

No free lunch

THE CASE:

The Associated Press v Meltwater US Holdings, Inc and Ors
US District Court, Southern District of New York
20 March 2013

Following AP's triumph over Meltwater in a recent US case involving news aggregators, **Dori Hanswirth** of Hogan Lovells discusses how copyright law is making the internet safe for journalism

It is no secret that the rise of the internet has caused problems for journalism. Although the public has come a long way since the "information wants to be free" mantra of the early 2000s, content providers still face an uphill battle (and in far too many cases, a losing one) to produce news reporting that is both high-quality and can produce a financial return. But in March 2013, news publishers in the US found another arrow for their quiver in a decision issued out of the US District Court in Manhattan. In *The Associated Press v Meltwater US Holdings, et al*, Judge Denise Cote sided with the AP and a coterie of amici from the media industry to decide that subscription-based internet media monitoring service Meltwater News committed copyright infringement by selling reports containing snippets of AP articles without a licence.

Over objections that AP's news content was not protected from this kind of copying under the defense of fair use, the court found that usurping the wire service's creative writing and editorial decisions went too far. By reining in Meltwater, Judge Cote's decision sends a clear message to both copycats and content makers alike: journalism, through copyright law, still lives – even on the internet.

What, exactly, is an 'internet media monitoring service'? In Meltwater's words, the Meltwater News service is a "public relations software" that "helps maximise the reach and relevance of earned media coverage". What this means in real terms is the ability, through the operation of automated computer programs or algorithms, to 'monitor' over 162,000 news publications and social media sites published in over 190 countries. The monitoring service operates by copying or "scraping" articles from these online news sources (identified by searching for keywords or phrases), indexing the articles

'hit' by those terms, and then delivering the results to customers in emails called 'News Reports', which contain verbatim excerpts of the portions of the articles that are responsive to customers' standing search requests.

Meltwater is designed to appeal to customers who want to keep informed of all news on a particular topic – but who do not want to spend the time searching over 162,000 online news sources to get it. The service is marketed to users who want to get the most comprehensive coverage of particular topics – such as their own companies, their competitors, or their industries – in a time-efficient manner. The problem is the service also satisfies consumer demand for that information at the expense of the content providers who invested the time, energy, and financial resources to report it. By "bring[ing] the news to you," Meltwater makes it possible for subscribers to simply read the "snippets" of the news they care about included in their News Reports, without having to pay the price of admission to retrieve the full article from its source.

In response to the AP's suit, Meltwater claimed that its practice of providing excerpts of AP content to its subscribers was protected as a fair use under Section 107 of the US Copyright Act.

Drawing on a line of cases holding that internet search engines' retrieval of online content through user-directed searches was not actionable as copyright infringement, Meltwater claimed that its service was functionally no different from websites like Google or Yahoo. According to Meltwater, its service was not a "news clippings" service, which is classically regarded as an infringement unless properly licensed, but rather a tool that, like a search engine, directed users to a source of information online.

In previous cases involving search engines, courts had found that copying images to

display as 'thumbnails' in search results was a transformative use that did not qualify as copyright infringement of the underlying works. The court here, however, found that those cases did not apply a rule of decision for the copying in Meltwater's News Reports. The display of thumbnail images in those other cases did not satisfy the demand for the underlying work, in large part because they were reduced and of lower quality than the original. Accordingly, the display of thumbnails in the previous cases involving search engines was found to be protected because it operated as a pointer to the source of the information rather than as a form of entertainment.

Here, though, the court rejected Meltwater's contention that its monitoring service was in any way akin to a search engine. It found that the service did not use the AP reports in a "transformative" way – that is, that the monitoring service altered the articles in such a fashion that they were being used for a different purpose than originally intended – because it used its computer programs "to automatically capture and republish designated segments of text from news articles, without adding any commentary or insight". Using an algorithm to "crawl over and scrape content from the internet" was, the court found, "surely not enough to qualify as a search engine engaged in transformative work".

The court also noted that even if it had found that Meltwater qualified as a search engine, that finding would not have immunised it from an infringement claim. Even search engines have to prove that their particular use of a copyrighted work qualifies as a fair use. Meltwater failed to do that because it could not show that its use of the AP articles was simply a tool that allowed users "to sift through the deluge of data available through the internet and direct them to the original source". Rather, Meltwater was more

like a traditional news clipping service which simply repackaged – and replaced the demand for – original content.

