THE 2009 HOEFER PRIZES
FOR EXCELLENCE IN UNDERGRADUATE WRITING

IN RECOGNITION OF WRITING ACHIEVEMENT IN THE UNDERGRADUATE FIELD OF STUDY

STANFORD UNIVERSITY
MAY 20, 2009
Perfect 10 v. Google: It is Fair

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Economics 101
Economic Policy Analysis

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Search engines have become an integral part of today’s Internet. According to one study, users depend on Google and other search engines for finding desired information (an estimated 39%), navigating to other sites (24%) and engaging in transactions (an estimated 36%) (Broder 2002). In April 2008 alone, online search engines provided indexed answers to more than eight billion consumer queries (Bausch and McGiboney 2008). Google, a self-described “software, technology, Internet, advertising, and media company all rolled into one” (Perfect v. Google 2006: 3), was responsible for an estimated 5.1 billion of these, accounting for 62% of total searches. It also conducted the lion’s share of image searches, accounting for 71.9% of the total in February 2006 (Bausch and Fan 2006). While image searches, which display thumbnails of and also provide links to full-sized images, are still relatively uncommon, their number is growing. Between 2005 and 2006, queries nearly doubled (Bausch and Fan 2006).

Search engines decrease user search costs by categorizing web sites and, as a result, arguably make the Internet more efficient. They give consumers reliable access to desired information and thereby increase consumer benefit. Depending on the purposes for which individuals then use this information, that benefit can also spillover into social benefit. However, the impact of search engines on producers of indexed work is more debatable. While some scholars contend that search engines serve as complements to the original work, others argue that they are substitutes.

In numerous cases, copyright holders who agree with the latter characterization have filed suit against Google. They have argued that the search engine violates their
intellectual property rights and hurts their markets. Occasionally, they warn that allowing Google to continue its work will decrease future innovation, or at the least, access to it.

In November 2004, Perfect 10, publisher of an adult magazine and operator of a subscription-based nude-image website, initiated arguably the most significant of these challenges. In many ways, the case mirrored an earlier suit against thumbnail image searches, Kelly v. Arriba, and raised issues explored in other cases as well. At the same time, because this case challenged Google, it garnered more publicity and also brought to light the potential consequences of Google’s market power. In this paper, I will focus specifically on Google’s use of thumbnails and will assess its fair use defense. I will ask: Does Google Image Search’s use of thumbnails of copyrighted images constitute fair use? What impact does labeling it “fair use” have on future innovation? Alternately, what impact would labeling it not “fair use” have had?

My paper proceeds as follows: In Section 1, I present an overview of the court’s analysis in Perfect 10 v. Google. In Section 2, I define fair use and assess its economic legitimacy. In Section 3, I address the benefits of Google’s thumbnail search and, in Section 4, the costs. In Section 5, I attempt to weigh those costs and benefits and look to empirical data for support. In Section 6, I address alternatives to fair use. Finally, in Section 7, I draw conclusions and raise questions for future research.

Section 1: Case Overview

By the time Perfect 10 v. Google began in late 2004, Perfect 10 had published an estimated 5,000 images—2,700 in its magazine and approximately 3,300 on its website. The U.S. Copyright Office issued copyrights to each of these, granting Perfect 10 sole ownership of the rights to copy, display or distribute them (Perfect 10 v. Google 2006: 3).
Perfect 10 relies on these rights to generate revenue. It sells copies of and access to full-sized versions of its images in three ways to consumers: through newsstand purchases of the magazine ($7.99/issue), subscriptions to the magazine, and/or subscriptions to the website ($25.50) (Perfect 10 v. Google 2006: 3). In early 2005, following the inception of this case, Perfect 10 began offering thumbnails of its images in the form of cell-phone downloads as well. Through 2005 and 2006, UK consumers purchased approximately 6,000 images/month\(^1\) (Perfect 10 v. Google 2006: 3).

