

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE ASSOCIATED PRESS,

Plaintiff,

v.

No. 12-cv-1087 (DLC)

MELTWATER U.S. HOLDINGS, INC.,
MELTWATER NEWS U.S., INC. and
MELTWATER NEWS U.S. 1, INC.,

Defendants.

**BRIEF OF *AMICI CURIAE* THE NEW YORK TIMES COMPANY,
ADVANCE PUBLICATIONS, INC., GANNETT CO., INC.,
THE McCLATCHY COMPANY, THE NEWSPAPER ASSOCIATION OF
AMERICA, AND BURRELLESLUCE, IN SUPPORT OF PLAINTIFF**

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INTEREST OF AMICI CURIAE

The New York Times Company, Advance Publications, Inc., Gannett, Co., Inc., and The McClatchy Company are news organizations that each publishes, among other things, daily news reports in print and online carrying investigative, war, opinion, and other reporting. Some of the reporting is undertaken by employees and freelancers, and some is researched and written by reporters from other services, including The Associated Press. The Newspaper Association of America (“NAA”) is the trade organization representing 2000 additional news organizations in the United States and Canada. *Amici* (including NAA’s members) finance this reporting with revenues earned from subscribers, advertisers, and licensees in the belief that vigorous news reporting is essential to our nation and way of life. As James Madison understood, citizens in a democracy “must arm themselves with the power that knowledge gives. A popular government without popular knowledge or the means of acquiring it is but a prelude to a farce or a tragedy or perhaps both.” Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, 103 (Gaillard Hunt ed.) (1910).

It takes no friend-of-the-court brief for the Court to know that the rise of the Internet has been highly disruptive to the nation’s news organizations, as their readers and advertisers have migrated to the Web. In response, the nation’s news organizations, including the *amici* on this brief, have at considerable expense developed their own Websites and digital businesses to carry their news reports. These digital businesses are supported by electronic advertising revenue, electronic subscription revenue, and licensing income from other publishers and users and aggregators. None of these revenue streams can be sustained if news organizations are unable to protect their news reports from the wholesale copying and redistribution by free-riders like Meltwater.

Aggregators who believe that the law permits their free-riding (or that it would be too costly for news organizations to establish otherwise through litigation) will simply continue their parasitical behavior to the continuing and increasing harm of the economic incentives copyright is supposed to provide. If the massive, systematic copying of expression engaged in by Meltwater is held to be fair use, the AP (and others) would lose not only the revenues that Meltwater and others of its ilk *should have been* paying, but also the revenue that other media monitoring services and aggregators *have been and are* paying for licenses, based on their correct understanding that the routine commercial copying of the amount of expression taken by Meltwater is not fair use. A holding of fair use here would evaporate those revenues in short order.

Amici also have an interest in the continued viability and vibrancy of The Associated Press, which they rely on to maximize the reporting that they can accomplish with their own resources. They (and their readers, and indeed, the nation at large) share an interest in AP's ability to report with its limited resources. Free-riding such as Meltwater engages in directly injures the AP by diminishing the licensing revenue that AP is able to earn from its news reporting. By contrast, a decision that Meltwater's systematic, wholesale, daily commercial copying and reselling of the AP's expression into AP's existing and expected markets is not fair use would not impair Meltwater's ability to serve its customers. It would simply obligate Meltwater to pay for the expressive content that is central to its business, just as it (presumably) pays for other costs (rent, power, insurance) without stealing them, or demanding – on the basis of some imagined public interest – an entitlement to use them without payment.

The non-publisher amicus on this brief is a media monitoring company, BurrellesLuce, which has been an industry leader in licensing news content from the publishers going back to the advent of digital online delivery. BurrellesLuce is one of Meltwater's competitors – albeit one that, unlike Meltwater, obtains licenses from the news organizations whose expression it copies and redistributes, and pays required license fees. Having undertaken to pay the licensing fees that Meltwater ignores, BurrellesLuce finds itself at a significant competitive disadvantage. BurrellesLuce expects and hopes the resolution of this dispute will eliminate that disadvantage and make the rules of the copyright road plain, while strengthening the economic health of AP and other news organizations on which it depends for the provision of its own services.

The AP's lawsuit is thus a fight in which *amici*, as well as all the nation's citizens, have a stake.

