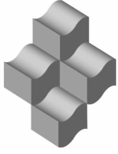

McNichols Randick O'Dea & Tooliatos LLP
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BRIEFLY SPEAKING

June 2002

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Linking Images on Company Website May Infringe on the Original Work

By Kevin Martin

Does your company website link and frame images from other sites? If so, such use may expose the company to copyright infringement liability, even though there technically is no reproduction or copying going on. In a recent court decision, Kelly v. Arriba Soft Corp., the U.S. Court of Appeals for the Ninth Circuit reversed a "fair use" summary judgment ruling from a lower court and held defendant liable for copyright infringement, even though the company engaged in no direct copying. According to the court, liability attached because defendant "facilitated" the display of copyrighted works by linking and framing full-sized images of the works on its site.

Thumbnail Use Okay: The defendant in the case was Arriba Soft Corp. (now Ditto.com), a web search engine that displays its search results as thumbnail images. Arriba uses inline linking technology on its site to link and frame images from other sites so they appear as part of Arriba's web pages. By clicking on a thumbnail image of a particular result, a user could then view a full-size version of the original image imported from the originating web site. Plaintiff Leslie A. Kelly is a photographer who discovered that Arriba was using 35 of his copyrighted images on its database and sued the company, claiming copyright infringement. The lower court granted summary judgment for Arriba, finding that its use of the images was fair because it did not intend to profit from the sale of the images. The appellate court upheld the lower court's decision with respect to the thumbnail use, explaining that even though Arriba made exact replications of Kelly's work, there was no infringement because the thumbnails were much smaller and lower-resolution than the original work and served a completely different purpose (improving access to information on the internet versus artistic expression).

Linking and Framing Full-Size Images Problematic: What the appellate court did find troubling, however, was Arriba's linking and framing of Kelly's full-size images. By making available the full-sized image of a copyrighted work, the court concluded, Arriba infringed on Kelly's exclusive right to display such works. In defending the

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Employment Law Update

By Julie Rose

There were a number of sexual harassment suits heard by the courts this last year. The employer prevailed in some of these cases, and the employee prevailed others. It is important to review your obligations as an employer to prevent sexual harassment on the job.

In Kohler v. Inter-tel Technologies 244 F.3d 1167 (9th Cir. 2001), an employee sued her employer for sexual harassment, discrimination and retaliation in violation of Title VII of the Civil Rights Act and the California Fair Employment and Housing Act. The court found that the employer exercised reasonable care to promptly correct the sexually harassing behavior. The employer: 1) promptly hired a neutral third party to investigate the allegations, 2) offered the employee a new job under a new supervisor, 3) offered the employee back pay from the time of her resignation through her reinstatement, 4) reprimanded the supervisor, and 5) conducted mandatory sexual harassment training seminars for the entire workforce.

In Star v. West, 237 F.3d 1036 (9th Cir. 2001), an employee sued her employer for failing to take what she felt were sufficient actions against another employee who had sexually harassed her. Upon receiving the claim of sexual harassment, the employer instructed the co-worker to stay away from the employee and later moved that co-worker to another shift. Though the actions taken by the employer were not specifically labeled as "disciplinary," the court found that the actions were an adequate remedy for addressing the problem and there was no liability on the part of the employer.

Finally, in Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001), the court found that the employer's temporary

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Recent Developments in the Law

By Phil Vermont

Residential Purchase Agreement Containing Liquidated Damages Clause Not Option Contract Despite Realtor's Handwritten Additions

A new Court of Appeal decision, dated January 2, 2002, has conclusively held that the standard California Association of Realtor form "Counter Offer No. 1", modified by a realtor to state "buyers increased deposit to be $80,000 – total deposit of $100,000 to be released to Seller as non-refundable purchase option monies", did not make the standard purchase and sale contract an option agreement.

In Allen v. Smith, plaintiff Allen appealed a decision by the trial court in favor of defendant Smith. The trial court had found that the parties' agreement gave Allen an option to purchase the Smith's residential property, and after declining to exercise the option she was not entitled to a refund of any portion of her $100,000 deposit because it was a non-refundable option fee. The court of appeal reversed, and instructed the trial court to grant plaintiff Allen judgment, including a finding that the contract, as interpreted by the court, did not constitute an option agreement. The court found that plaintiff Allen was entitled to receive a return of a substantial portion of her deposit based on language in the contract contained within a liquidated damages clause the clause stated that "[if] the property is a dwelling with no more than four units, one of which buyer intends to occupy, then the amount retained should be no more than 3% of the purchase price. Any excess shall be returned to buyer."

