ASSOCIATED PRESS V. MELTWATER US HOLDINGS, INC.: FAIR USE, A CHANGING NEWS INDUSTRY, AND THE INFLUENCE OF JUDICIAL DISCRETION AND CUSTOM

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> I'm very aware of how much we're hurting, Margaret. Staff reductions, dip in circulation. Each one of those faces of every subscriber we lose; they keep me awake at night. Now, I won't argue the business side of things. It's neither my place nor my area of expertise, but know this: Zoe Barnes, twitter, blogs, enriched media, they're all surface. They're fads. They're not the foundation this paper was built on, and they won't keep it alive. We have a core readership that thirsts for hard news. *Those* are the people I work 80 hours a week for. I won't be distracted by what's fashionable.[1]

In *House of Cards,* these are the parting words of a seasoned newspaper editor and, though fictional, they ring true. Increasingly, digital media redirects readership and revenue from traditional print sources by competing for eyeballs and, as a result, advertising revenue. New market relationships accompany new media forms, and in the case of news aggregation, the relationship between content producers, advertising revenue, and the various means of hosting the information is still in flux. In the information age, with unprecedented interconnectivity, how and why should we fund information and its sources? How much should we privilege the preservation of hard news content over the fluidity of the new media environment or vice versa?

Customary arrangements present one way to determine the legality of aggregators' use of news excerpts. Since before Ghen's lance was found in a beached whale,[2] courts and theorists have grappled with how best to incorporate custom into the law, and today is no different. In 1992, Professor Richard Epstein observed that, although custom could establish industry norms, the courts were necessary to enforce them.

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1. *House of Cards: Season 1 Episode 5,* NETFLIX (Netflix Original Series Feb. 1, 2013).

2. *See* Ghen v. Rich, 8 F. 159, 160 (Mass. 1881) (deferring to local custom and awarding ownership of the blubber from a beached whale to the hunter who killed it).

> [D]ecentralized customs may be generated without legal interference and control, but legal force may be necessary to maintain them against systematic defection. Indeed, the entire debate over whether some level of coercion is required first to form, and then to maintain, the state rests in part upon the common (dare one say customary) perception that purely private agreements will break down in the face of opportunistic behavior.[3]

According to Professor Epstein, government support and intervention is necessary to stem opportunistic behavior.[4]

However, what happens when a court is enforcing custom at the very moment that custom is emerging or in an industry that engages in preventive licensing to avoid litigation? The tenuous relationship between custom observation and creation is notably present in the realm of copyright. A number of scholars have highlighted a circularity problem at the intersection of customary licensing markets and the fair use factors.[5] Licensing

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3. Richard A. Epstein, International News Service v. Associated Press*: Custom and Law As Sources of Property Rights in News,* 78 VA. L. REV. 85, 127 (1992).

4. *Id.* at 127–28. Professor Epstein considers nominal governmental intervention a necessary element for successful private ordering:

> In many instances, these customs were able to form only because the government had supplied industry with the essential protection against external aggression that it needed to survive and flourish. . . . [W]hat works as a protected mechanism within a limited sphere may not work as an unprotected one in an unbounded domain.

Id.

5. For a discussion as to how the relationship between fair use and licensing markets may be problematic, causing a contraction of fair use, see Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1911, 1931, 1935 (2007); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007); Matthew Africa, Comment, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1160–62, 1164 (2000); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 38–41 (1997); Christina Bohannan*, Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 975, 977, 978 (2007). The fair use factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2012).

agreements meant to avoid litigation in uncertain areas of law serve as *evidence* of an existing market, and the once-prophylactic licensing schemes become mandated by law.[6] Jennifer Rothman identifies three components that make up the "circularity" issue in licensing and fair use: (1) there is a problematic creation of "clearance cultures" across the content industries in order to avoid litigation, (2) courts use the "clearance culture" to inform the nature of the use and market effect in a fair use analysis, and (3) courts, relying on licensing agreements to analyze market harm, fall into a "dangerous circularity," in which licensing practices that were originally employed to mitigate litigation risk are codified into existing law.[7]

In the news industry, the combination of a struggling traditional print business and new aggregating technologies have made custom a hammer for the news content producers to shape the emerging aggregator licensing market via both hot news and fair use. For the past decade or so, traditional print newspapers and newswire services have attempted to recapture lost advertising dollars from news aggregators[8] through the so-called "hot news" action, which provides news producers with a temporary right of exclusive publication of the content of news stories.[9]

Today, *Associated Press v. Meltwater U.S. Holdings, Inc.*, in a decision focusing on the eligibility of a news aggregator for the fair use defense, is a new variation on the news industry's use of legal recourse, via copyright, to affect digital media licensing custom and practice.[10] Meltwater U.S. Holdings, Inc. ("Meltwater") is a "software as a service" company based in Norway that markets its keyword-based news-monitoring service to public relations professionals.[11] The company uses automated programs to scrape news articles, most often from the website of newsgathering organization Associated Press ("AP"), and then delivers the resulting headlines, so-called "ledes,"[12] and article excerpts, sometimes verbatim, to the customer's e-mail

6. For a detailed account of the relationship between preventative licensing practices in the content industry and the contraction of fair use, see Rothman, *supra* note 5, at 1911, 1931, 1935; Gibson, *supra* note 5, at 884.

7. Rothman, *supra* note 5, at 1911, 1931, 1935.

8. *See infra* Section I.A.3 (discussing recent hot news and fair use actions brought against news aggregators and search engines as well as subsequent settlements); Section I.B.1 (detailing the resurgence of the hot news doctrine and its application in the news industry).

9. *See infra* Section I.B.1.

10. *See* Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 543 (S.D.N.Y 2013).

11. *Id.* at 543.

12. *Id.* at 541. A "lede," the first line of an article, conveys the main idea of a news story.

inbox.[13] Meltwater outcompeted AP software-as-a-service licensees for several mega-contracts.[14] In other words, there was a preexisting, customary licensing market for the court to consider in its fair use analysis.

In a perhaps unexpected contraction of fair use,[15] the Southern District of New York found that Meltwater's use of ledes, as well as its copying of article portions, violated Associated Press's copyright and did not qualify for the fair use defense.[16] The parties subsequently settled the case, insulating the court's rejection of the fair use defense from appellate review and establishing a licensing relationship between the companies.[17] The *Meltwater* case, in addition to defining the boundaries of the fair use doctrine in the context of novel information aggregation technology, provides a case study as content industries continually adopt new customary licensing schemes to maintain revenue streams within a changing media landscape. This Note argues that AP, in bringing the *Meltwater* action, may have been attempting enforcement, and even creation, of custom in order to maintain its income. After a resurgence of the "hot news" cause of action in recent years,[18] AP's strategic litigation and licensing settlement, following a favorable fair use ruling, illustrates how news wire services are turning to copyright law to shape licensing custom in the Internet Age.

Part I of this Note traces the arc of the news industry before and after the digital revolution, as well as the relevant "hot news" and fair use issues affecting the news industry. This Part shows that competition for advertising poses the greatest challenge to traditional news companies, focusing on increasing attempts by AP and other content producers to maintain control of their content online. Part II introduces the facts and reasoning of the *Meltwater* decision. Part III analyzes the resulting decision in light of the judicial discretion that pervades fair use determinations, as well as the circularity problems posed by an emerging licensing market. Specifically, it discusses how courts lack consistency in their treatment of the fair use

13. *Id.* at 543.

14. *Id.* at 543.

15. *See* Meng Ding, Note, Perfect 10, Inc. v. Amazon.com*: A Step Toward Copyright's Tort Law Roots*, 23 BERKELEY TECH. L.J. 373, 378–79 (2008) (predicting that "[f]or the foreseeable future, the courts will most likely stick to the liberal reading of the four factors in deciding copyright fair use cases").

16. *Meltwater*, 931 F. Supp. 2d at 537–38.

17. *See* Joe Mullin, *AP Settles Copyright Suit With PR Firm After Winning Fair Use Ruling*, ARS TECHNICA (Jan. 24, 2014, 9:10 AM), http://arstechnica.com/tech-policy/2013/07/ap-settles-lawsuit-with-pr-company-after-winning-key-fair-use-ruling/.

18. *See, e.g.*, Barclays Capital, Inc. et al. v. TheFlyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011); *see also* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

doctrine,[19] a phenomenon often explained as an ex post facto technical analysis or as a predictable outcome in the context of "policy-relevant clustering," a term coined by Professor Pamela Samuelson.[20] Regardless of the technical aspects of *Meltwater*'s fair use analysis, the relationship between customary licensing markets and fair use casts a pall on the finding that the fair use defense was unavailable to Meltwater. As a case of first impression in a still-forming market, we may be leaving important technology issues to an antiquated system plagued by doctrinal feedback, whereas thoughtful policy decisions would be a far better fit.

I. BACKGROUND

A. NEWSPAPER INDUSTRY

The news industry, faced with declining advertising revenue from its traditional print form, has struggled to find alternative sources of revenue. This Section provides an overview of recent trends in advertising in the traditional print news industry, as well as several possible future developments. The licensing settlement between AP and Meltwater provides one possible solution: licensing revenue from aggregators could be a means by which the news industry attempts to regain lost advertising income.

1. Past and Present

The news industry is in a state of flux, and advertisers and aggregators, in various ways, play a central role. The decline in journalism's profitability cannot be wholly attributed to the rise of online competition for readership; it was already suffering before the mid-1990s, with media companies underperforming the Standard and Poor's 500 starting in the mid-1980s.[21] However, the recent decline in advertising revenue is a direct result of the relationship between digital media and increased competition for advertisers' dollars. Declining advertising dollars for traditional printed periodicals have given rise to a business model in which subscription revenue accounts for

19. *See infra* Sections III.A.1, III.A.2.

