to findings by this Court and Congress recognizing the value of search engines. The lower court misapplied the first fair use factor – the purpose and character of the use – by improperly distinguishing this case from this Court's opinion in *Kelly* by relying on insignificant differences between Google's use of thumbnail images and the thumbnail use in *Kelly*. The District Court also erred in considering the fourth fair use factor – effect of the use of the market – by speculating that Google's use of thumbnails is likely to harm a marginal market for P10 images.

Having made these errors, the lower court nevertheless should have found that a technology that generates “immense value” to the public satisfies fair use when the doctrine is applied as an “equitable rule of reason.” Instead, the District Court treated fair use as a one-size-fits-all tallying exercise. An equitable approach would have accounted for the substantial public benefit that search engines provide to the public at large, including rights-holders. By ignoring the fair use doctrine and requiring explicit permission to provide image search services, the court reached a conclusion that, by its own admission, threatens “to impede the advance of internet technology.” *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006) (*P10*). This mistake must be corrected to ensure that the Internet-using public possesses the tools required to navigate the World Wide Web.

(2) Although it erred in its fair use analysis, the District Court’s decisions on in-line linking and secondary liability should be affirmed. The District Court rightly concluded that in-line linking – a fundamental and widely used Internet technology – is not a “display” for purposes of copyright. The District Court’s application of the “server test” in reaching this conclusion reflects the reality of Internet architecture. To “display” a work, a party must “touch” that work in some fashion. The server test

demonstrates that such contact does not occur in the case of an in-line link, and the lower court therefore correctly held that no display occurs. To rule otherwise, the lower court noted, would instantly transform routine activities by millions of commercial and non-commercial websites into copyright infringement.

The District Court also correctly declined to impose secondary infringement liability on Google. Unlike Napster, Google neither contributes to nor induces infringement by others. Similarly, Google does not control infringement on any third party websites to which it may link. Accordingly, secondary liability is manifestly inappropriate.

ARGUMENT

I. SEARCH ENGINES PROVIDE AN IMPORTANT PUBLIC SERVICE AND PLAY A CRITICAL ROLE IN THE DIGITAL ECONOMY.

As the District Court below recognized, the social utility of search engines is great:

It is by now a truism that search engines such as Google Image Search provide great value to the public. Indeed, given the exponentially increasing amounts of data on the web, search engines have become essential sources of vital information for individuals, governments, non-profits, and businesses who seek to locate information.

P10 at 848-49. Likewise, in *Kelly*, this Court recognized the significant public value of search engines. This Court found that Arriba's use of Kelly's images in its search engine "promotes the goals of the Copyright Act" and "benefit[s] the public by enhancing information gathering techniques on the internet." *Kelly* at 820; *see also Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1110 (D. Nev. 2006) ("Internet search engines like Google's allow Internet users to sift through the massive amount of information available on the Internet to find specific information that is of particular interest to them.").

In particular, the public benefits from the ability to search through the mass of images on the web to find a specific image. The lower court specifically acknowledged that thumbnails represent the only way to search effectively for visual content; while a snippet of text is a helpful means of displaying results of searches for web content, text does not enable a user to search visual content efficiently. *P10* at 850. For example, a user seeking an image of the Golden Gate Bridge enshrouded in fog can review dozens of thumbnail images returned by a search engine in a matter of seconds. It would take her far longer to review the same number of images if she had to click on a text link for each image and then wait for the image to be served by the originating website.

Congress, too, has given special recognition to the value of search engines. In the Digital Millennium Copyright Act (DMCA), Congress limited the remedies that a copyright owner could obtain against a provider of “information location tools” for linking to infringing content. *See* 17 U.S.C. § 512(d). In its section-by-section analysis of the DMCA, the Senate Judiciary Committee stated that “[i]nformation location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need.” S. Rep. No. 105-190, at 49 (1998). The Committee further observed that “online directories play a valuable role in assisting Internet users to identify and locate the information they seek on the decentralized and dynamic networks of the Internet.” *Id.* at 48.

Search engines store and catalog information in regularly updated search indices. When a user issues a query, the search engine searches its search index for responsive information. Searching the Internet itself in response to a particular query would take far too long and would severely reduce the number of users a search engine could assist simultaneously.

