

**ORIGINAL**

1 Kelly A. Evans  
 Nevada Bar No. 7691  
 2 SNELL & WILMER L.L.P.  
 3800 Howard Hughes Parkway, Suite 1000  
 3 Las Vegas, NV 89109  
 Telephone (702) 784-5200  
 4 Facsimile (702) 784-5400

5 David H. Kramer (Admitted Pro Hac Vice)  
 William O'Callaghan (Admitted Pro Hac Vice)  
 6 WILSON SONSINI GOODRICH & ROSATI  
 Professional Corporation  
 7 650 Page Mill Road  
 Palo Alto, CA 94304-1050  
 8 Telephone (650) 493-9300  
 Facsimile (650) 493-6811

9 Attorneys for Defendant GOOGLE INC.

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF NEVADA

13 BLAKE A. FIELD,  
 14 Plaintiff,  
 15 vs.  
 16 GOOGLE INC.,  
 17 Defendant.

No. CV-S-04-0413-RCJ-GWF

**GOOGLE INC.'S REPLY IN SUPPORT  
OF ITS MOTION FOR SUMMARY  
JUDGMENT**

18 AND RELATED COUNTERCLAIMS  
19  
20

**Snell & Wilmer**

LLP  
 LAW OFFICES  
 3800 HOWARD HUGHES PARKWAY, SUITE 1000  
 LAS VEGAS, NEVADA 89109  
 (702) 784-5200

21  
22  
23  
24  
25  
26  
27  
28

49

**Snell & Wilmer**

L.L.P.  
LAW OFFICES  
1800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702) 784-9200

**TABLE OF CONTENTS**

1		
2		<b>Page</b>
3	I.	INTRODUCTION ..... 1
4	II.	ARGUMENT ..... 2
5	A.	Field Has Not Established Copyright Infringement By Google. .... 2
6		a. Any Copying Resulting From A User Clicking On A
7		“Cached” Link Is Copying By The User, Not Google. .... 3
8		b. Offering “Cached” Links To Works Does Not Constitute
9		Distribution Of Copies..... 4
10		2. Google’s Automated Response To User Requests Does Not
11		Constitute Copyright Infringement. .... 5
12	B.	Google Is Entitled To Summary Judgment On Its Implied License Defense..... 7
13		1. Field Granted Google An Implied License By Choosing Not To
14		Utilize Industry Standard Protocols..... 7
15		2. Field Granted Google An Implied License Through His Affirmative
16		Conduct..... 8
17	C.	Google Is Entitled To Summary Judgment On Its Separate Estoppel
18		Defense. .... 9
19	D.	Google’s Operation Of Its System Cache Is A Fair Use. .... 11
20		1. <i>Kelly</i> Compels A Finding Of Fair Use..... 11
21		2. <i>Worldwide Church of God v. Philadelphia Church of God Is</i>
22		<i>Inapposite</i> ..... 13
23		3. Fair Use Factors..... 14
24		a. Factor One: Google’s Use Is Transformative, And At Most
25		Only Incidentally Commercial..... 14
26		i. Google’s Use Is Transformative. .... 14
27		ii. Whether Google’s Use Is Commercial Is Of Little
28		Relevance..... 15
		b. Factor Two: The Nature Of Field’s Made-For-Litigation
		Works Supports A Finding Of Fair Use. .... 16
		c. Factor Three: Google Used No More Of The Works Than
		Necessary For Its Transformative Use..... 17
		d. Factor Four: Google’s “Cached” Links Had No Negative
		Effect On The Market For, Or Value Of, Field’s Works..... 18
		e. Google’s Good Faith In Operating Its System Cache, And

**Snell & Wilmer**

LLP  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1800  
LAS VEGAS, NEVADA 89109  
(702) 784-7200

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	Field's Bad Faith In Manufacturing This Lawsuit, Weigh In Favor Of Fair Use.....	19
4.	Fair Use Summary.....	19
III.	CONCLUSION.....	20

**Snell & Wilmer**

L.L.P.  
LAW OFFICES  
OF  
3800 HOWARD HUGHES CENTER BOULEVARD, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702) 784-9200

1 **I. INTRODUCTION**

2 Plaintiff Blake Field’s contrived suit should go no further. Nowhere in his opposition  
3 brief does Field deny that he completely manufactured this copyright infringement claim to  
4 challenge Google’s “Cached” links in the hopes of reaping a multi-million dollar, undeserved  
5 windfall. More importantly, Field does not contest any of the facts that entitle Google to  
6 summary judgment on Field’s claim.

7 Through its now undisputed explanation of its system cache and Field’s machinations,  
8 Google has established that:

- 9 • Google automatically stores copies of Web pages in its cache in the process of  
10 creating an index of pages for its well-known search engine. Field has conceded that  
11 in this process Google did not infringe any of the copyrighted works he created and  
12 displayed on Web pages within his Web site. Indeed, Field has made clear that he  
13 desired to have Google make this copy and include the pages of his site within  
14 Google’s index.
- 15 • In displaying search results of the pages in its index, Google often displays a  
16 “Cached” link to the archival copy of a page its has stored within its cache.
- 17 • If a user clicks on a “Cached” link for a page, instead of the more prominent link to  
18 the original Web page, the user initiates a process by which he or she creates and  
19 retrieves a copy of the page stored in Google’s cache. Google’s involvement in this  
20 process is entirely automated and not volitional, thereby precluding any claim that  
21 Google itself is directly infringing any copyrighted work on the page.
- 22 • Industry standard protocols dictate that Web site operators must follow a simple  
23 procedure (include a “no-archive” meta-tag or an appropriate “robots.txt” file) to  
24 exclude their Web pages from search engine indexes and caches.
- 25 • Field failed to utilize these protocols for the pages of his site and took a number of  
26 additional, affirmative steps to induce Google to include his Web pages in its cache,  
27 fully expecting and desiring that Google display “Cached” links for those pages.
- 28 • Even if Google were somehow directly infringing copyrights through the creation or  
distribution of copies when a user clicks on a “Cached” link, the copy created has no  
impact on the market for the original page and contains no more of the page than is  
necessary to serve at least three transformative purposes:
  - Providing users (and operators) access to Web pages identified in Google’s  
search results when the page is otherwise unavailable;
  - Assisting researchers in identifying changes made to Web pages over time;  
and
  - Enabling users to understand why a Web page was identified in response to a  
search request by highlighting the user’s search terms as they appear on the  
page.

**Snell & Wilmer**  
LLP  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1 These facts and others set forth in Google’s opening brief demonstrate that Field cannot make a  
2 *prima facie* showing of infringement, establish Google’s affirmative defenses of implied license  
3 and estoppel, and warrant application of the fair use doctrine.

