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Dylan J. Quinn

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## Comment

### ***Associated Press v. Meltwater: Are Courts Being Fair to News Aggregators?***

*Dylan J. Quinn\**

The Associated Press (AP), a news cooperative, filed suit against Meltwater U.S. Holdings (Meltwater), a news aggregation service, for copyright infringement.<sup>1</sup> Meltwater conceded that sending its clients snippets of AP articles was copyright infringement, but contended that its use of the copyrighted articles constituted fair use under the Copyright Act of 1976 (Copyright Act).<sup>2</sup> In the alternative, Meltwater argued that AP had granted an implied license to redistribute the copyrighted articles.<sup>3</sup> The United States District Court for the Southern District of New York (SDNY) held that Meltwater’s scraping of the Internet and sending snippets in a “news report” to clients was not fair use and that an implied license did not exist.<sup>4</sup> This represents the first time a district court has ruled against a news aggregator by denying a fair use defense.<sup>5</sup> Meltwater appealed to the Second Circuit, but the

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1. *See* *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 537 (S.D.N.Y. 2013).

2. *Id.* at 541.

3. *Id.* at 561. AP actually filed six causes of action, but the copyright infringement claim was the central cause of action and only relevant claim for this analysis. *Id.* at 548.

4. *Id.* at 561 (holding that Meltwater was essentially a news clipping service that served as a substitute for the original article, that its use of the snippets was not “transformative,” and that the rejection of fair use furthered the purpose of the Copyright Act).

5. *See generally* Brief of Amici Curiae Electronic Frontier Foundation & Public Knowledge in Support of Defendants’ Opposition to Motion for Summary Judgment at 2–8, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (No. 2:12-cv-1087-DLC-FM) [hereinafter Brief of Elec. Frontier Found.], available at <https://www.eff.org/node/73059> (discussing previous case law on the finding of fair use for news aggregators).

case was settled while waiting on appeal.<sup>6</sup> The settlement provides that AP and Meltwater will begin working together in the future.<sup>7</sup>

The court in *AP v. Meltwater* denied the fair use defense because Meltwater's use was not transformative and effectively substituted for AP in the market,<sup>8</sup> while the implied license defense was denied for both practical and policy reasons.<sup>9</sup> The decision, although possibly providing the right outcome on these specific facts, presents a questionable interpretation of what is "transformative,"<sup>10</sup> unconvincingly argues against the feasibility of an expanded implied license defense, and leaves questions going forward in terms of what differentiates a search engine that is afforded fair use and one that is not.

In general, the court's analysis of Meltwater's fair use defense is important because it provides a look into how a court would apply the standard to a news aggregator. It has long been assumed that news aggregators are protected from news organizations and content providers by the fair use defense,<sup>11</sup> but this case provides evidence to the contrary. Furthermore, although the ruling correctly denied Meltwater's fair use defense under current Second Circuit precedent,<sup>12</sup> an expanded implied license doctrine in the context of online news media

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6. *AP, Meltwater Settle Copyright Dispute*, USA TODAY (July 29, 2013, 11:53 AM), <http://www.usatoday.com/story/money/business/2013/07/29/ap-meltwater-settle-copyright-dispute/2595769/> [hereinafter Associated Press] (discussing the cooperative agreement between AP and Meltwater that was agreed upon prior to appeal).

7. *Id.*

8. *See infra* Part II.A.

9. *See infra* Part II.B.

10. *See* Brief of Elec. Frontier Found., *supra* note 5, at 2–10 (arguing that the AP's proposed interpretation of "transformative use" is too narrow and will stifle news aggregators and search engines from distributing news content to the public); *see also* Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–22 (9th Cir. 2003) (explaining the transformative use of news articles employed by search engines and their benefit to the public).

11. *See* Nicole Marimon, *Shutting Down the Turbine: How the News Industry and News Aggregators Can Coexist in a Post-Barclays v. Theflyonthewall.com World*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1441, 1472–74 (2013) (assuming other remedies are needed for news providers since the fair use defense provides protection for news aggregators).

12. *See* Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 550–61, 561 (S.D.N.Y. 2013) (discussing Second Circuit precedent and holding that "Meltwater ha[d] failed to raise a material question of fact to support its fair use defense").

presents an intriguing alternative to traditional copyright law.<sup>13</sup>

The goal of this Comment is to discuss the impact, if any, the case will have on the relationship between news aggregators and news providers, and whether courts should apply the fair use factors in the same manner as the *Meltwater* court. Part I will introduce the current state of the online news industry, the fair use and implied license defenses, as well as the impact of news aggregators on news reporting. Part II will describe the *Meltwater* court's holding and analysis. Part III will critique the court's interpretation of "transformative use" and discuss implications and policy concerns regarding search engines and news aggregators.

## I. BACKGROUND

### A. THE NEWS INDUSTRY'S ATTEMPT TO CAPITALIZE ON THE INTERNET

The Internet seems to have altered every industry in some way, and the news industry is no exception. It is not that news providers are not attempting to effectively use the Internet; to the contrary, online revenues are at an all-time high.<sup>14</sup> The main problem is attempting to capitalize on the Internet market so that the gains in online revenue make up for the decreases in print.<sup>15</sup> Furthermore, while more sophisticated

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13. See *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115–16 (D. Nev. 2006) (finding no copyright infringement where the copyright holder knew of the ability to opt out of a search engine by being able to cache and index the copyrighted material); Monika Isia Jasiewicz, Comment, *Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators*, 122 YALE L.J. 837, 843–50 (2012) (arguing that the law should develop an opt-out standard, effectively allowing the implied use defense).

14. Rick Edmonds et al., *The State of the News Media 2012, Newspapers: By the Numbers*, STATEOFTHEMEDIA.ORG, <http://stateofthemediamedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/newspapers-by-the-numbers/> (last visited Mar. 1, 2014).

15. See *id.* (demonstrating that over the last two years the increases in online revenue did not make up for the losses in print). Furthermore, it is worth noting that print still comprises about 86.4% of overall revenue. *Id.* (taking the print revenue for 2011 divided by the total print and online revenue provides the 86.4%); see also Keiyana Fordham, Note, *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, 942–43 (2010) (discussing how newspapers used to hold a monopoly over providing news and connecting buyers and sellers through print advertising,

players may be better able to adapt to new trends, media outlets with less funding are being forced to close their doors.<sup>16</sup> While there is a seemingly infinite amount of variables leading to the industry's inability to effectively capture revenue from its online media services, many believe that news aggregators are a leading cause.<sup>17</sup> Amongst the various methods employed by news providers to combat aggregators, an actual judgment for copyright infringement against an aggregator may alleviate news providers' concerns about news aggregators.

The term "news aggregator" can encompass a variety of websites and online services, but most aggregators can be boiled down into two categories that both provide a middleman in between the original source and the consumer: "automatic" and "websites."<sup>18</sup> Automatic news aggregators operate using a search engine that automatically indexes copies of the articles it scrapes from the Internet, compiles headlines and excerpts, while providing a link to the original source.<sup>19</sup> Website news aggregators perform similarly, but actually use a human editor, often adding commentary, summary, and insight to go along

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but advertising is now migrating to the Internet); *AP Sees Slight Revenue Decline in 2012*, ASSOCIATED PRESS (Apr. 15, 2013), <http://www.ap.org/Content/AP-In-The-News/2013/AP-sees-slight-revenue-decline-in-2012> (discussing the AP's loss in revenues, and the need to severely cut back on operating costs and payroll).

16. See Edmonds et al., *supra* note 14 (noting that over the past five years, fourteen to twenty-one newspapers shut down annually).

17. See, e.g., David Sarno, *Murdoch Accuses Google of News 'Theft'*, L.A. TIMES (Dec. 2, 2009), <http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009dec02> (discussing Robert Murdoch's statements that aggregators use of news providers' material is equivalent to theft).

