

Perfect 10, Inc. v. Amazon.com, Inc.
United States Court of Appeals for the Ninth Circuit
487 F.3d 701 (9th Cir. 2007)

IKUTA, Circuit Judge.

In this appeal, we consider a copyright owner's efforts to stop an Internet search engine from facilitating access to infringing images. Perfect 10, Inc. sued Google Inc., for infringing Perfect 10's copyrighted photographs of nude models, among other claims. . . .

I Background

Google's computers, along with millions of others, are connected to networks known collectively as the "Internet." "The Internet is a world-wide network of networks ... all sharing a common communications technology." Computer owners can provide information stored on their computers to other users connected to the Internet through a medium called a webpage. A webpage consists of text interspersed with instructions written in Hypertext Markup Language ("HTML") that is stored in a computer. No images are stored on a webpage; rather, the HTML instructions on the webpage provide an address for where the images are stored, whether in the webpage publisher's computer or some other computer. In general, webpages are publicly available and can be accessed by computers connected to the Internet through the use of a web browser.

Google operates a search engine, a software program that automatically accesses thousands of websites (collections of webpages) and indexes them within a database stored on Google's computers. When a Google user accesses the Google website and types in 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 websites to the user's computer. Google's search engines can provide results in the form of text, images, or videos.

The Google search engine that provides responses in the form of images is called "Google Image Search." In response to a search query, Google Image Search identifies text in its database responsive to the query and then communicates to users the images associated with the relevant text. Google's software cannot recognize and index the images themselves. Google Image Search provides search results as a webpage 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, the user's browser program interprets HTML instructions on Google's webpage. These HTML instructions direct the user's browser to cause a rectangular area (a "window") to appear on the user's computer screen. The window has two separate areas of information. The browser fills the top section of the screen with information from the Google webpage, including the thumbnail image and text. The HTML instructions also give the user's browser the address of the website

publisher's computer that stores the full-size version of the thumbnail. By following the HTML instructions to access the third-party webpage, the user's browser connects to the website publisher's computer, downloads the full-size image, and makes the image appear at the bottom of the window on the user's screen. Google does not store the images that fill this lower part of the window and does not communicate the images to the user; Google simply provides HTML instructions directing a user's browser to access a third-party website. However, the top part of the window (containing the information from the Google webpage) appears to frame and comment on the bottom part of the window. Thus, the user's window appears to be filled with a single integrated presentation of the full-size image, but it is actually an image from a third-party website framed by information from Google's website. The process by which the webpage directs a user's browser to incorporate content from different computers into a single window is referred to as "in-line linking." *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir.2003). 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 also stores webpage content in its cache.³ For each cached webpage, Google's cache contains the text of the webpage as it appeared at the time Google indexed the page, but does not store images from the webpage. Google may provide a link to a cached webpage in response to a user's search query. However, Google's cache version of the webpage is not automatically updated when the webpage is revised by its owner. So if the webpage owner updates its webpage to remove the HTML instructions for finding an infringing image, a browser communicating directly with the webpage would not be able to access that image. However, Google's cache copy of the webpage would still have the old HTML instructions for the infringing image. Unless the owner of the computer changed the HTML address of the infringing image, or otherwise rendered the image unavailable, a browser accessing Google's cache copy of the website could still access the image where it is stored on the website publisher's computer. In other words, Google's cache copy could provide a user's browser with valid directions to an infringing image even though the updated webpage 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, the owner of a website can register with Google to become an AdSense "partner." The website owner then places HTML instructions on its webpages that signal Google's server to place advertising on the webpages that is relevant to the webpages' content. Google's computer program selects

³ Generally, a "cache" is "a computer memory with very short access time used for storage of frequently or recently used instructions or data." *United States v. Ziegler*, 474 F.3d 1184, 1186 n. 3 (9th Cir.2007) (quoting Merriam-Webster's Collegiate Dictionary 171 (11th ed.2003)). There are two types of caches at issue in this case. A user's personal computer has an internal cache that saves copies of webpages and images that the user has recently viewed so that the user can more rapidly revisit these webpages and images. Google's computers also have a cache which serves a variety of purposes. Among other things, Google's cache saves copies of a large number of webpages so that Google's search engine can efficiently organize and index these webpages.

the advertising automatically by means of an algorithm. AdSense participants agree to share the revenues that flow from such advertising with Google. . . .

