Hey, Keep Your Link to Yourself - Legal Challenges to Thumbnails and Inline Linking on the Web and the Potential Implications of a First Impression Decision in Kelly v. Arriba Soft Corp.

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HEY, KEEP YOUR LINKS TO YOURSELF!
LEGAL CHALLENGES TO THUMBNAILS AND INLINE LINKING ON THE WEB AND THE POTENTIAL IMPLICATIONS OF A FIRST IMPRESSION DECISION IN KELLY V. ARIBA SOFT CORP.

I. Introduction

Let's suppose you own a bike shop and decide to sell equipment online. You want to market your off-road bikes by linking to pictures of mountainous trails you found elsewhere on the Web. Are you breaking the law?

Add a twist: to attract customers to your Web site, you provide links to articles about trail riding from various other Web sites. Is this illegal?

Confused? Well, this is precisely the conundrum many believe the Ninth Circuit has placed upon the World Wide Web ("Web") with its ruling in Kelly v. Arriba Soft Corp.1

After a decade of commercial existence, the Web continues to stymie the efforts of lawmakers applying copyright law to an expanding market of online technologies.2 The swift development of the Internet and the Web has altered the way people communicate, negotiate business, and, in particular, seek out entertainment.3 Specifically, a Web site's ability to offer a user "free" access to another's intellectual property has captured the attention of our na-

1. 280 F.3d 934 (9th Cir. 2002); see Dana Blankenhorn, Efforts to Solomonize the Web, at http://www.a-clue.com/archive/02/cl020218.htm (Feb. 18, 2001) (explaining how Ninth Circuit's decision seems fair at glance, but may have unintended consequence of calling into question legality of Web page technology); see also Posting of Chuck Hamaker, cahamake@email.uncc.edu, Kelly v. Arriba Soft Corp., to liblicense-l@lists.yale.edu, at http://www.library.yale.edu/~license/List Archives/0204/msg00049.html (Apr. 23, 2002, 05:37:56 EDT) [hereinafter Hamaker] (describing how Ninth Circuit decision threatens linking on Web).

2. See Hamaker, supra note 1 (indicating lawmakers are still struggling to create legislation that strikes fair balance between protecting copyright property online and robbing public domain of ideas).

3. See Mary Elizabeth Fitzgibbons, Foreword to the Fall 1999 Issue, 4.3 J. TECH. L. & POL'Y 0, ¶ 1 (2000), at http://journal.law.ufl.edu/~techlaw/4-3/Foreword.html (detailing “staggering” impact of Internet technology). For a discussion distinguishing the Internet and Web on the basis of their relative functionalities, see infra notes 37-78 and accompanying text.
tion. In response, representatives and publishers within the entertainment industry have started working towards increasing copyright protection for artists.

Thus far, copyright law has defined entertainment on the Web in such cases as UMG Recordings, Inc. v. MP3.Com, Inc., A & M Records, Inc. v. Napster, Inc., and Ebay, Inc. v. Bidder's Edge, Inc. In MP3.Com, a court held that the retransmission of unauthorized copies of music simply reformatted in a different medium constituted copyright infringement because nothing new was added to the original. Similarly, in Napster, a court found that users of the Napster system who uploaded and downloaded copies of music files infringed the copyrights owned by music publishers and record companies. Finally, in Ebay, it was held that Web servers were personal property not subject to usage by other Web users without first obtaining permission.

In Kelly, the Ninth Circuit further applied copyright law to the Web with a ruling involving what many believe is its quintessential function: hyperlinking. In essence, the court had to resolve two distinct copyright issues relating to a visual search engine that displayed images of photographs.

The first issue involved whether the reproduction of online photographs, owned by Leslie A. Kelly, into thumbnails by Arriba

4. See Posting of Chuck Hamaker, cahamake@email.uncc.edu, IP Industry Control of Use, to liblicense@lists.yale.edu, at http://www.library.yale.edu/~liblicense/List-Archives/0204/msg00050.html (Apr. 24, 2002, 01:33:59 EDT).

5. See id. The entertainment industry is "working to create an environment where preservation, use of alternative display or listening devices, lending, migration, normal institutional use, long term survival of any particular format or medium, etc. will not be possible technically or legally without the property owner's express permission." Id.


10. See Napster, 239 F.3d at 1018-20 (issuing Napster mandatory preliminary injunction for participation in copyright infringement).

11. See Ebay, 100 F. Supp. 2d at 1073 (detailing Bidder's Edge injunction prohibiting use of any query device to copy Ebay's auction database without written authorization).

12. See Hamaker, supra note 1 (stating case involved "quintessential web practice of linking").

13. See Kelly v. Arriba Soft Corp., 280 F.3d 934, 939 (9th Cir. 2002). For the facts of Kelly, see infra notes 79-94 and accompanying text.
Soft Corp. ("Arriba") for use in Arriba’s visual search engine, violated Kelly’s exclusive statutory right to reproduction.14 Second, the Ninth Circuit addressed whether Ariba’s display of Kelly’s full-sized images through techniques of inline linking and framing violated Kelly’s exclusive right to publicly display his copyrighted photographs.15 The three-judge panel held that Ariba’s creation and use of Kelly’s images as thumbnails constituted fair use, but found displaying Kelly’s full-sized images via inline linking and framing to be in violation of Kelly’s public display rights.16

Unlike prior Web decisions, observers believe Kelly establishes an unprecedented rule that has the ability to render every link on the Web susceptible to strict liability for direct copyright infringement.17 In short, while trying to reconcile flourishing Web technologies with traditional copyright doctrine, Kelly inadvertently may have afforded future courts the potential to strike at the “heart of free expression on the Internet.”18 Currently, the Ninth Circuit’s decision stands as “an intriguing attempt to assert off-line proprietary rights within the free-flowing online world of the Internet,” with only the future holding any probable consequences.19

Section II of this Note serves as a technical guide to the Internet, the Web, and the technologies relevant to understanding the issues addressed in Kelly.20 Section III explores the factual underpinnings of Kelly.21 Section IV outlines general copyright law, its application to the Internet, and, in particular, how courts have applied it to issues regarding Web linking.22 Sections V and VI ex-

14. See Kelly, 280 F.3d at 939-40. For a brief discussion of thumbnails, see infra note 83 and accompanying text.
15. See Kelly, 280 F.3d at 944. For a further discussion of inline linking and framing, see infra notes 63-78 and accompanying text.
16. See Kelly, 280 F.3d at 948.
17. See Brief of Amici Curiae Electronic Frontier Foundation at ¶ 3, Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) (No. 00-55521) [hereinafter EFF Brief] (claiming decision may establish strict liability for web links), available at http://www.eff.org/IP/Linking/Kelly_v_Arriba_Soft/20020227_eff_amicus_brief.html.
20. For a discussion of pertinent online technologies, see infra notes 25-78 and accompanying text.
21. For a discussion of the Kelly facts, see infra notes 79-94 and accompanying text.
22. For a discussion of basic copyright principles relevant to the Kelly decision, see infra notes 95-155 and accompanying text.
amine the holding, reasoning, and rationale behind the Ninth Circuit's bifurcated analysis in *Kelly.* Section VII explores the decision's possible impact on the future of the Web and how courts may interpret the opinion in subsequent litigation.

II. "The Genesis of the Controversy"25

Understanding, analyzing, and appreciating the legal intricacies of the Ninth Circuit's holding in *Kelly* require a rudimentary grasp of the underlying technology.26 The following section serves as a technical primer on the basic vocabulary and functionality of both the Internet and the Web. Because an exhaustive account of such technology is unnecessary to address the issues raised in *Kelly,* this section is limited to those operations pertinent to the Ninth Circuit's analysis.27

A. The Internet

1. A Brief History: Birth and Beyond

"Computers in the future may weigh no more than 1.5 tons."

—Popular Mechanics, 194928

The word "Internet" has likely been misused over the past fifteen years more than any other fashionable piece of technical jargon.29 In fact, one expert went so far as to say, "[g]etting a handle on the Internet is a lot like grabbing a handful of Jello—the
more firm you think your grasp is, the more it oozes down your arm."30 Whether a proverbial misnomer or gelatinous metaphor, it makes no difference—we start from the beginning.

What is commonly referred to today as the Internet grew out of an experimental defense network called "ARPAnet."31 In 1969, the United States Defense Department called upon the Advanced Research Projects Agency ("ARPA") to design a network of interlinked computers enabling the military, defense contractors, and defense-related researchers to communicate with one another if a portion of the system were damaged during an attack.32 Although ARPAnet has since been abandoned, it served as an archetype for the eventual development of multiple civilian networks.33 Initially, these civilian networks were used exclusively for researching, providing users with unlimited access to any information contained within a network.34 The true promise of the Internet did not reveal itself until these civilian networks began linking together, enabling mil-


31. See Shea v. Reno, 930 F. Supp. 916, 925-26 (S.D.N.Y. 1996); see also In re Doubleclick, 154 F. Supp. 2d at 501 (describing how ARPAnet helped coin term "Internet" as nickname for expansive collection of "interconnected computer networks"). In the 1960s, ARPAnet was brought into the world as an experiment by government researchers attempting to connect their computers together via telephone lines. See GELMAN ET AL., supra note 28, at 1-2. Their goal was to communicate by linking together computers in various locations using a technology called "packet switching." See Shea, 930 F. Supp. at 926; see also GELMAN ET AL., supra note 28, at 1-2 (elucidating in-depth technology behind packet-switching technique).

Today's Internet continues to utilize packet switching as its means for transferring data. See In re Doubleclick, 154 F. Supp. 2d at 501.

32. See Reno v. ACLU, 521 U.S. 844, 849-50 (1997); Shea, 930 F. Supp. at 925-26 (explaining network of linked computers created numerous routes of communication that allowed messages to bypass damaged portions of network by using different paths); Emily Madoff, Freedom to Link Under Attack: Web Community Up in Arms over Lawsuits, 217 N.Y.L.J. S1, S1 (1997) (stating Internet was originally designed to have decentralized structure by interconnecting individual computers with smaller computer networks); Allison Roarty, Note, Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right, 68 FORDHAM L. REV. 1011, 1012 (1999) (characterizing how system of smaller, regionalized networks enabled subsisting sectors to maintain communication in event of nuclear attack).

33. See Reno, 521 U.S. at 850; see also Shea, 930 F. Supp. at 926 (telling how ARPAnet "formally ceased operations in 1990"). ARPA's support in developing communication protocols for transferring data triggered colleges, research groups, and commercial factions to create their own networks. See id. In the 1980s, these organizations started developing their own networks modeled after the ARPAnet protocols. See Krol, supra note 30, at 12.

34. See Roarty, supra note 32, at 1012 (noting civilian networks enabled unlimited access and use of information).
lions of people worldwide to communicate and access vast amounts of information.35 Consequently, the Internet rapidly found its way into commercial applications and continues to grow exponentially as we enter the twenty-first century.36

2. An Internet Operator’s Manual

Today, the Internet operates as a complex network of globally connected computers used for personal enterprise.37 It offers a variety of services to its users, including confidential correspondence and access to information located on other computers.38 For purposes of this Note, focus will be limited to a user’s ability to locate and retrieve information available on other computers.

Generally speaking, when a computer user signs onto the Internet, a connection is established between the user’s computer and another computer on the network, commonly referred to as a host computer.39 This allows the user to gather information from

35. See Shea, 930 F. Supp. at 926 (describing how Internet offers access to resources stored on individual computers located worldwide). By 1990, ARPAnet was replaced by a system of faster corresponding networks referred to today as the “Internet.” See id.; see also Reno, 521 U.S. at 850 (explaining how Internet is unparalleled method of communication enabling millions of people to access information worldwide); In re Doubleclick, 154 F. Supp. 2d at 501 (detailing Internet as modern, global entity linking millions of independent networks worldwide).

