

# United States Court of Appeals for the Ninth Circuit

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PERFECT 10, INC.,

*Plaintiff-Appellant-Cross-Appellee,*

— v. —

GOOGLE, INC.,

*Defendant-Appellee-Cross Appellant.*

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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)

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## **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.

Dated: New York, New York  
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## INTEREST OF AMICI CURIAE<sup>1</sup>

*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

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<sup>1</sup> 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 Hotelling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 204 (4<sup>th</sup> 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.

Fortunately for copyright plaintiffs, nothing in the copyright laws requires the kind of stringent standard of proof established by the lower court. To the contrary, relevant precedents have long applied a more flexible and practical approach in confronting issues of proof in copyright cases, permitting copyright plaintiffs to “prove defendant’s copying either by direct evidence or, *as is more often the case*,” inferentially. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992) (emphasis added). Indeed, it is precisely “[b]ecause direct evidence of copying is ordinarily unavailable” that plaintiffs are “permitted to demonstrate copying through indirect proof.” *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 654 F.2d 204, 207-08 (2d Cir. 1981). *See also Robert R. Jones Associates, Inc. v. Nino Homes*, 858 F.2d 274, 276-77 (6th Cir. 1988)(court may infer copying from circumstantial evidence); *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1231-32 (3d Cir. 1986)(same); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)(same).

In the virtual context of the Internet, a pirate’s acts of copying are not only unwitnessed and transient, but also often “without any objective physical manifestation,” *see id.*, accessible to an aggrieved copyright owner. It therefore makes no sense to impose a higher burden of proof in the online context than applies in brick and mortar reality.

## **B. An Inference of Direct Infringement Is Appropriate Here**

The court below recognized the likelihood that there were many Google users who in fact downloaded the plaintiff's copyrighted images from third-party websites, but nevertheless refused to infer that even a single such instance had occurred. Given the record evidence that a Google Image Search provided Google users with over 5,000 copies of Perfect 10's copyrighted images, it is inconceivable that none of the millions of Google users ever downloaded such images. *Cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2772 (2005) (although "no one can say how often the software is used to obtain copies of unprotected material," plaintiff's evidence suggests "the probable scope of copyright infringement is staggering"). Indeed, the downloading of infringing copies performed during plaintiff's investigations itself is sufficient foundation from which to conclude that other infringing copies have been made. *See, e.g., Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8<sup>th</sup> Cir. 1994) (reversing summary judgment for defendant in infringement action and granting judgment for plaintiff based on investigator's proof of direct infringement); *RCA/Ariola Int'l Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 782 (8<sup>th</sup> Cir. 1988) (summary judgment for plaintiff affirmed based on investigators' proof of direct infringement); *RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335, 338



(S.D.N.Y. 1984) (inferring acts of wrongful copying based on investigators' proof of such acts).

In the *RCA Records v. All-Fast Systems* case cited above, the court labeled as "frivolous" defendant's suggestion that there was no proof of infringement where the only acts of copying had been established through plaintiff's investigators:

I find frivolous defendant's argument that plaintiffs have presented no evidence of wrongful copying. Three times defendant's employees willingly and knowingly copied copyrighted tapes for plaintiffs' investigators. Assuming that this particular copying was, as defendant argues, consented to by plaintiffs, the evidence establishes a strong inference, which defendant has done nothing to rebut, that the employees would and did do exactly the same copying for customers unconnected with plaintiffs.

594 F. Supp. at 338. The argument advanced by Google here, and accepted by the court below, that Perfect 10 had not proven direct infringement, is equally baseless, because the only reasonable inference to be made from the evidentiary record is that Google users downloaded copies of Perfect 10's copyrighted images.

In the preliminary injunction context, a party is required to establish only a likelihood of success on the merits. *See, e.g., Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 627 (9<sup>th</sup> Cir. 2003). The district court's own language recognized that this standard had been satisfied with respect to direct infringement by Google users. *See Opinion* at 34 ("It is not unlikely that many

users” downloaded plaintiff’s images). Yet the court insisted on a level of proof that would not even be needed to establish ultimate liability in the case and that would also be nearly impossible to obtain.

