

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ICOPYRIGHT, INC.,

Plaintiff

v.

THE ASSOCIATED PRESS;
PRESS ASSOCIATION, INC.

Defendants

CIVIL ACTION NO. 10 CV 8860

DECLARATION OF
ANDREW S. ELSTON

I, Andrew S. Elston, declare as follows:

1. I am Chief Executive Officer of iCopyright, Inc. (“iCopyright”). As indicated in my Declaration dated November 22, 2010, I have intimate personal knowledge of the matters to which I testify herein.

A. **iCopyright is Suffering Irreparable Harm as a Result of AP’s Conduct, and an Injunction will not Harm AP**

2. Bruce Glover’s claim in his Declaration that The Associated Press (“AP”) “gave [iCopyright] the right to license only a limited segment of AP news stories that AP tagged on its “AP Hosted platform” (so-called “AP Hosted content,”...) to a relatively small market of end-users,” Glover Decl. ¶ 5, is false inasmuch as he states in his own April 30, 2009 email that he estimates the total page views for AP content on all web sites (which is the scope of iCopyright’s Agreement with AP) was one billion per month. Although the harm to iCopyright resulting from AP’s conduct is immeasurable, as it impacts all facets of the company, iCopyright nonetheless estimates the value of the agreement solely attributable to AP’s proper

implementation is many hundreds of millions of dollars over a properly-implemented 3-year term. If synergistic effects are included, the damages from non-performance are likely in the billions of dollars.

3. Mr. Glover's characterization of iCopyright's "authorization" to "handle licensing only for a small segment of AP's content," Glover Decl. ¶ 21, is false. iCopyright received the same feed of content from AP that other members and licensees receive. From the day the new iCopyright tags were applied on April 24, 2008 through the end of that year, iCopyright registered 2,566,534 iCopyright-tagged articles. In 2009, iCopyright registered 3,864,521 articles.

4. As the dominant source of daily news content, AP's abrupt cancellation has a disproportionately severe impact on iCopyright's business. The volume of content created by AP each day and tagged with iCopyright's tools was substantial. In 2009, AP articles represented 48.3% of all articles registered by iCopyright.

5. Based on historical usage patterns, for each day that AP causes the iCopyright tags to be missing from the AP Hosted sites, iCopyright loses approximately 500,000 page views and 1,300 licenses.

6. As a practical matter, if an injunction is granted, iCopyright would be getting four-and-a-half months' notice now that AP has made its intentions known. Until just recently, iCopyright had no reason to believe its agreement with AP would not be renewed. In fact, just the opposite is true. Until May 2010, AP repeatedly assured iCopyright that it was planning to deploy the iCopyright technology on its News Registry. Based upon AP's assurances, iCopyright invested significant time, intellectual property, and money to support its relationship with AP and to promote itself to AP members. If AP is going to reverse its position,

then iCopyright at a minimum needs time until expiration of the CSA to adjust its sales pitch to the 1,300 newspapers who are members of AP's dominant news network. Separately, as part of this litigation, iCopyright will also be collecting evidence that AP is misappropriating iCopyright's confidential information in developing its Registry.

7. An immediate termination of the CSA has an immediate cascade effect on other publishers that use iCopyright to tag AP content on their sites. Publishers that have placed the iCopyright tags on the AP content on their websites will be confused about whether they need to remove them if the CSA remains terminated. *See Exhibit 1.*

8. The cascade of harm continues even further. As syndicating partners realize they cannot tag AP content on their sites, they will be inclined to remove iCopyright from all other content on their sites out of desire to have a consistent appearance across articles or based on the false premise that iCopyright is unable to pay its obligations. An injunction is necessary to give iCopyright time to brief publishers on the situation and design work-arounds.

9. Simply terminating iCopyright without notice creates the false and damaging impression in the market that something is wrong with iCopyright's technology or its ability to pay. Given AP's dominant market position and influence, and AP's announcement of a competing service, this impression is particularly damaging to iCopyright. An orderly termination of the CSA at the end of the term, with 90 days notice, would have a less disruptive impact. iCopyright has already witnessed this fallout, with publishers asking whether they can continue tagging AP content. . *See Exhibit 1*

10. Abrupt termination of AP's content feed has disrupted the iCopyright Clip&Copy Service to more than 10,000 subscribers. AP content historically has accounted for 28.5% of the articles matched to users' keywords (more than 17 million since 2008), and for

44% of the articles actually read by users (a total of 843,000). iCopyright needs AP's feed reinstated immediately so it can restore this level of service to its customers. Otherwise, iCopyright is likely to lose those Clip&Copy subscribers.

