

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)

**AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER
FOUNDATION, AMERICAN LIBRARY ASSOCIATION, MEDICAL
LIBRARY ASSOCIATION, AMERICAN ASSOCIATION OF LAW
LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES, AND
SPECIAL LIBRARIES ASSOCIATION
IN SUPPORT OF GOOGLE, INC.**

Attorney for Amici Curiae

Fred von Lohmann
Cal. Bar No. 192657
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333 x123
(415) 436-9993 (fax)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* certify that no publicly held corporation or other publicly held entity owns 10% or more of any *Amicus Curiae*.

Dated: July 20, 2006

By:

Fred von Lohmann

Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333
(415) 436-9993 (fax)

Counsel for Amici Curiae

I. STATEMENT OF IDENTITY AND INTEREST

With the consent of all parties, pursuant to FRAP 29(a), the following organizations respectfully submit this *amicus curiae* brief in support of Appellee/Cross-Appellant Google, Inc..

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization devoted to protecting civil liberties and free expression in the digital world. Representing more than 11,000 contributing members, EFF has participated in many of the most important copyright cases of the digital age, including as counsel in *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005), and as *amicus curiae* before this Court in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), addressing the same public display questions raised by this appeal.

The American Library Association (ALA) is the oldest and largest library association in the world, with over 66,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.

The Medical Library Association (MLA) is a nonprofit, educational organization with more than 4,500 health sciences information professional members worldwide. Founded in 1898, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

The American Association of Law Libraries (AALL) is a nonprofit

educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve.

The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives.

II. QUESTIONS ADDRESSED

Amici file this brief to address three matters of critical importance for the future of the internet: (1) whether providing a link to an image hosted on a third-party website directly infringes a copyright owner's public display right; (2) the proper legal standards governing the application of copyright's secondary liability principles to internet search engines like Google; and (3) whether the creation and display of thumbnails by search engines properly qualifies as fair use.

III. THE FACTUAL CONTEXT: THE ARCHITECTURE OF THE WEB

The proper application of copyright law to this case depends on an accurate understanding of how the World Wide Web ("the Web") works, specifically who

transmits, and what is transmitted, as a user interacts with a search engine like Google and the webpages to which it links. A focus on “how content actually travels over the internet before it is shown on user’s computers,” *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 843 (C.D. Cal. 2006), reveals two things: first, that Google never transmits full-size versions of Perfect 10 images, and, second, that there is more that unites “linking,” “in-line linking,” and “framing” than distinguishes them, as they all fundamentally are methods of pointing to an address where content may be found.

At its core, the Web consists of a set of technologies that act as a global file retrieval system, allowing users connected to the internet to retrieve content stored on remote servers anywhere in the world:

The Web is data: a vast collection of documents containing text, visual images, audio clips and other information media that is accessed through the Internet. Computers known as “servers” store these documents and make them available over the Internet.... Users access documents by sending request messages to the servers that store the documents. When a server receives a user’s request..., it prepares the document and then transmits the information back to the user.

See In re DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 501 (S.D.N.Y. 2001). Computer users generally interact with web sites through a browser, a computer program running on the user’s own computer that sends the requests for content to web servers, receives the transmission of that content from the server, and renders that transmitted content on the screen for the user to see.

When a user types the address of a webpage she wants to visit into her browser (or clicks a link, which essentially automatically enters the address of the

page for her), the browser sends a request to the server at that address for the appropriate webpage. The server responds by transmitting a file back to her browser. The file that is transmitted is typically a text document written in HyperText Markup Language (HTML) that contains (1) the textual content of the requested page, (2) Uniform Resource Locators (URLs)¹ that point to additional content to be incorporated into the web page, and (3) “tags” that specify how the content should be laid out. In essence, the HTML file acts like a recipe for the webpage requested, describing what ingredients are needed, where those ingredients may be found, and how those ingredients should be combined in order to generate the webpage in question. *See generally* Preston Gralla, *How the Internet Works* 134-37 (6th ed. 2002); Marshall Brain, *How Web Pages Work*, <http://computer.howstuffworks.com/web-page1.htm> (last visited Jul. 17, 2006).

After receiving this HTML “recipe” file, the browser makes a series of requests for the other “ingredients” it needs in order to render the webpage. Depending on where that other content is located, it may be transmitted either from the same server as the initial webpage request, or from other servers.

For example, when a user submits a search query (e.g., “dan rather”) to Google’s Image Search, Google servers respond by transmitting an HTML file that, when rendered by the user’s browser, displays a grid of thumbnail images. All of the content making up this “results page,” comprising text, images, and links, is

¹ A URL is a string of characters conforming to a standardized format, which refers to a resource on the internet (such as a document or an image) by its location. *See* Uniform Resource Locator, Wikipedia, <http://en.wikipedia.org/wiki/Url> (last visited Jul. 17, 2006).

transmitted from Google's own servers.

