

## COMMENT

### Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators

In the 1918 Supreme Court case that gave rise to the common law doctrine of “hot news” misappropriation, the Associated Press (AP) famously sued the International News Service (INS), a competing newswire, for copying factual content from AP news stories without crediting the AP.<sup>1</sup> Nearly a century has passed, and the AP is going after a news collection service again. In February 2012, the AP filed suit against Meltwater News, an online “news aggregator,” for copyright infringement and “hot news” misappropriation.<sup>2</sup> On their face, the two cases present nearly identical issues, down to the same plaintiff. But times have changed – and so should the law.

The current suit is only the latest in a rash of recent copyright and hot news litigation<sup>3</sup> aimed at combatting news aggregators, or websites and mobile applications that digitally copy headlines and short excerpts of news stories from various Internet sources and display them all in one place.<sup>4</sup> In light of the

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1. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918). News disseminators enjoy a quasi-property right in news facts (commonly referred to as “hot news”), “until [their] commercial value as news . . . has passed away.” *Id.* at 245. The “hot news” doctrine provides a tort action vindicating this right. See MARK A. FRANKLIN, DAVID A. ANDERSON & LYRISSA C. BARNETT LIDSKY, *MASS MEDIA LAW* 380-82. (8th ed. 2011).
  2. Complaint and Demand for Jury Trial, *Associated Press v. Meltwater U.S. Holdings, Inc.*, No. 12 Civ. 1087 (S.D.N.Y. Feb. 14, 2012).
  3. See, e.g., Complaint and Demand for Jury Trial, *Associated Press v. All Headline News Corp.*, No. 08 Civ. 00323 (S.D.N.Y. Jan. 14, 2008); Amended Complaint, *Agence France Presse v. Google, Inc.*, No. 1:05-cv-00546 (D.D.C. Apr. 29, 2005).
  4. The term “news aggregator” is a flexible one, sometimes used interchangeably with “news reader” or “feed reader.” See Fiona Powell, *Blog Tips: A Glossary of Blog Terms*, BUSINESSBLOGSCHOOL (Oct. 15, 2009), <http://businessblogschool.com/13/business-blogging/blog-tips-a-glossary-of-blog-terms>. I focus here on what Kimberley Isbell has called “feed

many economic challenges facing traditional news media today,<sup>5</sup> commentators have been swift to blame news aggregators for free riding off newspapers' and magazines' expensively produced content.<sup>6</sup> Because intellectual property law does not grant copyright protection in news itself,<sup>7</sup> academics and government actors have sought new solutions to the news aggregator problem. In 2009, for instance, Judge Richard Posner suggested amending the Copyright Act so that news aggregators could be held liable for infringement.<sup>8</sup> Media law practitioners, meanwhile, have called for the federalization of hot news misappropriation through legislation.<sup>9</sup> The Federal Trade Commission even held a policy roundtable in 2010 that considered several different solutions to the aggregator problem, including compulsory licensing and statutory limits to fair use.<sup>10</sup>

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aggregators," which generally display headlines and article excerpts, typically with a link to the original website. Kimberley Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices* 5 (Berkman Ctr. for Internet & Soc'y, Research Publication No. 2010-10, 2010), <http://ssrn.com/abstract=1670339>. Examples of feed aggregator websites include Yahoo! News, Google News, and Newser. Mobile feed aggregators that display news excerpts in a format compatible with mobile phones or tablets include Flipboard, News360, and Pulse.

