

Kelly v. Arriba Soft, 280 F.3d 934 (9th Cir. 2002)

*“Each new advance in the technology of communications disturbs a status quo. . . . Technical laymen, such as judges, perceive the new technology in [its] early clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding.”*¹

I. INTRODUCTION

As the Internet has expanded while undergoing tremendous commercialization, courts have struggled to apply existing legal doctrines to an array of evolving technologies. Much of this tumultuousness in the legal landscape has taken place with regard to methods for hyperlinking to content on the Internet. In *Kelly v. Arriba Soft*,² the Ninth Circuit attempted to lend this area of law some measure of clarity, holding that Arriba Soft’s creation of small “thumbnails” of Kelly’s copyrighted images for use in its visual search engine constituted fair use per Section 107 of the Copyright Act.³ The court also held as a matter of first impression that Arriba’s unauthorized inline linking to, and framing of, images residing on Kelly’s website violated Kelly’s right of public display.⁴

This Note attempts to reconcile the Ninth Circuit’s analysis with relevant authority, taking the positions of various courts and commentators into account. It then examines *Kelly*’s likely implications for websites desirous of using thumbnail images, inline linking, framing, and similar technologies.⁵ Although the Ninth Circuit’s analysis may be inconsistent with some applicable authority⁶ and has faced mixed reviews from legal commentators,⁷ this Note

¹ ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 7 (1983).

² 280 F.3d 934 (9th Cir. 2002).

³ *See id.* at 948.

⁴ *See id.*

⁵ Although many areas of law come into play in Internet linking cases, this Note focuses on *Kelly*’s impact on copyright law on the Internet. Other areas of law implicated by Internet hyperlinking but not affected by the *Kelly* holding are not discussed here, having received ample coverage in various fora.

⁶ *See Part V, infra.*

concludes that the decision is consistent with the purposes of copyright law and constitutes a proper application of the fair use exception. Moreover, despite the dire predictions of Arriba's *amici*, the decision does not threaten all, or even many, forms of hyperlinking on the Internet.

II. THE TECHNOLOGIES AT ISSUE

Inline Linking and Framing

Both inline linking (“inlining”) and framing allow a web publisher to associate itself with the content of another party and to create a Web page that is a hybrid of both parties’ content.⁸ Such works shall hereinafter be referred to as “combinative” works.⁹ Inline links allow a website display a work residing on another Web site’s server within the context of its own Web site, as if the inlined work resided on its own server.¹⁰ The end user is typically unaware that the image has been imported from another website. Framing is quite similar, involving the use of code to display a graphic or, more often, an entire Web page, within a “frame” on the framing Web page.

A Web site operator may prevent the inline linking to, or framing of, her Web pages or images by the use of simple programming techniques.¹¹ Thus, if the image or Web page has been made available to the public for free without technological restrictions in place, some

⁷ See, e.g., Kelly Donohue, Note, *Court Gives Thumbs-Up For Use of Thumbnail Pictures Online*, 2002 DUKE L. & TECH. REV. 0006, ¶19-20 (giving general approbation to the Ninth Circuit’s decision); Eugene R. Quinn, Jr., *Web Surfing 101: The Evolving Law of Hyperlinking*, 2 BARRY L. REV. 37, 64 (2001) (criticizing the fair use determination of the district court in *Kelly v. Arriba Soft*, 77 F. Supp. 2d 1116, 1119 (C.D. Cal. 1999); this particular holding was affirmed by the Ninth Circuit and Quinn’s remarks are thus applicable to the appellate court’s reasoning).

⁸ See Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1297 (2001). See also Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technologies*, 4 J. SMALL & EMERGING BUS. L. 57, 59 (2000).

⁹ Such works have also been said to create “adaptive Web displays,” *id.*, and have also been called “integrated” works, Loren at 59. Since such works necessarily combine the content of two sites, but do not necessarily integrate the content or necessarily “adapt” the content of either site, it is more precise to call them combinative; this asserts only that they combine the two sites’ content.

¹⁰ For further explanation of the workings of inlining and framing, see Nicos L. Tsilas, *Minimizing Potential Liability Associated With Linking and Framing on the World Wide Web*, 8 COMM.LAW CONSPECTUS 85, 86 (2000).

¹¹ See David Yan, *Virtual Reality: Can We Ride Trademark Law to Surf Cyberspace?*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 773, 812-813 (2000); Aaron Rubin, Comment, *Are You Experienced? The Copyright Implications of Web Site Modification Technology*, 89 CAL. L. REV. 817, 842 n. 165 (2001); Quinn at 47; Sableman at 1341; Loren at 91.

commentators have criticized the rationale of those who would hold a framing site guilty for infringement.¹² Moreover, if a Web site operator attempted to defeat such technological restrictions, she could face liability under the Digital Millennium Copyright Act's anticircumvention provisions.¹³

"Thumbnail" Images

"Thumbnail" images are smaller, lower resolution copies of a digital image. They are often used to link to the corresponding full-size image, but they serve their linking function no differently than an ordinary text hyperlink. By definition, the creation of a thumbnail image requires that a copy of the full-size image be made.

III. LEGAL BACKGROUND

For a copyright owner to assert a prima facie case for copyright infringement, he or she must prove: (1) ownership of a valid copyright in the work; (2) copying by the defendant; and (3) improper appropriation.¹⁴ Web site operators inlining or framing other Web sites' content have not copied anything,¹⁵ and thus, most commentators prior to the *Kelly* decision speculated that such individuals could not be held liable for direct copyright infringement.¹⁶

A. Infringement of the Right to Publicly Display the Work

A copyright owner is granted the exclusive right to "display the work publicly."¹⁷ The Copyright Act's definition of the term "publicly" encompasses a transmission of a display of a

¹² See Loren at 88.

¹³ The Act prohibits manufacture or distribution to the public any product or any part of any product that is primarily designed for circumventing technological protections. 17 U.S.C. § 1201(a)(2)(A). See Sableman at 842 n. 167 (citing The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2863-72 (codified at 17 U.S.C. § 1201 (Supp. IV 1998)).

¹⁴ NIMMER & NIMMER, NIMMER ON COPYRIGHT 4 § 13.01, at 13-5, § 13.01[B], at 13-9.

