

Exhibit 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION
4

5 PERFECT 10, INC.,) C-04-0371-JW
6)
6 PLAINTIFF,) JULY 9, 2004
7)
7 V.) MOTION
8)
8 VISA INTERNATIONAL, ET) PAGES 1-37
9 AL.,)
10 DEFENDANTS.)

COPY

11 THE PROCEEDINGS WERE HELD BEFORE
12 THE HONORABLE UNITED STATES DISTRICT
13 JUDGE JAMES WARE

14 A P P E A R A N C E S:

15 FOR THE PLAINTIFF: KING, HOLMES, PATERNO &
16 BERLINER
17 BY: HOWARD E. KING
STEPHEN D. ROTHSCHILD
18 1900 AVENUE OF THE STARS
25TH FLOOR
19 LOS ANGELES, CALIFORNIA 90067

20 FOR THE DEFENDANTS: TOWNSEND AND TOWNSEND
21 BY: MARK T. JANSEN
JOHN C. BAUM
22 TWO EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA
23 94111

24 (APPEARANCES CONTINUED ON THE NEXT PAGE.)
OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
25 CERTIFICATE NUMBER 8074

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A P P E A R A N C E S: (CONT'D)

FOR THE DEFENDANTS: WINSTON & STRAWN

BY: ANDREW P. BRIDGES
101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA
94111

KEKER & VAN NEST

BY: MICHAEL H. PAGE
710 SANSOME STREET
SAN FRANCISCO, CALIFORNIA
94111

ALSO PRESENT:

PERFECT 10
BY: DANIEL J. COOPER
GENERAL COUNSEL
P.O. BOX 3398
BEVERLY HILLS, CALIFORNIA
90212

1 SAN JOSE, CALIFORNIA

JULY 9, 2004

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE CLERK: MATTER OF CIVIL-04-0371,
6 PERFECT 10, INC., VERSUS VISA INTERNATIONAL.

7 DEFENDANT'S MOTION TO DISMISS.

8 COUNSEL, STEP FORWARD AND STATE YOUR
9 APPEARANCE FOR THE RECORD, PLEASE.

10 THE COURT: AS YOU'RE COMING FORWARD AND
11 BEFORE WE BEGIN I WANT TO EXPLAIN WHY OUR COURTROOM
12 IS SO CROWDED. YOU HAVE THE ATTENTION OF TWO
13 GROUPS WHO ARE GUESTS TODAY. THE FIRST ARE SUMMER
14 ASSOCIATES AT THE FINNEGAN FIRM AND THE OTHER ARE
15 LAW CLERKS WHO HAVE SPENT THEIR SUMMER WORKING WITH
16 THE COURT AS EXTERNS MOST OF WHOM ARE EVENING LAW
17 STUDENTS AND WHO DURING THE REGULAR SCHOOL YEAR DO
18 NOT HAVE AN OPPORTUNITY TO TAKE AN EXTERNSHIP AND
19 SO THIS SUMMER THEY HAVE DEVOTED A LOT OF THEIR
20 EARNINGS THROUGH RESEARCH AND WRITING MOSTLY
21 THROUGH MY LAW CLERKS.

22 AND ONE OF THE THINGS THAT WE ASSIGN TO
23 THEM ARE THE MOTIONS THAT ARE BEING ARGUED TODAY
24 AND SO THEY RESEARCH THESE MOTIONS AND HAVE WRITTEN
25 PROPOSED ORDERS ON THEM AND THEY'RE HERE TO HEAR

1 THE ARGUMENT IN THE CASES TODAY.

2 SO THEY WILL BE SCRUTINIZING YOUR EVERY
3 WORD TO MAKE SURE THAT YOU ARE CORRECT AND TRUE TO
4 YOUR PAPERS.

5 SO WITH THAT, PLEASE ANNOUNCE YOUR
6 PRESENCE FOR THE COURT.

7 MR. KING: GOOD MORNING, YOUR HONOR.
8 HOWARD KING REPRESENTING THE PLAINTIFFS.

9 GOOD MORNING ESTEEMED GUESTS. PLEASE
10 DON'T PASS NOTES TO THE JUDGE.

11 MR. ROTHSCHILD: GOOD MORNING, YOUR
12 HONOR. STEPHEN ROTHSCHILD FOR PLAINTIFF.

13 MR. COOPER: GOOD MORNING. DANIEL COOPER
14 GENERAL COUNSEL FOR PERFECT TEN.

15 MR. JANSEN: GOOD MORNING. MARK JANSEN
16 FOR VISA INTERNATIONAL, DEFENDANT. THANK YOU.

17 MR. BRIDGES: GOOD MORNING. ANDREW
18 BRIDGES WITH THE SAN FRANCISCO OFFICE OF WINSTON
19 AND STRAWN AND I WOULD LIKE TO INTRODUCE
20 MR. COWBIN FROM VISA INTERNATIONAL IS HERE IN THE
21 COURTROOM.

22 THE COURT: AH, YES.

23 MR. PAGE: GOOD MORNING. MICHAEL PAGE
24 FROM KEKER AND VAN NEST FOR FIRST DATA CARD
25 SERVICES HUMBOLT, INC.

1 THE COURT: VERY WELL. PLEASE BE SEATED
2 ALL. TO ORGANIZE OURSELVES I HOPE MY STAFF ADVISED
3 YOU OF THE TIME LIMITS SO WE CAN GET THROUGH THE
4 BUSINESS. I KNOW THERE ARE MULTIPLE PARTIES IN
5 SOME OF THE CASES, AND I WOULD COUNT ON SOME OF YOU
6 TO DIVIDE THE TIME AMONG YOURSELVES.

7 SO THE FIRST MOTION WE'LL TAKE UP IS THE
8 DEFENDANT'S MOTION HERE IN THIS CASE TO DISMISS THE
9 COMPLAINT.

10 MR. BRIDGES: THANK YOU, YOUR HONOR. I'M
11 ANDREW BRIDGES REPRESENTING VISA MASTERCARD, AND I
12 WILL BEGIN AND ADDRESS THE COPYRIGHT AND TRADEMARK
13 ISSUES IN MY COMPLAINT; AND MY COLLEAGUE MARK
14 JANSEN WILL ADDRESS THE UNFAIR COMPETITION AND THE
15 17200; AND MIKE PAGE WILL ADDRESS THE LIBEL AND
16 INTERFERENCE.

17 THERE'S NO DOUBT AS TO WHAT THE
18 PLAINTIFFS ARE TRYING TO PLEAD. THEY HAVE
19 PLEADED THEIR BEST CASE, WE BELIEVE, IN DETAIL.
20 AND WE BELIEVE THAT DETAIL SHOWS THE COURT OF HOW
21 UNDER APPLICABLE STANDARDS PLAINTIFFS HAVE NEITHER
22 PLEADED A CASE NOR CAN THEY PLEAD A CASE AND FOR
23 THAT REASON WE BELIEVE THAT THE COURT SHOULD
24 DISMISS THE CASE IN ITS ENTIRETY WITH PREJUDICE.

25 THE STANDARDS THAT APPLY IN THE COPYRIGHT

1 OR TRADEMARK CASES OR CLAIMS ARE QUITE CLEAR AND
2 THE COURTS HAVE REPEATED THOSE STANDARDS TIME AND
3 TIME AGAIN. THERE'S NO AMBIGUITY AS TO THE
4 STANDARDS.

5 WHAT IS NOTABLE IS THAT IN THE
6 PLAINTIFF'S COMPLAINT AND IN THE EXPLICATION OF
7 THAT COMPLAINT IN THE PLAINTIFF'S PLEADINGS THEY
8 ARGUE A DIFFERENT STANDARD. RATHER THAN THE
9 PRECISE STANDARDS THAT APPLY, THEY MOVE INTO SOFT
10 FOCUS MODE.

11 INSTEAD OF A MATERIAL CONTRIBUTION TO THE
12 INFRINGEMENT ITSELF, THEY SUBSTITUTE THE PHRASE
13 PROVIDE CRITICAL SUPPORT TO WEB SITES. THE SUPPORT
14 THAT IS ALLEGED IN THE COMPLAINT IS MERELY
15 PROVIDING PAYMENT SYSTEMS, PAYMENT SERVICES THAT
16 ARE THE BACKBONE OF COMMERCE IN THE UNITED STATES
17 AND THROUGHOUT THE WORLD.

