

Google News include (a) headlines along with, in some cases, a portion of the story lead, typically consisting of the first sentence of the story or less, but in any event fewer than 300 characters (including spaces) (the “lead fragment”), and/or (b) very low resolution thumbnail images, fewer than 100 pixels by 100 pixels, that are small summaries of photographs associated with stories (the “thumbnail links”). Users cannot read a news story or view a full photograph on Google News, but can only do so by clicking on the link provided, thereby leaving Google News and going to the independent web site on which the story or photograph is posted.

Plaintiff Agence France Presse (“AFP”) claims that the use of a headline, basic facts, and thumbnail image as links constitutes copyright infringement, and that efficiently directing Internet users to news sites of interest unfairly competes with and injures AFP. Google disagrees and hereby answers AFP’s first amended complaint (“Complaint”), denying each allegation except as admitted or answered, setting out additional defenses, and asserting counterclaims, as follows.

ANSWER

1. Paragraph 1 contains conclusions of law to which no answer is required. Insofar as an answer may be required, Google admits that the Complaint purports to assert copyright infringement and to seek injunctive relief.
2. Google denies the allegations of Paragraph 2.
3. Google admits that certain headlines, lead fragments, and thumbnail links appear on <http://news.google.com>, but otherwise denies the allegations of Paragraph 3.
4. Paragraph 4 contains conclusions of law to which no answer is required. Insofar as an answer may be required, Google lacks knowledge or information sufficient to form a belief as to whether this lawsuit satisfies the necessary prerequisites for subject matter jurisdiction,

including AFP's proper registration in the United States Copyright Office of the copyrights alleged to be infringed, and on that basis denies the allegations of Paragraph 4.

5. Paragraph 5 contains conclusions of law to which no answer is required. Insofar as an answer may be required, Google avers that it has multiple offices throughout the U.S., including in California and the District of Columbia, and is incorporated in Delaware. Google lacks knowledge or information sufficient to form a belief as to whether this lawsuit satisfies the necessary prerequisites for subject matter jurisdiction, including AFP's proper registration in the United States Copyright Office of the copyrights alleged to be infringed, and on that basis denies the conclusion of subject matter jurisdiction in Paragraph 5.

6. Paragraph 6 contains conclusions of law to which no answer is required. Insofar as an answer may be required, Google avers that it does not contest personal jurisdiction in this case.

7. Paragraph 7 contains conclusions of law to which no answer is required. Insofar as an answer may be required, Google avers that it does not contest personal jurisdiction in this case.

8. Paragraph 8 contains conclusions of law to which no answer is required. Insofar as an answer may be required, Google denies that its actions have injured AFP and avers that it does not contest venue in this case.

9. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 9, and on that basis denies them.

10. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 10, and on that basis denies them.

11. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 11, and on that basis denies them.

12. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 12, and on that basis denies them.

13. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 13, and on that basis denies them.

14. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 14, and on that basis denies them.

15. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 15, and on that basis denies them.

16. Google avers that AFP appears to have filed with the U.S. Copyright Office some copyright registrations that AFP described as group registrations for automated databases, but otherwise lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 16, and on that basis denies them.

17. Google denies the allegation that AFP news stories are available only by subscription to one of AFP's wire services, and lacks knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 17 and on that basis denies them.

18. Google denies that a "story lead" necessarily consists only of the first sentence of a story and that headlines and story leads are "qualitatively the most important aspects of a story." Google avers that it is commonly understood and practiced in the field of journalism that headlines and story leads (especially of news stories) disclose the basic facts of the article, specifically, the facts referred to as the "5 Ws," who, what, when, where and why. Google lacks

knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 18, including without limitation the extent to which AFP “painstakingly creates” its headlines and leads, and on that basis denies them.

19. Google admits that AFP appears to have filed with the United States Copyright Office some copyright registrations that AFP described as group registrations for automated databases, but otherwise lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 19, and on that basis denies them.

20. Google admits the allegations of Paragraph 20.

21. Google avers that it offers searches of text on the web, images on the web, news on the web, shopping sites on the web, and other special interest categories. Google lacks knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 21, including AFP’s meaning as to “separate” search engines, and on that basis denies them.

22. Google admits that it offers Internet advertising solutions, and avers that certain aspects thereof are identified at a general level as “AdWords” and “AdSense,” and that certain aspects of “AdWords” and “AdSense” involve keyword targeting. Google otherwise denies the allegations of Paragraph 22.

23. Google avers that it regularly offers advertising services to advertisers, including to customers in this judicial district. Google otherwise denies the allegations of Paragraph 23.

