

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., : :

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Defendants The Associated Press ("AP") and Press Association, Inc. ("PA") (collectively "AP") respectfully submit this memorandum of law in opposition to the motion for a preliminary injunction of plaintiff iCopyright, Inc. ("iCopyright" or "Plaintiff").

INTRODUCTION

AP is the oldest and largest news agency in the world. For more than 100 years, AP has licensed other publications to republish its news to their own readers and viewers. As news content has become more widely published on the Internet, this has created risks for AP and other news producers (widespread unauthorized copying and other uncompensated uses of their news). But there is also the possibility that the Web can be used to profitably license news content to new customers and new technological platforms.

While AP has many years of licensing experience, some potential Internet licensing markets are too small or dispersed to be efficiently handled by AP sales personnel. In such cases, AP seeks to outsource the licensing of its content to outside companies. In April 2008, AP entered into a written Content Services Agreement ("CSA") with one such company, iCopyright. The CSA gave iCopyright the opportunity to license end users to reprint or republish individual stories from a segment of AP's web-based news content known as "AP Hosted News." AP would place iCopyright's hyperlink "tag" on individual news stories within the AP Hosted News product, and Internet users could order a license to reprint or republish a specific article by clicking on the tag. All that AP received in return for its grant of rights to iCopyright was iCopyright's contractual promise to pay AP a minimum fee of $15,000 every month, or (if it exceeded the minimum fee) a percentage of each month's licensing revenue.

AP performed its end of the bargain, tagging many tens of thousands of stories and other content with the iCopyright link. However, in March 2010, iCopyright, without explanation or

AP's consent, stopped paying the $15,000 monthly minimum fee due to AP. It ignored or evaded AP's demands for payment in the ensuing months. When it was clear that AP was about to terminate the CSA and seek legal collection of the money due it, iCopyright started to concoct claims that AP was the party breaching the contract. Finally, on November 15, 2010, when the unpaid amount exceeded $130,000, AP terminated the contract for non-payment, removed the iCopyright tags, and cut off iCopyright's access to AP content. Eight days later, iCopyright started this action.

iCopyright now demands that the Court disturb the status quo and enter a mandatory preliminary injunction. It wants the Court to resurrect the licensing contract which AP properly terminated for non-payment, compel AP to give iCopyright access to the AP Hosted feed, force AP to affix iCopyright tags to new AP Hosted content, and allow iCopyright to profit from licensing this content and associating itself with AP's prestige, *all while iCopyright continues to pay nothing in return.* Plaintiff's motion papers do not come close to showing entitlement to this drastic mandatory relief.

First, iCopyright fails to show a clear likelihood that it will succeed on its claim for contract breach, which is required for a mandatory injunction. iCopyright's non-payment of the Minimum Fee for many months was a material breach of the parties' contract, entitling AP to terminate the CSA and cease its own performance. AP's termination of the contract, ceasing to provide iCopyright with the AP feed, and removing iCopyright tags was legally justified, and not (as iCopyright now unconvincingly asserts) a breach of the CSA itself.

iCopyright's contentions that AP was somehow in breach of the contract before the termination are also entirely unsupported. The documentary record shows that AP affixed the iCopyright tags to AP Hosted News content, and provided commercially reasonable technical support, just as it had contractually promised. Until termination for non-payment loomed, iCopyright had found that performance acceptable and did not claim that AP was in breach. While there were some minor technical hiccups in the tagging system (as there are in performing almost every contract involving the use of computers), they had no material affect on iCopyright's ability to license AP Hosted content under the CSA.

The record also shows that AP kept its promise to promote iCopyright's services to AP members and subscribers. AP made it easy for iCopyright to enter into separate contracts with those publishers, instructed its bureau chiefs to facilitate iCopyright contacts with the publishers, and actively introduced iCopyright to major publishers and Internet portal owners. While iCopyright asserts that AP admitted that it had not promoted the iCopyright service, this claim is based on a deliberately truncated quote from an AP employee. In fact, iCopyright's current CEO and only Declarant, Andrew Elston, admitted at the time that AP had no obligation under the contract to promote iCopyright's services to particular AP customers.

Finally, there is no evidence to back up Mr. Elston's assertion that AP has received and misused confidential information or technology of iCopyright. No technology was transferred to AP by iCopyright under the CSA, and none is being used by AP today. Mr. Elston's claim that he recently discovered that AP is using iCopyright technology for a mysterious "Registry" is equally false. The AP News Registry is an ongoing initiative, which AP has sponsored but which other news publishers also participate in. It is designed to track where news content is going on the Web, and to develop technological means for expressing rights in that content that will attach to news stories, photos, etc., and travel with the content as it is republished and circulated on the Web. The AP News Registry uses none of iCopyright's alleged technology or information.

iCopyright also fails to show any irreparable injury. Its claim for contract breach, if successful, can be remedied by easily calculable money damages: the loss of licensing revenue from November 15, 2010 until April 15, 2011, when AP was entitled to terminate the CSA in any event. As iCopyright only earned about $2,000 from licensing AP content in the six months prior to termination, the loss of revenues for the following five months are likely to be quite small. The other forms of injury which Plaintiff asserts – loss of customers and reputation – is entirely speculative (backed only by Mr. Elston's "opinion"), and is in any event barred by iCopyright's agreement not to seek consequential damages for claims arising under the CSA.

iCopyright's claim that it will suffer great hardship from denial of a mandatory injunction is based on the same speculation. The balance of hardships, if relevant at all, strongly favors AP. The proposed injunction would force AP back into a relationship with an untrustworthy and debt-evading supplier. That supplier would be given the privilege to continue to license AP content without paying for that right, much less paying AP the more than $130,000 it already owes. Such an order would prevent AP from finding a more suitable licensing agent for this content. Lastly, as shown below, the injunction should be denied because iCopyright has unduly delayed in seeking judicial relief.

