Museums, Copyrighted Art, and the Internet: A Take on Fair Use

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In today’s digital age, having a website for your business is like having insurance for your car—it’s a must. An art museum, just like any other business (albeit non-profit), must use a website in order to capitalize on its opportunities for education, visibility, and marketability. The Internet gives museums the ability to showcase all of the great artwork they possess in order to create interest in the museum, bring in new patrons, and solicit funding. However, before putting artwork online, museums must consider the rights of the their art’s copyright holder, or else face the risk of lawsuits.

Generally speaking, if a party wishes to reproduce a copyrighted image, they must receive the expressed consent of the copyright holder of that image or artwork. By concept, copyright is an entirely separate entity as the work of art itself, and can belong to a person (the artist or another), an institution, or a company. It is often difficult to find the current copyright holder and contact the holder. If the holder can be contacted, it can be very expensive to clear those copyrights. For the use of multiple copyrighted images, this can amount to a sum that many art museums simply cannot afford.

Fortunately for museums, there are some permitted ways to use copyrighted works in a way that does not infringe upon the copyholders’ rights. This acceptable usage is governed by a doctrine called “fair use,” and it is weighed on a case-by-case basis, making it difficult to define. Section 107 of United States Copyright Code says, “The fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” However, the only way to know for sure if a particular use is fair use is to have it resolved in court. The

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amount of gray area in fair use cases has left the arts industry unclear as to what is acceptable for fair use.

Recently, the issue of digital thumbnail images has been the subject of multiple court cases that. For a number of reasons, courts have found the thumbnails to be an acceptable (fair) use of the copyright images. Yet, the reproduction of a thumbnail alone does not constitute fair use of a copyrighted work.³ There are specific details in each of these cases that lead to the courts’ ruling in the favor of fair use. It will be helpful to understand how and why certain elements of a case lead to a successful defense of fair use.

In order to best illustrate what is or is not typically fair use, I will use a hypothetical scenario dealing with an art museum’s usage of copyrighted works. This scenario will be the basis of my examination for a fair use defense. The scenario is as follows:

An art museum, hereinafter referred to as “Museum X” has a website on which it has taken its entire collection of photographs and paintings and archived them in the form of small digital images, known as thumbnails. These images are just large enough to identify the paintings, but are too small and low in resolution to be used for aesthetic reproduction purposes. Instead, these thumbnail images are displayed to showcase the art in the museum and to educate the public on those works. Aside from the art in the public domain and the art where the copyright has been bequeathed to the museum, there are many works, which are still under the control of the copyright holder. All of the artwork is owned by the museum, but the museum does not own the copyrights to these paintings. From a prima facie (at first sight) standpoint, this museum cannot reproduce these photos online without the consent of the copyright holder.

However, it is the contention of Museum X that used images are rightfully being displayed under the doctrine of fair use.

This paper will examine the key characteristics of fair use, analyze the analogous precedent cases, and compare them to the aspects of my “Museum X” example scenario. While I do not have the authority of a judge or a courtroom of any kind, I present this argument in order to educate museums as well as the copyright holders on the current findings of courts regarding copyrighted images being reproduced as thumbnails. Based on extensive analysis of recent precedents and legal trends, Museum X’s use of thumbnail images, should it be challenged for infringement, would have a high likelihood of success in demonstrating fair use.

Understanding Copyright Law and Fair Use

To understand the rights surrounding a copyrighted image, it is essential to know the granted rights of the copyright holder. The copyright owner of a given work is granted exclusive rights by the U.S. Copyright Act that no other owner of that work has. § 106 of Title 17 of U.S. Code grants the copyright owner the exclusive rights to do and authorize the right to reproduce, prepare derivative works, distribute for sale, perform publicly, display publicly, and in the case of audio, transmit publically their copyrighted work.4

If a museum purchases that copyrighted work of art, they own the property and can present it to viewers present at the place where the copy is located, but they cannot do any of the prescribed actions under the exclusive rights of the copyright holder. Posting an image online to a public website is an action of both public display and reproduction, and would thus require

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express authorization, unless that use is a fair use. This leads us to the exception to that notion—fair use.