20. *See, e.g.*, David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, LAW & CONTEMP. PROBS., Winter/Spring 2003 at 263, 280 (arguing that the fair use factors are used as an ex post facto justification, rather than as a test to determine outcome); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) (characterizing fair use outcomes as predictable and consistent by categorizing them according to policy concerns).

21. *See* Bruce C. Greenwald et al., *The Moguls' New Clothes*, THE ATLANTIC (Oct. 2009), *available at* http://www.theatlantic.com/doc/200910/moguls.

nearly half of profits.[22] From 1960 to 1994, daily print newspaper circulation hovered around sixty million, declining to forty million in 2011.[23] Advertising revenue has long been in decline, and gains in 2012 of 3.7 percent in online advertising, which now accounts for fifteen percent of total advertising revenue, is insufficient to change that trajectory.[24] The rate at which print advertising revenue is declining is greater than the rate at which digital newspaper advertising revenue is increasing.[25] This is partly because the high volume of digital advertising opportunities on such platforms as Facebook and Twitter lowers the prices advertisers are willing to pay.[26]

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22. *See* Pew Project for Excellence in Journalism, *Overview*, THE STATE OF THE NEWS MEDIA 2013: AN ANNUAL REPORT ON AMERICAN JOURNALISM, http://stateofthemedia.org/2013/overview-5/ [hereinafter *State of the News Media, Overview*]. Pew details the decline in newspapers both in terms of the cutbacks and redirected advertising revenue:

> Estimates for newspaper newsroom cutbacks in 2012 put the industry down 30% since 2000 and below 40,000 full-time professional employee for the first time since 1978. . . . Over all, mobile advertising grew 80% in 2012 to $2.6 billion. Of that, however, only one ad segment is available to news: display. While mobile display is growing rapidly, 72% of that market goes to just six companies—including Facebook, which didn't even create its first mobile ad product until mid-2012. . . . Thanks in good part to its two-year-old digital subscription program, The New York Times reports that its circulation revenue now exceeds its advertising revenue, a sea change from the traditional revenue split of as much as 80% advertising dollars to 20% circulation dollars. Going forward, many news executives believe that a new business model will emerge in which the mix between advertising and circulation revenue will be close to equal, most likely with a third leg of new revenues that are not tied directly to the news product.

Id.

23. *See Newspaper Circulation Volume*, NEWSPAPER ASS'N OF AMERICA (Sept. 4, 2012), http://www.naa.org/Trends-and-Numbers/Circulation-Volume/Newspaper-Circulation-Volume.aspx.

24. *See* Rick Edmonds et al., Pew Project for Excellence in Journalism, *Newspapers: By The Numbers*, THE STATE OF THE NEWS MEDIA 2013: AN ANNUAL REPORT ON AMERICAN JOURNALISM, http://stateofthemedia.org/2013/newspapers-stabilizing-but-still-threatened/newspapers-by-the-numbers/ [hereinafter *Newspapers: By the Numbers*] (showing that total advertising revenue declined from $46,155 in 2003 to $22,314 in 2012).

25. *See id.* ("Print advertising losses continue to far exceed digital ad gains. For 2012, the ratio was about 15 print dollars lost for every digital dollar gained—even worse than the 10 to 1 ratio in 2011.").

26. *See* Rick Edmonds et al., Pew Project for Excellence in Journalism, *Newspapers: Stabilizing, But Still Threatened*, THE STATE OF THE NEWS MEDIA 2013: AN ANNUAL REPORT ON AMERICAN JOURNALISM, http://stateofthemedia.org/2013/newspapers-stabilizing-but-still-threatened/ [hereinafter *Newspapers: Stabilizing but Still Threatened*].

The decline in advertising revenue is important because journalism has never subsisted on subscription fees alone; historically, the newspaper industry relied heavily on various forms of subsidies, whereas in recent decades, ads accounted for approximately eighty percent of profits.[27] The postal service, which enabled the distribution of newspapers, developed under Benjamin Franklin with significant government subsidy.[28] These early government subsidies for newspapers included the president's designation of an "official" Washington newspaper, which awarded lucrative government printing contracts; similar designation and subsidies from the House and Senate; and funding from political parties.[29] Towards the end of the nineteenth century, the rise of advertising, as well as increasing demand for newspapers, ended the period of subsidization and marked the beginning of a period of commercialization.[30] In fact, the average number of daily newspapers in medium or large U.S. cities peaked in 1910 before falling below Civil War numbers by approximately one third by 1930 and continuing to decline until the present.[31] In some countries, however, such subsidization continues: if the United States were to replicate the per capita rates of Sweden and Norway, today's subsidies would be $2 billion and $4 billion, respectively.[32] Although this sort of subsidization could threaten the existence of an independent press, the private ownership of newspapers also presents similar issues of financial relationships influencing reporting.

The rise in digital advertising revenue does not compensate for the overall losses papers have incurred for one reason: the money is going elsewhere. The competition for digital advertising revenue takes place in the interstices of news aggregators, licensed and otherwise, with Google as the lead player in the field.[33] The negative impact of free online classified services

27. *See* Jon Leibowitz, Chairman and Comm'r of the Fed. Trade Comm., Opening Remarks at the Federal Trade Commission News Media Workshop: "Creative Destruction" or Just "Destruction" How Will Journalism Survive the Internet Age? (Dec. 1, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/091201newsmedia.pdf.

28. *See* ROBERT MCCHESNEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM 127–28 (2011).

29. *See id.*

30. *See id.* at 133.

31. *See id.* at 272. This data measured papers in U.S. cities ranked three through twelve for population size. The average number of papers per city was as follows: twelve in 1910, about 7.5 in 1930, and a bit more than 1.5 in 2008.

32. *See id.* at 167.

33. *See* Jane Sasseen et al., Pew Project for Excellence in Journalism, *Digital: As Mobile Grows Rapidly, the Pressures on News Intensify*, THE STATE OF THE NEWS MEDIA 2013: AN

such as Craigslist on advertising revenue is separable from that of other types of newspaper advertising, and both are significant.[34] From 2003 to 2012, overall news outlet advertising revenue declined from $46.2 billion to $22.3 billion, while the portion resulting from online advertising revenue actually rose from $1.2 billion to $3.4 billion.[35] Interestingly, the current lists of print and digital newspapers with the highest numbers of subscribers are similar; three entities are among the top five in both categories.[36] In both cases, however, print circulation still dwarfs unique digital subscriptions.[37] To compare, as of September 2012, the number of *The Wall Street Journal* and *The New York Times* users with solely digital subscriptions were 794,593 and 883,263, respectively, while their total circulations are 2,293,798 and 1,613,865, respectively.[38]

2. The Future of Newspapers?

There is no widespread consensus regarding the future profitability of traditional print media or the changes the industry should embrace. One strategy employed by *The New York Times* was shifting to a paywall,[39] which reduces online traffic and therefore advertising revenue.[40] Pew Research Center considers the shift to paid content desirable and the most promising strategy for supporting the news industry in the future.[41] With the backdrop of declining circulation, papers have turned to various means of

ANNUAL REPORT ON AMERICAN JOURNALISM, http://stateofthemedia.org/2013/digital-as-mobile-grows-rapidly-the-pressures-on-news-intensify/.

34. *See Newspapers: By the Numbers*, *supra* note 24 (noting that from 2003 to 2012, total print revenue from classified advertisements dropped from over $15 billion to less than $5 billion, while national advertising fell from approximately $7 billion to less than $5 billion, and retail advertising declined from over $20 billion to slightly over $10 billion).

35. *See id.*

36. *See id.* As of September 2012, the top five newspapers with paid digital subscriptions were *The New York Times*, *The Wall Street Journal*, *The New York Post*, *Denver Post*, and *The Los Angeles Times*, in that order. The top five daily print papers is a similar list: *The Wall Street Journal*, *USA Today*, *The New York Times*, *The Los Angeles Times*, and the *New York Daily News*.

37. Unique digital subscriptions are tabulated separately from the digital subscriptions automatically granted to home-delivery subscribers. *See id.*

38. These figures are notable given that *The New York Times* only started offering digital subscriptions in 2011. *See id.*

39. A "paywall" functions by providing website access to subscribers, while limiting or blocking access for other users. *See* Ryan Chittum, *The NYT's $150 million-a-year paywall*, COLUMBIA JOURNALISM REVIEW (Aug. 1, 2013), *available at* http://www.cjr.org/the_audit/the_nyts_150_million-a-year_pa.php.

40. *See id.*

41. *See Newspapers: Stabilizing but Still Threatened*, *supra* note 26.

monetization: paywalls, partial paywalls (permission of "casual traffic" rather than a complete paywall), and offering free digital access to print subscribers.[42] As newspapers expand to mobile readers, advertising revenue has proven anemic or nonexistent, possibly because advertisers prefer to place targeted advertisements on social media websites and search engines, rather than alongside news stories.[43]

Another recent trend is entrepreneurs' investing in traditional print journalism. In 2012, Berkshire Hathaway acquired Media General, Inc.'s newspapers, Warren Buffet's hometown papers, and several others,[44] totaling twenty-five in circulation, for $142 million.[45] In 2013, Jeff Bezos of Amazon.com, Inc. bought *The Washington Post*, and Chris Hughes of Facebook, Inc. bought *The New Republic*.[46] Ebay, Inc. founder Pierre M. Omidyar, after backing multiple organizations relating to news and governmental transparency, will be collaborating with Glenn Greenwald to create "a large, general-interest news site with a focus on investigative and government accountability reporting."[47] Omidyar expressed doubt that news on its own could ever be profitable.[48]

Predictably, those concerned with preservation of the traditional newspaper industry include journalists themselves.[49] President Obama has voiced alarm about the direction of the news industry:

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42. *See id.*

43. *See id.*

44. *See* Jennifer Saba & Ben Berkowitz, *Warren Buffett to buy Media General Newspapers*, REUTERS, May 17, 2012, *available at* http://www.reuters.com/article/2012/05/17/us-mediageneral-idUSBRE84G0M920120517.

