



I've Been Framed

By: Jim Astrachan

You are a famous photographer and you maintain a website. On the site are images of photographs you have taken over the years. Your site attracts viewers and also offers these photos for sale. Increased viewership drives up the cost to advertise on your site.

You learn that someone has developed a program that crawls the internet looking for responses to search inquiries. This search engine produces a list of search results in the form of small pictures, or thumbnails, that appear on the searcher's screen. For this to occur, the crawler downloads the found, full size, images to a server. From these full size images, the program creates the smaller, low resolution, thumbnails of the originals that appear on the user's screen. Then the program deletes the full size images. A user can copy the thumbnails, but cannot increase resolution.

Are there legal consequences if a user is allowed to increase the size of the thumbnail to full size and retain clarity? What if this is accomplished, not by copying an image stored on the search engine's server, but by linking to the photographer's website and importing the page containing the large image to the

search engine's website, a process called "inline linking"? What if the full size image is surrounded by the search engine's webpage text and advertising—a process called "framing"? What if, due to the framing, the searcher would not realize that the image of the photograph actually resides on the photographer's website?

A lot of questions, true, but what is interesting about this situation is that the large image from which the thumbnail was made was copied but then deleted. The large image available to the searcher was not copied, however; it was linked from the photographer's site.

Website owners in the past brought several cases against sites that framed their webpages. They sued under traditional theories of unfair competition, alleging that the manner in which a defendant used their content misrepresented, or misappropriated, the source of the content. The early cases were ruled upon or settled on grounds unrelated to unfair competition, such as breach of contract.

Leslie Kelly, a professional photographer held in high regard for his photographs of the American west, is the photographer whose images and pages Arriba Soft framed. In fact, thirty-five of Kelly's images were copied without permission to Arriba's data base by its crawler program. Kelly sued Arriba for copyright infringement. The district court ruled that while Kelly had made a prima facie case of copyright infringement, the use of his images by Arriba was a "fair use" under the copyright statute. Thus, even though there was copying, there was

no infringement. The basic reasons for the district court's finding of fair use were that the thumbnails were transformative and that the use did not harm the market for, or value of, Kelly's work.

Kelly appealed, and the Ninth Circuit Court of Appeals affirmed in part, and reversed in part, the district court's decision.

Arriba engaged in two separate acts when it made Kelly's images available and each act was discussed at length by the court. First was the copying of Kelly's photos to create thumbnails. Second was the display, and framing, of the full size photos by inline linking, which occurred when the searcher double-clicked on the thumbnail.

There was no question that Kelly owned the copyright to the photos and that Arriba copied the photos without Kelly's consent in order to download them on its server and create thumbnails. Nevertheless, this act of copying was held to be a fair use as the images were transformed from high resolution full size, to low resolution thumbnail which could not be used by a searcher to replace the original. Thus, the court ruled against Kelly on his claim that his copyright was infringed because of Arriba's unauthorized copying.

But the inline linking and framing was an act of copyright infringement because one of the exclusive rights reserved to an owner of a copyright is the right to publicly display a copyrighted work. The court concluded that Arriba had

indeed violated Kelly's copyright by its act of inline linking because the framing of the full size work resulted in a public display of Kelly's work without consent.

Display is defined by the Copyright Act as showing a copy of the work. The right of public display is reserved to the owner of a work and extends from the original to a copy. By inline linking and framing, Arriba displayed Kelly's work at its site without his permission. Because the photos were available on its website, even without proof they were accessed, Arriba allowed public access. In doing so, it infringed Kelly's exclusive right to publicly display his work.

The court also examined whether inline linking and the resulting public display was a fair use and determined it was not, primarily because no transformative use occurred. Additionally, by using the photos to attract people to its site, the market for, or value of, the photos was harmed. There was no fair use.

There may still be steps that a website owner can take to use, without infringement, copyrighted images belonging to another person. But the user had better take very careful steps to assure that its use is a "fair use" exception to copyright infringement or that its use does not result in a public display. Otherwise, this well reasoned decision may lock-down this practice not as unfair competition but as a violation of copyright law.

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