4 Field’s opposition (along with his own motion for summary judgment) demonstrates that  
5 he too believes these issues are ripe for summary judgment. Rather than seeking to create triable  
6 issues of fact, Field asks the Court to ignore controlling authority in favor of cases that are of  
7 questionable relevance and precedence. For example, Field’s sole support for his infringement  
8 argument relies on the *Webbworld* opinion, which has been thoroughly discredited. Similarly, to  
9 the extent Field discusses the Ninth Circuit’s controlling fair use opinion in *Kelly v. Arriba*, he  
10 would have the Court instead rely on a discussion from a prior opinion that was *withdrawn*, is  
11 *superseded*, and is *uncitable*.

12 In sum, Field’s opposition, much like his case, is a charade. Because the undisputed facts  
13 entitle Google to judgment as a matter of law, Google respectfully requests that the Court grant  
14 its motion.

15 **II. ARGUMENT**

16 **A. Field Has Not Established Copyright Infringement By Google.**

17 In its motion, Google challenged Field to show that Google infringed his copyrighted  
18 works through the operation of its system cache — specifically, by providing “Cached” links to  
19 pages containing Field’s works that were stored within Google’s cache.<sup>1</sup> While Field argues that  
20

21 <sup>1</sup> Perhaps recognizing the infirmity of a claim challenging Google’s display of  
22 “Cached” links, Field at times appears to suggest that Google is somehow liable for the copies  
23 the Googlebot originally made of the pages of his site. *See* Field Opp. at 3:1-3, 4:4-8. If he is  
24 taking such a position, it is utterly frivolous. In his pleadings and through discovery, Field  
25 made it abundantly clear that he was not challenging the original copying of the Web pages  
26 into the cache needed to include the site in the Google index, but only Google’s providing of  
27 links to works once they were in the Google cache. *See* Field’s First Amended Compl. for  
28 Copyright Infringement (Docket #5) (“Amended Compl.”), ¶¶30-32. In fact, Field expressly  
conceded, as he must, that Google’s operation of the Googlebot does not infringe Field’s  
copyrights. *See* Field Depo. at 143:13-16 (“Q. So you don’t object to Google’s initial copying  
of your web pages for purposes of creating the Google index, do you? A. That’s correct.”).  
Nor could he make an infringement claim, given his concession that he wanted the Googlebot  
to crawl his Web site and make it available through the Google search engine. *See* Field’s  
Answer to Counterclaims (Docket #23), ¶¶12, 14 (admitting that Field desired having his Web  
site included in the Google index and took affirmative steps to ensure this result). Indeed, in  
making its original copy of a Web page, the Googlebot is no different than any end-user who

(continued...)

1 Google both made and distributed copies of his works, he simply has not established direct  
2 copyright infringement.<sup>2</sup>

3 **a. Any Copying Resulting From A User Clicking On A “Cached”**  
4 **Link Is Copying By The User, Not Google.**

5 According to Field, Google reproduced Web pages containing his copyrighted works  
6 when users clicked on “Cached” links to those pages and downloaded their own copies. The  
7 undisputed record establishes, however, that the only copies made in this process are the copies  
8 made *by the end user*. See Brougher Decl. ¶8. Google itself does not make copies and thus is  
9 not liable as a direct copyright infringer. See *Religious Tech. Ctr. v. Netcom On-Line*  
10 *Communications Servs., Inc.*, 907 F. Supp. 1361, 1371-73 (N.D. Cal. 1995) (“*Netcom*”) (finding  
11 no direct infringement where third parties cause the copying to occur on an automated system);  
12 *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555-56 (4th Cir. 2004) (“*LoopNet*”)  
13 (applying *Netcom* holding to Web site where submitted real estate listings were reviewed and  
14 posted following brief review by defendant); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923,  
15 932 (N.D. Cal. 1996) (“*Sega*”) (applying *Netcom* holding to operation of bulletin board service  
16 containing infringing works).

17 Field completely ignores *Netcom* and *Loopnet*; even he recognizes them as squarely on  
18 point. Field’s attempt to distinguish Google’s third case, *Sega*, is unpersuasive. Field notes that  
19 the defendant in *Sega* did not itself place a copy of the material at issue onto its computer  
20 system. He claims, by contrast, that Google itself originally “uploaded” the pages containing his  
21 works to its cache. See Field’s Opposition Brief (“Field Opp.”) at 4. Field’s distinction is  
22 without a difference. Field does not challenge the propriety of Google’s original copying of the  
23 content onto its computers. See *supra* at 2 n.1. Like the bulletin board operator in *Sega*, Google

24 \_\_\_\_\_  
25 (...continued from previous page)  
26 visits a page and thereby makes a copy of it. See Field Depo. at 143:17-23.

27 <sup>2</sup> Field has never asserted, and could not establish, that Google is liable for *indirect*  
28 copyright infringement. See Amended Compl., ¶¶26-39 (alleging only direct infringement). The  
record is devoid of any evidence of direct infringement by a third party, or of any evidence  
supporting the multiple additional elements for a claim against Google of contributory  
infringement or vicarious liability. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, \_\_\_  
U.S. \_\_\_, 125 S. Ct. 2764, 2776 (2005) (describing requirements for indirect infringement).

**Snell & Wilmer**

L.L.P.  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1 possesses an initial copy of content on its computers that was not the product of its own  
2 infringement. Field, like the plaintiff in *Sega*, instead challenges the subsequent copies  
3 downloaded by end users from a defendant’s computers. Google, like the bulletin board operator  
4 in *Sega*, does not itself make those additional copies or directly infringe copyrights when end  
5 users make them. *See Sega*, 948 F. Supp. at 931-32. As a matter of law, Google did not directly  
6 infringe Field’s copyrights by allowing end users to download copies from its computers.

7 **b. Offering “Cached” Links To Works Does Not Constitute**  
8 **Distribution Of Copies.**

9 Field argues that by making his works available through “Cached” links, Google directly  
10 infringes his exclusive right to “distribute copies.” *See* Field Opp. at 2-3. He cites no authority  
11 for this proposition, and *UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re*  
12 *Napster)*, 377 F. Supp. 2d 796, 803 (C.D. Cal. 2005), holds otherwise. As that case explains,  
13 providing an electronic link to a copyrighted work does not constitute distribution of copies of  
14 that work. *See id.* (holding that copyright infringement requires actual transfer of a copy of a  
15 copyrighted work; merely providing links through which users could access copyrighted works is  
16 not direct infringement). Field tries to distinguish *In re Napster* by claiming that Google —  
17 unlike Napster — hosts content and allows that content to be accessed by end users. Again,  
18 Field’s purported distinction is inapposite. The *In re Napster* court was not concerned with  
19 where the electronic content at issue resided; its concern was whether the defendant was  
20 distributing copies of the content merely by making it accessible to others.

21 A copyright holder has the exclusive right to “distribute copies or phonorecords of the  
22 copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or  
23 lending.” *See* 17 U.S.C. § 106(3) (2005). The Copyright Act thus precludes a party who  
24 possesses *copies* of a work from giving *those copies* to others. A party who possesses a copy of  
25 a work and merely makes it available to others so that they may make their own copy does not  
26 violate the distribution right.<sup>3</sup> This does not constitute distributing “copies” under the Copyright

27  
28 <sup>3</sup> To be clear, that party may be assisting others in their creation of copies (authorized or not), but questions of indirect copyright infringement are not presently before the Court.

