

LEGAL UPDATE

COPYRIGHT AND THE EVOLVING LAW OF INTERNET SEARCH – *FIELD V. GOOGLE, INC. AND PERFECT 10 V. GOOGLE, INC.*

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I. INTRODUCTION

Two recent district court opinions from the Ninth Circuit, *Field v. Google, Inc.*¹ and *Perfect 10 v. Google, Inc.*,² have opened the next chapter in the continuing evolution of copyright law in the context of Internet search engines and information search technology. Whether that chapter will prove to be characterized by additional clarity or additional chaos remains to be seen, but the two cases do promise to provide added controversy in the already hotly debated field of digital copyright law.

II. *FIELD V. GOOGLE, INC. AND GOOGLE'S CACHED LINK FEATURE*

A. *Background*

The plaintiff, Blake Field, is an attorney who also maintains a Web site where he publishes a number of his own copyrighted literary works.³ The defendant, Google, Inc., is the well-known operator of what is currently the Internet's most popular search engine.⁴ Google's search engine utilizes a program called Googlebot that visits Web sites, copies the pages they contain, and indexes them according to key words and other criteria.⁵ Users search for Web pages by entering text in Google's search page, triggering a query of Google's index for relevant pages.⁶ The search page then generates a result page with a list of hyperlinks to relevant Web pages alongside short excerpts of relevant text from those pages.⁷ Each individual result may also contain a link

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¹ *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

² *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

³ *Field*, 412 F. Supp. 2d at 1110.

⁴ *Id.*

⁵ *Id.* at 1110-11.

⁶ *Id.*

⁷ *Id.*

to a “cached link” page that, when clicked by a user, displays a copy of the Web page stored in the database of Web pages created by Googlebot and used in responding to user queries.⁸ This cached link page differs from the original Web page in several ways. First, the Web page is a historical copy of the Web page as it appeared on the date in which Googlebot last indexed, or “crawled,” the Web site.⁹ Second, the top of the page includes a conspicuous header indicating that the page is a cached copy provided by Google that may not be current.¹⁰ The header also includes a link to the original Web page.¹¹ Third, the user’s search terms are highlighted in the Web page to make them easily identifiable.¹²

Web site operators who so desire can use industry standard methods to exclude their Web pages both from indexing by a search engine and from being included in an archival presentation like the Google cache feature.¹³ These methods involve using a standard format text file that is stored on the Web site and including a small section of standardized text in the HTML file that constitutes a Web page.¹⁴ Google adheres to this methodology and does not include pages in its index or cache that have the appropriate configuration.¹⁵ Google also provides an automated method for requesting removal of a Web page from Google’s index and cache.¹⁶

According to the record, Field created the fifty-one literary works at issue in the suit, registered them with the U.S. Copyright Office, and created a Web site where he posted the works.¹⁷ Field then deliberately configured the Web pages displaying the works so that they would be included in Google’s cache.¹⁸ Field subsequently sued Google alleging copyright infringement based on Google’s use of this Web page content in the cached link feature.¹⁹

⁸ Google Help Center, Cached Links, <http://www.google.com/features.html#cached> (last visited Mar. 15, 2006).

⁹ *Field*, 412 F. Supp. 2d at 1110-11.

¹⁰ *Id.* at 1111.

¹¹ *Id.*

¹² *Id.* at 1112.

¹³ *Id.* at 1112-13.

¹⁴ *Id.*

¹⁵ *Id.* at 1113.

¹⁶ *Id.* at 1113 n5; *See also* Google Information for Webmasters, <http://www.google.com/remove.html> (last visited Mar. 15, 2006).

¹⁷ *Field*, 412 F. Supp. 2d at 1113-14.

¹⁸ *Id.*

¹⁹ *Id.* at 1110, 1114.

B. The Lawsuit

Field claimed that Google directly infringed his copyrights in fifty-one works on his Web site by reproducing and displaying copies of the works whenever a user of Google's search engine clicks a cached link hyperlink corresponding to his Web pages.²⁰ Field specifically asserted that Google's impermissible reproduction and display consisted of the generation of the cached pages in the user's Web browser.²¹ Google both denied that its cached link feature infringed and raised a series of defenses to infringement, arguing that: 1) Field had granted an implied license for the display of the cached web pages; 2) Field was estopped from asserting infringement against Google; 3) the cached link feature was a fair use; and 4) the cached link feature fell under the safe harbor provisions of the Digital Millennium Copyright Act (DMCA).²²

