

Kelly v. Arriba Soft: Toward Fair Use's Proper Role

As the Internet has expanded while undergoing tremendous commercialization, courts have struggled in the application of copyright law to an array of evolving technologies. Recent jurisprudence regarding fair use on the Internet may be seen as a microcosm of the larger battle between content creators and purveyors of new technologies. In *Kelly v. Arriba Soft*,¹ the Ninth Circuit attempted to lend the law regarding hyperlinking 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.² 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.³

This Note examines *Kelly* in the context of the larger debate regarding the increasing propertization of intellectual property, focusing on the case's implications for copyright law on the Internet. It attempts to reconcile the Ninth Circuit's analysis with relevant authority, casting a critical, yet ultimately approving, eye toward the court's emphasis on the transformative nature of the allegedly infringing use. It then proceeds to examine *Kelly*'s implications for websites desirous of using thumbnail images, inline linking, framing, and similar technologies.⁴ Although the Ninth Circuit's analysis has faced mixed reviews from legal commentators,⁵ this Note

¹ 280 F.3d 934 (9th Cir. 2002).

² *See id.* at 948.

³ *See id.*

⁴ 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.

⁵ *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

concludes that the decision is consistent both with recent jurisprudence and with the purposes of copyright law. Moreover, despite the dire predictions of some regarding *Kelly*'s implications for Internet hyperlinking, the decision does not threaten all, or even many, forms of hyper linking on the Internet.

I. THE TECHNOLOGIES AT ISSUE

Kelly involves several Internet-related technologies, including several that are typically disparate. The case necessarily implicates the technology currently surrounding search engines, including thumbnail images, shrunken versions of full-sized images which are ubiquitous on the Web and absolutely essential to visual search engines. They are at the heart of the first portion of the case. Second, the case involves software programs, technically referred to as "automated agents" or "autonomous agents," and commonly known as "robots" or "bots." A proper understanding of these agents' functioning, along with methods for controlling or affecting their functionality, is critical to a consideration of the proper role of copyright law in disputes regarding visual search engines. Several visual search engines also utilize some form of inline linking and framing, two methods for linking to content on the Internet. Much like "bots," these hyperlinking methods may be subject to technological controls.

A. "Thumbnail" Images

A "thumbnail" image is a smaller, lower resolution copy of a digital image that usually links to a larger image.⁶ They are often used to allow Web users, by first viewing the thumbnail, to determine whether they would like to download a larger, higher-resolution copy into their

holding was affirmed by the Ninth Circuit and Quinn's remarks are thus applicable to the appellate court's reasoning).

⁶ See "Thumbnail," Client Help Desk, at <http://www.clienthelpdesk.com/dictionary/thumbnail.html>. For a much more technical definition and description, see Harvey A. Cohen, *Access and Retrieval From Image Databases Using Image Thumbnails* (1996), available at http://homepage.cs.latrobe.edu.au/image/papers/ThumbRetrieval_ICIP96.pdf.

browser. Thumbnails usually link to the corresponding full-size image, but they serve their linking function no differently than an ordinary text hyperlink; that is, they may link to any kind of content. By definition, the creation of a thumbnail image requires that a copy of the full-size image be made.

B. “Autonomous Agents” or “Bots”

Software programs referred to in the computer science literature as “autonomous agents” or “intelligent agents,” and commonly known as “robots” or “bots,” are used for various types of data collection tasks. One important function of bots, often called “spiders” or “web crawlers” in the search engine context, is to automatically create the indexes upon which search engines are built.⁷ Bots traverse the Internet, recursively following hyperlink after hyperlink and indexing the web pages at each step along the way in order to create a database of webpages. Users may query a search engine to match terms contained in the search engine’s database and to retrieve the indexed page.⁸ Similarly, bots are used to create databases of images located on the Internet in order to allow users to search for particular images in visual search engines such as Google’s Image Search,⁹ Altavista’s Image Search,¹⁰ and Ditto Visual Search.¹¹

⁷ Stephen T. Middlebrook & John Muller, *Thoughts on Bots: The Emerging Law of Electronic Agents*, 56 BUS. LAW. 341, 343 (2000); see Niva Elkin-Koren, Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing, 26 U. DAYTON L. REV. 179 (2001).