FACTUAL BACKGROUND

<u>The Content Services Agreement</u>

On April 15, 2008, AP and iCopyright entered into the CSA. (December 3, 2010 Declaration of Bruce Glover ("Glover Decl.") Ex. 4). This gave iCopyright the authority to issue certain licenses to reproduce or republish individual stories from a segment of on-line AP news known as AP Hosted News, which AP had tagged with a link to iCopyright's website. (Glover Decl. ¶ 21). Pursuant to the CSA, iCopyright was only authorized to issue a limited set of licenses: primarily instant licenses with automated pricing for e-mails, photocopies, excerpts, or reprints; customized licenses, for larger orders, again limited to paper or electronic reprints or certain limited republication rights; and some free uses that would carry advertising. (CSA Schedule C). iCopyright publicly acknowledged that this was not a broad license for all AP Internet content, but covered only certain limited reuses of AP Hosted News content. (Glover Decl., Ex. 2). AP entered into the CSA with iCopyright because it was more efficient from its perspective to outsource these small, one-off licensing requests than to handle them internally. (Glover Decl. ¶¶ 17-18). However, AP has relationships with other companies that license other kinds of AP content to different user markets, and AP itself handles its own licensing to its members and major subscribers. (Glover Decl. ¶ 15).

Under the CSA, AP agreed to affix iCopyright Tags to AP Hosted stories. These tags, which visually appears as logos, are actually hyperlinks to iCopyright servers. (Glover Decl. ¶ 23; December 2, 2010 Declaration of Todd Martin ("Martin Decl.") ¶ 9). Upon clicking on the logo/link, a user would be taken to the iCopyright.com website from which various license rights could be ordered. (*Id.*) AP and iCopyright both understood, from the beginning, that there could be technical difficulties with this system once in operation. Section 1.7 of the CSA provided that each party would use commercially reasonable efforts to cooperate to ensure that the iCopyright service performed as contemplated. (Glover Decl. ¶ 24).

Because iCopyright wanted AP members and subscribers to use iCopyright's licensing services for the content that the members and subscribers themselves created, AP also agreed in the CSA to "promote iCopyright as its preferred agent for managing the services set forth in Schedule C to such AP licensees, Members and websites." (CSA § 1.2). This did not mean that AP was required to sell iCopyright services to any particular member or subscriber, but rather meant that AP would ease the way so that iCopyright, using its own sales staff, could try to convince these AP members and subscribers to contract with iCopyright for licensing services. (Glover Decl. ¶ 36).

AP fully performed its obligations under the CSA. (Glover Decl. ¶¶ 31-41). It made its AP Hosted copy available to iCopyright and enabled the iCopyright tags. (Martin Decl. ¶ 10). While there were occasional technical problems with the links between AP Hosted articles and the iCopyright website, the parties recognized at the outset that such problems might occur. The contract thus stated that AP would provide "commercially reasonable" technical support. (CSA § 1.7). At most, the problem links affected no more than about 1% of the tagged AP Hosted content. (Martin Decl. ¶ 13). AP technical support personnel addressed these problems as they arose, and iCopyright acknowledged that AP was responsive to its concerns. (Glover Decl. ¶ 33; Martin Decl. ¶ 13).

AP also promoted iCopyright's services to AP members and subscribers, providing Plaintiff with unique access to AP members not given to other licensing vendors, and instructed AP bureau chiefs (the main liaisons with AP members) on how to inform members/subscribers of iCopyright's services. (Glover Decl. ¶¶ 36-37). AP actively sought to interest major AP customers such as USA Today and Yahoo! in iCopyright's services. (Glover Decl. ¶ 38). However, AP did not have any obligation to promote iCopyright to any particular customer. The current iCopyright CEO and its current Declarant, Andrew Elston, acknowledged this fact and recognized that it was iCopyright's responsibility, not AP's, to contact and conclude agreements with AP members and subscribers. (Glover Decl. ¶ 39); December 2, 2010 Declaration of Paul Colford ("Colford Decl.") ¶¶ 17-19)).

The only performance that AP was to receive from iCopyright, in return for allowing iCopyright exclusive rights to license AP Hosted content to this specified market, was payment of money. (Glover Decl. ¶ 27). The revenues earned from licensing were to be split as specified in Schedule B of the CSA. iCopyright was required to "pay AP, each month, a Minimum Fee equal to $15,000 ("Minimum Fee") or the total of all the revenue share due AP under the terms of this Agreement, whichever amount is greater." (CSA § 2.5). The Minimum Fee was supposed to increase after the thirteenth month of the contract. However, at iCopyright's insistence, AP agreed in the written and signed First Amendment to iCopyright Content Services Agreement, effective as of March 15, 2009, to modify this provision so that the "Minimum Fee owed by iCopyright shall not increase but remain flat at $15,000 per month." (Glover Decl. ¶ 29). AP never waived its right to receive the $15,000 monthly Minimum Fee on a timely basis or signed any agreement to that effect. (Glover Decl. ¶ 30). Indeed, iCopyright never earned enough licensing revenue for AP's revenue share in any month to exceed $15,000, so timely payment of the Minimum Fee was essential to AP. (Glover Decl. ¶ 70). Without that payment, there was no reason for AP to continue its relationship with iCopyright. (Glover Decl. ¶ 28).