Fair use is a legal doctrine codified under the Copyright Act of 1976 as a defense to copyright infringement. In the book, Permissions, a Survival Guide: Blunt Talk about Art as Intellectual Property, author Susan Bielstein explains, “Fair use is not a law but an equitable rule of reason.” The doctrine was created in order to protect limited uses of copyrighted material for the purposes of criticism, comment, news reporting, teaching, scholarship, or research. To defend this ideal, Supreme Court Justice Sandra Day O’Connor wrote in Feist v. Rural Telephone, “The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”

If a party uses a copyright work for one of the aforementioned reasons, they may have a defense in fair use, but if the copyright holder disagrees, the outcome can only be resolved in court. When analyzing a fair use case in court, judges use four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion taken, and (4) the effect of the use upon the potential market. These factors are not binding criteria but rather guidelines that shape the decision in each personalized case. Fair use is especially difficult to determine in part because there is no specific number of words, lines,

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notes, or in our case, exact size that may safely be taken without permission. Also, making a visible acknowledgement of the author of the copyrighted material is not a factor in establishing fair use.9

The first factor, the purpose and character of the use, is referred to as the transformative factor, and it is considered to be the utmost critical of the four factors in determining fair use. Having said that, with the elusiveness of the word “transformative,” it is also the most difficult one to define. Judge Pierre Leval’s 1990, seminal article, Toward a Fair Use, argued for a heightened emphasis on transformativeness while attempting to define it. He stated:

The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test … If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.10

The monumental audio sampling case, Campbell v. Acuff-Rose Music, Inc., cited Leval’s article heavily and stated that while transformativeness was “not absolutely necessary for a finding of fair use … 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.”11 Campbell was also important in determining the significance of commercial usage in fair use cases. It should be

9 Ibid
noted that fair use factor in its entirety is “the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.” Prior to this case, every commercial use was “presumptively . . . unfair.” But Campbell determined that, while it is still a factor of determination, commercial use does not bar fair use, just as non-commercial use does not affirm fair use.

Acknowledging a transformative work is further complicated by trying to differentiate it with a derivative work. A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work.”

Given that a derivative work is one of the essential rights of a copyright holder, the alleged infringer must prove in his fair use defense that his transformative use is lacking the key elements of a derivative work. According to copyright litigator Lisa Dejaco, “Mere homage is not enough, nor is the effort that one puts into the creation.” Robert J. Kasunic, the principal legal adviser at the U.S. Copyright Office, has even conceded that the line between derivativeness and transformative is not at all clear.

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The second factor of fair use, the nature of the copyrighted work, is not weighed as heavily as the first but is still influential on the overall case. Typically this is a question of whether the use is in the public’s interest or if it is commercial in nature with profit.\textsuperscript{16} In \textit{Rosemont Enterprises, Inc. v. Random House Inc.}, the court asked whether the nature was such that “distribution would serve the public interest in the free dissemination of information.” However, despite this consideration, the courts recognize that, as with the cases of \textit{Campbell v. Acuff-Rose Music} or \textit{Bill Graham Archives v. Dorling Kindersley Ltd}, if the nature of the work is “transformative” then the second factor is considered of “limited usefulness.”\textsuperscript{17}

The third factor of consideration is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This factor analyzes not only the size or length of the use in question, but also whether or not the portion used is significant. In the past, if a court had deemed a use “de minimis” (deriving from “de minimis non curat lex,” which means “the law takes no account of trifles”)\textsuperscript{18} the court would permit it without further analysis.\textsuperscript{19} However even a “de minimis” defense can be eliminated if the portion is taken from the “heart” of the work.\textsuperscript{20} \textit{Bridgeport Music, Inc. v. Dimension Films}, a case that dealt with the looping of a small digital audio sample, eradicated “de minimis” from being a defense in fair use cases.\textsuperscript{21} Nonetheless, the size or length of a reproduced work plays a pivotal role in the case and directly affects the other three fair use factors.

