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Shutting Down the Turbine: How the News Industry and News Aggregators can Coexist in a Post-Barclays v. Theflyonthewall.com World

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2014; B.A., New York University, 2010. Thanks to Ryan Fox, Tiffany Miao, Tiffany Mahmood, Laura Lagone, and the rest of the IPLJ staff for their help in editing this piece. Thank you to Sasha Segall for her support and direction throughout this process. A very special thank you to Professor Olivier Sylvain for his guidance, inspiration, and strict schedule, without which I never would have reached this point. Finally, to my family, thank you for being an unending supply of support, but, mostly, to my aunt for putting up with me and my mountains of paper throughout this writing process.

Shutting Down the Turbine: How the News Industry and News Aggregators can Coexist in a Post-*Barclays v.* *Theflyonthewall.com* World

Nicole Marimon*

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INTRODUCTION

In February 2012, news that an employee at *The Huffington Post* was killed after being sucked into the powerful news aggregator’s content-gathering turbine engine was spreading across the Internet.¹ In reality, “America’s Finest News Source,” *The Onion*, was entertaining the web with another one of their classic satirical pieces, this time taking on powerhouse news aggregator *The Huffington Post*.² *The Onion*’s article makes a point of mentioning many of the publications, *The Washington Post* and *New York Times* included, that *The Huffington Post* combs through in order to create their standard 400-words or less snapshots of the news.³

The Huffington Post is probably the most famous and successful news aggregation website in existence.⁴ Like many others out there, *The Huffington Post* is in the business of selling news in short snippets. Their business model, as pointed out by *The Onion*, involves producing an exorbitant amount of content at

¹ “*Huffington Post*” *Employee Sucked into Aggregation Turbine*, ONION (Feb. 2, 2012), <http://www.theonion.com/articles/huffington-post-employee-sucked-into-aggregation-t,27244>.

² *Id.*

³ *See id.*; HUFFINGTON POST, <http://www.huffingtonpost.com> (last visited Jan. 13, 2013).

⁴ For example, AOL purchased *The Huffington Post* in 2011 for \$315 million. *See* Jeremy W. Peters, *Betting on News, AOL Is Buying The Huffington Post*, N.Y. TIMES (Feb. 7, 2011), http://www.nytimes.com/2011/02/07/business/media/07aol.html?_r=0.

breakneck speeds.⁵ The company's influx of manpower after a buyout by AOL only increased their ability to produce.⁶

The *Onion* piece focuses on an important trend that has been growing in the last decade: the practice of news aggregators mining information from traditional newsgathering sources and making a profit from it.⁷ The online news market moves fast, but traditional media giants, particularly newspapers, have failed to profitably integrate themselves into the system.⁸ Hurting from attacks on every field, the newspaper industry suffers, while news aggregators continue to profit on the labor of others.⁹ At the source is the tension between paid content and unpaid content.¹⁰ Having long upheld a system of allowing free access to their online content, the newspaper industry faces competition from online sources that can create the same information for less.¹¹

Looking for solutions, the industry has increasingly turned to the legal system for relief. The Associated Press recently brought suit against Meltwater News, a global online media-monitoring site.¹² This is the latest of several attempts by the Associated Press to sue a news aggregator for using its content. The claim, which is primarily about copyright infringement, also alleges a violation of the hot news doctrine.¹³ Filed this year in the Southern District of

⁵ See "Huffington Post" Employee Sucked Into Aggregation Turbine, *ONION* (Feb. 2, 2012), <http://www.theonion.com/articles/huffington-post-employee-sucked-into-aggregation-t,27244>.

⁶ See Jeff Bercovici, *Why Doesn't AOL Just Sell The Huffington Post*, *FORBES* (May 9, 2012), <http://www.forbes.com/sites/jeffbercovici/2012/05/09/why-doesnt-aol-just-sell-the-huffington-post>.

⁷ See *ONION*, *supra* note 1.

⁸ See *infra* Part I.B.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² MELTWATER NEWS, <http://www.meltwater.com/products/meltwater-news> (last visited Oct. 31, 2012), see also *Associated Press v. Meltwater*, *CITIZEN MEDIA LAW PROJECT* (Feb. 16, 2012), <http://www.citimedialaw.org/threats/associated-press-v-meltwater-news> (explaining that Meltwater creates a search database that allows clients to find the information they want through keywords, phrases, and topics).

¹³ Meltwater allegedly infringed copyright by taking complete copies of Associated Press stories and storing them on their database. In their complaint, the Associated Press alleged that Meltwater would circulate "substantial verbatim excerpts" in newsletters and email reports. This allowed subscribers of Meltwater's services to access, save, edit, and

New York, it is surprising to see the news industry still turning to a doctrine that in recent years has been left without much bite.¹⁴

The hot news doctrine was first established in *International News Service v. Associated Press*.¹⁵ The case involved the taking and reusing, by International News Service, of the Associated Press' content.¹⁶ International News Service was able to undercut the Associated Press by taking AP content published on the east coast and supplying it to INS subscribers on the west coast.¹⁷ Decisions in the Second Circuit have left the doctrine, which was created to protect the time value¹⁸ of the news, in a precarious situation. In *Barclays v. Theflyonthewall.com*, the most recent appellate decision dealing with hot news, the Second Circuit looked at previous case law and deemed the hot news test developed therein was dicta.¹⁹ In doing so the court left the doctrine ambiguous and failed to provide lower courts with the proper framework for a hot news analysis. Outside of insisting that a limited *International News Service* type claim survived copyright preemption, the court left the doctrine, and everyone else, in the dark.²⁰

Some argue the doctrine is on its way out and is no longer truly applicable today.²¹ Yet the circumstances surrounding *AP v. Meltwater* are eerily similar to *INS v. AP*; years after *INS*, AP-generated content is still being misappropriated by others.²² Now, when the practice of aggregation has become so commonplace that

even distribute the full text of the articles and excerpts. They also allege Meltwater prepared unauthorized translations of the articles. See Complaint at 2, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 2013 WL 1153979 (S.D.N.Y. 2013) (No. 12 Civ. 1087 DLC).

¹⁴ See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 878 (2d Cir. 2011).

¹⁵ *International News Service v. Associated Press*, 248 U.S. 215, 231(1918).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ Time value meaning the profit garnered by the timely publication of news, the depreciation of news occurring the more time passes and the more it spreads.

¹⁹ See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 901 (2d Cir. 2011).

²⁰ See *id.* at 894.

²¹ See *id.* at 878.

²² See *infra* Part I.C.

we easily accept it as a norm, the legal doctrine best placed to protect the industry is slowly being eroded by decisions, like *Barclay's*, that fail to solidify the doctrine in concrete terms.²³ Perhaps the doctrine is no longer fully equipped to deal with the scenarios found in today's digital industry, but some form of protection must be in place to ensure the continuation of responsible and comprehensive newsgathering.

This Note will argue that the best form of the doctrine going forward is one that begins to chip away at the proprietization of the news and the hot news doctrine by promoting a licensing scheme that encourages self-regulation and collaboration. The plan would ideally help traditional industry players establish more of a foothold in the online market. Part I of this Note will discuss the current status of the news media and the development of the hot news doctrine. Part II will focus on the possible re-imaginings the doctrine could undergo in order not only to keep it alive, but also to make it more applicable to today's predominantly digital market. Finally, Part III presents some issues that will be faced by any new incarnation of the doctrine. In conclusion, it is argued that the best solution is to keep a common law doctrine, but one with changes that include a new conception of what timeliness means and that stipulate what kinds of remedies apply. The solution stresses the integration of hot news with industry self-regulation schemes like News Right,²⁴ schemes that would help support the industry while it develops a stronger business model online. Promoting the profitable coexistence of both news gatherers and aggregators is the goal the industry should strive for: symbiosis rather than parasitism.

I. THE HOT NEWS DOCTRINE

A look at the inception and development of the hot news doctrine, along with a look at the current status of the news industry, will help us understand what role hot news has to play in protecting news gathering. First, this Note will take a closer look

²³ See *Theflyonthewall.com, Inc.*, 650 F.3d at 894.

²⁴ See *infra* Part I.A..

at the types of news aggregators competing for news revenues and the nature of the struggle faced by the news industry, before delving further into the current status of the newspaper industry, focusing on the challenges and changes the industry has faced as a result of the digital age. Next it will explore the development of the hot news doctrine since its inception in *INS v. AP* through the recent Second Circuit decision of *Barclays v. Theflyonthewall.com*. Then it will consider the relationship between copyright and the hot news doctrine, before considering several examples of state misappropriation doctrines by way of demonstrating how the doctrine has remained in play throughout the last few years, with special focus on the limitation preemption analysis can sometimes cause.

A. Aggregators . . . Never Heard of Them

In a country of media giants, the digital age has been an uphill battle for most traditional news organizations.²⁵ It may be a losing battle. Several years ago, news aggregators came onto the online scene and are now so integrated into the online news setting that many people do not even realize they are not getting their information from the original producer. Popular news aggregators include Google News, *The Huffington Post*, *Gawker*, and *Salon*.²⁶ With a simple business model, consisting primarily of gathering information from other news sources and repackaging it into a few paragraphs at most, aggregators have the ability to distribute the same information at a minimal cost.²⁷ Recent studies have found

²⁵ See generally LUCAS GRAVES, BILL GRUESKIN & AVA SEAVE, THE STORY SO FAR: WHAT WE KNOW ABOUT THE BUSINESS OF DIGITAL JOURNALISM, (Columbia Journalism School Tow Center for Digital Journalism) (2011), available at http://cjrarchive.org/img/posts/report/The_Story_So_Far.pdf; Rick Edmonds et al., *Newspapers: Building Digital Revenues Proves Painfully Slow*, PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, (Apr. 11, 2012), <http://stateofthedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow>.

²⁶ GOOGLE NEWS, <https://news.google.com> (last visited Nov. 21, 2012); GAWKER, <http://gawker.com> (last visited Nov. 21, 2012); HUFFINGTON POST, <http://www.huffingtonpost.com> (last visited Jan. 13, 2013); SALON, <http://www.salon.com> (last visited Nov. 21, 2012).

²⁷ See Lauren M. Gregory, Note, *Hot Off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the "Hot News" Misappropriation Tort in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577, 582 (2011).

that nearly 75,000 websites reuse newspaper content from all over the country without permission.²⁸ As one scholar explains, this “forces one news outlet to absorb the cost of news-gathering, while the other capitalizes on the output for free.”²⁹

At a surface level, a news aggregator is simply a website that culls information from many sources and displays it at a single place.³⁰ However, within that definition there is a myriad of different types of aggregating sites. Some make the distinction between pure aggregators and parasitic aggregators.³¹ Pure aggregators use headlines and a minimal amount of the text, linking the reader back to the original source.³² Parasitic aggregators, on the other hand, use the content to rewrite and publish it as their own.³³ However, these definitions, while evocative of what the ultimate dispute is between aggregators and content generators, does not comprehensively describe all of the aggregating sites available today. The Citizen Media Law Project has outlined four types of aggregators: feed aggregators, specialty aggregators, user-curated aggregators, and blog aggregators.³⁴ The distinctions are useful in understanding the legal perspective on the issue. Feed aggregators are similar to the pure aggregators mentioned above, including a few lines of the lede and a link to the original news story.³⁵ The specialty aggregators are similar but focus on one topic rather than an array.³⁶ User-curated aggregators are websites like Digg, where content is derived from user-

²⁸ *See id.*

²⁹ *Id.*

³⁰ KIMBERLY ISABELL & THE CITIZEN MEDIA LAW PROJECT, *THE RISE OF THE NEWS AGGREGATORS: LEGAL IMPLICATIONS AND BEST PRACTICES*, 2 (Berkman Center for Internet & Society at Harvard University) (2010), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/news%20aggregation%20white%20paper.pdf>.

