



WAKE FOREST
INTELLECTUAL PROPERTY
LAW JOURNAL

VOLUME 10

2009 - 2010

NUMBER 1

**ALL THE NEWS THAT'S FIT TO OWN:
HOT NEWS ON THE INTERNET & THE COMMODIFICATION OF NEWS
IN DIGITAL CULTURE**

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INTRODUCTION

Thousands of hard copies of newspapers across the country—particularly editions of college newspapers—are reported pilfered each year.¹ But just as the theft of print newspapers can occur at news racks, can online news stories that flow on the Internet also be stolen?

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¹ See *Student Newspapers Hit By Theft Nationwide*, STUDENT PRESS L. CENTER REP., Spring 2009, at 35, available at

https://www.splc.org/report_detail.asp?id=1508&edition=49 (last visited Sept. 5, 2009) (observing that “theft of free student newspapers is one of the most common means of censorship in college media,” and citing instances of theft of college newspapers in 2009 at universities including, among others, Virginia Commonwealth University, Massachusetts Institute of Technology, and Catholic University of America). See generally Clay Calvert, *All the News That's Fit to Steal: The First Amendment, a “Free” Press & a Lagging Legislative Response*, 25 LOY. L.A. ENT. L. REV. 117 (2004) (providing an examination of the legal issues and legislation surrounding the theft of free newspapers in the United States).

That question, as this article demonstrates, is no idle academic query or a wasted exercise in verbal gymnastics distinguishing newspapers from news and news stories.² In fact, it is at the heart of some battles now being fought over news on the Internet.

It is, of course, a fundamental tenet of copyright law in the United States that ideas cannot be owned.³ Similarly, as the United States Supreme Court observed nearly twenty years ago, “facts are not copyrightable,”⁴ adding that this proposition is “universally understood.”⁵ The implication of these twin principles for the practice of journalism and the often poorly explicated concept of news itself⁶ is that while “the words and arrangement of a news story would be copyrightable expression,”⁷ when they are assembled in an original manner and fixed in a tangible medium of expression,⁸ “the underlying news itself—the facts and events being recounted—of course could not be the subject of copyright protection.”⁹ In other words, as one federal appellate court put it, “[c]opyrightable material often contains uncopyrightable elements within it.”¹⁰ This would seem to protect rewrites of news articles when those rewrites involve re-ordering, re-working, and using the underlying facts—the uncopyrightable underlying “news element,” as the United States Supreme Court once called it¹¹—in different ways.

² As Elvis Costello once so aptly put it in a way that attorneys and long-winded legal scholars would be wise to obey, “spare us the theatrics and the verbal gymnastics.” Elvis Costello, *The Loved Ones*, on IMPERIAL BEDROOM (Rykodisk 1982).

³ See 17 U.S.C. § 102 (b) (2006) (providing, in relevant part, that “in no case does copyright protection for an original work of authorship extend to any idea”). See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (noting the distinction “between copyrightable expression and uncopyrightable facts and ideas”).

⁴ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991).

⁵ *Id.*

⁶ See generally BRUCE D. ITULE & DOUGLAS A. ANDERSON, *NEWS WRITING & REPORTING FOR TODAY’S MEDIA* 11 (7th ed. 2007) (writing that “the definition of news is elusive,” observing that definitions of news range from “[s]omething you haven’t heard before” to “[w]hat editors and reporters say it is,” and ultimately determining that “[w]hatever it is, news is an extremely complex term, and it is different things to different people”).

⁷ Gary Myers, *The Restatement’s Rejection of the Misappropriation Tort: A Victory for the Public Domain*, 47 S.C. L. REV. 673, 675 (1996).

⁸ See 17 U.S.C. § 102 (a) (2006) (providing, in pertinent part, that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression,” including literary works). The United States Supreme Court long ago recognized that a news “article, as a literary production, is the subject of copyright.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

⁹ Myers, *supra* note 7, at 675.

¹⁰ *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997).

¹¹ *Int’l News Serv.*, 248 U.S. at 234.

But that does not end the legal inquiry. Copyright principles do not provide the only legal framework for considering possible redress when one news agency or news service believes another company is, in a nutshell, ripping off its news articles. As the Associated Press proved in 2009, the common law tort of hot news misappropriation provides a viable method—at least in those states that recognize it¹² and do not view it as pre-empted by the federal Copyright Act¹³ and in those circumstances that fall within its rather narrow confines¹⁴—of fighting back against the alleged digital piracy of news stories online where, as one law journal article contended, the “ease of free riding on the investment of others via Internet-related technological advances threatens to be a serious disincentive to investment in the development of data-based informational products.”¹⁵

In July 2009, the Associated Press settled for an undisclosed dollar amount¹⁶ a lawsuit asserting that, in layperson’s terms, its news content was being stolen by the All Headline News Corp. (hereinafter “AHN” or “All Headline News”), a Florida-based business that bills itself as “a leading provider of news, weather, and other content for web sites, wireless, digital signage, interactive applications, broadcast

¹² The tort of hot news misappropriation originally was a “creature of the federal common-law,” and “while the federal common-law no longer provides the source for the action of misappropriation, state law can provide the basis for such protection.” *Schuchart & Assocs. v. Solo Serve Corp.*, 540 F. Supp. 928, 942, n.9 (W.D. Tex. 1982).

¹³ See 17 U.S.C. § 301 (2006) (providing, in general, for the preemption of “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of” federal statutes governing copyright, and governing preemption issues of federal copyright law). Importantly, courts have held that the hot news misappropriation tort is “a branch of the unfair competition doctrine not preempted by the Copyright Act.” *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 209 (2d Cir. 1986).

¹⁴ See *infra* note 81 and accompanying text (identifying the five elements of this cause of action that, according to courts within one federal appellate circuit, must be demonstrated in order for a plaintiff to succeed).

¹⁵ Rex Y. Fujichaku, Recent Development, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of “Hot News” Information*, 20 U. HAW. L. REV. 421, 425 (1998).

¹⁶ See Press Release, Associated Press, AP and AHN Media Settle AP’s Lawsuit Against AHN Media and Individual Defendants (July 13, 2009) (on file with Wake Forest Intellectual Property Law Journal), available at http://www.associatedpress.com/pages/about/pressreleases/pr_071309a.html (noting that “[t]he settlement includes payment by AHN to AP of an unspecified sum to settle the AP’s claim for past unauthorized use of AP expression and news content.”).

and print use.”¹⁷ The AP, which conversely trumpets itself as “the largest and oldest news organization in the world”¹⁸ and “the backbone of the world’s information system serving thousands of daily newspaper, radio, television and online customers,”¹⁹ alleged in its January 2008 complaint that “AHN has no reporters and is simply a vehicle for copying news reports and misappropriating news gathered and reported by real news services such as AP.”²⁰ As such, the AP asserted that AHN was “free-riding on AP’s significant and costly efforts to collect, report and transmit newsworthy information,”²¹ thereby creating a low-cost news service with “no journalistic infrastructure”²² that “directly competes with AP’s own news services.”²³

Although the AP’s complaint included multiple causes of action, such as breach of contract,²⁴ trademark infringement,²⁵ and copyright infringement,²⁶ the most journalistically intriguing legal theory upon which the AP sued AHN was for hot news misappropriation under the common law of New York.²⁷ In *Associated Press v. All Headline News Corp.*,²⁸ the AP successfully reached back in time and stretched a ninety-one-year-old precedent—one developed many decades before the Internet enabled the type of appropriation engaged in by AHN—found in the United States Supreme Court’s opinion in *International News Service v. Associated Press*.²⁹

In that 1918 decision, a majority of the United States Supreme Court determined that, in situations of direct competition where “both parties are seeking to make profits at the same time and in the same field,”³⁰ news that is gathered by one of those parties “must be

¹⁷ About AHN/Company Background, <http://www.allheadlinenews.com/corp> (last visited Sept. 2, 2009).

¹⁸ Associated Press, Facts & Figures, <http://www.ap.org/pages/about/about.html> (last visited Sept. 5, 2009).

¹⁹ *Id.*

²⁰ Complaint at 2, *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 08 Civ. 323) [hereinafter Complaint].

²¹ *Id.* at 19.

²² *Id.* at 24.

²³ *Id.* at 19.

