April 23, 2002

RS21206

CRS Report for Congress

"Fair Use" on the Internet: Linking, Framing, and Copyright's Reproduction and Public Display Rights

Christopher Alan Jennings
Legislative Attorney
American Law Division

Summary

This report summarizes *Kelly v. Arriba Soft Corporation*, a significant case construing the scope of the Copyright Act's public display, reproduction and fair use rights on the Internet.

This case involves the use of inline linking and framing to display copyrighted image files located on the Internet. Inline linking and framing pulls content from another website and places it within the context of the linking-site. This technique can confuse the linking-site's users, if they fail to realize that the content resides at another site on the Internet. Short of confusion, this technique may also constitute copyright infringement, if the linking or framing process reproduces or displays copyrighted material without first obtaining the copyright holder's permission. In *Kelly*, the Ninth Circuit held that unauthorized inline linking to or framing of copyrighted photographic images constitutes infringement of a copyright holder's public display right, even absent evidence that anyone actually saw the images.

That court also considered whether "thumbnail" depictions – small, low resolution images – of the same copyrighted content constituted an infringement of the copyright holder's reproduction rights. It held, on the facts before it, that the thumbnail reproductions constituted a non-infringing, "fair" use of the copyrighted content.

Kelly v. Arriba Soft Corp[1] is a significant Internet copyright case arising out of the Ninth Circuit Court of Appeals. There, the court addressed the interface between the public's fair use rights and two of a copyright holder's exclusive rights – the reproduction and public display rights.

Factual and Procedural Background. In *Kelly*, the defendant Arriba operated a "visual search engine" that allowed users to search for and retrieve images from the

[1] 280 F.3d 934 (9th Cir. 2002)

Internet. To provide this functionality, Arriba developed a computer program that would "crawl" the Internet searching for images to index. It would then download full-sized copies of those images onto Arriba's server and generate lower resolution thumbnails. Once the thumbnails were created, the program deleted the full-sized originals from the server.

In response to a search query, the search engine produced a "Results" page, which listed of a number of reduced, "thumbnail" images. When a user would double-click these images, a full sized version of the image would appear. From January 1999 to June 1999, the full-sized images were produced by "inline linking," a process that retrieved the full sized-image from the original website and displayed it on the Arriba web page. From July 1999 until sometime after August 2000, the results page contained thumbnails accompanied by a "Source" link and a "Details" link. The "Details" link produced a separate screen containing the thumbnail image and a link to the originating site. Clicking the "Source" link would produce two new windows on top of the Arriba page. The window in the forefront contained the full-sized image, imported directly from the originating website. Underneath that was another window displaying the originating web page. This technique is known as framing, where an image from a second website is viewed within a frame that is pulled into the primary site's web page. Currently, when a user clicks on the thumbnail, the user is sent to the originating site via an "out line" link (a link that directs the user from the linking-site to the linked-to site).

Arriba's crawler copied 35 of Kelly's copyrighted photographs into the Arriba database. Kelly sued Arriba for copyright infringement, complaining of Arriba's thumbnails, as well as his inline and framing links. The district court ruled that Arriba's use of both the thumbnails and the full sized images was a fair use.[2] Kelly appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit's Decision. On appeal, the Ninth Circuit parsed the case into two distinct issues. The first arises from the reproduction of images to create the thumbnails and the use of those thumbnails in Arriba's search engine. The second involves the display of those images on the Arriba website.

Thumbnails. The Ninth Circuit affirmed the lower court's ruling that the use of the thumbnails implicated Kelly's reproduction rights, but was a fair use.

An owner of a copyright has the exclusive right to reproduce copies of the work.[3] To establish a claim of copyright infringement by reproduction, the plaintiff must show ownership of the copyright and copying by the defendant. There was "no dispute that Kelly owned the copyright to the images and that Arriba copied those images. Therefore," the court ruled, "Kelly established a prima facie case of copyright infringement."[4]

---

[2] *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999)

[3] *See* 17 U.S.C. §106

[4] *Kelly*, 280 F.3d at 940.

However, a claim of copyright infringement is subject to certain statutory exceptions, including the fair use exception.[5] This exception "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that statute is designed to foster."[6]

To determine whether Arriba's use of Kelly's images was a fair use, the court weighed four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;[7] (2) the nature of the copyrighted work; (3) the amount and substantiality of 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.[8]

Applying the first factor to this case, the court noted that the "more transformative the new work, the less important the other factors, including commercialism, become,"[9] and held that the thumbnails were transformative because they were "much smaller, lower-resolution images that served an entirely different function than Kelly's original images."[10] Furthermore, it would be unlikely "that anyone would use Arriba's thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices their clarity," the court found.[11] Thus, the first fair use factor weighed in favor of Arriba.

The court held that the second factor, the nature of the copyrighted work, weighed slightly in favor of Kelly because the photographs were creative in nature.[12] The third factor, the amount and substantiality of the portion used, was deemed not to weigh in either party's favor, even though Arriba copied the entire image.[13]

---

[5] 17 U.S.C. §107

[6] *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

[7] The Supreme Court has held that "the central purpose of this investigation is to see ... whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

[8] 17 U.S.C. § 107

[9] *Kelly*, 280 F.3d at 941 n. 14, *citing Cambell*, 510 U.S. at 579.