³¹ Richard T. Kaplar, *More on Newspapers and Aggregators*, MEDIA INSTITUTE (Aug. 26, 2009), <http://www.mediacompolicy.org/2009/08/articles/copyright/more-on-newspapers-and-aggregators>.

³² *See id.*

³³ *See id.*

³⁴ *See* Isabell, *supra* note 30, at 2–5.

³⁵ *See id.* at 2.

³⁶ *See id.* at 3.

submissions and comes from a wide variety of sources.³⁷ Finally, blog aggregators find themselves at the other end of the spectrum, most succinctly embodying the parasitic model described above. “Blog aggregators are websites that use third-party content to create a blog about a given topic.”³⁸ Examples of blog aggregators include websites like Gawker and *The Huffington Post*.³⁹ The content is sometimes used as the basis for original blogger-written articles composed of information culled from various sources, with links back to the original articles throughout.⁴⁰ Other times they are short summaries of original articles with links to the originals.⁴¹

The crux of the competition is the ability of these sites to divert readership from content generators. Commentators from the Columbia Tow Center for Digital Journalism say “[t]he definition of a competitor now is someone who gives away your story for free.”⁴² News aggregators compile news articles and distribute them to consumers through their websites, often times repackaging work that may have taken days to produce into a few sentences that take mere minutes to write.⁴³ In the race to gain views online, aggregators often win.⁴⁴ While newspapers and other print sources are still struggling to profitably incorporate themselves into the online world, news aggregators dip into their revenues by siphoning off possible readership from main news generators.⁴⁵ Aggregators also provide an outlet for otherwise unheard voices and bring together engaged audiences, all at minimal costs.⁴⁶ Interestingly, original content sites and aggregator sites are used in much the same way by users, meaning that heavily-reported stories

³⁷ See *id.* at 4.

³⁸ *Id.* at 5.

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 3.

⁴³ See *id.* at 84–86 (presenting a compelling example of how a feature story on *New York Magazine* is shortened and repackaged into a blurb for *The Huffington Post*).

⁴⁴ See *id.* at 13.

⁴⁵ See *id.* at 83.

⁴⁶ See *id.*

will get the same engagement from readers regardless of the news provider.⁴⁷

In order to fight this battle against new aggregators, apart from bringing lawsuits, the Associated Press and 28 other news organizations launched a partnership licensing organization in 2011 called NewsRight.⁴⁸ The company established a system called News Registry for collecting royalties from aggregators.⁴⁹ The system registers professionally-edited news items across thousands of websites.⁵⁰ “NewsRight will begin slowly, asking commercial enterprises that scrape stories and sell online news digests to business clients to pay licensing fees.”⁵¹ The enterprise hopes in time to incorporate larger news aggregators and to expand beyond text to include photos, video and international markets. The information will enable publishers to pursue different outcomes, including seeking legal remedies.⁵² NewsRight tracks the reuse of articles, but does not in any way own a stake in legal proceedings from such.⁵³ David Westin, formerly of ABC News and now the CEO of News Right said, “[w]e’re not a litigation shop.”⁵⁴ NewsRight is in the business of developing contracts and business relationships among news organizations.⁵⁵ Ideally, the effort would allow news organizations to collect fees from both digital subscriptions and from the “expanding aggregation sector.”⁵⁶ Opponents argue that the Associated Press is leading a war against the “democratization of distribution” provided by the Internet, a direct reaction to their inability to adapt to the new

⁴⁷ See *id.* at 84–86.

⁴⁸ See Staci D. Kramer, *NewsRight Launches with 29 Publishers: “Not a Litigation Shop,”* PAIDCONTENT (Jan. 5, 2012), <http://paidcontent.org/2012/01/05/419-newsright-launches-with-29-publishers-not-a-litigation-shop>.

⁴⁹ See Edmonds, *supra* note 25.

⁵⁰ News Registry also measures consumption of content online. It provides publishers and content users with information on how content is being used and facilitates licensing opportunities. See NEWS RIGHT, <http://www.newsright.com/About> (last visited Jan. 13, 2013).

⁵¹ *Id.*

⁵² See *id.*

⁵³ Kramer, *supra* note 48.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ Edmonds, *supra* note 25.

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online market.⁵⁷ Writer Matthew Ingram see it more as declaring war, “[t]he AP seems determined to . . . do whatever it can to maintain control over its content and the scarcity that is at the core of its business model just as newspaper owners like Rupert Murdoch are trying to do with pay walls and other gates around their information.”⁵⁸

However, the question of whether aggregation is legal has never been answered.⁵⁹ Without an answer from the courts, two remedies remain available for the industry: copyright and hot news misappropriation.⁶⁰ Over the last few years, the hot news doctrine has had a slight rebirth.⁶¹ The doctrine, which arose from the turn of the century case involving wire services Associated Press and International News Service, is being increasingly alleged in cases against online aggregators of content. The most recent case, *Barclays v. Theflyonthewall.com* involved financial companies bringing suit against a website compiling stock recommendations made by the investment companies⁶²—not exactly what the doctrine was originally intended to protect. Furthermore, after these recent developments it is no longer clear whether hot news is a viable option for the industry to use as protection against competition from news aggregators.

B. The Trouble with the Newspaper Industry

To understand what threat news aggregators present to traditional media sources, it is helpful to acknowledge the slow decline the industry has been suffering since the advent of online platforms.⁶³ News organizations, providing original journalism or

⁵⁷ Matthew Ingram, *Did the AP just declare war no news aggregators?*, GIGAOM (Feb. 14, 2012, 11:24 A.M.), <http://gigaom.com/2012/02/14/did-the-ap-just-declare-war-on-news-aggregators>.

⁵⁸ *Id.*

⁵⁹ See Isabell, *supra* note 30, at 3.

⁶⁰ *Id.* at 8.

⁶¹ See *Associate Press v. All Headline News Corp.*, 608 F.Supp. 2d 454, 459 (S.D.N.Y. 2009); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997); *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp. 2d 310, 313 (S.D.N.Y. 2010).

⁶² See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 878–80 (2d Cir. 2011).

⁶³ See Isabell, *supra* note 30, at 1.

“independent fact-finding undertaken for the benefit of communities of citizens”⁶⁴ have faced cutbacks not only to advertising revenues and circulation sales, but also to the number of staff and markets.⁶⁵ Industry analysts argue that without the independent reporting that “provides information, investigation, analysis, and community knowledge,” citizens will not receive the information they need.⁶⁶ News is valued for its watchdog capability, ideally keeping factions of society accountable for their actions.⁶⁷ Aggregators fail to fill the void left by decreased coverage because of the lack of in depth investigation; however, many argue that silencing aggregators in turn means silencing a faction of the public’s voice.⁶⁸

It is no secret that media outlets, including newspapers, magazines, and television news networks, have undergone a major shift in their production, management, and distribution over the last fifteen years.⁶⁹ Throughout the nineteenth century, newspapers followed industrialization, urbanization and “big-city retail economy.”⁷⁰ With growing urban populations and the advent of mass production, big profits were made selling advertising space for broad generally applicable advertisements targeted to the culturally diverse multitude of people living, working, and, perhaps most importantly, shopping in large cities.⁷¹ Today, the abundance of commerce conducted online means the news industry is faced with a new audience model; rather than being broad, it is

⁶⁴ GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 3.

⁶⁵ *Id.*; see also Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REVIEW (Oct. 19, 2009), http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=1.

⁶⁶ Downie & Schudson, *supra* note 65.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See generally* GRAVES, GRUESKIN & SEAVE, *supra* note 25 (arguing that newspapers present the best example of what has occurred to the entire media industry).

⁷⁰ *Id.* at 9.

⁷¹ *See id.* High profits from this model led to an industry dependence on this source of revenue rather than circulation. Interestingly, “historians of journalism argue that these economic and political shifts underpinned an increasingly professionalized and objective journalism that became the norm in the 1920s and 1930s.” *Id.* This is a norm this Note supports as the true watchdog quality of the industry.

localized and niched.⁷² Because of this, advertising models have changed. However, digital advertising revenue has not come close to filling the gap left by losses in traditional revenue streams.⁷³ What was a \$59.2 billion industry in 2000 is down to less than \$34 billion a year.⁷⁴

Overall, the lag in revenues has led to a shrinking of the industry, but most worrisome is the shrinking of the amount of news that is covered.⁷⁵ Statistics show there is less coverage of government topics in suburbs and remote cities.⁷⁶ State government coverage is also suffering.⁷⁷ Beats like science and religion have all but disappeared, and weekdays editions contain fewer feature-length articles.⁷⁸ The financial, political, and wire-service sectors, however, remain strong.⁷⁹ With a smaller workforce, the industry increasingly turns to citizen journalists and bloggers, bringing some to say the industry is suffering from an overall “de-skilling” of journalism.⁸⁰ The industry is increasingly being asked to make vital choices about what investments to make in the collection of news.

To fight the loss of revenue, newspapers have recently begun to institute pay walls for their online content.⁸¹ In 2011, the New York Times finally introduced a payment system for their online

⁷² See *id.* at 41. Theorists argue that the way to create more value for audiences is to differentiate through localization, by geographical locations and by topical interests. “The most effective way to [differentiate] is to create value through local coverage that is linked to the lives, aspirations, and understanding of individuals in the locations in which they live.” *Id.*

⁷³ See Edmonds, *supra* note 25. The Newspaper Association of America found that, while online advertising was up \$207 million compared to 2010, print advertising was down by \$2.1 billion. The losses were greater than the gains 10 to 1. See also *Trends and Numbers*, NEWSPAPER ASSOCIATION OF AMERICA (Mar. 14, 2012) <http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx>.

⁷⁴ Edmonds, *supra* note 25.

⁷⁵ See Downie & Schudson, *supra* note 65.

⁷⁶ See Edmonds, *supra* note 25.

⁷⁷ See Downie & Schudson, *supra* note 65 (noting that the number of newspaper reporters covering state capitals full-time fell from 524 in 2003 to 355 at the beginning of 2009).

⁷⁸ See *id.*

⁷⁹ Edmonds, *supra* note 25.

⁸⁰ See *id.*; Downie & Schudson, *supra* note 65.