²⁴ *See id.* at 26-27 (setting forth the AP’s seventh cause of action for breaches of contract).

²⁵ *See id.* at 22-23 (setting forth the AP’s fourth cause of action for infringement of a registered trademark).

²⁶ *See id.* at 20-21 (setting forth the AP’s second cause of action for copyright infringement).

²⁷ *See id.* at 19-20 (setting forth the AP’s first cause of action for hot news misappropriation).

²⁸ 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

²⁹ 248 U.S. 215 (1918).

³⁰ *Id.* at 236.

regarded as *quasi* property”³¹ that possesses “an exchange value to one who can misappropriate it.”³² In particular, the Court reasoned that the “peculiar value of news is in the spreading of it while it is fresh,”³³ implying that when news is no longer “fresh”—a term not defined in *International News Service*—the property right that one news service possesses against another disappears.

Rejecting as “untenable”³⁴ the notion that “news is abandoned to the public for all purposes when published in the first newspaper,”³⁵ the Supreme Court focused instead on fiscal concerns—the concept of unfair competition,³⁶ “the business of making [news] known to the world,”³⁷ and the equitable principle “that he who has fairly paid the price should have the beneficial use of the property.”³⁸ Put more bluntly, because the AP in *International News Service* had gathered and distributed news due to “a large expenditure of money, skill, and effort,”³⁹ it deserved to profit from the “novelty and freshness”⁴⁰ of its news and to stop a free-riding rival news service from “misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of”⁴¹ the Associated Press.

The case has thus been called by one law professor “the most famous reap/sow case”⁴² of the twentieth century, drawing from Justice Mahlon Pitney’s underlying concern for fairness that defendant *International News Service* was “endeavoring to reap where it has not sown.”⁴³ As Professor John Tehranian aptly summed up the majority ruling, *International News Service* “granted news organizations temporary ownership of factual information in order to preserve their incentive to expend resources on news-gathering without fear of having rivals free ride on the information by scooping them without payment.”⁴⁴

³¹ *Id.* (emphasis added).

³² *Id.* at 238.

³³ *Id.* at 235.

³⁴ *Id.* at 240.

³⁵ *Id.*

³⁶ *See id.* at 235 (“[I]t seems to us the case must turn upon the question of unfair competition in business.”).

³⁷ *Id.*

³⁸ *Id.* at 240.

³⁹ *Id.* at 238.

⁴⁰ *Id.*

⁴¹ *Id.* at 240.

⁴² Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 178 (1992).

⁴³ *Int’l News Serv.*, 248 U.S. at 239.

⁴⁴ John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1225.

The “practical needs and requirements of the business” of making and disseminating news thus prevailed before the Supreme Court in *International News Service*.⁴⁵ The case represents, as Professor Dale P. Olson put it a decade ago, “the genesis of misappropriation,”⁴⁶ and it “formed—and continues to form—the basic contours of the doctrine of misappropriation of publicly disclosed trade values.”⁴⁷ The continuing formation and evolution of that doctrine and, in particular, the tort of hot news misappropriation in 2009 in *Associated Press v. All Headline News Corp.* is the focus of this article. And although the federal common law that gave rise to the *International News Service* decision is now long defunct,⁴⁸ the hot news misappropriation tort is alive and well in the age of the Internet in New York.

Part I of this article analyzes the case of *Associated Press v. All Headline News Corp.*, tracing it from the filing of the complaint through the July 2009 settlement. Importantly, it uses the actual pleadings and briefs filed by the parties, as well as other background information about the parties, to better contextualize the story behind the case. Part II then explores the legal precedent underlying the hot news misappropriation theory that was at issue in the case, as well as some of the criticisms and comments that legal scholars have launched against it over the years. Next, Part III goes beyond a pure legal analysis to explore the potential implications of the hot news misappropriation doctrine for a digital culture in which freshness and up-to-the-minute information is privileged and prized. Part III also identifies the different interests at stake in cases like *Associated Press v. All Headline News Corp.* Finally, Part IV concludes by suggesting future avenues of research related to the conduct of companies such as All Headline News Corp., including analyzing their behavior from an ethical perspective, not simply a legal one. In brief, journalism ethicists should analyze both the case and hot news doctrine from their viewpoint and position.

I. RE-WRITING THE NEWS OR RE-WRITING THE LAW? THE ASSOCIATED PRESS’S BATTLE AGAINST ALL HEADLINE NEWS CORP.

⁴⁵ *Int’l News Serv.*, 248 U.S. at 241.

⁴⁶ Dale P. Olson, *Common Law Misappropriation in the Digital Era*, 64 MO. L. REV. 837, 878 (1999).

⁴⁷ *Id.*

⁴⁸ See Gary R. Roberts, *The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information*, 15 STAN. L. & POL’Y REV. 167, 171 (2004) (“The legal foundation for the INS decision, federal general common law, has since been eliminated by the Supreme Court in the famous Erie Railroad case in 1938.”).

“AP is a leader in protecting intellectual property rights through monitoring, licensing and enforcement efforts.”⁴⁹

High-profile evidence buttressing that assertion, which the Associated Press conveys on its website,⁵⁰ was on full display in 2009 when the news service contended that artist Shepard Fairey engaged in a “willful and blatant violation of The AP’s copyright in a photograph of President Obama”⁵¹ that Fairey used to create his so-called Obama Hope poster.⁵² Tom Curley, president and chief executive officer, proclaimed that the AP’s countersuit against Fairey—the artist had initially sued the AP—“is about protecting the content that The Associated Press and its journalists produce every day, with creativity, at great cost, and often at great risk.”⁵³

Beyond this skirmish over a now iconic image,⁵⁴ the Associated Press in July 2009 announced it was “creating a way to track and control the distribution of its articles online.”⁵⁵ The move arose because, as the *Wall Street Journal* reported, “some bloggers and other Web sites run stories without permission.”⁵⁶ Tom Curley, AP’s chief executive, incorporated language in a press release echoing the reap/sow principle at the heart of *International News Service*,⁵⁷ emphasizing that the AP has “stood by too long and watched other people make money off the hard work of our journalists. We have decided to draw a line in concrete.”⁵⁸

⁴⁹ Associated Press, Protecting AP’s Intellectual Property, <http://www.associatedpress.com/iprights> (last visited Sept. 1, 2009).

⁵⁰ *Id.*

⁵¹ Answer, Affirmative Defenses and Counterclaims of Defendant, the Associated Press at 10, *Fairey v. Associated Press*, No. 09-01123 (S.D.N.Y. Mar. 11, 2009).

⁵² See generally Christopher Borrelli, *Street Artist Fairey at a Crossroad*, CHI. TRIB., Feb. 9, 2009, at 3 (reporting on “an allegation from The Associated Press that Fairey infringed its copyright by appropriating one of its photos for the ‘Hope’ poster”).

⁵³ Press Release, Associated Press, Associated Press Defends Lawsuit Brought by Shepard Fairey over Obama Poster (Mar. 11, 2009) (on file with Wake Forest Intellectual Property Law Journal), available at http://www.ap.org/pages/about/pressreleases/pr_031109.html.

⁵⁴ See James C. Goodale, *What’s Fair is Fair. But What is Fair?*, 241 N.Y. L.J. 3, (2009) (“Mr. Fairey downloaded the photo from the Internet, cast Mr. Obama in red, white and blue tones, and added ‘Hope’ underneath. The poster became a *campaign icon*.”) (emphasis added).

⁵⁵ Russell Adams & Shira Ovide, *AP Creates Way to Track Distribution of Articles Online*, WALL ST. J., July 24, 2009, at B6.

⁵⁶ *Id.*

⁵⁷ See *supra* notes 43-45 and accompanying text (discussing this principle within the context of *International News Service*).

⁵⁸ Press Release, Michael Liedtke, Business Editor, Associated Press, AP Setting Up Tracking System for Web Content (July 23, 2009) (on file with Wake Forest Intellectual Property Law Journal), available at

In addition to such policing and monitoring of its content on the Internet via built-in beacons that track where a story moves and posts online,⁵⁹ the AP demonstrated its resolve on intellectual property matters in very different way in *Associated Press v. All Headline News Corp.*⁶⁰ In particular, it used an aging doctrine that was developed at a time when print newspapers ruled the day.

