Copyright Alert: *Associated Press v. Meltwater*

Good "News" for the Newspaper Man; Not so good "News" for Online Aggregator Service Providers

BY JENNIFER STANLEY

Fenwick
FENWICK & WEST LLP

Meltwater News infringed copyrights of the Associated Press (AP), the U.S. District Court for the Southern District in Manhattan held last week, when Meltwater republished excerpts of AP news stories as part of its online news aggregation service. The excerpts were made available in response to searches for news by Meltwater customers. Rejecting the contention that Meltwater offered a navigation tool for internet users "to improve access to content across the Internet," the court held Meltwater was simply a "clipping service" that made "undiluted use" of AP's protected articles, providing them to users of an expensive and "closed subscriber system." 2013 WL 1153979 (S.D.N.Y.)

Meltwater characterizes itself as an online media intelligence service which searches news sources using keywords which are of relevance to its business customers. It then delivers the search results in the form of short excerpts from, with links to, the original articles. According to the court, Meltwater markets itself as a "customized news digest" that can save readers the time it takes to read an entire article. The AP is a news agency, owned by over 1,400 newspapers and radio and television stations in the United States. Its news content comes from stories contributed by its owners and the work of its staff journalists. The AP sued Meltwater in 2012 for copyright infringement, claiming that the Meltwater search results infringed the AP's copyrights in the news articles included in the results. The suit centered on 33 specific AP articles that were excerpted by the Meltwater service.

Meltwater relied on five affirmative defenses to the AP's claims of copyright infringement including: (i) fair use, (ii) implied license, and (iii) copyright misuse.

Spurning Meltwater's defenses, Judge Denise Cote granted summary judgment for the AP, commenting that news services like the AP provide a public service and that Meltwater's business model put that service in danger. She noted that "Investigating and writing about newsworthy events occurring around the globe is an expensive undertaking, and enforcement of the copyright laws permits AP to earn the revenue that underwrites that work." "Permitting Meltwater to take the fruit of AP's labor for its own profit, without compensating AP, injures AP's ability to perform this essential function of democracy."

Fair use

Section 106 of the U.S. Copyright Act affords a copyright holder certain exclusive rights in a copyright protected work – including to reproduce, prepare derivative works based upon and to distribute copies of the work. However, as the *Meltwater* court noted, copyright law recognizes the need for "breathing space." In certain circumstances, it is permitted to use protected works without permission of the copyright owner – if the use is a "fair use." In order to determine whether or not a use is fair, a four part test is applied to the use, looking at (i) the purpose and character of the use – and whether the use is somehow "transformative" in nature relative to the original purpose for the work, (ii) the nature of the work in question, (iii) the amount of the work used in relation to the work as a whole and (iv) the effect of the use on the potential market for or value of the work. Applying this test, the court held that Meltwater's use of the AP articles was not a fair use.

The use of copyright-protected materials by search engines like Google, for example, in their presentation of search results, has been established in most cases as fair use in light of the important role that search engines play in the modern world and their corresponding "transformative" use of protected works in production of search results.

Meltwater argued that its service was analogous to a search engine because it only provided its customers with headlines and portions of articles in response to search terms and did not reproduce the articles in their entirety. Judge Cote was not convinced. She noted that Meltwater added no commentary or insight about the articles it excerpted and, importantly, that Meltwater users generally did not use the links to the full articles. The service could not truly be considered as a search engine because it went beyond offering information location functionality. "Instead of driving subscribers to third-party websites, Meltwater News acts as a substitute for news sites operated or licensed by AP." The court did, however, make efforts to distinguish "legitimate" search engines, which only use copyrighted material as part of an information-location tool, emphasizing that a publicly available tool to improve access to content on the internet is very different from a private, fee-requiring subscription service.

