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STILL AN ALTERNATIVE WAY TO PROTECT TRADITIONAL NEWS: WHY *BARCLAYS* DID NOT KILL THE “HOT NEWS” TORT

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The news industry is in trouble. Among other setbacks, advertisement revenues and print circulation for American newspapers have fallen precipitously, leading to significant staff layoffs and, some contend, to a reduction in the quality of the news product.¹ Although one argument is that this is a result of the economic recession, Judge Richard Posner blames the newspaper industry’s continual financial troubles on the permanent shift in consumer behavior “from the paid to the free medium.”² He notes that “[n]ews, as well as other information found in newspapers, is available online for nothing, including at the websites of the newspapers themselves, who thus are giving away content.”³ Hence, consumers no longer pay—or expect to pay—for access to the day’s news in print if they can access the same or similar content online. One study found that as of January 2010, close to sixty-one percent of Americans received their news from online sources on an average day.⁴ Another study found that print newspapers’ total advertising revenue has fallen significantly every year since 2006.⁵

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1. See Richard Posner, *The Future of Newspapers*, THE BECKER-POSNER BLOG (July 23, 2009, 7:37 PM), <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html>. For a more complete explanation of why the loss of traditional newspapers may be detrimental to the news dissemination process as a whole, see Elaine Stoll, Note, *Hot News Misappropriation: More Than Nine Decades After INS v. AP, Still an Important Remedy for News Piracy*, 79 U. CIN. L. REV. 1239 (2011). Stoll argues that the fall of the traditional newspaper industry means a decline in original news reporting, which leads to the disappearance of substantial information even while online content sites increase in number. Eventually (and ironically) these online blogs, social media, and other internet sites that provide free access to news content will themselves suffer due to a lack of original information to propagate. *Id.* at 1284–88.

2. Posner, *supra* note 1.

3. *Id.*

4. Kimberley Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices* 1 (Berkman Ctr. For Internet & Soc’y, Res. Publ’n Working Paper No. 2010-10, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339.

5. *Advertising Expenditures (Annual)*, NEWSPAPER ASS’N OF AM., <http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx> (last updated

Posner proposes that Congress expand copyright law to bar online access to copyrighted material or to prevent linking or paraphrasing of copyrighted material without the copyright holder's consent.⁶ His proposal for broader protections has strong roots in the history of American intellectual property theory; for example, one archetypal view is that intellectual property protection is essential to create the economic incentives necessary to invent and innovate.⁷

Although this is a popular understanding of the benefits of intellectual property, it has not gone unchallenged in copyright literature. Thirty years ago, for example, Stephen Breyer, now a Supreme Court Justice, challenged the notion that the economic incentives copyright law affords are absolutely necessary to incentivize invention and innovation.⁸ Furthermore, as caselaw has recognized⁹—and as this Note will illustrate—copyright protection “has not mattered much” historically in protecting the news industry's products, in part because “news moves too quickly to make exclusive rights protected by copyright law useful.”¹⁰

This Note will argue that aside from expanding copyright law, there exists another long-standing legal claim that the newspaper industry can employ in certain instances to protect its work product: the “hot news” misappropriation tort, a cause of action developed in a 1918 Supreme Court case that sought to protect the value of uncopyrightable facts in news stories.¹¹ Part I of this Note defines the “hot news” tort, its origin as a method to protect certain uncopyrightable aspects in informational works of value, and the evolution of the doctrine up to the present day. Part II then

Mar. 1, 2011). This dataset also presents the revenue that newspapers earn from online advertising through their websites. Although online advertising revenue increased between 2003 and 2007 (and in 2010), the total combined revenue from print and online advertising has fallen since 2006 from almost fifty billion to about twenty-six billion dollars. *Id.*

6. Posner, *supra* note 1.

7. See Edmund W. Kitch, *Property Rights in Inventions, Writings, and Marks*, 13 HARV. J.L. & PUB. POL'Y 119, 123 (1990) (noting that intellectual property rights are part of a “subtle and complex system of private empowerment” that exists to “enable private parties to engage in the activity of investment in innovation, authorship, and development of positive relationships with customers”); see also Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 118 (1990) (“Except in the rarest case, we should treat intellectual and physical property identically in the law.”).

8. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970).

9. See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 233 (1918). The “hot news” tort originated *International News Service*, which is discussed *infra* Section I.

10. See Minjeong Kim, *Show Me the Money: The Economics of Copyright in Online News*, 58 J. COPYRIGHT SOC'Y U.S. AM. 301, 305 (2011).

11. *Int'l News Serv.*, 248 U.S. 215.

shifts the Note's focus to the Second Circuit Court of Appeals's recent decision in *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*.¹² The Second Circuit is the highest court that has attempted to define the parameters of what constitutes a viable "hot news" cause of action in the modern era. Finally, Part III argues that although the Second Circuit and several district courts have systematically limited the scope of what constitutes a "hot news" claim, the tort nonetheless remains a viable cause of action for those who seek to protect the traditional newspaper industry from the challenges presented by the world of online aggregation.¹³ However, Part III also notes that the Second Circuit's decision in *Barclays II* does not represent a sure win for traditional newspaper businesses and outlines certain detrimental problems that the court created, but did not address.

I. INTRODUCTION TO "HOT NEWS" MISAPPROPRIATION

The "hot news" misappropriation claim originated in the Supreme Court case *International News Service v. Associated Press*.¹⁴ Both International News Service ("INS") and Associated Press ("AP") were powerful news-gathering services that provided stories of a national and international scope to local newspapers throughout the United States that subscribed to their respective wire services.¹⁵ William Randolph Hearst, INS's owner, had been critical of U.S. entry into World War I on the side of Great Britain.¹⁶ In response, Great Britain prohibited INS reporters from sending cable telegrams to the United States.¹⁷ INS thus was not as well-positioned as AP to provide the latest war

12. *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, 650 F.3d 876 (2d Cir. 2011), *rev'g* *Barclays Capital, Inc. v. Theflyonthewall.com. (Barclays I)*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

13. Whether the traditional news industry should be protected, however, is beyond the scope of this Note.

14. *Int'l News Serv.*, 248 U.S. 215. Though this is when the U.S. Supreme Court first recognized a "hot news" interest, the nature of property rights in the news had been contested in American courts since at least the latter part of the nineteenth century. *See, e.g.*, *Kiernan v. The Manhattan Quotation Tel. Co.*, 50 How. Pr. 194 (N.Y. Sup. Ct. 1876); *see generally* Eric R. Claeys, *Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyamkrishna Balganesch ed., forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889231 (describing "hot news" and the tort's relation to the concept of property rights).

15. Isbell, *supra* note 4, at 14.

16. *See id.*

17. *See id.*

news to its subscribers.¹⁸ INS then engaged in various “questionable practices”¹⁹ to ensure its access to AP’s pre-publication materials.²⁰

The issue before the Court was INS’s practice of acquiring information about war developments from copies of AP newspapers on the East Coast and rewriting the stories to send to INS’s subscriber newspapers throughout the United States, especially those on the West Coast.²¹ The time-lag involved in this practice sometimes led to INS-subscriber papers publishing stories before AP-subscriber papers, even though only AP had spent money on the news-gathering resources and manpower to document the event(s) at issue.²² The Court had to decide whether INS could be lawfully enjoined from appropriating AP’s “news” to sell as a product to INS’s clients.²³ AP claimed that INS’s actions were a violation of AP’s “property right in the news” and constituted “unfair competition in business.”²⁴

AP, however, did not bring a copyright claim against INS; copyright law did not apply because AP’s “news matter [was] not copyrighted” and was practically uncopyrightable “because of the large number of dispatches that [were] sent daily, and, according to [AP]’s contention, news [was] not within the operation of the copyright act [of 1909].”²⁵ Furthermore, the Supreme Court noted that although news articles could be copyrighted, the “news elements” within them—the information respecting current events contained in the literary production” (i.e. the facts)—could not.²⁶ For its side, INS argued that AP would be granted a “despotic monopoly” if the Court agreed with AP that news had property value.²⁷ INS said that permitting an

18. *See id.*; *see also* Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News v. Associated Press*, 50 U. CHI. L. REV. 411, 412 (1983) (describing INS’s actions).

