

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICOPYRIGHT, INC.,

Plaintiff,

-against-

THE ASSOCIATED PRESS and
PRESS ASSOCIATION, INC.,

Defendants.

Civil Action No. 10CV8860

**REPLY MEMORANDUM
IN SUPPORT OF MOTION
FOR PRELIMINARY
INJUNCTION**

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I. INTRODUCTION

As the proliferation of news on the Internet increased, The Associated Press (“AP”) faced an inflection point; it could either take a back seat to the likes of Twitter, blogs, Google, and Facebook, or it could fight to remain relevant. The role iCopyright played was to show AP how it could remain relevant and prosper in an industry being decimated by the misuse of copyrighted content on the Internet. AP sought to preserve its dominance and began using iCopyright’s services. After several years of this, AP and iCopyright decided to enhance the relationship through a Content Services Agreement (“CSA”). To iCopyright, the CSA represented the latest step in a relationship iCopyright believed would catapult its business to the next level.¹ However, as AP slowly came to recognize the massive opportunity presented by iCopyright and the CSA – an opportunity that was projected to provide AP with \$290 million *annually* in new revenue under the CSA’s revenue sharing provisions – AP had buyer’s remorse and instead decided to misappropriate iCopyright’s business plans and take the opportunity entirely for itself. AP soon stopped performing under the contract, frustrating iCopyright’s ability to perform, and encouraged iCopyright to terminate the CSA. When iCopyright refused to take AP’s bait, AP illegally terminated the contract, just weeks after assuring iCopyright that it would not do so and just weeks after announcing the formation of a Rights Clearinghouse to compete with the iCopyright clearinghouse it was legally obligated to promote to its members and licensees.

As demonstrated below, AP’s legal arguments are meritless. Moreover, the relief iCopyright seeks in this motion is not broad. iCopyright does not request that the Court somehow reconstruct the entire contract; iCopyright merely requests that the Court restore the (albeit imperfect) status quo so as to provide iCopyright with the ability to engage in an orderly winding down of its relationship with AP and limit the irreparable reputational harm associated with AP’s abrupt and unwarranted actions. The evidence demonstrates that irreparable harm has been – and is now – occurring. The Court can mitigate this irreparable harm through the

¹ Elston Decl. ¶ 20; O’Donnell Decl. ¶¶ 10, 17-18.

issuance of a limited injunction that preserves the status quo for the remainder of the contract period – until April 15, 2011. The equities weigh heavily in iCopyright’s favor, especially in light of the fact that restoring iCopyright’s tags and access to the content is a simple procedure that would take the AP as little as five minutes. In comparison, it would take iCopyright years even to begin to rectify the ongoing harm to iCopyright’s reputation and goodwill caused by AP.

II. ARGUMENT

A. The Injunction iCopyright is Seeking is Prohibitory and Will Maintain the Status Quo

AP erroneously argues that iCopyright is asking the court to enter a “mandatory” injunction, which requires a higher showing of likelihood of success on the merits. The linchpin of AP’s argument is that the status quo iCopyright seeks to preserve is measured from the date the Court considers the request for preliminary relief and not from the date on which AP took actions to injure iCopyright. AP’s argument is unfounded both as a matter of logic and law.

The circumstances that caused iCopyright to file a motion for preliminary relief on November 23 were caused by AP’s own actions. After AP purported to terminate the CSA on November 15, AP continued to display iCopyright tags on its site despite rendering them non-functional. After iCopyright sent a letter declaring AP’s breach unlawful and threatening litigation, AP began disabling the links to iCopyright’s services and breaking the tags. Counsel for iCopyright sent another letter, notifying AP of the problem and demanding the status quo – working tags – be restored. Instead of restoring the broken tags, however, AP acted quickly to make the problem worse by disabling and removing all of iCopyright’s tags.