As the Supreme Court has explained in the summary judgment setting, where the factual context makes the non-moving party’s position “implausible,” that party “must come forward with more persuasive evidence ... than would otherwise be necessary.” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Google’s position that not a single one of its users downloaded Perfect 10’s images is so implausible that it would fail as a matter of law without further evidentiary support. Certainly, in a context where the court’s mission is to ascertain the “likely” outcome on the merits, it should reject an unsupported and implausible assertion in favor of a more reasonable and in fact logically unimpeachable inference. Any other result would unduly hamper copyright plaintiffs in the already difficult task of policing infringements on the Internet and, concomitantly, effectively exonerate online pirates who successfully cover their evidentiary tracks.

## **II. THE DECISION BELOW APPLIED AN ERRONEOUS LEGAL ANALYSIS AS TO CONTRIBUTORY INFRINGEMENT AND VICARIOUS LIABILITY FOR LINKING SITES**

The court below committed numerous errors in its analysis of contributory infringement and vicarious liability in connection with Google’s in-line linking to

infringing content. If allowed to stand, the court's reasoning could effectively eliminate these doctrines as they apply to *any* linking activity on the internet. Such a result is contrary to the understanding of the United States Supreme Court, which recognized the importance of applying secondary liability in a manner that provides "effective -- not merely symbolic -- protection" for copyright owners. *Sony*, 464 U.S. at 441 (1984).

## **A. Contributory Infringement**

### **1. Knowledge**

The district court's entire analysis of the knowledge element is clearly *dicta*, because the court ultimately assumed "without deciding the question" that Google had actual knowledge of infringing conduct. *Opinion* at 38. Unfortunately, the court announced that assumption only after lengthy remarks that purported to limit dramatically what constitutes knowledge for purposes of contributory infringement. Based on misstatements of the law that deviate from established principles of law regarding knowledge, the lower court's analysis must be corrected by this Court.

#### **a. The Court's Focus on File-by-File Notice Misstates the Knowledge Requirement of Contributory Infringement**

The lower court's analysis of the knowledge requirement is both confused and dangerously restrictive. While initially acknowledging that this element can be satisfied by either actual or constructive knowledge, the court overlooks

evidence of Google's own activities and awareness and concludes that Google could be found to have actual knowledge "*only* upon receiving proper notice of alleged infringement." *Opinion* at 37 (emphasis added). The court then considered several arguments advanced by Google as to why Perfect 10's notices were improper, including failure to identify the specific copyrighted work at issue. *Id.* It thus remains completely unclear whether, under the court's analysis, a plaintiff can establish an online infringer's knowledge with anything less than formal and highly specific notice of infringement.

To the extent that the court's language suggests that specific file-by-file notice is the only means of providing a link site or search engine with sufficient knowledge, it is clearly erroneous. By the express terms of the Digital Millennium Copyright Act (hereafter "DMCA"), which Google itself seeks to invoke in this action, *Opinion* at 36 n.18, a copyright owner need not provide file-by-file notice to a service provider in order to invoke the notice and takedown remedy of the DMCA.<sup>2</sup> *See* 17 U.S.C. § 512(c)(3)(A)(ii)(requiring "identification of the copyrighted work claimed to have been infringed, *or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site*")(emphasis added). Pursuant to this provision, a service

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In general terms, the DMCA provides at § 512 that an Internet service provider's liability for copyright infringement can be limited if the service provider complies with certain statutory requirements, such as responding appropriately to notices of infringement served by copyright owners.

provider that fails to remove allegedly infringing content based on receipt of a “representative list” of copyrighted works – or even upon receipt of “information reasonably sufficient to permit the service provider to locate” a link to allegedly infringing material -- loses its immunity from liability. 17 U.S.C. § 512(d).

If file-by-file notice were truly a prerequisite to liability, it would make no sense for Congress to impose liability on service providers who fail to act on less particularized notices. In other words, a requirement of file-by-file notice would completely undermine the statutory scheme of the DMCA. Accordingly, any suggestion of a requirement of file-by-file notice must be rejected.

Moreover, apart from the specificity of the notice, the court’s *dicta* also has the practical effect of requiring some type of formal notice from the copyright owner as the *only* acceptable proof of actual knowledge. The case law does not support any such proposition. Since the earliest formulations of the contributory infringement doctrine, long prior to the Internet and the DMCA, courts have simply required that the defendant have knowledge; they have not specified how or from whom the defendant must have obtained that knowledge. The lower court, however, analyzed only what the defendant knew by virtue of plaintiff’s notice, not what defendant may have known more generally. In establishing the element of knowledge, the dispositive issue is always “what did the defendant know?” and not “what did the plaintiff do?” All evidence relevant to the defendant’s actual

knowledge must therefore be considered.<sup>3</sup> Here, the court disregarded other evidence of actual knowledge and other means of proving it, including Google's own policy (since abandoned) of monitoring the sites of its AdSense partners, *Opinion* at 37, because of the court's narrow focus on the lack of a formal file-by-file notice from the copyright owner. This analysis was again error.

