

“expand” instead of “extend” was its choice. Indeed, the goal of the CSA was to extend the iCopyright tags implemented on AP Hosted to AP content being published by its members and distributors, including Yahoo!, AOL, Comcast, CBS, and others.

5. The statement in the Declarations of Mr. Colford and Mr. Glover that the relationship was to be “limited to AP Hosted” is a mischaracterization. AP agreed to let iCopyright promote the services beyond AP Hosted and it agreed to help iCopyright do so. When iCopyright started to promote the services to AP members as agreed to in the CSA, iCopyright began to attract media attention. Shortly after, however, various people at AP told iCopyright to stop promoting its services to AP’s broadcast members and to the press. Members of my sales staff complained that they were not getting any support from AP to educate AP’s members about iCopyright’s services, or even confirm that AP would like them to implement the services. Three documented examples are attached collectively as Exhibit 1.

6. On a phone call with Mr. Colford shortly after the paidContent article was published, Mr. Colford told me to stop talking to the press and that any statement I wished to make needed to be cleared by his office first. He also told me to take down a blog post I had posted in response to a blogger’s criticism of AP charging \$12.50 to excerpt 5 to 25 words of AP news stories via iCopyright.

7. At a face-to-face meeting at AP’s offices after the paidContent story was published, I was instructed by Srinandan Kasi, AP’s General Counsel and head of business development for their News Registry, to stop talking to the press about AP’s use of iCopyright’s services.

8. iCopyright proposed the initial press release that Mr. Colford cited in his Declaration and AP cooperated in drafting and releasing it. However, soon thereafter, both Mr.

Colford and Mr. Kasi told me to stop talking to the press about the AP-iCopyright relationship. The statements I made to the press were accurate with respect to the services iCopyright was providing for AP content and consistent with the information preapproved by AP for the press release and other materials AP's staff had prepared for distribution.

9. Soon after my sales staff was instructed not to talk to AP broadcast members and I was instructed not to talk to the press, we received a memorandum from Laurie Morris, AP Deputy Director of Communications, instructing us on how to articulate points about the AP-iCopyright agreement. In relevant part, the memorandum reads: “[D]o not suggest or say that AP is pursuing any ‘prospects’ on your behalf. Avoid making specific reference to AP members as AP members.” *See* Exhibit 2. Mr. Colford and Bruce Glover state in their Declarations that “the duty to promote was iCopyright’s.” Colford Decl. ¶ 17; Glover Decl. ¶ 5.c, 37-38. However, AP severely limited iCopyright’s ability to promote and did little to promote on iCopyright’s behalf as it was required to do under the CSA. As a result of this conduct, coupled with other conduct, AP severely hampered iCopyright’s ability to generate revenue under the CSA.

10. Mr. Colford declares that iCopyright was “only permitted to issue licenses for limited reprint and republication uses of AP-hosted content.” Colford Decl. ¶ 12. Mr. Colford misrepresents the terms of the agreement between iCopyright and AP and the long-term goals of the relationship. The CSA specifically grants iCopyright the rights to issue licenses for AP content that is not just published on AP Hosted, but *on any AP-member website*. This extends to articles that were being viewed approximately 1 billion times per month according to information AP supplied to iCopyright. As a result of this information, iCopyright believed that

its business would take-off when it entered into the CSA because iCopyright believed that AP would honor its contractual obligations.

11. In fact, Mr. Colford posted a comment on the paidContent website telling the entire publishing industry that while AP had agreed to make “the service *available* to all its licensees—members and commercial customers-- . . . AP *has not promoted* the service to any particular customers” (emphasis supplied). This was clearly inconsistent with AP’s obligations under the CSA. Promotion is one of the important considerations iCopyright had bargained (and paid) for. Even worse, if AP was going to the trouble to post this comment on one of the most widely-read publications in the industry, it was very clear that AP did not intend to promote the service to its members. Further, Mr. Colford admits that he published this comment without iCopyright’s approval despite his earlier claim that press releases could only be made upon mutual agreement. Colford Decl. ¶ 6, 16.

12. Mr. Colford highlights this point in his statement that “it was iCopyright’s role to “get [AP] members and licensees to implement [iCopyright] licensing services.” Colford Decl. ¶ 19. Mr. Colford misconstrues the word “promote” to mean the same as “implement,” and he suggests that Mr. Elston had waived AP’s duty to promote the services to its members. Contrary to its obligations under the CSA, Mr. Colford attempts to wash AP’s hands of its duty of promotion through misconstruing Mr. Elston’s statement. Indeed, after the initial press release and an email that was sent to its bureau chiefs, AP did *zero* promotion of the service to its members as far as iCopyright knows. By no means does iCopyright understand one press release and one email to a small group of insiders over a span of three years to come close to what it bargained for in the CSA. Rather, iCopyright imagined using AP’s significant market power as a springboard to promote iCopyright’s service and bring iCopyright into prominence.

13. After these admonishments by AP, AP told iCopyright that AP was to “control the message.” iCopyright permitted this because AP told iCopyright to “be patient” and “go slow” while they had a chance to bring a new platform (known as “hNews” and then “The Registry”) online. AP said iCopyright would be embedded in the new platform and that it would be the primary delivery vehicle for AP news stories to all AP members. On that inducement, and to maintain the goodwill of AP, iCopyright ceased promotion to certain AP members and waited for AP to complete the new platform. It was important for iCopyright to maintain a good business relationship with AP because iCopyright saw the CSA as a unique opportunity due to AP’s clout in the market.