Prior to the initiation of this suit, however, Google had displayed thumbnails of Perfect 10’s copyrighted images in its Image Search. These thumbnails were smaller, lower-resolution versions of Perfect 10’s images and were stored on Google’s computers. Additionally, Google provided links to third-party sites that hosted full-sized versions of the images. Google stored information on how to access these sites on its computers, but did not store the full-sized images themselves. Google’s inclusion of Perfect 10’s images in its Search was in line with its general indexing technology, which “automatically scans and stores the content of each website into an easily-searchable catalog” (Perfect 10 v. Google 2006: 3-4). Using such technology, Google aims “to organize the world’s information and make it universally accessible and useful” (Google Enterprise). At the same time, Google allows sites to opt out of this indexing process by including a “robot.txt” script on their page (Pasquale 2007: 6).\(^2\) It does not, however, filter the web sites it indexes for infringing content. Thus, while a copyright holder may use the opt-out option to request that its images not be included in the thumbnail display, an infringing

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\(^1\) This is the most recent data available. Similarly, though the service was distributed worldwide, I could not find statistics outside of the UK market.

\(^2\) For its Library Project, Google further publicized this option. It suspended copying of published materials for several months in an effort to give copyright owners the chance to “opt-out” of the project (Westin 2007).
party that hosts the same image may continue to allow the thumbnail. As a result, the thumbnail may still show up, in direct violation of the copyright holder’s wishes.

Perfect 10 filed suit against Google on November 19, 2004, challenging the legality of its Image Search. Perfect 10 contended that Google’s thumbnails constituted direct infringement while its links to infringing third parties constituted contributory and/or vicarious infringement. ³ Perfect 10 asked the court for an injunction.⁴ In defense, Google argued that its Search constituted fair use and was therefore legal. Initially, the district court granted a partial injunction to Perfect 10, but, on appeal, the Ninth Circuit court vacated the injunction and ruled largely in favor of Google.⁵ Though it agreed that Google’s thumbnails did directly infringe Perfect 10’s copyright, it also held that the fair use exception to copyrights justified this infringement.⁶

Section 2: Fair Use

According to Justice Ikuta, author of the appeal decision, the fair use exception to copyright “encourage[s]…and allow[s]…the development of new ideas that build on earlier ones” (Perfect 10 v. Google 2007: 9). As Pasquale (2007) puts it, “Fair use is copyright’s ‘safety valve’” (5). When copyrights are too protective and infringement becomes necessary for the very innovation that they are meant to protect, fair use allows the infringement. Specifically, it authorizes the use of copyrighted work without the

³ Contributory and vicarious infringement are both types of secondary infringement. Contributory infringement occurs when the accused party fails to stop its own infringing behavior. Vicarious infringement occurs when the accused party fails to stop a third party’s infringing behavior.
⁴ An injunction would have forced Google to remove all of Perfect 10’s copyrighted images from Google-controlled databases and to delete linkages to all other infringing sites.
⁵ In the only ruling that could potentially be seen as favoring Perfect 10, the court remanded the issue of Google’s contributory infringement to the district court for fact finding, arguing that the lower court had too easily dismissed this claim in its initial trial.
⁶ The Digital Millennium Copyright Act was also briefly mentioned, but deemed to be relevant only if Google were found to have infringed. Further analysis of it was therefore remanded as well.
owner’s consent “for purposes such as criticism, comment, news reporting, teaching, … scholarship, or research” (17 U.S.C. § 107).

Under current law, a court must weigh four factors when deciding whether or not a particular use is “fair use”: “(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) …the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work” (Perfect 10 v. Google 2007: 9). In practice, courts tend to place particular emphasis on the first factor (Olson 2004).

Following this formula in Perfect 10 v. Google, the appeals court held that the first factor weighed heavily in favor of Google, the second slightly in favor of Perfect 10, and the third and fourth in favor of neither.7 In weighing the four, the court therefore deemed Google’s use of thumbnails legally “fair,” thus permitting it with or without Perfect 10’s authorization.