To update their search indices, the major search engines copy a large percentage of the World Wide Web every few weeks as permitted under the fair use doctrine. Given the vast quantities of constantly growing and changing information on the web, search engines simply could not operate

under a regime that ignored the fair use doctrine and required them to seek permission to copy each site's public contents. This is true regardless of whether the material copied is text or images. Accordingly, courts must get the fair use analysis right; the potential repercussions of judicial misinterpretation on search engine functions are enormous.

This Court, in deciding *Kelly*, and Congress, in legislating the DMCA's safe harbor for providers of information location tools, have upheld the ability of search engines to perform their functions under copyright law. However, the District Court below incorrectly challenges that ability. Indeed, as the District Court itself admitted, its narrowing of *Kelly* threatens to "impede the advance of internet technology." *P10* at 851.

II. THE DISTRICT COURT IMPROPERLY APPLIED THE FAIR USE TEST AND FAILED TO WEIGH ADEQUATELY THE PUBLIC INTEREST.

The District Court erred in departing from this Court's holding in *Kelly* and finding that Google's use of thumbnail images did not satisfy the fair use test. The District Court's analysis of the four fair use factors was flawed in three ways. First, the District Court failed to weigh correctly the first factor – purpose and character of use – by erroneously (a) concluding that Google's AdSense program made Google's use of thumbnails more commercial than Arriba's, and (b) determining that Perfect 10's (P10) third-

party dealings with Fonestarz somehow converts Google’s transformative use of the images into a “consumptive” one. Second, the District Court erred in its analysis of the fourth fair use factor – effect of the use on the market – by finding that Google’s use is likely to harm the market for P10 images. The harm is completely speculative and at most *de minimis*. Finally, the District Court erroneously treated fair use as a rigid, one-size-fits-all tallying exercise, rather than as “equitable rule of reason.” While recognizing the enormous public benefit provided by search engines, the District Court nevertheless gave this benefit minimal weight in the fair use calculus, and failed to explain how a ruling that undermined search engines’ ability to deliver critical services could promote the public interest.

A. GOOGLE’S USE OF THE IMAGES SATISFIES THE FAIR USE TEST AS APPLIED BY THIS COURT IN *KELLY*.

In *Kelly*, this Court concluded that fair use permits a commercial search engine’s display of thumbnail images in its search results. In particular, this Court found that the transformative and socially useful character of Arriba’s use outweighed its commercial purpose.³ It also found that Arriba had to display the images in order to perform the image search

³ The Second Circuit subsequently relied on this Court’s analysis. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

function effectively. Google uses thumbnail images in exactly the same way as Arriba; therefore, applying the teaching of *Kelly*, the District Court should have permitted Google's use. The District Court, however, was led astray by two facts not present in *Kelly*: the AdSense program and the Fonestarz service. The District Court distinguished *Kelly* on the basis of these two features. A close examination of the features, and the District Court's analysis of them, reveals that the District Court incorrectly gave them far too much weight. Properly considered, AdSense and Fonestarz do not change the applicability of *Kelly* to this case.

- 1. The District Court Erred by Determining that the First Fair Use Factor Weighed in Favor of Perfect 10.**
 - a. AdSense Does Not Make Google's Use of Thumbnails More Commercial than Arriba's.**

The District Court stated that in instances where sites included in Google's index happen also to participate in AdSense, "Google's thumbnails lead users to sites that directly benefit Google's bottom line." *P10* at 847. Thus, the District Court concluded, "AdSense unquestionably makes Google's use of thumbnails on its image search far more commercial than Arriba's use in *Kelly*". *Id.* However, the District Court in no way explained how Google's use was more commercial than Arriba's. While this Court stated that Arriba "operates its web site for commercial purposes," *Kelly* at

818, neither the district court nor the appellate opinions in *Kelly* discussed precisely how Arriba achieved those commercial purposes. Here, the District Court cited no evidence concerning Arriba's business model; it presented no reasoned basis for its conclusion that Google's use was more commercial than Arriba's.