18 THAT IS A FAR CRY FROM THE SPECIFIC
19 STANDARD REQUIRED BY COPYRIGHT LAW FOR CONTRIBUTORY
20 INFRINGEMENT WHICH IS A MATERIAL CONTRIBUTION TO
21 THE INFRINGING ACTIVITY ITSELF.

22 UNDER COPYRIGHT LAW INFRINGING ACTIVITY
23 MUST VIOLATE ONE OF THE EXCLUSIVE RIGHTS OF A
24 COPYRIGHT HOLDER, ITS REPRODUCTION, DISTRIBUTION,
25 DISPLAY, PERFORMANCE, ALTERATION THROUGH DERIVATIVE

1 WORK. THERE'S NO ALLEGATION THAT ANY OF THESE
2 DEFENDANTS HAS ASSISTED IN THOSE VIOLATIONS.

3 THE COURT: NOW, LET ME HAVE YOU
4 DISTINGUISH, IF YOU CAN, A CIRCUMSTANCE SUCH AS WAS
5 INVOLVED IN THE NAPSTER CASE WHERE SPACE, A
6 BULLETIN BOARD, A PLACE WAS PROVIDED WHERE USERS
7 COULD EXCHANGE COPYRIGHTED INFORMATION.

8 WHAT WOULD BE THE DISTINCTION IN YOUR
9 MIND BETWEEN THIS CASE WHERE FINANCIAL SERVICES ARE
10 CRITICAL TO THE OPERATION OF THE SERVICE AND THE
11 NABSTER CASE WHERE THE SPACE WAS CRITICAL TO THE
12 OPERATION OF THE SERVICE?

13 MR. BRIDGES: YOUR HONOR, YOU RAISE A
14 GOOD POINT BECAUSE CRITICAL TO THE OPERATION POINT
15 IS ONE OF THE PLAINTIFF'S BEST POINT. BUT THE
16 DISTINCTION IS IT IS NOT CRITICAL TO THE
17 INFRINGEMENT. IT IS CRITICAL TO A BUSINESS, JUST
18 AS A WATER SUPPLY, JUST AS ELECTRIC SERVICE IS
19 CRITICAL TO A BUSINESS. IT IS NOT CRITICAL TO THE
20 INFRINGEMENT FOR THE DEFENDANTS TO PROVIDE PAYMENT
21 SYSTEMS.

22 IN NAPSTER, THE NAPSTER SERVER, THE FILE
23 INDEX THAT NAPSTER MAINTAINED WAS CRITICAL TO THE
24 INFRINGEMENT.

25 IN FONOVISA UPON WHICH THE NAPSTER CASE

1 RELIED, THE DEFENDANT PROVIDED THE CITE AND
2 FACILITIES FOR THE INFRINGEMENT ITSELF WHICH WAS
3 THE ILLEGAL DISTRIBUTION AT THE FLEAMARKET OF THE
4 INFRINGING PRODUCTS. SO THAT'S THE IMPORTANT
5 DISTINCTION, YOUR HONOR.

6 MANY COMPANIES, MANY ENTERPRISES PROVIDE
7 ALL SORTS OF CRITICAL SUPPORTS TO ALL TYPES OF
8 COMPANIES, BUT HERE THE CRITICAL SUPPORT IS NOT
9 SUPPORT OF THE INFRINGEMENT.

10 THE COURT: AND WHAT IS IT THAT
11 DISTINGUISHES ONE FROM THE OTHER? I HEAR WHAT YOU
12 SAY AND I HEAR THE CONCLUSION YOU WANT ME TO REACH
13 BUT WHAT IS THE INDICIA OF MATERIAL CONTRIBUTION TO
14 THE INFRINGING CONDUCT WHICH IS PRESENT IN NAPSTER
15 BUT NOT -- MAYBE YOU DISAGREE THAT IT WAS PRESENT
16 THERE BUT AT LEAST IT WAS FOUND TO BE PRESENT
17 THERE? WHY SHOULD THAT CASE NOT BE CONTROLLING?

18 MR. BRIDGES: WELL, I THINK THE LAW IN
19 NABSTER IS CONTROLLING BUT THE FACTS IN THAT CASE
20 DO NOT APPLY TO THE FACTS IN THIS CASE.

21 AND WHAT HAPPENED IN NAPSTER WAS THAT
22 THERE WAS AN INDEX THAT NAPSTER RAN THAT WAS THE
23 MEANS BY WHICH PEOPLE EXCHANGED OR TRANSFERRED
24 FILES.

25 NAPSTER OPERATED THAT INDEX. IT'S

1 IMPORTANT TO UNDERSTAND THE DISTINCTION BETWEEN THE
2 NAPSTER CASE AND THE MGM VERSUS GROKSTER CASE WHICH
3 FOUND SUMMARY JUDGMENT FOR DEFENDANTS GROKSTER AND
4 STRING CAST NETWORKS WHERE THE COURT ENTERED
5 SUMMARY JUDGMENT FOR THE DEFENDANTS BECAUSE THEY
6 DID NOT OPERATE THAT NEXUS POINT THAT BROUGHT
7 INFRINGING USERS TOGETHER.

8 NABSTER OPERATED IT AND GROKSTER AND
9 STRING CAST MERELY PROVIDED SOFTWARE THAT OTHER
10 PEOPLE USED TO FORM THEIR OWN CONNECTIONS.

11 GROKSTER AND STRING CAST WERE NOT THE
12 NEXUS THEMSELVES. IT IS AN ISSUE, YOUR HONOR, ON
13 WHICH COUNSEL HERE ARE EQUIPPED TO SPEAK AND WE CAN
14 GO ON AT LENGTH BECAUSE I HAPPEN TO REPRESENT
15 STRING CAST AND MR. PAGE HAPPENS TO REPRESENT
16 GROKSTER. SO THAT DISTINCTION, WE ASSURE THE
17 COURT, WAS THE VERY DISTINCTION THAT CAUSED THE
18 DEFENDANTS TO WIN IN THE GROKSTER CASE.

19 THE COURT: ALL RIGHT.

20 MR. BRIDGES: BUT THE PLAINTIFFS WANT TO
21 SUBSTITUTE CRITICAL SUPPORT FOR MATERIAL
22 CONTRIBUTION TO THE INFRINGING ACTIVITY ITSELF.
23 THAT'S THE CONTRIBUTORY SITE OF COPYRIGHT. THE
24 VICARIOUS SITE OF COPYRIGHT RELATES TO THE RIGHT
25 AND THE ABILITY TO CONTROL THE INFRINGING ACTIVITY

1 ITSELF. THE STANDARD IS DIFFERENT, BUT, YOUR
2 HONOR, FOR ALL PRACTICAL PURPOSES THE SAME POINT
3 EXTENDS ACROSS BOTH HALVES OF COPYRIGHT.

4 I'D LIKE TO TALK ABOUT TRADEMARK BRIEFLY
5 AND ALLOW MY COLLEAGUES TO SPEAK. AS RECOGNIZED IN
6 THE SUPREME COURT'S CASE INWOOD, A TRADEMARK CASE,
7 AS RECOGNIZED BY THE SUPREME COURT'S CASE IN SONY
8 VERSUS UNIVERSAL STUDIOS, A COPYRIGHT CASE, AS
9 RECOGNIZED IN THE COPYRIGHT CASE FONOVISA, IT'S
10 MUCH NARROWER THAN COPYRIGHT FOR A CONTRIBUTORY
11 COPYRIGHT INFRINGEMENT.

12 HAVING SAID THAT, BECAUSE THERE'S NO
13 PLEADING OF ANY CASE FOR CONTRIBUTORY COPYRIGHT
14 INFRINGEMENT, A FORTIORI WE BELIEVE THE COURT
15 SHOULD DISMISS THE TRADEMARK CLAIMS BECAUSE THE
16 STRONGER SHOWING FOR CONTRIBUTORY TRADEMARK HAS NOT
17 BEEN MADE IN THESE PLEADINGS AND CANNOT BE MADE IN
18 THESE PLEADINGS AND THAT'S WHY, YOUR HONOR, THE
19 COURT SHOULD DISMISS THE COMPLAINT.

