

When Is Fair Use Not Really Fair Use — Size Matters

A pro-photographer, Kelly, displayed much of his work on his website as well as other websites with whom he had a working, license agreement. He sued Arriba Soft for copyright infringement when he discovered that his images were being used inside Arriba's search database.

The plaintiff, Kelly, sold images to a variety of publications from his website. [Arriba Soft, Inc.](#), with its CEO Michael J. Lyons owned and ran a search engine which indexed images from the Internet so web users could perform picture searches. The search engine returned a set of postage-stamp-size thumbnails related to the search term used. Kelly's images, and millions of others. Clicking a thumbnail from Kelly's website would link the user through a "deep link." The thumbnail pictures were stored on Arriba's system, but the full image was maintained on Kelly's site.

Nick Wooldridge, [a criminal attorney in Las Vegas](#), adds that the case could be potentially heard in any court of the nation, including Nevada.

In 2002, San Francisco's Ninth Circuit United States Court of Appeals ruled that thumbnails infringed on Kelly's copyright, but the fair use doctrine allowed the use of the thumbnails. The court recognized the rights of image search engines to show small copies of images inside their search results.

The images used were found to be transformative, but not of the same form as the original work as the pictures were not being sold but were used to aid in the images' identification inside the search engine. The court also ruled the images are a published creative work available online. A 'creative work' favors a finding of infringement, according to the court.

The court found the quantities of images used to be neutral.

The court determined Kelly had proved a prima facie case of infringement founded on Arriba's duplicating and display of Kelly's copyrighted work. The court then said the presentation created a non-infringing "[fair use](#)."

The court went on to say that although the utilization of the thumbnails in Arriba's search engine was fair use, they ruled the District Court should not have ruled regarding full-size images' displayed was a breach of Kelly's sole right to display his pictures publicly.

The case has been remanded as the courts still wrestle with the issue and try to assess damages for

copyright infringement for those images which were displayed full size.