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See You Later, Aggregator: How Hot News Misappropriation Deters Aggregators Without Overprotecting Facts

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SEE YOU LATER, AGGREGATOR: HOW HOT NEWS MISAPPROPRIATION DETERS AGGREGATORS WITHOUT OVERPROTECTING FACTS

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CHAPTER I: INTRODUCTION

Newspapers are in a state of crisis. Newspaper Death Watch reports that since March 2007, 12 U.S. metropolitan dailies have closed and at least 18 former print dailies are adopting hybrid online-print models or online-only models.[1] Amid declines in circulation and advertising revenue,[2] newspapers and other traditional news outlets today are scrambling to monetize their online content. Twelve of the top-20 U.S. daily newspapers (by weekday circulation)[3] have started a paywall or plan to do so.[4] But traditional media find themselves fighting for page views with another competitor who takes their news and makes a profit on it: news aggregators.

News aggregators are websites that compile news from a variety of news websites into one location.[5] The rise of news aggregation websites has been the bane of traditional news organizations. An example of a news aggregating giant is Google News, which gathers and arranges headlines, ledes and sources of news into a news feed on a single page. In 2009 Rupert Murdoch, chairman of media conglomerate News Corp. that publishes the Wall Street Journal and the New York Post, characterized Google News' aggregation of media content as stealing, saying, "There are those who think they have a right to take our news content and use it for their own purposes without contributing a

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[1] Newspaper Death Watch, http://newspaperdeathwatch.com (last visited Feb. 20, 2013).
[2] Rick Edmonds et al., *Newspapers: By the Numbers*, THE PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2012, 2012, http://stateofthemedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/newspapers-by-the-numbers (last visited February 28, 2013).
[3] Alliance for Audited Media: The New Audit Bureau of Circulations, *Top 25 U.S. Newspapers for September 2012*, 2012, http://www.auditedmedia.com/news/research-and-data/top-25-us-newspapers-for-september-2012.aspx (last visited March 25, 2013).
[4] Rani Molla, *A Majority of the Biggest Newspapers in the Country Now Have Paywalls*, April 3, 2013, GIGAOM, http://paidcontent.org/2013/04/03/a-majority-of-the-biggest-newspapers-in-the-country-now-have-paywalls-infographic.
[5] KIMBERLY ISBELL, CITIZEN MEDIA LAW PROJECT, THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES 2 (2010), *available at* http://ssrn.com/abstract=1670339.

penny to its production. Their almost wholesale misappropriation of our stories is not fair use. To be impolite, it's theft."[6]

This paper seeks to show how uncontrolled aggregation of news harms public discourse, why copyright as a form of protection falls short, and why the state common law doctrine hot news misappropriation can help discourage aggregation in a manner that is not inconsistent with the First Amendment.

In recent years, several traditional journalism organizations have tried to fight news aggregators through copyright infringement and hot news misappropriation lawsuits.[7] Hot news misappropriation is a state common law action that prevents direct competitors from disseminating time-sensitive information for a limited period of time.[8] Even though hot news misappropriation started out as federal common law, it has since been limited to state common law, and accepted in only a handful of states.[9] There have not been many cases involving hot news misappropriation, and many, such as *Associated Press v. All Headline News Corp.*,[10] have been settled outside of courts.

In 2009, the Associated Press (AP) sued All Headline News (AHN) for misappropriating its news.[11] In its Amended Complaint, AP alleged that AHN did no original reporting and asked employees to copy or rewrite news stories, including AP

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[6] David Sarno, *Murdoch accuses Google of news 'theft'*, L.A. TIMES, Dec. 2, 2009, *available at* http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009dec02.
[7] *See* AFP v. Google News (2007), Associated Press v. All Headline News (2009), GateHouse Media v. New York Times Co. (2008)
[8] *See*, e.g., International News Serv. v. Associated Press *("INS")*, 248 U.S. 215, 221 (1918), NBA v. Motorola, 105 F.3d 841 (2nd Cir. 1997), Barclays Capital Inc. v. Theflyonthewall.com 650 F.3d 876 (2d Cir. 2011).
[9] *See* McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (Illinois); Pollstar v. Gigmania Ltd., 170 F. Supp.2d 94 (E.D. Cal. 2000) (California); Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp.2d 1044 (E.D. Mo. 1999) (Missouri); Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657 (Pa. 1963) (Pennsylvania); NBA v. Motorola, 105 F.3d 841 (2nd Cir. 1997) (New York).
[10] 608 F.Supp.2d 454 (S.D.N.Y. 2009).
[11] *Id.*

stories, and republish them as AHN stories.[12] AHN also asked its reporters to remove any indication that AP was the author or copyright holder of the articles, which were then sold to paying clients.[13] AP sued AHN for, among other things, copyright infringement and hot news misappropriation under New York common law.[14] The New York federal court refused AHN's motion to dismiss the misappropriation claim because "a cause of action for misappropriation of hot news remains viable under New York law, and the Second Circuit has unambiguously held that it is not preempted by federal law."[15] Eventually AP and AHN settled the suit outside of court.

The viability of the hot news doctrine has been affirmed by the Second Circuit Court of Appeals, most recently in a case involving investment recommendations, *Barclays v. Theflyonthewall.com*.[16] Barclays Capital and several other investment banks had brought suit against online investment news website Theflyonthewall.com (Fly) for taking their investment recommendations and sending them out to other clients before the stock market opened.[17] The trial court ruled in favor of the banks and said Fly was indeed misappropriating the bank's hot news and diverting income away from the banks, so the court issued an injunction for Fly to prevent the website from issuing the investment recommendations until after the market opened. [18]However, the appeals court reversed the trial court ruling and said Fly was not subject to hot news misappropriation because it was not free-riding on the banks' work – the firms were making the news and Fly was

[12] *Id.* at 457.
[13] *Id.* at 457-58.
[14] *Id.* at 457.
[15] *Id.* at 461.
[16] Barclays Capital Inc. v. Theflyonthewall.com 650 F.3d 876 (2d Cir. 2011).
[17] *Id.*
[18] *Id.*

breaking the news.[19] They also reasoned that Fly was not in direct competition with the banks.[20]

The doctrine's application in Barclays has generated much debate about whether the hot news misappropriation doctrine should be used to help or save journalism. [21] There is great concern that the decline of newspapers -- traditionally the bulwark of accountable reporting[22] -- will impair democratic functions of journalism, thus leading to a decline in the health of public discourse.[23] Scholars have suggested that the doctrine could be a viable way to "save journalism" from pirating news aggregators because it protects facts, which copyright does not.[24] After the Barclays ruling, scholars suggested that although the doctrine was narrowed, it is still "alive and well" because the Second Circuit and other state courts continue to uphold a hot news misappropriation cause of action that survives federal copyright preemption.[25]

However, the doctrine has been criticized as well. The doctrine is seen as encroaching into protection of federal copyright law and First Amendment freedoms by granting a property right in facts, which copyright law expressly does not protect.[26]

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[19] *Id.*
[20] *Id.*
[21] Bruce W. Sanford et al., *Saving Journalism With Copyright Reform and the Doctrine of Hot News,* 26 COMM. LAW 8 (2008-2009).
[22] *See* Steven Waldman, Information Needs of Communities: The Changing Media Landscape in a Broadband Age 56 (2011), *available at* http://www.fcc.gov/info-needs-communities ("Throughout the history of this nation, newspapers have provided the bulk of the civically important functions that democracy requires. Good TV, radio, and web operations do this, too, but traditionally, and currently, broadcast and Internet media rely heavily on newspapers to provide original reporting on topics that matter.").
[23] *Id.* at 242-47 ("While the presence of good journalism does not guarantee a healthy democracy, it is fair to say that the absence of good journalism makes a healthy democracy far less likely.").
[24] Brian Westley, Note, *How a Narrow Application of 'Hot News' Misappropriation Can Help Save Journalism,* 60 AM. U. L. REV. 691 (2010-2011).
[25] Sanford et al., *supra* note 21, at 8.
[26] Heather Sherrod, Comment, *The "Hot News" Doctrine: It's Not 1918 Anymore – Why The "Hot News" Doctrine Shouldn't Be Used to Save the Newspapers*, 48 Hous. L. Rev. 1205 (2011-2012).

Furthermore, courts have not provided a satisfactory answer to the duration of protection the doctrine affords news.[27]

Chapter II lays out how the shift to digital has affected traditional media with declining online advertising revenue and competition from online news aggregators. This part also explains how information is vulnerable to free riding in a digital environment because of its characteristics as a public good.

Chapter III examines copyright law and shows its inadequacy in protecting newsgathering investments because it rewards originality, not effort. Copyright law also does not protect facts, and its fair use exception opens up loopholes for news aggregators.

Chapter IV provides a brief history of hot news misappropriation and argues that the doctrine is not inconsistent with the First Amendment because it protects incentives to produce news similar to how copyright protects incentives for authors by protecting the right of first publication. Furthermore, hot news misappropriation was founded under the unfair competition tort, which protects the use of hot news by direct competitors, not any other parties.

Chapter V considers what factors determine how long hot news remains "hot" based on previous cases of hot news misappropriation. Despite limited case law, a trial court judge has provided a set of suitable considerations for determining a reasonable time frame for an injunction protecting hot news.

Chapter VI discusses the conclusions drawn from Chapter V and offers recommendations for a uniform application of hot news duration protection through federalization of hot news misappropriation. Chapter VII summarizes all the conclusions and recommendations.

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[27] *Id.*

CHAPTER II: NEWS NEEDS PROTECTION FROM FREE RIDING

The digital era has changed the way information is accessed and distributed and those changes exert pressure on traditional media in the form of declining advertising revenue and competition with news aggregators. This chapter explains how the nature of news as a public good facilitates free riding and makes news hard to protect.