Each thumbnail image appearing on the results page, in turn, also functions itself as a link to the third-party website hosting the "full size" image corresponding to the thumbnail. So, when the user clicks the top-most thumbnail on the "dan rather" results page, corresponding to an image hosted at www.dan-rather.com, Google transmits the following HTML file to the user in response:

```
<html>

<head>

<meta http-equiv="content-type" content="text/html;
charset=UTF-8">

<title> Google Image Result for http://www.dan-
rather.com/Dan-Rather.jpg</title>

</head>

<frameset rows="137,*">

<frame src="/imgres?imgurl=http://www.dan-
rather.com/Dan-Rather.jpg&imgrefurl=http://www.dan-
rather.com/&h=301&w=255&sz=15&tbnid=XNJ_iK-
EbDDj7M:&tbnh=112&tbnw=94&hl=en&prev=/images%3Fq%3D%25
22dan%2Brather%2522%26svnum%3D10%26hl%3Den%26lr%3D%26c
2coff%3D1%26safe%3Doff%26sa%3DG&frame=small"
scrolling=no marginwidth=0 marginheight=0>

<frame src="http://www.dan-rather.com/">

<noframes>Your browser does not support frames. Google
uses frames to display image results. You can view the
<a href=http://www.dan-rather.com/>referring page</a>
for this image.</noframes>

</frameset>

</html>
```

Unlike larger, more complex HTML files, this file can be readily parsed by the naked eye. After header tags specifying metadata and page title, a “<frameset>” tag specifies that the body of the browser’s display is to be comprised of two other webpages, one stacked atop the other, and provides the URLs for each of the two webpages. The user’s browser automatically requests these two webpages (each of which in turn contains further URLs specifying additional ingredients to be gathered from still more servers), resulting in “a page comprised of two distinct frames, one hosted by Google and a second hosted by the underlying website that originally hosted the full-size image.” *Perfect 10 v. Google*, 416 F. Supp. 2d at 833.

This example underscores two salient facts. First, Google never transmits the underlying full-size images—those are transmitted directly from the server of the third-party website on which they appear. What Google transmits is *the address of the third-party server* (<frame src="http://www.dan-rather.com/">) where the image in question may be found, much like *TV Guide* provides the time and channel where a TV program may be found.

Second, there is no fundamental difference between a “link,” an “in-line link,” and a “frame.” In all three cases, the user’s browser receives a URL pointing to content stored on a server, accompanied by “tags” that suggest how the content should be formatted in the browser window. The following HTML code, for example, results in the browser displaying a typical blue, underlined “link”:

```
<a href="http://www.dan-rather.com/Dan-Rather.jpg">Dan Rather  
Photo</a>
```

If the user clicks on the “Dan Rather Photo” link, the current page in her browser window will be replaced by the linked-to webpage (in this case, the photo of Dan Rather).

An “in-line” image link would look like the following:

```

```

This line of code instructs the browser to request the image as an “ingredient” for incorporation directly into a webpage. *See Kelly v. Arriba Soft*, 336 F.3d at 816 (describing “in-line” linking).

Finally, the code for a “frame” would look like the following:

```
<frame src="http://www.dan-rather.com/Dan-Rather.jpg">
```

This line of code instructs the browser to request the photo and juxtapose it with the other webpages specified in the frameset.

While linking, in-lining, and framing may each result in different user experience,² they are all fundamentally just “links”—addresses where content may be found. In each case, it is the server specified in the URL that transmits the

² What a browser chooses to do with each of these URLs is not mandated by the tag that accompanies it. Based on the preferences of the user, a browser can choose to treat a regular link like a frame or an in-line link like a regular link. For example, some browsers allow users to block in-line images completely, or display them as links so that the user can choose whether or not to retrieve them. Other browsers may “pre-fetch” content from every link on a webpage so that it is available quickly if the user wants to visit one of those pages. *See Wade Roush, Revamping the Web Browser*, Technology Review, June 12, 2006, http://www.technologyreview.com/read_article.aspx?id=16974; *see also* Flock Tour, <http://flock.com/tour/> (last visited Jul. 5, 2006) (describing a new browser with “social browsing” functionality built into it that changes the way users interact with webpages).

content itself. The link itself is simply a pointer to the server from whence the content may be requested.

IV. ARGUMENT

Copyright law grants to rightsholders a limited set of statutorily defined exclusive rights, supplemented by narrowly drawn, judge-made principles of secondary liability. That set of rights plainly reaches the infringing activities of websites that amass and post unauthorized copies of Perfect 10's photographs. Unsatisfied with the remedies afforded by copyright law against these infringers, Perfect 10 and its supporting *amici* urge this Court to expand the reach of copyright law to the four corners of the digital universe, ensnaring everyone from the individual web surfer who comes across a Perfect 10 image online, to search engines like Google that index these images alongside billions of others on the Web. Like the District Court below, this Court should reject this effort to hold the whole world liable for the infringing acts of a few.