45. *See id.*

46. *See* Renee Montagne & Steve Inskeep, *eBay Founder Explains His Venture Into Journalism*, NPR (Oct. 21, 2013, 4:00 AM), http://www.npr.org/templates/story/story.php?storyId=240428476.

47. *See* David Carr, *An Interview with Pierre Omidyar*, N.Y. TIMES, Oct. 20, 2013, http://www.nytimes.com/2013/10/21/business/media/an-interview-with-pierre-omidyar.html.

48. When asked whether the news industry could ever be profitable, Omidyar explained:

> I think on its own, probably not. . . . The audience for the most important stories can be depressingly small. There will always be a core of readers willing to support that work, but it is a tiny, tiny percentage of broader society. That's part of the reason we are doing a general-interest site, to work on how we get a general-interest audience to become engaged citizens.

Id.

49. *See* MCCHESNEY & NICHOLS, *supra* note 28, at xv; *see also* BRUCE A. WILLIAMS & MICHAEL X. DELLI CARPINI, AFTER BROADCAST NEWS: MEDIA REGIMES, DEMOCRACY,

> I am concerned that if the direction of the news is all blogosphere, all opinions, with no serious fact-checking, no serious attempts to put stories in context, that what you will end up getting is people shouting at each other across the void but not a lot of mutual understanding.[50]

Even Seventh Circuit Judge Richard Posner has dedicated multiple blog posts to the topic.[51] Proponents of traditional news media emphasize a link between journalism and democracy-enabling public discourse.[52] Suggestions for reviving the industry include government subsidies,[53] or, more amorphously, novel media platforms incorporating traditional journalistic standards.[54] Some advocates favor "democratization" of news through aggregation and similar search-enabling uses, possibly through a lax "hot news" or broad fair use application. Organizations favoring such policies include Electronic Frontier Foundation ("EFF") and digital media companies that rely on aggregation and advertising, such as Google.[55]

AND THE NEW INFORMATION ENVIRONMENT 1–15 (2011); PAGE ONE: INSIDE THE NEW YORK TIMES AND THE FUTURE OF JOURNALISM ix-xvi (David Folkenflik ed., 2011); JACK FULLER, WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM ix–12 (2010); NEIL HENRY, AMERICAN CARNIVAL: JOURNALISM UNDER SIEGE IN AN AGE OF NEW MEDIA 1–18 (2007).

50. Michael O'Brien, *Obama Open to Newspaper Bailout*, THE HILL (Sept. 20, 2009, 8:24 PM), http://thehill.com/blogs/blog-briefing-room/news/59523-obama-open-to-newspaper-bailout-bill.

51. *See* Richard Posner, *The Future of Newspapers*, THE BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html; Richard Posner, *Are Newspapers Doomed?,* THE BECKER-POSNER BLOG (June 29, 2008, 2:07 PM), http://www.becker-posner-blog.com/2008/06/are-newspapers-doomed--posner.html.

52. *See* MCCHESNEY & NICHOLS, *supra* note 28, at ix.

53. *See id.* at 157–212.

54. *See* WILLIAMS & DELLI CARPINI, *supra* note 49, at 324–26.

55. *See, e.g.*, Brief for Electronic Frontier Foundation and Public Knowledge as Amici Curiae Supporting of Defendant's Opposition to Motion for Summary Judgment at 2, 6, 8, 13, Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537 (S.D.N.Y 2013) (No. 2:12-cv-1087-DLC-FM) (arguing against an expressiveness requirement for transformative use and recommending that the court give strong weight to public interest). EFF expressed concern that a finding of infringement for a news aggregator could render inventors liable, "undermine legal protections for personal non-expressive copying," as well as "undermine the sharing of news snippets by private citizens." *Id.* at 9; *see also* Google, *Comments on Federal Trade Commission's News Media Workshop and Staff Discussion Draft on "Potential Policy Recommendations to Support the Reinvention of Journalism"*, FED. TRADE COMM'N: MEDIA WORKSHOP, at 20 (July 20, 2010) *available at* http://www.ftc.gov/sites/default/files/documents/public_comments/2010/07/544505-05218-55014.pdf (recommending ways in which content producers should collaborate with Google and other aggregators and search engines as a means of extracting novel revenue).

3. Newspapers Take a Direct Approach To Shaping Licensing Markets

The combination of legal settlements resulting in licensing schemes and concerted efforts by AP to track and litigate unlicensed uses of articles suggests that traditional media is taking an active role in shaping the emerging aggregator licensing market.

In 2005, Agencies France-Presse ("AFP") filed suit against Google News for displaying AFP's headlines and photographs its search results.[56] In 2007, the parties settled, establishing a licensing agreement that permitted Google to index the articles in Google News, presumably for a fee.[57] Shortly thereafter, Samuel Zell, then the owner of the *Chicago Tribune*, announced he wanted similar licensing fees from Google.[58] In October 2007, after sending a cease-and-desist letter, AP sued news aggregator Moreover Technologies for copyright infringement.[59] Moreover's services included providing links to customers, like British Broadcasting Corporation ("BBC") that they could publish alongside relevant articles, maintaining a Google News-like database and hosting unlicensed AP articles on sites alongside advertisements.[60] The case settled on undisclosed terms.[61] Although the terms of the settlement were confidential, Moreover's continued news services suggest that the parties reached a licensing agreement.[62]

There are clear signs that AP is increasing monitoring and enforcement against non-licensing entities that use their content. In 2010, it rolled out the

56. *See* Eric Goldman, *Initial Assessment of* AFP v. Google, TECH. & MKTG. L. BLOG (Mar. 21, 2005), http://blog.ericgoldman.org/archives/2005/03/initial_assessm_1.htm.

57. *See* Eric Goldman, AFP v. Google *Settles*, TECH. & MKTG. L. BLOG (Apr. 7, 2007), http://blog.ericgoldman.org/archives/2007/04/afp_v_google_se.htm. At the time, Google was already paying AP licensing fees.

58. *See* Frank Ahrens & Karl Vick, *Zell Wants End to Web's Free Ride*, POST BUSINESS (Apr. 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040601967.html?nav=rss_technology.

59. Thomas Wilburn, *AP Sues U.S. News Aggregator for Copyright Infringement and Trademark Abuse*, ARS TECHNICA (Oct. 10, 2007, 8:48 PM), http://arstechnica.com/uncategorized/2007/10/associated-press-sues-news-aggregator-for-licensing-failure/.

60. *See id.*

61. *See* Mark Hefflinger, *Associated Press Settles Lawsuit Against Moreover, VeriSign*, DIGITAL MEDIA WIRE (Aug. 18, 2008, 12:16 PM), http://www.dmwmedia.com/news/2008/08/18/associated-press-settles-lawsuit-against-moreover-verisign.

62. *See* MOREOVER TECHNOLOGIES, http://www.moreover.com/ (last accessed Mar. 17, 2014).

News Registry, a system for tagging and tracking news.[63] In 2011, AP launched the News Licensing Group, which absorbed the News Registry's tracking role and served as a central hub for content licensing, modeled after the American Society of Composers, Authors, and Publishers.[64] The News Licensing Group, renamed NewsRight, LLC, became an independent company in 2012.[65] The startup, which did not own the copyright to any of the content it protected and tracked, served as a licensing clearinghouse and provided information to publishers wishing to bring suit.[66]

In an interesting twist, in May 2013, NewsRight "joined forces" with Moreover Technologies (the former subject of an AP lawsuit) and BurrellesLuce, another monitoring service, to offer news monitoring, licensing, and distribution, while the Newspaper Association of America absorbed NewsRight's policing role.[67] NewsRight's dissolution occurred after failing to retain more than five customers, including Moreover, and perhaps reflects a slight change in strategy by the twenty-nine newspapers that partnered to form NewsRight.[68]

B. LEGAL BACKGROUND

It is not a new phenomenon for members of the news content industry to turn to the "hot news" doctrine as well as copyright for protection from misappropriation and infringement, respectively. However, these doctrines have new relevance in an era of news aggregation. Reliance on copyright, particularly as it relates to ledes, is only a recent and ongoing development.

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63. *See* Russell Adams, *AP To Launch News Licensing Group*, DIGITS: TECH NEWS & ANALYSIS FROM THE WSJ (Feb. 3, 2011, 4:48 PM), http://blogs.wsj.com/digits/2011/02/03/ap-to-launch-news-licensing-group/.

64. *See id.*

65. *See* Staci D. Kramer, *NewsRight Launches with 29 Publishers; 'Not A Litigation Shop,'* PAIDCONTENT (Jan. 5, 2012, 9:00 PM EST), http://paidcontent.org/2012/01/05/419-newsright-launches-with-29-publishers-not-a-litigation-shop/.

66. *See id.* Analysts speculate that aggregation services and sites such as Meltwater and Huffington Post spurred NewsRight's formation. *See id.*

67. *See NewsRight Joins Forces with Moreover Technologies/Burrelles*Luce *to Expand Content Licensing and Tracking Service*, BUS. WIRE (May 2, 2013, 12:00 PM EST), http://www.businesswire.com/news/home/20130502006103/en/NewsRight-Joins-Forces-Technologies-BurrellesLuce-Expand-Content.

