

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 -
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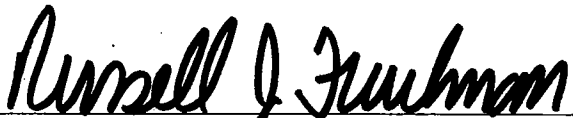
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CORPORATE DISCLOSURE STATEMENT

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,

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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.)

	<u>Page</u>
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.)

	<u>Page</u>
(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&M Records, Inc. v. Napster, Inc.</u> , 239 F.3d 1004 (9th Cir. 2001)	<i>passim</i>
<u>A&M Records, Inc. v. Napster, Inc.</u> , 284 F.3d 1091 (9th Cir. 2002)	50, 51
<u>A&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.)

	<u>Page(s)</u>
<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 & 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.)

	<u>Page(s)</u>
<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 & 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.)

	<u>Page(s)</u>
<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 & 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.)

	<u>Page(s)</u>
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. 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?