<u>iCopyright Materially Breaches the Content Services Agreement</u>

Starting in March 2010, Plaintiff failed to pay AP the monthly $15,000 Minimum Fee due to AP. (Glover Decl. ¶¶ 43-44). It continued this default until AP terminated the CSA for breach. (*Id.* ¶¶ 46-48, 51-52). While Plaintiff now claims that it advised AP in early 2010 that iCopyright was going to suspend payment because AP was not performing, this is false. (Glover Decl. ¶ 49). In fact, in May 2010, iCopyright represented to AP that it would pay its arrears (*id.* ¶ 47), and when iCopyright was sent notices of the amounts due to AP, iCopyright did not claim that AP was in breach. Instead, Mr. Elston evaded the calls and e-mails of AP's accounting department, which was seeking to collect this ever-mounting debt. (Glover Decl. ¶ 51, Ex. 12). AP never told iCopyright that it would forgive iCopyright's debts to AP. (Glover Decl.¶ 49). Nor did it waive its entitlement to the Minimum Fee payments in writing, as the CSA required for any contract modification. (*Id.*).

Only in mid-October 2010, when AP informed Mr. Elston that it would have to suspend iCopyright and place its account in collection, did iCopyright begin making claims that AP was in breach. (Glover Decl. ¶ 52, 58).

AP Terminates the Content Services Agreement

AP terminated the CSA on November 15, 2010, because at that time Plaintiff had failed to pay AP the minimum due under the contract for many months, owed AP $130,000, and refused to make arrangements for payment of the overdue amount. (Glover Decl. ¶¶ 64-66). AP then ceased its own performance, removing iCopyright's tags from AP Hosted content and terminating iCopyright's access to AP's services. This process was completed before iCopyright filed its complaint and application for a temporary restraining order in this case. (Glover Decl. ¶ 67).

iCopyright's Misappropriation Claims and The AP News Registry

AP has not misappropriated any of Plaintiff's confidential information or technology. In fact, AP never received any such confidential information or technology from Plaintiff in performing under the CSA. (Martin Decl. ¶ 30). The technical process that AP followed was to affix hyperlink tags to AP Hosted stories, which then led to the iCopyright website. This work involved use of AP or third-party software, not any technology owned by iCopyright. (Martin Decl. ¶ 31).

Contrary to Plaintiff's speculative assertions, there is no connection between the termination of the CSA and the AP News Registry (the "News Registry"). (Martin Decl. ¶ 16). Ever since news publishers began to move content to the Internet in the mid-1990s, AP and other news providers have been concerned about the many unlicensed, uncompensated, and infringing uses made of that digital content. (Martin Decl. ¶ 17). Since the early 2000s, AP and other news providers have been considering various technological approaches that would meet three goals: (a) the ability to locate sites on the Web where news content is being used without permission; (b) developing efficient means of enforcing intellectual property rights where infringement is apparent; and (c) wherever possible, turning unlicensed republishers of news content into licensees, thereby stopping the loss of online revenue that has threatened the news business's viability, and making it possible to develop profitable new markets and platforms. (Martin Decl. ¶ 17).

AP has been a leader in this effort. (Martin Decl. ¶ 18). AP did not need iCopyright to teach it about the risks and revenue opportunities presented by Internet use of news content, or the need for new technological approaches. It knew about these issues, and began developing solutions, years before AP signed the CSA. (*Id.*). One of these solutions is the AP News Registry, which is a technological platform intended (among other things) to monitor and report on what news content is being published online by whom, when, where, and for how long, and to determine what rights and licensing rules are being followed (or not followed). (Martin Decl. ¶ 20). It involves creation of both (a) a database that which stores rights and usage information about news content published on the Web, and (b) a set of Web-based services, provided for a license fee, which defines and express the rights in specific news items. (*Id.*). Contrary to Plaintiff's insinuations, The News Registry is no secret. AP publicly announced its creation in April 2009, and the announcement was widely covered in the media; additional announcements about the News Registry have been made from time to time since then. (Martin Decl. ¶ 21).

iCopyright was aware of this initiative from its first announcement, and made many attempts, well into 2010, to offer its tools and services for use by the News Registry. (Martin Decl. ¶ 22-23). However, it never provided AP with any technology relevant to the News Registry. In fact, AP evaluated iCopyright's non-confidential description of its technology along with the offerings of iCopyright' competitors, and concluded that the services and tools of one competitor, Attributor, was better suited to the needs of the News Registry. (Martin Decl. ¶¶ 27-28).

ARGUMENT

PLAINTIFF FAILS TO SHOW ENTITLEMENT TO A MANDATORY INJUNCTION

A. The Standard For Awarding Mandatory Injunctive Relief

"A preliminary injunction is a 'drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Grillasca v. New York City Housing Auth.*, 09 Civ. 6392 (NRB), 2010 WL 1491806, at *6 (S.D.N.Y. April 7, 2010) (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)). Typically, a "preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits." *Mastrovincenzo v. City of New York,* 435 F.3d 78, 89 (2d Cir. 2006). Plaintiff contends that it needs only to satisfy the legal standards applicable to prohibitory injunctive relief. (Pl. Br. at 11-12).

Plaintiff is wrong. Its complaint was filed with the Clerk of the Court, and its papers in support of a temporary restraining order were delivered to this Court, on November 23, 2010. AP, however, terminated the CSA on November 15, 2010, notifying iCopyright by e-mail.

Almost immediately thereafter, AP removed the iCopyright tags from AP Hosted content and terminated iCopyright's access to the AP feed. (Glover Decl. ¶¶ 66, 67). On the day that iCopyright sued, it had been more than a week since the contract termination. The status quo was that iCopyright had no AP feed and its tags did not appear on AP Hosted content. That remains the status quo today.

