

**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*
RECORDING INDUSTRY ASSOCIATION OF AMERICA
AND NATIONAL MUSIC PUBLISHERS' ASSOCIATION
IN SUPPORT OF NEITHER PARTY**

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RULE 26.1 STATEMENT OF PROPOSED *AMICI CURIAE*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed *amici curiae*, the Recording Industry Association of America, Inc. and the National Music Publishers' Association, hereby state that neither entity has a parent corporation and that no publicly held corporation owns 10% or more of their respective stock.

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INTEREST OF AMICI CURIAE¹

Amicus the Recording Industry Association of America (“RIAA”) is the trade association that represents the sound recording industry in the United States. Its members are record companies in the United States that collectively create, manufacture or distribute approximately ninety percent (90%) of all legitimate sound recordings that are produced and sold in the United States. *Amicus* respectfully submits that it has a useful understanding of the law that would aid the Court in resolving the questions presented on appeal.

Amicus National Music Publishers’ Association (NMPA) is the principal trade association representing the interests of music publishers in the United States. As such, NMPA works to protect the interests of the music publishing industry and, for over eight decades, has served as the leading voice of the American music publishing industry in Congress and the courts. With over 600 members, NMPA represents both large and small music publishing firms throughout the United States.

The participation of *amici* would be particularly appropriate here because, although the appeal does not involve music industry parties, the outcome of this case could have a significant impact on the music industry. The industry has been

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

harméd immeasurably over the recent years by rampant piracy of music and sound recordings on the Internet. Among the most pernicious of these Internet-based infringers are a growing number of websites that offer links to infringing content hosted elsewhere. These sites derive the benefit of offering large amounts of infringing content, conveniently aggregated for the user, but often attempt to escape liability by relying on others to store and serve the infringing copies.

Unless the courts clearly and consistently enforce the copyright laws, such conduct will only grow more common and more devastating to the industry. The decision of the district court erroneously deviates from existing law to establish bright-line rules of direct and indirect liability for the Internet context. In so doing, the court seemingly absolves a wide range of other activities that the courts have previously deemed actionable. The court's novel rules are without support in the statute or the case law, and should not be endorsed by this Court. This Court should be extremely skeptical of any such bright-line rules, particularly where the likely consequences for copyright owners are so damaging.

The *amici* support neither party as to the ultimate outcome in this case, but seek to identify certain errors of law committed by the court below with respect to several specific issues, and to urge this Court to clarify the law of this Circuit with respect to those issues.

SUMMARY OF ARGUMENT

The district court's opinion creates an overly restrictive standard for establishing secondary liability for copyright infringement. The court's test would impose substantial and unwarranted burdens on copyright plaintiffs seeking to stem the ever expanding tide of online infringements.

In the first instance, the lower court erroneously limited its analysis to the direct infringements committed by third-party websites offering Perfect 10's copyrighted images. The court overlooked an entire other class of direct infringers by failing to infer that any Google users had themselves downloaded infringing images. In a procedural context in which the court was required to find the "likely" outcome on the merits, the court's own observation that it was "not unlikely" that Google users committed such infringements should have controlled over the unlikely conclusion that not a single Google user had ever downloaded the available infringing content. The court's insistence on some higher level of proof that is rarely present -- and in any event never required -- in copyright infringement cases was clear error. Such a burden would be insuperable, and would effectively eliminate the possibility of preliminary injunctions in cases of this nature.

By eliminating the direct infringements by individual Google users from its secondary liability analysis, the court established a legal test which could dramatically underestimate a defendant's participation in the infringing activity

and its right to control that activity. The court failed to consider Google's substantial contribution to infringements committed by its own users who gain access to the third-party sites directly through Google. Moreover, the court did not give sufficient consideration to Google's right and ability to control its own indexes of images and website listings, through which Google users access infringing copies of Perfect 10's copyrighted works.

Even with respect to the third-party sites whose infringements were considered a possible predicate for Google's secondary liability, the court below made significant errors that could establish dangerous precedents for all copyright owners if not rectified by this Court. While the district court assumed, without finding, the existence of the knowledge predicate for contributory infringement, its analysis of the knowledge element is rife with errors. First, by focusing principally on whether plaintiff had provided specific file-by-file notice to Google of the infringements, the court failed to acknowledge the many additional ways a plaintiff can satisfy the knowledge prong of contributory infringement. Second, the court erroneously stated that the existence of substantial noninfringing uses for the Google search engine would serve to negate the presence of constructive knowledge.