¹⁵ See Nicole M. Bond, Note, Linking and Framing on the Internet: Liability under Trademark and Copyright Law, DEPAUL BUS. L.J. 185, 213 (1998) (citing Kenneth Freeling and Joseph E. Levi, *Frame Liability Clouds the Internet's Future*, N.Y.L.J., May 19, 1997, at 3.).

¹⁶ See, e.g., Loren at 59.

¹⁷ 17 U.S.C. § 106(5).

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."¹⁸ Moreover, unlike the reproduction right, the display right extends to any copy of the work, including the original one.¹⁹ The Act defines a display as "any act by which the initial performance or display is transmitted, repeated, or made to recur."²⁰ Thus, although a framing site does not store a copy of any of its target pages nor directly transmit such copies, the instructions contained in their frameset documents do directly cause the page to be displayed within a frame.²¹ Although the user requests the copies, the framing site contains the code necessary to display the foreign content in a questionable manner.²² Given its editorial decision to structure its content in that manner, if this display is indeed infringement, it may be plausibly argued that the framing site has at least "caused" or "induced" it.²³

B. Infringement of the Right to Create Derivative Works

The owner of a copyright has the exclusive right to prepare derivative works based on the copyrighted work.²⁴ The derivative right has been described as existing where "the contribution of independent expression to an existing work effectively creates a new work for a different market,"²⁵ and it may be infringed even if no unlawful copy of the material is made.²⁶ This is further complicated by the fact that nearly all works are "derivative works" in a sense; nearly all

¹⁸ 17 U.S.C. § 101.

¹⁹ See H.R. REP. NO. 94-1476, at 64 (1976).

²⁰ *Id.* at 63.

²¹ See Brian D. Wassom, *Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking and Inlining*, 49 CASE W. RES. L. REV. 181, 208 (1998).

²² See *id.*

²³ See *id.*

²⁴ 17 U.S.C. § 106(2).

²⁵ See Michael A. Stoker, *Framed Web Pages: Framing the Derivative Works Doctrine on the World Wide Web*, 67 U. CIN. L. REV. 1301, 1311 (citing Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 217 (1983)).

²⁶ See Bond at 269-70 (citing Freeling & Levi at S12); see also 2 NIMMER & NIMMER § 8.09(A) (citing H. REP. NO. 94-1476., p. 62).

works of authorship are based to some extent on pre-existing works.²⁷ For these and other reasons, the Ninth Circuit recently called the right “hopelessly overbroad.”²⁸

Before *Kelly*, a few plaintiffs had asserted infringement of their right to create derivative works as a legal theory on which to sue Web sites that inline linked or framed their copyrighted content.²⁹ This took place despite a plethora of commentators arguing against the theory’s tenability.³⁰ The derivative works theory has two permutations. In the first, when an end user views a combinative work, a novel audiovisual experience is created that combines elements of the combinative work and elements of the preexisting works.³¹ In the second, the copyright owner asserts that the framing or inlining site is itself creating a derivative work; it claims both that the combinative work itself is a work that is “based on” the copyrighted work it references and that the work created by the interaction of the combinative work and that the copyrighted work constitutes a derivative work.³² Despite these theories’ ostensible tenability,³³ the *Kelly* court did not so much as mention the possibility of Arriba Soft’s liability on this basis.

The Ninth Circuit’s reticence with respect to the derivative works theory may have been due to a mix of questionable precedent in the circuit. In *Mirage Editions, Inc. v. Albuquerque*

²⁷ See 1 NIMMER & NIMMER § 3.01 (citing *Emerson v. Davies*, 8 F. Cas. 615, 619 No. 4436 (C.C.D. Mass. 1845)).

²⁸ *Micro Star v. FormGen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998).

²⁹ See, e.g., *Washington Post Co. v. Total News, Inc.*, 97 Civ. 190 (PKL) (S.D.N.Y., complaint filed Feb. 20, 1997) complaint PP7-10, available at http://www.jlx.com/internet/comp_laint.html; *Shetland Times, Ltd. v. Wills*, [1997] F.S.R. 604, 1997 S.L.T. 669, (Sess. Oct. 24, 1996) (Scot.) (issuing temporary restraining order pursuant to Scottish law), available at <http://www.jmls.edu/cyber/cases/shetld1.html> (visited Sept. 19, 2002), (dismissed upon settlement on Nov. 11, 1997), available at <http://www.jmls.edu/cyber/cases/shetld2.html> (visited Sept. 19, 2002); see also *Quinn* at 57 (citing *Futuredontics, Inc. v. Applied Anagramics, Inc.*, 45 U.S.P.Q.2d 2005, 2007, *aff’d*, 152 F.3d 925 (9th Cir. 1998)).

³⁰ See *Wassom* at 222-23 (suggesting that the derivative work theory is untenable); *Stoker* at 1329 (arguing that a framed hyperlink should not be held to violate the derivative work right); *Rubin* at 837-40 (making a similar argument).

³¹ See *Loren* at 88.

³² See *Loren* at 66.

³³ See *WGN Continental Broadcasting Co. v. United Video*, 693 F.2d 622, 625 (7th Cir. 1983) (“Although Web sites may well have an implied license to directly link to other sites on the Internet, that does not mean that a licensee has the right to make derivative works unless expressly authorized to do so by the copyright owner.”). This most strongly supports the second theory of liability for infringing the right to create derivative works.

A.R.T. Co.,³⁴ a Ninth Circuit panel held that removing reproductions of given art works from a compilation of copyrighted art works, and thereafter mounting those reproductions onto ceramic tile, resulted in the creation of derivative works.³⁵ An Alaska district court followed *Mirage* shortly thereafter in a case against the same defendant.³⁶ However, the *Mirage* holding has faced sharp criticism from commentators, judicial and otherwise,³⁷ and was explicitly not followed by the Seventh Circuit.³⁸

A few years after *Mirage*, the Ninth Circuit held in *Louis Galoob Toys, Inc. v. Nintendo of America, Inc.*³⁹ that altered displays of a video game were not sufficiently “fixed” to constitute an infringing derivative work.⁴⁰ Moreover, since the allegedly infringing product could not independently generate the altered displays, it was not a derivative work, and thus could not be an infringement.⁴¹ Soon thereafter, the only American case to directly address inline linking and framing prior to *Kelly, Futuredontics, Inc. v. Applied Anagramatics, Inc.*, was brought in a federal district court.⁴² Here the plaintiff argued, *inter alia*, that the framing created an unauthorized derivative work based on its own Web site.⁴³ The court cited *Mirage* and *Galoob*,

³⁴ 856 F.2d 1341 (9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989).