ARGUMENT

I. MELTWATER IS NOT A SEARCH ENGINE

At the core of Meltwater's arguments is the contention that it should be considered a "search engine." The amicus brief for the Computer and Communications Industry Association ("CCIA"), of which Google is a key member, makes the same assertion. But Meltwater and CCIA never demonstrate why that is so, or why on these cross-motions it should even matter, and the point is mistaken in multiple respects.

First, the assertions that Meltwater is a search engine are just that: completely unsupported assertions, never cited to any authority. No judicial opinion is cited for the proposition that Meltwater is (or should be considered to be) a search engine. No authority is cited that categorizes as a "search engine" a closed-end, commercial content delivery business like Meltwater (whose value proposition is based on selling to its

paying customers, at a lower price, the very thing a copyright owner suing for infringement is already selling). Moreover, these assertions are not even supported by Meltwater's own web site. The various pages on its website describing its "news" business (reproduced in the Addendum below) contain no reference whatever to Meltwater being a search engine. Rather, Meltwater touts its "media monitoring service," explaining that it tracks a defined number of news websites and extracts articles for placement into a proprietary database consisting entirely of content copyrighted by genuine news organizations.

There were clipping services (the paper analogues to Meltwater) for decades, and they would not have been excused from buying multiple copies (which they did before photocopying machines) or paying license fees (which they did thereafter, to the Copyright Clearance Center)¹ had they uttered the phrase "search engine" as they collected checks from customers for re-distributing expression created by the news media. No company could undertake to sell consumers selected slices (less than all) of a cable company's channel package and call the process of winnowing out the unwanted channels a "search engine," or defend it as fair use. Nor can Meltwater sell selected slices of AP content (or the content of other news organizations) and immunize itself by calling its copying service a "search engine" or "fair use."

Second, and more fundamentally, nothing in the briefs indicates why classifying Meltwater as a "search engine" should affect the fair use analysis in any way whatever. Fair use depends on factual distinctions, not labels that cover them over. Meltwater's news service is so entirely different from classic search engines that any fair use assessment would have to take into account these extensive distinctions. Usual search

¹ See *American Geographical Union v. Texaco Inc.*, 60 F.3d 913, 929 n.16 - 930 (2d Cir. 1994).

engines (such as Google's) are available to the world on each user's screen, and can be used by anyone to search the entire Internet for any purpose at no charge. By contrast,

Meltwater

- carefully limits those *to whom* it delivers content (its paying clients who have contracted for its services), and is specifically targeted to and used for only business purposes;
- sharply limits *what it searches* (news articles from a defined list of content providers), and uses that defined content on a regular, continuing, systematic basis, as opposed to the ad hoc searches undertaken through a search engine like Google;
- defines precisely and advantageously (to its own business) *what it delivers* (news articles or the large chunks thereof), as opposed to links to third party servers on which content resides;
- promises *to always deliver the headline and the lede of responsive articles*, along with additional content as well (depending on the client's order); and
- produces click-through rates that are very substantially lower than those produced by other aggregators, suggesting that Meltwater is fully superseding AP (and its licensees) as the source for AP content (and newspaper content generally).²

Third, the briefs of Meltwater and CCIA nowhere mention, much less grapple with, the fact that Congress considered the extent (if any) to which search engines need statutory protection, and provided only limited protection. *See* 17 U.S.C. § 512(d), which has no application to this motion or in respect of the copying and distribution Meltwater massively undertakes, but rather provides a safe harbor from monetary and injunctive relief only for infringement “by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link” under specified circumstances). *Cf. Agence Fr. Presse v. Morel*, 2013 U.S. Dist. LEXIS 5636,

² AP's brief reports that the average click-through rate on AP's Registered Articles on Meltwater is roughly 0.08% and the click-through rate for the entire Meltwater system in the UK was only 0.5%. Rule 56.1 Statement, ¶¶ 151-152. By contrast, industry news reports indicate that Google News users access individual news sites at much higher rates. *See, e.g.*, <http://techcrunch.com/2010/01/19/outsell-google-news/>.

at *49 (S.D.N.Y. 2013) (Nathan, J.) (“search engines” are “information location tools” under § 512(d)).

Meltwater cannot and does not claim the protection that Congress extended to search engines. Meltwater asserts no § 512(d) defense or counterclaim in its Answer or on this motion, and it should not be permitted to stretch fair use doctrine to create additional protection for itself that Congress chose not to provide. On these cross-motions (but not in its marketing materials, see the Addendum *infra*), Meltwater analogizes itself to a search engine, a theme picked up by its *amici*. But the salient differences between Meltwater and classic search engines make plain that the considerations that led Congress to provide in 17 U.S.C. § 512(d) a safe harbor for information location tools simply do not apply to businesses like Meltwater.

