

No. 18-910

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

JUSTIN GOLDMAN,

Plaintiff-Respondent,

- against -

BREITBART NEWS SERVICE, LLC, VOX MEDIA, INC.,
HERALD MEDIA, INC., BOSTON GLOBE MEDIA PARTNERS, INC.,

Defendants,

HEAVY, INC., TIME, INC., YAHOO, INC., GANNETT COMPANY, INC.,
and NEW ENGLAND SPORTS NETWORK, INC.,

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 1-17-CV-03144 (KBF)

**PLAINTIFF-RESPONDENT'S RESPONSE TO
DEFENDANTS-PETITIONERS' PETITION**

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Content: International and Comparative Perspectives, 41 Colum.
J.L. & Arts 153 (2018) 2n

INTRODUCTION

Plaintiff-Respondent Justin Goldman (“Plaintiff”) respectfully submits this response to Defendants-Petitioners’ request for permission to file an interlocutory appeal. Plaintiff does not shirk from this Court’s review of Judge Forrest’s decision – indeed, we welcome it. At the same time, we believe this Court should have as full an understanding as possible of all of the relevant circumstances underlying the pending petition. In our view, those circumstances suggest that the petition does not merit the extraordinary relief it requests.

The Essence of this Case

There are two separate but related aspects to what this case is really about. The first is the facial “legal” argument as to what, as a matter of law, the governing law is and should be. The second is how a single industry – the for-profit website publishing business – effectively created for itself a very profitable “rule of law” at the expense of already-struggling copyright owners and now seeks to have the courts -- including this Court -- vindicate and make “legal” their self-created and, they hoped, self-fulfilling private law-making. We will first address the “legal” aspect of this case.

This case turns almost entirely on a single 2007 decision by the Ninth Circuit¹ and, more specifically, the extent to which that decision -- more ac-

¹ Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir, 2007).

curately, one of its holdings -- should be plucked entirely out of context and blindly applied to fact patterns that could not be more different. That decision has been roundly criticized by one of this country's most respected academic authorities on the law of copyright -- Columbia Law School Professor Jane Ginsberg² -- and it was decisively criticized and rejected by two separate U.S. District Courts, including the decision below.³ More important, it has never been accepted or applied in a case presenting a legal framework or fact pattern remotely analogous to that of this case. Indeed, as here relevant, that ten-year old decision is essentially a legal orphan, with only a smattering of cases (all involving very different facts and/or sections of the Copyright Act) even mentioning it.⁴

The facts of Perfect 10 can be succinctly stated. The defendant was the Google Image Search Engine. In response to a specific search request by a user, and without the involvement of any human discretion or activity, it generated countless – possibly tens of thousands – of “thumbnail” (reduced size and low resolution) images responsive to the specific search. Then, as a result of internal

² Ginsburg and Budiardjo, Liability for Hyperlinks to Infringing Content: International and Comparative Perspectives, 41 Colum. J.L. & Arts 153 (2018).

³ The other case is The Leader's Institute, LLC v. Jackson, 2017 U.S. Dist. LEXIS 193555, 2017 WL 5629514 (N.D. Texas 2017).

⁴ Those cases are discussed further below.

(and invisible) computer coding, if the user volitionally clicked on a particular thumbnail, a full rendition of that image is displayed in a one-on-one, decidedly non-“public,” interaction. That’s it; those are the underlying facts of Perfect 10.

The copyright owner of photos that were thus displayed in full when the corresponding thumbnails were clicked sued Google for, inter alia, infringement of the owner’s “exclusive right” under Section 106(5) of the Copyright Act to publicly “display” the relevant copyrighted works.⁵ In adjudicating that search-engine display right infringement claim, the Ninth Circuit’s opening sentence made explicit what it was deciding: “In this appeal, we consider a copyright owner’s efforts to stop an Internet search engine from facilitating access to infringing images” (emphasis added). (Note: no mention of any other outlets – especially for-profit editorial websites like defendants’ -- and no mention of actually providing (by showing) full renditions of such images, as compared with only “facilitating” access to them.

