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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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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. 🐼

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Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu> www.unc.edu/~unclng/gasaway.htm

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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QUESTION: Patrons often request digital copies of photographs in the library's collection. Are there restrictions on supplying digital copies? Section 108(i) that states the rights of reproduction and distribution (as applied to libraries and archives) do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work... does this include photographs?

ANSWER: Yes it does. Libraries may reproduce copies of works for patrons upon request, such as an article, a book chapter, etc., but this general permission for libraries does not include "stand alone" photographs. If a photograph is a part of an article, it may be reproduced for a user along with the article. 🐼

Not Such a Big Deal

by **Mary Ann Liebert** (President and CEO, Mary Ann Liebert, Inc., publishers, 140 Huguenot Street, New Rochelle, NY 10801; Phone: 914-740-2121) <mliebert@liebertpub.com> www.liebertpub.com www.genengnews.com www.westchesterwag.com

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

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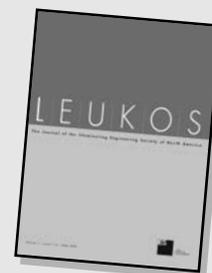
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