

June 2007

Cases of Note -- Googling Our Way to Big Social Benefit

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Recommended Citation

Strauch, Bruce (2007) "Cases of Note -- Googling Our Way to Big Social Benefit," *Against the Grain*: Vol. 19: Iss. 3, Article 25.

DOI: <https://doi.org/10.7771/2380-176X.5382>

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LEGAL ISSUES



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Cases of Note — Googling Our Way to Big Social Benefit

Copyright — Fair Use of Thumbnails

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Perfect 10, Inc. v. Amazon.com, Inc.; Perfect 10 v. Google, United States Court of Appeals for the Ninth Circuit, 2007 U.S. App. LEXIS 11420 (2007).

This case is of particular interest because the issues are nearly identical to the ongoing litigation over Google putting sample pages of copyrighted books on the net.

Google, like every other computer, is connected to the Internet. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1238 n.1 (N.D. Cal. 1995).

Yes, I thought you'd get a chuckle out of the Ninth Circuit's compelling need for a legal citation on that.

Websites allow computer owners to share information on their computers with others via the Internet. A Webpage contains text plus instructions in Hypertext Markup Language (HTML) that lead to an address where images are stored on some other computer.

Google's search engine accesses thousands of Websites and indexes them in the

Google database. A search query by a user then turns up text, images or videos.

Google Image Search stores reduced, lower-resolution images or "thumbnails" in its server. When the user clicks on the thumbnail, HTML instructions take you to the computer that stores the full-size version.

And now, herein lies the problem. Webpage-X may have HTML instructions leading to a copyright infringing image but then take the instructions down when threatened with litigation by the owner. Now if you went directly to Webpage-X, you couldn't access the image. But **Google's** cached copy doesn't update its version of Webpage-X, and the old HTML instructions would still carry a viewer to the image.

Which Leads to Our Fight

Perfect 10 markets copyrighted images of naked women, or "nude models" as they call them. You can only view them in the "members area" of the site. For which they charge a fee, which is how they make money.



comforted. In time, **Google** will fade, just as libraries are fading a bit in the Internet age, just as German faded as the dominant language of the social sciences, and Latin as the language of naturalists. **Jeanneney's** examination of the limits of **Google Books**, and his vision of a European counterpart, helps makes the point that human knowledge generally outlives the boxes it's put in.

But for the time being, **Google** is on the rise. Its responsiveness to critics like **Jean-neney** only strengthens its position. Just a couple of months ago, the **Bavarian State Library** agreed to let **Google Books** digitize a million out-of-copyright books in its important research collection, greatly increasing the non-English content of the project. 🐾

Editor's Note: As we go to print Google has announced the inclusion of many more countries and languages. Amazon, Microsoft, and Yahoo! have also announced similar projects. — JR

Ah, the world of electronic entertainment. Yes, your stalwart investigative reporter has already checked. You can't see anything without shelling out. Not even a teaser.

Some dastardly Website operators violate **Perfect 10's** copyright and post the lustful vixen photos on their Webpages. **Google's** voracious search engine indexes the Webpages and provides thumbnails of the naked gals. And the thumbnails are stored in **Google's** servers.

In 2001, **Perfect 10** got fed up and told **Google** to stop doing this. In 2004, they sued.

Why is **Amazon** in the suit? It's not terribly important from our learner's perspective. **Amazon** partnered up with **Google** to in-line link with the **Google** search engine. A buyer of **Amazon** books would make literary queries and feel that **Amazon** was giving the result, when in fact it was the masterful **Google** search engine. And thus **Amazon** got dragged in.

Anyhow, the district court gave a preliminary injunction against **Google** displaying thumbnail versions of **Perfect 10's** buff sirens, but did not enjoin **Google** linking to third-party Websites that had full-size images of said sirens. Neither side was happy, and both appealed.

The issue on appeal for a preliminary injunction is likelihood to succeed on the merits at trial, which means you have to go through all the law in advance.

