No. 00-55521

Before Betty B. Fletcher, Thomas G. Nelson, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Thomas G. Nelson, decided February 6, 2002.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE A. KELLY,

Plaintiff-Appellant,

v.

ARRIBA SOFT CORPORATION AND DOES 1 THROUGH 100,

Defendants-Appellees.

Appeal from the U.S. District Court for the Central District of California
No. CV 99-560, Judge Gary L. Taylor

BRIEF OF GOOGLE INC. AS AMICUS CURIAE
IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC
BY DEFENDANT-APPELLEE DITTO.COM, INC.
(FORMERLY ARRIBA SOFT CORPORATION)

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March 1, 2002

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I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE.

Google Inc. ("Google") is the developer of the world's largest and most comprehensive Internet search engine, which offers Google's consumers direct access to more than three billion Internet documents including World Wide Web pages, images, and newsgroup messages. Google's interest in this case arises because the Panel's decision—without clarification—could lead to allegations of copyright infringement against any Internet service that directly linked to a copyrighted work. Because linking to third party sites is precisely how search engines like Google work, such an interpretation could destroy the essential service provided by search engines: helping individuals find information in the vast morass that is the Internet. In addition, the Panel's decision leaves search engine companies and other Internet services uncertain of their exposure to copyright infringement liability for the necessary practice of linking to publicly available web sites. As such, the Panel's decision involves a question of exceptional importance in which there is an overriding need for national uniformity and is appropriate for rehearing en banc. Google files this brief together with the instant motion pursuant to Fed. R. App. P. 29(b).

II. INTRODUCTION.

Google and other search engines are the card catalogs of the digital library that is the Internet. As the Internet continues to grow, the need for technology that sifts through the billions of pages it contains increases. In its infancy, the World Wide Web contained only hundreds of web pages. Today, Google's technology helps people search for information in more than three billion web documents. It accomplishes this by creating an index of web pages and their information, much like an electronic version of a library card catalog. When a user searches this "card catalog," Google's technology returns a list of links to relevant web pages; the user may then click on a link and travel to the referenced web page.

In its decision, the Panel states that Arriba is liable for publicly displaying Kelly's images without his permission because it established a direct link to Kelly's web page. *See Kelly v. Arriba Soft Corp.,* 2002 WL 181351 (9th Cir. Feb. 6, 2002), at *9 (hereafter, "Opinion"). Without clarification, such a result would cripple the ability of users of the primary Internet navigation tool, the search engine.

III. SOME INTERPRETATIONS OF THE PANEL'S DECISION MAY HAVE PROFOUND, NEGATIVE REPERCUSSIONS ON SEARCH TECHNOLOGY COMPANIES' ACTIVITIES AND ON USERS' ABILITY TO LOCATE INFORMATION ON THE INTERNET.

A. Search Engines are Critical to Most Users' Ability to Navigate the World Wide Web and Require the Use of Linking

Google views the provision of information searching as a critical service to Internet users.[1] This is not surprising, given the amount of information available on the World Wide Web—for example, the Internet Archive, a non-profit organization that is building a digital web library, has archived ten billion web pages to date. *See* The Internet Archive, *The Internet Archive: Building an 'Internet Library,' at* <http://www.archive.org/index.html>. Search technology tools are simply necessary for users to find relevant information in the vast landscape of the Internet.[2]

Given the volume of information on the Internet, it is increasingly impractical to manually identify and organize the information. Thus, Google and many other search engines use an automated process for locating web pages and

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[1] According to industry analyst Media Metrix, Google's service is used by approximately twenty-three million visitors per month. *See* Media Metrix, *U.S. Top 50 Web and Digital Media Properties*, *at* <http://www.jmm.com/xp/jmm/press/mediaMetrixTop50.xml> (describing the number of unique visitors to the fifty sites most often visited on the Web in December, 2001).

[2] Congress has recognized the essential role that search technology plays in Internet use. It drafted the search technology portion of the safe harbor provisions of the Digital Millennium Copyright Act because "information location tools are

organizing the information contained therein in a searchable manner. A process called "crawling" (or "spidering") is used to traverse web pages and summarize the information that they contain; this information is then compiled into an "index," much like a card catalog in a library. When a user enters a search query, the index is consulted to identify the web pages that correspond to that query. The identified pages are then organized according to a variety of proprietary algorithms, and references are presented to the user in the form of a list of links to the identified pages, ranked according to the relevance of each page to the search query.

When the user selects a reference by clicking on the associated link, he or she leaves Google's servers and travels to the corresponding web page. Using the card catalog analogy, it is as if the user leaves the card catalog and goes to the book referenced by a card.

Importantly, the entire process of locating the web pages, creating the index and providing search results to a user is *automated* and *requires linking to be effective*. This is the only practical and scalable way to cope with the rapidly increasing amount of information on the Internet.

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essential to the operation of the Internet; without them, users would not be able to f find the information they need." H.R. Rep. No. 105-551 at 58 (1998).

B. The Panel Decision's Suggestion that the Linking Required for Search Technology to Work May Constitute Copyright Infringement has Potentially Devastating Implications for Users' Ability to Locate Information on the Internet.