20 I'LL NOW TURN TO MY COLLEAGUE.

21 MR. JANSEN: YOUR HONOR, MARK JANSEN FOR VISA
22 INTERNATIONAL. AND JUST TO ELABORATE A LITTLE BIT
23 ON MR. BRIDGE'S COMMENTS, IN THIS CASE THERE SIMPLY
24 IS NO RELATIONSHIP BETWEEN THE DEFENDANTS HERE,
25 WHICH ARE ESSENTIALLY FINANCIAL PROCESSING

1 COMPANIES. THEY PROVIDE FINANCIAL SERVICES SIMILAR
2 TO BUT NOT EXACTLY AS A BANK, NO RELATIONSHIP
3 BETWEEN THEM AND THE ALLEGED INFRINGERS ADEQUATE TO
4 GIVE RISE TO ANY KIND OF DUTIES TO POLICE THE
5 CONDUCT OF THOSE MERCHANTS.

6 AND ALTHOUGH THE CASES I THINK IN THE
7 COPYRIGHT AREA ARE SOMEWHAT MURKY AT ONE LEVEL, I
8 THINK IF YOU LOOK AT THEM IN THEIR TOTALITY THERE'S
9 A FENCE THAT'S BEEN CREATED AND THE FENCE COMES
10 FROM THE COMMON LAW.

11 SO IF YOU LOOK AT THE STANDARDS OF DUTY
12 AND COMMON LAW OF VICARIOUS LIABILITY ISSUES OR
13 WHETHER WE LOOK AT THE STATUTE, THERE'S NO DUTY ON
14 THE PART OF THESE DEFENDANTS TO RESPOND TO NOTICES
15 FROM ONE OF MANY, MANY MILLION MERCHANTS THAT THEY
16 INDIRECTLY PROCESS TRANSACTIONS. THERE'S NO DIRECT
17 CONTRACTUAL RELATIONSHIP OF ANY KIND ALLEGED
18 BETWEEN VISA, MASTERCARD AND ANY OF THE MERCHANTS
19 IN THIS CASE. THEY HAVE NO DIRECT CONTROL OVER
20 THEM. THEY HAVEN'T ASSUMED ANY SPECIAL
21 RELATIONSHIP WITH THEM THAT WOULD GIVE THEM THE
22 DUTY TO CONTROL THEIR ACTIVITIES

23 THE COURT: NOW, WHAT ABOUT THE INTERNAL,
24 AS I'LL CALL IT, POLICY THAT VISA AND OTHERS
25 MAINTAIN THAT IF THEY HAVE EXCESSIVE BACK CHARGES

1 THAT THAT WOULD CAUSE OR CAUSE THEM TO CONSIDER
2 TERMINATING THE SERVICE AND IN THIS CASE THERE'S
3 BEEN A NOTICE ALLEGED TO HAVE BEEN GIVEN THAT THESE
4 PIRATTED WEB SITES OR STOLEN CONTENT WEB SITES ARE
5 USING COPYRIGHTED MATERIAL, WHY CAN'T THEY RELY ON
6 THAT POLICY AS CREATING A DUTY?

7 MR. JANSEN: WELL, TWO ANSWERS TO THAT.
8 NUMBER ONE, I DON'T BELIEVE THAT ALLEGED IN THIS
9 COMPLAINT ANYWHERE IS ANY STATEMENT OF POLICY THAT
10 VISA OR ANY OTHER DEFENDANT WILL TERMINATE
11 MERCHANTS UPON RECEIVING A NOTICE. THERE'S NO SUCH
12 ALLEGATION OF THAT.

13 THERE ARE STANDING ISSUES THROUGHOUT THIS
14 CASE. THEY EXTEND PARTLY TO THE RELIANCE ON
15 REGULATIONS THAT ARE NOT ENACTED FOR THE BENEFIT OF
16 THE PLAINTIFF. THE PLAINTIFF HAS NO CONTRACTUAL
17 RELATIONSHIP WHATSOEVER WITH VISA OR WITH
18 MASTERCARD. IT'S NOT AN ATTENDED BENEFICIARY OF
19 THOSE REGULATIONS AND SO IT HAS NO STANDING TO
20 ASSERT ANY ALLEGED BREACHES OR FAILURES TO PERFORM
21 INTERNAL POLICIES.

22 VISA AND MASTERCARD ARE NOT BANKS BUT
23 LIKE BANKS THEY ARE CONCERNED ABOUT THE
24 CREDITWORTHINESS OF ALL OF THE MERCHANTS IN THE
25 SYSTEM.

1 IF THERE ARE EXCESSIVE CHARGE BACKS AND
2 THE WAY THE CHARGE BACK WORKS IS THAT IF I AS A
3 CUSTOMER GO ON LINE OR I GO TO A RESTAURANT, I
4 AGREE TO PURCHASE A MEAL OR A VIDEO OR A BOOK ON
5 AMAZON.COM, WITHIN MINUTES OF APPROVAL OF THAT
6 TRANSACTION THE MERCHANT, WHOEVER IT IS, IS PAID BY
7 THE ACQUIRING BANK THAT HAS A CREDIT RELATIONSHIP
8 WITH

9 IF I GET MY BILL AND SAY I DIDN'T
10 AUTHORIZE THIS AND I DON'T KNOW WHO THIS IS AND I
11 DIDN'T AUTHORIZE THIS, AS A MATTER OF LAW I CAN
12 CANCEL THAT CHARGE AND LEAVING THE MERCHANT WHO MAY
13 HAVE MADE SOME KIND OF IMPROPER TRANSACTION. SO
14 THAT MERCHANT BECOMES INDIRECTLY A CREDITOR.

15 SO JUST LIKE A BANK, VISA AND MASTERCARD
16 HAVE EVERY RIGHT AND REASON TO ESTABLISH INTAKE
17 REGULATIONS TO REDUCE THE CREDIT RISK BUT THERE'S A
18 CLEAR FALLACY AND MISREPRESENTATION IN THE
19 PLAINTIFF'S PAPERS REGARDING THE REGULATIONS FOR
20 SO-CALLED HIGH RISK MERCHANTS OR ATTACHED AS
21 EXHIBIT 2 TO THE COMPLAINT AND THE OPPOSITION BRIEF
22 AND THAT IS THAT THOSE ARE NOT DIRECTED TO WEB
23 SITES OR PORN WEB SITES. THEY'RE DIRECTED TO ALL
24 INBOUND TELEMARKETERS. SO THEY'RE NOT IN ANY WAY
25 CONTENT DIRECTED.

1 MOREOVER, JUST AS A BANK HAS NO DUTY TO
2 POLICE ITS CUSTOMERS, VISA, IN HAVING REGULATIONS,
3 DOES NOT INCUR ANY LIABILITY OR RESPONSIBILITY
4 TOWARDS OR DUTY TOWARDS ANY OTHER MERCHANT IN THE
5 SYSTEM. THOSE ARE ITS REGULATIONS PROTECT ITSELF
6 FINANCIALLY.

7 I THINK JUDGE WHYTE SAID IT VERY CLEARLY
8 IN THE NETCOM CASE THAT WE CITED IN OUR BRIEF THAT
9 THE DEVELOPMENT OF REGULATIONS, INTERNAL
10 REGULATIONS DOES NOT IMPOSE A HIGHER DUTY UNDER THE
11 COPYRIGHT ACT AND I THINK THAT'S THE ANSWER OF THAT
12 QUESTION.

13 I BELIEVE THAT UNLESS THE CASES,
14 INCLUDING NAPSTER, ARE ALL CLEAR THAT UNLESS THE
15 DEFENDANT IS SOMEHOW PROVIDING THE SITE AND
16 FACILITIES, THAT HE'S EITHER A DIGITAL LANDLORD OR
17 A REAL LANDLORD LIKE A FLEAMARKET OPERATOR OR A
18 SYSTEMS OPERATOR AS NAPSTER WAS OR AN EMPLOYER OR
19 THEY'RE ACTUALLY PROVIDING THE TOOLS AND MEANS OF
20 PREPARING AND DISSEMINATING COPYRIGHT MATERIALS,
21 THEY JUST CAN'T BE LIABLE.

22 VISA AND MASTERCARD ARE SO FAR AWAY FROM
23 THAT FENCE. WE'RE NOWHERE ON THE SPECTRUM THAT
24 RUNS FROM A LANDLORD TO AN EMPLOYER THAT, THAT WE
25 JUST -- YOU REALLY DON'T HAVE TO GET ANY DETAILED

1 FACTUAL ANALYSIS. WE'RE SOMETHING WAY OUTSIDE OF
2 THAT FENCE WHERE THERE WOULD BE POTENTIAL
3 LIABILITY.

4 ON THE 17200 CLAIM REALLY BRIEFLY, I
5 THINK EMERY VERSUS VISA IS DIRECTLY ON POINT AND
6 THERE'S NO WAY TO DISTINGUISH THAT CASE AND THAT
7 CASE CLEARLY HOLDS THERE CANNOT BE VICARIOUS
8 LIABILITY FOR AN UNFAIR BUSINESS PRACTICE CONDUCT
9 UNDER 17200.

