

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ICOPYRIGHT, INC.,	:	
Plaintiff,	:	10 CV 8860 (NRB)
-against-	:	
THE ASSOCIATED PRESS and PRESS	:	
ASSOCIATION, INC.,	:	<b><u>ANSWER AND COUNTERCLAIM</u></b>
Defendants.	:	
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Defendants The Associated Press (“AP”) and Press Association, Inc. (“PA”) (collectively “AP”), by its attorneys DLA Piper LLP (US), for its answer to the complaint of plaintiff iCopyright, Inc. (“iCopyright”), allege as follows:

1. Admits that iCopyright brought this action, and, except as so admitted, denies the allegations contained in paragraph 1 of the complaint.
2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.
3. Admits that The Associated Press is a not-for-profit membership corporation, organized under the laws of the State of New York, with its principal place of business located in New York, New York.
4. Admits the allegations contained in paragraph 4 of the complaint.
5. Admits the allegations contained in paragraph 5 of the complaint.
6. Admits the allegations contained in paragraph 6 of the complaint.

7. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

8. Admits that AP has approximately 1,400 members and that AP has experienced first-hand the negative effects associated with pirated content on the Internet, and, except as so admitted, denies knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 8 of the complaint.

9. Denies the allegations contained in paragraph 9 of the complaint.

10. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint.

11. Admits that AP has made the statement quoted in paragraph 11 of the complaint, and, except as so admitted, denies the remaining allegations therein.

12. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

13. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Admits that the Contract Services Agreement (CSA) between AP and iCopyright contains reference to the iCopyright toolbar and, except as so admitted, denies the allegations contained in paragraph 14 of the complaint and refers the Court to Exhibit A for the true contents thereof.

15. Denies knowledge and information sufficient to form a Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 15 of the complaint and, with regard to the second sentence of paragraph 15

of the complaint, admits that the CSA contains references to the iCopyright tag, and, except as so admitted, denies the allegations therein and refers the Court to Exhibit A for the true contents thereof.

16. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint.

17. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint.

18. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the complaint.

19. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the complaint.

20. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the complaint.

21. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the complaint.

22. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the complaint.

23. Admits that the partial quotation in the fourth sentence of paragraph 23 of the complaint is taken from a May 2010 article co-authored by Srinandan Kasi and that an automated means to protect copyrighted material online has value, and, except as so admitted, denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the complaint.

24. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the complaint.

25. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the complaint.

26. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the complaint.

27. Admits that AP and iCopyright entered into the CSA effective as of April 15, 2008, and, except as so admitted, denies the allegations contained in paragraph 27 of the complaint.

28. Admits that the quoted phrases in paragraph 28 of the complaint appear in the CSA, and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained in that paragraph and refers the Court to Exhibit A for the true contents of the CSA.

29. Admits that the quoted definition in paragraph 29 of the complaint appears in the CSA, and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained in that paragraph and refers the Court to Exhibit A for the true contents of the CSA..

30. Admits that the quoted phrases in paragraph 30 of the complaint appear in the CSA, and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained in that paragraph and refers the Court to Exhibit A for the true contents of the CSA.

31. Admits that the quoted phrases in paragraph 31 of the complaint appear in the CSA, and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained in that paragraph and refers the Court to Exhibit A for the true contents of the CSA.

32. Admits that the quoted phrases in paragraph 32 of the complaint appear in the CSA, and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained

in that paragraph and refers the Court to Exhibit A for the true contents of the CSA.

33. Admits that the quoted phrases in paragraph 33 of the complaint appear in the CSA, and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained in that paragraph.

34. Admits that the quoted phrases in paragraph 34 of the complaint appear in the CSA, and, except as so admitted, denies the allegations contained in that paragraph and refers the Court to Exhibit A for the true contents of the CSA.

35. Admits that the quoted phrases in paragraph 35 of the complaint appear in the CSA (with certain words omitted), and that AP agreed to the terms of the CSA, and, except as so admitted, denies the allegations contained in that paragraph and refers the Court to Exhibit A for the true contents of the CSA.

