PERFECT 10, INC.
v.
VISA INTERNATIONAL SERVICE ASSOCIATION et al.

***494 F.3d 788* (9th Cir. 2007)**

[*792] MILAN D. SMITH, JR., Circuit **[**2]** Judge: . . .

FACTS AND PRIOR PROCEEDINGS

Perfect 10 publishes the magazine "PERFECT10" and operates the subscription website www.perfect10.com., both of which "feature tasteful copyrighted images of the world's most beautiful natural models." Appellant's Opening Brief at 1. Perfect 10 claims copyrights in the photographs published in its magazine and on its website, federal registration of the "PERFECT 10" trademark and blanket publicity rights for many of the models appearing **[**3]** in the photographs. Perfect 10 alleges that numerous websites based in several countries have stolen its proprietary images, altered them, and illegally offered them for sale online.

Instead of suing the direct infringers in this case, Perfect 10 sued Defendants, financial institutions that process certain credit card payments to the allegedly infringing websites. The Visa and MasterCard entities are associations of member banks that issue credit cards to consumers, automatically process payments to merchants authorized to accept their cards, and provide information to the interested parties necessary to settle the resulting debits and credits. Defendants collect fees for their services in these transactions. Perfect 10 alleges that it sent Defendants repeated notices specifically identifying infringing websites and informing Defendants that some of their consumers use their payment cards to purchase infringing images. Defendants admit receiving some of these notices, but they took no action in response to the notices after receiving them. . . .

Perfect 10 filed suit against Defendants on January 28, 2004 alleging contributory and vicarious copyright and trademark infringement as well as violations of California laws proscribing unfair competition and false advertising, violation of the statutory and common law right of publicity, libel, and intentional interference with prospective economic advantage. Defendants moved to dismiss the initial complaint under *FRCP 12(b)(6)*. The district court granted the motion, dismissing the libel and intentional **[**5]** interference claims with prejudice but granting leave to amend the remaining claims. In its first amended complaint, Perfect 10 essentially repeated the allegations in its original complaint concerning the surviving causes of action and Defendants again moved to dismiss under *FRCP 12(b)(6)*. The district court granted the Defendants' second motion in full, dismissing all remaining causes of action with prejudice. Perfect 10 appealed to this court. . . .

STANDARDS OF REVIEW

We review *de novo* the district court's dismissal for failure to state a claim upon which relief can be granted pursuant to *FRCP 12(b)(6)*. *Rodriguez v. Panayiotou, 314 F.3d 979, 983 (9th Cir. 2002)*. On appeal, "we take all of the allegations of material fact stated in the complaint as true and construe them in the light most favorable to the nonmoving party. A complaint should not be dismissed unless it appears beyond doubt that plaintiff **[**6]** can prove no set of facts in support of his claim which would entitle him to relief." *Id*. (internal citations omitted).

Although a plaintiff's allegations are generally taken as true, the court need not accept conclusory allegations of law or unwarranted inferences, and dismissal is required if the facts are insufficient to support a cognizable claim. *City of Arcadia v. U.S. Envtl. Prot. Agency, 411 F.3d 1103, 1106 n.3 (9th Cir. 2005)*; *see also Pena v. Gardner, 976 F.2d 469, 471- 72 (9th Cir. 1992)*. The court may also affirm on any ground supported by the record even if the district court did not consider the issue. *Fields v. Legacy Health Sys., 413 F.3d 943, 958 n.13 (9th Cir. 2005)*; *Arc Ecology v. United States Dep't of the Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005)*.

We review *de novo* the district court's interpretation of state law. *Rodriguez, 314 F.3d at 983*.

DISCUSSION . . .

A. Secondary Liability for Copyright Infringement

Perfect 10 alleges that numerous websites based in several countries--and their paying customers--have directly infringed its rights under the Copyright Act, *17 U.S.C. § 101, et. seq.* [1] In the present suit, **[**7]** however, Perfect 10 has sued Defendants, not the direct infringers, claiming contributory and vicarious copyright infringement because Defendants process credit card charges incurred by customers to acquire the infringing images.

1 While Perfect 10's complaint does not clearly specify which of Perfect 10's rights are being infringed, it appears that at least four such rights are potentially at issue: reproduction (*17 U.S.C. § 106(1)*); derivative works (*17 U.S.C. § 106(2)*); distribution of copies (*17 U.S.C. § 106(3)*); and public display (*17 U.S.C. § 106(5)*).