Shifts in traditional journalism business model

The digital era has brought many changes to the news industry, not the least of which is a shift in the business model of print journalism. Combining circulation and advertising revenue, the newspaper industry has shrunk 43 percent since 2000 and newsrooms across the U.S. have faced severe cutbacks in the past decade.[28]

Two of the major problems for newspapers are a decrease in circulation and a decrease in advertising revenue. But the Pew Research Center found that although print readership has continued to decline, newspapers have managed to keep their circulation revenue stable by raising newspaper prices over the last few years.[29] In contrast, advertising revenue has continued to fall (see Figure 1), showing that "the crisis for newspapers is an advertising problem, not an audience problem."[30]

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[28] Amy Mitchell & Tom Rosenstiel, *Key Findings*, THE PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2012, 2012, http://stateofthemedia.org/2012/overview-4/key-findings; Amy Mitchell & Tom Rosenstiel, *Overview*, THE PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2012, http://stateofthemedia.org/2012/overview-4.

[29] Edmonds et al., *supra* note 2.

[30] *Id.*

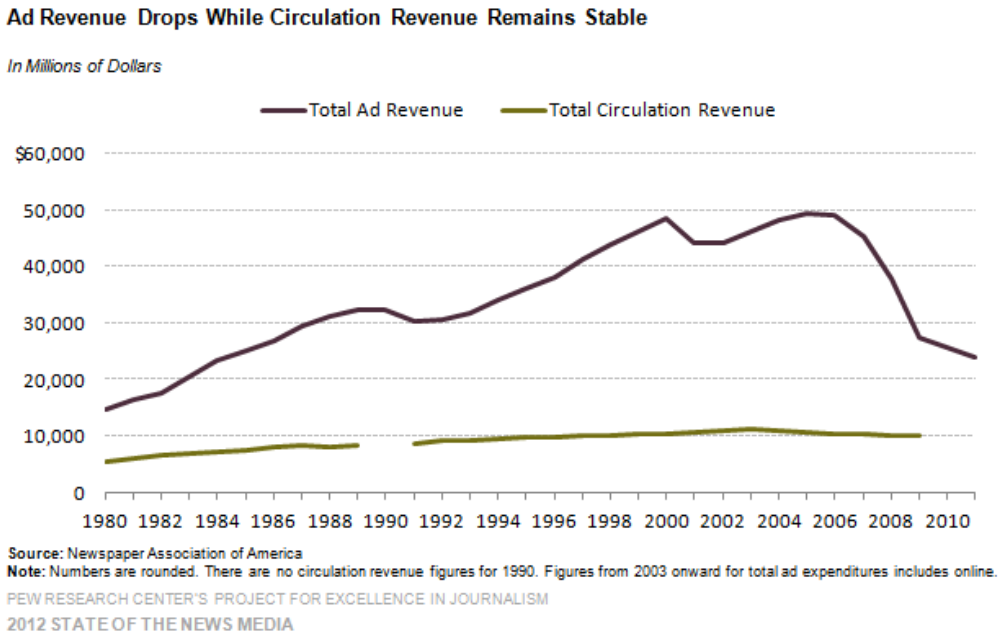

Figure 1. Newspaper advertising revenue and circulation revenue (1980-2010)

It seems, then, that the main problem for newspapers is their net losses in advertising revenue, which can be attributed to major losses in print advertising revenue and small gains in online advertising revenue.

There is no doubt that more people are consuming news online. The Pew Research Center's annual State of the Media report showed that most Americans get their news online or via mobile devices. In 2011, online audiences grew the most out of all news media --17.2 percent.[31] Network TV audiences grew by 4.5 percent while local TV, cable TV and audio audiences grew by 1 percent each.[32] The data show that online advertising is still the fastest growing sector in advertising, even though the bulk of advertising dollars is still in television (see Figure 2).

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[31] Amy Mitchell & Tom Rosenstiel, *Key Findings*, THE PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM: THE STATE OF THE NEWS MEDIA 2012, 2012, http://stateofthemedia.org/2012/overview-4/key-findings

[32] *Id.*

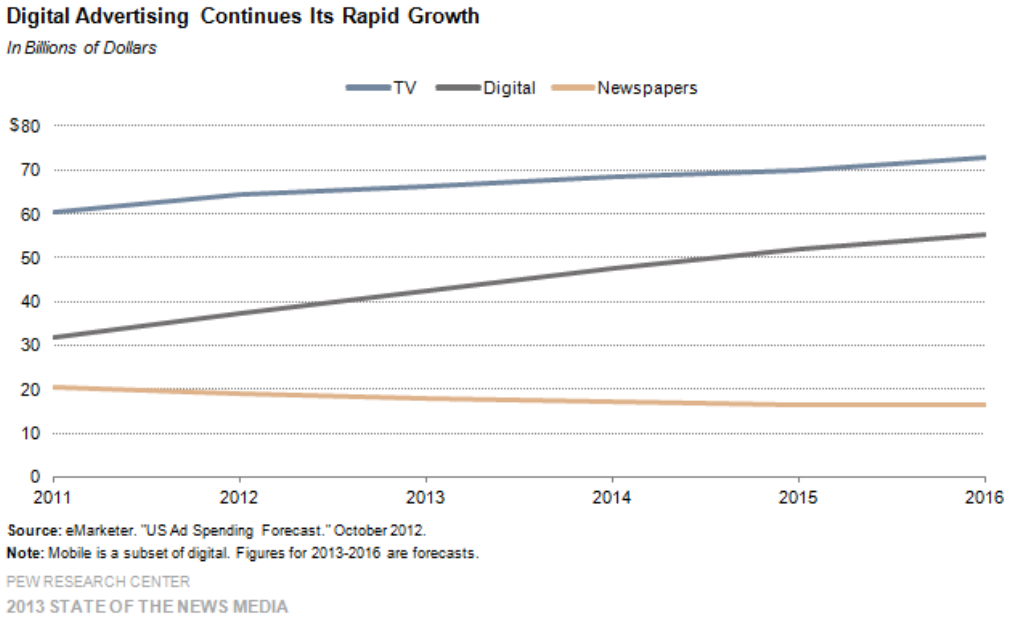

Figure 2. U.S. advertising spending forecast (October 2012)

But the problem is that news websites cannot compete with online advertisers. Former Senator John Kerry observed that newspapers and broadcast news were once "market intermediaries" that "connected buyers and sellers through advertising."[33] But now anyone with a computer or digital device with an online connection may access the Internet and connect a buyer or seller at a much reduced cost because digital operations have low overhead and do not spend money reporting the news.[34]

In the early 2000s, newspapers lost to the online world a large chunk of their print revenue that came from classified advertising. In 2009, a Pew Research Center report showed that newspapers' annual classified ad revenue has plummeted from $19.6 billion in 2000 to $10 billion in 2008. In 2011, classified advertising revenue fell to just $5

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[33] JOHN KERRY, OPENING STATEMENT OF JOHN KERRY: SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SUB-COMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET, HEARING ON THE FUTURE OF JOURNALISM 3 (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg52162/pdf/CHRG-111shrg52162.pdf.

[34] *Id.*

billion,[35] largely because of free online alternatives such as Craigslist – the most used online classified advertising website in the United States.[36]

As an online operation, Craigslist lacks the ad space limitations inherent in print advertising. Craigslist also does not have to pay to maintain a newsroom and printing presses as newspapers do. As a result, the website can afford to let users post classified ads free while funding itself by charging for only a handful of postings, such as $75 per job listing in the San Francisco area, $25 per job listing in specific cities and $10 per apartment rental posting in New York City.[37]

Now online news media continue to face "intensifying competition" from Google and other tech firms like Google and Facebook.[38] According to eMarketer projections, the five largest online companies – Google, Yahoo, Facebook, Microsoft and AOL – pocketed 64 percent of all digital ad spending in the U.S. in 2012, unchanged from 2011.[39]

Furthermore, newspapers are unable to monetize their content the same way they used to do in print, and users favor a more fragmented approach to browsing news online:

> The old model of journalism involved news organizations taking revenue from one social transaction — the selling of real estate, cars and groceries or job hunting, for example, — and using it to monitor civic life — covering city councils and zoning commissions and conducting watchdog investigations. Editors assembled a wide range of news, but the popularity of each story was subordinate to the value,

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[35] Newspaper Association of America, http://www.naa.org/Trends-and-Numbers/Newspaper-Revenue.aspx (last visited March 31, 2013).
[36] Sydney Jones, *Online Classifieds*, Pew Internet and American Life Project, http://pewinternet.org/Reports/2009/7--Online-Classifieds/1-Overview.aspx.
[37] Craigslist.com Posting Fees, http://www.craigslist.org/about/help/posting_fees (last visited March 28, 2013).
[38] Jane Sasseen et al., *Digital: As Mobile Grows Rapidly, the Pressures on News Intensify*, Pew Research Center State of the Media, http://stateofthemedia.org/2013/digital-as-mobile-grows-rapidly-the-pressures-on-news-intensify.
[39] *Id.*

> and the aggregate audience, of the whole. And the value of the story might be found in its consequence rather than its popularity. . . . Online, it is becoming increasingly clear, consumers are not seeking out news organizations for their full news agenda. They are hunting the news by topic and by event and grazing across multiple outlets.[40]

While the Internet has inevitably changed how news is published and distributed online, Baltimore Sun reporter David Simon points out that news organizations are partly to blame for their demise.[41] Even before the threat of new technology, Simon said *The Baltimore Sun* and other newspaper executives had been cutting personnel to gain more profit instead of focusing on delivering a more quality product.[42]

Because of these factors, newspapers' online advertising gains have not kept up with print circulation and revenue declines. In 2011, newspapers lost 10 print advertising dollars for every digital ad dollar gained.[43] In 2012, the gap widened, with newspapers losing 16 print advertising dollars for every digital ad dollar gained.

Why is it so hard to get people to pay for news? News as a public good

The interesting thing about news and information as commodities is that they can be "consumed" and still be "used" by the next person, because they are intangible public goods. A public good is "a commodity whose benefits may be provided to all people at no more cost than that required to provide it for one person."[44]

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[40] The Pew Research Center's Project for Excellence in Journalism, *Major Trends*, THE STATE OF THE NEWS MEDIA 2010, 2010, http://stateofthemedia.org/2012/overview-4/key-findings.
[41] DAVID SIMON, STATEMENT OF DAVID SIMON, FORMER REPORTER OF THE BALTIMORE SUN AND BLOWN DEADLINE PRODUCTIONS, SCIENCE AND TRANSPORTATION, SUB-COMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET, HEARING ON THE FUTURE OF JOURNALISM 29 (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg52162/pdf/CHRG-111shrg52162.pdf.
[42] *Id.*
[43] Mitchell & Rosenstiel, *supra* note 31.
[44] PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 980-81 (13th ed. 1989).