Thus, in an effort to bind this Court’s hands, AP sought to fabricate a new “status quo” by promptly and unilaterally compounding the problem it had created. Now, after having magnified iCopyright’s injuries through its own actions, AP attempts to argue iCopyright must

meet a heightened standard to restore the parties to the positions they occupied *prior to the point at which AP took affirmative steps to injure iCopyright*.² Such a result is clearly improper.³

B. An Injunction Will Not Harm AP and iCopyright is Suffering Irreparable Harm as a Result of AP’s Conduct

AP claims it would suffer “a significant hardship” if it were “forced back into a licensing arrangement” with iCopyright. The basis for this unsupported assertion is that AP would bear some unidentified expense in restoring iCopyright’s tags. The evidence compels precisely the opposite conclusion. First, iCopyright’s tags are designed to be installed quickly and seamlessly.⁴ Indeed, in light of the fact that AP was able to take the tags down promptly, it stands to reason that AP could restore the tags just as quickly – and even if it claims it could not, it should not benefit from its reckless acts. Second, AP itself claims that iCopyright provides service to AP only on a small scale and that AP was easily able to address any problems associated with placing the tags on its content.⁵ Third, AP was willing and able to place iCopyright tags on its online content *before* the parties entered into the CSA.⁶ Finally, AP makes no mention of the fact that it has also cut off iCopyright’s access to AP servers.

² AP Br. at 12 (“The ‘status quo’ is whatever the circumstances are at the time the Court considers the request for a preliminary injunction”).

³ See *Varsames v. Palazzolo*, 96 F. Supp. 2d 361, 367 (S.D.N.Y. 2000) (an order directed at the status quo is “an order that seeks to restore the parties as best as possible to their positions *prior to injury already inflicted by the defendant*”) (emphasis supplied); *Unicon Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966) (“It is hornbook law that the general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action. Obviously, where agreements which require joint action lead to disputes between the parties which cannot be dissolved short of litigation, it is impossible to place the parties in the exact positions which they enjoyed prior to their disagreement. It follows that the court must have discretion to fashion such a preliminary injunction as may best approximate past positions in the light of the basic rights of the parties.”) (internal citations omitted); Charles A. Wright et al., *Federal Practice and Procedure* § 2948 (“Courts also have awarded preliminary injunctions when it is necessary to compel defendant to correct injury already inflicted by defining the status quo as ‘the last peaceable uncontested status’ existing between the parties before the dispute developed.”).

⁴ Sauerhaft Decl. ¶ 26.

⁵ Glover Decl. at ¶ 5a; Martin Decl. at ¶ 10, 13. See also Glover Decl. Exh. 1 (touting the “[q]uick, easy setup and maintenance” of AP Hosted custom news and emphasizing daily modifications made by AP).

⁶ O’Donnell Decl. ¶ 18; Elston Decl. ¶ 20.

Presumably this is because restoring access to the servers would – like flipping a switch – be virtually costless for AP.

Furthermore, there is no indication that AP would suffer going forward by being required to honor its obligations to iCopyright under the CSA. Despite putting three declarations in the record and making repeated mention of the “*de minimis*” sums iCopyright was earning as a result of the CSA,⁷ AP has never once complained about the quality of the service iCopyright was providing. Yet, AP has the audacity to suggest it would be harmed by a court order forcing its performance because it “would not be able to seek out other means of licensing its own news content.”⁸ The fact that AP is already contemplating ways to replace iCopyright only serves to underscore the irreparable harm iCopyright will face if it is not given time to wind down its relationship with AP in an orderly manner.