A. The District Court Correctly Concluded That Google Does Not Infringe the Public Display Right.

1. Google Does Not Transmit Displays of Full-Size Images.

Because copyright law is, first and foremost, a creature of statute, *see Sony Corp. v. Universal City Studios*, 464 U.S. 417, 431 (1984) (“[T]he protection given to copyrights is wholly statutory.”), any infringement analysis must begin with the statutory language. “[T]he statute is cast in terms of *activities* that are reserved to the copyright owner. It follows that an infringer must *actually engage* in one of those activities in order to directly violate the statute.” *Playboy Enters., Inc. v.*

Russ Hardenburgh, Inc., 982 F. Supp. 503, 512 (N.D. Ohio 1997) (emphasis in original).

Transmission of a display to the public is the essence of the public display right. See R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. Ill. L. Rev. 83, 86-92 (2001) (after parsing the statutory language, concluding that § 106(5) "fundamentally gives copyright owners control over the transmission of their images or texts from one place to another."). According to the Copyright Act, to "display" a work is "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process." 17 U.S.C. § 101. A copyright owner, however, is not entitled to control all displays, but rather is granted only exclusive rights "to display the copyrighted work *publicly.*" 17 U.S.C. § 106(5) (emphasis added). "Publicly" is defined to mean:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family and its social acquaintances is gathered; or

(2) to *transmit or otherwise communicate* a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or separate places and at the same time or at different times.

17 U.S.C. § 101 (emphasis added). This Court has referred to the two parts of the definition as "the public place clause" and "the transmit clause." See *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 280-81 (9th Cir. 1989). Only the "transmit clause" is relevant to this case, as there is no allegation that Google is conducting "in-person" displays in public places. The

Copyright Act further provides that “[t]o ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. § 101.

Because Google does not “transmit or otherwise communicate” the full-size images, it has not displayed those images “publicly,” and thus has not directly infringed Perfect 10’s rights under § 106(5). As described above, and as recognized by the District Court, Google does not transmit any displays of full-size Perfect 10 images.³ These displays are transmitted solely by third-party websites. What Google transmits is only a link—the address (URL) of the third-party webpage where the full-size image was last known to reside—along with “<frameset>” tags that suggest how the link or third-party transmission should be formatted. The user’s browser then connects directly to the third-party website, requests the specified webpage, and displays it in a frame beneath Google’s navigation bar (itself a distinct webpage). In short, Google plays no direct role in the transmission from the third-party server and, at most, has merely told the user where the display may be obtained.

Google’s indexing technology may, of course, indirectly facilitate transmissions by the third-party websites, but “[m]erely *encouraging* or *facilitating* those activities is not proscribed by the statute.” *Hardenburgh*, 982 F. Supp. at 512 (emphasis in original). Any analysis of such indirect activities accordingly must be

³ Google does transmit, and hence publicly displays, thumbnails of Perfect 10 images. These public displays, however, qualify as fair uses, as discussed further in Section IV.C. of this brief.

guided by secondary liability principles. *See id.* at 512-13 (“[I]t is the area of contributory liability which allows ‘the imposition of liability on certain parties who have not themselves engaged in the infringing activity.’”) (quoting *Sony v. Universal*, 464 U.S. at 435).

2. The Imposition of Direct Infringement Liability on Google for Linking to Images Would Yield Absurd Results and Threaten the Activities of Millions of Internet Users.

Perfect 10 and its supporting *amici* urge this Court to erase the line between direct and secondary liability with respect to the public display right, replacing the statute’s focus on who is transmitting with a radically expansive conception that would impose direct (and hence strict) liability on anyone who, as Google does, transmits a link and thereby “causes the appearance” of a Perfect 10 image. P10 Br. at 15. This conception is not only at odds with well-established principles of copyright jurisprudence, *see Hardenburgh*, 982 F. Supp. at 513 (“There would be no reason to bifurcate copyright liability into the separate categories of direct and contributory if any remote causal connection to copyright infringement could be analyzed under theories of direct infringement.”), but would also inflict “a tremendous chilling effect on the core functionality of the web—its capacity to link.” *Perfect 10 v. Google*, 416 F. Supp. 2d at 840. No principled distinction separates Google’s links to Perfect 10 images from the billions of links transmitted by web publishers, libraries, bloggers, and regular internet users every day. A rule that threatens strict liability for any image displayed as a result of the transmission of a URL (whether expressed as a link, in-line link, or frame) would radically change linking practices, and thereby transform the internet as we know it. The

fast-moving, cross-linked array of resources that constitutes much of the Web would be replaced by fewer, more-isolated publications willing to link to each other only after consulting with their errors & omissions insurers.

The chilling effect of such a rule would only be exacerbated by the absurdity of its results. For example, imagine that an unauthorized display of a Perfect 10 image appears in the next episode of the popular NBC series, “Law & Order: SVU,” which is also made available from NBC’s website. While NBC would face the possibility of direct infringement liability under the transmit clause for broadcasting the image to the public on TV and transmitting it to the public from its website, Perfect 10’s conception of the public display right would also result in strict liability for fans who emailed friends or family with a link to the episode on NBC’s website (the email would constitute a communication that “causes the appearance” of the Perfect 10 image). Strict liability would even reach a fan who simply called a friend to suggest tuning in to NBC at 10 p.m. on Tuesday night. And TiVo would likewise find itself strictly liable for NBC’s transgression when its subscribers’ digital video recorders automatically recorded the episode in response to program guide information electronically transmitted to each subscriber by TiVo.