5. See, e.g., Ken Doctor, *The Newsonomics of the Next Recession*, NIEMAN JOURNALISM LAB (Aug. 11, 2011, 10:00 AM), <http://www.niemanlab.org/2011/08/the-newsonomics-of-the-next-recession>.
6. See, e.g., Bill Keller, *All the Aggregation That's Fit To Aggregate*, N.Y. TIMES MAG. (Mar. 10, 2011), <http://www.nytimes.com/2011/03/13/magazine/mag-13lede-t.html>; Yelena Schuster, AP Chairman: 'We Can No Longer Stand By and Watch Others Walk Off with Our Work,' N.Y. MAG. (Apr. 6, 2009, 6:02 PM), [http://nymag.com/daily/intel/2009/04/we\\_can\\_no\\_longer\\_stand\\_by\\_and.html](http://nymag.com/daily/intel/2009/04/we_can_no_longer_stand_by_and.html).
7. See *infra* Part I; see also NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 83 (2008) (explaining that early copyright law did not apply to newspapers at all).
8. Richard Posner, *The Future of Newspapers*, THE BECKER-POSNER BLOG (June 23, 2009), <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html>.
9. See, e.g., Andrew L. Deutsch, *Protecting News in the Digital Era: The Case for a Federalized Hot News Misappropriation Tort*, 1003 PRAC. L. INST. 511 (2010); David Marburger & Daniel Marburger, *Reviving the Economic Viability of Newspapers and Other Originators of Daily News Content* 46 (2009), <http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/MainAnalysis.pdf>. John C. McDonnell, meanwhile, has made a thoughtful argument that the current state-level hot news doctrine may be adequate to protect newsgatherers' proprietary interests in the aggregator era. See John C. McDonnell, *The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregation*, 10 NW. J. TECH. & INTELL. PROP. 255 (2012). McDonnell admits, however, that "the hot news misappropriation doctrine is not the perfect tool for content producers to use against news aggregators." *Id.* at 275. Rather, he sees it as a preferred option to "currently available alternatives." *Id.* Notably, McDonnell's discussion of alternative proposals does not contain any mention of implied license doctrine. *Id.* at 271-73.
10. *Potential Policy Recommendations To Support the Reinvention of Journalism*, FED. TRADE COMM'N

All of these conversations are fundamentally misguided because they attempt to address the problem of online news aggregation as if it were a traditional hot news or copyright issue. The similarity of the current aggregator problem to the paradigmatic hot news case is actually a red herring. As it turns out, the *Meltwater* case has less in common with *INS v. AP*—or, for that matter, with traditional copyright infringement cases—and more to do with recent case law governing the operation of online search engines.

This Comment argues that the appropriate legal framework for addressing news aggregators lies in federal courts' handling of intellectual property claims against search engines. In the 2006 case of *Field v. Google, Inc.*,<sup>11</sup> a federal district court applied a new version of the doctrine of implied license to hold that Google's indexing of websites does not amount to copyright infringement when a website owner has not affirmatively opted out of indexing through technological measures.<sup>12</sup> This Comment argues that extending the *Field* decision to news aggregators would establish a legal framework that is more appropriate to the technological reality of the modern news industry and could also prove mutually beneficial. Thus far, implied license doctrine online has been characterized primarily as benefitting would-be infringers.<sup>13</sup> Indeed,

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(2010), <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf>.

11. 412 F. Supp. 2d 1106 (D. Nev. 2006).

12. *Id.* at 1115-16.

13. See, e.g., Jonathan Bailey, *Does Posting Your Work Online Give Others the Right To Copy?*, PLAGIARISM TODAY (Aug. 19, 2010), <http://www.plagiarismtoday.com/2010/08/19/does-posting-your-work-online-give-others-the-right-to-copy> (“[W]e are faced with the possibility . . . that courts could rule that posting a work on the Web is the same as giving an implied license to copy and republish it freely, something that could all but eliminate copyright protection for many Web publishers.”); Jeff Neuberger, *The Righthaven Lawsuits: What Is Fair Use of Online Publications?*, PROSKAUER NEW MEDIA & TECH. L. BLOG (Feb. 24, 2011), <http://newmedialaw.proskauer.com/2011/02/24/the-righthaven-lawsuits-what-is-fair-use-of-online-publications> (calling recent media law implied license decisions “concerning” insofar as they suggest copyright owners are “consenting to the unrestricted copying and dissemination of the work by third parties”). Indeed, policymakers in pursuit of copyright-friendly reforms have rejected implied license doctrine precisely *because* it seems to benefit aggregators. The FTC’s 2010 roundtable on aggregation, for instance, characterizes the *Field* decision as a barrier to proposed statutory limits on fair use, because an implied license seems to give aggregators more freedom to copy content. See *Potential Policy Recommendations To Support the Reinvention of Journalism*, *supra* note 10, at 11 (“[S]ome could argue that . . . some aggregators . . . have implicit permission from newspaper web site owners to copy and distribute content, which may negate the need for a fair use defense.”). Although the FTC was clearly aware of the *Field* decision and considered it in its brainstorm for solutions to the news aggregator problem, it did not view implied license doctrine as a potential *solution* benefitting the news media at all.

