



Fair Use or Fair Dealing? A Proposed Approach towards Digital Intermediary Copying in Australia

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Outline



- I. Google Book Search in the US
- II. The Theories of the Copyright Protection in Australia
- III. Legal Application of Google Book Search in Australia
- IV. Fair Use or Fair Dealing?
- V. A Possible Solution





I. Google Book Search in the US

- The Partner Program
- The Library Project

Display the snippets of copyrighted books without authorisation

<http://books.google.com/>



Settlement

- Reached by Google, Author's Guide, and Association of American Publishers
- No answer on fair use
- Book Rights Registry to collect revenues from Google and distribute those revenues to copyright owners



II. The Theories of the Copyright Protection in Australia

- Utilitarian-based theory:
Maximization of the net social welfare
- Google Book Search is worth being promoted



III. Legal Application of Google Book Search in Australia

- Substantial taking
- Fair dealing



Substantial Taking

- Amount of reproduction in each searching process
- Originality in these several sentences
- Recognisable



Fair Dealing

- A variety of purposes of end users
- No specified exception for Google Book Search itself
- Not a defence of public interests or public policy



IV. Fair Use or Fair Dealing?

- Advantages of fair use
 1. AUSFTA
 2. Flexibility to encompass new technologies
- Disadvantages of fair use
 1. Different contexts among fair use, terms of copyright, and technology protection measures
 2. Uncertainty
 3. Berne Convention



Fair Use in the US



- Section 107 of Title 17 of 1976 Copyright Act:
For purposes such as criticism, comment, news reporting, teaching, scholarship, or research=Fair use

Open-ended:

- (1)The purpose and character of the use
- (2)The nature of the copyrighted work
- (3)The amount and substantiality of the portion used
- (4)The effect of the use on the market for copyrighted work



The Purpose and Character of the Defendant's Use

- Commercial
- Transformative



Transformative Use



Images search engines

地址 <http://images.google.com.au/images?hl=en&q=obama&gbv=2&aq=f&oq=>

[Web](#) [Images](#) [Maps](#) [News](#) [Video](#) [Gmail](#) [more](#) ▼

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... **Obama's** focus ...
400 x 300 - 18k - jpg
news.aol.com



President **Obama**, the
time ...
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www.globalresearch.ca



Senator **Obama** scrambled
for votes ...
341 x 305 - 36k - jpg
www.treehugger.com







JOHN MCCAIN	258
BARACK OBAMA	280



Transformative Use



- Highly transformative (entirely different function)
- No presumption of market harm
- Improve access to the information

Kelly v. Arriba Soft Corp., 336 F. 3d 811 (9th Cir. 2007).

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1154, 1160 (9th Cir. 2007).



V. A Possible Solution



- Compulsory licensing
 1. For informational purposes
 2. Works that have previously been made available to the public
 3. A sufficient acknowledgement
 4. Persons other than those making use of the information (i.e. third party copying)



Benefits

- Cooperation
- Compensation for copyright holders





Thank you!

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