36. See Reno, 521 U.S. at 850-51 (noting Internet’s tremendous growth through 1990s and how introduction of commercial online services received tremendous response); see also Shea, 930 F. Supp. at 926 (estimating Internet growth in hundreds of millions upon entering twenty-first century).

37. See Gelman et al., supra note 28, at 3-4; see also Reno, 521 U.S. at 849 (depicting Internet as “an international network of interconnected computers”); In re Doubleclick, 154 F. Supp. 2d at 501 (portraying Internet as “network of networks”); Shea, 930 F. Supp. at 926 (defining modern Internet as “series of linked, overlapping networks that gradually supplanted ARPAnet”). An “internet” exists whenever two or more computer networks (individually linked computers sharing information) happen to connect with one another. See id.; see also Gelman et al., supra note 28, at 4 (analogizing Internet network to “modern network of transcontinental superhighways,” freeways, and parkways interconnecting cities and small towns). The Internet network in the United States consists of a backbone of main computers to which regional networks that feed smaller networks and individuals are connected. See id.

38. See Shea, 930 F. Supp. at 926; Krol, supra note 30, at 7 (listing Internet’s expansive collection of services and user’s ability to connect to other networked computers).

39. See Wassom, supra note 29, at 188. “When a computer user ‘gets on’ the Internet, she has not actually ‘gotten’ anywhere but instead has established a connection with another computer that will allow her to receive information from that and other computers that have made themselves available via the Internet network.” Id.

Numerous terms are used to refer to the “host” computer, including “host server” and “server.” See id. For the sake of clarity, this Note will use the term “host.”
other computers within the network by sending a request to its host.\textsuperscript{40} Although Internet users retrieve information through a variety of means,\textsuperscript{41} no category of communication quite parallels the expansive applications of the Web.\textsuperscript{42}

B. The World Wide Web

The Web is an interactive marketplace where people and organizations around the world exchange a variety of electronic information in the form of text, image, sound, and video.\textsuperscript{43} The Web’s “popularity stems in large part from the way in which it enables individuals to navigate their own paths . . . and to contribute ideas to a global audience . . . .”\textsuperscript{44}

Essentially, the host is another computer operated by an Internet Service Provider (“ISP”), which is a company that provides the user with access to the entire Internet network. See id. The user connects to its host by dialing over a phone line, using a phone number provided by the ISP. See id. Once a connection is established, the user is essentially “on” the Internet via its host. See id.

\textsuperscript{40} See id.; see also Krol, supra note 30, at 20 (detailing intricacies of data transfer over Internet). The host contacts the targeted computer containing the requested information. See In re Doubleclick, 154 F. Supp. 2d. at 501. Numerous terms are used to refer to the “target” computer, including “remote” computer and “destination” computer. See id. at 501-02 (depicting discussions incorporating these terms); Shea, 990 F. Supp. at 927 (depicting same). For the sake of clarity, this Note will use the term “target.”

The target then sends a copy of the requested information back along the same path to the user’s computer, which converts the transmission into a visual display on the user’s screen. See Wassom, supra note 29, at 188.

\textsuperscript{41} See Reno, 521 U.S. at 851 (listing various methods of retrieving information on Internet). The methods, as a whole, comprise what is referred to as “cyberspace,” which maintains no particular location, yet allows universal access to its users. See id.; see also Shea, 990 F. Supp. at 928 (stating Internet users have advantage of using variety of devices for information retrieval).

\textsuperscript{42} See Reno, 521 U.S. at 852 (stating Web is most popular means of Internet communication). The Web’s ability to convey a graphic interface, along with other types of media, on the user’s display has enabled this multimedia technology to displace passé Internet applications. See Gelman et al., supra note 28, at 5-6. In fact, the Web is largely responsible for the Internet’s drastic rise in popularity. See Chuck Musciano & Bill Kennedy, HTML & XHTML: The Definitive Guide 1 (Mike Loukides & Deb Cameron eds., O’Reilly & Associates, Inc. 4th ed. 2000) (1996).

\textsuperscript{43} See Andrew Ford & Tim Dixon, Spinning the Web 6 (Liz Israel Oppedijk ed., International Thomson Computer Press 2nd ed. 1996). The Web was invented in 1989 by software expert Tim Berners-Lee in an effort to expedite communication among physicists stationed in different parts of the world. See id. at 5. Subsequently, the Web has developed into an unrestricted medium that essentially allows anyone to participate in the exchange of both text and non-text information. See id.

\textsuperscript{44} Id. Unlike other information systems, the Web enables users to distribute unified documents of text, graphics, and sound, while also incorporating the technique of hypertext linking, whereby users can reference other Web documents directly from all around the world. See Musciano & Kennedy, supra note 42, at 3.
1. The Basic Architecture

The Web is based on a system called “hypertext,” which allows users to publish information on the Web and make it available to all potential viewers.45 The hypertext system uses a computer language called Hypertext Markup Language (HTML) to create the publishable Web files.46 Each individual file is commonly referred to as a “Web page.”47 Moreover, each Web page is assigned a unique Web address, called a Universal Resource Locator (URL), which distinguishes each Web page from all other Web pages on the Web.48

2. The Basic Operations

The Web operates according to basic networking principles similar to those that dictate the Internet’s general functionality.49 Every document published on the Web is stored on a “Web server.”50 In order to access published information, a user must have a “Web ‘browser’ . . . capable of displaying documents formatted in . . . [HTML], the standard Web formatting language.”51 As

45. See Alain Strowel & Nicolas Ide, Liability with Regard to Hyperlinks, 24 COLUM.-VLA J.L. & ARTS 403, 404 (2001); see also Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 307 (S.D.N.Y. 2000) (declaring documents published on Web are normally in hypertext form); FORD & DIXON, supra note 43, at 6 (indicating idea of hypertext system actually originated in 1940s, with gradual movement toward pervasive network of personal computers); Madoff, supra note 32, at S1 (declaring information is considered published once available on Web). Publishing only requires that the publisher have a computer that is connected to the Internet and that runs Web software. See id. As a result, hoards of individual users have published personal information on the Web. See Reno, 521 U.S. at 853 n.9.

46. See Strowel & Ide, supra note 45, at 404-05; see also FORD & DIXON, supra note 43, at 7 (designating HTML structures as “defining components” of Web documents).

47. See Wassom, supra note 29, at 189. Typically, Web pages will contain “any combination of text, graphics, audio and video content, software program, and other data.” Reimerdes, 111 F. Supp. 2d at 307. A collection of Web pages is known as a “Web site.” See id.

48. See Shea v. Reno, 930 F. Supp. 916, 929 (S.D.N.Y. 1996); see also Reno, 521 U.S. at 852 (analogizing Web address to personal telephone number). Each URL is comprised of a “www” designation and a domain name identifying the person or organization owning that Web page. See Strowel & Ide, supra note 45, at 406.

49. See FORD & DIXON, supra note 43, at 7.


mentioned above, HTML is a computer language used to create a set of instructions allowing a browser to convert a Web page from a computer code to a visual display. The HTML instructions for any Web page can be viewed by clicking on the browser's "View" and then "View Source" commands.

The Web's system of communication requires a Web server to run "Hypertext Transfer Protocol" (HTTP), an Internet protocol that enables communication between the user's browser and a distant server. Under the basic model, the user's browser sends a request to a distant server for certain information and receives a response. The HTTP process initiates when a user types in a Web site's URL or clicks on a "hyperlink" ("link").

3. Linking

Links effectuate the HTTP process by creating a connection between the content of two different files, allowing a user to navigate seamlessly from one Web document to another. The term "link" carries both technical and visual connotations. Technically, a link is the physical HTML code that instructs a browser to retrieve information from a specific distant server. Visually, a link typically appears in the form of highlighted text or images that alert the user as to what information that link will retrieve. Combining these two concepts, a link provides for navigation within the same document.

227 (discussing term "browser" as Web terminology for any public-access client program used for reading hypertext).

52. See Roarty, supra note 32, at 1014-15.
53. See Strowel & Ide, supra note 45, at 406 (articulating how HTML instructions are viewed).
54. See id.; Ford & Dixon, supra note 43, at 7 (defining HTTP protocol as "a set of rules for the programs at either end of a network link, which tells them how to talk to each other and what meaning to give the date they receive").
55. See Roarty, supra note 32, at 1015 (describing process of transferring information between browser and server).
56. See Shea, 930 F. Supp at 929 (discussing how linked Web servers provide for seamless navigation among documents notwithstanding location); see also P. Eve Athanasekou, Work in Progress, Internet and Copyright: An Introduction to Caching, Linking and Framing, J. INFO. L. & TECH., ¶ 7 (June 30, 1998), at http://elj.warwick.ac.uk/jilt/wip/98_2atha/default.htm (suggesting links are "statements of location without the original content").
57. See Strowel & Ide, supra note 45, at 406.
58. See id. (designating HTML code as hidden aspect of link). This part of the link contains the URL of the file that the Web designer wants to link to his or her own document. See id.
59. See id. Working in conjunction with the "technical" part of the link, clicking on the highlighted text or image causes the user's browser to retrieve the information specified by the URL contained within the HTML code. See Jackson, supra note 51, at 737.
ment, between different documents within the same Web site, or between different documents on different Web sites.  

a. HREF Links

Links can be incorporated into Web documents in two different ways while carrying two different functions.  

The most prevalent link type is a hypertext reference (HREF) link, which activates only upon selection by the user, thereby instructing the browser to go to a different point on the same page, to a different page within the same Web site, or to another Web site.

b. Inline Links

The second type of link is an image link, which is called an "inline link" because it "inlines" or pulls an image from a separate file into the Web page being viewed. Unlike an HREF link, an inline link automatically pulls in linked files, unassisted by the user, during the initial stages of Web page loading. As a result, an inline link is notably different from an HREF link in that while an HREF link obviates a change in the Web page, either by a difference in appearance of the new page or from a change in the URL address, an inline link is generally unapparent to the viewer. Therefore, inline linking gives users "the impression that they are viewing an image from the Web page [that] they are browsing, while the image actually comes from another [Web] page."

A Web page designer creates an inline link by using an HTML image tag, along with the image's URL, to instruct the browser to inline a particular image file, convert it into a viewable format, and

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61. See Jackson, supra note 51, at 737 (asserting links exist in two distinct forms); Roarty, supra note 32, at 1017 (explaining how "out links" and "in links" are two basic link types).

62. See Roarty, supra note 32, at 1017 (illustrating different ways information is linked on Internet).

63. See id. Similar to HREF links, the file may be from the same page, a different page within the same Web site, or a different Web site altogether. See id.

64. See Jackson, supra note 51, at 737; see also Strowel & Ide, supra note 45, at 408 (indicating nature of action also has led to term "embedded" link because command buried, or embedded, within HTML code).


66. Strowel & Ide, supra note 45, at 408.
display it at a certain location on the screen. While these graphics are typically image files stored on the designer's server, inline linking also permits the retrieval of graphics from outside servers by simply incorporating the image's URL into the HTML code. The advantage of this technique is that although an outside graphic appears on the designer's Web page, it is merely inlined from another server and has never actually been downloaded to the designer's server. As a result, a designer can construct a Web page using images stored on other servers, thus creating a way for the designer to save large amounts of hard drive space.

c. Framing

In conjunction with inline linking, a common way designers present their Web pages is through a technique called "framing." A designer can write HTML code that segments a single Web page into separate areas for concurrent viewing. As a result, frames are created, commonly in the form of a fixed border or margin, containing the logo or name of the Web site owner while framing or edging other content on the Web page. Typically, framing is used to present content from a single Web site or to incorporate external elements from other Web sites via an inline link. Therefore, framing is often analogized to inline linking because frames are usually created by inline linking content from other Web pages.