Perfect 10 markets and sells copyrighted images of nude models. Among other enterprises, it operates a subscription website on the Internet. Subscribers pay a monthly fee to view Perfect 10 images in a “members' area” of the site. Subscribers must use a password to log into the members' area. Google does not include these password-protected images from the members' area in Google's index or database. Perfect 10 has also licensed Fonestarz Media Limited to sell and distribute Perfect 10's reduced-size copyrighted images for download and use on cell phones.

Some website publishers republish Perfect 10's images on the Internet without authorization. Once this occurs, Google's search engine may automatically index the webpages containing these images and provide thumbnail versions of images in response to user inquiries. When a user clicks on the thumbnail image returned by Google's search engine, the user's browser accesses the third-party webpage and in-line links to the full-sized infringing image stored on the website publisher's computer. This image appears, in its original context, on the lower portion of the window on the user's computer screen framed by information from Google's webpage.

Procedural History. In May 2001, Perfect 10 began notifying Google that its thumbnail images and in-line linking to the full-size images infringed Perfect 10's copyright. Perfect 10 continued to send these notices through 2005.

On November 19, 2004, Perfect 10 filed an action against Google that included copyright infringement claims. This was followed by a similar action against Amazon.com on June 29, 2005. On July 1, 2005 and August 24, 2005, Perfect 10 sought a preliminary injunction to prevent Amazon.com and Google, respectively, from “copying, reproducing, distributing, publicly displaying, adapting or otherwise infringing, or contributing to the infringement” of Perfect 10's photographs; “linking to websites that provide full-size infringing versions of Perfect 10's photographs; and infringing Perfect 10's username/password combinations.”

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II Standard of Review

We review the district court's grant or denial of a preliminary injunction for an abuse of discretion. The district court must support a preliminary injunction with findings of fact, which we review for clear error. We review the district court's conclusions of law de novo.

Section 502(a) of the Copyright Act authorizes a court to grant injunctive relief “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). “Preliminary injunctive relief is available to a party who demonstrates 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 tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.”

Because Perfect 10 has the burden of showing a likelihood of success on the merits, the district court held that Perfect 10 also had the burden of demonstrating a likelihood of overcoming Google's fair use defense under 17 U.S.C. § 107. . . . In order to demonstrate its likely success on the merits, the moving party must necessarily demonstrate it will overcome defenses raised by the non-moving party. This burden is correctly placed on the party seeking to demonstrate entitlement to the extraordinary remedy of a preliminary injunction at an early stage of the litigation, before the defendant has had the opportunity to undertake extensive discovery or develop its defenses. . . .

However, entitlement for preliminary relief “is determined in the context of the presumptions and burdens that would inhere at trial on the merits.” Because the defendant in an infringement action has the burden of proving fair use, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994), the defendant is responsible for introducing evidence of fair use in responding to a motion for preliminary relief. The plaintiff must then show it is likely to succeed in its challenge to the alleged infringer's evidence.

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III Direct Infringement

Perfect 10 claims that Google's search engine program directly infringes two exclusive rights granted to copyright holders: its display rights and its distribution rights. . . . Even if a plaintiff [establishes copyright ownership and infringement], the defendant may avoid liability if it can establish that its use of the images is a “fair use” as set forth in 17 U.S.C. § 107.

The district court held that Perfect 10 was likely to prevail in its claim that Google violated Perfect 10's display right with respect to the infringing thumbnails. However, the district court concluded that Perfect 10 was not likely to prevail on its claim that Google violated either Perfect 10's display or distribution right with respect to its full-size infringing images. We review these rulings for an abuse of discretion.

A. Display Right

In considering whether Perfect 10 made a prima facie case of violation of its display right, the district court reasoned that a computer owner that stores an image as electronic information and serves that electronic information directly to the user (“i.e., physically sending ones and zeroes over the [I]nternet to the user's browser”) is displaying the electronic information in violation of a copyright holder's exclusive display right. See 17 U.S.C. § 106(5). Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-

line links to or frames the electronic information. The district court referred to this test as the “server test.”

Applying the server test, the district court concluded that Perfect 10 was likely to succeed in its claim that Google's thumbnails constituted direct infringement but was unlikely to succeed in its claim that Google's in-line linking to full-size infringing images constituted a direct infringement. As explained below, because this analysis comports with the language of the Copyright Act, we agree with the district court's resolution of both these issues.

