

United States Court of Appeals for the Ninth Circuit

PERFECT 10, INC.,

Plaintiff-Appellant-Cross-Appellee,

– v. –

GOOGLE, INC.,

Defendant-Appellee-Cross Appellant.

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

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

Of Counsel:

VICTOR S. PERLMAN
American Society of Media
Photographers

NANCY E. WOLFF
Cowan, DeBaets, Abrahams
& Sheppard, LLP


ROBERT W. CLARIDA
JASON D. SANDERS
COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Amici Curiae
1133 Avenue of the Americas, 35th Floor
New York, New York 10036
Tel.: (212) 790-9200
Fax: (212) 575-0671

RULE 26.1 STATEMENT OF PROPOSED *AMICI CURIAE*

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

Dated: New York, NY
June 6, 2006

COWAN, LIEBOWITZ & LATMAN, P.C.

By: 

Robert W. Clarida
Jason D. Sanders
1133 Avenue of the Americas
35th Floor, New York, NY 10036
212-790-9200
Attorneys for *Amici Curiae*

Of Counsel:
Victor S. Perlman
American Society of Media Photographers

Nancy E. Wolff
Cowan, DeBaets, Abrahams & Sheppard, LLP

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PRELIMINARY STATEMENT

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

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

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

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

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

ARGUMENT

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

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

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

The Copyright Act states that to display a work “publicly” is “to transmit or otherwise *communicate a . . . display of the work to . . . the public, by means of any device or process*, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101 (emphasis added).

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

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