AP’s claim that iCopyright can be compensated in monetary relief ignores the fact that a significant portion of iCopyright’s business is dedicated to AP as a result of the CSA and that AP’s action is having and will continue to have deleterious effects on iCopyright’s reputation and future business prospects.⁹ AP represents a substantial and necessary element of iCopyright’s business as the largest single user of iCopyright tags. In 2009, 48.3% of all of iCopyright’s tags were on AP Hosted content.¹⁰ This Court has previously held that the loss of such a substantial portion of a company’s business constitutes irreparable harm. *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 723 (S.D.N.Y. 1969), *aff’d*, 417 F.2d 621 (2d Cir. 1969) (determining that the loss of access to a brand accounting for 40% of a product line would constitute irreparable harm). But the improper termination of the CSA will impact more than

⁷ As discussed in more detail in Section II.c.i., the CSA represented a unique and lucrative opportunity to both parties, but due to AP’s desire to seize this opportunity for itself, AP failed to perform many of its obligations under the CSA and thereby ensured the CSA resulted in limited earnings.

⁸ AP Br. at 25.

⁹ Indeed, Dow Jones recently communicated to iCopyright its confusion about what to do about the tags. See Elston Decl. Exh. 1.

¹⁰ Elston Decl. ¶ 4.

just tags on AP Hosted content because other customers that use iCopyright tags on their own content will discontinue using iCopyright tags.¹¹

AP also claims the CSA's limitation against liability for consequential *damages* somehow precludes iCopyright from receiving *injunctive* relief.¹² Such a claim is both nonsensical – the terms of the contract itself refer only to consequential *damages* – and contrary to New York law. *See Vacold LLC v. Cerami*, 545 F.3d 114, 130 (2d Cir. 2008) (holding that even contractually liquidated damages simply limits the amount of money recoverable and will not preclude equitable relief). A limitation on damages is a restriction only on one avenue of recovery and will not act as a bar to other forms of relief absent a clear and explicit statement to that effect. *Rubinstein v. Rubinstein*, 296 N.Y.S.2d 354, 358 (N.Y. 1968); *Barclay Arms Assocs. v. Clemente*, 470 N.Y.S.2d 881, 882 (N.Y. App. Div. 1983).

C. iCopyright Will Succeed On The Merits Of Its Underlying Claims

i. AP Breached the CSA

AP breached the CSA by, among other things: (1) purporting to terminate the CSA and subsequently failing to perform; (2) failing to implement properly iCopyright's tags and tools; (3) failing to promote iCopyright; and (4) violating confidentiality provisions. AP wrongly argues that iCopyright cannot demonstrate a likelihood of success on its claim of breach.

AP first argues that iCopyright stopped paying the minimum fees under the CSA and thus AP could terminate without any prior notice and that iCopyright's arguments to the contrary are "frivolous" and "ludicrous."¹³ Despite this hyperbole, AP's first argument fails because it

¹¹ *See Two Wheel Corp. v. Am. Honda Corp.*, 506 F. Supp. 806, 813, 815 (E.D.N.Y., 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980) (considering the impact that the cancelation of a distributor agreement would have on plaintiff's remaining business).

¹² AP Br. at 23-24. iCopyright disputes AP's claim that monetary damages are unavailable, but it is the immediate injunctive relief that is the focus of this motion. Other issues regarding damages will be taken up in due course in this litigation.

¹³ AP wrongly asserts that the "only performance that AP was to receive from iCopyright . . . was payment of money." AP Br. at 7, 13. This assertion ignores the title of the CSA (Content *Services* Agreement) and the fact that the CSA at its root concerns AP's subscription to iCopyright's services and

implicitly and wrongly assumes that iCopyright agreed to pay AP regardless of AP's failure to uphold its end of the bargain.¹⁴ It is long-established law in New York that a party "cannot by breach of contract create a condition which naturally brings plaintiff into default, and then declare that the plaintiff under the contract has forfeited all rights by reason of the default which their acts have caused."¹⁵ iCopyright has alleged – and even at this preliminary stage of the case (*i.e.*, before discovery) has presented evidence demonstrating – that AP failed to promote iCopyright and failed to implement iCopyright's tags properly. As a result of AP's actions, iCopyright was greatly disrupted and frustrated in its ability to perform fully under the CSA.¹⁶