24. Google avers that it offers an Internet-based information location tool called “Google News” at <http://news.google.com>, but denies the allegations that Google News is a “collection of current news stories . . . and photographs” and “displays these news stories.” Google avers that Google News is instead an index of links to news stories and related

photographs that third parties have already made publicly available on the Internet, at any of more than 4,500 web sites that host those news stories and related photographs. Google further avers that Google News links take the form of, and are displayed on Google News as, (i) headlines, sometimes accompanied by lead fragments which identify the news story and direct users to it, *i.e.*, to the web site hosting and displaying the story, and (ii) thumbnail links, which identify the photograph and direct users to the web site hosting and displaying it. Google admits that Google News endeavors to maintain links to content that is about thirty (30) days old or less, and that it can organize links into various sections including those referenced in Paragraph 24. Google lacks knowledge or information sufficient to form a belief as to what AFP considers a “search service” or a “news aggregation service,” but avers that Google News aggregates links to news stories, presenting them as an index to users (as noted in footnote 1, Google is not including the news-based keyword search function available in Google News within its use of the term “Google News” as it does not understand the search feature to be included within the scope of the Complaint). Google further avers that Google News is, like other Google services or tools, based upon Google’s proprietary “web crawlers” that search and organize the huge amount of information on the Internet so that users can easily locate and identify where on the web there is information that they are interested in. Google otherwise denies the allegations in Paragraph 24.

25. Google admits that an English language version of Google News was released on or around the date alleged in Paragraph 25, and otherwise denies the allegations of Paragraph 25.

26. Google admits that various Google search pages, *e.g.*, at <http://www.google.com>, include a blank keyword entry form accompanied by a “search” button, and that users may input keywords and initiate a search. Google further avers that the Google News home page does not

require a keyword search initiated by a user (see footnote 1 and Paragraph 24), and can include a multiple-column layout with links to news stories hosted on other Internet web sites, and accompanying thumbnail links to photographs hosted on other Internet web sites. Google also avers that a lead fragment may sometimes be included with such links. Moreover, Google avers that Google News may sort such links into various categories (which may be customized by users) including those listed in Paragraph 26. Google otherwise denies the allegations in Paragraph 26.

27. Google admits that the “Google News” home page includes links to news stories hosted on other Internet web sites, and that with respect to any given topic, such links consist of one boldface headline sometimes accompanied by a lead fragment, accompanied by the age of the story and name of the source web site. Google further admits that two more headline links to other news stories on the same topic, at other sources, typically are included below the initial link but without the boldface type and with no portion of the lead, but noting the source, and that several additional links to sources are provided as links with no headline or lead. Google further admits that links to news stories sometimes are accompanied by a thumbnail link to a photograph hosted on another Internet web site, which may or may not be the web site that is the source of the headline and lead fragment. Google denies the remaining allegations of Paragraph 27.

28. Google avers that the Exhibits A1, A2, A3, and A4 demonstrate that the conduct alleged by AFP would not infringe any rights of AFP. The Exhibits demonstrate, among other things, that the headlines AFP asserts are its own often are *de minimis* and contain no copyrightable subject matter (*e.g.*, “Le mystere Julia,” Ex. A3) or contain no expression distinct from the underlying facts and ideas (*e.g.*, “Pope stay in hospital extended till Easter,” Ex. A2). Google further avers that story leads contain *de minimis*, if any, expression distinct from the

underlying facts and ideas (*e.g.*, “Pope John Paul II spent another night at Rome’s Gemelli hospital on Friday, with doctors yet to decide on a date for his discharge,” Ex. A2), that the thumbnail links provided by Google News are different in kind, function and use from the underlying photographs (*e.g.*, links in Exhibit A1), and that Google News may not include the entire headline or story lead (*e.g.*, example in Ex. A4). Google further avers that, though it considers the Complaint to be without merit, since the filing of the original complaint Google has endeavored to exclude links to stories and photographs containing any information suggesting that AFP asserts an interest in the stories or photographs. Google avers that any use it made of portions of works in which AFP allegedly owns copyright, if any, was entirely lawful. Google otherwise denies the allegations of Paragraph 28.

29. Google denies the allegation of Google’s unauthorized use, and lacks knowledge or information sufficient to form a belief as to the allegations of unauthorized use by the “source” (*i.e.*, the host web site to which the Google News link is directed) and on that basis denies those allegations of Paragraph 29. To the extent Paragraph 29 purports to contain (*e.g.*, somewhere in the accompanying screen shots) further or more specific allegations, Google lacks knowledge or information sufficient to form a belief as to such allegations and on that basis denies them.

