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## COPYRIGHT



## Copyright of 'thumbnail' images

The United States Court of Appeals for the Ninth Circuit recently held that the unauthorised creation and use of 'thumbnail' images in an Internet search engine was not actionable by the owner of copyright in the images. Lawyer Anthony Selleck reports on the case.

On 7 July 2003, the United States Court of Appeals for the Ninth Circuit held in *Kelly v Arriba Soft Corporation* that the unauthorised creation and use of 'thumbnail' images in an Internet search engine was not actionable by the owner of copyright in the images. The court held that, while the thumbnails were a prima facie infringement, they were nevertheless a 'fair use' under US copyright law. The court, however, remanded for further proceedings the issue of copyright infringement by in-line linking to the original full-sized images.

### Thumbnail image search engines

Arriba Soft Corporation operated an Internet search engine that displays the results of user queries in the form of small pictures, called 'thumbnails', rather than displaying text, as with conventional search engines. Arriba used software agents to trawl the Internet in search of images from which the thumbnails would be created and included in a database. The thumbnails were smaller and of lower resolution to the full-sized images, which were deleted from Arriba's servers once the thumbnails had been created.

The search engine also allowed a user to click onto a thumbnail to display the original full-sized image. The displayed image would be surrounded by text that included a description of the size of the image, a link to the web site from which the image was taken, and advertising. This functionality was implemented via 'in-line linking', that allows a graphic from one web page to be seamlessly incorporated into another web page, giving the impression that the graphic forms part of that web page rather than being copied from another web site.

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Mr Leslie Kelly sued Arriba for copyright infringement after thumbnails of his photographs were included in the Arriba database. Mr Kelly's claim was twofold, contending infringement through Arriba's creation and use of thumbnails and through the practice of in-line linking to the original full-sized images on Mr Kelly's website. These two acts, according to Mr Kelly, infringed his exclusive rights to display, reproduce and distribute his photographs pursuant to section 106 of the US Copyright Act.

## Fair use

Arriba was granted summary judgment by the District Court, which held that, although Mr Kelly established a prima facie case of infringement, Arriba had successfully shown that use of the thumbnails and the in-line linking was 'fair use' under s107 of the Copyright Act. Mr Kelly appealed to the Ninth Circuit, which upheld the District Court's decision on the thumbnails but, for procedural reasons, remanded the in-line linking issue to the District Court for further consideration.

*Mr Kelly's claim was twofold, contending infringement through Arriba's creation and use of thumbnails and through the practice of in-line linking to the original full-sized images on Mr Kelly's website.*

US law permitted the Ninth Circuit to apply the relevant 'fair use' principles itself, rather than being limited to reviewing the correctness of the District Court's decision.

In deciding whether a use of a copyright work is a permissible 'fair use', the court must consider, among other things, the purpose and character of the use, including whether the use is for commercial purposes. According to earlier Supreme Court authority, the purpose of this consideration is to see whether the new work 'adds something new, with a further purpose or different character, altering the first with new expression, meaning or message'. It should also be noted that there may still be a 'fair use', notwithstanding that the use was for commercial purposes.

Past applications of this consideration have reached the following conclusions:

Scenario	Conclusion
Re-transmission of radio broadcasts over telephone lines	No fair use
Reproduction of audio CD into MP3 format	No fair use
Reproducing news footage without editing the footage	No fair use
Copying a religious book to create a new book for use by a different church	No fair use
Copying a photograph intended to be used in a modelling portfolio and using it instead in a news article	Fair use
Using screen shots from computer games in comparative advertising	Fair use

In each case, where fair use was found, the court held that the original copyright work had been sufficiently 'transformed' from its original purpose and context.

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The court then cited the following grounds to support its ruling that Arriba's database of thumbnail images was a fair use of the original full-sized images from Mr Kelly's web site:

- (a) Arriba was neither using Mr Kelly's images to directly promote its website, nor trying to profit by selling Mr Kelly's images;
- (b) the smaller, lower resolution thumbnails served an entirely different function to Mr Kelly's images, as Mr Kelly's images served an aesthetic purpose, while Arriba used the thumbnails to help index and improve access to images on the Internet;

- (c) the public derived a benefit by enhanced information-gathering techniques on the Internet;
- (d) Arriba's thumbnails did not harm the market for Mr Kelly's images; indeed, inclusion in the database may have directed more users to Mr Kelly's website.

*Mr Kelly appealed to the Ninth Circuit, which upheld the District Court's decision on the thumbnails but, for procedural reasons, remanded the in-line linking issue to the District Court for further consideration.*

### **In-line linking**

The Ninth Circuit remanded the issue of the in-line linking to the District Court for further consideration. It is interesting to note that the District Court's original decision was that the in-line linking was also a fair use of Mr Kelly's images. This ruling seems to be in spite of the fact that at least grounds (b), (c) and (d) noted above arguably would not apply to in-line-linking to full-sized images, as opposed to creating and using thumbnails of those images. A further appeal to the Ninth Circuit may be imminent if the District Court reaches the same conclusion in the further proceedings.

### **The Australian position**

Australia has more limited 'fair use' defences to copyright infringement when compared to the more general 'fair use' doctrine of US jurisprudence. The creation of a thumbnail from a full-size image would be reproduction in a material form, and the delivery of that thumbnail over the Internet in response to a search query would constitute 'a communication to the public' (section 31(1)(b)(III)). Thus, to avoid infringement, a specific defence would need to be established. Many of the grounds relied on by the US court to find 'fair use' would not be relevant to defences under Australian copyright law.



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## For further information, please contact:

**Tim Golder**  
Partner, Melbourne  
Ph: +61 3 9613 8925  
Tim.Golder@aar.com.au

**Jim Dwyer**  
Partner, Sydney  
Ph: +61 2 9230 4873  
Jim.Dwyer@aar.com.au

**Peter James**  
Partner, Brisbane  
Ph: +61 7 3334 3360  
Peter.James@aar.com.au

**Steven Cole**  
Partner, Perth  
Ph: +61 8 9488 3743  
Steven.Cole@aar.com.au

**Ted Marr**  
Partner, Hong Kong  
Ph: +852 2903 6210  
Ted.Marr@aar.com.au

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