We evaluate Perfect 10's claims 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--(1) to promote the continued development of the Internet and other interactive computer services and other interactive media [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *47 U.S.C. §§ 230(b)(1), (2)*.

1. Contributory Copyright Infringement

Contributory copyright infringement is a form of secondary liability with **[*795]** roots in the tort-law concepts of enterprise liability and imputed intent. *See Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996)*; *Perfect 10, Inc. v. Amazon.com, Inc. et.al., 487 F.3d 701, 2007 U.S. App. LEXIS 11420, 2007 WL 1428632 (9th Cir. May 16, 2007)*. This court and the United States Supreme Court (Supreme Court) have announced various formulations of the same basic test for such liability. . . .

We understand these several criteria to be noncontradictory variations on the same basic test, i.e., that one contributorily infringes when he (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement. . . .

a. Knowledge of the Infringing Activity

Because we find that Perfect 10 has not pled facts sufficient to establish that Defendants induce or materially contribute to the infringing activity, **[**11]** Perfect 10's contributory copyright infringement claim fails and we need not address the Defendants' knowledge of the infringing activity.

[*796] b. Material Contribution, Inducement, or Causation

To state a claim of contributory infringement, Perfect 10 must allege facts showing that Defendants induce, cause, or materially contribute to the infringing conduct. *See, e.g.*, *Ellison, 357 F.3d at 1076*. Three key cases found defendants contributorily liable under this standard:*Fonovisa, 76 F.3d 259*; *Napster, 239 F.3d 1004*; and *Grokster, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781*. In *Fonovisa*, we held a swap meet operator contributorily liable for the sale of pirated works at the swap meet. In *Napster*, we held the operator of an electronic file sharing system liable when users of that system employed it to exchange massive quantities of copyrighted music. In *Grokster*, the Supreme Court found liability for the substantially similar act of distributing software that enabled exchange of copyrighted music on a peer-to-peer, rather than a centralized basis. Perfect 10 argues that by continuing to process credit card payments to the infringing websites despite **[**13]** having knowledge of ongoing infringement, Defendants induce, enable and contribute to the infringing activity in the same way the defendants did in *Fonovisa, Napster* and *Grokster*. We disagree.

1. Material Contribution

The credit card companies cannot be said to materially contribute to the infringement in this case because they have no direct connection to that infringement. Here, the infringement rests on the reproduction, alteration, display and distribution of Perfect 10's images over the Internet. Perfect 10 has not alleged that any infringing material passes over Defendants' payment networks or through their payment processing systems, or that Defendants' systems are used to alter or display the infringing images. In *Fonovisa*, the infringing material was physically located in and traded at the defendant's market. Here, it is not. Nor are Defendants' systems used to locate the infringing images. The search engines in *Amazon.com* provided links to specific infringing images, **[**14]** and the services in *Napster* and *Grokster* allowed users to locate and obtain infringing material. Here, in contrast, the services provided by the credit card companies do not help locate and are not used to distribute the infringing images. While Perfect 10 has alleged that Defendants make it easier for websites to profit from this infringing activity, the issue here is reproduction, alteration, display and distribution, which can occur without payment. Even if infringing images were not paid for, there would still be infringement. *See Napster, 239 F.3d at 1014* (Napster users infringed the distribution right by uploading file names to the search index for others to copy, despite the fact that **[*797]** no money changed hands in the transaction).

Our analysis is fully consistent with this court's recent decision in *Perfect 10 v. Amazon.com*, where we found that "Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps." *2007 U.S. App. LEXIS 11d420, [WL] at *19*. The dissent claims this statement applies squarely to Defendants **[**15]** if we just substitute "payment systems" for "search engine." Dissent at 7866. But this is only true if search engines and payment systems are equivalents for these purposes, and they are not. The salient distinction is that Google's search engine itself assists in the distribution of infringing content to Internet users, while Defendants' payment systems do not. The *Amazon.com* court noted that "Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials." *Id* . Defendants do not provide such a service. They in no way assist or enable Internet users to locate infringing material, and they do not distribute it. They do, as alleged, make infringement more profitable, and people are generally more inclined to engage in an activity when it is financially profitable. However, there is an additional step in the causal chain: Google may materially contribute to infringement by making it fast and easy for third parties to locate and distribute infringing material, whereas Defendants make it easier for infringement to be *profitable*, which tends to increase financial incentives to infringe, **[**16]** which in turn tends to increase infringement.