C. The District Court's Holding

The District Court of Nevada first held that Google's cached link feature did not directly infringe Field's copyrights because Google's conduct in the creation of the copy was passive, non-volitional conduct which prior cases had deemed non-infringing.²³ The court opined that it was the users who were actually creating copies by clicking on the hyperlink to request the cached page.²⁴ The court also noted that Field did not allege that Google's copying of his Web pages for indexing and storing in its cache was infringing, nor did Field allege secondary infringement.²⁵

The court next considered Google's defenses, beginning with implied license.²⁶ The court observed that Web site operators typically direct search engines and Web page archival services to exclude content using the technical methods described above and that Field was both aware of these methods and consciously chose not to implement them.²⁷ Because Field knew that his copyrighted content would be presented when users clicked on the cached link, the court concluded that it could reasonably infer the grant of a license to Google to use the content in this manner.²⁸

The court next considered Google's estoppel defense.²⁹ The court held that

²⁰ *Id.* at 1115.

²¹ *Id.*

²² *Id.* at 1115-23.

²³ *Id.* at 1115.

²⁴ *Id.* at 1114.

²⁵ *Id.* at 1114 n8, 1115.

²⁶ *Id.* at 1115.

²⁷ *Id.* at 1116.

²⁸ *Id.*

²⁹ *Id.* at 1116-17.

Google had proved the four elements required in order to estop Field from asserting infringement against Google.³⁰ First, Field knew of Google's allegedly infringing conduct.³¹ Second, Field had remained silent about his desire not to have his content included in the cached link feature and intended that Google rely on his silence as permission to include the content.³² Third, Google had been ignorant of the true facts.³³ Fourth, Google relied on Field's conduct to its detriment.³⁴ The court found that, in summary, because Field knew how to exclude his works from Google's cached link function and actively refused to do so, Google remained unaware of his desire to exclude his site from Google's cached link feature and as a result, Google suffered the detrimental consequence of the lawsuit.³⁵

The court then considered Google's defense of fair use and concluded that "[b]ased on a balancing of the relevant fair use factors, . . . to the extent that Google itself copied or distributed Field's copyrighted works by allowing access to them through 'Cached' links, Google engaged in a 'fair use' of those copyrighted works."³⁶ In its analysis, the court relied heavily on the prior case of *Kelly v. Arriba Soft Corp.*,³⁷ which held that the actions of an image search engine were fair use where the search engine had copied copyrighted images from Web sites, created lower resolution "thumbnails"³⁸ of those images, and displayed those thumbnails along with links to the originating site in the result sets for user searches.³⁹

Addressing the first of the four traditional fair use factors, the purpose and character of the use, the court first noted that Google's cached links serve a different purpose than Field's original works.⁴⁰ The court identified three

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1117.

³⁵ *Id.*

³⁶ *Id.* at 1118.

³⁷ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

³⁸ As the court described: "A 'thumbnail' is a lower-resolution (and hence, smaller) version of a full-size image. Thumbnails enable users to quickly process and locate visual information. For example, users of Google Image Search are presented with a set of thumbnails that are potentially responsive to their search queries. Because thumbnails are smaller in size, more of them can be displayed at the same time on a single page or screen. Users can quickly scan the entire set of thumbnails to locate the particular full-size image for which they were looking." *Id.* at 833 n.4.

³⁹ *Field*, 412 F. Supp. 2d at 1118-22; *Kelly*, 336 F.3d 811 at 815.

⁴⁰ *Field*, 412 F. Supp. 2d at 1118-19.

purposes served by the cached link feature.⁴¹ First, archiving Web sites enables users to access a site's content when the original page is inaccessible.⁴² Second, an archive of sites allows a user to detect changes made to a Web page by comparing a past and present version.⁴³ Finally, the cached link feature helps a user identify relevant information by highlighting the text in the page that matches the user's search terms.⁴⁴ The court emphasized that these functions were distinct from those of Field's original literary works and therefore did not substitute for the works.⁴⁵ The court further observed that the design of the cached link feature discourages substitution by 1) identifying the cached link page as displaying content from a different Web site and providing a link to the originating site, and 2) providing a means by which Web site operators can exclude content on their sites from the cached link feature in a matter of seconds.⁴⁶

