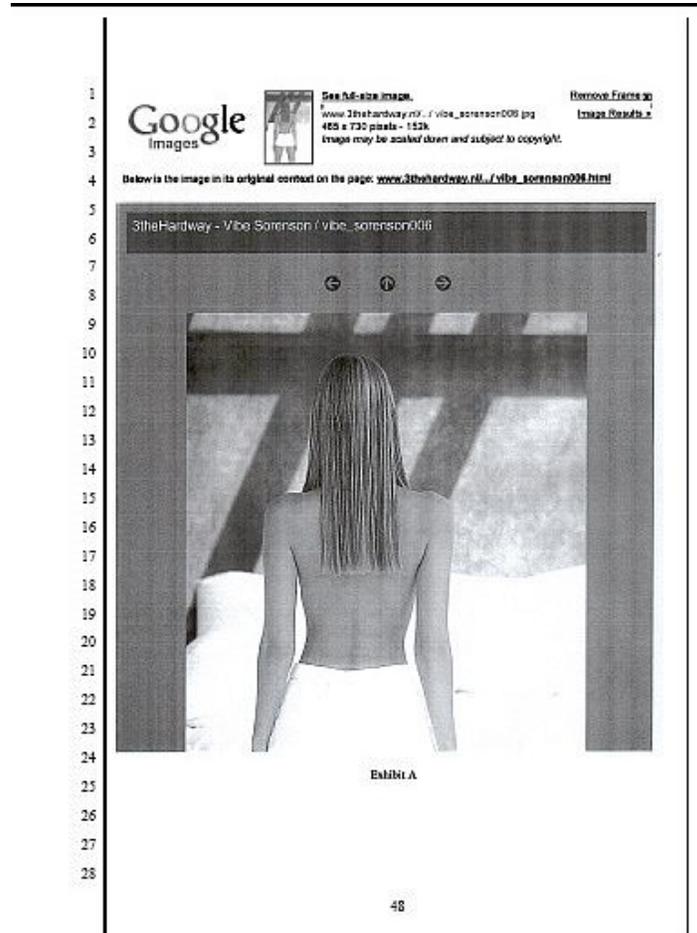


Summary of
PERFECT 10 v. AMAZON
508 F.3d 1146 (9th Cir. 2007)



FACTS

Plaintiff Perfect 10 markets and sells copyrighted images of nude models and operates a subscription website on the Internet whereby subscribers pay a monthly fee to view Perfect 10's images in a "members' area" of the site. Subscribers must use a password to log into the members' area. Perfect 10 also licenses reduced-size copyrighted images for download and use on cell phones.

Defendant Google operates a search engine that automatically accesses thousands of websites on the Internet and indexes them within a database stored on Google's computers. When a Google user accesses the Google website and performs a search query, Google's software searches its database for websites responsive to that search query. Google then sends relevant information from its index of web sites to the user's computer. Google's search engine provides results in the form of text, images, or videos.

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“Google Image Search” is the Google search engine that provides responses to users in the form of images. Google Image Search identifies text in its database responsive to the user query and then communicates to users the images associated with the relevant text. Google Image Search provides search results as a web page of small images called “thumbnails,” which are stored in Google’s servers. The thumbnail images are reduced, lower-resolution versions of full-sized images stored on third-party computers. When a user clicks on a thumbnail image, Google’s software directs the user’s browser to create on the user’s computer screen a small rectangular box that contains the Google thumbnail and a larger box that contains the full-size image, which the user’s computer has been instructed to access from the third-party site that houses that image. The two boxes together appear to be coming from the same source, since they are in the same frame, but actually come from two sources—Google and the third-party website. The process by which the web page directs a user’s browser to incorporate content from different computers into a single window is referred to as “in-line linking.” The term “framing” refers to the process by which information from one computer appears to frame and annotate the in-line linked content from another computer.

Google does not store the images that fill the larger box and does not communicate the larger images to the user. Google, however, does store the smaller thumbnail images on its server. Google also stores web page content in its cache, which ultimately means that Google’s cache copy can provide a user’s browser with valid directions to an infringing image even though the updated web page no longer includes that infringing image.

In addition to its search engine operations, Google generates revenue through a business program called “AdSense.” Under this program, a website owner can register with Google to become an AdSense “partner.” The owner then places HTML instructions on its web pages that signal Google’s server to place advertising on the web pages that is relevant to the web pages’ content. Google’s computer program selects the advertising automatically by means of an algorithm, and the AdSense participants share the revenues that flow from such advertising with Google.

Some website publishers pirated Perfect 10’s images, and Google’s search engine automatically indexed the web pages containing the pirated images and provided thumbnail versions of the images in response to user inquiries. Perfect 10 repeatedly sent Google notices that its thumbnail images and in-line linking to the full-size images infringed Perfect 10’s copyright. When Google continued its search engine practices, Perfect 10 filed a copyright infringement action against Google, and sought a preliminary injunction to prevent Google from infringing Perfect 10’s copyright in its images and linking to websites that provide full-size infringing versions of Perfect 10’s photographs. Google raised the affirmative defense that its use was a fair use, but the district court rejected this defense, finding that the first, second and fourth fair use factors weighed slightly in Perfect 10’s favor, and that the third factor was neutral. The district court granted the preliminary injunction, finding harm to the derivative market for Perfect 10’s reduced-size images. The court of appeals granted this review.

DECISION

The first fair use factor [17 U.S.C. § 107(1)] requires a court to consider “the purpose and character of the use.” A “transformative work” is one that alters the original work “with new expression, meaning, or message.” Here, Google's use of thumbnails is highly transformative. Google’s search engine provides social benefit by incorporating an original work into a new work that serves as an electronic reference tool, thereby providing an entirely new use for the original work. Even though the entire original work is taken, it serves an entirely different function than the original, and therefore the use is transformative. The significantly transformative nature of Google’s search engine, particularly in light of its public benefit, heavily outweighs Google’s superseding and commercial uses of the thumbnails with regards to Google’s AdSense.

The second fair use factor is “the nature of the copyrighted work” [17 U.S.C. § 107(2)]. Perfect 10’s images are “creative in nature” and thus “closer to the core of intended copyright protection than are more fact-based works.” However, because the photos appeared on the Internet before Google used thumbnail versions in its search engine results, this factor weighs only slightly in favor of Perfect 10.

The third fair use factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of the copying [17 U.S.C. § 107(3)]. Here, this factor is neutral and does not weigh in favor of either party because Google’s use of the entire photographic image was reasonable in light of the purpose of a search engine and since using less than the entire image would be less helpful to a computer user.

The fourth fair use factor [17 U.S.C. § 107(4)] is “the effect of the use upon the potential market for or value of the copyrighted work.” Google’s use of thumbnails did not hurt Perfect 10’s market for full-size images. The presumption of market harm does not arise when a work is transformative because “market substitution is at least less certain, and market harm may not be so readily inferred.” As already discussed, Google’s thumbnail images were highly transformative, and there was no evidence of market harm to Perfect 10’s full-size images. Any potential harm to Perfect 10’s market remains hypothetical, and, therefore, this factor favors neither party.

Weighing the fair use factors leads to the conclusion that Google’s use was a fair use, especially in light of the public utility served by its search engine and the transformative nature of its use. The courts have articulated the principle that the fair use factors must be analyzed flexibly in light of new circumstances, especially during periods of rapid technological change.