⁸ See Jeffrey M. Rosenfeld, *Spiders and Crawlers and Bots, Oh My: The Economic Efficiency and Public Policy of Online Contracts That Restrict Data Collection*, 2002 STAN. TECH. L. REV. 3 (2002), p.2.

⁹ Available at <http://images.google.com>.

¹⁰ Available at <http://www.altavista.com/image/default>.

¹¹ The original Arriba Vista search engine has been modified and is now called Ditto Visual Search. Its latest incarnation is located at <http://www.ditto.com>.

C. 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 webpage that is a hybrid of both parties’ content.¹² Inline links allow a website to display a work residing on another website’s server within the context of its own website, as if the inlined work resided on its own server.¹³ 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 webpage, within a “frame” on the framing webpage. Frames allow Web authors to incorporate remote sites, either in their entirety or in part, into local Web pages, thus allowing viewers to “look through” the framing site to the framed site, without ever terminating the connection to the framing site.¹⁴ The actual framing involved in *Kelly* was much different than framing as typically implemented: after a user clicked on a thumbnail contained in the results of a search, Arriba’s search engine would display the image in a frame, replete with Arriba’s advertisements and lacking any of the image’s original context or identification as to source. Usually, framing websites frame an entire webpage, not simply an image; thus, the District Court and Ninth Circuit refer to Arriba’s practice as “inline linking and framing,” a concept distinct from both typical inline linking and framing, but involving elements of each.

¹² 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).

¹³ 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).

¹⁴ See Richard Raysman & Peter Brown, *Dangerous Liaisons: The Legal Risks of Linking Web sites*, 217 N.Y.L.J., April 8, 1997, at 3.

D. Technological Controls For Website Operators

A website operator may prevent the inline linking to, or framing of, her webpages or images by the use of simple programming techniques.¹⁵ Techniques of similar ease may be employed to prevent bots from extracting content from their websites. To prevent access by robots, a website may incorporate a “robot exclusion header,” a text file that informs the robot that its presence is unwelcome.¹⁶ While most bots respond appropriately to these instructions, compliance is entirely voluntary and predicated on the bot being programmed to read the header and to conform to its instructions.¹⁷

Several methods exist by which Web authors may prevent websites from linking to, inlining, or framing their websites. The most basic techniques include frequently changing the URL of a website’s main or subsidiary pages, or requiring a password or some other means of authentication in order to access a website’s content.¹⁸ These crude methods may curtail legitimate traffic, however, and the second may burden desired users with a clumsy registration process. Similarly, programmed commands may be used to prevent a site’s content being linked to by websites with a certain domain. Since inlining involves a simple hyperlink – albeit an IMG link rather than a HTTP link – and framing utilizes a HREF link in the context of the frameset, such programming techniques may be used to prevent inlining and framing as well, although simple techniques like the use of a proxy server exist to circumvent these restrictions.¹⁹ Also, these means prevent any linking at all from the unfavorable domain, which negatively affects

¹⁵ 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 Website Modification Technology*, 89 CAL. L. REV. 817, 842 n. 165 (2001); Quinn at 47; Sableman at 1341; Loren at 91.

¹⁶ See Rosenfeld at 3; see also Laura Quilter, *The Continuing Expansion of Cyberspace: Trespass to Chattels*, 17 BERKELEY TECH. L.J. 421, 424 n. 31 (2002).

¹⁷ See *id.*

¹⁸ See Beal at 732-33; Sableman at 1341.