aggregators themselves have relied on implied licenses as defenses against infringement in recent litigation.<sup>14</sup> But this Comment is the first to recognize that implied license doctrine can actually benefit content originators too, by giving legal force to a nearly costless technological solution: so-called robots exclusion protocols, or lines of code written into websites that would tell aggregators to stay away.

In Part I below, I expand on the news aggregator problem and briefly consider commonly proposed solutions. Part II describes the emerging standard of opt-out schemes for gaining copyright holders' permissions online and examines how the *Field* decision enforces this standard as a matter of law. Finally, in Part III, I explain how extending implied license doctrine to news aggregators can benefit both aggregators and newspapers. Specifically, I argue that courts should clarify that aggregators expose themselves to copyright liability when they ignore robots exclusion protocols. This simple doctrinal fix would restore some degree of informal protection to the news by making it more difficult and costly for aggregators to copy original content without permission. It would also provide newspapers with a bargaining chip they can use to channel negotiations with news aggregators toward mutually beneficial licensing deals.

## I. THE NEWS AGGREGATOR PROBLEM

Although there are many causes underlying the current economic crisis in the news industry, media insiders partly blame news aggregators, which copy headlines and excerpts from news stories from various websites and display them in a single forum, often without the advertisements that originally accompanied the stories. News aggregators, the argument runs, "free ride" off content in which traditional news institutions have invested costly time and effort. Media mogul Rupert Murdoch, founder of News Corporation, has even gone so far as to call news aggregation "theft."<sup>15</sup>

In reality, the news media's relationship with aggregators is a complicated one

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14. Notably, such arguments have been advanced in both American and foreign courts. See, e.g., *Righthaven L.L.C. v. Klerks*, No. 2:10-cv-00741, 2010 WL 3724897, at \*3-4 (D. Nev. Sept. 17, 2010); *Google, Inc.'s Answer and Counterclaims* at 28-29, *Agence France Presse v. Google, Inc.*, No. 1:05-cv-00546 (D.D.C. May 19, 2005); *Cours d'Appel [CA] [Courts of Appeal] Bruxelles*, 9e ch. Nov. 5, 2011, 37 (Belg.), <http://www.scribd.com/doc/60314492/Copiepresse-Ruling-Appeal-Google-5May2011>.

15. David Sarno, *Murdoch Accuses Google of News 'Theft,'* L.A. TIMES, Dec. 2, 2009, <http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009deco2>.

because, even when aggregators copy portions of news stories without permission, they may actually be helping newspapers distribute their stories to new audiences.<sup>16</sup> In fact, there appears to be no direct empirical evidence that news aggregators are actively cutting into the news industry's advertising revenue.

Yet this is not to say that the traditional media's concerns about *potential* losses to news aggregators are unwarranted. More than ever, newspapers feel the need to be protective of their ad revenue, which plummeted forty-five percent in the first decade of the 2000s.<sup>17</sup> By presenting original content stripped of ads, aggregators threaten to deprive content originators not only of website traffic, but also of precious advertising income. And if that income continues to spiral downward, one may reasonably fear that news stories that are costly to produce—such as investigative reports—will cease to emerge in the first place.<sup>18</sup>

What makes news aggregators particularly threatening from a news originator's perspective is that, despite the intuition that news aggregators are guilty of free riding, their activities frequently lie beyond the reach of copyright liability. This is so for two reasons: copyright protection in news is thin, and aggregators' taking of content often falls within the fair use defense. Because facts alone are not copyrightable, copyright protection in news stories only extends to the elements of the story—like wording and organization—that are original to the author.<sup>19</sup> Moreover, even longer excerpts of news articles displayed by aggregators are typically protected by the fair use defense, particularly because section 107 of the Copyright Act specifically lists “news reporting” as one of the purposes of use

