

# CRS Report for Congress

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## “Fair Use” on the Internet: Copyright’s Reproduction and Public Display Rights

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### Summary

This report summarizes *Kelly v. Arriba Soft Corporation*, a case construing the scope of the Copyright Act’s public display, reproduction and fair use rights on the Internet. The Ninth Circuit Court of Appeals considered whether “thumbnail” depictions — small, low resolution images — of copyrighted content constituted an infringement of the copyright holder’s reproduction and display rights. It held that the thumbnail reproductions displayed by an Internet visual search engine constituted a non-infringing “fair use” of the copyrighted content.

*Kelly v. Arriba Soft Corp*<sup>1</sup> is a significant Internet copyright case arising from 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 — those of reproduction and public display.

**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 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.

Arriba altered its display format several times. 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

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<sup>1</sup> 336 F.3d 811 (9th Cir. 2003)

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).<sup>2</sup>

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 its in-line and framing links. The district court ruled that Arriba’s use of both the thumbnails and the full sized images was a fair use.<sup>3</sup> Kelly appealed to the Ninth Circuit Court of Appeals.

**The Ninth Circuit’s Decision.** On appeal, the Ninth Circuit affirmed the district court’s finding that the reproduction of images to create the thumbnails and their display by Arriba’s search engine was a fair use. But it reversed the lower court holding that Arriba’s in-line display of the larger image was a fair use as well.<sup>4</sup>

*Thumbnails.* An owner of a copyright has the exclusive right to reproduce copies of the work.<sup>5</sup> 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.”<sup>6</sup>

However, a claim of copyright infringement is subject to certain statutory exceptions, including the fair use exception.<sup>7</sup> 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.”<sup>8</sup>

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

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<sup>2</sup> Arriba Soft subsequently changed its name to “Ditto.com”.

<sup>3</sup> Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999)

<sup>4</sup> In an earlier decision subsequently withdrawn by the Ninth Circuit Court of Appeals, it held that the in-line display of the larger image of Kelly’s work was not a fair use and was therefore infringing. See Kelly v. Arriba Soft Corp, 280 F.3d 934 (9<sup>th</sup> Cir. 2002). In its revised opinion, the court determined that the issue of in-line linking had not been adequately raised by the parties and should not have been decided by the district court.

<sup>5</sup> See 17 U.S.C. §106

<sup>6</sup> Kelly, 336 F.3d at 817.

<sup>7</sup> 17 U.S.C. §107

<sup>8</sup> Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1399 (9<sup>th</sup> Cir. 1997).

is of a commercial nature or is for nonprofit educational purposes;<sup>9</sup> (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.<sup>10</sup>

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”<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> The court found that Arriba’s creation

<sup>9</sup> 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).

<sup>10</sup> 17 U.S.C. § 107

<sup>11</sup> *Kelly*, 330 F.3d at 818 n. 14, *citing Campbell*, 510 U.S. at 579.

<sup>12</sup> *Kelly*, 330 F.3d at 818. 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.

<sup>13</sup> *Id.* at 819.

<sup>14</sup> *See id.* at 820.

<sup>15</sup> *See id.* While wholesale copying does not preclude fair use per se, copying an entire work militates against a finding of fair use. 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.* at 821. 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, the court concluded, it was reasonable to copy the entire image.

<sup>16</sup> *Id.* at 821, *citing Campbell*, 510 U.S. at 590. *See also*, 3 M. Nimmer & D. Nimmer, NIMMER (continued...)

and use of the thumbnails would not harm the market for or value of Kelly's images.<sup>17</sup> Accordingly, on balance, the court found that the display of the thumbnails was a fair use.

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<sup>16</sup> (...continued)

ON COPYRIGHT § 13.05[A][4], at 13-102.61 (1993).

<sup>17</sup> Kelly, 330 F.3d at *id.* 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.* at 821-822.