AHN, based in Wellington, Florida, is owned by a former police officer named Jeffrey Brown, who founded the company after a customer of another website he operated, BridalClicks.com, asked for news content.⁶¹ He had no previous journalism experience.⁶² Despite the lack of relevant bona fides, the business took off fast, and Brown was quoted in 2008 as stating that “despite the troubling and uncertain economy, we’re on track to double our revenues this year.”⁶³

With AHN’s operation apparently becoming a success, AP filed its lawsuit against AHN and Brown in federal court in New York in January 2008.⁶⁴ The AP alleged that AHN hires poorly paid individuals, instructs them to surf the Internet for new stories, and then has them either copy the stories verbatim or re-write them, all the while carefully omitting any identifying information about their origin.⁶⁵ In its First Amended Complaint, filed in April 2008, the AP asserted that AHN’s writers “do no independent research and newsgathering in preparing news stories.”⁶⁶ In fact, the AP contended that—like so many businesses today in the United States—AHN off-shored part of the re-writing process to people in Malaysia, with the cost savings allowing AHN to sell what once really were the AP’s stories at a price to subscribers cheaper than the AP could sell them.⁶⁷ Once the stories are edited, the AP claimed they are “aggregated by AHN into a news feed which it then distributes to its customers and displayed and/or distributed via AHN’s servers.”⁶⁸

http://www.ap.org/pages/about/whatsnew/wn_072309a.html.

⁵⁹ *Id.* (stating that the AP will be “bundling its text stories in an ‘informational wrapper’ that will include a built-in beacon to monitor where stories go on the Internet”).

⁶⁰ See *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

⁶¹ Bill Frogameni, *Associated Press Sues News Provider Based in Wellington*, S. FLA. BUS. J., June 20, 2008, available at <http://www.bizjournals.com/southflorida/stories/2008/06/23/story10.html>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Complaint, *supra* note 20.

⁶⁵ *Id.* at 2-3.

⁶⁶ First Amended Complaint at 16, *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 08 Civ. 323) [hereinafter First Amended Complaint].

⁶⁷ *Id.* at 20.

⁶⁸ *Id.* at 16.

Striking to the economic heart of its hot news misappropriation claim, the AP asserted that AHN's conduct

is likely to usurp AP's business relationships and opportunities. AHN's "news service" directly competes with AP's own services. Both services are sold to the same potential customer base. Most customers of news service only carry one service. When a company or entity decides to subscribe to AHN's "news service," this effectively excludes AP from selling its service to that company or entity.⁶⁹

Asking the court to enjoin AHN's actions, the AP closed its argument on the hot news misappropriation cause of action by conjuring up the proverbial parade of horrors that would result in the absence of such a judicial decree:

If Defendants are not enjoined from misappropriating AP's efforts and investments in this manner, the acts of Defendants and other free-riders will so reduce AP's incentive to gather and report the news that the existence and/or quality of the news services that AP provides to AP Members, subscribers and other licensees, and thereby to the public, will be substantially threatened.⁷⁰

AHN, of course, attempted to paint the case as a battle in the David-and-Goliath tradition, arguing that "this case is an attempt by Plaintiff Associated Press to crush by weight of litigation a small company that it views as a competitor in the business of online news distribution."⁷¹ But it defended against the hot news misappropriation cause of action not primarily on the merits of the case, but rather by claiming that the law of Florida—not New York—applied, and Florida did not recognize such a legal theory.⁷² As the attorneys for AHN and Brown wrote, "Defendants are not aware of any Florida state court opinions that have recognized a theory of misappropriation like that asserted by Plaintiff here."⁷³ AHN also asserted that the *International News Service* opinion itself was no longer good law,⁷⁴ as it claimed the hot news misappropriation doctrine found in *International News Service* was part of the federal common law that was later eliminated

⁶⁹ *Id.* at 20.

⁷⁰ *Id.*

⁷¹ Memorandum in Support of Defendants' Motion to Dismiss Under Federal Rule of Civil Procedure 12 at 1, *All Headline News Corp.*, 608 F. Supp. 2d 454 (No. 08 Civ. 323).

⁷² *Id.* at 3-10.

⁷³ *Id.* at 9.

⁷⁴ *Id.* at 7, n.2.

by the U.S. Supreme Court in *Erie Railroad Co. v. Tompkins*.⁷⁵

These arguments failed to gain traction, however, with the court. In February 2009, U.S. District Judge P. Kevin Castel refused to dismiss the Associated Press's hot news misappropriation claim, as he determined that the cause of action "remains viable under New York law"⁷⁶ and is not pre-empted by federal copyright law.⁷⁷ Quoting from a 1997 ruling by the United States Court of Appeals for the Second Circuit that also recognized such a theory under New York law,⁷⁸ Judge Castel articulated five elements that must be present for a successful cause of action for hot news misappropriation:

- (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.⁷⁹

Judge Castel did not apply these elements to the facts of the case, however, as AHN's motion to dismiss focused only on the pre-emption argument and the contention that Florida law, rather than New York, controlled.⁸⁰

⁷⁵ *Id.* For an in-depth discussion of the *Erie* Doctrine, see generally Joseph R. Oliveri, *Converse-Erie: The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372, 1375-76 (2008) (observing that "the *Erie* doctrine – the cornerstone of analysis of the relationship between federal and state law in federal courts – provides that federal courts, except in matters governed by the Constitution or federal statutes, shall apply the substantive law of the forum state," and adding that in *Erie*, "the Supreme Court overturned the previous rule of *Swift v. Tyson*, rejecting the notion of a 'federal general common law' to which federal courts had previously looked to find the applicable rule of decision") (citations omitted).

⁷⁶ *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009).

⁷⁷ *Id.*

⁷⁸ See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (involving the application of the hot news misappropriation tort in the context of a dispute about the transmission of scores and other data about NBA games in progress via paging devices).

⁷⁹ *All Headline News Corp.*, 608 F. Supp. 2d at 461 (quoting *Motorola*, 105 F.3d at 845).

⁸⁰ See *All Headline News Corp.*, 608 F. Supp. 2d at 458 (writing that the motion to dismiss the hot news misappropriation cause of action was based "on two grounds," including the contention that "choice of law requires that plaintiff's claim of misappropriation of hot news be considered under the law of Florida, which, defendants contend, has rejected such a cause of action" and the assertion "that a claim for misappropriation of hot news is preempted by the federal Copyright Act").

In lauding Judge Castel's decision, the AP's director of media relations, Paul Colford, stated the "ruling reaffirms the viability of the hot news misappropriation doctrine, and thereby protects AP's investments in news gathering and reporting against copying by free-riders."⁸¹ Colford also pointed out that the case was not simply about the AP's right to make money, but the public's right to receive information, as he stated that "by preserving the economic incentive to gather and report hot news, this decision will further the public interest in having access to such news and also encourage the efforts of journalists."⁸² This framing⁸³ of the case attempts to place the AP in the noble position of protecting the public interest rather than casting it as a greedy entity trying to eliminate a competitor.

Significantly, when the case settled,⁸⁴ the agreement between the parties included a provision under which AHN acknowledged that "the tort of 'hot news misappropriation' has been upheld by other courts and was ruled applicable in this case by U.S. District Court Judge P. Kevin Castel."⁸⁵ This appears to be a warning shot fired by the AP—a shot targeting other news services and news aggregators⁸⁶ like AHN—that the AP will use the same theory again to challenge their actions. Ethan K. Ackerman, a Washington, D.C.-based attorney who has worked in the U.S. Senate as technology counsel, observed "settlements don't validate legal theories, court opinions do. That said, part of the settlement required AHN to pseudo-admit the viability of the hot news misappropriation doctrine."⁸⁷ In its own—albeit much shorter—press release, AHN acknowledged paying the AP an

⁸¹ Press Release, Associated Press, AP Statement on All Headline News Court Ruling (Feb. 18, 2009) (on file with Wake Forest Intellectual Property Law Journal), available at http://www.ap.org/pages/about/pressreleases/pr_021809b.html.

⁸² *Id.*

⁸³ See generally Jeongsub Lim & Hyunjin Seo, *Frame Flow Between Government and the News Media and its Effects on the Public: Framing of North Korea*, 21 INT'L J. PUB. OPINION RES. 204, 205-07 (2009) (providing an overview of the concept of framing and framing effects).