Moreover, the court committed further error by imposing a legally improper requirement for material contribution under which Google could not be held

secondarily liable if the infringement would continue to exist without Google's participation. There never has been and should not be such a heightened legal requirement for establishing material contribution. The district court's approach sweeps far too broadly by exonerating a wide range of activities materially contributing to copyright infringement.

In the final analysis, in its effort to accommodate the legitimate uses to which the Google search engine can be put, the court changed the governing legal standards in finding that Google's linking activities did not give rise to direct or secondary liability. It thereby provided unwarranted protection for the multitude of large scale commercial entities whose operations are built around supplying links to infringing content on the Internet. Indeed, linking itself has been held to be a species of both direct and secondary copyright liability. This Court should thus be particularly wary of bright line rules with regard to Internet hyperlinks, because exempting this category of activity from claims of infringement could effectively eviscerate copyright protection on the Internet for the owners of copyrighted works.

ARGUMENT

I. THE DECISION BELOW CREATES AN INSUPERABLE EVIDENTIARY THRESHOLD FOR PLAINTIFFS IN ESTABLISHING DIRECT COPYRIGHT INFRINGEMENT

The district court imposed a novel and unwarranted evidentiary threshold by requiring plaintiffs to demonstrate specific instances of direct infringement by individual users of an Internet service. This requirement would place an onerous burden on copyright owners, and is contrary to well-settled law regarding the evidentiary obligations of plaintiffs in such actions.

The existence of a direct infringement by a third party is a prerequisite to both contributory and vicarious infringement. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). However, the direct infringer need not be a defendant in the case. *Danjaq S.A. v. MGM/UA Communications Co.*, 773 F. Supp. 194, 201 (C.D. Cal. 1991), *aff'd*, 979 F.2d 772 (9th Cir. 1992).

It was uncontested below that various third-party websites committed direct infringement by reproducing, displaying and distributing unauthorized copies of Perfect 10's copyrighted photographs. *See Perfect 10 v. Google, Inc.*, No. CV 04-0484 AHM (SHX), Slip Op. (C.D. Cal. February 17, 2006) ("*Opinion*") at 34. However, the lower court found an absence of evidentiary foundation for Perfect 10's claim that Google users themselves committed acts of direct infringement by

downloading Perfect 10's copyrighted images from the third-party websites making such images available. *Id.* According to the district court, Perfect 10 had "demonstrated only that users of Google search are *capable* of directly infringing by downloading the underlying webpage or image." *Id.* (emphasis in original). While acknowledging that "[i]t is not unlikely" that many Google users do in fact engage in infringing downloads from third-party websites, the court concluded there was no direct evidence in the record proving such acts of direct infringement. *Id.*

The court's refusal to consider the substantial *circumstantial* evidence of such infringement – easily inferred from the sheer number of images that were made available for download by the countless users of Google's image search – was clear error that requires correction by this Court. As set forth below, the court's analysis deviated from basic principles of copyright law permitting circumstantial and inferential proof of infringement where no direct evidence is available. Moreover, the court heightened the standard of proof of direct infringement in a factual setting – the evanescent world of the Internet – where direct proof of infringement is most difficult to obtain. Adoption of the court's standard of proof for direct infringement will preclude the majority of copyright holders from pursuing meritorious claims of contributory and vicarious infringement occurring online.

A. The Law Permits Courts to Infer Direct Infringement

By refusing to infer acts of direct infringement by Google users, notwithstanding the court's own awareness as to the *likelihood* that *many* users committed such acts, the court ignored reality and created a potentially insuperable burden for copyright plaintiffs seeking to halt the pervasive problem of piracy on the Internet. Given the generally ephemeral nature of online evidence, coupled with the absence of the direct infringers as parties to the case, the type of direct proof of infringement required by the court below will be impossible to provide in many instances. *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 204 (4th Cir. 1997) (“no one can expect a copyright holder to prove particular instances of use by the public when the proof is impossible to provide because the infringing [defendant] has not kept records of public use”).

It has been the consistent experience of *amici* that concrete evidence of online infringement is routinely purged or deleted, often difficult or impossible to collect, or otherwise completely obscured by the furious pace of copying and transferring content on the Internet. As a practical matter, no one, including most defendants in the cases prosecuted by *amici*, really disputes that such online infringements occur on a massive scale. However, even with the benefit of the most sophisticated forensics, *amici* have learned that actually capturing the acts of copying is close to legally and technologically impossible.