Indeed, this precise argument was rejected by the court in *Fonovisa, Inc. v. Napster, Inc.*, No. 3:01-CV-02669, 2002 WL 398676 (N.D. Cal. Jan. 28, 2002). There, defendant Napster asserted that any claim of secondary copyright infringement against an on-line system required specific notice as to the works infringed, citing the modified injunction issued under this Court's decision in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001) ("*Napster I*"). Judge Patel in *Fonovisa* rejected this argument as an overbroad reading of *Napster I*: "Had the Ninth Circuit intended to overhaul copyright liability and carve out special protections for computer service providers, the Court of Appeals would have explicitly stated such a change." *Fonovisa*, 2002 WL 398676, at \*10.

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<sup>3</sup> This established legal principle is consistent with the language used throughout § 512 of the DMCA, which requires that service providers, as a condition of safe-harbor protection, *both* lack actual or constructive knowledge of infringement *and* respond expeditiously upon receipt of formal notice. See 17 U.S.C. § 512(c)(1)(A) and (d)(1)(A). If actual or constructive knowledge could be established only by formal notice, the first of these requirements would be superfluous, and the statute could simply require that service providers respond expeditiously to formal notice.

In the instant case, the lower court's narrow focus on plaintiff's notice caused it erroneously to avoid consideration of defendant's more general knowledge. The result is an unwarranted shift in responsibility whereby the onus is on plaintiff to create knowledge in the defendant, regardless of what defendant might otherwise know. Under this cramped knowledge-by-notice-only analysis, the online facilitator of piracy can ignore obvious signs of infringement by simply criticizing the absence of or quality of plaintiff's notice. Indeed, the online infringer could even ignore specific notice from a third party as long as plaintiff's notice was either missing or insufficiently specific. Surely, the knowledge prong of contributory infringement was not meant to be so circumscribed.

Finally, the court's implication that file-by-file notice would be the only practicable means of proving Google's knowledge places an impracticable burden on copyright owners, because the infringing contents of a service like Google's are constantly in flux. The Fourth Circuit in *ALS Scan, Inc. v. Remarq Communities, Inc.*, 239 F.3d 619 (4<sup>th</sup> Cir. 2001), recognized that the law imposes no such burden. In *ALS Scan*, defendant argued that it was entitled to DMCA immunity because plaintiff's notice of infringement did not identify any specific infringing works posted by subscribers to defendant's Internet newsgroups. The Fourth Circuit disagreed, holding that defendant had "actual knowledge" of infringing activity by virtue of plaintiff's letter identifying the two newsgroups where multiple works

were being infringed. In so holding, the Fourth Circuit explained that the DMCA was not meant to place an onerous burden on copyright owners experiencing multiple infringements of their works on the Internet:

This subsection specifying the requirements of a notification does not seek to burden copyright holders with the responsibility of identifying every infringing work -- or even most of them -- when multiple copyrights are involved. *Instead, the requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.* Thus, when a letter provides notice equivalent to a list of representative works that can be easily identified by the service provider, the notice substantially complies with the notification requirements.

*Id.* at 625 (emphasis added).

Accordingly, the district court's confusing remarks concerning actual knowledge and constricted view of the evidence that can establish actual knowledge should be corrected and clarified on appeal.

**b. The Court Erroneously Allowed Substantial Noninfringing Use to Negate Constructive Knowledge**

In like fashion, the court below also erred in its sweeping misstatement that “[u]nder *Sony*, Google cannot be deemed to have constructive knowledge of infringing activity since its search engine clearly is capable of commercially significant non-infringing uses.” *Opinion* at 36. Even in *dicta*, this is a material error that must be addressed. The court derives its remark from a passage in the Supreme Court's 2005 decision in *Metro-Goldwyn-Mayer Studios Inc. v.*



*Grokster, Ltd.*, --- U.S. ---, 125 S.Ct. 2764 (2005), which is itself *dicta* paraphrasing the holding of *Sony*. Again misreading the basic parameters of the knowledge requirement for contributory infringement, the court below has oversimplified the law in a way that eliminates important protection for copyright owners.