⁸⁴ See Order of Dismissal at 1, *All Headline News Corp.*, 608 F. Supp. 2d 454 (No. 08 Civ. 323) (providing, in relevant part, that the court was "advised that all claims asserted herein have been settled," and dismissing the case without prejudice to reopening it within 60 days if the settlement was not consummated).

⁸⁵ Press Release, Associated Press, AP and AHN Media settle AP's lawsuit against AHN Media and individual defendants (July 13, 2009) (on file with Wake Forest Intellectual Property Law Journal), available at http://www.associatedpress.com/pages/about/pressreleases/pr_071309a.html.

⁸⁶ See generally Barb Palser, *Is It Journalism?*, AM. JOURNALISM REV., June 2002, at 62, ## (discussing the concept of news aggregators and, in particular, Yahoo! News).

⁸⁷ Posting of Ethan Ackerman, to Technology & Marketing Law Blog, <http://blog.ericgoldman.org/> (July 22, 2009, 09:44 PST).

undisclosed amount of money, but it continued to deny the AP's allegations.⁸⁸

With this analysis of the *Associated Press v. All Headline News* case in mind, the next part of this article turns to the development of the tort at issue in it, as well as a review of scholarly legal commentary about it.

II. THE EVOLUTION OF THE HOT NEWS MISAPPROPRIATION TORT: A REVIEW OF LEGAL PRECEDENT AND SCHOLARLY LITERATURE

The U.S. Supreme Court's decision in *International News Service v. Associated Press* was handed down in 1918, a time when consolidation in the print newspaper industry was first beginning.⁸⁹ Media mogul William Randolph Hearst had created what would become the International News Service⁹⁰ ("INS") some twelve years earlier to compete against the Associated Press, which had been formed in the mid-1800s.⁹¹ The dispute at issue between the two news services began when INS, lacking international cables connecting Europe to the United States, began "clipping news from AP member newspapers"⁹² and "copying it from AP bulletin boards."⁹³ By pilfering AP-based content from early editions of East Coast newspapers, INS was actually able to beat the AP, given time-zone differences, to the West Coast newspapers with the AP's own content.⁹⁴ As Professor Paul W. Sullivan observes in an excellent

⁸⁸ Melvin Baker, Press Release, All Headline News, AHN, AP Settle Lawsuit (July 13, 2009) (on file with Wake Forest Intellectual Property Law Journal), available at <http://www.allheadlinenews.com/articles/7015776639?AHN,%2520AP%2520Settle%2520Lawsuit>.

⁸⁹ "Let Munsey Kill It!": *The Birth of the Newspaper Chain*, in 1 AMERICAN DECADES 350, 350-51 (Vincent Tompkins ed., 1996) (writing that "[i]n 1890 New York had fifteen English-language daily newspapers. By 1932 it had half that number. The twentieth-century trend toward newspaper consolidation began in earnest during the century's first decade" and pointing out that "[i]n upstate New York Frank E. Gannett bought a partial interest in the *Elmira Gazette* in 1906 and then merged it with the *Elmira Star*. In the 1910s he bought two papers in Ithaca and combined them, and in the 1920s acquired others in Rochester, Utica, and in other northeastern states, laying the groundwork for the largest chain in the country").

⁹⁰ In 1958, United Press absorbed International News Service to become United Press International. Richard A. Schwarzlose, *International News Service: William Randolph Hearst's News Wire*, in HISTORY OF MASS MEDIA IN THE UNITED STATES: AN ENCYCLOPEDIA 275 (Margaret A. Blanchard, ed., 1998).

⁹¹ Laura Bergheim, *Press Associations*, in 6 DICTIONARY OF AMERICAN HISTORY 458, 458 (Stanley I. Kutler ed., 2003).

⁹² Paul W. Sullivan, *News Piracy: An Interpretation of the Misappropriation Doctrine*, 54 JOURNALISM Q. 682, 683 (1977).

⁹³ *Id.*

⁹⁴ *Id.*

examination of the case that should be read by anyone wanting a complete analysis of it, the “AP objected that some of its own members in the western part of the country were not receiving the news as quickly as INS customers were receiving the pirated news.”⁹⁵

Importantly, the AP did not argue that its stories were copyrighted. As Professor Eric Easton writes, the “AP argued that securing copyright for its dispatches was impractical and that those dispatches were beyond the scope of the Copyright Act. AP’s property interest lay exclusively in protecting its business from freeriders.”⁹⁶

As described in the Introduction, Justice Pitney and the majority of the court sided with the Associated Press, expressing deep concern about what it considered to be unfair competition by INS and finding a quasi property right in the fresh news stories that it spent time, money, and labor to gather and produce.⁹⁷ The property interest held by the AP, Justice Pitney made clear, was *not* as against all of the world or the newspaper reading public, but only as against its competitors, writing:

The question here is *not so much the rights of either party as against the public but their rights as between themselves*. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is 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.⁹⁸

From a public policy perspective that centers on an unenumerated First Amendment right to receive speech,⁹⁹ this is an

⁹⁵ *Id.*

⁹⁶ Eric B. Easton, *Who Owns 'The First Rough Draft of History?': Reconsidering Copyright in News*, 27 COLUM. J.L. & ARTS 521, 547 (2004).

⁹⁷ See *supra* footnotes 43-45 and accompanying text (describing Justice Pitney’s opinion for the majority of the high court).

⁹⁸ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918) (emphasis added) (citation omitted).

⁹⁹ See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (opining that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (writing that “the right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read”); *Martin v. Struthers*,

important dichotomy. It suggests that the majority opinion is *not* intended to deprive the public of news but is, instead, only intended to provide profit and incentive for the gathering of that news by depriving another business entity—a rival/competitor—from profiting from it. In other words, the hot news misappropriation doctrine that was to emerge from the case was not to be used against the public, but against rival businesses.

The court also made it clear that, even as against a rival/competitor, the quasi property interest held in news is ephemeral, lasting only so long as the news at issue is fresh. As Justice Pitney wrote:

[T]he view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles; but *only postpones participation* by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainants efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim *sic utere tuo*, etc.¹⁰⁰

Finally, Justice Pitney and the majority attempted to make it clear that the misappropriation cause of action could *not* be used to prevent or thwart one competitor from taking “the news of a rival agency as a ‘tip’ to be investigated, and if verified by independent investigation the news thus gathered is sold.”¹⁰¹ The Court here drew another dichotomy, this time between the uses that a rival could properly make of a competitor’s fresh news content:

- **Permissible:** Use the information as a tip to be independently investigated and corroborated for one’s own story.
- **Forbidden:** “the bodily appropriation of another’s labor in accumulating and stating information.”¹⁰²

319 U.S. 141, 143 (1943) (writing that the First Amendment freedom to distribute literature “necessarily protects the right to receive it”).

¹⁰⁰ *Int’l News Serv.*, 248 U.S. at 241 (emphasis added). The phrase “*sic utere tuo ut alienum non laedas*” reflects an ancient common law maxim in nuisance law that means “use your own so as not to injure another.” Joseph H. Guth, *Law for the Ecological Age*, 9 VT. J. ENVTL. L. 431, 447 (2008). As Professor Gregory Alexander recently observed, “the negative obligation of the Anglo-American common law to avoid committing nuisance” reflects an approach that “is captured by the *sic utere tuo* maxim.” Gregory S. Alexander, *The Social-Obligation Norm in American Property*, 94 CORNELL L. REV. 745, 753 (2009).

¹⁰¹ *Int’l News Serv.*, 248 U.S. at 243.

¹⁰² *Id.* (quoting *Associated Press v. Int’l News Serv.*, 245 F. 244, 247 (2d Cir. 1917)).

In summary, the majority opinion, although failing to clearly delineate the precise elements of the hot news misappropriation tort that would evolve from the *International News Service* case, seemed to place three limitations on it, at least in the opinion of the authors of this article:

1. It can only be used by one rival against another rival, not against the public.
2. The quasi property right in news that is instilled by the tort does not last forever against a rival, but merely “*postpones participation*”¹⁰³ in the news by the rival, hence the idea that it merely is a “hot news” tort.
3. A rival is free to use a competitor’s fresh news for purposes of providing it with a tip or lead to be independently investigated and produced as its own news story.