19. *See* Isbell, *supra* note 4, at 14.

20. *See id.* The “questionable practices” included bribing AP employees and employees who worked for AP subscriber papers. *Id.*; *see also* Case Comment, *Injunction to Protect the Right of Property in News*, 18 COLUM. L. REV. 257, 257–61 (1918) (describing the *International News Service* case).

21. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 229–32 (1918); *see also* Baird, *supra* note 18, at 412–15 (providing background history).

22. *Int’l News Serv.*, 248 U.S. at 238–39.

23. *Id.* at 232.

24. *Id.*

25. *Id.* at 233.

26. *Id.* at 234.

27. *News Pirating Case in Supreme Court*, N.Y. TIMES (May 3, 1918), <http://query.nytimes.com/mem/archive-free/pdf?res=f50d1ff6345b11738dddaa0894dd405b888df1d3>.

injunction against its practices would grant AP a “general” or “absolute property” right in the news.²⁸

Instead of deciding whether a property right existed in news facts, the Supreme Court instead recognized a “quasi-property” interest in the news information that AP gathered and distributed.²⁹ The Court distinguished between an absolute property right in the news against the public and a property right against a direct competitor, and ruled that AP had the latter but not necessarily the former.³⁰ The AP could not, for example, sue an individual newspaper purchaser who spread the factual content of a news article “for any legitimate purpose not unreasonably interfering with [AP]’s right to make merchandise of it.”³¹ However, when the facts in news taken from AP were transmitted for commercial use, in direct competition against AP, and within a certain period of time, this practice amounted to unfair competition,³² and a time-based injunction against INS was proper.³³

Thus, while the Supreme Court denied copyright protection for facts, in its decision it sought to devise a way to reward AP for its news-gathering efforts. It chose, in the words of one scholar, “to steer a middle path [between an absolute property right and none at all,] and in the process articulated a framework that has since remained as novel as it was

28. *Id.*

29. *See Int’l News Serv.*, 248 U.S. at 236.

30. *Id.* at 236–40.

31. *Id.* at 239–40.

32. *Id.* The court describes misappropriation in this context as:

[T]aking material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that [INS] in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of [AP]’s members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference 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 defendant in competition [INS] because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

Id.

33. Although the majority in *International News Service* did not specifically outline the time length of this injunction, Justice Holmes in his concurrence saw it as a matter of hours. The key is to figure how long a particular news item has value because it has not yet been disseminated to the public. *See id.* at 247–48 (Holmes, J., concurring).

controversial.”³⁴ In doing so, the Court shaped the common law tort of misappropriation to attempt to address the instance when “one competitor free rides on another competitor’s work at the precise moment when the party whose work is being misappropriated was expecting to reap rewards for that work.”³⁵ This cause of action became known as a “hot news” misappropriation claim due to the subject matter at issue and time-sensitive nature of the information appropriated.³⁶

A. FROM *INTERNATIONAL NEWS SERVICE* TO THE 1976 COPYRIGHT ACT

In the decades following *International News Service*, courts were ambivalent about the scope and applicability of “hot news” misappropriation. In 1929, the Second Circuit in *Cheney Bros. v. Doris Silk Corp.* limited the tort’s applicability.³⁷ Plaintiff, a silk manufacturer, relied on *International News Service* to ask the court to grant a temporary injunction to prevent Defendant from copying Plaintiff’s designs that were produced every season.³⁸ The court refused to apply *International News Service*, noting that the holding in the case applied specifically to “situations substantially similar” to that case (that is, in the news industry) and did not create a federal common-law patent or copyright doctrine.³⁹ Judge Learned Hand noted that ruling otherwise “would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter” at issue—federal statutory

34. Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM L. REV. 419, 422 (2011). Balganesh argues that in the years since *International News Service*, most courts, including the Second Circuit, have adopted a “propertarian rhetoric” that the majority’s decision claimed to have avoided. *Id.* at 423.

35. Isbell, *supra* note 4, at 14.

36. *See, e.g.*, Balganesh, *supra* note 34, at 422.