30. Google denies the allegations of Paragraph 30.

31. Google denies that it is “using AFP’s photographs,” and that any other service utilizes thumbnail links in the manner that Google News does. Otherwise, Google lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 31, including the precise characteristics of AFP’s subscribers, what they pay for, and their use of AFP photographs, and therefore denies the allegations of Paragraph 31 on that basis as well.

32. Google admits that the Google News information location tool, as described in Paragraph 24 of this Answer, has various foreign language versions consisting of links to foreign language web sites. Google denies the remaining allegations of Paragraph 32.

33. Google lacks knowledge or information sufficient to form a belief as to AFP's awareness, and on that basis denies allegations of Paragraph 33 relating to AFP's awareness. Google denies the remaining allegations of Paragraph 33, and incorporates its answer to Paragraph 28 as if fully set forth herein.

34. Google denies the allegations of Paragraph 34 as to Google's "likely use" in the future. Google is without sufficient information regarding what AFP alleges are "AFP's photographs, headlines and text" or whether such allegations are true, to form a belief as to the allegations contained in Paragraph 34, and on that basis denies them. Google further avers that, although it considers AFP's complaint to be without merit, since the filing of the original complaint in this matter, it has endeavored to exclude links to stories and photographs containing any information suggesting that AFP asserts an interest in the stories or photographs. Finally, Google avers that it follows widely publicized and known Internet standards for permitting web site operators to exclude, at any time, their web sites and the content thereon from Google News and Google's other indexing and searching products. Google provides notification of this fact and publishes on its web site the instructions for exclusion.

35. Google denies the allegations of Paragraph 35.

36. Google denies the allegations of Paragraph 36.

37. Google denies the allegations of Paragraph 37.

38. Google denies the allegations of Paragraph 38.

39. Google denies the allegations of Paragraph 39.

40. Google denies the allegations of Paragraph 40, except that it admits that before AFP filed suit, AFP made assertions to Google similar to some of those contained in Paragraph 40. Moreover, Google avers that after AFP first made such assertions, AFP gave Google reason to believe that AFP did not, in fact, want Google to remove links to material allegedly owned by AFP or to remove any purported “AFP material” from Google News. When Google learned (by AFP’s original complaint filed in this action) that AFP did, in fact, want all purported “AFP material” to be removed from Google News, Google took steps to exclude links to stories and photographs containing any information suggesting that AFP asserts an interest in the stories or photographs.

41. Google denies the allegations of Paragraph 41.

42. Google denies the allegations of Paragraph 42.

43. Google admits that Exh. B includes a news article, but denies that the allegations of Paragraph 43 accurately characterize the article and any Google plan or result of such plan.

44. Google denies the allegations of Paragraph 44.

45. Google denies the allegations of Paragraph 45.

46. Google denies the allegations of Paragraph 46.

47. Google denies the allegations of Paragraph 47.

COUNT I

(Alleged Copyright Infringement in Photographs)

48. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

49. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 49, and on that basis denies them.

50. Google denies that it has reproduced and publicly displayed anything that can fairly be said to be AFP’s claimed photographs. Google lacks knowledge or information

sufficient to form a belief as to the allegations contained in Paragraph 50, and on that basis denies them.

51. Google denies the allegations of Paragraph 51.

52. Google denies the allegations of Paragraph 52.

53. Google denies the allegations of Paragraph 53.

54. Google denies the allegations of Paragraph 54.

55. Google denies the allegations of Paragraph 55.

COUNT II

(Alleged Copyright Infringement in Headlines)

56. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

57. Paragraph 57 contains conclusions of law to which no answer is required. To the extent Paragraph 57 alleges facts, Google lacks knowledge or information sufficient to form a belief as to those allegations, and on that basis denies them. Without limiting the foregoing, Google specifically denies that headlines in AFP news stories contain copyrightable text.

58. Google denies that the headlines included in the links on the Google News information location tool are protected by copyright. Google lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 58 and on that basis denies them.

59. Google denies the allegations of Paragraph 59.

60. Google denies the allegations of Paragraph 60.

61. Google denies the allegations of Paragraph 61.

62. Google denies the allegations of Paragraph 62.

63. Google denies the allegations of Paragraph 63.

COUNT III

(Alleged Copyright Infringement in Story Leads)

64. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

65. Paragraph 65 contains conclusions of law to which no answer is required. To the extent Paragraph 65 alleges facts, Google lacks knowledge or information sufficient to form a belief as to those allegations, and on that basis denies them. Without limiting the foregoing, Google specifically denies that the story leads in AFP news stories contain copyrightable text.