The dissent disagrees with our reading of *Amazon.com* and charges us with wishful thinking, dissent at 7866, and with "draw[ing] a series of ephemeral distinctions," dissent at 7890. We respectfully disagree and assert that our construction of the relevant statutes and case law is completely consistent with existing federal law, is firmly grounded in both commercial and technical reality and conforms to the public policy of the United States. Helping users to locate an image might substantially assist users to download infringing images, but processing payments does not. If users couldn't pay for images with credit cards, infringement could continue on a large scale because other viable funding mechanisms are available. For example, a website might decide **[**17]** to allow users to download some images for free and to make its profits from advertising, or it might develop other payment mechanisms that do not depend on the credit card companies. In either case, the unlicensed use of Perfect 10's copyrighted images would still be infringement. We acknowledge that Defendants' **[*798]** payment systems make it easier for such an infringement to be profitable, and that they therefore have the effect of increasing such infringement, but because infringement of Perfect 10's copyrights can occur without using Defendants' payment system, we hold that payment processing by the Defendants as alleged in Perfect 10's First Amended Complaint does not constitute a "material contribution" under the test for contributory infringement of copyrights. [9]

9 Our dissenting colleague assures us that we would not jeopardize Internet commerce by finding Defendants liable because he has "every confidence" that this court will simply find that other providers of essential services may contribute to infringement, but not materially so. Dissent at 7875. We take little comfort in his assurances because the predicate of our colleague's optimistic view of future judicial refinement of his new world of secondary liability is a large number of expensive and drawn-out pieces of litigation that may, or may not, ever be filed. Meanwhile, what would stop a competitor of a web-site from sending bogus notices to a credit card company claiming infringement by its competitor in the hope of putting a competitor out of business, or, at least, requiring it to spend a great deal of money to clear its name? Threatened with significant potential secondary liability on a variety of fronts under the dissent's proposed **[**19]** expansion of existing secondary liability law, perhaps the credit card companies would soon decline to finance purchases that are more legally risky. They, after all, are as moved by Adam Smith's "invisible hand" as the next set of merchants. If that happened, would *First Amendment* rights of consumers be trampled? Would Perfect 10 itself be adversely impacted because no credit card company would want to take a chance on becoming secondarily liable? . . .

Our holding is also fully consistent with and supported by this court's previous holdings in *Fonovisa* and *Napster* . While there are some limited similarities between the factual **[**20]** scenarios in *Fonovisa* and *Napster* and the facts in this case, the differences in those scenarios are substantial, and, in our view, dispositive. In *Fonovisa*, we held a flea market proprietor liable as a contributory infringer when it provided the facilities for and benefitted from the sale of pirated works. *76 F.3d 259*. The court found that the primary infringers and the swap meet were engaged in a mutual enterprise of infringement and observed that "it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet. These services include, among other things, the provision of space, utilities, parking, advertising, plumbing, and customers." *76 F.3d at 264*. But the swap meet owner did more to encourage the enterprise. In 1991, the Fresno County Sheriff raided the swap meet and seized 38,000 counterfeit recordings. *Id. at 261*. The Sheriff sent a letter to the swap meet operator the following year notifying it that counterfeit sales continued and reminding it that it had agreed to provide the Sheriff with identifying information from each vendor, but had failed to do so. *Id*. The *Fonovisa* court found **[**21]** liability because the swap meet operator knowingly provided the "site and facilities" for the infringing activity. *Id. at 264*.

In *Napster*, this court found the designer and distributor of a software program liable for contributory infringement. *239 F.3d 1004*. Napster was a file-sharing **[*799]** program which, while capable of non-infringing use, was expressly engineered to enable the easy exchange of pirated music and was widely so used. *See Napster, 239 F.3d at 1020 n.5* (quoting document authored by Napster co-founder which mentioned "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music' "). Citing the *Fonovisa* standard, the *Napster* court found that Napster materially contributes to the users' direct infringement by knowingly providing the "site and facilities" for that infringement. *239 F.3d at 1022*.

Seeking to draw an analogy to *Fonovisa* and, by extension, *Napster*, Perfect 10 pleads that Defendants materially contribute to the infringement by offering services that allow it to happen on a larger scale than would otherwise be possible. Specifically, because the swap meet in *Fonovisa* created a commercial environment which allowed the frequency **[**22]** of that infringement to increase, and the Napster program increased the frequency of infringement by making it easy, Perfect 10 argues that the Defendants have made available a payment system that allows third-party infringement to be profitable, and, consequently, more widespread than it otherwise might be. This analogy fails. . . .