Specifically, framing allows a designer to create a fixed frame containing advertisements or a table of contents, while maintaining

67. See Wassom, supra note 29, at 193 (describing how HTML code contains image source tags for each image file, instructing browser to retrieve graphic and place in designated place within Web page). An image, like a Web page, has its own independent URL, identifying the exact location of where it's stored on the Web, which allows a designer to locate an image and instruct the browser on where to find the file. See Strowel & Ide, supra note 45, at 408.

68. See Roarty, supra note 32, at 1017-18.

69. See id. As a result, the outside image is never copied by a designer who simply inlines the image from another server. See id. at 408-09.

70. See Wassom, supra note 29, at 191.


72. See Wassom, supra note 29, at 191.

73. See Strowel & Ide, supra note 45, at 407 (explaining how frame is typically fixed border or margin encircling Web page content).

74. See id. at 407-08. Framing enables a Web designer to retrieve or inline some or all of another's Web page and surround it with his or her own frames. See Chan, supra note 71, at 147. Moreover, a Web designer may hide the external Web page's advertisements or trademarks or even replace them with his or her own advertisements. See id.

75. See Madoff, supra note 32, at S1.
the bulk of the Web page in a separate scrollable frame.\textsuperscript{76} This particular technique has gained commercial value because it allows a local Web site to display advertisements while the user accesses and views information from other Web sites.\textsuperscript{77} Consequently, each Web page that a user views does not appear as it normally would when accessed directly, but rather "within the portion of the screen designated as its frame."\textsuperscript{78} Thus, with a basic understanding of the technology at issue in \textit{Kelly}, the precise facts confronted by the Ninth Circuit follow.

III. THE TECHNOLOGY AT ISSUE

A. Leslie A. Kelly, \textit{Photographer}

Kelly is a professional photographer devoted to capturing scenes of California’s gold rush country as related to works by Laura Ingalls Wilder.\textsuperscript{79} He owns and maintains two Web sites featuring many of his copyrighted works and also licenses his photographs for display on other Web sites.\textsuperscript{80}

B. Arriba, \textit{Visual Search Engine Operator}

Arriba\textsuperscript{81} operates a search engine on the Internet, which allows Web users to enter a search query and obtain a list of related responses.\textsuperscript{82} Unlike most search engines, Arriba perpetuates a "visual search engine" that displays its results in the form of small images called thumbnails instead of descriptive text.\textsuperscript{83}

\begin{itemize}
  \item \textsuperscript{76} See Bruce P. Keller, \textit{Copyright in the Digital Age}, 709 PLI/PAT 451, 477 (2002).
  \item \textsuperscript{77} See id. (explaining how framing layouts have gained popularity on several levels).
  \item \textsuperscript{78} Madoff, supra note 32, at S1; \textit{see also} Chan, supra note 71, at 147-48 (articulating how framing presents content of other Web site as if offered by framing Web site).
  \item \textsuperscript{79} See Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116, 1117 (C.D. Cal. 1999).
  \item \textsuperscript{80} See id. (discussing how Kelly never sells photographs independently but collectively publishes them in several books).
  \item \textsuperscript{81} See Kelly v. Arriba Soft Corp., 280 F.3d 934, 938 n.1 (9th Cir. 2002) (noting Arriba has changed name to “Ditto.com” since start of litigation).
  \item \textsuperscript{82} See Kelly, 77 F. Supp. 2d at 1117; \textit{see also} James S. Huggins, \textit{Search Engines Disputes}, at http://jamesshuggins.com/h/oth1/search_engine_disputes.htm (last modified Jan. 1, 2003) (discussing origin of search engines and their basic operation).
  \item \textsuperscript{83} See Kelly, 280 F.3d at 938 (describing Arriba’s search engine as “unconventional” because it retrieves images in form of thumbnails instead of text). When a user wants to search the [I]nternet for information on a certain topic, he or she types a search term into a search engine, which then produces a list of web sites that have information relating to the search
\end{itemize}
From January 1999 to June 1999, an Arriba user who clicked on a thumbnail would activate an "Images Attributes" page, which inlined a full-sized version of the thumbnail from another Web site and surrounded the image with Ariba banners and advertisements. Subsequently, from July 1999 through August 2000, Arriba altered its protocol to include a "Details" link and "Source" link beside each thumbnail image.

C. Arriba's Controversial Actions

In January 1999, Arriba's visual search engine traveled to Web sites containing Kelly's photographs and downloaded thirty-five of his images to its database. Then, these images were generated

term. Normally, the list of results is in text format. The Arriba search engine, however, produces its list of results as small pictures.

Id. (emphasis added); see also Huggins, supra note 82 (designating visual search engines as "new breed[s]").

Arriba called its visual search engine the "Arriba Vista Image Searcher." See Kelly, 77 F. Supp. 2d at 1117. The search engine's functionality is based on a computer program that Arriba developed that "crawls" the Web looking for images to "index." See Kelly, 280 F.3d at 938. In response to a user query, the search engine first scours the Web for related images, retrieves these images, and then downloads full-size copies of them to Arriba's database. See id. These full-size copies are then used "to generate smaller, lower-resolution thumbnails of the images." Id. The program then deletes each original full-sized copy once a thumbnail of the image is made. See id. With respect to the "thumbnail" action, the Ninth Circuit noted, "[a]lthough a user could copy these thumbnails to his computer or disk, he cannot increase the resolution of the thumbnail; any enlargement would result in a loss of clarity of the image." Id.

84. For a discussion on inline linking, see supra notes 63-70 and accompanying text.

85. See Kelly, 280 F.3d at 938. The "Images Attributes" page contained text indicating image size, a link to the originating Web site, the Arriba banner, and selected Arriba advertisements. See id. An image inline linked from another Web site and surrounded by Arriba text and advertising created the effect that the image was part of the current Arriba page. See id. "As a result... the user typically would not realize that the image actually resided on another [W]eb site." Id. at 938-39.

86. See id. at 939 (portraying "Details" link produced screen similar to "Images Attributes" page, but with thumbnail rather than full-sized image). Moreover, when a user double-clicked on the "Source" link, two new windows were created on top of the Arriba page. See id. The window in the forefront contained the full-sized image inlined from the originating Web site, while underneath was a different window showing the originating Web page. See id. Currently, Arriba's engine does not display a page consisting only of an inlined image. See id. at 939 n.2.

87. See id. at 939 (discussing how Arriba's search engine maintains indexed database). Both configurations of the Arriba search engine (with the "Source" and "Details" links and without) operate by maintaining an indexed database of approximately two million thumbnail images. See Kelly, 77 F. Supp. 2d at 1117. Further, "[Ariba] employees conduct a final screening to rank the most relevant thumbnails and eliminate inappropriate images." Id.
into thumbnails for users of Arriba’s visual search engine.\textsuperscript{88} Kelly had never given permission to Arriba to copy his images to its database.\textsuperscript{89} Therefore, he objected upon discovering Arriba’s activities.\textsuperscript{90}

D. Kelly’s Lawsuit in the District Court

In April 1999, Kelly filed an action for copyright infringement, alleging that Arriba’s use infringed upon Kelly’s copyright privileges.\textsuperscript{91} In response, Arriba defended on the grounds of fair use.\textsuperscript{92} In balancing the fair use factors, the district court granted summary judgment in favor of Arriba, holding that the reproduction and display of Kelly’s images constituted a non-infringing statutory fair use.\textsuperscript{93} Kelly appealed the district court’s decision to the Ninth Circuit, which affirmed in part and reversed in part.\textsuperscript{94}

IV. COPYRIGHT LAW

A complete history and application of United States copyright law is well beyond the scope of this Note. Yet, a firm grasp of the basic policies and principles relevant to the Ninth Circuit’s decision in Kelly is in order.

A. Policies and Principles

The evolution of federal copyright law began when the framers of the Constitution granted Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .”\textsuperscript{95} In 1790, Congress exercised this power by enacting the

\begin{footnotesize}
\begin{enumerate}
\item See Kelly, 77 F. Supp. 2d at 1117.
\item See Kelly, 280 F.3d at 939.
\item See id. Kelly sent Arriba a notice of copyright infringement in January 1999. See Kelly, 77 F. Supp. 2d at 1117. Upon receiving such notice, Arriba deleted those images on its database that it had retrieved from Kelly’s two Web sites and any other sites that Kelly had identified. See Kelly, 280 F.3d at 939. Arriba placed these Web sites on a list of sites that it would not crawl in the future. See id.
\item See Kelly, 77 F. Supp. 2d at 1116-18 (depicting how Arriba’s cross motions raised fair use issue); see also 17 U.S.C. § 107 (2000) (setting forth complete text of fair use statute). For the complete text of the fair use statute, see infra note 111.
\item See Kelly, 77 F. Supp. 2d at 1121. For a discussion on Judge Taylor’s fair use analysis, see infra note 164 and accompanying text.
\item See Kelly, 280 F.3d at 938 (holding Arriba’s creation and use of thumbnails constituted fair use, but display of full-sized image violated Kelly’s exclusive right of public display).
\item U.S. Const. art. 1, § 8, cl. 8.
\end{enumerate}
\end{footnotesize}
nation's first copyright law. Since then, the Supreme Court has defined the public purpose of copyright as one that intends to encourage and reward the creative expression of authors in exchange for a limited period of protection. Ultimately, this fosters the goal of providing public access to such expressions when this period expires.

Throughout the past century, Congress had guided the development of copyright law by enacting legislation based upon "business-to-business arrangements worked out among industry representatives." As a result, copyright as a legal concept has evolved into a web of contractual details, which now manifests itself in the Copyright Act of 1976.

B. The Copyright Act of 1976

The Copyright Act of 1976 ("Act") extends copyright protection to "original works of authorship fixed in any tangible medium of expression." This statutory protection provides copyright owners with control over nearly all activities of possible commercial importance. This control stems from a bundle of exclusive rights including the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies of the copyrighted work, the right to perform a copyrighted work, and the


[The] limited [monopoly] grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity or authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id. (quoting Sony, 464 U.S. at 429).
98. See id.
100. See id.
102. See Sony, 464 U.S. at 432-33 (stating section 102 language does not grant protection to all possible uses, but rather is limited to exclusive rights set forth in section 106) (citing White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908)); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1555 (M.D. Fla. 1993).
right to publicly display a copyrighted work. To establish ownership of these exclusive rights, a copyrightable work must be an original creation by the author. Consequently, violation of any of these exclusive rights constitutes statutory copyright infringement.

Federal law makes clear that copyright infringement is established when a plaintiff proves two threshold requirements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Moreover, copyright infringement can be characterized in three different ways: direct, contributory, or vicarious.