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16. Cf. Lesley Chiou & Catherine E. Tucker, *News, Copyright, and Online Aggregators* 4 (Oct. 1, 2010) (unpublished manuscript), <http://arrow.hunter.cuny.edu/media-economics-workshop/conference-papers/chiou%20and%20tucker%20news.pdf> (reporting an empirical study finding that “news aggregators actually provoke readers to seek further news”).
  17. *Potential Policy Recommendations To Support the Reinvention of Journalism*, *supra* note 10, at 2 (citing *State of the News Media 2010*, PEW RES. CENTER (Mar. 15, 2010), <http://www.pewresearch.org/pubs/1523/state-of-the-news-media-2010>). It is unknown what portion of this decrease can be attributed to the activities of news aggregators, as the decrease in ad revenue can also be attributed to a variety of other sources as well—for example, losses in classified advertising spurred by the development of websites such as Craigslist.
  18. For examples of just how costly journalism can be, see Zachary M. Seward, *An Extremely Expensive Cover Story—With a New Way of Footing the Bill*, NIEMAN JOURNALISM LAB (Aug. 28, 2009), <http://www.niemanlab.org/2009/08/an-extremely-expensive-cover-story-with-a-new-way-of-footing-the-bill>. According to Seward, a single 13,000-word *New York Times Magazine* article investigating the euthanization of patients in a New Orleans hospital after Hurricane Katrina cost \$400,000 to produce.
  19. 17 U.S.C. § 102(a) (2006) (clarifying that copyright protection extends to “original works of authorship”); see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

that are privileged in fair use analysis.<sup>20</sup> This means that aggregators can convincingly claim that, by copying publications' stories, they are merely re-reporting the news and disseminating it to a broader audience.

Until recently, in the absence of clear copyright protection for news, newspapers and other original content providers were able to rely on the protection of "tedium" to prevent free riding on their expensively produced content. That is to say, third parties would not copy extensively from news outlets when copying and distribution technologies were too cumbersome to make free riding worth it. The trouble with today's news aggregators is that digital technology enables them to instantaneously copy and distribute news content to thousands of users on their laptops, tablet devices, and mobile phones.<sup>21</sup>

So the question arises: How should intellectual property law stop news aggregators from free riding on publications' content? The prevailing answers to date have fallen into one of two camps: either amend the Copyright Act to expand copyright protection in news, or rely on hot news misappropriation liability. The first option is problematic from a constitutional perspective. The Supreme Court has declined to subject copyright legislation to elevated First Amendment scrutiny where "Congress has not altered the traditional contours of copyright protection."<sup>22</sup> Yet the Court recently clarified in *Golan v. Holder* that these "traditional contours" include the idea/expression dichotomy and fair use<sup>23</sup>—the very same First Amendment safeguards that aggregation control legislation would threaten. For this reason, such legislation may in fact be subject to strict scrutiny.<sup>24</sup> The second option, meanwhile, is likely unworkable from a practical perspective because hot news protection only gives content originators an exclusive right in the facts that they report for a limited time—as

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20. 17 U.S.C. § 107.

21. See, for example, *Copyright & Commerce: Guarantees or Promises?*, COPYRIGHT CLEARANCE CENTER 37:56 (May 9, 2011), <http://beyondthebookcast.com/copyright-and-commerce-05-09-11>, in which Tim Jucovy, associate counsel at the *Washington Post*, explains that "tedium was a great protection against copyright infringement . . . . Now all of the sudden, you have the reproduction but you also have just the incredible ease of mass scale distribution . . . ."

22. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

23. *Golan v. Holder*, 132 S.Ct. 873, 890 (2012).

