

astrachan gunst thomas

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## **Thumbnails and Other Body Parts**

By: Jim Astrachan

In a decision bound to bring tears of joy to all those search engines who profit guiding web searchers to adult, and other, websites, the Ninth Circuit vacated an injunction entered against the search engine Google. If the injunction had not been vacated Google would be barred from displaying thumbnail sketches of nude photographs owned by a company named Perfect 10. These are the same photos that a searcher would find if he or she took the time to ferret out a favorite fetish without resorting to Google's gathering and indexing tactics.

It's a little technical, but here's what happens. Google operates a search engine, being a software program that accesses millions of websites and indexes them in a database stored on its computers. A Google user will access Google's website and type in a search query; the software then searches Google's database for sites that are responsive to the query. Results are provided in text, image or video form.

Google's search engine that provides results in image form is called "Google Image Search". An image search query results in the software providing an image identified from related text. The software does not recognize or index the image. What the searcher sees are small images of webpages, called "thumbnails", which are stored in Google's servers. The thumbnails are small and they are low resolution. They are not intended to replace the real webpages; only to allow a searcher to view available webpages and make a selection by clicking on a thumbnail.

When the click occurs the searcher's browser program interprets Google's HTML instructions and the searcher's browser causes a window containing two separate areas to open on the searcher's screen. The top section is filled with information from the Google webpage, including the thumbnail and text. The searcher's computer receives the address of the website's publisher and stores the thumbnail. The searcher's computer is directed to the website and a full size image of the thumbnail is downloaded and appears on the bottom portion of the searcher's screen. The top part of the window comments on the bottom part of the split screen display. Google does not store the thumbnail image, but it does store text from the thumbnail.

Okay. Enough technical stuff and more than you need to know unless you're a Geek. Google does this to make money. Money comes from its search engine operations and its "Ad Sense" program in which a website owner can register with Google, place HTML instructions on its webpage and automatically advertise on Google. Google gets a cut of this revenue and content and searchability drives revenues.

Perfect 10 sells copyrighted images of nude models; its subscribers receive a password and pay fees to view and download those images; Google searchers do not see the password-protected images; they see homepage shots. Perfect 10 has also licensed its hi-resolution reduced-size images for use on cell phone screens. Occasionally, infringers will publish full size Perfect 10 images on their website and Google's search engine would blindly find these and reduce them to thumbnails in response to a search query.

Perfect 10 was terribly displeased that Google appeared to be abetting or contributing to the infringement of its images and demanded it cease and desist, which Google ignored. A copyright suit was brought against Google, and a preliminary injunction was sought that would stop the copying, distribution and contributory infringement of Perfect 10's images. The District Court enjoined Google from reproducing thumbnails and it appealed. It did not find it likely Google would have vicarious liability or be a contributory infringer, and Perfect 10 filed a cross appeal.

Analyzing whether infringement occurred, the appellate court concluded that Google's thumbnails constitute copying, an infringing action under the Copyright Act, but that linking to full size infringing images was not copying under the Act. Google asserted a defense of fair use and since Perfect 10 bore the burden of establishing likelihood of success on the merits, Perfect 10 needed to establish it was likely to overcome the fair use defense. It could not.

Fair use permits copying without authorization under some circumstances. It is intended to allow persons to use another's copyrighted work to develop new ideas and build on earlier ideas. Fair use is designed to encourage creativity. There are no bright line tests for application of fair use and courts must examine the defense on a case by case basis. This court considered an earlier case also brought by a photographer against a search engine for also using thumbnails. There, the use of thumbnails was considered transformative, a benefit to the public with no loss of market to the photographer. It was here also.

The use was transformative because Google's use served a different function than did Perfect 10's, whose purpose was to sell images. Google, on the other hand, turned Perfect 10's images into "pointers" directing searchers to information. Thus, the court reasoned, the search engine provides social value by incorporating an old work into an electronic reference tool. And although Google earns money by using Perfect 10's images, its commercialization does not negate fair use, particularly when social benefit and the Supreme Court's directive to remain flexible when applying fair use to emerging technological users is considered.

Other issues, including Google's contributory infringement and vicarious liability were raised and the trial court held Perfect 10 not likely to prevail on the merits. The appellate court, however, reversed and remanded for fact finding on these issues.

The older criteria for determining fair use, such as for criticism, education, and comment are no longer the only uses that will evoke fair use. Commercial use no longer provides a fatal taint to the analysis. New technology creating new uses of copyrighted material will require courts to keep an open mind, be flexible and push the envelope when considering whether fair use applies or infringement exists.

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*James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.*