The majority opinion in *International News Service* has been the subject of much legal commentary and writing over the years. For instance, University of Chicago Law Professor Richard Epstein observes that Justice Pitney’s opinion “rests upon the idea of property rights in news,”¹⁰⁴ rights that the AP possessed in its fresh news as against a direct competitor, INS.¹⁰⁵ These rights, however, last only while the news is fresh and, in addition, only against a direct competitor.¹⁰⁶ This echoes two of the three limitations set forth above.

The notion of finding a property right in news, however, is one of the fundamental reasons that *International News Service* is criticized by legal scholars. For example, Professor Leo J. Raskind blasts the “‘quasi-property’ foundation on which the INS majority relied”¹⁰⁷ in order to side with the AP and divine a theory of misappropriation as “question-begging.”¹⁰⁸ Raskind suggests that the majority’s concern with unfair competition—the “unique commercial ‘dirty trick,’”¹⁰⁹ in Raskind’s words, in which INS “took AP news in

¹⁰³ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 241 (1918) (emphasis added).

¹⁰⁴ Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 112 (1992).

¹⁰⁵ *Id.* at 92.

¹⁰⁶ *See id.* at 114 (observing that Justice “Pitney describes the defendant’s interest in its news as ‘quasi property,’ which is good only for a short period of time (less than a day) and then only against the direct competitor of the plaintiff”).

¹⁰⁷ Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875, 900 (1991).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 881.

order to have a saleable product”¹¹⁰ and passed it off as its own work—should not have led it to adopt a property foundation for grounding the opinion. As Raskind writes:

Introducing the concept of “quasi-property” diverts the inquiry. The defect in the majority opinion is that it relies on a legal doctrine relating to the marketing side of competition [passing off] and cloaks that doctrine with the status of property. The majority then sought to provide an analysis of a taking of an undefined property interest in the context of a competitive market in which taking is the very nature of the relationship.¹¹¹

Others also object to the notion of using a property right to protect information. Professor Michael Pendleton describes what he calls “the inappropriateness of property as a conceptual/legal device for ordering rights among the groups of persons who have legitimate interests in protecting as well as accessing (within limits) the substantial labour, skill, effort and investment of time and money involved in creating information ‘products.’”¹¹²

Another criticism of the *International News Service* decision relates to the separation of powers and roles between judges and legislators. As Professor Douglas G. Baird writes, “[critics] argue that judges are poorly situated to identify the policies at stake in an intellectual property dispute and that judges therefore should not recognize intellectual property rights until the legislature has done so.”¹¹³ Supporting this proposition that legislators should create the law here is the idea that “the federal system of intellectual property derives from the clause of the Constitution that gives Congress the power to give authors and inventors exclusive rights to their writings and discoveries for a limited time for the purpose of promoting ‘the Progress of Science and useful Arts.’”¹¹⁴ In this line, Professor L. Ray Patterson observes that *International News Service* actually “can be viewed as a copyright case in the guise of unfair competition”¹¹⁵ because, although the AP’s stories were copyrightable, it had not copyrighted them.¹¹⁶ As a copyright case in the United States, it would be governed by legislative rules, not by a court-created doctrine that

¹¹⁰ *Id.* at 885.

¹¹¹ *Id.* at 886-87.

¹¹² Michael D. Pendleton, *Balancing Competing Interests in Information Products: A Conceptual Rethink*, 14 INFO. & COMM. TECH. L. 241, 246 (2005).

¹¹³ Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 417 (1983).

¹¹⁴ *Id.* at 415 (quoting U.S. CONST. art. I, § 8, cl. 8).

¹¹⁵ L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 59 (1987).

¹¹⁶ *Id.* at 58-59.

was, as Professor Raskind contends, launched “in an *ad hoc* fashion” to fill a vacuum in favor of the Associated Press.¹¹⁷

More generally but certainly not less importantly, the majority opinion has been criticized as being at odds with the First Amendment freedom of speech. As Professor Diane Zimmerman writes about the majority’s rationale that hard work and effort in gathering news should be rewarded with property rights for exclusive use:

Taken at face value, this principle suggests that property rules are appropriately applied whenever someone exploits for profit information generated by the personality, activities, or intellectual efforts of someone else – and that the First Amendment is not offended by the requirement that the user first bargain for that right with the source of the value. Certainly, no evidence suggests that First Amendment jurisprudence has ever accepted this view.¹¹⁸

Given these criticisms of the opinion, it is not surprising that the justices themselves split in *International News Service*. In particular, Justice Louis Brandeis dissented at length,¹¹⁹ while Justice Oliver Wendell Holmes, Jr. issued a very brief concurrence that was joined by Justice Joseph McKenna.¹²⁰ Brandeis, who parsimoniously defined news as “a report of recent occurrences,”¹²¹ objected to the idea that news is property. He opined:

An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use.¹²²

Brandeis also emphasized the danger to the right of the public to receive information that might be affected by extending a property

¹¹⁷ Raskind, *supra* note 107, at 881.

¹¹⁸ Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 722 (1992).

¹¹⁹ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 248-267 (1918) (Brandeis, J., dissenting).

¹²⁰ *Id.* at 246-248 (Holmes, J., concurring).

¹²¹ *Id.* at 249 (Brandeis, J., dissenting).

¹²² *Id.* at 250.

right in news, writing that an extension of property rights in news would lead to “a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations.”¹²³ Even if one were to extend such a right, Brandeis opined that such a decision should be made by a legislative body, not a judicial one, writing that “courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest.”¹²⁴

Brandeis here seemed clearly concerned about potential harm to the public’s interest in news that might be caused by the majority’s holding. As Professor Geraldine Szott Moohr observes, Brandeis believed that “a new rule, unless carefully crafted, could injure the general public,”¹²⁵ and thus “preferred a rule that encouraged free use of knowledge and ideas.”¹²⁶

A number of lower federal court opinions have since considered, to varying degrees, the viability and elements of the hot news misappropriation tort,¹²⁷ but probably the most important opinion for purposes of the AP’s case against AHN, given its decision by the United States Court of Appeals for the Second Circuit, is *National Basketball Ass’n v. Motorola, Inc.*¹²⁸ The case did not involve either news stories or news agencies, but centered instead on the real-time transmission of NBA game scores and statistics, taken from television and radio broadcasts of games in progress, via a paging device manufactured by Motorola and compiled by a service

¹²³ *Id.* at 263.

¹²⁴ *Id.* at 267.

¹²⁵ Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 695 (2000).

¹²⁶ *Id.* at 696.

¹²⁷ See, e.g., *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997); *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204 (2d Cir. 1986); *Scranton Times v. Wilkes-Barre Publ’g Co.*, No. 3:08-cv-2135, 2009 WL 585502 (M.D. Pa. Mar. 6, 2009); *X17 v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2007); *McGraw-Hill Cos. v. Int’l Sec. Exch., Inc.*, No. 05 Civ.1129(HB), 2005 U.S. Dist. LEXIS 18674 (S.D.N.Y. Sept. 1, 2005); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737 (D. Md. 2003); *Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836 (S.D.N.Y. 2000); *Morris Commc’ns. Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322 (M.D. Fla. 2000); *Gannett Satellite Info. Network, Inc. v. Rock Valley Cmty. Press, Inc.*, No. 93 C 20244, 1994 U.S. Dist. LEXIS 15736 (N.D. Ill. 1994); *Nash v. CBS, Inc.*, 704 F. Supp. 823 (N.D. Ill. 1989); *P.I.T.S. Films v. Laconis*, 588 F. Supp. 1383 (E.D. Mich. 1984); *Schuchart & Assocs. v. Solo Serve Corp.*, 540 F. Supp. 928 (W.D. Tex. 1982); *Harper & Row Publishers, Inc. v. Nation Enters.*, 501 F. Supp. 848 (S.D.N.Y. 1980).

¹²⁸ 105 F.3d 841.

called Sports Team Analysis and Tracking Systems.¹²⁹ The case is important for two primary reasons: it recognized the existence of the hot news misappropriation tort in New York,¹³⁰ and it articulated the same five elements¹³¹ of the cause of action spelled out by Judge Castel in the AP's battle against AHN. In specifying those elements, the appellate court in *Motorola* called the hot news misappropriation tort "properly narrowed,"¹³² suggesting it is cabined quite closely by the Second Circuit.