18. See Fordham, *supra* note 15, at 946, 947–51 (stating that "[t]his Note will focus on two types of news aggregators: automatic news aggregators, and news aggregation websites"); see also Priya Barnes, *The Prospects for Protecting News Content Under the Digital Millennium Copyright Act*, 3 HARV. J. SPORTS & ENT. L. 201, 206–07 (2012) (distinguishing between "feed" aggregators, which compile news items from a variety of sources on multiple topics, and "specialty" aggregators, which compile news on particular topics). Barnes uses the terms "pure-play" and "hybrid" to represent "automatic" and "website," respectively. *Id.*

19. Fordham, *supra* note 15, at 947. Search engines like Google News are an example, but so is the defendant in *Meltwater*. The defining characteristic is that no new commentary or insight is added to the original source. See *id.* (describing what is listed on automatic news aggregators' websites, all of which comes from the original source).

with the original source.<sup>20</sup> These categories are not exclusive, and as the industry evolves there will undoubtedly be a blending between the two. While some have categorized news aggregators into four categories,<sup>21</sup> for the purposes of this Comment the main distinction will be drawn between those that add their own expressive content (websites), and those that automatically scrape the Internet and just republish pieces of the original source (automatic).

News providers take the position that their publications, which take hours (maybe even days) to complete, are being exploited by aggregators who scrape the Internet and republish the work to their own consumers.<sup>22</sup> This, news providers say, reduces consumer traffic to their sites, undermines their ability to get advertising revenue,<sup>23</sup> and is akin to thievery.<sup>24</sup> All the while, aggregators point out that they serve a valuable public purpose in that they further disseminate information, which leads to a more informed public.<sup>25</sup>

Although it seems intuitive that news aggregators undermine the ability of news providers to operate in the market by attracting visitors away from the provider and to the aggregator, there is disagreement about whether this is

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20. See *id.* at 948–51 (describing how news aggregation websites operate and discussing, as an example, how a Gawker employee re-wrote a Washington Post article). The Huffington Post is a great example of this type of aggregator. While the categories seem mutually exclusive, aggregators may blur the lines between them, further complicating the legal framework and analysis of the issue discussed *infra*.

21. Marimon, *supra* note 11, at 1447 (distinguishing between feed, specialty, user-curated, and blog aggregators).

22. See Fordham, *supra* note 15, at 950.

23. *Id.* at 942–43. *But see* Jasiewicz, *supra* note 13, at 841 (“[T]here appears to be no direct empirical evidence that news aggregators are actively cutting into the news industry’s advertising revenue.”).

24. Sarno, *supra* note 17 (quoting News Corporation chairman Rupert Murdoch accusing aggregators of “almost wholesale misappropriation” that “[t]o be impolite, [is] theft”).

25. See Brief of Elec. Frontier Found., *supra* note 5, at 1. In support of aggregators, the amicus brief argues that a ruling against aggregators’ fair use defense would “sharply curtail the essential role fair use plays in facilitating online innovation and expression, restricting the use and development of services that allow users to find, organize and share public information.” *Id.* These valuable services that are offered are dependent on making intermediate copies and personal consumer uses such as time shifting. *Id.*; see also Barnes, *supra* note 18, at 209 (“By increasing consumers’ choice of access to the same information, news aggregators may provide a balancing pressure for dominant media to be less biased in their coverage.”).

actually the case.<sup>26</sup> It appears that the revenue declines are not attributed so much to a lack of readership, as much as losses in advertising revenue.<sup>27</sup> It is unclear if aggregators are actually taking away viewers from the original news provider as opposed to increasing traffic to the original source.<sup>28</sup> As aggregators are becoming more prevalent on the Internet, the news industry has fought back, responding in various ways, like using paywalls and licensing organizations.<sup>29</sup> The problem is that paywalls and online subscriptions are not working since not many people are willing to pay for the news.<sup>30</sup> As attempts of erecting paywalls fail, it is logical to assume that legal action against news aggregators is the next step. While legal action has led to settlement agreements which provide that the

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26. See Edmonds et al., *supra* note 14 (noting that circulation losses are much less severe, indicating that the audience isn't so much diminishing as much as advertising revenue is); see also Hsiang Iris Chyi & Angela M. Lee, *Online News Consumption: A Structural Model Linking Preference, Use, and Paying Intent*, 1 DIGITAL JOURNALISM 194, 196 (2013) (discussing research that shows "online newspaper use serves [as] entertainment, interpersonal communication . . . and information scanning," indicating consumers are not interested in reading full articles on the Internet). Chyi & Lee conclude that consumers also are typically not willing to even pay for the news source (especially online) that the consumer prefers, illustrating the problem with news providers using paywalls and trying to collect revenue directly from online consumers. See *id.* at 206.

27. See Susan Athey & Markus Mobius, *Local News Consumption: The Impact of Aggregators on Traditional Media*, TECH. ACADEMICS POL'Y (Aug. 20, 2012), <http://www.techpolicy.com/Blog/August-2012/Local-News-Consumption-The-Impact-of-Aggregators-o.aspx> (summarizing research that indicates aggregators may lead to increased local news consumption, but at the same time may be taking away from advertising revenue since clicking directly through to the article bypasses the news provider's home page).

28. See *id.*

29. See *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 542–43 (S.D.N.Y. 2013) (discussing the numerous websites and aggregators that pay for license agreements with the Associated Press); Barnes, *supra* note 18, at 211–13 (2012) (discussing the various paywalls and digital access regimes employed by online news providers); Marimon, *supra* note 11, at 1449 (discussing NewsRight, a partnership licensing organization started by twenty-nine news organizations in 2011 with the goal of collecting royalties from aggregators).

30. Chyi & Lee, *supra* note 26, at 197 (discussing an international survey that shows approximately 80% of people would not pay for online news content). The study by Chyi & Lee shows that, overall, even if people prefer and desire to read certain news content, that does not make them more willing to pay. *Id.* at 205–06.



aggregator is to pay the provider a licensing fee,<sup>31</sup> there is obviously no way a news provider can go after the thousands of websites that use its content. It is possible that an adverse judgment against a news aggregator for copyright infringement could dispel the notion that aggregators are protected under fair use, sending a message across the industry, but it is unclear if aggregators will actually respond to the message and change their business model.

## B. THE COPYRIGHT ACT AND FAIR USE ON THE INTERNET

Although the Copyright Act has continually been employed by news providers in recent years to go after search engines and news aggregators, the industry has historically relied on other doctrines for protection.<sup>32</sup> About a century ago, AP won the landmark case *International News Service v. Associated Press*.<sup>33</sup> The case created the “hot news” doctrine, which was intended to protect the time value of the news as a way to counteract unfair competition,<sup>34</sup> all the while seemingly dismissing the idea of a copyrightable interest in the news.<sup>35</sup> Today, the hot news doctrine is a toothless cause of action that is completely inadequate in light of recent Second Circuit precedent.<sup>36</sup>

If the hot news doctrine cannot be utilized by news providers, they can and are turning to the Copyright Act.<sup>37</sup> Some have raised concerns that the Copyright Act is

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31. See, e.g., Jeffrey D. Neuburger, *A Brief History of AP's Battles with News Aggregators*, PBS (May 26, 2009), <http://www.pbs.org/mediashift/2009/05/a-brief-history-of-aps-battles-with-news-aggregators146/> (discussing a 2006 settlement between Google and AP which required Google to pay undisclosed licensing fees for the use of AP's content).

32. *Id.* (discussing the hot news doctrine).

33. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239–40 (1918) (ruling against International News Service, holding that International News Service engaged in unfair competition by republishing the news procured by AP).

34. Neuburger, *supra* note 31.

35. *Int'l News Serv.*, 248 U.S. at 234–35 (“We need spend no time, however, upon the general question of property in the news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition . . .”).

36. See Marimon, *supra* note 11, at 1460–61 (discussing how *Barclay Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011) leaves only a “ghostly presence” of *International News Service v. AP*).

37. See, e.g., Neuburger, *supra* note 31.



inadequate in preventing aggregators from republishing content<sup>38</sup> since the Act expressly mentions “news reporting” under permissible fair uses.<sup>39</sup> Furthermore, the Supreme Court has made clear that printing facts alone without some originality or creativity in their compilation is not copyrightable expression.<sup>40</sup> Notwithstanding the alleged shortcomings of the Copyright Act, it has been employed by news providers in recent years<sup>41</sup> and very well may represent the best weapon news providers have against aggregators.