iCopyright's provision of the same. iCopyright was at all relevant times providing all the services that are at the root of the contract and was making payment to AP in accordance with the revenue sharing arrangement. Elston Decl. ¶19, 21; *see Nolan v. Sam Fox Pub. Co.*, 499 F.2d 1394, 1397 (2d Cir. 1974) (partial payment of royalties due was not a material breach). Accordingly, AP's analogy to cases involving non-payment of rent are inapposite. *Awards.com v. Kinko's, Inc.*, 834 N.Y.S.2d 147, 187 (N.Y. App. Div. 2007) (failure to pay rent); *Hooker v. Wooten*, 655 N.Y.S.2d 995, 995 (N.Y. App. Div. 1997) (failure to pay for real estate). Be that as it may, whether any partial performance by iCopyright is a material breach is besides the point – for the reasons explained in this brief, the proper focus must be on whether AP should now be permitted to benefit from any failure brought about by its own conduct.

¹⁴ AP claims that iCopyright "assumed the commercial risk" and accordingly "agreed to pay the Minimum Fee regardless of the licensing revenue it actually earned." AP Br. at 13. This formulation is too broad; even if iCopyright assumed "commercial risk" in the CSA, it did not assume an obligation to pay AP \$15,000 a month in the event AP failed to uphold its end of the bargain.

¹⁵ *Gardner v. Roycrofters*, 118 N.Y.S. 703, 706 (N.Y. App. Div. 1909); *see also Reinhardt v. Reinhardt*, 613 N.Y.S.2d 89, 90 (N.Y. App. Div. 1994) (the parties to every contract owe an "elementary duty not to hinder or obstruct the performance of the other party to the contract."); *Farrell Heating, Plumbing, A.C. Contractors, Inc. v. Facilities Dev. & Improvement Corp.*, 414 N.Y.S.2d 767, 770 (N.Y. App. Div. 1979) ("where the party for whom a contract is being performed obstructs the [performer's] efforts and thereby greatly disrupts and frustrates the [performer's] operation, such conduct serves to excuse the [performer's] nonperformance and constitutes a breach of the parties' agreement.").

¹⁶ O'Donnell Decl. ¶ 9; Elston Decl. ¶¶ 22-23. *See also Sabhlok v. Dana*, 492 N.Y.S.2d 70, 71-72 (N.Y. App. Div. 1985) (plaintiff not entitled to rescind contract where the defendant's effort to pay tax debt as per contract representation was prevented by the plaintiff, who refused to make the contract payments that the defendant needed to pay the taxes); *Young v. Whitney*, 490 N.Y.S.2d 330 (N.Y. App. Div. 1985) ("[T]he court improperly charged that defendant had to show that any obstruction by [plaintiff] rendered his performance impossible, not merely difficult. Defendant need only have shown that [plaintiff's] acts greatly disrupted and frustrated his performance.").

Thus, AP is not excused from performance and its purported termination and subsequent non-performance is breach.¹⁷

Perhaps recognizing the weakness of its simplistic first argument, AP goes on to argue that AP did not “materially breach” the CSA by failing to implement iCopyright’s tags properly or by failing to “promote the iCopyright service as promised.”¹⁸ AP claims that it did promote iCopyright in accordance with the CSA and awkwardly attempts to backpedal from its admissions to the contrary. AP’s brief also admits that there were “tagging problems” and, without citing any legal authority, claims that the admitted “tagging problems” do not matter because the “problems” did not amount to a “*material breach*.” “Material breach,” however, is not relevant to a determination of whether AP was permitted to terminate and not perform; the issue under New York law is whether AP’s conduct taken together has “obstruct[ed] [iCopyright’s] efforts and thereby greatly disrupts and frustrates” iCopyright’s performance.¹⁹

The evidence indicates that AP’s conduct did greatly disrupt and frustrate iCopyright’s performance. Although AP claims it “fulfilled” its commitment to promote iCopyright to its members, the evidence shows that the CSA requires that AP promote iCopyright’s services to “AP licensees, Members, and websites” and that AP did not do so.²⁰ Indeed, AP publicly

¹⁷ Likewise, AP’s arguments that it need not follow the notice provisions of the CSA when it purported to terminate are wrong, AP Br. at 15-16, because AP frustrated iCopyright’s ability to perform in full. Accordingly, AP could not terminate on the basis of the partial performance it brought about, at least until AP could legally terminate as per the termination and notice provisions in the CSA.