To tidy up the mess created by its overbroad conception of public display, Perfect 10 proposes that the courts rely on the fair use doctrine to excuse the bulk of nominal infringements. *See* P10 Br. at 27. This “solution” only aggravates the problem, forcing millions of web publishers and internet users to rely on the expense and uncertainty of a fair use defense in hundreds of instances each day.

Fortunately, copyright law has long since adopted a more sensible approach, namely the application of secondary liability principles to those who do not themselves engage in the activities expressly reserved to a copyright owner. *See, e.g., Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 405 (S.D.N.Y. 1966) (applying secondary liability analysis in evaluating whether defendant radio station could be held liable for advertising infringing recordings).

3. Courts Have Uniformly Imposed Public Display Liability Only on Those Who Actually Transmit the Display.

Perfect 10's effort to read "transmit or otherwise communicate" out of the transmit clause also cannot be squared with the case law. This Court's decision in *Professional Real Estate Investors* is particularly instructive. In that case, Columbia Pictures argued that the owner of the La Mancha hotel directly infringed the public performance right by renting videodiscs to its guests for private viewing in their rooms. Admitting that the hotel did not actually "transmit" anything, Columbia nevertheless argued (as Perfect 10 does here) that "otherwise communicate" should be stretched to reach the hotel's rental activities. *Professional Real Estate Investors*, 866 F.2d at 281-82. This Court rejected this invitation, concluding that "[a]ccording to the rule of *ejusdem generis*, the term 'otherwise communicate' should be construed consistently with the term 'transmit.'" *Id.* at 282.

Indeed, a survey of public display cases⁴ imposing direct liability under the transmit clause (including the cases cited by Perfect 10) reveals that every one involved a defendant who actually transmitted the infringing display at issue. *See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't., Inc.*, 342 F.3d 191 (3d Cir. 2003) (website transmitted “clip previews” that included individual images from motion pictures); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F.Supp. 543 (N.D. Tex. 1997) (website transmitted Playboy images); *Hardenburgh*, 982 F.Supp. at 505-06 (electronic bulletin board system transmitted Playboy images); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (same).

In the public performance context, the reported cases that impose direct liability under the “transmit clause” also uniformly involve defendants who themselves transmitted the performances at issue. *See, e.g., Nat’l Football League v. Primetime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000) (transmissions of football games to satellites); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991) (transmission of motion pictures from central VCRs to hotel rooms); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290 (S.D.N.Y. 1991) (transmissions of television programming to cable stations); *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752 (S.D.N.Y. 1988) (same); *Hubbard Broad., Inc. v. S. Satellite Sys.*, 593 F. Supp. 808 (Dist. Ct. Minn. 1984) (same). In short, Perfect 10’s effort to impose direct liability under the transmit

⁴ There have been relatively few reported cases involving the public display right since the right’s creation in the 1976 Copyright Act. *See Reese, supra*, at 102-22 (surveying all reported cases as of 2001).

clause on defendants who do not actually transmit its images runs counter to the clear trend in copyright jurisprudence.

Moreover, Perfect 10's theory of direct liability has been rejected by the only courts to have considered it. Judge Baird in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002), concluded that Perfect 10 was unlikely to succeed in establishing direct infringement of the public display right where the defendant provided age verification and other services to infringing third-party websites, but did not store or transmit any Perfect 10 images itself. *Id.* at 1168-69. Thus, far from "substitut[ing] the Court's own (incorrect) policy judgment for the statutory definition," P10 Br. at 22, the District Court below, like its sister courts, correctly derived the "server test" from the statutory language of § 106(5) and the precedents that have applied it in the past. *See Perfect 10 v. Google*, 416 F. Supp. 2d at 843-44.

4. The Legislative History of § 106(5) Lends No Support to Perfect 10's Position.

Seeking to buttress Perfect 10's expansive conception of public display, *amici* American Society of Media Photographers, et al (hereafter "Photographer *amici*"), resort to a lengthy, but ultimately unilluminating, treatment of § 106(5)'s legislative history. As an initial matter, where the statutory language speaks clearly, as it does here, legislative history cannot be invoked to override it. *See Pipefitters Local Union v. United States*, 407 U.S. 385, 446 (1972).

In any event, the legislative history lends no support to Perfect 10's effort to expand the reach of the transmit clause to those who do not themselves transmit

the display. Perfect 10 and its *amici* correctly observe that Congress created the public display right principally to address television broadcasting and future computer networks. *See Reese, supra*, at 92-102 (surveying legislative history and concluding that “the primary concern of the display right from the very beginning was the transmission of images to the public”). The Photographer *amici* are also correct that the transmission of full-size images over the internet constitute public displays. *See id.*; *see also id.* at 114-22 (describing how transmissions over computer networks result in public displays). Indeed, no one has claimed otherwise.

