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13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16

17 PERFECT 10, a California corporation,
18 Plaintiff,
19 v.
20 GOOGLE, INC., a corporation; and
DOES 1 through 100, inclusive,
21 Defendants.
22

CASE NO. CV 04-09484 AHM (SHx)

**MEMORANDUM OF POINTS AND
AUTHORITIES OF PLAINTIFF
PERFECT 10 IN OPPOSITION TO
MOTION OF ELECTRONIC
FRONTIER FOUNDATION FOR
LEAVE TO FILE BRIEF AMICUS
CURIAE**

Date: November 7, 2005
Time: 10:00 a.m.
Ctmm: The Honorable A. Howard
Matz

Introduction

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3 The Electronic Frontier Foundation (the “EFF”) seeks leave to file a brief as
4 an *amicus curiae* in connection with Perfect 10’s pending Motion for Preliminary
5 Injunction (“PI Motion”).¹ The Motion for Leave to File Brief *Amicus Curiae*
6 (“Motion for Leave”) and proposed *amicus* brief are improper, and will not assist the
7 Court, for three main reasons: First, the EFF is not a proper *amicus* – it is not
8 impartial to the outcome of the litigation, and has financial ties to the Defendant
9 Google, Inc. (“Google”). Second, the proposed *amicus* brief is cumulative of
10 arguments made by Google in its Opposition to the PI Motion. Third, the EFF
11 unreasonably delayed until the eleventh hour to file its Motion for Leave and
12 proposed *amicus* brief, prejudicing Perfect 10.

I. THE EFF IS NOT A PROPER AMICUS

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15 “Historically, an *amicus curiae* is an *impartial* individual who suggests the
16 interpretation and the status of the law, gives information concerning it, and whose
17 function is to advise in order that justice may be done, *rather than to advocate a*
18 *point of view* so that a cause may be won by one party or another. Indeed, if the
19 proffer comes from an individual with a partisan, rather than an impartial view, the
20 motion for leave to file an *amicus* brief is to be denied.” Time Oil Co. v. Cigna
21 Property & Cas. Ins. Co., 1990 WL 515585, at *2 (W.D. Wash. Apr. 2, 1990)
22 (emphasis added) (quoting Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. 1982)).

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28 ¹ It is unusual for such a request to be made at the District Court level. The Federal Rules of Civil Procedure do not contain an equivalent to Rule 29 of the Federal Rules of Appellate Procedure, which sets forth specific procedures for filing an *amicus* brief in the Court of Appeals. This Court’s Local Rules similarly do not provide any basis for the filing of an *amicus* brief.

1 Courts traditionally have permitted the filing of an *amicus* brief by an impartial
2 party who:

3 “suggests the interpretation and status of the law, gives information
4 concerning it, and advises the Court in order that justice may be done,
5 ***rather than to advocate a point of view so that a cause may be won by***
6 ***one party or another.*** Amicus curiae fulfill the role by submitting
7 briefing designed to supplement and assist in cases of general public
8 interest, supplement the efforts of counsel, and draw the court’s
9 attention to law that might otherwise escape consideration.”

10 Community Care Assoc. for Restoration of the Env’t v. DeRuyrer Brothers Dairy,
11 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (internal quotations and citations
12 omitted; emphasis added). Courts have rejected the filing of *amicus* briefs by
13 interested parties such as the EFF: “The vast majority of amicus briefs are filed by
14 allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect
15 merely extending the length of the litigant’s brief. Such amicus briefs should not be
16 allowed. They are an abuse.” Ryan v. Commodity Futures Trading Comm’n, 125
17 F.3d 1062, 1063 (7th Cir. 1997).

18 Far from being an “impartial” friend of the Court, the EFF is an interested
19 party that has received significant funding from Google. Perhaps in recognition of
20 its partisan status, its motion does not even inform the Court of all the relevant facts
21 pertaining to its interest in the matter.² First, the EFF states that it is “a donor-
22 supported membership organization” but neglects to mention that Google is a major
23 donor. In response to Perfect 10’s inquiry, the EFF disclosed that Google donated at
24 least \$50,000 to the EFF this year alone – approximately 3% of its budget. See
25 Declaration of Elena Segal in Opposition to Motion for Leave to File Brief *Amicus*
26 *Curiae* (“Segal Decl.”), ¶¶ 2-4, Ex. A. The EFF has been unwilling to provide
27 further information with respect to its donors, despite specific request. Id. at ¶ 5, Ex.

28 ² This alone is a basis for denying the Motion for Leave. See Fed. R. App. Proc.
29(c)(3) (motion for leave to file *amicus* brief must contain “a concise statement of
the identity of the *amicus curiae*, ***its interest in the case***, and the source of its
authority to file”) (emphasis added).