The court next discussed the second fair use factor, the nature of the copyrighted work, and found that the factor weighed only slightly in Field's favor.⁴⁷ The court determined that Google's for-profit nature was only somewhat relevant because 1) Google's use was transformative; 2) there was no evidence that Google profited from the use of Field's works because they were among billions of works in Google's database; and 3) the page displayed for a cached link did not display any advertisements or otherwise offer any commercial transactions to a user.⁴⁸ Further, even assuming the creativity of the works in question, Field had actively sought to make his works available to the widest audience possible by publishing the works on the World Wide Web and configuring his Web site with a "robots.txt" file that ensured search engines would index the site.⁴⁹ Similarly, the court deemed the third fair use factor concerning the amount and substantiality of the work used to be neutral because, although Google copied the works in their entirety, the transformative and socially valuable purposes of the use could only be achieved through copying the entire works.⁵⁰

The court found that the fourth fair use factor, the effect of the use on the potential market for and value of the copyrighted work, weighed heavily in

⁴¹ *Id.* at 1111-12, 1118-19.

⁴² *Id.* at 1118.

⁴³ *Id.*

⁴⁴ *Id.* at 1112, 1119.

⁴⁵ *Id.* at 1118.

⁴⁶ *Id.* at 1119.

⁴⁷ *Id.* at 1119-20.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1120.

favor of fair use.⁵¹ The court determined that there was no evidence of a potential market for cached links; it was unlikely that such a market would develop given that the material was otherwise available free on the originating site; and that a lack of negative effect could be inferred from the fact that reputable Web sites of some major companies chose to have their websites included in the cached link feature.⁵²

The court concluded its fair use analysis by noting that the Copyright Act authorizes consideration of factors beyond the four listed in the act and went on to consider Google's good faith as an additional factor that argued in Google's favor.⁵³ First, the court took note of the mechanisms Google has implemented to allow site operators to have their content excluded from Google's cache.⁵⁴ The court also noted that Google, on its own initiative, removed the cached link option for Field's pages upon learning of the filing of Field's complaint in the action and before service of the complaint.⁵⁵ The court also contrasted Google's good faith with Field's actions, including his failure to request the pages' removal while knowing how the pages would otherwise be treated.⁵⁶

Finally, the court considered whether Google was entitled to protection under the Digital Millennium Copyright Act's (DMCA) safe harbor provision in § 512(b) of the Copyright Act.⁵⁷ Section 512(b) offers service providers meeting certain requirements a safe harbor against monetary damages for infringement if their activities involve copying only for "intermediate and temporary storage."⁵⁸ The court held that Google's Web page copies constituted intermediate and temporary storage under the DMCA, rejecting Field's assertions to the contrary.⁵⁹

The *Field* opinion, building on *Kelly*, establishes a seemingly broad sphere of protection around the activities of Internet search engines. In essence, the court implicitly acknowledged the impracticality of an "opt-in" type system for an information location service like Google's in terms of clearing copyrights and used a number of statutory and doctrinal elements of copyright law to shift the burden to content owners to "opt-out." The *Field* court did not have before it a number of issues that need resolving in order to understand what constitute

⁵¹ *Id.* at 1121-22.

⁵² *Id.* at 1122.

⁵³ *Id.*

⁵⁴ *Id.* at 1122-23.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1123-24.

⁵⁸ *Id.* at 1124.

⁵⁹ *Id.* The copies in Google's index are maintained on average for 14-20 days. *Id.*

the borders of this sphere of protection, including whether search engines can be liable for infringement based on indexing, or “crawling,” alone, and what liability might arise based on infringing content crawled from third-party sites. A month after *Field*, another district court in the Ninth Circuit made a further attempt to define the metes and bounds of infringing and non-infringing activities for search engines, this time touching on indexing as infringement, third-party infringing content, and a host of other issues.

III. PERFECT 10 v. GOOGLE AND GOOGLE IMAGE SEARCH

A. *Background*

Perfect 10 is an adult magazine publisher that also maintains a Web site⁶⁰ featuring a members-only area where adult photographs are available to paid subscribers.⁶¹ Some of the photos available by subscription on the site were copied and displayed on a number of third-party Web sites without Perfect 10’s permission.⁶² Certain specialized image search engines, one of which was operated by Google, subsequently indexed the third-party copies.⁶³

Google offers a number of specialized search services, including a service called Google Image Search.⁶⁴ Image search engines function similarly to the Web page search engines described above by copying content, indexing it, and generating sets of links to the originating sites in response to user text queries.⁶⁵ One difference between Google’s Web page search and image search is that the image search engine indexes Web page images based on text surrounding the images on the originating site.⁶⁶ Second, the image search engine takes the copied image file from the indexed Web page and converts it into a smaller, lower resolution thumbnail⁶⁷ as part of the indexing process.⁶⁸

⁶⁰ Perfect 10 Home Page, <http://www.perfect10.com> (last visited May 5, 2006).