The central question here, however, is not *whether* public displays are taking place, but rather *who* is publicly displaying them. On this point, the statute speaks clearly: the “transmit clause” imposes liability on a person who “transmit[s] or otherwise communicate[s]” a display to the public. 17 U.S.C. § 101 (definition of “publicly”); *see also Prof'l Real Estate Investors*, 866 F.2d at 282 (applying the rule of *eiusdem generis* to the phrase “otherwise communicate,” concluding it must be construed consistently with the term “transmit”).

Notwithstanding the efforts of the Photographer *amici* to construe the public display right to reaching anyone who “provides a ‘process’ which allows this remote reception to occur,” Photogs. Br. at 12, the examples mentioned in the legislative history instead reinforce the conclusion that the public display right extends only to those who are directly engaged in transmitting displays and performances:

Thus, for example, a singer is performing when he or she sings a

song; a broadcasting network is performing when it *transmits* his or her performance (whether simultaneously or from records); a local broadcaster is performing when it *transmits* the network broadcast; a cable television system is performing when it *retransmits* the broadcast to its subscribers; and any individual is performing whenever he plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.

H.R. Rep. No. 94-1476, at 63 (1976) (emphasis added). In the first and last of these examples—the singer and individual operating the receiving set—public performance liability would arise under the “public place clause.” The remaining three examples—the broadcast network, the local broadcaster, and the cable system—all implicate the “transmit clause,” and infringement is expressly tied to the act of “transmitting” or “retransmitting” the performance to the public.

Similarly, the 1976 House Report explains that “[e]ach and every method by which the images or sounds comprising a performance or display are *picked up and conveyed* is a ‘transmission,’ and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106.” *Id.* at 64 (emphasis added). Again, the focus is on the act of transmission (“picked up and conveyed”), rather than on more indirect forms of causation.

Notably absent from the legislative history surrounding the enactment of § 106(5) is any example suggesting direct infringement liability under the “transmit clause” for a person who does not herself transmit a performance or display. There is no example of direct infringement arising from the provision of transmitting equipment to a third party, nor any example of direct infringement stemming from the provision of information about where an infringing performance or display may be witnessed. And although the Photographer *amici* make much of the prescience

of Congress in crafting the public display right to reach transmissions over computer networks, there is no example that suggests direct liability for someone who provides information that leads to an infringing transmission from a third party.

The reason for the absence of such examples is straightforward—when the 1976 Copyright Act was passed, copyright law had already developed secondary liability doctrines to address these situations in a balanced manner. *See, e.g., Gershwin Publishing Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159 (2d Cir. 1971) (imposing secondary liability on concert promoter for its “pervasive participation” in infringing public performances); *Screen Gems v. Mark-Fi*, 256 F. Supp. at 405 (applying secondary liability doctrines to advertising agency, radio station, and fulfillment service who were facilitating sales of infringing sound recordings). Thus, for Google, which does not actually transmit any of the full-size images in question, the only appropriate basis for copyright liability, if any, would have to be grounded in secondary liability principles.

5. In Adopting a “Server Test,” the District Court Did Not Conflate the Public Display and Reproduction Rights.

Perfect 10 and its supporting *amici* also complain that the “server test” improperly merges the public display and reproduction rights. This argument mischaracterizes the District Court’s ruling and overlooks the long tradition of overlap between the two exclusive rights.

First, nothing in the District Court’s ruling “precludes a finding of infringement of the display right unless the reproduction right is also violated.”

P10 Br. at 19. The “server test” imposes liability for infringement of the public display right on that entity that is “physically sending ones and zeroes over the internet to the user’s browser”—in other words, on the entity that is “transmitting or otherwise communicating” the display. No additional infringement of the reproduction right need be shown. For example, if someone points a streaming webcam at a Perfect 10 image and thereby transmits an infringing display of it over the internet, liability under the “server test” would be triggered irrespective of whether the reproduction right had also been violated. By the same token, the “server test” would impose liability on a Perfect 10 subscriber for infringing transmissions of Perfect 10 images over the internet, even if the subscriber enjoyed a license to reproduce the images on his computer.

Of course, in many circumstances involving the transmission of digital copies over computer networks, the reproduction right may also be separately infringed. *See, e.g., Webbworld*, 991 F.Supp. at 543 (defendant infringed both the reproduction and public display rights). This potential overlap between the exclusive rights of reproduction and public display is not the product of the “server test,” but rather this Court’s previous suggestion that a temporary reproduction in a computer’s random access memory (RAM) may infringe the reproduction right. *See MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Reese, supra*, at 141 (criticizing *MAI v. Peak* for dramatically expanding the reach of the reproduction right).

Moreover, the substantial overlap between the public display and reproduction rights is nothing new. According to the leading scholarly treatment of

the public display right:

[D]espite the drafters' prediction of its "great importance," the display right to date has been probably the least important of the copyright owner's rights, with respect to both television transmissions and the computer networks, such as the Internet, that the drafters foresaw as the main area for exercise of the display right. Instead, the display right has been overshadowed by the reproduction right. There is a substantial relationship between the display right and the reproduction right, and the particular technology used to transmit displays to the public will determine whether the display right offers copyright owners significant independent control over such transmissions or is merely a sometimes useful strategic complement to the control over such transmissions that the reproduction right provides.