\textsuperscript{17} Bill Graham Archives v. Dorling Kindersley Ltd., 448 F. 3d 605 (Court of Appeals, 2nd Circuit 2006).
\textsuperscript{20} Ibid
\textsuperscript{21} Bridgeport Music, Inc. v. Dimension Films, 410 F. 3d 792 (Court of Appeals, 6th Circuit 2005).
The fourth and final factor is the effect of the use upon the potential market for or value of the copyrighted work. As I will later discuss, the size of the reproduced copyrighted work has a major effect on this factor. If the use in question is divesting income from the original work, whether or not the competition is direct, it is likely infringing the copyright.22 Under this factor, the courts weigh the extent of market harm caused by the particular actions of the alleged infringer, and also “whether unrestricted and widespread conduct of the sort engaged in by the defendant…would result in a substantially adverse impact on the potential market for the original.”23 The monetary implications of the alleged infringing use are generally the cause of the lawsuit in the first place.

Precursor to the Case Scenario

The analysis of my example scenario with Museum X deals heavily with thumbnail images, and therefore they are a critical concept for comprehension of the case. To clarify, a thumbnail is a small, low-resolution, digital representation of an image. A thumbnail is significantly reduced from its original size and has been reduced in resolution.24 The definition of a thumbnail was instrumental in Perfect 10 v. Google, Inc.:

Thumbnails enable users to quickly process and locate visual information. For example, users of Google Image Search are presented with a set of thumbnails that are potentially responsive to their search queries. Because thumbnails are

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smaller in size, more of them can be displayed at the same time on a single page or screen.\textsuperscript{25}

In the last decade, two cases, \textit{Kelly v. Ariba Soft Corp.} and \textit{Perfect 10 v. Amazon.com} (the appellant of \textit{Perfect 10 v. Google Inc.}), where search engines used thumbnails without permission and ultimately were found to be acting under fair use. While there are many precedent cases that this paper will use to weigh the fair use question, those two cases are the most relevant precedents because they are the only ones to make a decision specifically on online thumbnail images. The next portion of this paper will dissect the details of Museum X’s scenario, and examine its bearing in each of the four factors, just as a court would.

\textbf{Background}

Museum X is a college-based art museum that is open and free to the public. Museum X operates a website with information about the museum, current exhibitions, links to its art collections, and an archive of all of its owned artwork. Many of the pictures are high in resolution and have interactive qualities that allow the viewer to zoom in on the picture. These types of pictures fall into one of two categories: 1) artwork in the image is in the public domain and therefore is no longer under control of its copyright, or 2) the copyright holder has formally licensed the use to the museum or has at least authorized permission. The remaining art in the museum’s possession (and not necessarily the majority, by any means) is presumably still under copyright.

On the homepage is a link to a page entitled “Digital Archive.” This archive is a searchable database of all the museum’s artwork, digitized into small, thumbnail images. Upon

\textsuperscript{25} \textit{Perfect 10 v. Google, Inc.}, 416 F. Supp. 2d 828 (District Court, CD California 2006) (Google Scholar, Dist. file).
clicking on the name of a painting, a page will show the title, the artist’s name, a brief
description of the work, and other relevant information such as the provenance of the work. The
artwork on this site that are in the public domain or have been commissioned to the museum by
the copyright holder are of no particular interest to this case. On the other hand, there are
hundreds of images being displayed in this archive without the permission of their copyright
holders. The fact that the museum owns these works does not excuse them from engaging in the
exclusive rights of the copyright holder (to reproduce, prepare derivative works, distribute,
perform, or display). We will therefore examine whether this type of usage is direct copyright
infringement or fair use.

Precedent Cases

Kelly v. Arriba Soft Corp., 336 F. 3d 811

Defendant Arriba Soft Corp. operated an Internet search engine that displays images in its
search results as opposed to the more standard form of text. All of the images on the search
engine were obtained from copying images from other websites. They were displayed as
miniature pictures, called “thumbnails,” and when the user clicked on the image, the page would
load a larger version of the picture. The display of the full-sized image employed a technique
called in-line linking.26

Plaintiff, Mr. Leslie Kelly, found that some of his copyrighted photographs were used in
Arriba’s database, and sued Arriba for copyright infringement. Mr. Kelly claimed that Arriba’s