In deciding that (automated, robotic, search-engine user-click-activated) case, the Ninth Circuit articulated a so-called “Server Test” and held that Google’s

⁵ Section 106(5) of the Copyright Act grants to copyright owners the “exclusive right” to “display the copyrighted work publicly.” (17 U.S.C. §106(5)). Section 101 of the Act defines “display” as follows: “To display a work means 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) (emphasis added).

search engine did not infringe the plaintiff's "display right" because it did not possess its own copy of the image at issue and did not save a copy of it on its server. The opinion did not mention that no copyright case before it had ever held that a "display" infringement required any such possession or saving.⁶ Within the past few months, two separate U.S. District Courts have flatly refused to apply Perfect 10 to the "display" cases before them. The only issue on this (requested) appeal is whether that "Server Test" from a search engine user-activated case must -- as a matter of law -- be applied to a wide range of cases that could not be more different factually or legally.

In this connection, the facts underlying this case can also be succinctly stated: Each of the moving defendants operate for-profit editorial websites that offer – display – editorial content for viewing by their visitors. Inevitably, that content includes photographs, and prior to Perfect 10 the law required that -- at least absent a "fair use" defense -- a license from the copyright owner be obtained. But, as this case makes clear, the website publishing industry chose to "interpret" Perfect 10 so as to abolish that pre-2007 license-required copyright norm. In short, that is exactly -- and only -- what this case is really about: a single industry's attempt to have the courts -- through this case -- create out of whole cloth an

⁶ Also, no copyright case since, except perhaps for one or two that followed Perfect 10, has held that a "display" infringement requires the alleged infringer to possess or save the work infringed, and several cases have rejected that proposition.

industry-wide blanket immunity from any legal consequences when they help themselves to copyright content that they previously had to pay for.

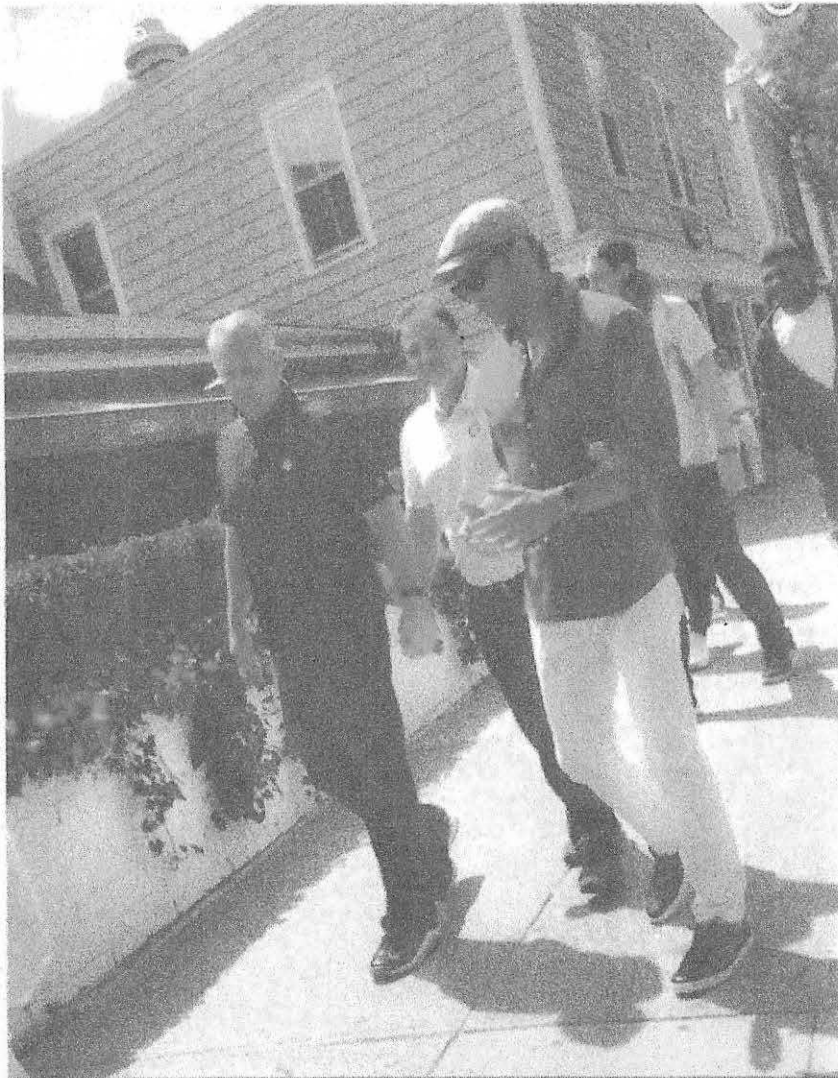
In contrast to Google's robotic sweeping-up and presenting in thumbnails countless photos in response to a search request, each defendant here separately decided to, and then reached-out for, and then helped-itself to, and then prominently displayed on their websites, a copyrighted photo owned by plaintiff. (One example of those displays is set forth on the following page.) As a result of decisions made and coding engineered solely by defendants, those displays were presented in full on their websites. In effect, defendants did the (Perfect 10-required) "clicking" for their visitors so that those visitors had no choice: the photo was there to be seen whether or not they had any interest in seeing it.