³⁵ 856 F.2d at 1342-43.

³⁶ *Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309 (D. Alaska 1993).

³⁷ *See, e.g.*, 1 NIMMER & NIMMER § 3.03 (“Even apart from the questionable contribution of intellectual labor in the physical activities of page-removal and mounting, it is difficult to imagine that [an artist] could take separately copyrighted individual art works and, merely by reproducing them in a compilation and then taking the reproduced pages out of the compilation and remounting them, thereby obtain a new copyright in the same art works. For the sole contribution added in this process is the method of mounting; choosing ceramic rather than cardboard as the backing material should scarcely be construed as a “meaningful” variation in the eyes of the Copyright Act.” (internal citations omitted)); *see also* *Stoker* at 1321-22 (citing PAUL GOLDSTEIN, COPYRIGHT § 5.3 at 5:84); *Gordon* at 255 n.401 (1992); *Precious Moments, Inc. v. La Infantil, Inc.*, 971 F. Supp. 66 (D.P.R. 1997).

³⁸ *See* *Lee*, 125 F.3d at 582-83 (“[I]f [the Ninth Circuit is] right about what counts as a derivative work, then the United States has established through the back door an extraordinarily broad version of authors’ moral rights. . . . [I]t would not be sound to use [the derivative work right] to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act.”)

³⁹ 964 F.2d 965 (9th Cir. 1992).

⁴⁰ *Id.* at 968.

⁴¹ *Id.* at 969.

⁴² *Futuredontics, Inc. v. Applied Anagramatics, Inc.*, 1998 U.S. Dist. LEXIS 2265 (C.D. Cal. 1998), *aff’d*, 152 F.3d 925 (9th Cir. 1998).

⁴³ *See id.*

finding that the latter case had “substantially undercut” *Mirage* but did not overrule it.⁴⁴ Faced with this inconclusive authority, the court refused both plaintiff’s motion for a preliminary injunction and defendant’s motion to dismiss,⁴⁵ holding that the cases cited by the parties did not conclusively determine whether the defendants’ framing Web page constituted a derivative work.⁴⁶ This result was affirmed on appeal,⁴⁷ yielding an air of uncertainty to the derivative works theory in the Ninth Circuit⁴⁸ that *Kelly* has left entirely unabated.

C. The Fair Use Exception

Congress created a fair use exception, to be applied in cases of otherwise infringing activity, to preserve the potential future uses of artistic works for purposes of scholarship, research, teaching, criticism, and news reporting.⁴⁹ This exception “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁵⁰

The fair use exemption is codified in 17 U.S.C. § 107 and states, in relevant part, that:

. . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (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

⁴⁴ See Quinn at 58 (“To be sure, the Ninth Circuit did distinguish the *Mirage* case from its *Galoob* decision and certainly did not overrule *Mirage*, but it is indeed difficult to discern a principled reason why the display of an image mounted on a ceramic tile is so radically different from the display of an image viewable through a video game monitor. Therefore, it seems unlikely that Courts will in the future find that framing creates a derivative work.”) (internal citations omitted).

⁴⁵ See *Futuredantics*, 1998 U.S. Dist. LEXIS 2265, p. 10.

⁴⁶ *Id.*

⁴⁷ See *Futuredantics, Inc. v. Applied Anagramatics, Inc.*, 152 F.3d 925 (9th Cir. 1998).

⁴⁸ See Quinn at 58.

⁴⁹ See 17 U.S.C. § 107.

⁵⁰ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁵¹

During deliberation on the bill, Congress made clear that this list of factors was to be illustrative rather than exhaustive.⁵² Thus, the implementation of Congress' goal, to achieve an optimal balance between fostering incentives for the creation of literary and artistic works and the optimal use and dissemination of such works,⁵³ has been largely left to the courts.

The fair use exception's recent history prior to *Kelly* centers around *Campbell v. Acuff-Rose Music, Inc.*,⁵⁴ a parody case in which the Supreme Court took a step back from its prior fair use jurisprudence and instead emphasized a fact-based inquiry.⁵⁵ In *Campbell*, the Court held that a commercial use of the copyrighted material does not end the inquiry under the "purpose and character of the use" factor.⁵⁶ Rather, stated the Court, [t]he central purpose of [the] investigation is to see . . . whether and to what extent the new work is transformative.⁵⁷ As to the effect upon the market for the copyrighted work, the *Campbell* Court established that "[w]hen the second use . . . is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."⁵⁸ However, the Court also cited Nimmer's treatise in explaining that courts must 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

⁵¹ See 17 U.S.C. § 107.

⁵² See MERGES ET. AL at 490 (citing H.R. REP. NO. 94-1476, at 66 (1976) (stating that the factors to be considered – along with section 107's list of possible fair uses – were "the result of a process of judicial accretion" during the judicial development of the fair use doctrine at common law, and that section 107 was designed to "offer some guidance" in determining fair use rather than to formulate "exact rules"); see also Okediji at 123 (citing Notes of Committee on the Judiciary, H.R. Rep. No. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681 (stating "[t]here may be instances in which copying which does not fall within the guidelines . . . may nonetheless be permitted under the criteria of fair use").

⁵³ See MERGES ET. AL at 352.

⁵⁴ 510 U.S. 569 (1994).

⁵⁵ Lloyd L. Weinreb, Lecture, *Fair Use*, 4 FORDHAM L. REV. 1291, 1299 (1999).

⁵⁶ *Id.* at 579.

⁵⁷ *Id.*

⁵⁸ *Id.* at 591.

the original.”⁵⁹ Campbell’s most significant contribution to fair use jurisprudence was its emphasis of the transformative use inquiry, however. This was subsequently furthered and refined by the Ninth Circuit in *Sony Computer Entertainment America, Inc. v. Bleem*,⁶⁰ thus solidifying the transformative use inquiry’s paramount role in fair use analyses.