The Copyright Act was adopted to advance the arts and sciences by providing exclusive rights in an author’s work.<sup>42</sup> In order to prevail in a copyright infringement action, a copyright holder must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”<sup>43</sup> The bar is set low for authors/creators to gain copyright protection in their work, but that does not mean they will necessarily prevail since the Act allows for a fair use affirmative defense.

The fair use defense is the most frequently invoked defense for those defending against allegations of copyright infringement.<sup>44</sup> The fair use defense was codified into the Copyright Act from judicial precedent.<sup>45</sup> Although the purpose

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38. *See id.*

39. 17 U.S.C. § 107 (2012).

40. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362–64 (1991) (holding that the re-publishing of names, telephone numbers, and directory information was not a copyrightable work since it lacked the originality required for copyright protection); Marimon, *supra* note 11, at 1463–64 (discussing the shortcomings of the Copyright Act to protect the news industry in light of *Feist Publications Inc. v. Rural Telephone Service Co.*).

41. *See, e.g.*, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 541 (S.D.N.Y. 2013).

42. *See generally A Brief Introduction and History*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/circs/circ1a.html> (last visited Feb. 1, 2014) (explaining that copyright means “that body of exclusive rights granted by law to authors for the protection of their work”).

43. *Arista Records L.L.C. v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010) (quoting *Feist Publications*, 449 U.S. at 361).

44. Fordham, *supra* note 15, at 951 (“When copyright owners seek to enforce their rights in court against infringers of their copyrighted works, the most commonly raised defense is fair use.”).

45. *See id.* (“Fair use is a judicial construct, codified into law at section 107 of the 1976 Copyright Act . . .”). *See generally Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901) (distilling judicial precedent into the four factors that were eventually codified into the Copyright Act of 1976).

of copyright is to “promote science and the arts,”<sup>46</sup> fair use provides the necessary breathing room to avoid rigid application of the statute by allowing courts to weigh various factors on a case-by-case basis.<sup>47</sup> In granting an affirmative fair use defense, a court is to consider

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>48</sup>

All of the factors are “to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>49</sup>

Copyright infringement suits involving the Internet are not unique to the news industry,<sup>50</sup> but courts’ analyses of the fair use factors in the context of search engines, news aggregators, and online media are most relevant for this comment.<sup>51</sup> Recent cases dealing with a search engine’s proposed fair use of copyrighted materials provides guidance into how a court would treat a news aggregator.<sup>52</sup> Case law

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46. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

47. *Id.* at 577–78.

48. 17 U.S.C. § 107 (2012). The first factor includes a two-part test to establish if the secondary use is for a commercial purpose and if the use is transformative. Fordham, *supra* note 15, at 953. After the Supreme Court’s holding in *Campbell v. Acuff-Rose Music, Inc.*, lower courts put much less of an emphasis on whether or not the secondary use is for a commercial purpose. *Id.* at 953–54. The second factor is normally given the least weight in a court’s analysis. *Id.* at 954–55.

49. *Campbell*, 510 U.S. at 578.

50. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900–01 (N.D. Cal. 2000) (ruling against Napster’s fair use defense and in favor of music publishers); *see also* *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 106 (2d Cir. 1998) (finding retransmission of radio broadcasts over the telephone did not constitute fair use).

51. *See Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 293–94 (S.D.N.Y. 2013), for the most recent SDNY case that has a direct impact on this Comment. The court in *Authors Guild* found that Google’s mass digitization of copyrighted books was fair use since converting the text into a digital format was transformative and the project constituted a massive benefit to society. *Id.*

52. *See* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163–68 (9th Cir. 2007) (granting search engine’s fair use defense of copyrighted images in search queries since the cached and index copy of the image did not supplant the need for the original and because of the public benefit provided by search engines); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817–22 (9th Cir. 2002) (ruling that the search engine’s use of thumbnails in response to search

indicates that search engines, like Google, are protected by fair use due to the limited use of the copyrighted material<sup>53</sup> and the immense benefit they afford society by increasing access to information.<sup>54</sup> While aggregators can serve a similar function as search engines,<sup>55</sup> not all aggregators are the same.<sup>56</sup> Aggregators can vary from search engines by charging a fee to consumers, using more of the copyrighted content, adding additional content, or by summarizing copyrighted content.<sup>57</sup> While case law indicates that search engines are afforded fair use, it is unclear how courts will differentiate between aggregators or other online media services that have functions similar to that of a search engine.

### C. IN ADDITION TO FAIR USE, AGGREGATORS ARE NOW TURNING TO AN IMPLIED LICENSE DEFENSE

While aggregators will heavily rely on fair use, the news providers themselves may look for protection from other sources outside of the Copyright Act. Some have argued that the news providers should lobby for new legislation targeted at aggregators.<sup>58</sup> However, any additional legislation targeted at news aggregators has obvious First Amendment implications that must be considered.<sup>59</sup> Some have discussed whether or not the news industry could find relief under the Digital Millennium Copyright Act,<sup>60</sup> but it is uncertain if this would be

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queries was fair since the tiny version of the original image did not supplant the need for the original, the thumbnails were transformative, and because of the public benefit such search engines provide).

53. *Authors Guild*, 954 F. Supp. 2d at 286–87.

54. *See, e.g., id.* at 293–94.

55. *See* Associated Press v. Meltwater U.S. Holdings, 931 F. Supp. 2d 537, 563–64 (mentioning that news aggregator employed the same “crawlers” to scan the Internet as search engines, and provides results to customers’ search queries).

56. *See supra* notes 18–21 and accompanying text (discussing the different types of news aggregators).

57. *See supra* notes 18–21 and accompanying text. This list is by no means exhaustive.

58. *See* Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement*, 12 VAND. J. ENT. & TECH. L. 947, 971 (2010).

59. *Id.* at 959–72 (discussing the impact of protecting ideas in news articles on free speech, and the fact that any aggregation control legislation would be analyzed under elevated First Amendment scrutiny).

60. *See* Barnes, *supra* note 18, at 208; Neuburger, *supra* note 31 (discussing a district court’s ruling that “AP could pursue a claim under the

possible.<sup>61</sup> Even with these other potential avenues, the most prevalent for the foreseeable future is the Copyright Act.

Although the Copyright Act and the fair use defense is the primary statute (or doctrine) governing these type of suits,<sup>62</sup> an implied license affirmative defense<sup>63</sup> has been gaining traction. Since it is a non-exclusive license, it does not need to be in writing.<sup>64</sup> Furthermore, it is a creature of contract law, meaning its existence primarily hinges on the party's intentions.<sup>65</sup> A common standard for demonstrating an implied license requires the alleged infringer to show that (1) the licensee requests the creation of the work; (2) the creator makes the particular work and delivers it to the licensee who requested it; and (3) the licensor intends that the licensee-requester copy and distribute his or her work.<sup>66</sup> It appears a court using the three-factor test would always rule against a news aggregator since the aggregator will have a difficult time showing they requested the work directly, and it was delivered to them via that request. However, not all courts follow this exact standard, and instead employ a more fluid standard focusing on the conduct and intentions of the parties.<sup>67</sup>

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copyright management provision of the [Digital Millennium Copyright Act]" if the defendant "removed references to the AP as owner and author of the articles that it copied").

61. Barnes overlooks the fact that the statute is geared towards anti-trafficking and the circumvention of safeguards in place, but by crawling the Internet there is no circumvention of a pay-wall or anything.

62. See Fordham, *supra* note 15, at 947–48, 951.

63. See, e.g., *Atkins v. Fischer*, 331 F.3d 988, 992 (D.C. Cir. 2003) (“[A]lleged infringers have the burden of establishing an implied license.”).

64. 17 U.S.C. § 101 (2012) (leaving out nonexclusive licenses from the definition of “transfer of copyright ownership”); *id.* § 204 (stating attempted transfers of copyright ownership must be made in writing).

65. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 562 (S.D.N.Y. 2013) (“Since an implied license is a creature of contract law, the parties’ intent is a critical factor.”).

66. See *Beholder Prods., Inc. v. Catona*, 629 F. Supp. 2d 490, 494 (E.D. Pa. 2009) (stating that “the Third Circuit referenced a three-factor test adopted by numerous other circuits (including the 9th, the 7th, the 5th and the D.C. Circuits) to determine whether or not an implied license was granted” and then listing and discussing the three factors). In *Effects Associates* the Court found an implied license granted by the special effects company to the moviemaker, the alleged infringer. *Effects Assocs. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990).

67. See *Meltwater*, 931 F. Supp. 2d at 562 (“Even those courts that do not require evidence of each of these three elements do require evidence of a meeting of the minds between the licensor and licensee such that it is fair to

Furthermore, it would not be out of the question for a jurisdiction to tweak the three-factor requirement to satisfy the needs of the particular industry, since it has been done before.<sup>68</sup>

The leading example of a case utilizing a more expansive implied license standard that is relevant to news aggregators, is *Field v. Google*.<sup>69</sup> In that case the District Court in Nevada agreed with Google that the copyright holder granted an implied license since it was aware of an industry standard that could have been employed to adequately prevent the search engine from using the copyrighted material, but failed to utilize it.<sup>70</sup> This logic could seemingly be applied to all news service providers, meaning they would effectively have to “opt out” of having aggregators and search engines use their copyrighted works.<sup>71</sup> Although there are questions about the feasibility of creating an industry wide opt-out system using the implied license doctrine,<sup>72</sup> the argument provides a possible framework going forward for dealing with the complicated relationship between news providers and aggregators outside of fair use and the Copyright Act.

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infer that the licensor intended to grant a nonexclusive license.”); *see also* 2 PATRY ON COPYRIGHT § 5:131 (2013) (discussing the Ninth and Fifth Circuits’ different variations and acceptable demonstrations of an implied license outside of the three factors commonly applied).

68. Since courts have altered the three factors to better suit industry practices in the film industry, what would stop a court from recognizing the unique nature of the news and the necessity to make a different standard? *See Fontana v. Harra*, No. CV 12-10708 CAS, 2013 WL 990014, at \*8–9 (C.D. Cal. Mar. 12, 2013).

69. *See Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1113–16 (D. Nev. 2006) (granting Google’s Motion for Summary Judgment based on an implied license defense since the copyright holder was aware of the industry standard which allows website owners to employ a meta-tag, which informs a search engine scraping the Internet not to pull that source).

70. *Id.* at 1115–16.

71. *See Jasiewicz*, *supra* note 13, at 843–47 (discussing how the Internet is an opt-out system, while traditional copyright law is an opt-in system where distribution rights prohibit reproduction without copyright holders affirmatively providing their consent).

72. *E.g.*, *id.* at 845 (stating that “[h]istorically, implied licenses have only been found in copyright cases when there is direct dealing between just a few parties” and not in any context comparable to the Internet).

D. IT IS UNCLEAR IF COURTS ACKNOWLEDGE THAT AGGREGATORS OFTEN INCREASE NEWS CONSUMPTION AND PROVIDE A BENEFIT TO SOCIETY

Even if the Copyright Act affords some protection, it is odd that many cases settle.<sup>73</sup> News providers presumably would want to set precedent in their favor and get rid of the long-held belief that aggregators are protected under fair use. It is without question that thousands of websites reuse news content without permission;<sup>74</sup> however it is quite possible that the news providers do not want constricting legislation that will impair aggregators from coming into the market place. Publishers of news content may actually want aggregators, since they recognize the value of having their information reach a larger consumer base.<sup>75</sup> This is supported by the fact that most settlements involving news providers and search engines (or news aggregators) lead to a mutually beneficial agreement, normally involving the payment of licensing fees.<sup>76</sup> Therefore it is questionable if any news provider actually cares about securing an adverse judgment against a news aggregator; that may be because they understand the positive impact and benefit they provide society by further disseminating information.

Recent research supports the notion that news aggregation services likely increase the traffic to the original news providers and increase overall news consumption by consumers.<sup>77</sup> One research study showed that when Google

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73. *E.g.*, Kimberly Isbell, *What's the Law Around Aggregating News Online? A Harvard Law Report on the Risks and the Best Practices*, NIEMAN JOURNALISM LAB (Sept. 8, 2010, 10:30 AM), <http://www.niemanlab.org/2010/09/whats-the-law-around-aggregating-news-online-a-harvard-law-report-on-the-risks-and-the-best-practices/> (discussing *AP v. All Headline News*, the copyright claims maintained in the SDNY, and the eventual settlement).

74. *See* Marimon, *supra* note 11, at 1446–47 (discussing research that estimates that 75,000 websites reuse newspaper content without permission across the country).

75. *See* Mark Sableman, *News Aggregation Services—Legal and Practical Perspectives*, ASS'N BUS. INFO. & MEDIA COMPANIES, <http://www.abmassociation.com/images/abm/pdfs/News%20Aggregation%20Handout.pdf> (last visited Mar. 20, 2014).

76. *See, e.g.*, Associated Press, *supra* note 6 (discussing the settlement between AP and Meltwater that led to a cooperative agreement between AP and the news aggregator).

77. *See* LESLEY CHIOU & CATHERINE E. TUCKER, NEWS, COPYRIGHT, AND ONLINE AGGREGATORS 3 (2010), *available at* <http://arrow.hunter.cuny.edu/>

News dropped its use of AP content in 2009 due to an ongoing dispute, the traffic to websites containing the AP content significantly decreased.<sup>78</sup> It is not a surprise that many assume news aggregators take away consumer traffic from news providers; however research indicates aggregators may actually increase traffic to the original site.<sup>79</sup> In addition they may lead viewers to a wider variety of news providers and increase overall news consumption,<sup>80</sup> which has been cited by policymakers as increasing civic engagement.<sup>81</sup> As courts apply the Copyright Act and analyze the various fair use factors, it is important that the courts acknowledge the public benefits provided by news aggregators, all while understanding that the news aggregators may actually aid news providers by increasing traffic to their websites.

In recent years there has been an increase in copyright litigation brought by news providers against news aggregators, but not one case has reached a decision.<sup>82</sup> There is likely a feeling that neither side could afford an adverse judgment since it could have an immense ripple effect across the industry. As a policy matter, courts should acknowledge the benefit provided to society by news aggregation services, and allow such acknowledgement to shape outcomes of copyright infringement suits. The judgment rendered against Meltwater U.S. Holdings is the first copyright infringement ruling against a news aggregator.<sup>83</sup> By denying the fair use defense and the existence

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media-economics-workshop/conference-papers/chiou%20and%20tucker%20news.pdf (“Our finding suggests that the aggregation of news content actually complements the original content. In other words, users are more likely to be provoked to seek the original source and read further when they come across a story summarized by an aggregator, rather than being merely content with the summary.”); *see also* Athey & Mobius, *supra* note 27 (discussing the research study where French consumers began using Google News, which led to an increase in news consumption and traffic to local news sites). It is conceded that these examples pertain to Google News, which is obviously one of the most widely used aggregation services, and the results may not be directly applicable to smaller and less widely used aggregators.

78. CHIOU & TUCKER, *supra* note 77, at 19 (citing a research study that showed about a 20% decrease in traffic).

79. *Id.*

80. *See* Athey & Mobius, *supra* note 27.

81. CHIOU & TUCKER, *supra* note 77, at 4.

82. *See* Neuburger, *supra* note 31 (discussing recently settled copyright litigation by AP and the parent company of the Boston Globe).

83. *See supra* note 5 and accompanying text.



of an implied license, the SDNY sheds valuable light on how courts will handle these issues, and may undermine the ability of aggregators to serve beneficial public functions.