66. Google denies that the story leads accompanying the links on the Google News information location tool are copyrighted. Google lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 66 and on that basis denies them.

67. Google denies the allegations of Paragraph 67.

68. Google denies the allegations of Paragraph 68.

69. Google denies the allegations of Paragraph 69.

70. Google denies the allegations of Paragraph 70.

71. Google denies the allegations of Paragraph 71.

COUNT IV

(Alleged Removal or Alteration of Copyright Management Information)

72. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

73. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 73, and on that basis denies them.

74. Google lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 74, and on that basis denies them.

75. Paragraph 75 contains conclusions of law to which no answer is required. Insofar as an answer may be deemed required, Google lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 75 and on that basis denies them.

76. Google lacks knowledge or information regarding, *inter alia*, what AFP alleges are “AFP’s photographs,” whether such allegations are true, and whether such photographs contain any watermark, credit line or copyright notice, sufficient to form a belief as to the allegations contained in Paragraph 76 and on that basis denies them. Google further denies that it reproduces AFP’s photographs and that it removes CMI.

77. Google lacks knowledge or information regarding, *inter alia*, what AFP alleges are “AFP’s photographs,” whether such allegations are true, and whether such photographs contain any watermark, sufficient to form a belief as to the allegations contained in Paragraph 77 and on that basis denies them. Google further denies that it reproduces AFP’s photographs and that the resolution of its thumbnail links is small “so that” anything is made illegible.

78. Google lacks knowledge or information regarding, *inter alia*, what AFP alleges are “AFP’s headlines and story leads,” whether such allegations are true, and whether such headlines or story leads contain copyright management information, sufficient to form a belief as to the allegations contained in Paragraph 78 and on that basis denies them. Google further denies that it removes copyright management information from headlines or story leads purportedly owned by AFP and that it reproduces story leads.

79. Google denies the allegations of Paragraph 79.

80. Google denies the allegations of Paragraph 80.

81. Google denies the allegations of Paragraph 81.

82. Google denies the allegations of Paragraph 82.

83. Google denies the allegations of Paragraph 83.

COUNT V

(Alleged State Law Misappropriation of Hot News)

84. Google realleges and incorporates the prior paragraphs, as if fully set forth herein.

85. Google lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 85 and on that basis denies them.

86. Google lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 86 and on that basis denies them.

87. Google lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 87 and on that basis denies them. Google also avers that its ranking algorithms rank a story more highly if more independent news sources on the Internet are reporting on the subject of the news story, and that Google News publishes links to multiple sources of that news.

88. Google lacks knowledge or information sufficient to form a belief as to the allegation that AFP has engaged in costly efforts, and on that basis denies it. Google denies the remaining allegations of Paragraph 88.

89. Google denies the allegations of Paragraph 89.

90. Google lacks knowledge or information sufficient to form a belief as to the “quality” of AFP’s services, but denies that any of Google’s activities would put such “quality” in jeopardy. Google denies the remaining allegations of Paragraph 90.

91. Google is without sufficient information regarding, *inter alia*, what AFP alleges are “AFP photographs, headlines and lead sentences” or whether such allegations are true, to form a belief as to the allegations contained in Paragraph 91, and on that basis denies them. Google avers that Google News includes links to stories and links to photographs that are up to about thirty (30) days old, and that such links often first appear on Google News within 24 hours, if not sooner, of the story’s posting on the host web site. Google denies the remaining allegations of paragraph 91 and avers that its ranking algorithms rank a story more highly if more

independent news sources on the Internet are reporting on the subject of the news story, and that Google News publishes links to multiple sources of that news.

92. Google denies the allegations of Paragraph 92.

93. Google denies the allegations of Paragraph 93.

FIRST ADDITIONAL DEFENSE

94. Counts I, II, III, IV, and V fail to state a claim on which relief can be granted.

SECOND ADDITIONAL DEFENSE

95. The works purportedly infringed according to Counts II and III do not constitute copyrightable subject matter.

THIRD ADDITIONAL DEFENSE

96. The conduct alleged to infringe AFP's copyrights in Counts I, II, and III is fair use.

FOURTH ADDITIONAL DEFENSE

97. The material alleged to infringe in Counts I, II, and III is not substantially similar to AFP's copyrighted work(s), if any, and otherwise the conduct alleged to infringe constitutes *de minimis* use (if any use at all) of copyrighted works.