IV. CASE SUMMARY

A. FACTUAL BACKGROUND

Plaintiff Leslie Kelly, a professional photographer, displays several of his copyrighted photographs at his Web site and at other Web sites with which he has a license agreement. Defendant Arriba Soft Corp. [hereinafter “Arriba”]⁶¹ operated an Internet search engine which displayed the results of a user’s search query as thumbnail images.⁶² Arriba generated the thumbnail images by using a “crawler” computer program, which would search the Internet in order to find images to index in its search engine.⁶³ Upon finding a suitable image, the program would download a copy of the full-size image onto Arriba’s server, generate a thumbnail representation of the full-size image, and then delete the full-size image from the server.⁶⁴

The second attribute of Arriba’s program concerned the result of the user’s double-clicking the thumbnail. At the Web site’s inception, a user double-clicking a thumbnail image caused Arriba’s program to produce a page displaying the full-size image, retrieved to the user directly from the originating Web site, along with text describing the size of the image, a link to the originating Web site, the Arriba banner, and Arriba advertising.⁶⁵ After operating in this

⁵⁹ *Campbell*, 510 U.S. at 590 (quoting 3 NIMMER & NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-102.61 (1993)) (ellipses in original).

⁶⁰ 214 F.3d 1022 (9th Cir.2000).

⁶¹ Arriba Soft changed its name to “Ditto.com” after the commencement of its litigation with Kelly.

⁶² Although the past tense is used in this portion of the Note so as to describe only relevant facts, Arriba Soft (under its new name, Ditto.com) still operates the search engine in question. It is located at <http://www.ditto.com>.

⁶³ *See Kelly*, 280 F.3d at 938.

⁶⁴ *Id.*

⁶⁵ *Id.*

manner for several months, Arriba altered the program such that the results page contained two links, entitled “Source” and “Details,” respectively.⁶⁶ The “Details” link produced a page similar to the one it had produced before, except with a thumbnail rather than the full-sized image.⁶⁷ By clicking on the “Source” link or the thumbnail from the results page, however, Arriba’s site produced two new windows on top of its results page.⁶⁸ The window in the forefront contained the full-size image, imported directly from the originating Web site. Underneath that was a window displaying the originating Web page. This technique, in which the image from a second Web site is viewed within a frame that is pulled into the primary site’s Web page, is called “framing.”⁶⁹

B. PROCEDURAL HISTORY

Upon learning that some of his copyrighted images were part of Arriba’s database in 1999, Kelly brought a claim in the Central District of California against Arriba for copyright infringement.⁷⁰ In December 1999, U.S. District Court Judge Gary L. Taylor ruled that Kelly had established a prima facie case of copyright infringement based on Arriba’s unauthorized reproduction and display of Kelly’s works, but that this reproduction and display constituted a noninfringing fair use under Section 107 of the Copyright Act.⁷¹ Kelly subsequently appealed this decision to the Ninth Circuit.⁷²

C. THE NINTH CIRCUIT’S ANALYSIS

⁶⁶ *Id.* at 939.

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ *Id.*; see also Nicos L. Tsilas, *Minimizing Potential Liability Associated With Linking and Framing on the World Wide Web*, 8 COMMLAW CONSPECTUS 85, 86 (2000), *supra* n. 10 and accompanying text.

⁷⁰ Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

⁷¹ *Id.* at 1121.

⁷² Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002).

The Ninth Circuit analyzed Arriba's use of thumbnails and its inline linking and framing of Kelly's images as two separate and distinct actions.⁷³ Kelly had established a prima facie case of infringement of the reproduction right for the thumbnail images, and infringement of the right to publicly display the work with regard to Arriba's inline linking to, and framing of, Kelly's images. The Ninth Circuit analyzed each use in turn under the Copyright Act's "fair use" exception.

Thumbnail Reproductions of Kelly's Images

In its evaluation of the thumbnail images, the court focused primarily on the first and fourth statutory factors: the purpose and character of the use, and the effect on the market for the copyrighted work. The court determined that although Arriba's website served an overtly commercial purpose, Arriba's use was not highly exploitative since Arriba was neither selling Kelly's images nor using them to directly promote its Web site.⁷⁴ Thus, this prong of the first statutory factor weighed only slightly in favor of Kelly.⁷⁵

However, the court had commenced its analysis by emphasizing the importance of the transformative use inquiry,⁷⁶ noting that "[t]he more transformative the new work, the less important the other factors, including commercialism, become."⁷⁷ The court determined that Kelly's images served an entirely different function than Arriba's thumbnail reproductions, since Kelly's images were artistic works used for illustrative purposes, while Arriba's search engine "function[ed] as a tool to help index and improve access to images on the internet and their related web sites."⁷⁸ Because Arriba's use did not supersede Kelly's use, but instead created a

⁷³ See *id.* at 939.

⁷⁴ *Id.* at 940.

⁷⁵ *Id.* at 941.

⁷⁶ See *Kelly*, 280 F.3d at 940 (citing *Campbell*, 510 U.S. at 579) ("[T]he central purpose of [the purpose and character of the use] investigation is to see . . . whether and to what extent the new work is transformative.")

⁷⁷ *Id.* (citing *Campbell*, 510 U.S. at 579).

⁷⁸ *Id.* at 941.

different purpose for the images, the court found Arriba's use transformative.⁷⁹ Thus, the first factor weighed in favor of Arriba.⁸⁰

The second and third factors – the nature of the copyrighted work, and the amount and substantiality of the portion used in relation to the work as a whole, respectively – received scant attention from the court. Regarding the nature of the work, the court noted that creative works such as Kelly's "are closer to the core of copyright protection than are more fact-based works," but determined that Kelly's having previously published the work online cut in favor of fair use.⁸¹ Thus, this factor weighed only slightly in favor of Kelly. As to the amount and substantiality of the portion used, the court decided that although copying an entire work militates against fair use, the extent of permissible copying varies with the purpose and character of the use.⁸² The court determined that this factor would weigh in favor of neither party, since although Arriba had copied the images in their entirety, it was necessary to do so for the sake of the visual search engine's functionality.⁸³

Respecting the effect on the market for the copyrighted work, the court again focused on the transformative nature of Arriba's use. Noting that "a transformative work is less likely to have an adverse impact on the market of the original than a work that merely superseded the copyrighted work,"⁸⁴ the court concluded that as a highly transformative use of Kelly's images, the thumbnails' adverse effect on the market for the images would be minimal.⁸⁵

⁷⁹ *Id.* at 941-42.