⁸¹ See Edmonds, *supra* note 25.

content;⁸² the slightly complicated system allows users to access 10 articles for free every month.⁸³ However, the shift from a world where users were never asked to pay for content to a digital pay wall world could mean a decrease in users for many sites, although systems implemented through handheld devices may prove to be successful in boosting readership.⁸⁴ The industry faces the ever-looming problem of figuring out how to monetize these new platforms.⁸⁵ Advertising on these digital platforms remains unsecure.⁸⁶ Readership numbers can often be inflated because users may be counted several times by using multiple devices such as a laptop, smartphone, and tablet.⁸⁷ Furthermore, these new technological devices bring with it a divergence in presentation, requiring a different format or appearance on each platform.⁸⁸

C. Hot News Doctrine Reel

1. Rewind: Hot News Comes on the Screen

The hot news doctrine originated in the Supreme Court's *International News Service v. Associated Press* case of 1918. There, the Court upheld an injunction against International News Service ("INS") preventing the wire service from using Associated

⁸² *See id.*

⁸³ GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 77 (explaining that approximately 150 mid-sized and metro dailies have also instituted similar metered models, including *The Boston Globe*, *The Dallas Morning News*, and *The Star Tribune* of Minneapolis, while notable holdouts include *The Washington Post* and *USA Today*).

⁸⁴ *See id.* at 79–81. However, advertising on these new platforms remains unsecure and the industry will have to develop a system for monetizing these handheld platforms, a feat made more difficult because of the competition posed by technology giants like Google, Facebook, and Apple.

⁸⁵ Edmonds, *supra* note 25 (stating nearly a quarter of adults in the United States receive their news from at least two platforms, usually through websites and website applications for news sources).

⁸⁶ *See id.*; *see also* GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 130 (explaining that trying to compete for ads in a market dependent on volume is impossible against behemoths like Google and Facebook. Google and Facebook manage to control most of the online advertising, while the growth of discount programs like Groupon in the last few years has managed to steal local merchant advertising from many newspapers and their websites).

⁸⁷ GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 21.

⁸⁸ *See id.* at 55.

Press news until the commercial value of the news had passed away (this concept is known as the “time value” of the news).⁸⁹ As World War I was coming to a close, INS was blocked by foreign nations from gathering and transmitting news back to the United States after papers receiving INS wire service printed news of the sinking of the British battleship *Audacious* and “described London as being in flames.”⁹⁰ In order to maintain a competitive edge, INS began bribing AP employees, gathering news stories from bulletins where AP posted stories, and collecting early edition papers containing these stories.⁹¹ INS was then able to telephone or telegraph news they had not gathered to their papers in the West Coast, effectively beating AP to the newsstands.⁹²

The suit filed by the Associated Press made it to the Supreme Court, where the Court determined the defendant was acquiring work produced “by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complaint for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown.”⁹³ This reap what it has not sown mentality touched on Lockean property theories, instilling in the news a property value that comes from the expenditure of labor in gathering the information. The gathering of news was an act of labor creating value belonging to the actor who expended it. The court made one clear distinction, “[t]he peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it

⁸⁹ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 245–46 (1918). The Court, in addressing the terms of the injunction, admitted the terms were ambiguous or indefinite but felt it lacked information to formulate more specific terms and upheld the decision of the District Court.

⁹⁰ *News Pirating Case in Supreme Court*, N.Y.TIMES (May 3, 1918), available at <http://query.nytimes.com/mem/archive-free/pdf?res=F50D1FF6345B11738DDDA0894DD405B888DF1D3> (describing from oral arguments presented before the Supreme Court the reasons for why INS was blocked).

⁹¹ *Int’l News Serv.*, 248 U.S. at 238.

⁹² *Id.*; see also Gregory, *supra* note 27.

⁹³ *Int’l News Serv.*, 248 U.S. at 239. In other words, the Court determined the Associated Press was expending resources into gathering news and International News Service was misappropriating the profits rightfully belonging to the Associated Press by presenting the content as their own.

secret.”⁹⁴ They were using to their advantage the peculiar features of “novelty and freshness” that are so vital to the success of the news industry.⁹⁵ The Court granted the news industry its now famous “quasi property” right because of the time value of news.⁹⁶

In light of all the property attributions, Professor Shyamkrishna Balganesh, from the University of Pennsylvania Law School, describes the hot news doctrine as existing under a property myth, one that originates from the language of *International News Service v. Associated Press*.⁹⁷ Justice Pitney writes in *INS*, “he who has fairly paid the fair price should have the beneficial use of the property.”⁹⁸ However, in reality the court determined that a misappropriation of the information by a competitor was an exercise of unfair competition.⁹⁹ To clarify, the Court explained it did not create a monopoly right per se in the news but limited or “postpone[d]” the participation of competitors in the “distribution and reproduction of news that it [had] not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant’s efforts and expenditure.”¹⁰⁰ The monopoly lasts “until its [the news’] commercial value as news to the complainant and all of its members has passed away.”¹⁰¹ This was to ensure AP was granted enough “lead time to profit from its entrepreneurship.”¹⁰² The lead time was a way to ensure a preservation of the incentives to “produce socially useful services.”¹⁰³ The Court feared a scenario where society would suffer because the industry was left profitless, an interesting point

⁹⁴ *Id.* at 235.

⁹⁵ *Id.* at 238.

⁹⁶ *Id.* at 235–36.

⁹⁷ See Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 425–26 (2011).

⁹⁸ *Int’l News Serv.*, 248 U.S. at 240.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 241.

¹⁰¹ *Id.* at 245 (affirming the decision and language used by the Circuit Court of Appeals, the Court indicates it shares the concerns about this clause and agrees the terms of the injunction could have been more specific and framed to contain the protection as long as reasonable, not indefinitely).

¹⁰² See Gregory, *supra* note 27, at 588.

¹⁰³ *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp.2d 310, 332 (S.D.N.Y. 2010).

in light of the current situation facing the news industry. The dissent, on the other hand, focused on the free flow of ideas, insisting that the creations, inventions, and discoveries imbued with property rights were those properly protected under copyright and patent law.¹⁰⁴ Justice Brandeis was against any limitation on the free flow of information and felt this property right should come from Congress, not the Court.¹⁰⁵

2. The Road to *Barclays: NBA v. Motorola*

Leading up to the recent developments in the hot news doctrine, the Second Circuit decided *National Basketball Association v. Motorola*,¹⁰⁶ where it defined a misappropriation remedy still in existence outside the copyright doctrine.¹⁰⁷ The case involved two similar services by the National Basketball Association and Motorola that provided updates of professional basketball games. The court ultimately determined that NBA did not have a hot news claim. The court held that the hot news doctrine survived in limited cases.¹⁰⁸ A hot news doctrine claim was defined as pertinent to cases where: “(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 or service that its existence or quality would be substantially threatened”.¹⁰⁹ The prior New York state iterations of the misappropriation tort were considered too broad for the purposes of the preemption intended by Congress through the Copyright Act

¹⁰⁴ *Int’l News Serv.*, 248 U.S. at 250.

¹⁰⁵ *Id.* at 266.

¹⁰⁶ *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

¹⁰⁷ *Id.* at 843.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 845.

of 1976.¹¹⁰ Consequently, the court outlined what it felt was a narrow misappropriation tort that would survive preemption.¹¹¹

The confusion in the case begins when the court incorporated the extra-element test intended to determine whether the Copyright Act preempts the work in question. This three-step test consists of “(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.”¹¹² The court reasoned that failing to preempt claims based on misappropriation of underlying facts would expand the reach of the state law claims.¹¹³ Congress intended for the underlying facts to be a part of the public domain.¹¹⁴ In the case that there is an extra element, beyond the mere act of reproduction, then the state claim cannot be said to lie within the general scope of copyright, and there can be no preemption.¹¹⁵

3. The Slow Death of the Hot News Doctrine: *Barclays v. Theflyonthewall.com*

Barclays v. Theflyonthewall.com involved a suit brought by several investment firms (the “Firms”) against Theflyonthewall.com alleging hot news misappropriation and copyright infringement.¹¹⁶ Theflyonthewall.com (“Fly”) “is an internet subscription news service that aggregates and publishes research analysts’ stock recommendations along with many other items of varying interest to investors.”¹¹⁷ The Firms were

¹¹⁰ *Id.* at 852; *see also infra* notes 147–48 and accompanying text; Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2006).

¹¹¹ *Nat’l Basketball Ass’n*, 105 F.3d at 852.

¹¹² *Id.* at 853.

¹¹³ *Id.* at 849.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 850 (holding for Motorola because the company was expending its own funds to collect the information they were later distributing through their own product) (citing *Computer Assoc. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992)).

¹¹⁶ *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp.2d 310, 313 (S.D.N.Y. 2010). The investment firms included Barclays Capital, Merrill Lynch, and Morgan Stanley, collectively referred to as the “Firms.”

¹¹⁷ *Id.*; *see also id.* at 322–25 (quoting from the website of Theflyonthewall.com). Fly provided investment and trading news to subscribers, assigning different levels of access to correspond with different membership levels. The newsfeed capabilities allowed users

primarily in the business of facilitating trades on behalf of their clients, and in this capacity they generated trading reports for their clients.¹¹⁸ The reports typically included a variety of “projections of future stock prices, judgments about how a company will perform relative to its peers, and conclusions about whether investors should buy, sell, or hold stock in a given company,”¹¹⁹ including recommendations for upgrading or downgrading a security, and predictions about changes in target prices of securities.¹²⁰ These recommendations were released to customers between midnight and seven in the morning, prior to the opening of markets, making timely access “a valuable benefit to each Firm’s clients, because the Recommendations can provide them an early informational advantage.”¹²¹ The reports were the work of hundreds of employees and they cost hundreds of millions of dollars worth of research to produce.¹²² In order to ensure the investment paid off, the timely distribution of the reports was crucial to initiating trades right away.¹²³ Customers tended to initiate trades with the Firms in order to quickly reap the benefits of the recommendations found in the reports.¹²⁴

Fly incorporated recommendations published by the Firms into their newsfeed content. In a very *INS*-like method, they relied on employees at the Firms to give them access to the reports.¹²⁵ As of 2006, Fly was posting recommendations up to one hour before the opening of the market and other media outlets.¹²⁶ The Firms accused Fly of free riding on their efforts by disseminating timely market information, and of unfair competition, because their dissemination of the information diverted potential trades from the

to filter information not only through headline topics, but also through individual searches.

¹¹⁸ *Id.* at 315.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 316.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 319.

¹²⁴ *Id.*

¹²⁵ *Id.* at 325.

¹²⁶ *Id.* at 327.

Firms.¹²⁷ With access to information from other sources like Theflyonthewall.com, traders would be less likely to place trades with the Firms.¹²⁸

The district court applied the five-step test from *NBA*, ultimately determining that the actions of Fly constituted a misappropriation of the Firms' property.¹²⁹ The only costs incurred by Fly were the costs of lifting the recommendations from the Firms' reports.¹³⁰ Fly tried to convince the court to apply a "head-to-head" competition analysis, but the court ignored them.¹³¹ Finally, the court determined they only needed to show the activity would likely threaten a plaintiff's ability to continue to participate in the market.¹³² In coming to this conclusion, the district court determined that "the purpose of the *INS* tort, like the traditionally accepted goal of intellectual property law more generally, is to provide an incentive for the production of socially useful information without either under-or over-protecting the efforts to gather such information."¹³³ The court issued an injunction against Theflyonthewall.com preventing them from publishing this information until a half-hour after the opening of markets.¹³⁴

On appeal, however, the Second Circuit changed everything. The Second Circuit, on appeal, overturned the decision handed down by the Southern District of New York.¹³⁵ Many agree that the final conclusion reached by the Second Circuit to overturn the district court was the correct one.¹³⁶ "The Second Circuit went to

¹²⁷ See generally *id.* at 318–20.

