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9TH CIRCUIT UPHOLDS USE OF THUMBNAILS IN A SEARCH ENGINE AS FAIR USE UNDER COPYRIGHT LAW BUT REVERSES ON ISSUE OF WHETHER USE OF FULL-SIZED IMAGES WAS FAIR USE

[Kelly v. Arriba Soft Corp., 2003 U.S. App. LEXIS 13562 (9th Cir. July 7, 2003).

Arriba Soft operates an Internet search engine that displays its search results in the form of low resolution "thumbnails" pictures.¹ By clicking on the thumbnail, the user can then view a larger version of the same picture within Arriba Soft's webpage. Arriba developed a program that crawls the Internet looking for images to index.² The program then creates smaller images.³ Once the smaller, lower-resolution, thumbnail picture is created, the Arriba program deletes the full-sized original from its server.⁴ Although users can copy the thumbnails to their own computers, users cannot increase the resolution of the thumbnail without a loss of clarity of the image.⁵ Once a user clicks on the thumbnail, an image attribute page is appears that is used as an in-line link to display the full-sized image with a link to the original website along with the Arriba banner and advertising.⁶

In January of 1999 the Arriba crawler copied 35 of Kelly's images from a web site. Kelly had not given permission to copy his images and objected when he discovered that the images had been copied.⁷ Kelly brought an action against Arriba Soft when he discovered his pictures were being used on the Arriba Soft site.⁸ The district court granted summary judgment in favor of Arriba finding that the use of both thumbnail images and the full-sized images was fair use.⁹

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There are exceptions to a claim of copyright infringement. Fair use is one such exception. The Fair Use exception "'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law was designed to foster.'"¹⁰ The Fair Use test involves a four factor analysis: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education 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."¹¹

In this case, the court noted that "the thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals. In addition, they benefit the public by enhancing information-gathering techniques on the internet."¹² Thus, the first prong of the fair use test favored Arriba "because of the public benefit of the search engine and the minimal loss of integrity to Kelly's images."¹³

The court noted that published works are more likely to qualify for fair use because the first expression of the artist has already occurred.¹⁴ Works that are creative in nature, like photographs that are meant for viewing, come closer to the intention of copyright protection and get more protection than a written publication. Balancing these two elements in considering the nature of the copyrighted work, the court concluded that the nature of the copyrighted work in this case favored Kelly, but only slightly.¹⁵

The extent of copying that is permissible varies with the purpose and character of use.¹⁶ The court concluded that the factor for amount and substantiality of the portion used did not weight in favor of either party.¹⁷ The court concluded that while Arriba had copied the images as a whole, that copying was reasonable in view of the use that was being made of the images.¹⁸



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In looking at the effect of the use on the potential market for a copyrighted work, “a transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work.”¹⁹ The court concluded that “Arriba’s use of Kelly’s images in its thumbnails does not harm the market for Kelly’s images or the value of his images. . . Even if users were more interested in the image itself rather than the information on the web page, they would still have to go to Kelly’s site to see the full-sized image. The thumbnails would not be a substitute for the full-sized images because the thumbnails lose their clarity when enlarged.”²⁰ The court was careful to note, however, that “we do not suggest that the inferior display quality of a reproduction is in any way dispositive or will always assist an alleged infringer in demonstrating fair use.”²¹

The district court had also granted summary judgment to Arriba with respect to whether the full-size images were fair use. The 9th Circuit noted that the court broadened the scope of the motions for partial summary judgment to include the full-size images.²² “With limited exceptions that do not apply here, a district court may not grant summary judgment on a claim when the party has not requested it.”²³ Thus, the court remanded the case for further proceedings on whether the use of full-size images was infringement.²⁴

¹ 2003 U.S. App. LEXIS 13562 at *2.

² *Id.* at *3.

³ *Id.* at *4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at *7.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *10 (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997)).

¹¹ *Id.* (citing to 17 U.S.C. § 107).

¹² *Id.* at *17-18.



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¹³ *Id.* 1t 18-19.

¹⁴ *Id.*

¹⁵ *Id.* at *19.

¹⁶ *Id.* at *20.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *21.

²⁰ *Id.* at *22-23.

²¹ *Id.* at *23, n. 37.

²² *Id.* at *24.

²³ *Id.* at *24-25 (citing *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1452 (9th Cir. 1984)).

²⁴ *Id.*