⁸⁰ *Id.* at 942.

⁸¹ *Id.* at 942-43.

⁸² *Id.* at 943.

⁸³ *Id.*

⁸⁴ *Kelly*, 280 F.3d at 943 (citing *Campbell*, 510 U.S. at 591).

⁸⁵ *See id.*

Having applied the four statutory factors to Arriba's creation and use of the thumbnail images, the court concluded that Arriba's use of Kelly's images as thumbnails constituted fair use.⁸⁶

Inline Linking and Framing of Kelly's Full-Size Images

In analyzing Arriba's inline linking to, and framing of, Kelly's images, the court acknowledged that this use did not entail making copies of Kelly's images, and the court thus confined its analysis to the public display right.⁸⁷ The court explained that the legislative history emphasizes the "broad nature of the display right," and indicates that the display of Kelly's images on a computer screen constitutes a public display per the statutory definition.⁸⁸ Next, the court examined two district court cases, each of which found infringement of the display right.⁸⁹ The court refused to distinguish the cases on the grounds that, unlike the case before it, in each of the two cited cases the defendants had copied the images onto their own servers.⁹⁰ Rather, the court emphasized the "active role" the defendants had taken in creating the display of the copyrighted images.⁹¹

Finally, the court examined whether Arriba's infringement of Kelly's public display right might be spared by the fair use exception. Primarily because Arriba's use in this instance was not transformative,⁹² the court concluded that all four statutory fair use factors weighed in favor of Kelly. In short, the inline linking to, and framing of, Kelly's images superseded the object of

⁸⁶ *Id.* at 944.

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F.Supp. 543 (N.D.Texas 1997) (holding the operator of a Web site who downloaded copyrighted photographs from Internet newsgroups, discarded the text, and made the images available to subscribers to have violated Playboy's exclusive right to display the photographs); *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503 (N.D.Ohio 1997) (holding the owner of an electronic bulletin board system infringed Playboy's copyrights by displaying copyrighted images on its system).

⁹⁰ *See id.* at 946.

⁹¹ *Id.* at 946.

⁹² *Kelly*, 280 F.3d at 947.

Kelly's images, deterred people from visiting Kelly's site, and reduced Kelly's opportunity to sell or license his own images.⁹³

V. DISCUSSION

This Note attempts to explain *Kelly*'s likely impact on linking law and to elucidate the case's likely implications. In so doing, it examines the Ninth Circuit's explicit rationale as well as underlying considerations that may have swayed the court's decision and, perhaps, which may serve as a harbinger of future trends in this area of law.

This Note first attempts to make clear that although Arriba's *amici* contend that the court's condemnation of inline linking and framing may have dire consequences for all forms of hyperlinking on the Internet,⁹⁴ close examination of the court's reasoning quickly puts this argument to rest. Despite language sometimes lacking in technical precision, the court accurately conveyed the functionality of Arriba's search engine and engaged in a meticulous fair use analysis to come to its decision. Indeed, the ultimate result in the case – that using thumbnail images to link is allowable while inline linking and framing are not – reflects a careful balancing of providing for the dissemination of information and copyright owners' right to control the public display of their works.

If any valid concern exists with the Panel's opinion, it may well be that the inquiry into the transformative nature of an alleged infringer's use may come to swallow the entire fair use analysis. This likelihood, particularly insofar as it involves the court's heavy emphasis on the

⁹³ See *Kelly*, 280 F.3d at 947-48.

⁹⁴ Brief of Google Inc. as Amicus Curiae In Support of Petition for Panel Rehearing En Banc by Defendant-Appellee Ditto.com, Inc. (Formerly Arriba Soft Corporation), p. 5 (citing Opinion at 9); see also Brief of the Electronic Frontier Foundation as Amicus Curiae In Support of Petition for Panel Rehearing En Banc by Defendant-Appellee Ditto.com, Inc. (Formerly Arriba Soft Corporation), p. 1 (“The Panel . . . has announced an unprecedented rule that would impose . . . strict liability for linking.”).

“functionality distinction,”⁹⁵ allows for the conclusion that *Kelly* may portend broad application of the fair use exception in Internet cases.

The Note proceeds by rejecting the argument that copyright owners should be forced to utilize technological protections before bringing suit under copyright law, and concludes with an argument that legislatures and judges ought not accord search engines special protection under copyright law.

The reader should note that, although Internet hyperlinking cases implicate a myriad of legal issues under various theories of liability,⁹⁶ this Note focuses on the issues addressed by the Ninth Circuit in *Kelly*. It also covers the derivative works theory, which was not asserted by the plaintiff in *Kelly* but for which its omission may signal a new direction in Internet jurisprudence, particularly in the Ninth Circuit.

A. *Kelly* Does Not Pose a Threat to All, or Even Many, Forms of Hyperlinking to Copyrighted Content on the Internet

Arriba Soft and its *amici* contend that the Panel’s opinion may be read to imply that “the mere act of establishing a direct link to a copyrighted work creates liability for public display unless authorized.”⁹⁷ One *amicus* claims that “without clarification, it might be argued that this reasoning would impose liability on every search engine for providing a list of search results that link to third party web pages (and indeed, on every Internet service provider that directly links to copyrighted works).”⁹⁸ This assertion is almost certainly incorrect. In the context in which the

⁹⁵ See *Kelly*, 280 F.3d at 942-43.

⁹⁶ Possible theories include, but are not necessarily limited to, trademark infringement, trademark dilution, common law misappropriation, and Lanham Act violations, along with more general aspects of unfair competition.

⁹⁷ *Id.*

⁹⁸ Brief of Google Inc. as Amicus Curiae In Support of Petition for Panel Rehearing En Banc by Defendant-Appellee Ditto.com, Inc. (Formerly Arriba Soft Corporation), p. 5.