37. 35 F.2d 279 (2d Cir. 1929) (declining to extend “hot news” misappropriation protection to silk designs, which change frequently), *cert. denied*, 281 U.S. 728 (1930). New York courts, however, did allow other fashion designers to use misappropriation to protect their products. *See, e.g.*, *Doir v. Milton*, 155 N.Y.S.2d 443 (N.Y. Sup. Ct. 1956); *Margolis v. Nat’l Bellas Hess Co.*, 245 N.Y.S. 175 (N.Y. Sup. Ct. 1931). The broadening of *International News Services* at the state level also occurred in other industries. *See, e.g.*, *Metropolitan Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950) (preliminary injunction against the recording, copying, and sale of certain musical performances); *Mut. Broad. Sys., Inc. v. Muzak Corp.*, 30 N.Y.S.2d 419 (N.Y. Sup. Ct. 1941) (temporary injunction barring defendant from simultaneously transmitting baseball game broadcasts). The Second Circuit would address this seeming discord between it and state courts and decisively limit the reach of misappropriation in *National Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). *See infra* note 57.

38. *Id.* at 279–80.

39. *Id.* at 280.

intellectual property laws.⁴⁰ After *Erie Railroad Co. v. Tompkins*⁴¹ abolished federal common law in diversity of citizenship cases (the basis for federal jurisdiction under *International News Service*), some commentators argued that *Erie* had killed the “hot news” misappropriation doctrine *International News Service* had created at the federal level.⁴²

The kernel of the misappropriation tort, however, survived.⁴³ Indeed, when federal copyright law was overhauled in 1976, Congress explicitly recognized the persistence of misappropriation as a cause of action separate from intellectual property law that would not be preempted in all instances. Federal preemption was codified in the Copyright Act of 1976 as follows:

(a) [A]ll 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 . . . come within the subject matter of copyright as specified by sections 102 and 103 . . . 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.*⁴⁴

Yet Congress did not seek to eliminate state common law or statutes that protect rights other than those mentioned in the Act; the Act does not limit rights or remedies respecting “subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103”⁴⁵ and “activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”⁴⁶ The legislative history of the 1976 Act mentions that § 301 does not completely preempt misappropriation under the federal intellectual property regime, and the legislative history specifically cites the *International News Service* case as a scenario where misappropriation could survive such preemption:

“Misappropriation” is not necessarily synonymous with copyright, and thus a cause of action labeled as “misappropriation” is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right

40. *See id.*

41. 304 U.S. 64 (1938).

42. *See* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 974 (5th ed. 2009) (citing James Treece, *Patent Policy and Pre-emption: The Stiffel and Compco Cases*, 32 U. CHI. L. REV. 80 (1964)); Balganes, *supra* note 34, at 422.

43. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38(b) (1995).

44. 17 U.S.C. § 301(a) (2006) (emphasis added).

45. *Id.* § 301(b)(1).

46. *Id.* § 301(b)(3).

equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting ‘hot’ news, whether in the traditional mold of [*International News Service*], or in the newer form of data updates from scientific, business, or financial data bases.⁴⁷

Therefore, the 1976 Copyright Act did not eliminate the possibility of state misappropriation claims, and *International News Service*-like “hot news” misappropriation claims have seemingly resurged in cases where parties seek to defend what they argue constitutes “property”⁴⁸ that cannot be protected under federal intellectual property laws (or bring hot news misappropriation claims addition to regular intellectual property claims).⁴⁹

47. See H.R. REP. NO. 94-1476, at 132 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5748. This part of the legislative history contemplates an expansion of “hot news” into other fields, but, as this Note indicates, courts, in particular the Second Circuit, have decidedly limited the scope of the tort to the news industry. See *infra* Sections I.B, II.C.

