

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE A. KELLY,)
)
 Plaintiff-Appellant,)
)
 v.) NO. 00-55521
)
 ARRIBA SOFT CORPORATION)
 AND DOES 1 THROUGH 100,)
)
 Defendants-Appellees.)

BRIEF FOR AMICI CURIAE GRAPHIC ARTISTS GUILD,
AMERICAN INSTITUTE OF GRAPHIC ARTS,
AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS,
VISUAL ARTISTS AND GALLERIES ASSOCIATION, INC.,
THE NATIONAL WRITERS UNION,
THE PICTURE AGENCY COUNCIL OF AMERICA,
THE ASSOCIATION OF MEDICAL ILLUSTRATORS,
THE SOCIETY OF ILLUSTRATORS

Appeal from the United States District Court for the Central District of
California in CV 99-560, Judge Gary L. Taylor

INTEREST OF AMICI CURIAE

Amicus Curiae Graphic Artists Guild UAW Local 3030 (the "Guild"),
a New York not-for-profit corporation under section 501(c)(5) of the
Internal Revenue Code, represents graphic designers, illustrators, and
other creative professionals in the graphic arts. The Guild's mission is to
protect and promote the economic interests of its members, to improve

conditions for all creators of graphic art and to raise ethical and financial standards throughout the graphics industry. The Guild is affiliated with the United Automobile, Aerospace and Agricultural Implement Workers of America International Union, AFL-CIO, CLC.

Amicus Curiae American Institute of Graphic Arts ("AIGA") is an organization created to further excellence in communication design as a broadly defined discipline, as a strategic tool for business and as a cultural force. Founded in 1914, the AIGA remains the oldest and largest professional organization serving graphic designers, with more than 15,000 members organized through over forty chapters nationwide, providing a variety of local and national programs annually. The AIGA is a national not-for-profit educational organization incorporated under Section 501(c)(3) of the Internal Revenue Code in the State of New York.

Amicus Curiae American Society of Journalists and Authors ("ASJA") is the nation's leading organization of independent nonfiction writers. Founded in 1948, the ASJA's membership consists of over 1,000 writers of magazine articles, trade books and many other forms of nonfiction writing, each of whom has met the Society's exacting standards of professional achievement. To its members, the ASJA offers professional development,

confidential market information, an exclusive referral service and the opportunity to explore professional issues and concerns with peers. To the publishing community, the ASJA brings leadership in establishing high ethical standards and in recognizing and encouraging the pursuit of excellence in nonfiction writing. The ASJA is a national not-for-profit educational organization incorporated under Section 501(c)(6) of the Internal Revenue Code of the State of New York.

Founded in 1976, Amicus Curiae the Visual Artists and Galleries Association, Inc., ("VAGA") was the first organization of its kind in the U.S. to represent the copyright interests of visual artists, in particular fine artists. VAGA acts as an artists' rights organization and copyright collective on behalf of rights holders in visual works. Publishers, museums, galleries, and other art users contact VAGA to obtain permission to reproduce works of art by our members. The majority of our members are the artists (or their estates) who created the works of art. VAGA is active in creating a dialogue within the art community on issues related to artists' rights and copyright in particular. As a copyright collective, we are a member society of CISAC, the International Confederation of Societies of

Authors and Composers. VAGA is a membership corporation under the laws of the State of New York.

Amicus Curiae The National Writers Union, UAW Local 1981 is the only union for freelance authors. Its purpose is to advance the economic interests of its members and the writing community at large. It initiates general industry-wide campaigns to increase writers' economic power, advises members on contracts, holds regular contract training seminars across the nation, represents members in grievances with the publishing industry and lobbies for legislation to strengthen authors' rights in copyright and other laws. The National Writers Union is a 501(c)(5) not-for-profit organization.

The mission of Amicus Curiae The Picture Agency Council of America ("PACA") is to develop uniform business practices within the stock picture industry, in keeping with the Code of Ethics as established by the Council. PACA serves member agencies, their clients and their contributing artists by promoting communication, furthering education and fostering the protection of intellectual property.

Amicus Curiae The Association of Medical Illustrators, an Illinois not-for-profit corporation under section 501(c)(6) of the IRS Code,

represents persons in the field of art for medicine and related sciences. The Association of Medical Illustrators' mission is to enhance the competency and professionalism of its members and to advance the profession of medical illustration.