10 THE CASE GOES ON TO EXPLAIN THAT THE MERE
11 FACT THAT A DEFENDANT HAS REGULATIONS IN PLACE TO
12 POTENTIALLY LOOK AT AND PROTECT ITS TRADEMARK, FOR
13 EXAMPLE, IT, IN FACT, YOU MAY DO SOME INSPECTION,
14 DOES NOT CREATE CONTROL ADEQUATE TO ESTABLISH ANY
15 KIND OF VICARIOUS RESPONSIBILITY AND I THINK
16 THERE'S NO WAY TO DISTINGUISH EMERY AND IT REQUIRES
17 THE DISMISSAL OF THE BUSINESS AND PROFESSIONS CODE
18 17200 CLAIM. AND IT ALSO IN THE AIDING AND
19 ABETTING ANALOGY THE CONDUCT LIKE VISA AND MASTER
20 CARD ENGAGE IN OF SIMPLY PROCESSING TRANSACTIONS
21 CANNOT BE DEEMED TO BE PURPOSEFUL OR AIDING AND
22 ASSISTING IN A TORT. IT WOULD BE NECESSARY TO
23 ESTABLISH AIDING AND ABETTING LIABILITY UNDER
24 CALIFORNIA LAW.

25 SO I THINK THE CALIFORNIA CLAIMS HAVE GOT

1 TO COME OUT ON THAT BASIS AND I WANT TO THANK YOU.

2 THE COURT: VERY WELL.

3 MR. PAGE: YOUR HONOR, BRIEFLY ON THE
4 INTERFERENCE CLAIMS. THERE'S NO DISPUTE THAT IN
5 2001 PERFECT 10 WAS TERMINATED AS A MERCHANT UNDER
6 VISA REGULATIONS. THAT MEANS THAT YOU PUT THEIR
7 NAME IN A COMPUTER FILE THAT LISTS MERCHANTS THAT
8 ARE TERMINATED.

9 THE ALLEGEDLY LIBEL STATEMENT IS SIMPLY
10 INCLUDED IN THAT LIST. IT IS UNCONTROVERTIBLY
11 THROUGH. THEY DO NOT DISPUTE, THAT THEY WERE
12 TERMINATED. THEY CANNOT DISPUTE AND EVEN THOUGH
13 THEY DO IN THEIR OPPOSITION, THAT THEY KNEW IN
14 FEBRUARY OF 2001 THAT THEY HAD BEEN PLACED ON THIS
15 LIST.

16 WHEN THEY SAY THAT THEY DIDN'T KNOW UNTIL
17 TWO YEARS LATER, THAT'S SIMPLY FALSE. AND THEY
18 DIDN'T ALLEGE IN THEIR COMPLAINT THAT THEY DIDN'T
19 KNOW, AND, IN FACT, THEY ALLEGE IN THE COMPLAINT
20 THAT THEY DID. THE STATEMENT IS LITERALLY TRUE,
21 IT'S NOT LIBEL.

22 TO BEGIN WITH IT IS TIME BARRED BECAUSE
23 THEY KNEW OF IT. IT IS NOT A CONTINUING
24 PUBLICATION BECAUSE UNDER THE RECENT TRADITIONAL
25 CAT ASSOCIATION CASE UNLESS IN A DATABASE THAT IS

1 CONTINUALLY ACCESSED AND UPDATED IS SUBJECT TO THE
2 SINGLE PUBLICATION RULE, IF IT WEREN'T, THERE COULD
3 BE NO STATUTE OF LIMITATIONS FOR ELECTRONIC
4 COMMUNICATIONS.

5 AND FINALLY IT IS A PARADIGMATIC
6 PRIVILEGED COMMUNICATION. THIS IS A LIST EXCHANGED
7 ONLY AMONG MERCHANTS AND BANKS AND ISSUERS OF A
8 LIST OF PEOPLE WHO HAVE BEEN TERMINATED FOR THE
9 PURPOSE OF ASSESSING CREDITWORTHINESS. IT IS A
10 CLASSIC INTERESTED PERSON COMMUNICATION.

11 THEY CANNOT AMEND THIS COMPLAINT TO
12 ALLEGE THAT THEY DIDN'T KNOW IF THE DEFAMATORY
13 STATEMENT, ALLEGELY LIBEL STATEMENT BEFORE THE
14 STATUTE RAN BECAUSE THEY DID AND THEY WON'T BE ABLE
15 TO TELL YOU THAT. THEY WON'T BE ABLE TO TELL YOU
16 THAT THEY CAN AMEND IT. THE SAME AFFECTS THE
17 UNDERLYING CLAIM.

18 THE ONLY FACTUAL ALLEGATION THAT SUPPORTS
19 THE INTERFERENCE CLAIM IS THE INCLUSION OF THEM IN
20 THE TERMINATED MERCHANTS LIST. AGAIN THAT HAPPENED
21 IN 2001, AND THEY WERE AWARE OF IT AND SO THE
22 STATUTE HAS RUN ON THE INTERFERENCE CLAIM.

23 THE INTERFERENCE CLAIM ALSO FAILS BOTH
24 BECAUSE THEY HAVE NOT ALLEGED ANY EXISTING BUSINESS
25 RELATIONSHIPS WITH WHICH THE TERMINATED LIST SAYS

1 THAT THEY INTERFERED WITH AN ALLEGEDLY HOPE OF
2 FUTURE BUSINESS. UNDER THE ROTH AND YOUST AND WEST
3 SIDE CENTER CASE AND UNDER DELLA PENNA BECAUSE THEY
4 HAVE NOT BEEN ABLE TO ALLEGE AN INDEPENDENT
5 WRONGFUL ACT THEY HAVE NOT STATED AN INTERFERENCE
6 CLAIM

7 THE COURT: THANK YOU.

8 WELL, I'M ANXIOUS TO HEAR FROM YOUR
9 OPPONENT.

10 MR. KING: THAT'S GOOD BECAUSE WE'RE
11 ANXIOUS TO SPEAK. MY NAME IS HOWARD KING AND WE'RE
12 HERE ON A MOTION TO DISMISS. I'LL DO SOMETHING I
13 DON'T USUALLY DO IS START WITH MY SUMMARY AND GET
14 INTO MY DETAIL BECAUSE LISTENING TO THE OPPOSING
15 PARTY'S ARGUMENT ONLY REINFORCES THE PARTS IN OUR
16 ARGUMENT THAT I'M GOING TO MAKE TODAY THE POINTS IN
17 OUR ALLEGATION.

18 VIRTUALLY EVERY CASE CITED BY THE
19 DEFENDANTS WAS A CASE THAT WAS DECIDED AFTER
20 SUMMARY JUDGMENT, AFTER DISCOVERY WAS TAKEN AND
21 AFTER THE PLAINTIFF HAD THE OPPORTUNITY TO BRING
22 OUT THE FACTS.

23 WE FACE A FORMIDABLE OPPONENT HERE WITH
24 LOTS OF INFORMATION THAT IS PROPRIETARY THAT WE
25 HAVEN'T SEEN WHICH WE BELIEVE WILL SUPPORT THE

1 ALLEGATIONS THAT WE HAVE MADE. WE ONLY HAVE TO
2 MAKE THE ALLEGATIONS IN GOOD FAITH WITH SUFFICIENT
3 DETAIL AND THE PARTIES UNDERSTAND WHAT THOSE
4 ALLEGATIONS ARE.

5 THE DEFENDANT'S MOTION, IN ESSENCE,
6 CLAIMS THAT THERE'S NO RELIEF THAT CAN BE GRANTED
7 UNDER ANY SET OF FACTS THAT COULD BE PROVED
8 CONSISTENT WITH THE EXISTING ALLEGATIONS.

9 WE'RE NOT REQUIRED TO SPECULATE ON EACH
10 AND EVERY FACT THAT WILL COME OUT BUT THERE ARE
11 SOME FACTS UNDISPUTED FOR THIS MOTION. IT'S
12 UNDISPUTED THAT THERE IS INFRINGEMENT OF MY
13 CLIENT'S COPYRIGHT AND TRADEMARKS AND OTHER RIGHTS
14 BY INTERNET MERCHANTS WE HAVE REFERRED TO AS THE
15 STOLEN CONTENT WEB SITES. IT'S UNDISPUTED THAT
16 THOSE THEFTS ARE FACILITATED THROUGH THE ACCEPTANCE
17 OF VISA AND MASTERCARDS ISSUED BY THE VARIOUS
18 DEFENDANTS.

