

No. 00-55521

Before Betty B. Fletcher, Thomas G. Nelson, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Thomas G. Nelson, decided February 6, 2002.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LESLIE A. KELLY,

Plaintiff-Appellant,

v.

ARRIBA SOFT CORPORATION AND DOES 1 THROUGH 100,

Defendants-Appellees.

Appeal from the U.S. District Court for the Central District of California
No. CV 99-560, Judge Gary L. Taylor

**BRIEF OF GOOGLE TECHNOLOGY INC. AS AMICUS CURIAE
IN SUPPORT OF THE SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE DITTO.COM, INC.
(FORMERLY ARRIBA SOFT CORPORATION)
RESPONDING TO THE COURT'S ORDER DATED OCTOBER 10, 2002**

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Dated: December 2, 2002

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Google Technology Inc. states that it has no parent corporation and no public company controls 10% or more of its stock.

Dated: December 2, 2002.

Respectfully submitted,

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE.

Google Technology Inc. (“Google”) is the developer of the world’s largest and most comprehensive Internet search engine. On behalf of its users, Google culls the specific information individuals seek from billions of Internet documents including World Wide Web pages, images, and newsgroup messages. The features at issue in this case are common to all search engines. Google would like to help the Court understand how Web site owners are able to easily control access to their sites, or information available on their sites, through technological means. Further, Google would like to explain how the technology and practice of linking to a copyrighted work, regardless of the contextual changes wrought by users and their chosen intermediaries, does not infringe the derivative work right. Finally, Google would like to explain the potential ramifications of a ruling extending the definition of derivative work to encompass contextual changes caused by search engines, browsers, applications, devices, and the users who choose and frequently configure them. Google files this brief together with the instant motion pursuant to Fed. R. App. P. 29(b).

I. INTRODUCTION

In its Order dated October 10, 2002, the Court in its third question asks, “...was Kelly’s derivative use right violated?” The Court has correctly held that Ditto’s use of thumbnails in its search engine constitutes fair use, and liability thus does not attach. *See Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 944 (9th Cir. 2002) (“Opinion”). Ditto also provided links directly to images on Kelly’s web site. It is these links which Kelly argues infringe either or both his derivative work and display rights. *See Kelly Supp. Br.* at 7-10. Given the nature and operation of the Web as a vast Internet library, it would be imprudent and impractical policy to attempt to use copyright law instead of readily available technological means to regulate access to what are otherwise publicly accessible addresses. In any case, under a copyright law analysis, creation of a link to a Web address should not be found to infringe the derivative work right.

II. WEB SITE OWNERS PROPERLY CONTROL ACCESS TO WORKS THEY MAKE AVAILABLE OVER THE WORLD WIDE WEB.

A. The Vast Library of the World Wide Web Functions Through the Use of Uniform Resource Locators, Which Allow Web Site Owners to Make Works Publicly Available and Searchable or to Keep Them Private from Individuals and Search Engines.

An understanding of whether providing links to the images on Kelly’s website constitutes infringement of Kelly’s derivative work right necessarily rests upon a clear understanding of the nature and operation of the Web.

The Web consists of an immense array of information pieces, each with its own address in the form of a Uniform Resource Locator (“URL”). The information pieces (analogous to words, paragraphs, or images in a book) are organized into Web pages (which are analogous to book pages). Sets of Web pages are aggregated into a Web site (analogous to a book), which has a “home page” (analogous to a table of contents or introduction). Because each information piece, each Web page, and each Web site has its own unique address, the total number of items that can be addressed is truly astounding. *See* Google’s Rehearing Br. at 3 (explaining that the Internet Archive had archived ten billion Web pages as of March, 2002) (citations omitted).

In Google’s Rehearing Brief, Google likened this configuration of information to a vast library, see Br. at 4; similarly, the system of URL addresses could be likened to the Dewey Decimal System that allows a library patron to find an individual book among the hundreds, thousands, or millions of volumes available in a library. While each information piece available via the Web has its own value, the true power of the Web comes from the links that interconnect the information pieces. As articulated by Tim Berners-Lee, widely recognized as the founder of the Web:

The Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks. The universality is essential to the Web: it

loses its power if there are certain types of things to which you can't link.