Amicus Curiae The Society of Illustrators was founded in 1901 to “promote and stimulate interest in the art of illustration—past, present and future.” Its membership includes over 1000 working, professional artists and those in associated fields. The Society’s membership participates in and supports programs in education, community and government service. It is a national not-for-profit corporation under section 501(C)(3) of the Internal Revenue Code in the State of New York.

The World Wide Web (the "Web") has given rise to many new creative and commercial opportunities for the membership of the above named Amici, but it has also raised new threats to their economic survival. The March 10, 2000 decision in this matter by Judge Gary L. Taylor of the Central District of California virtually eliminates meaningful copyright protection for any work of creative authorship which the Amici's members may henceforth hazard to post on the Web and threatens the existing market for licensing such works in digital form. This decision, if affirmed,

will create a strong economic disincentive for the Amici's members, and for artists in all creative fields, to disseminate their works through the Web and will thus impede the progress of science and the useful arts, which the Copyright Act was enacted to promote under Article I, Section 8, Clause 8 of the U.S. Constitution.

By condoning, indeed encouraging, the unauthorized electronic reproduction and transmission of millions of original images, captured without permission from the artists' own Websites, the decision below will deny artists the right to control and profit from the use of their creations, and will accordingly have an immediate and severe chilling effect on authors and artists, in all media, who would otherwise eagerly embrace the Web as a means of sharing their creative work with the world. At best, the decision forces artists to provide compulsory free samples of their work to the public, for the benefit of a commercial Website operator, and at worst it permits outright theft. For this reason, the Amici urge this court to reverse the decision below and order the entry of judgment for the plaintiff, Leslie A. Kelly.

ARGUMENT

I. Preliminary Statement

The federal courts have long recognized that a picture is worth a thousand words.¹ If Arriba had reproduced and republished 35,000 words from Leslie A. Kelly's "Laura Ingalls Wilder" and "goldrush1849.com" Websites in a purported attempt to "index" them without authorization, no court would countenance such a taking as a fair use under § 107. For the following reasons, the Amici respectfully submit that the court below erred in reaching a contrary result simply because Kelly's works are in a visual medium and the infringement occurred on the Web.

¹ Regan v. Time, Inc., 468 U.S. 641, 678 (1984) (Brennan, J.) (dissent) (First Amendment case); U.S. v. Todd, 964 F.2d 925, 933 (9th Cir. 1992)(criminal case); Sohappy v. Hodel, 911 F.2d 1312, 1317 (9th Cir. 1990)(criminal case); Litton Sys. Inc. v. Whirlpool Corp., 728 F.2d 1423, 1433 (Fed. Cir. 1984)(patent/trade dress case); Images Audio Visual Prods., Inc. v. Perini Bldg. Co., Inc., 91 F. Supp. 2d 1075, 1085 (E.D. Mich. 2000) (copyright fair use case); Selmon v. Hasbro Bradley, Inc., 669 F. Supp. 1267, 1273 (S.D.N.Y. 1987) (copyright case); Stonehill Communs., Inc. v. Martuge, 512 F. Supp. 349, 352 (S.D.N.Y. 1981) (copyright case, applies adage literally); Carolina Enters., Inc. v. Coleco Indus., Inc., Copy. L. Rep. (CCH) ¶ 25,379 (D.N.J. 1981) (copyright/trade dress case); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 142 (S.D.N.Y. 1968) (copyright case), quoting Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569, 1597-1598 (1963).

II. Defendant's Extensive Reproduction and Public Display of Kelly's Photographs Is Commercial, Nontransformative, and Cannot Be Excused as a Fair Use

The district court decision, if not reversed, would substantially nullify the copyright protection for photographs, works of graphic art, and other pictorial works (hereinafter "artistic works") specifically enumerated in sections 106(1) and (5) of the Copyright Act of 1976 ("the Copyright Act"), which provide the copyright owner with the exclusive right to reproduce and publicly display these works. Rather than serving the constitutional purposes of copyright, the lower court's holding would permit artistic works to be rampantly and indiscriminately copied and publicly displayed on the Web, eviscerating the exclusivity granted to authors and reducing their incentive and economic ability to create and disseminate artistic works.

