

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

The principal two-part issue in this case arises out of the increasingly recurring conflict between intellectual property rights on the one hand and the dazzling capacity of internet technology to assemble, organize, store, access, and display intellectual property “content” on the other hand. That issue, in a nutshell, is: does a search engine infringe copyrighted images when it displays them on an “image search” function in the form of “thumbnails” but not infringe when, through in-line linking, it displays copyrighted images served by another website?

Plaintiff Perfect 10, Inc. (“P10”) filed [a] suit[] against Google, Inc. [...], alleging copyright and trademark infringement and various related claims. P10 moves now for a preliminary injunction [...], solely on the basis of its copyright claims. P10 seeks to prevent [Google’s] image search engines from displaying “thumbnail” copies of P10’s copyrighted images [and full-size images hosted on third-party websites].

[...] The Court now concludes that Google’s creation and public display of “thumbnails” likely do directly infringe P10’s copyrights. [The Court also concludes, however, that Google’s display of

full-size images, hosted by third parties, cannot form the basis for direct infringement].*

[...]

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. During the last nine years, P10 has invested \$36 million to develop its brand in its magazine and its website. [...] P10 has obtained registered copyrights for its photographs from the United States Copyright Office.

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; 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. 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.

2. Google

[...] 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. Websites that do not

*[P10 also argued that Google could be held vicariously or contributorily liable for the infringement of full-size images. I have edited out the sections of this opinion that deal with this form of liability. We will cover that topic a little later in this course.—TGA]

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. 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.

Google stores content scanned by its web crawler in Google's "cache." For Google Web Search, because its "web page index is based entirely on the textual part of web pages and not the images, [its] web page cache contains only the text pages, and not the images that those pages include when displayed." For Google Image Search, too, the results depend solely on the text surrounding an image.⁵ 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.'"

"Framing" is a method of "combin[ing] multiple pages in a single window so that different content can be viewed simultaneously, typically so that one 'frame' can be used to

annotate the other content or to maintain a link with an earlier web page." In other words, when a user clicks on a thumbnail returned as the result of a Google Image Search, his computer pulls up a page comprised of two distinct frames, one hosted by Google and a second hosted by the underlying website that originally hosted the full-size image. The two frames are divided by a gray horizontal line a few pixels high. The upper frame is the Google frame. It contains the thumbnail, retrieved from Google's cache, and information about the larger image, including the original resolution of the image and the specific URL associated with that image.⁶ The Google frame also states that the thumbnail "may be scaled down and subject to copyright" and makes clear that the upper frame is not the original context in which the full-size image was found, stating, "Below is the image in its original context on the page: <http://<URL>>." The lower frame contains, or shows, the original web page on which the original image was found. Google neither stores nor serves any of the content (either text or images) displayed in the lower frame; rather, the underlying third party website stores and serves that content. However, because it is Google's webpage that composites the two frames, the URL displayed in the browser's address bar displays "images.google.com."

[...] [For an example, please go to the Google website and run an image search for "Jon Bing" (include the quotation marks). Then click on one of the thumbnail images to see how framing works.—TGA]

Google generates much of its revenue through two advertising programs: AdWords, for advertisers, and AdSense, for web publishers. Through AdWords, advertisers purchase advertising placement on Google's pages, including on search results pages and Google's Gmail web-based email service. Google's AdSense program allows pages on third party sites "to carry Google-sponsored advertising and share

⁵ Google Image Search does not have the ability to accept an image as a search query and return similar images. Only text-based search queries can be input. Google Image Search returns those images on the internet whose surrounding text was deemed responsive to the user's textual search string.

⁶ Since URLs may often be extremely long, Google displays the domain name of the third-party website and the file name of the image, but the middle portion of the URL frequently contains an ellipsis indicating that the full URL has been truncated.

[with Google the] revenue that flows from the advertising displays and click-throughs.” “To participate [in AdSense], a website publisher places code on its site that asks Google’s server to algorithmically select relevant advertisements” based on the content of that site.⁷

B. Procedural History

On November 19, 2004, P10 filed suit against Google asserting various copyright and trademark infringement claims[, including]: (1) direct copyright infringement. [...]