A public good does not diminish when used by an additional person. For example, highways are considered a public good because everyone can use them, and one person's use of them does not diminish another person's ability to use it in the future. The opposite of a public good is a private good. For example, a hamburger is a private good and can be consumed by only one person. It cannot be used by another person after the first person has used it. Someone getting information about something does not diminish the value of the information, so the person may pass it on to someone else who has not heard it.[45]

News differentiates itself from information because its value is based on not just the value in the facts themselves but also in the freshness of the facts:

> The 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 secret ....[The news] business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.[46]

Once someone creates public good and it does not diminish in value, no one will want to be the first to invest in its creation. The first person to create this public good would have invested time and effort and not receive any returns because it can then be shared with the next person and the next person. This is especially so with information because it is an intangible good.[47]

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[45] Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information,* 20 U. Haw. L. Rev. 421, 427 (1998).
[46] International News Serv. v. Associated Press, 248 U.S. 215, 235 (1918).
[47] Fujichaku, *supra* note 45, at 427.

Before the 21st century, free riders such as news aggregators could not easily enter into competition with print journalism organizations because it took lot of money to buy printing presses, print publications and to distribute the printed product. But in the digital era, lower barriers to publication and ease of sharing information have resulted in an almost unlimited number of ways that others, such as news aggregators, may access and republish news. Anyone with a computer or similar digital device and an Internet connection can publish online with a few clicks of the mouse and potentially reach the same audience on the Internet as a traditional news organization, and make some money off it.[48]

News organizations only have a limited window within which to make money on the news, as do the aggregators who take the news from those who first report it.[49] If free riding continues unchecked, the incentive to produce a public good (news, in this case) will be diminished.[50] Information as a public good theory is reflected in the way that people do not want to pay for news online and in the way online news aggregators are able to index and redistribute news and still make money off it.[51]

Executives from Google News[52] and blog news aggregator Huffington Post[53] have argued that the aggregators in fact help news websites by directing traffic to them. While

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[48] Eric P. Schmidt, Comment, *Hot News Misappropriation in the Internet Age*, 9 J. ON TELECOM. & HIGH TECH. L. 313, 338 ("[O]riginal news reporting is time consuming and expensive, while reproduction is easy and cheap thanks to evolving technology. The dramatic rise of Web 2.0 applications allowing users to share their own content has led some commentators to predict that the death of the newspaper industry will lead to the rebirth of a new—and better—model of journalism.").
[49] Fujichaku, *supra* note 45, at 421-22.
[50] *Id.* at 428.
[51] Waldman, *supra* note 22, at 18.
[52] MARISSA MAYER, STATEMENT OF MARISSA MAYER, VICE PRESIDENT, SEARCH PRODUCTS AND USER EXPERIENCE, GOOGLE, SCIENCE AND TRANSPORTATION, SUB-COMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET, HEARING ON THE FUTURE OF JOURNALISM 17 (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg52162/pdf/CHRG-111shrg52162.pdf ("Together, Google News and Google Search provide a valuable free service to online newspapers specifically by sending interested readers to their sites at a rate of more than 1 billion clicks per month.").

that seems to be true[54], aggregators also compete with news websites for page views. A 2010 research report showed that 44 percent of Google News visitors scan headlines and do not click through to news websites.[55] If readers do not click through to the entire news story, then news aggregators like Google News potentially divert readers – and therefore ad and subscription revenue – away from news websites. However in the last few years, many larger newspapers are following in the footsteps of small and medium-sized newspapers in setting up online paywalls to start charging for content to stem the free riding.[56] Reporters must expend effort to report the news and it is not free, as Steve Waldman wrote:

> [I]f too many people free ride, media outlets cannot pay the salaries of the reporters who painstakingly gather the information. One of the most famous phrases of the Internet era is "Information wants to be free." . . . People want to distribute and receive information for free. But what that leaves out is reality that in some cases the information will not come to the fore without the work of professional reporters.[57]

Aggregators as free riders of news

The number of news aggregators has grown quickly. Among the most successful is the news aggregation website and blog Huffington Post, which "boasts 68 sections, three international editions," "1.2 billion monthly page views and 54 million comments in the past year alone" and "came to surpass the traffic of virtually all the nation's

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[53] Arianna Huffington, *Journalism 2009: Desperate Metaphors, Desperate Revenue Models, And The Desperate Need For Better Journalism*, THE HUFFINGTON POST, Dec. 1, 2009, http://www.huffingtonpost.com/arianna-huffington/journalism-2009-desperate_b_374642.html.
[54] BILL GRUESKIN, AVA SEAVE & LUCAS GRAVES, THE STORY SO FAR 86 (2011), *available at* http://cjrarchive.org/img/posts/report/The_Story_So_Far.pdf ("[L]inks from other sites or search engines are among the cheapest and most efficient ways to bring in new users.").
[55] Robin Wauters, *Report: 44% of Google News Visitors Scan Headlines, Don't Click Through*, TECHCRUNCH, Jan. 19, 2010, http://techcrunch.com/2010/01/19/outsell-google-news.
[56] Molla, *supra* note 4.
[57] Waldman, *supra* note 22, at 123.

established news organizations and amass content so voluminous that a visit to the website feels like a trip to a mall where the exits are impossible to locate," as journalist Michael Shapiro described.[58]

There are many different definitions of news aggregators reflecting their varied purposes and practices. Kimberley Isbell identified four kinds of news aggregators in her discussion on legal implications and best practices of aggregating: feed aggregators, specialty aggregators, user-curated aggregators and blog aggregators (see Table 1).[59]

Table 1. Types of news aggregators

Type of aggregator	**Definition**	**Characteristics**	**Examples**
Feed aggregator	A website that contains material from various websites organized into "feeds," which are typically arranged by source, topic or story.	- closest to traditional conception of news aggregator - typically displays headline of news stories, sometimes the first few lines of the lede - displays name of original website and links to it	Yahoo! News, Google News
Specialty aggregator	A website that collects information from a number of sources on a particular topic or location.	- typically displays headline of story, occasionally first few lines of lede - displays name of original website and links to it - unlike feed aggregator, more limited in focus and number of sources covered	- Hyper-local websites e.g. Everyblock and Outside.In. - Specific topic websites e.g. Techmeme and Taegan Goddard's Political Wire

[58] Michael Shapiro, *Six degrees of aggregation: How the Huffington Post Ate the Internet*, COLUMBIA JOURNALISM REVIEW, April 16, 2012, http://www.cjr.org/cover_story/six_degrees_of_aggregation.php (last visited March 4, 2013.

[59] ISBELL, *supra* note 5.

User-curated aggregator	A website that features user-submitted links and portions of text taken from a variety of websites.	- has links usually taken from a wider variety of sources than most news aggregators - often includes links to blog posts and multimedia content like YouTube videos, as well as links to more traditional media sources.	Digg.com, Reddit.com
Blog aggregator	A website that uses third-party content to create a blog about a given topic.	- looks the least like traditional news aggregator - can use third party content in different ways to make up blog posts (see examples column)	*Gawker Media* Blog posts may consist of: - synthesized information from a few sources into a single story, sometimes incorporating quotes from original articles - two to three sentence summaries of articles from a third-party source, with link to original articles - short excerpts/summaries from a few articles strung together, with links to original articles *The Huffington Post* - front pages typically feature links to content, including original articles authored by Huffington Post writers, AP articles hosted on the Huffington Post website, and articles hosted on third-party websites. - In linking to third-party content, sometimes the original headline is used, and other times a headline written by Huffington Post editors is used.

(Source: Kimberley Isbell)[60]

This is not to say that all aggregation is unacceptable. Most online news sites practice some form of aggregation.[61] Aggregation is also done in newsrooms and refers to

[60] ISBELL, *supra* note 5, at 2-6.

a broad spectrum of practices, as former Washington Post ombudsman Patrick Pexton wrote:

> This is an imprecise term. At its best, aggregation can mean collecting stories on a topic from a variety of news outlets and directing readers toward them through Web links. At its worst, as Bill Keller, the former editor of the New York Times has written, it verges on theft. In the middle, where most aggregation is, it is repackaging. A digital journalist reads a raft of stories on a given subject from different publications, summarizes and rewrites them in a bright way, provides links and, at The Post, adds a Washington angle. The goal is to surf the trend waves on the Internet, hoping to catch a few thousand page views as a story crests. It's cashing in on the passing popularity of a story even if you don't have a reporter covering it.[62]

Besides describing what aggregation taken to extremes can be, Pexton hit on a driving force in aggregation: to make money, often times off information that others gather, with little or extensive reworking. Information is valuable; as Samuelson noted, "In the Information Age, information becomes the primary economic commodity, the source of greatest wealth."[63] But unlike other commodities, information is an intangible and a public good, making it easy to pass on repeatedly without losing its value or usability.

Aggregators not only take advantage of the cheap cost of copying the news, but also do it quickly, thus leaving no time for news organizations to recoup their investment

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[61] GRUESKIN ET AL., *supra* note 54, at 84 ("In fact, almost all online news sites practice some form of aggregation, by linking to material that appears elsewhere, or acknowledging stories that were first reported in other outlets. An analysis of 199 leading news sites by the Pew Project for Excellence in Journalism found that most of them published some combination of original reporting, aggregation and commentary and that the mix differed considerably depending on the anagement strategy, the site's history and—to be sure—its budget.").

[62] Patrick B. Pexton, *The Post Fails a Young Blogger*, WASH. POST, April 20, 2012, http://articles.washingtonpost.com/2012-04-20/opinions/35454516_1_aggregation-web-links-international-stories.