## II. CASE DESCRIPTION

It is not surprising that when Meltwater began doing business in the United States it assumed it was protected by fair use.<sup>84</sup> Nevertheless AP filed a copyright infringement suit in February 2012, leading to both sides submitting cross motions for summary judgment in November 2012.<sup>85</sup> The Complaint alleged that Meltwater indexed and distributed excerpts that were at the “heart” of the copyrighted articles, with no licensing agreement.<sup>86</sup> However, Meltwater contended that it had licensing agreements with websites that did not make its information freely available on the Internet, saying that they just take free public articles (normally from a licensee of AP) without a licensing agreement.<sup>87</sup> Meltwater’s relevant contentions were that it operates like a search engine, therefore expanding public access to information, and that by not employing technology to disallow the scraping of its freely

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84. See Defendant’s Answer to Complaint and Counterclaims at 30–31, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (No. 2:12-CV-01087-DLC-FM) [hereinafter Defendant’s Answer to Complaint and Counterclaims] (“Meltwater launched Meltwater News in the United States on the understanding that its processes for indexing news sources publicly available on the Internet and returning short snippets of articles in the form of search results responsive to its users’ queries fall within the fair-use doctrine . . .”).

85. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 548 (S.D.N.Y. 2013). It is worth noting that AP hired a group to inquire about a Meltwater subscription, and Meltwater ended up giving the agent a free trial. Defendant’s Answer to Complaint and Counterclaims, *supra* note 84, at 39–40. AP was asking for statutory damages under 17 U.S.C. § 504, and attorney’s fees pursuant to § 505. Complaint at 33, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (No. 12-CV-01087) [hereinafter Meltwater Complaint].

86. See Meltwater Complaint, *supra* note 85, at 29–30. The Complaint alleges that Meltwater stored all or portions of copyrighted articles since 2007, it did not pay licensing fees to AP like some of Meltwater’s competitors, and that it was a closed system available only to subscribers, so was in no way expanding public access. *Id.* at 29–32.

87. See Defendant’s Answer to Complaint and Counterclaims, *supra* note 84, at 34 (discussing how Meltwater has entered into agreements and is specifically given permission to access and index news content that publishers have chosen not to make freely available to the public).

published articles, AP granted an implied license.<sup>88</sup> The SDNY had to decide whether Meltwater was akin to a search engine,<sup>89</sup> or was a “classic news clipping” service not entitled to fair use.<sup>90</sup>

#### A. FAIR USE ANALYSIS

The court made clear that the purpose of fair use is to provide the flexibility needed in order to avoid “rigid application” of the Copyright Act that undermines the very creativity the statute intends to promote.<sup>91</sup> In determining whether the use is “fair,” the court was guided by the four factors enumerated in § 107, which are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>92</sup>

In line with Supreme Court precedent, the court stated that all the factors are to be explored together and weighted to best promote the intended purpose of the Copyright Act.<sup>93</sup> Finally, because fair use is an affirmative defense, the burden of proof rested on Meltwater.<sup>94</sup>

##### 1. Purpose and Character of the Use

First, the court analyzed “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,”<sup>95</sup> and found the factor

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88. *Meltwater*, 931 F. Supp. 2d at 541 (discussing the fair use defense as Meltwater’s “principal defense” but Meltwater also argued that it had an implied license). Meltwater also had affirmative defenses of equitable estoppel, laches, and copyright misuse, but these are not relevant for this comment. *Id.*

89. *Id.* at 541, 556 (assuming for the purposes of the opinion that a search engine’s use of copyrighted work was transformative).

90. *Id.* at 561.

91. *Id.* at 550 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

92. 17 U.S.C. § 107 (2012).

93. *Meltwater*, 931 F. Supp. 2d at 550–51.

94. *Id.* at 550.

95. 17 U.S.C. § 107; see *Campbell*, 510 U.S. at 569 (“[W]hether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose of different character, altering the first

weighed in favor of AP. Essentially the first factor boils down to (1) whether or not the use is “transformative”; and (2) to what extent it actually transforms the copyrighted work.<sup>96</sup> The court found the use was not transformative because Meltwater did not add commentary or insight, and just automatically captured and republished portions of copyrighted works.<sup>97</sup> The court did not accept Meltwater’s contention that it operates as a search engine, stating that there was no evidence offered to show that consumers used Meltwater to access the original copyrighted works.<sup>98</sup> Therefore as opposed to transforming the content as a means of promoting access to information, Meltwater’s consumers’ use of the service demonstrated it was being used as a way of supplanting the need for the original news article.<sup>99</sup> The court concluded that “the purpose and character of Meltwater’s use of AP’s articles weigh against a finding of fair use.”<sup>100</sup>

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with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” (citations omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901))). Aside from being transformative, a court is to consider whether it is commercial or not for profit, but it has been made clear by the Supreme Court that this is more about whether or not the defendant is exploiting the copyrighted material without paying the customary price. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

96. *Meltwater*, 931 F. Supp. 2d at 551.

97. *Id.* at 552. Note that Meltwater is an “automatic” news aggregator, and not a “website” that adds commentary or some other form of creative value. *See supra* Part I.A.

98. *Meltwater*, 931 F. Supp. 2d at 554. Courts have generally found search engines’ indexing and caching of copyrighted material as transformative since it serves the valuable purpose of connecting the public to information. *Id.* at 555 (discussing two search engine copyright infringement cases). However, the court made clear that Meltwater had a specific burden to show that their specific use was fair, not that they just operated as a search engine using the same technology and scraping process. *Id.* at 556.

99. *See id.* at 554 & n.13 (regarding the thirty-three articles in question, Meltwater users only “clicked-through” to the original source .08% of the time, whereas a source relied on by the court stated Google News had a click-through rate of 56%). The court concluded that “[i]nstead of driving subscribers to third-party websites, Meltwater News acts as a substitute for news sites operated or licensed by AP.” *Id.* at 554.

100. *Id.* at 557.

## 2. Nature of Copyrighted Work

The court ruled in favor of Meltwater on the second factor.<sup>101</sup> The court broke down the second factor into two separate analyses: (1) whether the work is creative, like a work of fiction, or if it is more factual; and (2) whether the work is published or not.<sup>102</sup> Since the scope of fair use is broader for factual reporting (rather than creative works) and for published material (rather than more private unpublished works), the court ruled in favor of Meltwater and a finding of fair use.<sup>103</sup>

## 3. Amount and Substantiality of the Copying

The court ruled in favor of AP in regards to the third factor.<sup>104</sup> In analyzing the substantiality of copying, the court broke the analysis down into quantitative (the portion taken in relation to the whole), and qualitative dimensions (the importance of the expressive components taken).<sup>105</sup> In terms of the quantitative analysis, the court stated that “no bright-line rule exists with respect to how much copying is too much.”<sup>106</sup> In comparing Second Circuit precedent, Meltwater’s use of anywhere from 4.5% to 61% of any given article was viewed as excessive, in light of the “character and purpose” of the secondary use.<sup>107</sup> In further supporting this conclusion, the court relied on the qualitative aspects of the analysis, stating that Meltwater “automatically took the lede from every AP story.”<sup>108</sup> The court discussed the creative nature of a “lede” as it is meant to convey the heart of the entire story and “is a sentence that takes significant journalistic skill to craft.”<sup>109</sup> Meltwater tried to argue that the lede was not meant to summarize the article, but instead was supposed to serve as a “teaser” that draws the reader in.<sup>110</sup> The court dismissed the argument, saying that if that was the case, it only undermines

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 558.

105. *Id.* at 557.

106. *Id.* at 558.

107. *Id.*

108. *Id.* at 558.

109. *Id.*

110. *Id.* at 559.