¹⁹ This cite will be inserted ASAP ...

overall traffic. Some servers allow for less intrusive command sets that prevent outside domains from inlining images directly to their website, but allow access to the images only in their proper context. However, these methods are rather easily thwarted.²⁰ Finally, simple programming techniques may be used to prevent framing by other websites, although such methods are not foolproof either.²¹ Despite the relative ease by which many of these preventive measures may be defeated, those who attempt to do so could potentially face liability under the Digital Millennium Copyright Act's anticircumvention provisions.²²

II. LEGAL BACKGROUND

Kelly's invocation of existing law was relatively straightforward. As to the inline linking and framing, Arriba Soft had not actually copied anything, and the Ninth Circuit thus focused on *Kelly's* right to publicly display the work. With respect to Arriba Soft's creation and use of the thumbnail images, it was undisputed that *Kelly's* images were copyrightable and that Arriba Soft had copied them without authorization. Therefore, Arriba Soft's liability for its creation and use of the thumbnail images hinged entirely on the success of its fair use defense. A summary of the relevant doctrine follows.

²⁰ See Apache Server Frequently Asked Questions, at <http://httpd.apache.org/docs/misc/FAQ-G.html> (giving a command for preventing inlining of images, but noting that it may be circumvented either mischievously or by accident).

²¹ See, e.g., Web Design Group, Web Authoring FAQ: HTML Frames, at <http://www.htmlhelp.com/faq/html/frames.html>. A webmaster may prevent framing with a Netscape browser with a simple HTML command. However, if the user is using a different browser (such as Microsoft Internet Explorer), the webmaster must insert a command in the JavaScript programming language on the webpage. Most browsers allow their users to disable JavaScript commands if so desired, so this command could not prevent the framing of a website viewed by a potentially significant number of Web users. See also Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 MINN. L. REV. 609, 646 (1998) (discussing the use of methods employed by news organizations in a framing case, the first of which involved the dissolving of surrounding frames after a certain period of time, and the second, which involved dissolving the frames after a user sufficiently explored the framed website).

²² 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))).

A. Infringement of the Right to Publicly Display the Work

A copyright owner is granted the exclusive right to “display the work publicly.”²³ The Copyright Act’s definition of the term “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.”²⁴ Moreover, unlike the reproduction right, the display right extends to any copy of the work, including the original one.²⁵ The Act defines a display as “any act by which the initial performance or display is transmitted, repeated, or made to recur.”²⁶ 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.²⁷ 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 caused or at least “induced” it.²⁸

B. The Fair Use Exception

Congress codified the judicially-created fair use exception to protect otherwise infringing activity if used for purposes of scholarship, research, teaching, criticism, and news reporting.²⁹ 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.”³⁰

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

²³ 17 U.S.C. § 106(5).

²⁴ 17 U.S.C. § 101.

²⁵ See H.R. REP. NO. 94-1476, at 64 (1976).

²⁶ *Id.* at 63.

²⁷ 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).

²⁸ See *id.*

²⁹ See 17 U.S.C. § 107.

³⁰ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

. . . 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
- (4) the effect of the use upon the potential market for or value of the copyrighted work.³¹

These factors are intended to be illustrative rather than exhaustive.³² It was left to the courts to flesh out the factors, as they had done at common law.

III. CASE SUMMARY

A. FACTUAL BACKGROUND

Plaintiff Leslie Kelly, a professional photographer, displayed several of his copyrighted photographs at his website and at other licensed websites. Defendant Arriba Soft Corp. [hereinafter “Arriba”]³³ operated an Internet search engine which displayed the results of a user’s search query as thumbnail images.³⁴ Arriba generated the thumbnail images by using a “crawler” computer program, which would search the Internet to find images to index in its search engine.³⁵ 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.³⁶

³¹ See 17 U.S.C. § 107.

³² 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”).

³³ Arriba Soft changed its name to “Ditto.com” after the commencement of its litigation with Kelly.

³⁴ 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>.

³⁵ See *Kelly*, 280 F.3d at 938.

³⁶ *Id.*

Users of Arriba's search engine saw the thumbnails as search results. At the website'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 website, along with text describing the size of the image, a link to the originating website, the Arriba banner, and Arriba advertising.³⁷ After operating in this manner for several months, Arriba altered the program such that the results page contained two links, entitled "Source" and "Details," respectively.³⁸ The "Details" link produced a page similar to the one it had produced before, except with a thumbnail rather than the full-sized image.³⁹ By clicking on the "Source" link or the thumbnail from the results page, Arriba's site produced two new windows on top of its results page.⁴⁰ The window in the foreground contained the full-size image, imported directly from the originating website. Underneath that was a window displaying the originating webpage. This technique, in which the image from a second website is viewed within a frame that is pulled into the primary site's Web page, is called "framing."⁴¹

B. PROCEDURAL HISTORY

Upon learning that some of his copyrighted images were part of Arriba's database, Kelly brought a claim in the Central District of California against Arriba for copyright infringement.⁴² 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

³⁷ *Id.*

³⁸ *Id.* at 939.

