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Khio D. Dang

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KELLY V. ARRIBA SOFT CORP.: COPYRIGHT LIMITATIONS ON TECHNOLOGICAL INNOVATION ON THE INTERNET

Khoi D. Dang†

I. INTRODUCTION

The Copyright Act confers upon owners of copyrights the right to prevent others from reproducing and publicly displaying their copyrighted works.\(^1\) Specifically, section 106 states that “the owner of a copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies” and “to display the copyrighted work publicly.”\(^2\) However, with the growing number of computer users accessing the Internet, and the advance of innovative technologies organizing this access to information in meaningful ways, copyright owners’ exclusive rights to reproduce and display their copyrighted works on the Internet, and the burgeoning technologies to facilitate access to information, have increasingly come into conflict.\(^3\)

† Khoi graduated from the University of California, Los Angeles, in 1996 with a B.A. in English Literature as well as a B.A. in Political Science. Khoi then received his Masters in International Relations and Pacific Studies with a regional focus on Southeast Asia in 1999 from the University of California, San Diego. Khoi will graduate from Santa Clara University School of Law in May 2002 with a Certificate in the International High Technology Law Program, and currently serves as a Technical Editor for the Santa Clara Computer and High Technology Law Journal. Khoi wishes to thank all the other contributing editors for volunteering their time and effort to this project.

2. Id.
3. Web pages or Web sites are “linked” together through hypertext linking which enables Internet users to jump from one Web page to another “linked” Web page. Mark Sableman, Link Law Revisited: Internet Linking Law at Five Years, 16 BERKELEY TECH. L.J. 1273, 1276 (2001). Currently, Web pages may be linked in at least one of three technical ways. Id. at 1277. Typically, most hypertext links take the form of Hypertext Reference (“HREF”) links. Id. When users click on an HREF, the Web browser is instructed to go to the linked location that is specified in the markup written in the HTML language. Id. HREFs may be created by using words or images as the linking reference. Inline image linking also creates links or associations among different Web pages or Web sites by pulling images located on one site, and then displaying the image as part of second site. See Raymond Chan, Internet Framing: Compliment or Hijack?, 5 MICH. TELECOMM. & TECH. L. REV. 143, 146 (1998/1999). Framing also links or associates different Web pages. Framing allows the owner
In an effort both to preserve copyright owners’ exclusive rights and to accommodate advancing technologies designed to improve the anarchic Internet, courts have looked to the principal exception to these exclusive rights to determine whether these technologies can be justified as “fair use.” Section 107 of the Copyright Act specifically provides that, notwithstanding the exclusive rights in section 106, “the fair use of a copyrighted work . . . is not an infringement.”

The statute itself delineates the principal factors for a court’s consideration in determining whether an infringing use can be justified as “fair use.”

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.

In *Kelly v. Arriba Soft Corp.*, plaintiff alleged that defendant’s new visual search engine, reproducing plaintiff’s copyrighted photographs to generate thumbnail image reference links and displaying the full-sized images of plaintiff’s copyrighted photographs, infringed plaintiff’s reproduction and public display rights in those images. Plaintiff further alleged that defendant’s infringing uses could not be justified as “fair use.” In applying the

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5. See id.
6. Id.
8. Id. at 938.
9. Appellant’s Brief at 21, Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) (No. 00-55521).

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multi-factor fair use test under section 107, the Court of Appeals for
the Ninth Circuit attempted to strike a balance between protecting
copyright owners' exclusive rights and encouraging new technologies
designed to facilitate Internet navigation.

This Case Note examines the fair use multi-factor balancing test

as applied by the court in Kelly, with particular focus on
transformative use and the limits imposed on both innovative Internet
technologies and the assertion of exclusive copyrights on the Internet.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-appellant, Leslie A. Kelly (hereinafter "Kelly"), is a
professional photographer specializing in photographs of the
American west and gold rush country. Kelly displays some of his
photographs on two Web sites he owns, on which he markets
corporate retreats and sells books related to the subject of his
photographs. Kelly also licenses his photographs for display on
Web sites other than his own. Defendant-respondent, Ditto.com,
formerly known as Arriba Soft Corporation ("Arriba"), maintains a
database of images, which have been indexed by its "Arriba Vista
Image Searcher" Internet search engine. This search engine
responds to user queries by first scouring the Internet for related
images, retrieving and downloading the images onto Arriba's server,
converting the images into thumbnail form and then deleting the
downloaded image, and, finally, displaying the results of the search as
 thumbnail images on the "results" page available for the user to
view. From January 1999 to June 1999, users who clicked the
thumbnails would be linked to an "image attributes" window
containing full-sized images, which were inline linked from the
originating Web site and framed within borders containing text,
Arriba's banner, and advertisements selected by Arriba for display.
From July 1999 until August 2000, Arriba altered its protocol and
included both a "Source" and "Details" link next to the thumbnail image.
When users clicked the "Source" link, two windows would