36. Admits the allegations contained in paragraph 36 of the complaint.

37. Denies the allegations contained in paragraph 37 of the complaint.

38. Denies the allegations contained in paragraph 38 of the complaint.

39. Admits that the quoted statements in paragraph 39 of the complaint were contained in an e-mail by Ted Mendelsohn of AP, and, except as so admitted, denies the allegations contained in that paragraph.

40. Admits that the quoted statement in paragraph 40 of the complaint was contained in an e-mail by Bruce Glover of AP, and, except as so admitted, denies the allegations contained in that paragraph.

41. Admits that AP made the first statement quoted in paragraph 41 of the complaint, and, except as so admitted, denies the allegations contained in that paragraph.

42. Denies the allegations contained in paragraph 42 of the complaint.

43. Admits that the quoted statements in paragraph 43 of the complaint were made in one or more e-mails by Bruce Glover of AP, and, except as so admitted, denies the allegations contained in that paragraph.

44. Admits that the quoted statement in paragraph 44 of the complaint was made in an e-mail by Jay Tuten of AP, and, except as so admitted, denies the allegations contained in that paragraph.

45. Denies the allegations contained in paragraph 45 of the complaint.

46. Denies the allegations contained in paragraph 46 of the complaint.

47. Denies the allegations contained in paragraph 47 of the complaint.

48. Admits that iCopyright was obligated, under the CSA, to pay AP the Minimum Fee provided for under the CSA (as modified in amount by the parties' later March 15, 2009 written and executed amendment), that iCopyright thereafter willfully and unilaterally breached this obligation to pay AP the Minimum Fee, that the CSA was not modified at any point so as to relieve iCopyright of the obligation to pay AP the agreed amount of the Minimum Fee on a monthly basis, and, except as so admitted, denies the allegations contained in paragraph 48 of the complaint and refers the Court to the CSA (Exhibit A to the complaint) for the true contents thereof.

49. Admits, upon information and belief, that the revenue share that would have been due to AP under the CSA never exceeded the monthly Minimum Fee due to AP thereunder, and, except as so admitted, denies the allegations contained in paragraph 49 of the complaint.

50. Admits that the statement quoted in the fourth sentence of paragraph 50 of the complaint (except for the bracketed word "AP") was contained in a May 6, 2010 e-mail from Jay

Tuten of AP, and, except as so admitted, denies the allegations contained in paragraph 50 of the complaint.

51. Denies the allegations contained in paragraph 51 of the complaint.

52. Denies the allegations contained in paragraph 52 of the complaint.

53. Denies the allegations contained in paragraph 53 of the complaint.

54. Denies the allegations contained in paragraph 54 of the complaint.

55. Denies the allegations contained in paragraph 55 of the complaint.

56. Admits that on or about March 26, 2010, AP, through its counsel Arnold & Porter LLP, filed a request for a Business Review Letter with the Antitrust Division at the U.S. Department of Justice, and that a true copy of that request appears as Exhibit B to the complaint, refers the Court to said document for the true contents thereof, and, except as so admitted, denies the allegations contained in paragraph 56 of the complaint.

57. Admits that the first quoted statement appears in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 57 of the complaint.

58. Admits that the quoted statements appear in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 58 of the complaint.

59. Admits that the quoted statements appear in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 59 of the complaint.

60. Admits that the quoted statements appear in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 60 of the complaint.

61. Admits that the quoted statements appear in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 61 of the complaint.

62. Admits that the quoted statements appear in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 62 of the complaint.

63. Admits that the quoted statements appear in the Business Review Letter that is reproduced as Exhibit B, and, except as so admitted, denies the allegations contained in paragraph 63 of the complaint.

64. Denies the allegations contained in paragraph 64 of the complaint.

65. Denies the allegations contained in paragraph 65 of the complaint and refers the Court to Exhibit B for the true contents thereof.

66. Admits that Bruce Glover of AP made the statements quoted in paragraph 66 of the complaint (except for the bracketed material) in a September 14, 2010 e-mail to Srinandan Kasi of AP, and, except as so admitted, denies the allegations contained in that paragraph.

