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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California
corporation,

Plaintiff,

v.

GOOGLE INC, a corporation.; and DOES
1 through 100, inclusive,

Defendants.

No. CV04-9484 AHM (SHx)

**BRIEF AMICUS CURIAE OF
ELECTRONIC FRONTIER
FOUNDATION**

Date: November 7, 2005
Time: 10:00 a.m.
Dept.: Courtroom 14

INTEREST OF AMICUS

1
2 Amicus Electronic Frontier Foundation (EFF) is a membership-supported,
3 nonprofit public interest organization devoted to maintaining the proper
4 public/private balance in copyrights as more material moves into the digital domain.
5 The EFF represents the interests of parties from individual hobbyists to technology-
6 driven entrepreneurs whose freedom to innovate could be stifled by overbroad
7 application of copyright laws, as well as students, teachers, and researchers who
8 depend on copyright law's fair use doctrine to access information about digital
9 images online. Several of the copyright claims in this case threaten to impinge upon
10 the rights of innovators and educational actors, upsetting the delicate statutory
11 balance between the ability of copyright owners to control their works and the rights
12 of the public at large to use them as set out by Congress and maintained by the courts
13 under the Fair Use doctrine. EFF files this brief because, as discussed below, the
14 ability to make copies of copyrighted works as an intermediate step toward accessing
15 information about those works and making further transformative non-infringing
16 uses of them is essential to achieving two of the primary goals of the Copyright Act:
17 promoting technological advancement and improving the ability of the public to
18 effectively find and use existing creative works for socially beneficial purposes such
19 as research and education. While Perfect 10's particular copyrighted work may have
20 limited academic application, the rule set forth by the court in this matter will have
21 dramatic implications for all those who search for digital visual information online.
22 Therefore, Amicus respectfully requests that the court consider this brief as it
23 determines the copyright claims in this case.

I. INTRODUCTION

24
25 The Copyright Act's primary purpose is to encourage the creation and
26 dissemination of new and original works. This is done in myriad ways. One way is
27 through the exclusive rights afforded under Section 106 of the Act to the copyright
28 owner of an original work, such as plaintiff Perfect 10. However, the Copyright Act

1 also encourages creativity in other ways. For example, the Fair Use doctrine
2 embodied in Section 107 of the Copyright Act encourages the creation of criticisms
3 and parodies. It also encourages the use of works for teaching, education, and news
4 reporting. Courts and Congress have historically recognized these uses as “fair” in
5 part because they are transformative in nature and lead to further creativity and
6 learning in the public interest.

7 With the emergence of digital technologies, the courts have begun to
8 recognize another kind of transformative use serving the public interest – the making
9 and use of intermediate copies of digital computer files for legitimate purposes. The
10 advent of the Internet and the digital revolution have fostered an explosion of new
11 and unforeseen uses for creative works – from software that enables independent
12 filmmakers to produce award-winning documentaries by combining pre-existing
13 archival film with newly-shot high-definition footage to internet technologies that
14 allow friends to organize and share group photographs online. Many of these new
15 uses cannot be achieved in a vacuum; rather, they require computers to capture and
16 manipulate the imagery at issue through the creation and use of “intermediate
17 copies” of each work in a computer’s memory or on its hard drive. When such copies
18 are a necessary step to furthering the purpose of the Copyright Act and other public
19 interests, courts have generally found them to be fair uses.

20 The copies created by Defendant Google’s “image search engine” service are
21 just such necessary steps. The engine makes transformative intermediate uses that
22 are necessary to achieve at least two legitimate purposes. First, it allows Google to
23 create and make available to the public Google’s own innovative copyrighted search
24 programs that advance the progress of science, a key purpose of the Copyright Act.
25 *See* U.S. CONST., Art. I, Sec. 8, cl. 8. Second, it allows millions of Internet users to
26 locate and access knowledge and information about images on the Internet, including
27 information for research and education.

28 The purpose of Google’s image search is simple: to allow Internet users to

1 find the location of images on the web by typing in keyword search terms associated
2 with those images. Once the location of the images has been found, Google displays
3 the location next to an identifying “thumbnail” image – an image substantially
4 smaller and inferior to the image on the page to which it points. Unlike the original
5 copyrighted image, the thumbnail is not artistic or expressive but rather *informative*;
6 it helps users identify information they are looking for online (e.g., the location of a
7 photo) and access that information. The thumbnail is, as the clichéd expression goes,
8 worth a thousand words of descriptive text.

9 In its Notice of Motion and Motion of Plaintiff Perfect 10, Inc. for Preliminary
10 in Junction and Memorandum of Points and Authorities (“Perfect 10 Motion”),
11 Perfect 10 argues that Google violated plaintiff’s exclusive right to reproduce,
12 distribute, and display the copyrighted work under 17 U.S.C. § 106. *See* Perfect 10
13 Motion at 3. Yet Perfect 10 never clearly articulates why any of this “copying” is bad
14 for society or even bad for copyright owners. Rather, Perfect 10 obfuscates the
15 argument by abstracting it into the individual acts of copying done by Google’s
16 computers – the same copying that any computer does when presented with a digital
17 file. For example, transferring a file from a disk to a computer’s hard drive is making
18 a “reproduction” of it for purposes of copyright. So is displaying a web page on a
19 computer screen. Thus, simply claiming something is illegal because it is a
20 reproduction misses the point of the copyright determination. The key question is not
21 whether or not there was a reproduction, but *why* there was a reproduction.