Unlike providers of “information location tools,” which are typically available to the world-at-large to search the entire web and involve linking and referring, Meltwater’s news monitoring services consists principally of copying and distributing the expression of real news organizations and publications on behalf of its own pre-arranged clients, for whom it searches sites that Meltwater has pre-selected or already archived. Meltwater promises its customers expression, not merely facts or links, including the most valuable expression news media create and market, namely headlines and their ledes. Its customers are not interested in merely the facts, but, as Meltwater’s own marketing materials reflect, in the expression itself, so that they can gauge tone and resonance and detail. *See, e.g.*, Addendum at 1 (“providing users with foreign character search capability in 25 languages ensures thorough and in-depth results”); *id.* (Meltwater permits tracking of “keywords [and] phrases” and “advanced Boolean search capabilities . . . throughout

online publications”); *id.* at 4 (“Meltwater allows customers to assess “tone – evaluate if your coverage . . . is positive, negative or neutral”).

Meltwater’s creation of its own long-term archive, and its service of enabling its customers to make further copies of headlines, ledes, and additional content in-house (to their additional employees) and outside (to third parties), add further reason for not characterizing Meltwater as a “search engine.” *See* Addendum at 5 (Meltwater enables its customers to “upload[] articles at a click of a button” so as to “increase traffic to [the customer’s] Web site and enhance brand exposure among targeted audiences”).

AP is complaining on these cross-motions not of some physical object or some piece of software at all, but of the services Meltwater provides to its paying customers, in the course of which Meltwater itself is copying and distributing the copyrighted work of the AP and others. AP receives license revenue from Google News, but not from Meltwater, even though Meltwater knowingly and intentionally signs up corporate customers (most of whom presumably have been AP customers, directly or indirectly), who then pay Meltwater (at a lower cost, according to Meltwater’s marketing materials)³ for the same content that they would have obtained from AP or its members or licensees. Calling it a search engine makes no difference whatever.

II. MELTWATER’S MAKING AND DISTRIBUTING COPIES OF THE AP’S COPYRIGHTED EXPRESSION TO THE AP’S EXISTING OR EXPECTED CUSTOMERS IS NOT TRANSFORMATIVE

A. Meltwater’s Repackaging Is Not Transformative

Meltwater’s News Reports consist of exact copies of critical portions of AP news stories – the headlines, ledes, and article text. There is nothing transformative about Meltwater’s repackaging of the AP’s copyrighted content. *See Campbell v. Acuff-Rose*

³ *See* Addendum at 6-9.

Music, Inc., 510 U.S. 569, 588 (1994) (“[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (“A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the [transformative use] test”).

Meltwater’s arguments cannot be reconciled with the holding in *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999), where the Second Circuit agreed with the district court that roughly translated articles (inaccurately called “abstracts” by the defendant) were not transformative. The defendant there gathered news articles from a variety of sources and sold rough translations of those articles to its customers. The conversion process, which involved selecting the article, translating it, and revising the translation to achieve a consistent style, took approximately thirty-six minutes per piece. Agreeing with the district court, the Second Circuit observed that these translations were “not in the least transformative.” *Id.* at 72. Like the translations in *Nihon*, Meltwater’s News Reports lack any transformative quality. Meltwater does not employ abstractors, but instead uses the AP’s own expression, relying on technology to compile its reports automatically. This difference in technology does not aid Meltwater. Indeed, the elimination of the human component (and thus the potential for any stylistic or expressive changes) makes Meltwater’s reports even less transformative than the translations in *Nihon*.

B. Meltwater’s Use Is Not For a Different Purpose

AP uses its original works to deliver the news; Meltwater uses the AP article excerpts for the same purpose. Notwithstanding the contention of amicus CCIA that

Meltwater uses the copyrighted works for a different purpose – saying that “AP’s purpose is to *report* the news, while Meltwater’s purpose is to help clients determine *how the news is reported*” – that clever phrasing effectively concedes that Meltwater is selling not facts but expression, and undermines Meltwater’s fair use argument that the purpose of its use differs from AP’s.

Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998), rejected a similar argument. The defendant there argued that its use – a telephonic service that enabled defendants’ customers to listen to recordings of selected radio broadcasts – was transformative because its customers used the broadcasts for informative rather than entertainment purposes. The Second Circuit explained that “it [wa]s not clear that all of Kirkwood’s target audience ‘transforms’ the broadcasts as he suggests. Talent scouts, who admittedly would not be listening in order to be entertained themselves, would nevertheless be listening for the entertainment value of the broadcasts rather than the factual content.” *Id.* The original broadcast and the rebroadcast could be used for the same purpose. Accordingly, the court found a “total absence of transformativeness in [defendant’s] acts of retransmission.” *Id.* at 109. Moreover, the court stressed that it was the defendant’s “own retransmission of the broadcasts, not the acts of his end-users, that [wa]s at issue [.]” *Infinity*, 150 F.3d at 108. Where “[a]ll [the defendant] d[id wa]s sell access to unaltered radio broadcasts,” there could be no transformation. *Id.*

Here, as in *Infinity*, Meltwater is a purely commercial user whose business is re-selling pertinent news articles – including the expression, and not just the facts – to businesses who are interested in what the articles say and how they say it, with some added bells and whistles (analytical tools). Moreover, even if the court were to look to

the purpose of Meltwater's customers' use, and not to Meltwater's own purpose, Meltwater's clients can (and do) use the Meltwater News Reports for the same purpose as the AP's copyrighted works (and those of *amici* as well). Unlike search engines, a news aggregator "serves a similar function to a newspaper's website – to collect and organize news stories so that they can be read" ⁴ Meltwater acknowledged that at least some of its subscribers use articles in the Meltwater News Reports "to keep abreast of news developments," and that doing so is "a valid way to use the [Meltwater] system." McNamara Decl. ¶ 20. Meltwater's use supercedes the AP's use: it fulfills the demand for the AP's own content (*i.e.*, its expression). Because the two uses can and do serve the same purpose, the "different purpose" argument advanced by Meltwater and its *amici* should fail.

Meltwater's *amici* argue that *Infinity* is inapposite because it involved unshortened retransmissions and Meltwater does not reproduce entire AP articles. This attempt to distinguish *Infinity* overlooks a critical aspect of the court's reasoning and its decision—namely, that the original broadcasts and the retransmissions could both be used for the same purpose. Although a "difference in purpose is not quite the same thing as transformation," in *Infinity* there was not even a difference in purpose. *Infinity*, 150 F.3d at 108. ⁵ The same is true here. Similarly, in *United States v. ASCAP*, 599 F. Supp. 2d 415, 424 (S.D.N.Y. 2009), *aff'd in part, vacated in part and remanded* (on other grounds), 627

⁴ Kimberly Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices*, at 11 (Berkman Ctr. For Internet & Soc'y, Research Publication 2010); *see also* Keiyana Fordham, *Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 Fordham Intell. Prop. Media & Ent. L.J. 939, 983 (2010) ("studies indicate that online readers may use this feature [automatic news aggregation] as a news source instead of a reference tool, which . . . create[s] a news reporting purpose").

⁵ Indeed, the language that amicus CCIA quotes from *Kelly v. Arriba Soft Corp.* acknowledges as much: "the result was that people could use both types of transmission for the same purpose." 336 F.3d 811, 819 (9th Cir. 2003).

F.3d 64 (2d Cir. 2010), the infringing works consisted of shortened versions of the original works. Nevertheless, the court reached the same conclusion as the court in *Infinity*.

In *ASCAP*, AT&T Wireless argued that its ringtone and ringback previews were transformative, despite the absence of any expressive changes to the original work, because “the new work ha[d] an entirely different purpose and meaning.” *ASCAP*, 599 F. Supp. 2d at 424. According to AT&T Wireless, the previews served the purpose of informing customers, which was different from the entertainment purpose of the original music. The court disagreed. Because AT&T Wireless did not demonstrate that “its customers use previews solely for informational purposes, and not also to assess the musical quality and entertainment value of the ringtones,” there was no transformation. *Id.* at 427. *See*, to the same effect, *Video Pipeline, Inc. v. Buena Vista Home Entm’t Inc.*, 342 F.3d 191, 200 (3d Cir. 2003) (rejecting defendant’s “different purpose” argument and holding that the clip previews were not transformative due to the “the shared character and purpose of the clip previews and the trailers [so that the clips will likely serve as a substitute for the trailers] and the absence of creative ingenuity in the creation of the clips”), *cert. denied*, 540 U.S. 1178 (2004); *L.A. Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669, at *28 (C.D. Cal. Apr. 5, 2000) (holding that posting entire articles on “bulletin board” website for the purpose of encouraging responses and debate was not transformative because the articles “ultimately serve[d] the same purpose as that for which one would normally seek to obtain the original – to have it available for ready reference”).

