

Intellectual Property

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Cut, Paste, Infringe

Southern District rejects news aggregator's fair use defense.

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On March 20, 2013, the Southern District of New York held that Meltwater, an Internet news aggregator, infringed the Associated Press' copyright by excerpting news articles and delivering them to Meltwater's paid subscribers.¹

Meltwater uses computer programs known as "crawlers" to scrape, or copy, articles from online news sources, thereafter delivering excerpts of the

stories to its subscribers in response to search queries.² In this way, Meltwater functions as a traditional news clipping service upgraded with searching capabilities, delivering its customers customized emails that contain news excerpts responsive to their specified search requests. With regard to the at-issue AP articles, Meltwater had excerpted anywhere between 4.5 percent to 60 percent of the stories, including what AP asserted was the critical aspect of the stories—the lede sentence.

Is It Permissible Fair Use?

Meltwater did not contest that it had infringed

AP's copyright in the articles. Rather, it relied on five affirmative defenses, the principal one being fair use.³ The fair use defense, which allows for the use of copyrighted works in limited instances such as for purposes of criticism, commentary, news reporting, or teaching, focuses on four statutory factors: (i) the purpose and character of the use (including whether it is for commercial purposes and whether it is transformative); (ii) the nature of the copyrighted work (e.g., whether the copyrighted work is fictional or nonfictional); (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect

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of the use upon the potential market for or value of the copyrighted work (asking whether the new use would lessen demand for the original work).⁴

AP argued in its briefing that traditional news clipping services were not protected under the fair use doctrine, citing Ninth and Eleventh Circuit precedent.⁵ In both *Los Angeles News Service v. Tullo*⁶ and *Pacific & Southern v. Duncan*,⁷ the courts rejected the fair use argument handily, with the Eleventh Circuit noting that the defendant's news clipping service—which videotaped plaintiff's news broadcasts and sold those tapes to others—"is neither productive nor creative in any way."⁸

Meltwater contended that its main contribution over and above traditional news clipping services was its search engine capability, and that providing customers with this service constituted transformative use of the original works and thus was protected under the fair use doctrine. In support of its argument, Meltwater relied upon two well-known Ninth Circuit fair use cases, *Perfect 10 v. Amazon.com*⁹ and *Kelly v. Arriba Soft*,¹⁰ in which the courts held that the displays of thumbnail images of copyrighted works on defendants' Image Search webpage constituted fair use. The *Perfect 10* court had found such use "highly transformative," citing *Kelly's* reasoning that the thumbnails improved access to information on the Internet rather than functioning as a means of artistic expression.¹¹

The *Meltwater* court rejected the analogy to *Kelly* and *Perfect 10*. Central to the court's holding was its finding that "Meltwater News is neither designed nor operated to improve access to" content across the Internet. In this regard, although Meltwater contended that it functioned principally as a search engine by providing its subscribers links to the full articles, virtually none of its subscribers actually clicked through to read the source article, relying instead on Meltwater's excerpt of the article.¹² Even less helpful to Meltwater's defense was the court's finding that Meltwater automatically took the lede from every AP story. "As described by [an AP editor], the lede is 'meant to convey the heart of the story.' A lede is a sentence that [AP argued] takes significant journalistic skill[s] to craft. There is no other single sentence from an AP story that is as consistently important from article to article—neither the final sentence nor any sentence that begins any succeeding paragraph in the story."¹³ In so holding, the district court emphasized §107's focus on the "substantiality of the portion used in relation to the copyrighted work as a whole,"¹⁴ citing the Supreme Court's "heart of the work" doctrine in *Harper & Row*, which recognizes that "relatively small takings may be significant if the portions taken are qualitatively important."¹⁵

Implications, Ramifications

In some respects, the district court's rejection of Meltwater's fair use defense does not break new ground in that it adheres closely to earlier news clipping precedent and largely turns on the fact-specific finding that Meltwater's "search engine" is a sham. However, as it is one of the first cases to apply the fair use defense to search engines based on text, not images, *Meltwater* raises many interesting questions about whether (and under what circumstances) other news search engines, like Google News, could raise a viable fair use defense, particularly if the search results contained a story's lede. The case also raises the question of whether news aggregators that do not offer a search function, but exist merely to compile other stories, could ever operate legally in the new digital age. *Tullo* and *Pacific & Southern* were 20th-century decisions involving videotapes; the new digital age of e-readers and tablet-based news services has seen an outgrowth of companies trying to capitalize on the large wealth of available information on the Internet in ways that improve the way we access and consume news and information.