14. In his Declaration, Mr. Glover states that “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.a. This is false. The CSA specifically grants iCopyright the rights to issue licenses for AP content from websites of *AP-members, licensees, aggregators, or any other website authorized to display AP content*. The stated objective from the beginning of the CSA (and during negotiations) was to “extend” the tags to all AP-member sites and aggregators of AP news stories, reaching hundreds of millions of readers each day. This was one of the reasons iCopyright agreed to pay the monthly minimum guarantee.

15. I had several conversations with Mr. Glover where he acknowledged how important it would be to get large distributors like AOL and Yahoo! to add the iCopyright tags. In fact, AP agreed to help introduce iCopyright to companies like AOL, Yahoo!, and Newsbank and entice them to add the tags (even before the CSA was effective). Three documented examples are attached collectively as Exhibit 3. These are not AP Hosted customers and they

each reach a large market of end-users, not a “small market” as Mr. Glover declares. Glover Decl. ¶ 5.a.

16. Furthermore, Mr. Glover declares that “AP did promote iCopyright’s service to AP members and subscribers.” Glover Decl. ¶ 5.c. It is unclear why AP would do so if iCopyright’s licensing services were intended to be limited only to AP Hosted content. Mr. Glover contradicts himself in his own sworn declaration.

17. Mr. Glover states “we decided to authorize iCopyright to handle licensing only for a small segment of AP’s content offerings, namely content carried on the AP Hosted service described above that were tagged by AP.” Glover Decl. ¶ 21. Mr. Glover confuses “tagging content” with “handling licensing.” AP may have tagged only the content on AP Hosted, but it granted iCopyright the right to “extend” the tag and an “expansive” suite of licensing services to *every* member and distributor of AP content. The goal was to extend the tags to AP content published by Google, Yahoo!, AOL, NYT, CNN, MSN, and 1,300 other outlets. This entails a very large market of one *billion* page views each month, as opposed to the 16 million per month logged by AP Hosted. AP Hosted, although not insignificant in end user page views and important to showcase the tags, was a fraction of the traffic that iCopyright intended to reach as a result of the CSA. In other words, the CSA presented an unparalleled opportunity to propel iCopyright’s business.

18. iCopyright’s services had already been live on AP Hosted for many years by virtue of an agreement through Wrights Reprints. iCopyright did not enter into the CSA to pay an additional monthly guarantee in order to do what it had already been doing for years. iCopyright shared its projections with AP showing that if AP members implemented iCopyright’s services on the online content they published from AP, even a conservative click-

through rate would amount to substantial new revenue for AP, its members, and iCopyright. The CSA's purpose was aimed at this, not merely about the subset of content (and eyeballs) on AP Hosted.

19. The objective of the CSA was to tag AP content everywhere. Mr. Glover understood very well that that was the goal of the relationship and iCopyright's primary motivation. In fact, Mr. Glover sent me an email on March 26, 2008 to finalize the CSA and wrote, in part, "My focus hasn't been Hosted [meaning the AP Hosted platform] either and I did consider it material to our agreement that AP's selections on the Console would control across the board," meaning the focus of the CSA was not on AP Hosted content, but that the focus was on AP's entire distribution network. *See Exhibit 4.*

20. The inducement for iCopyright to enter into the CSA with AP and to pay the minimum monthly guarantee was threefold:

A. Improved implementation (what we called "best practices") of the iCopyright tags that were already installed on AP Hosted via a previous agreement, so that AP Hosted would serve as a model for all AP members, aggregators, and the publishing industry at-large;

B. Authorization to extend the tags to AP's dominant network, including *all* AP members, aggregators, and other distributors of AP content, thereby reaching a market of hundreds of millions of end users, in which AP, its members, and iCopyright would share the revenue; and

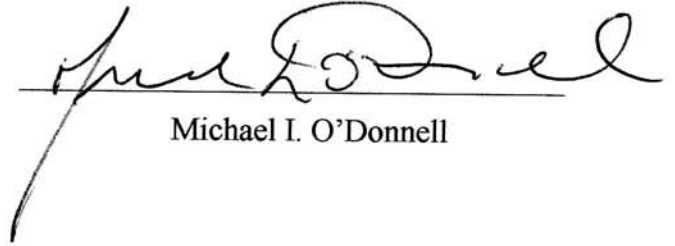
C. AP's promotion of iCopyright's services to AP members and the publishing industry at-large to adopt the iCopyright service and implement the tags in the same way that AP had done. In fact, iCopyright would not have entered into the minimum guarantee but for AP's promise to both implement the tags properly and promote iCopyright's services to its members.

21. AP's abrupt and improper termination of the CSA is catastrophic to iCopyright. The company is harmed in many ways, most importantly as a result of immediate and ongoing loss of reputation and goodwill associated with iCopyright's tags no longer being displayed on AP content and with AP's termination of iCopyright's access to AP's feed. Additional harm includes unavoidable and immediate user and content owner confusion and the inability to serve the existing user base of 10,000 iCopyright Clip&Copy users who get AP news clips each day as part of their subscription.

22. The opportunity for iCopyright to get the 90 day notice of termination that is specified in the CSA is paramount to iCopyright minimizing these harms. Without such notice, iCopyright is unable to orderly plan for the contingencies involved with termination of the CSA.

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

Executed: December 7, 2010
Seattle, Washington

A handwritten signature in black ink, appearing to read "Michael I. O'Donnell", is written over a horizontal line. The signature is fluid and cursive, with a large loop for the letter 'O' in "O'Donnell".

Michael I. O'Donnell