While Perfect 10 has alleged that it is easy to locate images that infringe its copyrights, the Defendants' payment systems do not cause this. Perfect 10's images are easy to locate because of the very nature of the Internet--the website format, software allowing for the easy alteration of images, high-speed connections allowing for the rapid transfer of high-resolution image files, and perhaps most importantly, powerful search engines that can aggregate and display those images in a useful and efficient manner, without charge, and with astounding speed. Defendants play no role in any of these functions.

Perfect 10 asserts otherwise by arguing for an extremely broad conception of the term "site and facilities" that bears no relationship to the holdings in the actual "cases and controversies" decided in *Fonovisa* and *Napster* . Taken literally, Perfect 10's theory appears to include any tangible or intangible component related to any transaction in which infringing material is bought and sold. But *Fonovisa* and *Napster* do not require **[**24]** or lend themselves to such a construction. The actual display, location, and distribution of infringing images in this case occurs on websites that organize, display, and transmit information over the wires and wireless instruments that make up the Internet. The *websites* are the "site" of the infringement, not Defendants' payment networks. Defendants do not create, operate, **[*800]** advertise, or otherwise promote these websites. They do not operate the servers on which they reside. Unlike the *Napster* (and *Grokster*) defendants, they do not provide users the tools to locate infringing material, nor does any infringing material ever reside on or pass through any network or computer Defendants operate. [11] 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. . . .

> 11 Moreover, if the processing of payment for an infringing **[**25]** transaction were as central to the infringement as the dissent believes it to be--*see, e.g.*, dissent at 7867 (payment processing is "an essential step in the infringement process"), dissent at 7873 ("Defendants are directly involved in every infringing transaction where payment is made by credit card")-- it is difficult to see why Defendants would be not be *direct* infringers of the distribution right. . . .

2. Inducement

In *Grokster*, the Supreme Court applied the patent law concept of "inducement" to a claim of contributory infringement against a file-sharing program. *545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781*. The court found that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id. at 936-37*. Perfect 10 claims that *Grokster* is analogous because Defendants induce customers to use their **[**27]** cards to purchase goods and services, and are therefore guilty of specifically inducing infringement if the cards are used to purchase images from sites that have content stolen from Perfect 10. This is mistaken. Because Perfect 10 alleges no "affirmative steps taken to foster infringement" and no facts suggesting that Defendants promoted their payment system as a means to infringe, its claim is premised on a fundamental misreading of **[*801]** *Grokster* that would render the concept of "inducement" virtually meaningless.

The *Grokster* court announced that the standard for inducement liability is providing a service "with the object of promoting its use to infringe copyright." *Id* . "[M]ere knowledge of infringing potential or actual infringing uses would not be enough here to subject [a defendant] to liability." *Id . at 937*. Instead, inducement "premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id*. Moreover, to establish inducement liability, it is crucial to establish that the distributors "communicated an inducing message to their . . . users," the classic example of which **[**28]** is an "advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations." *Id*. The *Grokster* court summarized the "inducement" rule as follows:

> In sum, where an article is good for nothing else but infringement, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe. Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's

> products will be misused. It leaves breathing room for innovation and a vigorous commerce.

545 U.S. at 932-33 (internal citations and quotation marks omitted).

Perfect 10 has not alleged that any of these standards are met or that any of these considerations are present here. Defendants do, of course, market their credit cards as a means to pay for goods and services, online and elsewhere. But it does not follow that Defendants affirmatively promote each product that their cards are used to purchase. The software systems in *Napster* and *Grokster* were engineered, disseminated, **[**29]** and promoted explicitly for the purpose of facilitating piracy of copyrighted music and reducing legitimate sales of such music to that extent. Most Napster and Grokster users understood this and primarily used those systems to purloin copyrighted music. Further, the Grokster operators explicitly targeted then-current users of the Napster program by sending them ads for its OpenNap program. *Id. at 925-26*. In contrast, Perfect 10 does not allege that Defendants created or promote their payment systems as a means to break laws. Perfect 10 simply alleges that Defendants generally promote their cards and payment systems but points to no "clear expression" or "affirmative acts" with any specific intent to foster infringement. . . .

Finally, we must take as true the allegations that Defendants lend their names and **[**31]** logos to the offending websites and continue to allow their cards to be used to purchase infringing images despite actual knowledge of the infringement--and perhaps even bending their association rules to do so. But we do not and need not, on this factual basis, take as true that Defendants "induce" consumers to buy pirated content with their cards. "Inducement" is a legal determination, and dismissal may not be avoided by characterizing a legal determination as a factual one. We must determine whether the facts as pled constitute a "clear expression" of a specific intent to foster infringement, and, for the reasons above noted, we hold that they do not.