11. Id.
12. See Kelly, 280 F.3d at 938.
13. Id. at 938 n.1 (Respondent-defendant changed its name to "Ditto.com" since the start
of the appeals litigation).
15. See Kelly, 280 F.3d at 938.
16. See id.
17. See id. at 939.
appear; the forefront window contained the full-sized image inline-linked and framed from the originating Web site, which appeared just underneath. At no point did Arriba’s visual search engine copy the full-sized image onto Arriba’s server for the purposes of public display, and the image remained on the originating Web site.

Without Kelly’s prior consent, Arriba’s visual search engine added thirty-five of Kelly’s images to its image database. Kelly objected and filed suit against Arriba for copyright infringement, and Arriba defended on the grounds of fair use. In balancing the fair use factors, Judge Taylor of the district court granted summary judgment in favor of Arriba on the grounds that Arriba’s infringing use constituted defensible fair use.

With respect to the first factor, Judge Taylor found that Arriba’s use of Kelly’s images both in thumbnail form and as full size images, although commercial, was "significantly transformative." Therefore, this factor weighed in favor of fair use. The second factor was held against fair use on the grounds that Kelly’s photographs were artistic works and at the core of copyright protection. Regarding the third factor, Judge Taylor held that use of the entire images in thumbnail form was reasonable in relation to the purpose and character of the visual search engine, but use of the full-sized images was not necessary to the search engine’s main purpose. As a whole, however, Judge Taylor concluded that this factor weighed only slightly against fair use. He found the fourth factor weighed in favor of Arriba, because Kelly had not shown any evidence of harm or adverse impact, and failed to refute Arriba’s proof tending to show a lack of market harm.

With the score of two factors favoring fair use and two factors against fair use, Judge Taylor returned to transformative use, because, in his opinion, "the first factor of the fair use test is the most
important in this case."  

Willing to accommodate technological innovation, Judge Taylor remarked that, "when considering the purpose and character of use in a new enterprise of this sort, it is more appropriate to consider the transformative purpose, rather than early imperfect means of achieving this purpose."  

He also held that, "[w]here as here, a new use and new technology are evolving, the broad transformative purpose of the use [should] weigh more heavily than the inevitable flaws in its early stages of development."  

Judge Taylor therefore concluded that Arriba’s infringing conduct was defensible on the grounds of fair use.  

Kelly appealed to the United States Court of Appeals for the Ninth Circuit.

III. OVERVIEW OF THE ARGUMENTS

On appeal, Kelly argued that Judge Taylor’s fair use analysis failed to account separately for Arriba’s infringement of Kelly’s reproduction rights by copying the full-sized image to generate the thumbnails, and infringement of Kelly’s public display rights when Arriba inline-linked and then framed the images onto the image attributes page.  

Moreover, Kelly argued that generating and displaying the thumbnails on the “results” page and then allowing users to view a full-sized image through the process of inline-linking and framing does not constitute transformative use.

First, both infringing acts, comprehensively, have the same purpose as Kelly’s use of the images; namely, to attract users to their respective sites in order to sell products. Second, the district court’s distinction between Kelly’s aesthetic use of the photographs and Arriba’s functional use of the same does not support a finding of transformative use.  