¹²⁸ *Id.*

¹²⁹ *Id.* at 335–43. The cost of generating the reports, as already mentioned, went up into the hundreds of millions. Fly also did not dispute the timeliness of the recommendations. The court determined the core of Fly's business was free riding. According to the court, for the purposes of direct competition the primary business of both Fly and the Firms was the dissemination of the recommendations. Finally, the court determined that the Firms incentive to produce recommendations was threatened.

¹³⁰ *Id.* at 336.

¹³¹ *Id.* at 340.

¹³² *Id.* at 341.

¹³³ *Id.* at 344.

¹³⁴ *Id.* at 347.

¹³⁵ *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).

¹³⁶ See Ray Hashem, *Barclays v. Thefly: Protecting Online News Aggregators from the Hot News Doctrine*, 10 NW. J. TECH. & INTELL. PROP. 37 (2011); see also Shyamkrishna

significant lengths to cabin the reach of the doctrine quite considerably, despite reiterating that it was not abrogating it altogether.”¹³⁷ Specifically, the Second Circuit determined that federal copyright law preempted the hot news claim brought by the Firms against Fly.¹³⁸ While rejecting the determination of the district court that there was a hot news claim, the Second Circuit expressed the continued binding effects of *NBA* and the existence of a hot news misappropriation tort under New York law.¹³⁹ They couched this within an extensive look at what was wrong with the hot news doctrine. Preemption, the court noted, often includes material that is un-copyrightable (i.e., facts) but applies as long as the work as a whole satisfies the subject matter requirement.¹⁴⁰ In reviewing the *NBA* preemption analysis, a preempted claim is defined as one that “seeks to vindicate ‘legal or equitable rights that are equivalent’ to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106—the ‘general scope requirement’; and [] if the work in question is of the type of works protected by the Copyright Act under 17 U.S.C. §§ 102–103—the subject matter requirement.”¹⁴¹ That being said, the court accepted that Congress intended that an *INS* hot news claim survive, but more as a tort theory than as a precedent.¹⁴²

The Second Circuit, for the purposes of the hot news doctrine, determined that the test set out in *NBA* was dicta and not a holding

Balganesh, *The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134 (2012).

¹³⁷ See generally Balganesh, *supra* note 136, at 136–41 (outlining three different factors where the Second Circuit ineffectively analyzed the hot news doctrine. (1) The court began its analysis with obvious doubt that the doctrine was still viable and reluctant to disclaim it. (2) They denied the viability of the *NBA* test by deeming that it was dicta. In holding that the test was dicta they also deemed it inconsistent, unreliable, and unnecessary to the decision in *NBA*. (3) Finally, in denying the *NBA* test and not presenting a formulation of its own the court was essentially rejecting the hot news doctrine).

¹³⁸ *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 878 (2d Cir. 2011).

¹³⁹ *Id.* at 890–91.

¹⁴⁰ *Id.* at 892 (quoting *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997)).

¹⁴¹ *Id.* (internal numbering omitted) (quoting *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997)).

¹⁴² *Id.* at 894.

upon which the Second Circuit, or other courts, were expected to adhere.¹⁴³ The inconsistencies in the test made them hard to apply, not only to the facts in *NBA*, but also to the facts of this case (as they were applied by the district court).¹⁴⁴ Moreover, the Second Circuit was not deciding upon the issue of hot news, but rather on preemption, meaning the test was not a part of the holding but simply an extended discussion by the court on a possible means of applying the hot news doctrine.¹⁴⁵ In light of this, the hot news doctrine exists only as the ghostly presence of *INS* and in that very limited capacity.¹⁴⁶

In finding the claims were preempted, the court found it was not determinative that the facts in the recommendations were not copyrightable.¹⁴⁷ They also determined that the “reports together with the recommendations fulfill the general scope requirement because the rights “may be abridged by an act which, in and of itself, would infringe one of the exclusive rights’ provided by federal copyright law.”¹⁴⁸ Furthermore, the claims were not sufficiently like an *INS* claim that they would survive preemption. The Second Circuit in applying the *NBA* test determined that Fly was not free riding because the facts being misappropriated by Fly were that the Firms had made recommendations about securities. This led the court to reason that “[t]he Firms are making the news; Fly, despite the Firms’ understandable desire to protect their business model is breaking it.”¹⁴⁹ The matters and facts that make up the news are publici juris,¹⁵⁰ or similarly a part of the public domain, and while the hot news doctrine may have the effect of creating some legal interest in these facts, the court here determined that the Firms were creating the news using their expertise and knowledge; in other words, they were not gathering

¹⁴³ *Id.* at 901.

¹⁴⁴ *Id.* at 901–02.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 894.

¹⁴⁷ *Id.* at 843.

¹⁴⁸ *Id.* at 902 (quoting *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 928 F.2d 693 (2d Cir. 1992)).

¹⁴⁹ *Id.*

¹⁵⁰ *See Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *see also id.* at 903.

the information through efforts like reporting.¹⁵¹ Finally and crucially, the information in the recommendations was being attributed to their source because without it the information would have been worthless to Fly without it.¹⁵² The court ultimately reduced the *NBA* test to one question: is the behavior in question free-riding and if not is it preempted?¹⁵³ The opinion provides little guidance to lower courts for applying the limited hot news doctrine in the future.¹⁵⁴

D. Relations of a Sort: Hot News and Copyright

The Supreme Court's decision in *Erie Railroad Co. v. Tompkins* effectively did away with federal common law.¹⁵⁵ "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."¹⁵⁶ And so *International News Service v. Associated Press*, a child of the federal common law, was in a sense swept away by the decision in *Erie*. While technically no longer "good law" at the federal level, states retained the doctrine known as the hot news doctrine as a part of their misappropriation tort law, and the reasoning in *INS* was still cited in many cases.¹⁵⁷ Pennsylvania, New York, and California have continued to uphold general misappropriation torts after *Erie* and after the Copyright Act of 1976, even going so far as to apply it outside the news scenario.¹⁵⁸ From the 1950s to the 1980s, the doctrine developed in many states into a general *INS*-based misappropriation doctrine that was applied in subscription-based television programming (i.e., HBO), financial data, and recorded music cases.¹⁵⁹ Other states decided to

¹⁵¹ *Barclays*, 650 F.3d at 903.

¹⁵² *Id.*

¹⁵³ *Id.* at 906–07. Interestingly, the concurring opinion came to the same determination by applying the *NBA* test. The concurrence specifically applied the direct competition test more narrowly. There could be no direct competition because Fly was reporting all recommendations not only the ones that would lead to trades. *Id.* at 908–12 (Raggi, J., concurring).

¹⁵⁴ See Balganes, *supra* note 136, at 135.

¹⁵⁵ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹⁵⁶ *Id.*

¹⁵⁷ Gregory, *supra* note 27, at 588.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 589.

limit the strength of the doctrine to scenarios that were similar to *INS*, specifically cases in which one party was attempting to misrepresent and pass off their competitor's product as their own.¹⁶⁰ Other states rejected the tort theory altogether, reasoning, for example, “[e]xcept where there has been a breach of trust of contract . . . it is not unfair competition in Massachusetts to use information assembled by a competitor.”¹⁶¹

An important consideration remains—facts alone are not protected by copyright law. The Supreme Court affirmed this in *Feist Publications Inc. v. Rural Telephone Service Co.*,¹⁶² where the Court asserted two things: “[t]he first is that facts are not copyrightable; the other, that compilations of facts generally are.”¹⁶³ *Feist* revolved around whether telephone directories, produced as a result of a Kansas regulation requiring telephone companies to issue telephone directories, were copyrightable.¹⁶⁴ The Court made it clear that there was no such protection for this information under the Copyright Act of 1976.¹⁶⁵ Concerning fact-based works, the touchstone of the Act is not a sweat of the brow theory, but rather originality.¹⁶⁶ The Court rejected the sweat of the brow¹⁶⁷ theory because it felt that it would prevent authors from relying on facts contained in prior works.¹⁶⁸ This rationale,

¹⁶⁰ See *Herald Publ'g Co. v. Fla. Antennavision, Inc.*, 173 So. 2d 469, 474 (Fla. Dist. Ct. App. 1965) (“In conclusion, we hold that unless appellees are able to demonstrate a protectible interest by virtue of the copyright laws or bring themselves within the contemplation of some other recognized exception to the policy promoting free access to all matter in the public domain, they cannot prevail.”); *Loeb v. Turner*, 257 S.W.2d 800, 803–04 (Tex. App. 1953) (holding that dissemination into the public made “news available for comment and use, so far as any property right of appellant was concerned information”).

¹⁶¹ *Triangle Publ'ns, Inc. v. New Eng. Newspaper Publ'g Co.*, 46 F.Supp. 198, 203 (D. Mass. 1942) (internal citations omitted).

¹⁶² *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344 (1991).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 342–43 (explaining how Rural refused to license its listings to Feist and Feist in turn used the information without consent, publishing the telephone information in their own directories).

¹⁶⁵ *Id.* at 359–60.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 359 (referring to the idea that “each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another”).

¹⁶⁸ *Id.* at 353.

the Court held, goes against the purpose of copyright, which is “to promote the Progress of Science and useful Arts.”¹⁶⁹ The standard for originality was not intended as a stringent standard; however, as the Court found in *Feist*, an arrangement of facts must contain some creative elements in order to obtain copyright protection.¹⁷⁰ The Court held that “[f]acts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts”¹⁷¹ In a social policy consideration, the Court feared creating a monopoly on information rightly belonging to the public through an extension of copyright protections.¹⁷² In this light alone, copyright cannot provide the kind of protection that the news industry is seeking.

The Copyright Act of 1976 again weakened the reach of the hot news doctrine, this time at the state level. The Act provides “copyright protection [for] original works of authorship fixed in any tangible medium of expression.”¹⁷³ In order to receive this protection a work must include “independent creation plus a modicum of creativity.”¹⁷⁴ The Act grants exclusive rights to the owner of the copyright while, at the same time, allowing for fair use of the material for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.¹⁷⁵ Crucial to the news industry is that their product originates from facts; and facts do not meet the “originality” standard.¹⁷⁶ In other words, infringement of another’s copyrighted material is a violation of the Act and, thus, provides an adequate remedy for those who have been infringed upon. In order to reduce confusion and inconsistencies, the Act preempts¹⁷⁷ any claim that comes within

¹⁶⁹ *Id.* at 349 (citing U.S. CONST. art. I, § 8, cl. 8).

¹⁷⁰ *Id.* at 345.

¹⁷¹ *Id.* at 350.

¹⁷² *Id.* at 353–54.

¹⁷³ 17 U.S.C. § 102 (2006).

¹⁷⁴ *Feist*, 499 U.S. at 340.

¹⁷⁵ 17 U.S.C. §§ 106, 107 (2006).

¹⁷⁶ *See Gregory*, *supra* note 28, at 591.