Perfect 10 said **Google** directly infringed two exclusive rights of a copyright owner: display right and distributions right.

Display Right

17 U.S.C. § 106(5) says a copyright holder has the exclusive right to "display the copyrighted work publicly." Display means "to show a copy of it either directly or by means of a film, slide, television image, or any other device or process ..." 17 U.S.C. § 101. Copies are "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

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pean Union, where a multilingual digital book collection would be a fitting emblem of a new pan-European culture. He has the support of almost all the national librarians of the member states of the **EU**, but so far the **EU** has refused to fund the digitization of books, throwing the burden back on individual nations. It seems likely that the **European Union** will become involved at some later stage.

For me, one of **Jeanneney's** most interesting points was the possible impermanence of **Google**. He speculates in passing about what would happen to that vast collection of digital books if **Google** ceased to exist as a corporation. But as an Anglophone curator of knowledge (OK, librarian) who uneasily imagines that the **Google Books** project has the potential to contain all human knowledge, and maybe somehow imprison or immobilize it — am I the only one who has this irrational notion? — I'm

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The image in the computer is the copy. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-18 (9th Cir. 1993). The computer makes a copy when it transfers the image from another computer into its own memory because it's now fixed so it can be perceived, reproduced or otherwise communicated.

BUT — and this is a big but — Google does not display a full-size copy of the infringing photos when it does in-line linkage. Google does not have any “material objects” in which a work is fixed. Rather, Google has the HTML instructions that direct a browser to the full-size image on someone’s Webpage.

HTML instructions are lines of text, not images. And the instructions in and of themselves do not make the image appear. They direct the browser to where the images lie.

AND, it is of no relevance that Google is directing a browser to images that the third party has taken down from its Website. It is the Website computer that is storing and displaying the image.

But what about those thumbnails Google has cached? Well, yes indeed, under the plain language of the statute, those are copies fixed in a manner “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101.

So on this issue, Perfect 10 has shown their prima facie case.

Distribution Right

A copyright owner has the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. §106(3). Copies are “material objects ... in which a work is fixed.” 17 U.S.C. § 101.

Certainly, copies may be distributed electronically. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483,498 (2001). But Google is not distributing copies. The Website owner is doing it.

Are you asking, what about Napster and that music swapping type distribution? *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Napster users had a complete collection of the music. Google does not own a complete collection of Perfect 10’s full-size images.

Fair Use

To get an injunction, Perfect 10 still has to show it can overcome Google’s affirmative defense of Fair Use. And that means going through the toilsome four elements.

Again, this will be relevant to you folks out in readership land who are following the brou-ha-ha over Google excerpting sample pages from books.

Purpose and character of the use. Is it commercial or for educational purposes? Is it transformative, adding something new, altering the original with new expression or message?

Google’s thumbnails are very transformative.

You’re going “what?” It’s the same picture. Wait for it.

Google is giving us social benefit by improving access to information on the Internet, not providing artistic expression. The original image created for entertainment is now transformed into an electronic reference tool. Even given that the entire image is used, this does not diminish the transformation as long as it serves a different purpose from the original. *Kelly v. Arriba Soft Corp.* 336 F.3d 811, 818-19.

Nature of the copyrighted work. Photos of gals in the buff are “creative in nature” and at the core of what copyright is intended to protect. But Perfect 10’s images had been previously published, i.e., on the Perfect 10 pay-to-view Website.

An author has the right to control where a work is first published. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985). This right is exhausted of course once it’s published. See, e.g., *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1235 (9th Cir. 1998) (noting that such a right “does not entail multiple first publication rights in every available medium”).

The end result was creative, but previously published, therefore only slight weight going to Perfect 10 on this element.

Amount and substantiality of the portion used. For purposes of a search engine, the entire amount of the image must be copied. A viewer has to see the entire image to make a decision about pursuing it further.

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Effect of use on the market. Thumbnails do not hurt 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 the 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).