Nonetheless, a prima facie case of infringement can be subject to certain statutory exceptions, such as the "doctrine of fair use." As the most reputable limitation on a copyright owner’s exclusive rights, fair use was borne out of a judicially-created privilege for those authors fairly using prior writings. The doctrine incorporated subjective flexibility into the rules of copyright when rigid ap-

105. See 17 U.S.C. § 501(a) (2000). Section 501(a) provides in relevant part, “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121 . . . is an infringer of the copyright [held by the copyright owner] . . . .” Id. “‘Anyone who violates any of the exclusive rights of the copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, ‘is an infringer of copyright.’” Sony, 464 U.S. at 433 (quoting 17 U.S.C. § 501(a)).
107. See Jackson, supra note 51, at 741; see also Sony, 464 U.S. at 435 (announcing, although Act is silent on types of infringement, contributory and vicarious liability, along with direct liability, all stand as valid ways to infringe owner’s copyright). Direct copyright infringement requires some type of direct involvement with the infringing activity, even if the involvement was unintentional or lacked a specific mind state. See Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 512 (N.D. Ohio 1997). In the alternative, a plaintiff can establish contributory infringement by proving that the defendant knowingly induced, caused, or contributed to a party’s directly infringing activity or vicarious infringement by proving that the defendant supervised or controlled the party directly infringing. See id. at 514 (citing Gershwin Publ’g Corp. v. Columbia Artists Mgmt., 443 F.2d 1159, 1162 (2d Cir. 1971)).
109. See H.R. REP. No. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679; see also Wassom, supra note 29, at 223 (“Fair use is the judicially crafted play in the joints of an otherwise rigid and unforgiving copyright apparatus.”). “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts . . . .’” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting U.S. Const. art. 1, § 8, cl. 8).
plication of the law would otherwise "stifle creativity rather than promote it."\textsuperscript{110}

The fair use defense eventually was codified in section 107 of the Act, and courts assessed it pursuant to the four factors enumerated therein.\textsuperscript{111} Moreover, while courts always have considered each factor in their analyses, the factors are not exhaustive and act merely as a useful framework to apply on a case-by-case basis.\textsuperscript{112}

C. Responding to the Internet

Historically, the interaction of copyright law and technology has been a subject inundated with controversy.\textsuperscript{113} Modern debate reveals concern over whether the Act can accommodate "the cur-

\textsuperscript{110} See Wassom, \textit{supra} note 29, at 223. The Supreme Court stated, "[t]he fair use doctrine . . . permits and requires 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." \textit{Id.} (citing \textit{Stewart v. Abend}, 495 U.S. 207 (1990)).

\textsuperscript{111} See 17 U.S.C. § 107 (indicating fair use of copyrighted work). Section 107 provides in relevant part:

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.

The fact that a work is unpatented shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

\textit{Id.}


\textsuperscript{113} See generally Jessica D. Litman, \textit{Copyright Legislation and Technological Change}, 68 Or. L. Rev. 275 (1989) (exploring historical battle between traditional copyright doctrine and constant technological development). On one hand, there are those who question the foundation of copyright law because modern technology is developing far beyond the technologies upon which copyright legislation was originally drafted. \textit{See id.} at 276. On the other hand, there are those who stipulate that copyright law has handled issues of technological change with extraordinary success. \textit{See id.}

In \textit{Twentieth Century Music Corp. v. Aiken}, the Supreme Court averred, "[w]hen technological change has rendered its literal terms ambiguous, [copyright legislation] must be construed in light of [the] basic purpose" of providing the public with the benefit of the copyright owner's toil. 422 U.S. 151, 156 (1975).
rent climate of rapid technological change." Among the most interesting and significant disputes are those addressing the legal quandaries created by the application of traditional copyright law to emerging Internet technologies, such as the Web.  

1. General Interpretation by Federal Courts

Although the Internet’s technical characteristics create new and complex legal challenges, the federal courts have established that works online are, in fact, subject to statutory copyright law. As mentioned above, copyright protection extends to “original works of authorship fixed in any tangible medium of expression.” "Original works of authorship" include literary, musical, dramatic, and pictorial works, plus new forms of expression such as electronic music, filmstrips, and computer programs, as long as the work is solely a product of the author. Furthermore, House Rep-

114. See Litman, supra note 113, at 276; see also Howard Berman, How Should the Government Protect Copyrights in Light of New Technology?: Copyright Law Essential to Well-Being of Internet, ROLL CALL, Mar. 27, 2000, ¶ 4 (indicating “torrid pace of technological change has increased” public focus on copyright law), available at http://www.rollcall.com/pages/pb/00/03/pb27j.html.

115. See Athanasekou, supra note 56, at ¶ 1. (indicating legal significance of applying copyright law to Internet); see also Shea v. Reno, 930 F. Supp. 916, 929-30 (S.D.N.Y. 1996) (discussing how computer technologies differ from previous methods of communication Congress has attempted to monitor). Despite prior one-way technologies, such as radio and television, Congress also intended to regulate “interactive” computer networks where almost any user has the ability to speak. See id. at 930.


port 1476 defines the scope of "fixed in any tangible medium of expression" as follows:

[I]t makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device now known or later developed.119

Accordingly, courts have concluded that online information, such as Web pages containing literary, musical, dramatic, or pictorial works, are logically within the scope of copyright protection and thus subject to infringement.120

2. Linking Precedent: A Common Law Assortment

As the Internet continues its inexorable growth, the ability to post commercial information online has created an influx of people using the Web for commercial profit through advertisements and self-promotion.121 Ironically, this inundation of commercial users has obscured the distinction between shared and protected information and stymied what many advertisers believe to be the most attractive and operative function of the Web.122

At the forefront of such frustration exist multiple linking techniques that allow users to avoid Web site advertisements and, in turn, hinder commercial exposure and a Web page owner’s ability to charge for advertising.123 At the same time, the ability to create links is arguably the Web’s most indispensable technology.124 Ac-

120. See Roarty, supra note 32, at 1020 (stating written, pictorial, musical, and audiovisual content on Web is digital material subject to protection by copyright law).
121. See id. at 1011.
122. See id.
123. See id.
124. See id.; see also Bolin, supra note 65, at ¶ 6 (indicating Web would cease to exist if linking were rendered illegal). "Without [links], the World Wide Web would not have the qualities that make it so compelling," Strowel & Ide, supra note 45, at 404. "[Links] are . . . the threads in which the Web is spun." Id. "Links are what unify the . . . Web into a single body of knowledge, and what makes the Web unique." Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 340 (S.D.N.Y. 2000) (citing ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997)). "They ‘are the mainstay of the Internet and indispensable to its convenient access to the vast world of information.’" Id. (quoting Richard Raysman & Peter Brown, Recent Linking Issues, N.Y.L.J., Feb. 8, 2000, at 9).
cordingly, "some of the most interesting and important [online] controversies" address how to apply copyright law to the linking technologies of the Web.\textsuperscript{125}

Linking triggers a multitude of infringement issues; yet, apt consideration of each possible intrusion extends beyond the scope of this Note. Instead, the following discussion has been framed within the scope of those issues confronted by the Ninth Circuit in \textit{Kelly}.\textsuperscript{126}

\textbf{a. The Original: \textit{Shetland Times Ltd. v. Wills}}

"Link law" first went public in 1996 as a hyperlinked headline on an electronic newspaper in the Shetland Islands of Scotland.\textsuperscript{127} The \textit{Shetland Times} ("\textit{Times}") brought a copyright infringement lawsuit against its rival newspaper, the \textit{Shetland News} ("\textit{News}"), for using the \textit{Times}'s headlines as text for links to stories contained on the \textit{Times}'s Web site.\textsuperscript{128} The Court of Session, by Lord Hamilton, enjoined the \textit{News} from creating further hyperlinks to the \textit{Times}'s Web site, noting the reproduction of the \textit{Times}'s headlines as Web links constituted copyright infringement.\textsuperscript{129} This decision substantiates the notion that linking is legal when it is not detrimental to the Web site owner, and established a premise for future link litigation.\textsuperscript{130}

\textsuperscript{125} Wassom, supra note 29, at 183 (discussing how linking will likely trigger future Web litigation). "The first and most critical issue arising from application of copyright law to the Web is how to handle the 'link.'" \textit{Id.} at 184. The importance of link litigation is likely to increase as technologies continue to expand their commercial applications and abilities. \textit{See id.} at 183.

\textsuperscript{126} \textit{See} \textit{Kelly v. Arriba Soft Corp.}, 280 F.3d 934, 939 (9th Cir. 2002). The case involved two issues that required separate determination under section 106 of the Act: (1) the violation of Kelly's reproduction rights in context of thumbnail images, and (2) the violation of Kelly's public display rights in the context of inline linking and framing. \textit{See id.}

\textsuperscript{127} \textit{See Shetland Times Ltd. v. Wills}, 1997 S.L.T. 669 (Sess. Cas. 1996); \textit{see also} Mark Sableman, \textit{Link Law Revisited: Internet Linking Law at Five Years}, 16 BERKELEY TECH L.J. 1273, 1285 (2001) ("The Shetland Times case raised the curtain on linking claims just around the time that the World Wide Web was reaching a wide audience[..]").

\textsuperscript{128} \textit{See} Sableman, supra note 127, at 1285. On the News's Web site, readers could link to the \textit{Times} for any story not in the News. \textit{See id.} The crux of the News's action was that its links bypassed the \textit{Times}'s home page, thereby avoiding the \textit{Times}'s advertisements. \textit{See id.} at 1287.

\textsuperscript{129} \textit{See Shetland Times}, 1997 S.L.T. at 669 (announcing incorporation of another Web site's headlines is infringement).

\textsuperscript{130} \textit{See} Strowel & Ide, supra note 45, at 420. At the same time, Lord Hamilton's decision limiting unauthorized linking with copyright law has been accused of leaving too many questions unanswered. \textit{See} Sableman, supra note 127, at 1288.
b. Exploring Public Display Rights—The "Playboy Trilogy"

The first (and only) cases to explore the interaction of display rights and digital images were three unrelated lawsuits involving Playboy Enterprises, Inc. ("Playboy"). In 1993, Playboy inadvertently began defining the right of online public display when it filed suit against George Frena, the operator of a subscription bulletin board service, for distributing and displaying unauthorized copies of Playboy photographs. The United States District Court for the Middle District of Florida analyzed whether the public display right protects images transmitted by a computer system. Pursuant to the Act, the court determined a public display is any display open to the public or a large number of people exterior to a typical group of family and friends. Ultimately, the court concluded Frena's display of Playboy's copyrighted images to subscribers constituted a public display, thus infringing Playboy's exclusive right under section 106(5).

In 1997, Playboy resumed its fight against online bulletin board services in Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.


132. See Frena, 839 F. Supp. at 1552. After paying a subscription fee, any user with the proper computer equipment could log onto Frena's bulletin board and upload or download adult material, including Playboy's copyrighted works. See id. at 1554. The court explained that downloading refers to the process by which the user moves an image from the bulletin board to his or her computer. See id. at 1554 n.1. Additionally, the court referred to uploading as the process by which the user moves content from his or her personal database onto the bulletin board. See id. at 1554 n.3. Specifically, a bulletin board service allows personal computer users to access content from a central location via a modem. See Hardenburgh, 982 F. Supp. at 505. This central location acts as a storage space for uploaded files, which any subscriber has the benefit of downloading to his or her own database. See id. The bulletin board operator controls how users access the bulletin board system and under what conditions users may download or upload material. See id. Such conditions often include the payment of a subscription fee or making the bulletin board system inaccessible to the general public. See id.

133. See Frena, 839 F. Supp. at 1556-57.

134. See id. at 1557 (quoting 2 Melville B. Nimmer, NIMMER ON COPYRIGHT § 8.14[c], at 8-169 (1993)); see also Columbia Pictures Indus., Inc. v. Prof'l Real Estate Inventors, 866 F.2d 278, 282 (9th Cir. 1989) (discussing how transmission of display exists when "images and sounds are received beyond the place from which they [were] sent").

by filing claims, similar to those in Frena, against Hardenburgh, the President of "Rusty–N-Edie's BBS." The court followed the reasoning in Frena, but emphasized that Frena was a passive operator in comparison to Hardenburgh, who screened all uploaded images prior to posting them on the bulletin board. The court found Hardenburgh directly liable for copyright infringement, noting his active participation in the unauthorized display of Playboy's copyrighted images.

Less than three weeks later, the third decision in the Playboy trilogy came from the United States District Court for the Northern District of Texas in Playboy Enterprises, Inc. v. Webbworld, Inc. ("Webbworld"). Similar to Frena and Hardenburgh, Webbworld operated a bulletin board service called "Netpics," where subscribers viewed adult images in thumbnail format. The court, citing Frena, described the display concept as broad and applicable to images shown on a computer screen via an electronic transmission. The district court rejected Webbworld's contention that it was a "mere conduit" and found the corporation directly liable for copyright infringement.