24. This is not to say that amending the Copyright Act is impossible—merely that any amendment would have to be sufficiently narrowly tailored to not place an undue burden on aggregator speech. See generally Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement*, 12 VAND. J. ENT. & TECH. L. 947 (2010) (considering Judge Posner's proposed copyright amendment and concluding that it would have to be very circumscribed to pass constitutional muster).

long as they retain their commercial value as hot news.<sup>25</sup> At the time of *INS v. AP*, the question of how long a news service could retain its “quasi-property” right in facts was an easy one to answer: generally speaking, as long as it took the newspaper to distribute its stories over the geographic reach of its circulation. In the Internet era, when distribution happens instantly and internationally, one might argue that a publication’s exclusive right to the facts in an article is extinguished as soon as the work is posted online.

More importantly, each of the proposed solutions is stuck in an outdated mindset about the operation of intellectual property rights on the Internet. To solve the news aggregation problem, the legal community should look not to the hot news and copyright cases of old, but to the new framework of intellectual property law that is developing in other Internet contexts.

## II. OPT-OUT PERMISSIONS AND IMPLIED LICENSES

Traditional copyright law is an opt-in system, in which the default distribution of rights prohibits reproduction of copyrighted material unless copyright holders affirmatively give their permission.<sup>26</sup> This system, however, has been shaped in large part by technological considerations. Before the Internet, it was usually easier for a copyright holder to give permission on an individual basis than to search for would-be infringers in order to revoke permission. Now that the Internet has greatly reduced search costs, the technological norm has changed to an opt-out system. Any solution to the news aggregator problem, whether legal or technological, will need to operate based on opt-out principles as well.

### A. *The Emerging Opt-Out Norm Online*

The Internet has been designed from its inception to be an open system. When the Internet Protocol (IP) was first developed in the 1960s and 1970s, its creators designed it to be an “open architecture” network, one which all were permitted to join.<sup>27</sup> Users now browse websites freely by default, unless site owners exclude them by taking affirmative steps to block access, such as

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25. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918).

26. 17 U.S.C. § 106 (2006) (“The owner of copyright under this title has the exclusive rights . . . to authorize” enumerated uses of a copyrighted work.).

27. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD* 23 (2006).

requiring a user account and password or blocking a specific IP address. The result is an opt-out system enforced by technology; all are free to join, unless owners use technology to opt out of the open community.<sup>28</sup>

Most news aggregators also operate on an opt-out basis – this one enforced by a combination of technology and community norms. The technology underlying “feed aggregators” is the same technology used by search engines like Google, which index billions of web pages by using a computer code, called a “web crawler,” to digitally scan and copy them. Google’s “Googlebot” crawler does not seek permission from website owners to index their sites; instead, it will automatically index a site unless its owner takes affirmative steps to stop the Googlebot.<sup>29</sup>

The easiest way for a website owner to do this is to simply put instructions in the site’s code telling the Googlebot to stay away. A site owner can create a text file called “robots.txt” – hidden from viewers, but immediately visible to the web crawler – that instructs search engines on which parts of a site they may index.<sup>30</sup> Authors of robot.txt files can be quite specific about what content they do and do not want indexed. For instance, a blog author may wish to make the text of her posts open to the Googlebot while keeping personal photographs off-limits. This customizability is perhaps the greatest advantage of the opt-out default: if the Googlebot were forced to ask permission to index every folder, transaction costs would be prohibitively high.<sup>31</sup>

Notably, robots.txt does not make it technologically impossible for a web crawler to index a site. All it does is notify the robot of the site owner’s wishes. Thus, the robots exclusion protocol is currently enforced only by web crawlers’ voluntary compliance with the community norm of respecting these instructions.

### *B. Implied License Doctrine*

Aside from both relying on web crawler technology, search engines and news aggregators are similar in another important respect: both create copies of websites that potentially infringe their owner’s copyrights. When a web

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28. See John S. Sieman, *Using the Implied License To Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 890 (2007).

29. See *Googlebot*, GOOGLE, <http://support.google.com/webmasters/bin/answer.py?hl=en&answer=182072> (last updated Sept. 24, 2012).

30. *About /robots.txt*, ROBOTSTXT.ORG, <http://www.robotstxt.org/robotstxt.html> (last updated Aug. 23, 2010).