C. Proposed Injunctive Relief

P10 seeks to preliminarily enjoin Google from engaging in the following activities: [directly infringing any copyrighted images owned by Perfect 10 which have been or will be identified in notices to Google.]

III. DISCUSSION

A. Legal Standard for Preliminary Injunction

1. General Principles

“A preliminary injunction should be granted if a plaintiff can show either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tilt in the plaintiff’s favor.” In any preliminary

⁷ To illustrate how AdSense works, an individual who maintains a website dedicated to soccer—“Soccer-MANIA.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.

injunction analysis, courts also look to “whether the public interest will be advanced by granting preliminary relief.”

[...]

B. Likelihood of Success

P10 asserts that Google is . . . directly . . . liable for copyright infringement. P10 alleges that Google’s image search engine directly infringes by copying, distributing, and displaying thumbnails and full-size images of P10’s copyrighted photographs. [...]

Google raises several defenses. First, in response to P10’s direct infringement claims, it argues that (1) many of its actions do not infringe upon any of the exclusive rights granted to the owner of a copyright, and (2) to the extent that its actions do implicate those rights, such use is fair under 17 U.S.C. § 107. [...]

1. Direct Infringement

To establish direct copyright infringement, a plaintiff must prove two elements: (1) ownership of a valid copyright, and (2) violation of one of the exclusive rights granted under copyright.

a. What Actions by Google Allegedly Constitute Direct Infringement?

Although 17 U.S.C. § 106 sets forth six exclusive rights of a copyright holder, the rights in question here are the right to display publicly, the distribution right, and the reproduction right. P10 alleges that Google directly infringes in that it both (1) displays and distributes full-size images hosted by third-party websites, and (2) creates, displays, and distributes thumbnails of P10’s copyrighted full-size images. P10 contends that these displays and distributions of copyrighted material extend to cell phones as well as computers. Google concedes that it creates and displays thumbnails; it denies that it “displays,” creates, or distributes what is depicted in the lower frame; and it challenges P10’s argument that any of its activities can be the basis for direct infringement.

The Court will address P10's contentions about framed, full-size images first.

b. As to "In-Line Linking," What Constitutes a "Display"?

There is no dispute that Google "in-line links" to and/or "frames" content that, in fact, is stored on and served by other websites. Whether that conduct constitutes a "display" for purposes of copyright law is the issue.

The terms "link" and "in-line link" can be used in two distinct, but related, ways. "Link" is most commonly used to refer to text or image "hyperlinks" that are displayed on a webpage and that when clicked by the user, transport him to a new page. "In-line link" refers to the process whereby a webpage can incorporate by reference (and arguably cause to be displayed) content stored on another website. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir.2003) [hereinafter "*Kelly II*"] ("The in-line link instructs the user's browser to retrieve the linked-to image from the source website and display it on the user's screen, but does so without leaving the linking document.").

There are at least two approaches to defining "display" in the context of in-line linking: what the Court will call (1) a "server" test and (2) an "incorporation" test. The differences in the "server" and "incorporation" tests can be illustrated if we return to the example of SoccerMANIA.com. See *supra* [foot]note 7. That fictitious website might contain a single webpage with the text, "We proudly show this photo," below which appears a photo of the legendary soccer great Pelé that he (Pelé) copyrighted. The mere fact that the Pelé photo appears on SoccerMANIA's webpage *does not* necessarily mean that the photo (or even a copy of it) is stored on or transferred via SoccerMANIA.com. Using standard HTML, SoccerMANIA.com's webpage might, in fact, be in-line linking to the Pelé photo stored on, say, "SoccerPASSION.com." If that is the case, when the person seeking to visit SoccerMANIA.com's webpage uses his browser, the browser would (1) download SoccerMANIA.com's webpage, (2) parse through

the various HTML commands of that webpage, (3) per HTML code, display the text "We proudly show this photo," (4) also per HTML code, follow an in-line link to the image stored on SoccerPASSION.com, (5) download the photo to the user's computer directly from SoccerPASSION.com, and (6) display the image in the browser below the text.