Moreover, termination of the CSA was no surprise to iCopyright. It had ample prior notice that its continued refusal to pay money owed to AP would result in suspension and termination. By e-mail dated October 14, 2010, an AP collections manager informed iCopyright that it was deeply in arrears in paying the Minimum Fee owed to AP, and that unless payment was received, AP would suspend service and place the account in collection. (Glover Decl. Ex. 13). On November 2, 2010, Bruce Glover of AP telephoned Andrew Elston of iCopyright and informed him of an absolute deadline of November 12 to reach a settlement. (Glover Decl. ¶ 63).[1]

Plaintiff asks the Court to (a) resurrect the terminated contract, (b) force AP to tag its AP Hosted content with iCopyright tags, and (c) compel AP to provide iCopyright with access to the AP Hosted feed. Such an order would change, not preserve the status quo. Thus, the relief sought is a mandatory injunction, which "'orders an affirmative act or mandates a specified course of conduct.'" *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006) (quoting *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995)).

[1] As noted at Section E below, because Plaintiff did not seek legal relief during the time it claimed that AP was in breach of the contract, nor even when it knew AP was about to terminate the contract and iCopyright's service, its demand for mandatory relief is also barred on the separate grounds of inexcusable delay.

The standards for grant of a mandatory injunction are more stringent than those cited by Plaintiff. Specifically, a moving party "seek[ing] an injunction that will alter rather than maintain the status quo . . . must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits." *Doninger v. Niehoff,* 527 F.3d 41, 47 (2d Cir. 2008). The "status quo" is whatever the circumstances are at the time the Court considers the request for a preliminary injunction. *See, e.g.*, *Robinson v. Lindsay Park Housing Corp*., 00 CV 6305, 2001 WL 483493, at *10 (E.D.N.Y. May 8, 2001) ("After plaintiffs filed their proposed Order to Show Cause dated October 11, 2000 to enjoin their eviction, they were, in fact, removed from their apartment the following day, on October 12. Since plaintiffs' request, as it must now be read under these changed circumstances, seeks a 'mandatory' injunction restoring the apartment to their possession, they must meet a higher standard of proof.").

Here, the circumstances at the time the preliminary injunction motion was submitted to the Court were, and still are, no contract between AP and iCopyright, no AP Hosted feed, and no iCopyright tags on AP Hosted content. Because Plaintiff asks the Court to alter this status quo, it must show a clear likelihood of success on the merits, as well as the traditional requirements of irreparable injury and a favorable balance of hardships. As demonstrated below, it fails on all three fronts.

B. iCopyright Fails to Show a Clear Likelihood of Success

1. *iCopyright's Breach Of Contract Claims Fail*

iCopyright asserts that AP breached the CSA by (1) improperly terminating the CSA and then failing to perform after the improper termination; and (2) engaging in "numerous" other breaches, including alleged failure to institute iCopyright tags and tools on its website, and violating confidentiality provisions. (Pl. Br. at 18-20.) Plaintiff does not show *any* likelihood that it will win on these claims at trial, much less the clear likelihood required where mandatory preliminary relief is sought.

a. AP Properly Terminated The CSA Due To iCopyright's Nonpayment of Minimum Fees, Which Was a Material Breach

The outlines of the contract in this case are not complex. AP agreed to authorize iCopyright to license a segment of AP's news feed, AP Hosted Content, to users who wanted to make limited reprints or republication of specific AP news stories. The process would be automated by AP affixing iCopyright tags to news content delivered through the AP Hosted system. When a consumer clicked on a tag for a particular AP Article, he or she would be taken to the iCopyright website and could order a license to reproduce or republish the content under specified terms. (Glover Decl. ¶¶ 11-12, 23).

The *only* performance that AP was to receive from iCopyright, in return for allowing iCopyright exclusive rights to license AP Hosted content to this specified market, was payment of money. iCopyright was required to pay AP the greater of a monthly Minimum Fee of $15,000 or the total of all the revenue share due AP under the terms of the Agreement. (Glover Decl. ¶ 27, CSA, § 2.5). The Minimum Fee was intended to give AP assurance that it would receive some consideration in return for agreeing to contract with iCopyright and allowing iCopyright to leverage its AP relationship in seeking business from other publishers. iCopyright knowingly assumed the commercial risk that the licensing project would not be successful, and agreed to pay the Minimum Fee regardless of the licensing revenue it actually earned. Thus, payment of the Minimum Fee to AP was unquestionably a material condition of this contract. (Glover Decl. ¶ 28).

AP's Declarations and Exhibits show that iCopyright stopped paying the Minimum Fee in March 2010 (Glover Decl. ¶ 43, Ex. 8), that AP sent several e-mails requesting payment as the amounts due mounted (Glover Decl. ¶¶ 43-48, Exs. 9, 11), and that on May 7, 2010, Andrew Elston of iCopyright acknowledged that iCopyright owed this money and would pay it (Glover Decl. Ex. 10). However, no payment of Minimum Fees was forthcoming. Although Mr. Elston asserts that he told AP in May 2010 that iCopyright was suspending its payment of Minimum Fees and that AP acquiesced in this suspension, there is no documentary support for this assertion and Bruce Glover, the AP manager in charge of the iCopyright account, firmly denies it. (Glover Decl. ¶ 49).