22 Here, every reproduction and display performed by a Google computer is a
23 necessary step to achieving a legitimate public purpose. Google’s image search
24 functionality provides millions of users with vitally important public information
25 about images and the subjects with which they are associated. Such public access to
26 information should be valued as a public good, both because it promotes the progress
27 of digital innovation and because it enhances public access to knowledge and
28 information online. As such, this Court should follow circuit precedent and find such

1 use to be fair under Section 107 of the Copyright Act.

2 II. ARGUMENT

3 A. Intermediate uses of copyrighted works that promote the public 4 interest and the purposes of the Copyright Act are fair uses.

- 5 1. The Ninth Circuit has consistently held that intermediate use of
6 copyrighted works is a fair use when necessary to achieve a
7 legitimate purpose.

8 The issue of using intermediate digital copies is not new to Ninth Circuit law.
9 Over a decade ago, the court addressed the issue for the first time in the seminal case
10 of *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992), where it found that Defendant
11 Accolade’s verbatim and repeated copying of Sega computer code was nonetheless
12 excused under the Fair Use doctrine because all of the copying was “intermediate” in
13 nature and necessary to achieve several legitimate purposes – promoting innovation,
14 accessing information, and the creation of new works. *Sega*, 977 F.2d at 1526-27. In
15 particular, the court found that allowing such copying to take place served the public
16 interest purposes of the Copyright Act.

17 Almost a decade later, the Ninth Circuit strongly affirmed this policy in *Sony*
18 *v. Connectix*, 203 F.3d 596 (9th Cir. 2000) (“Sony”). In that case, the defendant had
19 made hundreds of copies of plaintiff’s copyrighted work. The Court excused all of
20 these copies as fair uses because they were intermediate and necessary to achieving
21 legitimate purposes – the creation of new software for plaintiff’s videogames and
22 providing consumers with more game-playing locations. *Sony*, 204 F.3d at 603.

23 Finally, in *Kelly v. Arriba Soft*, the Ninth Circuit directly addressed the
24 question presented here – whether generating thumbnails of copyrighted images
25 obtained from a web page, and presenting those thumbnails to users seeking
26 information as part of the results obtained from a search engine, was a fair use under
27 § 107 of the Copyright Act – and held that it was. *Kelly v. Arriba Soft*, 336 F.3d 811
28 (9th Cir. 2003). In that case, Arriba Soft Corp. (“Arriba”) offered a service very
similar to Google’s. Like Google, Arriba would automatically acquire images from

1 third party web sites, reduce them to thumbnails, store them in an index, and later
2 present them to users in response to search requests. *Id.* at 815. In *Kelly*, the court
3 held that both “[t]he *creation of and use of* thumbnails in the search engine is a fair
4 use.” *Id.* at 815 (emphasis added).

5 In determining whether or not the use in *Kelly* was a fair one, the court
6 concentrated on whether the use was transformative:

7 “[T]he central purpose of this investigation is to see . . . whether the
8 new work merely supersede[s] the objects of the original creation, or
9 instead adds something new, with a further purpose or different
10 character, altering the first with new expression, meaning, or message; it
11 asks, in other words, whether and to what extent the new work is
12 transformative.”

13 *Id.* at 818 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). In
14 finding that Arriba’s use was fair, the *Kelly* court held that, although the images were
15 not themselves altered beyond reduction in size, “[b]ecause Arriba’s use [was] not
16 superseding Kelly’s use but, rather, [had] created a different purpose for the images,
17 Arriba’s use [was] transformative.” *Id.* at 818. Indeed, “Arriba’s use of Kelly’s images
18 promotes the goals of the Copyright Act and the fair use exception. The thumbnails
19 do not stifle artistic creativity because they are not used for *illustrative or artistic*
20 purposes and therefore do not supplant the need for the originals. In addition, they
21 benefit the public by enhancing information-gathering techniques on the internet.”
22 *Id.* at 820 (emphasis added).

23 The Ninth Circuit’s emphasis on the fairness of both the *copying* of the images
24 and the *use* of them as information location tools is instructive. In doing so, the court
25 recognized that copyrighted images can be used for multiple purposes. On the one
26 hand, they can be used for *artistic* or *expressive* purposes, such as substituting for an
27 original work in violation of the exclusive rights under Section 106. On the other
28 hand, they can also be used for *informational* purposes – functional purposes that do
not substitute for the expressive protections under Section 106 and that serve
valuable public interest goals such as greater public access to information. This

1 distinction is one of the critical ways of segregating illegal and legal uses of works in
2 the digital environment.