. . . In sum, based on the plain language of the statute, a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory. There is no dispute that Google's computers store thumbnail versions of Perfect 10's copyrighted images and communicate copies of those thumbnails to Google's users.⁶ Therefore, Perfect 10 has made a prima facie case that Google's communication of its stored thumbnail images directly infringes Perfect 10's display right.

Google does not, however, display a copy of full-size infringing photographic images for purposes of the Copyright Act when Google frames in-line linked images that appear on a user's computer screen. Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act. In other words, Google does not have any “material objects ... in which a work is fixed ... and from which the work can be perceived, reproduced, or otherwise communicated” and thus cannot communicate a copy. 17 U.S.C. § 101.

Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen. Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues, see *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005), *Napster*, 239 F.3d at 1019, and does not constitute direct infringement of the copyright owner's display rights.

⁶ Because Google initiates and controls the storage and communication of these thumbnail images, we do not address whether an entity that merely passively owns and manages an Internet bulletin board or similar system violates a copyright owner's display and distribution rights when the users of the bulletin board or similar system post infringing works. Cf. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir.2004).

Perfect 10 argues that Google displays a copy of the full-size images by framing the full-size images, which gives the impression that Google is showing the image within a single Google webpage. While in-line linking and framing may cause some computer users to believe they are viewing a single Google webpage, the Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion. Cf. 15 U.S.C. § 1114(1)(providing that a person who uses a trademark in a manner likely to cause confusion shall be liable in a civil action to the trademark registrant).

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Because Google's cache merely stores the text of webpages, our analysis of whether Google's search engine program potentially infringes Perfect 10's display and distribution rights is equally applicable to Google's cache. Perfect 10 is not likely to succeed in showing that a cached webpage that in-line links to full-size infringing images violates such rights. . . .

B. Distribution Right

The district court also concluded that Perfect 10 would not likely prevail on its claim that Google directly infringed Perfect 10's right to distribute its full-size images. The district court reasoned that distribution requires an "actual dissemination" of a copy. Because Google did not communicate the full-size images to the user's computer, Google did not distribute these images.

Again, the district court's conclusion on this point is consistent with the language of the Copyright Act. Section 106(3) provides that the copyright owner has the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). As noted, "copies" means "material objects . . . in which a work is fixed." 17 U.S.C. § 101. The Supreme Court has indicated that in the electronic context, copies may be distributed electronically. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 498 (2001) (a computer database program distributed copies of newspaper articles stored in its computerized database by selling copies of those articles through its database service). Google's search engine communicates HTML instructions that tell a user's browser where to find full-size images on a website publisher's computer, but Google does not itself distribute copies of the infringing photographs. It is the website publisher's computer that distributes copies of the images by transmitting the photographic image electronically to the user's computer. As in *Tasini*, the user can then obtain copies by downloading the photo or printing it.

Perfect 10 incorrectly relies on *Hotaling v. Church of Jesus Christ of Latter-Day Saints* and *Napster* for the proposition that merely making images "available" violates the copyright owner's distribution right. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir.1997); *Napster*, 239 F.3d 1004. *Hotaling* held that the owner of a collection of works who makes them available to the public may be deemed to

have distributed copies of the works. Similarly, the distribution rights of the plaintiff copyright owners were infringed by Napster users (private individuals with collections of music files stored on their home computers) when they used the Napster software to make their collections available to all other Napster users.

This “deemed distribution” rule does not apply to Google. Unlike the participants in the Napster system or the library in *Hotaling*, Google does not own a collection of Perfect 10's full-size images and does not communicate these images to the computers of people using Google's search engine. Though Google indexes these images, it does not have a collection of stored full-size images it makes available to the public. Google therefore cannot be deemed to distribute copies of these images under the reasoning of *Napster* or *Hotaling*. Accordingly, the district court correctly concluded that Perfect 10 does not have a likelihood of success in proving that Google violates Perfect 10's distribution rights with respect to full-size images.

C. Fair Use Defense

Although Perfect 10 has succeeded in showing it would prevail in its *prima facie* case that Google's thumbnail images infringe Perfect 10's display rights, Perfect 10 must still show a likelihood that it will prevail against Google's affirmative defense. Google contends that its use of thumbnails is a fair use of the images and therefore does not constitute an infringement of Perfect 10's copyright. See 17 U.S.C. § 107.