Particularly now, as the Web is becoming a major, worldwide marketplace for copyrighted works, it is imperative that the legal system not abandon effective copyright protection merely because evolving technology is capable of capturing millions of artistic images in a single search and displaying them throughout the world. Instead, the courts should encourage respect for copyrights so that authors will continue to

have the economic incentive to create artistic works and display them on the Web.

The Supreme Court has emphasized the fundamental, constitutional purpose of, and the public benefit derived from, copyright protection: "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression" by providing authors with an exclusive, marketable right to their creative works. Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 558 (1988). The District Court decision undermines this constitutional purpose and gravely misinterprets the fair use doctrine, which is also designed to benefit the public by permitting limited use of copyrighted works when such use will enhance the store of new creative works available to the public. See, e.g., Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 510 U.S. at 579 (1994); and Harper & Row, supra, 471 U.S. at 562.

Fair use is a mixed question of law and fact which is reviewed de novo. Harper & Row, supra, 471 U.S. at 560; Los Angeles News Service v. Reuters Television Int'l, 149 F.3d 987, 993 (9th Cir. 1998). Fair use is also an affirmative defense; the defendant has the burden to establish each of its

elements. Campbell, supra, 510 U.S. at 590; Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 107 (2d Cir. 1998).

Section 107 of the Copyright Act sets forth four non-exclusive factors to be considered in the fair use analysis:

- (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 evaluating the defense of fair use, all of these factors "are to be explored and weighed together, in light of the purposes of copyright." Campbell, supra, 510 U.S. at 578.

The district court found that Kelly's photographs are artistic works at the core of copyright's intended protection. 77 F. Supp. 2d at 1120. It therefore found that the second factor -- "the nature of the copyrighted work" -- weighs against fair use.

The lower court also found that the third factor -- "the amount and substantiality of the portion used" -- "weighs slightly against fair-use," id., a

finding which greatly understates the weight which should be given to this factor. See infra at Section II(C). The wholesale copying of 35 of plaintiff's artistic works and the public display of reduced, but clearly visible and reproducible versions of them, deprives plaintiff of potential licensing revenue and directly interferes with his exclusive right to market his work.

Although two of the § 107 factors favored Kelly, the District Court based its holding primarily on its findings that the first and fourth factors weighed in favor of fair use "because of the established importance of search engines and the 'transformative' nature of using reduced versions of images to organize and provide access to them." 77 F. Supp. 2d at 1121. In relying so heavily upon what it viewed as a highly transformative use by defendants, the District Court ignored Supreme Court and Ninth Circuit precedent regarding the nature of transformative use. In determining that the fourth factor weighed in favor of fair use, the lower court failed to consider the actual and potential harm which would be caused by defendant's use, including the complete loss of control over the reproduction and public display of plaintiff's photographs throughout the world and the impairment of the value of the photographs, in both full-size

and reduced forms, for licensed use by third parties on the Web and in print. Accordingly, the District Court's decision was erroneous and should be reversed.

A. The Purpose and Character of Defendant's Use Is Nontransformative and Commercial

A central inquiry in the fair use analysis is whether the user engages in creative "transformation" by "altering the first [work] with new expression, meaning or message." Campbell, supra, 510 U.S. at 578. When defendant merely reproduces and publicly displays plaintiff's photographs in reduced format, it makes no creative transformational use whatsoever of these works. It is not sufficient merely to republish, repackage or copy the protected works, as defendant has done here to millions of works. Such conduct does not "add something new" to these artistic works or imbue them "with new expression, meaning or message," as Campbell requires, but merely copies and displays them in furtherance of defendant's own commercial interests.

In a Court of Appeals decision rendered shortly after Campbell, the Second Circuit emphasized that the court must assess both "the value generated by the secondary use and the means by which it is generated":

To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use.