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137. See id. at 505.

138. See id. at 511. The court found it important to note that Frena contained no discussion of a screening process prior to the uploading of images onto the main system. See id. Apparently, Frena allowed his subscribers to transfer their files directly onto the bulletin board system uninhibited and unmonitored. See id. Therefore, the court found that Frena played a more passive role in the copying and displaying of Playboy's photographs than Hardenburgh. See id.

139. See id. at 513.


141. See id. at 549. Netpics was a bulletin board system that actually existed as a Web site, with the following URL: http://www.netpics.com. See id. Webbworld downloaded its images from various adult-oriented newsgroups, which sent Webbworld news feeds consisting of new material containing text and graphics. See id. Webbworld then removed the text and copied only the picture onto its database in the form of a large and small thumbnail image. See id. at 549-50. The smaller thumbnails created more space on the Webbworld server, yet allowed users to view full-sized images when clicking the thumbnail. See id. at 550. Webbworld offered its Web site services at a subscription fee of $11.95 per month. See id.

142. See id. at 551-52.

143. See id. at 552. The court analogized Webbworld's Web site to a store, stating that Netpics was simply a "commercial destination within the Internet." See id. "Just as a merchant might re-package and sell merchandise from a wholesaler, so did Webbworld re-package (by deleting text and creating thumbnails) and sell images it obtained from the various newsgroups." Id.
c. Two Guideposts for the Future

Although the *Playboy* trilogy addressed public display rights in the context of the Web, the cases' direct application to the issues of inline linking and framing has yet to be addressed by any federal court. Nonetheless, commentators often cite two particular settlement cases when predicting how courts may react when faced with these particular issues.

i. The Inline Linking Guidepost

In the context of inline links, the "*Dilbert* Hacking Controversy" best illustrates the controversies and legal implications of this technology. In 1995, Dan Wallach designed "The *Dilbert* Hack Page," which inlined *Dilbert* comic strips from the United Media Web site where the comic strips were stored. Thus, when a user opened Wallach's Web site, a new comic strip would appear automatically each day within the Web page without the user clicking on a link. United Media sent a letter to Wallach requesting that he terminate the inline link, arguing the use of the *Dilbert* comic strips constituted an unauthorized display of a copyrighted work in violation of the Act. Wallach eventually complied with United Media's de-
mands in order to avoid litigation. The Dilbert debate is noteworthy because it is the only publicized example of the inline linking controversy and suggests violation of the public display right as a possible claim of infringement in future inline linking litigation.

ii. The Framing Guidepost

In Washington Post v. TotalNews, the Washington Post ("Post") filed a complaint in the United States District Court for the Southern District of New York to challenge TotalNews, Inc.’s ("TotalNews") framing of a number of the Post's news sources. The Post contended that TotalNews violated several of its exclusive rights under section 106 of the Act, specifically pointing to the altered appearance of the Post’s Web pages when viewed within the TotalNews Web site. Ultimately, the case settled, as TotalNews agreed to replace the “framed” links with standard links that opened an entirely separate window.

V. Narrative Analysis

In Kelly, the Ninth Circuit specifically considered the application of copyright law to the operation of a visual search engine in two contexts. First, the court considered whether Arriba's reproduction of Kelly’s images into thumbnails for use in Arriba’s visual


150. See id. at 1034; see also Wassom, supra note 29, at 219-20 (stating Wallach complied with United Media’s cease and desist orders).

151. See Roarty, supra note 32, at 1034.

152. See generally Post Complaint, supra note 145 (describing procedural posture).

153. See id. at ¶ 33; see also Chan, supra note 71, at 148-49 (highlighting “TotalNews controversy”). TotalNews's Web site contained links to numerous new sources, including the Washington Post. See id. at 148. When a TotalNews user clicked on a Washington Post link, the contents of Washington Post's Web site was brought in TotalNews's Web site and displayed within frames containing the TotalNews logo, URL, and advertisements. See id.

154. See Post Complaint, supra note 145, at ¶ 72.


156. See Kelly v. Arriba Soft Corp., 280 F.3d 934, 939 (9th Cir. 2002). The Ninth Circuit found the need to divide the operation of Arriba's search engine into two distinct stages because each carried its own type of potential infringement. See id.
search engine violated Kelly’s exclusive right to reproduction.\textsuperscript{157} Second, the court addressed whether Arriba’s display of Kelly’s full-sized images through techniques of inline linking and framing violated Kelly’s exclusive right to publicize his copyrighted works.\textsuperscript{158} The Ninth Circuit held that Arriba’s creation and use of Kelly’s images as thumbnails in its visual search engine constituted a fair use, but found that the display of Kelly’s full-sized images, through inline linking and framing, “violate[d] Kelly’s exclusive right to publicly display his copyrighted works.”\textsuperscript{159} Importantly, the second part of the court’s analysis marked the first attempt by a federal circuit to reconcile inline linking with rights of public display.\textsuperscript{160} Specifically, the Ninth Circuit’s decision reversed the United States District Court for the Central District of California’s finding that Arriba’s inline linking operation qualified as a fair use of Kelly’s photographs.\textsuperscript{161}

A. The District Court’s Analysis

At the district level, Judge Taylor treated Arriba’s creation of thumbnails and framing of full-sized inline-linked images as one infringement.\textsuperscript{162} In particular, Judge Taylor focused upon whether Arriba’s reproduction and display of Kelly’s images as thumbnails signified a fair use under the Act.\textsuperscript{163} Judge Taylor proceeded to analyze each of the four statutory fair use factors and found that the first and fourth factors weighed in favor of fair use, and the second and third factors weighed in opposition.\textsuperscript{164} Faced with a tie score,
Judge Taylor declared the first factor regarding transformative uses to be paramount and deserving of a broad construction to provide for flaws inherent in any developing technology. Consequently, Judge Taylor tipped the scale in favor of Arriba and denied the motion for summary judgment on Kelly’s copyright infringement claims.

B. The Ninth Circuit’s Analysis

On appeal, Kelly distinguished between Arriba’s infringement of his reproduction right in copying full-sized images to generate thumbnails and its infringement of his public display right by inline linking full-sized images into frames within its “Images Attributes” page. Thus, unlike the district court, the Ninth Circuit recognized protection; (3) the third factor weighed slightly against fair use because reproducing the full-sized image in the “Image Attributes” window was not necessary to the main purpose of Arriba’s search engine; and (4) the fourth factor weighed in favor of fair use because Arriba met its burden of proof by offering evidence tending to show the lack of market harm, while Kelly failed to refute such proof with opposing evidence. See id. at 1119-21.

After finding two factors in favor of fair use and two factors against, Judge Taylor held the first factor of the fair use test to be prevalent. See id. at 1121. Therefore, the district court found that Arriba’s conduct constituted fair use of Kelly’s images and granted Arriba’s motion for summary judgment. See id.

165. See id. The transformative character of a reproduced work is not a mandatory factor for fair use analysis. See Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998). But see Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 23 (1st Cir. 2000) (declaring greater degree of “transformative” nature lessens significance of other factors, like commercial nature, weighed against fair use). Therefore, the use of a copyrighted work that “merely repackages or republishes the original” is unlikely to be deemed a fair use.” Infinity Broad., 150 F.3d at 108 (quoting Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1111 (1990)).

166. See Kelly, 77 F. Supp. 2d. at 1121.

167. See generally Brief for Plaintiff-Appellant Leslie A. Kelly, Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) (No. 00-55521) [hereinafter Kelly Brief], available at http://netcopyrightlaw.com/kellyarribasoft.asp. Specifically, Kelly asserted Arriba’s use of the photographs, both as thumbnails and full-sized images, was not a transformative use because they simply were repackaged in a different medium. See id. at 33. Moreover, Kelly claimed Arriba simply repackaged Kelly’s images into its own database. See id. As a result, a user could avoid Kelly’s Web site by using Arriba’s full-sized versions of Kelly’s photographs. See id. Kelly asserted, “merely recasting the work in a different medium for utilitarian purposes is not ‘transformative’ for the purpose of [the first] factor [of the fair use doctrine].” Id. at 26 (citing L.A. News Serv. v. Reuters Television Int’l, Ltd., 149 F.3d 987, 987 (9th Cir. 1998)). Kelly further contended that the district court’s distinction between his aesthetic use of the photographs and Arriba’s functional use was irrelevant in light of Arriba’s failure to add new meaning or expression to the original work. See id. at 33. Kelly also noted that the “district court’s reliance on the ‘functional’ and ‘comprehensive’ nature of [Arriba’s] image service is irrelevant to whether it is ‘transformative’ in a fair use sense . . . .” Id.; see also Kelly, 77 F. Supp. 2d. at 1119 (distinguishing between Kelly’s photographs as works of art and Arriba’s thumbnail index as functional in nature).
nized a legal dichotomy in the operation of Arriba’s visual search engine and bifurcated its analysis.\textsuperscript{168}

1. \textit{Arriba’s Thumbnails}

a. Copyright Infringement?

The Ninth Circuit first considered whether Arriba’s reproduction of Kelly’s images into thumbnails for use in Arriba’s search engine violated Kelly’s exclusive right of reproduction under section 106(1) of the Copyright Act.\textsuperscript{169} Looking to \textit{Hustler Magazine, Inc. v. Moral Majority, Inc.},\textsuperscript{170} the court began its analysis by insisting a claim of copyright infringement by reproduction required a showing of ownership and copying of the copyrighted work.\textsuperscript{171} The Ninth Circuit held that “Kelly [undoubtedly] established a \textit{prima facie} case of copyright infringement.”\textsuperscript{172}

b. Fair Use?

Next, the Ninth Circuit determined whether Arriba’s violation of Kelly’s exclusive right to reproduce his photographs was subject to the fair use exception.\textsuperscript{173} The Ninth Circuit began its analysis by recognizing that the purpose of the first factor is to determine not only commercial use, but also whether Arriba’s copy simply displaced Kelly’s images or actually altered their purpose and character by adding something new.\textsuperscript{174} Noting that transformative use was central to analyzing the first factor, the Ninth Circuit found for Arriba because its visual search engine benefited the public with little corresponding loss to Kelly’s images.\textsuperscript{175}

\textsuperscript{168} \textit{Compare} Kelly v. Arriba Soft Corp., 280 F.3d 934, 939 (9th Cir. 2002) (bifurcating its analysis into two distinct parts), \textit{with} Kelly, 77 F. Supp. 2d at 1118 (addressing copyright infringement of Kelly’s reproduction right and public display right in one fair use analysis).

\textsuperscript{169} \textit{See} Kelly, 280 F.3d at 940-44.

\textsuperscript{170} 796 F.2d 1148 (9th Cir. 1986). For a discussion on the requirements needed to establish a \textit{prima facie} case of copyright infringement, see the text accompanying \textit{supra} note 106.

\textsuperscript{171} \textit{See} Kelly, 280 F.3d at 940.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{See id.} at 940-44. The court noted that section 107 of the Act set out four statutory factors of fair use that must be balanced in light of copyright law objectives. \textit{See id.} at 940; \textit{see also} 17 U.S.C. § 107 (2000). For a discussion on the relevant portions of the fair use statute, see \textit{supra} notes 111-12 and accompanying text. For a discussion of the policies and principles of copyright law, see \textit{supra} notes 95-100 and accompanying text.

\textsuperscript{174} \textit{See} Kelly, 280 F.3d at 940-44.

\textsuperscript{175} \textit{See id.} at 942. The court stated that the “central purpose” behind looking at the purpose and character of the defendant’s use is to determine whether the “new work supercedes the objects of original creation or instead adds some-
With regard to the second factor, the Ninth Circuit recognized publication as the critical element. The court held that "this factor only slightly weighs in favor of Kelly" because Kelly's images appeared on the Web prior to Arriba's use of the images.

