I decided to be ambitious and call this column “Part 1.” The US Court of Appeals on the West Coast (CA 9) recently handed down an opinion (in Kelly v. Arriba Soft) broadly condemning as illegal what it termed “framing” and apparently condemning all hyperlinking as well.

It turns out, though, that what the CA 9 called framing is actually just putting an image from someone’s Web page into a new browser window by using a deep, direct hyperlink to the image file. This is not framing. In fact, the only apparent difference between this and an ordinary link to the same content is that, in this case, returning to the place where you started requires clicking the X box in the screen’s upper right corner rather than clicking the Back button. (You don’t need to reload the previous page, either, because it stays in memory, but you don’t see that.)

The court’s broad antilinking language scared Google and other search engine companies. They responded by filing an amicus curiae (friend of the court) brief, imploring the court to back off before it destroys the Internet. The Electronic Freedom Foundation weighed in too, asking the CA 9 to reconsider the result and all the technology errors it made getting there.

All this occurred shortly before the publication of the March-April issue of IEEE Micro. When the court did not respond promptly to the pleas that it reconsider, I thought surely it would publish a retraction before this issue. Then I would just tell you about the corrected version of the opinion and the Internet’s near miss with Halley’s Comet. But all of us fans of hyperlinking are still waiting, holding our collective breath: The CA 9 still hasn’t retracted its earlier opinion. So, I plan to tell you about this saga in two installments.

In this first installment, I’ll tell you about what the technologically illiterate CA 9 did. And because I remain confident that reason will always triumph over idiocy (or, at least, ignorance) in the marketplace of ideas, the next time I hope to tell you about how the CA 9 blushed furiously and decided it better do the right thing. You’ll know that I’m being too ambitious if you never get to see part 2.

Kelly goes for the gold

Les Kelly operates a Web site, where he displays photographs he took of 1849 Gold Rush scenes. Arriba Soft ran an image search engine that operated in pretty much the same way as other image search engines—Google, for example. You might enter the phrase “Gold Rush,” and a screen would come up, showing thumbnail pictures of grizzled prospectors, mules, and other forty-niner paraphernalia, along with perhaps a thumbnail of somebody’s dog named “Gold Rush.” If you clicked on one of the thumbnails, the corresponding full-size picture would appear on your screen, in a separate browser window, and for some reason the CA 9 considers this framing.

Kelly sued Arriba Soft for copyright infringement, saying the thumbnails and full-size images were illegal reproductions of the copies of the copyright-protected photos that he had posted on his Web site. Such reproduction violates section 106(1) of the Copyright Act, which prohibits unauthorized reproductions of protected works.

The trial court held that the thumbnails were a fair use of the copyright-protected photos. The fair-use doctrine excuses certain uses of copyright-protected works that would otherwise constitute infringement. The law excuses these uses because society considers them socially beneficial. Typical examples include classroom use, criticism, and parody. In this case, the use was fair for several reasons.
First, Arriba’s thumbnails did not compete in any way with Kelly’s photos at his Web site. The thumbnails were so small and of such low resolution that they could not act as market substitutes for Kelly’s photos. Moreover, search engine Web sites are useful and beneficial to the public, and the thumbnails were necessary to the search engine’s operation. How else could users identify which pictures they wanted to view as full-size images? The trial court brushed aside the linking to the full-size images? The trial court identify which pictures they wanted to engine’s operation. How else could users identify which pictures they wanted to search? thumbnails were necessary to the search useful and beneficial to the public, and the market substitutes for Kelly’s photos. Moreover, search engine Web sites are virtual space. If you can forget the non-sense about linking as framing, the CA 9 is apparently saying that providing a hyperlink to an image file is a public display of the encoded image. But who put the image files up on the Web in the first place? It was Kelly. Why isn’t Kelly the one, then, doing the public displaying? Or maybe it’s the user. How is a link a public display? It may possibly facilitate a display, but it is not a display in itself. If I take you by the hand and lead you to the shelf in the library that holds a copy of Gone with the Wind, and I point to the book, did I publicly display the work? Kelly’s lawyer says that all three—Kelly, Arriba, and the user—are displaying. But as long as Arriba is one of those doing the displaying, Kelly can thump Arriba under the copyright law.

Still panning for answers

But what is a display? The Copyright Act’s definition doesn’t help. It says that to display an image or other work is to show a copy of it, directly or with a device (that is, a machine). My computer law classroom looks out on a quad where there’s a statue of George Washington (the university’s namesake) rendered in the style of Gilbert Stuart. If I led you to the window and invited you to look at the statue, have I shown you the statue? Yes. Does that mean I’ve publicly displayed the work? Has the sculptor or whoever owns the copyright a claim against me under section 106(5)? How is what I did any different from what Arriba did? What if a tour guide shows you the limp watches of Dalí’s Persistence of Memory in a museum? Kelly’s lawyer has an answer to that, too. He says that what constitutes copyright infringement is presenting the copyright-protected work in a setting different from that which the copyright owner intended. Only when that situation occurs is there a violation of the public-display right. When I showed him the statue in the quad, he said that I was showing it to him in the setting intended by the sculptor, and therefore no unauthorized public display occurred. In contrast, Kelly intended his photos to be viewed on his Web page with his text and self-promotional materials nearby. Putting one of the photos in a separate window, divorced from Kelly’s text and self-promotional materials, took the picture out of Kelly’s intended context and thus involved an unauthorized public display. On the other hand, a link to Kelly’s home page would not be infringement, because the images and text would appear as Kelly intended. But the Copyright Act says nothing, at least not explicitly, about intended context.

Another way to look at this is that whenever somebody puts something on a Web site, it is understood that she is inviting people to look at it. They can look at it by stumbling upon it unaided, being tipped off about it in an e-mail, or clicking on a hyperlink to it from some Web page. What about inline links juxtaposing it with a different Web page? And what about putting an entire HTML file into an inline frame?) Kelly denies that any such understanding about linking exists. Does it? Is there an implied linking license for all netizens? If so, can the implication be dispelled by a notice saying, “Do not link”? If it could, how would search engine companies deal with that?

I asked Kelly’s lawyer how far the intended context theory goes. First, suppose we replace the image link with a text link (say, http://www.kelly-site.com/49Miner.jpg). Then consider hypothetical magazine IEEE Femto that prints an article on the Gold Rush. In the middle of the article, a statement directs IEEE Femto readers to a picture of a forty-niner at http://www.kelly-site.com/49Miner.jpg. If readers keypunch that URL into the address box of their browsers, they will see the JPEG image and nothing else—none of Kelly’s self-promotional materials. Is this a violation of Kelly’s public display right? First, Kelly’s lawyer said yes; then he said no. Then he said, “That’s not the facts of this case, and we don’t need to resolve that to determine that Arriba is an infringer.”

But asking such questions is the traditional form of legal analysis for deciding whether some city slicker is trying to sell you the Brooklyn Bridge. If applications of a proposed legal rule to similar fact patterns lead to results that you don’t like, something is probably wrong with the proposed rule. Let’s see how the CA 9 gets out of this fine mess that Kelly got it into. Stay tuned for part 2—maybe.