2. Vicarious Copyright Infringement

Vicarious infringement is a concept related to, but distinct from, contributory infringement. Whereas contributory infringement is based on tort-law principles of enterprise liability and imputed intent, vicarious infringement's roots lie in the agency principles of *respondeat superior*. *See Fonovisa, 76 F.3d at 261-62*. To state a claim for vicarious copyright infringement, a plaintiff must allege that the defendant has (1) the right and ability to supervise [13] the infringing conduct and (2) a direct **[**32]** financial interest in the infringing activity. *Ellison, 357 F.3d at 1078*; *Napster, 239 F.3d at 1022* (citations omitted). The Supreme Court has recently offered (in dictum) an alternate formulation of the test: "One . . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Grokster, 545 U.S. at 930* (internal citations omitted). Perfect 10 alleges that Defendants have the right and ability to control the content of the infringing websites by refusing to process credit card payments to the websites, enforcing their own rules and regulations, or both. We hold that Defendants' conduct alleged in Perfect 10's first amended complaint fails to state a claim for vicarious copyright infringement.

13 *Fonovisa* essentially viewed "supervision" in this context in terms of the swap meet operator's ability to control the activities of the vendors, *76 F.3d at 262*, and *Napster* essentially viewed it in terms of Napster's ability to police activities of its users, *239 F.3d at 1023*.

a. Right and Ability to Supervise the Infringing Activity

In order to join a Defendant's payment network, merchants and member banks must agree to follow that Defendant's **[**33]** rules and regulations. These rules, among other things, prohibit member banks from providing services to merchants engaging in certain illegal activities and require the members and member banks to investigate merchants suspected of engaging in such illegal activity and to terminate their participation in the payment network if certain illegal activity is **[*803]** found. Perfect 10 has alleged that certain websites are infringing Perfect 10's copyrights and that Perfect 10 sent notices of this alleged infringement to Defendants. Accordingly, Perfect 10 has adequately pled that (1) infringement of Perfect 10's copyrights was occurring, (2) Defendants were aware of the infringement, and (3) on this basis, Defendants could have stopped processing credit card payments to the infringing websites. These allegations are not, however, sufficient to establish vicarious liability because even with all reasonable inferences drawn in Perfect 10's favor, Perfect 10's allegations of fact cannot support a finding that Defendants have the right and ability to control the infringing activity.

In reasoning closely analogous to the present case, the *Amazon.com* court held that Google was not vicariously liable **[**34]** for third-party infringement that its search engine facilitates. In so holding, the court found that Google's ability to control its own index, search results, and webpages does not give Google the right to control the infringing acts of third parties even though that ability would allow Google to affect those infringing acts to some degree. . . .

Perfect 10 argues that this court's decision in *Napster* compels a contrary result. The *Napster* court found a likelihood of vicarious liability because Napster "had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material." *239 F.3d at 1023*. The Napster program created a forum for the exchange of digital music files and the program administrators had the ability to block certain users from accessing that forum to upload or download such files. As pled by Perfect 10, Defendants also provide a system that allows the business of infringement for profit to operate on a larger scale than it otherwise **[**36]** might, and Defendants have the ability to deny users access to that payment system.

This argument fails. The Napster program's involvement with--and hence its "policing" power over--the infringement was much more intimate and directly intertwined with it than Defendants' payment systems are. Napster provided users with the tools to enable the easy reproduction and distribution of the actual infringing content and to readily search **[*804]** out and identify infringing material. Defendants' payment systems do not. Napster also had the right and ability to block user access to its program and thereby deprive particular users of access to their forum and use of their location and distribution tools. Defendants can block access to their payment system, but they cannot themselves block access to the Internet, to any particular websites, or to search engines enabling the location of such websites. Defendants are involved with the payment resulting from violations of the distribution right, but have no direct role in the actual reproduction, alteration, or distribution of the infringing images. They cannot take away the tools the offending websites use to reproduce, alter, and distribute the infringing **[**37]** images over the Internet. They can only take away the means the websites currently use to sell them.