Moreover, the relationship between a thumbnail and Google's commercial benefit from the AdSense program is tenuous. Google, through AdSense, only benefits from the display of a thumbnail if: (1) a user clicks on a thumbnail that happens to be linked to a website participating in AdSense, and (2) the user then happens to click on an advertisement on that site that is provided by Google through AdSense. Given the large number of thumbnails Google displays in response to any query and the uncertainty of a user then clicking on an AdSense ad, the odds that the display of a particular thumbnail will actually lead to AdSense revenue are extremely low.

Stated differently, Google operates Image Search and AdSense as completely separate programs. Image Search contains many thumbnails not linked to AdSense partners, and AdSense partners can be found through search engines other than Google's. Google receives no benefit if a user clicks on a thumbnail not linked to an AdSense partner's site, nor if a user

on an AdSense partner's site chooses not to click on an ad provided by Google. Similarly, thumbnails in Google Image Search may lead to websites that incorporate non-AdSense advertising programs that benefit Google's competitors. By the same token, Google receives a benefit from a user clicking on an ad provided by Google on an AdSense partner's site even if the user found the site via Yahoo!, MSN, or Ask. As the District Court itself pointed out, this Court found that Arriba's commercial use "weighed only slightly against a finding of fair use' because 'Arriba was neither using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images.'" *P10* at 846 (citing *Kelly* at 818). Likewise, AdSense neither makes use of P10 images to promote the Google website, nor does Google attempt to sell P10 images. Nevertheless, the District Court concluded that Google's use of thumbnails was "far more commercial" than Arriba's. Considering the tenuous relationship between the display of a thumbnail and AdSense revenue, and the absence of any discussion of Arriba's business model, the District Court's reasoning is unsound.

Furthermore, the District Court's reliance on the AdSense program to defeat Google's fair use defense is at odds with the District Court's ruling on AdSense in the context of contributory liability. P10 argued that Google materially contributed to the existence of the infringing websites by

providing them with a revenue stream via the AdSense program. The

District Court rejected this argument, stating:

Although AdSense may provide some level of additional revenue to these websites, P10 has not presented *any* evidence establishing what that revenue is, much less that it is material (either in its own right or relative to those websites' total income). There is no evidence that these sites rely on Google AdSense for their continued existence or that they were created with the purpose of profiting from the display of AdSense advertisements.

P10 at 856. Since P10 could not prove that the websites' share of the revenue from AdSense was sufficient to constitute material contribution to the infringing activity on those websites, it made no sense for the District Court to conclude that Google's share of that revenue was sufficient to render its display of the thumbnails unfair.

In any event, this focus on whether Google's use was more or less commercial than Arriba's misses the point. This Court in *Kelly* recognized that Arriba was a commercial entity that used thumbnails to further its business objectives. Nonetheless, the social utility of the use outweighed the private benefit to Arriba. The same is true here. The specific business model employed is irrelevant; what matters is that the utility of the search engine justifies the use, even by commercial entities. In *Sony Computer Entertainment Corp. v. Connectix Corp.*, 203 F.3d 596, 605 (9th Cir. 2000), another case involving a commercial use, Sony asserted that Connectix

could have reversed engineered Sony’s product in a different manner that might have required less copying of the product. This Court brushed aside that argument. Once it determined that Connectix’s purpose – achieving interoperability – justified copying even by a commercial entity, this Court did not concern itself with engineering details and the amount of copying. Similarly, this Court should not concentrate on the precise business model employed by a commercial search firm, once assured that the firm uses the copyrighted works only for information location purposes.

b. Google’s Use Is Not “Consumptive.”

The District Court found that the introduction of the Fonestarz service after the commencement of this litigation rendered Google’s display of the thumbnails “consumptive,” and that this consumptive quality helped tip the first factor slightly in favor of P10. The District Court’s analysis contains several flaws. First, *Kelly* makes no reference to “consumptive” uses, and from the District Court’s discussion, one cannot distinguish a consumptive use from a use that harms the market for the copyrighted work. In other words, the District Court appears to collapse the first and fourth fair use factors.

Second, the District Court fails to explain how a use that is transformative one day can become consumptive the next by virtue of the

action of a third party. The focus of the first fair use factor is the purpose and character of Google's use. Following *Kelly*, the District Court held that Google used the thumbnails in a transformative manner by incorporating them in its search engine. The fact that P10 subsequently entered into a license agreement to supply reduced-size images for download to cell phones, and that some users might download images from Google's Image Search rather than from Fonestarz, does not change the essential transformative nature of Google's use.