26 Kelly v. Arriba Soft Corp., 336 F. 3d 811: In-line linking allows one to import a graphic from a source website
and incorporate it in one’s own website, creating the appearance that the in-lined graphic is a seamless part of the
second web page. The in-line link instructs the user’s browser to retrieve the linked-to image from the source
website and display it on the user’s screen, but does so without leaving the linking document. Thus, the linking
party can incorporate the linked image into its own content. As a result, although the image in Arriba’s Images
Attributes page came directly from the originating web site and was not copied onto Arriba’s server, the user would
not realize that the image actually resided on another web site.
reproduction and display of thumbnails as well as the in-line linking to the full-sized images from Mr. Kelly’s website both directly infringed his exclusive rights to display, reproduce and distribute his photographs pursuant to section 106 of the US Copyright Act. The court cited the following grounds to support its ruling that Arriba’s database of thumbnail images was a fair use of the original full-sized images from Mr. Kelly’s web site:

1. (Arriba Soft) was neither using images to directly promote its website, nor trying to profit by selling Mr. Kelly’s images.
2. The smaller, lower resolution thumbnails served an entirely different function to Mr. Kelly’s images, as Mr. Kelly’s images served an aesthetic purpose, while Arriba used the thumbnails to help index and improve access to images on the Internet;
3. The public derived a benefit by enhanced information-gathering techniques on the Internet;
4. Arriba’s thumbnails did not harm the market for Mr. Kelly’s images; in fact, inclusion in the database may have lead to increased traffic on Mr. Kelly’s website.

The Appellant court reversed the original ruling that the in-line linking display of full-sized images was fair use, and remanded it for further proceedings consistent with this opinion.

Perfect 10, Inc. v. Amazon.com, Inc., 487 F. 3d 701

Defendant Google operates a search engine, which instantly accesses thousands of websites and indexes them within a computer database. Google’s “Image Search” provides

search results as a page of small thumbnail images, which are a smaller, low-resolution version of the original full-sized images stored on third-party computers.

In addition, Google has an agreement with Amazon.com, Inc. that allows Amazon.com to in-line link to Google’s search results. Amazon.com gave its users the impression that Amazon.com was providing search results, but Google communicated the search results directly to Amazon.com’s users.

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. Google did not include these password-protected images from the members’ area in Google’s index or database. However, when pirating websites republished Perfect 10’s images on the Internet without authorization, Google’s search engine automatically indexed the webpages containing these images and provided 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.

Perfect 10 claimed that Google’s search engine program directly infringed two exclusive rights granted to copyright holders: its display rights and its distribution rights. Perfect 10 also sued Google for being secondarily liable for its in-line linking to infringing full-size images under the doctrines of contributory and vicarious infringement (which the District Court originally found Perfect 10 unlikely to succeed in showing).

The court found Google’s use of thumbnails to be “highly transformative.” It stated, “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.” It also found that the “search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.”

It concluded 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. This incorporated 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.”

Unlike with the case of *Kelly v. Ariba Soft Corp.* (hereinafter referred to as *Kelly*), Perfect 10 does have a market for reduced-sized images in regard to the sale of small images for downloading onto cell phones. However, with no evidence of Google users downloading the thumbnails for free off Google instead of for a fee off Perfect 10’s website, this potential harm is only hypothetical and therefore favors neither party.

In the end, the court concluded that Google’s use of Perfect 10’s thumbnails was a fair use. Because my example scenario with Museum X does not involve in-line linking, the details of the ruling on Perfect 10’s claim of Secondary Liability for Copyright Infringement will not need to be discussed. However, the court stated that Perfect 10 was unlikely to succeed on the matters of contributory and vicarious liability.

**Discussion**

**Direct Infringement**

“To establish direct infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”

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case, a hypothetical suing party (the copyright holder) would likely be able to establish these two elements prima facie. One would then contend that Museum X directly infringes in that it creates, displays, and distributes thumbnails of copyrighted full-size images. If the court finds that any of these actions are carried out, thus infringing the copyright holder’s exclusive rights, Museum X will need to prove the use is fair use.

In Perfect 10 v. Google, Inc., the court found that Google’s use of thumbnails was considered public display. There is no reason to believe that Museum X’s use of the thumbnails is unique in that it does not evidence public display.\textsuperscript{30}

\textbf{Fair Use Defense}

In order to determine whether or not Museum X has directly infringed the copyright holders’ exclusive rights to distribute and display, we examine the merits of Museum X’s fair use defense.