American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 923 (2d Cir. 1994). Here, defendants have merely reproduced and displayed reduced versions of the artistic works as they originally appeared. Defendants have done nothing to transform the works themselves and therefore such use cannot be considered transformative. See also, Infinity Broadcast v. Kirkwood, 150 F.3d 104 (2d Cir. 1998); Los Angeles News Service v. Reuters Television Int'l, 149 F.3d 987 (9th Cir. 1998); Princeton University Press v. Michigan Document Services, 99 F.3d 1381 (6th Cir. 1996); and UMG Recordings Inc. et al. v. MP3.Com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

In Infinity Broadcast, the court squarely held that the long-distance rebroadcasting of radio programs was not transformative, even though it was done for a different purpose than the original broadcasts:

However, difference in purpose is not quite the same thing as transformation, and Campbell instructs that transformativeness is the critical inquiry under this [first] factor.

* * * *

Here, as the district Judge observed, 'Kirkwood's retransmissions leave the original broadcasts unchanged.' 965 F. Supp. at 557. In short, there is no transformation. As then-District Judge Leval noted in his frequently cited article on fair use, a use of copyrighted material that 'merely repackages or republishes' the original is unlikely to be deemed a fair use. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990).

150 F.3d at 108 (emphasis added). Similarly, defendants' republishing and repackaging of plaintiff's photographs here, even if it were for a different purpose -- which it was not, see infra at Section II(B) -- does not transform the works themselves and does not constitute fair use.

The Ninth Circuit has applied the same approach in Los Angeles News Service v. Reuters Television Int'l, 149 F.3d 987 (9th Cir. 1998), holding that Reuters' copying of plaintiff's copyrighted footage of the beating of Rodney King during the Los Angeles riots did not constitute fair

use, even though the footage was ultimately used in news broadcasts. The copying by Reuters was done to enable it to provide the news footage to its subscriber news stations for a fee. The Court held that while Reuters' "service does have a news reporting purpose, its use of the works was not very transformative[.] Reuters copies footage and transmits it to news reporting organizations; Reuters does not explain the footage, edit the context of the footage, or include editorial comment." 149 F.3d at 993. The court held that Reuters' purpose was commercial (weighing against fair use), nontransformative, and ultimately not a fair use. The court also held that the use made by Reuters' customers (news reporting organizations) was irrelevant to the fair use inquiry; instead, it was Reuters' own use that must be examined. Id. at 994, citing the Ninth Circuit's decision in Los Angeles News Service v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992). See also, Princeton University Press, supra, 99 F.3d at 1389.

As in Reuters, defendant's purpose in setting up an ad-supported Website here is commercial and weighs against fair use regardless of the use made by visitors to its Website. In addition, defendant's use is nontransformative because it does not edit, alter, or comment upon plaintiff's artistic works but merely copies and republishes them.

The Sixth Circuit reached the same conclusion when it held in Princeton University Press, supra, that college "coursepacks" compiled by a "copyshop," which contained excerpts from various textbooks or articles, was not a transformative use:

It should be noted, finally, that the degree to which the challenged use has transformed the original copyrighted works . . . is virtually indiscernible. If you make verbatim copies of 95 pages of a 316 page book, you have not transformed the 95 pages very much - even if you juxtapose them to excerpts from other works and package everything conveniently. This kind of mechanical "transformation" bears little resemblance to the creative metamorphosis by the parodists in the Campbell case.

Princeton University Press, supra, at 1389 (emphasis added). In the case at bar, as in Princeton University Press, the mere "mechanical 'transformation'" performed by defendant, and the lack of any "creative metamorphosis" of the photographs themselves, as well as defendant's commercial purpose, all require a finding that the first fair use factor weighs overwhelmingly against fair use.

The district court failed to apply the clear teachings of Reuters, Infinity and Princeton University Press, however, because it placed undue emphasis on the "evolving" technological means by which defendant here carried out its infringement. The court thus fell prey to the trap which the

Southern District of New York recently identified, and avoided, in UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000). In MP3.com, decided May 4, 2000, defendant used MP3 compression technology to copy thousands of compact disc recordings into computer files easily transmitted over the internet. Defendant's Website (which, like Arriba's, was supported by advertising revenue) then enabled subscribers to listen to and download these MP3 recordings which were stored without authorization, like Arriba's images, in a central database accessible through the internet. MP3.com unsuccessfully interposed the fair use defense, which was summarily rejected by district Judge Rakoff:

Here, defendant "adds no new aesthetics, new insights and understandings" to the original music recordings it copies, (citation omitted), but simply repackages those recordings to facilitate their transmission through another medium. While such services may be innovative, they are not transformative.