31. See Michael R. Mattioli, Note, *Opting Out: Procedural Fair Use*, 12 VA. J.L. & TECH. 1, 22 (2007) (“For practical purposes, strict opt-in would be the death of online search.”).



crawler indexes a site, it creates a copy of all of the site's contents. Because the right to copy or reproduce a work is one of the exclusive rights of copyright owners, it seems that under traditional copyright law, web crawlers would automatically be guilty of copyright infringement.<sup>32</sup> Yet courts have so far been willing to permit search engines' indexing. One decision in particular provides a model for how the law should approach the news aggregator problem.

In *Field v. Google, Inc.*, a federal district court in Nevada used a new version of the doctrine of implied license in copyright law to hold that Google's use of the Googlebot to index websites does not amount to copyright infringement when a website owner has not opted out of indexing.<sup>33</sup> Under traditional copyright law, holding a license is an affirmative defense to a claim of copyright infringement. The license can either be granted expressly or impliedly.<sup>34</sup> Historically, implied licenses have only been found in copyright cases when there is direct dealing between just a few parties.<sup>35</sup>

The *Field* court expanded the earlier doctrine to hold that implied license arises "where the copyright holder knows of the use and encourages it."<sup>36</sup> Applying this two-pronged knowledge and encouragement test to the *Field* facts, the court found that the website owner was aware of the robots exclusion protocol mechanisms for communicating with the Googlebot, and that by not using them, he essentially encouraged the Googlebot to index his content.<sup>37</sup>

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32. See 17 U.S.C. § 106 (2006). Notably, when an aggregator does not fall within the realm of fair use, it can be liable for not only *copying* a work, as search engines are, but also for publicly *displaying* the work. Aggregators that compile a variety of news sources could also be said to be creating "derivative works." All of these uses are traditionally exclusive to copyright holders. *Id.* The fact that search engines' activities could be infringing copyrights on the basis of *copying* alone, however, makes the comparison between search engines and aggregators nonetheless apt.
33. 412 F. Supp. 2d 1106, 1115-16 (D. Nev. 2006).
34. See *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) ("[A] nonexclusive license may be granted orally, or may even be implied from conduct." (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 10.03[A], at 10-36 (1989))).
35. See, for example, *id.* at 558-59, in which the Ninth Circuit found that a film producer had an implied license to use a special effects company's copyrighted footage, where the producer had paid the company nearly \$56,000 for the footage. The court reasoned that although the parties did not discuss the copyright, "[t]o hold that [the plaintiff] did not . . . convey a license to use the footage in [the producer's film] would mean that plaintiff's contribution to the film was 'of minimal value,' a conclusion that can't be squared" with the footage's hefty price tag. *Id.*
36. *Field*, 412 F. Supp. 2d at 1116.
37. *Id.* ("Thus, with knowledge of how Google would use the copyrighted works he placed on those pages, and with knowledge that he could prevent such use, Field instead made a

The *Field* court thus recast the passive failure to use robots.txt as an active behavior that gives rise to an implied license. Under *Field*, where a website owner knows that the Googlebot is accessing his copyrighted works, and where he “encourages” the copying by leaving his site open, the Googlebot’s copying is permitted.

### C. *The Potential for Extending Field’s Reach*

The *Field* decision represented a novel and unusually broad application of implied license doctrine designed to respond to the technological reality of opt-out mechanisms on the Internet. Its two-pronged test has begun to take hold in other jurisdictions, so that implied license is now emerging as an established mechanism for dealing with the allocation of intellectual property rights online.<sup>38</sup> Indeed, some commentators have predicted that implied licensing will—and should—become central to the allocation of intellectual property rights on the Internet.<sup>39</sup>

Admittedly, an opt-out scheme for gaining copyright holders’ permission online represents a significant departure from the traditional framework of American copyright law, which places the burden on would-be infringers to seek affirmative permission. For this reason, some courts have been hesitant to extend *Field*’s reach beyond the narrow search engine context. For instance, in a dispute between Google Books, a searchable online database of books, and The Authors Guild, a federal court recently rejected a proposed settlement that would have used an opt-out system.<sup>40</sup> The court found that it would be “incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.”<sup>41</sup>

Yet placing affirmative duties on authors is not entirely new to American copyright law.<sup>42</sup> While the present version of the Copyright Act has mostly

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conscious decision to permit it.”).

