

**Nos. 06-55406, 06-55425, 06-55759, 06-55854, 06-55877
Consolidated with Docket No. 06-55405**

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

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

v.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA, HON. A. HOWARD MATZ, CASE No. CV 04-9484 AHM (SHx)

**FOURTH BRIEF ON CROSS-APPEAL
APPELLEE/CROSS-APPELLANT GOOGLE INC.'S REPLY BRIEF**

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REDACTED VERSION – NOT AS FILED

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I. INTRODUCTION

Much is at stake in this case, for both the parties and the public.

Google is the pre-eminent search engine and has helped promote the revolution in information access that the Internet has brought about.

SERG0508;SERG0482:5-11;SERG0480:10-12;SERG0552. Congress and the courts recognize the importance of the Internet, and search engines, in disseminating information and expanding knowledge. *See* 47 U.S.C. §§230(a)-(b); S.Rep. 105-190, at 49; H.R. Rep. 105-551(II), at 58; *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

The goals of copyright law in this case align with other policies promoting the development of the Internet. The Constitutional basis of copyright law is clear: “to promote the Progress of Science and useful Arts.” U.S. Const. art. I, §8, cl.8. The fair use doctrine is a vital component and serves copyright’s purpose by encouraging and protecting the dissemination of information. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-577 (1994).

The amici highlight the importance of the issues. On fair use, P10 draws support from only the Motion Picture Association of America (P10’s other amici address issues not related to Google’s appeal). With Google, however, stand major library associations; a consumer rights and civil

liberties group; and computing, consumer electronics, Internet, communications, and technology trade associations. (Amicus Curiae Brief of the Electronic Frontier Foundation *et al.* at 1-2; Brief of Amici Curiae NetCoalition *et al.* at 1-2.) Regarding “Progress of Science and useful Arts,” the division of allies is significant.

As explained below, P10 offers no plausible defense of the district court’s injunction, which, although limited to Google’s “thumbnail” images, would damage Google and its users. Instead of respecting facts and precedents, P10 either distorts or ignores them or, worse, smears Google as a distraction.¹

In this reply on its appeal, Google focuses on (1) the District Court’s error in finding likely infringement arising from Google’s use of “thumbnails” in Image Search results, which incorporated (a) wrongful expansion of direct infringement liability to a technology instead of limiting it to volitional conduct, and (b) an analysis of fair use that was both flawed

¹P10 has improperly submitted “Further Excerpts of Record” with irrelevant and inflammatory materials such as a lawsuit by a politician against Google concerning child pornography, FERG90-109, which was withdrawn two months before P10 submitted it, *see* Notice of Discontinuance, *Toback v. Google Inc.*, no. 2:06-cv-02692-DRH-WDW (E.D.N.Y. filed June 21, 2006); a news article about that case, FERG688; an irrelevant transaction between Google and Associated Press, FERG110; unauthenticated documents created after the District Court’s decision, FERG1-15;FERG17-87; and one unauthenticated document from another P10 case. FERG16. The Court should reject P10’s manipulation of the record.

and contrary to this Court's discussion in *Kelly*; (2) the District Court's failure to respect limitations imposed by the Digital Millennium Copyright Act on liability and injunctions; and (3) the District Court's improper analysis of harms where P10 furnished no evidence of irreparable harm. This Court should reverse the District Court's thumbnail-based direct infringement ruling and vacate the injunction.

II. ARGUMENT

A. **P10 Established No Basis For Finding Direct Infringement Based On Volitional Conduct By Google.**

P10 discussed the requirement of volitional conduct for direct infringement with respect to both thumbnails and original size images, and P10 concedes that direct infringement requires volitional conduct. *See* P10 Third Brief 5-8. To argue that Google's conduct is volitional, however, P10 distorts the facts and record. A comparison of P10's principal allegations (as summarized on page 1 of its Third Brief) with truth *and the record* follows:

P10 allegation: Google selects the infringing P10 images that it copies.

Established fact: Google's *automated* processes comprehensively canvass and index the Web. SERG0026;SERG0482:1-11;SERG0511. There is no suggestion in the record that Google particularly seeks P10 images. *Cf.* SERG0537.