Reese, *supra*, at 102. Notwithstanding this overlap, the public display right can still be separately asserted in ways that provide strategic value to copyright owners in particular cases. *See id.* at 111-13 (separate assertion of public display right may, in appropriate cases, bestow remedial advantages, revive time-barred claims, and establish personal jurisdiction).

B. Perfect 10 Misstates the Applicable Legal Standards Governing Secondary Liability Claims Against Search Engines.

In addition to direct infringement claims, Perfect 10 presses contributory infringement claims against Google based on its activities as a search engine. These secondary liability claims are premised on holding Google responsible for the activities of two different groups of alleged direct infringers: (1) Google users and (2) operators of third-party websites that host Perfect 10 images without authorization.

1. Internet Users Do Not Infringe Copyright by Simply Browsing the Web.

With respect to Google users, Perfect 10 renews its breathtaking argument

that “viewing a P10 image on a computer screen necessitates the making of a copy.” P10 Br. at 29 n.12. In other words, Perfect 10’s argues that merely by viewing a third-party webpage containing Perfect 10 images, “individual users of Google search make local ‘cache’ copies of its photos and thereby directly infringe through reproduction.” *Perfect 10 v. Google*, 416 F. Supp. 2d at 852 n.17. The District Court properly rejected this argument, holding that any reproductions automatically made during the course of simple web browsing should qualify as a fair use. *See id.*

This Court should endorse the District Court’s analysis of web browsing as a fair use. Most internet users would be shocked to learn that, according to this Court’s ruling in *MAI v. Peak*, anyone who browses the Web and unintentionally runs across infringing material is potentially liable for copyright infringement based on the RAM and cache copies automatically made by her browser.⁵ *See MAI v. Peak*, 991 F.2d at 518. Each work reproduced in this manner, moreover, potentially exposes the casual web surfer to a statutory damages award of as much as \$30,000 and “not less than \$200.” 17 U.S.C. § 504(c)(2) (copyright owner entitled to an absolute minimum of \$200 per work infringed, even against “innocent infringers”).

This absurd state of affairs cannot and should not be allowed to continue. The right to read has never been within the ambit of a copyright owner’s exclusive rights, and there is no reason for a different rule to apply in the online context. *See*

⁵ Indeed, even when browsing lawfully posted material online, a user is potentially liable for infringement, but for a defense grounded in fair use or implied license.

generally Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts & Ent. L.J.* 29, 31-32 (1994). The District Court here was the second to expressly hold that reproductions made automatically in the course of typical web browsing activities qualify as fair uses. See *Perfect 10 v. Google*, 416 F.Supp.2d at 852 n.17; *Religious Technology Center v. Netcom On-line Comms. Svcs.*, 907 F. Supp. 1361, 1378 n.25 (N.D. Cal. 1995). An appellate court endorsement of this common sense solution to the “digital browsing” problem would dispel one of the embarrassing doctrinal uncertainties that has been eroding the legitimacy of copyright law in the eyes of the public. See Jessica Litman, *War And Peace: The 34th Annual Donald C. Brace Lecture*, 53 *J. Copyright Soc’y U.S.A.* 1 (Fall 2005-Winter 2006). It would also begin to cabin the mischief that overzealous litigants like *Perfect 10* seek to make from *MAI v. Peak* and its progeny.⁶

2. Perfect 10 Has Failed to Come Forward with Any Evidence Establishing that Google Users Directly Infringe.

Beyond the simple act of browsing, *Perfect 10* contends that some portion of Google users “download and/or transmit copies of P10 images obtained through Image Search and, therefore, infringe P10’s reproduction and distribution rights.” P10 Br. at 29. The District Court rejected this contention, finding that *Perfect 10* had failed to come forward with any evidence to support it. See *Perfect 10 v.*

⁶ Even if copyright owners are unlikely to sue individual internet users for infringement based on simple web browsing, *Perfect 10*’s effort here illustrates how overzealous copyright owners can exploit the doctrinal possibility of liability for web browsing to strengthen their hand in secondary liability cases. For example, until judicial precedents dispel the possibility that simple web browsing gives rise to infringement liability, libraries that provide web terminals to their patrons will continue to face uncertainties regarding their legal position.

Google, 416 F. Supp. 2d at 852.

Perfect 10 and *amici* Recording Industry Association of America (RIAA) contend that Perfect 10 is entitled to an inference that some indeterminate portion of Google users “downloaded and/or transmitted P10 images.” P10 Br. at 30. This inference apparently stems from the 5,000 Perfect 10 images indexed by Google, the 4,000,000 links to third-party websites containing Perfect 10 images, and the fact that Perfect 10’s own investigators were able to download a number of Perfect 10 images.