News aggregators can take some solace in the fact that the underlying facts of a work such as an article, unlike the expression of such facts, are not copyrightable.

In the case of news search engines, the answer should be relatively straightforward. Critical to Meltwater's failure to mount a successful fair use defense was the fact that it appears not to have served as a search engine at all: Users were using the service to *read* the news, not *find* the news. And the quantity and quality of content Meltwater was taking mattered as well.

Moving forward, search engines and aggregators should recognize as their main priority ways to legally locate, rank, and sort the content for which its users are searching. Put differently, to come within the *Perfect 10* line of analysis, they must somehow "lead without the lede," directing users to the original story by providing enough detail that it fulfills the user's search, but without divulging too much information that the original source becomes unnecessary. Like a thumbnail, the "image" of a news story (i.e., the excerpt) must be both clear enough to signal to the user that they have potentially found the story they are looking for, yet hazy enough that they cannot rely on the excerpt itself to glean all the information they need.

News aggregators, on the other hand, can take some solace in the fact that the underlying facts of a work such as an article, unlike the expression of such facts, are not copyrightable. Notably, the common law "hot news" misappropriation doctrine, the elements of which were called into doubt by the Second Circuit's 2011 majority opinion in *Barclays Capital v. Theflyonthewall.com*,¹⁶ was not addressed by the *Meltwater* court. *Barclays*, which held that one's "ability to make news...does not give rise to a right for it to control who breaks that news and how," was a win for news aggregators everywhere—at least when it comes to reporting on the underlying facts of a story.¹⁷

But if it was not clear already, *Meltwater* makes it clear to news aggregators that merely cutting and pasting excerpts from news stories will likely result in a finding of copyright infringement with no fair use defense on which to lean. Whether a creative, transformative way of displaying copyrighted content would qualify for a fair use defense remains to be seen. Services such as Flipbook, Pinterest, or even Twitter certainly suggest that there may be socially valuable uses of information that involve aesthetizing, sharing, and repurposing data. The key in the new digital age will be ensuring that it is done so legally.

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1. *Associated Press v. Meltwater U.S. Holdings*, No. 12 Civ. 1087 (DLC), 2013 WL 1153979 (S.D.N.Y. March 21, 2013) (to be published in F. Supp. 2d).

2. *Id.* at *3-5.

3. The other defenses, which we do not discuss here, were implied license, equitable estoppel, laches, and copyright misuse.

4. See 17 U.S.C. §107; Pierre N. Leval, "Toward a Fair Use Standard," 103 Harv. L. Rev. 1105 (1990).

5. Memorandum of Law of Plaintiff the Associated Press in Support of its Motion for Summary Judgment on its Copyright Infringement Claim, at 13 (citing *Los Angeles News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992) and *Pacific & Southern v. Duncan*, 744 F.2d 1490 (11th Cir. 1984)).

6. 973 F.2d 791 (9th Cir. 1992).

7. 744 F.2d 1490 (11th Cir. 1984).

8. *Pacific & Southern*, 744 F.2d at 1496.

9. 508 F.3d 1146 (9th Cir. 2007).

10. 336 F.3d 811 (9th Cir. 2003).

11. *Perfect 10*, 508 F.3d at 1165.

12. *Meltwater*, 2013 WL 1153979, at *13 (noting that fewer than one percent of Meltwater's subscribers clicked through to the underlying article).

13. *Id.* at *18.

14. *Id.* at *10.

15. *Id.* at *17.

16. 650 F.3d 876 (2d Cir. 2011).

17. *Id.* at 907.