⁶¹ Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 831-32 (C.D. Cal. 2006).

⁶² *Id.* at 837. Third-party Web sites had also published username and password combinations for Perfect 10’s site in an effort to undermine Perfect 10’s system of restricting access to paid subscribers. *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 832-33. Amazon.com and its subsidiary A9 were also defendants in the suit on the same grounds as Google. *Id.* at 831. A9 is a search engine site that provides an image search function similar to Google’s using technology licensed from Google. *Id.*

⁶⁵ *Id.* at 832-34.

⁶⁶ *Id.* at 833.

⁶⁷ As the court described: “A ‘thumbnail’ is a lower-resolution (and hence, smaller) version of a full-size image. Thumbnails enable users to quickly process and locate visual information. For example, users of Google Image Search are presented with a set of thumbnails that are potentially responsive to their search queries. Because thumbnails are

The thumbnail is stored on Google's server and displayed in response to a user's query instead of the usual excerpts of texts and accompanying link to a Web page.⁶⁹ When a user clicks on one of the thumbnails in the results, the user's browser displays a page with top and bottom "framed" portions.⁷⁰ The top frame is the "Google frame," which contains the thumbnail result, some information about the image including a hyperlink to the Web page from which the image originates, and text stating the lower frame is displaying "the image in its original context" from the originating site.⁷¹ The bottom frame loads the actual originating Web page containing the image, as part of a method of presentation known as "in-line linking."⁷²

B. The Lawsuit

Perfect 10 sued Google alleging direct, vicarious, and contributory copyright infringement, a series of trademark and state law claims, and circumvention in violation of the Digital Millennium Copyright Act related to the display by Google Image Search of Perfect 10's copyrighted photos in thumbnail versions and in framed pages.⁷³ The district court's opinion considered Perfect 10's motion for a preliminary injunction that required Google, upon notice within 10 days from Perfect 10, to: 1) remove copies and thumbnails of identified images copyrighted by Perfect 10 from Google's cache and site; 2) remove links to third-party Web sites displaying images that infringe Perfect 10's copyrights; and 3) disable and remove links to sites that give away usernames and passwords for Perfect 10's subscription area.⁷⁴ The bulk of the court's analysis dealt with the determining Perfect 10's probable success on the merits of its copyright infringement claims.⁷⁵

smaller in size, more of them can be displayed at the same time on a single page or screen. Users can quickly scan the entire set of thumbnails to locate the particular full-size image for which they were looking." *Id.* at 833 n.4.

⁶⁸ *Id.* at 832-33.

⁶⁹ *Id.* at 833.

⁷⁰ *Id.* at 833-34. Frames are a method of Web page implementation in which multiple Web pages are displayed in divided areas ("frames") in a user's Web browser. *Id.* at 833.

⁷¹ *Id.* at 834.

⁷² *Id.* at 834, 838 ("In-line link" refers to the process whereby a webpage can incorporate by reference (and arguably cause to be displayed) content stored on another website.") (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003)).

⁷³ *Id.* at 834. Lawsuits were also filed against A9 and its parent Amazon.com which were later consolidated. *Id.*

⁷⁴ *Id.* at 834-35.

⁷⁵ *Id.* at 836-59. The court noted that a preliminary injunction should be granted if the plaintiff can show either probable success on the merits coupled with a possibility of irreparable harm or "serious questions are raised and the balance of hardships tilt in the

Perfect 10 claimed that Google's image search directly infringes Perfect 10's copyrights by 1) displaying and distributing full-size images hosted by third-party Web sites; and 2) creating, displaying, and distributing thumbnails of Perfect 10's copyrighted full-size images.⁷⁶ Perfect 10 also alleged vicarious and contributory infringement based on direct infringement by 1) third-party Web sites that reproduced, displayed, and distributed unauthorized copies of Perfect 10's copyrighted photos and username/password combinations for accessing photos in the subscription area of Perfect 10's Web site; and 2) users of Google that infringed by reproducing such photos by downloading them from the allegedly infringing third-party sites.⁷⁷

Google denied its image search directly infringed and raised the defense of fair use.⁷⁸ With respect to secondary infringement, Google conceded that the third-party Web sites in question were infringing but argued there was no evidence presented demonstrating its users actually infringed.⁷⁹