3 2. Google's use of images qualifies as fair because it transforms the
4 purpose of the works and is necessary to achieve legitimate
5 public ends.

6 Google's use of images here is fair use because, like *Sega* and *Sony*, it
7 promotes technological innovation, and like *Kelly*, it enhances information-gathering
8 techniques on the Internet. In *Sega* and *Sony*, the Court found that allowing
9 defendants to make intermediate copies of plaintiff's works advances to progress of
10 technological innovation and brought new and creative software works to consumers
11 that would otherwise be unavailable. The same is true here. According to Google's
12 Opposition filings, there is no feasible way to provide comprehensive image search
13 functionality to the entire Internet in an effective manner without capturing live
14 images, transforming them into thumbnails, and then using them on the search
15 results page to help users identify the information they seek. Any other solution will
16 not provide the same public benefits. As such, the intermediate use of images is a
17 necessary mechanism to allow Google's new and creative copyrighted software to
18 function and provide the public with its accompanying benefits.

19 Moreover, as in *Kelly*, Google's image search provides the public with a
20 highly-transformative use of the copyright works in question – not an expressive or
21 artistic use that would substitute for the original work, but rather an *informative* use
22 the “enhanc[es] information-gathering techniques on the internet.” *Kelly*, 336 F.3d at
23 820. For example, Art professors and students can use Google's search engine for
24 research on visual patterns and periods. Others may use Google's image search to
25 identify someone they met at a conference or to distinguish one famous speaker or
26 musician from another. But perhaps no one benefits more from the availability of an
27 effective image search than copyright owners themselves. Copyright owners use
28 Google's search to determine what is publicly available on the web and enforce their
own rights, while potential users of copyrighted photos can use Google's search

1 engine to locate topical images that they may wish to license.

2 Without the display of thumbnails, image searches would be much less useful
3 because users could not take advantage of the visual information of the image to
4 make sure they had found the right search result. It would be like searching through
5 an electronic card catalog where you could enter a subject, but all that you received
6 in return are the call numbers for the books – no author and no title. Without going
7 and finding each individual book, there would be no way to tell if you had found
8 what you were looking for. The purpose of Google’s image search is to reduce
9 drastically the time it takes to find *relevant* images and web pages, and the
10 thumbnails are integral to the user’s ability to determine which images, with their
11 surrounding pages, are relevant.

12 Further, without the initial reproduction, there would be no way to provide
13 those thumbnails to the user. Even if Google could successfully index the locations
14 of images, and determine which were likely to be relevant to a user’s search, there is
15 no reasonable way to show those results to the user in a useful manner unless Google
16 has a copy of the image that has been transformed for that purpose. Thus, Google
17 transformation of the full expressive images into informative thumbnail images
18 serves a vital and important public purpose, and thus should be found fair use.

19 **B. The Court should consider the impact on the public interest in its**
20 **preliminary injunction determination**

21 Consideration of the public interest is an important part of any determination
22 for preliminary injunctive relief. *Johnson v. California State Bd. of Accountancy*, 72
23 F.3d 1427 (9th Cir. 1995) (“Traditional equitable criteria for granting preliminary
24 injunctive relief” include the “advancement of the public interest.”). Further, the
25 court “is free to consider the public benefit resulting from a particular use” in
26 performing a fair use analysis. *Sega*, 977 F.3d at 1523 (internal citations omitted).
27 Here, in addition to the merits of the claims and defenses, the court should consider
28 independently whether or not granting injunctive relief to Perfect 10 would further

1 the public interest.

2 A search engine, whether used for text or for images, confers strong benefits
3 on the public by enabling more and better legitimate information access. Much like a
4 card catalog in a library, search engines help users make sense of large amounts of
5 data. For example, while the Library of Congress contains nearly 128 million items
6 (including 29 million books and 12 million photographs), Google recently reported
7 having indexed over 8 *billion* web pages and 2 *billion* images. Such a wealth of
8 information loses much of its value if it cannot be accessed in a useful way; search
9 engines like Google provide that way. Navigating the web without a search engine is
10 like navigating a library without a card catalog: One is left to browse the library
11 shelf-by-shelf, page by page. Occasionally, a person will be able to point out an
12 appropriate book or site, or a “near miss” will provide pointers to better sources. To
13 be sure, navigating in this manner is useful – however, one cannot get anywhere near
14 the maximum value out of such vast stores knowledge without a effective central
15 indexing system.

16 The public utility of search engines cannot be ignored. Every day, millions of
17 users go to search engines looking for information, including information about
18 images and the subjects within them. The more complete and comprehensive that
19 search engines are, the better we inform the public and the more we enhance the
20 public knowledge of the world around us. Shutting down Google’s image search will
21 have a serious and immediate detrimental effect on the public’s access to knowledge
22 and the benefits they receive every day from Google’s innovation. Thus, for this
23 additional reason, Plaintiff’s Motion should be denied.

24 **CONCLUSION**

25 For the foregoing reasons, Amicus Electronic Frontier Foundation respectfully
26 requests the court deny plaintiff’s motion for preliminary injunction.

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