Turning to the third factor, the Ninth Circuit noted, "the extent of permissible copying" depended upon whether the defendant copied only that portion necessary to accommodate his or her intended use. The court found this factor to be neutral because Arriba's copying of Kelly's complete images appeared reasonable in light of its use of the images.

Lastly, the Ninth Circuit found the fourth factor in favor of Arriba, noting potential market harms hinged upon the extent of the transformative use because "[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." Because the court found Arriba's use to be transformative in the first factor analysis, it found Arriba's use harmless to "the market for or value of Kelly's images."

With two factors favoring Arriba, one factor neutral, and one slightly favoring Kelly, the Ninth Circuit concluded that Arriba's reproduction of Kelly's images into thumbnails for use in its visual search engine constituted a fair use. As a result, Arriba's repro-thing new, with a further purpose or different character, altering the first with new expression, meaning or message[.]" Id. at 940 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)). Subsequently, the court found Arriba's thumbnail use to be transformative because the use served an entirely different function than Kelly's original images. See id. at 941. Because the thumbnails were of lower resolution than Kelly's originals, the court barred Arriba's use from being similar to Kelly's intended use of the images as artistic works for illustrative purposes. See id.

176. See id. at 943. The Ninth Circuit averred that use of a published work was more likely to constitute fair use because the artist had already revealed his work to the public. See id.

177. Id.

178. See id.

179. See Kelly, 280 F.3d at 943.

180. Id. (citing Campbell, 510 U.S. at 591). The language of section 107 of the Act suggests a court should limit its "analysis to the effect of the copying on the market for the reproduced photographs." Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000); see also 17 U.S.C. § 107 (2000). "In short, this factor is 'concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright holder.'" Nunez, 235 F.3d at 24 (quoting Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 110 (2d Cir. 1998)).

181. Kelly, 280 F.3d at 944. In support of its reasoning, the court noted that Arriba's visual search engine likely guided Arriba's "users [toward] Kelly's [W]eb site, rather than away." Id.

182. See id.
duction of full-sized copyrighted images into thumbnail images and subsequent use of those thumbnail images as reference links in their visual search engine did not violate a copyright owner’s exclusive right to reproduce his or her works.183

2. Arriba’s Inline Links

Next, the Ninth Circuit turned its attention to a topic of first impression among federal circuits: whether Arriba’s inline linking and framing of Kelly’s photographs violated Kelly’s exclusive right under the Act to publicly display his copyrighted works.184

a. Public Display?

The Ninth Circuit began its analysis with the principle that a claim of copyright infringement by public display required an un-


184. See Kelly, 280 F.3d at 944-47 (noting no court has addressed whether inline linking and framing violate copyright owner’s exclusive right to publicly display original works). As a preatory comment, the Ninth Circuit explained Arriba’s inline linking and framing of Kelly’s full-sized images did not create an issue of copying because the images were imported directly or inlined from Kelly’s Web site. See id. at 944. Therefore, the court reasoned that copyright infringement by reproduction was not possible, but rather such technology triggered the right of public display. See id.
authorized display of a copyrighted work, where such display is made available to the public.185 The court then addressed the statutory meaning of the terms "display" and "publicly," as used in the Act.186

First, the Ninth Circuit pointed to legislative history clearly defining a "display" to include the projection of an original image onto a computer screen.187 Thus, the court concluded that Arriba's inline linking and framing of Kelly's original works constituted a display within the meaning of the Act.188 Moreover, the Ninth Circuit conceded the mere availability of Kelly's images on the Arriba Web site amounted to sufficient public access to qualify the display as "public."189 Looking strictly at statutory language and legislative history, the court found that Arriba's inline linking of Kelly's images infringed upon Kelly's exclusive right of public display.190

b. Applying Precedent

Although recognizing the issue as one of first impression, the Ninth Circuit found support for its decision by way of analogy in two federal district court decisions involving online public display rights.191 First, the court found the situation in Webbworld anal-

185. See id.
186. See id. at 944-45.
187. See id. at 945 (articulating Congress's definition of "display" in context of Act). Specifically, the legislative history states the following:

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions . . . . "[D]isplay would [also] include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

188. See Kelly, 280 F.3d at 945.
189. See id. The Ninth Circuit found that the term "publicly" included any public display of a work via any process or device, regardless of whether the transmission was immediately received by any of those members of the public with the potential to receive such a display. See id. Moreover, location and time of reception also were deemed irrelevant to the statutory meaning of the term. See id.; see also 17 U.S.C. § 101 (2000) (defining "publicly" in context of performance and transmission); H.R. REP. No. 94-1476, at 64, reprinted in 1976 U.S.C.C.A.N. 5659, 5678 (stating public transmission includes "all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting").
190. See Kelly, 280 F.3d at 945.
191. See id. at 945-47 (analogizing instant case to situations in Webbworld and Hardenburgh).
gous to the instant case because both Webbworld and Arriba created a public display of the plaintiff's copyrighted works by allowing the public to view them at their own Web sites.192 Similar to the court in Webbworld, the Ninth Circuit rejected the argument that Kelly failed to prove that anyone ever saw his images on Arriba's Web site.193 Additionally, the Ninth Circuit cited Hardenburgh to exemplify infringement by public display in the slightly different context of an online bulletin board service.194 Like the holding in Webbworld, the Hardenburgh decision further supported the Ninth Circuit's proposition that simply providing users with access to copyrighted images constituted a violation of the public display right, regardless of whether any person ever saw the image.195

Specifically, the Ninth Circuit emphasized that the defendants in Webbworld and Hardenburgh were active players in the display of the copyrighted images.196 The court noted, where no affirmative action was taken, but rather the defendant operated the system merely as a "passive conduit," no direct infringement had occurred.197 Following this logic, the Ninth Circuit found that crawling the Web, finding Kelly's images, and inline linking those images into a frame within its own Web page made Arriba directly liable for the unauthorized public display of Kelly's images.198

c. Fair Use?

Having determined that Arriba directly infringed upon Kelly's public display rights, the Ninth Circuit briefly addressed whether the fair use doctrine exonerated Arriba's inline linking and framing

192. See id. at 946.
193. See id.
194. See id.
195. See Kelly, 280 F.3d at 946.
196. See id. In Webbworld, the district court held that the screening procedure constituted an exercise of complete control and active participation in deciding what content to offer its customers. See Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543, 552 (N.D. Tex. 1997). For a discussion on the holding in Webbworld, see supra notes 140-43 and accompanying text.
In Hardenburgh, the district court found that encouraging subscribers to upload images constituted active participation. See Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997). For a discussion on Hardenburgh's active participation in the operation of his bulletin board service, see supra notes 136-39 and accompanying text.
198. See id. at 947.
actions. With respect to the first factor—the purpose and character of the use—the court found that Arriba's display of Kelly's full-sized images had no purpose different from Kelly's illustrative use of them, nor did Arriba transform the images by adding new expression or meaning to them. Thus, the Ninth Circuit found the first factor to favor Kelly because Arriba's images merely superseded Kelly's.

Next, the court considered the second factor, as applied to Arriba's inline linking and framing, to be identical to the previous "second-factor discussion" concerning Arriba's thumbnails, which weighed only slightly in favor of Kelly. Regarding the third factor, the Ninth Circuit found Arriba's complete display of Kelly's full-sized images illegitimate because it provided users with access to Kelly's exact photographs and diminished the need to visit Kelly's Web site. Therefore, the court found that the third factor favored Kelly.

Finally, the Ninth Circuit determined that the fourth factor also favored Kelly because Arriba harmed all of Kelly's markets by providing users with automatic access to Kelly's full-sized images. With all factors favoring Kelly, the Ninth Circuit concluded that Arriba was not free from liability for violating Kelly's exclusive right of public display under a fair use defense. In conclusion, the Ninth Circuit held Arriba's reproduction of Kelly's images for use as thumbnails in Arriba's search engine to be a fair use, while Arriba's display of Kelly's full-sized images via inline linking and framing

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199. See id. The court considered the fair use of Arriba's inline linking of Kelly's full-sized images only because the district court had done so in its analysis. See id.  
200. See id. at 947-48. Unlike Arriba's thumbnail images, the full-sized, inline linked images served as the end product, instead of leading the user to more information. See id. at 947. Furthermore, the court found Arriba's use of the images identical to Kelly's use of the images because Arriba's search engine would function the same with or without the inline linked images. See id. For a discussion on how the Ninth Circuit applied this factor to Arriba's thumbnails, see supra notes 174-75 and accompanying text.  
201. See Kelly, 280 F.3d at 947-48.  
202. See id. at 948.  
203. See id.  
204. See id.  
205. See id. The court established that new works that are not transformative usually serve a purpose similar to that of the original work and often negatively affect the market of the original work. See id. The Ninth Circuit stated that Arriba's inline linking practice diverted users away from Kelly's Web site, hindered Kelly's ability to license and sell his own works, and increased the chance for outsiders to exploit Kelly's photographs. See id.  
206. See Kelly, 280 F.3d at 948.
techniques constituted a violation of Kelly's exclusive right to publicly display his copyrighted works.207

VI. CRITICAL ANALYSIS: DISSECTIONS AND DISPUTES

In Kelly, the district court and the Ninth Circuit agreed that Kelly established a prima facie case of copyright infringement under his exclusive rights to reproduce and publicly display his copyrighted works.208 Moreover, both courts agreed that the doctrine of fair use exempted Arriba's unauthorized reproduction of Kelly's copyrighted images for use as thumbnails in Arriba's search engine.209 Nevertheless, the two courts diverged in their opinions when applying the fair use exception to Arriba's process of inline linking and framing.210

A. The Thumbnail Holding

Initially, both Judge Taylor and the Ninth Circuit prioritized the concept of transformative use when analyzing the first factor of the fair use defense.211 On appeal, Kelly argued Arriba's use of Kelly's images as thumbnails could be transformative because they were exact reproductions of Kelly's original works with no new expression or meaning.212

In rejecting this argument, the Ninth Circuit correctly stated that Arriba's use of Kelly's images as thumbnails served a functional purpose, while Kelly's use of the images primarily served aesthetic

207. See id.
208. Compare Kelly, 280 F.3d at 940, 945 (ruling that Kelly established prima facie case of copyright infringement under exclusive rights of reproduction and public display), with Kelly v. Arriba Soft Corp., 77 F. Supp. 2d. 1116, 1118 (C.D. Cal. 1999) (holding that Kelly established prima facie case of copyright infringement under exclusive rights of reproduction and public display).
209. Compare Kelly, 280 F.3d at 944 (holding that Arriba's use of Kelly's images as thumbnails constituted fair use), with Kelly, 77 F. Supp. 2d at 1121 (finding that Arriba's use of Kelly's images as thumbnails constituted fair use).
210. Compare Kelly, 280 F.3d at 948 (deciding that fair use exemption was not applicable to Arriba's display of Kelly's photographs through inline linking and framing processes), with Kelly, 77 F. Supp. 2d at 1121 (ruling that Arriba's conduct constituted fair use of Kelly's images).
211. Compare Kelly, 280 F.3d at 940 (stating "central purpose of [first factor] investigation" is to determine whether new work transformative), with Kelly, 77 F. Supp. 2d at 1118-19, 1121 (suggesting that transformative nature of Arriba's use was most important in fair use test).
212. See Kelly, 280 F.3d at 941; see also Kelly Brief, supra note 167, at 27 ("It is undisputed that [Arriba's] image service adds no 'new meaning, message or expression' to the images that its automated Packet Rat indiscriminately reproduces from other Web sites."), available at http://netcopyrightlaw.com/kellyvarribasoft.asp. "Nothing about this use is transformative in the fair use sense." Id.
purposes. Subsequently, the Ninth Circuit depicted the purposes of Kelly's photographs as serving to attract potential customers to Kelly's Web site or initiate the sale of Kelly's photographs to other Web sites. This characterization by the court raises the question of whether the potential markets, in which a copyrighted work can be used "fairly," are limited to the market containing what a court considers to be the work's primary use.