Specifically, Kelly argued that functional use is irrelevant in light of the fact that Arriba’s thumbnails and inline-linked and framed display of full-sized images fail to add any new

30. Id.
31. Id.
32. Id.
33. See id.
34. Appellant’s Brief at 20, Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) (No. 00-55521). Interestingly, after identifying Arriba’s conduct as two distinct copyright infringements, plaintiff’s brief then discussed both thumbnail creation and full-sized image display as components of a single comprehensive use. See generally id. at 30.
35. See id.
aesthetics, expression, meaning or message to the original work, but constitutes a simple repackaging of the copyrighted work.\textsuperscript{36}

IV. HOLDING, RATIONALE AND DISCUSSION

The circuit court agreed with Kelly that the issue of copyright infringement should account separately for Arriba’s infringement of Kelly’s reproduction rights through generation of the thumbnails and Arriba’s infringement of Kelly’s public display rights by inline-linking and framing of Kelly’s images.\textsuperscript{37} Accordingly, the court considered the fair use factors of each potentially infringing use separately, although primarily focusing on the first factor.

A. Thumbnails

1. The purpose and character of the use

Like Judge Taylor, the court began its analysis of this prong by citing to \textit{Campbell v. Acuff-Rose Music, Inc.}\textsuperscript{38} In \textit{Campbell}, the Supreme Court rejected the contention that an alleged infringer’s mere commercial use was conclusively dispositive of the same purpose and/or same character of use.\textsuperscript{39} Rather, the \textit{Campbell} Court noted that the primary purpose of this inquiry is to determine whether the “new work merely supersedes[s] the object of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.”\textsuperscript{40} Accordingly, commercial use is but one factor in the analysis that weighs against fair use.

With regards to commercial use of the thumbnails, the court concluded that Arriba’s commercial use of Kelly’s images was not “highly exploitative” and “only slightly [weighed] against a finding of fair use.”\textsuperscript{41} The court agreed with Judge Taylor that Arriba’s use of Kelly images was unlike traditional commercial uses of copyrighted works.\textsuperscript{42} Arriba’s use was found to be more “incidental” to the purpose of the visual search engine because Kelly’s images were only

\begin{itemize}
\item \textsuperscript{36} See id. at 33.
\item \textsuperscript{37} See Kelly v. Arriba Soft Corp., 280 F.3d 934, 939 (9th Cir. 2002).
\item \textsuperscript{38} See id. at 940.
\item \textsuperscript{39} Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 (1994).
\item \textsuperscript{40} See id. at 579.
\item \textsuperscript{41} Kelly, 280 F.3d at 940.
\item \textsuperscript{42} Id. at 941.
\end{itemize}
a few among a thousand that were converted into thumbnails. In addition, Kelly’s images displayed in thumbnail form were not used to directly promote Arriba’s Web site. Instead, the commercial value of the visual search engine lies in its ability to search the Internet for images and index the images in thumbnail form for display to users, and not to directly market and sell the images to users.

The heart of the court’s finding in favor of fair use on this issue was the transformative use factor. The court rejected Kelly’s contention that Kelly’s own purpose and use of his images, and the purpose and use for which Arriba employed them, were identical—to attract visitors and then market products and services to them through advertisements located on their respective Web sites. Rather, the court found that Kelly’s images were “artistic works used for illustrative purposes” to “portray scenes from the American West in an esthetic manner.”

On the other hand, the court agreed with Arriba that the purpose of reproducing Kelly’s images to generate the thumbnails for display was to improve access to images on the Internet. Although the court noted that this function provided a public benefit, it did not explicitly decide whether providing a public benefit alone would weigh in favor of a finding of transformative use.

In finding Arriba’s use of Kelly’s works to be functional in character and purpose, the court explicitly rejected Kelly’s argument that functional use is irrelevant for transformative use determinations. In support of the relevancy of functional use, the court cited to Nunez v. Caribbean International News Corp. In Nunez, the First Circuit Court of Appeals held that placing a photograph that was originally intended to be part of a modeling portfolio in a news article transformed the use of the original work into news and created a new meaning and purpose for the work.

43. See id.
44. See id.
45. Id.
46. See id.
47. See generally Kelly v. Arriba Soft Corp., 280 F.3d 934, 942 (9th Cir. 2002) (holding that the use of Kelly’s photographs to generate thumbnails was not antithetical to the Copyright Act because such use does not stifle creativity, but enables the additional public benefit of improving information gathering techniques on the Internet).
48. See id.
50. Kelly, 280 F.3d at 942 (citing Nunez v. Caribbean Int’l News Corp., 235 F.3d 18 (1st Cir. 2000)).
the court's opinion, the thumbnails predicament was analogous to that presented in *Nunez*; the use of the copyrighted work for a different function and for a different purpose than originally intended by the copyright owner may be sufficient to transform the work and give the original a new meaning and expression.\(^5\) Accordingly, giving copyrighted works a different function than originally intended may support a finding of transformative use.