C. The District Court's Holding

The District Court for the Central District of California ordered Google and Perfect 10 jointly to propose language for an injunction based on a finding that Google's creation and public display of thumbnails likely does directly infringe Perfect 10's copyrights but that Perfect 10 was not likely to succeed on its vicarious and contributory liability theories.⁸⁰

1. Direct Infringement

The court began its direct infringement analysis by discussing whether Google directly infringed when its image search feature in-line linked to third-party Web pages that included copies of Perfect 10 photos.⁸¹ The court first decided the appropriate test for what constituted "display" in this context.⁸² Analyzing existing precedent, the court held that the "server" test advocated by Google, under which "the website on which content is stored and by which it is served directly to a user, not the website that in-line links to it, is the website

plaintiff's favor," with the question of "whether the public interest will be advanced by granting preliminary relief" also being a factor. *Id.* at 836 (citing *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir.2003); *Preminger v. Principi*, 422 F.3d 815, 823 (9th Cir.2005)).

⁷⁶ *Id.* at 838.

⁷⁷ *Id.* at 851-52.

⁷⁸ *Id.* at 837-38.

⁷⁹ *Id.* at 838.

⁸⁰ *Id.* at 858-59.

⁸¹ *Id.* at 838.

⁸² *Id.* at 839.

that ‘displays’ the content,” was the appropriate test.⁸³ In so doing, the court rejected the “incorporation” test advocated by Perfect 10, which focused on “the act of *incorporating* content into a webpage that is then pulled up by the browser.”⁸⁴ The court concluded that under the server test, Google’s in-line linking did not constitute display for the purposes of infringement. Similarly, the court reasoned that the in-line linking did not constitute “public distribution” for the purposes of infringement because there was no “actual dissemination” of copies by Google; rather, any such dissemination was by the third-party sites hosting the copied photos.⁸⁵ With respect to Google’s creation, storage, and display of thumbnail image, the court found that Google’s actions did constitute display under the server test and that consequently these thumbnails were, absent a valid defense, infringing.⁸⁶ The court next considered Google’s fair use defense. Discussing the first factor, the purpose and character of the use, the court noted that Google’s image search engine was very similar to the image search engine protected by fair use in *Kelly v. Arriba Soft Corp.*⁸⁷ The *Kelly* court concluded that the defendant’s image search engine there represented a commercial but transformative use, and that the first factor therefore weighed only slightly against the defendant.⁸⁸ The *Perfect 10* court found two distinctions with *Kelly* that led the court to consider Google’s use to be both more commercial and more consumptive, as opposed to transformative.⁸⁹

The court’s first distinction centered on the role of Google’s AdSense network.⁹⁰ AdSense is one of Google’s sponsored advertising programs in which Web site operators add a section of sponsored advertising links provided through Google to their Web pages.⁹¹ The Web site operators and Google split the resulting advertising revenue from these sponsored links.⁹² The court noted that “[i]f third-party websites that contain infringing copies of [Perfect 10’s] photographs are also AdSense partners, Google will serve advertisements on those sites and split the revenue generated from users who click on the Google-served advertisements.”⁹³ The consequence of this, the court reasoned, was that

⁸³ *Id.*

⁸⁴ *Id.* at 839-40.

⁸⁵ *Id.* at 843-44.

⁸⁶ *Id.* at 844-45.

⁸⁷ *See id.* at 846-47.

⁸⁸ *Id.* at 845-46.

⁸⁹ *Id.* at 847-49.

⁹⁰ *Id.* at 846-47.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 846.

Google had a commercial incentive to maximize the number of third-party sites that were AdSense partners.⁹⁴ Google purported to have a policy that prohibits a Web site from registering as an AdSense partner if the site includes images contained in Google Image Search, but the court noted that Google presented no evidence about the enforcement of the policy or whether Google had removed any AdSense partners from the program for violating the policy.⁹⁵ Perfect 10, in contrast, presented evidence that some infringing third-party sites featured AdSense advertisements.⁹⁶

Next, the court considered the distinction that Perfect 10 had a licensing agreement in place under which its licensee would distribute thumbnails of Perfect 10's photographs for download to mobile phones.⁹⁷ The court concluded that a user could potentially download Google's thumbnails from a computer to a mobile phone and thereby create a substitute for the licensed downloads for which Perfect 10 received a fee.⁹⁸ The court found that this fact made Google's use more consumptive than the use in *Kelly*.⁹⁹