\textbf{I. Purpose and Character of the Work}

The principal objective of this factor is to determine if the new work in question is “transformative” and, if so, to what extent.\textsuperscript{31}

\textbf{a. Commercial Versus Noncommercial Use}

In assessing whether a use is commercial, the focus is solely on Museum X’s use of the images, and not on any individual users of Museum X’s website, nor is it on whether the subsequent use of the images is noncommercial (e.g., titillation) or commercial (e.g., to print or


The aspect of subsequent use will be a factor further in the case, but not for this particular consideration.

“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” There is little evidence of a commercial nature in the Museum X Digital Archive. For one, Museum X is a non-profit organization that is entirely free to the public. Should the images be used to draw its website’s user into the museum, the museum will not receive any sort of admission or fee income from that user. Whether or not patrons choose to purchase from the museum’s gift shop is not contingent on whether the images in the Digital Archive are geared toward commercial use. Also, the archive obtains no data from search queries of the users, and therefore would not be able to deduce trends for its own commercial benefit. The noncommercial nature of Museum X’s use of images weighs in its favor for fair use, but as we have seen in cases like *Kelly*, it is the transformative factor that carries the ultimate weight, regardless of a noncommercial use.

**b. Transformative Versus Consumptive Use**

The question of transformativeness is “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Furthermore, a consumptive use of images is when the defendant’s use does “merely supersedes the object of

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the originals” without incorporating a “further purpose or different character.” Whether a use is transformative depends in part on whether it serves the public interest.

The thumbnail images of Museum X’s archive are themselves characteristically similar to the thumbnail images examined in *Kelly v. Arriba Soft* and *Perfect 10 v. Google*. All of Museum X’s thumbnails are drastically reduced in size, resolution, and pixel data from their original images. The subsequent loss in detail makes it difficult to discern the fine details that were distinguishable in the original image. Consider the following example from *Kelly*: a typical full-size image might be 1024 pixels wide by 768 pixels high, for a total of 786,432 pixels worth of data. A typical thumbnail might be 150 pixels wide by 112 pixels high, for a total of only 16,800 pixels. This represents an information loss of 97.9 percent between the full-size image and the thumbnail. While Museum X’s thumbnails vary slightly throughout the archive in their exact pixel ratio, none of the images exceed the size of 150 x 150 pixels. Like with the thumbnails considered in *Kelly*, users are unlikely to enlarge the thumbnails and use them for artistic purposes because, due to the low resolution, any enlargement results in a significant loss of clarity of the image, making them inappropriate as display material. That court found that with photographic images, in particular, the quality of the reproduction matters more than in other areas of the arts. No exact dimensions have been used in the courts to quantify the size of a certifiable thumbnail, but rather the collection of characteristics.

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It is important to note that establishing an image as a thumbnail does not in itself evidence a transformative use of the image. Circuit Judge T.G. Nelson furthered this by claiming the court “does not suggest that the inferior display quality of a reproduction is in any way dispositive or will always assist an alleged infringer in demonstrating fair use.” This brings us to the next key component, which is the purpose served by the thumbnail image.

In *Bill Graham Archives v. Dorling Kindersley Ltd.*, in which copyrighted concert posters were reproduced as images in a biographical, visual compilation, the small size of the reproduced images was deemed sufficient to permit readers to recognize the historical significance of the posters, but inadequate to offer more than a glimpse of their expressive value. As a result, the court found that the publisher, Dorling Kindersley Ltd. (DK), used the “minimal image size necessary to accomplish its transformative purpose.” From this they concluded that DK’s use of BGA’s images was transformatively different from the images’ original expressive purpose and DK did not seek to exploit the images’ expressive value for commercial gain. The small, scaled-down size of the thumbnail images served an entirely different purpose from the original.