[63] Pamela Samuelson, *Information as Property: Do Ruckleshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 367 (1989)

in reporters and other resources to gather facts. In this way, the actions of aggregators reduce the incentive for traditional journalism organizations to continue reporting the news.

Also, because news aggregators only compile news stories and do not do their own reporting, there is less original content to go around. Although the number of Web news outlets increases every day, studies have shown that original reporting has remained fixed or is declining.[64] Coupled with cutbacks in newsrooms, the decline of original content potentially leads to a decline in the health of public discourse.[65]

In 2009, David Simon, former reporter for The Baltimore Sun, spoke about the effects of free riding on legacy media:

> High-end journalism is dying in America and unless a new economic model is achieved, it will not be reborn on the web or anywhere else. The Internet is a marvelous tool and clearly it is the information delivery system of our future, but thus far it does not deliver much first-generation reporting. Instead, it leeches that reporting from mainstream news publications, whereupon aggregating websites and bloggers contribute little more than repetition, commentary, and froth. Meanwhile, readers acquire news from aggregators and abandon its point of origin; namely, the newspapers themselves. In short, the parasite is slowly killing the host.[66]

In some sense, aggregation "is what editors do" when they put together stories and different sources, wrote Bill Keller, former executive editor of The New York Times. [67] But he also said there is a "thin line between aggregation and theft. Sending readers to savor the work of others at the sites where they publish — that's one thing. Excerpting or

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[64] Waldman, *supra* note 22, at 123.
[65] *Id.*
[66] SIMON, *supra* note 41.
[67] Bill Keller, *Postcript: Aggregation Aggro*, N.Y. TIMES, March 13, 2011, http://6thfloor.blogs.nytimes.com/2011/03/13/postscript-aggregation-aggro.

paraphrasing at length, so the original sources doesn't [sic] get the traffic or the revenue, that's something else."[68] So how do we find that line? Copyright law and unfair competition law provide some insight to answer this question.

[68] *Id.*

CHAPTER III: WHY COPYRIGHT LAW FAILS TO PROTECT HOT NEWS

In law, federal patent and copyright laws are the primary sources of protection for intangible trade values such as information, innovations and ideas. [69]

> Individuals are given a limited property right, not so much because they are morally deserving, but because providing them with such a right is thought necessary to induce them to produce the work in the first instance. Both copyright and patent law balance the need to provide authors and inventors with incentives against the need for free access to what has been produced.[70]

The Patent and Copyright Clause of the U.S. Constitution gives Congress power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[71] Exclusive rights granted to copyright owners are defined in Section 106 of the Copyright Act of 1976, and include the right to reproduce the copyrighted work, the right to prepare derivative works based on the copyrighted work, the right to distribute copies of the work through sale or lease, the right to display the work publicly and the right to perform the work publically.[72]

In intellectual property theory, it was important to provide people with a time frame to get money and credit for their work, because only then would they have incentive to invent and create more work. The same might work for news, as Rex Fujichaku observed: "The furnishing of property rights, including exclusive rights to possess, use, and sell, to providers of hot news information would serve to maximize its

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[69] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. a (1995).
[70] Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 415 (1983).
[71] U.S. Const. art. I, § 8, cl. 8.
[72] 17 U.S.C. § 301.

commercial value and to reward the initial investment of time, energy, and resources expended to generate or gather such information."[73]

Section 102 of the Copyright Act of 1976, also known as the subject matter clause, states copyright protects "original works of authorships fixed in any tangible medium of expression."[74] This means that a work must be sufficiently original or creative to be protected by copyright, and it must be fixed.

The idea-expression dichotomy limits protection of facts

A foundational principle of copyright law is the idea-expression dichotomy,[75] which is a theory that ideas and language used to express an idea are separate.[76] Facts and ideas cannot be copyrighted, but the way in which facts and ideas are expressed may be copyrighted, hence "the 'ideas' that are the fruit of an author's labors go into the public domain, while only the author's particular expression remains the author's to control."[77]

In the U.S. Supreme Court's 1991 decision *Feist Publications, Inc., v. Rural Telephone Service Co.*, the court held that compilation of names and phone numbers in a phonebook was uncopyrightable even though the phone company used time and energy to compile the information.[78] Rural Telephone Service Company provided telephone service to a few communities in northwest Kansas, and it issued telephone directories to customers annually.[79] Feist Publications, Inc. was a publishing company that wanted to publish an area-wide telephone directory, so Feist offered to pay Rural for the rights to

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[73] Fujichaku, *supra* note 45, at 423.
[74] 17 U.S.C. § 102 (1976).
[75] Edward Samuels, *The Idea-Expression Dichotomy in Copyright* Law, 56 TENN. L. REV. 321, 322 (1989)
[76] *See* Baker v. Selden, 101 U.S. 99 (1879).
[77] Samuels, *supra* note 75, at 323.
[78] 499 U.S. 340 (1991).
[79] *Id.* at 343.

use the companies' white pages listings.[80] Rural refused but Feist went ahead and published the phone numbers from Rural's directory without consent,[81] so Rural sued Feist for copyright infringement, saying that the telephone listings contained in Rural's directory are copyrighted.[82] The District Court and the Court of Appeals agreed with Rural, but the U.S. Supreme Court ruled that telephone books were not copyrightable because the information within them are facts and "facts do not owe their origin to an act of authorship."[83] The court also explained that copyright does not reward labor and effort of compiling information, but originality.[84] The compilations of facts may be copyrightable if they are even minimally creative, but the copyright would only protect the selection and arrangement of facts, not the facts themselves.[85]

In *Miller v. Universal City Studios*, the court held that a writer's research of a factual account is not copyrightable.[86] In 1968, Miami Herald reporter Gene Miller reported on the kidnapping of a college-aged girl, Barbara Mackle.[87] Miller later wrote a book titled "83 Hours Till Dawn" detailing the kidnapping and Mackle's subsequent rescue.[88] A few years later, Universal City Studios wanted to make a dramatization of the kidnapping based on Miller's book, but it was unable to come to an agreement with Miller to purchase movie rights.[89] Universal proceeded with the movie and allegedly

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[80] *Id.* at 343.
[81] *Id.* at 343.
[82] *Id.* at 340.
[83] *Id.* at 350. (""This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.")
[84] *Id.* at 364. ("...copyright rewards originality, not effort.")
[85] *Id.* at 348-49.
[86] 650 F.2d 1365 (1981).
[87] *Id.* at 1367.
[88] *Id.* at 1367.
[89] *Id.* at 1367.

wrote the script based on Miller's book, and Miller sued for copyright infringement.[90] The district court ruled in favor of Miller, but the U.S. Court of Appeals for the Fifth Circuit said the lower court made a mistake saying research was copyrightable. "The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable," the appeals court said.[91]

Most news reports consist of facts, and because facts are not copyrightable, copyright law provides limited protection to news reports. While the expression and arrangement of words in news stories could be copyrightable, the facts themselves can be reused without infringing copyright.

An example of how copyright protects expression of ideas is illustrated in *Burgess v. Chase-Riboud*.[92] In 1979, Barbara Chase-Riboud wrote a novel, *Sally Hemings: A Novel*, inspired by former President Thomas Jefferson's biography, which alleged a love affair between Jefferson and his slave "concubine," Sally Hemings.[93] A few years later, Granville Burgess wrote a play on the same subject called *Dusky Sally*.[94] Although the two works were different, they were similar in many ways. Burgess sued Chase-Riboud for a declaratory judgment that he did not infringe on Chase-Riboud's copyright because the content of both their works were historical fact and thus do not belong to either of them.[95] However, the U.S. District Court ruled that Burgess had infringed on Chase-Riboud's copyright because the two works were substantially similar in the setting, plot, character details, and many of those similarities could not be traced to any historical

[90] *Id.* at 1367.
[91] *Id.* at 1372.
[92] 765 F.Supp. 233 (E.D. Pa. 1991).
[93] *Id.* at 233.
[94] *Id.* at 234.
[95] *Id.* at 233

account.[96] Judge Robert Kelly wrote, "the similarity between the two works is so obvious, and so unapologetic that an ordinary observer can only conclude that Burgess felt he was justified in copying *Sally Hemings,* or at least that there was no legal impediment to doing so, assuming a few modifications were made."[97]

The fair use exception

Copyright law permits copyrighted information to be used without permission under certain circumstances that qualify as fair use." Section 107 of the Copyright Act of 1976 codifies fair use exceptions to copyright. Fair use of a copyrighted work includes reproduction of the work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[98] Additionally, Section 107 states the four factors to be considered when determining whether the use of a work is fair:

> 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.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[99]

Bloggers and news aggregators have argued that their unauthorized copying falls under fair use.[100] To consider whether news aggregators' use of news articles qualify as fair use, courts would have to analyze each case based on the four factors.

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[96] *Id.* at 240.
[97] *Id.* at 242.
[98] 17 U.S.C. § 106.
[99] 17 U.S.C. § 107.

Factor 1: Purpose and character of use

The first factor of fair use looks at the purpose and character of the use, such as whether the use is for commercial or non-profit purposes. A noncommercial or nonprofit use is more likely to be considered fair use.[101] Under this factor, courts also consider whether the use is transformative.[102] A work is transformative when the new work does not "merely supersede the objects of the original creation" but rather "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[103]

For example, the use of copyrighted images as search thumbnails has been found sufficiently transformative to qualify as fair use, as courts decided in *Perfect 10 v. Google, Inc*.[104] Perfect 10 is a website that sells copyrighted images of nude models and their subscribers can pay a monthly fee to view these images in a members' area. Google indexed those photos and showed thumbnails, smaller and lower resolution images, of the original pictures in users' search results, which Perfect 10 said infringed on its copyright. The court ruled that Google had sufficiently transformed the photos by shrinking them and displaying them in search results as a "pointer" to the original image.[105] The court said Google's use of the images are "fundamentally different" than the entertainment and aesthetic uses Perfect 10 intended, and Google was also providing a public service through its search function, thus use of the images would qualify as fair use.[106]

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[100] Jeena Moon, Note, *The "Hot News" Misappropriation Doctrine, The Crumbling Newspaper Industry, and Fair Use as Friend and Foe: What is Necessary to Preserve "Hot News"?*, 28 CARDOZO ARTS & ENT. L.J. 631, 644 (2010-2011).
[101] DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 539 (18th ed. 2013).
[102] *Id.* at 542.
[103] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).
[104] 487 F.3d 701 (2007). *See also* Kelly v. Arriba, 280 F.3d 934 (9th Cir. 2002).
[105] Perfect 10 v. Google, Inc. 487 F.3d 701, 721 (9th Cir. 2007).
[106] *Id.* at 725.