The fair use defense permits the use of copyrighted works without the copyright owner's consent under certain situations. The defense encourages and allows the development of new ideas that build on earlier ones, thus providing a necessary counterbalance to the copyright law's goal of protecting creators' work product. “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose” *Campbell*, 510 U.S. at 575. “The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ ” *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (alteration in original).

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We must be flexible in applying a fair use analysis; it “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.... Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell*, 510 U.S. at 577-78. The purpose of copyright law is “[t]o promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, and to serve “ ‘the welfare of the public.’ ”

In applying the fair use analysis in this case, we are guided by *Kelly v. Arriba Soft Corp.*, which considered substantially the same use of copyrighted photographic images as is at

issue here. In *Kelly*, a photographer brought a direct infringement claim against Arriba, the operator of an Internet search engine. The search engine provided thumbnail versions of the photographer's images in response to search queries. We held that Arriba's use of thumbnail images was a fair use primarily based on the transformative nature of a search engine and its benefit to the public. We also concluded that Arriba's use of the thumbnail images did not harm the photographer's market for his image.

In this case, the district court determined that Google's use of thumbnails was not a fair use and distinguished *Kelly*. We consider these distinctions in the context of the four-factor fair use analysis, remaining mindful that Perfect 10 has the burden of proving that it will successfully challenge any evidence Google presents to support its affirmative defense.

Purpose and character of the use. The first factor, 17 U.S.C. § 107(1), requires a court to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” The central purpose of this inquiry is to determine whether and to what extent the new work is “transformative.” *Campbell*, 510 U.S. at 579. A work is “transformative” when the new work does not “merely supersede the objects of the original creation” but rather “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* (internal quotation and alteration omitted). Conversely, if the new work “supersede[s] the use of the original,” the use is likely not a fair use. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550-51 (1985) (internal quotation omitted) (publishing the “heart” of an unpublished work and thus supplanting the copyright holder's first publication right was not a fair use) . . .

As noted in *Campbell*, a “transformative work” is one that alters the original work “with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. “A use is considered transformative only where a defendant changes a plaintiff's copyrighted work or uses the plaintiff's copyrighted work in a different context such that the plaintiff's work is transformed into a new creation.” *Wall Data [v. L.A. County Sheriff's Dep't]*, 447 F.3d 769, 778 (9th Cir. 2006)].

Google's use of thumbnails is highly transformative. In *Kelly*, we concluded that Arriba's use of thumbnails was transformative because “Arriba's use of the images serve[d] a different function than Kelly's use-improving access to information on the [I]nternet versus artistic expression.” Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a “parody has an obvious claim to transformative value” because “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,” *Campbell*, 510 U.S. at 579, a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work. See, e.g., *id.* at 594-96 (holding that 2 Live Crew's parody of “Oh, Pretty Woman” using the

words “hairy woman” or “bald headed woman” was a transformative work, and thus constituted a fair use). In other words, a search engine puts images “in a different context” so that they are “transformed into a new creation.”

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The district court nevertheless determined that Google's use of thumbnail images was less transformative than Arriba's use of thumbnails in *Kelly* because Google's use of thumbnails superseded Perfect 10's right to sell its reduced-size images for use on cell phones. The district court stated that “mobile users can download and save the thumbnails displayed by Google Image Search onto their phones,” and concluded “to the extent that users may choose to download free images to their phone rather than purchase [Perfect 10's] reduced-size images, Google's use supersedes [Perfect 10's].”

Additionally, the district court determined that the commercial nature of Google's use weighed against its transformative nature. Although *Kelly* held that the commercial use of the photographer's images by Arriba's search engine was less exploitative than typical commercial use, and thus weighed only slightly against a finding of fair use, the district court here distinguished *Kelly* on the ground that some website owners in the AdSense program had infringing Perfect 10 images on their websites. The district court held that because Google's thumbnails “lead users to sites that directly benefit Google's bottom line,” the AdSense program increased the commercial nature of Google's use of Perfect 10's images.