Panel uses the term “direct link,”⁹⁹ it is referring to the instructions in the framing site’s frameset documents that cause the Web page to be displayed within a frame.¹⁰⁰ This type of linking, in which the framed image is entirely divorced from its original setting and, in this particular case, mired amongst Arriba’s advertisements, is fundamentally different than standard HREF links that are commonly used to link all documents on the Internet. While the briefs of Arriba’s *amici* contain powerful rhetoric, the actual content of their arguments falls flat.

The *Kelly* court’s selective marshalling of precedent supports this argument. A judge in the Central District of California held in 2000 that hyperlinking is not copyright infringement,¹⁰¹ and if the Ninth Circuit intended to imply that hyperlinking to copyrighted content would in fact always constitute copyright infringement, it would almost certainly address that case in order to abandon it or to confine it to its facts. Rather, as indicated by its reasoning, the court did not even consider HREF hyperlinking as possible direct copyright infringement. Moreover, in a 1997 case involving involuntary framing of several news Web sites, the owners of the framed sites made clear that they did not oppose the hyperlinks which were used to retrieve their content; rather, the plaintiffs objected to the way the framing Web site orchestrated the links using frames.¹⁰² Indeed, if a hyperlink may properly be likened to a library’s card index system,¹⁰³ then framing – by enabling the framing site to alter the display of the framed site and

⁹⁹ See *Kelly*, 280 F.3d at 947 (“Arriba acted as more than a passive conduit of the images by establishing a direct link to the copyrighted images. Therefore, Arriba is liable for publicly displaying Kelly’s copyrighted images without his permission.”).

¹⁰⁰ See Wassom at 208.

¹⁰¹ See *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 U.S.P.Q. 2d 1344, 1345 (C.D. Cal. 2000).

¹⁰² See Sableman at 1299 (citing Wash. Post Co.’s Complaint, *Wash. Post Co. v. Total News, Inc.*, No. 97 Civ. 1190 (PKL) (S.D.N.Y., filed Feb. 20, 1997), available at <http://www.court tv.com/-legaldocs/cyberlaw/totalnew.html>). The case ultimately settled, resulting in little guidance to be gleaned from the case. However, the settlement in the case – requiring Total News to link to the other sites only via the standard HREF link that is commonly used on the Internet, and only upon being granted a “linking license” – indicates at least mild concern on the part of Total News that their framing of the news sites would be found to constitute infringement.

¹⁰³ See Dan L. Burk, *Proprietary Rights in Hypertext Linkages*, 1998(2) THE JOURNAL OF INFORMATION, LAW & TECHNOLOGY (JILT), available at http://elj.warwick.ac.uk/jilt/intprop/98_2burk/; Brian D. Wassom, *Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking and Inlining*, 49 CASE

to juxtapose the framed content with its own advertisements – represents a potentially much greater affront to various rights of the copyright holder. This was precisely the contention of the plaintiff in *Kelly*, and was treated as such by the court.

B. The Panel’s Holding May Portend Broad Application of the Fair Use Doctrine in Internet Cases

The Ninth Circuit’s analysis indicates that so long as a use is arguably transformative, other factors detracting from a fair use claim will likely be reduced to a mere scintilla of importance. This is particularly so in cases involving evolving technologies,¹⁰⁴ which is consistent with courts’ general tendency to favorably apply the fair use exception where the allegedly infringing work results in an entirely new product.¹⁰⁵ While avoiding the limitation of nascent technologies is usually desirable from a societal point of view, this approach’s congruence with the goals of copyright law is much less certain. Moreover, when new technologies are not involved, overemphasis of the transformative use inquiry may be of even greater concern.

1. *Kelly* May Reduce the Entire Fair Use Inquiry For Copyrighted Content Posted Online to an Inquiry Into a Single Factor: Transformative Use

Kelly appears to reduce the entire fair use inquiry into an examination of a single, judicially crafted factor – the “transformative” nature of the use. A significant theme that developed in the case law prior to *Kelly* is that uses that are "transformative," that is, those that alter a copyrighted work "with new expression, meaning, or message," lie at the heart of the fair

W. RES. L. REV. 181, 219 (1998). *But see* Quinn at 77 (arguing that a hyperlink is much more functional and can convey much more information than a card catalog system or a footnote).

¹⁰⁴ See *Kelly*, 77 F. Supp. 2d 1116, 1121 (C.D. Cal. 1999) (“Where, as here, a new use and new technology are evolving, the broad transformative purpose of the use weighs more heavily than the inevitable flaws in its early stages of development.”).

¹⁰⁵ See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine For Cyberspace*, 53 FLA L. REV. 107, 131 (2001).

use doctrine.¹⁰⁶ In *Campbell*, the Supreme Court emphasized the importance of the transformative use analysis, but it did so in the context of a parody case. Specifically, *Campbell* involved the taking of only a fraction of the words from the original, and a fraction of the musical beat, in the creation of an entirely new work.¹⁰⁷ Professor Leval has described transformative use by explaining that if "the secondary use adds value to the original--if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings --this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."¹⁰⁸ Analyzing Arriba's use with this model, Arriba's copying of the full-size images in order to create thumbnails has added no new information of any sort, and indeed has added very little of value in one sense. Arriba merely shrunk the images, which anyone with an image-editing software program could do. However, the thumbnails served an entirely different *function* than the full-sized images – improving access to content, rather than serving as artistic expression¹⁰⁹ – and this functionality distinction appears to be at the heart of the decision in *Kelly*. Arriba's shrinking of the images is transformative, but clearly not as transformative as the act of the defendants in *Campbell*.¹¹⁰ Since the transformative nature of the use's effects is framed as a matter of degree – that is, the more transformative the new use, the less important other factors, such as commercialism, become¹¹¹ - *Kelly*'s lack of any explicit indication as to how one might quantify the transformative nature of a use is curious.

2. *Kelly* Indicates That Any Use, So Long as It Does Not Supplant the Need for the Original, Will Be Considered Transformative

¹⁰⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁰⁷ See Quinn at 63-64.

¹⁰⁸ Leval at 1111.

¹⁰⁹ See *Kelly*, 280 F.3d at 941.