2. Google's Use Does Not Harm the Market for P10 Images.

The District Court improperly evaluated the fourth factor in its fair use analysis – the effect on the market for P10's images. In finding that Google's display of thumbnails of P10 images harmed Fonestarz's sale of reduced-sized P10 images for download to cell phones, the District Court mistakenly overlooked the fact that when Google displays thumbnails, the P10 images are interspersed among thousands of other adult images. *See P10* at 849. Because a user could download any of these images to his cell phone, it is purely speculative that he would download P10 images rather than the far more abundant non-P10 images. That is, there is no evidence that the P10 images on Google Image Search in fact compete with the Fonestarz images. Stated differently, even if *no* P10 images appeared in

Google Image Search, the adult images that did appear would compete to the same degree with the P10 images from Fonestarz. Furthermore, Google Image Search does not provide a special function facilitating the downloading of images to cell phones. Accordingly, this Court should reverse as speculative the District Court's finding that Google's use was market damaging.

Moreover, even if Google's display of P10 thumbnails did have a negative impact on the demand for P10 images through Fonestarz, that impact would be *de minimis* in the context of the overall market for P10 images. P10's core markets are print magazines and adult website subscriptions, and the District Court correctly found that Google's use is not likely to affect these markets. *P10* at 850. In contrast, the cell phone image download market is only a small sideline that began after P10 initiated this litigation. Accordingly, the impact of Google's use on this market, if any, should not receive much weight in the fair use calculus.⁴

Finally, the District Court failed to consider properly the countervailing public benefit from the use, against which any potential loss to the copyright owner must be weighed. Rejection of the fair use defense

⁴ “[C]opyright owners may not preempt exploitation of transformative markets....” *Bill Graham Archives*, 448 F.3d at 615 (citation omitted).

on the basis of Image Search's potential harm to the *de minimis* market for downloads to cell phones may force Google to shut down Image Search as it currently exists. Such a ruling will encourage other copyright owners who plan cell phone download services to bring similar lawsuits, and they, like P10, will seek broad orders excluding their images from Image Search. With current technology, there is no way for Google to ensure compliance with such orders except by human review of each image in the index against a set of images copyrighted by all these plaintiffs, once at the outset and again every time the index is updated. Obviously, Google cannot feasibly undertake such a task. Even the District Court acknowledged this limitation, noting that "Google's software lacks the ability to analyze every image on the internet, compare each image to all the other copyright images that exist in the world (or even to that much smaller subset of images that have been submitted to Google by copyright owners such as P10), and determine whether a certain image on the web infringes someone's copyright." *P10* at 858.

Elimination of Image Search certainly would not be a positive outcome for the online community, and arguably it is not a good outcome for rightsholders, either. Halting image search services (or alternatively operating them without the thumbnail displays that help users identify the

sites they are looking for) does nothing to eradicate the underlying infringement on third party sites and deprives copyright holders of an ideal tool for locating and expunging online infringement. Without the image search thumbnail display in which to detect infringements efficiently, it becomes next to impossible for copyright owners to know which sites may infringe their work.⁵

B. FAIR USE IS AN EQUITABLE RULE OF REASON, NOT A RIGID APPLICATION OF ENUMERATED STATUTORY FACTORS.

Even though the District Court misapplied the first and fourth fair use factors, the District Court should nevertheless have reached the result it expressly found to be equitable. Instead, by rejecting Google’s fair use defense for the display of thumbnails of P10 images in its search results, the District Court missed the forest for the trees. Mechanically applying the four statutory fair use factors, it failed to appreciate the Supreme Court’s teaching that fair use is “an equitable rule of reason... which permits courts to avoid rigid application of the copyright statute when, on occasion, it

⁵ As one of P10’s *amici* previously represented to this Court, “the immense size of the Internet *necessarily* requires an automated search mechanism to locate infringement. Therefore, copyright infringement on the Internet sometimes initially may be identified by automated searches using ‘bots.’” Brief of Motion Picture Association of America (MPAA) at 31 n.9, *Rossi v. MPAA*, No. 03-16034 (9th Cir. Dec. 29, 2003) (emphasis supplied).