Again, the only "legal" issue on this putative appeal is whether, as a matter of law, this Court (and indeed every court in the county) must apply the search-engine user-click-activated "Server Test" to cases like this one. No court – repeat no court – has come close to so holding, and two district courts, including the court below, have explicitly refused to do so.

But underlying that "legal" issue is the real-world machinations that have led to it. As defendants effectively concede, although not so directly, their industry used their interpretation of Perfect 10 to bestow upon themselves the legal im-

NESN Red Sox Bruins Patriots Celtics MLB NHL NFL NBA Cars Soccer UFC WWE Odds TV Schedule

New England Patriots quarterback Tom Brady was photographed walking with Danny Ainge and other members of the Celtics before the meeting with Durant.



Celtics and Tom Brady roll thru to get Durant
#Hamptons



Tricky 'Final Jeopardy' Clue About MLB Team Name Stumps Everyone



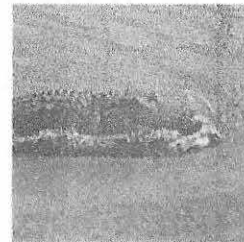
Ronda Rousey Surgery Shocker Puts UFC Return in Limbo



Stephen A. Smith Rips Tom Brady After Deflategate Appeal Denial



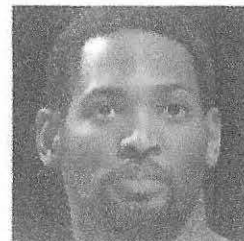
This Freakishly Tall 15-Year-Old Might Be a Future Star



Alligator Battles Python on Florida Golf Course



10 Reasons Steph Curry Will Never Win Another Championship



13 Most Successful NBA Players Ever



Football Prodigy Gets Banned From League



munity they now ask this Court to actually grant to them. As defendants put it, “[Judge Forrest’s] Order upended settled expectations regarding liability for the ubiquitous practice of linking to content on the internet.” (Petition, p. 2.)

Exactly. But, crucially, the real questions are: Were those “settled expectations” fairly based on law -- the search-engine Perfect 10 case -- or instead on a cynical self-serving and self-created concoction of a legal “justification” for, as here, no longer seeking licenses for their for-profit uses of copyrighted content? And, second, whether this Court will now actually give to that industry the blanket legal immunity it has already granted to itself?

One more important point must be made here. Misleadingly, defendants’ petition implies that embedding only involves “social media,” and more specifically “tweets” on Twitter. In fact, as defendants conceded below, anything on the internet -- photographs, movies, entire books -- can be embedded, and the industry-wide immunity defendants ask this Court to grant them would wholly legalize the wholesale theft-by-embedding of everything on the Internet. The Complaint in this case set forth several hypotheticals to illustrate this point, but we will only present a new one here. Defendant Time, Inc., has published a book -- which it has posted on a website controlled by it -- entitled 100 Photographs: The Most Influential Images of All Time (<http://100photos.time.com/>). If defendants prevail in this case and obtain the industry-wide immunity they seek, every other

website in the world – including hate-speech, porn, political, and schlocky commercial sites – will be able freely and without legal consequence to help themselves to, in the guise of embedding, that entire book, including of course its 100 classic photographs that would otherwise be fully protected by copyright.