¹¹⁰ See Quinn at 64.

¹¹¹ See *Kelly*, 280 F.3d at 940 (citing *Campbell*, 510 U.S. at 579).

Indeed, if any instruction is to be inferred from the Ninth Circuit panel's reasoning, it may be that any use of copyrighted content, irrespective of commerciality or the amount used, may be held to constitute fair use if it is even *arguably* transformative. Such logic succeeds in a case like *Kelly*, where the court has found that the allegedly infringing work causes no market harm to the original. However, this appears to reduce the entire fair use inquiry to a question of whether the use was transformative, and this answer in turn appears to depend heavily, if not solely, on the allegedly infringing product's effect on the market for the original work. Whether the *Campbell* Court would intend its reasoning to stretch so far is up for debate, and resolution on the issue may well have to come from the Supreme Court.

C. When Returning to Copyright's First Principles, To Balance Incentives and Access, the Panel's Opinion is Sound

Having discussed what *Kelly* did not do, this Note shall now explicate what the court did in fact do, ultimately concluding that the court properly balanced the goals of copyright law while engaging in its fair use analysis.

Although the reduction of the fair use inquiry to an examination of a single factor – transformative use – may fail in some contexts, in *Kelly* it is successful at emphasizing the principles of copyright law. Specifically, *Kelly*'s ultimate emphasis on market effects leads to a proper balancing of incentives and access, and – in this case and others like it – the attainment of the proper result detracts from concerns one might have from the overemphasis of a single, judicially-crafted factor in the application of a statutory test.

The Supreme Court has emphasized mindfulness of copyright's first principles while evaluating cases of first impression brought about by technological change.¹¹² *Kelly* provides an

¹¹² See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature,

unusual application of these principles, since the accused use involved the wholesale copying of images in their entirety, yet also embodies the very concept of improving the public's access to works of authorship. Thus, the *Kelly*'s focus on the effects on the market for the copyrighted works, even if shrouded somewhat by the emphasis on whether the use is "transformative," led to the correct result in the eyes of the justifications for copyright law.

In the case of the thumbnail images, the court's finding fair use despite the copying of Kelly's images was appropriate. The court recognized the necessity of copying the images in their entirety in order for the search engine to function, and since the effects on the market for Kelly's images could, according to the court, only be positive,¹¹³ the public use function of the search engine outweighed Kelly's exclusive right of reproduction. Although Kelly may well have wished to receive a licensing fee for Arriba's use of his images in thumbnail form, and requiring such a fee in these kinds of situations may well lead to more creative content being posted online, this fact alone cannot lead to the requirement of a royalty in this case.¹¹⁴ The court's result thus preserved the author's incentive to create and distribute the works online while according the public the concomitant benefit of access.

In the case of Arriba's inline linking and framing of Kelly's images, however, the court properly declined to find fair use. The court correctly recognized that this action was not essential to the functionality of the search engine, and could have detrimental effects on the market for Kelly's images. Finding fair use in this case would have severely undercut Kelly's

music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.")

¹¹³ See *Kelly*, 280 F.3d at 944 ("By showing the thumbnails on its results page when users entered terms related to Kelly's images, the search engine would guide users to Kelly's web site rather than away from it.")

¹¹⁴ See Aaron Rubin, Are You Experienced? *The Copyright Implications of Web Site Modification Technology*, 89 CAL. L. REV. 817, 861 (2001) (arguing that requiring royalties for the use of unprotected works would theoretically lead to greater incentives to produce those works, conferring copyright protection on any currently unprotected class of works might create additional incentives to create such works). Although Rubin refers to unprotected works, this concept may be extended to unprotected uses of protected works as well. The prospect of greater remuneration for works already protected would increase the incentives to produce these works.

incentives to take creative photographs and to make them available to the public. All told, the court's application of the fair use exception was entirely in accord with copyright law's theoretical justifications. In handling this case of first impression, the court properly balanced the goal of broad provision of works of authorship with the author's incentives to create. **[This section will be augmented with more source support and greater development of these arguments, and probably will require rearrangement. I have outlined the arguments here parenthetically so you can see where the revisions of this paper will lead; I have all the materials in hand to support and augment these arguments, but wanted to get this draft to you ASAP.]**

D. The Fate of the Derivative Works Theory For Framed and Inlined Web Pages is Unclear*

*** Paul, here I have stopped working on the derivative works section since I would like to get your opinion before continuing. Although the derivative works theory has received a great deal of attention in the literature, I am not sure how much discussion to give it here, if any. I have declined to extensively discuss several other plausible theories, such as trademark dilution, claims under the Lanham Act, and so forth, so when I take a step back, I am unsure if it is wise to devote much attention to the derivative works theory. What's your opinion? I definitely have enough material to discuss it thoroughly, although even a cursory discussion takes up a great deal of space since the theory has a few different permutations.**

Although it has been suggested that the *Kelly* court may have simply been responding to the briefs, and for this reason alone did not address the derivative works theory,¹¹⁵ its complete omission from discussion at both the trial and appellate levels is striking. Although the derivative works theory has been criticized and relied on questionable precedent in the Ninth Circuit, the theory has been described as a more plausible theory of liability than infringement of the display right, and had been recently asserted in several cases prior to *Kelly*. Whether the failure to assert the derivatives work theory represents conscious abandonment on the part of the

¹¹⁵ See Hillel I. Parness, *Framing the Question: How Does Kelly v. Arriba Soft Advance the Framing Debate?*, 7 NO. 1 CYBERSPACE LAW. 9 (2002) (arguing that it is likely that the theory is still viable after *Kelly*).

parties – or the district court¹¹⁶ – is unclear, but in the absence of contrary authority, the theory ought still be considered viable by potential litigants in this area.

E. The Ostensible Availability of Technologies to Prevent Framing and Inlining of Copyrighted Works Ought Not to Significantly Affect Jurisprudence in This Area

Although various technologies and programming techniques may prevent most forms of undesirable linking, including framing and inline linking, potential plaintiffs should not be required to avail themselves of such methods before bringing copyright infringement suits relating to Internet hyperlinking.