More importantly, the Ninth Circuit's analysis inadvertently seems to teeter upon the notion that transformative use necessarily involves a balancing of realities and probabilities. For instance, even though the Ninth Circuit suggested differently, it is possible that users may continue using or enlarging Kelly's thumbnails for infringing purposes.

213. See Kelly, 280 F.3d at 941. The Ninth Circuit distinguished the instant case from a line of cases where the doctrine of fair use was not applied where the new use was similar to the original use because Arriba's thumbnails served a purpose wholly distinct from that of Kelly's images. See id. (citing Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998); L.A. News Serv. v. Reuters Television, 149 F.3d 987, 993 (9th Cir. 1998); UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)). The district court made the same distinction in its opinion, stating, "[t]he character of the thumbnail index is not aesthetic, but functional; its purpose is not to be artistic, but to be comprehensive." Kelly, 77 F. Supp. 2d at 1119.

214. See Kelly, 280 F.3d at 948.

215. See Dang, supra note 183, at 402. In its fair use analysis regarding Arriba's thumbnails, the Ninth Circuit noted that the purpose and use of Kelly's images were primarily aesthetic. See id. The court then acknowledged several other possible markets; however, it rejected a fair use defense concerning Arriba's inline linking practice. See id. Logically, it may follow that the court was inferring that the only market in which Arriba could have exercised a fair use of Kelly's images was the market containing the original work's primary use. See id.

216. See id.

217. See id. The Ninth Circuit stated, "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 as display material." Id.; see also Court Rules Web Thumbnails Fair Use, at http://www.photo.net/bboard/q-and-a-fetch-msg?msg_id=001wYa (last visited Feb. 1, 2003) [hereinafter Court Rules] (discussing ambiguities within Ninth Circuit's thumbnail decision). The following is an excerpt of a dialog taken from an online forum hosted by Mark Scheuern, at http://www.photo.net, typifying immediate reactions among experts to the Ninth Circuit's decision. See id. This particular segment includes responses and concerns regarding the court's ruling that search engines can display thumbnails of copyrighted images but not full-sized images:

Philippe Gauthier: What's a thumbnail, for the purpose of this rule? If I post a photo [that] is 95% of the original size, is it considered a thumbnail? Where's the limit?

Mark Scheuern: I was wondering that too, Philippe, since it seems undefined. It's also not clear what "link" means in this context.

* * *

Dave Nance: What's a thumbnail for the purposes of this ruling? Good question. The court doesn't answer it. It doesn't even describe the size...
Seemingly, the Ninth Circuit avoided such quandaries by focusing its analysis on how Arriba’s search engine benefited the public and furthered the goals of copyright law.218 Thus, whether copyrighted materials posted on the Web constitute infringement may depend upon whether technologies provide a sufficient public benefit apart from the benefits the public already receives from the copyrighted work itself.219 On the other hand, the Ninth Circuit refused to find a similar public benefit in Arriba’s inline linking of Kelly’s full-sized photographs into frames located within Arriba’s Web site.220

B. A “Questionable” Inline Link Holding

Although much of the Ninth Circuit’s analysis focused on fair use, its decision directly relating Kelly’s public display rights to Arriba’s inline linking and framing is arguably the most significant ruling recently to come from a federal appeals court.221 The court

of the thumbnails in the case. However, the court’s discussion of the issue seems to turn on its assessment that the thumbnails were lousy enough in terms of quality that no one would want to use them for anything.

Jack Walton: Wisdom of Solomon — look at your thumb to determine the size :)

Aaron Linsdau: No, there was no definition of thumbnail, so it leaves it to a case by case evaluation. I would think that the Google image sea[r]ch tool could run into the same problem, though they directly link to the originator’s website.

Id.

218. See Kelly, 280 F.3d at 942. Copyright law benefits both the artist and the public through its promotion of creativity. See id. Congress created the doctrine of fair use to encourage the use of artistic works in “teaching, researching, critiquing, and news reporting[.]” See id. Arriba’s thumbnails advance these goals and “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.” Id. Instead, Arriba’s thumbnails “benefit the public by enhancing information gathering techniques on the [I]nternet.” Id. Furthermore, the district court added that these goals must be considered in light of the fact that the technologies surrounding the Internet are young and still developing. See Kelly, 77 F. Supp. 2d at 1121.

219. See Dang, supra note 183, at 402.

220. See id. For a statement of the Ninth Circuit’s holding, see supra note 207 and accompanying text.

unanimously ruled that a link to a full-sized copyrighted image on a photographer’s Web site does not qualify as a fair use under the Act.\textsuperscript{222}

While the Ninth Circuit’s decision appears correct on its face, a closer look at the technology involved begs the question of whether the court was too quick to find support in \textit{Webbworld} and \textit{Hardenburgh}.\textsuperscript{223} While both Web sites in these cases downloaded actual copies of each image file to their respective servers, the Ninth Circuit readily identified that Arriba’s inline linking technique involved no copying.\textsuperscript{224} Although the Ninth Circuit recognized this distinction in a footnote, it inexplicably persisted with its analogy to \textit{Webbworld} and \textit{Hardenburgh} and did not pursue the footnoted matter further.\textsuperscript{225} Ironically, but perhaps expectedly, this critical distinction has become a central point of controversy among critics and may prove to be the most powerful attribute of the Ninth Circuit’s decision.\textsuperscript{226} Moreover, setting forth the possible arguments

\begin{footnotesize}
\item \textsuperscript{222} See Kelly, 280 F.3d at 947.
\item \textsuperscript{223} See EFF Brief, supra note 17, at 7. While \textit{Webbworld} and \textit{Hardenburgh} held that a retransmitter is directly liable for infringing a copyright owner’s exclusive right to public display, neither stands for the proposition that third parties are directly liable for causing such a transmission. See \textit{id}. The Ninth Circuit failed to recognize “what” was being transmitted and “by whom.” See \textit{id}. at 5. Moreover, the court failed to explain how the underlying technology of inline linking operates before embarking on its analysis. See \textit{id}.
\item \textsuperscript{224} See Kelly, 280 F.3d at 944. Webbworld’s server actually copied Playboy’s image by physically downloading the files for each graphic to its database prior to offering viewer access. See Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543, 549 (N.D. Tex. 1997). The computer bulletin board service in \textit{Hardenburgh} functioned in a similar manner. See Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 505 (N.D. Ohio 1997). To the contrary, the Ninth Circuit admitted in its opinion that Arriba’s inline linking technique directly imported Kelly’s images without making actual copies. See Kelly, 280 F.3d at 944.
\item \textsuperscript{225} See Kelly, 280 F.3d at 946 n.46. The court did not explain the meaning of the term “import” as used in its analysis and thus failed to describe sufficiently how the technology operated. See EFF Brief, supra note 17, at 5.
\item \textsuperscript{226} See Court Rules, supra note 217 (exemplifying controversies over Ninth Circuit’s inline linking decision). The following is an excerpt of dialog taken from an online forum hosted by Mark Scheuern, at http://www.photo.net, typifying reactions among experts to the controversy over the legality of whether inline linking involves copying another person’s copyrighted material:

Pete Andrews: As long as images weren’t copied from the original server to the search engine, then it’s difficult to see where any breach of copy-
likely to arise in future cases best elucidates support for this proposition.

C. Arguments Related to the Inline Link Decision

One camp may argue Arriba neither "copied" nor "transmitted" displays of Kelly's images and, therefore, never committed copyright infringement. To the contrary, the Ninth Circuit found that Arriba transmitted copies of Kelly's images onto its user's computer screen, constituting a statutory "display" of a copyrighted work. The court's analysis is arguably incorrect because inline linking only temporarily pulls an image in from a linked Web server onto the user's display via HTML instruction sent by the linked Web server. Technically, Arriba only "transmitted" an instruction to the user's Web browser to tell Kelly's Web site to send the image. Considered in this light, the Ninth Circuit's finding that Arriba's activity constituted direct copyright infringement should extend to every link existing on the Web.

right might have occurred in this case. Anyone that puts images on the [W]eb surely expects them to be downloaded for viewing. . . . Basically, if you don't want your images viewed or downloaded, then don't put them on the [W]eb!

Mark Scheuern: It seems wrong to me that person A should create an image, put it on the server, and person B should put it in his [W]eb page by referencing it with an IMAGE tag.

Pete Andrews: If I hang a picture in my home or office, then should I put a big sign beside it crediting the author, or make a point of drawing the viewer's attention to a signature? NO. I just hang it there for casual viewing. The situation is almost exactly the same with [Arriba's] search engine.

Lyle Aldridge: Pete, the problem with your analysis is the U.S. copyright law extends to more than copying. The law gives the authors the exclusive right to display their work, as well as the exclusive right to copy. . . . [Even so, Kelly] may also suggest that this component of copyright law is just fundamentally incompatible with the Internet.

Id.

227. See id. (providing posting by Pete Andrews on February 11, 2002 discussing how no copies means breach of copyright). While Kelly is actually the one who publicly displayed the images, Arriba simply initiated the process by transmitting a URL to Kelly's Web site to retrieve the file for an interested user. See EFF Brief, supra note 17, at 5.

228. See Kelly, 280 F.3d at 944-45.

229. See EFF Brief, supra note 17, at 5. For a discussion on the operation of an inline link, see supra notes 63-70 and accompanying text.

230. See EFF Brief, supra note 17, at 5.

231. See id. "If a mere transmission of a URL constitutes direct copyright infringement, as the Panel opinion holds, then there is no principled basis in copyright law that would distinguish [Arriba's] activity from any link on the Web." Id.
On the other hand, it is arguable that simply by causing the user to view Kelly's images, Arriba created an unauthorized public display constituting infringement of Kelly's copyrighted works. Questionably, Arriba simply could have directed users to Kelly's Web site instead of inlining a full-sized image into its own Web page. Interestingly, while the district court excused Arriba from this paradigm because of the imperfect means inherent in new technology, the Ninth Circuit did not implement such reasoning.

D. Issues Not Addressed

First, the Ninth Circuit did not address a line of federal appellate rulings that determined that copyright law protected only literal elements, such as the actual computer language of a computer program, and not non-literal elements that simply appear on a display screen. Following the logic of these cases, Arriba's incorporation of the HTML code for Kelly's images into its inline linking protocol may create another avenue of copyright infringement to pursue.

Second, the Ninth Circuit did not address whether a presumption of authorization or implied license to link existed between Kelly and Arriba. One could argue that in posting images on his Web site, Kelly authorized other Web users to reference his material. Such online participation gives tacit authorization to refer to Web site content, but arguably not to copy all or part of this content. Nonetheless, Arriba then could assert that inline link-

233. See id. at 7.
234. See Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116, 1119 (N.D. Cal. 1999) (asserting how consideration of character and purpose of new enterprise favors finding transformative use rather than imperfect means of achieving such purpose); see also Kelly, 280 F.3d at 948 (mentioning no imperfect technology exception to Arriba's actions).
235. See Wassom, supra note 29, at 206 (citing Mitek Holdings, Inc. v Arce Eng'g Co., 89 F.3d 1548 (11th Cir. 1996) (holding screen display was not determinative factor when addressing whether computer program subject to copyright protection)).
236. See generally Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002) (showing no mention of presumptive authorization or implied license to link).
237. See Strowel & Ide, supra note 45, at 412. Publishing content on the Web implies acceptance and authorization for another Web site to link to this material without first obtaining express consent. See id.
238. See id.
ing is mere referencing, not copying, and the implied license authorization is not violated.