¹⁸ AP Br. at 16-22. Unfortunately, at times AP’s brief degenerates into *ad hominem* attacks. See AP Br. at 16 (calling iCopyright a “deadbeat”). Name-calling cannot make up for a lack of legal support.

¹⁹ Compare *Farrell Heating, supra* note 20, with *Frank Felix Assocs. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (material breach is breach that is “so substantial that it defeats the object of the parties in making the contract”). In any event, the evidence supports a finding that AP’s failure to implement iCopyright’s tags properly and failure to promote were material breaches of the CSA, regardless of whether AP breached by purporting to terminate the CSA. See Sauerhaft Decl. ¶¶ 22-39; O’Donnell Decl. ¶¶ 5, 11.

²⁰ O’Donnell Decl. ¶¶ 5, 11-12. It is particularly telling that prior to the effective date of the CSA, iCopyright tags were already on AP Hosted as part of a revenue sharing arrangement with AP that did not involve minimum payments. iCopyright only agreed to the minimum payments in the CSA because of AP’s promise to promote iCopyright to its members. AP’s failure to promote, along with AP’s other

admitted it “had not promoted [iCopyright’s services] to any particular customers” and expressly refused to promote the service to certain AP members.²¹ Moreover, although AP wrongly claims the “tagging problem” caused by AP “affected at most only a tiny portion” of the AP content at issue, a close reading of AP’s declarations shows there is little substance to this assertion.²² In any event, AP does not offer any evidence on the key issue – whether AP’s failures disrupted and frustrated iCopyright’s ability to perform. The evidence before the Court demonstrates that AP’s failure to promote iCopyright and to tag the content properly did just that. Accordingly, AP breached by improperly terminating the CSA and failing to perform after its purported termination.²³ Moreover, regardless whether AP’s termination and subsequent failure to perform constitutes a breach of contract, AP breached the CSA by failing to tag content properly, failing to promote iCopyright, and violating the confidentiality provisions in the CSA.²⁴

ii. iCopyright Will Succeed On Its Unfair Competition Claim

AP’s failure to address the likelihood of iCopyright’s success on the unfair competition claim is astounding. Instead of addressing the arguments made in iCopyright’s opening brief, AP merely claims in a footnote that “the unfair competition claim is duplicative of the breach of contract claim and should be dismissed [because] [t]he unfair competition complained of is that

breaches, frustrated the purpose of the minimum fees and the ability of iCopyright to perform. Nonetheless, iCopyright continued to perform the services due under the CSA and to make payment according to the revenue sharing arrangement. Elston Decl. ¶¶ 21, 23.

²¹ O’Donnell Decl. ¶ 11.

²² Sauerhaft Decl. ¶¶ 40-49. AP’s claim that it used “commercially reasonable” efforts to try to fix the “tagging problem” it caused is somewhat beside the point. The issue is whether AP frustrated performance by iCopyright, not whether AP used commercially reasonable efforts. In any event, AP did breach the CSA because it did not use “commercially reasonable,” or any other significant, efforts. *See* Sauerhaft Decl. ¶¶ 22-39.

²³ Even if the Court were to conclude that AP did not frustrate iCopyright’s ability to perform, AP still could not terminate due to its conduct after May 2010. Elston Decl. ¶¶ 22, 23; *Rose v. Spa Realty Ass’n*, 397 N.Y.S.2d 922, 924 (N.Y. 1977) (oral modification); *Apex Pool Equip. Corp. v. Lee*, 419 F.2d 556, 561-63 (2d Cir.1969) election of remedies); *Oleg Cassini, Inc. v. Couture Coordinates, Inc.*, 297 F.Supp. 821, 830-831 (S.D.N.Y. 1969) (waiver).