In short, the court found that, since the parties to the contract had initialed the liquidated damage provisions of the contract, those liquidated damages would not be available if the contract were to be construed as an option contract. A valuable lesson can be learned from this case. But for the handwritten language added to the counter offer by the Allen's real estate agent (the language that stated "non-refundable purchase option monies"), there would have been no dispute as to whether the contract was a purchase and sale agreement, or an option agreement. Often, realtors add handwritten language to counter offers; unless the language added to those counter offers is clear and unambiguous, and if necessary, reviewed by counsel, those handwritten additions can cause conflicts with the printed portion of the contracts, and litigation can follow.

Linking Images...cont.

matter, Arriba argued that there could be no "display" of the copyrighted works because Kelly could not show that anyone ever viewed his images through the Arriba website. The court rejected this argument, citing several other cases which have found that simply allowing the capability of display is enough to establish infringement and that the fact that no one actually saw the images goes to the issues of damages, not liability.

Active Infringement: This case is notably different from other earlier decisions like Religious Tech. Center v. Netcom On-Line Communication Servs. Inc. wherein a different federal court refused to find liability for internet service companies who took passive roles in allowing copyrighted images to be displayed. According to the appellate court, Arriba was an active participant in this case because it trolled the internet for images, organized them, and made them available for display.

What Does This Mean?: The Arriba decision has several implications for businesses. It is clear that any linking and framing of full-sized images from other sites which are then displayed at the host site is problematic and exposes the company to liability. Even where the use is not one directly for profit, the mere display of the image could lead to a lawsuit. As noted by the court in Arriba, giving users access to full-sized images harms all of the copyright owner's markets. The user would no longer have to go to the copyright owner's website to see the full-sized images, thereby reducing the owner's website traffic, and the images themselves could be downloaded and sold or licensed directly from the host site, depriving the owner of sales and profit. Use of thumbnail images, however, appears safe for the time being.

MRO&T Announcements

—McNichols Randick O'Dea & Tooliatos is pleased to announce that Kevin R. Martin has joined the firm as an associate. Mr. Martin's practice will focus on intellectual property matters including trademark prosecution and litigation, as well as real property and business litigation.

—Annette Neuhart, Administrator of the firm, was elected President of the East Bay Chapter of the Association of Legal Administrators effective April 1, 2002. She has been on the Board of Directors of the Association for four years in several different capacities.

—Leslie Baxter, Partner, was elected President of the Eastern Alameda County Bar Association.

—Nick Tooliatos, Managing Partner, is a faculty member for the seminar, *Estate Planning and Probate for the Paralegal/Legal Assistant in California.* This seminar, offered through the Institute for Paralegal Education, will be held on June 25, 2002 at the Oakland Airport Hilton.

Going Places - New York City: A Work of Heart

By Steve and Kathy McNichols

We were prepared for our mid-February trip to New York. We had packed all the right clothes to protect us from the harsh winter weather. We had our fully charged digital camera, cell phones and a plastic-coated Manhattan map. We had even watched Sister Wendy's video tour of The Metropolitan Museum of Art. And of course, we had our "hard to get" Lion King Broadway show tickets lined up, and had researched the Zagat guide to make dinner reservations at several hot spots. We were not ready, however, for the gracious and warm welcome that the City and its people gave us. And we found that the art was not just in the museums, but every place that we went.

The weather was unseasonably warm as we walked through Central Park the first day past the horse drawn buggies to see the ice skaters. The mounted policeman there smiled a hello and there was a slowly melting cupid ice sculpture in the garden at the Tavern on the Green. This was not the New York that we were expecting. We felt very safe and comfortable, even on the subway. We did not find any rude cabbies or waiters.

They had a very well organized procedure for visiting Ground Zero. Free tickets were available in the Seaport area for half hour periods to arrive at the viewing deck that overlooks the WTC site. Upon arriving, volunteer police and firemen with thick Brooklyn accents patiently directed us to the walkway and viewing line. We walked by the hundreds of tributes and memorials left around the site, and humbly took our turn peering down on the construction trailers and bare ground.

We spent a day in the Soho district, nibbling on pizza from John's of Bleecker Street (where the brick oven has not been turned off since it opened in 1929) and then settling into overstuffed sofas for coffee at Caffe Vivaldi around the corner on Jones. There were dozens of great art galleries to walk through, and a sort of ad hoc WTC photography exhibition at 116 Prince Street. They have a website at www.hereisnewyork.org. All of the photos relate to the events of 9/11, and copies are sold with the proceeds being donated to the Children's Aid Society WTC Relief Fund. A walk through Washington Square Park with its many musicians capped off the day.