In any event, there is no merit to iCopyright's assertions of an oral modification of the contract's payment provision. The CSA expressly provided that "[t]his Agreement can be amended only in writing . . . " (CSA § 9.9), and Plaintiff has produced no writing showing that AP agreed to relieve iCopyright from its obligation to pay.[2] The CSA is governed by New York law (CSA § 9.4), and contract provisions requiring that only written and signed changes to the contract will be binding on the parties are enforceable in New York. N.Y. Gen. Obl. Law § 15-301(1); *Southern Fed. Sav. and Loan Ass'n of Georgia v. 21-26 East 105th Street Assocs.*, 145 B.R. 375, 380 (S.D.N.Y. 1991).

iCopyright does not deny that as of November 15, 2010, it owed to AP, and had intentionally failed to pay, at least $130,000 in Minimum Fees. In fact, Mr. Elston admits that iCopyright unilaterally "decided in May 2010 that it would begin to pay only based upon the actual revenue share due AP under the revenue sharing arrangement in the CSA." (Elston Decl. ¶ 9.). Plaintiff thus admits that it materially breached the contract.

[2] In contrast, the parties entered into a written and signed agreement in March 2009 which limited the Minimum Fee, which otherwise would have increased later that year, to $15,000. (Glover Decl. Ex. 5).

iCopyright contends that because the CSA only mentions termination of the contract at the end of a three-year term, and does not expressly mention termination for breach, AP could not terminate before the three years were up, even for the most fundamental breach. (Pl. Br. at 17-18). The contention is ludicrous. In New York, as likely everywhere else in the world, the failure to make timely payment of monthly amounts due under a contract is a material breach, giving the other party the right to terminate the contract whether or not the contract mentions termination for non-payment. *See, e.g.*, *Awards.com v. Kinko's, Inc.*, 42 A.D 3d 178, 187, 834 N.Y.S.2d 147, 155 (1st Dep't 2007) (where "the monthly fee was the primary consideration under the agreement . . . .[a] party's default in payment . . . is routinely held to constitute a material breach, justifying contract termination"), *aff'd*, 14 N.Y.3d 791, 899 N.Y.S.2d 123 (2010); *Hooker v. Wooten*, 237 A.D.2d 572, 572, 655 N.Y.S.2d 955, 955 (2d Dep't 1997) ("The plaintiff's failure to make monthly installment payments to the defendant pursuant to their agreement constituted a material breach of the agreement. Therefore, the plaintiff is not entitled to an award of specific performance.").

In a similarly frivolous vein, Plaintiff contends that the notice and termination were ineffective because AP did not follow the notice procedures provided in the CSA. (Pl. Br. at 17). The law is otherwise. Unless a contract requires the non-breaching party to allow the breaching party an opportunity to cure the breach, or a grace period before making payments due, the non-breaching party can terminate for breach at any time. It has no duty to provide prior notice of the breach. For example, in *Awards.com v. Kinko's, Inc.*, the New York Court of Appeals held defendant's termination of the contract valid where (1) the failure to pay "monthly rent promptly was a material breach", (2) "the contract contained no provision for a grace period, and no requirement that Kinko's give notice of a breach and an opportunity to cure it"; and (3) "Kinko's did not waive its right to terminate." 14 N.Y.3d at 793, 899 N.Y.S.2d at 123-24. In fact, where a party has materially breached a contract, the non-breaching party is relieved of *all* of its contract obligations. *Millenium Expressions, Inc. v. Chauss Mktg, Ltd*., 02 Civ. 7545 (JCF), 2007 WL 950070, at *13, n. 8 (S.D.N.Y. Mar. 30, 2007) ("[T]he common law relieves a party of all its obligations under a contract when the other party has committed a material breach.") (internal citations omitted).

Here, the payment provision of the CSA (§ 2.5) required iCopyright to "pay AP, each month, a Minimum Fee equal to $15,000." As in *Awards.com*, this contract did not give iCopyright any grace period before it must pay, or require AP to give iCopyright a notice of breach and/or an opportunity to cure a material breach before terminating. As noted above, AP never waived its right to terminate the contract for non-payment. Moreover, the "Notices" provision of the CSA only compelled AP to deliver certified mail or overnight delivery notices for "[a]ll notices *required under this Agreement*." (§ 9.6; emphasis added). As the CSA did not require delivery of a notice where the contract was being terminated for breach, AP could notify iCopyight of termination of the contract by any means, including the November 15, 2010 e-mail that it actually sent. (Glover Ex. 17). Plaintiff's breach of contract claim, which is based upon the claim that AP wrongly terminated the contract or failed to perform after termination, thus fails as a matter of law.

b. iCopyright Has Not Clearly Shown That it Will Prevail On Its Claim that AP Breached the CSA

To avoid the consequences of its default, iCopyright argues that it was really AP that was in breach all along and that it was justified in not paying the Minimum Fee. This is the transparent excuse of a deadbeat. From March 2010, AP sent numerous dunning e-mails to Mr. Elston seeking payment of overdue amounts. (Glover Decl. Exs. 8-13). He made vague promises to pay the amount due in May 2010 (*id.* Ex. 10), but by August had stopped returning the phone calls and e-mails of AP's accounting department. (*Id.* Ex. 12). At no time did he claim that the money was not owed because AP was in breach of the CSA. Finally, on October 14, 2010, Ann-Marie Casale of AP's collections department warned Mr. Elston that if payment was not received shortly, "service will be suspended and your account will be forwarded for further collection efforts and or legal review." (*Id.* Ex. 13). It was only on October 21, 2010, when termination for non-payment loomed, that Mr. Elston for the first time claimed that iCopyright did not owe any money because AP "has not maintained nor promoted the tags according to the terms of our agreement." (*Id.*). And it was not until November 9, 2010, six days before AP terminated the CSA, that iCopyright first asserted that AP had somehow misappropriated its technology or software for use in the AP News Registry. (*Id.* Ex. 16).

