

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

Outline

I. INTRODUCTION

- a. Statement of the Ninth Circuit's holding in *Kelly*
 - i. The downloading and copying of full-size images, their conversion into "thumbnail" images, and posting these images on the Web for use in a visual search engine constituted fair use.
 - ii. The unauthorized inline linking to, and framing of, Kelly's images violated his exclusive right to display the images publicly.
- b. Possible Implications of the Holding
 - i. The true implications of the holding fit somewhere between the disparate contentions of the *amici*
 - 1. Google and EFF – partially accurate, partially histrionics
 - 2. ASMP
 - ii. General implications of the holding for fair use on the Web
- c. Goals of this Note
 - i. *Kelly*'s likely effects, stated generally
 - ii. That which is beyond the scope of this Note
 - 1. Trademark, misappropriation, dilution, unfair competition, etc. – since Kelly does not directly implicate these theories of liability, not discussed herein
 - 2. Footnote giving sources for information on those matters

II. THE TECHNOLOGIES AT ISSUE, BRIEFLY (To be culled from several different articles)

- a. Inline Linking ("Inlining")
- b. Framing
- c. "Thumbnail" Versions of Images ("Thumbnails")

III. LEGAL BACKGROUND (Chiefly as submitted in the briefing paper, although rearranged and selectively augmented)

- a. The Right of Reproduction
- b. The Public Display Right
- c. The Right to Prepare Derivative Works
- d. Secondary Liability
- e. The Fair Use Exception

IV. SUMMARY OF THE CASE

- a. Truncated version of the version turned in for the first assignment

- b. Brief summary of significant issues brought up in the District Court case but not discussed by the Ninth Circuit
- c. Additional issues not addressed at the trial or appellate levels
 - i. Infringement of the right to create derivative works
 - ii. The DMCA's protections for copyright management information as codified in 17 U.S.C. § 1202.

V. DISCUSSION

- a. *Kelly* Does Not Pose a Threat to All, or Even Many, Forms of Hyperlinking to Content on the Internet
 - i. Despite its sometimes technically incorrect language, the Panel's opinion is clear
 - 1. As written, the opinion does indeed contain some "troubling" language that would seem to threaten hyperlinking in general
 - 2. The petition for rehearing has still not been acted upon by the court.
 - ii. Kelly correctly proscribes the violation of the author's display right by the use of code that displays the image in a context other than that desired by the owner, not by actually "importing" the image to the framing Web site
 - 1. "A display is "any act by which the initial performance or display is transmitted, repeated, or made to recur." See H.R. REP. NO. 94-1476, at 63 (1976). Although the meta-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." 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).
 - 2. Still, speculation prior to the decision was mixed regarding violation of the public display right by a framing Web site
 - a. Compare Allison Roarty, *Link Liability: The Argument For Inline Links and Frames as Infringements of the Copyright Display Right*, 68 FORDHAM L. REV. 1011, 1056 (framing does infringe display right) with Wassom at 209 (framing does not infringe display right).
 - b. Compare *Gilliam v. American Broadcasting Cos.* (finding infringement by editing portions of a Monty Python movie).and *National Bank of Commerce v. Shaklee Corp.* (finding infringement for adding advertisements to book cover) with *Paramount Pictures Corp. v. Video Broadcasting Systems, Inc.* (adding commercials to video versions of copyrighted movies does not constitute infringement).
 - i. Thus, as Wassom concludes, the mere juxtaposition of advertisements with copyrighted content does not