92 F. Supp. 2d at 351 (emphasis added).

Accordingly, Judge Rakoff found infringement, and noted that "the complex marvels of cyberspatial communication may create difficult legal issues; but not in this case." Id. at 350. The same analysis and conclusion are warranted in the case of Arriba, which merely copied and transmitted

the visual equivalent of MP3 music files: reduced versions of millions of images, copied, displayed and transmitted for defendant's own commercial purpose and without making any transformative comment or casting new creative light on the photographs themselves. Such flagrantly commercial and nontransformative copying and repackaging does not qualify as a fair use.

B. The District Court Failed To Consider The Actual and Potential Harm Caused by Defendant's Use

The court made three fundamental errors in applying the fourth fair use factor. First, the court's decision improperly shifted the burden of showing market harm to plaintiff. See 77 F. Supp. 2d at 1121 ("Plaintiff has shown no evidence of any harm or adverse impact.") Fair use is an affirmative defense; every element must be established by the defendant. Campbell, supra, 510 U.S. at 590; Infinity, supra, 150 F.3d at 107. In light of the court's statement that it never received "any evidence about traffic to Plaintiff's Web sites or effects on Plaintiff's businesses," 77 F. Supp. 2d at 1121 (emphasis added), the court erred in requiring any showing on Kelly's part; there was nothing for him to rebut with regard to these important factors. See Campbell, supra, 510 U.S. at 594 ("a silent record on an

important factor bearing on fair use disentitle[s] the proponent of the defense . . . to summary judgment").

Second, the court's decision improperly requires a showing of actual harm, not merely potential harm, as recognized by §107(4). The court acknowledges that the value of Kelly's photos "could potentially be adversely affected if their promotional purposes are undermined," id. at 1120, and under §107(4) even such potential harm warrants a finding that the fourth factor weighs against fair use. The court, however, improperly required Kelly to show present, actual harm, not merely potential harm. See id. at 1121 ("plaintiff has shown no evidence of any harm or adverse impact").

Third, the court concluded, without authority or citation to the record, that the only relevant market for Kelly's work is the market for his sites in their entirety. Id. at 1120. In fact, the record is undisputed that Kelly licensed the use of his individual photographs for display by third party sites on the Web. See Joint Stipulation of Facts at ¶ 16, 21. These licensed images were and are displayed, both by Arriba and by Kelly's licensees, in reduced size and low resolution, for the purpose of promoting the sale of products. Id. at Exhibit 1 and Exhibit 2. The market for display

of individual photographs on the Web, in reduced form, is therefore not hypothetical or speculative, but is a real and fully-functioning market in which Kelly actively participated with the very images here at issue. The court ignored this market, limiting itself to consideration of the market for Kelly's sites as a whole and the "illustrative," "esthetic" purpose for which Kelly's photos were allegedly "originally created" 77 F. Supp. 2d at 1119, rather than the promotional purpose to which Kelly in fact put them. Id. at 1120.

The court thus erred in failing to consider the degree to which Arriba's activities would, if widespread, inhibit Kelly's ability to license his individual works for Web display in reduced form. Had it considered the issue, a finding of fair use would have been impossible: Arriba directly competes with Kelly in this market by using his images to promote the sale of products by Arriba's own advertisers, rather than Kelly's chosen licensees. This use of Kelly's images in the context of commercial licensing and advertising is not "very different" from Kelly's use, as the court below contended, 77 F. Supp. 2d at 1116, but is in fact of exactly the same nature and character -- display of images to promote the sale of products. This use directly "supersedes the objects" of Kelly and his own licensees, Folsom v.

Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841), and thus can be neither transformative nor a fair use. See Leval, Toward A Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990).² The court was mistaken to perceive a different, "functional" purpose in Arriba's use of individual images, as opposed to the allegedly "esthetic" purpose of Kelly's sites in toto; both parties use individual images to promote the sale of products. The potential effect on Kelly's market is therefore enormous, and the court erred in finding the fourth factor in favor of Arriba.