With regard to the second and third fair use factors, the nature of the copyrighted work and the amount and substantiality of the portion used, the court found the facts to be in line with *Kelly*.¹⁰⁰ The court deemed the nature of the works to weigh only slightly in favor of Perfect 10 because the images already appeared on the Internet, and the amount and substantiality of the portion used to be neutral because Google's complete copying was necessary to achieving an effective image search.¹⁰¹

Turning to the fourth fair use factor, the effect of the use on the potential market for and value of the copyrighted work, the court concluded that this factor weighed slightly in favor of Perfect 10.¹⁰² The court, relying on *Kelly*, found that the thumbnails did not substitute for the original full-size images in question.¹⁰³ The court found that the thumbnails could, however, harm the potential market for mobile phone downloads of Perfect 10's thumbnail photos.¹⁰⁴

The court concluded in summary that Perfect 10 was likely to prove that

⁹⁴ *Id.*

⁹⁵ *Id.* at 846-47.

⁹⁶ *Id.*

⁹⁷ *Id.* at 849.

⁹⁸ *Id.*

⁹⁹ *Id.* at 848-49.

¹⁰⁰ *Id.* at 849.

¹⁰¹ *Id.*

¹⁰² *Id.* at 850-51.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 851.

Google directly infringed by displaying thumbnails of Perfect 10's photos and that Google was unlikely to argue fair use successfully.¹⁰⁵

2. Secondary Infringement

Analyzing Perfect 10's claims of contributory and vicarious infringement, the court first concluded that Perfect 10 had not shown any evidence of direct infringement by Google's users and could only base secondary infringement on the direct infringement by third-party sites containing copies of Perfect 10's photos.¹⁰⁶ Examining Google's potential contributory infringement, the court noted that Perfect 10 had to demonstrate Google's knowledge of the infringing activity and material contribution to the activity.¹⁰⁷ The court concluded that, even assuming knowledge, Google does not materially contribute to the infringing activity.¹⁰⁸ The court distinguished other cases of material contribution, notably the *Napster* case, which involved peer-to-peer technology used to find audio files on the computers of other users of the Napster network.¹⁰⁹ The court also rejected the claim that Google's AdSense program provided a basis for material contribution noting that

[a]lthough AdSense may provide some level of additional revenue to these websites, [Perfect 10] 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.¹¹⁰

Finally, the court considered Perfect 10's claim of vicarious infringement.¹¹¹ The court noted that to demonstrate vicarious infringement, Perfect 10 would have to show "(1) that Google enjoys a direct financial benefit from the infringing activity of third-party websites that host and serve infringing copies of P10 photographs and (2) that Google has declined to exercise the right and ability to supervise or control the infringing activity."¹¹² The court found that under the broad definition of "direct financial benefit" in *Napster II*, encompassing even "future hope 'to monetize,'" Google conceivably received a direct financial benefit through the potential expansion of its AdSense

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 852.

¹⁰⁷ *Id.* at 853.

¹⁰⁸ *Id.* at 853-56.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 856.

¹¹¹ *Id.* at 856-58.

¹¹² *Id.* at 856.

network.¹¹³ However, the court found that the Google lacked the requisite control over the infringing Web site operators since even excluding them from Google's index would not remove the sites from the Web.¹¹⁴

IV. IMPLICATIONS OF *FIELD* AND *PERFECT 10*

Another district court in Pennsylvania has already followed the *Field* decision in granting summary judgment to Google in another case involving caching and indexing copyrighted material from the Internet.¹¹⁵ That case is unlikely to be the last to remark on the dynamics of copyright law as applied to search engines. Two trends in particular seem to imply that legal controversies related to search engines will become more prevalent in the near future. The first is the successful monetization of search.¹¹⁶ Gone are the days where search was an industry without a business model. The financial success of Google and its competitors has brought with it increasing scrutiny of how the monetary spoils are allocated amongst content creators and providers of online search tools.¹¹⁷ Second is the increasing breadth of services offered by companies in the online search industry, which today encompass not only Web page search, image search and cached links, but also features such as video and television search, local search tied to map services, searchable news aggregation, product search, and search of digitized books.¹¹⁸ *Field* and *Perfect 10* are only intermediary cases in the development of this area of law. The following, for example, are just a few of the search-related controversies currently under consideration by the courts where these two cases will likely be revisited.

¹¹³ *Id.* at 856-58.

¹¹⁴ *Id.* at 857-58.

