

(Publication page references are not available for this document.)

United States District Court,
C.D. California.
PERFECT 10, Plaintiff,
v.
GOOGLE, INC., et al., Defendants.

Feb. 17, 2006.

ORDER GRANTING IN PART AND DENYING IN
PART PERFECT 10'S MOTION FOR PRELIMINARY
INJUNCTION AGAINST GOOGLE

[MATZ](#), District Judge.

I. INTRODUCTION

* * *

Plaintiff Perfect 10, Inc. ("P10") filed separate suits against Google, Inc. and against Amazon.com, Inc. and its subsidiary, A9.com, Inc. [\[FN1\]](#) (collectively, "Amazon"), alleging copyright and trademark infringement and various related claims. The suits were consolidated. P10 moves now for a preliminary injunction against both Defendants, solely on the basis of its copyright claims. P10 seeks to prevent Defendants' image search engines from displaying "thumbnail" copies of P10's copyrighted images and also from linking to third-party websites which host and serve infringing full-size images.

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The Court now concludes that Google's creation and public display of "thumbnails" likely do directly infringe P10's copyrights.

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II. BACKGROUND

A. The Parties

1. Perfect 10

P10 publishes the adult magazine "PERFECT 10" and operates the subscription website, "perfect10.com," both of which feature high-quality, nude photographs of "natural" models. Pl.'s Zada Decl. ¶¶ 9-10.

P10 generates virtually all of its revenue from the sale of copyrighted works: (1) it sells magazines at newsstands (\$7.99 per issue) and via subscription; (2) it sells website subscriptions to perfect10.com for \$25.50 per month, which allow subscribers to view P10 images in the exclusive "members' area" of the site [\[FN3\]](#); and (3) since early 2005, when P10 entered into a licensing agreement with Fonestarz Media Limited, a United

Kingdom company, for the worldwide sale and distribution of P10 reduced-size copyrighted images for download and use on cell phones, it has sold, on average, approximately 6,000 images per month in the United Kingdom. *Id.* ¶ 16. Aside from the licensing agreement with Fonestarz Media Limited, P10 has not authorized any third-party individual or website to copy, display, or distribute any of the copyrighted images which P10 has created. *Id.* ¶ 17.

2. Google

Google describes itself as a "software, technology, Internet, advertising, and media company all rolled into one." Google, Inc., 2004 Annual Report (Form 10-K), at 9. Google is one of the most highly frequented websites on the internet. Pl.'s Zada Decl., Ex. 3 (report from Alexa Internet, Inc. showing <http://www.google.com/ranking> as the third most visited site in the world). Google operates a search engine located at the domain name "google.com." Google's search engine indexes websites on the internet via a web "crawler," *i.e.*, software that automatically scans and stores the content of each website into an easily-searchable catalog. Def.'s Levine Decl. ¶¶ 13- 14. Websites that do not wish to be indexed, or that wish to have only certain content indexed, can do so by signaling to Google's web crawler those parts that are "off limits." Google's web crawler honors those signals.

Google operates different search engines for various types of web content. All search queries are text-based, *i.e.*, users input text search strings representing their query, but results can be in the form of text, images, or even video. *Id.* ¶ 21. Thus, for example, Google's basic web search, called Google Web Search, located at <http://www.google.com/>, receives a text search string and returns a list of *textual* results relevant to that query. Google Image search, on the other hand, receives a text search string and returns a number of reduced-sized, or "thumbnail" images organized into a grid. [\[FN4\]](#)

Google stores content scanned by its web crawler in Google's "cache." * * * For Google Image Search, too, the results depend solely on the text surrounding an image. [\[FN5\]](#) *Id.* ¶ 22. But for Image Search, Google also stores thumbnails in its cache, in order to present the results of the user's query. A user of Google Image Search can quickly scan the grid of returned thumbnails to determine whether any of the images responds to his search query. He "can then choose to click on the image thumbnail and show more information about the image and cause the user's browser ... to open a 'window' on the screen that will display the underlying Web page in a process called 'framing.'" Def.'s MacGillivray Decl. ¶ 3.