As in *ASCAP*, Meltwater News reports consist of shortened versions of the original works; they are “previews” or “pertinent passages” of the full news stories. The

shortening does not prevent Meltwater subscribers from using the reports for the same purpose as the originals – reading what the news media are writing about particular topics, persons, or businesses, to understand tone, atmospherics, and approach.

Meltwater and its *amici* rely heavily on *Bill Graham Archives*, 448 F.3d 605 (2d Cir. 2006), but that case is entirely distinguishable and does not support fair use here. The court in *Bill Graham Archives* was faced with a classic example of fair use – reproduction of copyrighted material to illustrate and give texture to a biographical work. The court began its analysis by emphasizing that *Illustrated Trip*, the work at issue, was “a biographical work documenting the 30-year history of the Grateful Dead.” *Bill Graham Archives*, 448 F.3d at 609. The court explained that although “there are no categories of presumptively fair use . . . courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects.” *Id.* (internal citations omitted). With that backdrop, the court stressed that the images in the biographical work served as “historical artifacts,” *id.* at 610, a distinct purpose from the original artistic and promotional purpose of the images. Here, in contrast, the original AP articles and the Meltwater copies serve the same purpose – the delivery of news reporting, with expression intact so as to convey not just discrete facts but tone and tenor. Further, use in a biography or history is a one time occurrence, whereas Meltwater’s copying from the AP is routine, systematic, daily, and a substitute for the AP articles themselves. *Bill Graham Archives* is thus inapposite.

Meltwater’s and its *amici*’s reliance on *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), and *Kelly v. Arribasoft*, 336 F.3d 811 (9th Cir. 2003), is also

misplaced. Those cases concerned visual images which were delivered in degraded form unsuited for any use other than identifying the destination websites where useful images could be licensed and purchased. The entire basis for the Court’s ruling was that the images displayed by search engines were *not* substitutes for the use of the originals, but rather served a distinct purpose, namely to lead the user to the “original.” Here, Meltwater’s use of the AP copyrighted content can and does serve as a substitute for the original AP articles, and more than 99% of the time Meltwater’s customers never click-through to the underlying publication. Nor did the use in those cases present anything comparable to Meltwater’s copying of the lede from every AP article copied.

Meltwater and its *amici* also err when they argue for fair use on the basis that Meltwater’s clients are interested only in facts (which are not subject to copyright protection) and not AP’s expression (which of course is). First, if it were true that Meltwater’s clients are interested in only the facts— and it is not — then presumably Meltwater would convey only facts, not (as it does) unaltered, unparaphrased AP expression. But Meltwater’s own marketing materials concede — indeed, they tout — that its customers want expression, not just facts. *See* Addendum at 4 (“With Meltwater News, users can examine . . . [t]one — evaluate if your coverage or media response is positive, negative or neutral); *id.* at 5 (touting the “Newsfeed,” which “provides RSS feeds for employees, investors, suppliers, board members, journalists and the general public” and “highlight[s] positive coverage”).

Second, the lesser protection accorded to factual materials derives from a policy desire to ensure that other publications can write about and analyze the news itself, without hamstringing them by copyright enforcement. *See Feist Publ’ns, Inc. v. Rural*

Tele. Serv. Co., Inc., 499 U.S. 340, 349-50 (explaining that the inherent tension between the unprotected status of facts and protected status of fact compilations can be understood through the fact/expression dichotomy; “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work”). But here, Meltwater does not provide its own news reporting, and does nothing more than repackage and retransmit the AP’s original content (with some added bells and whistles that the user may or may not even use, and which AP does or can offer in any event). Since the only reporting of news is AP’s, and Meltwater does not need to use so much of the AP’s expression on such a systematic basis in order to report the facts (if that was what it sought to do), the underlying policy reasons for affording lesser protection to factual works are wholly absent here.