¹¹⁵ See *Parker v. Google, Inc.*, 2006 WL 680916 (E.D. Pa. Mar. 10, 2006); Elinor Mills, *Google Wins a Court Battle*, ZDNET NEWS, Mar. 16, 2006, http://news.zdnet.com/2100-9595_22-6050667.html.

¹¹⁶ See JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 86-126 (2005) (describing the history of search engine business models and the eventually successful struggle to find profit in search); see also *Perfect 10*, 416 F. Supp. 2d at 847 (noting that Google's AdSense program generated \$630 million in gross revenue in 2005).

¹¹⁷ See, e.g., *European Publishers Accuse Search Engines of Leeching*, SILICONVALLEY.COM, Dec. 6, 2005, <http://www.siliconvalley.com/mld/siliconvalley/business/technology/13342179.htm>; World Association of Newspapers, *Newspaper, Magazine and Book Publishers Organizations to Address Search Engine Practices*, Jan. 31, 2006, <http://www.wan-press.org/article9055.html>

¹¹⁸ See e.g. Google Labs, <http://labs.google.com> (last visited May 9, 2006) (listing new and on-going services offered by Google).

A. *Google Book Search*

One instance where *Field* and *Perfect 10* may have an impact is in the two pending lawsuits which assert that Google is committing “massive copyright infringement” through its Google Book Search service.¹¹⁹ Google Book Search stems from the premise of making all the world’s books searchable through digitization and inclusion in an online search engine.¹²⁰ Authors and publishers sued Google alleging infringement in response to a portion of the project in which Google scans the copyrighted books of university libraries and provides three short “snippets” of text (approximately two to three sentences each) from these books as search results to user queries.¹²¹ Responding to objections by authors and publishers, Google initiated procedures under which copyright owners could “opt out” their works from scanning, but maintained a default position of scanning and including the books contained in its partner library in Google’s index.¹²² The plaintiffs argued that such framework remained inconsistent with copyright law.¹²³

As a preliminary matter, the import of *Field* or *Perfect 10* for the Google Book Search cases will likely first depend on whether the court is willing to move beyond extra element of change in medium from books to the Internet. If the courts make this leap, the *Field* opinion’s focus on good faith in the form of opt-out methods and technological limitations that appear designed may provide a useful precedent.¹²⁴ *Perfect 10*, however, brings elements that could be used to argue against a fair use defense in the Book Search cases. The *Perfect 10* court’s analysis of the consumptive nature of the image search service, for example, leaves open the argument that Google Book Search is likewise predominantly consumptive because of the added advertising revenue

¹¹⁹ See Edward Wyatt, *Writers Sue Google, Accusing It of Copyright Violation*, N.Y. TIMES, Sept. 21, 2005, at C3; Plaintiff’s Complaint, *Author’s Guild v. Google, Inc.*, No. 05CV8136 (S.D.N.Y. Sept. 20, 2005); Hiawatha Bray, *Publishers Battle Google Book Index*, BOSTON GLOBE, October 20, 2005, at E1; Plaintiff’s Complaint, *McGraw Hill v. Google*, No. 05CV8881 (S.D.N.Y. Oct. 19, 2005).

¹²⁰ Google Press Release: *Google Checks Out Library Books*, Dec. 10, 2004, http://www.google.com/press/pressrel/print_library.html; Edward Wyatt, *New Google Service May Strain Old Ties in Bookselling*, N.Y. TIMES, Oct. 8, 2004, at C3.

¹²¹ See Wyatt, *supra* note 119; Bray, *supra* note 119.

¹²² Yuki Noguchi, *Google Delays Book Scanning; Copyright Concerns Slow Project*, WASH. POST, Aug. 13, 2005, at D01; Jonathan Band, *The Google Print Library Project: Fair Use or Foul?*, 9 J. OF INTERNET LAW 1, 13 (Oct. 2005).

¹²³ *Id.*

¹²⁴ See Dan Cohen – Digital Humanities Blog, *Impact of Field v. Google on the Google Library Project*, Feb. 9, 2006, http://dancohen.org/blog/posts/impact_of_field_v_google_on_the_google_library_project (discussing proposed positive and negative implications of the *Field* opinion on the Google Book Search lawsuits).

that can come with extending Google's Book database. The *Field* court rejected a similar argument on the grounds that the commercial gain of expanding Google's image database was, by itself, too speculative an argument.¹²⁵ The resulting tension is an issue the courts in the Book Search cases will likely need to resolve.