The court next addressed the problem that the thumbnails themselves might be used for artistic purposes as well, because they were reproductions of Kelly's full-sized images in miniature.\(^5\) It is precisely at this point that the court's analysis moved from legal analysis based on precedent to weighing of probabilities based on realities. The court opined that "users are *unlikely* to enlarge the thumbnails and use them for artistic purposes because the thumbnails are of much lower resolution than the originals; any enlargement results in a significant loss of clarity of the image, making them inappropriate for display material."\(^5\) Accordingly, "it is *unlikely* that anyone would use Arriba's thumbnails for illustrative or esthetic purposes, because enlarging them sacrifices their clarity."\(^5\)

Therefore, the court concluded that Arriba's infringing reproduction of Kelly's images to generate thumbnails was sufficiently transformative, and, as such, entitled to fair use protection under the first factor.\(^5\)

2. Nature of the copyrighted work

With regards to this factor, the court agreed with Judge Taylor's finding that Kelly's photographic works are creative in nature, and therefore "are closer to the core of intended copyright protection than are more fact-based works."\(^5\) However, since Kelly had already published these photographs on the Internet, the photographs were "more likely to qualify as fair use because the first appearance of the artist's expression has already occurred."\(^5\) Therefore, the court held

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51. *See id.* at 942.
52. *See generally id.* at 941.
53. *Id.* (emphasis added).
54. *Id.* (emphasis added).
55. *Id.* at 942.
56. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 943 (9th Cir. 2002).
57. *Id.* (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985) (noting that the scope of fair use is narrower with respect to unpublished works because the author's right to control the first public appearance of his work weighs against the use of his work before its release)).
that this second fair use factor only "slightly weighs" in favor of Kelly.\textsuperscript{58}

3. The amount and substantiality of the portion used

In analyzing the third factor, the court found that it was reasonable for Arriba to use the entire photograph to generate the thumbnail so that "users could recognize the image and decide whether to pursue more information about the image or the originating Web site,"\textsuperscript{59} and that a "partial reproduction would reduce the usefulness of the search engine."\textsuperscript{60} However, because Arriba used the entire photograph to generate a thumbnail, and that "copying an entire work militates against a finding for fair use,"\textsuperscript{61} the court concluded that this factor was therefore neutral.\textsuperscript{62}

4. Potential market harms

Regarding this fourth factor, the court stated that the "fourth factor often depends upon how transformative the new use is compared to the original use,"\textsuperscript{63} and that "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."\textsuperscript{64} Since the court earlier found the purpose and use of thumbnail images as reference links to be functional and sufficiently transformative, it found that Arriba’s use of Kelly’s photographs for such purpose did not harm the market for Kelly’s images.\textsuperscript{65} Rather, the court opined that the visual search engine would help guide Internet users to Kelly’s Web sites, since users were unlikely to enlarge the thumbnails to create a viable substitute for the full-sized image on Kelly’s Web site.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. (quoting Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110, 1118 (9th Cir. 2000)).
\item \textsuperscript{62} See Kelly v. Arriba Soft Corp., 280 F.3d 934, 943 (9th Cir. 2002).
\item \textsuperscript{63} Id. at 948.
\item \textsuperscript{64} Id. at 943 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (stating that a "work that supersedes the object of the original serves as a market replacement for it, making it likely that market harm will occur, but when the second use is transformative, market substitution is less certain.").
\item \textsuperscript{65} See id. at 944.
\item \textsuperscript{66} See id.
\end{itemize}
5. Conclusion

Based on the four factors of the fair use analysis, the court concluded that both the first and fourth factors weighed in favor of fair use, the second factor only slightly weighed against fair use, and the third factor was neutral.\(^{67}\) Therefore, generating thumbnail images by reproducing the copyrighted full-sized image and subsequently using the thumbnail images as reference links in a visual search engine is not copyright infringement.