In this Court, iCopyright repeats its excuse that its non-payment was justified by AP's prior material breach of the contract. But, outside of a few misleadingly truncated quotes and Mr. Elston's undocumented say-so, it provides no evidence to back these naked conclusions. This does not come close to the required demonstration of a clear likelihood of success on the merits.

iCopyright's "prior breach" claims fall into three categories. The first is an assertion that AP did not properly implement the iCopyright tags in AP Hosted content. There is only a sliver of truth in this claim. As shown in the Declaration of AP's Chief Technology Officer Todd Martin, the news content that AP provided and tagged with iCopyright tags came from AP's "Hosted" servers. AP first implemented the iCopyright tags on its legacy "Hosted 1" server system, then, in December 2008, began to also tag content delivered from its newer "Hosted 2" system. There were some technical difficulties with some iCopyright tags on content delivered from the Hosted 2 system; these did not always provide a working link to the AP story. (Martin Decl. ¶ 12). However, AP's contractual obligation under the CSA was to "use commercially reasonable efforts to cooperate to ensure that the Service performs as contemplated." (CSA § 1.7). As iCopyright brought these problems with Hosted 2 links to AP's attention, AP's technical personnel addressed and resolved them, as required by the CSA. (Martin Decl. ¶¶ 13, 15).

Moreover, this tagging problem affected at most only a tiny portion of the AP Hosted content which iCopyright was authorized to license. As of December 2008, when iCopyright tags were first implemented on Hosted 2, 99.9% of the entire traffic to the AP Hosted system ran through the legacy Hosted 1 servers, on which there was no tagging problem. (Martin Decl. ¶ 11). After December 2008, when both Hosted 1 and Hosted 2 were carrying iCopyright tags, no more than 10% of the entire AP Hosted traffic ran through the Hosted 2 servers. Of this Hosted 2 traffic, no more than 10% of the stories had iCopyright tag problems. Thus, at most, the tag implementation issue never affected more than about 1% of the total AP Hosted traffic which iCopyright was authorized to license. (Martin Decl. ¶ 13). This hardly qualifies as a material breach in performance.

Moreover, Mr. Elston himself recognized that AP was living up to its obligations to support the iCopyright tags, and that almost all the licensable traffic ran through the Hosted 1 system, where the tags were being properly implemented. For example, in July 2009, in an e-mail to AP, he said that "the main platform where the implementation was initially done [i.e., the Hosted 1 server] is working properly – and I assume this is where most of the customers are." (Martin Decl.¶ 13; Ex. 2). He was correct then; he is wrong now.

The second breach claim is that AP did not promote the iCopyright service as promised.

The CSA stated only that “AP agrees to promote iCopyright as its preferred agent for managing the [iCopyright service] to such AP licensees, Members and websites.” (CSA § 1.2). AP also fulfilled this commitment. As contemporary e-mails show, AP actively promoted iCopyright’s licensing services by (a) “pre-clearing” AP licensees, making it easy for them to participate in the iCopyright system (Glover Decl. ¶ 36), (b) encouraging AP’s regional vice-presidents and bureau chiefs (who have direct business contact with AP members and licensees) to explain the iCopyright system to customers (*id.* ¶ 37), and (c) although not required to do, introducing the iCopyright system to important AP customers such as Google, AOL, Yahoo!, the New York Times, and USA Today. (*Id.* ¶ 38 and Ex. 6).

Mr. Elston asserts that Paul Colford, who heads AP’s public relations effort, had made a public posting to a website in which “AP publicly declared that it ‘had not promoted the [iCopyright] service[s].’” (Elston Decl. ¶ 6). This truncated quote is grossly misleading. In fact, as Mr. Colford states in his Declaration, his posting was a correction to statements that the then-CEO of iCopyright had made to an industry publication. Because these statements concerned AP’s relationship with iCopyright, iCopyright’s CEO was acting in violation of the CSA (which required public announcements about the relationship to be “subject to prior mutual agreement.”) (CSA § 5.1). Moreover, iCopyright’s CEO wrongly asserted that the AP-iCopyright relationship had recently been expanded, that iCopyright could now sell rights to AP content “outright,” and that AP was talking to major media companies “to participate” in this allegedly expanded relationship. (Colford Decl. ¶ 10, Ex. 3).

Mr. Colford was rightly alarmed by this unauthorized interview, particularly when he learned that many of the iCopyright statements were inaccurate. He then sent an e-mail to Mr. Elston of iCopyright, telling him that AP would have to post a correction to the online publication. He advised Mr. Elston that the correction would say, among other things, that "AP has agreed to make the [iCopyright] service available to all its licensees – members and commercial customers – but *AP has not promoted the service to any particular customers.*" (Colford Decl. ¶ 14, Ex. 4) (emphasis added). It is the emphasized language that Mr. Elston has carefully trimmed down in his Declaration.

Far from complaining that this statement admitted a breach of AP's duty to promote, Mr. Elston approved it at the time. While he was unable to reach the company CEO, Mr. Elston proposed to provide a further corrective comment to the online story, in which he "echo[ed]" the statements in Mr. Colford's correction, and stated that "It is iCopyright's role, not the AP's, to get members and licensees to implement our licensing services according to the AP's terms." (Colford Decl. ¶ 17, Ex. 6). Later, when the iCopyright CEO was finally heard from, he also did not take issue with Mr. Colford's statement about promotion. (*Id* ¶ 18, Ex. 7).

The third claim of breach is the flimsiest of all. Mr. Elston asserts that AP somehow misappropriated "highly confidential and proprietary information, including revenue projections, business plans and intellectual property." (Elston Decl. ¶ 13). He does not provide a single example of this confidential information or intellectual property, nor attach a single document showing that it was given to AP or even exists. In reality, iCopyright never gave AP any software or other proprietary technology for purposes of performing under the CSA. AP used its own technicians and its own (or third-party) software, and standardized computer formatting language, in order to enable the iCopyright tags that were appended to AP Hosted news stories. (Martin Decl. ¶ 30).