In our hypothetical case, the primary function of the Digital Archive is to index the vast collective of art that is owned by Museum X. It allows the public to browse through the alphabetical list of artists, use the search function to see what art the museum holds, and learn basic facts about those works. The underlying purpose of having this index is to educate the users on the art. However, this is not to overstate an entertainment value of the digital archive. The page displaying a thumbnail is not intended for the appreciation or enjoyment of the artwork itself. It is simply a reference to the actual work that is contained in the museum. When the artwork has been converted to a thumbnail image, the thumbnail image, by nature, has no 

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39 Ibid  
40 Ibid
aesthetic value. Therefore, the thumbnail image carries an entirely different purpose than what
the artist originally intended, and thus Museum X’s use is transformative. As with Kelly, “the
thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic
purposes and therefore do not supplant the need for the originals. In addition, they benefit the
public by enhancing information-gathering techniques on the internet.”

There are some differences between the archive on Museum X’s website and the case of
Google and Arriba Soft. The two given search engines show the images in order to index the
images gathered from the internet. Google, for example, does not itself provide the information
about the images, but rather links its users to the site that contains the original image. On the
contrary, Museum X’s archive search will not look up images from around the web. The archive
can only search for the artwork located in the museum’s database, all of which are owned by the
museum. While Museum X’s site does provide general information on the artwork in a given
thumbnail, it does not provide a means to enlarge the picture nor link to another hosting website.
The courts in Kelly and Perfect 10 agreed that the search engines have a utility that serves a great
benefit to the public. Museum X’s archive does not search the Internet and therefore does bring
the public the same benefit that those search engines do. On the other hand, the nature of the art
museum is one of public utility, providing education and culture. A service (Digital Archive) that
provides access and information on the art for free is most certainly a public benefit.

One of the main reasons cited in Kelly that Arriba Soft’s use was fair use was it was
neither using images to directly promote its website, nor trying to profit by selling Mr. Kelly’s
images. In contrast, Museum X is using the images to promote its own website and ultimately
the museum. However, unlike with other cases, this self-promotion does not work against the
favor of Museum X. Quite contrarily, the subsequent education and culture that could come
from a user going to the actual museum, should work in Museum X’s favor. Once again, with the museum being free to the public, there is no commercial benefactor when new patrons visit. The motivation is solely educational.

Accordingly, we can conclude that the first fair use factor weighs in favor of Museum X because Museum X’s use of the copyrighted images is transformatively different from the images’ original expressive purpose, and the Museum’s use does not result in commercial gain.

II. Nature of the Copyrighted Work

“Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.”41 If the intent of the photograph is to be informative or aesthetically pleasing then it is typically considered “creative in nature.” The other critical component of the artwork’s nature is whether it has been published or not.42 Furthermore, published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred. More protection is given to works that have not been published due the ambiguity of the artist’s intention for the work. The nature of Museum X’s art is creative, aesthetic, and invariably artistic. All the photographs and paintings shown in Museum X’s Digital Archive have been previously published, many of which have already been publicly displayed. Some of these works appeared on the Internet before Museum X published them as thumbnails. When considering the creative nature, which favors the copyright holder, and the works being published, which helps the fair use case, this factor would still weigh slightly in favor of the copyright holder. This notion of the creative aspect tipping the scale toward the

42 Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 US 539: noting that the scope of fair use is narrower with respect to unpublished works because the author’s right to control the first public appearance of his work weighs against the use of his work before its release.
As preceded in *Campbell*, the second factor is of “limited usefulness where the creative work of art is being used for a transformative purpose.” Justice Souter elaborated that the second factor is not “likely to help much in separating the fair use sheep from the infringing goats” in cases involving transformative copying of “publicly known, expressive works.”

Therefore, we hold that even if the art displayed in the Museum’s Digital Archive are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of Museum X’s use is transformative from the original creative nature of the works.

### III. The Amount and Substantiality of the Portion Used

Generally speaking, the greater the amount or substantiality of the portion used in the work under review, the more this factor would detriment the overall defense of fair use. However, the scope of the copying that is acceptable varies with the purpose and character of the use. It will not weigh against the secondary user if he or she is copying the amount needed for the intended purpose. In the case of thumbnails, that usually means copying the entire image. In *Kelly*, the Ninth Circuit concluded:

> This factor neither weighs for nor against either party because, although Arriba did copy each of Kelly’s images as a whole [to make thumbnails], it was reasonable to do so in light of Arriba’s use of the [thumbnails]. It was necessary for Arriba to copy the entire image to allow users to recognize the image and

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decide whether to pursue more information about the image or the originating web site. 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.

