

# Thumbs Up? Thumbs Down?

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*Can we protect our tiny images from commercial piracy?*

Who says a thumbnail photo can't be swiped from the Internet?

Could a legitimate company swipe thousands of thumbnail-size images and sell them to, say, a cell phone company for downloading? And still be legal?

Well, presently they could, if they went through an innocent major search engine that featured image-search.

This is the story of an adult-content company (Perfect-10) who leases (for \$\$\$\$) its thumbnail-sized "adult pictures" to a British cell phone entity (Fonestarz Media Ltd.), and finds that those same pictures are being offered for free on a major search engine such as Google. Thumbnails can be marketed on the web, nowadays, in different ways, so this brings up a problem for stock photographers.

A brief history: Over the years we have reported on this question. A California photographer, Leslie Kelly, sued a company called (at that time) Arriba Soft, and asked, "Can search engines tap into photographers' web photos and use them to display in their own website?" The case took several years to decide. The courts finally came up with an answer (in layman's terms): "Yes, web search engines can display a photographer's images, if they use them in a 'thumbnail format.'" That's why we see Google and the other search engines freely displaying the photos of photographers (and non-photographers) on the search engines' website in small (thumbnail) low-res format, with no legal problems.

## TECHNOLOGY CHANGES

But technology changes. In the early days of the automobile it might have been legal to place your arm out of the window of your car to signal which way you were about to turn. But with the invention of electronic turn signals, it eventually became illegal to use your arm for the signal. You are required now to have a working turn signal on the car you drive. A faulty one could lead to a fine. Who knows what future technological changes hold in store for the rules of the road.

Such a change has come to stock photography. Thumbnails are used all over on the Internet, and to date, there have been few objections by photographers because they have served, usually, as mini-publicity points for the photographers. We've all thought, until recently, that thumbnails don't qualify technically to be able to be used for commercial purposes. We as photographers have been conditioned to believe thumbnails are "safe" from thievery. Here at PhotoSource International, we've heard of no thumbnail copyright infringement cases in the last decade, except for the Leslie Kelly cases. But a recent court case has beamed a new light on this subject. The Ninth Circuit Court of Appeals originally handled the Kelly complaints. They are taking a second look.

The case, *Perfect 10 v. Google, Inc.*, brought in the United States District Court for the Central District of California, is about Google's image search function in the form of thumbnail-size images as part of its search engine services. Google, relying on the Kelly decision, declared that its use of thumbnails is considered "fair use" under the Copyright Law.

According to the preliminary ruling in the Perfect 10 case, the major factor differentiating Google's use of Perfect 10's images from Arriba Soft's use of Kelly's images; was that since early 2005, Perfect 10 licensed reduced-size images of its photographs to Fonestarz Media Ltd. of the United Kingdom. Fonestarz sells reduced-size copyrighted images for download and use on cell phones worldwide. The company sells about 6,000 thumbnails per month in Britain alone. The same thumbnails which Perfect 10 holds copyright registrations for, were being made available for downloading from Google's image search engine. The images are free from Google. You have to pay to obtain the images from Fonestarz. That's not the way photo-owners like to work.

This is something the courts didn't recognize in their decision back in 2004. Leslie Kelly had not established that he made sales on thumbnails. The Court, likewise, made the presumption (like we all did) that there was no market for thumbnail-size images, and that included Kelly's.

## IS IT FAIR USE?

How's this going to turn out for stock photographers?

On the one hand, searching and finding images within the Fair-Use doctrine of the Copyright Law has become imbedded in the web search culture. Can the search engines continue to offer this service, or will they start charging for thumbnails and acting as a broker for the photographers who own the copyrights to the images?

The concept of this kind of micro payment is not new. Look at recording artists and composers, and radio broadcast.

Originally, radio stations only broadcast performers live. Later, recordings became widely used. Performers wanted to be paid, and many composers didn't want their music performed or played for free, but the stations wouldn't pay them. The composers who were members of ASCAP boycotted radio in 1944, and no music was broadcast for several months.

Eventually the broadcasters agreed to pay "royalties" for each time a musician's recorded tune was broadcast. Thus began the system of royalty micropayment.

Incidentally, Google has appealed the preliminary ruling mentioned above. We'll keep you posted. Note: for former coverage by PSI on the Kelly case, see:

**[www.photosource.com/photoaim/kelly.html](http://www.photosource.com/photoaim/kelly.html)**

**[www.photoaim.com/gen546.html](http://www.photoaim.com/gen546.html)**

**[www.photoaim.com/list/380d.html](http://www.photoaim.com/list/380d.html)**

**[www.photosource.com/searchengine.html](http://www.photosource.com/searchengine.html)**

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