

THUMBING ALONG THE INFORMATION HIGHWAY: FEDERAL APPEALS COURT RULES ONLINE THUMBNAIL PHOTOS ARE FAIR USE BUT NOT FULL-SIZED IMAGES

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In early February, the United States Court of Appeals for the Ninth Circuit in San Francisco ruled that a software company's postings of small thumbnail reproductions of a photographer's images on its Internet search engine website was a "fair use" under the U.S. Copyright Act. At the same time, the court ruled that the company violated the photographer's exclusive right to publicly display his works by "inline linking" and "framing" full-sized images of the photographs from the photographer's website and displaying them in their entirety on the company's visual search engine. Kelly v. Arriba Soft Corp., 2002 U.S. App. LEXIS 1786 (9th Cir. Feb. 6, 2002). (The company is now called Ditto.com).

The court's decision was based on its interpretation of the fair use doctrine, codified in Section 107 of the Copyright Act, 17 U.S.C. §107. While the Copyright Act grants the copyright holder a set of exclusive rights, namely reproduction, distribution, adaptation, and public performance and public display, 17 U.S.C. §106, the Act also establishes a number of limitations on the owner's exclusive rights, the most important of which is the doctrine of fair use. Section 107 of the Act provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement, and sets out a number of factors for courts to consider on a case-by-case basis:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

In interpreting this section, courts often decide fair use cases on a fact-intensive basis, relying on prior cases and in-depth analysis of the four statutory fair use factors. Here, the court ruled that smaller and lower resolution thumbnail images did not substitute for the plaintiff's photographs but were "transformative" because they served a different function as a search tool providing information to users rather than the artistic or aesthetic purpose of plaintiff's full-sized photographs. Moreover, the court noted that the thumbnail images would not affect the market for plaintiff's images but rather could lead web searchers to plaintiff's website where he sells advertising space and products. Also, the thumbnails would not be a substitute for full-sized images because when they are enlarged they lose their clarity, so users would have to go to plaintiff's site for quality high resolution images.

By contrast, the court found that the display of plaintiff's full-size images on defendant's site by means of inline linking and framing would impair plaintiff's market for his images because they could serve as substitutes for web users who would otherwise view plaintiff's images on his website or on authorized third party websites. The court took exception to the defendant's use of "inline linking" whereby an image from one website is directly imported onto another site and "framed," or placed within the context of a secondary website. Unlike the thumbnails, a full-sized picture does not enhance the defendant's search engine and does not have a transformative purpose but rather substitutes for the plaintiff's site. If a user is only looking for images, he or she can simply download the pictures from the defendant's search engine and bypass plaintiff's website. Thus, the display of full-sized photos harms plaintiff's markets because he uses his images to attract advertisers and buyers to his site and sell or license his photos.

The appellate court thus affirmed the district court's decision as to the thumbnail reproductions but reversed judgment for the defendant with respect to the full-size images.

Supreme Court to Rule on Copyright Extension Constitutionality

In another copyright case that could ultimately affect the use of works on Internet websites, the U.S. Supreme Court agreed to hear an appeal challenging the constitutionality of the Sonny Bono Copyright Term Extension Act, a 1998 law which extended the term of copyright in the United States by twenty years. Last year, a Federal Appeals Court in Washington, D.C. upheld the constitutionality of the law in a case brought by a variety of organizations and individuals who rely on the use of works in the public domain, led by a non-profit online publisher who posts literary classics and other public domain works on the Internet. Eldred v. Reno, 239 F.3d 372 (D.C. Cir. Feb. 16, 2001).

The law extended the term of virtually all copyrighted works in the U.S., including cartoon characters like Mickey Mouse and the song "Happy Birthday." It was passed after a vigorous effort by copyright owners such as the Disney Company and the heirs of composers Irving Berlin and George Gershwin, whose 1920s works were set to expire this decade. For more on the case, now styled Eldred v. Ashcroft, see my article "Happy Birthday, Mickey! Federal Appeals Court Upholds the Constitutionality of the Copyright Term Extension Act", online at <http://www.easl.net/Documents/pr09.htm>.
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