LEGAL UPDATE

QUESTIONS OF COPYRIGHT IN GOOGLE'S IMAGE SEARCH: DEVELOPMENTS IN *PERFECT 10, INC. V. AMAZON.COM, INC.*

*Eric Carnevale**

I. INTRODUCTION

17 U.S.C. § 502(a) allows a court to grant injunctive relief to a copyright holder "on such terms as [the court] may deem reasonable to prevent or restrain infringement on a copyright."[1] Copyright holders for digital information such as music and movies have long used this provision to stem piracy by shutting down services connecting downloaders to content servers. These copyright holders have sought injunctions under two theories: direct infringement under 17 U.S.C. § 106,[2] or secondary infringement under common law.[3] The 9th Circuit recently examined this issue in *Perfect 10, Inc. v. Amazon.com, Inc.* (Perfect 10), decided on May 16, 2007.[4]

II. A BRIEF HISTORY OF DIRECT AND SECONDARY INFRINGMENT

Modern copyright law was codified in 1976.[5] Copyright was designed to protect five fundamental rights of copyright holders: "the exclusive rights of reproduction, adaptation, publication, performance, and display."[6] By statute,

* J.D. Candidate, Boston University School of Law, 2009; B.S., Biology Case Western Reserve University.

[1] 17 U.S.C. § 502(a) (2000).

[2] 17 U.S.C. § 106 (2000).

[3] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005) [hereinafter Grokster](holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

[4] *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007) [hereinafter Perfect 10].

[5] *See* 17 U.S.C. § 107 (2000) et seq.

[6] House Report No. 94-1476 (1976).

these rights only extended over "copies or phonorecords" of an artistic work.[7] The courts have interpreted this definition broadly to include both physical copies and copies stored in more intangible mediums, such as on computers.[8]

The rights afforded to a copyright holder are subject to limitations. Most significant is the limitation of fair use,[9] codified under federal law in 17 U.S.C. § 107.[10] In determining whether fair use applies, a court must consider: "(1) the purpose and character of the use including whether it is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[11]

As copyrighted works became more easily reproduced and distributed, the common law evolved to target the distributors of infringing content. Two leading cases, *Shapiro, Bernstein & Co. v. H. L. Green Co.*,[12] and *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*,[13] helped develop the early scope of secondary liability for copyright infringement. In *Sony Corp., v. Universal City Studios*, the Supreme Court clarified the reach of infringement liability.[14]

In the late 1990s the internet became a significant source of copyright infringement. In *A & M Records, Inc. v. Napster, Inc.*, Napster maintained an index of music files, mostly copyrighted works, stored on individual user's computers. Other users could access this index, locate music files on computers linked to the index, and download those files to their personal

[7] *See* 17 U.S.C. § 106.

[8] *See e.g.* Grokster; A&M Records, Inc. v. Napster, Inc, 239 F.3d 1004 (9th Cir. 2001) [hereinafter Napster].

[9] House Report No. 94-1476 (fair use is "one of the most important and well-established limitations on the exclusive right of copyright owners.").

[10] 17 U.S.C. § 107 (2000) (fair use is intended to protect "such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research").

[11] *Id.*

[12] Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (C.A.N.Y. 1963) ("When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials-even in the absence of actual knowledge that the copyright monopoly is being impaired the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation."(citations omitted)).

[13] Gershwin Pub. Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (C.A.N.Y. 1971) (holding that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer.").