Similar to the thumbnails used by Arriba Soft, Museum X’s thumbnails show the entire work in the image, which is used to help identify the original work. Even if the art in the Digital Archive could be accurately described in text, as expressed in Perfect 10 v. Google, “Words cannot adequately substitute for thumbnails in quickly and accurately conveying the content of indexed full-size images.” Such use by Museum X is tailored to further its transformative purpose because its reduced-size reproductions of the archived artwork in their entirety “displayed the minimal image size and quality necessary to ensure the viewer’s recognition of the (original work of art).” Accordingly, despite Museum X using the full image, this third factor would not weigh in favor of either party.

IV. Effect of the Use upon the Market for or Value of the Original

While the scope of this case is too broad to examine the specific market for each copyright holder of the works displayed by Museum X, we can still draw from the major characteristics of previous cases. Campbell showed us that a transformative work is less likely to cause detriment to the market of the original than a work that merely supersedes the copyrighted work. We have already determined that the thumbnails used by Museum X are transformative in nature. So does the free access to these transformative images create a new market for those works or one that would take away from the market of the original work? To resolve this question let us first examine the potential action to come from these open-access thumbnail

45 Bill Graham Archives v. Dorling Kindersley Ltd., 448 F. 3d 605 (Court of Appeals, 2nd Circuit 2006).
images. We know the purpose is to index the original work, but what other utility might a capable online user find from these images?

Despite containing the full portion of the original work, the roughly one-square-inch thumbnail is designed to be low in quality and pixel count. Therefore, if a user were to try to enlarge the image, it would become blurred and subsequently would fail to achieve its original aesthetic purpose. That entertainment aspect would presumably be the reason to enlarge, print or even try to sell a copy of the image. Given the low-resolution nature of the thumbnail, it is unlikely that those actions would be carried out, and therefore there is no evidence that the thumbnails take away from the market of the full-sized images.

However, even without a use for enlarging the images, Perfect 10, Inc. v. Amazon.com found a market for reduced-size images that was not considered in weighing the market effect of the thumbnails in *Kelly*—cell phones. 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.”46 The court reasoned that users who can obtain Perfect 10 images for free from Google are less likely to pay for a download from Perfect 10’s website, and the availability of Google’s thumbnail images would harm Perfect 10’s market for cell phone downloads. Even without any evidence of Google’s user downloading thumbnails for use on their cell phone, the court found this as a potential harm. As a result, the third factor of market effect favored neither party.

Again, the nature of the Museum X scenario is too broad, without looking at a specific lawsuit, to determine whether a copyright holder would actually be intending to sell thumbnails for the purchase on cell phones, but it still must be considered. Should the sale of thumbnails for

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cell-phones or other electronic devices be relevant, it would likely prevent this factor in aiding the fair use defense of the alleged infringing party, as it did with Google. Nonetheless, even without the weight of the factor, Google still prevailed in its fair use defense, largely due to the weight of its thumbnails’ transformative nature.

Keeping in mind the growing prevalence of portable technology, the potential harm for a market in small-size images, and the lack of effect on the market for full-sized images, this third factor will bring no weight to either party’s case.

**Conclusion**

To recap the deciding factors of the fair use case we have:

1) **Purpose and Character of the Use**: weighs in favor of Museum X because its use is deemed transformative of the original purpose. Also, the use is for educational purpose as opposed to commercial gain.

2) **The Nature of the Copyrighted Work**: slightly favors copyright holders, but limited weight is given to this factor due to the transformative nature of the use.

3) **The Amount and Substantiality of the Portion Taken**: carries no weight, as the use of the full image is normally a demerit for a fair use case, but it is instrumental to the indexing nature of a thumbnail image.

4) **The Effect of the Use Upon the Potential Market**: with a lack of effect on the market for the full-sized images, and a slight possibility for a market for thumbnails in mobile devices, this factor weighs in neither party’s favor.
In lieu of all of the facts presented with the four factors above, the scenario of Museum X’s use of thumbnail images would likely be found to be fair use, considering the disproportionately large weight placed on the transformative factor.