In essence, the four-factor test attempts to weigh the costs and benefits of infringement. However, several commentators have suggested that fair use analysis should address this balance more directly. Referencing the Supreme Court’s reasoning in Sony, they argue that courts should simply weigh “what the public ha[s] to gain and what it ha[s] to lose from allowing the unauthorized [use]” (Lunney 2002: Abstract). They

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7 Following the Kelly v. Arriba precedent, the court found that the first factor favored Google. It held that the purpose/character of Google’s use of Perfect 10’s work was highly transformative and that it had great public value. Because Perfect 10 had already exercised its first publication right, the court found that the second factor (i.e., the nature of the Perfect 10’s work) weighed only slightly in Perfect 10’s favor. Google also contended that Perfect 10’s work is less creative than that of other plaintiffs in similar cases, but the court did not agree (Perfect 10 v. Google 2007: 12). Concluding that Google had to use the copyrighted work in its entirety in order to fulfill its function as a search engine, the court found that the third factor (i.e., the portion of Perfect 10’s work used) did not weigh in favor of either party. Similarly, the court held that the fourth factor (i.e., the effect on Perfect 10’s market) did not favor Perfect 10 or Google either. Perfect 10 claimed that its market for thumbnail downloads was affected, but the court held that the effect was purely hypothetical as Perfect 10 had failed to produce any supporting evidence. Further, Google lawyers argued that, because Perfect 10 only created this thumbnail market after filing the initial suit, any impact on it should be irrelevant.
argue that this approach would deal directly with the purpose of fair use. Rather than complicate the issue with four rigid, indirectly defined categories, courts should simply authorize those uses found to be more beneficial than costly to society and prohibit all others.

Putting aside whether all courts should adopt this approach in the future, I use the *Sony* court’s version of fair use analysis for the remainder of this paper. This allows me to tackle the exact issues for which the exception was established in a flexible and inclusive way. I ask: What are the benefits of Google’s infringement? What are the costs? In labeling the search engine’s thumbnails “fair use”, do courts accomplish the goals for which fair use was created? In answering these questions, I look at the three types of innovators who may be affected: original copyright holders whose work is indexed by Google, search engines in competition with Google, and Google itself. Deeming Google’s treatment of Perfect 10’s images “fair use” inevitably leads to different incentive effects for each.

Section 3: Benefits

Some scholars argue that society suffers from an “information overload” externality. They suggest that, as the amount of information available increases, the likelihood of one finding what he/she is looking for decreases (Pasquale 2007). Pasquale (2007) highlights the importance of this issue, contending that “[t]he ‘search cost’ of finding a needed work has been well-documented” (4). He challenges the conventional wisdom that innovation is by definition good and instead argues that some innovation simply convolutes the already existing mass of information. He looks to search engines as the solution to this externality. Acting as categorizers, they can sift through the mass of
information and clarify the usefulness of certain pieces to each user. Thus, he claims that search engines are socially beneficial. This argument holds particularly true for a well-used, well-trusted search engine like Google.

Furthermore, even if we loosen Pasquale’s controversial assumption that not all innovation is good, we cannot deny that search engines do decrease search costs and therefore provide some benefit to society regardless. As a group of search engines argued in *Arriba*, “[the search engine’s] indexing and search services ma[kes] the Internet more accessible to users” (Olson 2004: 493). By categorizing and displaying results, search engines decrease search costs. This should benefit all involved parties—consumers should benefit from the increased ease with which they can find what they are searching for and producers should benefit from increased demand from consumers who are now more aware of and interested in their products.

As discussed in the Introduction, however, the benefit of thumbnails to producers is debatable. The issue hinges on whether thumbnails serve as complements or as substitutes for the original innovation. If thumbnails complement the original work, producers benefit and are more likely to innovate in the future; if they substitute for it, producers lose and may innovate less. In a less extreme case, they may simply refuse to make their innovation available via the Internet (Olson 2004: 492). If thumbnails are substitutes for the original work, labeling them “fair use” could force society to bear the costs of decreased innovation or, alternately, decreased access to that innovation.