[14] Sony Corp. v. Universal City Studios, 464 U.S. 417, 434 (1984) ("The Copyright Act does not expressly render anyone liable for infringement committed by another.").

computers.[15] The Court imposed vicarious liability on Napster based on evidence that the company had allowed individuals to infringe copyrights in order to draw customers to its service,[16] and that the company had the capacity to police its networks for copyright infringement, but did not.[17] In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, Grokster, another indexing service, attempted to circumvent Napster's holding by willfully failing to maintain an index which would permit policing of its service's material.[18] Grokster provided software that allowed users to chain small indices of files across "supernodes" made up of other users, with no centralized database or means of control by Grokster.[19] The Supreme Court ruled this was not sufficient to avoid liability for infringement.[20]

III. PERFECT 10 *BACKGROUND*

In the middle of 2001 Google, Inc. announced an image search service operated via a "crawler."[21] A crawler is a piece of software which automatically searches websites for links to other websites. By following each successive link, the crawler creates a directory describing the structure and relationship between websites.[22] Google's crawler, also looked specifically for image files on each website, and stored information relating to those image files on Google's servers.[23] In particular, Google stored a thumbnail of the image and a link to its location on the Internet.[24] The original image could

[15] Napster at 1012.

[16] *Id.* at 1024.

[17] *Id.* ("Napster's failure to police the system's "premises," combined with a showing that Napster financially benefits from the continuing availability of infringing files on its system, leads to the imposition of vicarious liability.").

[18] Grokster, 545 U.S. at 920-21.

[19] *Id.*

[20] *Id.* at 932-33 ("[W]here an article is good for nothing else but infringement, there is no legitimate public interest in unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe. . . . Conversely, [this] doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused.").

[21] *Google Tests Web-Wide Image Search*, COMPUTER WIRE, July 4, 2001. (The service began with only rudimentary function and a small image catalogue. It is interesting to note that "[Google], aware of the issues of copyright infringement, has provided detailed instructions for people wishing to see their images removed from Google's cache, either through individual requests, or using robot exclusion meta tags in HTML pages.").

[22] *See* Marie Swift, *Getting on Google: There's an Art to Ranking High On Various Search Engines. Mastering it Will Help You Draw More Potential Clients to Your Web Site,* FINANCIAL PLANNING, Sept. 1, 2005.

[23] Perfect 10, 487 F.3d at 712.

[24] *Id.*

then be accessed by users submitting search criteria for that image to Google's server.[25]

In May 2001, Perfect 10, Inc., an adult magazine and Internet publisher, became concerned that Google was linking to images on websites that contained photographs which infringed on Perfect 10's copyrights.[26] Perfect 10 sent cease and desist letters to Google and Amazon.com,[27] who operated a search program which licensed Google's image search technology.[28] In November 2004, Perfect 10 filed suit against Google in Los Angeles federal court.[29] The following June, Perfect 10 filed a separate complaint against Amazon.com.[30] In both actions, the plaintiff moved for a preliminary injunction to prevent Google and Amazon.com from linking infringing images, thumbnails of the images, or websites containing infringing images.[31] The district court combined the cases and heard both on November 7th 2005.[32]

A. District Court Decision

Perfect 10 based its suit against Google on four arguments. First, it argued that Google directly infringed the copyright on its photographs by linking to the infringing images.[33] Second, Perfect 10 believed that Google directly infringed by storing 'thumbnail" copies of the images on Google servers.[34] Third, Perfect 10 claimed that Google contributorily infringed by knowing that infringing activity was taking place, and materially contributed to that infringement by providing direct infringers with an audience and advertising

[25] *Id.*

[26] Brief for the Plaintiff-Appellant at 11, Perfect 10, Inc. v. Google Inc., No. 06-55406 (9th Cir. May 31, 2006) [Hereinafter Perfect 10 Brief].

[27] *Id.*

[28] Brief for the Defendant-Appellee at 5, Perfect 10, Inc. v. Amazon.com, Inc., Nos. 06-55405, 06-55425, 06-55406 (9th Cir. August 11, 2006) [hereinafter Amazon Brief] ("Google supplied its web and web image search result sets to Amazon.com; Amazon.com automatically forwarded links to those results to A9.com users.").

[29] *Id.* at 4.

[30] *Id.*

[31] *Id.*

[32] Perfect 10, Inc. v. Google, Inc., 416 F.Supp.2d 828, 831 (C.D. Cal. 2006) [hereinafter Google].

