Perfect 10 v. Google

In ***Perfect 10 v. Google,*** a federal district court in California issued a decision that contains both positive and negative rulings for search engines.[1] The case is on appeal, so its lasting implications cannot be predicted.

Facts. Perfect 10 publishes erotic photographs in a magazine and a website. It claims that other websites copy and display its photographs without permission. In the course of its search engine operations, Google automatically scans the photographs on the infringing websites, stores them in its search database, displays thumbnails of these infringing images in response to search queries, and provides links to the infringing sites. Additionally, Google provides the AdSense service. Under AdSense, when a user clicks on a search result and visits a website, Google displays ads on the site if the site is an AdSense partner. Google and the website split the ad revenue. Here, it seems that some of the infringing sites to which Google linked were AdSense partners.

Perfect 10, which has sued numerous service providers in recent years for infringement[2], sued Google both for displaying thumbnail images of Perfect 10 photographs in response to search queries and for linking to sites where infringing images were displayed. The court issued a preliminary injunction to Perfect 10 with respect to some of its claims.

In-Line Linking. The court first discussed the linking to the infringing websites. Perfect 10 argued that this constituted both direct and secondary infringement. Google provided an "in-line" link to other websites. This means that the Google site framed the content from the linked site, but Google made it very clear that the user was viewing content from the linked site. Perfect 10 argued that Google incorporated the content from the linked site, and thus Google was engaging in an unlawful display of the content. Google, on the other hand, argued that it was just serving content that was being displayed by the linked site. In other words, Google argued that the linked site was

[1] Perfect 10, Inc. v. Google, Inc., 416 F.Supp 2d 828 (D. Cal. 2006).
[2] *See, e.g.*, Perfect 10, Inc. v. CCBill, LLC, 340 F.Supp 2d 1077 (D. Cal. 2004); Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F.Supp 2d 1114 (D. Cal. 2001).

displaying the content, not Google. The court agreed with Google, and held that Google was serving the display, but not displaying the content itself. The court explained that this is what actually happens technologically: the content is being displayed by the site on which it is stored, not by the site that provides an in-line link to the site that stores the content.

The court also ruled that providing an in-line link did not infringe Perfect 10's distribution right. A distribution of a work requires an actual dissemination of copies. The court held that in the Internet context, an actual dissemination means the transfer of files from one computer to another. Although Google links to and frames the third-party websites, it is those third-party websites that are transferring the files, not Google. Accordingly, Google is not infringing the distribution right. [3]

Additionally, the court rejected Perfect 10's argument that Google was secondarily liable for providing links to sites with infringing content. The court agreed with Google that there was no evidence that any user actually used to Google to find an infringing site, and then print out an image from that site. Perfect 10 contended that by merely viewing such a site, the user was making a local cache or RAM copy, and thereby infringed the reproduction right. In an interesting footnote, the court concluded that RAM copies of this sort are fair uses.

Since there was no evidence that the users were infringing, the remaining question was whether Google was secondarily liable for the websites' infringement of Perfect 10's copyrights. The court ruled that the answer was no. While the court mentioned the U.S. Supreme Court's decision in *Metro Goldwyn Mayer Studios* v. *Grokster*[4], it seemed to rely on a more traditional contributory infringement analysis: knowledge and material contribution. Although the court questioned whether Perfect 10 provided Google with

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[3] The court could have reached the same result under a different theory. Some cases suggest that the transfer of an electronic file from one computer to another does not constitute a distribution – that a distribution requires the transfer of physical copies.

[4] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).

adequate notice of infringing activity on the sites to which it linked, the court assumed that Google had knowledge of the infringing activity. However, the court concluded that providing an audience for the infringement – providing users a means of finding these infringing sites -- did not constitute material contribution to infringing activity. The court provided a chart comparing Google's actions with those of Napster, and found that Google was far more removed from the infringing conduct than Napster. The court observed that "Google has not actively encouraged users to visit infringing third party websites, and it has not induced or encouraged such websites to serve infringing content in the first place."[5] The court stated that the "websites existed long before Google Image Search was developed and would continue to exist were Google Image Search shut down."[6]

Turning to vicarious liability, the court found that Google did receive a direct financial benefit from the infringing activity, particularly through the AdSense program. However, the court found that Google did not have the right and ability to control the infringing activity on the third party sites. Google did not control the environment in which the websites operated, and could not render them inaccessible by means of other search engines.