68. *See* Ken Doctor, *The Newsonomics of Where NewsRight Went Wrong*, NIEMAN JOURNALISM LAB (May 15, 2013, 8:20 AM), http://www.niemanlab.org/2013/05/the-newsonomics-of-where-newsright-went-wrong/.

1. Hot News: a Narrow Cause of Action

News aggregators are prime targets for so-called "hot news" claims. In its current form, the hot news doctrine grants news agencies temporary protection from misappropriation of the content of their news stories. The focus on content of the stories, rather than the wording, distinguishes hot news from copyright.[69] The claim's narrowness results from a combination of the end of federal common law, copyright preemption, and a narrowed application in the Second Circuit.

The hot news doctrine originated in 1918 in *International News Service v. Associated Press*, in which the Supreme Court held that news content, despite being outside the realm of copyright, merited protection as "*quasi* property," thus granting a temporary property right and prohibiting misappropriation by a direct competitor.[70] Two decades later, *Erie Railroad Co. v. Tompkins* marked the end of federal common law, but the hot news doctrine has survived in various iterations, rendering hot news a state law tort claim.[71] Today, hot news survives as a state law claim in multiple circuits.[72]

However, as a state law claim, hot news is limited by federal preemption; in areas where it overlaps with the 1976 Copyright Act, federal copyright law must supersede.[73] Copyright law grants protection to a creative work fixed in a tangible medium of expression: it does not protect ideas or facts,[74] despite the effort expended in acquiring them.[75] In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court rejected the sweat-of-the-brow justification for copyright protection and permitted free copying of unprotected aspects of a work.[76] The case concerned one telephone director's copying of telephone listings from a competitor; the Court held that the

69. *See* ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 1016–17 (6th ed. 2012).

70. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

71. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); MERGES, MENELL & LEMLEY, *supra* note 69, at 1016.

72. *See* MERGES, MENELL & LEMLEY, *supra* note 69, at 1016 (citing U.S. Golf Ass'n v. St. Andrews Sys., 749 F.2d 1028 (3rd Cir. 1984); IMAX Corp. v. Cinema Techs., Inc., 152 F.3d 1161 (9th Cir. 1998); Ettore v. Philco Television Broad. Corp., 229 F.2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956)).

73. *See* MERGES, MENELL & LEMLEY, *supra* note 69, at 1017.

74. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

75. *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980).

76. 499 U.S. 340, 359–60 (1991).

listings were unprotectable because they "lack[ed] the requisite originality."[77] Subject to the holding in *International News Service v. Associated Press*, the Court permitted that "raw facts may be copied at will."[78]

The hot news cause of action had a recent rejuvenation in the Second Circuit, as well as, some argue, a subsequent limitation. In *National Basketball Association v. Motorola, Inc.*, a case concerning the unauthorized dissemination of real-time information about basketball games,[79] the Second Circuit outlined five requirements a plaintiff must meet to prevail on a hot news claim, ensuring that the cause of action is substantially different from copyright infringement. The requirements are:

> (i) [A] plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product that its existence or quality would be substantially threatened.[80]

Barclays Capital, Inc. v. TheFlyonthewall.com, Inc. further limited the hot news doctrine. The court held that the doctrine did not apply to republication of Barclays brokers' investment recommendations by a news service called TheFly.[81] The court's rationale for excluding such alleged misappropriation from the hot news doctrine was that the Copyright Act preempted the claim. Barclays failed to allege a hot news claim because at issue was misattribution of journalistic information, rather than misappropriation. The information was *created* by Barclays, not journalistically researched;[82] the brokers receiving TheFly's news, and not TheFly, were diverting profits from Barclays;[83] and the information and opinions were being *ascribed* to Barclays brokers, rather than claimed as a result of TheFly's own research.[84] After *Barclays*, subsequent

77. *Id.* at 364.

78. *Id.* at 353–54, 350.

79. 105 F.3d 841, 843 (2d Cir. 1997).

80. *Id.* at 845.

81. 650 F.3d 876, 878 (2d Cir. 2011).

82. *Id.* at 903 ("In pressing a 'hot news' claim against Fly, the Firms seek only to protect their Recommendations, something they *create* using their expertise and experience rather than *acquire* through efforts akin to reporting.").

83. *Id.* at 903.

84. *Id.* at 904.

analyses have noted the doctrine's uncertainty, as well as its potential to help the ailing news industry.[85]

2. The Origins of Fair Use

In the case of news aggregators, copyright, as well as the fair use defense, are particularly important because of the automated nature of aggregation; usually an aggregator is hosting actual excerpts, not simply the informational content that hot news protects. As a result, the scope of fair use—how large of an excerpt an aggregator may permissibly use—could have important ramifications for the development and monetization of aggregators as well as news.

Before the 1976 Copyright Act, fair use was "an exclusively judge-made doctrine,"[86] based on prior case law and judicial discretion, as judges sought to balance the interests of the public with those of creators.[87] In a seminal decision recognizing fair use more than 150 years ago, Justice Story stated that courts, in assessing whether the use of a copyrighted work is fair, "must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."[88] Courts evolved and adapted this standard for over a century before Congress codified the doctrine in the Copyright Act of 1976:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining

85. *See* Rayiner Hashem, Note, Barclays v. Thefly*: Protecting Online News Aggregators From the Hot News Doctrine*, 10 NW. J. TECH. & INTELL. PROP. 37 (2011); Shyamkrishna Balganesh, *The Uncertain Future of "Hot News" Misappropriation After* Barclays Capital v. Theflyonthewall.com, 112 COLUM. L. REV. SIDEBAR 134 (2012); Brian Westley, Comment, *How a Narrow Application of 'Hot News' Misappropriation Can Help Save Journalism*, 60 AM. U. L. REV. 691, 692 (2011); Joseph A. Tomain, *First Amendment, Fourth Estate, and Hot News: Misappropriation is Not a Solution to the Journalism Crisis*, 2012 MICH. ST. L. REV. 769, 770 (2012); Amy E. Jensen, Comment, *When News Doesn't Want to Be Free: Rethinking "Hot News" to Help Counter Free Riding on Newspaper Content Online*, 60 EMORY L.J. 537, 539 (2010).

86. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994)

87. The constitution enables intellectual property "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., art. I, § 8, cl. 8.

88. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

> whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[89]

There is debate about the purpose, function, and internal consistency of fair use, which this Note will address in Section III.A. Congress intended that fair use continue to evolve according to judicial interpretation and that § 107 only serve as a guide.[90] Accordingly, the four statutory factors are meant to be "illustrative and not limitative."[91] Some scholars, such as Pierre Leval, a judge on the Second Circuit, take the opposite tact, arguing that a court should only consider the four factors.[92]

3. Fair Use of Newspaper Clipping and Search Engine Excerpts

News aggregators seemingly sit at the crux of fair use law as it applies to newspaper clippings and search engines. Although courts have found a search engine's use of thumbnails to constitute a fair use,[93] newspaper clipping services are not permitted under fair use.[94] Similar to newspaper

89. 17 U.S.C. § 107 (2012).

90. H.R. REP. No. 94-1476, at 66 (1976); S. REP. No. 94-473, at 62 (1975).

91. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); *see also* 17 U.S. § 101 (2012).

92. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990). Leval stated, "[t]he more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that divert the inquiry from the goals of copyright." *Id.*

93. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2002) (finding a search engine's use of thumbnails for an index function constituted transformative use); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1155 (9th Cir. 2007) (finding Google's use of thumbnails to show image search results was a fair use, despite supplanting a legitimate licensing market).

94. *See* Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 199 (3d Cir. 2003) (holding that a compiler of video clips for commercial use on the Internet did not qualify as a fair use); Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 72 (2d Cir. 1999) (finding that the sale of abstracts of articles consisting of similar structure,

clipping services, news aggregation consists of exact copying of headlines, and sometimes ledes, as well as the bodies of news articles. However, like search engines, aggregators' copying operates via scraping[95] and could promote the public interest enabling access to information.

Meltwater is not the first news aggregator case involving ledes to reach the trial stage, although it is one of few, if any, to receive a verdict before settling. *GateHouse Media v. New York Times Co.* involved the website of a local Massachusetts newspaper.[96] GateHouse alleged infringement based on the defendant's "reproducing, displaying and distributing on the Infringing Website unauthorized verbatim copies of newspaper article headlines and the first sentences thereof (the 'ledes'), as first published by the plaintiff."[97] This settlement, rather than resulting in a licensing deal, consisted of an agreement that the plaintiff's website would set up technical barriers to prevent scraping *and* that the defendant website would honor those barriers.[98]

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chronology, and content was not a fair use); Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (finding that Wayne Kirkwood, appearing pro se, could not sell a radio-monitoring service under the fair use defense); L.A. News Serv. v. Tullo, 973 F.2d 791, 797, 799 (9th Cir. 1992) (finding that a service selling clips of television news broadcasts did not qualify for the fair use defense); Pac. & S. Co., Inc. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984) (finding that a service selling tapes of news broadcasts to the subjects of those broadcasts did not qualify as fair use).