1 A. The EFF also displays Google ads on its website, eff.org, which presumably
2 means it receives an undisclosed amount of additional revenue from Google. *Id.* at ¶
3 6, Ex. B. Thus, EFF has a direct financial interest in the outcome of this litigation.

4 The EFF also is not impartial because it has consistently opposed suits seeking
5 to impose liability for massive online copyright infringement, and it has been a vocal
6 advocate for infringing file-sharing networks. For example, it has represented as
7 counsel of record, and continues to represent, the defendants in Metro-Goldwyn-
8 Mayer Studios, Inc. v. Grokster, Inc., Case No. C0108541 (C.D. Cal.) (SVW), a
9 copyright infringement action brought by the record companies, music publishers,
10 and movie studios against the operators of three, Napster-like file-sharing networks.
11 Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2772 (2005)
12 (“MGM’s evidence gives reason to think that the vast majority of users’ downloads
13 are acts of infringement, and because well over 100 million copies of the software in
14 question are known to have been downloaded, and billions of files are shared across
15 the FastTrack and Gnutella networks each month, the probable scope of copyright
16 infringement is staggering”). The EFF attempted to file (it was rejected as late-filed)
17 an *amicus* brief in In re Aimster Copyright Litig., No. 02-4125 (7th Cir.) in support
18 of a service whose “*raison d’etre* appears to be the facilitation of and contribution to
19 copyright infringement on a massive scale.” In re Aimster Copyright Litig., 252 F.
20 Supp. 2d 634, 638 (N.D. Ill. 2002). The EFF also has represented parties who are
21 directly infringing using peer-to-peer networks (e.g., Fonovisa, Inc. v. Plank, Case
22 No. CV03-6371 (C.D. Cal.) (DT)), and has provided advice on its website to both
23 individuals and peer-to-peer networks as to how to avoid being sued for copyright
24 infringement (while not necessarily ceasing to infringe copyrights). See Segal Decl.,
25 ¶¶ 7-8, Exs. C, D.

26 In sum, the EFF is far from impartial – it is a biased advocate that supports
27 infringers at every turn and broadly claims that copyright holders who seek to
28 protect their interests are using “a combination of law and technology to suppress

1 the rights of people using technology.” *Id.* at ¶ 9, Ex. E. Accordingly, its Motion
2 for Leave should be denied.

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4 **II. THE EFF’S PROPOSED BRIEF WILL NOT ASSIST THE COURT**

5 Even if the EFF were otherwise a proper *amicus*, the Court should deny leave
6 to file the proposed *amicus* brief because it would not assist the Court in reaching a
7 just decision on the PI Motion. *Amicus* briefs may be permitted:

8 ***“when a party is not represented competently or is not represented at***
9 ***all, when the amicus has an interest in some other case that may be***
10 ***affected by the decision in the present case, or when the amicus has***
11 ***unique information or perspective that can help the court beyond the***
12 ***help that the lawyers for the parties are able to provide. Otherwise,***
13 ***leave to file an amicus curiae brief should be denied.”***

14 Community Care Assoc., 54 F. Supp. 2d at 975 (internal quotations and citation
15 omitted; emphasis added).

16 The EFF cannot contend that Google is inadequately represented. It also does
17 not claim to have any interest in other litigation that may be affected by the decision
18 here. Finally, the EFF’s proposed brief fails to provide any “unique information or
19 perspective that can help the court beyond the help that the lawyers for the parties
20 are able to provide.” *Id.*; see also Ninth Circuit Advisory Committee Note to Fed.
21 R. App. Proc. 29-1 (“Movants are reminded that the court will review the *amicus*
22 *curiae* brief in conjunction with the briefs submitted by the parties, so that *amici*
23 briefs should not repeat arguments or factual statements made by the parties”); U.S.
24 v. El-Gabrowni, 844 F. Supp. 955, 957 n.1 (S.D.N.Y 1994) (“The usual rationale
25 for *amicus curiae* submissions is that they are of aid to the court and offer insights
26 not available from the parties.”).