And a word about the ostensible reaction to Judge Forrest’s decision. We acknowledge that the for-profit website industry is not happy with that decision -- after all, it may require those websites (like defendants here) to pay for copyrighted content that they have (over the past ten years) simply helped themselves to (as here) -- claiming “embed immunity.” And we acknowledge that they and their affiliated organizations and sympathizers have mounted a largely hysterical (and false) public reaction to the decision. But the truth remains: If, as Judge Forrest found, there is no such “embed immunity,” then even the most rabid reaction to that decision should have absolutely no effect on any decision by this -- or any Court. The fact that defendants here so heavily stress that largely self-interested reaction to the decision only reiterates how threatened they are by the prospect of having now to pay for what they admittedly “expected” to continue to be able to take for free.

The Law to Date

In submissions to Judge Forrest, the defendants claimed that Perfect 10 and its “Server Test” were “settled law.” In their petition, they claim “settled prece-

dent” (p. 1), “a test since applied by a host of other courts” (p. 2), and “longstanding precedent from the Ninth Circuit and elsewhere” (p.3). However, as Judge Forrest explicitly found, these claims are, to say the least, unsupported and unpersuasive. (To say a little more, they are nonsense.) To repeat: no case has ever even arguably applied those claimed “settled precedents” to cases at all analogous to this one -- and two cases flatly refused to do so.

Because defendants have so extravagantly presented their “settled law” claims as the foundation for their petition, we will set forth here – borrowing from our main brief to Judge Forrest – our review of those claims, examining each of the “host” of cases defendants have claimed support their argument.

First, however, there is this revealing fact: A very recent Lexis search for the term “Server Test” reports this result: Since it was invented in Perfect 10 over a decade ago, and apart from Judge Forrest’s decision below, the term appears in a total of nine court decisions, emanating from three cases, all in the Ninth Circuit, with the plaintiff in two of those three cases “Perfect 10, Inc.” Judge Forrest, of course, flatly refused to apply the “Server Test” to the facts of this case. Not exactly a viral national groundswell.

Here is our review of all of the (“host of”) cases cited by defendants below.

1. MyPlayCity, Inc. v. Conduit Ltd, 2012 U.S. Dist. LEXIS 473123

(S.D.N.Y. 2012): This was not a 106(5) display case but instead a 105(3) “dis-

tribution” case; and the defendant was not as here an editorial website in the business of displaying copyrighted material. The alleged infringement of the distribution right grew out of a prior licensing agreement between the parties. Most significantly, a visitor’s access to the plaintiff’s copyrighted work was only triggered by that visitor volitionally clicking on a “Play Now” tab that contained the necessary instructions to import the copyrighted work. There is not a hint in this decision that supports defendants’ claim to be legally entitled to the click-free, instructions-free,⁷ user-discretion-free exploitation of every copyrighted work ever created.

2. Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012). This was not a display case and it involved thumbnails of photos that had to be clicked by the visitor to gain access to the underlying copyrighted work. Here too, there is not a hint in this decision that supports defendants’ claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created.

3. Pearson Education, Inc. v. Ishayev, 963 F.Supp.2d 239 (S.D.N.Y. 2013). This was not a display case. The Court declared: “As a matter of law, sending an email containing a hyperlink to a site facilitating the sale of a copyrighted work

⁷ Here, and for all purposes in this brief, we intend “instructions” to mean guidance from one party to another party for possible use by that other party, and not entirely self-executing computer programming that only the originating party is aware of and can act on.

does not itself constitute copyright infringement.” Here too, there is not a hint in this decision that supports defendants’ claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created.

4. Capitol Records, LLC. v. ReDigi, Inc., 934 F.Supp.2d 640 (S.D.N.Y. 2013). This case had nothing whatever to do with links of any kind or embedding of any kind. Instead, it was about the defendant’s “streaming thirty-second song clips and exhibiting album cover art to potential buyers.” At 652. In a three-sentence table-setting paragraph, not thereafter revisited, Judge Sullivan wrote (note the double hedge “may” and “in part”):

The Ninth Circuit has held that the display of a photographic image on a computer may implicate the display right, though infringement hinges, in part, on where the image was hosted. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

Defendants apparently contend that that one-sentence hedged dictum that had nothing to do with the case in which it was made supports their position in this case. We disagree. And, of course, here too there is not a hint in this decision that supports defendants’ claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created.

5. Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, 2014 U.S. Dist. LEXIS 92809 (N.D.Ill. 2014). This case involved the defendant’s “links” to the

plaintiff's work, and the Court strictly followed both its Circuit's Flava Works, discussed above, which involved thumbnails and discretionary visitor access-by-clicking, and Perfect 10, which also involved thumbnails and discretionary visitor access-by-clicking. Although plaintiff here believes that even Perfect 10's relatively constricted search engine opinion was erroneous, Leveyfilm's explicit reliance on cases involving thumbnails and access-by-clicking provides no support whatever for defendants' claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created.

6. Totally Her Media, LLC v. BWP Media USA, Inc., Case 2:13-cv-08379 (C.D.Cal. 2015). The operative facts of this case, in which the alleged infringer was the plaintiff, were as follows (emphasis added): "All of the images identified in the settlement database were stored on third-party websites, and were only displayed on Plaintiff's website by hypertext links that allowed users to view the material without entering the separate URL where the photographs were stored. . . . However, third-party forum users selected that content on their own and linked to that content on their own Plaintiff did not review or approve any user posts to its website, including the posts containing the allegedly infringing images." Here, of course, defendants not only "selected" and "reviewed" and "approved" their respective displays of the Photo -- they alone made that full display possible, without input from anyone else. Thus, here too, there is not a hint in this decision

that supports defendants' claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created.

7. Live Face On Web, LLC v. Biblio Holdings LLC, 2016 U.S. Dist. LEXIS 124198 (S.D.N.Y. 2016). This was a not a "display" case but instead a "distribution" case. In this case, Judge Buchwald quoted from Conduit (above), which involved a "Play Now" clicking option to access the plaintiff's copyrighted work, to the effect that "providing a 'link' to a site containing copyrighted material does not constitute direct infringement of a holder's distribution right." But we are not here dealing with a "link" to another site with a discretionary "Play Now" option but with the non-discretionary full unavoidable display of plaintiff's Photo. Here too there is not a hint in this decision that supports defendants' claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created. (In any event, Judge Buchwald declined to rule on this issue, declaring: "Nevertheless, as this subject was hardly briefed and the decisions in *Perfect 10* and *MPC* had the benefit of factual development, we will permit discovery on the relationship between Tweople and the distribution of the allegedly infringing software.")

8. Grady v. Iacullo, 2016 U.S. Dist. LEXIS 51584 (D. Colo. 2016). As in Perfect 10, Flava Works, and other cases discussed above, the defendant in this case merely displayed "thumbnails" of the plaintiff's copyrighted works and the

plaintiff's allegation of infringement centered on whether the defendant's "sharing of links to plaintiff's photographs and videos with other users of a website constituted copyright infringement." Since this decision seems limited to the "sharing of links" via thumbnails, not present here, here too there is not a hint in this decision that supports defendants' claim to be legally entitled to the click-free, instructions-free, user-discretion-free exploitation of every copyrighted work ever created. Moreover, in a subsequent decision, the Court actually granted summary judgment to the copyright-owner plaintiff, on reasoning that seems directly applicable to defendants here.

So, to recap defendants' own cases, none -- not one -- even arguably supports their no-clicking-needed, no-instructions needed, no visitor-discretion-needed position in this case and each thus actually supports plaintiff's position that defendants' egregiously grandiose proffered interpretation of Perfect 10 is utterly unsupported, unlawful, and must be rejected.

This, then, is the truth underlying defendants' claims to this Court that the position they espouse -- flatly rejected by Judge Forrest on the facts before her -- constitutes "settled precedent" adopted by a "host" of other courts. The claims are baseless, and call into serious question the credibility of all their other claims as well. If anything, Perfect 10 -- as least as here relevant -- is a lonely legal orphan.