Meltwater's fair use defense since it would further highlight the creative and artistic skill necessary to craft an intriguing lede.<sup>111</sup> Overall, the court ruled in favor of AP on this factor because, coupled with the analysis above, Meltwater did not offer any evidence to prove that it only used as much as necessary to direct users to the original content.<sup>112</sup>

#### 4. The Effect of the Use on the Potential Market or Value of the Work

The court ruled in favor of AP on the fourth factor stating that the use by Meltwater served as a substitute for the original copyrighted work and undermined AP's ability to fairly operate within the market.<sup>113</sup> The final prong in § 107 requires a court to "consider not only the extent of the market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original."<sup>114</sup> More specifically, the analysis hinges on whether the secondary use substitutes for the original in the market, not whether it suppresses or destroys the market of the original.<sup>115</sup> The court found that the fourth factor weighed heavily against Meltwater since AP obtains licensing fees from businesses within the same commercial market as Meltwater.<sup>116</sup> Therefore, by not paying a licensing fee and operating within the same established market, Meltwater gained an unfair competitive advantage over other licensees of AP's content.<sup>117</sup>

#### 5. The Aggregate Assessment of All the Factors

The court rejected Meltwater's fair use defense, relying heavily on the facts that the use was not transformative, Meltwater's business model directly competed with AP, and

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111. *Id.*

112. *Id.* at 558–59. The court found it significant that the "snippets" used by Meltwater were significantly smaller in its foreign operations. *Id.*

113. *Id.* at 560–61.

114. *Id.* at 559 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

115. *Id.* at 560.

116. *Id.* at 560–61.

117. *Id.*

Meltwater did not pay licensing fees.<sup>118</sup> It was irrelevant that Meltwater used search engine technology, since the Copyright Act still requires an alleged infringer to show that their specific use of copyrighted content was fair.<sup>119</sup> In sum, Meltwater failed to provide enough evidence that the use of AP content was fair use.

## B. IMPLIED LICENSE DEFENSE

Another affirmative defense argued by Meltwater was that AP granted an implied license to use its content.<sup>120</sup> Meltwater argued that because the licensees of AP did not employ “robots.txt”<sup>121</sup>—a protocol which allows each website to communicate to Meltwater’s crawler technology not to use the content—AP had acquiesced through conduct and granted a nonexclusive license to Meltwater to redistribute the copyrighted articles.<sup>122</sup> The court ruled that AP did not grant an implied license to Meltwater because the three required elements were not satisfied.<sup>123</sup> The court also stated that even if other jurisdictional requirements were followed, there were practical and policy concerns that weighed against a finding of an implied license.<sup>124</sup>

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118. *See id.* at 561 (“Examining the four factors individually, and considering them as a whole in light of the purposes of the Copyright Act and the fair use defense, Meltwater has failed to raise a material question of fact to support its fair use defense.”).

119. *Id.*

120. *Id.* (citing *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998)) (“The burden of proving that a license exists falls on the party invoking the defense.”).

121. *Id.* at 563. Robots.txt is also known as the Robot Exclusion Standard. *Id.*

122. *Id.* at 563.

123. *Id.* at 563–64; *see also supra* Part I.C (discussing the implied license defense). While it is clear that Meltwater did not meet the three requirements [(1) licensee requested the creation; (2) licensor made particular work and delivered it to the licensee who requested it; (3) licensor intended that licensee copy and distribute], other jurisdictions do not have such guidelines. *See supra* Part I.C. For purposes of this analysis the reasoning provided explains why the court denied the defense, even if the elements were not mandatory. *See Meltwater*, 931 F. Supp. 2d at 562 (“Even those courts that do not require evidence of each of these three elements do require evidence of a meeting of the minds between the licensor and licensee such that it is fair to infer that the licensor intended to grant a nonexclusive license.”).

124. *See Meltwater*, 931 F. Supp. 2d at 562–64.

The court's main policy reason in not accepting the implied license defense focused on the fact that, if accepted, it would shift the burden onto the copyright holder to affirmatively act in order to ensure there was no misuse of the copyrighted material.<sup>125</sup> That would be in contrast to the basic concepts of copyright law.<sup>126</sup> The court also stated numerous practical reasons for dismissing Meltwater's implied license defense. First, there would seemingly be no way to differentiate between those crawlers that make fair use of the content and those that do not.<sup>127</sup> Second, AP and all of its licensees would have to constantly update which crawler-utilizing websites were allowed and which ones were not.<sup>128</sup> Aside from failing to meet the required elements,<sup>129</sup> the court also found that there was no meeting of the minds between AP and Meltwater, and for the reasons discussed above, the implied license defense had to fail.<sup>130</sup>

### III. ANALYSIS OF *MELTWATER* AND IMPLICATIONS GOING FORWARD

Since the application of the fair use defense is to be analyzed on a case-by-case basis,<sup>131</sup> it is difficult to assess the actual impact of the *Meltwater* decision. Nevertheless, *Meltwater*: (1) may undermine the ability of other aggregators

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125. See *id.* at 563 (“[W]hat Meltwater is suggesting would shift the burden to the copyright holder to prevent unauthorized use instead of placing the burden on the infringing party to show it had properly taken and used content.”).

126. See Jasiewicz *supra* note 13, at 846; see also *Meltwater*, 931 F. Supp. 2d at 564 (stating that “another policy reason” for not using the robots.txt to enforce the Copyright Act, is that it would require websites concerned with misuse to stop crawlers from using the content, which would run against the interests of openness on the Internet).

127. See *Meltwater*, 931 F. Supp. 2d at 563 (“Meltwater has presented no evidence to suggest that robots.txt instructions are capable of communicating which *types* of use the copyright holder is permitting the web crawler to make of the content or the extent of the copying the copyright holder will allow.”).

128. See *id.* at 563–64 (discussing how the system could automatically allow all web crawlers access and just specify which ones were designated as denied, but it seems difficult for a website to actively manage an accurate list of the crawlers who were to be denied). One of the issues the court had was that Meltwater reserved the right to ignore its placement on an exclusionary list. *Id.* at 564 n.21.

129. See *supra* note 123.

130. *Meltwater*, 931 F. Supp. 2d at 562–64.

131. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).



to distribute and disseminate information to the public by taking too narrow a view of what constitutes “transformative” use;<sup>132</sup> (2) raises difficult questions about the differences between a search engine that is afforded fair use and a news aggregator (which employs search engine technology) that is not; and (3) raises questions about the feasibility of an implied license framework as an alternative to the Copyright Act in guiding the relations between content providers and news aggregators.

#### A. THE COURT INTERPRETED “TRANSFORMATIVE USE” TOO NARROWLY AND DID NOT ACKNOWLEDGE THE BENEFITS AGGREGATORS PROVIDE TO SOCIETY

A pivotal factor for the *Meltwater* court in determining whether the use was fair was whether the use was “transformative.”<sup>133</sup> After all, in regard to the first statutory factor under § 107 of the Copyright Act, the Second Circuit has made it clear that the most important aspect of a court’s first factor analysis is the transformative aspect, not the commercial aspect.<sup>134</sup> Therefore, if the court ruled in favor of *Meltwater* on the first factor, the outcome of the case may have been different.<sup>135</sup> Even if the outcome remained the same, the court still interpreted “transformative use” too narrowly and did not acknowledge the benefit aggregators provide to society,<sup>136</sup> thereby creating precedent that could stifle innovation and information dissemination.

In regard to “transformative use,” the Supreme Court has stated that the use should not supersede the original copyrighted work, but “instead [should] add[ ] something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks in other words, whether and to what extent the new work is

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132. *E.g.*, *AP v. Meltwater*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/cases/ap-v-meltwater> (last visited Feb. 25, 2014).

133. *See Meltwater*, 931 F. Supp. 2d at 561.

134. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006); *see also Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (mentioning that the Second Circuit does not give weight to the fact that the use was for commercial gain).

135. The court ruled in favor of *Meltwater* for the second factor. *See supra* notes 101–03 and accompanying text.

136. *See generally Meltwater*, 931 F. Supp. 2d at 553 (showing that the court does not talk about the public benefit).