Tim Berners-Lee, *Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by its Inventor* 3 (1999).

To be sure, the technology behind the Web contemplates that in some cases a Web site owner might not want to allow the public to access the information found at certain addresses. In such cases, a site owner can easily restrict access to those addresses by using password protection or industry standards like the Robots Exclusion Standard. *See* Google Rehearing Br. at 6-7 (describing the Robots Exclusion Standard). But a site owner who provides works at a Web address that is not restricted using technological means expects those works to be accessed by the public.

Kelly, for example, created his Web site in a manner such that each individual image was provided at a non-password protected, publicly available URL address. As explained above, Kelly's Web site itself has a unique address; each page within that site has a separate address; and each image on a particular page has its own separate address. Thus, a user could access each image separately from any other information piece or Web page available on Kelly's site. The user could, for example, choose to view only an image, by simply entering that image's address into her Web browser or by using a search engine. Alternatively, a user could choose to view the main page of Kelly's Web site, or any other Web page

within that site. Kelly could have chosen a variety of technological means to restrict access to any set of these addresses. Instead, he chose to leave each address unrestricted.

B. Responsibility for Determining a Work’s Accessibility to the Public Properly Lies with the Web Site Owner.

While on the one hand making each address publicly available, Kelly on the other hand seeks to use copyright law as a means to restrict access to those addresses. Not only is such an approach unsupported by copyright law, see *infra* Section III and Ditto Supp. Br. at 10–18, but it is also simply impractical, given the nature of the Web. To require each particular individual who wants to link to a publicly available Web address to first obtain permission from that site owner in an effort to avoid liability for infringing the site owner’s copyrights turns the Web’s default rule that an address “can be linked to unless otherwise technologically indicated,” on its head. The rule becomes: “only link to an address if permission is first received.”

This problem is magnified for search engines, the “card catalogs” of the Web, see Google Rehearing Br. at 3-4. Due to the sheer size of the Web, search engines must use automated computer algorithms to create the indices that allow Web patrons to find desired information.¹ Absent a technological indication that an address should not be accessed, these algorithms are incapable of determining

whether an address should not be included in the search engine's index of links. The only alternative for search engine companies is to sift manually through the billions of available Web addresses and ask permission for each one before providing a link to it. Thus if, absent explicit permission, search engines can only provide links to home pages or other "approved" pages, then the "critical tool"² they provide to Internet users will be fundamentally broken.

In sum, the technical and automated nature of the Web makes it simple and straightforward for authors to use technical means to regulate access to the various addresses on their Web site. In contrast, the technical and automated nature of the Web makes it difficult to use subjective means such as copyright law to regulate access to otherwise publicly available addresses. Accordingly, technological measures, rather than legal measures, are the proper method of regulating access to particular Web addresses.

¹ Google's current search engine, for example, creates an index of over three billion Web pages.

² "Because the Internet contains an almost infinite number of Web pages, Internet search engines provide a critical tool for Internet users. Without search engines, Internet users would be unable to locate all but the most obvious Web sites." *Playboy Enters., Inc. v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070, 1077 (C.D. Cal. 1999).

III. THE “RECASTING” OF WHICH KELLY COMPLAINS IS A MERE CHANGE IN CONTEXT OF THE TYPE INHERENT IN ACCESSING PUBLICLY AVAILABLE WORKS ON THE WORLD WIDE WEB.

A clear understanding of the technological process underlying linking reveals that a Web patron accessing works via a link will often experience the work within a different context from that imagined by the copyright holder. Yet this is contemplated by and allowed under copyright law.