Google is concerned by statements in the Panel's decision suggesting that the simple act of linking to another publicly available web site constitutes copyright infringement. The Panel states that:

> Arriba acted as more than a passive conduit of the images by establishing a direct link to the copyrighted images. Therefore, Arriba is liable for publicly displaying Kelly's copyrighted images without his permission.

Opinion at *9.

This language implies that the mere act of establishing a direct link to a copyrighted work creates liability for public display unless authorized. Without clarification, it might be argued that this reasoning would impose liability on every search engine for providing a list of search results that link to third party web pages (and indeed, on every Internet service provider that directly links to copyrighted works). But, as set forth in Section III above, linking is essential to search technologies such as Google's, and search technologies are critical to Internet users. If explicit permission of the copyright holder becomes prerequisite to including links in search engine results, the pressure of the transaction costs involved will lessen, if not destroy entirely, the usefulness of search technology by

greatly narrowing the number of pages that can be included in the search results. Such a result would leave Internet users without a viable means of navigating the enormous amount of information on the Internet. The number of "cards" in the card catalog analogy could be reduced to the point that only a miniscule percentage of the "books" in the "library" could be found.

IV. PUBLISHERS ON THE WORLD WIDE WEB UNDERSTAND THAT THEIR WORKS WILL BE INDEXED AND "LINKED TO" BY SEARCH ENGINES WITHOUT THE PUBLISHER'S EXPLICIT PERMISSION AND CAN EASILY PREVENT THIS USING INDUSTRY-STANDARD TECHNOLOGICAL MEANS OR BY INVOKING STATUTORY COPYRIGHT LAW.

Google is surprised that the Opinion did not address the role of the copyright holder who publishes on the World Wide Web and the copyright holder's ability to limit the inclusion of his or her copyrighted work in search engines.

While the use of search engines that employ "crawling," cataloging and linking is an important way for users to find information on the Internet, publishers on the web may use the HTML "rules of the road" to prevent content on their web sites from being crawled by search engines at all. In fact, copyright owners have the ability to use industry accepted technological means to regulate all Internet access to some or all of their content. For example, the robots exclusion standard allows a web site operator to specify that some or all pages of that site may not be indexed by a search engine. *See* Martijn Koster, *A Standard for Robot Exclusion, at* < http://www.robotstxt.org/wc/norobots.html>. Simply put, publishers are free

to keep their "books" out of the "card catalog" altogether. Google, for example, provides detailed instructions about how to prevent a URL, web page or individual piece of content from being crawled by Google's and other search engines' indexing processes. *See* Google Inc., *Remove Content from Google's Index*, *at* <http://www.google.com/remove.html>. If a publisher employs these methods, links to its site will never appear in the list of links that respond to a search engine user's query for information.

The publisher may also request that the search technology company stop crawling the publishers' web pages and that it remove disputed files from its index. *See, e.g.,* ER 90-92, Exh. 6. Indeed, Ditto did both of these things when Kelly complained about thumbnail images included in Ditto's index. *See* ER 15-16 ¶¶ 55-57.

The "notice and takedown provisions" of the Digital Millennium Copyright Act provide a solution for copyright owners concerned about search engines linking to third party sites that post infringing material. *See* 17 U.S.C. § 512(d). Once a copyright owner notifes the search engine of potentially infringing works, the search engine must act "expeditiously to remove, or disable access to, the material" in order to take advantage of the safe harbor protection provided by Section 512(d). 17 U.S.C. § 512(d)(1)(c).

V. GOOGLE AND OTHER SEARCH TECHNOLOGY COMPANIES NEED MORE CERTAINTY CONCERNING THEIR LEGAL EXPOSURE FOR LINKING THAN THE PANEL'S DECISION PROVIDES.

As set forth above in Section III, Google is concerned by the possibility that the Opinion might be interpreted such that linking to publicly available web sites constitutes copyright infringement. If this is the case, the Panel's decision will have clear negative effects on Google's and other search technology companies' business activities and on individuals' ability to locate information on and navigate the Internet. As it stands, search technology companies are mired in uncertainty. Google respectfully requests clarification of its and other search technology companies' legal exposure for listing links in their search results.

VI. CONCLUSION

For the reasons stated herein, amicus curiae Google Inc. respectfully requests rehearing of this matter, and/or rehearing en banc, as appropriate.

Respectfully submitted,

_____
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Dated: March 1, 2002

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4 and 40-1, I certify that the attached brief of Amicus Curiae Google Inc. in support of Defendant-Appellee Ditto's petition for panel rehearing/petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 1739 words.

_____

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CERTIFICATE OF SERVICE

I, Patricia Lopez, declare:

I am a citizen of the United States and am employed in the County of Alameda, State of California. I am over the age of 18 years and am not a party to the within action. My business address is Center for Clinical Education, University of California at Berkeley School of Law (Boalt Hall), 396 Simon Hall, Berkeley, CA 94720-7200. I am personally familiar with the business practice of the Samuelson Law, Technology and Public Policy Clinic. On March 1, 2002, I served the following document(s):

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at Berkeley California.

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