67. Admits that Srinandan Kasi of AP made the first quoted statement in paragraph 67 of the complaint in an e-mail, and that Bruce Glover AP forwarded that e-mail to iCopyright, and, except as so admitted, denies the allegations contained in that paragraph.

68. Admits that Bruce Glover of AP made the quoted statement in paragraph 68 of the



complaint an October 19, 2010 e-mail, and, except as so admitted, denies the allegations contained in that paragraph.

69. Admits that Bruce Glover of AP made the first and second quoted statement in paragraph 69 of the complaint in an October 19, 2010 e-mail, and that Tom Curley, CEO of AP, made the third quoted statement in that paragraph in a speech, and, except as so admitted, denies the allegations contained in that paragraph.

70. Admits that Jane Seagrave of AP made the quoted statement in paragraph 70 of the complaint in a November 3, 2010 e-mail, and, except as so admitted, denies the allegations contained in that paragraph.

71. Admits that Bruce Glover of AP made the quoted statement in paragraph 71 of the complaint in an e-mail dated November 15, 2010, and, except as so admitted, denies the allegations contained in paragraph 71 of the complaint

72. Denies the allegations contained in paragraph 72 of the complaint.

73. Admits that, on or about November 16, 2010, Alex Modelski, an attorney who stated that he was general counsel to iCopyright, sent an e-mail copy of a letter to Srinandan Kasi, Bruce Glover, and Jane Seagrave of AP, in which Mr. Modelski asserted that AP's termination of the CSA for material breach (non-payment of minimum fees due) by iCopyright was a "purported termination," that Exhibit C accurately reproduces that letter, and, except as so admitted, denies the allegations contained in paragraph 73 of the complaint and refers the Court to Exhibit C for the true contents thereof.

74. Admits that, on or about November 16, 2010, Andrew L. Deutsch, an outside attorney representing AP, sent a letter to Alex Modelski, that Exhibit D accurately reproduces that

letter, and, except as so admitted, denies the allegations contained in paragraph 74 of the complaint.

75. Admits that AP terminated the CSA for material breach by iCopyright (non-payment of minimum fees due) on November 15, 2010, that thereafter AP cancelled iCopyright's access to AP's content server and terminated the links between iCopyright tags previously applied to AP Hosted content and iCopyright's server, further admits that it may have been possible that due to the amount of time needed to implement the termination, that iCopyright tags were applied to some AP Hosted content after the date of the notice of termination, and, except as so admitted, denies the allegations contained in paragraph 75 of the complaint.

76. Denies the allegations contained in paragraph 76 of the complaint.

77. Admits that, on or about November 18, 2010, Andrew L. Deutsch, an outside attorney representing AP, received a copy of the letter from Charles Rule of Cadwalader Wickersham & Taft, that Exhibit E accurately reproduces that letter, that Mr. Deutsch responded to Mr. Rule by a letter which is accurately reproduced as Exhibit F to the complaint, and, except as so admitted, denies the allegations contained in paragraph 77 of the complaint and refers the Court to Exhibits E and F for the true contents thereof.

78. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third and fourth sentences of paragraph 78 of the complaint, and, except as so denied, denies the remaining allegations contained in that paragraph.

79. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in the second sentence of paragraph 79 of the complaint, and, except as so denied, denies the remaining allegations contained in that paragraph.

80. Admits that, on or about November 20, 2010, Tamar Y. Duvdevani, an outside

attorney for AP, received a copy of a letter from Charles Rule of Cadwalader Wickersham & Taft which is accurately reproduced as Exhibit G to the complaint, further admits that the phrase “*restored* iCopyright’s access privileges, not obliterate the tags themselves” (emphasis in original) appears in that letter, and, except as so admitted, denies the allegations contained in paragraph 80 of the complaint and refers the Court to Exhibit G for the true contents thereof.

81. Admits that, on or about November 20, 2010, Tamar Y. Duvdevani, an outside attorney for AP, sent a letter to Charles Rule of Cadwalader Wickersham & Taft which is accurately reproduced as Exhibit H to the complaint, and, except as so admitted, denies the allegations contained in paragraph 81 of the complaint and refers the Court to Exhibit H for the true contents thereof.