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Google generates much of its revenue through two advertising programs: AdWords, for advertisers, and AdSense, for web publishers. Def.'s MacGillivray Decl. ¶ 9. Through AdWords, advertisers purchase advertising placement on *Google's* pages, including on search results pages and Google's Gmail web-based email service. *Id.* Google's AdSense program allows pages on *third party sites* "to carry Google-sponsored advertising and share [with Google the] revenue that flows from the advertising displays and click-throughs." *Id.* ¶ 10. * * * [\[FN7\]](#)

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Pl.'s Proposed Prelim. Inj. ¶ 1.

III. DISCUSSION

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B. Likelihood of Success

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2. Fair Use

[\[10\]](#) Having found that the thumbnails directly infringe P10's copyrights, the Court turns to Google's affirmative defense of fair use. Google argues that its creation and display of thumbnails is fair under [17 U.S.C. § 107](#). "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts....' [U.S. Const., Art. I, § 8, cl. 8](#)." [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). This notion was codified in [17 U.S.C. § 107](#):

[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching[,] scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Although often discussed within the context of the first factor, "the public interest is also a factor that continually informs the fair use analysis." *Nimmer* § 13.05[B][4]; *see*

also [Sony Computer Entm't America, Inc. v. Bleem, LLC](#), 214 F.3d 1022, 1027 (9th Cir.2000); [Sega Enters. Ltd. v. Accolade, Inc.](#), 977 F.2d 1510, 1523 (9th Cir.1992) ("[W]e are free to consider the public benefit resulting from a particular use...."). Courts are to consider "these factors in light of the objectives of copyright law, rather than view them as definitive or determinative tests." [Kelly v. Arriba Soft Corp.](#), 336 F.3d 811, 818 (9th Cir.2003) [hereinafter "[Kelly I](#)"]

a. Purpose and Character of Use

[\[11\]](#) "[T]he preamble to [Section 107](#) ... enumerate[s] certain purposes that are most appropriate for a finding of fair use: 'criticism, comment, news reporting, teaching[,] scholarship or research.' " *Nimmer* § 13.05[A][1][a]. "The central purpose of [the first fair use factor] is to see ... whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' " [Campbell](#), 510 U.S. at 579, 114 S.Ct. 1164. Although the Supreme Court has stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright," [Sony](#), 464 U.S. at 451, 104 S.Ct. 774, this pronouncement does not preclude a finding that a defendant's commercial use may nevertheless be fair. [Kelly II](#), 336 F.3d at 818 (citing [Campbell](#), 510 U.S. at 579, 114 S.Ct. 1164). Furthermore, "[t]he more transformative the new work, the less important the other factors, including commercialism, become." *Id.*

i. Commercial Versus Noncommercial Use

[\[12\]](#) In assessing whether a use is commercial, the focus here is not on the individuals who use Google Image Search to locate P10's adult images. Nor is it on whether their subsequent use of the images is noncommercial (*e.g.*, titillation) or commercial (*e.g.*, to print and sell). Rather, it is *Google's* use that the Court is to consider. That use, P10 contends, is commercial in nature. The Court agrees.

Courts have defined "commercial uses" extremely broadly. *See* *Nimmer* § 13.05[A][1][c] (providing examples). Google unquestionably derives significant commercial benefit from Google Image Search in the form of increased user traffic--and, in turn, increased advertising revenue. The more people who view its pages and rely on its search capabilities, the more influence Google wields in the search engine market and (more broadly) in the web portal market. In turn, Google can

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attract more advertisers to its AdSense and AdWords programs.