III. MELTWATER’S USE HARMS THE AP’S EXISTING AND POTENTIAL MARKETS

The contention of Meltwater and its amici that the fourth fair use factor does not weigh against Meltwater ignores the leading authorities on fourth factor market harm, which make plain that Meltwater’s use is in fact a classic superseding use that aims to supplant AP’s own existing and normal markets and its reasonable expectations.

The fourth fair use factor is the “effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Properly applied, the fourth factor requires a court to consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others), would result in a substantially adverse impact on the potential market for, or value of, the plaintiff’s present work.” 4 MEVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT, §13.05[A][4](2012); see *Princeton Univ. Press v. Michigan Document Serv.*,

Inc., 99 F.3d 1381, 1386-1387 (to negate fair use, the plaintiff need only show that “if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.”); *Basic Books, Inc v. Kinko’s Graphics Corp.*, 758 F.Supp. 1522, 1534 (S.D.N.Y. 1991) (same).

Additionally “neither copyright law nor copyright principle draws a line between markets entered and markets not entered.” 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, §12.2.2.4 (3d ed. 2013). Thus courts have also examined the impact on traditional, reasonable or likely to be developed markets when examining and assessing a secondary use’s effect upon the potential market for or value of the copyrighted work. *Texaco*, 60 F.3d at 930; *Princeton Univ. Press*, 99 F.3d at 1387 (explaining that where the copyright holder has an interest in exploiting a market, and especially when the copyright holder has successfully done so, potential licensing revenues should be included in the fair use analysis).

The summary judgment record reflects that the AP sells in precisely the same submarket that Meltwater tries to carve out as its own: the market for digitally delivered news reporting generally, and specifically, the market for media monitoring services. The AP has entered into licenses with entities that Meltwater has identified as competitors, including LexisNexis, Factiva, BurrellesLuce, and other entities that deliver news articles to subscribers based on subscriber-set criteria. *See* McNamara Decl. ¶ 5, Exs. 10-15; *id.* Ex. 1 at 77:23-78:12; Countercl. ¶ 3. The AP and some of its licensees have lost customers to Meltwater due to Meltwater’s ability to offer AP content at reduced prices. ADD CITE. This loss of potential royalty and licensing revenues in the AP’s main marketplace is precisely the type of harm that precludes a fair use defense.

As demonstrated by the record, the AP is already in the process of exploiting the market for digital excerpts of its content, and it will continue to further develop its reach in this market. Indeed, the AP has successfully negotiated licensing agreements for the very content that Meltwater is reselling. The AP has also entered into licensing agreements with several digital aggregators, digital portals, search engines, and mobile applications. Cross Decl. ¶ 40. For example, AP has licensing agreements with Cision, LexisNexis, and BurrellesLuce granting these companies general distribution rights for the use of its content. *See* AP 56.1 ¶¶ 256, 258, 262 (the agreement with Cision gives it the right to use AP content for its “press clipping service,” and the LexisNexis licensing agreement permits it to “reproduce, display, [and] distribute...authorized use of AP materials) (internal quotations omitted).⁶ The very text of the statutory fourth factor, as explained in both the Nimmer and Goldstein treatises, directs that copyright law reserves to owners not only their existing markets and customers but also “potential markets” (*see* 17 U.S.C. § 107; NIMMER § 13.05[A][4]). That rule forecloses Meltwater’s attempt to separate its licenses of AP’s work from those that the AP is exploiting and entitled to exploit. This is especially true because Meltwater is selling to individuals at the core of the market for newspaper content.

Because courts have consistently protected the copyright holder’s right to exploit not only existing markets, but also ones that are “traditional, reasonable, or likely to be developed,” *Texaco*, 60 F.3d at 930, and because Meltwater’s copying and distribution, especially if it becomes even more widespread, will heavily damage, if not largely

⁶ AP’s expected license income is also harmed by Meltwater’s facilitation for its customers of uses that the AP does not allow. *See* A.P. 56.1 ¶¶ 266-73 (restricting licensees from engaging in specific uses of AP content, largely related to archiving).

destroy, the licensing market that has developed in recent years, the fourth factor strongly weighs in the copyright owner's favor.

