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Questions & Answers -- Copyright Column

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Effect of use on the market. Thumbnails do not harm the market for full-size images, particularly when the use of the image is transformative.

So the Ninth Circuit found *Perfect 10* unlikely to overcome Google’s fair use defense and vacated the preliminary injunction against use of the thumbnails.

You can see what’s going to happen with the book excerpts. No injury to the market for books and big social benefit. Google wins with ease.

**Okay, Then What About Contributory Infringement?**

The recent *Grokster* case now sets the rules for contrib. The two categories are (1) actively encouraging infringement and (2) distributing a product used for infringement if it is not capable of commercially significant non-infringing uses. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).


But, you don’t get the answer to this because the Ninth Circuit threw the case back to the district court to make findings about whether *Perfect 10* gave adequate notice of infringement to Google and whether it was feasible for Google to block the infringement.

**Well What About Vicarious Infringement?**

You infringe “vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930. *Grokster* requires both a legal right to stop infringement and the practical ability to do so.

*Perfect 10* loses again. It has demonstrated neither profit by Google nor the legal right to stop the infringement. *Napster* had a proprietary music-file sharing system that was used for the piracy of copyrighted music. *Napster*, 239 F.3d at 1011-14. It was a closed system which required registration and could block users’ access.

By contrast, Google can’t control the piracy on third-party Websites. The district court rightly found that “Google’s software lacks the ability to analyze every image on the [I]nternet, compare each image to all the other copyrighted images that exist in the world... and determine whether a certain image on the Web infringes someone’s copyright.” *Perfect 10*, 416 F. Supp. 2d at 858. Google on, folks.
As you may know, I am a magazine junkie.

So when a young college student who was selling magazine subscriptions came to the door, I welcomed him warmly. He was working to offset college expenses, he explained, and he had “wonderful packages” to offer.

The selection was mind-boggling: it included newsweeklies; magazines devoted to parenting, sports, decorating, celebrity life, cars, boats and planes, health, wellness and nutrition, all were well represented, and there were the special interest titles that would appeal to wine aficionados or those who like to knit. Something for everyone and then some. I gave him my full attention.

The more magazines I would purchase, the better the deal would be. The bundling and packaging offers were seductive, and magazines I would not have subscribed to otherwise suddenly became very compelling. The per-title price was dropping each time I added another. That is where the deal got really good. I justified these magazine madness moments by reassuring myself that all these publications were necessary to feed my ever-curious brain. Well, maybe not. On the other hand, I might have overnight guests who would welcome such a stash on a bedside table. Perhaps my husband would welcome more magazines in his medical office reception room.

I wrote a check without buyer’s remorse.

Later that evening, I realized that my “More is Marvelous” mode had not taken into account that several new magazines that I really wanted to have were not included in my big deal, and my budget for my subscriptions was depleted.

But then, I am a sucker for such packages.

It is also tempting to buy book packages, but unloading books can become a package situation as well.

A local librarian recently bemoaned the fact that when local residents offered to donate books for their fundraising book sale drives, the neighbors do not offer them title by title. The library has to accept the whole package …all of the books its owner wants to part with. After the book sale is over, the library finds itself with hundreds of books they don’t want in their collection and now they have to figure out how to dispose of them.

Aha, some of you are probably thinking …a swell rationale for the obsolescence of print. Not at all. The fact is that “Many Too Many” is “Much Too Much.” Selectivity is an option that may be becoming obsolete.

Package deals are very seductive — for journals, for books, for...