¹⁷⁷ 17 U.S.C. § 301(2006) (“All legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within

the general scope of copyright¹⁷⁸ and within the subject matter of copyright.¹⁷⁹ This effectively did away with state copyright remedies and further jeopardized the status of the hot news doctrine.

The House Report accompanying passage of the Copyright Act specifically addresses the issue of hot news preemption.¹⁸⁰ The commentary clearly indicates that preemption was not the intention of the bill.¹⁸¹ Interestingly, misappropriation was originally included in a list of exceptions to federal copyright law, but it never made it onto the final version of the Act.¹⁸² That being said, the hot news doctrine still maintains a precarious position in opposition to copyright. It fills a void left by copyright, while at the same time being completely outside the bounds of copyright, because the true hot news claim is an unfair competition claim—not a property right as associated with copyright. The issue of preemption continues to plague the hot news doctrine, even though the doctrine was specifically intended to remain as a viable remedy for plaintiffs.

E. It's Alive: Hot News Continues to Exist in Jurisdictions

Surprisingly, the hot news doctrine has managed to survive in certain jurisdictions as a part of the common law tort doctrine of

the subject matter of copyright as specified by sections 102 and 103, whether created before or after the date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).

¹⁷⁸ 17 U.S.C. § 106 (2006).

¹⁷⁹ 17 U.S.C. §§ 102–103 (2006).

¹⁸⁰ H.R. REP. NO. 94-1476, at 24 (1976) (Misappropriation is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as “misappropriation” is not preempted if it is a fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting “hot” news, whether in the traditional mold of *International News Service v. Associated Press* (citation omitted), or in the newer form of data updates from scientific, business, or financial data bases.).

¹⁸¹ *Id.*

¹⁸² Gregory, *supra* note 27, at 595.

unfair competition.¹⁸³ In a case very similar to the recent claim filed against Meltwater by the Associated Press, the AP brought suit in the Southern District of New York against All Headline News Corp, an online venture in the business of distributing news reports to customer websites.¹⁸⁴ These included reports of breaking news collected from original content produced by the Associated Press. The AP alleged that All Headline News would pay “reporters to remove or alter the identification of the AP as author or copyright holder of the articles” and subsequently distribute these articles as their own product, free-riding on AP’s original reporting.¹⁸⁵ The court, upon a determination that New York law applied, did not dismiss the claim, following the Second Circuit predecessor to *Barclays, National Basketball Association v. Motorola*. “Hot news misappropriation is ‘a branch of the unfair competition doctrine not preempted by the Copyright Act according to the House Report.’”¹⁸⁶

A case from the same year, *Scranton Times L.P. v. Wilkes-Barre Publishing Company*, from the Middle District of Pennsylvania, also upheld the view in *NBA v. Motorola*.¹⁸⁷ There, the defendant published a newspaper in Wilkes-Barre, Pennsylvania. The Scranton Times alleged that the defendants were copying obituaries from their newspapers and website.¹⁸⁸ The court found that the misappropriation claim was preempted because the plaintiff did not show how it was losing business due to the defendant’s activity.¹⁸⁹ More importantly, the court also took into account the extra-element test that was described in *NBA*.¹⁹⁰ Likewise, in California, the extra-element test was applied

¹⁸³ See *Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454, 457 (S.D.N.Y. 2009); *Scranton Times L.P. v. Wilkes-Barre Publ’g Co.*, 3:08-CV-2135, 2009 WL 585502, at *1 (M.D. Pa. Mar. 6, 2009); *X17, Inc. v. Lavandeira*, 563 F.Supp.2d 1102, 1103 (C.D. Cal. 2007).

¹⁸⁴ *All Headline News Corp.*, 608 F.Supp.2d at 458.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 461 (citing *Financial Information, Inc. v. Moody’s Investors Service, Inc.*, 808 F.2d 204, 209 (2d Cir.1986)).

¹⁸⁷ See 3:08-CV-2135, 2009 WL 585502 (M.D. Pa. Mar. 6, 2009).

¹⁸⁸ *Id.* at *1.

¹⁸⁹ *Id.* at *4.

¹⁹⁰ *Id.* at *3.

in the California case *X17, Inc. v. Lavandeira*.¹⁹¹ X17, operator of an online photo archive, brought suit against Mario Lavandeira, better known as Perez Hilton of the celebrity gossip website perezhilton.com. The suit alleged copyright infringement and hot news misappropriation. The hot news allegation was based on the time-sensitive nature of the photographs and the interest created in publishing them first. In regards to preemption, this court expressed,

[i]f under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will in itself infringe the state created right, then such right is preempted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie ‘within the general scope of copyright,’ and there is no preemption.¹⁹²

The court determined there was a hot news case within the facts and chose not to dismiss, thus recognizing the hot news misappropriation doctrine under California law.¹⁹³

II. THE FUTURE OF HOT NEWS

The ambiguity left by *Barclays* begs the question, what happens to the hot news doctrine now? Is it still viable, or should the doctrine be left to wilt away? The Second Circuit is not alone in its opinion that the hot news doctrine is on its way out. However, with the industry in a precarious position, hot news still serves a valuable purpose in providing the industry with a cause of action against unfair competition. In light of the lack of direction from the Second Circuit, it is valuable to consider several options that have been presented to aid in reestablishing, and strengthening, the hot news doctrine. Some present the idea that

¹⁹¹ *X17, Inc. v. Lavandeira*, 563 F.Supp.2d 1102 (C.D. Cal. 2007).

¹⁹² *Id.* at 1104–05.

¹⁹³ *Id.* at 1109.

hot news should be incorporated into federal law on its own or as a part of the Copyright Act, while others propose changes to the common law doctrine—a *new* hot news formulation. Still others support the idea that the doctrine is fine as formulated in *NBA*, and propose ignoring the *Barclays* decision. Realistically, the implementation of all of them is not possible and each presents some concerns in practice. While this discussion proceeds, the industry continues to bring hot news claims, but to what end? At one end, to possibly continue promoting and attempting to solidify the doctrine within the American legal system, while at the other, it is probably in the hope that they will be able to gain some ground against news aggregators, turning the tide in their favor. In shaping the future of hot news, the problems of the past are understandably a major concern. To overcome the inconsistencies in the doctrine, it is essential to simultaneously create a concrete framework, while retaining a sense of flexibility to allow the doctrine to adapt over time and account for changing technologies.

To this end, Part II.A addresses some concerns the hot news doctrine faces in the legal world. Part II.B presents the option of creating a federal misappropriation tort that would apply uniformly throughout the nation. Part II.C presents the idea of incorporating the hot news doctrine into the Copyright Act and addresses several conceptual problems with this idea. Part II.D argues for the implementation of a varied common law scheme, promoting a more finely tuned *NBA* test.¹⁹⁴ Part II.E presents the idea of going back to the original *NBA* test.

A. *Concerns Post-Barclays in the Second Circuit*

After *Barclays*, the Federal Trade Commission asked for comment on the role of misappropriation in the news context. “The idea, according to an FTC document circulated in June 2010, is to create a policy that will allow news outlets that have the infrastructure to gather news and the means to continue doing so in an economically feasible manner.”¹⁹⁵ Three proposals have been presented. One is to abolish misappropriation in favor of copyright

¹⁹⁴ See *infra* Part I.C.ii.

¹⁹⁵ Gregory, *supra* note 27, at 603.

solutions.¹⁹⁶ A second is to amend the Copyright Act to encourage misappropriation and prevent preemption.¹⁹⁷ Finally, suggestions have been made to create a federal hot news tort, distinct from copyright law.¹⁹⁸ Changes to the common law are also a possible way of moving the hot news doctrine toward a more appropriate framework.¹⁹⁹

The hot news doctrine has come against many dissenters, particularly the American Law Institute. For these commentators, like the American Law Institute and Judge Richard Posner, the hot news doctrine has lost all value.²⁰⁰ In the Restatement (Third) of Unfair Competition, for example, the doctrine is discredited. Section 38 of the Restatement explains that there is no general rule of law that prohibits the appropriation of another's ideas, innovations, and other intangible assets once they become publically known.²⁰¹ The decision in *INS* is in this view an unjust restraint on competition. The ALI accepts that the doctrine could be widely applicable against unjust enrichment, but argues that the doctrine is better applied in the narrow setting of *INS*.²⁰²

Shyamkrishna Balganes, a professor at the University of Pennsylvania School of Law, argues that the common law has been called upon to protect the traditional business models of information industries, like newspapers, that have been hurt by the digital age.²⁰³ The common law, while facially adaptable, also needs to change to remain significant.²⁰⁴ Professor Balganes provides three possible options for the common law: "(i) create new law in an effort to take account of the new reasons and contexts, (ii) abdicate the doctrinal areas in question to the

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See *infra* Part II.D & Part II.E.

²⁰⁰ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995); see also Richard Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 641 (2003) (stating that "[c]larity of analysis would be enhanced if the [misappropriation] doctrine and the very word were banished from discussions of intellectual property law.").

²⁰¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995).

²⁰² See *id.* cmt. c.

²⁰³ Balganes, *supra* note 136, at 136, 143.

²⁰⁴ *Id.* at 143.

legislature on the theory that '[c]ourts are ill-equipped' to the task, or (iii) proceed with caution, enabling the law to fully grapple with the new context, before moving in either direction."²⁰⁵ The Second Circuit took this last path in deciding *Barclays*, doing nothing to expand or to diminish the doctrine.²⁰⁶ Instead of moving in any clear direction, the court left the doctrine vague and lifeless.

The hot news doctrine has had a varied past and the tort of misappropriation remains unpopular with many.²⁰⁷ Yet as law suits in the last few years have shown, the newspaper industry considers the doctrine a plausible remedy against aggregators.²⁰⁸ Along with copyright, it is one of the only legal solutions left for the industry.²⁰⁹ However, the shape in which the Second Circuit left the doctrine and its failure to adequately describe how the doctrine functions under its holding leaves the future of hot news ambiguous. Some have gone as far as to say that the court, in failing to outline how the doctrine survives, is attempting to slowly do away with hot news misappropriation altogether.²¹⁰ In light of this, several possible changes and solutions have been put forth, which range from federal action to a complete redefining of the common law doctrine. As always, the possibility remains that the doctrine is no longer viable as a remedy for the current industry.

B. A Return to the Federal Field

One option would be to follow Justice Brandies in *INS* and support legislative action toward the creation of a federal misappropriation tort, thus reopening the federal courts as a venue for the hot news doctrine.²¹¹ This option would "present an unequivocal statement from Congress" validating the doctrine as a cause of action "essential to the maintenance of a free and vibrant press."²¹² By legislatively creating a cause of action, the option

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Richard Posner, *Misappropriation: A Dirge*, 40 Hous. L. Rev. 621, 641 (2003).

²⁰⁸ See *supra* Part I.E.

²⁰⁹ See, e.g., *X17, Inc. v. Lavandeira*, 563 F.Supp.2d 1102 (C.D. Cal. 2007).

²¹⁰ Balganes, *supra* note 137, at 135.

²¹¹ Bruce W. Sanford, Bruce D. Brown & Laurie A. Babinski, *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, COMM. LAW, 8, 10 (2009).