IV. THE EQUITABLE AND PUBLIC INTEREST CONSIDERATIONS THAT UNDERLIE THE FAIR USE DOCTRINE WEIGH HEAVILY IN FAVOR OF THE AP

The Supreme Court has repeatedly made clear that the four statutory fair use factors are not the only considerations to be weighed. Fair use is an “equitable rule of reason,” whose “ultimate aim” is the stimulation of further expression and publication “for the general public good.” *Texaco*, 60 F.3d at 940 (1994) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994) and *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); *see also, e.g., Stewart v. Abend*, 495 U.S. 207, 236 (1990) (precluding rigid application of the statutory factors and requiring consideration of the public interest in the fair use analysis because fair use is an equitable rule of reason); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 (describing the “essential character” of the fair use doctrine as “an equitable rule of reason”) (2d Cir. 1986). Indeed, in *Harper & Row*, the Court rejected a news magazine’s argument that the public interest in broad news publication supported fair use, concluding that “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.” 471 U.S. at 559.

As in *Harper & Row*, the case here strongly implicates public interest considerations, and those considerations strongly weigh against – not in favor of – excusing the defendant’s copying as fair use. The economic incentives of those in (or considering being in) the news (or reporting) business are considerably less strong than they had been, in large part because of the copying by freeriders, including Meltwater, who defend

their uses as “fair” in the face of an alarming shrinkage of newsgathering resources. “[N]ot all effects of even beneficial technologies are socially desirable when counter-balanced by the negative impact they may have on the rights of other parties, including copyright owners.” Keiyana Fordham, *Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media*, 20 Fordham Intell. Prop. Media & Ent. L.J. 939, 983-4 (2010) (citing Raymond T. Nimmer, Content Protection and Copyright, 984 PLI/Pat 81, 87 (2009) (discussing *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001))); *see also Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980) (“The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.”). The benefits which Meltwater and its amici claim justify its fair use defense must be weighed against the detriment to the rights of other parties, and the impact on copyright incentives generally. *Harper & Row, supra*.

Bearing in mind that “the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good,” *Harper & Row*, 471 U.S. at 558 (quoting *Twentieth Century Music Corp.*, 422 U.S. at 156), it is patently clear that it is the AP – not Meltwater, which engages in no newsgathering whatever – that serves “the general public good” and therefore needs to be incentivized and not have its revenues and licensing revenues imperiled. Any other conclusion would threaten the AP’s ability to continue serving the general public good as it has for more than a century, in just the way Madison anticipated.

Nor is there force to the contention that enforcing the AP’s copyright will stifle technological innovation. Many other news aggregators, including the Huffington Post,

LexisNexis, Factiva, Cision and BurrellesLuce, are able to use the same type of “innovative” technology that Meltwater uses without violating copyright law, by taking licenses from AP and other news organizations whose expression they copy and resell. Both NewsRight and the Copyright Clearance Center, which was discussed at some length in *Texaco* as a viable licensing mechanism, offers modern on-line licensing.⁷ The difference between Meltwater and these other aggregators lies simply in Meltwater’s refusal to pay for copyrighted content, as well as the extent and comprehensiveness of its copying. There is no evidence that requiring Meltwater to pay a licensing fee, or stop using the AP’s content, would have any impact on technological innovation.

V. IMPLIED LICENSE CANNOT SUCCEED ON THE PRESENT RECORD AND IN ANY EVENT CANNOT DEFEAT PROSPECTIVE RELIEF

A. There Was No Implied License

The Second Circuit has cautioned that implied licenses are limited to “narrow circumstances,” *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharma., Inc.*, 211 F.3d 21, 25 (2d Cir. 2000) (internal quotations omitted), and should be found “only when a copyright owner creates a work at the request of the licensee and with the intention that the licensee exploit it.” *Weinstein Co. v. Smokewood Entm’t Group, LLC*, 664 F.Supp. 2d 332, 334 (S.D.N.Y. 2009). It is Meltwater’s burden to prove the existence of an implied license. *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995).

Some courts have “relaxed” the traditional requirements of the implied license test. *See Psihoyos v. Pearson Educ., Inc.*, 855 F. Supp. 2d 103, 121 (S.D.N.Y. 2012) (discussing the tests applied by various courts). These courts tend to focus on the plaintiff’s

⁷ See, for example, <http://www.newsright.com/Products> (licenses for AP and other content, plus analytical tools, available from NewsRight); <http://www.copyright.com/search.do?operation=detail&item=149193374&detailType=advancedDetail> (AP content available for CCC licensing).