That Google's use of thumbnails is commercial, however, does not necessarily weigh heavily in favor of P10. In [Kelly II, supra](#), the Ninth Circuit acknowledged that Arriba's use was commercial, yet concluded that that fact "weigh[ed] only slightly against a finding of fair use" because "Arriba was neither using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images." [Kelly II, 336 F.3d at 818](#). The court found that the creation and use of thumbnails to display Arriba's image search results were "more incidental and less exploitative in nature than more traditional types of commercial use." [Id.](#)

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But unlike Arriba, Google offers and derives commercial benefit from its AdSense program. AdSense allows third party websites "to carry Google-sponsored advertising and share revenue that flows from the advertising displays and click-throughs." Def.'s MacGillivray Decl. ¶ 10. If third-party websites that contain infringing copies of P10 photographs are also AdSense partners, Google will serve advertisements on those sites and split the revenue generated from users who click on the Google-served advertisements.* * *

AdSense unquestionably makes Google's use of thumbnails on its image search far more commercial than Arriba's use in [Kelly II](#). Google's thumbnails lead users to sites that directly benefit Google's bottom line. [Id.](#), Ex. 6 (Second Quarter Fiscal 2005 Report) at 98 ("Revenues generated on Google's partner sites, through AdSense programs, contributed \$630 million, or 46% of total revenues..." [\[FN12\]](#)). Google has a strong incentive to link to as many third-party websites as possible--including those that host AdSense advertisements.

ii. Transformative Versus Consumptive Use

[\[13\]\[14\]\[15\]](#) That a use is commercial does not preclude a defendant from tipping the balance back to a finding of fair use by showing that its use is "transformative," as opposed to "consumptive." A consumptive use is one in which defendant's "use of the images merely supersede[s] the object of the originals ... instead [of] add[ing] a further purpose or different character." [Kelly II, 336 F.3d at 818](#). Whether a use is transformative depends in part on whether it serves the public interest. * * *

P10 argues that Google's use of thumbnails is consumptive rather than transformative since Google "provides the exact same images through the exact same

medium ... as does Perfect 10." Whether thumbnails are identical copies of their full-size counterparts is debatable. A thumbnail contains significantly less pixel data (and hence, less image detail) than does the full-size image. [\[FN13\]](#) The more complex or nuanced the original full-size image, the less exact is the replicated viewing experience--*i.e.*, at some point viewers can no longer discern many of the fine details that were once visible in the full-size image. On the other hand, thumbnails are not "cropped" in any way, and if few or no important details have been lost, they do convey the full expression-- they achieve pretty much the same effect--as the original full-size images. Merely because Google's thumbnails are not cropped does not necessarily make them exact copies of P10's images, but the record currently before the Court does suggest that the thumbnails here closely approximate a key function of P10's full-size originals, at least to the extent that viewers of P10's photos of nude women pay little attention to fine details.

Google's use of thumbnails does not supersede P10's use of full-size images. In the final analysis, P10's use is to provide "entertainment," both in magazines and on the internet. For some viewers, P10's use of the photos creates or allows for an aesthetic experience. Google, in contrast, does not profit from providing adult content, but from locating, managing, and making information generally more accessible, and therefore more attractive to advertisers. Google is focused almost exclusively on the web and is involved in a wide variety of internet-related projects (*e.g.*, web search, desktop search, newsgroup search, map and directory services, academic research, and language translation services). In this respect, Google's wide-ranging use of thumbnails is highly transformative: their creation and display is designed to, and does, display visual search results quickly and efficiently to users of Google Image Search.

The Ninth Circuit's opinion in [Kelly II](#) is particularly instructive on this point:

Although Arriba made exact replications of Kelly's images, the thumbnails were much smaller, lower-resolution images that served an entirely different function than Kelly's original images. Kelly's images are artistic works intended to inform and to engage the viewer in an aesthetic experience. His images are used to portray scenes from the American West in an aesthetic manner. Arriba's use of Kelly's images in the thumbnails is unrelated to any aesthetic purpose. Arriba's search engine functions as a tool to help index and improve access to images on the internet and their related web sites. In fact, users are unlikely to enlarge the thumbnails and use them for artistic purposes because the thumbnails are of much lower-resolution than the originals; any enlargement results in a

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significant loss of clarity of the image, making them inappropriate as display material.

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This case involves more than merely a retransmission of Kelly's images in a different medium. Arriba's use of [thumbnails] serves a different function than Kelly's use--improving access to information on the internet versus artistic expression. Furthermore, it would be unlikely that anyone would use Arriba's thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices their clarity. Because Arriba's use is not superseding Kelly's use but, rather, has created a different purpose for the images, Arriba's use is transformative.