Because the visitor cannot see any of these actions take place, he probably—but mistakenly—will assume that the copyrighted photo of Pelé is stored on and served by SoccerMANIA.com. Indeed, even though the image was actually transferred directly from SoccerPASSION.com, the address shown on the user's browser will still indicate something akin to "http://www.SoccerMANIA.com/webpage.html". This is because browsers display the address of the file (here, a webpage) that they are currently rendering; they do not in any way indicate the location from which each component element of a webpage (such as an image) originates.

The question, then, is whether SoccerMANIA.com, SoccerPASSION.com, or both have "displayed" the copyrighted Pelé photo.

i. The Server Test Embraced by Google

From a technological perspective, one could define "display" as the act of *servicing* content over the web—i.e., physically sending ones and zeroes over the internet to the user's browser. Adopting this definition, as Google urges the Court to do, SoccerPASSION.com would be the entity that "displays" the Pelé image, and SoccerMANIA.com would not risk liability for direct infringement (regardless of whether its in-line linking would otherwise qualify as fair use).

ii. The Incorporation Test Embraced by P10

From a purely visual perspective, one could define "display" as the mere act of *incorporating* content into a webpage that is then pulled up by the browser—e.g., the act by SoccerMANIA.com of using an in-line link in its webpage to direct the user's browser to retrieve the Pelé image from SoccerPASSION.com's server each time he

navigates to SoccerMANIA.com. P10 urges the Court to adopt this definition. Under it, SoccerMANIA.com, as the host of its own webpage which incorporates the Pelé photo from SoccerPASSION.com, would be the entity that “displays” that image.

As opposite ends of a spectrum, the server and incorporation tests both are susceptible to extreme or dubious results. Under the server test, someone could create a website entitled “Infringing Content For All!” with thousands of in-line links to images on other websites that serve infringing content. That website, however, would be immune from claims of direct infringement because it does not actually serve the images.¹⁰ On the other hand, under the incorporation test, any website that in-line links to or frames third-party content would risk liability for direct infringement (putting aside the availability of an affirmative defense) even if that website discloses the identity of the actual server of the image. Thus, SoccerMANIA.com would expose itself to suit for direct infringement even if the text of its webpage had stated:

ATTENTION FBI: We did not take the picture, and it is not served by SoccerMANIA.com. It is probably subject to copyright. We maintain this site to help authorities identify potentially infringing images on the web. The image of Pelé is stored on and served by SoccerPASSION.com. Please investigate.

To adopt the incorporation test would cause a tremendous chilling effect on the core functionality of the web—its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable.

iii. Existing Precedents

Only a few courts have addressed the question of whether hyperlinking constitutes “displaying” that infringes a copyright holder’s exclusive right

¹⁰ That website, however, might still be held liable for secondary infringement. [Again, this is a topic we will cover later in the course.—TGA]

to display his work. Fewer have considered in-line linking or framing.

P10 cites *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F.Supp. 543 (N.D.Tex.1997). There, Defendant Webbworld, an adult website, received a “news feed” of nude photos from adult internet newsgroups, downloaded them to its computers, and then uploaded them to its own publicly accessible web servers. The photos included Playboy’s copyrighted images. Webbworld then charged internet users a monthly subscription fee to view the images on its website. The district court concluded that Webbworld “displayed” Playboy’s photos because it caused them to be shown on users’ computers and because “[t]he image existed in digital form on *Webbworld’s servers.*” (emphasis added). Here, it is undisputed that Google does not store or serve any full-size images.

Similarly, in *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503 (N.D. Ohio 1997), also cited by P10, Defendant Rusty-N-Edie’s, Inc. (“RNE”) operated an electronic bulletin board through its own computers onto which paying subscribers could upload various files and then receive access to, and the right to download, all the files that other subscribers had uploaded. When users downloaded files from the bulletin board, those files were transferred to the user’s computer directly from RNE’s computers (not from the original uploader’s computer). The court concluded that RNE had publicly displayed and distributed the files posted on the bulletin board. The court relied, in part, on the fact that after reviewing the files in the upload queue, RNE *moved them to its own servers* that were available to other subscribers. Unlike RNE, however, Google does not store or serve any full-size images on Google Image Search.