[33] Amended Complaint at 8, Perfect 10, Inc. v. Google, Inc., 2005 WL 4705032 (C.D.Cal. 2005) ("Although Google claims that the full-size copies displayed in this manner do not reside on Google servers, as a practical matter these full-sized copies of Perfect 10 Copyrighted Works appear to be on google.com and Google is making them available to consumers to view, copy, download, and otherwise manipulate without the need to take any action. . . to leave Google.").

[34] *Id.* at 7-8 ("The infringing Perfect 10 copies made and provided by Google, even in their reduced-size version, are large and detailed enough to serve as a substitute to those offered on perfect10.com for a subscription fee.").

revenue.[35] Lastly, Perfect 10 contended that Google had vicariously infringed by enabling others to find websites with infringing content through their image search service.[36] Perfect 10's claims of contributory and vicarious infringement were directed to Google's Adwords and Adsense advertising programs, both of which may have been used by infringing websites to generate revenue.[37]

Google in turn, argued that it did not directly infringe the copyright of any linked photograph because it stored only the link, not the content itself.[38] While Google did store thumbnail versions of the photographs, Google believed these reduced quality versions should have constituted fair use.[39] Google believed that vicarious liability for copyright infringement did not encompass its incidental linking to infringing images.[40] On the issue of contributory infringement, Google denied liability primarily by attacking the materiality of its contribution.[41]

The district court held for Google on three out of the four issues. On the question of direct infringement of the full sized images, the Court determined that unless Google owned the hardware on which the infringing content was stored, they could not be directly liable.[42] For the issue of vicarious liability,

[35] *Id.* at 28 ("Google has continued to supply Google's services to the Stolen Content Websites with knowledge that the Stolen Content Websites are using Google's services to infringe the Perfect 10 Marks and are using the Perfect 10 Marks in commerce in connection with the sale. . . and advertising of goods and services.").

[36] *Id.* at 23 ("Google has the right and ability to supervise and control the infringing conduct. . . but has failed and refused to exercise such supervision and/or control. . . . Google has derived a direct financial benefit from fees charged to the Stolen Content Websites in Google's Adwords and Adsense programs, and from the increased traffic to Google.com and advertising dollars resulting from the 'draw' of the Perfect 10 Copyrighted Works."); *See infra* note 38 at 134.

[37] Google's Adwords program allows businesses to create advertisements which are linked to a keyword. When someone searches for that keyword on Google, the relevant ads appear along side the search results. Welcome to AdWords, http://adwords.google.com (last visited Dec. 21, 2007); Google's Adsense program scans a client's website in order to find and display ads for products which are related to the site's content. Welcome to AdSense, https://www.google.com/adsense/login/en_US/ (last visited Dec 21, 2007).

[38] Answer to Amended Complaint at 22, 2005 WL 4705033 (C.D. Cal 2005) ("For original images, the user must call upon the website of origin with his or her Internet browser.").

[39] *Id.* at 30.

[40] Google's Opposition to Perfect 10's Motion for Preliminary Injunction at 19-20, 2005 WL 4705034, (C.D. Cal. 2005) [hereinafter Google's Opposition] ("Imposing such a duty on Google would require it to police the entire internet.").

[41] *Id.* at 16-17 (implying that material contribution would require "that Google assist those sites in scanning photos, or downloading them from Perfect 10, copying them to servers, or posting them to the web.").