Aggregators usually display advertising next to their news feeds or posts as a means of making money, which means the purpose is commercial. Feed aggregators like Google News do not really transform the news articles that they gather. News headlines and ledes or snippets of stories are usually displayed verbatim. What blog aggregators do by paraphrasing and adding commentary may provide a more transformative use of news articles, which may outweigh the commercial factor in the use.

Factor 2: Nature of copyrighted work

The second factor of fair use examines the nature of the original work. Courts consider whether the original work is still in print or out of print, whether the work is consumable (such as a workbook that accompanies a textbook), whether the work is informational or creative, and whether the work is published or unpublished.[107] A use is more likely to be considered fair use if the copyrighted work is out of print, not consumable, informational and published.[108]

The news that news aggregators aggregate is usually published, informational and not consumable, so this factor weighs in favor of news aggregators.

Factor 3: Amount and substantiality of the use

The third factor of fair use looks at the amount of work used and the "relative proportion of the work used."[109] For example, using 400 words from a 800-page encyclopedia is much less in proportion to using 20 words from a 40-word poem. Courts will also consider whether the "heart of the work" was used, because the heart of a work reflects the essence of a copyrighted work.[110]

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[107] PEMBER & CALVERT, *supra* note 101, at 543-44.
[108] *Id.*
[109] *Id.* at 545.
[110] Salinger v. Random House, 811 F. 2d 90 (2d Cir. 1987).

News aggregation websites such as Google News gather news from various news outlets and display a list of hyperlinks to individual news articles. The aggregated content usually includes a headline and the lede (first few sentences) of the news article. As a reflection of the inverted pyramid style of writing in news – organizing information from the most important to the least important – the lede usually summarize the entire story.[111] Copyright law does not protect short phrases like headlines, but it could be argued that aggregators' use of headlines, and especially the ledes, constitute taking the "heart of a story" and thus not qualify as fair use. So, this factor tilts in favor of content creators if the aggregators use the lede and headline of a story.

Factor 4: Effect of use on potential market/value of the copyrighted work

For this factor, the courts examine the economic impact that the use of a work would have on the original, copyrighted work.[112] This is also considered one of the most important factors of a fair use analysis. Justice Sandra Day O'Connor commented in *Harper & Row v. Nation Enterprises* that "this last factor is undoubtedly the single most important element of fair use."[113]

When news aggregators republish news from journalism organizations, their actions affect the potential market and value of the original news reports because readers can now choose to go to the traditional news website or the news aggregation site, thus splitting the potential audience pool. Further, even though research shows that news aggregators direct traffic to traditional news websites,[114] some people who read the

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[111] Purdue Online Writing Lab, *The Inverted Pyramid Structure*, http://owl.english.purdue.edu/owl/resource/735/04/.
[112] PEMBER & CALVERT, *supra* note 101, at 547.
[113] 471 U.S. 539, 566 (1985).
[114] Lesley Chiou, & Catherine Tucker, *Copyright, Digitization, and Aggregation*, NET Institute Working Paper No. 11-18 (2011), *available at* SSRN: http://ssrn.com/abstract=1864203 or doi:10.2139/ssrn.1864203.

headlines and ledes on news aggregation sites may not visit the original news website.[115] If the content displayed on the news aggregator's website serves as a substitute for the original news article, then the copy clearly affects the market for the original. Therefore, this factor favors content creators.

Based on this analysis of the fair use factors, feed aggregators like Google News are least likely able to argue that their use of news reports constitutes fair use because their use is commercial, the headlines and ledes are not transformed very much when displayed, the headlines and ledes can be considered the "heart" of a news story, and their use affects the market for the existing copyrighted news.[116] Blog aggregators are most likely to argue that their use of existing news reports constitutes fair use because they inject commentary along with the links to news that they use. However, search engines' uses of copyrighted content have been considered fair use.[117]

News reporting is not automatically fair use

Several uses are listed in the fair use doctrine, but no use is presumptively fair, even if it is used in those listed manners. For example, news reporting is not always fair use. In *Harper & Row v. Nation Enterprises*,[118] the court ruled that a news service's use of unpublished memoirs of Gerald Ford was not fair use even though The Nation was reporting about it and only used 300 to 400 words verbatim from the work.[119]

In 1977, former President Ford contracted with Harper & Row to publish his memoirs, and this gave Harper & Row the right to license excerpts prior to publication.[120]

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[115] Wauters, *supra* note 55.
[116] Isbell,
[117] *See e.g.* Perfect 10 v. Google, Inc. 487 F.3d 701, 721 (9th Cir. 2007); Kelly v. Arriba, 280 F.3d 934 (9th Cir. 2002).
[118] 471 U.S. 539 (1985).
[119] *Id.* at 569.
[120] *Id.* at 539.

In 1979, Harper & Row struck a deal with Time Magazine to let them publish an excerpt of 7,500 words of his pardon of Richard Nixon in exchange for $25,000.[121] But before Time could publish the excerpt, The Nation Magazine received the Ford's unpublished manuscript from an unauthorized source and scooped Time Magazine.[122] Time cancelled its agreement and Harper & Row sued Nation Enterprises for copyright infringement.[123]

The District Court ruled that Nation had infringed on Harper & Row's copyright, but the Second Circuit Court of Appeals reversed, saying that The Nation's use of the quotations constituted fair use. The Supreme Court reversed the appeals court decision and held that The Nation's unauthorized publication of verbatim quotes took from the "heart" of Ford's unpublished memoirs, and took away Harper & Row's right of first publication.[124] The Court said although The Nation was serving a public interest by reporting the news, the appeals court erred "in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use."[125] The right of first publication is "an important marketable subsidiary right."[126] Something can be published for the first time only once – and that right should belong to the copyright owner, Harper & Row.[127]

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 569
[126] *Id.* at 540.
[127] *See id.* at 569 ("Placed in a broader perspective, a fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage to the marketability of first serialization rights in general.").

Will *AP v. Meltwater* give more protection to content creators?

A 2013 ruling by a federal judge that reselling news excerpts from the Internet is not a fair use could possibly afford content originators more fair use protection for news content originators.[128] On March 21, 2013, Judge Denise Cote from the U.S. District Court for the Southern District of New York ruled that online news clipping service Meltwater News, Inc., had infringed on the copyright of news wire service Associated Press (AP) copying AP articles without paying AP a licensing fee.[129]

Meltwater News offers online media monitoring service to clients for a fee.[130] Meltwater News uses a computer program to gather and store web content, including AP articles, matching search terms its clients specify.[131] Meltwater then provides its clients with reports containing excerpts of news that fit the client's criteria. Meltwater's chief defense against copyright infringement was that its use of AP articles were fair use, because it operated like an Internet search engine and only provided excerpts of news articles, not whole articles, to clients.[132]

The judge rejected Meltwater's argument that it was a search engine because Meltwater charged for its service and marketed itself as a news clipping service instead of a "publicly available tool to improve access to content across the Internet."[133] The judge concluded Meltwater's use was not fair use because its use of the articles was commercial and not transformative. Furthermore, Meltwater copied material portions of AP articles. The judge also ruled that AP and Meltwater were direct competitors and Meltwater's

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[128] 2013 WL 1153979 (S.D.N.Y.)
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 12.

publication of AP excerpts could serve as substitutes to AP articles and deprive AP of licensing revenue.[134] Meltwater will appeal the decision, but for now, the district court's reasoning seems to reject the notion that everything published on the Internet is free for the taking.[135]

[134] *Id.*
[135] Elizabeth A. McNamara et al., *AP Wins Key Copyright Action: Reselling News Excerpts From Internet Not Fair Use*, LEXOLOGY, March 21, 2013, http://www.lexology.com/library/detail.aspx?g=89d3952c-c5db-42cd-9d4a-7d8569994b05&utm.

CHAPTER IV: HOT NEWS MISAPPROPRIATION IS NOT INCONSISTENT WITH THE FIRST AMENDMENT

The previous chapters have laid out the crisis facing journalism as the online environment facilitates free riding of news, thus reducing the incentive to report news. The previous chapters also discussed how copyright law is limited in its protection of newsgathering because of limitations in protecting facts. This chapter provides background on the hot news misappropriation, which was founded in unfair competition and shows why it is a possible solution to control free riding of news without infringing on the First Amendment.

History of hot news misappropriation

Legal redress against news piracy in INS v. AP

Although news aggregators were born in the digital era, the idea of making money by rewriting someone else's news is not. The hot news misappropriation doctrine emerged in a 1918 U.S. Supreme Court decision called *International News Service v. Associated Press,*[136] where one news service sued a competing news service for pirating its news. The Associated Press (AP) and International News Service (INS) were competing news wires reporting on World War I. The AP, based in New York, was a news cooperative of about 950 daily newspapers all over the U.S.[137] INS was based in New Jersey and served about 400 newspapers in the U.S. and overseas – a few of which were also AP members.[138]

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[136] International News Serv. v. Associated Press *("INS")*, 248 U.S. 215 (1918).
[137] *Id.* at 221
[138] *Id.* at 230 (The INS was created in 1909 by William Randolph Hearst to serve his chain of morning newspapers. It also sold news to other newspapers on a contract basis. In 1958, it merged with the United Press to form United Press International. Frank Luther Mott, American Journalism, New York: The Macmillan Company, 1962, pp. 592 and 818.)