In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F.Supp.2d 1114 (C.D.Cal.2001), Defendant Cybernet Ventures, Inc. (“Cybernet”) ran a website called “adultcheck.com” which functioned as a gateway to other adult web sites. Paying subscribers would receive access to “the content on any of the related sites within the Adult Check ‘family.’” As it does here, Perfect 10

argued that Cybernet directly infringed its copyrighted images. The court denied summary judgment for Cybernet because it lacked sufficient information regarding how Cybernet's systems interacted with those of its partners, noting "Cybernet *may* have [had] a direct role in the infringement." The court did not discuss whether Cybernet had stored or served any of the infringing content. But in a later decision on a motion for preliminary injunction, the same court expressed doubt that liability for direct infringement could be found because Cybernet did not store or serve the infringing content[.] *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1168-69 (C.D.Cal.2002).

[...]

In its now-withdrawn opinion in *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir.2002) [hereinafter, "*Kelly I*"], amended by *Kelly II*, 336 F.3d 811 (9th Cir.2003), the Ninth Circuit discussed liability for direct infringement resulting from in-line linking, without addressing how the technology functioned—i.e., who stored and served the infringing content. Defendant Arriba operated an image search engine much like Google's—it in-line linked to and framed, but did not store or serve, full-size copies of Kelly's photographs. Stating that "[n]o cases have addressed the issue of whether inline linking or framing violates a copyright owner's public display rights," the Ninth Circuit nevertheless analogized to *Webbworld* and *Hardenburgh*, ignored the fact that the defendants in those two cases actually hosted and served the infringing content, and concluded that Arriba had directly infringed Kelly's exclusive right to display. *Kelly I*, 280 F.3d at 945-47.

[...]

Some seventeen months later, perhaps "reflect[ing] sub silentio that the panel no longer believed in the substance of its much-criticized conclusion," the Ninth Circuit withdrew the portion of the *Kelly I* opinion dealing with direct infringement on procedural grounds. [...]

iv. "Display" for Purposes of Full Size Images

The Court concludes that in determining whether Google's lower frames are a "display" of infringing material, the most appropriate test is also the most straightforward: the website on which content is stored and by which it is served directly to a user, not the website that in-line links to it, is the website that "displays" the content. Thus, the Court adopts the server test, for several reasons.

First, this test is based on what happens at the technological-level as users browse the web, and thus reflects the reality of how content actually travels over the internet before it is shown on users' computers. Persons who view the full-size "image in its original context" (i.e., the lower frame) after clicking on one of the thumbnails that Google Image Search aggregated, are not viewing images that Google has stored or served. Rather, their computers have engaged in a *direct* connection with third-party websites, which are themselves responsible for transferring content.

Second, adoption of the server test neither invites copyright infringing activity by a search engine such as Google nor flatly precludes liability for such activity. This test will merely preclude search engines from being held directly liable for in-line linking and/or framing infringing content stored on third-party websites. Copyright owners may still seek, as P10 does, to impose contributory or vicarious liability on websites for the inclusion of such content. [...]

Third, website operators can readily understand the server test and courts can apply it relatively easily. To be sure, the incorporation test, which would have courts look at the URL displayed in the browser's address bar, also can be applied relatively easily. But that test fails to acknowledge the interconnected nature of the web, both in its physical and logical connections and in its ability to aggregate and present content from multiple sources simultaneously.

Fourth, here the initial direct infringers are the websites that stole P10's full-size images and posted them on the internet for all the world to

see. P10 would not have filed suit but for their actions.

Finally, the server test maintains, however uneasily, the delicate balance for which copyright law strives—i.e., between encouraging the creation of creative works and encouraging the dissemination of information. Merely to index the web so that users can more readily find the information they seek should not constitute direct infringement, but to host and serve infringing content may directly violate the rights of copyright holders.