Continuing in the realm of sheer speculation, Mr. Elson asserts that AP somehow attempted to replace iCopyright with a secretive product called "The Registry" and has been using iCopyright's confidential and proprietary information "in order to develop The Registry." The same conclusory statements are advanced in the Complaint to support a claim of unfair competition. (Complaint ¶¶ 87-88).[3]

There is nothing mysterious about the AP News Registry and no substance to the claim of unfair competition. AP has been concerned for many years about infringing and uncompensated use of news content on the Internet. Since the early 2000s, AP and other news providers have launched technological initiatives that would allow them to locate where on the Web news content is being used without permission or compensation, to enforce intellectual property rights against infringement, and to turn unlicensed republishers of news content into licensees. (Martin Decl. ¶ 17).

One of these initiatives is the AP News Registry. This was launched in April 2009, and Ap widely publicized the News Registry from from inception. The general concept of the News Registry has two parts: (a) creation of a database to store rights and usage information about AP and member content published on the Web, and (b) a set of Web-based services, provided for a license fee, which defines and expresses the rights in specific news items. (Martin Decl. ¶ 20). Since April 2009, AP has been working on this project, and deciding whether and how to use outside suppliers for portions of the technology, since the beginning of the project.

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[3] In fact, the unfair competition claim is duplicative of the breach of contract claim and should be dismissed when AP moves for that relief. The unfair competition complained of is that AP did not maintain iCopyright's alleged confidential information and technology as required by the CSA. (Complaint ¶ 87). Such duplicative claims are routinely dismissed. *See, e.g.*, *Washington v. Kellwood Co*., 05 Civ. 10034 (DAB), 2009 WL 855652, at *7-8 (S.D.N.Y. March 24, 2009); *Orange Cnty Choppers, Inc. v. Olaes Enters, Inc.*, 497 F. Supp. 2d 541, 558 (S.D.N.Y. 2007).

Mr. Elston disingenuously suggests that iCopyright did not know about the News Registry until March 2010. (Elston Decl. ¶ 11). In reality, iCopyright knew about the project as soon as it was announced, and eagerly sought to supply services to it. In April 2009, Mr. Elston, having seen a New York Times article announcing the launch of the News Registry, sent AP an e-mail seeking to become involved in the project. (Martin Decl. ¶ 22, Exs. 7-8). Shortly thereafter, in May 2009, iCopyright's CEO and directors (including a partner of its current litigation counsel) made a non-confidential presentation of the company's capacities to AP personnel involved in the News Registry Project. (*Id.* ¶ 23, Ex. 9). It did not, however, provide any technology to AP. AP ultimately decided that the tools offered by iCopyright were inadequate and not suitable for the needs of the News Registry. (*Id.* ¶ 27-28). Nonetheless, iCopyright persisted, well into 2010, in its attempts to to interest AP in using its services for purposes of the News Registry. (*Id.* ¶ 29).

In short, iCopyright cannot establish a clear likelihood of success on the merits of its claims, and preliminary relief should be denied on that ground alone.

C. iCopyright Has Failed To Demonstrate That It Will Suffer Irreparable Harm Absent Injunctive Relief

Plaintiff also fails to establish irreparable harm, the "single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.,* 559 F.3d 110, 118 (2d Cir. 2009). A preliminary injunction may not issue "based only on a possibility of irreparable harm," *Winter v. Natural Res. Def. Council,* 129 S. Ct. 365, 375 (2008). Moreover, preliminary injunctions should not issue where an adequate legal remedy exists, such as an award of money damages. *Moore v. Consolidated Edison Co. of New York, Inc.,* 409 F.3d 506, 510 (2d Cir. 2005).

Plaintiff fails to show that monetary damages would not be an adequate remedy for AP's alleged breach of contract. Even if iCopyright had not materially breached the CSA, AP would have been entitled to terminate that contract effective as of April 15, 2011, that is, five months after the November 15, 2010 termination for breach. (CSA § 3.1). Thus, Plaintiff's damages, if AP's November 15, 2010 termination were somehow found wrongful, can be easily calculated: it is equal to five months of licensing revenue. In the six months immediately preceding the termination, according to iCopyright's own records, the actual licensing revenue it earned from licensing AP Hosted content was apparently less than $2,000.00. (Glover Decl. ¶ 70, Exs. 18-19). iCopyright's loss of the opportunity to earn a similar *de minimis* sum in the five remaining months of the contract (had it not been terminated) hardly qualifies as harm, much less irreparable harm.

To inflate Plaintiff's irreparable injury claim, Mr. Elston makes several assertions of his "opinion": that by cancelling the contract, AP would cause other publishers, already under contract to iCopyright, to cease using iCopyright's services, and that this would somehow harm iCopyright's "reputation." (Elston Decl. ¶¶ 20-22). Not a whit of admissible evidence backs up Mr. Elston's opinion. As many court decisions hold, such unsupported assertions do not satisfy a movant's burden to show irreparable harm. *Miss Am. Org. v. Mattel, Inc.,* 945 F.2d 536, 545 (2d Cir. 1991); *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp*., No. 03-CV-8843 (LAP)(RME), 2010 WL 3155176, at *11 (S.D.N.Y. July 30, 2010) (plaintiff "must do more than provide conclusory statements to support a finding of irreparable harm."); *Limonium Mar., S.A. v. Mizushima Marinera, S.A.,* 961 F. Supp. 600, 611 (S.D.N.Y. 1997).