95. *See* Marc S. Friedman & William T. Zanowitz, *The Invasion of the "Screen Scrapers"!*, 6 NO. 5 E-COMMERCE L. REP. 4 (May 2004). The authors define a "screen scraper" as:

> [A] computer software program that accesses (or, figuratively, "scrapes") information from a website server. The data is collected in HTML source code form (not graphically) and is then stored on the "screen scraper's" host server. These "screen scraper" programs go by many different names—"robot," "spider crawler," "scraper," "spider" and "bot" are just some examples. A "screen scraper" functions like a web browser, except that the "screen scraper" is incredibly fast, with the ability to visit millions of web pages per second. Because of the speed, a "screen scraper" can retrieve several pages on a server simultaneously, and that consumption can burden the resources of the website, potentially depriving legitimate users of the ability to visit the site. A "screen scraper" can also automatically access target websites thousands of times per day.

Id.

96. No. 1:08-cv-12114 (D. Mass. Dec. 22, 2008), *available at* http://dmlp.org/sites/citmedialaw.org/files/2009-01-26-Settlement%20Order%20of%20Dismissal.pdf.

97. Complaint at 2, GateHouse Media v. N.Y. Times Co., No. 1:08-cv-12114 (D. Mass. Dec. 22, 2008) *available at* http://www.dmlp.org/sites/citmedialaw.org/files/2008-12-22-Gatehouse%20Media%20Complaint.pdf.

98. *See* Robert Weisman, *NYT, Gatehouse Release Settlement Details*, BOSTON.COM (Jan. 26, 2009 11:56 AM), http://www.boston.com/business/ticker/2009/01/nyt_gatehouse_r.html.

There is also a growing body of law that permits certain types of copying by search engines. Two Ninth Circuit cases lead and illuminate these laws. In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit found "that [search engine operator] Arriba's use of [photographer] Kelly's images for its thumbnails was transformative."[99] Although the thumbnails were not literally transformative, they "served an entirely different function than Kelly's original images."[100] The exact copying to form a thumbnail image was necessary for the search engine's indexing function,[101] and, rather than supplanting the market for Kelly's work, Arriba's use enabled potential customers to locate and identify that work.[102] The court noted the lack of any licensing market for Kelly's images, bolstering its conclusion.[103]

In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit held that Google's use of thumbnail images to show image search results constituted a fair use, despite possibly supplanting a legitimate licensing market and despite the fact that the thumbnails helped generate advertising revenue for the search engine.[104] The court considered an "exact copy of a work" to be transformative, "so long as the copy serves a different function than the original work."[105] Google passed this test, it held, because "a search engine transforms the image into a pointer directing a user to a source of information."[106] In weighing the various fair use factors, the Ninth Circuit found that the transformative use of the thumbnail images, paired with the public interest in accessing information, outweighed Google's commercial interest in displaying the results.[107]

II. THE *MELTWATER* CASE

On March 21, 2013, Judge Denise Cote of the Southern District of New York issued an opinion finding that Meltwater, a news aggregation service, could not use the fair use defense to justify duplication and distribution of headlines, ledes, and excerpts from AP news articles.[108] The *Meltwater* court's

99. 336 F.3d 811, 818 (9th Cir. 2003).
100. *Id.*
101. *See id.* at 821.
102. *See id.*
103. *Id.* at 821–22.
104. 508 F.3d 1146, 1161–62 (9th Cir. 2007).
105. *Id.* at 1165.
106. *Id.*
107. *See id.* at 1166.
108. Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 540 (S.D.N.Y. Mar. 21, 2013).

decision focused on the fair use defense despite multiple causes of action brought in AP's complaint.[109] The court's holding differentiated Meltwater's services from those of a search engine, a fair use,[110] which could mark an expansion of the recourse available for news wire services. The following Sections will outline the facts of the case and the reasoning behind the court's decision, and they will then suggest some lines of reasoning by which a court could have found that Meltwater's use qualified for the fair use defense.

A. THE FACTS OF THE CASE

AP's news clipping service has significant breadth in the news industry, with ownership spanning 1,400 individual newspapers, a staff of about 3,700, and production of over one thousand articles each day.[111] Relevant to the balancing of fair use factors, licensing fees account for "a principal component of AP's revenue."[112] One of AP's services is AP Exchange, which permits licensees to perform keyword searches of AP articles, receive updates on keyword searches via e-mail, and provide a similar service to licensees' own customers.[113]

Meltwater, based in Norway, is a multinational "software as a service" company founded in 2001; it earned $124.5 million in revenue in 2012.[114] Since 2005, Meltwater has offered Meltwater News in the United States,[115] consisting of a news monitoring service based on the use of keywords. It uses "automated computer programs or algorithms to copy or 'scrape' an

109. *Id.* at 548. The multiple causes of action brought were:

> (1) [C]opyright infringement; (2) contributory copyright infringement; (3) vicarious copyright infringement; (4) declaratory judgment of copyright infringement; (5) "hot news" misappropriation under New York common law; and (6) removal or alteration of copyright management information. In response, Meltwater has raised four counterclaims: (1) declaratory judgment of non-infringement; (2) declaratory judgment of safe harbor from infringement claims based upon the Digital Millennium Copyright Act ("DMCA"); (3) libel per se; and (4) tortious interference with business relations.

Id. Beyond fair use, the defenses mounted and summarily rejected were "implied license, equitable estoppel, laches, and copyright misuse." *Id.*

110. *Id.* at 553.

111. *Id.* at 541.

112. *Id.*

113. *Id.* at 542.

114. *Id.* at 543; *see Meltwater Group Company Profile*, INC., http://www.inc.com/profile/meltwater-group (last accessed Jan. 27, 2014).

115. *Meltwater*, 931 F.Supp.2d at 543.

article from an online news source, index the article, and deliver verbatim excerpts of the article."[116] The service is primarily marketed to public relations professionals as a means of tracking press coverage.[117]

Meltwater's services are indelibly tied to use of AP articles, making the case critical to its business model and vice versa. Judge Cote identified Meltwater as a competitor to "AP and its licensees," emphasizing that Meltwater had won a "mega-contract" that otherwise would have gone to an AP licensee.[118] Meltwater customers access news stories via "News Reports" (reports created in response to search queries and accessed via e-mail updates or the website), "Analytics" (charts and graphs describing coverage of the search term), "Ad Hoc Searches" (searches performed by the user in real time), or a "Newsletter" (personalized newsletters created from a search query).[119] For the sake of the case, thirty-three "Registered Articles" were used to track infringing activity.[120] Of the thirty-three registered articles in the case, "Meltwater was able to calculate from its records that it made at least 22,297 excerpts from the twenty-four Registered Articles available to its customers in the United States in response to agent queries."[121]

B. THE COURT'S REASONING

Of the four fair use factors, Judge Cote determined that the first, third, and fourth factors— the purpose and character of the use, the amount and substantiality of the portion used, and the potential effect on the market or value of the work, respectively—favored a finding against fair use. Because the second factor was neutral, Judge Cote weighed it as though it favored fair use. The private nature of Meltwater's service and the presence of licensing

116. *Id.* at 545.

117. *Meltwater News, Product Overview*, MELTWATER, http://www.meltwater.com/products/meltwater-news (last visited Jan. 27, 2014).

118. *See Meltwater*, 931 F. Supp. 2d at 544.

119. *Id.* at 544–46.

120. *Id.*

121. *Id.* at 546. There have been previous lawsuits against the news service. In the United Kingdom, the Newspaper Licensing Agency brought an action alleging copyright infringement, in which, interestingly, "the Court of Appeal found that headlines were copyrightable because they were works that were original and literary." *See* Alexander Weaver, Comment, *Aggravated with Aggregators: Can International Copyright Law Help Save the Newsroom?*, 26 EMORY INT'L L. REV. 1161, 1178 (2012). In addition, Meltwater has various cases pending abroad, and the implications of these lawsuits are unclear. *See* Ali Sternburg, *AP-Meltwater Settlement Dims Prospects for European Ruling on Internet Browsing,* DISCO: DISRUPTIVE COMPETITION PROJECT (July 30, 2013), http://www.project-disco.org/intellectual-property/073013-ap-meltwater-settlement-dims-prospects-for-european-ruling-on-internet-browsing/.

agreements between AP and similar parties played a significant role in Judge Cote's reasoning. At later steps in the analysis, she found the use of ledes and excerpts did not constitute a "transformative use," and the weighing of the public interest favored protection of AP's rights.[122]

1. Purpose and Character of the Use

The court's analysis of the "purpose and character of the use" turned on whether the use was transformative or especially favorable to the public interest.[123] The opinion quickly dismissed physical changes to the works and emphasized the limitations of transformative use, citing authority that a "change of format, though useful," is not transformative.[124] The opinion also found the public interest to weigh against Meltwater because interference with AP's profits harmed its "ability to perform this essential function of democracy."[125] Judge Cote compared the importance of Meltwater's search function with the public benefit of news-reporting agencies, emphasizing that the holding would not harm internet search engines "in any way," whereas she considered Meltwater's unlicensed use a serious risk to AP's revenue.[126]

The court also differentiated *Perfect 10* and *Arriba* from *Meltwater* on the basis that the prior cases involved the use of a "search engine engaging in transformative purpose," "publicly available" search results, and indivisible images.[127] Meltwater, in contrast, provides "the online equivalent of a traditional news clipping service," the production of which is not transformative.[128]

2. Nature of the Copyrighted Work

The court addressed the issue of the nature of the copyrighted work relatively quickly. The court found that although the work was nonfiction, which weighed in favor of a finding of fair use, the fact that the work was published weighed against fair use.[129] In sum, this factor favored a fair use finding.[130]

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122. *Meltwater*, 931 F. Supp. 2d at 551.

123. *See id.* at 552–53.

124. *Id.* at 551 (citing Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109–10 (2d Cir. 1998)).

125. *Id.* at 553.

126. *Id.*

127. *Id.* at 555–56.