The *Grokster* passage cited by the court states that *Sony* “barred secondary liability based on presuming or imputing intent to cause infringement *solely* from the design or distribution of a product capable of substantial lawful use, which the distributor knows in fact is used for infringement.” *Grokster*, 125 S.Ct. at 2778 (emphasis added). The district court’s reading ignores the crucial word “solely,” and purports to preclude constructive knowledge “since” Google’s “search engine clearly is capable of commercially significant noninfringing uses.”

The difference is enormous. Under the Supreme Court’s *Grokster* formulation, constructive knowledge can still be established notwithstanding a “substantial lawful use,” provided that the constructive knowledge is not presumed or imputed “solely” from “the design or distribution of a product” having such uses. If there are other facts that support a finding of constructive knowledge, the court is free to consider them and find constructive knowledge if the facts so warrant. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896, 919 (N.D. Cal. 2000)(enumerating evidence, other than system design, which

supported finding that Napster had constructive knowledge). The district court's oversimplification does not do this. Rather, it skips the constructive knowledge inquiry altogether if it can identify noninfringing uses. The court ignored whether other evidence of constructive knowledge may exist: "*since*" there is a noninfringing use, the defendant "*cannot* be deemed to have constructive knowledge." *Opinion* at 36 (emphasis added). Just as the court reduced the actual knowledge issue to a question of formal, file-by-file notice, it improperly reduced the constructive knowledge issue to a question of noninfringing use.<sup>4</sup>

In light of the ongoing relationship between Google and the direct infringers, and Google's role in facilitating the distribution of the infringing content, the court's inquiry into constructive knowledge cannot be limited to the question of whether Google's technology does or does not permit noninfringing uses.

Regardless of what the technology allows, the court must also look to how Google actually interacts with its partners and users. As this Court observed in *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001), "[w]e are compelled to

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<sup>4</sup> Moreover, the Supreme Court passage upon which the district court purported to rely concerned only the relation between constructive knowledge and "the design or distribution of a product." Neither *Sony* nor *Grokster* applied this language to an on-line business such as Google's, which does not merely distribute a "product" but rather operates a service having an ongoing relationship with both its AdSense "partners" and its end users. Moreover, this service, unlike the video recorders at issue in *Sony*, actually delivers infringing content from Google's AdSense "partners" – the infringing third-party websites -- to its users.

make a clear distinction between the architecture of the Napster system and Napster's conduct in relation to the operational capacity of the system." *Id.* at 1020 (finding *Sony* doctrine inapplicable). *See also Sony*, 464 U.S. at 437 (no application of staple article doctrine where there exists "an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occur[s]"); *RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335, 339 (S.D.N.Y. 1984) ("The *Sony Corp.* decision extends protection only to the manufacturer of the infringing machine, not to its operator").

The district court here did not make this "clear distinction" between the technology and its operation, but instead rejected any possibility of constructive knowledge, purportedly under *Sony*, solely because of the technical capabilities of the Google system.<sup>5</sup> This is not the holding of *Sony*, nor is it consistent with *Grokster's* paraphrase of *Sony*. More important, the court's error is of a piece with its entire erroneous description of the knowledge requirement, which it seeks to rewrite in the context of online infringement. The knowledge requirement, however, has been successfully and logically applied for years to myriad contexts, virtual or otherwise, and should not be narrowed unduly where the Internet is

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<sup>5</sup> To this extent, the district court's opinion is again contrary to the DMCA, which applies a constructive knowledge standard to the conduct of Internet services that clearly also have potentially non-infringing uses. *See* 17 U.S.C. § 512(c)(1)(A)(ii) and (d)(1)(B) (immunity only available to storage or linking site where "in the absence of such actual knowledge [the service provider] is not aware of facts or circumstances from which infringing activity is apparent").

involved. The district court's erroneous observations about constructive knowledge must therefore be rejected.

## **2. Material Contribution**

### **a. The Court Erroneously Required But-For Causation, Not Material Contribution**

The court below compounded its errors as to knowledge by imposing an extremely stringent standard for material contribution at odds again with established precedent, effectively requiring that Google be the but-for cause of the infringements by third-party sites: "Such websites existed long before Google Image Search was developed and *would continue to exist were Google Image Search shut down.*" *Opinion* at 41-42 (emphasis added). Thus, for the district court, unless the injunction of Google would result in the complete cessation of infringing activity, Google cannot be held to have materially contributed to the infringement.