[10] *Kelly*, 280 F.3d at 941. While Kelly's images were artistic works used for illustrative purposes and to portray scenes from the American West in an aesthetic manner, Arriba's use of Kelly's images in the thumbnails was unrelated to any aesthetic purpose. Arriba's search engine functions as a tool to help index and improve access to images on the Internet and their related websites.

[11] *Id.* at 942.

[12] *See id.* at 943.

[13] *See id.* While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use. *See id.* However, the extent of permissible copying varies with the purpose and character of the use. "If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her." *Id.* Applying this principle, the court found that if Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine. Therefore,

(continued...)

Finally, the court held that the fourth factor, the effect of the use on the potential market for or value of the copyrighted work, weighed in favor of Arriba. The fourth factor required the court to consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market for the original."[14] The court found that Arriba's creation and use of the thumbnails would not harm the market for or value of Kelly's images.[15] Accordingly, on balance, the court found fair use.

Display of the Larger Image. As the use of Kelly's images in this context does not entail copying but, rather, "importing them directly from Kelly's website," the theory of infringement, the court found, "cannot be copyright infringement based on the reproduction of copyrighted works," but on the public display right.[16] As "no case has addressed the issue" of whether inline linking or framing violates a copyright owner's public display rights,[17] the court based its decision on statutory text and legislative history, finding that the right is implicated here since Arriba provided unrestricted public access to Kelly's images without first obtaining Kelly's permission.[18] Additionally, the court did not find Arriba's display of the larger image to be a fair use.

The court's treatment of Kelly's public display right is potentially broad, as it found that the mere act of inline-linking to or framing of copyrighted photographic images constitutes infringement. The court reached this holding in two steps. First, it found that

---

[13] (...continued)
the court concluded, it was reasonable to copy the entire image.

[14] *Id.* at 944, *citing Cambell*, 510 U.S. at 590. *See also*, 3 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-102.61 (1993).

[15] *Kelly*, 280 F.3d at 944. The court emphasized that "Arriba's use of Kelly's images would not harm Kelly's ability to sell or license his full-sized images. Arriba does not sell or license its thumbnails to other parties. Anyone who downloaded the thumbnails would not be successful selling the full-sized images because of the low-resolution of the thumbnails. There would be no way to view, create, or sell a clear, full-sized image without going to Kelly's websites." *Id.*

[16] *Id.* at 945, *citing* 17 U.S.C. §106(5). When the court observed that offering full-sized images though linking "does not entail copying," it was referring to direct copying by Arriba, for, it is certainly the case that a digital copy of Kelly's photographs is made in the user's computer RAM, as well as on the user's screen.

[17] *Kelly*, 280 F.3d at 946.

[18] *Id.* The Act's definition of "publicly" encompasses a transmission of a display of a work to the public "by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." The Copyright Act defines "display" as showing a copy of a work. 17 U.S.C. § 101. The legislative history, the court noted, states that "display" includes "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." *Id., citing* H.R. Rep. No. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677. This language, the court concluded, indicates that showing Kelly's images on a computer screen would constitute a "display."

the disputed links constituted "unauthorized displays" Kelly's work – "[b]y inline linking and framing Kelly's images, Arriba is showing Kelly's original works without his permission." [19] Second, it found that the display was "public" – "[b]y making Kelly's images available on its website, Arriba is allowing public access to those images."[20] "Looking strictly at the language of the Act and its legislative history, it appears that when Arriba imports Kelly's images into its own web page, Arriba is infringing upon Kelly's public display right,"[21] the court held.

Furthermore, the court rejected Arriba's fair-use argument. Unlike the case of the thumbnails, the first factor weighed against Arriba. Arriba's use of the full-sized photographs was not "transformative," because "the full-sized images on Arriba's site act primarily as illustrations or artistic expression," which is the same function that Kelly's website serves for those images.[22] The second factor cut in favor of Kelly for the same reasons as it did in the case of the thumbnails. The third factor also weighed in favor of Kelly – although it was necessary to copy the entire image "to suit Arriba's purpose of giving users access to the full-sized images without having to go to another site such a use is not [a] legitimate [reason to copy the entire image]."[23] Finally, the court found that the fourth factor weighed in favor of Kelly since Arriba's display of Kelly's work on its site displaced Kelly's advertising and licensing markets.

Accordingly, the court held, "the doctrine of fair use does not sanction Arriba's display of Kelly's images through the inline linking or framing processes that puts Kelly's original images within the context of Arriba's website."[24]

Current Status. The Court of Appeals remanded the case back to the lower court for a finding of damages. Arriba is petitioning the appellate court's decision for a rehearing en banc. This report will be updated as circumstances warrant.

---

[19] *Kelly*, 280 F.3d at 945.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 947.

[23] *Id.*

[24] *Id.* at 948.