82. Repeats the admissions, denials, and averments contained in paragraphs 1 through 81 of this Answer as though fully set forth.

83. Admits that, prior to AP’s justified termination of the CSA for breach on or about November 15, 2010, the CSA was an enforceable agreement that imposed certain contractual conditions on AP, and, except as so admitted, denies the allegations contained in paragraph 83 of the complaint.

84. Denies the allegations contained in paragraph 84 of the complaint.

85. Denies the allegations contained in paragraph 85 of the complaint.

86. Repeats the admissions, denials, and averments contained in paragraphs 1 through 85 of this Answer as though fully set forth.

87. Denies the allegations contained in paragraph 87 of the complaint.

88. Denies the allegations contained in paragraph 88 of the complaint.

89. Denies the allegations contained in paragraph 89 of the complaint.

90. Neither admits nor denies the allegations contained in paragraph 90 of the complaint as it is an assertion of law and not a factual allegation.

#### **FIRST DEFENSE**

91. The complaint fails to state a claim upon which relief may be granted.

#### **SECOND DEFENSE**

92. The relief sought by iCopyright is barred by the doctrine of unclean hands.

#### **THIRD DEFENSE**

93. The relief sought by iCopyright is barred by the doctrine of laches.

#### **FOURTH DEFENSE**

94. iCopyright has failed to establish irreparable injury.

#### **FIFTH DEFENSE**

95. iCopyright's claims are barred by reason of its prior material breaches of the CSA.

WHEREFORE, Defendants AP and PA request that the Court enter judgment:

- A. Dismissing the complaint in its entirety with prejudice.
- B. Awarding Defendants the costs of this action, including, if available, a reasonable attorney's fee and interest as permitted by law.
- C. Granting such other and further relief as the Court may deem just and proper.

## **COUNTERCLAIM**

Counterclaimants Press Association, Inc. (“PA”) and The Associated Press (“AP”) (collectively, “AP”), by their attorneys, DLA Piper LLP (US), for their Counterclaim against Counterclaim Defendant iCopyright, Inc. (“iCopyright”) alleges as follows:

### **THE PARTIES**

1. AP is a not-for-profit membership corporation, organized under the laws of the State of New York, with its principal place of business located in New York, New York.. PA is a corporation incorporated under the laws of the state of New York, with its principal place of business located in New York, New York. PA is a wholly owned subsidiary of AP (AP and PA are referred to collectively herein as “AP”).

2. Upon information and belief, iCopyright is a corporation organized under the laws of the State of Washington with its principal place of business located in Seattle, Washington.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over the subject matter of this counterclaim pursuant to 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum of \$75,000, exclusive of costs and interest, and there is complete diversity of citizenship between the parties.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events giving rise to AP’s claim occurred in this district. In addition, the parties agreed in Section 9.4 of the Content Services Agreement dated April 15, 2008 (“CSA”) to submit any claim arising out of or related to the CSA to the exclusive jurisdiction and venue in the federal and state courts in New York, New York.

## FACTUAL ALLEGATIONS

5. AP and iCopyright entered into the CSA, with an effective date of April 15, 2008. The CSA had a stated term of three years from the effective date.

6. The CSA gave iCopyright the authority to issue certain licenses to reproduce individual stories from a segment of AP news known as AP Hosted News (“AP Hosted”). In return, AP agreed to add links or tags to AP Hosted stories. An Internet user could order such a license from iCopyright by clicking on a tag, which would take the user to the iCopyright website where the license transaction could be transacted.

7. AP also authorized iCopyright to enter into separate license agreements with AP Members, licensees and subscribers to “tag” AP content that appeared on those member and subscriber websites, and agreed to promote iCopyright as its preferred agent for managing the services set forth in Schedule C of the CSA to such AP Members, licensees, and subscribers.

8. AP also agreed to use commercially reasonable efforts to cooperate with iCopyright to ensure that the Service (as defined in the CSA) performed as contemplated, and to designate one or more AP employees to iCopyright for resolving open business and technical issues.