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *Id.*; see also Nicos L. Tsilas, *Minimizing Potential Liability Associated With Linking and Framing on the World Wide Web*, 8 COMM'LAW CONSPECTUS 85, 86 (2000), *supra* n. 10 and accompanying text.

⁴² Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

display of Kelly's works, but that this reproduction and display constituted a noninfringing fair use under Section 107 of the Copyright Act.⁴³ Kelly appealed to the Ninth Circuit.⁴⁴

C. THE NINTH CIRCUIT'S ANALYSIS

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.⁴⁵ Kelly had established a prima facie case of infringement of the reproduction right for the thumbnail images, and infringement of the right of public display with regard to Arriba's inlining and framing. The Ninth Circuit analyzed each use in turn under the Copyright Act's "fair use" exception.

1. 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 promote its website directly.⁴⁶

However, the court determined that Kelly's images served an entirely different function than Arriba's thumbnail reproductions. 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 websites."⁴⁷ Because Arriba's use did not supersede Kelly's use, the court found Arriba's use transformative.⁴⁸ Thus, the first factor weighed in favor of Arriba.⁴⁹

⁴³ *Id.* at 1121.

⁴⁴ *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002).

⁴⁵ *See id.* at 939.

⁴⁶ *Id.* at 940.

⁴⁷ *Id.* at 941.

⁴⁸ *Id.* at 941-42.

⁴⁹ *Id.* at 942.

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.⁵⁰ Thus, this favor 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.⁵¹ 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.⁵²

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,”⁵³ 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.⁵⁴

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.⁵⁵

⁵⁰ *Id.* at 942-43.

⁵¹ *Id.* at 943.

⁵² *Id.*

⁵³ *Kelly*, 280 F.3d at 943 (citing *Campbell*, 510 U.S. at 591).

⁵⁴ *See id.*

⁵⁵ *Id.* at 944.

2. Inlining and Framing of Kelly's Full-Size Images

In analyzing Arriba's inlining and framing, the court acknowledged that no copies were made, and the court thus confined its analysis to the public display right.⁵⁶ The court explained that the legislative history emphasized the "broad nature of the display right," and indicated that the display of Kelly's images on a computer screen constitutes a public display per the statutory definition.⁵⁷ Next, the court examined two district court cases, each of which found infringement of the display right.⁵⁸ The court refused to distinguish the cases on the grounds that both involved actual copying.⁵⁹ Rather, the court emphasized the "active role" the defendants had taken in creating the display of the copyrighted images.⁶⁰

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,⁶¹ the court concluded that all four statutory fair use factors weighed in favor of Kelly. In short, the inlining and framing of Kelly's images superseded Kelly's market.⁶²

IV. DISCUSSION

This Note attempts to explain *Kelly's* likely impact on linking law and to elucidate the case's 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 that may well serve as harbingers of future trends in this area of law.

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F.Supp. 543 (N.D.Texas 1997) (holding the operator of a Website 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).

⁵⁹ *See id.* at 946.

⁶⁰ *Id.* at 946.

⁶¹ *Kelly*, 280 F.3d at 947.

⁶² *See Kelly*, 280 F.3d at 947-48.

This Note first attempts to make clear that although it has been argued that the Ninth Circuit's condemnation of inline linking and framing may have dire consequences for all forms of hyperlinking on the Internet,⁶³ close examination of the court's reasoning quickly puts this argument to rest. Despite language sometimes lacking in technical precision, the court accurately captured 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 inlining and framing are not – reflects a result entirely in line with recent fair use jurisprudence.