FIFTH ADDITIONAL DEFENSE

98. AFP has authorized or licensed the uses of its works alleged in the Complaint, or exhausted the rights asserted therein, *inter alia*, through AFP's agreements with its subscribers and, on information and belief, the terms of such agreements allowing widespread Internet copying, distribution, and display of works and "hot news" allegedly owned by AFP, including access by Internet indexing tools such as Google News.

SIXTH ADDITIONAL DEFENSE

99. AFP's claims are barred, in whole or in part, by the doctrines of waiver, estoppel, and laches.

SEVENTH ADDITIONAL DEFENSE

100. AFP has failed to take steps to mitigate damages, if any, and AFP's recovery, if any, must be barred or diminished accordingly.

EIGHTH ADDITIONAL DEFENSE

101. Count V is preempted by the Copyright Act.

NINTH ADDITIONAL DEFENSE

102. Counts I, II, III, IV, and V are barred by the doctrines of copyright misuse and unclean hands.

TENTH ADDITIONAL DEFENSE

103. Google functions as a "Service Provider" within the meaning of Section 512(k) of the Copyright Act, which precludes monetary relief and limits injunctive relief for Counts I, II, and III.

ELEVENTH ADDITIONAL DEFENSE

104. Statutory damages and attorneys fees for Counts I, II, and III are precluded by AFP's failure, on information and belief, to properly and timely register its purported copyrights.

TWELFTH ADDITIONAL DEFENSE

105. The statutory damages sought in Counts I, II, III, and IV are unconstitutional as void for vagueness and would violate the guarantees of substantive and procedural due process of law.

THIRTEENTH ADDITIONAL DEFENSE

106. The statutory damages sought in Counts I, II, III, and IV, to the extent awarded at all, would be limited by substantive and procedural due process requirements and by common

law prohibitions on excessive civil punishment, and therefore must, *inter alia*, be reasonably related to the actual harm of any violation and not otherwise excessive.

COUNTERCLAIMS

For its Counterclaims, Google incorporates the prior paragraphs as if fully set forth herein and further alleges as follows:

BACKGROUND AND DESCRIPTION OF GOOGLE NEWS

107. The Internet is a decentralized network of millions of computers, owned and controlled by millions of independent entities and persons, storing literally billions of “web pages” of constantly-changing content.

108. Without some way of organizing the mass of information on the Internet, in a way that users can locate material of interest to them, the size of the Internet limits its utility and potential.

109. Google’s business and mission is to organize the world’s information and make it universally accessible and useful.

110. Pursuant to its mission, Google offers a variety of information location tools that search the Internet for certain kinds of information, index or catalog such information, and permit users to find information of interest. Google News is one such tool.

111. Google News, located at news.google.com, is a Google product that assists users in locating news on the Internet.

112. Google News does not provide any full news stories, nor any full sized photographs to users.

113. Rather, Google News provides users with links to news stories and links to news photographs accompanying news stories that are posted on more than 4,500 different web sites

throughout the Internet, which (other than a small number of news blogs hosted by Google) are not hosted or owned by Google.

114. Only a very small portion of the web sites indexed by Google News contained content allegedly owned by AFP.

115. A link is, in layman's terms, a pointer to a specific web page on the Internet. Clicking on a link takes a user to the web page designated by that link. Links are critical to navigating the Internet because they permit users easily to jump from page to page without having to know or remember and enter the (often cumbersome) "address" or Uniform Resource Locator of a web page.

116. The links displayed on Google News are organized logically and automatically (without intervention by Google employees or agents) by news topic, or in a customized fashion chosen by the user.

117. The links on Google News are labeled to identify to users the subject of the news story linked to. Namely, the two types of links consist of (i) story headline links, sometimes accompanied by lead fragments, and (ii) thumbnail links, as previously defined herein. Both types of links point to news stories (in the case of the thumbnail links, a photograph accompanying a news story) on third party web sites separate from Google News.

118. A user of Google News cannot read any news story, or meaningfully view any photograph, on Google News, but can do so by following the corresponding link displayed on Google News to the site hosting the story or photograph. Following the link, the user leaves the Google News web site and is taken to the third-party web site where the respective story or photograph is hosted (stored on the third party's web site server) and displayed. In short, a Google News user need only click on a headline link or thumbnail image link to be directed to

the third party web site hosting and displaying the news story or photograph of interest, respectively.

119. The technology underlying Google News is proprietary (including without limitation the subject of numerous patents and patent applications), complex, and the result of substantial research and development and related investment by Google. For example, Google employs state of the art “web crawlers” to constantly and automatically search the Internet for new and relevant news stories, automatically creates the aforementioned links to these stories, and automatically organizes the links on Google News.