19 IT'S UNDISPUTED THAT THERE'S GROSSLY
20 UNFAIR BUSINESS PRACTICES ENGAGED IN BY THESE
21 MERCHANTS.

22 IT'S UNDISPUTED BY THAT MY CLIENT HAS
23 SUFFERED SIGNIFICANT DAMAGE, AND IT'S UNDISPUTED
24 THAT THE DEFENDANTS HAVE NOTICE OF THE ILLEGAL
25 ACTIVITIES UNDERTAKEN BY THEIR MERCHANTS.

1 IT'S ALSO UNDISPUTED THAT FOR THE
2 PURPOSES OF THIS MOTION THAT THE DEFENDANTS ARE
3 EARNING A DIRECT PROFIT FROM EACH AND EVERY
4 TRANSACTION THAT RESULTS IN THE INFRINGEMENTS THAT
5 WE HAVE DISCUSSED.

6 SO THE ISSUE FOR TODAY IS THAT CAN THE
7 PLAINTIFF STATE A CAUSE OF ACTION SHOWING THAT
8 THESE DEFENDANTS ARE LIBEL FOR THESE UNDISPUTED
9 VIOLATIONS BY THE STOLEN CONTENT WEB SITES?

10 WE HAVE ATTEMPTED TO DESCRIBE THE
11 RELATIONSHIP OF THE DEFENDANTS IN OUR PAPERS BUT
12 MOST IMPORTANTLY SINCE WE DON'T KNOW THE INTIMATE
13 DETAILS OF THAT RELATIONSHIP, WE HAVE ALLEGED THAT
14 THEY WORKED TOGETHER, YOU KNOW, BOTH TO CREATE THE
15 SYSTEM THAT ALLOWS THESE MERCHANTS TO USE CREDIT
16 CARDS AS WELL AS TO FUND THESE MERCHANTS.

17 WE DO KNOW THAT THEY ARE DIRECT
18 CONTRACTUAL RELATIONS BETWEEN MOST OF THESE
19 DEFENDANTS AND THE STOLEN CONTENT WEB SITES BUT
20 JUST HAVEN'T SEEN THOSE CONTRACTS AND DON'T KNOW
21 WHAT THEY SAY.

22 WE KNOW THAT VISA AND MASTERCARD IMPOSE
23 REGULATIONS ON THE OTHER DEFENDANTS THAT REQUIRE
24 THEM TO INCORPORATE VISA AND MASTERCARD RULES INTO
25 THESE CONTRACTS.

1 THE COURT: WELL, LET ME JUMP AHEAD AND
2 ASSUME THAT I AM GOING TO GRANT THE MOTION AND
3 WE'RE CONSIDERING WHETHER TO ALLOW YOU LEAVE TO
4 AMEND.

5 IS THERE ANYTHING MORE YOU WOULD SAY,
6 AND, IN OTHER WORDS, HAVE YOU SAID, YOUR OPPONENT
7 SAYS IT'S IN GREAT DETAIL AND IT IS. THIS IS THE
8 COMPLAINT.

9 IF I'M NOT SATISFIED THAT WHAT YOU HAVE
10 ALLEGED ARE FACTS WHICH SUPPORT A CLAIM FOR
11 MATERIAL CONTRIBUTION TO THE INFRINGING CONDUCT AS
12 OPPOSED TO MATERIAL OR EMPLOYING CRITICAL SUPPORT,
13 WHICH IS THE LANGUAGE THAT IS USED, IS THERE MORE
14 THAT YOU COULD ALLEGE TO SATISFY ME THAT WHAT IS
15 GOING ON IS MATERIAL CONTRIBUTION TO THE INFRINGING
16 CONDUCT AS OPPOSED TO MATERIAL SUPPORT TO THE
17 BUSINESS?

18 MR. KING: SURE, THERE IS.

19 THE COURT: WHAT IS IT?

20 MR. KING: NOT THAT IT'S NECESSARY BUT
21 I'M HAPPY -- I MADE A LIST. I WAS BORED LAST
22 NIGHT. HERE ARE SOME OTHER FACTS THAT DISTINGUISH
23 SOMEONE LIKE THE DEFENDANTS HERE AND THE ELECTRIC
24 COMPANY OR THE GAS COMPANY OR THE BANK THAT
25 PROVIDES THEM A BANK LOAN.

1 UTILITIES OR BANKS DON'T HAVE ANY
2 QUALIFICATION -- UTILITIES HAVE NO QUALIFICATIONS
3 OR STANDARD FOR PROVIDING THE SERVICE. YOU PAY
4 YOUR PERCENTAGE, YOU GET SERVICE. UTILITY DOESN'T
5 COME IN AS THE CREDIT PROCESSORS DO AT LEAST UNDER
6 THEIR, UNDER THE EXISTING GUIDELINES AS I HAVE SEEN
7 THEM DO A BUSINESS INVESTIGATION, DO SITE VISITS,
8 DO CONSTANT MONITORING OF THE ACTIVITIES OF THEIR
9 MERCHANTS TO MAKE SURE UNDER THEIR REGULATIONS
10 THEY'RE NOT VIOLATING THE LAW.

11 UTILITIES DON'T VARY THE RATE THAT THEY
12 CHARGE CUSTOMERS DEPENDING UPON THE ASSESSMENT OF
13 RISKS IMPOSED BY THE CUSTOMER'S ACTIVITIES.

14 I MEAN, WE WILL SHOW AND IF WE NEED TO
15 ALLEGE IT, IT SEEMS SUPERFLUOUS FOR A PROCEEDING
16 THAT ADULT ORIENTED BUSINESSES MIGHT PAY FIVE TIMES
17 THE RATE OF MCDONALDS JUST BECAUSE THE PROCESSORS
18 ARE AWARE OF THE GREATER RISKS IMPOSED.

19 AND WE'RE NOT TALKING ABOUT THE GREATEST
20 CREDIT RISK OF THEM LOSING MONEY. WE'RE TALKING
21 ABOUT THE GREATER RISK OF THEM ENGAGING IN ILLEGAL
22 ACTIVITY.

23 YOU KNOW, UTILITY DOESN'T IMPOSE
24 REQUIREMENTS ON HOW A CUSTOMER USES THE SERVICE.
25 MASTERCARD, VISA, AND THE OTHER DEFENDANTS IMPOSE

1 REQUIREMENTS.

2 FOR INSTANCE, THERE'S A VISA AND
3 MASTERCARD RELATION WHICH VISA AND MASTERCARD
4 REQUIRE THE OTHER --

5 THE COURT: LET ME PAUSE ON THAT ONE
6 BECAUSE I WANT TO MAKE SURE THAT I UNDERSTAND, IN
7 OTHER WORDS, IF GRANTED LEAVE TO AMEND, YOU WOULD
8 SEEK TO ASSERT THAT THE DEFENDANTS ARE MATERIALLY
9 CONTRIBUTING TO THE INFRINGEMENT BECAUSE BASED UPON
10 THE RISK, THE KNOWN RISK THAT THE CUSTOMER OR THE
11 WEB SITES ARE ENGAGING IN ILLEGAL ACTIVITY, THEY
12 CHARGE DIFFERENTLY THAN THEY WOULD ANYONE ELSE.

13 MR. KING: NO. I MEAN, FIRST OF ALL, WE
14 HAVE ALREADY ALLEGED THEY ARE MATERIALLY
15 CONTRIBUTING. IF THE COURT WANTS ADDITIONAL FACTS
16 I WOULD ALLEGE FIRST THAT MASTERCARD, VISA, AND THE
17 PROCESSORS ARE VIRTUALLY IN THE VIRTUAL WORLD, IN
18 THAT ROOM AS THAT TRANSACTION IS TAKING PLACE,
19 TAKING THE MONEY FROM THE CUSTOMER, KEEPING A PIECE
20 OF IT FOR HIMSELF, DELIVERING IT TO THE MERCHANT,
21 OVERSEEING THE TRANSACTION MAKING SURE IT'S LEGAL.