P10 allegation: Google provides full-size P10 images in a “frame.”

Established fact: Google allows a user, by clicking on a thumbnail Image Search result, to fetch via browser the Web page associated with the image; any “full size” image appears *in the original context and on a Web page transmitted from the website to the user in response to user’s action.*

SERG0002:21-28;SERG0485-87.

P10 allegation: Google provides full-size P10 images via a “See full-size image” link.

Established fact: In Image Search results, when a user clicks on a thumbnail, Google provides a new hyperlink with the quoted language. When the user clicks on the link, the user’s browser fetches the relevant image *directly from the source* with no Google frame. SERG0485:10-11 (“original image file alone”).

P10 allegation: Google places advertisements around P10 images.

Established fact: Google does not place advertising on Image Search results. ERG1249:15-19;ERG679-718;ERG985-1017. While Google explained at the PI hearing that it had once conducted an advertising test, it explained that Image Search does not have advertising; the District Court said “I never saw any.” ERG1249:15-23. To the extent P10 argues that Google-sponsored advertising appears on third-party Web pages containing

P10 images, the third-party publishers place the code that determines where the advertising appears and Google has a practice of terminating publishers that violate Google terms of service. SERG4:3-20;SERG0017-18;SERG0783-87;SERG0940-58.

P10 allegation: Google creates a cache link allowing users to view full-size P10 images, even when they are no longer accessible on the original infringing third party website.

Established fact: This relates to Web Search only. SERG0484:4-19;SERG0485:17-0486:3. Google's cache allows users to obtain via browser *archived* text and HTML-code portions of Web pages from Google, which may differ from the *current* versions of those pages. SERG0002:13-20;SERG0483-84. Archived Web page code may link to earlier images still stored separately on the source's web server. SERG0484:4-19. If so, when displaying archived pages, the browser will summon images from the third-party source's Web server (not from Google) to appear on the archived Web page, even if the current page does not link to the image. SERG0482:22-24;SERG0484;SERG0002.

In short, only by distorting the record, and the truth, is P10 able to argue that Google engages in volitional infringing conduct with respect to P10's images. But that argument has no basis in fact.

P10's analysis of case law likewise fails to establish volitional conduct by Google. For example, P10's effort to distinguish *Field v. Google Inc.*, 412 F.Supp.2d 1106 (D. Nev. 2006), on the issue of volition fails. Field, like P10, alleged direct infringement. The facts that (1) text (not images) was at issue, (2) the plaintiff's site was copied, and (3) the plaintiff failed to send notices are irrelevant to *Field's* volition requirement and its application to *Google's search engine*. P10 does not criticize *Field's* analysis or its application to Google's search engine. And P10's distinction of *Newborn v. Yahoo!, Inc.*, 391 F.Supp.2d 181, 186 n.3 (D.D.C. 2005), fails to address *Field's* discussion of direct infringement and its endorsement of the principle that automated functions do not constitute direct infringement.

P10's analysis of *Playboy Enters. v. Webbworld, Inc.*, 991 F.Supp. 543, 552 (N.D. Tex. 1997), is similarly erroneous. The *Webbworld* defendant specifically sought and collected pornographic images in a database to sell to the public. The court did not address the "volitional" standard specifically but reached a decision consistent with it. Distinguishing *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 923 F.Supp. 1231 (N.D. Cal. 1995), the court stated in an earlier opinion: "[the defendant's website's] function is not to provide Internet access, but rather to provide its subscribers with adult images which are contained in the

storage devices of its computers.” *Playboy Enters. v. Webworld, Inc.*, 968 F.Supp. 1171, 1175 (N.D. Tex. 1997); *see also* 991 F.Supp. at 552.

Despite P10’s inflammatory rhetoric calling Google the world’s largest porn site, ERG1223, Google provides a general information location tool that allows users to research and locate virtually any information on the Web. SERG0482:1-11;SERG0511;SERG0537. Google’s mission is “to organize the world’s information and make it universally accessible and useful.” ERG870. Search tools are as important to “Internet access” as a communications service. S.Rep. 105-190, at 49; H.R.Rep. 105-551(II), at 58 (“Information location tools are essential to the operation of the Internet”); 47 U.S.C. §§230(a)-(b). There is a world of difference between Google and the defendant in *Webworld*.