E. Final Comments on the Inline Link Holding

While such controversy may serve to poke holes in the Ninth Circuit’s decision, perhaps such holes should be expected when a court attempts to reconcile the complex nuances of developing technology with traditional legal doctrine.\(^\text{239}\) Regardless, the Ninth Circuit accepted Kelly’s new legal proposition relating copyright law to inline linking and found that Arriba’s inline linking and framing of Kelly’s full-sized images violated rights of public display.\(^\text{240}\) Despite uncertainty as to the long-term effects of such a ruling, the immediate ramifications and concerns regarding this decision are addressed in the final section.\(^\text{241}\)

VII. Impact

Although recent Internet battles over mp3s and DVDs have received widespread public attention, the impact of Kelly has yet to grab the public’s attention.\(^\text{242}\) Nonetheless, the possible implications of the Ninth Circuit’s decision have triggered a plethora of controversial speculations within the legal community, entertainment industry, and Internet companies.\(^\text{243}\)

\(^{239}\) See Litman, supra note 118, at 277 (indicating traditional copyright law has struggled to accommodate advances in technology). “The language of [past] copyright statutes has been phrased in fact-specific language that has grown obsolete as new modes and mediums of copyrightable expression have developed.” Id.

\(^{240}\) See Kelly, 280 F.3d 934.

\(^{241}\) See May, supra note 19, at ¶ 4 (claiming significant effects of decision lie in future litigation).

\(^{242}\) See id. at ¶ 1.

\(^{243}\) See Brian Krebs, Court Rules ‘Thumbnail’ Images OK, Full-Sized Copies Not, NEWSBYTES (Feb. 7, 2002), available at http://www.commoncriteria.org/news/newsarchive/Feb2002/feb12.htm. Mark Lemley, a law professor at the University of California at Berkeley, thinks that the Kelly “opinion contains some troubling language suggesting that anyone who links directly to copyrighted material is directly infringing by displaying it.” Id. To the contrary, Lee Bromberg, a partner at Bromberg & Sunstein in Boston, believes that the opinion is balanced, and that the defense of “'[h]ey, we’re not using a copy, we’re showing you the real thing’ doesn’t matter because it’s a public display, and the court said the copyright holder has the exclusive right to determine how its done.” Id.; see also Press Release, Leslie A. Kelly, Update: Kelly v. Arriba Soft, at http://netcopyrightlaw.com/kellyvarribasoft.asp (Apr. 1, 2002) [hereinafter Press Release, Update] (suggesting decision will put Internet companies, like Google, PicSearch, Alta Vista, and Lycos, at risk of copyright infringement); Press Release, Leslie A. Kelly, at http://netcopyrightlaw.com/kellyvarribasoft.asp (Mar. 22, 2000) [hereinafter Press Release, Kelly] (discussing how court’s decision will likely establish rules for online graphics, music, and text).
A. Negative Impact

Those who view the Internet as a seamless web of information free and open to all users believe the *Kelly* decision may stifle future development of the Internet by causing Web site operators to think twice before linking to another place on the Web. 244 One could interpret the Ninth Circuit's ruling to impose direct copyright infringement upon anyone who creates links without permission, which could lead Web site operators to seek authorization from the owners of each linked Web site. 245 Potentially, this could constrain the Internet's ability to function as a "global interconnected medium" by discouraging linking altogether. 246 Moreover, some commentators even believe the court's opinion threatens to render all linking on the Web illegal. 247 At minimum, the *Kelly* case has caused other major search engines to make serious decisions of how to display their images. 248

244. See May, *supra* note 19, at ¶ 3.
245. See *id*.
246. See *id*.; *see also* Hamaker, *supra* note 1 (describing how decision could lead to hindering user's navigation around Web).
247. See Hamaker, *supra* note 1; *see also* Letter from Leslie A. Kelly, Photographer, to Ms. Patti Waldemeir, Columnist, Financial Times, Washington D.C., at http://netcopyrightlaw.com/kellyvarribasoft.asp (last visited Mar. 13, 2002) [hereinafter Letter from Leslie A. Kelly] (explaining how Waldemeir's disfavoring Ninth Circuit's decision triggered host of obscene email to Kelly from users in England). A quote from one of the emails was, "[w]ay to ruin the Internet, jackass." See *id*. Moreover, some commentators have even gone as far as calling Kelly's lawsuit, "The Dumbest Lawsuit in Web History." See *id*.; *see also* EFF Brief, *supra* note 17, at ¶ 3 (noting that court's error could render every link act of copyright infringement). "Anything that would impose strict liability on a Web site operator for the entire contents of any Web site to which the operator linked therefore would raise grave constitutional concerns, as Web site operators would be inhibited from linking of exposure to liability." EFF Brief, *supra* note 17, at ¶ 2 (quoting Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 340 (S.D.N.Y. 2000)); *see also* Hillel I. Parnes, *Framing the Question: How Does Kelly v. Arriba Soft Advance the Framing Debate?*, 1 *CYBERSPACE LAW.* 9, ¶ 2 (Mar. 2002) ("[A] number of commentators were quick to predict the sweeping impact this may have on the practices of linking and framing, one stating 'it's basically going to do away with linking or framing without permission.'"), available at http://web2.westlaw.com/Welcome/LawSchool/default.w?Action=EditQuery&CFID=0&CiteListOnly=False&DB=JLR%2CAMJ%25UR%2CTF%2DALL&DocSample=false&EQ=Welcome%2FLawSchool&Method=TNC&n=1&Query=%22Linking+Full%2DSized+Web+Images+Is+%26quot%22+Not+Fair+Use%22&RecreatePath=%2FWelcome%2FLawSchool%2Fdefault%2EWL&RLTDDB=CLID%5FB1556311&&Service=search&SS=doc&Tab=cite+List&TF=10&TC=8&RS=WLW2.81&VR=2.0&SV=splitt&FN=_top&MT=lawSchool.

B. Positive Impact

Despite a barrage of negative responses to the Ninth Circuit's ruling, such criticisms have been countered by an equal amount of praise and support.\textsuperscript{249} In particular, photographers and other intellectual property owners in the entertainment industry have applauded the court for allowing artists to pursue their business ventures online.\textsuperscript{250} Supporters see the Kelly case as a chance for "hundreds of thousands of individuals whose livelihood depends on creative work, images, photos [and] design" to stymie the online theft of copyrighted works.\textsuperscript{251} Furthermore, such supporters believe a victory for Arriba would have rendered all artistic property prone to exploitation.\textsuperscript{252} Instead, Kelly now acts as a landmark decision allowing artists to showcase their creative works without the fear of being "ripped off" by search engines.\textsuperscript{253}

VIII. Conclusion

Either way, Kelly will likely take its place next to such cases as MP3.Com, Napster, and Ebay as a decision changing the way society

\textsuperscript{249} See Letter from Leslie A. Kelly, supra note 247 ("[H]undred of thousands of writers, authors, artists and photographers are praising the decision in support of the rights of intellectual property owners who wish to be able to successfully use the Internet for their own business pursuits.").

\textsuperscript{250} See Kelly Wins, supra note 221 (averring Kelly's victory gives artists precedent-setting decision to use against infringers); Press Release, Kelly, supra note 243 (reporting, "Kelly has received support from trade and industry groups to include the Graphic Artists Guild and The American Society of Media Photographers, Inc.," and expects more interest groups to also file amicus briefs).

\textsuperscript{251} Letter from Leslie A. Kelly, Photographer, NetCopyrightLaw Net Consulting Services, to Dana Blankenhorn, Columnist, at http://netcopyrightlaw.com/kellyvarribasoft.asp (last visited Nov. 1, 2002) (explaining Kelly's "lawsuit represents an opportunity to support copyright on the Internet and help to stop egregious theft of copyrighted material, be it images, graphics, text or music"). "The Internet represents an excellent marketing tool for artists," but if dishonesty invades this arena, "that poses a problem for everyone." Id.

\textsuperscript{252} See Letter from Paul Basista, Executive Director, Graphic Artists Guild, to Editor, Visual Arts Trends, at http://www.visualartstrends.com/Ea/Ea5/eS11-ditto.html (last visited Nov. 11, 2002) (expressing positive reaction to recent article by Visual Arts Trends writer Julia Ptasnik). "In today's digital world, an artist is a creator by day and a highway patrol person by night, keeping a vigilant eye out for copyright infringement on the information 'freeway' known as the World Wide Web." Id. A victory for Arriba would jeopardize the protection afforded to all copyrighted works online, which, in turn, may foster an intolerable environment of "unethical and unlawful business practices." See Julia Ptasnik, This Just Pisses Me Off, at http://www.visualartstrends.com/Ea/Ea4/eS10-pissesmeoff.html (last visited Nov. 11, 2002) (maintaining artist community cannot let others steal creativity).

\textsuperscript{253} See Press Release, Update, supra note 243 (describing Kelly decision as significant because it allows photographers, artists, and writers to use their images online without fear of copyright infringement).
relates to the Internet.\textsuperscript{254} Above all, the Ninth Circuit's decision "draws no hard lines," and instead, simply marks the beginning of a legal journey to reconciling traditional copyright law doctrines—like fair use and right of public display—with linking on the Web.\textsuperscript{255}

As a final note, amidst the storm of legal uncertainties inherent in this debate, there ironically emerges a single, overarching notion of certainty—that Kelly is not a model of judicial clarity.\textsuperscript{256} While the technology of inline linking is deceptively complex, the Ninth Circuit's analysis is surprisingly simplistic. Maybe this suggests "a bit of judicial ignorance about [HTML] and hyperlinks," which will cause Kelly to fall victim to refinement by other courts in the future.\textsuperscript{257} Because rapid developments of the Internet constantly change the way people conduct business and pursue entertainment, judges and lawyers need to be understanding and flexible with their application of the law.\textsuperscript{258} Nevertheless, any definite answer lies in the future, and as technology races along with lawmakers chasing at its heels, consider this interesting proposal:

The potential negative effects of a bad precedent arising from a ruling by a judge ignorant of how the World Wide Web works are profound . . . . [I]nformation technology changes so fast [that] . . . the world would be better off, if there was a general rule requiring complainants in areas of fast-moving technology and murky law to exhaust all reasonable technological remedies before resorting to the legal system.\textsuperscript{259}

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\textsuperscript{254} See Press Release, Kelly, supra note 243 (noting decision will affect "the way individuals and businesses think about and use the Internet").


\textsuperscript{256} See Court Rules, supra note 217 (suggesting Ninth Circuit was slightly ignorant as to technology at issue). The following is a statement taken from a posting by an intellectual property attorney on an online forum hosted by Mark Scheuern, at http://www.photo.net, typifying immediate reactions among experts to the Ninth Circuit's decision in Kelly. "The Ninth Circuit's opinion is not a model of clarity, [but rather] displays a bit of judicial ignorance about html and hyperlinks, and leaves out detail, perhaps for the sake of simplicity." \textit{Id.}

\textsuperscript{257} \textit{Id.} (providing posting by Pete Andrews suggesting judges need to be more "techno-savvy" when addressing such issues).

\textsuperscript{258} See Litman, supra note 113, at 282.

\textsuperscript{259} Athanasekou, supra note 56, at \textsection 15.
Erratum

Due to an editorial mistake, the Symposium Discussion involving Bernard Resnick and Kevon Glickman that was published in Volume IX, Issue 1 of the Journal was not published in its intended final form. The Journal wishes to extend an apology to Mr. Resnick and Mr. Glickman for the error. A revised final version of the Discussion can be found on-line at http://www.bernardresnick.com/writings/napstervillanova.html.