C. The Amount and Substantiality of Defendant's Taking Weighs Heavily Against Fair Use

Under § 107(3), the court made two fundamental errors which caused it to underestimate the substantiality of Arriba's copying. First, the court erred in looking to the extent of copying relative to defendant's work, not simply "in relation to the [plaintiff's] copyrighted work" as directed by the statute. Among the court's considerations in excusing defendant's copying

² The fact that Kelly chose to license his works on terms other than direct monetary payment, Joint Stipulation at ¶¶ 17, 22, does not diminish his right, as copyright owner, to determine whether and how to participate in this market for his individual works. See Castle Rock Entertainment Inc. v. Carol Publishing Co., 150 F.3d 132 (2d Cir. 1998)(copyright owner has complete discretion as to whether and how to market works: "It would . . . not serve the ends of the Copyright Act -- i.e., to advance the arts -- if artists were denied their monopoly over derivative versions of their creative works

was that Kelly's images were only a small part of the whole Arriba image database, merely 35 images out of two million, and not "exploited in any special way." Id. at 1119. For the court, such a use is "incidental" and "less serious," and thus excusable, even though the Kelly works were taken in their entirety. For the court to apply such reasoning under the first § 107 factor (as part of "purpose and character" of the use) effectively nullifies the statutory requirement under the third factor that the extent of the taking be judged solely in relation to the plaintiff's work.

Second, the court erred by considering the allegedly "indiscriminate" nature of Arriba's infringement as a mitigating factor for its wholesale copying. Intent is not an element of copyright infringement. Los Angeles News Service v. Corus Communs. Co. Ltd. Pshp., 969 F. Supp. 579, 584 (C.D. Cal. 1997) (rejecting defense that infringement was "unintended and unavoidable"). The commercial, nontransformative taking of entire works is equally infringing whether the copier specifically selects its targets or merely copies everything in sight, as Arriba attempted to do here. See

merely because they made the artistic decision not to saturate those markets with variations of their original").

Infinity Broadcast, supra at 106 (no fair use where entire broadcast spectrum in major radio markets retransmitted by defendant).

Moreover, the actual images added to the Arriba index and transmitted to the public were selected by human editors, 77 F. Supp. 2d at 1117, so with respect to the transmission of reduced images, which is the sole focus of the court's fair use analysis, Kelly's images were in fact singled out for inclusion in the index.

Finally, the court arrived at its conclusion that Arriba's taking of reduced versions of the images was not "substantial" by mistakenly relying upon its finding that enlarged versions would not be useful. Id. at 1120. This finding addresses the wrong question. The record contains copies of pages from the parties' own Web sites, Joint Stipulation of Facts, Exhibits 1 and 2, which demonstrate that small, low resolution "thumbnail" photographs are themselves commonly and effectively used on the Web. The court's conclusion that "thumbnails cannot be enlarged into useful images," 77 F. Supp. 2d at 1120, thus misses the point because thumbnails themselves are useful images, especially on the Web. Accordingly, the extensiveness of the copying here, and the harm to Kelly's potential market, is far more serious than the court recognized.

Moreover, the court offers no support for its apparent assumption that low-quality copies of an entire work do not constitute a substantial taking for fair use purposes, simply because they are not a direct market substitute for the high-quality original. As described above, this assumption is factually wrong because even low-resolution photos are a direct market substitute for Web licensing of the original images. But even apart from that mistaken premise, the court's assumption would re-write § 106(1) by giving the author only an exclusive right to reproduce the copyrighted work in "useful, high-quality copies or phonorecords," rather than the broad reproduction right which the statute actually provides, and would legitimize claims of fair use by flagrant infringers such as video pirates, who could rightly claim that their shoddy back-room copies of feature films are not "useful" for theatrical projection and thus noninfringing.

Accordingly, the court should have weighed the third factor heavily against a finding of fair use, not merely "slightly" against such a finding.