This is not the law. In the Ninth Circuit, as elsewhere, defendants frequently have been liable as contributory infringers even though their contributions were not the *sine qua non* of any direct infringement. For example, in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9<sup>th</sup> Cir. 1996), the swap meet operator was liable because it "provide[d] the environment and market" for the infringement to occur on a "massive" scale, not because the infringement would have been

impossible to carry out otherwise. *See also Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3<sup>rd</sup> Cir. 1986)(same).

Thus, even assuming *arguendo* that Google's contributions do not rise to the level of "but-for" causation, the possibility of contributory liability does not disappear. The seller of pirated recordings in *Fonovisa* could well have sold his wares from the trunk of his car, but by facilitating his infringement "in the massive quantities alleged" the swap meet operator made a material contribution. *Fonovisa*, 76 F.3d at 264. There was no requirement that the infringing conduct would cease entirely, absent the support of the swap meet.

The reasoning of *Fonovisa* has been consistently followed. Applying *Fonovisa*, the court in *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670(JBS), 2006 U.S. Dist. LEXIS 14988 (D.N.J. Mar. 31, 2006) very recently expressed the proper test as follows: a party "need only provide a central 'hub' for infringing activity to materially contribute to infringement." *Id.* at \*51.<sup>6</sup> *See also UMG Recordings, Inc. v. Sinnott*, 300 F. Supp.2d 993, 1001 (E.D. Cal. 2004) (providing

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<sup>6</sup> The DMCA supports the holding of *Arista Records* that providing such a "central hub" is sufficient to give rise to secondary liability. Under § 512(d), a service provider enjoys immunity from liability for "referring or linking users to an online location containing infringing material or infringing activity, by using information location tools such as a directory, index, reference, pointer, or hypertext link" only where certain stringent conditions are satisfied. If providing links to infringing content could not itself give rise to liability, however, the statute would again be granting a shield against liability that no court could ever impose. Congress cannot be presumed to have indulged in such a futile exercise.

support services for infringing activities constitutes material contribution under *Fonovisa*). In the online context, this Court used the reasoning of *Fonovisa* to find Napster liable for providing the “site and facilities” for direct infringement through its integrated service enabling users to find and download infringing music. *Napster* 239 F.3d at 1022 (quoting *Fonovisa*).

Under the relevant precedents, providing services that lend meaningful support or assistance to infringing activities constitutes a material contribution. This standard will certainly be met when a party acts in such a way as to make infringing content widely available to users. The district court’s stringent but-for requirements for establishing material contribution threaten to exclude from liability many categories of infringers that would otherwise fall squarely within the definition for secondary liability under the existing case law, such as for example sites aggregating links to obviously infringing content. Accordingly, the district court’s “but-for” test for material contribution should be rejected as erroneous.

**b. The Court Erroneously Required A Close Financial Nexus Between Google’s AdSense Payments and the Infringing Activity**

The court below committed a similar error in rejecting the possibility that Google’s financial relationship with the infringing AdSense partners might constitute a material contribution to the infringements by those parties. The court stated that “there is no evidence that these [infringing] 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.” *Opinion* at 41 (emphasis added). This conclusion is contradicted by the relevant case law. Under the district court’s analysis, only payments amounting to life-or-death sustenance can ever constitute a “material” contribution, but far lesser forms of financial support, such as paying for advertising to attract customers, have been deemed sufficient in prior cases. *See Fonovisa*, 76 F.3d at 264; *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 846 (11th Cir. 1990) (promoter who, among other things, provided funds and equipment to “encourage the duplication of [copyrighted] program” held contributorily liable).

Further, the court’s novel consideration of whether the third-party sites had been “created with the purpose of profiting from” the AdSense revenue sharing program is utterly without support of authority, and erroneously introduces the *direct infringer’s* intent into the contributory infringement analysis. Plaintiffs cannot be required to prove the subjective intention of every non-party direct infringer in order to show a material contribution on the part of the secondarily liable party. The only intention that is even arguably relevant is that of the secondary infringer, and courts can assume that the secondary infringers would stop offering the payments if they did not consider them “material” in attracting partners to the venture.

Therefore, the court's holding as to material contribution is erroneous and should be reversed.