A Web patron who is interested in a known URL address can type that URL directly into his browser address bar and travel to the desired address. Alternatively, one who does not know the address can use a search engine to help locate it. In either instance, when a Web user selects a link, the user’s browser obtains the information directly from the originating server. This is almost exactly analogous to a library patron obtaining a book’s Dewey Decimal Number from a card catalog, and then leaving the catalog to pull the book from the correct shelf. In the case of Ditto’s image search service, the user loads the image from Kelly’s server to the user’s browser. *See* EFF Rehearing Br. at 6-7.

It is at this point, when a user views a work through her hardware and software, that Kelly claims a derivative work is created. He asserts that an image is “recast” merely by being viewed in a context the author did not desire. *See* Kelly Supp. Br. at 11. As explained in Ditto’s Supplemental Brief, however, the image is not “recast” at all. *See* Ditto Supp. Br. at 10-15. It remains unchanged

and appears exactly the same as it does on Kelly's site. This not surprising, given that the image is served from Kelly's site.

Recognizing that the image is not changed in any way, Kelly argues that the change is in the "*context* in which the author intended that work to appear," not in the image, itself. Kelly Supp. Br. at 11. (emphasis added). He asserts that the image may be viewed in a "new setting," or there may appear to be a "jumble of multiple windows." Kelly Supp. Br. at 11. This may well be true, but it is inherent in the way today's graphical computers work.

The Web is premised on control of presentation at the user end. Once a given Web address is located, the users' hardware devices, software programs, and other intermediaries determine the context in which it is viewed. This technical presumption has allowed the Web to grow from simple text-based terminals into multimedia devices capable of showing multiple windows on a computer screen. Most recently, viewers can access the Web through Personal Digital Assistants, handheld devices, and cellular telephones. On a computer screen showing multiple windows, each window potentially has a different software program running; this allows users to do more than one thing at a time. The number of windows that are open, the content of those windows, the font size used, the colors used, and many other viewing choices are all controlled by the user, and all may work a change in the context in which a work accessed over the Web is viewed.

As explained in Ditto's brief, however, such changes in context are not considered derivative works. See Ditto Supp. Br. at 12-15 (citing *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992); *Micro Star v. FormGen, Inc.*, 154 F.3d 1107, 1111 (9th Cir. 1998); *Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 314 (D. Alaska 1993), *aff'd*, 38 F.3d 1218 (9th Cir. 1994); *Paramount Pictures Corp. v. Video Broadcasting Sys., Inc.*, 724 F. Supp. 808, 821 (D. Kan. 1989); and *Lee v. Deck the Walls*, 925 F. Supp. 576 (N.D. Ill. 1996)). While Kelly may not wish his images to be surrounded by material other than his Web site, copyright law simply does not provide a means for controlling such surroundings. "Sony recognizes that a party who distributes a work cannot dictate how that work is to be enjoyed." *Galoob* at 971 (discussing *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984)).

Using the book analogy, a bookstore may group the books it is selling by subject, placing books by photographers competitive with Kelly alongside his book. Similarly, a bookstore customer may pick up Kelly's book, follow a pin cite in a review to the photograph found on page 102, and then put the book back on the shelf without ever reading the introduction or looking at other photographs—just as Ditto allowed Web users to skip Kelly's home page and directly view the desired photograph. Copyright law affords Kelly no control over this type of affront.

On the Web, Ditto may provide a Web patron's browser with separate images and information that surround Kelly's photograph (the original Arriba Vista engine), see ER 108, or it may link to the photograph and also place Kelly's home page behind the photograph in a separate browser window (the modified Ditto service), see SER 30. As noted above, the patron has chosen a particular type of browser, may have multiple windows open on her computer screen, may have a picture that is used as "wallpaper" for the computer screen, or otherwise organize her computer screen in a variety of ways. Each of these things would change the context in which Kelly's images are shown, and yet none of these things ought to be viewed as creating a derivative work.