Moreover, as explicitly noted by Judge Forrest, a pre-Perfect 10 decision by Judge Patterson in the Southern District of New York presciently rejected the very post-Perfect 10 argument now made by defendants here. Hard Rock Café International v. Morton, 1999 U.S. Dist. LEXIS 8340 (S.D.N.Y. 1999) was a trademark case in which Judge Patterson squarely declared as follows (emphasis added):

Through framing, the Hard Rock Hotel Mark and the Tunes site are combined together into a single visual presentation and the Hard Rock Hotel Mark is used to promote the sale of CDs by Tunes. Because the Tunes material appears as a window within the original linking page, it is not clear to the computer user that she or he has left the Hard Rock Hotel web site. . . . The Tunes web page is reached in the same fashion as any other section of the Hard Rock Hotel web site, by clicking on a button labeled "record store" which resembles the other buttons leading to web pages maintained by Hard Rock Hotel. The Hard Rock Hotel web site and the Tunes web page are thus smoothly integrated. In light of this seamless presentation of the Tunes web page within the Hard Rock Hotel web site, the only possible conclusion is that the Hard Rock Hotel Mark is used or exploited to advertise and sell CDs.

The District Court in Perfect 10 acknowledged that this decision was contrary to its conclusion and chose, apparently for that reason, to disregard it. However, in the Southern District of New York at least, this is a never-challenged powerful precedent rejecting defendants' proffered interpretation of Perfect 10.

While the motions below were being briefed, The Leader's Institute decision was issued. In that case, the defendants claimed that the plaintiff, a direct competitor, "caused" the defendants' copyrighted content "to appear" on the plaintiffs'

website. The plaintiff there made the same argument defendants make here -- that Perfect 10 immunized from liability their blatant display of the defendants' copyrighted content. The Court would have none of it. Referring to "framing," a synonym for embedding, the Court declared (emphasis added):

By framing Magnovo's copyrighted works, the plaintiffs displayed the works by "show[ing] a copy" of the works via a "process." 17 U.S.C. §101. That process was the instructing of users' web browsers to display Magnovo's copyrighted works when those users visited one of the accused TLI domain names. And the plaintiffs displayed the copy-righted works publicly. By instructing users' web browsers to display Magnovo's content upon accessing TLI's publicly-accessible web-sites, the plaintiffs "transmit[ed] . . . a display of the [defendants'] work . . . to the public." Id.

Rejecting the invocation of Perfect 10, the Court held:

But the plaintiffs' reliance on *Perfect 10* is misplaced. First, TLI's conduct is factually different from Google's. Google did not actually display infringing images but instead provided links for users to access sites that displayed infringing .images. . . . Upon visiting one of the TLI sites, a user would necessarily see Magnovo's content. Unlike Google, TLI did not merely provide a link by which users could access Magnovo content but instead displayed Magnovo's content as if it were its own. . . . And to the extent *Perfect 10* makes actual possession of a copy a necessary condition to violating a copy-right owner's exclusive right to display her copyrighted works, the Court respectfully disagrees with the Ninth Circuit. . . . [

2017 U.S. Dist. LEXIS 193555 at *28-*33 (emphasis added; footnotes omitted).

Final note about The Leader's Institute: The defendants here maintained below that that case was "wrongly decided." This means that they will also maintain to this Court that, as a matter of ("controlling") law, the plaintiff there must be legally free -- immune from any infringement claim -- to continue in perpetuity to display the defendants' copyrighted content as if it were their own.

Controlling Question of Law

The only way this requirement for an interlocutory appeal can be met here is if this Court agrees that extracting Perfect 10's “Server Test” from its factual and legal context and then claiming ipse dixit that it must “as a matter of (controlling) law” be robotically applied to every other conceivable “display” case involving embedding – regardless of the facts and legal framework of those cases, including The Leader’s Institute and this case -- presents such a qualifying “question.” Because Perfect 10's “Server Test” has never been applied to a case even arguably analogous to this one, and has been flatly rejected by two separate district courts, we respectfully submit that the ipse dixit claim of a “controlling question of law” here must be rejected. Indeed, we think relevant here this observation from this Court: “In view of the criticism which the decision has received and the failure of the Court to discuss the principles upon which the decision rests, we think that [a cited decision] cannot be taken as precedent for other than its own limited facts.” United States v. Eastport S.S. Corp., 255 F.2d 795, 805 (2d Cir. 1958).