St. Patrick's Cathedral is quite a feast for the eyes, as well as all the windows at Tiffany's and Bloomingdale's along the Avenues.

We found that even the bars there have art! The King Cole Bar at the St. Regis on 55th has a full wall Maxfield Parrish mural of Ole King Cole. This is the bar that created the Bloody Mary, by the way, originally known as the Red Snapper cocktail. Then, of course, there is the famous Oak Bar at the Plaza, where many deals are made over manhattans and cigars. And on the more elegant side, the Plaza serves high tea in the Garden Court Restaurant.

Our biggest treat in food was at Pastis, however, on Little West 12th Street in lower Manhattan. This is a French Bistro, serving breakfast, lunch, dinner and supper. Reserve ahead, and enjoy wonderful steak & frites, onion soup, mussels and superb service. It was a delightful place. And the Lion King production that followed was just incredible. It is a must see for young and old!!

The city had its heart on its sleeve, and the welcome mat out. Perhaps sharing their city now is a way of dealing with the pain. In any case, we highly recommend a visit. You will not be disappointed!!

Employment Law Update...cont.

(Continued from page 1)

steps of an investigation and warnings to the employee, and its permanent action of transferring the complaining employee, constituted a prompt response designed to end the harassment. Therefore, the employer was found not to be liable.

The above three cases were brought under Title VII, a federal law. Under California law, a company is strictly liable for sexual harassment by a supervisor even if the company takes immediate action. Therefore, prevention is the ultimate protection.

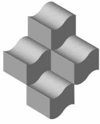
An employer is required by law to post a California Department of Fair Employment and Housing (DFEH) poster, "DFEH-162," in a prominent and accessible workplace location. These posters can be obtained by contacting the DFEH.

An employer is also required to provide an information sheet on sexual harassment and make sure that it is distributed to all employees. It is recommended that these information sheets be included in an employee's pay envelope once a year.

It is also important to be aware of the fact that independent contractors working for you are also entitled to a harassment-free work environment.

One source of potential liability is your outside sales/work force. Your company policy should clearly state that your company will not tolerate sexual harassment by your employees of employees of other companies on which they call.

If your employees are harassed by an employee of a company servicing your work site, that employee should immediately report the harassment and you should notify the other company.



McNichols Randick
O'Dea & Tooliatos LLP
Attorneys at Law

5000 Hopyard Road, Suite 400
Pleasanton, CA 94588
Phone: 925-460-3700
Fax: 925-460-0969
E-Mail: info@McNicholsLaw.com
Web Site: McNicholsLaw.com

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Achieving Results Through Innovation ®

Team McNichols to Walk 60 Miles in Three Days!
WE NEED YOUR SUPPORT!!

This year over 182,000 women in the United States will be diagnosed with breast cancer. Over 40,000 will die. Breast cancer is not just a woman's issue. Although rare, men can be diagnosed with breast cancer and everyone has a wife, mother, sister, daughter or friend who is a potential breast cancer victim.

The McNichols law firm is committed to helping to find a cure for breast cancer. Toward that end, seven members of the McNichols staff have committed themselves to walking 60 miles over three days while participating in the Avon 3-Day Walk for Breast Cancer Challenge. We also have one staff member who has agreed to serve as an Avon crew member during the event.

The McNichols team will walk from San Jose to San Francisco, California with 3,000 other courageous people. It's 72 hours of all-out commitment to the cause. A moving tribute to the power of human kindness. We're walking to honor our loved ones, to celebrate breast cancer survivors, to help more people survive this deadly disease, and ultimately, to find the cure that will eradicate breast cancer for good.

In order to participate in this event, the McNichols team is committed to raising $ 13,300 by June 14th and we are asking you to consider making a *fully tax-deductible donation* to help us reach our goal. Any amount that you can give will greatly assist our efforts. Our team's involvement in this event is made possible by the sponsors who make donations and each member of our team is more than willing to wear tee shirts, hats, etc. to let the community know who our sponsors are!

If you have any questions about donating or the event, please contact our team leader, Ms. Annette Neuhart at (925) 460-3700. All donations should be made out to the "Avon 3 Day Walk for Breast Cancer."

Thank you for helping us to help others!