38. See, e.g., *Parker v. Yahoo!, Inc.*, No. 07-2757, 2008 WL 4410095 (E.D. Pa. Sept. 25, 2008) (applying the *Field* test to find that plaintiff’s posting of copyrighted works online amounted to an implied license); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006) (holding that Google’s archiving of a writer’s postings of copyrighted material was not infringing). Google has also used implied license as a defense in the ongoing Google Books litigation. See Mattioli, *supra* note 31, at 2-10.

39. See Sieman, *supra* note 28, at 916-24.

40. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

41. *Id.* at 682.

42. See, e.g., Mattioli, *supra* note 31, at 19.

done away with registration formalities,<sup>43</sup> historically such requirements often burdened copyright holders. Registration with the U.S. Copyright Office<sup>44</sup> and deposit of copyrighted works with the Library of Congress<sup>45</sup> are still prerequisites for bringing infringement suits.<sup>46</sup> Indeed, the “onus on copyright holders” to opt out online is hardly an onus at all; it merely requires the use of a robots exclusion protocol, which is easy and almost costless to implement.

Moreover, although applying *Field*'s expansive view of implied licenses to the news aggregator context would represent a significant judicial innovation, doing so would be entirely consistent with already developing community norms on the Internet, as recent litigation surrounding aggregators reveals. To provide just one example, when French news agency Agence France-Presse (AFP) sued Google News in 2005, Google answered with a counterclaim seeking declaratory judgment that its uses were authorized by implied license.<sup>47</sup> Google stated that it “follows widely publicized and known Internet standards, including standards allowing third party websites to ‘opt out’ of Google News.”<sup>48</sup> Because AFP apparently knew of the opt-out technology and did not employ it, Google argued that its use of AFP content was licensed, “implicitly if not explicitly.”<sup>49</sup> The AFP litigation settled out of court,<sup>50</sup> so it is unknown whether Google's argument would have succeeded. It is telling, however, that Google based its counterclaims on the “known Internet standards” of online opt-out culture.

### III. A MUTUALLY BENEFICIAL SOLUTION: WHAT IMPLIED LICENSE DOCTRINE CAN DO FOR THE NEWS INDUSTRY

Although others have extolled the benefits of relying on implied license

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43. See ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 415 (5th ed. 2010).
44. 17 U.S.C. § 408 (2006).
45. *Id.* § 407.
46. *Id.* § 411 (stating that except for actions vindicating visual artists' moral rights under 17 U.S.C. § 106A, “no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title”).
47. Google, Inc.'s Answer and Counterclaims at 28-29, *Agence France Presse v. Google, Inc.*, No. 1:05-cv-00546 (D.D.C. May 19, 2005).
48. *Id.* at 19.
49. *Id.* at 28.
50. See Caroline McCarthy, *Agence France-Presse, Google Settle Copyright Dispute*, CNET NEWS (Apr. 6, 2007), [http://news.cnet.com/2100-1030\\_3-6174008.html](http://news.cnet.com/2100-1030_3-6174008.html).

doctrine online generally,<sup>51</sup> commentators have thus far not recognized the benefits to the news industry that could emerge if courts were to clarify that violating the terms of an implied license can expose news aggregators to liability. While aggregators may seem to be the clear beneficiaries of implied license doctrine, consistent application of the doctrine would make robots exclusion protocols legally enforceable—which, in turn, could restore some degree of tedium protection in news and help to channel negotiations between newspapers and aggregators toward mutually beneficial licensing agreements.