‘transformative.’”<sup>137</sup> The *Meltwater* court seemed to dismiss the idea that the snippets distributed to customers, although not creative, were being used for a different *purpose* even if the snippet was unaltered and there was no evidence that consumers visited the original article.<sup>138</sup> Instead the court relied on the fact that customers rarely clicked through to the original article, assuming they were using the snippets of three hundred characters as a substitute for the original.<sup>139</sup> This interpretation is too narrow because the Supreme Court has specifically mentioned that a use can be transformative if the use adds something new “with a further purpose.”<sup>140</sup>

In this particular case, Meltwater failed to provide enough evidence to show that its customers were using the snippets for something other than a substitute for the original story.<sup>141</sup> However, in future scenarios, what if a news aggregator can show that its commercial consumers only use the snippets for monitoring how frequently it is mentioned in the media and by whom? Is that not a different “use”? The SDNY recently held that Google’s systematic digitalization of copyrighted books was transformative, in part because it changes the text of the books into data.<sup>142</sup> This was achieved by employing a word index function that can search the frequency of any word throughout various works.<sup>143</sup> Using the technology, one could track the use of a word through a set period in an attempt to study language. By using the same type of search through the copyrighted content, the consumer of a news aggregator can be using the exact snippet of text, but for a different purpose than just

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137. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

138. *See Meltwater*, 931 F. Supp. 2d at 558–59; *supra* note 4 and accompanying text.

139. *See Meltwater*, 931 F. Supp. 2d at 554 (“Instead of driving subscribers to third-party websites, Meltwater News acts as a substitute for news sites operated or licensed by AP.”). The court mentions that Meltwater made a “conscious decision” not to provide evidence in regards to how often their customers click through to the original article. *Id.*

140. *Campbell*, 510 U.S. at 579.

141. *See Meltwater*, 931 F. Supp. 2d at 554–57 (discussing Meltwater’s intentional withholding of information in regards to how its business is utilized by customers).

142. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013) (“Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas . . .”).

143. *Id.*

reading the article. This “further use” should be viewed as transformative since consumers of news aggregators may not be using the snippet to substitute the need to read the original, but for a different purpose. Holding that Meltwater’s use was not transformative may create too narrow an interpretation of what constitutes transformative use and may stifle the ability of news aggregators to disseminate information to consumers for different purposes.

This is not to say that Meltwater, in this specific case, actually met its burden of presenting evidence to demonstrate the use was fair in regards to the other factors,<sup>144</sup> but if the court had determined that the use was transformative, the outcome may have been different when analyzing all of the factors together under § 107.<sup>145</sup> Since the Second Circuit, in analyzing the first factor, places more weight on the transformative aspect, as opposed to the commercial,<sup>146</sup> it is possible that if the use was ruled transformative, the first prong would have weighed in favor of Meltwater. Regardless, the court’s interpretation of what constitutes transformative use may be too narrow, allowing future cases to rely on it and undermine the very fair use protection which should be afforded many news aggregators due to the benefit they provide society.<sup>147</sup> Aggregators increase access to information and increase news consumption, thereby leading to a more informed populous engaging in civic duties.<sup>148</sup> The *Meltwater* court’s narrow interpretation of “transformative” use does not adequately take this into account. Courts going forward should acknowledge that although some “automatic” aggregators’ use

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144. See *supra* Part II.A.5. After all, in regards to the fourth prong, Meltwater could not show that it was not having a negative impact on the market and value of AP’s work. See *Meltwater*, 931 F. Supp. 2d at 561 (mentioning that Meltwater side-stepped all arguments in relation to the fourth prong and relied on the transformative nature of the use).

145. See *supra* note 135 and accompanying text.

146. See *supra* note 134.

147. For other issues with the interpretation outside of online news aggregators, see *AP v. Meltwater News: Summary & Questions*, KELLY WARNER L. (Apr. 12, 2013), <http://www.aaronkellylaw.com/online-intellectual-property/ap-meltwater-summary-questions/>, discussing the possibility that a company that produces a monthly newsletter with links to “how-to” articles may be engaging in copyright infringement under the logic of the *Meltwater* Court.

148. See *supra* note 77 and accompanying text.

may be “minimally transformative,”<sup>149</sup> news aggregators do provide a benefit to society.<sup>150</sup>

#### B. WHAT IS THE DIFFERENCE BETWEEN GOOGLE AND A SEARCH ENGINE THAT EMPLOYS SEARCH ENGINE TECHNOLOGY?

*Meltwater* does not give any real guidance in terms of what constitutes a search engine, or news aggregator employing search engine technology, that is actually afforded fair use and one that is not.<sup>151</sup> On a more practical level, aside from the strict analysis of the fair use factors, the court seemed to differentiate Meltwater from other search engines because (1) Meltwater’s consumers used the service differently than Google’s consumers; and (2) Meltwater was not like other search engines since it charged a fee for its service.<sup>152</sup> While it is true that Meltwater’s service is different than Google’s, courts should not rely on these two factors in deciding which aggregators using search engine technology are afforded fair use, and which ones are not.

The court stated that although Meltwater utilized search engine technology and provided such services to its customers, it did not offer “a comparison between the click-through rate for any single News Report and the rate for a single Google News search or any other search for news conducted through a recognized Internet search engine.”<sup>153</sup> This means that whether or not an aggregator or search engine is afforded fair use may hinge not on what the business model is but actually on the will of the consumer. For example, if an online business provides a search engine service, but most consumers use it for

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149. KIMBERLY ISBELL, CITIZEN MEDIA LAW PROJECT, THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES 11 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670339](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339). Isbell states that even feed aggregators provide additional convenience, organization, and greater access to news content and information, and therefore are, at the very least, “minimally transformative.” *Id.*

150. Not to mention, as discussed in Part I.D., *supra*, they may even be complementing news providers.

151. *E.g.*, Nate Raymond, *AP Win Against Meltwater Could Impact Online News Aggregation*, ELECTRONIC FRONTIER FOUND. (Mar. 26, 2013), <https://www.eff.org/mention/ap-win-against-meltwater-could-impact-online-news-aggregation>.

152. *See* *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 553–54 (S.D.N.Y. 2013).

153. *Id.* at 554; *see also supra* note 99 (discussing the comparison of click-through rates between Meltwater and Google).

something the business did not intend, the online business may be liable for copyright infringement. This is unfair to news aggregators.

Another difference the court considered was that Meltwater was not open to the public, like Google, and instead charged a fee to a relatively small amount of consumers.<sup>154</sup> While this may impact a court's analysis in regard to the public benefit that a search engine or aggregator provides, charging a fee should not be used when analyzing whether or not copyrighted material is being exploited. For example, is it really the case that Google does not profit from advertising and exploiting the content of others? Although Google clearly has other ventures besides its basic search engine, it had over \$15 billion in revenue just in the final quarter of 2013.<sup>155</sup> Google is not some non-profit entity that exists to provide public benefits. It is one of the most successful companies in the world, whose shares are currently trading for well over \$1000 on security exchanges.<sup>156</sup> Again, it is true that Google does not charge money for the use of its search engine and therefore is used by a much larger portion of the population. However, courts should not conclude that because Google does not charge a fee in order to use its search engine, it somehow is not exploiting copyrighted content in the same way as Meltwater is when charging a fee.

Again, there may be other good reasons and factors that differentiate a news aggregator (using search engine technology) that is not afforded fair use and a search engine that is. However, the difference should rest on how the consumer utilizes the service or whether or not they charge a fee to consumers. Future courts addressing the issue should find other ways to differentiate between a search engine and a news aggregator employing the same technology.

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154. *See Meltwater*, 931 F. Supp. 2d at 553–54.

155. *Investor Relations*, GOOGLE, [https://investor.google.com/earnings/2013/Q4\\_google\\_earnings.html](https://investor.google.com/earnings/2013/Q4_google_earnings.html) (last visited Feb. 25, 2014).

156. *Google, Inc.*, WALL ST. J., <http://quotes.wsj.com/GOOG> (last visited Feb. 25, 2014).

