

**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**

Andrew P. Bridges
Jennifer A. Golinveaux
WINSTON & STRAWN LLP
101 California Street, 39th Floor
San Francisco, CA 94111-5894
Telephone: (415) 591-1000
Facsimile: (415) 591-1400

Gene C. Schaerr
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006-3817
Telephone: (202) 282-5000
Facsimile: (202) 282-5100

**ATTORNEYS FOR DEFENDANT, APPELLEE AND
CROSS-APPELLANT
GOOGLE INC.**

REDACTED VERSION – NOT AS FILED

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	3
A.	P10 Established No Basis For Finding Direct Infringement Based On Volitional Conduct By Google.	3
B.	Both The Factual Record And This Court’s Decision In <i>Kelly</i> Unequivocally Establish Google’s Fair Use.	9
1.	Purpose And Character Of Google’s Use	10
a.	Transformative Use.....	10
b.	Good Faith.....	12
c.	Commercialism	14
d.	Public Benefit.....	16
2.	Nature Of P10’s Claimed Copyrighted Works	16
3.	Amount And Substantiality Of Google’s Thumbnail Images In Comparison With P10’s Images.....	17
4.	Effect Of Google’s Thumbnails On Market Value Of P10’s Images	19
5.	Fair Use Conclusion	23
C.	P10 Has Established No Basis For A Challenge To Google’s DMCA Protection.....	24
D.	P10 Failed To Furnish Any Competent Evidence Regarding Irreparable Harm and the Balance of Harms.....	30
III.	CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001)	8
<i>Am. Geophysical Union v. Texaco, Inc.</i> , 60 F.3d 913 (2d Cir. 1994)	22, 23
<i>Atari Games Corp. v. Nintendo of Am., Inc.</i> , 975 F.2d 832 (Fed. Cir. 1992)	12, 13
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	11, 12
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	1, 9, 10, 13, 22, 23
<i>CoStarGroup, Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004)	7, 9
<i>eBay, Inc. v. MercExchange, L.L.C.</i> , 126 S.Ct. 1837 (2006).....	22, 30
<i>Elvis Presley Enters. v. Passport Video</i> , 349 F.3d 622 (9th Cir. 2003)	21
<i>Field v. Google Inc.</i> , 412 F.Supp.2d 1106 (D. Nev. 2006).....	6, 7, 25
<i>GoTo.com, Inc. v. Walt Disney Co.</i> , 202 F.3d 1199 (9th Cir. 2000)	14
<i>Harper & Row, Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	9, 12, 13, 14, 16, 17
<i>Interstellar Starship Servs., Ltd. v. Epix, Inc.</i> , 304 F.3d 936 (9th Cir. 2002)	26

<i>Kelly v. Arriba Soft Corp.</i> , 77 F.Supp.2d 1116 (C.D. Cal. 1999).....	9, 10, 13, 14, 15
<i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2003).....	1, 3, 9, 16, 17, 18, 19, 26, 32
<i>Los Angeles News Serv. v. Reuters Television Int’l, Ltd.</i> , 149 F.3d 987 (9th Cir. 1998).....	22
<i>Newborn v. Yahoo!, Inc.</i> , 391 F.Supp.2d 181 (D.D.C. 2005).....	6, 7
<i>Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.</i> , 16 F.3d 1032 (9th Cir. 1994).....	30, 32
<i>Nuñez v. Caribbean Int’l News Corp.</i> , 235 F.3d 18 (1st Cir. 2000).....	17
<i>NXIVM Corp. v. Ross Inst.</i> , 364 F.3d 471 (2d Cir. 2004).....	12, 13
<i>Online Policy Group v. Diebold</i> , 337 F.Supp.2d 1195 (N.D. Cal. 2004).....	12
<i>Parker v. Google, Inc.</i> , 422 F.Supp.2d 492 (E.D. Pa. 2006).....	7
<i>Perfect 10, Inc. v. CCBill, LLC</i> , 340 F.Supp.2d 1077 (C.D. Cal. 2004).....	27, 28
<i>Perfect 10, Inc. v. Cybernet Ventures, Inc.</i> , 213 F.Supp.2d 1146 (C.D. Cal. 2002).....	27
<i>Playboy Enters. v. Webworld, Inc.</i> , 968 F.Supp. 1171 (N.D. Tex. 1997).....	7
<i>Playboy Enters. v. Webworld, Inc.</i> , 991 F.Supp. 543 (N.D. Tex. 1997).....	6, 7
<i>Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.</i> , 923 F.Supp. 1231 (N.D. Cal. 1995).....	6, 13