would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal citations and quotations omitted). As the Supreme Court has made clear, the four factors are a non-exclusive list of issues a court must consider in making its fair use determination—not a statutory straightjacket requiring a ruling that the District Court itself conceded it was “reluctant” to issue. *Harper & Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *P10* at 851. Finding that three weighed slightly in favor of P10 while the fourth weighed in favor of neither party, the District Court opted to rule against Google “despite the enormous public benefit that search engines such as Google provide.” *Id.* The District Court erroneously believed that “the immense value to the public of [internet] technologies” could not “trump” what it considered to be “a reasoned analysis of the four fair use factors.” *Id.*

The District Court evidently was unaware of this Court’s statement in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), that “[b]ecause fair use presupposes good faith and fair dealing, courts may weigh the propriety of the defendant’s conduct in the equitable balance of a fair use determination.” *Id.* at 436-37 (internal citations and quotations omitted). The District Court gave no weight to Google’s good faith and fair dealing.

The record in this case clearly reveals the entities that act in bad faith: the websites that intentionally infringe P10's copyrights by posting its images without authorization. As the District Court noted in its discussion of in-line linking, "here 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." *P10* at 844. Google, by contrast, did not intentionally infringe P10's copyrights. Rather, Google's software copied and displayed P10's images as part of an automatic process essential to the operation of its search engine. Moreover, Google contends that when P10 provided it with sufficient information concerning infringing images, it promptly processed the notices, suppressing links to specific images identified by P10. The District Court did not find to the contrary. *See P10* at 854.⁶

This is hardly a case of Google free-riding on P10's images. Google creates software that crawls the web; it organizes and stores huge quantities

⁶ The MPAA argues that *Kelly* is distinguishable because Arriba Soft copied a noninfringing image, while Google copied an infringing image. Brief *Amicus Curiae* of MPAA at 23-24. MPAA overlooks the fact that both Arriba and Google copied in the course of an automatic process, and that Google had no contemporaneous knowledge that the images it was copying allegedly infringed P10's copyrights. Indeed, it is precisely on account of this distinction that Congress deemed the DMCA's safe harbor for information location tools necessary in the first place, *i.e.*, so that search

of information gathered by these software spiders; it develops computer programs with algorithms to retrieve and rank information from this search index in response to user queries. Google's use reflects a substantial investment with ample public policy interests that should receive great weight in the fair use calculus.

III. THE DISTRICT COURT'S DECISIONS CONCERNING IN-LINE LINKING AND SECONDARY LIABILITY ARE CORRECT AND SHOULD BE AFFIRMED.

While this Court should reverse the District Court's rejection of Google's fair use defense, it should affirm the District Court's holdings concerning in-line linking and secondary liability.

A. IN-LINE LINKING DOES NOT CONSTITUTE A DISPLAY.

In-line linking is one of the most basic and widely used technologies on the Internet. If a hyperlink to another website were treated as a display or distribution, then search engines and a wide array of other websites would routinely engage in direct copyright infringement. After thoroughly considering the "server" test, the "incorporation" test, and the relevant precedents for defining display, the District Court correctly adopted the "server" test. *P10* at 843-45. The District Court accurately observed that the

engines could not be charged with the very liability that MPAA is asserting here.

server test “is based on what happens at the technological-level as users browse the web, and thus reflects the reality of how content actually travels over the internet before it is shown on users’ computers.” *Id.* at 843.

Significantly, after the user clicks on a thumbnail in Google Image Search, a third party website, not Google, displays the full-sized image to the user.

Moreover, the court noted, “[t]o adopt the incorporation test would cause a tremendous chilling effect on the core functionality of the web—its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable.” *Id.* at 840. Given these technological and policy-based realities, the District Court properly found that Google’s in-line links do not directly infringe P10’s copyrights.

1. A Display Under the Copyright Act Requires that the Displayer “Touch” the Content in Question.

P10 and its *amici* challenge the District Court’s common sense ruling. They argue that Google displays the full-sized images even though they are neither housed on Google’s servers nor do they pass through Google’s networks or hardware on their way to the user. Contrary to P10’s assertions, one cannot display – “show a copy of,” 17 U.S.C. § 101 -- something that one does not “touch” in some manner ranging from possessing a physical object to receiving electronic impulses. To display a sculpture, a museum must possess the sculpture. A museum does not display a sculpture in the

copyright sense if it constructs a window through which patrons can see a sculpture that belongs to the museum's neighbor. If the sculpture in the neighbor's yard is an unlawful copy, the museum does not infringe the display right. Rather, the person who displays the unlawful copy – the neighbor – infringes the display right.