AP complained that INS bribed AP employees to get AP news before publication and then transmitted the news by telegraph or telephone to INS clients.[139] INS also copied AP stories from news bulletin boards and early editions of AP newspapers, then sold to INS clients the rewritten or whole stories without attribution to AP.[140] Furthermore, INS transmitted the news through their own newswire, such that the news stories were being transmitted to INS's West Coast at the same time or even faster than AP's.[141] AP sued INS for unfair competition and unjust enrichment.[142]

The U.S. Supreme Court found that the news was considered "stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise."[143] Therefore, the court agreed that what INS had done was to interfere with the normal operation of AP's legitimate business "precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to [INS] in the competition because of the fact that it is not burdened with any part of the expense of gathering the news."[144] Furthermore, INS was depriving AP of the lead time to make money, meaning INS was trying to "reap where it had not sown" and the courts issued an injunction against INS.

But the hot news misappropriation as federal common law was abolished after *Erie Railroad Co. v. Tompkins*.[145] In *Erie*, the U.S. Supreme Court held that

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the

[139] *Id.* at 231.
[140] *Id.* at 231.
[141] *Id.* at 238-39.
[142] *Id.*
[143] *Id.* at 236.
[144] *Id.* at 240.
[145] 304 U.S. 64 (1938).

> law of the state. . . . Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[146]

As a result, federal common law was abolished and this means *INS v. AP* is no longer binding precedent.[147] However, the doctrine has been adopted as a common law cause of action in several states such as Illinois, California, Missouri, Pennsylvania and New York.[148]

Federal copyright preemption of hot news misappropriation

Some legal scholars[149] and aggregators have argued that federal copyright law preempts hot news misappropriation because the works the doctrine seeks to protect fall under copyright law. Traditionally, both states and federal governments protected copyright.[150] Federal patent and copyright statutes offer protection to eligible subject matter, but they also limit the protection of intangible trade values such as ideas and information under state statutory and common law.[151] The Copyright Act of 1909 said published works fell under the jurisdiction of federal law while unpublished works were under the jurisdiction of state common law.[152] After the Copyright Act of 1976 came into effect, copyright subsists in a work the moment it is fixed in a tangible medium of

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[146] *Id.* at 78.
[147] Sanford et al., *supra* note 21, at 9.
[148] *See* McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (Illinois); Pollstar v. Gigmania Ltd., 170 F. Supp.2d 94 (E.D. Cal. 2000) (California); Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp.2d 1044 (E.D. Mo. 1999) (Missouri); Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657 (Pa. 1963) (Pennsylvania); NBA v. Motorola, 105 F.3d 841 (2d Cir. 1997) (New York).
[149] Sherrod, *supra* note 26.
[150] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. d (1995).
[151] *Id.* at cmt. a.
[152] *Id.* at cmt. d.

expression, which may include a computer hard drive or Web server. [153] Thus, there is no longer any distinction between published and unpublished works – they both fall under federal copyright protection. Federal copyright preemption means that all copyright claims fall under federal law and states cannot offer separate protection of works[154], as stated in § 301:

> On and after January 1, 1978, all legal or 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 subject matter of copyright as specified by sections 102 and 103, whether created before or after that 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.[155]

Federal preemption of hot news misappropriation is still brought up as a reason to invalidate the doctrine, but the Second Circuit Court of Appeals has ruled in several hot news misappropriation cases that a hot news misappropriation claim will not be preempted by federal copyright law if "extra elements" are present, [156] as set forth in *NBA. v. Motorola, Inc.* [157]

Narrowing of the doctrine NBA v. Motorola

Hot news misappropriation was not discussed much until 1997, when the most modern iteration of the doctrine was set forth by the Second Circuit Court of Appeals in *National Basketball Ass'n v. Motorola, Inc.*[158] The National Basketball Association sued

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[153] 17 U.S.C. § 101 (1976).
[154] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. e (1995).
[155] 17 U.S.C. § 301.
[156] *See e.g.* NBA v. Motorola, 105 F.3d 841 (2d Cir. 1997), Barclays Capital Inc. v. Theflyonthewall.com 650 F.3d 876 (2d Cir. 2011).
[157] 105 F.3d 841 (2d Cir. 1997).
[158] Nat'l Basketball Ass'n v. Motorola, Inc. ("*NBA*"), 105 F.3d 841 (2nd Cir. 1997).

Motorola, Inc. because Motorola had made a handheld pager, SportsTrax, that displayed real-time scores and statistics of live professional basketball games.[159] NBA claimed SportsTrax infringed on NBA's copyright to broadcast the games and misappropriated game statistics, which were considered hot news.[160] The federal district court in New York permanently enjoined Motorola from transmitting the data from NBA games through its SportTrax device.[161]

But the Second Circuit reversed, saying that copyright law preempted NBA's hot news misappropriation claim because NBA broadcasts are copyrightable and because NBA's hot news misappropriation claim did not survive preemption under the new five element test.[162] Because the NBA games were subject matter protected by federal copyright law, hot news misappropriation – a state cause of action – could not apply unless it met additional requirements.[163] The Second Circuit provided these extra elements for an *INS*-like hot news claim that would survive federal preemption:

- A plaintiff generates or gathers information at a cost.
- The information is time-sensitive.
- A defendant's use of the information constitutes free riding on the plaintiff's efforts.
- The defendant is in direct competition with a product or service offered by the plaintiff.

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[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at
[163] *Id.* at 845.

- The ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the plaintiff's product or service that its existence or quality would be substantially threatened.[164]

Based on these factors, the court concluded that the game scores SportsTrax transmitted were time-sensitive.[165] But Motorola did not free ride on the NBA because it expends its own resources to collect the game scores independently. Also, the court said Motorola was not in direct competition with the NBA because NBA's primary products were producing basketball games for live audiences and licensing copyrighted broadcasts of games, whereas SportsTrax primarily collected and transmitted factual information about the game like scores and statistics.[166] In the end Motorola was not held liable for copyright infringement, because Motorola had transmitted the statistics of the game, but not the live broadcasts.[167]

Development in Barclays Capital v. Theflyonthewall.com

Barclays Capital, Inc. v. Theflyonthewall.com[168] was the first hot news misappropriation case to be tried in courts on its merits, and the first where an injunction was issued.[169] In 2006, investment banks Barclays Capital; Merrill Lynch, Pierce, Fenner, & Smith; and Morgan Stanley sued TheFlyOnTheWall.com (Fly), which is a subscription-based investment-news service providing market information to help investors. The investment banks usually issued the recommendations to their clients

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[164] *Id.*
[165] *Id.* at 853.
[166] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997).
[167] *Id.*
[168] 650 F.3d 876 (2d Cir. 2011).
[169] *See* Andrew L. Deutsch, Srinandan Kasi & Riyad A. Omar, *Publishers Increasingly Invoke 'Hot News' Doctrine*, NAT'L L.J. , (2010), *available at* http://socrates.berkeley.edu/~scotch/DigitalAntitrust/Deutsch-Omar.pdf *("Barclays Capital* **...** is the first 'hot news' case to be fully tried to a decision on equitable remedies.").

between midnight and 7 a.m. Eastern Time. At 8 a.m., sales staff contact the clients in hopes that the client will place a trade with the firm and earn the firm a commission. [170]

Fly gained access to the recommendations somehow and republished the investment firms' research and recommendations in a daily newsletter that went out to Fly subscribers before the stock market opened at 9:30 a.m. each day.[171]

Barclays sued for copyright infringement for the verbatim copies of the reports and hot news misappropriation for other reworked recommendations. The New York trial court considered in that case whether a claim for "hot news" misappropriation was preempted by federal copyright law and eventually ruled that there was no preemption. [172]After considering the five elements from *NBA*, the trial court ruled in the firms' favor and issued a permanent injunction barring Fly from reporting the firms' recommendations for either half an hour after the market opens at 9:30 a.m. (if the report containing the recommendation was released before 9:30 a.m.) or two hours after release (if the report was released after 9:30 a.m.).[173]

But in June 2011, the Second Circuit reversed the trial court's decision and vacated the permanent injunction because the stock recommendations fell within the rights and subject matter protected by copyright and failed NBA's five element test for surviving federal preemption. [174] The Second Circuit court found that Fly did not satisfy the third element of the test: that the defendant's use of the information constitutes free riding. The court said Fly did not "free-ride" on the firms' work because it was "collecting, collating and disseminating factual information" reporting on the news

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[170] Barclays Capital Inc. v. Theflyonthewall.com ("*Barclays*"), 650 F.3d 876, 889 (2d Cir. 2011).
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*

created by the firms at its own expense.[175] Fly hired reporters to gather the investment recommendations from various sources and put them together into a newsletter. "The Firms are making the news; Fly, despite the Firms' understandable desire to protect their business model, is breaking it," the court wrote.[176]

The court said it was a stretch to say Fly is in direct competition with the firms because Fly, although it had made effort to link subscribers with discount brokerage services, had not itself offered brokerage services and tried to divert the banks' commission to itself.[177] However the court refused to consider the matter any further because it reasoned that it was bound by the *NBA* ruling where the lack of free riding was fatal to NBA's hot news misappropriation claim against Motorola, so they need not consider whether there was indeed direct competition between the banks and Fly.[178]

The court argued that the investment banks produced the investment recommendations instead of acquiring them. Furthermore, in its newsletters, Fly attributed the stock recommendations to the investment banks. The recommendations carried weight precisely because the investment firms made them, not Fly, and Fly was not trying to sell the recommendations as its own. [179]

News originators cannot protect their work from copying because U.S. copyright law does not protect facts and common law does not protect the effort in compiling facts, which form the backbone of news reports. The *Feist* decision also determined that "copyright awards originality, not effort," such as that involved in gathering news.[180] Hot

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[175] *Id.* at 902.
[176] *Id.* at 902.
[177] *Id.* at 904.
[178] *Id.* at 906-07.
[179] *Id.* at 903.
[180] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340, 364 (1991).

news misappropriation as has been applied by the Second Circuit Court of Appeals provides an alternative to intellectual property law protection. However, scholars such as Sherrod are concerned that the hot news misappropriation doctrine violates the First Amendment because it grants property rights in news and would enjoin others from using the facts reported by news organizations while it is still valuable, even if it is for just a short time.[181] But taken from an unfair competition perspective, the doctrine does not restrict free speech unreasonably, because it imposes liability on direct competitors only, not the public.