B. Full-Sized Images

Although Arriba did not explicitly defend on the grounds of fair use with regards to inline linking, and then framing, a full-sized image on Arriba’s Web site, both the district court and the appellate court addressed fair use with regards to this conduct.\(^{68}\) The district court began its analysis of this issue by explicitly stating that the process of inline image linking from the originating Web site and then framing these images on the target Web site does not involve copying.\(^{69}\) Rather, by inline linking and framing Kelly’s photographs, which resided on Kelly’s own Web pages or Web pages to which Kelly licenses his photographs, Arriba publicly displayed the copyrighted images in violation of Kelly’s exclusive rights to display those same photographs.\(^{70}\)

The court first noted that “[n]o cases have addressed the issue of whether inline linking or framing violates a copyright owner’s public display rights.”\(^{71}\) However, the court opined that the present problems presented by inline image linking and framing are analogous to those in *Playboy Enterprises, Inc. v. Webbworld, Inc.*\(^{72}\) In *Webbworld*, a federal district court in Texas found that Webbworld violated Playboy’s exclusive right to display its copyrighted images by downloading material from certain newsgroups, discarding the associated text, retaining only the images, and then making the images available to subscribers of Webbworld’s services.\(^{73}\)

\(^{67}\) See id.

\(^{68}\) See Kelly v. Arriba Soft Corp., 280 F.3d 934, 947 (9th Cir. 2002).

\(^{69}\) See id. at 944.

\(^{70}\) See id. at 947.

\(^{71}\) Id. at 945.

\(^{72}\) See id. (citing Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Texas 1997)).

\(^{73}\) See id. (citing Webbworld, Inc., 991 F. Supp. at 549–50).
The court further likened the extent of Arriba’s conduct to the defendant in another case involving Playboy. In *Playboy Enterprises, Inc. v. Hardenburgh, Inc.*, the court held that a defendant-owner of a computer bulletin board service (BBS) is both directly and contributorily liable for copyright infringement by encouraging BBS users to upload Playboy’s copyrighted images to the BBS central file, screening all uploads, and then moving some images into files in order to make such materials available for download by other BBS users. The *Hardenburgh* court held that defendant’s action amounted to an infringing display when the defendant made copyrighted materials available for subscribers to download.

The court in *Kelly* noted that unlike the *Webbworld* and *Hardenburgh* defendants, Arriba did not actually copy the copyrighted images onto its server for purposes of generating the full-sized images. However, the court found that Arriba’s actions were analogous in that Arriba “took an active role in creating the display of the copyrighted images.” The court held that by inline linking and framing copyrighted images on the “image attributes” or “Source” page, Arriba’s visual search engine went beyond being a mere passive conduit. The court found Ariba played an active role in the public display by searching the Web for Kelly’s images and then inline-linking and framing Kelly’s copyrighted images onto the “images attributes” or “Source” page, thereby providing Internet users a “direct link” to the copyrighted images, without permission from copyright owners. The court reasoned that “[w]ithout this program, users would not have been able to view Kelly’s images within the context of Arriba’s site” and that merely providing this capability is sufficient to establish the infringement.
1. Character and purpose of the use

After finding prima facie copyright infringement of Kelly’s public display rights, the court then addressed Arriba’s fair use defense with regards to the full-sized images. The court differentiated Arriba’s use of Kelly’s images as thumbnails and as full-sized images on the ground that the latter does not enhance the use of the visual search engine.\(^84\) The court noted that the full-sized images did not function as a “means to access other information,” but were “likely the end product themselves.”\(^85\) The court opined that the primary purpose of this “end product” would be artistic expression, therefore having the same purpose as Kelly’s purpose in those images.\(^86\)

Furthermore, the court agreed with Kelly that Arriba’s use of full-sized images for display did not add new expression to the images, thereby transforming the use of copyrighted images.\(^87\) The court found that merely “placing the images in a ‘frame’ or locating them near text that specifies the size and originating web site is not enough to create new expression or meaning for the images.”\(^88\) Therefore, because Arriba’s use of Kelly’s images was not transformative, and given the commercial nature of Arriba’s use, the court found that this first factor weighed against a finding of fair use.