Because search engines do not create the work they index, they—and the rest of society—rely on the original producers. While the social benefit of search engines is clear, it disappears without original work for them to categorize. In the Perfect 10 case,
for instance, if consumers decide that Google’s free thumbnail versions of Perfect 10’s images are sufficient, the demand for Perfect 10’s goods will decrease and its profits will inevitably fall. As a result, Perfect 10 will stop creating images (i.e., innovating). Since Google does not create the original images it indexes, their supply will eventually dwindle and consumers will likely suffer. Thus, it is essential to establish whether search engines, and more specifically thumbnails, hurt or help original producers.

Though original copyright holders have filed suit against Google numerous times, search engines may actually increase the visibility and value of the original work in two ways. First, search engines can guide consumers to the original creator’s work by highlighting its relevance to their query. As the *Kelly v. Arriba* court reasoned, “By showing the thumbnails on its results page when users entered terms related to [the original creator’s] images, the search engine would guide users to [his] Web site rather than away from it” (Seadle 2002). By including an image in its thumbnail results, Google signals to its user that the image can meet his/her demand. This should push the user to, rather than from, the original work.

Second, search engines can also serve as advertisements for original work. In *Video Pipeline, Inc. v. Buena Vista Home Entertainment*, for instance, “[the district court found that v]isitors…‘who might otherwise be unaware of, or unattracted to’ the [original work], would [be exposed to it]” (Pasquale 2007: 16). By including an image in its results, Google increases its visibility and exposes previously ignorant, but now interested, consumers to it. This should again increase the market for the original work. If search engines do actually serve these complementary functions to original creation, they should add to the incentives for innovation and the case for fair use is clear.
Section 4: Costs

Alternately, Google may serve as a substitute for original work and therefore decrease future innovation. This argument is bolstered in the case of thumbnails by the fact that they include copyrighted images in their entirety, though in a reduced-size, reduced-resolution form. While the snippets of copyrighted text Google uses in its Web and News Searches may only peak users’ interest and lead them to the original site, the uncropped pictures Google displays in its Image Search are more likely to satisfy a larger chunk of consumer demand. In this case, Perfect 10 argued that Google’s thumbnails served as substitutes for both its full-sized images and its thumbnail downloads.

In terms of full-size images, legal precedent holds that thumbnails cannot serve as substitutes. In *Kelly v. Arriba*, the court found that “[t]he thumbnails [at issue] would not be a substitute for the full-sized images, because, when the thumbnails are enlarged, they lose their clarity” (Seadle 2002). Furthermore, “[t]he court concluded that [Arriba’s] thumbnails were…in fact…more likely to increase Kelly’s potential market than detract from it” (Olson 2004: 494). This is consistent with the reasoning presented in Section 3.

At the same time, several critics argue that the *Kelly* finding authorizes the thumbnail use of only a limited subset of images. Olson (2004) explains, “For example, the court’s holding may be narrowly construed such that a thumbnail is a fair use only if the original image is an aesthetic work and the thumbnail is used solely for indexing purposes” (496). Baroni (2002) contends that this construction does not cover Perfect 10’s images. “Particularly with porn, it's easily argued that the titillating effect of a small photo is just as effective as that of a larger version of the image.” Thus, thumbnails of pornographic images are sufficient substitutes for the original work and thereby “[negate]
the market need for the original” (Baroni 2002). However, Perfect 10 was unable to present any evidence of such negative market impacts. The actual effect of thumbnail images on the full-size image market is therefore unclear: while it may satisfy the demand of certain consumers, it may only peak the interest of others, thus drawing consumers both to and from the original work and establishing an ambiguous effect overall.

Perfect 10 also raised the issue of perfect substitutes, contending that Google’s free thumbnails served as perfect substitutes for its cell phone downloads. Because Google’s thumbnails were the same size and resolution as Perfect 10’s downloads, it is relatively obvious that the two functioned as substitutes. However, Perfect 10 again failed to prove market damage, as sales were stable. Yet, in this case, the court argued that proving damage would have required a counterfactual: while sales may not have decreased with the existence of Google’s Image Search, there was no way to tell whether they would have increased without it.