**B. The District Court Improperly Analyzed Google's Right and Ability to Control Infringing Activity**

Vicarious liability for copyright infringement exists where the defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Napster*, 239 F.3d at 1022 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). The court below found that Google had the requisite financial interest in the infringing activities of third party websites, but could not be held vicariously liable because it lacked the right and ability to control such infringing activities. *Opinion* at 43-44. In so ruling, the district court misperceived the nature of control required to establish vicarious copyright infringement.

At the outset, the court's vicarious liability analysis was hampered by its reluctance to find direct infringement by Google users downloading copies of Perfect 10's copyrighted images from third party websites. *See Point I supra*. By limiting its consideration of secondary liability to the direct infringements committed by third party websites, the court overlooked the high degree of control exercised by Google with respect to its own users. Google has the absolute ability to control its own indexes of images and website listings through which Google users gain access to infringing content. The court below failed to consider whether



control over that particular environment – as opposed to the entire Internet – was sufficient to trigger vicarious liability. *See Napster*, 239 F.3d at 1024 (“Napster ... has the ability to locate infringing material listed on its search indices, and the right to terminate users’ access to the system. The file name indices, therefore, are within the ‘premises’ that Napster has the ability to police.”).

Similarly, with respect to the direct infringements committed by the third party websites, the court failed to appreciate the significance of removing those sites from Google’s indexes to the vicarious liability analysis. The district court apparently believed that because “Google cannot shut down the infringing websites or prevent them from continuing to provide infringing content to the world,” it cannot be held vicariously liable for copyright infringement. *Opinion* at 44. However, to be found liable for vicarious copyright infringement, a party need only control the capacity of the infringement to be offered on its own premises, not anywhere in the world. *See, e.g., Fonovisa*, 76 F.3d at 262-63 (imposing vicarious liability on flea market operators based on their ability to control access to infringing copies offered within confines of their own flea market). Thus, the fact that the third-party sites would continue to exist, or that Google users might access such websites by other means if the sites were removed from Google’s indexes, should not exonerate Google from liability for vicarious infringement.

The removal of infringing websites from Google's indexes would, as the district court acknowledged, "make it more difficult for such websites to be found on the web." *Opinion* at 44. In other words, by exercising control over the infringing content found in its indexes, Google had the ability at least to limit the scope of infringing activity taking place. *See Grokster*, 125 S. Ct. at 2776 ("One infringes ... vicariously by profiting from direct infringement while declining to exercise a right to stop *or limit* it") (emphasis added).

Finally, this Court should reject any assertion by Google that the sheer size of the AdSense program renders control impractical. As the court noted in *Arista Records, supra*, "Defendants alone control the size of their market . . . If the market's growth outpaced Defendants' ability to monitor and control what happens on their own premises by their own vendors, then they should have reduced the size and scope of their operations or hired more security to meet their obligations, or both." 2006 U.S. LEXIS 14988 at \*37.

Accordingly, the district court's conclusion as to vicarious liability is in error and should be reversed.

### **III. THE DECISION BELOW ERRONEOUSLY APPLIED A BLANKET RULE PRECLUDING DIRECT LIABILITY FOR LINKING TO INFRINGING CONTENT**

In addition to its errors regarding secondary liability, the court below erroneously dismissed the possibility of direct infringement by Google arising

from its provision of hyperlinks to infringing content. The court held, *Opinion* at 21, that it could not impose direct liability for violation of the public display right unless Google also reproduced the infringing content on its own servers. While *amici* take no position on whether or not Google's activities ultimately constitute direct infringement, it is important for the Court to recognize that commercial link sites aggregating large amounts of infringing content pose one of the most significant threats to the recording industry. *Amici* are aware of numerous large-scale commercial infringers whose operations consist entirely or primarily of supplying Internet hyperlinks to infringing content, while relying on remotely hosted sites to store and serve the infringing copies. Any broadly constructed rule protecting all providers of such links from claims of direct infringement, such as the bright line server test adopted here by the district court, would be ill advised.