Even assuming *arguendo* that a mere inference is enough to support the extraordinary relief of a preliminary injunction, Perfect 10’s factual predicate here falls far short of supporting an inference that Google users downloaded or transmitted any particular Perfect 10 images. Although Google does not publish the size of its index, Yahoo! last year estimated that its comparable index contained links to more than 19 billion web documents and 1.6 billion images. *See* Our Blog is Growing Up—And So is Our Index, Yahoo! Search Blog, <http://www.ysearchblog.com/archives/000172.html> (Aug. 8, 2005) (last visited July 17, 2006). Thus, when measured against the size of Google’s index, Perfect 10’s images amount to a handful of needles in a solar system of haystacks. In order to satisfy its burden of proving a likelihood of success on the merits of its secondary liability claims, Perfect 10 must offer a much stronger factual basis before completed acts of infringement by Google users may be inferred. *Cf. Arista Records, Inc. v. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918 at *1 (S.D.N.Y. Aug. 29, 2002) (“While the structure of MP3Board’s site and the

scale of the operation certainly give rise to a strong statistical inference that MP3Board users downloaded files containing copyrighted music in violation of the record companies' reproduction rights under Section 106(1), the record companies have failed to eliminate all genuine issues of material fact.”).

3. Third Party Websites Do Not Distribute Perfect 10 Images.

Unable to build its secondary liability case on any direct infringements on the part of Google users, Perfect 10 next argues that Google should be held responsible for “facilitating distribution of P10 images by infringing websites.” P10 Br. at 29 n.11. This argument fails as well.

Simply put, the third-party websites do not directly infringe Perfect 10’s distribution right because transmissions over computer networks *never* directly infringe the a copyright owner’s § 106(3) distribution right, which only reaches contexts where a material object changes hands. *See Reese, supra*, at 122-38 (concluding after thorough analysis that “the distribution right, as currently framed...does not appear to encompass transmissions of copyrighted works over computer networks.”).

Section 106(3) provides that the owner of a copyright has the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106(3). When defining the right, Congress expressly limited it solely to the distribution of *copies or phonorecords* of the work, rather than distribution of *the copyrighted work*. *Compare* 17 U.S.C. § 106(4)-(6) (granting the exclusive right to perform or display “the copyrighted work” publicly). This distinction is critical, as the

Copyright Act defines both “copies” and “phonorecords” as “material objects” in which copyrighted works are fixed. *See* 17 U.S.C. § 101; *see also* 17 U.S.C. § 202 (distinguishing ownership of work from ownership of copies); H.R. Rep. No. 94-1476, at 53 (emphasizing “fundamental distinction” between the intangible copyrighted work and the material objects in which it can be embodied). In short, “the copyright owner’s exclusive right of distribution is a right to distribute such tangible, physical things.” Reese, *The Public Display Right, supra*, at 126.⁷

Thus, like Perfect 10’s public display theory, its “facilitation of distribution” theory runs afoul of copyright’s statutory scheme. It should be rejected.

4. Specific Knowledge of Particular Acts of Infringement Is Necessary Before Contributory Infringement Liability Can Be Imposed on Google.

This leaves Perfect 10 with only one direct infringement foundation on which to build its contributory infringement claim: “third-party websites that reproduce and display unauthorized copies of P10’s photographs.” *Perfect 10 v. Google*, 416 F. Supp. 2d at 852. As the District Court correctly concluded, with respect to these alleged direct infringements, “the question here is whether P10 provided Google with adequate actual knowledge of specific infringing activities.”

⁷ This Court has in dicta suggested that transmissions can infringe the distribution right. *See A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001). Because direct infringement by Napster users was not disputed in that preliminary injunction appeal, the statement is dictum. *See id.* at 1013. Similarly, a smattering of district court cases have included loose language, unsupported by analysis of § 106(3)’s plain statutory language, suggesting that transmissions over computer networks can infringe § 106(3). *See Reese, supra*, at 123-31 (discussing cases). This Court should take the opportunity to reject these poorly reasoned authorities and bring the scope of the distribution right back into line with its statutory roots.

Perfect 10 v. Google, 416 F. Supp. 2d at 854.

Ultimately, the District Court assumed without deciding that Google possessed actual knowledge of infringement. Nevertheless, apparently displeased with related statements in dicta, *amici* RIAA launches an extensive, misguided attack on the District Court’s conception of the “knowledge” element of contributory infringement.⁸ RIAA Br. at 13-22. Contrary to the RIAA’s arguments, the District Court correctly stated the relevant knowledge standard, insisting on specific knowledge of particular acts of infringement.

“Traditionally, one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing activity of another, may be held liable as a contributory infringer.” *A&M Records v. Napster*, 239 F.3d at 1019 (internal quotations omitted). “Contributory liability requires that the secondary infringer ‘know or have reason to know’ of direct infringement.” *Id.* at 1020.