120. Google News, like other Google tools, follows widely publicized and known Internet standards, including standards allowing third party web sites to “opt out” of Google News. Google’s web site includes detailed instructions as to these standards. Web site operators therefore may exclude their web sites and the content thereon from Google, either to various degrees or entirely, *e.g.*, by preventing Google’s “web crawlers” from accessing the web site and identifying the content thereon.

121. The aforementioned “opt out” ability is well known to Internet web site operators. It is well known that “do not crawl” and similar instructions can be, and sometimes are, conveyed in web sites to prevent automated Internet tools and services from indexing the site. More specifically, web site operators typically are aware of a standard file called “robots.txt” that will exclude web crawlers such as Google’s, and <meta> tags that can be placed on a page to prevent being part of search results.

122. On information and belief, AFP and its subscribers and licensees were aware that they had the ability to exclude their respective web sites (and the content thereon) from being accessed or linked to by Google, in Google News.

123. On information and belief, many or all AFP subscribers, licensees, and AFP itself did not employ “opt out” tools or other standard files or protocols to preclude Google News from searching and indexing the content on web sites allegedly including AFP copyrighted works, and thereby allowed Google News to create links to such sites.

124. When web site operators place content, including AFP news stories, on their web sites not requiring any password or otherwise restricting access, they are intentionally making that content available to be viewed by any of the millions of users with a computer and Internet connection.

125. Google News does not, and cannot, link users directly to news stories on web sites that require a password for access, such as the online Wall Street Journal, unless given permission. Indeed, Google cannot “crawl” such restricted sites and thereby identify the content they include without permission.

126. Thus, the content to which Google News directs users is content that the respective web site hosts want to be widely viewed.

NATURE OF GOOGLE NEWS’ ALLEGED “USE” OF “COPYRIGHTED WORKS”

127. Google News provides links to news stories and news photographs and may have previously provided links to alleged copyrighted works created or owned by AFP.

128. At no time has Google News provided users with any AFP story or photograph in its entirety. Rather, Google News provides, at most, links containing the headline, lead fragment, and a thumbnail link.

129. Google News transforms the headline, and sometimes approximately the first sentence and a photograph, from underlying news stories by creating links as described in paragraph 128.

130. Google News further transforms the headlines, lead fragments and thumbnails by categorizing them by subject matter and creating an index of news stories and thumbnail images that users may use to find and select web sites containing information relevant to them.

131. Google News transforms the headlines, lead fragments and thumbnails from underlying news stories by indexing them by subject matter.

132. Google News transforms the headlines, lead fragments and thumbnails from underlying news stories by informing the reader of the age of the story.

133. Google News transforms the headlines, lead fragments and thumbnails from underlying news stories by informing the reader of the source of the story.

134. Google News transforms the headlines, lead fragments and thumbnails from underlying news stories by organizing and ranking them using proprietary Google algorithms developed to reflect the collective wisdom of the Internet regarding what constitutes current news of note.

135. Google News transforms the photographs associated with underlying news stories by creating a small, very low resolution thumbnail image of fewer than 100 pixels by 100 pixels to serve as a link to the source web site.

136. A primary purpose of news stories is to educate the reader about current events or other subjects of political, social, scientific, or other importance. Google News' use of the headline, where applicable, lead fragment, and, where applicable, thumbnail link from underlying news stories fulfills educational purposes. Google News' use of the headline, where applicable, lead fragment, and, where applicable, thumbnail link from underlying news stories furthers the goal of news reporting by directing users to news stories.

137. Google does not profit from inclusion of any particular headline, lead fragment, or thumbnail link in Google News.

138. At all times, links on Google News to related AFP stories, if any, constituted a miniscule fraction of the material on Google News.

139. Google News has instituted measures to no longer link to, or provide users with any part of, allegedly copyrighted material in which it may appear that AFP asserts an ownership interest. These measures appear to have succeeded. Google is currently unaware of any links to alleged AFP material on Google News.

NATURE OF THE WORKS REFERENCED IN AFP'S COMPLAINT

140. The news stories that provide the headlines and leads that form the basis of AFP's complaint ("AFP news stories") are fact-based works that are intended to, and do, communicate news or factual information to the public.

141. The primary purpose of AFP news stories is to convey facts, *i.e.*, news or information, to readers.

142. The headlines of AFP news stories generally seek to encapsulate the factual content of the story.

143. The headlines of AFP news stories often consist of fewer than ten words.

144. The first sentences of AFP news stories typically contain the most significant facts.

145. It is a generally-accepted principle of journalism that a news story lead should provide the "5 W's" of the story, including "who" and "what" the story is about, "when" and "where" the subject events occurred, and "why" they occurred and may be relevant to the reader. Newswire services, on information and belief including AFP, practice this principle.