If any valid concern exists with the Panel's opinion, it may well be that the inquiry into the transformative nature of the 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 "functionality distinction,"⁶⁴ may be a proper step in Internet hyperlinking jurisprudence, however. It could indicate that, at least insofar as the Internet is concerned, courts are finally paying proper attention to the public interest when attempting to balance issues of incentives and access. Thus, liberal application of the fair use exception may reflect a truly proper balance of providing for the dissemination of information with copyright owners' right to control the public display of their works.

The Note then rejects the argument that copyright owners should be forced to utilize technological protections before bringing suit under copyright law, and concludes by noting the plethora of legal issues potentially implicated by database creation and hyperlinking.

⁶³ 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.").

⁶⁴ *See Kelly*, 280 F.3d at 942-43.

A. Kelly's Implications for Internet Hyperlinking

Some have claimed that the court's condemnation of inlining and framing 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."⁶⁵ One *amicus* of Arriba Soft claimed 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)."⁶⁶ In practical terms, this assertion is incorrect. In the context in which the Panel used the term "direct link,"⁶⁷ it was referring to the instructions in the framing site's frameset documents that cause the web page to be displayed within a frame.⁶⁸ 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. Indeed, the Ninth Circuit did not even address the possibility of HREF linking constituting direct copyright infringement in this case, much less lend it its approval. While dire predictions of hyperlinking's impending doom carry great rhetorical force, such fears are unfounded.

B. The Importance of the "Transformative Use" Analysis

Not only does the Ninth Circuit's ruling fail to portend any real doom for hyperlinking, but the court's analysis indicates that so long as a use is arguably transformative, factors militating against a fair use claim will likely be ignored. Indeed, if anything is to be feared by

⁶⁵ *Id.*

⁶⁶ 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.

⁶⁷ *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.").

⁶⁸ *See Wassom* at 208.

the copyright academe, it is that the transformative use inquiry may come to swallow the entire fair use analysis. Such would have particularly profound effects if the court's indication, that any use with a different purpose than the original constitutes a "transformative" use, indeed comes to pass.

1. *Kelly* May Reduce the Entire Fair Use 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 transformative uses, those that alter a copyrighted work "with new expression, meaning, or message," lie at the heart of the fair use doctrine.⁶⁹ In *Campbell*, the Supreme Court emphasized the importance of the transformative use analysis, but 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.⁷⁰ Arriba's use, in contrast, involved the copying of the images in their entirety. Neither any information, nor anything else of cognizable value, was added to the images themselves. However, the thumbnails serve an entirely different *function* than the full-sized images—improving access to content, rather than serving as artistic expression⁷¹—and this functionality distinction is at the heart of the Ninth Circuit's analysis. Still, Arriba's shrinking of the images is transformative, but clearly not as transformative as the act of the defendants in *Campbell*.⁷² Since the degree of transformation is inversely related to the weight accorded other factors—that is, the more transformative the new use, the less important other factors

⁶⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁷⁰ See Quinn at 63-64.

⁷¹ See *Kelly*, 280 F.3d at 941.

⁷² See Quinn at 64.

become⁷³—*Kelly*'s indication of willingness to find many new uses transformative may portend especially broad application of the fair use exception on the Internet.

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

Indeed, the practical instruction to be taken from the court's ruling 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 those who champion an emphasis on the transformative nature of the use would intend their reasoning to stretch so far is up for debate, although the court's result appears consistent with relevant precedent.

C. *Kelly*'s Result Accords With Both Judicially-Crafted Norms and Copyright's First Principles

Having examined *Kelly*'s seeming overemphasis on the transformative nature of an allegedly infringing use, this Note shall now explain how the court's reasoning—even if it did stretch transformative use further than it was intended to be stretched—was the normatively correct step in Internet hyperlinking jurisprudence. First, although the reduction of the fair use inquiry to an examination of a single factor – transformative use – may expose it to anomalous results, it is nonetheless in accord with recent fair use jurisprudence. Second, *Kelly*'s ultimate emphasis on market effects actually 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

⁷³ See *Kelly*, 280 F.3d at 940 (citing *Campbell*, 510 U.S. at 579).

test. This relatively recent shift in the analysis of the fair use defense in *Kelly* is the proper direction for the courts to take, for it allows fair use to play its proper role as an important factor in the copyright bargain.