²⁴ AP’s failure to tag properly and to promote iCopyright have been addressed above. *See also* Elston Decl. ¶17; Sauerhaft Decl. ¶¶ 4-21 (discussing violations of confidentiality provisions).

AP did not maintain iCopyright’s alleged confidential information and technology as required by the CSA.”²⁵ The claims, however, are not duplicative – and contrary to AP’s assertions, the difference between an extra-contractual obligation not to steal from others and a contractual obligation to keep certain material confidential is self-evident.

AP also asserts there is “no substance” to the unfair competition claim, because there is “nothing mysterious” about the Registry, as if the fact that information about the Registry was publicly available proves that AP did not misappropriate anything. iCopyright has offered evidence to support its claim, including AP’s letter to the Department of Justice (“DOJ”), in which AP passes off much of iCopyright’s technology and business plans as its own and falsely denies the existence of services such as iCopyright’s. Tellingly, AP has not even addressed its statements to the DOJ, much less iCopyright’s demonstration of AP’s bad faith.²⁶

D. AP’s Claim of Inexcusable Delay is Baseless

Finally, AP cites *Lanvin Inc. v. Colonia, Inc.*, 739 F. Supp. 182, 192 (S.D.N.Y. 1990) for the proposition that iCopyright’s motion should be denied because of inexcusable delay in requesting relief from a court. In that case, the plaintiff filed a motion for a temporary restraining order *seven months* after it filed its complaint. *Id.* at 185. Here, AP terminated the CSA on November 15 and removed the tags on November 18. iCopyright moved for temporary injunctive relief *only five days later*. Regardless, AP claims iCopyright should have moved for temporary relief in March 2010 because it knew then that AP was seeking payment. But the facts in the record demonstrate that, at all times, iCopyright sought to preserve its contractual

²⁵ AP Br. at 21 n.3.

²⁶ The extent of AP’s misappropriation of iCopyright’s confidential information will be the subject of discovery. AP’s own employees, however, have noted the “dysfunction” of the company and have questioned its leadership, including an apparent head of the Registry project, Srinandan Kasi. Notably, Mr. Kasi did not submit a declaration despite his centrality to this case – instead, the AP deferred to an employee (Mr. Martin) who has little to no personal knowledge of AP’s relationship with iCopyright.

relationship with AP, not commence litigation.²⁷ Moreover, AP's declarant, Mr. Glover, told iCopyright that AP would not be coming after iCopyright for payment as late as October 2010.²⁸ Only on November 18, when AP irreparably harmed iCopyright by removing its tags, did iCopyright reluctantly conclude legal action was necessary. AP has cited no authority – because there is none – for the proposition that moving for temporary relief only *five days* after suffering irreparable injury is an inexcusable delay.

III. CONCLUSION

For the foregoing reasons, the Court should grant iCopyright the limited preliminary relief it seeks. The Court need not reconstruct the entire contract; iCopyright merely requests that the Court restore the (albeit imperfect) status quo that existed prior to November 15, 2010. iCopyright requests that the Court issue an order requiring AP to restore the tags and iCopyright's connections so as to provide iCopyright with the ability to engage in an orderly winding down of its relationship with AP. Such an order would mitigate the ongoing irreparable harm caused by AP's abrupt and illegal actions.

Dated: December 8, 2010

Respectfully Submitted,

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²⁷ Glover Decl. ¶ 5d (Mr. Glover admits that on numerous occasions, he told iCopyright it could seek to terminate the CSA and iCopyright refused, because it “wanted the relationship with AP to continue.”) Elston Decl. ¶¶ 2-5, 23.

²⁸ Elston Decl. ¶ 28.

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