* * *

It is by now a truism that search engines such as Google Image Search provide great value to the public. Indeed, given the exponentially increasing amounts of data on the web, search engines have become essential sources of vital information for individuals, governments, non-profits, and businesses who seek to locate information. As such, Google's use of thumbnails to simplify and expedite access to information is transformative of P10's use of reduced-size images to entertain. But that does not end the analysis, because Google's use is simultaneously consumptive as well. In early 2005, after it filed suit against Google, P10 entered into a licensing agreement with Fonestarz Media Limited for the sale and distribution of P10 reduced-size images for download to and use on cell phones. Google's use of thumbnails does supersede this use of P10's images, because mobile users can download and save the thumbnails displayed by Google Image Search onto their phones. Google's thumbnail images are essentially the same size and of the same quality as the reduced-size images that P10 licenses to Fonestarz. Hence, to the extent that users may choose to download free images to their phone rather than purchase P10's reduced-size images, Google's use supersedes P10's. [FN14]

In *Kelly II*, the Ninth Circuit found the first fair use factor to weigh in favor of Arriba. *Kelly II*, 336 F.3d at 820 ("[T]his first factor weighs in favor of Arriba due to the public benefit of the search engine and the minimal loss of integrity to Kelly's images."). Here, because Google's use of thumbnails is more commercial than Arriba's and because it is "consumptive" with respect to P10's reduced-size images, the Court concludes that this factor weighs slightly in favor of P10.

b. Nature of Copyrighted Work

[16] "Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works." *Kelly II*, 336 F.3d at 820 (citing *A & M Records*, 239 F.3d at 1016). "Photographs that are meant to be viewed by the public for informative and aesthetic purposes ... are generally creative in nature." *Id.*; accord *Elvis Presley*, 349 F.3d at 629 ("[P]hotographs taken for aesthetic purposes, are creative in nature and thus fit squarely within the core of copyright protection."). [FN15]

[17] "The fact that a work is published or unpublished also is a critical element of its nature" given a copyright holder's right of first publication. *Kelly II*, 336 F.3d at 820 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)). "Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." *Id.*

In *Kelly II*, however, the Ninth Circuit found that Kelly's photographs, although creative, had "appeared on the internet before Arriba used them in its search image." *Kelly II*, 336 F.3d at 820. Partly for that reason, the Ninth Circuit concluded that although the second statutory fair use factor weighed in favor of Kelly, its weight was slight. *Id.* Similarly, here, although P10's images are "creative," they, too, have previously been published, both in print and on the web. Thus, as in *Kelly II*, the Court concludes that this factor weighs only slightly in favor of P10.

c. Amount and Substantiality of the Portion Used

[18] "While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use." *Kelly II*, 336 F.3d at 820 (citing *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir.2000)). "However, the extent of permissible copying varies with the purpose and character of the use." *Id.* (citing *Campbell*, 510 U.S. at 586-87, 114 S.Ct. 1164). "If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her." *Id.* at 820-821.

* * *

The Court finds that Google's use of the infringing copies of P10's images also is no greater than necessary to achieve the objective of providing effective image search capabilities. In doing so, the Court rejects P10's contention that Google could have provided such assistance through the use of text, claiming that P10's images are more readily describable in words than Kelly's images. First, contrary to P10's contention, photographs

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of nude women can, like photographs of the American West, vary greatly. Second, *both* kinds of pictures can be described verbally, yet no matter how susceptible any image is to textual description words cannot adequately substitute for thumbnails in quickly and accurately conveying the content of indexed full-size images.

Thus, as in [Kelly II](#), the Court finds that this factor favors neither party.

d. Effect of the Use upon the Potential Market for and Value of the Copyrighted Work

"This last [fair use] factor requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market for the original." [Kelly II, 336 F.3d at 821](#) (internal quotations omitted). "A transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work." [Id.](#)

P10 targets its copyrighted small- and full-size images at several markets: the print magazine market, the online adult website subscription market, and the cell phone image download market. Google's use of thumbnails is not likely to affect the market for full-size images (whether in print or online). As stated in [Kelly II](#),

The thumbnails would not be a substitute for the full-sized images because the thumbnails lose their clarity when enlarged. If a user wanted to view or download a quality image, he or she would have to visit Kelly's original [and download the full-resolution image]. This would hold true whether the thumbnails are solely in Arriba's database or are more widespread and found in other search engine databases.