D. The Court's Fair Use Analysis Mistakenly Ignores
The Violation Of Plaintiff's Exclusive
Reproduction Right Under 17 U.S.C. § 106(1)

Not only did the court below erroneously conclude that the display of Kelly's photographs was a fair use notwithstanding § 106(5), it also erred in failing to consider the violation of Kelly's exclusive § 106(1) reproduction right as part of its fair use analysis. Defendant conceded, and the court found, that Arriba "reproduced and displayed plaintiff's images in thumbnail form without authorization," 77 F. Supp. 2d at 1118 (emphasis added), but the court characterized the issue before it as being merely "whether the display of copyrighted images on the Internet constitutes fair use under the Copyright Act." Id. (emphasis added). The court then performed its fair use analysis as though Arriba had merely displayed the images, rather than also reproducing them. The court's fair use analysis is thus incomplete as a matter of law, and this incompleteness caused the court to overestimate the transformativeness of Arriba's use and underestimate the market harm which it inflicts on Kelly and other creative artists whose works are appropriated.

This court has recently recognized that where a copyrighted work is both reproduced and transmitted, as were the images here, the fact that the

ultimate transmission may be a fair use does not excuse the unauthorized reproduction which preceded it: "it is not the transmission [to the subscriber] that is the infringement but the unauthorized copying of the works." L.A. News Serv. v. Reuters Telev. Int'l, Ltd., 149 F.3d 987, 994 (9th Cir. 1998).

Even where both acts are carried out by the same party, like Arriba here, the court may not simply collapse the reproduction and subsequent use of a copyrighted work into a single course of conduct for purposes of determining fair use. This is clear from L.A. News, where the defendant argued that its transmission of news clips to other broadcasters, for use in news reporting, was permissible as a fair use. Regardless of the fairness of the transmission, or the ultimate use by the receiver of the transmission, this court held that the defendant's underlying act of copying constituted infringement. Id. Accord, American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994)(archival photocopying of technical articles for research use by corporate scientists held not a fair use); Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113 (D. Nev. 1999) (scanning of photograph into computer held infringing on summary judgment motion, despite issues of fact as to whether ultimate use of photo on

digitally-enhanced postcard was also infringing); Ticketmaster Corp. v. Tickets.com Inc. 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000) (wholesale digital copying of Web pages, to facilitate lawful extraction and republication of factual data, states infringement claim on 12(b)(6) motion).

The results in L.A. News, American Geophysical, Tiffany and Ticketmaster simply confirm the basic statutory principle that notwithstanding the ultimate use, every unauthorized reproduction of a copyrighted work is a violation of the author's exclusive rights unless the reproduction itself is privileged under a statutory exemption, e.g. § 108 (archival reproduction for libraries), § 112 (ephemeral recordings for broadcasters and Webcasters) or § 117 (backup and "essential step" copies of computer programs), or excused as a fair use under § 107.

Here, the court utterly failed to analyze the reproduction itself as required under § 107 ("Notwithstanding the provisions of §§ 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section" is not infringing)(emphasis added). Instead, the court merely applied the § 107 factors to the "other means" by which the Kelly works were used, i.e., public display, effectively excusing Arriba's reproduction without

conducting the mandatory analysis ("in determining whether the use made of a work . . . is a fair use the factors to be considered shall include" those enumerated) (emphasis added).

Had the court followed the statutory mandate and considered the § 107 factors in connection with Arriba's reproduction of the photos in its image database, it could not have found that use to be a fair one. In particular, the outcome under the first and fourth factors of the analysis weighs even more heavily against Arriba in connection with the reproduction of images than in connection with the unauthorized public display of those images as part of the Arriba "index."

Under the first factor, whatever overriding "transformative" public purpose may allegedly be served by Arriba's public display of Kelly's images -- and Amici contend there is no such purpose -- it is utterly lacking in connection with the wholesale reproduction of images in the Arriba database. The court openly acknowledged that reproduction of images in the Arriba database was not technologically necessary to present the Arriba user with displays of those images on his or her computer screen. 77 F. Supp. 2d at 1117 n.1. And the display of the images on the end user's screen was the sole rationale offered by the court for permitting Arriba to

use the images at all: "Defendant argues it is necessary for a visual search engine to copy images in their entirety so users can be sure of recognizing them." Id. at 1120.

Accordingly, the reproduction of millions of images in the Arriba database was wholly gratuitous and offered no transformative public benefit to users of the Arriba site: they would have been just as "sure of recognizing" an image displayed by means of a link, which Arriba has demonstrated that it can provide. Arriba's gratuitous warehousing of images does not qualify as a fair use under the first factor because it is commercial and non-transformative. See Leval, supra, at 1113 (urging detailed analysis to prevent possibility that "a favorable appraisal of the constructive purpose overall could conceal unjustified takings of protected expression").