²¹² *Id.*

would be available to the industry without having to wait for the slow development it would require at common law.²¹³ In 2003, Congress considered implementing a federal hot news doctrine based on the three extra-element tests in *NBA*.²¹⁴ The bill never passed, but support for it continues.²¹⁵ Proponents maintain that Congress should create a flexible statutory scheme based on the *NBA*s test but applying a *Barclay*'s approach, focusing on the conduct of the misappropriator.²¹⁶ Suggestions include applying not only the five-factor test, but also a necessary showing of the plaintiff's acquisition of the information first and an affirmative defense for defendants who can show they have done their own reporting.²¹⁷ The statute should allow courts to choose from among a variety of remedies including "injunctions, compulsory licensing, and damages, depending upon the context and circumstances of each individual case."²¹⁸

The goal in implementing these changes would be to create uniformity in the application of the doctrine.²¹⁹ States have been changing how the hot news doctrine functions within their borders. Many cases in recent years have stayed true to the *NBA* factors.²²⁰ Creating a statutory system with a basis in the *NBA* factors would fit into the existing scheme already in place in some states.²²¹ However, creating a statutory scheme would also expand the right to states, which had previously determined that the hot news doctrine did not survive copyright preemption. As Lauren Gregory, in her Note for the *Vanderbilt Journal of Entertainment and Technology Law*, writes, "[c]ountless bloggers and citizen journalists act in their own interest, and will continue to do so without clear guidelines that have penalties attached to curtail

²¹³ *Id.*

²¹⁴ Gregory, *supra* note 27, at 608.

²¹⁵ *Id.* at 608.

²¹⁶ *Id.* at 611.

²¹⁷ *Id.*

²¹⁸ *Id.* at 612.

²¹⁹ See Sanford, Brown & Babinski, *supra* note 211, at 10.

²²⁰ See *supra* Part I.E.

²²¹ See *Scranton Times L.P. v. Wilkes-Barre Publ'g. Co.*, 3:08-CV-2135, 2009 WL 585502, at *3-4 (M.D. Pa. Mar. 6, 2009); *X17, Inc. v. Lavanderia*, 563 F. Supp. 2d 1102, 1106 (C.D. Cal. 2007).

parasitic newsgathering practices.”²²² Nowhere is this activity more prevalent than on the Internet, where jurisdictional boundaries are meaningless.

C. Using the Copyright Act

In a similar vein to supporters of a federal misappropriation hot news tort, others argue that copyright should be extended to fill the gap the hot news doctrine now serves to protect.²²³ While on the one hand it would solve the issues of preemption the hot news doctrine has faced since 1976 and it would address the concerns of uniformity, copyright claims and hot news address different legal concerns.²²⁴ For instance, Eric P. Schmidt at University of Colorado Law School took into consideration the effects of extending the Copyright Act.²²⁵ He stresses that the hot news doctrine is at its heart about anticompetitive conduct, while copyright is about infringement and fair use.²²⁶ Copyright has long been established on the idea-expression dichotomy.²²⁷ Facts and ideas are treated the same and are given no protection under the Act.²²⁸ Under copyright law today, infringement occurs when “the author of the work holds a valid copyright, and the elements of the work that are copied are original.”²²⁹ This test completely fails to protect against free-riding by competitors. Meanwhile, the ruling in *Feist* remains good law, meaning the compilation is protected but the underlying facts are left for the pickings.²³⁰ Furthermore, the defense of fair use remains open to aggregators, who can easily

²²² Gregory, *supra* note 27, at 610.

²²³ Eric P. Schmidt, Note, *Hot News Misappropriation in the Internet Age*, 9 J. TELECOMM & HIGH TECH. L. 313, 324 (2011).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 325.

²²⁷ *Id.*

²²⁸ *See supra* Part I.D.

²²⁹ Brian Westley, *How A Narrow Application of “Hot News” Misappropriation Can Help Save Journalism*, 60 AM. U. L. REV. 691, 712–13 (2011).

²³⁰ *See id.* at 713–14 (presenting an appropriate example using the original reporting of Bob Woodward and Carl Bernstein on the Watergate scandal. The report itself would be protected under copyright, meaning the entire story could not be closely copied and republished. However, the facts making up the story could legally be taken and rewritten into a new story by another source.).

argue that the use of a copyrighted work for news reporting is a fair use of the work.²³¹

The decision in *Feist* is one of the things standing in the way of copyright protection being extended to the factual content the news industry seeks to protect with hot news. The Supreme Court rejected the “sweat of the brow” theory in *Feist* because it based its decision on evidence that showed virtually no effort, or labor, on the part of the phone companies in collecting the information being disputed.²³² *Feist* blocks publishers from asserting copyright infringement claims. They can try to “assert copyright infringement in the headlines and brief snippets that aggregators often copy into their links, but the doctrine of fair use as it currently stands may well cover the duplication of small portions of text.”²³³ This question was at the heart of litigation involving Google and Agence-France Presse for Google’s use of the latter’s headlines, photos, and news summaries, but the case settled before it reached trial.²³⁴

Fair use, the second issue involved in incorporating hot news into the Copyright Act, is exemplified by the above case between Google and Agence-France.²³⁵ Central to the Copyright Act are two ideals: the right to invest your *product* with a property right, and the idea that this property right is subject to the imposition of limitations on that right, in the form of a fair use defense. Fair use, in most cases, is the trusty friend of the news industry, allowing it access to normally copyrighted material.²³⁶ However, the application of fair use in aggregating contexts tends to work

²³¹ *Id.* at 714; *see also* 17 U.S.C. § 107 (2006).

²³² *See* *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361–63 (1991); *see also* Sanford, Brown & Babinski, *supra* note 211, at 8.

²³³ *See* Sanford, Brown & Babinski, *supra* note 211, at 8.

²³⁴ First Amended Complaint for Preliminary and Permanent Injunction and Copyright Infringement, *Agence France Presse v. Google, Inc.*, No. 1:05CV00546, 2005 WL 5834897, at ¶28 (D.D.C. Apr. 29, 2005).

²³⁵ *Id.*

²³⁶ 17 U.S.C. § 107 (2006) (“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.”).

against the industry.²³⁷ The doctrine was intended to support the very purpose of copyright by promoting the development of new ideas that build on older ones.²³⁸ Regarding the four factor test for fair use,²³⁹ the Supreme Court has determined that the factors be evaluated and weighed together “in light of the purposes of copyright.”²⁴⁰ In applying this flexible standard, courts have found fair use in cases involving the aggregation of content online. The Ninth Circuit, in *Perfect 10, Inc. v. Amazon.com, Inc.*, found that the “transformative nature of Google’s search engine” and the resulting public benefit outweighed Google’s commercial use of thumbnailed images.²⁴¹ In determining the transformative nature of the search engine, the court focused on the improved access to information online provided by the thumbnails, and primarily, their ability to serve as pointers directing a user to the source of the information.²⁴² The same argument can be made of aggregators of news content, which usually tend to link back to the original source.

In 2008, GateHouse Media brought copyright infringement claims against the *New York Times*, alleging it had copied headlines and ledes from GateHouse Media’s *Wicked Local Boston.com*.²⁴³ The case also settled before trial, leaving the question of how courts will deal with fair use and news

²³⁷ See *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007).

²³⁸ *Id.*

²³⁹ 17 U.S.C. § 107 (2006) (“In determining 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.”).

²⁴⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

²⁴¹ This case involved a copyright infringement claim brought by Perfect 10, Inc. against Google and Amazon for displaying thumbnailed versions of Perfect 10’s images, and in Amazon’s case for granting users access to Google content. *Perfect 10*, 508 F.3d at 1166.

²⁴² *Id.* at 1165.

²⁴³ See *GateHouse Media v. The New York Times Co*, Citizen Media Law Project (Dec. 22, 2008), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-12-22-Gatehouse%20Media%20Complaint.pdf>.

aggregators unanswered.²⁴⁴ However, it is likely that when applying this flexible standard, courts could determine fair use does indeed apply to aggregated content, depending on its transformative nature. In light of pro-aggregating arguments outlining the social benefits of aggregation (i.e., easier access to information), courts could determine that these benefits shift the balance in a fair use analysis. By existing outside the confines of copyright, the hot news doctrine avoids the fair use defense.

D. Keeping with the Common Law

Restructuring the common law hot news doctrine is also an option for courts to pursue. Former journalist and law student, Brian Westley, suggested a plan called “Motorola Plus,” which consists of a slightly expanded version of the *NBA* five-factor test.²⁴⁵ Westley maintains the original first four prongs but qualifies the last prong: “the defendant’s free-riding is likely to reduce the plaintiff’s incentive to produce the product or service, thereby threatening its existence.”²⁴⁶ The change is intended to show that the plaintiff is not required to prove that there has been an actual damage to their business, but only that damages would likely occur if the free-riding continued.²⁴⁷ Motorola Plus would require that the court ask two additional questions: (1) whether protecting the plaintiff’s information will provide a tangible and useful benefit to society, and (2) whether the plaintiff had the information first.²⁴⁸ Wesley argues that the first question is a way of making sure that the values of intellectual property are maintained.²⁴⁹ The goal is to promote the continued production of news works and not solely to reward the author. The second question touches on the issue of timeliness inherent in the doctrine.²⁵⁰ The court, in inquiring whether the plaintiff had the information first, can determine whether “the work’s societal value

²⁴⁴ *Id.*

²⁴⁵ Westley, *supra* note 229, at 716.

²⁴⁶ *Id.* at 717.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 718–19.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

may be diminished to the point where the benefits of providing protection no longer outweigh the costs.”²⁵¹ Westley also incorporated several defenses into his Motorola Plus hot news scheme, whereby the defendant can defeat a hot news claim if it can show that it had independently reported the same facts although they failed to be the first to break it and if they can show that the information was used for commentary or criticism.²⁵²

The plan proposed by Westley limits remedies to injunctive relief. He proposed an injunction that lasts only until the commercial value of the news has passed away.²⁵³ The benefit of not granting monetary damages is that courts would not be obligated to involve themselves in the calculation of the impact the copying had on the plaintiff.²⁵⁴ While leaving out monetary damages would prevent the judiciary from becoming entangled in a determination of injury that the plaintiff is not even required to show,²⁵⁵ injunctive relief also presents similar problems. The question of timeliness becomes prevalent. How does a court determine when the commercial value of a certain story or line of factual information has ended? Westley suggests that the news originator should be given enough lede time to ensure the continued investment in newsgathering.²⁵⁶

E. Forget the Second Circuit

Another possibility to explore is to retain the doctrine explained in *NBA* and in the district court’s opinion in *Barclays*, returning to the five-step test first established in *NBA* and applying this to news aggregators.²⁵⁷ Proponents argue a continued use of

²⁵¹ *Id.* at 719 (arguing that there are situations in which applying this protective right has little practical value, such as situations involving natural disasters in which the value of news is limited to very short time spans).

²⁵² *Id.* at 720.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Prong five of the *NBA* test does not require proving that their business has been damaged, but only that there is a potential that it will be damaged if the activity continues.

²⁵⁶ Westley, *supra* note 229, at 720.