[42] Google, 416 F.Supp.2d at 841 (The Court adopted the "server" test over Perfect 10's preferred "incorporation" test. The server test restricted only those people who are

the Court determined that Google did not have a sufficient ability to supervise or control infringing activity.[43] On the similar issue of contributory liability, the Court determined that Google's AdSense program did not materially contribute to any direct infringement.[44] The Court decided against Google on one claim, holding that Google likely directly infringed on Perfect 10's copyrights by storing thumbnail versions of Perfect 10's copyrighted images.[45] In making this determination, the Court reasoned that these images probably do not fall within the ambit of the fair use doctrine.[46] Based on this finding, the Court granted Perfect 10's motion for a preliminary injunction against Google.[47]

B. Court of Appeals for the Ninth Circuit

Perfect 10 and Google appealed the partial grant and partial denial of the preliminary injunction.[48] The 9th Circuit affirmed the ruling of the lower court in denying an injunction for Google's linking to full-sized images on other sites.[49] It also affirmed that Google was not likely vicariously liable for the

responsible for "physically sending ones and zeroes over the internet to the user's browser." The incorporation test created liability for "the mere act of incorporating content into a webpage that is then pulled up by the browser[.]" The Court opted for the server test because "[t]o adopt the incorporation test would cause a tremendous chilling effect on the core functionality of the web – its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable.").

[43] *Id.* at 858 ("Google cannot shut down infringing websites or prevent them from continuing to provide infringing content to the world.").

[44] *Id.* at 857 ("Although [Google's] AdSense may provide some level of additional revenue to [infringing] website, P10 has not presented *any* evidence establishing what that revenue is, much less that it is material. . . . There is no evidence that these sites rely on Google AdSense for their continued existence or that they were created with the purpose of profiting from the display of AdSense advertisements."); *See supra* note 38 at 135.

[45] *Id.* at 844 (applying the "server" test to the display of thumbnails. Because Google physically stored the thumbnailed images, they were liable for any infringement that resulted from displaying those images.). *See supra* note 43 at 135.

[46] *See* Id at 844-51 (utilizing the four factor fair use test. The first factor slightly favored Perfect 10 because the Court determined that the thumbnails were at least partially commercial and consumptive. The second factor also favored Perfect 10 because the photographs were creative and "consistently reflect professional, skilful, and sometimes tasteful artistry." The third factor favored no party because Google used no more than what was "necessary to achieve the objective of providing effective image search capabilities." The final factor weighed in favor of Perfect 10 because Google's thumbnails may have harmed Perfect 10's market for cell phone sized images.).; *See supra* at 131.

[47] *Id.* at 851.

[48] Perfect 10, 487 F.3d at 713.

[49] *Id.* at 717 ("Google does not, however, display a copy of full-size infringing photographic images for purposes of the Copyright Act when Google frames in-line linked images that appear on a user's computer screen. Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the

infringement of third party websites.[50] However, the 9th Circuit reversed the district court's holding on Google's direct liability for infringement with its thumbnail images, reasoning that Google would likely prevail under its fair use defense.[51] The Court remanded the case to reconsider the contributory infringement charge. "Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps."[52]

IV. A DISCUSSION OF FAIR USE

The District Court and the Circuit Court relied on *Kelly v. Arriba Soft Corp.* to guide their fair use analysis.[53] In *Kelly*, a nature photographer filed suit against Arriba Soft Corp., creators of a search engine cataloging internet images.[54] The Arriba engine operated essentially the same as the Google Image Search in the present case.[55] Similarly, Arriba argued that its thumbnails were protected under fair use.[56] The Appellate Court in Arriba

Copyright Act.").

[50] *Id.* at 730-731 (The 9th Circuit's reasoning differed slightly from that of the district court. The appellate court held that Google was not vicariously liable because they did not have any meaningful control over the actions of the third party websites. "Perfect 10's suggestions regarding measures that Google could have implemented to prevent its web crawler from indexing infringing websites and to block access to infringing images were not workable.").

[51] *Id.* at 720-725 (The district court erred in holding that Google's thumbnail images were not transformative. Google "provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool." The Court affirmed the districts holding on two of the remaining three factors of fair use, which weighed either in no party's favor, or only slightly in the plaintiff's favor. On the matter of the effect of the use on the market, the Court reversed, saying the determination that Perfect 10's cell phone picture sales were harmed was purely hypothetical.). *See Supra*, note 45 at 135.