27 The EFF’s proposed brief does nothing more than labor through an erroneous
28 analysis of issues which Google already has addressed. As the EFF’s proposed
amicus brief adds nothing new to the arguments already before the Court, Perfect 10

1 will not respond in full to the substance of the brief. To summarize, the EFF's
2 proposed *amicus* brief lacks merit in the following ways:

3 (a) The EFF repeats the misstatement of law made by Google (Opp.
4 at 11) with respect to “intermediate copies,” and the Sega v. Accolade, 977 F.2d
5 1510 (9th Cir. 1993) and Sony v. Connectix, 203 F.3d 596 (9th Cir. 2000) cases on
6 which it relies.³ In Sega and Connectix the courts could not have been more clear
7 that they were dealing with, and ruling on, a unique and narrow set of
8 circumstances, which do not exist here – reverse engineering. See Connectix, 203
9 F.3d at 603 (*software programs* “pose[] *unique problems* because computer
10 programs are in essence, utilitarian articles – articles that accomplish tasks. As such,
11 they contain many logical, structural, and visual display elements that are dictated
12 by the function to be performed”) (internal quotations and citations omitted;
13 emphasis added); Sega, 977 F.2d at 1518 (“we conclude based on the policies
14 underlying the Copyright Act that *disassembly of copyrighted object code* is, as a
15 matter of law, a fair use of the copyrighted work *if such disassembly provides the*
16 *only means of access to those elements of the code* that are not protected by
17 copyright and the copier has a legitimate reason for seeking such access”) (emphasis
18 added). The Sega Court pointed out that the fair use arose because the “intermediate
19 copying” took place only in order to reach and examine the functional elements of
20 the software. Id. at 1527. Here, Google makes an *exact* copy of the *entire* image,
21 none of which is functional, in order that it may further infringe the copyright in the
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24 ³ Although the EFF here claims that Google’s copies are *not* infringing, its counsel,
25 Fred von Lohmann, on behalf of the EFF, previously stated that “Google is making
26 copies of all the Web sites they index and they’re not asking permission. . . . From a
27 strict copyright standpoint, it violates copyright.” Segal Decl. at ¶ 10, Ex. F at p.3.
28 Von Lohmann further stated that “Most people agree that the caching exception in
the DMCA is obsolete. . . . I don’t think it would cover Google’s cache. Google is
not waiting for users to request the page. It spiders the page before anyone asks for
it.” Id. at p.4.

1 image by displaying it to third parties. Google is not seeking to understand the
2 functional, and unprotected elements of code, which was considered “fair use” in
3 Sega and Connectix, because no such code is at issue here.⁴ Further, in neither Sega
4 nor Connectix did the copier publicly display or otherwise use the intermediate
5 copy. In contrast, Google is infringing *another* exclusive right reserved to the
6 copyright holder by publicly displaying both full-size and reduced-size copies. This
7 conduct also makes the copy far from intermediate.

8 Similarly, Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003), was not a
9 case of “intermediate copying,” and that term is never used by the Court. As Perfect
10 10 has explained, for many reasons Kelly does not apply here, including (but not
11 only) because unlike the defendant in Kelly: Google is making thousands of copies
12 of Perfect 10 images from infringing websites and directing users to those infringing
13 websites; Google is copying and displaying the same images that Perfect 10 sells;
14 Google has not ceased its conduct after notice; and Google is displaying full size
15 infringing images, which conduct was not addressed by Kelly. See Memorandum in
16 Support of Motion for Preliminary Injunction at 13-19.

17 (b) The EFF misdirects the Court by implying that the relief Perfect
18 10 seeks will cause Google’s Image Search to be shut down, which is not the case,
19 and which Google itself does not even claim to be the case. Reference to Perfect
20 10’s narrowly-tailored proposed injunction (which the EFF never specifically
21

22 ⁴ It is clear that the reverse engineering cases do not provide authority that
23 “intermediate copying” *in general* constitutes fair use. Rather, “[w]here there is a
24 good reason for studying or examining the unprotected aspects of a copyrighted
25 computer program, disassembly for purposes of such study or examination
26 constitutes fair use.” Sega, 977 F.2d at 1520; see also Connectix, 203 F.3d at 602
27 (“The fair use issue arises in the present context because of certain characteristics of
28 Google’s image search software, the fact is that the works *infringed* were Perfect
10’s images, and they were not copied by Google for the purpose of “studying or
examining” any unprotected aspects.

1 mentions) reveals that Perfect 10 seeks only an injunction to prevent the copying
2 and display of *Perfect 10's copyrighted images*, and the provision of links to other
3 infringing websites, after Google is given *specific identification of precise*
4 *infringing images and websites*. Accordingly, the EFF's claim that, if the requested
5 relief were granted, Google would no longer be able to bring "new and creative
6 software works to consumers that would otherwise be unavailable," is disingenuous,
7 at best. Under the proposed preliminary injunction, Google simply would no longer
8 be able to display infringing content that belongs to Perfect 10, and direct consumers
9 to other infringing sources of such content, *after receiving notice*.