Creating liability for the type of contextual differences wrought by changing the frame of a painting, surrounding a book with volumes disfavored by the author, or sending a reader to a particular image in a two-hundred page book clearly grants copyright holders far too much control over their works. Yet a clear understanding of the Web, linking, and search technology reveals that a ruling that Ditto violated Kelly's derivative work right would produce exactly this result.

IV. A FINDING OF INFRINGEMENT UNDER THE DERIVATIVE WORK RIGHT OR THE DISPLAY RIGHT WOULD CREATE COMPARABLE LEGAL UNCERTAINTY FOR SEARCH TECHNOLOGY COMPANIES, WOULD INTERFERE WITH WEB PATRONS' ABILITY TO FIND INFORMATION ON THE INTERNET, AND WOULD UPSET THE PROPER BALANCE OF COPYRIGHT LAW.

Should the Court impose liability under a derivative work theory, rather than under the Opinion's display right analysis, see *Kelly* 280 F.3d at 944–47, legal uncertainty for search engines will still result. The notion of imposing copyright liability for linking to unrestricted information has ramifications far beyond Kelly's narrow concern that he control the context in which his copyrighted photographs are viewed. Under either theory, the Court would alter the long-standing nature and operation of the Web, for linking is the Web's backbone. See *supra* pp. 2-4 and EFF Rehearing Br. at 1. As described *supra* pp. 5-6, such an imposition of liability would limit search technology companies' ability to help Web patrons find information in the vast library of the Internet.

Copyright protection must always strike a balance between encouraging investment in the creation and dissemination of new creative works by granting copyright holders the ability to control their works, and the public interest in benefiting from and using those works. See Lydia Loren, "The Changing Nature of Derivative Works in the Face of New Technologies," 4 *J. Small & Emerging Bus. L.* 57, 60 (2000). "To balance these tensions, copyright law provides certain protections but places limitations on those protections—limitations not only in

duration, but in scope as well.” *Id.* While Kelly desires to control the manner in which Web patrons view his images, this is a level of control that is simply not provided by copyright law. Kelly chose to make his photographs available on the Web, and he chose to do so without availing himself of simple technological measures for controlling access. By doing so, he joined the vibrant information exchange that is the Web and invited users around the world to view his images. The search engines, browsers, and applications users choose to employ will no doubt change the context in which Kelly’s works are viewed, sometimes in ways he finds objectionable. Yet this is merely a result of the necessary balance inherent in copyright law and the technical design of the “universal space of information” that is the Web.³ Copyright law and the architecture of the Web equally support Web patrons’ right to access publicly available images and to view those images in a context of their choosing.

³ Tim Berners-Lee, *Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by its Inventor* 3 (1999), *supra* p. 4.

V. CONCLUSION

For the reasons stated herein, an infringement of Kelly's derivative use right should not be found.

Respectfully submitted,

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Dated: December 2, 2002

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4 and 40-1, I certify that the attached Brief of Google Technology Inc. as Amicus Curiae In Support of the Supplemental Brief of Defendant-Appellee Ditto.com, Inc. (Formerly Arriba Soft Corporation) Responding to the Court's Order Dated October 10, 2002 is proportionately spaced, has a typeface of 14 points or more, and contains 2726 words.

Respectfully submitted,

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Dated: December 2, 2002

CERTIFICATE OF SERVICE

I, [REDACTED], declare:

I am a citizen of the United States and am employed in the County of Alameda, State of California. I am over the age of 18 years and am not a party to the within action. My business address is [REDACTED]. I am personally familiar with the business practice of [REDACTED]. On December 2, 2002, I served the following document(s):

**BRIEF OF GOOGLE TECHNOLOGY INC. AS AMICUS CURIAE
IN SUPPORT OF THE SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE
DITTO.COM, INC. (FORMERLY ARRIBA SOFT CORPORATION)
RESPONDING TO THE COURT'S ORDER DATED OCTOBER 10, 2002**

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_____ (By Facsimile/Telecopy) I caused each document to be sent by Automatic Facsimile/Telecopier to the number(s) indicated above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at _____.

DATED: December 2, 2002