Some commentators suggest that Internet copyright plaintiffs should employ technological measures to prevent copying, rather than relying on copyright law.¹¹⁷ Indeed, Web site operators may use simple programming methods to prevent essentially all kinds of unwanted linking.¹¹⁸ Such methods are typically effective, and the Digital Millennium Copyright Act affords legal protection against those who would attempt to circumvent such measures.¹¹⁹

However, while one may certainly wonder why a competent Web site operator would not voluntarily employ such measures, courts nonetheless should not require them to do so. If courts required Web site operators to use technological controls, search engines and others seeking to access copyrighted content would almost certainly seek out images that had not been protected by technological measures. Those images would likely reside on infrequently updated or shut -

¹¹⁶ Since the Ninth Circuit found infringement of the public right to display in the case of inline linking and framing, one may safely assume that the derivative works theory was seen as superfluous if it was considered at all.

¹¹⁷ See, e.g., Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technologies*, 4 J. SMALL & EMERGING BUS. L. 57, 91-92 (2000); Robert L. Tucker, *Information Superhighway Robbery: The Tortious Misuse of Links, Frames, Metatags, and Domain Names*, 4 VA. J.L. & TECH. 8, 143 (1999) (“[Technological solutions], which can block or redirect unauthorized links--are so simple and readily available that it is difficult to understand why anyone would want to resort to litigation rather than use the quick, certain, and comparatively inexpensive technological fix instead.”)

¹¹⁸ See Tucker at 143-46.

¹¹⁹ See The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2863-72 (codified at 17 U.S.C. § 1201 (Supp. IV 1998)). The Act prohibits manufacture or distribution to the public any product or any part of any product that is primarily designed for circumventing technological protections. 17 U.S.C. § 1201(a)(2)(A).

down Web sites, as well as on Web sites posted online by those ignorant of the aforementioned programming techniques. Preventing authors who post copyrighted content at such sites from seeking legal redress would provide a disincentive for the creation and dissemination of creative works.

Judicial economy strikes in favor of encouraging technological protection methods where possible, so as to discourage unnecessary lawsuits. Although it may be argued that retaining full copyright protection for copyrighted works on the Internet might provide an incentive for Web site operators to forgo technological controls, the high cost of retaining counsel and pursuing litigation would likely provide sufficient incentives for most copyright owners to employ technological protection methods where possible. Moreover, judicial economy is not the only consideration at issue here. When sites employ many types of technological controls, they may impede accepted types of fair use, such as classroom teaching, literary criticism, and research.

Finally, requiring Web sites to use technological controls will often simply force them into an antagonistic cycle of new prophylactic controls, soon countered by a new means by which to avoid or overcome these controls, and copyright owners ought not to face the possibility of losing protection for their works simply by refusing to take place in, or being trumped in, such a fruitless game. Those who do not utilize technological controls to prevent undesired forms of linking – for whatever reason – should not be deprived of their rights under copyright law. In this instance, legal certainty is highly preferable to requiring the use of various technological control measures of varying efficacy.

F. Neither the Legislature Nor the Courts Need Accord Search Engines Special Protection Under Copyright Law

Although the fair use analysis entails a highly fact-specific inquiry that may make firms' ex ante judgments of copyright liability difficult, such is preferable to attempts to enact special

legislation or to carve out special exemptions in the courts. As the Ninth Circuit's *Kelly* analysis indicates, even cases of undeniable copyright infringement shall constitute fair use when the defendant is merely seeking to achieve something akin to indexing, summarizing, and otherwise improving access to content on the Internet.¹²⁰ This is so even when the use is overtly commercial.¹²¹ However, when the copyright infringement is not necessary to the functionality of the search engine, the fair use exception shall not apply. A fact-specific inquiry is thus necessary in the case of each search engine in order to ascertain the necessity of the alleged infringer's use of the material, particularly when taking into account the development of new technologies and Web programming techniques. Legislation and judicial exceptions could only decrease the precision of this inquiry, while each would have to evolve in application, much like the fair use analysis has, in response to novel technological developments. Thus, while a full analysis of all legal issues faced by search engines is well beyond the scope of this Note,¹²² the current application of the fair use exception provides ample protection for search engines insofar as copyright law is implicated.

VI. CONCLUSION

In a case claimed to do everything from “endangering hyperlinking on the Internet”¹²³ to “only decid[ing] the slender issue that thumbnails of another's aesthetic photos are a fair use

¹²⁰ See *Kelly*, 280 F.3d at 942-43.

¹²¹ *Id.*

¹²² To provide but one important example, consider the possibility of “clickwrap agreements” that a Web site may utilize to require that users agree to terms and conditions before being allowed to browse the site. Were such a limited license to prohibit a search engine creating a link to the site, the owner of the site could presumably bring a private contract claim in order to enforce the license. This solution to the “hyperlinking problem” has, in fact, been judicially suggested. See Quinn at 70-71. Having not arisen under copyright law, such a claim would not be subject to the fair use defense. See *id.* While a full discussion of “clickwrap agreements,” including the possibility of their preemption by the Copyright Act, is beyond the scope of this Note, this example demonstrates that threats outside the auspices of copyright law may endanger uses that would be protected from copyright liability by the fair use exception.

¹²³ See n.97, *supra*.

when done for information-gathering or indexing purposes,”¹²⁴ *Kelly*’s actual implications fall squarely between these two extremes. *Kelly* evinces a desire on the part of the courts to avoid limiting new technologies, and the boundaries of this desire are not readily apparent. It is especially unclear whether this willingness to expand the scope of the fair use exception will carry over to industries beyond the vast confines of the Internet and high technology.

But despite these uncertainties, *Kelly* provides remarkably clear guidance for search engine operators and others who might wish to use thumbnails to link to copyrighted content. It also appears to comport with the goals of the copyright grant, equitably balancing the rights of copyright owners with the public’s need for information-gathering, indexing, and information location tools. As such, Congress need not accord search engines special protection under copyright law; *Kelly*’s holding is largely sound and sufficiently clear.

¹²⁴ Michael L. Baroni, *Photos and Fair Use Online: From Penthouse Pets to Kelly's Thumbnails*, Gigalaw.com, at <http://www.gigalaw.com/articles/2002-all/baroni-2002-03-all.html>.