- infringe the right of public display; *Paramount* seems most relevant given the particular objections of framed Web sites.
- ii. Such advertisements might be relevant to a potential Lanham Act claim, however. *See* Wassom at 211-12.
 - iii. Insofar as infringement of the derivative work right by a framing site is concerned, any blocking of the framed site's advertisements is likely to be a highly fact-specific inquiry.
- iii. The decision does not necessarily portend the death of framing
 1. The particular sort of framing in *Kelly*, involving the display of only selected portions of the referenced Web page, is essentially only a slight variation on inlining. As such, it does not necessarily address the issue of framing entire Web pages. *See* Hillel I. Parness, *Framing the Question: How Does Kelly v. Arriba Soft Advance the Framing Debate?*, 7 No. 1 CYBERSPACE LAW. 9 (2002).
- b. *Kelly* May Reduce the Fair Use Inquiry For Copyrighted Content Posted Online to an Inquiry Into a Single Factor: Transformative Use
 - i. The "functionality distinction" seems to overcome all other fair use considerations
 - ii. The court's invocation of *Campbell* may be somewhat misplaced
 1. Is the mere shrinking of full-size copyrighted images truly "transformative?"
 - a. *See* Okediji at 168 (arguing that despite Arriba's shrinking of *Kelly*'s images, its use still constituted copyright infringement, not fair use).
 2. The fair use doctrine in the context of parody may be inapposite to other forms of allegedly infringing uses (such as that at issue in *Kelly*)
 3. Reconciliation, conclusion that *Campbell*'s teachings are indeed applicable to other situations requiring fair use analysis
- c. When Returning to Copyright's First Principles, To Balance Incentives and Access, the Panel's Opinion is Sound
 - i. An alleged infringer who inlines copyrighted works in their entirety and surrounds them by advertising should not be allowed to avail itself of the fair use defense.
 1. This would severely undermine incentives to create and publish creative works, and the import of this is clear from the fourth statutory fair use factor (effect on the market for the copyrighted work).
 - a. This is true even if the "market" is the market for licensing of the images in question rather than for the images themselves.

2. Display of the entire copyrighted work is not necessary for Ditto's new technology to perform or, specifically, to serve its function as a "research tool." Web users can use it to access full-sized images, so access is not of concern.
 3. Incentives for the development of technologies such as Ditto's are not harmed, since the search engine still has ample opportunities to advertise via various mechanisms. Kelly, in contrast, cannot advertise at all if his images are able to be displayed without the surrounding context.
- ii. In this, as in all cases, there ought to be a fact-specific inquiry into the actual effects on the copyright owner's market(s), and by application, the author's incentives to create.
 1. In *Kelly*, the framing/inlining decision is almost certainly correct if Kelly obtains significant revenue from advertising.
 2. If Ditto's search engine actually provided more customers for the books and corporate retreats advertised on the sites in question, no actual damage has occurred.
 - iii. However, the court's approbation given thumbnails ought not be read too broadly, since in another context, the thumbnails themselves could have value
 1. Such possible contexts include pornography (as such images could still "titillate"), cartoon characters (thumbnail images could serve as replacement icons for one's desktop); photographs of persons or landmarks (in order to serve a mere informative function, as in the case of a picture on a "bio" page)
 - iv. Moreover, "[a] work which transforms an original document for research purposes can also qualify as a transformative use under section 107. Indeed, the Second Circuit has remarked that "[i]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end." Wassom at 226, citing *New Era Publications Int'l v. Carol Publ'g Group*, 904 F.2d 152, 156 (2d Cir. 1990). Although the *Kelly* court did not state it specifically, Arriba's search engine's value as a research tool may be significant not just for vague claims of "public benefit," but also for analysis of the purpose and character of the allegedly infringing use.
 - v. To more specifically examine the *Kelly* court's finding that Arriba's use was not highly exploitative, profit motive must be distinguished from wrongful exploitation.
 1. Application of *Sony Corp. of America v. Universal City Studios, Inc.*
 2. *See also* Wassom at 229 (arguing that if profit motive were fatal to fair use, the first statutory fair use factor would swallow the entire fair use inquiry)
- d. The Panel's Holding May Portend Broad Application of the Fair Use Doctrine in Internet Cases

