

# e-commerce law & policy

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# Payment processors: liability for trade in stolen items

The US Court of Appeals for the Ninth Circuit dismissed a claim from Perfect 10, which alleged that Visa and others had ‘secondarily’ infringed its copyright by continuing to provide payment services to internet sites that traded in images stolen from Perfect 10. Michael Vatis, a partner in the New York office of Steptoe & Johnson LLP, explains that although it represents a victory for payment processors, the decision is worth monitoring, as lawmakers could decide on a reversal.

In a significant win for credit card associations and payment processors, the United States Court of Appeals for the Ninth Circuit in July affirmed<sup>1</sup> a lower court’s dismissal of all causes of action in *Perfect 10, Inc. v Visa* for failure to state a claim. Perfect 10 had alleged that, by continuing to provide payment services to websites that trade in stolen copies of Perfect 10’s adult images after receiving notice of the infringement, Visa, MasterCard and affiliated banks and data processing services secondarily infringed upon Perfect 10’s copyrights and trademarks. In a 2-1 ruling, the Ninth Circuit found that Perfect 10’s claims came up short, since the defendants’ payment systems were not essential to the distribution of the allegedly infringing images, were not designed to encourage infringement, and did not create a ‘right and ability to control’ the allegedly infringing activity. The court also repeatedly noted that a finding for the plaintiffs would contradict the US policy of promoting e-commerce. Nevertheless, despite this win for the credit card companies, online payment processors should still tread carefully when serving suspect customers.

## Ruling preface

The majority prefaced its ruling by noting that Perfect 10’s claims were evaluated with ‘an awareness that credit cards serve as the primary engine of electronic commerce and that Congress has determined it to be the policy of the United States ... to promote the continued development of the internet’. The court then found that there could be no contributory copyright infringement, since:

- contribution required a ‘direct connection’ to the infringement, but the defendants’ payment systems were not used to ‘alter’

‘display’, ‘locate’ or otherwise ‘distribute’ the infringing images;

- while the defendants ‘ma[d]e it easier for infringement to be profitable’, infringement could occur without payment, and ‘other viable funding mechanisms [were] available’; and
- defendants had not ‘promoted their payment system as a means to infringe’, and therefore had not induced infringement.

## Perfect 10 v Amazon

The majority also distinguished the Ninth Circuit’s earlier ruling<sup>2</sup> in *Perfect 10, Inc. v Amazon.com, Inc.* There, the court had held that search engines could face contributory liability for using in-line linking to aid third party websites in distributing full-size images. The key distinction, the majority in the *Visa* case noted, was that in *Amazon.com*, the ‘search engine itself assist[ed] in the distribution of infringing content to internet users, while Defendants’ payment systems do not’. The majority also warned that finding defendants liable would open the door to ‘expensive and drawn-out ... litigation’, which could include bogus suits used to drive competitors out of business, and might push some credit card companies to ‘decline to finance purchases that are more legally risky’. The court concluded that ‘[t]o find that Defendants’ activities fall within the scope of [contributory infringement] would require a radical and inappropriate expansion of existing principles of secondary liability and would violate the public policy of the United States’.

## Copyright infringement claim

The court also barred Perfect 10’s vicarious copyright infringement claim. Although credit card association rules ‘require the members and member banks ... to

terminate [merchants'] participation in the payment network if certain illegal activity is found', the court concluded that these contracts do not establish the 'right and ability to control the content of the infringing websites' - since the defendants cannot order the websites to remove infringing material or otherwise directly stop its online distribution, infringement could continue without the credit cards' payment services.

### Dissent

The decision drew a strongly worded dissent, which found significant tensions between the majority's opinion and the Amazon.com decision. The dissent contended that Amazon had established contributory copyright liability for any activity that 'substantially assists' infringement - regardless of whether such infringement could continue if the assistance were removed - and vicarious copyright liability in cases where the defendants have the contractual power to 'stop or limit' infringement. It argued that the majority had 'ignor[ed]' several of the plaintiff's allegations, including that the pirate sites 'cannot exist' without defendants, and that the defendants had 'adopted special rules and practices that apply only to the Stolen Content Websites'. It also suggested that courts would have 'no difficulty' in demarcating the limits of such secondary liability, and noted that finding liability would not threaten e-commerce 'any more than did the recent law<sup>3</sup> prohibiting the use of credit cards for internet gambling'. Accordingly, the dissent concluded that, since the defendants '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', they

**The court also repeatedly noted that a finding for the plaintiffs would contradict the US policy of promoting e-commerce**

should have been held secondarily liable for copyright and trademark infringement.

### Conclusion

Credit card companies and other online payment processors should watch this case closely, since a reversal could significantly increase their liability for providing services to online merchants. Moreover, as the dissent's reference to federal gambling legislation suggests, lawmakers are warming to the idea of holding payment processors responsible for the business practices of their online customers.

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1. Perfect 10, Inc., v Visa International Service Association; First Data Corporation; Cardservice International; Inc.; Humboldt Bank; MasterCard International, Inc., No. 05-15170, D.C. No. CV-04-00371-JW Opinion. [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/7EF5B069AA425BC38825730D00579E8C/\\$file/0515170.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/7EF5B069AA425BC38825730D00579E8C/$file/0515170.pdf?openelement)
2. Perfect 10, Inc., a California corporation, v Amazon.com Inc., a corporation; A9.com Inc., a corporation. No. 06-55405, D.C. No. CV-04-09484-AHM. [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DE8297F56287C0BC882572DC007DACC6/\\$file/0655405.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DE8297F56287C0BC882572DC007DACC6/$file/0655405.pdf?openelement)
3. Security And Accountability For Every Port Act of 2006, Public Law 109-347, 109th Congress, Title VIII - Unlawful Internet Gambling Enforcement. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ347.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ347.109.pdf)



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