10 (c) The EFF contends that even when a search engine knowingly
11 infringes for commercial purposes, it still serves the public interest. The same
12 overbroad argument was made by Google. Opp. at 11, 15, 24-25. However, here
13 Google is not "enabling more and better *legitimate* information access" (*Amicus*
14 Brief at 7). It is providing "more and better" access to *infringing* content, even after
15 specific notice of infringement, and Google is knowingly causing search results to
16 lead to its infringing advertising partners. Zada Reply Decl. ¶¶ 47-48. None of this
17 is a legitimate search function. It is certainly not in the public interest. See, e.g.,
18 Stewart v. Abend, 495 U.S. 207, 228 (1990) ("the [Copyright] Act creates a balance
19 between the artist's right to control the work during the term of the copyright
20 protection and the public's need for access to creative works"). The EFF's approach
21 entirely skews the balance that the copyright law provides, essentially ignores the
22 fair use four-factor test, and disregards the damage caused to the public by
23 wholesale infringement that chills the incentive to create. The traditional fair use
24 analysis is designed precisely to address this balance, Wainwright Securities, Inc. v.
25 Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) ("The fair use doctrine
26 offers a means of balancing the exclusive rights of a copyright holder with the
27 public's interest in dissemination of information affecting areas of universal
28 concern, such as art, science and industry"), as are the obligations imposed by the

1 DMCA on search engines, 17 U.S.C. § 512(d), (i), which Google failed to heed and
2 the EFF does not consider. Similarly, the EFF's unsupported claim that Google's
3 unauthorized copying and display actually benefits the copyright holder (Proposed
4 *Amicus* Brief at 6:6-7) is a view not shared by Perfect 10 or supported by the facts,
5 and the same argument has uniformly been rejected by the courts. See, e.g., DC
6 *Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) ("even a
7 speculated increase in DC's comic book sales as a consequence of [defendant's]
8 infringement would not call the fair use defense into play as a matter of law.").

9 10 **III. DELAY**

11 Perfect 10 filed its PI Motion on August 24, 2005. That filing received
12 significant coverage in the media. Google filed its Opposition on September 27,
13 2005. If Federal Rule of Appellate Procedure 29 were to apply (which is the only
14 guidance available in the absence of any rule expressly applicable here), the EFF's
15 Motion for Leave and proposed *amicus* brief would have been too late. See Fed. R.
16 App. Proc. 29(e) ("An *amicus curiae* must file its brief, accompanied by a motion
17 for filing when necessary, no later than 7 days after the principal brief of the party
18 being supported is filed"). Since the EFF's brief supports Google, its papers should
19 have been filed on or before October 4, 2005. The EFF, however, did not file until
20 October 13, 2005. Although the Federal Rules of Appellate Procedure do not
21 govern this Court, at the very least, this rule is an indicator of what is reasonable.
22 The EFF took ***more than double*** the period of time permitted by the Federal Rules
23 of Appellate Procedure before filing its Motion for Leave and proposed *amicus*
24 brief. Such delay is unreasonable, improper and prejudicial, leaving Perfect 10 with
25 the option of responding on the merits in one week's time, or potentially requiring a
26 continuance of the November 7 hearing.

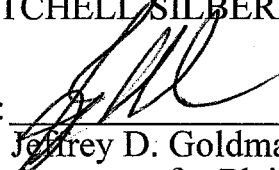
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Conclusion

For all the foregoing reasons, Perfect 10 respectfully requests that the Court deny the EFF's Motion for Leave to File Brief Amicus Curiae.

Dated: October 24, 2005

RUSSELL J. FRACKMAN
JEFFREY D. GOLDMAN
MARC E. MAYER
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By: 
Jeffrey D. Goldman
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18, and not a party to the within action; my business address is Mitchell Silberberg & Knupp LLP, Los Angeles, California 90064-1683.

On October 24, 2005, I served the foregoing document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES OF PLAINTIFF PERFECT 10 IN OPPOSITION TO MOTION OF ELECTRONIC FRONTIER FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE** on the parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows, and taking the action described below:

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- BY MAIL:** I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
- BY FAX:** Instead of placing a copy of the document in a sealed envelope, I sent a copy of the above-described document(s) via telecopier to each of the individuals set forth above, at the following facsimile telephone numbers:
- BY OVERNIGHT MAIL:** I deposited the above-described document(s) with ___ in the ordinary course of business, by depositing the document(s) in a box regularly maintained by ___ or delivering the document(s) to an authorized driver for the carrier, in an envelope designated by the carrier with delivery fees provided for, addressed as shown above.
- BY PERSONAL DELIVERY:** I caused personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth above.
- BY PLACING FOR COLLECTION AND MAILING:** I sealed and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at , Los Angeles, California 90064-1683 in the ordinary course of business.

Executed on October 24, 2005 at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Carol McAndrew