Moreover, iCopyright has expressly agreed that it will not assert claims for the types of "harm" asserted by Mr. Elston. The CSA states that neither party shall be liable to the other "for any indirect, incidental, special or consequential damages arising out of.. . . *any other claim under this Agreement*." (CSA § 7.2) (emphasis added). This limitation survives "any termination or expiration of this Agreement." (CSA § 9.2). The types of harm alleged by iCopyright, namely, loss of reputation and loss of customers from breach of contract, are classic consequential damages claims. Claims for those types of damages are barred by contract clauses that eliminate liability for consequential damages. *Int'l Gateway Exch., LLC v. Western Union Fin. Servs., Inc.*, 333 F. Supp. 2d 131, 149 (S.D.N.Y. 2004); *RIJ Pharm. Corp. v. Ivax Pharms., Inc.*, 322 F. Supp. 2d 406, 415 (S.D.N.Y. 2004).[4] In sum, Plaintiff has not, and cannot, show the irreparable harm required for a preliminary injunction.

D. iCopyright Has Failed To Demonstrate That The Balance of Hardships Tips In Its Favor

AP need not address where the balance of the hardships lies, given iCopyright's utter failure to demonstrate irreparable injury or the clear likelihood of success required for mandatory injunctions. *See, e.g., Bellamy v. Mount Vernon Hosp.*, 07 Civ. 1801 (SAS), 2009 WL 1835939, at *7 (S.D.N.Y. June 26, 2009) ("This Court need not address the balance of equities nor the public interest factors because Bellamy has not shown irreparable harm or a substantial

4 iCopyright's case authority for irreparable harm is clearly distinguishable or supports AP's position. In *CRP/Extell Parcel I, L.P. v. Cuomo*, 10-1929-cv, 2010 WL 3784214, at *3 (2d Cir. Sept. 30, 2010), the Second Circuit affirmed denial of a preliminary injunction, agreeing with the district court that the alleged irreparable harm was "based upon . . . purely speculative allegations." *Nat'l Elevator Cab & Door Corp. v. H&B, Inc.*, 07 CV 1562 (ERK)(RML), 2008 WL 207843, at *6 (E.D.N.Y. Jan. 24, 2008), granted an injunction prohibiting violation of a non-solicitation and non-compete agreement because it stipulated that money damages would not be sufficient in the event of a breach. No such clause exists in the CSA.

Nemer Jeep-Eagle, Inc. v. Jeep Eagle Sales Corp., 992 F.2d 430, 435 (2d Cir. 1993) and *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of New York, Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984) are both cited by iCopyright for the proposition that a threat to the continued existence of a business can constitute irreparable injury. (Pl. Br. at 13.) But here, there is no evidence that AP's termination of the CSA threatens the continued existence of iCopyright. The contrary would appear true: if all that iCopyright could earn from licensing AP's content in the last six months of the contract was about $2,000, AP is hardly essential to Plaintiff's business. Moreover, Plaintiff itself advertises that it has a wide range of publishers using its services other than AP. (Glover Decl. ¶ 71; Ex. 20). Finally, *Register.com v. Verio*, 356 F.3d 393, 404 (2d Cir. 2004) involved a plaintiff that, unlike iCopyright, showed that it was likely to succeed on its claims, as well as suffer irreparable harm.

likelihood of success on the merits.”). In any event, Plaintiff’s hardship argument also relies entirely on the speculations of its CEO that it will be “irrevocably damaged” absent an injunction. (Pl. Br. at 15-17.). These conclusions are no more sufficient to carry the day on hardship than they are on irreparable harm.

In any event, AP would unquestionably suffer a significant hardship if forced back into a licensing relationship with an untrustworthy and non-paying counter-party. It would bear the unrecoverable expense of reprogramming its computers and continuously tagging content, and would not be able to seek out other means of licensing its own news content that may prove more lucrative. In contrast, if no injunction is issued, Plaintiff will lose the opportunity to earn perhaps $2,000 in licensing revenue over the next five months. These facts speak for themselves.

E. iCopyright’s Inexcusable Delay In Seeking Relief Warrants Denial of Its Motion

Plaintiff’s demand for a mandatory injunction, and its assertion of irreparable harm, is also undermined by its long delay in seeking an injunction. As shown above, iCopyright knew from March 2010 onward that AP was demanding payment of overdue Minimum Fees, yet asserted no claim of prior breach by AP and sought no judicial relief. It was aware by early October of the likelihood that AP would suspend the service and terminate the contract for non-payment. This was over a month before the termination actually occurred. Yet, again, it sought no judicial relief until November 23, 2010, more than a week after AP had terminated the contract and the service. Plaintiff’s own deliberate inaction in the face of what it now calls a longstanding fundamental breach shows that it is not entitled to the drastic injunction that it seeks. “A delay [in moving for a mandatory preliminary injunction], even if it does not rise to the level of laches, demonstrates a lack of need for speedy action.” *Lanvin Inc. v. Colonia, Inc.*, 739 F. Supp. 182, 192 (S.D.N.Y. 1990); *see also All New York Auto Corp. v. Renault, Inc.*, 19 Misc. 2d 790, 792, 190 N.Y.S.2d 410, 412-13 (Sup. Ct. 1959) ("While claimed laches may not defeat the action, it is fair to say that plaintiffs, having full knowledge of the situation in January of this year since which time intervening rights have arisen, have awaited the summer months and too long to support a claim of right to temporary mandatory relief so drastic.").

CONCLUSION

For the reasons stated above, the Court should deny Plaintiff's motion for preliminary injunction in its entirety.

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