1 Act. *See* 17 U.S.C. § 101 (2005) (“Copies” defined as “material objects, other than  
2 phonorecords, in which a work is fixed by any method now known or later developed and from  
3 which the work can be perceived, reproduced, or otherwise communicated, either directly or with  
4 the aid of a machine or device.”). In sum, Google does not, by providing “Cached” links to  
5 copies of Web pages stored in its cache, “distribute copies” of those pages within the meaning of  
6 the Copyright Act.

7 **2. Google’s Automated Response To User Requests Does Not Constitute**  
8 **Copyright Infringement.**

9 Even if Field could attribute either copying or distribution of copies to Google, his  
10 infringement claim would still fail because Field has not offered any evidence of volitional  
11 conduct by Google. Any copying or distribution Field could identify would undeniably take the  
12 form of an automated response by a Google computer to a user who clicks on a “Cached” link.  
13 The seminal *Netcom* decision and its progeny establish that such non-volitional conduct by a  
14 machine in automatically transmitting content to third parties at their request does not constitute  
15 direct infringement by the operator of the machine. *See Netcom*, 907 F. Supp. at 1369-70.  
16 *Netcom* operated a system that automatically copied users’ “Usenet” newsgroup postings onto  
17 *Netcom*’s computers, and then allowed users to retrieve copies of those postings from those  
18 computers. In holding that *Netcom* did not itself engage in any direct infringement by operating  
19 this system, the court stated:

20 Although copyright is a strict liability statute, there should still be some element of  
21 volition or causation which is lacking where a defendant’s system is merely used to  
create a copy by a third party.

22 *Netcom*, 907 F. Supp. at 1369-70. Because *Netcom*’s system was automated, *Netcom* was not  
23 liable for direct infringement of the plaintiff’s copyrights.

24 Like the system in *Netcom*, Google’s system automatically allows the user, at the user’s  
25 request, to access copies of Web pages stored on Google’s computers. Absent evidence of  
26 volitional conduct by Google in the process by which the user obtains its copy, Google’s  
27 operation of this system does not directly infringe copyrights on the works that users request and  
28 retrieve. *See id.*; *see also LoopNet*, 373 F.3d at 549-52 (affirming judgment of no direct



1 infringement in favor of operator of system on which content was automatically uploaded and  
2 downloaded); *Sega*, 948 F. Supp. at 932; *Marobie-FL, Inc. v. Nat'l Assn. of Fire Equip. Distribs.*  
3 *and Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1176-79 (N.D. Ill. 1997); *Newborn v. YAHOO!*,  
4 *Inc.*, No. Civ. A. 04-659 (RBW), 2005 WL 2416336 (D.D.C. Sept. 27, 2005), at 5 n.3 (citing  
5 *Loopnet* and dismissing copyright infringement claim against search engines based on lack of  
6 volitional conduct).

7 Field ignores this leading line of cases, which undermines his position, and instead relies  
8 upon the now-discredited decision in *Playboy Enters. v. Webworld, Inc.*, 991 F. Supp 543 (N.D.  
9 Tex. 1997) ("*Webworld*"). This is doubly mistaken.

10 As noted, *Webworld* is of "questionable" reasoning, and of dubious continued  
11 validity. A number of articles considering *Webworld* have criticized its logic. *See, e.g.*,  
12 EDWARD A. CAVAZOS & COE F. MILES, *Intellectual Property on the WWW*, 576 PLI/Pat 559,  
13 \*572 n.70 (1999) (calling *Webworld*'s reasoning "questionable," as it conflates direct and  
14 indirect infringement liability); DAVID L. HAYES, *Computer and Internet Lawyer* (October  
15 2002) at 1 & n.9 (suggesting Congress may have overruled *Frena* and *Webworld* cases).  
16 *Webworld* follows the reasoning of the earlier, pre-*Netcom* decision in *Playboy Enters., Inc.*  
17 *v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) ("*Frena*"), which was expressly criticized by  
18 Congress. In citing the *Netcom* decision with approval, Congress stated that the *Frena* line of  
19 cases has been overruled.<sup>4</sup> By contrast, there can be no doubt that the *Netcom* line of cases,  
20 relied upon by Google, is the law of the land. *See ALS Scan v. Remarq Communities, Inc.*, 239  
21 F.3d 619, 622 (4th Cir. 2001) (finding "the *Netcom* court reasoning more persuasive" than that  
22 of *Frena*).<sup>5</sup>

24 <sup>4</sup> *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[A][1]  
25 at 12B-12 to -13(2005) (noting that the DMCA "overrules those aspects of *Playboy Enterprises,*  
*Inc. v. Frena*" holding that automated acts by service providers constitute direct infringement)  
(quoting H. Rep. (DMCA), p. 11)).

26 <sup>5</sup> The leading copyright treatise fully endorsed *Netcom*, saying "the judge demonstrated  
27 mastery of both the technology and the nuances of the law." 3 NIMMER ON COPYRIGHT,  
28 12B.01[A][1] at 12B-7 (2005). As to its conclusion regarding direct infringement, Prof. Nimmer  
stated that *Netcom*'s "logic is compelling," and noted that "Congress in fact endorsed much of  
the *Netcom* decision when it later entered the fray." *Id.*

**Snell & Wilmer**  
LLP  
LAW OFFICES  
1800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-9300

1           Regardless, *Webbworld* is easily distinguished. There, the defendant actively sought out  
2 and stored copyrighted material on its computer system without any authorization, express or  
3 implied, from copyright holders. *Webbworld*, 991 F. Supp. at 549-50. By contrast, it is  
4 undisputed that Google’s initial collection and storage of Field’s works in its cache was  
5 authorized, as Google legitimately obtained its materials directly from Field. *See supra* at 2 n.1.<sup>6</sup>

6           Whether because he could not demonstrate that Google copied or distributed copies of his  
7 works, or because he could not show that Google engaged in volitional conduct, Field has failed  
8 to establish a *prima facie* case of infringement. Accordingly, Google is entitled to summary  
9 judgment on his copyright claim.

10           **B. Google Is Entitled To Summary Judgment On Its Implied License Defense.**

11           Given Field’s inability to establish a direct infringement claim against Google, the Court  
12 need not examine the various defenses that Google has asserted as alternative grounds for  
13 summary judgment in its favor. Nevertheless, Google has established each of these defenses as a  
14 matter of law, starting with the defense of implied license.