1. The Court's Emphasis on Transformative Use is in Accord With Recent Precedent

For the better part of a decade, the judicial crafting of the fair use exception has been relatively coherent and unified. The clear direction has been away from rigid categorical judgments and toward an emphasis on the transformative nature of an otherwise infringing use.⁷⁴ The Supreme Court's most recent fair use case⁷⁵ saw it emphasize the lost emphasis on "productive use,"⁷⁶ but "in the context of a far more sophisticated discussion, related in every detail to the basic objectives of copyright doctrine."⁷⁷ *Kelly*'s emphasis on transformative use, then, comports with recent precedent.

2. The Emphasis on Transformative Use is Normatively Correct

Kelly's emphasis on transformative use, through effects both intended and unintended, nudges Internet hyperlinking jurisprudence toward a proper application of copyright law. As previously discussed, *Kelly* indicates that nearly any use, so long as it does not entirely subsume the original, will be considered transformative.⁷⁸ While such an expansive application of the term may be unwarranted, its result—potentially broad application of fair use, allowing the exception to play a tangible, if not an integral, role in balancing an author's incentives to create

⁷⁴ See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (contending that justification for the fair use exception primarily turns on whether, and to what extent, the challenged use is transformative); see also *Campbell*, supra n. 73 and accompanying text.

⁷⁵ *Campbell*, supra note 73.

⁷⁶ See Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19-20 (1994) (arguing that the Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), announced that productivity was not an essential requirement of fair use only because it did not square well with that case's particular facts).

⁷⁷ Leval, 13 CARDOZO ARTS & ENT. L.J. at 23.

⁷⁸ See Part B(2), *supra*.

vis-à-vis the public’s right of access—reflects a proper understanding of fair use’s role in the copyright grant. Indeed, “fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.”⁷⁹ The Ninth Circuit’s fair use analysis in *Kelly* reflects this fundamental understanding.

a. Market Analysis

The effect on the market for the copyrighted work, the most important of the four statutory factors,⁸⁰ fully rationalizes *Kelly*. Any other market approach would reflect an improper balancing of incentives and access. For instance, those espousing a “neoclassicist” view contend that, absent incurable market failure, copyright law should allow content creators’ exclusive rights to encompass the economic value of all uses to which an author’s work is currently put or may be put in the future.⁸¹ They even contend that authors who use existing expression transformatively in creating new expression should generally also have to pay full market price for this use.⁸² Authors could realize this economic value by charging visual search engines a negotiated royalty for copying images as part of creating, and ultimately displaying, thumbnails of the authors’ copyrighted images. Although allowing Arriba Soft to copy images in order to create and use thumbnails without charge forecloses this potential licensing market, each fair use claim necessarily precludes such a market.⁸³ The sole legitimate inquiry as to

⁷⁹ Leval, 103 HARV. L. REV. at 1107.

⁸⁰ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating that this factor is “undoubtedly the single most important element of fair use”).

⁸¹ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 340 (1996).

⁸² Netanel at 316 (citing Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1634, 1640-41 (1982)).

⁸³ See Leval, 103 HARV. L. REV. at 1124.

market effects is thus whether the infringing use “supersede[s] the use of the original,”⁸⁴ and this dovetails with an inquiry into whether the infringing use was “transformative.” More precisely, the only situation in which a transformative use would negatively affect the market would be when the new use arguably has a different purpose or character yet still serves as a market substitute for the original. Such a case is likely to be rare, if not outright unimaginable. Were the court to instead allow for greater propertization of copyright by imposing stricter criteria to find transformative use, thereby decreasing the scope of the fair use exception, markets for legitimate products—such as a visual search engine that functions as a powerful research tool—would likely be foreclosed. This would create at least one avenue by which potentially deleterious effects on expressive diversity and public education could be realized; such a result should be fervently opposed.