22 IN OTHER WORDS, TO PUT IT IN MY ERA,
23 MASTERCARD IS THE FENCE SITTING IN THE NEXT ROOM
24 WHO GIVES MONEY TO A CAR THIEF AND SAYS, HERE'S
25 MONEY, AND YOU GO OUT AND STEAL CARS. AND I DON'T

1 CARE WHAT YOU STEAL OR WHO YOU SELL IT TO BUT WHEN
2 YOU SELL IT OR TAKE BACK A PROMISSORY NOTE OF WHO
3 YOU SELL IT TO, YOU GIVE IT TO ME AND I'LL GIVE 50
4 PERCENT OF THAT NOTE, AND I'LL KEEP THE REST.
5 THAT'S THE ACTIVITY THAT IS MATERIAL. WHETHER YOU
6 CALL IT CRITICAL OR MATERIAL IS A DISTINCTION THAT
7 I DON'T THINK IS APPROPRIATE UNDER THE COPYRIGHT
8 ACT.

9 I THINK THERE ARE WORDS THAT YOU USE IN
10 ALLEGATIONS. THE REAL QUESTION IS WHEN YOU GET TO
11 A MOTION FOR SUMMARY JUDGMENT OR TRIAL, WHERE ON
12 THE SPECTRUM ARE YOU BETWEEN NAPSTER, WHICH I HAVE
13 SOME FAMILIARITY WITH SINCE WE'RE ALL GIVING OUR
14 RESUMES HERE, NAPSTER WHO IS PROVIDING A CRITICAL
15 ELEMENT FOR THE NECESSARY CONTRIBUTION AND EMERY,
16 FOR INSTANCE, WHO IS NOT A COPYRIGHT CASE BUT IT'S
17 A CASE WHERE THERE WAS NO CONTRIBUTION OTHER THAN
18 THEY HAD A VISA AND MASTERCARD LOGO AND THAT'S HOW
19 IT GOT PAID FOR BUT THERE WAS NO KNOWLEDGE OR
20 INVOLVEMENT IN THE SPECIFIC TRANSACTION. IT'S A
21 SPECTRUM AND ALL OF THESE CASES ARE A SPECTRUM AND
22 INTERESTINGLY ENOUGH THEY HAVE ALL DECIDED AFTER
23 DISCOVERY HAS BEEN DONE SO A JUDGE CAN MAKE A
24 DETERMINATION WHEREUPON A SPECTRUM THAT CONDUCT IS
25 AND THEREFORE DETERMINE WHETHER IT WAS MATERIAL OR

1 IMMATERIAL.

2 THE COURT: AND I TAKE SERIOUSLY YOUR
3 ARGUMENT THAT I NEED TO WAIT IF INDEED THERE IS
4 MORE THAT CAN BE FACTUALLY ALLEGED. AND THAT'S WHY
5 I'M TRYING TO FIGURE OUT BECAUSE IF I ALLOW THE
6 CLAIM AT THE SAME TIME I'M SAYING TO THE COMMERCIAL
7 WORLD, ANYONE WHO PROCESSES PAYMENTS IN THE NATURE
8 OF VISA OR BANKS THAT ARE INVOLVED HERE ARE SUBJECT
9 TO BEING SUED, IF THE COMPANY, WITH WHOM THEY'RE
10 DOING BUSINESS, VIOLATES THE RIGHTS OF OTHERS.
11 THAT'S A VERY BROAD STATEMENT THAT I WOULD BE
12 MAKING MORE FOR THE COMMERCIAL WORLD AND I'M ONLY
13 WILLING TO DO THAT IF I CAN FIND SOME LEGAL BASIS
14 FOR IT.

15 YOUR FENCING EXAMPLE IS INTERESTING. I
16 WANT TO STUDY THAT. IT SEEMS TO ME THAT IT
17 WOULDN'T BE THE ACTIVITY OF THE MERCHANDISE THAT
18 WOULD BE INVOLVED WITH THE FENCING BECAUSE THAT HAS
19 ALREADY TAKEN PLACE; RIGHT?

20 MR. KING: RIGHT. I HAVE ACTUALLY GIVEN
21 YOU A BROADER EXAMPLE THAN FENCING. I HAVE GIVEN
22 YOU AN EXAMPLE OF A FENCE WHO FUNDS THE ACTIVITY
23 PRETHEFT AND POST-THEFT AND IF A TRADITIONAL
24 OFFENSE WOULD BE POST-THEFT AND BRING ME THE
25 MERCHANDISE, AND I'LL BUY IT KNOWING IT'S STOLEN

1 AND I'VE GIVEN YOU AN EXAMPLE OF SOMEONE WHO WAS
2 INVOLVED BEFORE THE TRANSACTION.

3 THE COURT: I SEE. SO I WOULD HOLD
4 MERCHANTS OR FINANCIERS LIBEL IF THEY ALLOW A
5 COMPANY TO SET UP THAT INTENDS TO GO OUT AND STEAL
6 MATERIAL.

7 MR. KING: NO. AGAIN, IT'S FACT BASED
8 AND YOUR HONOR'S POLICY CONCERN I THINK CAN BE
9 ADDRESSED. I MEAN, YOUR HONOR WOULD NOT HESITATE
10 TO ALLOW A BANK, I DON'T BELIEVE, MAYBE I'M BEING
11 PRESUMPTUOUS, BUT TO PROCEED IN A LAWSUIT IF THE
12 CLAIM WERE ALLEGED THAT THEY WERE COCONSPIRING WITH
13 SOMEBODY TO LAUNDER MONEY. YOU WOULDN'T SEE THAT
14 AS A THREAT TO THE FINANCIAL SYSTEM SO NO BANKS ARE
15 GOING TO DO BUSINESS WITH PEOPLE WHO MIGHT BE
16 INVOLVED IN AN ACTIVITY THAT CONSTITUTES
17 LAUNDERING.

18 THE COURT: COULD YOU EXTEND YOUR
19 ARGUMENT TO THE TELEPHONE COMPANY. I DON'T KNOW
20 HOW THE INTERNET OPERATES BUT IT SURE DEPENDS UPON
21 SOME COMMUNICATION SYSTEM.

22 WHAT IS THE DIFFERENCE BETWEEN PROVIDING
23 THAT KIND OF SERVICE AND PROVIDING PROCESSING OF
24 PAYMENTS?

25 MR. KING: WELL, A HUGE DIFFERENCE AND

1 YOU KNOW THE DEFENDANTS USE THIS SEEMINGLY HARMLESS
2 PHRASE IN THEIR PAPERS ABOUT ALL WE'RE DOING IS
3 BACKEND PROCESSING. TELL THE PHONE COMPANY YOU
4 CALL UP MY SERVICE, HERE IS MY SOCIAL SECURITY
5 NUMBER, YES, I QUALIFY, I'LL PAY THE BILL. THAT'S
6 IT.

7 CONTRAST THIS AND TAKE THE SPECTRUM TO
8 THE OTHER SIDE WHERE YOU CALL CARD SERVICES AND YOU
9 WANT PROCESSING. THERE'S A WHOLE SET OF
10 REGULATIONS THAT THEY UNDERGO BEFORE YOU GET
11 PROCESSING. THEY'RE REQUIRED TO INSPECT YOUR SITE,
12 YOU'RE REQUIRED TO ASSURE THEM THAT YOU'RE NOT
13 DOING ANYTHING ILLEGAL. CARD SERVICES IS REQUIRED
14 TO WARN THE VISA AND MASTERCARD THAT THE MERCHANT
15 IS NOT DOING ANYTHING ILLEGAL AND YOU SET UP
16 PRICING DEPENDING UPON THE TRANSACTIONS, YOU ASSIGN
17 A RISK CATEGORY TO THE MERCHANT, YOU ASSIGN A
18 BUSINESS CATEGORY TO THE MERCHANTS, YOU MONITOR THE
19 MERCHANT TO MAKE SURE THAT THAT BUSINESS CATEGORY
20 DOESN'T CHANGE.

21 IN DISCOVERY I BET WE'RE GOING TO FIND
22 2000 PAGES OF FURTHER REGULATIONS THAT REQUIRE
23 DIRECT INVOLVEMENT WITH THE BUSINESS OF THE
24 MERCHANT BUT MOST IMPORTANTLY, YOU KNOW, DIFFERENT
25 THAN THE TELEPHONE COMPANY, YOU'RE VIRTUALLY

1 SITTING IN THAT ROOM WHEN THE TRANSACTION TAKES
2 PLACE.

3 THE CREDIT CARD COMPANY IS TAKING THE
4 DRAFT, TAKE THE MONEY, RETAINING, IN THE CASE OF
5 ADULT MERCHANTS, 7 OR 8 PERCENT OF IT, AND GIVING
6 THE REST TO THE MERCHANT.