The correctness and importance of the volitional requirement recognized by *Netcom* was endorsed by *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004); its aptness was underscored by *Newborn*; and the volitional criterion was specifically applied to Google by *Field. Parker v. Google, Inc.*, 422 F.Supp.2d 492, 497 (E.D. Pa. 2006), in turn followed *Field* and dismissed direct infringement claims against Google for failure to allege volitional conduct.

The “volitional” requirement properly focuses the analysis on *conduct* and not on architecture of a technology. This Court recognized as important the distinction between conduct and technology with respect to secondary liability in *Napster*, following the Supreme Court’s lead in *Sony*. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 436 (1984). But the importance of the distinction is not limited to secondary liability: indeed, *Sony* involved claims for direct infringement as well. See *Universal City Studios, Inc. v. Sony Corp.*, 480 F.Supp. 429, 457-59 (C.D. Cal. 1979), *aff’d on other grounds*, 464 U.S. 417 (1984). The Supreme Court discussed the fluidity of the direct and secondary liability theories in that case. *Sony*, 464 U.S. at 435 n.17. The Court held defendants not liable for contributory infringement arising from their technology because their products were capable of substantial noninfringing uses. *Id.* at 456. Because the direct infringement claims were not presented to the Court, the Court’s holding did not extend to them; but the Court did not preclude application of its doctrine, that liability based on a technology is defeated by its capability for noninfringing uses, to direct infringement. Indeed, the District Court in *Sony* held that defendants were not liable for direct infringement in part

specifically because their acts of furnishing the technology “can easily lead to noninfringing uses.” *See Universal City Studios*, 480 F.Supp. at 458.

The Fourth Circuit has also invoked *Sony* as justifying the requirement of volitional conduct and meaningful causation for direct infringement. *See CoStar*, 373 F.3d at 549-50. Because P10’s claim is based upon Google’s technology and not volitional conduct, *cf.* SERG0482:1-11, these cases further teach that the District Court’s conclusion of direct infringement was erroneous as a matter of law and should be reversed.

B. Both The Factual Record And This Court’s Decision In *Kelly* Unequivocally Establish Google’s Fair Use.

P10 likewise fails to provide any convincing defense of the district court’s rejection of Google’s fair use. Fair use calls for case-by-case analysis, *Campbell*, 510 U.S. at 577, and “each case raising the question must be decided on its own facts,” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (quoting H.R.Rep. No. 94-1476, at 65). Nevertheless, the relevant facts and fair use considerations of this case are remarkably similar to those of *Kelly v. Arriba Soft Corp.*, 77 F.Supp.2d 1116 (C.D. Cal. 1999), *aff’d in relevant part and rev’d in part on procedural grounds*, 336 F.3d 811 (9th Cir. 2003). P10 seeks to exploit false or irrelevant factual distinctions between *Kelly* and this case. In the course of

discussing the fair use factors below, Google will address the facts of *Kelly* and P10's flawed distinctions.

1. Purpose And Character Of Google's Use

a. Transformative Use

Courts regularly find "transformative" uses to be fair. As the Supreme Court said in *Campbell*,

Although...transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works....[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Campbell, 510 U.S. at 579 (citations omitted). The district court in *Kelly* applied this analysis in concluding that:

The most significant factor favoring Defendant is the transformative nature of its use of Plaintiff's images. Defendant's use is very different from the use for which the images were originally created. Plaintiff's photographs are artistic works used for illustrative purposes. Defendant's visual search engine is designed to catalog and improve access to images on the Internet. The character of the thumbnail index is not esthetic, but functional; its purpose is not to be artistic, but to be comprehensive.

Kelly, 77 F.Supp.2d at 1119 (citation omitted). **These observations apply equally to Google.**

P10 has tried to manufacture a distinction—after this lawsuit began—by licensing "thumbnail" images to a foreign cellphone download broker.