Perfect 10 offers two counter-arguments. Perfect 10 first claims that Defendants' rules and regulations permit them to require member merchants to cease illegal activity-- presumably including copyright infringement--as a condition to their continuing right to receive credit card payments from the relevant Defendant entities. Perfect 10 argues that these contractual terms effectively give Defendants contractual control over the *content* of their merchants' websites, and that contractual control over content is sufficient to establish the "right and ability" to control that content for purposes of vicarious liability. In the sense that economic considerations can influence behavior, these contractual rules and regulations do give Defendants some measure of control over the offending websites since it is reasonable to believe that fear of losing access to credit card payment **[**39]** processing services would be a sufficient incentive for at least some website operators to comply with a content-based suggestion from Defendants. But the ability to exert financial pressure does not give Defendants the right or ability to control the actual infringing activity at issue in this case. Defendants have no absolute right to stop that activity--they cannot stop websites **[*805]** from reproducing, altering, or distributing infringing images. . . . Defendants can only refuse to process credit card payments to the offending merchant within their payment network, or they can threaten to do so if the merchant does not comply with a request **[**40]** to alter content. . . . For vicarious liability to attach, however, the defendant must have the right and ability to *supervise* and *control* the infringement, not just affect it, and Defendants do not have this right or ability.

Perfect 10 relies heavily on the reasoning of *Fonovisa* and *Napster* to support this argument, but that reliance is misplaced. The swap meet operator in *Fonovisa* and the software operator in *Napster* both had the right to remove individual infringers from the **[**41]** very place the infringement was happening. Defendants, like the defendants in *Amazon.com*, have no such right. As already discussed, Defendants cannot take away the software the offending websites use to copy, alter, and distribute the infringing images, cannot remove those websites from the Internet, and cannot themselves block the distribution of those images over the Internet. Defendants can refuse to process credit card payments for those images, but while this refusal would reduce the number of those sales, that reduction is the result of indirect economic pressure rather than an affirmative exercise of contractual rights. [17]

> 17 We do not hold, as the dissent suggests, that the ability to exert financial pressure is categorically insufficient to establish sufficient control for vicarious liability. We recognize that financial pressure is often very powerful, but it is precisely for this reason that we hesitate to expand the law of vicarious liability to encompass the sort of financial pressure Defendants may exert. The dissent believes that the gravamen of "right and ability to control" is the "practical ability" to limit infringement. Dissent at 7878-79. But if this were true, despite **[**42]** the dissent's protestations to the contrary, there are many providers of essential services who could limit infringement by refusing to offer those services. If "practical ability" is the test, it does not matter if software operators, network technicians, or even utility companies do not have a contractual right to affect the websites' content. It is an article of faith of the free market that, subject to certain limited exceptions, one can refuse to deal with anyone for any reason, and by refusing to deal with the offending websites, these providers could limit infringement.

Perfect 10 also argues that were infringing websites barred from accepting the Defendants' credit cards, it would be impossible for an online website selling adult images to compete and operate at a profit. While we must take this allegation as **[*806]** true, it still fails to state a claim because it conflates the power to stop profiteering with the right and ability to control infringement. Perfect 10's allegations do not establish that Defendants have the authority to prevent theft or alteration of the copyrighted images, remove infringing material from these websites or prevent its distribution over the Internet. **[**43]** Rather, they merely state that this infringing activity could not be *profitable* without access to Defendants' credit card payment systems. The alleged infringement does not turn on the payment; it turns on the reproduction, alteration and distribution of the images, which Defendants do not do, and which occurs over networks Defendants do not control. . . .

Grokster does not stand for the proposition that just because the services provided by a company help an infringing enterprise generate revenue, that company is necessarily vicariously liable for that infringement. Numerous services are required for the third party infringers referred to by Perfect 10 to operate. In addition to the necessity of creating and maintaining a website, numerous hardware manufacturers must produce the computer on which the website physically sits; a software engineer must create the program that copies and alters the stolen images; technical support companies must fix any hardware and software problems; utility companies must provide the electricity that makes all these different related operations run, etc. All these services are essential to make the businesses described viable, they all profit to some degree from those businesses, and by withholding their services, they could impair--perhaps even destroy--the commercial viability of those business. But that does not mean, and *Grokster* by no means holds, **[**45]** that they are all potentially liable as vicarious infringers. Even though they have the "right" to refuse their services, and hence the literal power to "stop or limit" the infringement, they, like Defendants, do not exercise sufficient control over the actual infringing activity for vicarious liability to attach.

b. Obvious and Direct Financial Interest in the Infringing Activity

Because Perfect 10 has failed to show that Defendants have the right and ability to control the alleged infringing conduct, it has not pled a viable claim of vicarious liability. Accordingly, we need not reach the issue of direct financial interest. . . .