The Second Circuit in *Motorola* interpreted the Supreme Court's *International News Service* decision as founded on the goal of "the protection of property rights in time-sensitive information so that the information will be made available to the public by profit-seeking entrepreneurs."¹³³ As such, a viable hot news misappropriation claim will only survive preemption by the Federal Copyright Act if three key things are present: (i) the factual information at issue is time sensitive; (ii) there is a free-riding defendant; and (iii) there is a threat to the very existence of the product or service provided by the plaintiff.¹³⁴ If it survives preemption, then a court will turn to the five elements of the tort itself.

III. NEWS, CULTURE AND CONTROL OF INFORMATION IN THE DIGITAL AGE: RAMIFICATIONS OF THE HOT NEWS MISAPPROPRIATION TORT

The hot news misappropriation tort originated in 1918 when people obtained their news via newspapers. Today, people get their news on the Internet, BlackBerrys and iPhones, as well as on television and even Twitter;¹³⁵ an August 2008 report by the Pew Research Center for the People & the Press, for instance, found that "since the early 1990s, the proportion of Americans saying they read a newspaper on a typical day has declined by about 40%."¹³⁶ Conversely, the same survey found that "since 2006, the proportion of Americans who say they get news online at least three days a week has

¹²⁹ *Id.* at 843-44.

¹³⁰ *Id.* at 845.

¹³¹ See *supra* note 81 and accompanying text.

¹³² *Motorola*, 105 F.3d at 848.

¹³³ *Id.* at 853.

¹³⁴ *Id.*

¹³⁵ See Bob Franklin, *The Future of Newspapers*, 9 JOURNALISM STUD. 630, 630-31 (2008) (observing that today's news content is delivered on "multiple media platforms" and "delivered by the Internet, pod casts and mobile telephony, more often than by newspaper delivery boys and girls").

¹³⁶ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT 3 (2008), <http://people-press.org/reports/pdf/444.pdf>.

increased from 31% to 37%.”¹³⁷

We also live in a culture that thrives on the constant flow of information. As the website for Twitter states, “In countries all around the world, people follow the sources most relevant to them and access information via Twitter *as it happens—from breaking world news to updates from friends.*”¹³⁸ Twitter has more than 20 million users,¹³⁹ and as the *Philadelphia Inquirer* observed, it has played “a growing role in disseminating news and organizing social and protest movements.”¹⁴⁰ Might the use of the hot news misappropriation tort hinder or otherwise stanch the flow of news in such a faster-is-better world?

The dramatic changes in the speed at which news is conveyed, as well as the manner and mode of its receipt, can be a double-edged sword when intellectual property concerns are put into the equation. As Brian Cooper, the executive editor of the *Telegraph Herald* in Dubuque, Iowa, recently observed:

In this Internet Age, with thousands of media outlets available at the click of a mouse, it is easier than ever to follow news events anywhere – from your hometown to the other side of the world. And it is also easier than ever for less-scrupulous outlets to appropriate that news and label it their own. Simply copy, paste, delete credit lines and – voila!¹⁴¹

The Associated Press clearly is concerned about the ease at which such piracy can occur. It explains on its website why it has chosen to fight such battles so aggressively:

The Associated Press is a not-for-profit news cooperative that spends hundreds of millions of dollars every year gathering and sharing news of public interest from around the world. Licensing of this content by our members is critical to support our news operations. In the new digital content economy, however, a significant amount of AP news and news from AP members is used without permission or fair compensation. This situation has serious consequences: it dilutes the value of news for licensors and advertisers; it fragments and disperses content so widely that consumers end up relying on fragmented coverage to get their news

¹³⁷ *Id.* at 4.

¹³⁸ About Twitter, <http://twitter.com/about> (last visited Sept. 1, 2009) (emphasis added).

¹³⁹ See Verne Kopytoff, *Virtually Famous Folks*, S.F. CHRON., July 27, 2009, at A1 (noting that Twitter has 21 million users and describing how it turns ordinary people into popular figures on the service).

¹⁴⁰ John Timpane, *Tweeting Twitter Seriously*, PHILA. INQUIRER, July 30, 2009, at A1.

¹⁴¹ Brian Cooper, *Say, Where Did That News Story Come From?*, TELEGRAPH HERALD (Dubuque, Iowa), June 3, 2008, at A4.

despite the availability of comprehensive and authoritative coverage on a 24-hour basis.¹⁴²

The AP's actions likely have a large impact on so-called online news aggregating sites that, as attorney Jeffrey D. Neuburger writes, "have become ubiquitous on the Internet."¹⁴³ An adjunct Professor at Fordham University School of Law, Nueburger points out the AP had previously been successful in obtaining settlements from other online news aggregators, including Google News and Verisign.¹⁴⁴ The AP's win in federal court against AHN gives it more leverage to obtain further settlements in the future.

The potential ramifications of the AP's current use of the hot news misappropriation tort stretch beyond the Internet to also affect television and radio journalism. As journalist Ken Robertson of the *Tri-City Herald* in Washington State wrote in early 2009:

[I]t's common practice for radio and TV "news" readers to simply rip their stories off from their local newspaper, seldom bothering to credit the newspaper.

This kind of theft has been commonplace for decades, and we newspaper people called it "rip and read" and joked that you could often hear the sound of the newspaper being folded on the air.¹⁴⁵

The practice of rip-and-read journalism on the radio may be increasing today, Robertson points out, as economic pressures mean that "radio and TV stations have even smaller staffs and thus even less time to do any original reporting and must rely more and more on rip and read."¹⁴⁶ The AP's newspaper clients—who pay for and work together with the AP—might now invoke the hot news misappropriation tort to forbid a local radio station from reading its stories on the air. "In Boise, Idaho, for example, the newspaper has told AP to forbid Boise radio and TV stations from using the newspaper's news that is shared on the AP wire,"¹⁴⁷ Robertson writes.

Perhaps one of the most interesting questions involving the ramifications of *Associated Press v. All Headline News Corp.* is whether the hot news misappropriation doctrine can be successfully used to squelch the speech of bloggers and citizen journalists who make use of online news like that conveyed by the AP. In other

¹⁴² Associated Press, Protecting AP's Intellectual Property, <http://www.associatedpress.com/iprights/faqiprights.html> (last visited Sept. 1, 2009).

¹⁴³ Posting of Jeffrey D. Neuburger to New Media & Technology Law Blog, <http://newmedialaw.proskauer.com> (Feb 26, 2009).

¹⁴⁴ *Id.*

¹⁴⁵ Ken Robertson, *Opinion: AP's Suit Over Theft of 'Hot News' Should Rattle TV, Radio*, TRI-CITY HERALD (Kennewick, Wash.), Feb. 20, 2009, at Commentary.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

words, will the hot news doctrine jeopardize the rapid and free exchange of information on what the U.S. Supreme Court once called “the vast democratic forums of the Internet?”¹⁴⁸ Conversely, could a blogger who gets a scoop and breaks an important political news story be able to own the story, as it were, for a brief amount of time—as long it is “hot” news—and thereby stifle its dissemination to the wider public that relies on information conveyed by news services like the Associated Press? This is particularly important because, as Paul Farhi recently noted in the *American Journalism Review*:

Two of the biggest campaign trail scoops came not from a professional *journalist*, but from a blogger named Mayhill Fowler. . . . Using her own money to follow the campaign around the country, the 61-year-old Fowler recorded Obama’s comments, made at a fundraiser in San Francisco, that “bitter” small-town voters “cling to guns and religion.” (Fowler never identified herself as a blogger; she was admitted to the closed event because she was an Obama contributor.) In June she encountered Bill Clinton at a rally in South Dakota and (again, failing to identify herself) asked about an unflattering profile of him in *Vanity Fair*. When Clinton launched into a tirade about the article’s author, former *New York Times* reporter Todd Purdum (“sleazy!” “a scumbag!”), Fowler recorded that, too, and posted it online.¹⁴⁹

The answer to each these questions would generally seem to be no. Why? Because the elements of the hot news misappropriation cause of action frame the tort so narrowly that most cases involving bloggers and citizen journalists on one side of the case, and a news service like the AP on the other side, simply would not fall within it. In particular, the fourth element of the tort as framed by Judge Castel in *Associated Press v. All Headline News Corp.*—and quoting the Second Circuit’s opinion in *National Basketball Ass’n v. Motorola*—requires the plaintiff to prove that “the defendant is in direct competition with a product or service offered by the plaintiffs.”¹⁵⁰ The operations of the Associated Press or a news service like the United Press International¹⁵¹ simply are not in “direct competition” with the

¹⁴⁸ *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

¹⁴⁹ Paul Farhi, *Off the Bus*, AM. JOURNALISM REV., Dec. 2008-Jan. 2009, at 28, 31.