146. News story leads, including story leads of AFP news stories, generally provide the facts referenced in paragraph 145 in a paragraph of typically four or fewer sentences.

147. Even outside the field of journalism, as a matter of custom and practice news stories generally are identified by the title and the facts provided in the story lead. For example, a “bluebook” legal citation to a news story typically includes the title of a story and a parenthetical stating the subject matter of the story, often from the first sentence.

148. A logical way to identify a news story in an index or directory is by listing its title and first sentence.

149. The first sentence of an AFP news story typically constitutes a small fraction of the overall content of the story.

150. Photographs accompanying AFP news stories typically are intended to convey the subject matter of the news story they are published with.

EXTENT OF ALLEGED USE OF AFP WORKS BY GOOGLE NEWS

151. The links presented in Google News, including, in the past, links related to news stories or photographs allegedly owned by AFP, sometimes include or are paired with a lead fragment typically consisting of not more than the first sentence of the story and in any event fewer than 300 characters (including spaces).

152. AFP news headlines typically include ten or fewer words.

153. AFP news stories typically are hundreds of words long.

154. The headline and lead fragment, if any, presented in the past as (or with) a Google News link to a given AFP news story, typically constituted less than 5% of that AFP news story.

155. Use of alleged AFP headlines, text, and thumbnail images on Google News typically constituted, on information and belief, a miniscule percentage, if any, of all of the material on Google News.

156. Google News included at most only one thumbnail link to an alleged AFP photograph for any given news story.

IMPACT OF GOOGLE NEWS ON THE MARKET FOR AFP WORKS

157. A news headline and lead fragment are not qualitatively or quantitatively the same as the news story itself, and do not substitute for reading the news story itself.

158. Similarly, a thumbnail link of fewer than 100 pixels by 100 pixels is not qualitatively or quantitatively the same as the source photograph itself and does not substitute for viewing the photograph.

159. On information and belief, the web sites to which the links containing headlines and lead fragments, or thumbnail links, allegedly owned by AFP on Google News referred users were web sites operated by AFP subscribers under license with AFP to provide AFP news stories or photographs on such web sites. Such AFP subscribers typically provide AFP news stories and photographs to Internet users free of charge.

160. On information and belief, AFP's licensees typically earn advertising revenue from their web sites. Typically, and in the case of AFP's licensees, the ability to earn advertising revenue from a web site is enhanced if "traffic" to the web site increases, *i.e.*, if more users are accessing or viewing pages on the web site.

161. On information and belief, AFP's licensees typically benefit from an increase in traffic to their web sites.

162. Publishers of news web sites, including AFP's licensees, recognized and still recognize value in increasing the traffic to their web sites. On information and belief, publishers, including AFP's licensees, have paid third parties for delivering traffic to their news web sites, *e.g.*, by third parties' providing of links to news web sites and inducing users to "click through" those links to such web sites.

163. On information and belief, AFP's licensees benefited from web site traffic generated for free by Google News, *i.e.*, Google News users following links to AFP's licensees' web sites.

164. The benefit obtained by AFP's licensees generated by Google News increased the value of AFP's content to AFP's licensees.

165. On information and belief, at least some of AFP's licensees are in favor of inclusion of headline links, lead fragments and thumbnail links in Google News, and believe that such inclusion benefits them.

166. Far from competing with or harming the market for news stories and accompanying photographs, Google News directly benefits the sources of news stories and photographs, including (previously) newswires such as AFP, by efficiently directing readers to the stories and photographs of interest.

**THE PUBLIC INTERESTS SERVED BY GOOGLE NEWS
AND THE "USE" IT MAKES OF NEWS CONTENT**

167. The public interest is served by educating citizens as to current events and other items of news.

168. The public interest is served by providing and informing citizens of various different sources of news, from different perspectives.

169. The public interest is served by organizing a large volume of information in a way that can be easily found and used by citizens. For example, a public library with thousands of volumes would be of limited use without an index or some other means to organize and find particular volumes of interest.

170. As the United States Supreme Court has observed, the World Wide Web is "comparable, from the readers' viewpoint, to . . . a vast library including millions of readily

available and indexed publications.” Google News serves an important public interest as one of the indexes to news publications on the World Wide Web.

171. Google News directs users to sites containing news stories in thousands of newspapers and other news sources online, and in so doing furthers the objectives and benefits of news reporting, learning, and cultural development.