9. In return, iCopyright agreed to pay AP, on a monthly basis, the greater of (a) the share of monthly revenue allocated to AP under the CSA or (b) a Minimum Fee equal to \$15,000.

10. The Minimum Fee was required by the original CSA to increase to \$20,000 per month in the thirteenth month of the CSA and to \$30,000 per month beginning in the twenty-fifth month of the CSA.

11. The CSA did not prohibit either party from terminating the CSA on grounds of the other party's material breach of the contract, nor specify that the terminating party must provide any form of notice to the breaching party upon terminating the CSA for material breach.

12. The CSA did not provide any grace period to iCopyright for making the payments due to AP.

13. The CSA provided that, with one exception not relevant to this Counterclaim, the CSA could only be amended in a writing, signed by representatives of each of the parties.

14. Pursuant to this provision, AP and iCopyright agreed in a writing, signed by representatives of both parties, and effective as of March 15, 2009, to amend the CSA so as to maintain the Minimum Fee at \$15,000 per month for the remaining term of the CSA. Outside of that written and signed amendment, AP and iCopyright never entered into any other binding amendment of the CSA.

15. AP fully performed all the material obligations assumed by it in the CSA.

16. Starting in December 2009, iCopyright began failing to make its Minimum Fee payment to AP. Numerous e-mail notices and telephone calls reminding Andrew Elston of iCopyright that iCopyright was overdue in payment of the Minimum Fee were sent or made by AP starting in March 2010, and continuing thereafter until AP terminated the CSA for iCopyright's material breach.

17. Upon information and belief, in or about May 2010, iCopyright unilaterally decided to cease making Minimum Payments to AP despite the requirements of the CSA.

18. On October 14, 2010, AP sent an e-mail to Mr. Elston. This informed him that the total amount of Minimum Fees due to AP and unpaid by iCopyright was now \$130,500. It

also informed him that if payment was not received by October 19, 2010, AP would suspend service and the account would be forwarded for further collection or legal review.

19. On November 3, 2010, AP sent a further e-mail to Mr. Elston, stating, among other things, that (a) there was a very substantial amount past due from iCopyright and that AP's practice was to put such accounts into collection, and (c) if iCopyright wanted to make an offer in compromise, it should contact Bruce Glover of AP on or before November 12, 2010. Mr. Elston responded with a proposal, unacceptable to AP, which would have excused iCopyright from paying its arrearages and would have locked AP into a further extension of a contract with iCopyright.

20. Accordingly, on November 15, 2010, Bruce Glover of AP sent an e-mail notice to Mr. Elston, informing him that AP was terminating the CSA as of that date because of iCopyright's continuing failure to pay the amounts due AP under the CSA.

21. There is currently due from iCopyright to AP, and unpaid, the amount of \$137,236.62.

**FIRST CAUSE OF ACTION  
(Breach of Contract)**

22. AP repeats and realleges the allegations contained in paragraphs 1 through 20 of this Counterclaim as though fully set forth.

23. AP fully performed all of its material obligations of the CSA.

24. iCopyright breached the CSA by failing to pay to AP the monthly \$15,000 Minimum Fee as required by the CSA.

25. There is due and owing to AP from iCopyright, under the CSA, an unpaid balance of \$137,236.62, representing Minimum Fees due to AP, which iCopyright has failed and refused



to pay, despite due demand therefor.

26. AP is entitled to recover compensatory damages for such breach of contract, in an amount to be determined at trial, together with interest as permitted by law.

WHEREFORE, Counterclaimants request that the Court enter judgment in their favor, and against iCopyright, on the First Cause of Action of the Counterclaim:

- A. Determining that iCopyright has breached the Content Services Agreement by non-payment of Minimum Fees as required thereunder;
- B. Awarding to AP compensatory damages in an amount to be determined at trial, with interest as permitted by law;
- C. Awarding to AP the costs and expenses of this proceedings, and
- D. Awarding to AP such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Counterclaimants demand trial by jury for the cause of action asserted in this

Counterclaim.

Dated: New York, New York  
December 29, 2010

DLA PIPER LLP (US)

By:  \_\_\_\_\_

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