Substantial Grounds for Difference of Opinion

Here again, ipse dixit proclamations should not suffice. As demonstrated above, no court – not one – has found that the “Server Test” must be applied to every conceivable display/embed case, and no case has applied it to a fact pattern

and legal framework even arguably analogous to this case. And, of course, there is not a hint in Perfect 10 itself that it was intended to declare a “controlling” rule of law for every conceivable display/embed case, and not just the “Internet search engine”/“facilitating access” case that it delimited in its opening sentence and that are the only subjects of both the District Court’s and Ninth Circuit’s opinions.

Defendants invoke the Seventh Circuit’s opinion in Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012) as support for their petition. This is curious, since a) that was not a “display” case; b) it involved a service analogous to a search engine; c) it involved “thumbnails” d) that had to be clicked by a user before anything further could be seen. But, of course, the issue in this case is whether the “Server Test” must as a matter of law be applied to a case where a) the defendants were not search engines but for-profit editorial websites b) that themselves affirmatively reached-out for and helped themselves to a specific copyrighted work; c) and then prominently displayed that photo in full (no thumbnails) with no involvement (no clicking) on the part of their visitors, who had to see it whether they wanted to or not. With due respect, Flava Works has nothing whatever to do with any issue presented by this petition. Instead, the issues on this petition are a) whether as a “controlling” rule of law the “Server Test” must be applied to display/embed cases that do not involve search engines or clickable

thumbnails and do involve a website seeking-out and prominently displaying a copyrighted work and b) whether there are any grounds for a “difference of opinion” on that issue. Flava Works, and indeed Perfect 10, are useless on those issues.

The only way this requirement for an interlocutory appeal can be met is to accept at face value defendants’ claim that the Ninth Circuit in Perfect 10 and the Seventh Circuit in Flava Works expressed the “opinion” that the “Server Test” must as a matter of law be applied to every conceivable “display” case involving embedding, such as this case and such as The Leader’s Institute. We respectfully submit that there are no “grounds” for a “difference of opinion” on whether the “Server Test” must be so applied, much less “substantial” grounds.

Materially Advance the Ultimate Termination of the Litigation”

The third §1292(b) factor that must be satisfied is whether “an immediate appeal from [Judge Forrest’s Order] may materially advance the ultimate termination of the litigation.” (emphasis added) The answer to this factor is clear.

At present there are six remaining defendants in this case. At most, a hypothetical interlocutory reversal of the Order -- without any other remand for further proceedings, etc.-- would result in the departure of only half of the remaining defendants. Which means that the case will necessarily proceed in full

on every remaining issue -- including “the very serious and strong” defenses mentioned in the Order -- which means full discovery (including documents and depositions); expert reports and depositions; extensive motion practice (including dispositive motions); a jury trial; and almost certainly (further) appeals to this Court. Thus, if this Court were to grant the pending petition, that will essentially guarantee that there will be (at least) two separate appeals in this litigation, thus (unnecessarily) doubling the appellate time, effort and expenditure of resources for all concerned, which is of course a major reason interlocutory appeals are strongly disfavored in federal practice.

This factor is expressly limited to “the ultimate termination of the litigation,” and does not (at least overtly) contemplate the removal of a few parties along the way. Thus, even if three defendants left the case after the interlocutory appeal, there is simply no way that appeal -- especially if all proceedings are stayed pending its resolution -- could even arguably advance “the ultimate termination of the litigation.” The defendants’ suggestion that about a year from now -- after the proposed interlocutory appeal is briefed, argued and decided -- the hypothetical departure, then, of three defendants (leaving three) will somehow significantly advance “the ultimate termination of the litigation” defies experience and belief.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the defendants' petition should be denied.

Dated: April 6, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 5(c)(1) and 32(f) and (g), the foregoing Plaintiff-Respondent's Response to Defendants-Petitioners' Petition is proportionately spaced, has a typeface of 14 points or more and contains 5,148 words together with the contents of page 6.

s/ Kenneth P. Norwick

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