As explained above, the primary means to stop the grant of an implied license—the robots exclusion protocol—is currently enforced only by community norms, as it has no technological exclusionary ability and no real legal teeth outside of the search engine context contemplated in *Field*. It is unclear whether the instructions of a robots exclusion protocol can be considered a legally enforceable contract.<sup>52</sup> Moreover, the Digital Millennium Copyright Act (DMCA), which prohibits circumvention of technological measures<sup>53</sup> controlling access to copyrighted works,<sup>54</sup> is unlikely to provide an avenue for legal enforcement of robots.txt because robots.txt probably does not satisfy the DMCA’s definition of digital rights management.<sup>55</sup> One legal solution to the news aggregator problem, then, is for courts to clarify that ignoring a robots.txt file is a violation of the terms of the implied license, which in turn re-exposes the offending news aggregator to copyright liability. This simple doctrinal clarification would encourage compliance on the part of aggregators. It would also encourage traditional news media to more widely adopt the use of robots exclusion protocols, whereas currently they often do

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51. See, e.g., Sieman, *supra* note 28.

52. See *id.* at 909 (“Whether this notice to Google has any legal force at all is extremely unclear and not previously litigated.”).

53. These sorts of “technological measures” are commonly referred to as “digital rights management” (DRM). A classic example of DRM is technology that prevents a CD or DVD from being copied. See *Digital Rights Management*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Digital\\_rights\\_management](http://en.wikipedia.org/wiki/Digital_rights_management) (last updated Sept. 6, 2012).

54. 17 U.S.C. § 1201(a)(1)(A) (2006).

55. *Id.* § 1201(a)(3)(B) (“[A] technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”); see *Healthcare Advocates, Inc. v. Harding, Early, Follmer & Frailey*, 497 F. Supp. 2d 627, 642 (E.D. Pa. 2007) (“No court has found that a robots.txt file universally constitutes a ‘technological measure effectively controll[ing] access’ under the DMCA.” (alteration in original)).

not perceive a benefit to using them.<sup>56</sup> Combined, these two effects would restore some degree of tedium protection in news, as widespread use of robots.txt would make it impossible for aggregators' web crawlers to rapidly copy large swaths of content from around the Internet.

Naturally, news sites may not always wish to block news aggregators from their sites, as aggregators have the potential to have symbiotic rather than antagonistic relationships with news providers. Perhaps the greatest benefit of this scheme for enforcing robots exclusion protocols, then, is that it will enable news providers to use robots.txt as a bargaining chip to channel negotiations with aggregators toward affirmative licensing deals. If robots exclusion protocols become legally enforceable, then a news site can present an aggregator with two alternatives: either the site will block them out entirely by using a robots.txt file, or the aggregator can sign an affirmative licensing deal with the site, which will then permit it to pay the site for the right to aggregate its content. Such deals can benefit newspapers and aggregators alike—as is suggested by the fact that the settlement in the AFP case granted Google a license to link to AFP's content (presumably in exchange for a fee, although the financial terms of the settlement were not disclosed).<sup>57</sup>

## CONCLUSION

Extending implied license doctrine to the news aggregator context may ultimately represent a win for aggregators and news providers alike. On the one hand, an implied license enables aggregators to disseminate information broadly without fearing potential liability at every turn. On the other hand, judicial enforcement of robots exclusion protocols can provide content originators with a sense of security that their desires to opt out of copyright permissions will be respected. What is more, news sites can rely on the promise of compliance with robots.txt to channel negotiations toward traditional licensing deals with aggregators.

Best of all, the opt-out framework envisioned in *Field v. Google* reflects the technological reality of the news aggregator problem. The Internet was designed to be a presumptively open sphere for the exchange of ideas and culture. By enabling the rapid dissemination of news to broad audiences—while leaving in place incentives for monetary licensing deals that will fund

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56. Telephone Interview with Timothy L. Jucovy, Assoc. Counsel, The Wash. Post (Dec. 9, 2011).

57. McCarthy, *supra* note 50.

costly journalism—implied licensing fits into this ethos. Courts should embrace the opportunity to develop a new line of copyright doctrine that responds to, rather than struggles to overcome, the technological landscape of the modern news industry.

MONIKA ISIA JASIEWICZ\*

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