15           **1. Field Granted Google An Implied License By Choosing Not To Utilize**  
16 **Industry Standard Protocols.**

17           Most of the communications on the Internet take place between automated computers and  
18 thus industry standard protocols are necessary for the Internet to function properly. *See Levine*  
19 *Report* ¶25. At issue in this case are long-standing protocols relating to indexing and caching  
20 that search engines like Google necessarily rely upon to determine whether or not they can crawl,  
21 index, or cache a Web page. In his testimony, Dr. Levine made clear that it was reasonable for  
22 Google to interpret Field’s choice not to utilize these “industry standard and highly publicized”  
23 protocols “as a grant of permission” from Field for Google to present “Cached” links to the  
24

25           <sup>6</sup> Moreover, the defendant in *Webbworld* explicitly sought out information from certain  
26 online locations, such as “alt.mag.playboy,” knowing that they likely contained unauthorized  
27 images owned by the plaintiff. *Id.* at 552-53. Here, there is no allegation that Google’s  
28 automated system is targeted at content that Google knows is displayed without the copyright  
holder’s authorization. Rather, Google seeks to include in its search engine any content from the  
full scope of the World Wide Web, and its system is designed to allow objecting content owners  
to prevent their works from being included and accessible through “Cached” links.

1 pages of his site. See Levine Report at ¶37 (explaining that “[a]bsent such implicit permission,  
 2 and a system by which permissions can be communicated (or denied) automatically, search  
 3 engines simply could not operate”). Dr. Levine’s testimony is undisputed and by itself warrants  
 4 the conclusion that Google’s conduct was impliedly licensed.<sup>7</sup>

5 **2. Field Granted Google An Implied License Through His Affirmative**  
 6 **Conduct.**

7 Field’s affirmative conduct in submitting his Web site to Google and encouraging Google  
 8 to crawl, cache and index the site provides an additional ground for Google’s implied license  
 9 defense.<sup>8</sup> As Google explained, courts have found that where a copyright holder delivers its  
 10 work to another party, the copyright holder has impliedly licensed the other party to make its  
 11 expected use of the work. See *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 559 n.6 (9th Cir.  
 12 1990); *Herbert v. United States*, 36 Fed. Cl. 299, 310-311 (1996). Field attempts to distinguish  
 13 *Effects* and *Herbert* by arguing that those cases require that works be delivered, and  
 14 commissioned, by the defendant. See Field Opp. at 8-9. Neither case — nor the implied license  
 15 doctrine generally — contains such a requirement. Again, the test is simply whether the  
 16 copyright holder’s conduct would reasonably allow the defendant to infer that permission is  
 17 given for the use in question. See *Herbert*, 36 Fed. Cl. at 310-11 (plaintiff’s submission of book  
 18

19 <sup>7</sup> Rather than offering evidence of his own, Field criticizes Google for failing to cite  
 20 California or Nevada authority on implied licenses. That is sophistry. The cases Google cited in  
 21 support of the existence of an implied license are fully consistent with both California and  
 22 Nevada law. See *Rokos v. Peck*, 182 Cal. App. 3d 604, 616 (1986) (implied contract may arise  
 23 from the promisor’s conduct); Cal. Civ. Code § 1621 (same); *Western States Constr. v. Michoff*,  
 24 108 Nev. 931, 938 (1992) (same). In any event, contrary to Field’s assertion, Google did cite to  
 the Ninth Circuit’s opinion in *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990) on the  
 question of implied license. While Field inexplicably labels *Effects* “outmoded,” it is still good  
 law, and was cited approvingly by the Ninth Circuit in *Foad*, which recognized it as consistent  
 with California law. See *Foad Consulting Group, Inc. v. Musil Govan Azzalino*, 270 F.3d 821,  
 827 n.10 (9th Cir. 2001).

25 <sup>8</sup> Field takes the remarkable position that Google failed to provide evidence that he  
 26 delivered his Web site to Google. Field Opp. at 9. In reality, Google identified numerous  
 27 affirmative steps that Field took to do just that. See Google’s Motion at 14-15. Field also  
 28 claims that his actions did not constitute “delivery” of his site because Google’s corporate  
 designee was “unaware” of these activities. See Field Opp. at 9. Again, the position is  
 specious. Whether or not Google’s deponent was personally aware of Field’s conduct is  
 irrelevant, and hardly means that Google’s automated computer system was “unaware” of  
 those activities.

**Snell & Wilmer**

LLP  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702) 784-7200

1 to defendant knowing it intended to publish it “would lead a reasonable person . . . to believe that  
2 publication . . . would be with his consent”).

3 Field’s conduct in submitting his Web site to Google is akin to that of a reader who mails  
4 a “letter to the editor” of a newspaper, and then complains that he never gave express permission  
5 for the newspaper to publish his letter. Just as the reader knows or should know that newspapers  
6 publish letters addressed “Dear Editor,” Website owners know or should know that search  
7 engines will display “Cached” links to the pages of their sites unless told otherwise. Field’s  
8 delivery of his Web site to Google allows Google to assume, reasonably, that it could present  
9 “Cached” links to the pages of the site. Field thus impliedly granted Google a license to do so.<sup>9</sup>

10 **C. Google Is Entitled To Summary Judgment On Its Separate Estoppel**  
11 **Defense.**

12 Contrary to Field’s contention, Google’s estoppel defense is distinct from its implied  
13 license defense, although both lead to the conclusion that Field’s claim cannot proceed.

14 Field does not contest Google’s proof on three of the four elements of equitable  
15 estoppel. *See* Google’s Motion at 25. Indeed, Field offers no evidence of his own on the  
16 question of estoppel. His *arguments* on the issue relate exclusively to the second element —  
17 whether Google had a right to act as it did based upon Field’s conduct.

18 According to Field — who cites two early twentieth-century, non-copyright cases —  
19 estoppel cannot arise from a plaintiff’s silence unless the plaintiff had a duty to speak. *See* Field  
20 *Opp.* at 6 (citing *Wisler v. Lawler*, 189 U.S. 260, 270 (1903); *James v. Nelson*, 90 F.2d 910 (9th  
21 Cir. 1937)). Field ignores more recent decisions that have elaborated on when a copyright owner

22  
23 <sup>9</sup> As discussed in Google’s opening brief, Google was also impliedly licensed to  
24 provide to Field copies of his own works because it was “Field himself [who] was the direct  
25 cause of and exclusively responsible for what he characterizes as Google’s copying and  
26 distribution of his works.” *See* Google’s Motion at 24. Field ***did not respond at all*** to this  
27 additional basis for Google’s implied license defense. Field would have nothing to say. It  
28 simply makes no sense for Field to argue that Google infringed Field’s copyrights by allowing  
Field to access and retrieve a copy of his own works. Indeed, for the same reasons, the court  
could alternatively find that Field has failed to carry his burden of establishing direct copyright  
infringement. Where the claimed copying and distribution of works came at the direct request  
and instruction of the copyright holder, there has been no violation of the copyright holder’s  
rights. *See* Google’s Motion at 24 n.15.