Hot news misappropriation as unfair competition law

The original hot news misappropriation set forth in 1918 was built on unfair competition in principle.[182] As legal scholar Shyamkrishna Balganesh argued:

> Ironic as it may seem in light of common misconceptions about the doctrine, hot news misappropriation was developed as an attempt to avoid creating an exclusionary interest in factual news. It was aimed instead at preserving the common property nature of such news, while allowing industry participants to compete on equitable terms in drawing economic value from it. Recognizing that the maintenance and sharing of this common property resource required sustaining the self-organized cooperative framework that newspapers had developed, hot news misappropriation sought to raise the costs of free riding through a private law-based liability regime.[183]

Although the common law action for unfair competition evolved originally to afford relief against a competitor's misrepresentation of the source of goods or services, the term "unfair competition" now describes an array of legal actions addressing methods

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[181] Sherrod, *supra* note 26, at 1219-20.
[182] Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 Colum. L. Rev. 419, 425-26 (2011).
[183] *Id.* at 496.

of competition that improperly interfere with the legitimate commercial interests of other sellers in the marketplace.[184]

The Restatement (Third) of Unfair Competition § 38 lists hot news misappropriation under appropriation of intangible trade values such as ideas, innovations and information.[185] The general principle underlying misappropriation, based on the tort of unfair competition, is to protect "an incentive to invest in the creation of tangible assets" such as news, and to prevent "the potential unjust enrichment that may result from the appropriation of an investment made by another."[186]

The law of unfair competition imposes liability when a party uses "particular methods of competition that undermine rather than advance the competitive process."[187] These laws are meant to preserve the freedom to compete in a free enterprise system, and apply only to "harm incurred by persons with whom the actor directly competes and to harm incurred by other persons affected by the actor's decision to enter or continue in business. Thus, the actor is not subject to liability to indirect competitor's presence in the market."[188]

The unfair competition reasoning is reflected in the reasoning of the U.S. Supreme Court in *INS v. AP* when the Court decided the main question before them was not whether property rights exist or copyright law applies to the news INS copied, but

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[184] RESTATEMENT (THIRD) OF UNFAIR COMPETITION Foreword (1995).
[185] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 ("One who causes harm to the commercial relations of another by appropriating the other's intangible trade values is subject to liability to the other for such harm only if: (a) the actor is subject to liability for an appropriation of the other's trade secret under the rules stated in §§ 39-45; or (b) the actor is subject to liability for an appropriation of the commercial value of the other's identity under the rules stated in §§ 46-49; or (c) the appropriation is actionable by the other under federal or state statutes or international agreements, or is actionable as a breach of contract, or as an infringement of common law copyright as preserved under federal copyright law.").
[186] *Id.* at § 38 cmt. b
[187] *Id.* at § 38 cmt. a.
[188] *Id.* at § 1 cmt. a.

whether INS's actions constituted unfair competition in business.[189] The court reasoned that by INS taking AP's stories without providing any compensation to AP, INS was undermining AP's business model and profiting from selling the news that it had not invested any money gathering.[190]

Balganesh argued that the most modern reiteration of the doctrine in *NBA v. Motorola* deviated from the *INS* decision's unfair competition focus to one that granted property rights in news – something Balganesh argues the doctrine is incapable of actually doing. [191] He points out how the *NBA* court emphasized that hot news misappropriation claim "is about the protection of property rights in time-sensitive information."[192] In the *INS* case, Justice Pitney did refer to a "quasi-property" right in facts, but an examination of the case decision shows that he was clearly referring to the property rights among competitors, not between news organizations and the public.

Unfair competition regulates what participants who are competing in a free market economy may or may not do. Hot news misappropriation does not hinder anyone other than direct competitors from discussing or passing on hot news, so it does not violate the First Amendment. For example, Juan Cole's Informed Comment blog[193] would not be considered a direct competitor of news sources because the blog posts he writes are expanded based on his knowledge of the Middle East and his fluency in Arabic and Farsi. His blog caters to a different audience than the news reports from which he got the facts and the ideas, so he is not in direct competition with the original news sources. Thus, what he does would not be considered hot news misappropriation.

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[189] International News Serv. v. Associated Press, 248 U.S. 215, 234-235 (1918).
[190] *Id.* at 240.
[191] Balganesh, supra note 182, at 425-26.
[192] Nat'l Basketball Ass'n v. Motorola, Inc. ("*NBA*"), 105 F.3d 841, 853 (2nd Cir. 1997).
[193] Juan Cole, *Informed Comment: About*, http://www.juancole.com/about (last accessed April 3, 2013).

Hot news doctrine protects "right of first publication" for news

The misappropriation doctrine also does not violate the First Amendment because it works to protect incentives analogous to those protected by copyright's right of publication. As the previous chapters have shown, people willingly free ride on news, but news takes money to produce. The hot news misappropriation works not much differently from copyright to protect incentives to produce new work. For example, copyright's role in protecting an author's right of first publication, as set forth in *Harper & Row v. Nation Enterprises,* is analogous to what hot news misappropriation protects.[194] Right of first publication protects an unpublished work's author the right to profit first from the work.[195]

Unlike books or other print material, news is a valuable product not just for the facts it conveys, but because it is "new" or "hot." So news organizations can only profit from news within a short time frame from when it is published. This duration is much shorter than the time frame Harper & Row could profit from the sale of Ford's memoirs when they were first published.

Baird wrote, "That information once published should be presumptively free for all to use is a commonplace of intellectual property law."[196] But it is arguable technology and the 24/7 news cycle has made it much harder for news organizations get money from the news since it can be reproduced almost instantaneously through copy-and-pasting. Why should news organizations not be able to profit first from the news that their own reporters have gathered? Hot news misappropriation offers protection for a right analogous to the right of first publication. If the First Amendment interests in free

[194] Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).
[195] *Id.*
[196] Baird, *supra* note 70, at 411.

discussion of public affairs can accommodate the protection Harper & Row's first publication rights, they can also accommodate some hot news protection for news organizations. As trial court Judge Denise Cote said in *Barclays*, "Ultimately, 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." [197]

[197] Barclays Capital Inc. v. Theflyonthewall.com, 700 F.Supp.2d 310, 344 (2010).

CHAPTER V: EXPLORING THE DURATION OF HOT NEWS MISAPPROPRIATION PROTECTION

Concerns over hot news misappropriation overprotecting information arose during the *Barclays* case. Amici Google and Twitter raised questions as to how long hot news protection exists.[198] How long would a competitor be enjoined from sharing hot news? In the day and age of newspapers where print deadlines were once a day, one could conceivably reason that day-old news loses its commercial value. But in today's 24-hour news cycle where the audience clamors for the most current news, could commercial value of news diminish within hours, minutes and even seconds? The Internet and social sharing platforms are capable of spreading news around the world in shorter amounts of time than when the *INS* or *NBA* decisions were made.

Evaluating specific durations for when news is "hot"

Not many cases have evaluated or provided a way to determine when news is "hot." In a couple of cases dealing with stock recommendations, courts have considered specific durations when information can be and can no longer be considered hot news. In *BanxCorp v. Costco Wholesale Corp.*, the court found that information reproduced daily could be considered "hot."[199] In other words, information that is less than a day old could still be considered "hot." In *Financial Information v. Moody's Investors Service*, the court found that stock recommendations that were more than 10 days old could not be

[198] Brief for Amici Curiae Google Inc. & Twitter, Inc. in Support of Reversal at 9-11, Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv).
[199] BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 613 (S.D.N.Y. 2010).

protected by hot news misappropriation because they were no longer considered hot news at the time of misappropriation.[200]

However, specific durations for hot news protection may not be very helpful because there are many different kinds of news and evaluating the commercial value of information hinges on many factors. Editors make decisions on newsworthiness every day. Hard news that is strictly factual is more perishable than soft news such as feature stories. Hard news also has more public interest value than soft news. Since there is a higher public interest in getting hard news stories to the public, so these kind of stories should have a shorter duration of protection.

For example, if news breaks that the President has a terminal illness, it would certainly be news that everyone wants to know. Every new update of the President's status would automatically relegate the previous update to "old news." Thus, this type of news could fall under a short duration of protection – maybe an hour. A second example could be if news broke that the Department of Defense would be awarding a large contract soon. Both these examples are news which would spark great public interest, but the first example appeals to more people. So the cooling off period for the second example could be longer as compared to the first piece of news.

It is difficult to determine the market value of information because it depends on the type of news. For example, the stock recommendations in *Barclays* lose their value at a specific time – after the markets open for trading. Breaking news such as a bomb blast

[200] 808 F.2d 204, 209 (2d Cir. 1986) ("FII proved neither the quantity of copying nor the immediacy of distribution necessary to sustain a "hot" news claim. Because of lead times, to the extent that Moody's did copy from FII, the information it published would have been at least ten days old. The "hot" news doctrine is concerned with the copying and publication of information gathered by another before he has been able to utilize his competitive edge.").

nearby would cool down much more quickly because of continuous updates on the situation.

Duration or protection reflected in duration of injunctions

In considering an injunction in the *Barclays* case, the trial court seems to provide a glimpse into how to determine a specific duration of hot news protection.[201] The court barred the release of information pertaining to stocks until few hours after the stock market had opened. This could mean that the duration of hot news protection depends on the type of news that is being passed on and external factors of when the news becomes unimportant. In this case, stock recommendations are logically useful before the stock markets open each day, but the recommendations change daily.

In the district court decision of *Barclays*, Judge Cote said, "A balance must be struck between establishing rewards to stimulate socially useful efforts on the one hand, and permitting maximum access to the fruits of those efforts to facilitate still further innovation and progress on the other."[202] In trying to strike this balance in coming up with an injunction duration for Theflyonthewall.com, Judge Cote:

- considered the lead time advantage mentioned in INS that would allow content originators to recoup some of their investments.[203]
- weighed the injunction time frames requested by both the firms and Fly and tried to find middle ground between the two.