B. *News Aggregation*

Google News is an online service of Google's that combines the feature of Internet search of focused on news reporting Web sites with an aggregation element that pulls headlines, opening sentences and reduced photos from various new reporting sites into a centralized Web Page.¹²⁶ The French associated press agency Agence France Presse (AFP) filed suit against Google in March, 2005, alleging that the Google News infringed on AFP's copyrights by copying the headlines, opening sentences and photos from AFP's Web site.¹²⁷ The AFP case in some ways resembles a lawsuit filed in 1997 against the online news company TotalNEWS.¹²⁸ TotalNEWS maintained Web site that used in-line links to render content from various news reporting Web sites in a frames on TotalNEWS Web pages.¹²⁹ The operators of some of the various news sites sued TotalNEWS claiming the linking constituted copyright infringement.¹³⁰ The parties settled the case before an opinion was rendered, leaving the legal issues presented in the case unresolved.¹³¹

The AFP case combines several of the issues in seen in *Field* and *Perfect 10*. Like *Field*, the AFP case deals with content copied from a plaintiff's Web site as part of an information location-related service. Part of the claims in the directly overlap with *Perfect 10*, however, namely the copying of images and display of lower resolution versions. In this case, however, the images are otherwise available on the Internet, as opposed to infringing third-party copies

¹²⁵ See *Field*, 412 F. Supp. 2d 1106 at 1120 ("While Google is a for-profit corporation, there is no evidence Google profited in any way by the use of any of Field's works. Rather, Field's works were among *billions* of works in Google's database").

¹²⁶ See Google News Homepage, <http://news.google.com> (last visited May 8, 2006); About Google News, http://news.google.com/intl/en_us/about_google_news.html (last visited May 8, 2006).

¹²⁷ See *Google Sued Over Use of News Material*, L.A. TIMES, March 19, 2005, at C2; Pl.'s Compl., Agence France Presse v. Google, Inc., No. 05CV00546 (D.D.C. Mar. 17, 2005).

¹²⁸ See David S. Hilzenrath, *Online Publishers Wage a Battle Over Fame and Fortune*, WASH. POST, Feb. 11, 1997, at D1.

¹²⁹ *Id.*

¹³⁰ Pl. Compl., Washington Post v. TotalNEWS, Inc., No. 97CV1190 (S.D.N.Y. Feb. 20, 1997).

¹³¹ *An Accord With Total News Is Reached*, N.Y. TIMES, June 6, 1997, at D4.

as in *Perfect 10*. The court's answer to which of the two cases proves the stronger analogy could prove difficult to predict.

V. CONCLUSION

As the breadth of digital content that is publicly available continues to expand and our economy grows increasingly information-based, search engines and other information location services will play a critical role in our society. The *Kelly* case provided the first glimpses of how copyright law will interact with this increasingly important industry and *Field* and *Perfect 10* continue the story. *Field* seems to spin the tale of an opportunistic lawsuit constructed take advantage of an opportunity for suit brought on by technology. The court's response to that tale goes well beyond addressing a plaintiff with an unsympathetic cause. The *Field* court took the opportunity to speak to issues of copyright law that required clarification and created a broad sphere of legal protection around the operations of search engines in the process. One potential concern with the *Field* opinion is whether it raises too broad a shield around search. As the industry continues to evolve and continues to be scrutinized, the courts will likely revisit the boundaries of this sphere of protection.

The *Perfect 10* court did not deny the arguments supporting the social benefit and transformative nature of search engines. Indeed, the court's findings regarding in-line linking and secondary infringement were highly favorable towards search engines. Still, the *Perfect 10* opinion drew some boundaries around how far the leeway granted to search engines extends. The appropriateness and clarity of those boundaries remains an issue for future courts. For example, the initial infringing activity in *Perfect 10* was copying of photos by third-parties, followed by Google acting as intermediary between end users and third-party Web sites; the somewhat counter-intuitive outcome was a holding of direct infringement by Google but no secondary infringement. From a policy perspective, the court placed a seemingly high burden of monitoring on search engines in *Perfect 10*. This allocation of burdens appears to be in tension with the focusing of burdens on the content owners in *Field*. In any event, the final chapter in defining the relationship of search engines and copyright law is still far off, and given the shifting nature of technology there are likely to be issues that cannot even be conceived of at this time. *Field* and *Perfect 10*, while providing important insights, are thus building blocks in a legal landscape that is difficult to predict, yet integral to shape of the world's information landscape.