Furthermore, the court found that Google did not even have the ability proactively to prevent the serving of the infringing content. It lacked the software to determine in advance whether it was linking to an infringing image. The best it could do is respond to specific takedown requests. Perfect 10 argued that Google could refrain from indexing websites with a history of infringement. The court responded that Google had no way to evaluate whether a site had such a history. Moreover, blocking an entire site because it might possess some infringing images "would result in the suppression of speech and would be against the public interest."[7]

Display of Thumbnails. While the court found that providing links to third-party

[5] *Perfect 10*, 416 F.Supp 2d at 856.
[6] *Id.*
[7] *Id.* at 858 n.25.

pages did not lead to Google's direct or secondary liability, the court did nonetheless impose direct liability for Google's display of the thumbnail images by rejecting Google's fair use defense. In essence, the court distinguished the thumbnails here from the thumbnails by the search engine in *Kelly v. ArribaSoft*, 336 F.3d 811 (9th Cir. 2003). The court identified two features that distinguished this case from *Kelly*: AdSense and Fonestar. In *Kelly*, ArribaSoft received no financial benefit from the display of the Kelly's photograph. Here, by contrast, Google received a financial benefit from the display of the Perfect 10 thumbnails because the thumbnails led users to infringing sites from which Google profited via the AdSense program. The court concluded that this made Google's use "more commercial"[8] than ArribaSoft's.

Moreover, in *Kelly*, the court found that ArribaSoft's display of thumbnails did not harm the market for Kelly's work, in part because there was no market for the licensing of thumbnail images of Western scenery, the subject of Kelly's photos. But there does appear to be a market for thumbnail images of naked women. A company called Fonestar licenses photos and makes them available for download on cell-phones, where they are the same size as the thumbnails Google displays. The court found that it was possible that Google's display of the thumbnails would interfere with the success of the Fonestar service because cell-phone users could see the thumbnails through Google image search for free. Because of these factors, the court concluded that Google was unlikely to prevail on its fair use defense.

Remedy. The court ordered the parties to follow a notice and takedown procedure similar to that outlined in Section 512 of the Digital Millennium Copyright Act. Perfect 10 has the burden of monitoring Google's search results for infringing images. When it finds an infringing image, it must provide Google with detailed information concerning its location. Google then must disable access to the thumbnail and, if the website to which it links is an AdSense partner, Google must cease serving ads on that site. The order also contains a process by which Google can challenge Perfect 10's identification of infringing images. It appears that Google, prior to the litigation, was already removing infringing images in response to Perfect 10's notifications. Thus, this preliminary injunction seems to give nothing to Perfect 10 that it did not already have.

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[8] *Id.* at 847.

Possible Implications. The court's rulings relating to in-line linking are very positive for the Internet generally and search engines in particular. In-line linking is a basic Internet technology, and imposing liability based on such linking would disrupt the Internet's operation.

In contrast, the court's ruling concerning the display of thumbnails, if it stands on appeal, could create serious problems for search engines. This is because the court's analysis calls into question any search business model that relies on advertising tied to search results. The court distinguished *Kelly* by citing Google's AdSense program, where Google serves advertising on websites that users access by clicking on Google search results. The court believed that advertising revenue tied to search results rendered Google's use far more commercial than Arriba's. But many commercial search engines now derive advertising revenue from search results, and some use business models similar to AdSense. If a linkage between advertising revenue and search results renders the copying performed by search engines unfair, then advertising-based commercial search engines, which provide free access to users, are in serious jeopardy.

The court also distinguished *Kelly* by pointing to the Fonestarz service, which for a fee provides Perfect 10 images to cell phone users. The District Court concluded that Google's display of Perfect 10 thumbnails undermined the market for Fonestarz, thus tilting the fourth fair use factor against Google. This analysis casts doubt on all image search. In the future, firms may seek to provide specialized image download services to cell phones, *e.g.*, images of entertainers, athletes, politicians, art, architecture, and animals. Each firm will claim that image search results compete with its service.

Accordingly, on appeal Google must demonstrate that the court's reliance on AdSense and Fonestarz to marginalize *Kelly* does not withstand scrutiny. It must prove that AdSense does not render Google's use of the thumbnails more commercial than Arriba's. It must also prove that the harm to Fonestarz is completely speculative. If Google fails, search engines in the United States may have a grim future.