

Appeals Court Deals Blow To Pornography Publisher

By **Erin Coe**, erin.coe@portfoliomedia.com

Thursday, Jul 05, 2007 --- An appeals court has ruled that companies that process credit card payments for Internet pirates should not be held liable for copyright infringement.

On Tuesday, the U.S. Court of Appeals for the Ninth Circuit affirmed a judge's decision to toss a lawsuit filed by publisher Perfect 10 Inc. against Visa International, MasterCard Inc. and their affiliated banks.

In a 2-1 decision, the appellate panel determined that the Beverly Hills-based publisher of adult magazines and Web sites was unable to show how the credit card associations were at fault because they were not responsible for steering individuals to the Web sites and helping download any protected content.

The ruling was a blow to Perfect 10's attempts to prevent Web sites from selling access to its photographs of nude models without authorization. The publisher said it planned to ask for a new hearing by a bigger panel of appellate judges.

Two of the three judges concluded that Perfect 10 went too far to implicate third parties for violating copyright laws, alleging that they knowingly provided the "site and facilities" for the infringing activity.

"Defendants merely provide a method of payment, not a 'site' or 'facility' of infringement. Any conception of 'site and facilities' that encompasses defendants would also include a number of peripherally involved third parties, such as computer display companies, storage device companies and software companies that make the software necessary to alter and view the pictures, and even utility companies that provide electricity to the Internet," said Circuit Judge Milan D. Smith Jr. in his order.

Perfect 10 has also taken on Google Inc. in its crusade to stop the wholesale redistribution of what the publisher claimed in court documents as "tasteful copyrighted images of the world's most beautiful natural models."

The publisher secured a temporary injunction last year that prohibited Google from displaying smaller copies of Perfect 10's photographs that other Web sites had illegally posted. However, in May, the appeals court reversed the injunction and allowed the search engine to continue displaying the content.

Perfect 10 also targeted Amazon.com Inc. as a defendant in the suit because

its A9 search engine steers users to Google's search results.

Perfect 10 filed suit against the credit card associations in an effort to eliminate the financial incentive for copyright infringement. The publisher claimed that credit card companies should be held responsible for piracy because their rules mandate member banks to look into merchants believed to be engaging in illegal activities.

Circuit Judge Alex Kozinski dissented with the majority opinion, finding that the credit card companies were providing "very significant help" to the direct infringers and that Perfect 10 should be given an opportunity to prove its case through discovery and trial.

"They knowingly provide a financial bridge between buyers and sellers of pirated works, enabling them to consummate infringing transactions, while making a profit on every sale. If such active participation in infringing conduct does not amount to indirect infringement, it's hard to imagine what would," Kozinski said.

But Smith and Circuit Judge Stephen Reinhardt concluded that although the credit card associations could deny payment, they had no absolute right to prevent the infringing activity because like Google, they couldn't stop third-party Web sites from reproducing, altering or distributing infringing images of Perfect 10's photographs.

The credit card companies are so far removed from the activities accused of infringement that it is unreasonable to hold them as responsible parties, according to Marc Cooperman, a partner at IP law firm Banner & Witcoff Ltd.

"This is another example of the ongoing problem of liability that Internet companies are facing. For example, should Amazon be held liable for counterfeits sold on their sites? Or Google for literature that infringes on a copyrighted work? Some sites, like YouTube, are posting disclaimers or anti-copyright infringement software to prevent such occurrences. This decision is just another indication that third parties arguably tied into Internet sites may have little to fear," Cooperman said.

Perfect 10 Inc. is represented in this matter by King Holmes Paterno & Berliner LLP and Berman Mausner & Resser. Visa International is represented by Townsend and Townsend and Crew LLP, and MasterCard International Inc. is represented by Winston & Strawn LLP.

The case is Perfect 10 Inc. v. Visa International, case number 05-15170, in the U.S. Court of Appeals for the Ninth Circuit.