Did **Google** intend to encourage infringement? Under tort law, you intend the "natural and probable consequences" of your actions. *DeVoto v. Pac. Fid. Life Ins. Co.*, 618 F.2d 1340 (9th Cir. 1980). A computer system operator engages in contrib if he "has actual knowledge that specific infringing material is available using its system," *Napster*, 239 F.3d at 1022, and can "take simple measures to prevent further damage." *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

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. 🐼

Questions & Answers — Copyright Column

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QUESTION: *Is it true that to be federally compliant a library must keep three years (plus current) of records for each of the five titles within CCG that the library has obtained through interlibrary loan? An academic library maintains the following information for each ILL: publication title, citation, date ordered, name of the librarian who ordered it and name of the patron who wanted the material. Is it permissible to strip identifying patron names from the records to satisfy patron privacy and still be compliant?*

ANSWER: It is true that libraries are required to retain ILL records for three calendar years in order to comply with the CONTU Interlibrary Loan Guidelines. The guidelines do specify the format in which the records must be maintained. Clearly, in order to determine when a library reaches the suggestion of five for a particular journal title, records must be searchable by title.

The issue of patron privacy is not contrary to the requirements of ILL record keeping. There is no requirement that the patron's name be included in the records, and, in my experience, most libraries do not retain that patron identification data in the ILL records.

QUESTIONS: *A health sciences library retains records of interlibrary loan receipts for three years. Is this still necessary now that the interlibrary loan system (DOCLINE) provides a yearly report that details the journals and publication dates borrowed by this library? This report is easy to use and is actually better than the library's records. Is the DOCLINE annual record sufficient?*

ANSWER: Yes. As mentioned in the above response, the CONTU Guidelines mandate a three calendar year record retention but is silent as to the format of the records. An annual report of borrowing records by journal title is sufficient.

QUESTION: *A small group of academic librarians are creating a parody of one of the Geico caveman commercials. The reason for the spoof is to promote two of the bibliographic citation management systems supported by the library and to use in classes on RefWorks and EndNote. Would altering a company's commercial to market library classes be considered fair use because it would be a parody?*

ANSWER: Likely yes. Parody, especially noncommercial parody, which this is, may be excused as a fair use. If the parody is a one-time live performance, it is more likely that a court would find it to be a non-infringing parody. If the performance of the song with new words is recorded so it may be used repeat-

edly, it is less likely that a court would find it excusable.

QUESTION: *A faculty member attended a workshop about grant writing in a nearby city, and he wants to put on reserve the manual they used that day. It is a large manual which has no information in it to indicate that it is copyrighted. Is there any problem with putting the manual on reserve as first time use material?*

ANSWER: Regardless of whether the manual contains a notice of copyright or not, it is copyrighted. So, assume that the manual is copyrighted. If the library is putting the faculty member's original copy on reserve and not photocopying or otherwise reproducing the manual for reserve, there is no limitation on how long it may remain on reserve. If the faculty member is asking the library to photocopy a small portion of the manual and then place that photocopy on reserve, the one semester limitation without permission applies. The library should not reproduce the entire manual for reserve.

QUESTION: *A professor of psychology is studying the history of school psychology and would like to place a copy of the first book pertaining to the profession on the National Association of School Psychologists (NASP) Website. The book was published in 1930 and the author died in 1984. The use would be totally for nonprofit educational use. The book is out of print and does not seem to be registered with the U.S. Copyright Office.*

ANSWER: It is very difficult to determine if older works are still under copyright which is why passage of the Orphan Works legislation is so important to libraries and educational institutions. This work likely was protected by copyright, at least for 28 years, although it is possible that it was not registered which was required when it was published. It was reviewed in 1931 and appears to have been a regular book, published by the **World Book Company**, Yonkers on Hudson, NY. It does not show up in **Stanford University's** new database of copyright renewal records as having been renewed which would have had to occur in 1958. If the work was not renewed, then it is in the public domain. Public domain works may be digitized and placed on a Website without permission from the original author, her heirs or the publisher.

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