7 LET ME GIVE YOU ANOTHER EXAMPLE, WHICH I
8 THINK DESCRIBES THE DIFFERENCE.

9 I COULDN'T COME IN HERE AND SAY THAT
10 BECAUSE VISA AND MASTERCARD GIVES US THE MACHINES
11 THAT YOU USE TO SWIPE THE CREDIT CARD AND WE NEED
12 THOSE MACHINES TO PROCESS CHARGES THAT VISA AND
13 MASTERCARD ARE COMMITTING COPYRIGHT OR INFRINGEMENT
14 OR I'M GIVING THEM A MATERIAL THAT CAN BE USED AND
15 USUALLY IS USED FOR LEGITIMATE PURPOSES. WE'RE NOT
16 SAYING THIS IS THE CARD SWIPING MACHINE THAT THEY
17 JUST PROVIDED US.

18 THEY'RE INTIMATELY INVOLVED IN THE
19 BUSINESS OF THEIR MERCHANTS, AND, AGAIN, I BELIEVE
20 WE HAVE ALREADY PLED THIS BUT IF YOUR HONOR WANTED
21 MORE FACTS, I MEAN, THE PROBLEM WITH AN EVEN LONGER
22 COMPLAINT TO THAT IS THAT WE'RE MAKING THOSE
23 ALLEGATIONS IN GOOD FAITH BUT THE FACT OF THE
24 MATTER IS THAT WE DON'T KNOW HOW INTIMATE THE
25 RELATIONSHIP IS OTHER THAN THROUGH OUR OWN PERSONAL

1 EXPERIENCE.

2 THEY FIND MERCHANTS, AND MY CLIENTS MAY
3 FIND TENS OF THOUSANDS OF DOLLARS OF ALLEGED
4 VIOLATIONS OF THE MASTERCARD RULES. PHONE
5 COMPANIES DON'T FIND IT UNTIL YOU'RE DOING
6 SOMETHING ILLEGAL. AND THERE ARE SIGNIFICANT
7 DIFFERENCES, AND WE'RE TALKING ABOUT A NUMBER OF
8 CONTENT OWNER WEB SITES. THERE'S A LOT OF WEB
9 SITES BUT THERE ARE OWNERS BUT WE DON'T KNOW WHO
10 THEY ARE. THEY ARE ALL LOCATED OFFSHORE. VISA AND
11 MASTERCARD AND THE DEFENDANTS KNOW WHO THEY ARE AND
12 WHERE THEY ARE AND WHICH IS THE SOURCE OF OUR
13 FRUSTRATION.

14 YOUR HONOR MAY NOT KNOW BECAUSE I DON'T
15 BELIEVE IT'S IN THE PAPERS, WE HAVE TRIED TO GO
16 DIRECTLY TO THE INFRINGERS AND SUE THEM AND IT'S
17 NOT SO EASY TO GO TO COUNTRIES THAT DON'T EXIST.

18 THE COURT: VERY WELL. YOU HAVEN'T HAD
19 MUCH OF AN OPPORTUNITY TO ADDRESS THE OTHER CLAIMS,
20 AND I DON'T NEED TO NECESSARILY INVITE THAT.

21 BUT IT SEEMS TO ME THAT THE REAL QUESTION
22 THAT I HAVE IS THE COMPLAINT COMES DOWN TO AN
23 ALLEGATION ABOUT A CONCLUSION ABOUT THE LAW AND
24 THAT I DON'T HAVE TO ACCEPT AS TRUE FOR PURPOSES OF
25 THIS MOTION. AND THAT'S THE QUESTION OF WHETHER OR

1 NOT IF YOU PROVIDE FINANCIAL SERVICE SUPPORT THAT
2 CONSTITUTES MATERIAL CONTRIBUTION TO THE INFRINGING
3 ACTIVITY.

4 I'M NOT SURE I ACCEPT ANALOGIES TO
5 SITTING IN THE ROOM BUT THAT SEEMS TO SUGGEST THAT
6 THERE IS KNOWLEDGE ABOUT THE CONTENT OF THE
7 TRANSACTION, WHAT IS BEING TRANSACTED AT THAT POINT
8 IN TIME IN A VERY COMPLICATED AND SOPHISTICATED
9 BUSINESS WORLD.

10 WHAT WOULD BE YOUR BASIS FOR ASSERTING
11 THAT THAT LEVEL OF KNOWLEDGE IS PRESENT HERE?

12 MR. KING: WELL, ASSUMING WE ACTUALLY HAD
13 TO ASSERT SOMETHING AT THE PLEADING STAGE, I WOULD
14 POINT OUT TWO THINGS. FIRST I WOULD POINT OUT THE
15 DISTINCTION BETWEEN VICARIOUS AND CONTRIBUTORY
16 COPYRIGHT INFRINGEMENT BECAUSE THERE'S A
17 SIGNIFICANT DIFFERENCE AND THE CONTRIBUTION ELEMENT
18 IS NOT AN ELEMENT OF VICARIOUS COPYRIGHT ABILITY
19 AND WE THINK LIABILITY AND WE THINK THAT HAS BEEN
20 PLED AND THE RIGHT AND ABILITY TO CONTROL AND
21 SUPERVISE WHICH I THINK EVERY EXAMPLE I HAVE GIVEN
22 YOU CONSTITUTES THAT AND THE DIRECT FINANCIAL
23 INTEREST WHICH I DON'T THINK IS, I THINK IT'S
24 CONCEDED FOR THIS MOTION, BUT YOU KNOW, AS FAR AS
25 THE MATERIAL SUPPORT, AGAIN, IF YOUR HONOR ADOPTS

1 THE ARGUMENT THAT THIS IS MERELY PROCESSING, YOU
2 KNOW, THIS IS MERELY FINANCING YOUR ORGANIZATION, I
3 DON'T THINK YOU'LL GET THERE.

4 BUT I THINK WE HAVE ALLEGED OR WE COULD
5 ADD ALLEGATIONS AS I HAVE DESCRIBED TO YOU TEN MORE
6 STEPS IN THE PROCESS THAT GO FAR BEYOND THE BANK
7 THAT IS LOANING THEM MONEY OR PROVIDING THEM A
8 CHECKING ACCOUNT.

9 THE COURT: NOW, LET ME ASK ONE FINAL
10 QUESTION AND I SEE YOUR TIME IS OVER.

11 LET'S ASSUME THAT I AM CONSERVATIVE
12 ENOUGH TO STICK WITH THE OLD AS LONG AS IT'S GOOD
13 AND ONLY SWITCH TO THE NEW WHEN CONFIDENT IT'S
14 BETTER. WHERE IS THE CASE THAT SUPPORTS YOUR
15 POSITION?

16 MR. KING: ON THE COPYRIGHT INFRINGEMENT?

17 THE COURT: CONTRIBUTORY COPYRIGHT
18 INFRINGEMENT ON A COMPANY THAT PROVIDES FINANCIAL
19 SERVICES.

20 MR. KING: I THINK NAPSTER GOES RIGHT TO
21 THIS ISSUE. AGAIN, IF YOU LOOK AT THE CASES THAT
22 ARE FACT BASED, WHICH THE DEFENDANTS SEEM TO BE
23 DOING AND YOU SAY, WELL, NAPSTER INVOLVED A WEB
24 SITE THAT ALLOWED PEOPLE TO CONTACT, AND FONOVisA
25 WAS A REAL ESTATE CASE AND THAT'S PRETTY

1 CONSERVATIVE AND WE USUALLY LOOK TO THE RULES OF
2 THE LAW THAT APPLY TO THOSE FACTS.

3 NABSTER INVOLVED SOMEBODY WITH KNOWLEDGE
4 PROVIDING THE MEANS BY WHICH AN INFRINGEMENT COULD
5 TAKE PLACE. AND, YOU KNOW, YOU ASKED ME, HOW
6 DIFFICULT IS IT TO, YOU KNOW, THEM TO GET KNOWLEDGE
7 THAT THEY GET THESE NOTICES? WELL, NAPSTER LOST
8 THAT CASE BECAUSE THE PLAINTIFFS SENT THEM NOTICES.
9 PERFECT 10 ULTIMATELY IS GOING TO PREVAIL IN THIS
10 CASE BECAUSE THEY HAVE CONSISTENTLY SENT NOTICES TO
11 THESE DEFENDANTS SAYING THAT THESE WEB SITES, USING
12 YOUR PRODUCT, ARE STEALING OUR CONTENT.