11. On October 18, 2010, AP announced the introduction of its Rights Clearinghouse. AP's CEO stated that the industry's biggest challenge is the licensing of copyright material on the web: "scraping, copying, pasting, and aggregating has led to the creation of secondary markets for our content that have siphoned away considerable value." The next day, Mr. Glover emailed me suggesting that we ought to terminate the CSA – an agreement designed to address exactly that issue. The following day, Mr. Glover emailed me to state, "Transacting rights for secondary use of AP stories published on the web doesn't seem to be an area where we're focused on at this point...so I think it best to take [the links] down." See Exhibit 2. I have concluded from this and other publicly-available information about the Clearinghouse that there is a link between the Rights Clearinghouse strategy and AP's desire to terminate the CSA, and that AP's allegations of non-payment was pretext for its terminating the CSA. Also, AP's stance in its brief and declarations is directly contrary to positions it has stated to iCopyright over the past several years. It is clear now that AP wanted to terminate the CSA in order (to try) to avoid liability to iCopyright from implementing a service that misappropriated iCopyright's information and ideas.

12. Abrupt termination of the tags on AP's sites will deprive iCopyright of approximately 80 million page views over the remaining term of AP agreement based upon the partial implementation that was in effect before AP removed iCopyright's tags. This equates to a substantial loss of market presence and branding, as well as ad and licensing revenue.

13. Restoring iCopyright's tags and access to AP content is technologically very simple and will take very little time for AP to accomplish properly. The new tag formats have already been provided to AP's technical staff.

14. It is clear that AP seeks to evade its obligations over the remaining four-and-a-half months of the CSA so that it can promote services that compete with iCopyright as part of its Rights Clearinghouse. AP's need for its own competing Rights Clearinghouse is a smokescreen; it is simply a mechanism to transfer profit from iCopyright to AP and to evade its obligations to iCopyright under the CSA.

B. AP Has Misappropriated iCopyright's Business Plans, Trade Secrets and Intellectual Property

15. In reference to the December 2, 2010 Declaration of Todd Martin, I do not recall ever meeting or communicating with anyone by that name at AP. I therefore do not believe that he can testify from "personal knowledge or belief" with regard to the matters contained in his Declaration.

16. Mr. Martin states in his Declaration that AP did not misappropriate iCopyright's confidential information, but fails to explain how iCopyright's understanding of the Registry (or the "Rights Clearinghouse") as presented in AP's description filed with the Department of Justice ("DOJ") is incorrect. *See* Exhibit 3. The best evidence of what the Registry will be is the filing by which AP sought to inoculate itself against enforcement action by the Antitrust Division of the DOJ – not the declaration of an interested witness. In reviewing the letter to the DOJ, I believe that substantial portions of the functionality described by AP describes iCopyright's solutions and would require the use of iCopyright's proprietary technology and business plans that were confidential when transmitted to AP.

17. Mr. Martin asserts that a May 2009 meeting occurred after the News Registry was announced and that the meeting was “non-confidential.” Martin Decl. ¶ 23. Both assertions are false. AP did not begin using the moniker “News Registry” until July 23, 2009, when it issued a press release using that terminology for the first time. At the time of the May 2009 meeting, the specifics of what AP was planning were, in the words of Ms. Sue Cross, Vice President/Online of U.S. and Global Newspaper markets, “not that formed.” *See* Exhibit 4. To the best of my knowledge, Mr. Martin was not in this meeting, so he is in no position to characterize it as “non-confidential.”

18. The Declarations of Bruce Glover, Todd Martin, and Paul Colford each seek to trivialize the agreement between AP and iCopyright and to characterize iCopyright as an insignificant player in the online publishing world. Yet, in his July 16, 2009 internal email to Dorothy Abernathy (AP Bureau Chief) explaining the CSA, Mr. Glover expressly stated “we felt iCopyright had the best comprehensive solution,” Glover Decl. Exhibit 6 and in the FAQ relating to the launch of the CSA, AP characterizes iCopyright as follows: “iCopyright...is the intelligent copyright system for digital content. Founded in 1998, the (Software & Information Industry Association’s) Codie Award ...winning service currently handles thousands of online permissions every day. In 2007, iCopyright was named one of the Top 100 Companies that Matter Most in the Digital Content Industry by eContent magazine,” iCopyright was named to the same list in subsequent years as well, including 2010-2011. Among the other 100 companies are Microsoft, Google, Amazon and Adobe. In 2010, through November, iCopyright processed more than 4.5 million content licenses.