[52] *Id.*, at 729 (the determinations are significantly tied to whether or not notices which were sent by Perfect 10 were sufficient to provide Google with actual knowledge of infringing content.).

[53] *See* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)[hereinafter Kelly]; Perfect 10, 487 F.3d at 720 (Kelly is "considered substantially the same use of copyrighted photographic images as at issue here.").

[54] Kelly, 336 F.3d at 815.

[55] *Id.* ("Arriba developed a computer program that "crawls" the web looking for images to index. This crawler downloads full-sized copies of the images onto Arriba's server. The program then uses these copies to generate smaller, lower-resolution thumbnails of the images. Once the thumbnails are created, the program deletes the full-sized originals from the server. Although a user could copy these thumbnails to his computer or disk, he cannot increase the resolution of the thumbnail; any enlargement would result in a loss of clarity of the image.").

[56] *Id.* at 816.

based its decision on the four factor test described above,[57] and both Courts in the present case primarily considered the ways in which Google's fair use claim varied from the *Kelly* reasoning.[58]

The most varied conclusions came from considering the first factor: the purpose and character of use. *Kelly* determined that while the images were clearly for a commercial purpose, they were transformative because shrinking them to thumbnail size changed their purpose.[59] Indeed, changing the purpose without substantially modifying the physical object may be more defensible under fair use than changing the object without modifying the purpose.[60] This distinction between modifying the object and modifying the purpose is at the heart of the disagreement between the courts in the present case. The district court felt that the physical similarities between Google's thumbnails and Perfect 10's cell phone sized images rendered Google's use non-transformative.[61] The 9th Circuit on the other hand, felt that the transformation of purpose from aesthetics to indexing was sufficient to render the images transformative overall.[62]

The *Perfect 10* opinion may even expand upon *Kelly*. *Kelly* did rely in part on the fact that the images were reduced in size and quality, and therefore could not be used as aesthetic replacements for legitimate originals.[63] *Perfect 10* seems to imply that any use, possibly even use of full-size original images, could still be transformative if the context can be altered in a socially beneficial manner.[64] At the very least, the fact that Perfect 10 has a far greater

[57] *See supra* at 3; Kelly, 336 F.3d at 817 n. 12.

[58] *See* Perfect 10, 847 F.3d at 720-25; *See also* Google, 416 F.Supp.2d at 845-51.

[59] Kelly, 336 F.3d at 818 ("Kelly's images are artistic works intended to inform and to engage the viewer in an aesthetic experience. His images are used to portray scenes from the American West in an aesthetic manner. Arriba's use of Kelly's images in the thumbnails is unrelated to any aesthetic purpose. Arriba's search engine functions as a tool to help index and improve access to images on the internet and their related web sites.").

[60] *Id.* at 819 ("reproducing music CDs in computer MP3 format does not change the fact that both formats are used for entertainment purposes. Likewise, reproducing news footage into a different format does not change the ultimate purpose of informing the public about current affairs.").

[61] Google, 416 F.Supp.2d at 849 ("Google's thumbnail images are essentially the same size and of the same quality as the reduced-size images that P10 licenses to Fonestarz. Hence, to the extent that users may choose to download free images to their phone rather than purchase P10's reduced-size images, Google's use supersedes P10's.").

[62] Perfect 10, 487 F.3d at 721 ("[a]lthough an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.").

[63] Kelly, 336 F.3d at 819 ("Furthermore, it would be unlikely that anyone would use Arriba's thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices their clarity.").