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[201] Barclays Capital Inc. v. Theflyonthewall.com, 700 F.Supp.2d 310 (S.D.N.Y. 2010).
[202] *Id.* at 344.
[203] *Id.* at 345-46 ("In this case, the goal is a period of lead time long enough to enable the Firms to conduct a reasonable sales effort and to retain the advantage of being the first to reach key institutional investors who may react promptly to a Firm's Recommendation. . . . With the right lead time, the Firms will retain an incentive to create their research, but they will not be given a vise to squeeze every last cent out of their efforts to the exclusion of others.").

- considered whether there was a specific time by which the financial recommendations would lose their value. In the case of the stock recommendations, it was a few hours after the market opened.
- considered getting expert testimony if she thought there was not enough evidence presented to determine injunction length.[204]

These factors can also be useful for determining the duration of protection for hard news. It is hard to set a specific time for the expiration of "hot" news, but based on the history of journalism and previous cases, the default limit of protection should be 24 hours. A daily expiry date on news makes sense, because since the days of printing presses, newspapers had daily deadlines and yesterday's news was no longer news. In today's world, news grows cold significantly sooner, so the duration of hot news protection could likely be measured in hours.

Direct competition in market can indicate when hot news starts to cool

Market forces can also help indicate the duration of hot news protection. Lindsay Rabicoff suggested that competitors are likely to know whether something is still worth misappropriating because they will calculate the return of misappropriating a piece of hot news.[205] Thus, competitors likely know when a piece of news is cooling down or cooled and thus no longer worth using.[206] However, more research is needed in determining the market value of various types of news after it breaks. Can it be measured like the way the

[204] *Id.* at 347 ("While the Court could have benefited from expert testimony about the trading patterns of different investors and during different periods of the day, ultimately the parties provided sufficient evidence to permit lines to be drawn regarding the length of the injunction with sufficient confidence.").
[205] Lindsay G. Rabicoff, Comment, *The Hot News Misappropriation Doctrine: Confusion in the Internet Age and the Call for Legislative Action*, 53 Jurimetrics J. 71, 93-94 (2012).
[206] *Id.* at 94.

investment trading based on recommendations waned by midday – two and a half hours after the market opened?

Under the theory of hot news misappropriation, if an aggregator had to wait for news to cool off before taking it, it would have to do something else to the "cooled off" news for it to have any value. This would ensure that aggregators do something to "add value" to the facts in order to make money from them. The aggregator would be unable to free ride off the news organization and also thus no longer being a direct competition with the plaintiff. If a news aggregator wanted to continue to be in direct competition with a news organization, it would have to invest some money to get the news on its own (thus becoming a journalism organization!) or it could pay the news service to help support the reporting of that news.

If a direct competitor misappropriates news, it clearly does so with the intention of profiting from it. By the very same reasoning, if the news is no longer worth misappropriating, then competitors – moved by market forces – would not invest in a system to misappropriate the news. If direct competitors cannot appropriate the news while it is hot, then they either have to invest resources in original reporting or do something else to the news to add value to it.

Those who want to profit from news but do not want to invest money reporting it, can take cooled-off news and do something transformative to add value to it. Then they would not be guilty of hot news misappropriation -- because they would not be direct competitors. News blogs often do this when they inject commentary or criticism into the news that they discuss, and this is not necessarily. Doing something else to the cooled off news would transform it into a new product, and this process would logically take some

time, thus giving content originators a lead time to recoup some reporting investments from the sale of their content.

If a competing news organization was forced to invest in its own reporting staff to get its own news, then it may have much less incentive to misappropriate the news of others. Market forces would then regulate the duration of hot news protection. As long as a direct competitor is able to monetize the information without adding anything transformative, it is off limits.

CHAPTER VI: RECOMMENDATIONS FOR APPLYING HOT NEWS MISAPPROPRIATION

Federalizing the doctrine to ensure uniform application

The Restatement (Third) of Unfair Competition states: "Achieving a proper balance between protection and access is often a complicated and difficult undertaking. Because of the complexity and indeterminacy of competing interests, rights in intangible trade values such as ideas, innovations, and information have been created primarily through legislation."

By codifying the doctrine of hot news misappropriation according to the current elements, legislators will get a chance to balance the protection of news (to protect the newsgathering incentive or journalism organizations) and the public's access to news. The statute will be more precise.[207] A federalized hot news misappropriation statute would ensure that content creators and news aggregators are held against the same standard in all states. The Second Circuit Court of Appeals said in *Barclays*:

> To the extent that "hot news" misappropriation causes of action are not preempted, the aggregators' actions may have different legal significance from state to state—permitted, at least to some extent, in some; prohibited, at least to some extent, in others. It is this sort of patchwork protection that the drafters of the Copyright Act preemption provisions sought to minimize, and that counsels in favor of locating only a "narrow" exception to Copyright Act preemption.[208]

[207] Amy Jensen, Comment, *When News Doesn't Want To Be Free: Rethinking "Hot News" To Help Counter Free Riding On Newspaper Content Online*, 60 EMORY L.J. 537 (2010).
[208] Barclays Capital Inc. v. Theflyonthewall.com 650 F.3d 876, 897-98 (2d Cir. 2011).

Sanford, et al., suggest encouraging state courts to accept the doctrine as common law or federalizing the doctrine by codifying it as statute.[209] However, state courts could take a long time to do this, so this route is not as ideal.[210]

Adapting duration of hot news protection from *Barclays v. Theflyonthewall.com*

The factors that Judge Cote set forth in the trial court decision of Barclays would be useful if codified into a hot news misappropriation statute. In order to decide on a duration for protection of news, a judge could

1) consider how much lead time would be reasonable for content originators to recoup some newsgathering investment but without excluding news from the public for too long.
2) consider whether there is a specific time when the news ceases to be of value. Not all types of news will have this quality.
3) consider recommendations from experts and parties involved as to what a good duration of protection would be.

However, more market research needs to be done to see if it is worthwhile to impose such criteria on news.

Direct competition and free riding

Determining whether direct competition exists between two parties is quite a subjective factor in a current hot news misappropriation claim. In the *Barclays* case, it seemed that the court underestimated the harm that Theflyonthewall.com could do to damage Barclays revenue stream from brokerage deals even though they were not competing in the same market. However, even though Fly was not in the same business

[209] Sanford et al., *supra* note 21, at 10.
[210] *Id.*

as the investment banks, its dissemination of Barclay's stock recommendations, especially during the time that the information was still highly valuable, could serve to undermine the banks' reasons for releasing the recommendations for free through their own networks.

It would have been more damaging if Fly tried to contract with low-cost brokers to provide brokerage services to Fly's own customers alongside the investment banks' stock recommendations. Even though Fly did not actually partner with the brokers to provide service to their subscribers, Fly's dissemination of the investment banks' recommendations did devalue the recommendations and divert potential earnings to other firms, even if not to Barclays. This could harm the investment banks' incentive to produce the product. This is a consideration that legislators should take into account when trying to codify hot news misappropriation.

Implementing the doctrine alongside technological barriers

The expansion or clarification of hot news misappropriation is far from a magic cure to save the journalism industry.[211] In addition to codifying the doctrine, Jensen argues that content creators need to focus on keeping up with the technology instead of relying on legal redress as a solution to their survival.[212]

Keller posited that news aggregators such as the *Huffington Pos*t may have come to realize that "if everybody is an aggregator, nobody will be left to make real stuff to aggregate," which is why the blog aggregator has started hiring journalists to write about

[211] Elaine Stoll, *Hot News Misappropriation: More Than Nine Decades After INS v. AP, Still An Important Remedy For News Piracy*, 79 U. CIN. L. REV. 1239 (2010)
[212] Jensen, *supra* note 207, at 578.

business and politics.[213] This is what traditional journalism outlets should be doing: showing news aggregators that they cannot survive without content to aggregate. If news organizations banded together to protect their content with paywalls or even computer code to prevent aggregators from gathering their content, then perhaps news aggregators would work out mutually beneficial deals with traditional news media. Together with the protection of hot news misappropriation, the traditional news industry should be able to persuade news aggregators to work together to be more profitable.

[213] Bill Keller, *All the Aggregation That's Fit to Aggregate*. N.Y. TIMES, March 13, 2011, at MM11, *available at* http://www.nytimes.com/2011/03/13/magazine/mag-13lede-t.html.

CHAPTER VII: CONCLUSION

Hot news misappropriation is far from a cure all to save the news industry from a tough economy, technological change and changes in news reading habits. But the doctrine is able to help journalism recoup some of the reporting investment necessary to gather the information in the first place. The hot news misappropriation doctrine helps deter free-riding behavior under the tort of unfair competition because it offers temporary protection to facts that copyright law does not protect.

Hot news misappropriation does not violate the First Amendment rights of others to use the information because it limits the actions of direct competitors of content creators, not the entire public. Others are still free to use, comment on and share information considered as "hot news" as they like. Further, the doctrine also protects a right analogous to the right of first publication protected by copyright law.

Courts in the Second Circuit have given some indications as to how they determine the duration of hot news protection and these factors depend on the type of news, whether the news value "expires" at a specific time, what plaintiffs and defendants suggest, and what experts in the relevant industry might suggest. Setting specific time frames to protect specific types of news is not helpful because the value of news need to be considered within the context. For other types of news, the courts have not yet ruled on enough cases to draw sufficient conclusions on how they would rule in the future. However, in this wired world, much evidence points to the value of hot news lasting less than a day.

If hot news misappropriation remains in place, hot news will never be overly protected because market forces would ensure that the next party who picks up the news

will not be a direct competitor of the original news service. Market forces would ensure that the next person who picks up the news (after the news has cooled) would have to add value to the information by transforming it in some way so that it is salable. Anyone who picks up old news would not be able to sell it at a profit. Hence, the question of duration of protection is one that would vary with the kind of news and the market forces operating on the news.

Ideally, a hot news misappropriation statute would be a way to encourage news aggregators and news originators to work together in a mutually beneficial relationship instead of being "parasites," as David Simon described. News organizations should also be more proactive in protecting their revenue stream with paywalls and codes to stop aggregators from getting their content at no cost.