128. *Id.* at 556.

129. *Id.* at 557.

130. *Id.*

3. Amount and Substantiality of the Portion Used

The court engaged in both a qualitative and a quantitative analysis when considering the third fair use factor and found that both types of analysis favored a finding of infringement.[131] The proportion of copied articles was relatively high, and the court considered the "lede" to be an especially important, creative aspect of a news article:

> Meltwater took between 4.5% and 61% of the Registered Articles. It automatically took the lede from every AP story. As described by AP's Standards Editor, the lede is "meant to convey the heart of the story." A lede is a sentence that takes significant journalistic skill to craft. There is no other single sentence from an AP story that is as consistently important from article to article—neither the final sentence nor any sentence that begins any succeeding paragraph in the story.[132]

The variance of the proportion copied results from the length of the articles copied; there was no variance in the lengths of the excerpts themselves. Judge Cote's emphasis on the lede essentially pushed aside the issue of proportion copied.

4. Potential Effect on the Market or Value of the Work

The potential effect on the market or value of the work was particularly damaging to Meltwater's case. The court noted that an existing licensing market weighs strongly against fair use.[133] In particular, "[w]hen analyzing the fourth factor, 'the impact on potential licensing revenues is a proper subject for consideration.'"[134] In applying the facts to *Meltwater*, the court found that the market impact was significant because of direct competition between Meltwater and AP licensees. Consequently, Meltwater "obtained an unfair commercial advantage in the marketplace and directly harmed the creator of expressive content," undermining copyright's constitutional purpose.[135]

131. *Id.*

132. *Id.* at 558. If only headlines or ledes were copied, there would be an interesting question of whether infringement had occurred in this case. However, because the *Meltwater* case also involved copying of possibly significant proportions of the articles, the decision did not address the copyrightability of ledes alone.

133. *Id.* at 559 (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985)).

134. *Id.* at 560 (quoting Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994)).

135. *Id.* at 561.

C. AN ALTERNATIVE TO THE *MELTWATER* RESULT

Given the lack of direct precedent pertaining specifically to news aggregation, it is conceivable that *Meltwater* could have had a result favoring news aggregators. This Section proposes that a judge interpreting fair use more broadly in the context of aggregation technology could have in fact found that the first, third, and fourth factors favored fair use.[136]

1. Transformative Nature of the Use—Where the Public Interest Lies

An argument for the arbitrariness of the *Meltwater* decision might focus on the idea that the use was not necessarily less transformative than *Perfect 10* or *Kelly*; in fact, the public might benefit from the provision of Meltwater's services. In *Perfect 10*, the Ninth Circuit, citing *Sony Corp. v. Universal City Studios, Inc.*, concluded "that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances."[137]

However, Judge Cote may have taken an opposite tact more in line with the Ninth Circuit cases. It is perhaps telling that Judge Cote, despite differentiating Meltwater from a search engine, does not give a precise definition of a search engine anywhere in the opinion.[138] Her bases for differentiating *Meltwater* from a search engine are (1) that Meltwater may have scraped more content than is necessary for it to function as a search engine[139] and (2) that Meltwater's status as an "information-location tool" was insufficient to qualify as a search engine.[140] These two requirements taken

136. It is interesting to note that Judge Denise Cote had previously ruled against the fair use defense for a newspaper-clipping analogue in *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc*, perhaps reflecting a preference for a narrow fair use defense. *See* Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., No. 98 CIV. 641 (DLC), 1998 WL 274285, at *1 (S.D.N.Y. May 27, 1998), *aff'd*, 166 F.3d 65 (2d Cir. 1999).

137. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431–32 (1984) (quoting H.R. REP. No. 94-1476, at 65–66 (1976)) ("[Section 107] endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.").

138. *See Meltwater*, 931 F. Supp. 2d at 551.

139. *See id.* at 555–56.

140. *See id.* at 541.

together could mean that Judge Cote's opinion limits a search engine to a *specialized* search engine.[141]

One could analogize Meltwater's excerpts to the thumbnails in *Arriba* and *Perfect 10* due to the purpose they serve and the way a public relations professional would use them: as indices rather than articles. In *Arriba*, the thumbnails, although not literally transformative, served an entirely different function.[142] The thumbnails were necessary for the search engine's indexing function[143] and enabled potential customers to locate the work.[144] In *Perfect 10,* an exact copy was still transformative so long as it served "a different function," such as a "pointer directing a user to a source of information," despite possibly supplanting a licensing market.[145] Judge Cote's opinion emphasizes that a "change of format, though useful" is not transformative.[146] Perusing Meltwater's news excerpts, however, reveals that each snippet constitutes more than a change in format—it is more akin to a data point than a news article.[147] This snippet serves the purpose of providing information by pointing to where the relevant term appeared. The full tone and context of the article are not apparent from the excerpt alone, and therefore a court might easily find that the snippet is transformative.[148]

2. Quantity of Copying and the Relative Importance of Ledes

A reinterpretation of the importance of an excerpt's proportion and the qualitative significance of ledes could also make the third fair use factor cut in favor of Meltwater. In the *Meltwater* opinion, Judge Cote emphasized that the quantity of the portion copied and the qualitative importance of the lede made the third fair use factor cut against fair use.[149] The proportion of the articles excerpted for these ledes, however, varied considerably, ranging from

141. *See id.* at 541, 555–56.

142. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

143. *See id.* at 821.

144. *See id.* at 821–22.

145. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161–62, 1165 (9th Cir. 2007).

146. Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 551 (S.D.N.Y Mar. 21, 2013) (citing Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109–10 (2d Cir. 1998)).

147. *See Online Media Monitoring,* MELTWATER, http://www.meltwater.com/products/meltwater-news/online-media-monitoring/ (last accessed Feb. 8, 2014) (providing an image of Meltwater's search results, including examples of excerpts).

148. *See id.*

149. *Meltwater*, 931 F. Supp. 2d at 557.

4.5 to sixty-one percent.[150] Each excerpt consisted of a uniform quantity of characters, and it only varied because, in some cases, the excerpted articles were extremely short.[151] Judge Cote, by imbuing the lede with creative importance above other parts of the article, rendered the computer-generated snippets presented in Meltwater's search function more important than they would otherwise be.[152]

3. Legitimacy of the Existing Licensing Markets? Who Should Pay for News?

If the existing licensing markets between AP and businesses competing with Meltwater were deemed illegitimate, then the fourth factor would not favor a finding of fair use. However, because a licensing market is also automatically deemed legitimate, there is little room for a court to decide that a licensed activity qualifies for the fair use defense. As a result, in content industries, the culture of risk-avoidant licensing creates an automatic contraction of fair use, particularly paired with the fourth fair use factor.[153] The *Meltwater* opinion treated a low click-through rate as evidence that the article excerpt replaced the act of reading it and that the Meltwater excerpt supplanted the market for the original article.[154] This analysis presumes that, absent the Meltwater service, users would have sought out the article directly, and that the existing licensing market is legitimate.

The Supreme Court, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, designated the fourth factor, the potential effect on the market or value of the work, as the most important,[155] which makes sense because market interference undermines copyright's constitutional purpose to incentivize creation.[156] There is support for the proposition that the fourth factor continues to be the most prominent in the determination of fair use decisions,[157] which proves problematic when paired with the litigation-avoiding "clearance cultures" that emerge in content industries.[158]

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150. *See id.* at 558.

151. *Compare id.* (showing the range of proportions of articles copied), *with Products: Online Media Monitoring*, MELTWATER, http://www.meltwater.com/products/meltwater-news/online-media-monitoring/ (last visited Feb. 8, 2014) (demonstrating the uniform nature of the article excerpts).

152. *See Meltwater*, 931 F. Supp. 2d at 558.

153. *See infra* Section III.B.

154. *Meltwater*, 931 F. Supp. 2d at 557.

155. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

156. *See* Leval, *supra* note 92, at 1124.

157. *See Harper & Row*, 471 U.S. at 566–67; Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996); Triangle Publications, Inc. v. Knight-Ridder

III. THE EX POST FACTO NATURE OF FAIR USE AND THE CIRCULARITY OF CUSTOMARY LICENSING REGIMES CAST DOUBT ON THE *MELTWATER* RESULT

This Part details some debates regarding the predictability of the fair use defense and the risk of circularity when customary licensing markets inform fair use determinations.[159] There is considerable scholarship decrying the unpredictability of fair use determinations, characterizing them as ex post facto analyses rather than true weighing of objective factors.[160] On the other hand, Professor Pamela Samuelson, among others, views fair use as a series of policy-relevant clusters, in which court determinations become predictable based on the industry or subject matter.[161] Scholarship concerning the circularity of preexisting licensing markets, most notably that of Jennifer Rothman and James Gibson, paints a worrisome picture of litigation-phobic content industries, the courts, and the fair use defense working together to create and then enforce licensing markets.[162] Although the *Meltwater* decision becomes predictable when viewed in terms of Pamela Samuelson's relevant public policy cluster—Internet search engines—the circularity problem persists. Therefore, even if the decision is doctrinally correct, it accompanies the potential for powerful industries to strong-arm licensing markets into existence.

A. JUDICIAL DISCRETION AND THE MYTH OF A MECHANICAL FAIR USE

There is a significant amount of scholarship arguing that fair use decisions are inconsistent because courts use the factors as ex post facto justifications rather than as guidance decisions.[163] This Section will discuss the perspectives of Judge Pierre N. Leval and David Nimmer, who favor an arbitrary characterization of the fair use factors, as well as Professor Pamela

Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008).

158. *See infra* Section III.B.

