
Thumbnails, Fair Use and Hyperlinks: The Ninth Circuit Breaks New Ground in *Kelly v. Arriba Soft*

2002-02-20

Most of the content displayed on the Internet, including text, images, music and video, is protected by copyright laws, both in the United States and abroad. Copyright law makes it illegal for an Internet user to copy, display, publish, perform or create derivative works of any copyrighted material without the permission of the owner. However, the exclusive rights of the copyright owner are tempered by a doctrine called "fair use," which permits reproduction and use of copyrighted material in certain limited circumstances. Under the [Copyright Act](#), "fair use" includes activities such as criticism, comment, news reporting, teaching, scholarship and research. Other purposes, such as parody and private recording of television broadcasts for one's own later viewing, have also been deemed "fair use."

On February 6, the U.S. Court of Appeals for the Ninth Circuit in *Kelly v. Arriba Soft Corp.* further expanded the scope of the "fair use" exception to include "thumbnail" reproductions of copyrighted images generated by a visual Internet search engine. In doing so, however, the court also confirmed that hyperlinking to full-sized images "framed" by the search engine was not permitted.

Thumbnail Images and Fair Use

The defendant, Arriba Soft (now known as Ditto.com), offers a "visual" search engine with which users can search the web for images matching their search queries. Thus, unlike text-based search engines which return a textual list of web sites in response to a user's query, the Arriba search engine returns an assortment of images. However, rather than full-size images, the results of an Arriba search are represented by low-resolution, miniature

"thumbnail" versions of the images, displayed about twelve to a page.

The plaintiff, Leslie A. Kelly, is an author and photographer known for his photographs of the American West. In 1999, the Arriba search engine (using automated crawling technology) visited web sites that contained Kelly's photographs and copied them to Arriba's database. It then converted these images into thumbnails which, presumably, would be displayed in response to queries about Kelly, the American West, the Gold Rush, 1849, and related topics. Kelly sued Arriba Soft alleging, among other things, that the reproduction of his images to create the thumbnails, and the use of the thumbnails in the Arriba search engine, violated his copyrights in the images. The District Court granted summary judgment in favor of Arriba, finding that, although Arriba's conduct may have constituted a prima facie case of copyright infringement, such conduct was permitted as a fair use. The Ninth Circuit affirmed the District Court's judgment on the thumbnail issue.

In reaching his holding, Judge Nelson of the Ninth Circuit considered the [four statutory factors](#) that are considered in determining fair use:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.
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While Judge Nelson noted that Arriba's use of the images was for a commercial purpose, he reasoned that this use was more incidental than exploitative (that is, Arriba was not selling Kelly's images or using them directly to promote its web site; rather, the images were among thousands of others in Arriba's database) (See [A&M Records, Inc. v. Napster, Inc.](#), 239 F.3d 1004, 1015 (9th Cir. 2001)). Moreover, he considered the "transformative" nature of Arriba's use, and whether Arriba's display of the images superseded the object of the original images or added something new and different (See [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569, 579 (1994)). In analyzing the transformative nature of Arriba's thumbnail images, Judge Nelson noted that the thumbnails were much smaller and lower resolution than the original images, and that they were unrelated to either Kelly's artistic or commercial purposes. He compared Arriba's reproduction of Kelly's images to other transformative uses, such as copying a

modeling photograph for use in a news article or copying a video game "screen shot" for use in comparative advertising, both of which have been held to constitute fair use (See [Nunez v. Caribbean International News Corp.](#), 235 F.3d 18 (1st Cir. 2000) and [Sony Computer Entertainment America, Inc. v. Bleem](#), 214 F.3d 1022 (9th Cir. 2000)).

Thus, Judge Nelson found that the first fair use factor weighed in favor of Arriba, as did the fourth factor, considering that Arriba's display of thumbnails did not harm the potential market for or value of Kelly's images, nor did the small, low-resolution thumbnails "supersede" the original copyrighted works. Although the second and third fair use factors (nature of the copyrighted work and amount used) were neutral or weighed somewhat in favor of Kelly, Judge Nelson concluded that "Arriba's use of Kelly's images promotes the goals of the Copyright Act and the fair use exception. The thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals. In addition, they benefit the public by enhancing information gathering techniques on the internet."

Full-Sized Images and Framing

The second part of Judge Nelson's analysis concerned Arriba's use and treatment of full-size reproductions of Kelly's images, which he held to constitute a direct infringement of Kelly's copyrights.

In addition to displaying thumbnail versions of images related to a user's search query, the Arriba search engine also permitted a user to double-click on these thumbnails to produce full-sized versions of the images. These full-sized versions were hyperlinked directly from the originating web sites and displayed within Arriba "frames" containing Arriba banners and advertising. Although Arriba did not actually copy the full-sized images, a user would generally not realize that the images resided on a site other than Arriba's. Judge Nelson held that this practice infringed Kelly's exclusive right to publicly display his copyrighted works.

He distinguished Arriba's conduct from that of "passive" online service providers whose users display infringing images; these service providers are generally not held liable for their users' copyright infringements, provided that they comply with certain procedural requirements (see our [April 11, 2000](#) and [March 13, 2001](#) Internet Alerts). However, Arriba, he noted, "actively participated in displaying Kelly's images by trolling the web, finding Kelly's images, and then

having its program inline link and frame those images within its own web site." Thus, Arriba was more akin to a poster of images on a bulletin board, rather than a bulletin board operator which merely allowed its users to post infringing images on its site.

Arriba's conduct is also distinguishable from "pure" hyperlinking (which takes the user directly to the copyright owner's site without imposition of an intervening frame), which a federal District Court in California held to be permissible in ([Ticketmaster Corp. v. Tickets.com, Inc.](#), U.S. District Court, C.D. Cal., Mar. 27, 2000) (see our [June 7, 2000 Internet Alert](#)). Thus, while the Arriba decision deals a strong blow to the practice of web site framing, it does not go so far as casting into doubt the widespread practice of hyperlinking, which some have called the defining feature of the Internet.

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