Snell & Wilmer

LLP  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1 has a duty to speak. As they make plain, the “duty to speak” is not a legal duty, but rather “a  
2 duty of good faith.” See *DeCarlo v. Archie Comic Publ’ns, Inc.*, 127 F. Supp. 2d 497, 510  
3 (S.D.N.Y. 2001) (holding that plaintiff was estopped from asserting copyrights against  
4 defendant). The Court in *DeCarlo* explained:

5 [W]hen one party in a relationship with another has an opportunity to speak in  
6 order to avoid harm or injury to the other party and fails to do so to the ultimate  
7 prejudice of the other party, he will be estopped from relying thereafter on that  
8 relationship.

8 127 F. Supp. 2d at 510 (quoting *CBS, Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369 (2d Cir.  
9 1975)).

10 In *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944 (S.D.N.Y. 1997), the Court  
11 applied similar reasoning to find an estoppel. There, the original copyright owner (Lehman  
12 Brothers) sold some of its assets to the defendant (Smith Barney). *Id.* at 946. Smith Barney  
13 mistakenly believed that the asset purchase agreement included the rights to a software system.  
14 See *id.* Lehman Brothers knew that Smith Barney was using the copyrighted software, but did  
15 not object. See *id.* The court found that there was an estoppel because Lehman Brothers knew  
16 of Smith Barney’s use and remained silent. See *id.* at 947. Likewise, the courts in *Carson v.*  
17 *Dynegy, Inc.*, 344 F.3d 446, 453-55 (5th Cir. 2003) and *Quinn v. City of Detroit*, 23 F. Supp. 2d  
18 471, 752-53 (E.D. Mich. 1998) found estoppel when the copyright owners knew of the  
19 defendant’s allegedly infringing use and remained silent.<sup>10</sup>

20 Taken together, these cases demonstrate that, when a copyright owner knows that a  
21 defendant believes that it has permission to use a copyrighted work, the copyright owner has a  
22 good faith duty to object — or be estopped from asserting its copyrights against the defendant.  
23 Those are precisely the undisputed facts in this case, and they establish Google’s affirmative  
24

25 <sup>10</sup> Strangely, Field asserts that *Quinn*, *Carson*, and *Keane* dealt with acquiescence, not  
26 estoppel. Not so. All three cases squarely held that the copyright owner was estopped from  
27 asserting his copyrights. See *Quinn*, 23 F. Supp. 2d at 752-53 (“Quinn is estopped from pursuing  
28 his infringement action against the City . . . .”); *Carson*, 344 F.3d at 453 (“Carson nevertheless is  
estopped from the instant infringement claim . . . .”); *Keane*, 968 F. Supp. at 948 (“[T]he  
evidence clearly supports defendants’ reasonable assumption that they were entitled to use [the  
copyrighted software] and that they relied on that assumption to their detriment.”).

**Snell & Wilmer**  
LLP  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702) 734-9200

1 defense of estoppel.<sup>11</sup>

2 **D. Google’s Operation Of Its System Cache Is A Fair Use.**

3 Field did not address Google’s detailed analysis of the fair use factors in his opposition  
4 brief. Instead, he cut and pasted six pages from his own summary judgment brief and added a  
5 short introductory section which discusses, and misstates, the controlling Ninth Circuit decision  
6 in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (“*Kelly*”). For the same reasons  
7 presented in Google’s Motion — and in its Opposition to Field’s Motion — should the Court  
8 find that Field has established a direct infringement claim against Google, it should further find  
9 that Google’s conduct is protected by the fair use doctrine.

10 **1. Kelly Compels A Finding Of Fair Use.**

11 Field attempts to distinguish *Kelly*, arguing that the case turned on the fact that defendant  
12 Arriba only used smaller “thumbnail” images in its search engine, whereas Google includes the  
13 entire text of Web pages in the cache. While Arriba’s thumbnails were reduced in size in  
14 comparison to the originals, the Ninth Circuit focused on the transformative purpose of the  
15 search engine and whether Arriba used more of the original work than was necessary to  
16 accomplish that transformative purpose. *See Kelly*, 336 F.3d at 821. Because Arriba used no  
17 more of the photographs than needed, the Ninth Circuit found fair use.

18 Field’s implication — that *Kelly* held that copying the entirety of a work cannot be a fair  
19 use — is baseless. In fact, the Ninth Circuit noted in *Kelly* that Arriba “did copy each of Kelly’s  
20 images as a whole,” as copying of the entire photographs was necessary to create the thumbnails  
21 and serve the purpose to which Arriba put them. *Id.* Thus, *Kelly* (along with a host of other

22 \_\_\_\_\_  
23 <sup>11</sup> Field separately argues that he should not be estopped because Google could have set  
24 up its cached function as an “opt-in” system rather than an “opt-out” system. This argument  
25 suffers from several flaws. First, the argument addresses what Field *would like* the standards to  
26 be, not application of the law of estoppel to the facts of this case. Second, even if Google could  
27 unilaterally switch to an opt-in regime, the communication protocols at issue are *industry-wide*  
28 standards, so this would not affect the other search engines that would still abide by the  
standards. *See Google’s Motion* at 10-13; *Levine Report* ¶¶25-37. Third, Field does not  
demonstrate that an opt-in regime would be feasible. In fact, search engines must rely on “opt-  
out” standards or face significant hurdles in helping people find information on the Web.  
*Brougher Decl.* ¶18; *Levine Report* ¶25. Indeed, the “no-archive” meta-tag assumes permission  
to cache for good reason — Web site owners generally want search engines to cache their sites  
because of the benefits that caching provides. *See Google’s Motion* at 6-10; *Brougher Decl.* ¶26.

1 authorities) simply holds that fair use will generally be found where the scope of the defendant's  
2 use is consistent with the transformative purposes of the use. *See Kelly*, 336 F.3d at 820-21;  
3 *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 n.8 (9th Cir. 2003) ("*Mattel*");  
4 *Netcom*, 907 F. Supp. at 1380; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417,  
5 449-50 (1984) ("*Sony*").

6 Here, to the extent that Google is deemed to have copied or distributed copies of Web  
7 pages stored in its cache, its use of the full page is necessary to serve Google's transformative  
8 purposes. If Google did not use the full page, its cache could not (a) assist Web users by making  
9 that content available when the Web site is unavailable for technical or other reasons; (b) assist  
10 researchers and educators in the archival or comparative purposes of the Google "Cached" links;  
11 and (c) offer highlighted search terms in cached copies of Web pages to allow users to  
12 understand why a Web page was deemed germane. *See generally* Brougher Decl. ¶¶16-18; *see*  
13 *also* Levine Report ¶¶15-20. Accordingly, Google's use of Field's entire Web page is fully  
14 consistent with a fair use. *See Sony*, 464 U.S. at 449-50 (finding fair use for time shifting of  
15 entire television programs, as transformative purpose could not be accomplished by copying less  
16 than the entire show); *Netcom*, 907 F. Supp. at 1380 ("Netcom copied no more of plaintiffs'  
17 works than necessary to function as a Usenet server . . . Netcom had no practical alternative  
18 way to carry out its socially useful purpose; a Usenet server must copy all files, since the  
19 prescreening of postings for potential copyright infringement is not feasible.").