²⁵⁷ See John C. McDonnell, *The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregators*, 10 NW. J. TECH. & INTELL. PROP. 255, 303 (2012).

the hot news doctrine as applied in *NBA* would provide adequate protection for the industry against news aggregators.²⁵⁸ Furthermore, the protection maintains the industry's incentive to produce investigative news by ensuring they can bring suits for lost revenue caused by this form of unfair competition.²⁵⁹

In considering the practicality of applying the five elements to news aggregators, commentators have found the test applicable.²⁶⁰ The first prong, requiring plaintiffs show a cost in generating and gathering information, has normally been easy to news generators to establish.²⁶¹ Newspapers certainly expend resources in investigating and producing stories.²⁶² Timeliness is arguably applicable; even though questions remain as to how to determine what is timely and how long this quality lasts, the value of news has not really changed since the days of *INS*.²⁶³ As for the third prong, while aggregators can argue that they add value to the content by either selecting it or repackaging the information, Courts would, under this argument, likely see the lack of effort and cost in production on the part of the news aggregators as free riding.²⁶⁴ The basis for direct competition, the fourth prong, is the lack of click-through from aggregator sites to content originator websites.²⁶⁵ Preventing readers from reaching the source constitutes direct competition.²⁶⁶ Finally, the last prong, with its low burden, merely requires the plaintiff to argue that continued activity by the aggregators would reduce the incentive for them to produce the content.²⁶⁷

²⁵⁸ *Id.* at 67.

²⁵⁹ *Id.*

²⁶⁰ *See id.* at 51–55.

²⁶¹ *Id.* at 51.

²⁶² *Id.* at 51.

²⁶³ *Id.* at 52.

²⁶⁴ *Id.* at 53.

²⁶⁵ *Id.* at 54.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 55.

III. MISCONCEPTIONS AND REEVALUATIONS—WHERE DO WE GO FROM HERE?

Seth Lipsky, former editor of the now-defunct *New York Sun*, has argued, “[t]he best strategy to strengthen the press would be to maximize protection of the right to private property—and the right to competition.”²⁶⁸ These ideals are central to the *INS* decision in and they are the crux of what is wrong with much of the hot news debate. While *INS* formulated its decision in the now famous “quasi property” language, the Court did not want to grant actual property rights to the news industry.²⁶⁹ Conscious of the public’s right to factual information, subsequent formulations of the doctrine have taken, and further incorporated, the ideals of property into the hot news doctrine.²⁷⁰ And yet, with so much discussion about how to save the news industry, does Lipsky have a point? Can private property and increased competition save the news industry?

Part III takes into consideration the different options outlined for the future of the hot news doctrine. However, it argues against their implementation and presents an alternative scheme that, while borrowing from those detailed above, addresses some of the pitfalls the doctrine faces. It also addresses the implementation of similar schemes in Europe and the roadblock prior restraint could represent here in the United States.

A. *Trouble in Paradise*

Each of the above reinventions for the hot news doctrine presents a valid path to solidification of the doctrine going forward. Unfortunately, each is wanting in some way. A statutory approach would benefit both legacy newspapers and news aggregators by establishing an unambiguous federal system applicable to all.²⁷¹ The universal applicability of a federal tort necessitates the preemption of state law claims. Maintaining state law claims, in this case, would lead to disparate treatment

²⁶⁸ GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 3.

²⁶⁹ *International News Service v. Associated Press*, 248 U.S. 215, 235–36 (1918).

²⁷⁰ Balganes, *supra* note 97, at 423.

²⁷¹ See Sanford, Brown & Babinski, *supra* note 211, at 10.

depending on where the misappropriation claim was brought.²⁷² Additionally, hot news could still be subject to the ambiguity of preemption analysis if it is determined that some facet of the common law remains in existence.

In dealing with preemption, the statute would have to address the long-held belief that hot news was intended to survive copyright preemption, while at the same time getting around the very threat of preemption presented by the Copyright Act.²⁷³ The survival of hot news would be completely beholden to the federal statute and would be limited by its reach, because the development of the hot news doctrine in state courts would essentially be put on hold. Claims would have to fit within the bounds of the statute.²⁷⁴ The problem would then be to find a framework that provides protection, preempts conflicting state laws, and is itself not preempted. According to the Second Circuit, hot news survives preemption only in a very narrow setting because of the “importance of maintaining the uniform nationwide scheme that the Copyright Act . . . provides.”²⁷⁵ The uniformity protected by the Second Circuit and implemented by Congress would mean the flexibility provided by differing state jurisdictions would be lost. By removing it from the common law, the doctrine would be more susceptible to becoming stagnant, especially in light of the ever-changing news and technology industry. Yet the fact remains that the clarity provided by a federal misappropriation claim would provide leverage for the industry in negotiating with aggregators, something the currently weak doctrine does not provide.

In turn, incorporating the doctrine into the Copyright Act would further weaken the hot news doctrine. Aggregators would be given a strong and well-established defense to a claim brought by a content generator. This too could amount to a constraint on the ability of the doctrine to evolve. Commentators question the ability of the federal doctrine to deal with the multitude of possible

²⁷² See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 896–97(2d Cir. 2011).

²⁷³ See H.R. REP. No. 94-1476, at 134 (1976).

²⁷⁴ See Sanford, Brown & Babinski, *supra* note 211, at 10.

²⁷⁵ *Barclays*, 650 F.3d at 896 (2d Cir. 2011).

scenarios that may arise in applying the *NBA* test.²⁷⁶ A statute may also become a “rigid set of rules,” and in the ever-changing world of online media, a rule that cannot grow with the industry would quickly become obsolete. Furthermore, hot news creates a cause of action based not on originality but on facts, an idea that is the complete antithesis of the ideals of copyright protection. These ideals would tend to bar the incorporation of a hot news cause of action into the copyright scheme.

The Motorola Plus plan seems promising until its ambiguity also begins to create roadblocks. The plan leaves vital questions unanswered. Setting up a remedy, or even a factor in the doctrine, that revolves around something as ambiguous as time means that it will ultimately begin to generate more problems than it solves. Courts are ill-prepared to determine when the market value of breaking news has diminished in a marketplace that runs twenty-four hours a day and exists indefinitely online. Furthermore, the lede time revenues are not necessarily compatible with investments in newsgathering. Resources expended on newsgathering may not reflect the amount generated by lede times, and the decision to invest in certain newsgathering projects may come from more than just how much profit the story generates. Injunctive relief also fails to make up for the harm caused by the unfair competition that has already occurred.²⁷⁷

Finally, the *NBA* test as applied to news aggregators would present challenges for the industry. Primarily, counterarguments presented by aggregators could easily destroy a case in certain situations. Direct competition, similarly to the argument presented in *Barclays*, could be easily argued against, especially in situations in which there is a feed aggregator or user-curated aggregator. Blog aggregators could also be deemed outside of the sphere, because they can be said to add some additional content. “Time-sensitive” is an ambiguous term, and even applied on a case-by-

²⁷⁶ Sanford, Brown & Babinski, *supra* note 211, at 10 (“For example, what effect should a lack of time sensitivity, one of the Motorola factors, have in a situation where original content is posted not on a website where the time sensitivity of material is crucial to the aggregator’s profit, but instead on a topical website built around the common interests of certain readers?”).

²⁷⁷ Westley, *supra* 229, at 720.

case basis provides no security to the industry when considering whether to use the hot news doctrine. While there are pros to the *NBA* test, it is certainly not without cons.

B. Property Myths in Hot News

As the news industry continues to struggle, it turns to the law as a potential solution, of which *AP v. Meltwater* is a prime example. Using legal solutions like copyright infringement and the hot news doctrine, news organizations have been trying to beat back the “reuse” trend popular online. News organizations providing original journalism or “independent fact-finding undertaken for the benefit of communities of citizens,” as generally defined by geography,²⁷⁸ have faced cutbacks in not only advertising revenue and circulation sales, but also in the number of staff and the size of their markets.²⁷⁹ Industry analysts argue that without these skilled, independent journalists “much of what Americans need to know will go unreported and unexposed.”²⁸⁰ While the providers of original journalism continue to wage war against the highly successful aggregators, many argue that silencing aggregators in turn means silencing a faction of the public’s voice. The struggle is to find a balance between the two.

There are many possibilities for reformulating the hot news doctrine. There are many commentators supporting the continued viability of the doctrine, not to mention the news industry’s unwavering devotion to the continued existence and expansion of the doctrine.²⁸¹ The problem is that somewhere along the way the doctrine evolved far beyond the boundaries originally explicated in *International News Service*. While the Court established its decision in terms of property rights, the doctrine is one of unfair competition. Balganesch argues this is in part due to the nature of the news industry and developments that occurred in the last century. First, she argues that propertarian views of the industry,

²⁷⁸ See GRAVES, GRUESKIN & SEAVE, *supra* note 25, at 3.

²⁷⁹ See *id.*

²⁸⁰ *Id.* at 3–4 (promoting the social need for responsible in-depth journalism).

²⁸¹ See generally FEDERAL TRADE COMMISSION STAFF DISCUSSION: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM (May 20, 2010), <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf>.

and in turn the hot news doctrine, came out of the growth of the licensing market, necessitating a property right or entitlement on behalf of the licensor.²⁸² In order to avoid a lawsuit, licensing became the fee that competitors paid. In turn, the industry was able to use this commoditized vision of the news to their advantage.²⁸³ However, the problem has always been and remains that news does not easily give itself to an *ex ante* legal definition.²⁸⁴ Evolving hand in hand, the property-based understanding of the doctrine promoted the growth of licensing, while at the same time the growth only solidified the property misconceptions in the hot news doctrine.

Balganesh characterizes what she sees as the second problem as “an *in rem* interest.”²⁸⁵ The flaw comes from the expansive property understanding applied to the doctrine, an *in rem* right that remains indefinite at all times and that works against all individuals. The hot news doctrine, as a quasi property right, was established to work only against a certain class of individuals, namely direct competitors.²⁸⁶ She finally articulates that the injunctive remedies applied added to the problem of the propertization of the doctrine.²⁸⁷ The factors helped in creating a property myth surrounding the hot news doctrine, which, as stated before, is based in unfair competition. The goal of the industry is to capture the time value of news, which becomes increasingly difficult when the dissemination of news today is “immediate and multimodal.”²⁸⁸ To Balganesh, the threat of free riding lies in aggregators’ ability to impair the collection process as a whole, diminishing incentives and slowing the dissemination of news.²⁸⁹ The *INS* doctrine was formulated to prevent this market-based

²⁸² Balganesh, *supra* note 97, at 432.

²⁸³ *Id.* at 433.

²⁸⁴ *Id.* at 434 (arguing that “misappropriation had to be understood as an *ex ante* legal entitlement, one with boundaries that could be identified prior to a dispute/litigation, and which preferably revolved around a discrete asset—news”).

²⁸⁵ *Id.* at 435–36.

²⁸⁶ *Id.* at 435.

²⁸⁷ The distinction originally made by courts of equity in equating property rights with injunctive relief fueled this belief. *Id.* at 437–38.

²⁸⁸ *Id.* at 442.

²⁸⁹ *Id.* at 442–44.

harm. She explains that this market-based harm was a collective one meant to protect the dissemination of the news and maintain the market wide incentive to collect news (and, she argues, provide to the common pool).²⁹⁰ Unfortunately, hot news turned into a property regime protecting the industry under the guise of incentivizing the collection of news.