[64] Perfect 10, 487 F.3d at 721 ("[j]ust as a parody has an obvious claim to transformative value because it can provide social benefit, by shedding light on an earlier work, and, in the

commercial stake in thumbnail sized images than Kelly, proved to be of little consequence to the court.[65]

On the questions of the nature of the copyrighted work and the amount and substantiality of the portion used, there was little disagreement, and all three opinions dispose of these issues quickly. In both *Kelly* and *Perfect 10*, the creative nature of the works were "closer to the core of intended copyright protection than mere fact-based works" but were of minimal importance because the images had been published on the Internet before they were indexed by the search engines.[66] Likewise, in both situations the amount and sustainability factor favored no one because the search engine used only what was necessary to complete its objective.[67]

The fourth criterion also provides a difference of opinion between the courts in *Perfect 10*, but is also the least related to *Kelly*. In *Kelly*, the artist expressed no interest in the market for thumbnail sized images.[68] Furthermore, the search engine in that case linked many images on Kelly's own page, tending to direct business to the artist rather than away from him.[69] In the present situation, Perfect 10 was actively attempting to market thumbnail sized images, and it appeared far more likely that search results would direct Google users *away* from Perfect 10's subscription based web page and towards free illegitimate sites hosting Perfect 10's content.[70]

In this situation, the Circuit court appears to take a narrower stance compared to its reasoning in *Kelly*. Here, the Court dismisses the harm to Perfect 10's market as being purely hypothetical,[71] but it had earlier used similarly hypothetical reasoning to presume that Arriba's thumbnails directed users to Kelly's website rather than away from it.[72] Had the Circuit Court instead affirmed the District's holding, the effect on the market factor would have clearly favored Perfect 10.[73] This would have created direct tension with the first factor, which the Circuit Court felt clearly favored Google.[74] This result could have required a discussion regarding which factor or factors predominate in the analysis. By drawing the fourth factor more narrowly, the

process, creating a new one, a search engine provides a social benefit by incorporating an original work into a new one, namely an electronic reference tool." (quotations and citations omitted)).

[65] *Id.* ("The fact that Google incorporates the entire Perfect 10 image into the search engine results does not diminish the transformative nature of Google's use.").

[66] *Id.* at 723 (citing Kelly, 336 F.3d at 820).

[67] *Id.* at 724.

[68] *See* Kelly, 336 F.3d.

[69] *Id.* at 821.

[70] *See Supra*, n. 62.

[71] Perfect 10, 487 F.3d at 725.

[72] Kelly, 336 F.3d at 821-22.

[73] Google, 416 F.Supp.2d at 851.

[74] *See supra* at 131.

Court does not have to address this issue.

V. REMAINING QUESTIONS

The Circuit Court left three issues to be decided on remand. First, based on a test enunciated by the Circuit Court, did Google have "knowledge that infringing Perfect 10 images were available using its search engine, and could [have taken] simple measures to prevent further damage to Perfect 10's copyrighted works, and fail[sic] to take such steps?"[75] Next, what is Amazon.com's potential contributory liability?[76] Lastly, can Google and Amazon.com limit their liability pursuant to Title II of the Digital Millennium Copyright Act (DMCA)?[77]

The DMCA may provide Google and Amazon.com a measure of protection against Perfect 10's claims.[78] The 1998 law provides four safe harbor categories that can shield a provider from liability for copyright infringement.[79] A person meeting one of those safe harbor provisions must also have an effective policy in place to deal with instances of repeat infringement.[80] Before the safe harbor protections are required however, a content owner must give proper notice that the service provider is hosting infringing content.[81]

Google and Amazon.com claim protection under multiple safe harbor provisions. Amazon.com primarily relies on section 512(a)'s protection, but also claims status under sections 512(c-d).[82] Google only considers its website an "information location tool" under section 512(d).[83]

Both companies also claim to satisfy the requirements of section 512(i) in different ways as well. Amazon.com has had its repeat infringer policy approved in prior cases.[84] Google on the other hand has not litigated the issue

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[75] Perfect 10, 487 F.3d at 729.

[76] *Id.* at 733.

[77] *Id.*

[78] 17 U.S.C. § 512 et seq. (2000).