knowledge of, and acquiescence to, a defendant's use. *Id.* But, "whichever test is applied, the question comes down to whether there was a 'meeting of the minds' between the parties to permit the parties to permit the particular usage at issue." *Id.* at 124 (quoting *Ulloa v. Universal Music and Video Distrib. Corp.*, 303 F. Supp. 2d 409, 416 (S.D.N.Y. 2004)). This means that regardless of the particular version of the test the court applies, Meltwater "must prove that there was a meeting of the minds" in order to demonstrate the existence of an implied license. *Ulloa*, 303 F. Supp. 2d at 416. Given the record in this case, Meltwater cannot meet this burden. The AP prominently displays its copyright notices, and the AP's terms of service expressly prohibit commercial use of AP content posted on member websites. Meltwater selects the particular news sources to include its database, *see* A.P. Reply at 10 n.14. Having been sued in various jurisdictions, including the U.K., Meltwater's executives knew that the AP and other principal news organizations presented content with restrictive terms of service, but it deliberately chose to ignore the terms of service. There is no basis for finding a meeting of the minds of the two parties.

In addition, the court should reject Meltwater's attempt to turn the narrow doctrine of implied use into a mandatory opt-out scheme. Broadening the doctrine in this way would require a complete departure from the most basic of copyright principles, which affords no license absent permission from the owner. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) ("Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission; silence means a ban on copying"); *Authors Guild v. Google, Inc.*, 770 F.Supp.2d 666 (S.D.N.Y. 2011) ("[I]t is incongruous with the purpose of the copyright laws to place the onus on

copyright owners to come forward to protect their rights[.]”); GOLDSTEIN at §7.0.1 (“Copyright law’s exclusive rights, including the authorization right, entitle a copyright owner to refuse to license use of its work for any reason . . .”); GOLDSTEIN at §7.0.1 (“[T]he protection accorded literary property would be of little value if . . . insulation from payment of damages could be secured by a publisher merely refraining from making inquiry” (citing *Acosta v. Brown*, 146 F.2d 408 (2d Cir. 1944), *cert denied*, 325 U.S. 862 (1945))).

Nothing enacted by Congress deprives content owners of their exclusive rights when they decline to insert robot.txt notices. “The mere act of producing and releasing artistic works where there is a known risk of piracy cannot amount to a deliberate waiver of copyright.” *Sony BMG Music Entm’t v. Tenenbaum*, 672 F.Supp. 2d 217, 233-4 (D. Mass. 2009) (rejecting defendant’s assertion of plaintiff’s acquiescence to copyright infringement). This especially holds true when the content appears on sites that are controlled by others, as is the case here, depriving the copyright owner of the practical ability to insert a robot.txt instruction in order to opt out.

B. The Implied License Defense Does Not Bar Injunctive or Other Forward-Looking Relief

Even where implied license is a defense to a damages action, a nonexclusive implied license can be revoked. *Parker v. Yahoo!, Inc.*, 2008 U.S. Dist. LEXIS 74512, at *16 (E.D. Pa. Sept. 26, 2008) (“a nonexclusive implied license can be revoked where no consideration has been given for the license.”); NIMMER at § 10.02[B][5] (“It remains true that nonexclusive licenses are revocable absent consideration.”). When an implied license is revocable, “the institution of [a] lawsuit . . . constitute[s] revocation.” *Keane Dealer Servs. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997); *see also Parker*, 2008.

U.S. Dist. LEXIS 74512, at *16 (explaining that “initiation of a lawsuit itself may constitute revocation of an implied license if there was no consideration for the license.”).

Here, AP’s suit made it abundantly clear that AP objects to Meltwater’s conduct and revoked whatever implied license Meltwater may have imagined it had. Even if the court were to find that an implied license existed, that would not bar injunctive relief or relief for infringement occurring after the filing of this lawsuit on February 14, 2012.

CONCLUSION

Amici themselves rely extensively on fair use, and note that there is nothing *inherently* infringing about news aggregation: news aggregators differ in various respects, including (among others) the extent of the taking of expression, the amount of original material added, the human effort expended, whether there is a charge for the service, and the markets served. But it is clearly infringing when it amounts, as Meltwater’s business does, to the systematic, daily unlicensed copying of textual expression for sale in the same markets as those that are, or are likely to be, exploited by the copyright owner. For all the foregoing reasons, *amici* respectfully urge this court to grant the AP’s motion for summary judgment, and to deny Meltwater’s cross-motion.

Respectfully submitted,

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ADDENDUM

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