Afterthoughts

When Congress enacted the Copyright Act of 1976, they could not have considered the impact of the Internet, simply because it was not yet invented. Now that the Internet is a controlling force in nearly all aspects of business and culture, the courts are regularly encountering new issues and trying to evolve in accordance with previous laws and precedent cases. Since fair use is decided on a case-by-case basis, we are still seeing changes and discrepancies with the rulings concerning cases with very similar facts. However, recent signs are indicating a more lenient take on fair use.

Dr. Kathleen Olson is a litigating attorney and an associate professor who deals specifically with the extent of fair use protections. In a recent interview I had with her, she expounded on the trend as a result of heightened reliance on the transformative factor:

The ability to incorporate artists’ work for derivative work has to do with the increased importance of transformativeness. These cases (Kelly, Perfect 10, Bill Graham…etc.) are recent enough to find as a trend, and courts are really looking to see if the infringing parties are transforming the art of the their derivative … There’s (a) fine line between derivative work and copying, and there’s a fine line between derivative work and a transformative work which uses the copyright
As the benefactor of an increased influence of the transformative factor, the thumbnail image is a more recent example of a type of successfully argued case of fair use. Whether it is the intent of the courts to strengthen the defense of fair use, a visible movement toward the fair use side has not gone unnoticed.

Anthony Falzone, who is the Executive Director of the Fair Use Project and a Lecturer in Law at Stanford Law School, was not willing to affirm a definitive “trend” toward fair use. However, he asserted there was “certainly a trend toward embracing the use of copyrighted material for the purpose of the search information location as fair use.” That, he claimed, “is an identifiable trend in thumbnails, but one that is not limited to thumbnails.”

In a 2009 article for the Wall Street Journal, Robert J. Kasunic, principal legal adviser at the U.S. Copyright Office, acknowledged that there was an overall trend in the last couple of decades of courts allowing greater leeway for the claim of the new artwork being transformative. Kasunic matter-of-factly observed, “There is more sympathy in the legal environment – maybe it has gone too far.”

A recent ruling in August 2008 by U.S. District Judge Jeremy Fogel of San Jose, California, has some interesting implications of a positive relationship between the progress of technology and the fair use of copyrighted works. The ruling was the first in the nation to require the owner of the rights to a creative work to determine whether an online copy was a

48 Anthony Falzone, telephone interview by author, April 4, 2011.
“fair use” before ordering the Web host to take it down.\textsuperscript{50} This ruling was intended to limit the abuse of unwarranted takedown notices from copyright holders. This effectively succeeds the 1998 federal law authorizing takedown orders from copyright holders at any whim of unauthorized use of their work on the Internet without needing to prove a case of infringement. The EFF is seeking damages and attorney fees from the record label that allegedly acted in bad faith for issuing a takedown notice of a YouTube video. For years the Electronic Frontier Foundation has worked to defend the digital rights of consumers and aspiring artists, and this could be considered a moral victory for them. Regardless of which side prevails on the issue of infringement, this new rule shows unprecedented empathy with the consumers and future re-creators of copyrighted works.\textsuperscript{51}

As technology progresses, and new uses of copyrighted works are acted upon, it will be interesting to see how the law adapts. The very nature of our nation’s laws is that they are always outdated. As a result, it is the duty of the courts to make the proper acclimations to our ever-innovating society. With the underlying value of fair use being to help the progress and innovation in the arts and sciences, it seems logical to imagine that fair use will continue to have strong favor with the major court cases of tomorrow. Nonetheless, the law is a somewhat volatile institution, and it would therefore be imprudent to assume that any case is fool-proof.


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http://www.usa.gov/copyright.shtml.

http://www.copyright.gov/title17/92chap1.html#103.


Perfect 10, Inc. v. Amazon. com, Inc., 487 F. 3d 701 (Court of Appeals, 9th Circuit 2007).


In 2003, a photograph taken by Richard Prince, Untitled (Cowboy), sold at auction for $332,300. Some might be surprised that a photograph could garner such a sum, but, in this case at least, none more so than Jim Krantz. Krantz might be allowed a certain level of incredulity, for Prince's photograph was a photograph of another photograph, this one taken by Krantz himself. As far as copyright is concerned, Krantz's photograph and Prince's are the same work, and so Krantz is almost certainly infringing on Prince. Copyright protects an authored work, and not art works per se.