- i. Discussion of how far the ruling may extend
- ii. It would appear that any use that could be considered transformative in any way will presumably be held to constitute fair use. Kelly indicates that many uses will be considered transformative, and for a variety of reasons.
 - 1. Examples
 - 2. Fair use will be particularly entrenched in cases involving “normal indexing and summarizing” uses involving hyperlinks. See Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1291 (2001).
- iii. The Panel’s Holding Evinces a Strong Desire to Avoid the Limitation of New Technologies
 - 1. The holding is consistent with courts’ general tendency to favorably apply the fair use exception where the allegedly infringing work results in an entirely new product. See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine For Cyberspace*, 53 FLA L. REV. 107, 131 (2001).
- e. *Kelly’s* Implications for the Derivative Works Theory are Unclear (* Note: I am strongly considering moving this to an earlier portion of the argument.)
 - i. It is likely that the derivative works theory is not dead, and that the *Kelly* court was merely responding to the hand it was dealt. See Parness (no pg. #).
 - ii. See Aaron Rubin, Comment, Are You Experienced? *The Copyright Implications of Web Site Modification Technology*, 89 CAL. L. REV. 817, 832 (2001) (contending that violation of the right to create derivative works is more plausible than infringement of the right to publicly display the work).
 - iii. The right to prepare derivative works may be infringed “even if no unlawful copy of the material is made.” Kenneth Freeling and Joseph E. Levi, *Frame Liability Clouds the Internet’s Future*, N.Y.L.J., May 19, 1997, at 512. “The work may be deemed violated if a legally owned copy of the copyrighted work is merely altered, modified or presented to the public in a distorted form.” *Id.* (this seems to implicate Lanham Act claims, however, and it is unclear how “distorted” a work placed in a frame would be.) Also, per *Galoob*, “a party who *distributes* a copyrighted work cannot dictate how that work is to be enjoyed.” 964 F.2d at 971. By posting the content online, Kelly has arguably “distributed” the work to the public.
 - iv. However, the derivative works theory has not been widely received.
 - 1. Commentators have criticized the theory
 - 2. Questionable Ninth Circuit Precedent (*Mirage*, *Munoz*)
 - 3. The framing of a Web site does not necessarily mean that it has been “recast,” “transformed,” or “adapted.”
 - 4. Some case law, however, suggests that frames impermissibly modify the referenced page.

- a. Arguments on both sides
- b. Ultimate outcome is unclear
- c. Guidelines to follow
 - i. Framing an entire web page is likely to come out differently than inlining images. A search engine such as Arriba's would likely merely "enhance" a Web site which displayed images, as it would facilitate access to it. By using HTML code to display the full-sized images so that users seeking only the images would not have to visit Kelly's site, however, Arriba's search engine effectively functions as a substitute for the images Kelly had posted on his own Web site (note: this wording is technically incorrect – I will find a way to better state it). *See Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 969 (9th Cir. 1992) (suggesting that a "transformed" or "recast" derivative work is one that can at least partially serve as a stand- alone replacement for, or improvement to, the original--that a derivative work "duplicate[s]" the function of the original.)
- f. The Ostensible Availability of Technologies to Prevent Framing and Inlining of Copyrighted Works Ought Not to Significantly Affect Jurisprudence in this Area.
 - i. *Compare* 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) (arguing for the use of technological measures to prevent referencing by combinative works) *and* Sableman at 1341 n. 346 (citing Robert L. Tucker, *Information Superhighway Robbery: The Tortious Misuse of Links, Frames, Metatags, and Domain Names*, 4 VA. J.L. & TECH. 8, at PP 143, 145 (1999) (“[Technological methods], 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.”) *with* Roarty at 1057-58 (listing several reasons why technology should not be exclusively relied upon to remedy unwanted links) *and* Beal at 733 (“Unavoidably, for every technical prophylactic, there will be a corresponding technical advance to avoid or overcome the remedy. This will be a continuing circular battle, and it emphasizes the need to protect proprietary rights on the Internet.”)
 - ii. Conclusion: Legal certainty is preferable to the use of various technological fences of differing efficacy. Such fences might also cause problems for legitimate fair uses, such as classroom teaching.
- g. Courts May Wish to Accord Search Engines Special Protection Under Copyright Law
 - i. Direct liability

- ii. Secondary (derivative) liability
- iii. Examples in which fair use might not protect legitimate search engines
- iv. Conclusion: These few examples are not enough to merit special copyright protection for search engines; fair use is sufficient.

VI. CONCLUSION