159. *See infra* Section III.B. The risk posed by such circularity is that fair use will shrink, and the realm of works requiring a copyright licensing will increase, without any oversight in the process.

160. *See infra* Section III.A.

161. *See infra* Section III.B.

162. *See infra* Section III.C.

163. *See, e.g.*, Leval *supra* note 92, at 1106; Nimmer, *supra* note 20, at 280; LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 66 (2008).

Samuelson's identification of rhyme and reason in fair use decisions when a case is viewed in terms of the relevant policy cluster. Given that several of the fair use factors in *Melwater* could weigh for *or* against fair use, it would not be outlandish to characterize the decision as ex post facto. On the other hand, the result makes sense in light of Professor Samuelson's suggested factors for the Internet indexing tool or news copying policy cluster.

1. Ex Post Facto Fair Use

In the decade or so after the Copyright Act codified the fair use defense, Judge Pierre N. Leval took note of the staggering importance of judicial discretion and the practical irrelevance of the enumerated fair use factors[164] and lamented the absence of "a set of governing principles or values."[165] In contrast, in the public discourse courts had "treated the definition of the doctrine as assumed common ground."[166] Judge Leval argued that court rulings, rather than being governed by "consistent principles," are the product of "intuitive reactions to individual fact patterns" and are justified by "notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright."[167] The factors are a guide, he argued, encouraging a breadth of factors to consider, rather than a "score card."[168]

David Nimmer, echoing Judge Leval's perspective, attempted a systematic study of fair uses decisions since 1994 to bolster the point.[169] Based on his research, Nimmer concluded that the correlation between each factor favoring fair use and a fair use outcome was the following: fifty-five percent for the first factor, forty-two percent for the second, fifty-seven percent for the third, fifty percent for the fourth, and nearly fifty-one percent of all the factors favored fair use.[170] He summarized:

> Beyond elevating the first and third factors slightly, while denigrating the second, the numbers hardly tell a compelling story.

164. *See* Leval, *supra* note 92, at 1105–07.

165. *Id.* at 1105–06.

166. *See id.* at 1106.

167. *Id.* at 1107.

168. *See id.* at 1110.

169. Nimmer, *supra* note 20, at 278–89, 280–82. However, Nimmer acknowledges that his methodology was qualitative rather than quantitative, given the nature of judges' characterizations of their own decisions. The factor analysis is based on Nimmer's perception of the factors, rather than the courts', which yields a correspondence of approximately ninety percent, in his estimation.

170. *Id.* at 280.

> The last figure is the most revealing. Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.[171]

Nimmer painted judges' treatment of the fair use factors as an ex post facto justification for decisions already made, and he explained that "the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions."[172]

To support his contention that fair use decisions are often arbitrary, Nimmer cites cases in which the relationship between the factors and the outcome of the case are vexing.[173] The cases include *Financial Information v. Moody's*, in which an appeals court found the opposite of the district court on every fair use factor;[174] *Harper & Row v. Nation Enterprises,* when six Supreme Court justices found that all factors favored fair use, and three justices found that all factors disfavored fair use;[175] and *Robinson v. Random House, Inc.*, in which all factors favored fair use, and yet the court found that the defense did not apply.[176] Conversely, with regard to *Kelly v. Arriba*, Nimmer concluded that all factors disfavored fair use, whereas the district court and Ninth Circuit found that the use was, in fact, fair.[177]

In *Meltwater*, although Judge Cote found factors one, three, and four to disfavor fair use, it is plausible to analyze the factors in such a manner as to weigh in favor of a fair use finding.[178] Revisiting *Meltwater* with Nimmer and Leval's perspectives in mind, the decision seems arbitrary. However, the following Section will analyze a possible explanation for this seeming arbitrariness: policy relevant clustering among fair use decisions.

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171. *Id.*

172. *Id.* at 281.

173. *See id.*

174. *See id.* (citing Fin. Info., Inc. v. Moody's Investors Serv., Inc., 751 F.2d 501 (2d Cir. 1984)).

175. *See id.* at 282 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985)).

176. *See id.* (citing Robinson v. Random House, Inc, 877 F. Supp. 830 (S.D.N.Y. 1995)).

177. *See id.* at 283 (citing Kelly v. Arriba 280 F.3d 934 (9th Cir. 2002), *withdrawn*, Kelly v. Arriba, 77 F. Supp. 2d. 1116, 1120–21 (C.D. Cal. 1999)).

178. *See supra* Section II.C.

2. *Fair Use Policy Clusters As a Plausible Explanation for* Meltwater

Some scholars argue that fair use decisions form a pattern of "policy-relevant clusters,"[179] a view under which the *Meltwater* result makes more sense, despite fair use factors that could have supported the opposite outcome.[180] Professor Pamela Samuelson finds that courts, rather than "'stampede' to conclusions in favor of or against fair use," reach predicable conclusions in light of the applicable policy cluster.[181] For Professor Samuelson, fair use successfully "promote[s] competition, technological innovation, and greater public access to information and ability to make use of content"; it is not merely an ex post facto analysis to support a foregone conclusion.[182]

Fair use allows copyright to adapt to "unforeseen uses" resulting from technological innovation.[183] The purpose of the internet search engine policy cluster includes "promoting competition and innovation in complementary technology industries, furthering privacy and autonomy of users of copyrighted works, and fostering enhanced public access to information."[184] In particular, *Meltwater* would likely fall under either (1) Professor Samuelson's cluster concerning "internet search engine copying for the purpose of indexing or otherwise making information about protected works more publicly accessible"[185] or (2) her news-related policy cluster. Under the news-related cluster, the fair use defense usually fails "because judges believed the defendants took too much, interfered with core licensing markets, or engaged in wrongful conduct that tainted the fair use defense."[186]

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179. *See* Samuelson, *supra* note 20, at 2541; *see also* ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 8–14 (Comm. Print 1960), *available at* http://www.copyright.gov/history/studies/study14.pdf; Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1645–65 (2004); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 439–41 (2008).

180. *See supra* Section II.C.

181. Samuelson, *supra* note 20, at 2542.

182. *Id.* at 2546.

183. *See id.* at 2602.

184. *See id.*

185. *Id.* at 2610.

186. *See id.* at 2619; *see also* ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 8–14 (Comm. Print 1960).

For the internet search engine cluster, Professor Samuelson established a multifactor analysis:

> Among the factors highly relevant in information access cases are: (1) whether the putative fair user is, in fact, facilitating better access to publicly available copyrighted works; (2) whether the information-access tool is making searches more efficient and effective; (3) whether copying is necessary or reasonable in order to facilitate better access; (4) whether transaction costs for seeking and obtaining permission are such that a market cannot readily be formed; and (5) whether the information-access tool made by the defendant is superseding or supplanting the market for the plaintiff's work.[187]

Under this rubric, no judge could have found fair use in Meltwater. Under factor one, the service was clearly private, and the works were not publicly available; Meltwater users had to subscribe for the content.[188] Although the second factor is less glaringly in opposition to a finding of fair use, it is at best neutral; there is no evidence that Meltwater was providing a more efficient search. Factor three may slightly favor the fair use finding, but only marginally. Copying is not necessary to facilitate better access due to the presence of many similar search services, and reasonableness is quite subjective. Factor four clearly disfavors fair use under this rubric due to the presence of a preexisting licensing market, as does factor five for the same reason. Although these factors may eliminate the problem of predictability, there is still the problem of circularity.

B. CUSTOM AND FAIR USE IN THE NEWS INDUSTRY

Despite the soundness of the *Meltwater* decision in light of policy-relevant clustering, the issue of circularity in custom and licensing in fair use presents another potential issue for *Meltwater* and future aggregator cases. Discussion about the relationship between licensing and fair use determinations goes back nearly a century.[189] More recently, Professor Jennifer Rothman and a contingent of other scholars have observed that custom, when used to

187. Samuelson, *supra* note 20, at 2614.

188. *See* Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 544–46 (S.D.N.Y Mar. 21, 2013).

189. *See* Gibson, *supra* note 5, at 897 (citing RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925); ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 429 (1917); Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 51–52 (1955); Elizabeth Filcher Miller, Note, *Copyrights—"Fair Use,"* 15 S. CAL. L. REV. 249, 250 (1942)).

inform a fair use analysis, creates a "circularity" problem.[190] The "clearance culture" employed in many content industries to avoid litigation becomes incorporated into law, and as a result, prophylactic and legally required licensing regimes become one and the same.[191]

This Section first outlines the debate concerning custom and law in general, as well as in the particular context of licensing and fair use. In the early 1990s, Professors Richard Epstein and Stephen L. Carter debated the use of custom to inform rights in misappropriation cases. Epstein's and Carter's concerns about custom supporting or undermining content industry frameworks, depending on the application, also extended to fair use. Epstein viewed custom as an efficient means by which courts can determine misappropriation, whereas Carter expressed concern about judges' limited perspective.[192] The debate continues in the particular realm of fair use, including a disagreement between Professors Epstein and Rothman, among others, about the risks of circularity when considering licensing customs in fair use cases.[193]

1. Desirability of Applying Custom to the Law

Professor Richard Epstein supports the enforcement of private customary regimes by courts.[194] He advocates for court-enforced private ordering as a means of ensuring that misappropriation is properly applied.[195] Epstein concludes that courts should bow to custom in cases where parties' involvement is "repeat and reciprocal" because "their incentives to reach the correct rule are exceedingly powerful."[196] In situations where there is a weaker custom, Epstein asks for "some explicit cost/benefit calculation."[197] In his 1992 article, he argued that strong customs informed the decision in *INS v. AP*.[198] Because the parties were in direct competition, the value of news as a commodity depended on "their exclusive ability to get it to their respective markets as quickly as possible."[199] The very strength of the custom in *International News Service v. Associated Press* explains why misappropriation of

190. Rothman, *supra* note 5, at 1911, 1931, 1935.
191. *See supra* note 5 and accompanying text.
192. *Infra* Section III.B.1.
193. *Infra* Section III.B.2.
194. *See generally* Epstein, *supra* note 3.
195. *See generally id.*
196. *Id.* at 126.
197. *Id.*
198. *See id.*
199. *See id.* at 91.