20 While Field would have the Court believe the facts in *Kelly* could not be more different  
21 than those presented here, the similarity in fact patterns is overwhelming. Like Google's system,  
22 the search engine in *Kelly* crawled Web sites, made temporary copies of entire copyrighted  
23 works from those Web sites, stored copies of that content on its servers, and made that content  
24 available in response to user's search requests, along with links to the original Web page. *See*  
25 *Kelly*, 336 F.3d at 815. Like Google's system, "Arriba's use of the [copyrighted works] serves a  
26 different function than [the copyright holder's] use — improving access to information on the  
27 internet versus artistic expression." *See id.* at 819. And, like Google's system, Arriba used as  
28 much of the work as was necessary to accomplish its purpose.

Snell & Wilmer

L.L.P.  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1 Displeased with the Ninth Circuit’s *holding* in *Kelly*, Field incredibly cites an earlier  
2 Ninth Circuit decision that was *withdrawn*.<sup>12</sup> He does so, supposedly, “not . . . for [its]  
3 precedential value.” See Field Opp. at 10:20-25. But if Field is not citing the withdrawn opinion  
4 for its precedential value, there is no reason for him to have cited it at all. In reality, if anything  
5 is to be gleaned from the Ninth’s Circuit’s withdrawal of the opinion, it is that the court would  
6 likely repeat its rejection of conclusions that it took the extraordinary step of withdrawing —  
7 conclusions that Field now urges this Court to adopt.

8 **2. Worldwide Church of God v. Philadelphia Church of God Is**  
9 **Inapposite.**

10 Field rests his fair use argument almost exclusively upon a single case, *Worldwide*  
11 *Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000)  
12 (“*Worldwide Church*”). True to form, Field fails to mention that the Ninth Circuit in *Kelly*  
13 expressly distinguished *Worldwide Church*, finding it had no application in the context of a  
14 transformative use by an Internet search engine. In *Kelly*, the Ninth Circuit explained that it had  
15 held:

16 that copying a religious book to create a new book for use by a different church  
17 was not transformative. The second church’s use of the book was merely to make  
18 use of the same book for another church audience. The court noted that “where  
the use is for the same intrinsic purpose as [the copyright holder’s] . . . such use  
seriously weakens a claimed fair use.”

19 *Kelly*, 336 F.3d at 819 (quoting *Worldwide Church*, 227 F.3d at 1117 (alterations in *Kelly*)). It  
20 then held that the search engine’s transformative use at issue in *Kelly* rendered *Worldwide*  
21 *Church* inapposite. The same distinction and conclusion are appropriate here.<sup>13</sup>

22  
23 <sup>12</sup> In the order withdrawing and superseding the earlier *Kelly v. Arriba* opinion, the Ninth  
24 Circuit declared that the earlier opinion “may not be cited as precedent by or to this court or any  
25 district court of the Ninth Circuit.” See *Kelly*, 336 F.3d at 815. Field clearly recognized the  
impropriety of citing the case as evidenced by his feeble disclaimer. His decision to cite the case  
in violation of the order is sanctionable.

26 <sup>13</sup> Field further quotes *Worldwide Church*’s statement that the court had “found no  
27 published case holding that fair use protected the verbatim copying, without criticism, of a  
written work in its entirety.” Field Opp. at 16 (quoting *Worldwide Church*, 227 F.3d at 1120).  
28 As noted, the Ninth Circuit was addressing verbatim copying that was not transformative.  
Verbatim copying has been held to be fair when needed for transformative uses such as in the  
present case. See, e.g. cases cited in Section II.D.c.3, *infra*.



**Snell & Wilmer**

L.L.P.  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**3. Fair Use Factors.**

Google comprehensively addressed the fair use factors in its opening brief. For the sake of completeness, Google discusses them again here, with a focus on Field’s various arguments.

**a. Factor One: Google’s Use Is Transformative, And At Most Only Incidentally Commercial.**

Both parties agree that the main focus of the first fair use factor is whether the allegedly infringing use is transformative. See Field Opp. at 12 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“*Campbell*”)); see also Google’s Motion at 31 (same).

**i. Google’s Use Is Transformative.**

In this case, there can be no question that Google’s use is highly transformative. Field’s “writings” — alleged literary works — arguably are intended to enrich others. The copies accessible through Google’s cache functionality, by contrast, serve entirely different objectives: (i) enabling users to access content when the original page is inaccessible, (ii) allowing researchers to detect changes that have been made to a particular Web page over time, and (iii) allowing users to readily understand why a page was responsive to their query by highlighting search terms. See Google’s Motion at 6-9, 31-33. Because, as the Ninth Circuit has held, such uses are clearly transformative, see *Kelly*, 336 F.3d at 818, Google’s cache functionality is similarly transformative. See *id.* at 818-20 (contrasting purpose of original artistic works with search engine’s “functions as a tool to help index and improve access to images on the internet and their related web sites”).

Field’s argument that Google’s cache functionality is “superseding,” see Field Opp. at 12, is belied by the undisputed facts. There is no evidence whatsoever that “Cached” links substitute for visits to original Web pages, much less evidence that *anyone* has ever used the Google cache as a substitute for visiting the pages of *Field’s* site. In truth, the evidence is entirely to the contrary. See, e.g., Levine Report ¶¶21-23. Millions of Web site owners, including major online destinations, permit Google to provide “Cached” links to the pages of their sites; they could automatically prevent those links in a matter of seconds. Plainly, they do not believe that clicks on “Cached” links are any substitute for a visit to their original pages. Moreover, Google has

**Snell & Wilmer**  
LLP  
LAW OFFICES  
1800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1 included design features within its cache functionality to feature the original page, and ensure  
2 that those who wish to access it can easily do so. *See* Google’s Motion at 5; *see also* Brougher  
3 Decl. ¶¶9-10 & Ex. 1. In sum, the undisputed evidence demonstrates that Google serves different  
4 and socially important purposes in offering access to pages through “Cached” links. *See id.*  
5 ¶¶16-20.

6 Field’s assertion that fair use is precluded because Google’s cache contains a verbatim  
7 copy of Field’s work is expressly contradicted by controlling precedent. As the Supreme Court  
8 long ago made clear, copying of entire works should not weigh against fair use where the new  
9 use serves a different function from the original, and the original work can be viewed by anyone  
10 free of charge. *See Sony*, 464 U.S. at 449-50 (affirming as a fair use the “time-shifting” of entire  
11 television shows); *see also Kelly*, 336 F.3d at 821. Google’s “Cached” links present the same  
12 situation. Accordingly, the first fair use factor strongly weighs in Google’s favor.