### C. THE FEASIBILITY OF THE IMPLIED LICENSE FRAMEWORK AS AN ALTERNATIVE TO THE COPYRIGHT ACT

In denying Meltwater's implied license defense,<sup>157</sup> the court incorrectly reasoned that the robots.txt opt-out system would be undesirable even if the more expansive doctrine of other jurisdictions was adopted. The expansion of the implied license doctrine in the context of the robots.txt framework essentially creates an opt-out system on the Internet where copyright holders have to affirmatively act to prevent a news aggregator or search engine from scraping their content.<sup>158</sup> The court's main reasoning for dismissing the implied license argument was because it was clear the three requirements, utilized by many jurisdictions, were not met.<sup>159</sup> This takes little analysis, as it is obvious Meltwater fails the first factor by not asking AP directly to make the copyrighted articles.<sup>160</sup> However, the court recognized that some jurisdictions do not require all of the elements and analyzed the defense under the less often used, but more expansive, standard.<sup>161</sup> In analyzing the issue under the more flexible standard, the court incorrectly ruled that the implied license defense would still fail and went on to explain that such a standard is not desirable or feasible.<sup>162</sup> Going forward, courts should more seriously consider the robots.txt system and an opt-out framework (along with the implied license doctrine) as a solution, outside of the Copyright Act, to govern the relationships between online content providers and news aggregators.<sup>163</sup> Having an opt-out system where it is assumed

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157. See *supra* Part II.B.

158. See *supra* notes 69–71 and accompanying text.

159. See Part II.B.

160. Compare *supra* note 66 and accompanying text (describing a common standard for demonstrating an implied license, the first factor of which requires the licensee to request the creation of the work), with *supra* note 123 and accompanying text (describing the *Meltwater* court's rejection of Meltwater's implied license defense).

161. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 562 (S.D.N.Y. 2013) (discussing the courts that do not require all three elements, stating that only a fair inference that the licensor granted a nonexclusive license was required, and concluding that Meltwater was unable to point to any interaction that would demonstrate that either AP or one of AP's licensees granted a nonexclusive license).

162. See *id.*

163. But see Bart Van Besien, *Google News Switches to "Opt-In" in Germany to Avoid Copyright Fees*, NEWMEDIA-LAW (Nov. 7, 2013, 3:16 PM),

all news aggregators are entitled to scrape the Internet, unless the copyright holder opts out, will create a better balance. It will balance the benefits provided by news aggregators and the content providers' desire to single out select aggregators who are not benefiting them through increased consumer traffic.

In analyzing Meltwater's position under the more expansive implied license doctrine, the court denied the affirmative defense of an implied license because: (1) placing the onus on the copyright holder to opt out of having copyrighted material used contradicts the foundations of copyright law; (2) there is no way to specify what types of use were allowed and which uses were not; and (3) forcing AP or its licensees to constantly update their robots.txt protocol every time the list of licensees changes is not practical.<sup>164</sup> Each reason given by the court is analyzed below.

### 1. Copyright Owners Have Been Burdened Before

The *Meltwater* court stated that placing the burden on the copyright holder would go against the foundations of the current Copyright Act;<sup>165</sup> however, it is not unheard of to place an affirmative burden on copyright holders. For example, a copyright holder is still required to register with the U.S. Copyright Office and deposit the copyrighted works with the Library of Congress in order to bring an infringement suit.<sup>166</sup> Although the current Copyright Act does not seem compatible with a policy where a copyright holder needs to opt out of their content being infringed upon, the Internet presents new challenges that could not have been anticipated in 1976. Placing an affirmative burden on copyright holders is not unusual and could be done in this situation.

### 2. Specific Uses Do Not Need to Be Specified

The *Meltwater* court stated that there would be no way for a website to differentiate what kinds of "uses" it would allow

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<http://www.newmedia-law.com/news/google-news-switches-to-opt-in-in-germany-to-avoid-copyright-fees1/>, for an example of an opt-in system in Germany, where Google now will only display the results of websites and content providers who affirmatively opt in.

164. *Supra* Part II.B.

165. *See supra* notes 125–26 and accompanying text.

166. *See Jasiewicz, supra* note 13, at 846–47.



and would not allow.<sup>167</sup> However, authors of robots.txt files can be specific in terms of what content they do or do not want a crawler to use.<sup>168</sup> Furthermore, by understanding what aggregators or websites do not have a licensing agreement to use, an author of a robots.txt protocol could just not allow that site to use the content, thereby undermining the need to specify how a non-paying aggregator or search engine can use the content.

### 3. Instead of Having a List of Who Is Allowed, Narrow It by Who Is Not Allowed

The *Meltwater* court acknowledged that the use of the robots.txt protocol could be used in a way where the website or content provider had a list of all those who were not allowed, as opposed to having to constantly “update their robots.txt protocol to indicate which web crawlers had permission to visit each site’s webpages.”<sup>169</sup> While the court says it is hard to imagine how a website could keep track of those they do not allow, this actually seems quite feasible. Generally, many of these websites want web crawlers to aid in the dissemination of their content through aggregators and search engines.<sup>170</sup> Therefore it seems completely feasible that instead of keeping an updated list of who is allowed, a website or content provider can utilize the robots.txt protocol to single out the crawlers they believe are exploiting their content by not creating traffic back to the original. This would be much easier and more efficient than bringing a copyright infringement suit against the aggregators or search engines the website did not want distributing its content. Also, by creating a default that aggregators can scrape information, the system allows for further dissemination of information and a more informed public.

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167. *Meltwater*, 931 F. Supp. 2d at 563.

168. *See* Jasiewicz, *supra* note 13, at 844 (“Authors of robot.txt files can be quite specific about what content they do and do not want indexed.”).

169. *Meltwater*, 931 F. Supp. 2d at 564; *see also id.* at 564 n.21 (stating it is difficult to imagine a website effectively managing an accurate list of all crawlers roaming the web and which ones are denied access).

170. *Id.* at 564 (discussing how the public and those on the Internet have an interest in the “openness of the Internet,” and that denial of access would only be limited in certain circumstances).

Even though the *Meltwater* court is justified in ruling that Meltwater failed to meet the burden required to demonstrate an implied license because it did not meet the three elements required under Second Circuit precedent, its reasoning for discounting the robots.txt argument is unconvincing. The expansion of the implied license defense and the implementation of an opt-out system using the robots.txt protocol technology should be utilized because it provides protection against the exploitation of Internet media, while balancing the benefit aggregators provide by further disseminating information. Not only would this further the purposes of the Copyright Act, but it avoids a situation where Congress has to create additional legislation that would be subject to First Amendment scrutiny,<sup>171</sup> and would allow content providers to utilize the Digital Millennium Copyright Act since any circumvention of the robots.txt protocol would constitute a circumvention of a safeguard that controls access to copyrighted works.<sup>172</sup> In sum, the court incorrectly dismissed the robots.txt protocol argument as unworkable, and courts going forward should not make the same mistake.

### CONCLUSION

While it has long been thought that news aggregators were protected from news providers by the fair use defense of the Copyright Act, *Meltwater* demonstrates that this may not be true. Although this was the first time a judgment had actually been rendered against a news aggregator for copyright infringement, it is noteworthy that the controversy ended like other infringement suits do, just prior to appeal<sup>173</sup>—with a licensing agreement or other mutually beneficial agreement.<sup>174</sup> Therefore, it is unlikely this case will dramatically alter the landscape.

Even if *Meltwater* does not completely alter the relationship between news aggregators and news providers, it is important that courts take a more expansive view of what is “transformative,” since it is such a crucial part of the fair use

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171. See *supra* notes 58–59 and accompanying text.

172. See *supra* notes 60–61 and accompanying text.

173. *Supra* Part I.D.

174. Associated Press, *supra* note 6 (discussing the partnership agreement that was entered into between AP and Meltwater prior to Meltwater appealing the adverse judgment to the Second Circuit).

analysis. Weighing in favor of news aggregators on the first factor will make it more likely that aggregators will be protected by fair use. This is desirable because aggregators increase news consumption, which leads to wider dissemination of information and a more informed public.

The court's analysis does provide some guidance for aggregators in order to find protection under fair use. This includes the implication that aggregators market themselves as a search engine (or just not as a news clipping service) and allow as many users to access the website (or service) as possible. However, there are still important questions on how best to classify an aggregation service that is protected by fair use and one that is not.

Aside from being more flexible in terms of what constitutes "transformative use," courts should more seriously consider the expanded implied license defense and opt-out framework proposed by Meltwater. This way the aggregators may continue to disseminate information broadly, while also giving the copyright holder discretion to choose who is using the content. This might be the best option for the future, since it is questionable if the *Meltwater* court, in applying the fair use factors, is being fair to aggregators.

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