19. Mr. Glover states that the only performance that AP was to receive from iCopyright, in return for allowing iCopyright exclusive rights to license Hosted content to this

specified market, was payment of money. Glover Decl. ¶ 27. This is false. AP also receives services under the CSA. Section 1.2 of the CSA states that iCopyright is obligated to perform multiple functions and services including transacting and delivering content services, managing and fulfilling requests for custom licenses, contracting with third parties as necessary, and inserting advertisements into free uses of AP content. The full scope of those obligations as well as the Clip&Copy service is described in detail in Schedule C of the CSA. Such services are value-add services to AP in that AP does not have to provide the expensive systems, software, personnel, engineering, bandwidth, servers, etc. that iCopyright provides in order to provide these Services. iCopyright has provided these Services to AP for the entire contract term and intends to continue for the remainder of the term. Also, iCopyright is required by Section 2.1 to provide license tracking services to AP. Section 2.5 imposes reporting obligations upon iCopyright.

20. Before the CSA came into effect, iCopyright had been a party to the agreement between Wright's Reprints and AP whereby iCopyright was licensing AP content. This agreement did not require any minimum payments to the AP by Wright's or by iCopyright. Mr. Glover's contention that "[t]he purpose of the Minimum Fee was to provide AP assurance of some compensation in return for entering into this relationship and for allowing iCopyright to use its AP relationship in its efforts to obtain business from other publishers," Glover Decl. ¶ 28, is objectively false. iCopyright was already providing licensing services for AP content and already had a relationship with AP. The purpose of the minimum guarantee, as described elsewhere, was to ensure AP would deploy the iCopyright links in a "best practices" manner that would showcase it to AP members who were linking to the hosted service, and that AP would promote the iCopyright system to its members and licensees.

C. AP Failed to Live Up to its Obligations Under the CSA

21. Mr. Glover's assertion that I never connected AP's many breaches of the CSA with iCopyright's refusal to make the monthly minimum payment is untrue. As early as April 2009, when AP acquiesced in reducing the contractual monthly minimum, I stated in an email to Mr. Glover and Mr. Mendelsohn, "thanks for offering to extend the first-year monthly minimum fee through 2009" while reminding Mr. Glover of our continued frustration at AP's delays and inadequate performance. I complained that "we seem not to get proper and serious attention beyond your group." The last monthly minimum payment iCopyright made was on May 7, 2010. However, iCopyright continued making payment of the licensing split.

22. Mr. Glover declares that he "generally agreed that AP was responsive to [iCopyright's] concerns." Glover Decl. ¶ 15. This is false. AP's actions greatly disrupted and frustrated iCopyright's ability to perform fully under the CSA. There were numerous phone calls, meetings, and emails attempting to get AP (specifically Jay Tuten, Manager of Platform Development, and others) to respond to iCopyright. On July 22, 2009, I met with Mr. Glover, Mr. Tuten, and Mr. Saabye in Mr. Tuten's office in New York, with Neal Gronlund of iCopyright attending by phone. Mr. Tuten showed us a version of the iCopyright tags on a staging server for the Hosted 2 service, the second AP Hosted service that was being rolled out in August of 2009. The version of the tags displayed was nothing like the iCopyright Best Practices toolbar that we had provided to them previously nor anything like the tags on hosted.ap. We explained to the AP team that this needed to be changed to our new format, and they agreed to do so. The next day, July 23, Mr. Gronlund sent that format to Mr. Tuten. One year later, the specified iCopyright toolbar was still not deployed, and AP's own version was still

being displayed. AP never fixed this problem despite saying that it would. Mr. Glover and I were discussing these very same problems one year later on July 21, 2010.