To be sure, if the museum displayed the sculpture in its gallery, then it would infringe the display right. It would also infringe the reproduction right if it made the unlawful copy itself, rather than obtain it from a third party. Contrary to what P10 would argue, the fact that the museum would infringe both the reproduction right and the display right does not “conflate” the two rights; instead, it demonstrates that a person can infringe different exclusive rights during a particular course of conduct.

American Society of Media Photographers (ASMP) is among the P10 *amici* who challenge the applicability of the “server” test and the necessity that the displayer “touch” the content. ASMP asserts that Google “communicates” the display of an image by providing a process that causes it to appear on the user's screen and looks to a House Report in support of this theory. But all the examples in the report language ASMP cites describe a display in which the entity in the communication chain does, in fact, “touch” the content in some manner. The local broadcaster, the community

antenna service, and the radio owner all receive the radio signals that they subsequently display. *See* H.R. Rep. No. 83, at 27 (1967).⁷ Google, however, does not touch the content on the third party site when it provides a link to it, thus it cannot engage in a display of the content, infringing or otherwise. Imagine a service that changes the channel on a user’s television in response to his demands. The user declares, “Find me the NBA Finals,” and the service turns the television to ABC. The service is not “communicating” the basketball game; it merely changes the channel so that the user can watch ABC’s communication of the basketball game. In essence, Google “changes the channel” on the user’s computer when it provides a link to a website and a user clicks on that link.

2. The Display Right and the Reproduction Right Are Separate and Distinct.

In the radio broadcast example provided by the 1967 House Report cited by ASMP, retransmission can occur without a reproduction because of the nature of radio technology. The community antenna service can receive

⁷ ASMP quotes a different House Report as stating that the display right includes “[e]ach and every method by which the images ... comprising a ... display are picked up and conveyed....” Brief *Amici Curiae* of American Society of Media Photographers, Inc. *et al.* (ASMP Brief) at 13, *quoting* H.R. Rep. No. 94-1476 at 64 (1976). Clearly, an image must be “picked up” before it can be displayed; however, Google does not pick up the full-sized image to which it links.

and retransmit the radio signals without copying them, and a radio can receive and play the signal to a room full of people without making a copy. Digital technology, however, is different. A computer cannot receive a signal without making at least a temporary copy in its random access memory. Thus, in the Internet context, a website operator must copy an image into his computer's memory before he can display it, thereby implicating both the reproduction right and the display right.

Nonetheless, even in the Internet context, the reproduction right and the display right are decidedly distinct. A person might have the right to make a copy, but not to display the image publicly. For example, the person may subscribe to P10's online magazine, and P10 may grant him the right to store copies of its images on multiple personal hard drives, but at the same time prohibit him from displaying the images publicly by posting them on his website and making them accessible to others via the Internet. If he displays the images, he infringes the display right, but not the reproduction right. On the other hand, if he is not a P10 subscriber, and he makes unauthorized copies which he then displays, he infringes *both* the reproduction right and the display right. The server test does not conflate the reproduction and display rights. They remain separate, although a particular course of conduct might lead to infringement of both.

Under P10's test, every link on the Internet is an infringing display, unless it is excused by fair use. Brief of Perfect 10 (P10 Brief) at 27.⁸ To defend this result, P10 cites the District Court's example of a website entitled "Infringing Content For All," with thousands of in-line links to other websites with infringing content. P10 expresses shock that such a site would not directly infringe, but it overlooks the District Court's suggestion that the website "might still be held liable for secondary infringement." *P10* at 839 n.10.