Under the fourth factor, the reproduction of millions of images in the Arriba database poses a different and unrecognized threat of market harm: a threat to the artist's market for licensing images to professional stock image databases, which supply digitized images to subscribers for a fee. Many of the Amici participate actively on both sides of this market, which would be gravely harmed if advertiser-supported services such as Arriba

could continue to make millions of images available to the general public without charge. Unlike Arriba, professional stock databases pay photographers and artists for the inclusion of their works in digital collections, and these services could not long survive if the same images were available for free downloading from a source which paid nothing to obtain them. The extinction of these services at the hands of databases like Arriba would therefore deprive artists like Kelly of a real and growing source of revenue for their creative works.

Accordingly, the court below erred by failing to consider the reproduction of Kelly's images as a separate and distinct act of infringement under its fair use analysis. Although the public display of these images for commercial purposes is also infringing, the gratuitous reproduction and storage of copies of Kelly's images, and millions of others, is an independent violation of § 106 which cannot be excused as a fair use no matter what changes Arriba may subsequently adopt regarding its display of the images.

E. The Overall Weight of the Enumerated Fair Use Factors, and The Public Interest Served By Both Copyright and Fair Use, Require That Defendant's Infringement Not Be Excused

As set forth above, the court's application of § 107 was in error. A proper balancing of the statutory factors would result in a finding that the use was (1) commercial and non-transformative, (2) directed at creative works at the core of copyright protection, which works were (3) gratuitously reproduced and displayed in their entirety, causing (4) great and irreparable harm to the actual and potential market for Kelly's works, both in full-size and reduced form.

More fundamentally, however, the court's radical departure from existing copyright precedent effectively exempts the "evolving technology" of the Internet from the standards which the courts have long applied to conventional media. If affirmed, the court's ruling would deprive copyright owners of their constitutionally guaranteed exclusive rights, to the great detriment of the public at large. It would also disserve the public interest underlying the fair use doctrine, *i.e.*, encouraging the creation of new creative works through the transformation of preceding ones. Under the court's decision, microfilm companies, photo archives, and many other

users of copyrighted material could henceforth claim fair use for making "comprehensive" "functional" "indexes" of creative works, even if those "indexes" served as effective market substitutes for the works themselves. And in the context of the Internet, where images, songs, text, and other works can so easily be detached from their ostensibly "functional" settings and transmitted as stand-alone "esthetic" objects, the likelihood of market substitution from a seemingly innocuous work like an "index" is that much greater.

Although convenient free access to creative works on the Web may coincide with the public's "interest" in obtaining free goods at the expense of those who create them, the Constitution dictates that the exclusive rights of artists and other creators, and not consumer convenience, must be the primary mechanism for advancing the progress of science and the arts. As the Southern District of New York recognized on May 4 in MP3.com,

Copyright, however, is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders' property interests. Moreover, as a practical matter, plaintiffs have indicated no objection in principle to licensing their [works] to companies like [defendant]; they simply want to make sure they get the remuneration the law reserves for them as holders of copyright in creative works. Stripped to its essence, defendant's "consumer protection" argument amounts to

nothing more than a bald claim that defendant should be able to misappropriate plaintiff's property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity.

92 F. Supp. 2d at 352.

In the case at bar, as in MP3.Com, there is an evident gap between public demand for unlimited free content on the Web today, and the long term public interest which the Framers, the Congress, and the Judiciary have long recognized is served by both copyright law and the proper application of the fair use doctrine. The court below erred in resolving that contradiction against the creative artists who make the Web worth visiting in the first place.

CONCLUSION

Based on the above reasons and authorities, the decision of the district court should be reversed.

Dated: July 20, 2000

Respectfully submitted,

Robert J. Bernstein
Robert W. Clarida
COWAN, LIEBOWITZ & LATMAN, P.C.
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200

Counsel for Amici Curiae Graphic Artists Guild, American Institute of Graphic Arts, American Society of Journalists and Authors, Visual Artists and Galleries Association, Inc., The National Writers Union, The Picture Agency Council of America, The Association of Medical Illustrators, and The Society of Illustrators

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