23. On July 21, 2010 in a telephone conversation with Mr. Glover, he and I discussed many pending issues, including especially the difficulties in working with Mr. Tuten on the Hosted 2 platform. Mr. Glover stated that he was also frustrated and that AP was contractually obligated to make the adjustments iCopyright was complaining about. He suggested for the first time that I should “raise termination” in a letter to Jane Seagrave, Senior Vice President and AP Chief Revenue Officer, complaining about AP’s lack of performance. I replied that iCopyright did not want to terminate the CSA; iCopyright wanted AP to fix the problems and to cooperate fully in their “News Registry,” which he told me had just been quietly launched. I informed him that I had not made a monthly payment since May 7, and would not make further minimums until the problems were fixed (iCopyright had made approximately \$320,000 in minimum payments up until that point). Mr. Glover replied that he was aware we had not been paying due to AP’s failure to perform its obligations under the CSA.

24. Mr. Glover includes in his Declaration an email exchange with Ms. Conard in which he explicitly asks her to “Hold off for now” on sending a suspension letter. *See* Glover Decl. Exhibit 11. This is plainly contrary to Mr. Glover’s new view in his Declaration about the newly-claimed non-payment.

25. I did not hear anything further from Mr. Glover about our decision to withhold minimum monthly payments nor did I receive any communications suggesting that our access to the AP content would be “suspended” or “terminated” until October 14, when I received an email from Ann-Marie Casale, AP Collections Manager, stating that “If payment is not received by 10/19/2010, service will be suspended and your account will be forwarded for

further collection efforts and or legal review.” *See* Exhibit 5. I thought that this notice was an administrative detail that had been rendered moot by Mr. Glover’s statements because Mr. Glover is the person designated as AP’s “Business Contact” in the CSA. Furthermore, iCopyright did not receive any notice regarding the potential for termination of the CSA from the person designated by the CSA as AP’s legal contact, Mr. Srinandan Kasi.

26. On October 18, 2010, AP announced the creation of a “Rights Clearinghouse.” iCopyright concluded from this announcement that, contrary to its earlier representations to iCopyright, AP was becoming a competitor. I left urgent telephone messages for Mr. Mendelsohn and Mr. Glover that day to attempt to get some additional information. A series of back-and-forth emails with Mr. Glover ensued, culminating with a lengthy email from me on October 21 in which, among many other things, I asked him to communicate with AP’s accounting department to confirm that our account was current. *See* Exhibit 5.

27. The next day, on October 22, Mr. Glover called me. Notes of this conversation were sent by me in email to the management team at iCopyright. I also have notebook notes from this call, including:

- “No one is more disappointed and frustrated” [than Glover... over the lack of attention to iCopyright’s concerns; there’s] “only so much capital he can invest.”
- A new business unit is being created under an initiatives from Sri [Kasi] by way of Curley and “Nick is setting the agenda for the new entity.”
- Glover expressed “skepticism” that that this would be “outsourced to an external entity”

- Glover said that iCopyright has been “drawn into the dysfunctional AP family.”
- When I asked for a meeting with Mr. Curley, Mr. Kasi and Mark Contreras, or whomever else is responsible, Glover said “He [Mr. Glover] might not be doing us any favors” meaning that he felt he might not be our best ambassador at this point.
- When I asked him to take care of our accounts receivable situation, he said “don’t worry—we’ll keep the status quo.”

At no time in this conversation and in no subsequent email did Mr. Glover refute my assertion iCopyright was not obligated to make the minimum monthly payment.

28. I subsequently asked Mr. Glover to make sure that our service was not suspended. This led to a phone conversation with Mr. Glover on October 22 in which he assured me that they would not turn us off. After that call, I related the discussion to iCopyright management by email explaining that Mr. Glover “assured me that they won’t be coming after us for the back payments nor turning off the tags” and that he had promised to “stress to Sri [Kasi] that we are frustrated by the lack of follow-up from him.” *See Exhibit 6.*

29. AP reversed course dramatically in the ensuing month. On Monday, November 15, I received a terse email from Mr. Glover stating in part: “I regret that iCopyright has failed to make an offer to make payment of amounts outstanding . . . and that AP must terminate the agreement today.” *See Exhibit 7.* Through counsel, iCopyright told AP that its purported termination was wrongful. iCopyright received notice from AP’s counsel that they would be unwilling and unable to discuss the matter until almost two weeks later, after the Thanksgiving holiday. This litigation ensued thereafter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: December 7, 2010
Seattle, Washington



Andrew S. Elston