[79] *Id.* at § 512(a-d) ("transitory digital network communications," "system cashing," "information residing on systems or networks at the direction of users," and "information location tools.").

[80] *Id.* at § 512(i) (a provider is protected only if she "(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.").

[81] *Id.* at § 512(c)(3).

[82] Amazon Brief at 50-51.

[83] Google's Opposition at 20.

[84] Corbis Corp. v. Amazon.com, Inc., 351 F.Supp. 2d 1090, 1100 (W.D. Wash. 2004); Hendrickson v. Amazon.com, Inc., 298 F.Supp. 2d 914, 918 (C.D. Cal. 2003).

before, and did not have a written policy in place at the time.[85] Google instead relies on the fact that the section 512(i) requirements are broadly interpreted,[86] and believes it has been sufficiently pro-active in responding to copyright infringement claims in the past.[87]

Neither company requires safe harbor protections unless Perfect 10 has first submitted copyright infringement notices to Google and Amazon.com in compliance with section 512(c)(3). Perfect 10 did send Google "37 detailed notices of infringement, covering more than 7,000 infringing URLs."[88] They also sent Amazon.com "seven DMCA-compliant notices, identifying over 1,000 infringing P10 images."[89] However, both defendants claim that the notices do not comply with DMCA section 512(c)(3) requirements.[90] These complaints may have some merit, as a recent unrelated case held that Perfect 10's notices were inadequate under Section 512(c)(3).[91]

The determination of whether or not Google and Amazon.com deserve the protections of the DMCA safe harbor will rely on how strictly the court requires the parties to comply with the technical definitions in the act. These issues may be of little consequence to the case at large however, as Perfect 10 must first prove liability under ordinary copyright law before the protections or consequences of the DMCA may be attached.[92]

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[85] *See* Google's Opposition at 21 (Google claims a written repeat infringer policy would be impractical because "its search engine operates across the open Web, and Web sites are not 'account holders or subscribers.' Google cannot terminate access to the Web.").

[86] Corbis, 351 F.Supp. 2d at 1102 ("Section 512(i), however, is not so exacting. [a service provider] need only inform users that, in appropriate circumstances, it may terminate the user's accounts for repeated copyright infringement."); Perfect 10, Inc. v. CCBill, LLC, 340 F.Supp. 2d 1077, 1089 (C.D. Cal. 2004) ("Congress requires reasonable implementation of a repeat infringer policy rather than perfect implementation.").

[87] Google's Opposition at 21 ("Google devotes significant efforts to claims that particular pages or files are infringing; it regularly suppresses pages or files in its index upon complaint (including complaints by perfect 10), and it respects technical measures.").

[88] Perfect 10 Brief at 11.

[89] Reply Brief for the Plaintiff-Appellant at 25, Perfect 10, Inc. v. Amazon.com, Inc., No 06-55405 (9th Cir. September 19, 2006).

[90] Google's Opposition at 6 ("Perfect 10's notices were vastly overbroad, dealing often with unrelated third parties and non-copyright issues; they were incomplete and shoddy in light of the Section 512(c)(3) requirement; and they were delivered in a manner that impeded efficient handling by Google."); Amazon Brief at 10 ("The notices also were rife with errors, so much so that Amazon.com was unable to investigate.").

[91] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (9th Cir. 2007) ("[e]ach communication contains more than mere technical errors; often one or more of the required elements are completely absent.").

[92] Perfect 10, 487 F.3d at 715 n. 4 ("claims against service providers for direct, contributory, or vicarious copyright infringement, therefore, are generally evaluated just as they would be in the non-online world."(citation omitted)).

VI. CONCLUSION

The outcome of this case may have a profound impact on the way users search the Internet. A decision in favor of Perfect 10 could force search providers to become far more pro-active at policing the millions of websites they index. Likewise, a finding in favor of Google and Amazon may broaden the scope of fair use, and it may clarify the interpretation of several provisions of the DMCA.