In conducting our case-specific analysis of fair use in light of the purposes of copyright, we must weigh Google's superseding and commercial uses of thumbnail images against Google's significant transformative use, as well as the extent to which Google's search engine promotes the purposes of copyright and serves the interests of the public. Although the district court acknowledged the “truism that search engines such as Google Image Search provide great value to the public,” the district court did not expressly consider whether this value outweighed the significance of Google's superseding use or the commercial nature of Google's use. The Supreme Court, however, has directed us to be mindful of the extent to which a use promotes the purposes of copyright and serves the interests of the public.

We note that the superseding use in this case is not significant at present: the district court did not find that any down loads for mobile phone use had taken place. Moreover, while Google's use of thumbnails to direct users to AdSense partners containing infringing content adds a commercial dimension that did not exist in *Kelly*, the district court did not determine that this commercial element was significant. The district court stated that Google's AdSense programs as a whole contributed “\$630 million, or 46% of total revenues” to Google's bottom line, but noted that this figure did not “break down the much smaller amount attributable to websites that contain infringing content.”

We conclude that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial

uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances. We are also mindful of the Supreme Court's direction that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579.

Accordingly, we disagree with the district court's conclusion that because Google's use of the thumbnails could supersede Perfect 10's cell phone download use and because the use was more commercial than Arriba's, this fair use factor weighed “slightly” in favor of Perfect 10. Instead, we conclude that the transformative nature of Google's use is more significant than any incidental superseding use or the minor commercial aspects of Google's search engine and website. Therefore, the district court erred in determining this factor weighed in favor of Perfect 10.

The nature of the copyrighted work. With respect to the second factor, “the nature of the copyrighted work,” 17 U.S.C. § 107(2), our decision in *Kelly* is directly on point. There we held that the photographer's images were “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 Arriba used thumbnail versions in its search engine results, this factor weighed only slightly in favor of the photographer.

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The amount and substantiality of the portion used. “The third 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.” *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164(internal quotation omitted); see also 17 U.S.C. § 107(3). In *Kelly*, we held Arriba's use of the entire photographic image was reasonable in light of the purpose of a search engine. Specifically, we noted, “[i]t was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating [website]. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.” *Id.* Accordingly, we concluded that this factor did not weigh in favor of either party. *Id.* Because the same analysis applies to Google's use of Perfect 10's image, the district court did not err in finding that this factor favored neither party.

Effect of use on the market. The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). In *Kelly*, we concluded that Arriba's use of the thumbnail images did not harm the market for the photographer's full-size images. We reasoned that because thumbnails were not a substitute for the full-sized images, they did not harm the photographer's ability to sell or license his full-sized images. The district court here followed *Kelly*'s reasoning, holding that Google's use of thumbnails did not hurt Perfect 10's market for full-size images.

Perfect 10 argues that the district court erred because the likelihood of market harm may be presumed if the intended use of an image is for commercial gain. However, this

presumption 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.” Campbell, 510 U.S. at 591. As previously discussed, Google's use of thumbnails for search engine purposes is highly transformative. Because market harm cannot be presumed, and because Perfect 10 has not introduced evidence that Google's thumbnails would harm Perfect 10's existing or potential market for full-size images, we reject this argument.

Perfect 10 also has a market for reduced-size images, an issue not considered in Kelly. The district court held that “Google's use of thumbnails likely does harm the potential market for the downloading of [Perfect 10's] reduced-size images onto cell phones.” The district court reasoned that persons who can obtain Perfect 10 images free of charge from Google are less likely to pay for a download, and the availability of Google's thumbnail images would harm Perfect 10's market for cell phone downloads. *Id.* As we discussed above, the district court did not make a finding that Google users have downloaded thumbnail images for cell phone use. This potential harm to Perfect 10's market remains hypothetical. We conclude that this factor favors neither party.

Having undertaken a case-specific analysis of all four factors, we now weigh these factors together “in light of the purposes of copyright.” We note that Perfect 10 has the burden of proving that it would defeat Google's affirmative fair use defense. In this case, Google has put Perfect 10's thumbnail images (along with millions of other thumbnail images) to a use fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a significant benefit to the public. Weighing this significant transformative use against the unproven use of Google's thumbnails for cell phone downloads, and considering the other fair use factors, all in light of the purpose of copyright, we conclude that Google's use of Perfect 10's thumbnails is a fair use. . . .

[On the issue of indirect liability, the court held that “There is no dispute 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. . . . [Therefore,] 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.” The court remanded the issue of contributory liability for a determination under this test.]