13 **ii. Whether Google’s Use Is Commercial Is Of Little**  
14 **Relevance.**

15 Field next argues that Google’s cache functionality is commercial, and thus not a fair  
16 use. Field is mistaken.

17 Though Field cites *Campbell* with respect to the transformative use issue, *see* Field Opp.  
18 at 12, he ignores its clear teaching on the relevance of whether a use is commercial. In  
19 *Campbell*, the Supreme Court noted that many of the fair use examples described by Congress in  
20 the Copyright Act itself (*e.g.*, news reporting) are conducted for profit in this country, and stated  
21 that “the more transformative the new work, the less will be the significance of other factors,  
22 like commercialism, that may weigh against a finding of fair use.” *See Campbell*, 510 U.S. at  
23 579. Accordingly, the Supreme Court held that there is no presumption of unfair use based on  
24 the commercial nature of transformative uses. *See id.* at 594. The alleged commercial nature of  
25 the Google cache is of little relevance here.

26 Moreover, Field’s contention that Google’s cache functionality is directly commercial is  
27 meritless. *See* Field Opp. at 13-14. In fact, the undisputed evidence shows that Google makes  
28 no money from displaying “Cached” links to Web pages, and certainly made no money from

1 displaying “Cached” links to Field’s pages. *See* Brougher Decl. ¶13; *see also* Field Motion Ex.  
2 D. Like the home user’s private, time-shifting of television programs which the Supreme Court  
3 held to be a non-commercial fair use in the *Sony* case, *see Sony*, 464 U.S. at 449, the use of  
4 Google’s free cache functionality by Web users is similarly not directly commercial.

5 The Ninth Circuit described the use in *Kelly*, where advertising accompanied the display  
6 of images in Arriba’s search engine, as at most “incidental[ly]” commercial. *See Kelly*, 336 F.3d  
7 at 818. Google’s use of Field’s works — without accompanying advertising — is then, as in  
8 *Kelly*, incidentally commercial at best. And, as in *Kelly*, the fact that Google is a commercial  
9 enterprise is of only minor relevance in the fair use analysis. The transformative purpose of  
10 Google’s use is considerably more important in the overall balancing and demonstrates that the  
11 first fair use factor weighs heavily in Google’s favor. *See id.*, at 818.

12 **b. Factor Two: The Nature Of Field’s Made-For-Litigation**  
13 **Works Supports A Finding Of Fair Use.**

14 Field asserts that his works are “fictional [and] creative,” arguing that the second fair use  
15 factor, the nature of the work, weighs against a finding of fair use. *See* Field Opp. at 14-15.  
16 Field’s simplistic analysis is insufficient.

17 As an initial matter, in assessing this factor, the Ninth Circuit looks at both whether the  
18 works were “creative” and whether they were published. *See* Google’s Motion at 35. Here,  
19 Field manufactured his fifty-one “works” in just three days as part of his litigation jackpot  
20 strategy. *See* O’Callaghan Decl. Ex. 2 at 2 (Plaintiff’s Answer to Interrogatory No. 5); *see also*  
21 Field Depo. at 141:15-24. Further, Field published his works on the Internet, making them  
22 available to the world free of charge. These made-for-litigation, freely-available works are  
23 certainly entitled to less protection than the artistic photographic works at issue in *Kelly*, or the  
24 short story at issue in *Stewart v. Abend*, 495 U.S. 207 (1990), on which Field relies.

25 In any event, in cases involving transformative uses such as Google’s, the second fair use  
26 factor has been described as “not . . . terribly significant in the overall fair use balancing,” *see*  
27 *Mattel*, 353 F.3d at 803, and “not much help,” *see Campbell*, 510 U.S. at 586. As such, this  
28 factor is of only minor relevance and should not weigh against a fair use finding.

1 **c. Factor Three: Google Used No More Of The Works Than**  
 2 **Necessary For Its Transformative Use.**

3 Field asserts that the third factor — the amount and substantiality of the portion used in  
 4 relation to the copyrighted work as a whole — weighs against a finding of fair use because  
 5 Google allows access to Field’s entire works through its “Cached” links. *See* Field Opp. at 15.  
 6 Once again, Field’s analysis is misguided and misleading.

7 As noted, the Supreme Court made clear in *Sony* that copying of entire works should not  
 8 weigh against a fair use finding where the new use serves a different function from the original  
 9 and where the original work can be viewed by anyone free of charge. *See Sony*, 464 U.S. at 449-  
 10 50 (affirming as a fair use the “time-shifting” of entire television shows).<sup>14</sup> As discussed above,  
 11 in the context of Internet search engines, *Kelly* held that “the extent of permissible copying varies  
 12 with the purpose and character of the use” and that “[i]f the secondary user only copies as much  
 13 as is necessary for his or her intended use, then this factor will not weigh against him or her.”  
 14 *See Kelly*, 336 F.3d at 820-821; *see also Mattel*, 353 F.3d at 804 n.8 (holding that “entire  
 15 verbatim reproductions are justifiable where the purpose of the work differs from the original”);  
 16 *Netcom*, 907 F. Supp. at 1380 (“Netcom copied no more of plaintiffs’ works than necessary to  
 17 function as a Usenet server. . . . [A] Usenet server must copy all files, since the prescreening of  
 18 postings for potential copyright infringement is not feasible.”).<sup>15</sup>

19 \_\_\_\_\_  
 20 <sup>14</sup> In a *non-sequitur*, Field asserts that Google cannot rely on *Sony*’s discussion of fair use  
 21 because that case involved contributory infringement. *See* Field Opp. at 15. In fact, the Supreme  
 22 Court analyzed whether (non-party) home users who engaged in time-shifting were *direct*  
 23 infringers. *See Sony*, 464 U.S. at 447-55 (finding home users engaged in time-shifting make a  
 24 non-infringing fair use of plaintiffs’ works, creating a substantial non-infringing use for the  
 25 accused device). That the discussion was in the context of a contributory infringement analysis is  
 26 simply irrelevant. Field further asserts that *Sony*’s fair use analysis has never been applied to a  
 case of direct infringement like the one here. *See* Field Opp. at 15. He is wrong again. *Sony* has  
 been cited in countless decisions analyzing whether a defendant’s use is a fair use, both in the  
 context of direct and indirect infringement. *See, e.g., Sega Enters. Ltd. v. Accolade, Inc.*, 977  
 F.2d 1510, 1526 (9th Cir. 1993) (citing *Sony* and finding fair use by competitor who copied  
 entirety of work for transformative purpose of reverse engineering); *Hustler Magazine, Inc. v.*  
*Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986); *Netcom*, 907 F. Supp. at 1379-80; *Lewis*  
*Galoob Toys, Inc. v. Nintendo of Am.*, 780 F. Supp. 1283, 1294 (N.D. Cal. 1991).

27 <sup>15</sup> The case cited by Field on this point, *Hustler*, 796 F.2d at 1155, actually supports a  
 28 finding of fair use. In it, the Ninth Circuit noted that “*Sony Corp.* teaches us that the copying of  
 an entire work does not preclude fair use *per se.*” *See id.* The Ninth Circuit went on to find that  
 the use in question was “fair.” *See id.* at 1155-56.