The AP also argued that the "lede", which is the first portion of an article, is designed to convey the "heart of the story, rather than serving as a teaser for the reminder of the story." It is well established that copying the "heart" of a copyright protected work, regardless of the length of the excerpt, weighs against fair use. The court agreed with the AP that copying an excerpt of an article containing the lede must weigh against fair use because it included the part of the article users wanted to read most and could lead to a substitute for reading the article in its entirety. This is a somewhat surprising result in the context of news reporting, because, as some amici pointed out, the "heart of the work" doctrine does not work well for news articles. If an excerpt of a news article is shared, the focus is almost always on the most important aspect of the article, which tends to be factual in nature, and consequently only enjoys thin copyright protection.

The case illustrates an important consideration for online service providers, which is that the way end-users wind up actually using a service – regardless of the actual or nominal intent of the service provider when it launches a service – can play an important role in a court's later assessment of the nature of the service. Here, the copying of the "lede," as the court saw it, reinforced the practice of end-users to use Meltwater as their destination site; that is to say, as a news service, and not as a location tool.

Despite the attempt to insulate search engine functionality generally, the findings on fair use raise questions about when use of copyright protected content by search engines is actually a fair use. While standalone search engine services may not be overly concerned by this ruling, it may become difficult to recognize what a "legitimate" search engine is as contemplated by the court. The court's holding will be troubling for online news aggregators, particularly those which do not add commentary or opinion about the news articles they aggregate, but rather publish excerpts of the articles.

Implied License

Meltwater employed a web crawler, automated software that collected the news stories available for searches on Meltwater. Meltwater argued that it had an implied license to access the articles because the AP didn't use a robots.txt. protocol to block copying by Meltwater's web crawler. Robots.txt files give websites a tool to permit or disallow certain website crawlers. Some courts have looked to these files to determine if there is permission to include a particular website in search results, and Meltwater sought to rely on this concept. The New York court did not directly disagree with the leading robots.txt cases; however, it concluded that they were inapplicable. The court observed that the burden remained on the infringing party to show proper use of protected materials rather than on the rights holder to prevent unauthorized use.

Copyright Misuse

Meltwater also argued that the AP engaged in price fixing with competing news organizations in violation of antitrust laws and consequently misused its copyrights – i.e. endeavoring to "control competition in an area outside the copyright." Noting that the Second Circuit had not yet recognized a defense of copyright misuse, the court rejected the notion that the AP forced pricing arrangements onto companies licensing news articles and reports. On the contrary, the court emphasized that the AP does not create or control access to the news and has no power or restrictive authority over anyone wishing to report the news.

The AP praised the decision, calling it "an important ruling" for news organizations that "work so hard to provide high-quality original news reports on which the public relies." Meltwater decried the ruling as a loss for Internet freedom and the fair use doctrine, noting the implications for "other search engines and services." It plans to appeal to the Second Circuit. However until there is an appellate ruling, Judge Cote's decision will be a focal point in the suits against content aggregation services which will inevitably come in the wake of this decision.

Jennifer Stanley is Chair of the Copyright Group and a Partner in the Technology Transactions Group at Fenwick & West LLP.

For more information about this article, please contact: Jennifer Stanley (jstanley@fenwick.com).

©2013 Fenwick & West LLP. All Rights Reserved.

THE VIEWS EXPRESSED IN THIS PUBLICATION ARE SOLELY THOSE OF THE AUTHOR, AND DO NOT NECESSARILY REFLECT THE VIEWS OF FENWICK & WEST LLP OR ITS CLIENTS. THE CONTENT OF THE PUBLICATION ("CONTENT") IS NOT OFFERED AS LEGAL ADVICE AND SHOULD NOT BE REGARDED AS ADVERTISING, SOLICITATION, LEGAL ADVICE OR ANY OTHER ADVICE ON ANY PARTICULAR MATTER. THE PUBLICATION OF ANY CONTENT IS NOT INTENDED TO CREATE AND DOES NOT CONSTITUTE AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN YOU AND FENWICK & WEST LLP. YOU SHOULD NOT ACT OR REFRAIN FROM ACTING ON THE BASIS OF ANY CONTENT INCLUDED IN THE PUBLICATION WITHOUT SEEKING THE APPROPRIATE LEGAL OR PROFESSIONAL ADVICE ON THE PARTICULAR FACTS AND CIRCUMSTANCES AT ISSUE.