¹⁵⁰ *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009) (citing *Nat’l Basketball Ass’n v. Motorola*, 105 F.3d 841, 845 (2d Cir. 1997)).

¹⁵¹ The United Press International describes itself as “a leading provider of critical information to media outlets, businesses, governments and researchers worldwide. UPI is a global operation with offices in Beirut, Hong Kong, London, Santiago, Seoul and Tokyo.” About United Press International, <http://about.upi.com> (last visited Sept. 5, 2009).

services provided by a blogger or citizen journalist. The tort will only be successful if there are rivals in direct competition with each other.

Bloggers simply are not news services; both may supply important information that many people may consider to be news, but merely trafficking in similar information does not put them in direct competition. For instance, the Associated Press: 1) has more than 240 bureaus in 97 countries; 2) features 4,100 editorial, communications and administrative employees worldwide; 3) is owned by its 1,500 newspaper members; and 4) offers to its members news, photos, graphics, audio, and video.¹⁵² The stereotypical “blogger in his pajamas,”¹⁵³ in comparison, may hit an important scoop from time to time, but he or she simply does not fulfill the same function—supplying newspapers, radio stations, and websites across the country with a constant and steady stream of information and different formats of mediated content—and consistently discover the same type of information that is dug up “by skilled reporters working beats day in and day out.”¹⁵⁴ The AP can, to put it bluntly, be in many different places at one time, spanning the globe; the isolated blogger simply cannot. If the AP thus sued an individual blogger for taking one of its breaking news stories and posting it on the blogger’s website, as his or her own work, without either attribution or permission, the blogger certainly may have violated fundamental ethical tenets of journalism prohibiting plagiarism,¹⁵⁵ but surely he or she has not committed the tort of hot news misappropriation.

¹⁵² Associated Press, Facts & Figures, <http://www.ap.org/pages/about/about.html> (last visited Sept. 5, 2009).

¹⁵³ This phrase is often used by the news media themselves to stereotype bloggers. See, e.g., Carl Carter, *Who Will Pay for the News? The Internet has Walloped Newspapers*, BIRMINGHAM NEWS (Ala.), Mar. 8, 2009, at 1F (contending that “bloggers in pajamas” cannot replace mainstream newspapers because those bloggers, along with “cell-phone photographers,” merely “piggyback on the real work done by real reporters”); Marc Fisher, *Politics 24/7: No One Can Hear You Scream*, WASH. POST, Oct. 14, 2007, at M1 (using the twin phrases “bloggers in their pajamas” and “pajamas media”); Logan Jenkins, *What’s the Future of the U-T? Read On, For Now*, SAN DIEGO UNION-TRIB., Jan. 26, 2009, at B2 (arguing in favor of the importance of traditional newspapers and contending that there is “no way can a loose network of bloggers in pajamas – or, for that matter, time-challenged broadcast outlets – match our concerted effort to inform in detailed depth”).

¹⁵⁴ Editorial, *Burris Scoops Show How Much Newspapers Matter*, CHI. SUN-TIMES, Feb. 17, 2009, at 16.

¹⁵⁵ For instance, the ethics code of the Society of Professional Journalists bluntly admonishes journalists to “never plagiarize.” Society of Professional Journalists, Code of Ethics, available at <http://www.spj.org/pdf/ethicscode.pdf> (last visited Sept. 1, 2009). See Norman P. Lewis, *Plagiarism Antecedents & Situational Influences*, 85 JOURNALISM & MASS COMM. Q. 353, 353 (2008) (observing that “plagiarism seems to stick to journalism like a leech, despite universal prohibitions, zero-tolerance policies, and fallout from the 2003 Jayson Blair episode”). See generally

Ultimately, the Associated Press should be entitled to some form of qualified protection for its time, labor, and efforts in gathering breaking news, but not against bloggers or citizen journalists. The question really centers on defining the precise scope and range of the protection to which it should be entitled, given the competing interests at stake, against rival news services and news aggregators.

Those interests, in the opinion of the authors of this article, would seem to be at least threefold:

- the interests of the AP as the gatherer and creator of the newsstories;
- the interests of the AP's competitors and, in particular news aggregators; and
- the interests of the audience, recipients, and users of the news stories.¹⁵⁶

In light of these three interests, one might ask the following threshold question: Why is it important to protect the Associated Press in the first place, as it gathers information and writes news stories, when the public (the third possessor of an interest noted above) can obtain information from so-called citizen journalists and bloggers so readily today? Professor Michael Schudson of the University of California, San Diego, addressed that same issue in 2009, concluding that “matters of professional training, experience, and judgment are as or more important than ever”¹⁵⁷ in the world of journalism and reasoning that “one need not idealize the newspaper press to recognize that to this day television, radio, and online news feed off the basic reporting that to an overwhelming extent comes from organizations whose economic survival no one knows how to guarantee.”¹⁵⁸ In other words, there remains a fundamental difference in quality and content that separates professional journalists from bloggers and citizen journalists, even if that difference stems from a desire for economic survival.

According to a 2007 article published in *Journalism & Mass Communication Quarterly*:

Aggregators produce little original news content, instead providing a platform for established news producers and access for users to multiple news sources. Arguably the most popular online news portal, Yahoo!News, allows users

Marie Dunne White, *Plagiarism and the News Media*, 4 J. MASS MEDIA ETHICS 265 (1989) (discussing the concept of plagiarism and the related issue of lack of attribution in news media ethics).

¹⁵⁶ Cf. Pendleton, *supra* note 114, at 246 (identifying a very similar list of competing interests that must be taken into account in any dispute over intellectual property where time and labor are expended to gather and produce information).

¹⁵⁷ Michael Schudson, *Ten Years Backwards and Forwards*, 10 JOURNALISM 368, 370 (2009).

¹⁵⁸ *Id.*

to identify favorite topics—politics, business, science, entertainment—from various sources including Associated Press (AP), Agence France-Presse (AFP), Reuters, CNN, and others. A recent Pew study determined that 23% of online news consumers chose Yahoo!News, and while Yahoo!News usage has continued to increase, competitor aggregators, such as Google News, and online news providers, such as MSNBC.com and CNN.com, have lost users.¹⁵⁹

When a news aggregator has permission and explicit authorization from a company or news service to post links to its feeds, there clearly is no possibility of a hot news misappropriation claim. Lack of permission, however, raises the distinct possibility. While Judge Castel did not address the actual merits of such a scenario involving a news aggregator versus a news service,¹⁶⁰ it is clear that, as David Simon, a writer and former *Baltimore Sun* reporter, recently wrote in *Columbia Journalism Review*, “the relationships between newspapers and online aggregators—not to mention The Associated Press and Reuters—will have to be revisited and revised.”¹⁶¹ The interests of society and the reading public—the third possessor of an interest identified above by the authors of this article—require the economic viability of professional news services because while “amateur *journalists* may have wise and clever things to say,”¹⁶² they are not in the practice of regularly breaking news stories and subscribing to journalistic principles of neutrality and supposed objectivity.¹⁶³

Finally, it is important to note that Judge Castel did not address what attorney Jeffrey D. Neuburger calls “the more difficult and complex questions concerning the use of news reports by bloggers and others who do not merely excerpt and link to online news reports such as those produced by the AP, but add commentary to them as well.”¹⁶⁴ In the opinion of the authors of this article, it would seem that legal analysis of such blogger-added-commentary situations should

¹⁵⁹ Joe Bob Hester & Elizabeth Dougall, *The Efficiency of Constructed Week Sampling for Content Analysis of Online News*, 84 JOURNALISM & MASS COMM. Q. 811, 811 (2007).

¹⁶⁰ See *supra* notes 78-79 and accompanying text (describing how Judge Castel only considered the issues of choice of law, preemption and the viability of the hot news misappropriation theory under New York law).