2. Nature of the copyrighted work

The analysis of the second factor is essentially the same as that for the thumbnails, “because Kelly’s images are still the copyrighted images at issue.”\(^89\) Therefore, this second factor only “slightly weighs” against fair use.\(^90\)

3. The amount and substantiality of the portion used

The court held that Arriba’s use of the entire photographs to create a full-sized public display was not reasonable, because “giving users access to the full-sized images without having to go to another site” is not a legitimate purpose.\(^91\)

84. See id. at 947.
85. Id. (emphasis added).
86. See id.
87. See id.
88. Kelly v. Arriba Soft Corp., 280 F.3d 934, 947 (9th Cir. 2002).
89. Id. at 948.
90. Id.
91. See id.
4. Potential market harms

With regards to the fourth factor, the court reiterated that determination of potential market harms related back to the initial transformative use inquiry.\(^9\) The court reasoned that "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."\(^9\) Because Arriba’s use was not transformative, the fourth factor also weighed against fair use. The court determined that, "by giving users access to Kelly’s full-sized images on its own web site, Arriba harms all of Kelly’s markets."\(^9\) Specifically, the court found that inline linking and framing harm the potential market for Kelly’s images in two ways. First, it deters users from actually visiting Kelly’s web site since users would not have to actually access Kelly’s website to view those images.\(^9\) Secondly, it enables users to infringe Kelly’s copyright by allowing users to download the full-sized image from the Arriba’s inline linked and framed display of Kelly’s photographs and then sell or license the images themselves.\(^9\)

5. Conclusion

Applying the fair use factors to such use, the court concluded that because the full-sized images displayed through the process of inline linking and framing did not amount to transformative use of the images, the purpose and character of Arriba’s use of the copyrighted images were the same as Kelly’s purpose and use.\(^9\) Further, permitting Arriba to use the copyrighted images in this manner would potentially harm the market for Kelly’s images displayed on his own Web sites.\(^9\) Therefore, the court concluded that all four factors weighed against fair use, and that Arriba did not fairly use Kelly’s copyrighted images in publicly displaying those images through inline linking and framing.\(^9\)

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92. See generally id. at 943.
93. Id. at 943 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (stating that a "work that supersedes the object of the original serves as a market replacement for it, making it likely that market harm will occur, but when the second use is transformative, market substitution is less certain.").)
94. Kelly v. Arriba Soft Corp., 280 F.3d 934, 948 (9th Cir. 2002).
95. Id.
96. See id
97. See id.
98. See id.
99. See id.
V. CONCLUSION

Although I believe the court reached the correct conclusion regarding both defendant’s infringing reproduction and public display of plaintiff’s copyrighted works, the court’s application of the fair use factors leaves open many questions. One question is whether there are really any other factors beyond transformative use. Under the court’s approach, a transformative use will justify wholesale copying of those works at the core of copyright protection and the creation of a market different than the original use of the copyrighted work. It appears from the court’s analysis that even an inquiry into transformative use involves a balancing of realities and probabilities: whether users are likely to enlarge the thumbnails for their own infringing purposes, or whether the public display of the full-sized images would likely be viewed from the user’s perspective as end products themselves, thereby superseding Kelly’s intended use. Further, in analyzing transformative use with regards to the thumbnails, the court specifically held that Kelly’s use and purpose in his images were primarily aesthetic, but then acknowledged in its analysis of Arriba’s infringing public display, that there are many markets for which Kelly may appropriately use his images. This begs the question: are the principal markets in which copyrighted materials may be “used” fixed by the primary use for which the copyright owner originally intended his work? I believe the court’s analysis sidesteps these issues through its analysis of the public benefit. Whether new Internet technologies, designed to organize Internet navigation, and provide easier and more convenient access to copyrighted materials posted on the Internet, will constitute infringement of these same copyrights therefore may depend on whether these technologies provide a public benefit independent of the benefits the public already receives from the copyrighted materials themselves. According to the court, thumbnail images containing a reference link provide this independent benefit, full-sized images that have been inline image linked and framed in a secondary Web site do not.

Although whether or not this decision provides an effective balance of the competing interests between copyright owners and the public on the Internet remains debatable, it provides sufficient notice that at least courts in the Ninth Circuit will be looking at the innovative technological services separately within the whole service offering to determine the appropriate copyright limitations on each. Innovation itself does not provide sufficient justification for copyright
infringement on the Internet, but innovation coupled with an independent public benefit may just tip the analysis in favor of fair use.