The court’s analysis of inlining and framing provided a similarly well-reasoned application of the transformative use analysis, albeit while moving in the opposite direction. Quite simply, such practices supersede the purpose, and market, of the author’s creative works; they exploit the value of the original works while adding no new expression, meaning, or message. The inlining and framing of images removes opportunities for advertising revenue,⁸⁵ and may well de-emphasize or entirely remove proper attribution of the work. Both inlining and framing, at least in the manner in which Arriba Soft carried them out, provide disincentives to authorship of creative works, and each was rightly criticized by the court in *Kelly*. Thus, through proper application of fair use, the Ninth Circuit adequately protected content creators’ incentives without veering too closely to excessive protectionism.

⁸⁴ See *id.* (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D.Mass.1841) (No. 4901)).

⁸⁵ See *Kelly*, 280 F.3d at 948; see also O’Rourke, *supra* note 21, at 651 (noting that in a case involving deep linking, which evokes analogous concerns as framing and inlining, such conduct “may frustrate the evolution of [the advertising] marketplace by placing limitations on the parties’ negotiations”).

b. The Fair Use Exception Assumes Its Proper Role

In *Kelly*, the legitimacy and importance of the fair use exception on the Internet was made clear. Congress has been said to usually respond to technological change with excessive protectionism,⁸⁶ and many scholars have urged courts to give fair use its due; that is, to apply it not as a loose bundle of exceptions, but as an integral part of copyright law.⁸⁷ Some have particularly emphasized the role fair use should assume on the Internet.⁸⁸

Taking these commentators' points as valid, it stands to reason that even if transformative use swallows the remainder of the fair use inquiry and becomes the de facto standard for the fair use analysis, this represents a step in the proper direction. Fair use is not simply a tool of access; it is a tool of inclusion by which new forms of expression and new works may be generated.⁸⁹ Since each advance stands on building blocks fashioned by prior thinkers, the fair use of copyrighted material in order to create new expression and uses must be preserved.

D. Technological Controls – Practically Integral, Legally Irrelevant

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.

⁸⁶ Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

⁸⁷ See Lloyd L. Weinreb, *Fair Use*, 4 FORDHAM L. REV. 1291, 1310 (1999); Netanel, *supra* note 81; Leval, *supra* note 74; but see Adelstein & Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT'L REV. L. & ECON. 209 (1985) (arguing for the abolition of the fair use defense in response to technological change); Fleischmann, *Impact of Digital Technology on Copyright Law*, J. PAT. OFF. SOC'Y. 5, 25 (1988) (same).

⁸⁸ See DanThu Thi Phan, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 216 (1998); Litman at 275.

⁸⁹ Okediji at 154.

Some commentators suggest that Internet copyright plaintiffs should be required to employ technological measures to prevent copying, rather than relying on copyright law.⁹⁰ However, while one may certainly wonder why competent website operators would not voluntarily employ such measures, courts nonetheless should not require them to do so. If courts required website operators to use technological controls, specialty search engines and other sites would have no reason to refrain from framing, inlining, or otherwise inappropriately linking to sites lacking effective technological measures. Moreover, the Digital Millennium Copyright Act's anticircumvention provisions leave a great deal of room for interpretation of various terms. For instance, 17 U.S.C. § 1201(a)(1)(A) only prohibits circumvention of a technological protection measure that *effectively* controls access to a protected work.⁹¹ The actual efficacy of most technological measures attempting to constrain Internet hyperlinking varies greatly,⁹² and such differences would result in great inequity in prevention and enforcement. Preventing authors who post copyrighted content at unprotected sites from seeking legal redress would provide a significant disincentive for the creation and dissemination of creative works.

Still more problematic are technological protection measures' effects on fair use. When websites employ many types of technological controls, they may impede all types of fair use, including, but not limited to, classroom teaching, literary criticism, and research. Thus, although technological protection measures would likely promote judicial economy, and may well be used by a great number of websites, their use ought not be required in lieu of copyright protection or as a necessary condition for bringing legal action. Those who do not utilize technological

⁹⁰ 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.”)

⁹¹ See 17 USCS § 1201(a)(1)(A) (2002) (emphasis added).