In reaching this conclusion, the court relied on two particularly damning pieces of evidence. At the top of this list were statements in Meltwater's marketing materials that promoted the ability to use Meltwater News as a substitute for the original publication. Meltwater trumpeted its News Reports as "News at a glance" that was "delivered in easy to read morning and/or afternoon reports". One employee had even recommended telling customers that Meltwater News Reports "saves you time so you don't have to read the full article". If there is such a thing as a 'smoking gun' in a fair use case, that might have been it.

Equally problematic for Meltwater was evidence missing from the record: data regarding the number of times that customers had "clicked through" links in News Reports to review the article in full. In contrast to services like Google News, which boasts a click-through rate of approximately 56%, the evidence in the record showed that customers rarely clicked-through Meltwater News Reports to access the source articles. Meltwater refused to provide data on the click-through rates for the company as a whole, but the evidence showed that, for the 33 AP articles at issue in the suit, customers used the links in the News Reports to access the full article only 0.08% of the time. This data was significant because it was direct evidence of the extent to which Meltwater's reports in fact had satisfied demand for the full underlying article.

In convincing the court that Meltwater News infringed its copyrights, the AP overcame a substantial hurdle that has plagued news providers who attempt to protect their content through infringement claims. Traditionally, copyright protections have been found to apply only to an author's creative expression and not to underlying facts. For this reason, journalists, historians, and novelists are free to copy information learned from copyrighted texts so long as they do not appropriate the particular way that the author expressed those facts.

This principle, which is rooted in the First Amendment, provides protection to journalists in one sense, by making it impossible for any one author to claim a monopoly on reporting the facts of what has happened in a news report. At the same time, though, the fact that news reports are factual, rather than fictional in nature, has often cut against content providers attempting to enforce their rights against claims of fair use. News reports are commonly cited as an archetypical example of a nonfiction work of which a relatively greater

degree of copying is permitted under the doctrine of fair use.

Here, like most courts considering the issue, the court found that the factual nature of AP reports weighed in favour of excusing Meltwater's copying as a fair use. However, in considering the third prong of the fair use test, which examines the amount and nature of the copying, the court found that Meltwater's practice of copying AP ledes weighed strongly against fair use, in large part due to the fact that the court found such ledes to be highly creative content, even though factual in nature. In so finding, the court credited AP's showing that "[A] lede is a sentence that takes significant journalistic skill to craft," and that as a result, "[T]here is no other single sentence from an AP story that is as consistently important from article to article".

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Notably, AP was supported by several *amici curiae*, including ones submitted by news entities such as The New York Times Company, Advance Publications, Gannett Co, and The McClatchy Company.

The *amici* explained that, with the "rise of the internet", the news industry has had to reinvent itself and its revenue streams. It has done so by developing digital outlets for news that are supported by "electronic advertising revenue, electronic subscription revenue, and licensing income from other publishers and users and aggregators". According to the *amici*, "[N]one of these revenue streams can be sustained if news organisations are unable to protect their news reports from the wholesale copying and redistribution by free-riders like Meltwater".

These arguments clearly animated the court's holding that Meltwater failed to state a valid defence of fair use. Although it called itself

a search engine, merely labelling itself as such did not immunise it from suit and, in practice, the court found that it essentially operated as a "classic news clipping service" and not a tool for retrieving content. Its collection and "scraping" of expensive content created by publishers like the AP was a "free ride" that capitalised on the AP's creative efforts without paying the customary price, and sapped away customers who would otherwise have satisfied their demand for AP news by purchasing AP products.

In reaching this conclusion, the court drew a direct line between safeguarding the ability of media entities to profit from their work and the public being able to benefit from a robust press. Paraphrasing James Madison, the court recognised that "the world is indebted to the press for triumphs which have been gained by reason and humanity over error and oppression".

"[E]nforcement of the copyright law permits the AP to earn the revenue that underwrites" its work of "[i]nvestigating and writing about newsworthy events around the globe," which the court found was at once an "expensive undertaking" and an "essential function of democracy".

Meltwater may appeal this ruling – but it may not do so until after trial on its one remaining argument, the equitable defence of laches. Except under extraordinary circumstances, parties in federal court cannot take an appeal except from a final judgment. Because one of Meltwater's possible defences has survived summary judgment, Meltwater will have to wait until after a trial on that defence to take an appeal, even though the defence is unlikely to have a material impact on the overall outcome of the case. Alternatively, Meltwater may choose to drop that defence, take a final judgment against it, and then appeal more promptly.

Author



Dori Hanswirth is a partner in the New York office of Hogan Lovells, where she handles a wide range of civil litigation matters in federal and state courts and focuses on matters

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