172. Google News directs users to sites containing items of importance to public discourse and debate, from diverse viewpoints, and in so doing furthers the interests of a vibrant political and social discourse, and the First Amendment.

173. As expressed by the United States Congress and various other governmental bodies, the public interest is served by: (a) the continued development and enhancement of the Internet, (b) improvement of the efficiency of the Internet and use thereof, and (c) expansion of the variety and quality of services on the Internet, including services for locating information on the Internet.

174. Google News organizes a substantial amount of important factual information on the Internet in a way that assists citizens in finding particular factual information, and in so doing makes the Internet more efficient and useful.

FIRST COUNTERCLAIM

(Declaratory Judgment of Noncopyrightable Subject Matter)

175. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

176. AFP’s headlines and parts of “story leads” or other text that it alleges are infringed consist, in whole or in substantial part, of mere facts and ideas that are not subject to copyright protection.

177. AFP has added no creative expression, or *de minimis* expression, to those facts and ideas.

178. Accordingly, AFP's headlines and parts of story leads or other text that it alleges are infringed, are not copyrightable subject matter under the Copyright Act.

SECOND COUNTERCLAIM

(Declaratory Judgment of Google's Lawful Use)

179. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

180. To the extent that Google News utilizes or utilized any of AFP's copyrighted works, the nature of such use is transformative, informational, and educational.

181. To the extent that AFP owns copyright in any of the works referenced in its Complaint, such works are heavily fact-based and are entitled to limited (if any) copyright protection.

182. To the extent that Google News utilizes or utilized any of AFP's copyrighted works, the portion used is small in relation to the copyrighted work as a whole, and miniscule in relation to Google News as a whole, with its thousands of links to thousands of various sources.

183. Google News has had no adverse impact on the commercial market for AFP's alleged copyrighted works, and in fact substantially enhances that market and the value of such works by, *inter alia*, directing Google users to the AFP news stories posted by AFP's subscribers and licensees.

184. Google News serves a variety of important public interests, and the public interest is best served by Google News continuing to operate so that it may direct the public to any news source web sites that make news freely accessible to the public on the Internet.

185. Accordingly, Google's utilization of AFP's allegedly copyrighted works, if any, constitutes fair use and otherwise is lawful.

186. Additionally or alternatively, to the extent that AFP owns copyright in any of the works referenced in its Complaint, and to the extent Google News utilizes or practices any of AFP's exclusive rights in copyrighted works, Google utilizes such a small portion of the work as to constitute lawful, *de minimus* use.

THIRD COUNTERCLAIM

(Declaratory Judgment of License or Authorization)

187. Google realleges and incorporates the prior paragraphs as if fully set forth herein.

188. On information and belief, AFP provides news stories and photographs to third parties, including its subscribers and licensees, intending and authorizing such third parties to post the stories and photographs on their publicly-available Internet web sites.

189. On information and belief, AFP is and has been aware of automated programs that search the Internet and index and organize content from publicly available Internet web sites.

190. On information and belief, in some or all of its agreements or contracts with subscribers or licensees of its newswire, image database, or other works alleged to be infringed or misappropriated in its Complaint, AFP has not required subscribers or licensees to activate or implement any "do not crawl" or other technical features to prevent the automatic searching, scanning, indexing, and/or other use of AFP's alleged content on the subscriber's or licensee's web site by third party automated services.

191. Indeed, AFP realizes that restricting "crawling" and indexing of its content, and otherwise requiring AFP content to be excluded from Internet indexes, directories and similar tools, would make its content less valuable to licensees.

192. Accordingly, to the extent Google News utilizes any works or other material owned by AFP, Google's utilization thereof is licensed or authorized by AFP, implicitly if not explicitly, based *inter alia* upon AFP's conduct, knowledge, and contracts with third parties.

PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above, Google prays for judgment to be entered:

- (a) Dismissing AFP's Complaint.
- (b) Declaring that AFP owns no copyright in the headlines and portions of stories asserted in this action, that Google has not infringed any AFP copyrights, and that Google's use, if any, of AFP's alleged works and "hot news" was and is authorized or licensed by AFP and otherwise is lawful.
- (c) Granting no injunctive, monetary or other relief to AFP, and denying AFP's request for attorneys' fees and costs.
- (d) Awarding Google its costs and attorneys fees incurred in this action, as permitted by law.
- (e) Granting Google other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Google requests a trial by jury on all claims so triable.

Respectfully submitted,

Dated: May 19, 2005

/s/ Thomas W. Kirby

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