The district court echoed this same error in elsewhere concluding that a violation of a copyright owner's distribution right requires an actual "transfer of a file from one computer to another." *Opinion* at 22. Courts have in fact recognized that merely "making available" unauthorized copies constitutes unlawful distribution even without proof of an actual distribution or transfer. *See, e.g., Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (defendant violated distribution right by making unauthorized copies of copyrighted works available to public in library); *A&M Records, Inc. v. Napster*,

*Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001)(“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights”); *Matlow v. Solomon*, No. Civ. 04-6109, 2005 WL 309976 (D. Or. Feb. 7, 2005) (even without proof of actual distribution or sale, offering unauthorized copies of plaintiff’s photographs on eBay made copyright infringement “undisputed”). Contrary to the characterization of the district court here, *see Opinion* at 22, the 2005 district court decision in *In re Napster, Inc. Copyright Litigation*, 377 F. Supp. 2d 796, 805 (N.D. Cal. 2005) held that the distribution right under § 106(3) was violated where the defendant merely “*offered* to distribute copies . . . for purposes of further distribution, public performance or public display” (emphasis added). No actual transfer of files was required.

Other courts have rejected the sweeping proposition that Internet linking may never constitute direct copyright infringement. Indeed, under certain circumstances, courts have acknowledged the possibility of direct infringement by a defendant even when that defendant did not itself host the infringing material but merely connected users to it through hyperlinks. Most notably, this Court in its first *Kelly v. Arriba Soft* opinion, 280 F.3d 934 (9<sup>th</sup> Cir. 2002), *subsequently amended by* 336 F.3d 811 (9<sup>th</sup> Cir. 2003), recognized under extremely analogous

facts<sup>7</sup> that a party providing unauthorized “inline links” to copyrighted photographs was a direct infringer of the display right in those photos:

[Defendant] Arriba is directly liable for infringement. Arriba actively participated in displaying [plaintiff] Kelly’s images by . . . having its program inline link and frame those images within its own web site. Without this program, users would not have been able to view Kelly’s images within the context of Arriba’s site. Arriba acted as more than a passive conduit of the images by establishing a direct link to the copyrighted images. Therefore, Arriba is liable for publicly displaying Kelly’s copyrighted images without his permission.

280 F.3d at 947.

Although the district court correctly noted that the above portion of *Kelly I* was withdrawn on procedural grounds -- because the decision appealed from had not addressed in-line linking -- the facts here at issue do squarely present the question of direct liability for hyperlinking, and the logic behind the quoted passage from *Kelly I* should apply fully. Now that the question is properly before this Court, a case of direct liability for hyperlinking should be allowed to go forward, and should not be foreclosed as a matter of law.

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<sup>7</sup> The facts here actually support liability more strongly than did the facts of *Kelly*, because, among other things, plaintiff here operates a subscription-only, password protected site rather than a free public site, as did plaintiff in *Kelly*, and the infringing images originate not on plaintiff’s site but on sites of third party infringers. There is thus no argument here, as there was in *Kelly*, that plaintiff has somehow consented to the use by making images available on a free, publicly accessible web site.

The *Kelly* decision is not alone in rejecting a bright-line rule against direct liability for hyperlinking. In *Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02-cv-01011, 2004 U.S. Dist. LEXIS 24336 (S.D. Ind. Nov. 10, 2004), the defendant argued specifically that providing Internet links to infringing content “can never amount to a copyright violation.” *Id.* at \*31. However, the court expressly rejected the argument, noting there was no support “embracing the sweeping *per se* rule that [defendant] advocates on summary judgment.” *Id.* As in the present case, the defendant in *Batesville inter alia* provided links to infringing photographs which resided on a third party server, and which displayed the identifying information of defendant, not the hosting site. The court held that defendant’s involvement was sufficient to create potential liability for either direct or contributory infringement, and rejected the notion that such liability would pose a broad threat to use of hyperlinks on the Internet. *Id.* at \*36.

This Court should also avoid establishing a bright line rule exempting those who provide hyperlinks to infringing content from liability for copyright infringement.

## CONCLUSION

*Amici curiae* take no position on the factual issues of this case or the application of the law to the facts here of record. *Amici* respectfully urge only that

this Court apply the fundamental principles of copyright law in a manner  
consistent with the analysis set forth in this brief.

Dated: New York, New York  
June 6, 2006

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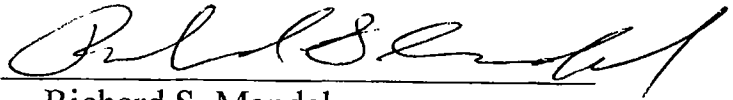
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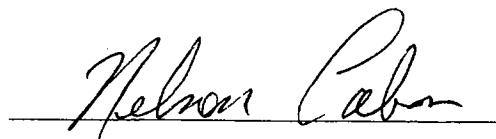
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