"rivals' bulletin boards or early editions" were not more widespread.[200] Epstein warns of mutually assured destruction when a court does not enforce news industry custom.[201]

Professor Stephen L. Carter advised caution in applying Professor Epstein's theory, citing a custom's possible inherent problems, judges' limited perspectives, and the "public goods problem."[202] An inherently problematic custom could involve negative externalities, which the involved parties should absorb, or restrictive licenses enabling anti-competitive behavior by firms.[203] A judge's ability to a discern a custom could be limited by their unfamiliarity with an issue or industry as well as the plausibility that parties are not fully truthful.[204] In the realm of intellectual property, Carter warns that the "public goods problem" makes cooperation more difficult to enforce, resulting in weaker industry customs and making it "[un]surpris[ing] when the courts upset local rules governing *intellectual* property."[205] Simply put, in Carter's view, industry custom is weaker and less relevant in the realm of intellectual property.

2. The Circularity Problem

In 1999, Professor Jennifer E. Rothman observed that the relationship between custom and intellectual property, rather than being non-existent, as Professor Carter had suggested, was problematic as well as ubiquitous,

200. *See id.* at 97; *see generally* Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

201. *See* Epstein, *supra* note 3, at 96 (quoting Nat'l Telegraph News Co. v. W. Union Tel. Co., 119 F. 294, 295–96 (7th Cir. 1902)). Additionally, in *National Tel. News Co.*, the court prohibited:

> [C]opying from the appellee's electrical instruments and printing machines, known as tickers, for the purpose of publishing, selling or transmitting through their own tickers, or otherwise disposing of, or using, any of the news or information . . . until the lapse of fully sixty minutes from the time such news items are printed . . . .

Nat'l Tel. News, 119 F. at 296.

202. Stephen L. Carter, *Custom, Adjudication, and Petrushevsky's Watch: Some Notes from the Intellectual Property Front*, 78 VA. L. REV. 129, 131, 132, 138 (1992). Carter's article summarizes the public goods problem:

> When the next user can appropriate the fruit of intellectual development at a cost close to zero and without interfering with the prior user's enjoyment, it is not easy to see what suasion the prior user can bring to bear, in the absence of regulation, to make the next user stop.

Id.

203. *See* Carter, *supra* note 202, at 131, 132, 138.

204. *See id.* at 132.

205. *Id.* at 138.

especially in the fair use context. Rothman's key observations were: (1) there was a problematic creation of "clearance cultures" across the content industries in order to avoid litigation, (2) courts used the "clearance culture" to inform the type of use and market affect in a fair use analysis, and (3) courts, relying on licensing agreements to analyze market harm, fell into a "dangerous circularity," in which licensing practices that were originally meant to avoid litigation risk were codified into existing law.[206] In a 2006 article, James Gibson elaborated on the circularity problem, attributing a gradual expansion of copyright to "the interaction of indeterminate doctrine and risk-averse licensing" in light of high damages when infringement is found.[207] The gray areas stem from "the idea/expression dichotomy, the substantial similarity test, and the fair use defense," which all consist of standards, rather than bright-line rules.[208] In turn, these licensing practices create a precedent relevant to fair use's consideration of licensing markets, turning once-gray areas into the domains of licensors and licensee in a recursive process that increases the domain protected by copyright.[209] Gibson terms this process "doctrinal feedback."[210]

The second and fourth fair use factors are particularly vulnerable to the circularity problem. A "commercial use" is likely to result in a finding that the character of the use is not fair.[211] In a similar vein, market harm is deemed likely when the infringement results from foregone licensing opportunities.[212] Rothman considers the use of licensing "custom" particularly because the judge, by using the customary marketplace to determine that a use is fair, effectively presumes an ideal market allocation

206. Rothman, *supra* note 5, at 1911, 1931, 1935.

207. Gibson, *supra* note 5, at 882.

208. *Id.* at 887.

209. *Id.*

210. *Id.* at 884. Decision-makers in prominent copyright industries often have traits that increase the likelihood they will engage in the risk-averse behavior that leads to doctrinal feedback: "high upfront costs, deep pockets, and a tiered distribution network." *Id.* at 887.

211. *See* Rothman, *supra* note 5, at 1931.

212. *See id.* at 1932. Rothman explains the relationship between fair use and forgone licensing opportunities:

> Under this rubric, clearance culture practices have an enormous impact on what courts consider allowable uses of others' IP because courts view both existing and potential licensing markets as an indication of whether a use is for profit and also whether a given use is likely to harm the market for the work at issue.

Id.

that does not necessarily exist.[213]A great deal of the use of custom in courts' fair use analyses cite to the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*[214] The Court's basis for analyzing the fourth fair use factor was "not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[215]

Although it is possible for contraction of fair use to occur unintentionally, purposeful conduct could increase the rate of copyright's expansion or the breadth of licensing regimes.[216] Gibson considers much of this shift unintentional, because, assuming copyright holders are not intentionally "gaming the system," the gray areas of intellectual property and the risk-aversion are sufficient to "cause entitlements to grow and public privilege to shrink."[217] Even many practitioner guides in copyright law advise erring on the side of clearance rather than relying on fair use.[218] On the other hand, doctrinal feedback becomes less pronounced when "copying is inconspicuous or primarily private."[219] In particular, a cease-and-desist letter might force a risk-averse secondary user to obtain a license, or large-scale copyright-holders engage in mutual licensing agreements.[220] On the other hand, users "who resist the pressure to license" usually fail to reduce "doctrinal feedback" because there are simply not a lot of them. [221] Even if they are numerous, unlicensed users will likely have little influence because (1) they will keep quiet to avoid detection and (2) they will likely "com[e] from smaller-scale projects that do not involve widespread distribution

213. *Id.* at 1935.

214. 471 U.S. 539 (1985).

215. *Id.* at 562.

216. *See* Gibson, *supra* note 5, at 901; Loren, *supra* note 5, at 34–36, 42–43 (1997); Africa, *supra* note 5, at 1174–75.

217. Gibson, *supra* note 5, at 885.

218. *See* Gibson, *supra* note 5, at 891 (citing MICHAEL C. DONALDSON, CLEARANCE & COPYRIGHT 67 (2d ed. 2003); STEPHEN FISHMAN, THE COPYRIGHT HANDBOOK: HOW TO PROTECT & USE WRITTEN WORKS 11/4 (8th ed. 2005); RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE & OFF 9/5 (2000)); *see also* RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE & OFF 301–302 (2013); STEPHEN FISHMAN, THE COPYRIGHT HANDBOOK: WHAT EVERY WRITER NEEDS TO KNOW 254–60 (2011).

219. Gibson, *supra* note 5, at 887.

220. *See id.* at 901.

221. *See id.* at 899.

through traditional channels."[222] In addition, if some copyright users are resisting licensing, they will be at a disadvantage in a fair use determination.[223]

Purposeful attempts to strong-arm licensing markets into existence can be inferred from the lawsuits and licenses promulgated by the print news industry. Members of the news industry themselves are not silent on the use of courts to enforce or create customs. Rupert Murdoch has explicitly stated an intention to extract revenue from news aggregators through lawsuits.[224] *International News Service v. Associated Press* has received a great deal of attention due to the court's role in enforcing norms of the newspaper industry.[225] As in *International News,* the *Meltwater* court may have followed or modified custom to protect the traditional news industries. *Meltwater*, in expanding the legal remedies available to news services, is an example of courts cooperating to create custom in an emerging industry through an expanded application of fair use.

IV. CONCLUSION

Meltwater was a case of first impression, in which the malleability of a transformative use designation and the circularity problem between custom and fair use may have overshadowed a discussion of which industries *ought* to include licensing. This leaves the application of *Meltwater* to other types of aggregators uncertain. In July 2013, after a ruling in favor of AP, the parties settled, forming a "partnership."[226] Meltwater has thus become another licensed AP customer.

Other industries in which "clearance culture" and scraping are common may face the same circularity problem in the judicial system. Although in some cases licensing revenue is mutually beneficial, the circularity problem of the fair use standard presents a potential problem. In a technological sector where new means of analyzing and aggregating data emerge at unprecedented

222. *See id.* at 900.

223. *See id.* at 903; *see also* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (finding that a copyright shop that refused to join licensing arrangement competitors was not protected by fair use).

224. *See* Interview by Marvin Kalb with Rupert Murdoch, Chairman and CEO, News Corp., in Washington, D.C. (Apr. 6, 2010), *available at* https://research.gwu.edu/sites/research.gwu.edu/files/downloads/RupertMurdoch_Transcript.pdf ("And we're going to stop people like Google and Microsoft, or whoever, from taking our stories for nothing.").

225. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918); Carter, *supra* note 202; Douglas G. Baird, *Common Law Intellectual Property and the Legacy of* International News Service v. Associated Press, 50 U. CHI. L. REV. 411 (1983); Epstein *supra* note 3.

226. Mullin, *supra* note 17.

rates, the balance between preservation of old industries and new technologies needs to be addressed thoughtfully, rather than through a pattern of doctrinal feedback.

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