[Id.](#)

On the other hand, Google's use of thumbnails likely *does* harm the potential market for the downloading of P10's reduced-size images onto cell phones. Google argues that because "P10 admits [that] this market is growing," its "delivery of thumbnail search results" must not be having a negative impact. Apart from being more [FN4](#). A "thumbnail" is a lower-resolution (and hence, smaller) version of a full-size image. Thumbnails enable users to quickly process and locate visual information. For example, users of Google Image Search are presented with a set of thumbnails that are *potentially* responsive to their search queries. Because thumbnails are smaller in size, more of them can be displayed at

relevant to the quantification of damages, this weak argument overlooks the fact that the cell phone image-download market may have grown even faster but for the fact that mobile users of Google Image Search can download the Google thumbnails at no cost. Commonsense dictates that such users will be less likely to purchase the downloadable P10 content licensed to Fonestarz.

e. Conclusion Regarding Fair Use and Direct Infringement

[\[19\]](#) The first, second, and fourth fair use factors weigh slightly in favor of P10. The third weighs in neither party's favor. Accordingly, the Court concludes that Google's creation of thumbnails of P10's copyrighted full-size images, and the subsequent display of those thumbnails as Google Image Search results, likely do not fall within the fair use exception. The Court reaches this conclusion despite the enormous public benefit that search engines such as Google provide. Although the Court is reluctant to issue a ruling that might impede the advance of internet technology, and although it is appropriate for courts to consider the immense value to the public of such technologies, existing judicial precedents do not allow such considerations to trump a reasoned analysis of the four fair use factors.

To summarize, then: (1) at this stage P10 has not established that it is likely to prove that Google's framing of and in-line linking to infringing (full-size) copies of P10's images constitutes a public display or distribution rendering Google liable for *direct* infringement; but (2) P10 has established a likelihood of proving that Google's creation and public display of thumbnails does directly infringe P10's copyrights.

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IV. CONCLUSION

For the reasons discussed above, the Court GRANTS IN PART and DENIES IN PART P10's motion for a preliminary injunction against Google. [\[FN26\]](#)

IT IS SO ORDERED.

the same time on a single page or screen. Users can quickly scan the entire set of thumbnails to locate the particular full-size image for which they were looking.

P10 repeatedly objects that the term "thumbnail" is a misnomer, even going so far as to point out that the thumbnails displayed by Google can be up to eight times the size of a person's actual

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thumbnail. Pl.'s Zada Reply Decl. ¶ 54. "Thumbnail," it argues, conveys the false impression that smaller, lower-resolution images are not useful in and of themselves--or that they are less useful than their full-size counterparts. The term "thumbnail," however, has become the standard way of referring to the smaller, lower-resolution images central to this suit. In any event, the Court recognizes that thumbnails have been used for purposes independent of their primary function, as is discussed later. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir.2003).

FN7. To illustrate how AdSense works, an individual who maintains a website dedicated to soccer--"SoccerMANIA.com," say--might post his personal commentary about recent games, along with player profiles and a short history of soccer. What he is not likely to do--perhaps because it is time-consuming or outside his area of expertise, or simply because he does not choose to--is find advertisers who are willing to pay to place advertisements on his site. This is where Google AdSense comes in. After registering to become an AdSense partner, the soccer aficionado can demarcate an area on his website that acts as a "placeholder" for an advertisement. Google will then scan the text of his website and populate or fill the placeholder with advertisements it deems relevant to the content on that site. Google's AdSense software will notice that the word "soccer" and other soccer-related terms appear frequently on the site, and thus will show advertisements directed at people interested in soccer-- *e.g.*, sites that sell tickets to World Cup games.