

# POSTING COURSE MATERIALS, LINKING, and THUMBNAIL IMAGES

When posting course materials to the Internet, it is always permissible to post materials that are original. Copying and posting the works of others without permission may be an infringement. Posting materials to the Internet is not an activity confined to the classroom, so the exceptions to copyright infringement may be less applicable. The use of password protection may help bring the use of posted copyrighted material within the range of the fair use doctrine.

Hyper linking to another site's home page to get to a work that has been posted by a copyright owner is probably legal. However, if the same material is copied and posted to another person's Web site, that constitutes infringement. For example, it is probably permissible to link to an online newspaper article, but one may not copy and post the article to another web site.

A deep link is a type of hyperlink that takes the web surfer not to a Web site's home page, but to a deeper page. This practice is disfavored by Web site owners, primarily because it may decrease their advertising revenue. Ordinarily, deep linking will not present copyright concerns that should concern those involved in academic endeavors. However, increasingly the practice is prohibited pursuant to a private contract entered into between the Internet user and the Web site owner. For the contract to apply, the user must have clicked on a button stating that the user read the agreement prohibiting deep linking.

A good argument can also be made that linking to material that is known to be infringing is prohibited by copyright law. See, *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000), *aff'd*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458-59 (2d Cir. 2001). (defendant enjoined from linking to software that violated anticircumvention provisions of the DMCA).

At least one court has reasoned that the use of thumbnail images (small, low resolution images) on a Web site constitutes fair use. In a factually complex case, the court in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, (9th Cir. 2003) examined the fair use issues involved in thumbnail depictions of a commercial photographer's photographs on a commercial Web site.

The court reasoned that the use of the images, while commercial, was transformative and served a different purpose than the originals. There was no esthetic value in the thumbnail image, while the purpose of the original was largely esthetic.

The images were creative, a fair use factor favoring the photographer. However, since the material had already been published on the Internet, this factor only slightly favored the photographer.

The amount copied was necessary because of the purpose of the thumbnail images. That was, to direct Web site users to a site where they could purchase the photographs.

There was no negative impact on the market for the photographs, because the Arriba Web site directed users to the photographer's web site. Also, the thumbnail images were of such low quality that they had no commercial value.

This case suggests that in many cases the use of thumbnail images in an academic environment would constitute fair use of an image. However, the same cannot be said for the posting of full size images of objects.