¹⁶¹ David Simon, *Build the Wall*, COLUM. JOURNALISM REV., July-Aug. 2009, at 36, 36.

¹⁶² Michael Shapiro, *Open for Business*, COLUM. JOURNALISM REV., July-Aug. 2009, at 29, 35.

¹⁶³ See generally Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149 (2001) (discussing objectivity in journalism).

¹⁶⁴ Neuburger, *supra* note 145.

incorporate and borrow fair-use factors from copyright law.¹⁶⁵ In particular, 17 U.S.C. § 107 specifically notes that criticism and comment of an otherwise copyrighted work may be protected.¹⁶⁶ In fact, such commentary might even be considered a form of “news reporting”¹⁶⁷ protected as a fair use. If the blogger is not making a commercial profit—per the first fair use factor¹⁶⁸—this too would militate in favor of protecting such a use in a blogger-added-commentary situation. In addition, the smaller the portion of the original article that is appropriated for purpose of commentary, the better for the blogger, as the fair-use statute asks courts to factor in “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁶⁹ This issue, of course, remains unresolved, and the article now turns to the Conclusion to offer some ideas of future research and to summarize some of its own findings.

IV. CONCLUSION

This article has attempted to illustrate the origin, evolution, and continuing viability of the hot news misappropriation doctrine nearly a century after it was first developed and at a time when we are, as one communication scholar recently put it, “in the midst of an epochal transformation of the news media.”¹⁷⁰ While the news media and the very nature of journalism may be changing today, the principles of unfair competition and reap/sow equity that gave rise in *International News Service v. Associated Press* to the hot news misappropriation remain vital, despite the scholarly criticism of them reviewed earlier in this article.¹⁷¹

The AP’s lawsuit against AHN was not the first time in recent years the venerable news service has sued a business for allegedly ripping off its content,¹⁷² but it was the first time this century that the AP has coaxed a very favorable judicial ruling to use as precedent in

¹⁶⁵ See 17 U.S.C. § 107 (2006) (setting forth four fair-use factors).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* § 107(1) (2006) (providing that courts should consider, when making a fair-use determination, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”).

¹⁶⁹ *Id.* § 107(3) (2006).

¹⁷⁰ Schudson, *supra* note 159, at 369.

¹⁷¹ See *supra* notes 109-23 and accompanying text (providing the commentary of other legal scholars on the high court’s decision in *International News Service*).

¹⁷² See Ken Robertson, Opinion, *More Trouble Ahead for Copyright Scofflaws*, TRI-CITY HERALD (Kennewick, Wash.), July 14, 2009, <http://www.tricityherald.com/942/story/646943.html> (“In 2007, [the Associated Press] sued Moreover Technologies Inc. and its parent, VeriSign Inc., for using AP headlines, photos and stories without permission. That case also was settled for undisclosed terms.”).

other cases in which it invokes the hot news misappropriation doctrine in New York. The Associated Press thus may also consider itself fortunate that it is headquartered in New York City,¹⁷³ within a jurisdiction that recognizes the hot news misappropriation tort, such that it can haul defendants into, quite literally, its home court within the Second Circuit.¹⁷⁴ Significantly, another state with a large concentration of media entities—California—also recognizes the hot news misappropriation doctrine and recently has applied it to images, not simply news stories, in a case involving celebrity gossip-monger Perez Hilton.¹⁷⁵ The fact that both New York and California recognize the hot news misappropriation tort brings increased power to the media companies headquartered there to fight back against nefarious competitors.

AHN's alleged conduct of stripping AP's stories of attribution and having them masquerade as AHN's own work raises perhaps as many worthy ethical issues—business ethics and journalism ethics—as legal ones, but they are beyond the scope of this law-focused article. It is worth noting here, however, that the term plagiarism—a cardinal sin in journalism ethics¹⁷⁶—is derived from the Latin word for kidnapper,¹⁷⁷ and that moniker perhaps provides an apt way of viewing AHN's conduct that, in turn, tees up media ethics issues. Given that there are even ambiguities about what constitutes plagiarism in journalism, as University of Florida Professor Norman Lewis recently pointed out in a detailed study,¹⁷⁸ there may even be a fundamental issue of whether what AHN allegedly did with the AP's stories even constitutes plagiarism. Future articles should address the ethical aspects of AHN's conduct and that of similar entities and news aggregators.

The news business, of course, is highly competitive. There have been lawsuits filed over the alleged stealing of sources,¹⁷⁹ much

¹⁷³ See Associated Press, Contact AP, <http://www.ap.org/pages/contact/contact.html> (last visited Sept. 1, 2009) (identifying the AP's headquarters as being located at 450 W. 33rd St. in New York, NY).

¹⁷⁴ A discussion of the jurisdictional issues and choice-of-law issues is beyond the scope of this article.

¹⁷⁵ See *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1107 (C.D. Cal. 2007) (involving a case about the use of photographs by Mario Lavandeira, who does business under the name Perez Hilton, and holding that “the hot news tort is cognizable in California”).

¹⁷⁶ See *supra* note 157 and accompanying text (discussing plagiarism and journalism ethics).

¹⁷⁷ White, *supra* note 157, at 267.

¹⁷⁸ Lewis, *supra* note 157, at 355.

¹⁷⁹ See Kathryn S. Wenner, *It's My Source and I'll Sue If I Want To*, AM. JOURNALISM REV., Oct 2001, at 16, 16. (describing a lawsuit filed in California

less the stealing of news stories. Thus, it is not surprising that the hot news doctrine would be used today, more than ninety years after it was created, and that other news entities beyond the AP would invoke it.

For instance, the doctrine was at the heart of a dispute in 2009 between the *Scranton Times* and the *Times Leader*, rival newspapers in Northeastern Pennsylvania, in *Scranton Times v. Wilkes-Barre Publishing Co.*¹⁸⁰ The dispute did not exactly involve what one might typically consider to be news; it focused, instead, on the allegation that the print edition of one newspaper was copying from the various websites of the other newspaper's obituaries.¹⁸¹ United States District Judge A. Richard Caputo did not reject the possible existence of a hot news misappropriation claim within Pennsylvania and the U.S. Court of Appeals for the Third Circuit, but he did find that, on the specific facts of the case, the claim was preempted by federal copyright law because "the Defendant's alleged copying and re-use of obituaries originally found in Plaintiffs' publications did not pose a threat to the existence of Plaintiffs' publications or the ability of those publications to continue the timely publication of obituaries."¹⁸²

But future battles are more likely to occur in scenarios like those involving the Associated Press and All Headline News Corporation. When a court finally addresses the actual merits of such a case on the five specific elements of the hot news misappropriation doctrine, it will trigger an opinion meriting a further scholarly analysis. For now, as this article has illustrated, the tort that exists (at least in New York) is quite narrowly articulated and seems unlikely to quash the work of bloggers and citizen journalists in situations where they might be sued by the Associated Press.

Finally, it seems that one important issue that must be resolved in such a future case, heard on the merits, is determining for exactly how long news actually remains "hot" or "fresh" in a world of instantaneous, digital communication. When, in other words, does news become cold? As our social expectations of faster and quicker news delivery change due to technology, does this mean that a concomitantly briefer period of quasi property ownership, per a 91-year-old case, should be allowed under the hot news misappropriation tort? Although one attorney recently proposed a very precise formula for such situations under copyright law (rather than the common law hot news misappropriation tort at issue in *International News*

involving competing journals that cover the wood and pulp industries and centering on the claim that the sources used by one of the journals were its trade secrets and could not be used by its former employees who went to work for the rival publication).

¹⁸⁰ No. 3:08-cv-2135, 2009 WL 585502 (M.D. Pa. Mar. 6, 2009).

¹⁸¹ *Id.* at **1-2.

¹⁸² *Id.* at **12-14.

Service),¹⁸³ it would seem this is indeed an area that requires the flexibility in equity that gives judges discretion when deciding whether to enjoin the likes of AHN for its alleged news piracy.

¹⁸³ See Ryan T. Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1, 3 (2008) (proposing "a change to current copyright law to bring more profit to news reporting" that "centers around allowing journalists, and the companies they work for, to own 98% of the investigated and researched facts they uncover for twenty-four hours after the story is first published").