Applying the server test, the Court concludes that for the purposes of direct copyright infringement, Google’s use of frames and in-line links does not constitute a “display” of the full-size images stored on and served by infringing third-party websites. Thus, P10’s claim of direct infringement with respect to these actions will likely fail.

c. “Display” for Purposes of Thumbnails

Applying the server test to Google’s use of thumbnails the Court finds that Google does “display” thumbnails of P10’s copyrighted images. Google acknowledges that it creates and stores those thumbnails on its own servers—and that upon receiving search queries, it responds by displaying a grid of those thumbnails.

[...]

2. Fair Use

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 (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]. [...]

a. Purpose and Character of Use

“[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. 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, this pronouncement does not preclude a finding that a defendant’s commercial use may nevertheless

be fair. *Kelly II*, 336 F.3d at 818. Furthermore, “[t]he more transformative the new work, the less important the other factors, including commercialism, become.” *Id.*

i. Commercial Versus Noncommercial Use

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 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.*

Google Image Search automatically scours the internet via its web crawler software to find and catalog images. For each image, Google records information about it and creates a thumbnail copy. The thumbnail is then stored in Google’s cache for later display when users perform an

image search. When an image search is performed, Google displays a grid of thumbnails that Google has algorithmically determined are responsive to the search string based on the text of the originating webpage surrounding the image. When a user clicks on one of the thumbnails, he is taken to the two-frame page discussed above. In these respects, Google functions like Arriba’s search engine.

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.” 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. Google counters that its AdSense Program Policies prohibit a website from registering as an AdSense partner if the site’s webpages contain images that appear in Google Image Search results: “In order to avoid associations with copyright claims, website publishers may not display Google ads on web pages with ... Image Results.” However, Google has not presented any information regarding the extent to which this purported policy is enforced. Nor has it provided examples of AdSense partners who were terminated because of violations of this policy. In contrast, P10 has submitted numerous screenshots of third-party websites that serve infringing content and also appear to be receiving and displaying AdSense ads from Google.

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 (“Revenues generated on Google’s partner sites, through AdSense programs, contributed \$630 million, or 46% of total revenues....”). 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

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. [...] 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.

[...]

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.¹⁴

[...] [B]ecause 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.

¹⁴ This inquiry is closely related to the fourth fair use factor, i.e., the impact on plaintiff’s potential market.

b. Nature of Copyrighted Work

“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. “Photographs that are meant to be viewed by the public for informative and aesthetic purposes ... are generally creative in nature.” *Id.*¹⁵

“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. “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. 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

“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. “However, the extent of permissible copying varies with the purpose and character of the use.” *Id.* “If the secondary user only copies as much as is necessary for his or her intended use, then this

¹⁵ Google argues that P10’s works are not creative because P10 “emphasizes the objects of the photographs (nude women) and [P10] assumes that persons seeking Perfect 10’s photos are searching for the models and for sexual gratification.” Google contends that this “implies a factual nature of the photographs.” The Court rejects this argument. The P10 photographs consistently reflect professional, skillful, and sometimes tasteful artistry. That they are of scantily-clothed or nude women is of no consequence; such images have been popular subjects for artists since before the time of “Venus de Milo.”

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 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. “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 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

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 [...] 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.

[...]

3. Secondary Copyright Liability—Contributory and Vicarious Infringement

[...]

4. Conclusion Regarding Likelihood of Success

P10 is likely to succeed in proving that Google directly infringes by creating and displaying thumbnail copies of its photographs. [...]

C. Irreparable Harm

In copyright cases, irreparable harm is presumed once a sufficient likelihood of success is raised. [...] P10 has satisfied the "irreparable harm" element.

D. Public Interest

Google argues that the "value of facilitating and improving access to information on the Internet ... counsels against an injunction here." This point has some merit. However, the public interest is also served when the rights of copyright holders are protected against acts likely constituting infringement. [...] The Court ORDERS P10 and Google to propose jointly the language of [...] an injunction, and to lodge their proposal by not later than March 8, 2006.

IV. CONCLUSION

For the reasons discussed above, the Court GRANTS [the motion for preliminary injunction as to direct infringement].