⁹² See note 20, *supra*.

controls to prevent undesired forms of linking – be it for economic reasons, lack of programming experience, or a conscious decision to allow unfettered access by legitimate users – should not be deprived of their rights under copyright law.

E. Other Legal Theories of Liability

For all *Kelly* does to clarify the law of linking on the Internet, it cannot lend absolute certainty to this most unsettled body of law. Various other theories of liability not asserted in *Kelly* have an unclear basis in law yet may form the basis for liability for Internet hyperlinking in the near future. A few of the legal theories potentially implicated in Internet hyperlinking and search engine data collection claims might include trademark infringement, trademark dilution, unfair competition, trespass to chattels, violation of database protection laws, and breach of contract. A full discussion of these theories is well beyond the scope of this Note, and each has received copious attention in the literature. However, “clickwrap” agreements, or any other contract by which access to copyrighted works is sold or otherwise limited, may significantly affect fair use on the Internet and merit brief discussion here.

Recent appellate caselaw indicates that an agreement in which a user agrees, as a condition of entering and browsing a website, not to copy any or all of the content contained therein, can be written and applied so as to be enforceable under state contract law.⁹³ An increasing amount of creative works are published primarily or exclusively online, and the digital environment contains no analogy to the public library, at which copyrighted materials may dependably be found for free. Moreover, one who buys a book usually has no contractual relationship with the author, publisher, or bookseller regarding how the person may use the

⁹³ See Lydia J. Wilhelmi, Comment, *Ensuring Enforceability: How Online Businesses Can Best Protect Themselves From Consumer Litigation*, 86 MARQ. L. REV. 181, 188-92 (2002) (citing cases).

book.⁹⁴ The buyer's rights to read the book, make notes in it, copy expression or ideas from it, or dispose of it through sale, rent, or gift are all determined by the nature and scope of the copyright owner's exclusive rights in the literary work embodied in the book and the buyer's property rights in book itself.⁹⁵ If a given work exists only in an electronic database, it may have to be obtained via a subscription contract or other agreement with the database provider.⁹⁶ Even if a user could locate the resource and was willing to pay for it, the database provider may well condition access on the user's binding promise to refrain from uses that might be considered fair use under copyright law.⁹⁷ Conceivably, such contracts could create ownership rights approaching, or eclipsing, the level of copyright protection, even for works that exist in the public domain.⁹⁸ Such limitations on access may have profound consequences for fair use of resources located exclusively online, whether the affected person is a child creating a library report or a critic attempting to create a parody for the purpose of social commentary. These examples not only demonstrate major issues implicated by clickwrap agreements, but also serve to reinforce the integral nature of the fair use exception.

V. CONCLUSION

In a case claimed to do everything from “endangering hyperlinking on the Internet”⁹⁹ to “only decid[ing] the slender issue that thumbnails of another's aesthetic photos are a fair use when done for information-gathering or indexing purposes,”¹⁰⁰ *Kelly's* actual implications fall

⁹⁴ Netanel, *supra* note 81, at 385.

⁹⁵ *Id.*; see also Quinn at 71.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.* (citing PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 223-34 (1994); Jane C. Ginsburg, *Copyright Without Walls?: Speculations on Literary Property in the Library of the Future*, *REPRESENTATIONS*, Spring 1993, at 53, 59-64; Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 *JURIMETRICS J.* 311 (1995).

⁹⁹ See n.97, *supra*.

¹⁰⁰ 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>.

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 definitive guidance for search engine operators and others who might wish to use thumbnails to link to copyrighted content. In the clear-cut instance of inlining and framing, the court clearly came down on the side of the author, while the opinion was also crafted to comport with the recent jurisprudential trend toward liberal application of the fair use exception through an analysis of the “transformative” nature of the allegedly infringing thumbnails. The case’s balanced result is in accord 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. Through *Kelly*, the Ninth Circuit has clearly opened its arms to new works and technologies that incorporate preexisting works in a transformative manner. In this small yet significant portion of the overall battle between technology and content, the Ninth Circuit came down clearly on each side, but gave signs that the winds may be shifting toward technology.