B. THE DISTRICT COURT PROPERLY REFUSED TO IMPOSE SECONDARY COPYRIGHT LIABILITY ON GOOGLE.

1. Google Is Not a Contributory Infringer.

The District Court correctly found that Google did not contribute to the infringements on the third party websites crawled by Google Image

⁸ The MPAA suggests that only in-line links trigger the display right, but offers no clear basis for distinguishing between in-line links and ordinary hyperlinks. MPAA Brief at 17-18. If revealing an image in half the screen is a display, then surely revealing the same image over the entire screen is also a display. ASMP suggests that an in-line link is more offensive to copyright law because the framer "obtain[s] the commercial benefit of having the images enhance their own content." ASMP Brief at 25. But in the museum example provided above, the museum receives a benefit from providing a view of the neighbor's sculpture. Indeed, the museum could construct a café near the window and thereby profit from the sculpture. Nonetheless, the museum would not be displaying the sculpture in a copyright sense. Furthermore, there are other legal remedies available for

Search. For one, Google did not materially contribute to infringing activity, nor did it have the intent to promote infringement of P10's copyrighted images. Furthermore, contrary to P10's assertions, the fact that Google availed itself of the DMCA safe harbor for information location tools does not imply contributory liability, nor does the fact that Google users incidentally download copies of P10 images when they click on these URLs in Google Image Search.

a. Google Did Not Materially Contribute to Infringing Activity of Third Party Sites.

In assessing whether Google materially contributed to infringing activity, the District Court carefully compared Google's activities with those of Napster. *P10* at 854. The District Court found that "Google d[id] not materially contribute to direct infringement in the ways or to the extent that Napster did." *Id.* at 855. The District Court held that "Google has *not* actively encouraged users to visit infringing third-party websites, and it has not induced or encouraged such websites to serve infringing content in the first place." *Id.* at 856. And, as discussed above, the District Court found no evidence of AdSense revenue actually flowing to websites with infringing content. *Id.*

in-line linking that rises to the level of passing off or other misrepresentation for commercial advantage.

b. Google Did Not Induce Infringement by Third Party Websites.

In attacking the District Court’s holding, P10 and its *amici* cite a variety of cases from other contexts, including swap meets, but fail to demonstrate material contribution by Google in this context. Moreover, P10 ignores the case that matters most: *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (*Grokster*), where the Supreme Court clarified the standards for contributory copyright liability. In *Grokster*, the Court stated that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.” *Id.* at 2776. What distinguishes *Grokster* from earlier contributory liability cases is its focus on intent. The Court’s repeated reference to intent demonstrates that after *Grokster*, intent is a necessary element of contributory infringement: “the object of promoting its use to infringe,” *id.* at 2770, “an actual purpose to cause infringing use,” *id.* at 2778, “statements or actions directed to promoting infringement,” *id.* at 2779, “purposeful, culpable expression and conduct,” *id.* at 2780, “a message designed to stimulate others to commit violations,” *id.*, “acted with a purpose to cause copyright violations,” *id.* at 2781, “a principal, if not exclusive, intent on the part of each to bring about infringement,” *id.*, “intentional facilitation of their users’ infringement,” *id.*, “unlawful objective,” *id.*, “the distributor intended and encouraged the

product to be used to infringe,” *id.* at 2782 n.13, “a purpose to cause and profit from third-party acts of copyright infringement,” *id.* at 2782, and “patently illegal objective.” *Id.*

There is absolutely no evidence in the record that Google specifically intended to promote infringement of P10’s copyrighted images. Compare Google’s activities with those of Grokster: Google did not advertise an infringing use nor instruct how to make an infringing use nor take “affirmative steps ... to foster infringement.” *Id.* at 2770. Certainly, intent cannot be inferred from providing automated search results that, among hundreds of millions of noninfringing sites, may also include links to some infringing sites.⁹

c. Eligibility for the DMCA Information Location Tool Safe Harbor Does Not Denote Contributory Infringement *Per Se.*

Contrary to assertions by P10 and its *amici*, the DMCA does not presume that a search engine *per se* contributes to infringement by linking to infringing sites. Rather, the DMCA recognizes that “[i]n the ordinary course of their operations, service providers must engage in all kinds of acts that expose them to *potential* copyright infringement liability.” S. Rep. No.

⁹ In contrast, creating a website with links to infringing images, and then entitling it “Infringing Content For All!,” *P10* at 839-40, unquestionably would demonstrate an intent to induce infringement.