Where the defendant is a vendor of a technology that is “capable of substantial noninfringing uses,” however, mere general knowledge of infringing uses cannot satisfy the knowledge requirement for contributory infringement. *See*

⁸ The Supreme Court has recently expressed the test for contributory infringement somewhat differently, holding that “[o]ne infringes by intentionally inducing or encouraging direct infringement.” *MGM v. Grokster*, 125 S.Ct. at 277. If this formulation was intended to displace the traditional legal standards applicable to contributory infringement claims, as Google suggests, then *Perfect 10*’s claim must fail for lack of evidence establishing any intent to foster infringement on the part of Google. *See* Google Br. at 41. In order to address the RIAA’s arguments, however, *Amici* here will assume that the “inducement” standard announced in *MGM v. Grokster* instead supplements the Court’s traditional contributory infringement jurisprudence.

MGM v. Grokster, 125 S.Ct. at 2777-78 (“[T]he [staple article of commerce] doctrine...limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.”); *Sony v. Universal*, 464 U.S. at 439 (finding no precedent to support liability against Sony based “on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material.”); *see also In re Aimster Copyright Litigation*, 334 F.3d 643, 649 (2003) (rejecting notion that a mere showing of “anything more than” constructive knowledge trumps *Sony-Betamax*); *Vault Corp. v. Quaid Software, Ltd.*, 847 F. 2d 255, 262 (5th Cir. 1988) (no liability even where software vendor had “actual knowledge that its product is used to make unauthorized copies of copyrighted material”).

Applying *Sony v. Universal*, *MGM v. Grokster*, and this Court’s rulings in *A&M Records v. Napster*, the District Court correctly concluded that Perfect 10 must provide Google “with adequate actual knowledge of specific infringing activities.” *Perfect 10 v. Google*, 416 F.Supp.2d at 854. Or, to put the matter as this Court has: “[I]n an online context, evidence of actual knowledge of *specific acts* of infringement *is required* to hold a computer system operator liable for contributory infringement.” *A&M Records v. Napster*, 239 F.3d at 1021 (emphasis added).

Lacking access to the sealed factual record in this case, *Amici* are not in a position to evaluate whether Perfect 10’s evidence of knowledge meets this standard. But should this Court reach the issue, it should reject the erroneous

general knowledge standard proposed by the RIAA.⁹

C. The District Court's Fair Use Ruling Regarding Thumbnails Should Be Reversed.

The District Court's rulings concerning linking liability and contributory infringement reflect an understanding of the technology underlying the internet and the practical implications of these rulings. Unfortunately, the District Court's fair use holding regarding Google's creation and use of thumbnails did not reflect a similar awareness. For the reasons stated in Google's brief, the District Court erred in distinguishing the instant case from *Kelly v. Arriba Soft*. The existence of the AdSense program does not render Google's use more commercial than Arriba's, nor does Perfect 10's arrangement with Fonestarz render Google's use consumptive rather than transformative.

Indeed, the transformative nature of Google's use cannot be overstated. In *Kelly*, this Court properly asked whether Arriba's use "added a further purpose" or had a "different character" from the original use. *See Kelly*, 336 F.3d at 818. It then concluded that "Arriba's use of the images serves a different function than Kelly's use—improving access to information on the internet versus artistic expression." *Id.* at 819. So, too, does Google's use improve access to information on the internet. Every day, millions of users—including consumers, students, educators,

⁹ The RIAA's invocation of the statutory standards for infringement notices sent under 17 U.S.C. § 512, RIAA Br. at 15, sheds no light on the proper knowledge standard for contributory infringement liability. In enacting the § 512 "safe harbors," Congress made it plain that the § 512 regime was not meant to disturb or supplant the evolving judge-made standards governing contributory infringement. *See CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 553 (4th Cir. 2004).

scientists, government officials, and corporate executives—use commercial search engines like Google to find information to assist them in a wide variety of tasks ranging from the esoteric to the mundane, from the sacred to the profane.

Libraries, in particular, rely on commercial search engines, including image search functions, to help patrons navigate the sea of information that constitutes the World Wide Web. Increasingly, the most current information relating to science, public health, government activities, and financial markets can be found only on the Web. And in the experience of *Amici* library associations, commercial search engines such as Google's often are the most efficient and effective means of finding the relevant universe of information. Image search allows librarians to find images of chemical compounds, microorganisms, surgical techniques, maps, graphs, photojournalism, and paintings, just to name a handful of the sorts of images librarians find for patrons.

In light of the importance of search technology to the Web and its users, the mere fact that commercial search engines turn a profit should not “trump,” in the District Court's parlance, the enormous public benefit they provide. *Perfect 10 v. Google*, 416 F. Supp. 2d at 851. This Court should hew to the spirit of its ruling in *Kelly v. Arriba Soft* and reverse the District Court's fair use ruling regarding Google's creation and use of thumbnails of Perfect 10 images.

V. CONCLUSION

For the reasons discussed above, the decision of the District Court should be affirmed with respect to its rulings on direct liability for linking to full-size images and contributory infringement, but reversed with respect to its fair use ruling

regarding Google's creation and use of thumbnails.

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Respectfully submitted,

Fred von Lohmann
Cal. Bar No. 192657
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333
(415) 436-9993 (fax)

*Attorney for Amici Electronic Frontier
Foundation, American Library
Association, Medical Library
Association, American Association of
Law Libraries, Association of
Research Libraries, and Special
Library Association*