At the same time, it is important to note the timing of Perfect 10’s download-market development. The company entered into the licensing agreement only after it initiated the suit against Google. While the flow of innovation (i.e., did Google’s thumbnails inspire Perfect 10’s business move? Did Perfect 10 come to this idea independently?) is debatable, allowing evidence of innovation not yet in existence when a suit is filed against a search engine that claims fair use as a defense is likely to decrease search engine breadth. As Westin (2007) explains, “Even with a project designed around the fair-use standards, the developments and uses for technology unforeseen at the project’s initiation can make a previously purely transformative use also consumptive and
establish market harm.” Thus, use that was previously “fair” could become unfair without warning due to future innovation, thereby placing greater risk on the search engine. This could create disincentives for search engines like Google and decrease the social benefits described in Section 3. One way to protect against this issue is to give less weight to innovations created after the suit has been initiated.

It is also essential to ask how this analysis would differ had Perfect 10’s download market pre-existed Google’s thumbnails. In that case, the thumbnails would clearly serve as substitutes for Perfect 10’s original innovation and while, again, determining market impact would require speculation, it is reasonable to assume that Perfect 10’s market would suffer. This implies that future innovation would decrease, likely hurting society. However, the markets and innovation for which this result holds are limited. Only when Google’s thumbnails are identical to the copyright holder’s innovation is their substitutability obvious. The decrease in innovation is therefore very limited. Because Google already creates thumbnails, any thumbnails produced by the original creator of a full-sized image are unnecessary. As a result, only if an image is produced solely as a thumbnail does the issue of decreased innovation arise. Given the limited benefit of a thumbnail due to its small size and low resolution, this problem is further minimized.

Section 5: Benefits v. Costs

Though different theories support the existence of both costs and benefits to producers from thumbnails, the simultaneous existence of both is impossible. I therefore turn to empirical data for answers. I hope to determine whether thumbnails are in fact complements or substitutes for original innovation by asking what impact thumbnails actually have on the original work’s market.
Unfortunately, no data clearly addresses this question. Courts have generally stood by the *Kelly* court’s reasoning and held that substitutes do not hurt the original work’s market. However, this is rarely, if ever, grounded in actual data. Two empirically documented markets could potentially help determine the answer. First, the *Perfect 10* court’s finding that the company’s cell phone downloads did not decrease over time may suggest that Google does not hurt the market for original work. Again, however, the timing of this example makes the actual impact hard to gauge. The second market that can help provide an answer is that of publishers who chose to join Google in its Library Project. According to the Project’s “Success Stories” page, numerous publishers have experienced increases in sales and individual authors also praise Google’s innovation. While this data is suspect, as it is largely anecdotal and provided by Google itself, the increase in book sales following their inclusion in Google’s Project does bolster the argument that search engines serve as complements for original work.

Clearly, empirical data can only go so far in solving the substitute-or-complement dilemma. Future analysis of the fair use of thumbnails would benefit from more targeted studies that ask how many users Google directs to the original work and how many users instead access Google’s thumbnail results but do not click further.

*Section 6: Alternatives to Fair Use*

Because the impact of Google’s Image Search on the original work’s market, and therefore the original innovator’s incentives, is so ambiguous, the validity of the fair use exception is not yet clear. As a result, it is important to assess the alternatives. Putting aside the issue of whether or not Google’s use was in fact “fair”, I ask: What would have happened had Google’s use been deemed not fair?
If this were to occur, critics of Google’s thumbnails seem to believe that Google would change its ways and begin asking owners of the work it hopes to include in its search for individual permission. Though these critics recognize that Google currently allows owners to opt out of its indexing, they argue that this still requires action on the part of the copyright holder and therefore shifts the power balance too far away from him/her. Furthermore, as mentioned in Section 3, infringing sites could continue allowing indexing of the disputed images, which would directly violate the copyright owner’s wishes. In effect, this possibility may force disinterested copyright holders to stay in Google’s search. This scenario greatly hinders the copyright holder’s agency, decreasing his/her incentives to innovate in the future. Thus, the opt-out option is not enough.