13 THE COURT: YOU COULD SEND THE SAME
14 NOTICE TO THE LANDLORD OF THE BUILDING, THE
15 COMPUTER COMPANY THAT SOLD THEM THE COMPUTER AND
16 THE TELEPHONE COMPANY, AND YOU COULD GO DOWN THE
17 LINE, THE QUESTION IS HOW FAR DOWN THE LINE DO I
18 WANT TO GO FOR THE SUPPORT OF THE BUSINESS
19 ENTERPRISE?

20 MR. KING: YOU DON'T WANT TO GO DOWN ANY
21 OF THOSE EXAMPLES YOU GAVE US BECAUSE NONE OF THEM
22 HAVE THE INVOLVEMENT WE HAVE HERE.

23 THE COURT: IN OTHER WORDS, THE INTIMATE
24 INVOLVEMENT I THOUGHT YOU WERE BASING ON THE FACT
25 THAT A NOTICE WAS SENT. IF A NOTICE IS SENT TO THE

1 TELEPHONE COMPANY THAT THE TELEPHONE LINES ARE
2 BEING USED TO TRANSMIT COPYRIGHTED MATERIAL, WOULD
3 THE TELEPHONE COMPANY HAVE THE DUTY TO TERMINATE
4 THAT LINE?

5 MR. KING: ABSOLUTELY NOT. THERE ARE TWO
6 DISTINCT ELEMENTS OF THE VIOLATION, KNOWLEDGE AND
7 MATERIAL CONTRIBUTION, OR IN THE CASE OF VICARIOUS
8 LIABILITY, THE RIGHT AND ABILITY TO SUPERVISE AND
9 CONTROL. THERE ARE TWO DIFFERENT ELEMENTS. I WAS
10 ANSWERING YOUR QUESTION ABOUT HOW DIFFICULT IS IT
11 GOING TO BE TO BUSINESSES TO RESPOND TO NOTICE.
12 THE TELEPHONE COMPANY DOESN'T HAVE TO RESPOND TO A
13 NOTICE. THE AUTOMOBILE REPAIR SHOP DOESN'T HAVE TO
14 RESPOND TO A NOTICE. THEY DON'T HAVE AN ONGOING
15 INTIMATE RELATIONSHIP WITH THE ACTUAL TRANSACTION
16 THAT GIVES RISE TO THE VIOLATION.

17 THAT'S A BIG DIFFERENCE. AGAIN, WE CAN
18 ALLEGE IT. I WENT ABOUT HALFWAY THROUGH MY LIST,
19 BUT I HAVE A LIST OF AREAS WHERE THESE
20 DEFENDANTS --

21 THE COURT: SO IF THE COMPANY WAS SET UP
22 THAT THE PAYMENT WAS MADE BY CHECKS, WOULD YOUR
23 ARGUMENT BE THAT THE BANK THAT PROCESSES THE CHECKS
24 THAT GETS A NOTICE HAS AN OBLIGATION TO TERMINATE
25 THE ACCOUNT?

1 MR. KING: NO. THAT'S A TYPICAL
2 COMMERCIAL TRANSACTION. I'M NOT ADVOCATING
3 CONSTRUCTION TO THE FINANCIAL SYSTEM. I MEAN, WE
4 TAKE CHECKS. PEOPLE TAKE CHECKS.

5 AND WHEN YOU TAKE A CHECK, YOU MAKE A
6 DETERMINATION, IS THE CHECK GOING TO CLEAR OR IS IT
7 NOT GOING TO CLEAR AT THE BANK? THAT'S IT.

8 THE COURT: WHAT IS THE DIFFERENCE?

9 MR. KING: WHAT'S THE DIFFERENCE? ALL
10 YOU'RE DOING IS CASHING THE CHECK. HERE YOU'RE
11 SETTING FORTH THE REGULATIONS AS TO HOW THAT
12 MERCHANT CAN OPERATE FROM THE BEGINNING.

13 THE COURT: WHO IS SETTING FORTH?

14 MR. KING: MASTERCARD VISA.

15 THE COURT: IT'S AN INTERNAL POLICY?

16 MR. KING: IT'S NOT AN INTERNAL POLICY.

17 THE COURT: IS IT IMPOSED BY THE
18 COPYRIGHT LAWS?

19 MR. KING: NO.

20 THE COURT: WHO IMPOSES IT UPON THEM?

21 MR. KING: MASTERCARD AND VISA.

22 THE COURT: WHO IMPOSES IT ON THEM?

23 MR. KING: THEY CHOOSE TO GET INVOLVED.
24 THERE'S NO LEGAL REQUIREMENT THAT THEY DO THIS.
25 THEY HAVE CHOSEN TO GET INTIMATELY INVOLVED WITH

1 THEIR CUSTOMER'S BUSINESS TO THE POINT OF CHARGING
2 THEM MORE FOR HIGH RISK TRANSACTIONS, REQUIRING
3 THAT THEY DON'T COMMIT ILLEGAL ACTS AND
4 INVESTIGATING THEIR SITES AND FACILITIES ON AN
5 ONGOING BASIS.

6 YOUR HONOR WAS ASKING COUNSEL ABOUT DUTY.
7 DUTY IS NOT MENTIONED ANYWHERE IN THE COPYRIGHT
8 ACT. IT'S NOT AN ELEMENT, FRANKLY, IN ANY CAUSE OF
9 ACTION THAT WE HAVE ALLEGED.

10 THE QUESTION IS FACTUAL, ARE THEY
11 ACTUALLY MATERIALLY CONTRIBUTING OR DO THEY HAVE
12 THE RIGHT AND THE ABILITY TO CONTROL? UNDER
13 VICARIOUS LIABILITY IT'S JUST THAT DO THEY HAVE THE
14 RIGHT AND ABILITY TO CONTROL THE ACTIVITY AND WE
15 HAVE ALLEGED THAT AT LENGTH THAT THEY HAVE THE
16 RIGHT AND THE ABILITY.

17 THERE'S NO ELEMENT TO THE MATERIAL
18 CONTRIBUTION TO ESTABLISH VICARIOUS LIABILITY.

19 THE COURT: THANK YOU. I'M GOING TO
20 ORDER THIS MATTER SUBMITTED. IT'S A FASCINATING
21 ISSUE. I'LL GIVE YOU A DECISION ON IT SHORTLY. AS
22 I SAID MY TENTATIVE DECISION IS TO GRANT THE
23 MOTION. THE QUESTION THAT I'M REALLY TRYING TO
24 DECIDE IS WHETHER THERE IS A CLAIM THAT COULD BE
25 STATED UNDER THESE CIRCUMSTANCES BECAUSE I WANT TO

1 GIVE YOU AN OPPORTUNITY TO SAY MORE IF THERE IS
2 MORE TO BE SAID.

3 THIS ARGUMENT HAS HELPED TO CLARIFY THAT
4 YOU SEE AN INVOLVEMENT HERE THAT YOU'RE ATTEMPTING
5 TO ALLEGE THAT PERHAPS IS NOT AS CLEARLY STATED BUT
6 I WONDER EVEN IF YOU HAVE THAT OPPORTUNITY IT WOULD
7 CONSTITUTE A CLAIM AND THAT'S WHAT I WANT TO LOOK
8 AT.

9 SO I'LL GIVE YOU A DECISION.

10 MR. KING: AND, YOUR HONOR, THE OTHER
11 CAUSES OF ACTION, WHICH I WON'T DWELL ON BECAUSE
12 YOU'RE DONE, ARE DIFFERENT THAN THE COPYRIGHTED
13 CLAIMS.

14 THE COURT: YES, I UNDERSTAND. I SAID WE
15 HADN'T GOTTEN TO THOSE BUT THAT'S OKAY. I'LL DEAL
16 WITH THE OTHERS BASED ON THE PAPERS.

17 MR. KING: THANK YOU, YOUR HONOR.

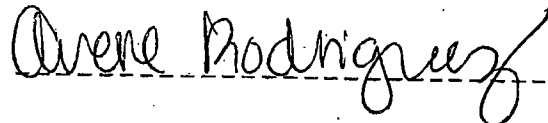
18 (WHEREUPON, THE PROCEEDINGS IN THIS
19 MATTER WERE CONCLUDED.)
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE, INCLUSIVE, CONSTITUTED A TRUE, FULL
AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN
AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.



IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER CSR 8074