**Snell & Wilmer**  
LLP  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1 Just like the broadcasters in *Sony* and the photographer in *Kelly*, Field made his content  
2 available to anyone, free of charge. Also like the fair uses in *Sony* and *Kelly*, Google’s use of  
3 entire Web pages (by allowing access to them through “Cached” links) is essential for the  
4 valuable, transformative purposes of the use. See Google’s Motion at 6-10. Again, these  
5 purposes could not be fulfilled if Google allowed access to only portions of the Web pages. See  
6 *id.* at 37. As both *Sony* and *Kelly* make clear, the third factor is neutral despite the fact that  
7 Google allowed access through “Cached” links to the entirety of Field’s works. See *Sony*, 464  
8 U.S. at 448-50; *Kelly*, 336 F.2d at 821.

9 **d. Factor Four: Google’s “Cached” Links Had No Negative**  
10 **Effect On The Market For, Or Value Of, Field’s Works.**

11 Field begins his discussion of the fourth fair use factor by wrongly contending that  
12 market harm can be presumed in this case, allegedly because Google’s use is commercial. See  
13 Field Opp. at 16. As noted above, the Supreme Court has recently made clear that it is  
14 reversible error to presume market harm based on a finding of a commercial use where, as  
15 here, the use is transformative. See *Campbell*, 510 U.S. at 591 (“[W]hen . . . the second use is  
16 transformative, . . . market harm may not be so readily inferred.”).

17 Field’s assertion that there is *actual* market harm in this case is preposterous. Field  
18 simply asserts — without *any* evidentiary basis — that “[t]here is no question that unrestricted  
19 and widespread” use of Field’s works in a manner similar to Google’s “would absolutely  
20 supplant the potential market for the original works.” See Field Opp. at 16. Such bald  
21 assertions are insufficient to defeat Google’s properly supported summary judgment motion.  
22 See Fed. R. Civ. P. 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102  
23 (9th Cir. 2000).<sup>16</sup>

24  
25 <sup>16</sup> The closest Field comes to attempting to support his argument is his assertion that  
26 Google’s activities would deprive Field of “control over the copying and dissemination of his  
27 works.” See Field’s Motion at 14. This is not only unsupported, but also contradicted, by the  
28 record. As noted above, Field offers his content for free, placing no restrictions on access to his  
works. See Google’s Motion at 14. Thus, Field has already ceded a significant amount of  
control over the works. Nevertheless, Field still retains complete control over whether those  
works will be accessible through Google’s “Cached” links given the myriad ways in which he  
can direct Google not to present those links. See Google’s Motion at 10-13. It is undisputed that  
(continued...)

**Snell & Wilmer**  
L.L.P.  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5300

1 As shown in Google’s Motion, Google’s “Cached” links had no impact on the market  
2 for Field’s works, or on copyrighted works in general. *See* Google’s Motion at 37-39. The  
3 Supreme Court has explained that it only considers the impact on markets “that creators of  
4 original works would in general develop or license others to develop.” *See Campbell*, 510  
5 U.S. at 592. Where there is no likely market for the challenged use of the plaintiff’s works, the  
6 fourth fair use factor favors the defendant. *See Mattel*, 353 F.3d at 806. In this case, there is  
7 no market for licensing search engines the right to allow access to Web pages through  
8 “Cached” links, and such a market is unlikely ever to develop. *See* Google’s Motion at 38-39.  
9 In fact, if anything, the market works in the opposite manner, with content owners paying  
10 some search engines for preferred listings. *See id.* at 39 n.20. Accordingly, this factor favors a  
11 finding of fair use.

12 **e. Google’s Good Faith In Operating Its System Cache, And**  
13 **Field’s Bad Faith In Manufacturing This Lawsuit, Weigh In**  
14 **Favor Of Fair Use.**

15 In addition to the four enumerated fair use factors, the Ninth Circuit has held that courts  
16 may further consider whether an alleged infringer has acted in good faith as part of the fair use  
17 inquiry. *See* Google’s Motion at 40 (citing 17 U.S.C. § 107 and *Fisher v. Dees*, 794 F.2d 432,  
18 436-37 (9th Cir. 1986)). Field chose to ignore this additional consideration, apparently unwilling  
19 or unable to defend his conduct. Considering the equities — including the fact that Field’s suit is  
20 manufactured, that Google complies with numerous industry-standard means for Web site owners  
21 to preclude their material from appearing in Google’s “Cached” links, and that Google promptly  
22 removes such material at the request of the Web site owner — there is no question that this  
23 additional factor supports a finding of fair use. *See* Google’s Motion at 40-41.

24 **4. Fair Use Summary.**

25 An analysis of the relevant factors leaves no doubt that Google’s operation of its cache,

26 (...continued from previous page)  
27 Google honors such requests. In fact, Google promptly removed “Cached” links to pages  
28 containing Field’s works when it first learned of Field’s objection. Accordingly, Field’s claim  
that copyright owners lack “control” over how their content is used by the Google cache is  
simply wrong.

**Snell & Wilmer**

L.L.P.  
LAW OFFICES  
3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702) 384-5200

1 and its alleged use of Field’s works in this case, qualify as fair use. The first and fourth  
2 factors, described in case law as the most important, strongly favor a finding that Google’s  
3 transformative use is a fair use. The second and third factors — which have been described as  
4 less significant in the context of a transformative use — are, in any event, neutral at worst.  
5 Finally, Google’s good faith (and Field’s bad faith) further supports a determination of fair  
6 use.

7 **III. CONCLUSION**

8 For the foregoing reasons, Google respectfully requests that the Court grant Google’s  
9 motion for summary judgment, holding that: (1) Field has not established that Google  
10 infringed his copyrights; (2) to the extent Google could be characterized as having made or  
11 distributed copies of Field’s works, Field impliedly licensed Google’s conduct; (3) by virtue of  
12 his acts and omissions, Field is estopped from claiming that Google infringed his copyrights;  
13 and (4) Google’s allegedly infringing activities are a fair use.

14  
15 Dated: October 31, 2005

SNELL & WILMER L.L.P.

16  
17 By: 

Kelly A. Evans  
Nevada Bar No. 7691  
3800 Howard Hughes Parkway, Suite 1000  
Las Vegas, NV 89109

18  
19  
20 and

21 David H. Kramer  
22 William O’Callaghan  
23 WILSON SONSINI GOODRICH & ROSATI  
24 650 Page Mill Road  
25 Palo Alto, CA 94304-1050

26  
27 Attorneys for GOOGLE INC.  
28

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the foregoing **GOOGLE INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** was served this 31 day of October, 2005, by placing same in the United States mail, postage prepaid, addressed to the following:

Blake A. Field  
9805 Double Rock Drive  
Las Vegas, NV 89134  
Telephone (702) 373-1022  
Pro Se Plaintiff

  
An employee of Snell & Wilmer, L.L.P.

**Snell & Wilmer**

LLP

3800 HOWARD HUGHES PARKWAY, SUITE 1000  
LAS VEGAS, NEVADA 89109  
(702)784-5200

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28