However, courts have generally held that the costs Google would have to incur in order to gain permission from each copyright holder would be prohibitive. “The Nevada District Court stated ‘[g]iven the breadth of the Internet, it is not possible for Google (or other search engines) to personally contact every Web site owner’” (Westin 2007: 11). Nonetheless, courts could choose to defy precedent and outlaw Google’s searches as they exist now. If this were to occur, commentators predict that, rather than abandon its search engine function, Google would enter into private agreements with the companies that take issue with its use of their copyrighted work. While this might allow Google to continue its work, the costs could potentially grow to be prohibitive in this case as well. As owners of indexed materials witnessed the concessions Google would be giving to their peers, they could begin to demand their own agreements. Thus, Google would face an increase in demand for private agreements, and therefore an increase in costs, both in terms of money and effort. Search engines using similar technology would suffer the
same fate. However, it is important to recall that certain copyright owners believe that search engines help them and would therefore resist the temptation of a private agreement.

If the costs did not put Google out of business, the private agreements would still be likely to hurt society overall. While Google would continue to function, other search engines would face higher costs as well. The private agreements would tilt the search-engine-playing-field in Google’s favor (Toobin 2007; Pasquale 2007). Google’s competitors would face increased costs if they wished to remain in the market, as they would have to expend their own resources to reach similar agreements. Given Google’s current market-share and overall value, the chances that other search engines would be equally able to establish private agreements are low. The search engine field, and indirectly society, could therefore be hurt by a lack of competition. On the other hand, if courts deem Google searches “fair use”, not only is Google’s use allowed, but that of all similar search engines is also. Therefore, with fair use, the playing field stays level.

Furthermore, private agreements would likely overshoot the benefit copyright holders should receive. First, if other search engines in addition to Google did succeed in entering private agreements with the copyright holder, he/she would get to charge his/her asking price more than once. This scenario already suggests an inefficient outcome. Second, given this increased power, copyright holders could censor or screen the search engines with which it enters into agreements. “For example…Amazon [already] screens reviews and does not permit exceptionally cutting or nasty criticism…Google’s legal troubles are legion, in part because it refuses to play by the rules set by content owners,” Pasquale notes (2007: 15). Copyright holders could force Google to give their work an
artificially high rank. If this were to occur, consumers could no longer trust Google as a neutral, accurate ranking site (Pasquale 2007) and the social benefit search engines serve would again decrease.

Instead of entering into private agreements, Google could also potentially work to develop new Image Search technology that would detect third party infringement. This, combined with their current opt-out policy, would alleviate the possibility of infringing images appearing in the thumbnail results discussed in Section 3. However, it would also require large effort from the search engine company. Rather than continue innovating in the directions it believes to be most lucrative or beneficial, Google would be forced to focus on minimizing infringing content. YouTube, among other examples, has shown that such technology is possible but challenging to develop. In this scenario, then, the question is whether this shift in Google’s focus would benefit society overall. As it would alter the search engine’s natural incentives, I would argue that it would again decrease the social benefit created by the search engine. Also, if the filter were too stringent, it may overshoot and restrict consumer access to legitimate sites. However, these costs could be balanced by the benefit to producers. Again, however, the search-engine-playing-field would greatly favor Google, with its new non-infringing technology, and competition among search engines would decrease.

Section 7: Conclusion

Based on a cost-benefit analysis of Google’s use of Perfect 10’s copyrighted images, I find that the appeals court came to the right decision in affirming the search engine’s fair use defense. Though empirical data is lacking, the social benefits appear to outweigh the costs, particularly when the realistic alternatives to fair use are kept in mind.
Google’s Image Search decreases search costs and may increase user flow to Perfect 10. Further, in allowing Google to continue its function, the court also permits other search engines to do the same, thus keeping competition in the field alive. Until an empirical analysis is conducted of the impact of thumbnails on the original image’s market, Google’s Image Search should retain the privileges of “fair use.”

Works Cited

17 U.S.C. § 107


Perfect 10 v. Google. 508 F.3d 1146; 2007 U.S. App. LEXIS 27843 (9th Cir. Cal., 2007).