105-190, at 8 (1998) (emphasis supplied). Accordingly, the DMCA creates safe harbors to “provide[] greater certainty to service providers concerning their legal exposure for infringements that *may* occur in the course of their activities.” *Id.* at 20 (emphasis supplied). The DMCA does not, therefore, presume that any specific activity infringes. Instead, it establishes a framework for Internet service providers to limit their exposure to the uncertain risks of copyright law. In the face of this uncertainty, search engines have an incentive to comply with the DMCA’s notice and takedown regime despite the District Court’s finding that in this instance Google was not contributorily liable. Compliance with the DMCA’s procedures provides a service provider with an efficient and sure way of limiting potential general liability for third party actions.

d. Google Is Not Secondarily Liable for Copies of P10 Images Made on Users’ Computers When Users Click on URLs in Google Image Search.

Finally, P10 attempts to pin contributory liability on Google by arguing that the District 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....” P10 Brief at 29; *see also* Brief *Amici Curiae* of Recording Industry Ass’n of America et al., at 3. But with respect to users, Google is not a secondary infringer. Under P10’s

scheme, the user who transmits the image would be the direct infringer, thus making the website that provides the user with the image a secondary infringer with respect to the user's transmission. Google is a step further removed, merely pointing the user to the secondary infringer, the website. Copyright law does not impose liability on this type of tertiary conduct.

2. Google Is Not Vicariously Liable.

With respect to vicarious liability, the District Court once again properly distinguished Google from Napster, and found that Google did not have the right and ability to control the infringing activity. The District Court observed that:

Google does not exercise control over the environment in which it operates – *i.e.*, the web. Google's ability to remove a link from its search index does not render the linked-to site inaccessible. The site remains accessible both directly and indirectly (*i.e.*, via other search engines, as well as via the mesh of websites that link to it).

P10 at 857-58.

P10 would have this Court find Google vicariously liable because it controls its search index, which points to the infringing images. *P10* Brief at 41-42. Under this reasoning, the operator of a toll road that leads to a swap meet should be vicariously liable for the infringing activity at the swap meet, because the toll road operator controls a road that provides access to the swap meet. Control over a means of access to the premises is different from

control over the premises itself. P10 asks for an unprecedented extension of vicarious liability, which this Court should reject.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's ruling on fair use, but affirm its holdings on in-line linking and secondary liability.

Respectfully submitted,

/s/ Jonathan Band
Jonathan Band
Jonathan Band PLLC
21 Dupont Circle, NW, 8th Floor
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

July 20, 2006

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced, has a typeface of 14 points or more, and contains 6,976 words.

Dated: Washington, District of Columbia

July 20, 2006

/s/ Jonathan Band

Jonathan Band

Jonathan Band PLLC

21 Dupont Circle, NW, 8th Floor

Washington, D.C. 20036

(202) 296-5675

jband@policybandwidth.com

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Russell J. Frackman, Esq.
Jeffrey D. Goldman, Esq.
MITCHELL, SILBERBERG & KNUPP, LLP
11377 W. Olympic Blvd.
Los Angeles, CA 90064

Jeffrey N. Mausner, Esq.
BERMAN, MAUSNER & RESSER
11601 Wilshire Boulevard, Suite 600
Los Angeles, CA 90025-1742

Daniel J. Cooper, Esq.
General Counsel
Perfect 10, Inc.
72 Beverly Park Dr.
Beverly Hills, CA 90210

Andrew P. Bridges, Esq.
Jennifer A. Golinveaux, Esq.
WINSTON & STRAWN, LLP
101 California Street, Suite 3900
San Francisco, CA 94111

Anthony J. Malutta, Esq.
Mark T. Jansen, Esq.
TOWNSEND TOWNSEND & CREW, LLP
Two Embarcadero Center, 8th Floor
San Francisco, CA 94111-3834

Eric J. Schwartz, Esq.
SMITH & METALITZ, LLP
1747 Pennsylvania Ave., NW, Suite 825
Washington, DC 20006

(service list continues on next page)

Richard S. Mandel, Esq.
Robert W. Clarida, Esq.
COWAN, LIEBOWITZ & LATMAN
1133 Avenue of the Americas, 35th Floor
New York, NY 10036

/s/ Matthew Schruers
Matthew Schruers