C. Here's to Change: A New Hot News Formulation

No matter the current state of hot news, some form of the doctrine needs to remain. The values set up in *INS* remain important today, and the value of original reporting cannot be paralleled. But while the many options presented above provide some guidance for possible routes the doctrine may take, I propose that the best route is to return hot news to the market by promoting a system of self-regulation with a more precisely defined common law system that takes into consideration what the news industry is really like today. The system, in its application to newspapers and news aggregators, would be loosely based on the *NBA* test, but with a few important changes.

First, the time sensitive nature of the information will no longer be based on linear understandings of time. In the digital age, this understanding of timeliness is no longer appropriate when content remains online for indefinite periods of time. This is known as the long tail.²⁹¹ Taking into consideration the amount of information that continues to live on in the Internet, the analysis of timeliness will be based on the genetic signature²⁹² and lifecycle of the information. The life of the topic and story line, based on the level of searches it achieves, is a clear numerical indicator of the length of time an originator could expect to make a profit from the story. Seemingly complicated, this system could easily work to use the

²⁹⁰ *Id.* at 444.

²⁹¹ Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, available at <http://www.wired.com/wired/archive/12.10/tail.html>. Digital content and storage also allows industries to present older information and niche media to consumers at a greater rate.

²⁹² Steve Lohr, *Study Measures the Chatter of the News Cycle*, N.Y. TIMES (July 12, 2009), <http://www.nytimes.com/2009/07/13/technology/internet/13influence.html> (“Frequently repeated short phrases, according to the researchers, are the equivalent of “genetic signatures” for ideas, or memes, and story lines.”).

information that is already collected by many competing online industries to calculate the true value of a news story. It also works to further integrate the two parties, news generators and aggregators, but with a purpose.

Along with this, the doctrine should step away from the property values it has so long incorrectly embraced by expanding the remedies beyond the traditional injunctive relief. While preliminary injunctions would still be useful in preventing further appropriation, approving damages remedies²⁹³ would grant the traditional industry the right to gain some reparation from the misappropriation suit. Namely, as suggested above, court ordered licensing schemes would provide much needed reparation but would also grant the aggregating community the opportunity to continue competing. The use of new remedies begins to chip away at the ideas of individual property in the news.

Licensing begins to lead the doctrine toward a mode of self-regulation, slowly attempting to diminish the industry's dependence on the legal system. The truth of the news industry is that it will continue to grow exponentially in the next decades and yet, in the last few, it has accomplished little to no headway in establishing a profitable foothold in the online market. Doctrines that continue to push the industry toward revenue-generating mechanisms online only support the industry's growth. Licensing is a part of the framework already being established by news generators through systems like News Right. The organization is set up to monitor and facilitate the establishing of licensing agreements between original news reporters and aggregators. Promoting the licensing scheme will solidify this business model, providing much-needed revenue sources and protecting the

²⁹³ Balganes, *supra* note 97, at 453–54. If the measure of liability is to be unfair competition, then the remedy should reflect such a principle. This rationale leads to the formulation that the award be the “disgorgement of any unfair cost saving it [the misappropriator] had obtained by its act of free riding.” Balganes argues for a damages award and claims it would accomplish three things: prevent “systematic free-riding by new entrants,” it would enable a defendant to assert that independently exerting resources to verify information culled from originators show there was no cost saving (similar to the defense in *Motorola Plus*), and it would “allow existing forms of cooperation to continue.” *Id.*

incentive for newsgathering. Licensing promotes a collective outlook on property rights in the news. As projected, the system is not in the business of promoting litigation. A system that supports this framework will prevent further litigation and establish clear guidelines and expectations among members of the news community. News Right is not the next Righthaven, which has been systematically criticized as a litigation farm.²⁹⁴ Righthaven, founded in 2010, is a copyright holding company that has been criticized for being a litigation shop whose sole purpose is to bring copyright infringement claims.

There are concerns that licensing would succeed in further embedding hot news in the property scheme. Facts must always remain a part of the public domain. The role of licensing in establishing a property scheme in the news has been discussed, and an absolute property interest in the factual information discredited; however, the value of this system is in developing industry standards that will serve to regulate the industry without constant litigation. An industry standard can fluctuate with the changing market in better ways than the common law and statutory legislation. It also requires less judicial involvement in the determination of what is appropriate. The market will determine what content is worthwhile to report and aggregators will pay a fee representing their investment in the gathering of the information. By ensuring generators do not lose revenue on content being used by aggregators; the hope is that they will have enough to continue investing in newsgathering that, while not in demand, is still valuable to society.

D. Foreign Licensing Schemes

Around the world, the industry faces similar problems. Recently, Germany proposed a revision to their copyright act that would create a system similar to what is being proposed above,

²⁹⁴ Steve Green, *Gibson Remains CEO of Righthaven, Appeals to Continue*, VEGASINC (Oct. 31, 2012), <http://www.vegasinc.com/news/2012/oct/31/gibson-remains-ceo-righthaven-appeals-continue>. Righthaven would acquire copyrights from newspapers specifically for lawsuit purposes and brought 275 no-warning suits between the years 2010 and 2011. See also Kramer, *supra* note 48.

granted through a federally imposed system.²⁹⁵ The proposal calls for ancillary copyright protections for news publishers.²⁹⁶ These protections would allow publishers to demand a fee for the online use of their material. The legislation limits the reach of these protections by aiming primarily at search engine operators and “online services that aggregate content in a manner comparable to that of a search engine.”²⁹⁷ The legislation targets systems like Google News by making illegal the indexing of news sites by operators.²⁹⁸ The rationale is that these systems use content in order to generate profit for the parent company (i.e., Google) which has little connection to the news industry.²⁹⁹ These systems will be required to purchase licenses in order to make use of content produced by news industries. The legislation faces opposition with Google, not surprisingly at the forefront.³⁰⁰

Nearby in France, Google is also facing changes in the law. Policy makers are threatening to implement laws that would require Google to pay for linking to French news agency content.³⁰¹ The concern remains that by removing a source like Google, the industry would suffer a reduction in the number of visitors to their websites.³⁰² The future costs of a system like this may not be known until it is systematically implemented. The threat to access presented by a licensing scheme, as pointed out by Google, is a valid concern. However, the benefit of a licensing

²⁹⁵ *English Translation of Ancillary Copyright for Publishers as Passed by German Government*, DER PRESSESCHAUDER (Sept. 3, 2012), <http://www.presseschaunder.de/english-translation-of-ancillary-right-for-publishers-as-passed-by-german-government>.

²⁹⁶ *Id.* at A.

²⁹⁷ *Id.* at A.II.

²⁹⁸ *See id.* Germany is limiting the protection against aggregators that mainly function like feed aggregators.

²⁹⁹ *See id.* (“This is because their business model is particularly oriented towards accessing published materials for the benefit of these providers’ own added value.”).

³⁰⁰ Defend Your Network, <https://www.google.de/campaigns/deinnetz> (last visited December 1, 2012).

³⁰¹ *Reuters, France To Act To Force Google To Pay for News*, CHICAGO TRIBUNE (Oct. 29, 2012), <http://www.chicagotribune.com/business/breaking/chi-france-to-act-to-force-google-to-pay-for-news-links-20121029,0,1550062.story>.

³⁰² Google threatened French news industries with boycotting if a licensing system were implemented in France. *See* Olivier Esper, *The Facts About our Position on French Copyright Proposals*, GOOGLE EUROPE BLOG (Oct. 18, 2012), <http://googlepolicyeurope.blogspot.be/2012/10/the-facts-about-our-position-on-french.html>.

system is that it forces businesses like search engines, which have in the last ten years ingrained themselves into the distribution system, to take part in the news infrastructure that has been in place for over 100 years. Newspapers were built on the licensing framework, an aspect aggregators have been simply skirting. France and Germany are only forcing aggregators to take part in the system.

E. The Trouble with Prior Restraints

The implementation of systems like those being explored in Germany and France would face a large obstacle in the United States. The doctrine of prior restraint is a long held common law doctrine referring to the “judicial orders and administrative rules that operate to forbid expression before it takes place.”³⁰³ From the time of Blackstone, the principle that there should be no previous restraints on expression has held true.³⁰⁴ American constitutional law retains this strongly held belief. While the Supreme Court has not held that prior restraints are not per se prohibited,³⁰⁵ the requisite burden for establishing a valid prior restraint is so high that it basically amounts to a per se prohibition. Subsequent restraints, in other words penalties after publication, have not been given the same treatment and are still widely implemented. The fear with prior restraints is that they prevent ideas and information from reaching the marketplace.³⁰⁶ The “freezing” aspect of prior restraints hurts the timeliness of speech, preventing citizens from accessing the important information they need.³⁰⁷ A subsequent restraint, on the other hand, provides citizens with the information they need in a timely fashion and the consequences of the publication only come at a later date, outside the realm of public domain.

³⁰³ SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15.1 (1996).

³⁰⁴ SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15.2.

³⁰⁵ See *Near v. State of Minn. ex rel. Olson*, 283 U.S. 697, 720 (1931); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976).

³⁰⁶ A subsequent restraint allows the information to be disseminated and the publisher deals with the consequences. SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15.10.

³⁰⁷ *Id.*

While a concern in the implementation of any pre-publication doctrine faces the prior restraint hurdle, the proposal herein outlined does not. Freedom of expression and freedom of the press are a vital part of American constitutional law and a defining characteristic of the American newspaper industry. Protections implemented through a hot news system as described above would focus its energies on promoting restructuring through the imposition of subsequent restraints. Imposing a licensing agreement between aggregators and originators would occur after a successful suit brought by the publisher suffering from misappropriation. Freedom of expression would in no way be infringed upon. The information is already public; it is this very fact that makes aggregation possible in the first place. Aggregation, particularly that done by feed aggregators, does not embody what prior restraint intended to protect.

CONCLUSION

Ultimately, taking the aggregation “turbine” under control and incorporating it into the system is a solution the news industry could implement through the hot news doctrine. As aggregators are forced to pay licensing fees and cooperative efforts are furthered, a strong marketplace-driven news industry will develop. Systems like the hot news doctrine and News Right will work to protect the industry and investment in newsgathering practices. In the end, the principles of *INS* are maintained; a system protecting both aggregators and generators means news will continue to reach audiences and information will flow steadily, fulfilling the purpose of the industry.

At the moment, *Barclays* reigns over the hot news doctrine, incapacitating claims that do not fit the narrow framework left by the Second Circuit. With continued interest in the doctrine, the industry may ultimately, and hopefully, push the courts into coming to some determination about the hot news doctrine. The development of cases like *AP v. Meltwater* will be of particular interest. Sustaining the doctrine would benefit the industry, providing it a much needed legal recourse. The news industry has been failing for years. A continued system of catch-up will never

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ensure its survival. A legal recourse like the hot news doctrine could mean the difference between continued investigative reporting and fealty to *The Huffington Post* crowd. The sad reality is that the turbine would not exist if not for the news generating industry that gathers all of the content being churned out by news aggregators. In the end, a profit-sharing coexistence is the only way forward—and the changes to the hot news doctrine suggested by this Note could lead us one step closer in that direction.