48. The scholarly literature has struggled in interpreting whether *International News Service* created a property right in the news. Richard Epstein, for example, argues that *International News Service* definitively decided the issue of property in the news, holding that such a right does exist. Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in the News*, 78 VA. L. REV. 85, 112–13 (1992). On the other hand, Balganesh notes that the Supreme Court explicitly rejected that its decision created a property right in the news because such a scheme would not have addressed the problems in the news industry, see *infra* note 107, and the Court instead established an alternative framework based on unfair competition and unjust enrichment. Balganesh, *supra* note 34, at 448–51. But see Richard A. Epstein, *The Protection of “Hot News”: Putting Balganesh’s “Enduring Myth” About International News Services v. Associated Press in Perspective*, 111 COLUM. L. REV. SIDEBAR 79, 80 (2011) [hereinafter Epstein, *Protection of “Hot News”*] (arguing that “[t]here is no myth [of property rights in the news] to dispel” since Epstein’s original piece did not refer to “property” in the conventional sense—i.e. as holding an exclusive right against the world). Although *International News Service* did not seek to create a property right in the news, however, “hot news” claimants in the news industry have adopted, and the Second Circuit has interpreted in the modern era, a “propertarian rhetoric” when discussing *International News Service*. See Balganesh, *supra* note 34, at 423–25. Treating factual information as a form of property gives a news industry claimant three consequential benefits: “(1) the recognition and validation of an ex ante licensing market for time sensitive news; (2) the increased emphasis on the in rem or nonrelational nature of the entitlement in misappropriation; and (3) the use of injunctive relief as the default remedy in hot news cases.” *Id.* at 431.

49. See, e.g., *Standard & Poor’s Corp. v. Commodity Exch., Inc.*, 683 F.2d 704 (2d Cir. 1982); *Bd. of Trade v. Dow Jones & Co.*, 439 N.E.2d 526 (Ill. App. Ct. 1982); *Columbia Broad. Sys., Inc. v. Melody Recordings, Inc.*, 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975); see also Edmund J. Sease, *Misappropriation is Seventy-Five Years Old; Should We Bury It or Revive It?*, 70 N.D. L. REV. 781, 801–02 (1994) (noting that fourteen states have a similar cause of action while only two, Massachusetts and Hawaii, have directly repudiated it).

B. “HOT NEWS” IN THE SECOND CIRCUIT POST-1976 AND BEFORE
BARCLAYS II

The Second Circuit Court of Appeals is the highest court in the United States to address the viability and parameters of a “hot news” cause of action in the modern era.⁵⁰ In 1997, the court in *National Basketball Ass’n v. Motorola, Inc.*⁵¹ held that, although limited, an *International News Service*-like claim could be a valid cause of action not subject to § 301 preemption.⁵²

In the case, Defendant Motorola created and sold a pager called the SportsTrax that would continually update its users about NBA games.⁵³ Motorola employed people who would gather information about NBA games either by watching or listening to the game, and then these employees would upload the information for SportsTrax subscribers.⁵⁴ The NBA offered a similar service, Gamestats, to its customers.⁵⁵ The District Court for the Southern District of New York found that Motorola was liable under the state-law “hot news” misappropriation claim because Motorola “had unlawfully misappropriated the NBA’s property rights in its games.”⁵⁶ Motorola then appealed to the Second Circuit, which had to decide if federal copyright law preempted NBA’s “hot news” claim or whether it survived as a separate claim.

The Second Circuit found that an *International News Service*-like “hot news” misappropriation claim still existed in the modern era and would survive federal copyright preemption whenever an “extra element” existed in the claim that dealt with a right the federal intellectual property laws did not cover.⁵⁷ However, the Second Circuit suggested that this “extra element” exists only when:

50. See Balganes, *supra* note 34, at 422. Of the states that have adopted a “hot news” cause of action, New York is the most pertinent since the Second Circuit has chosen to define just what *International News Service* means in the modern era. *Id.* at 422. See, e.g., *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, 650 F.3d 876, 907 (2d Cir. 2011); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

51. *Nat’l Basketball Ass’n*, 105 F.3d 841 (2d Cir. 1997).

52. See *id.* at 852 (“Our conclusion, therefore, is that only a narrow ‘hot-news’ misappropriation claims survives preemption for actions concerning material within the realm of copyright.”).

53. *Id.* at 841–45.

54. *Id.*

55. *Id.*

56. *Id.* at 848.

57. See *id.* at 852. In establishing that “hot news” misappropriation survives post-1976, however, the Second Circuit directly rejected previous theories of misappropriation that had been advanced at the New York state level and had expanded the reach of *International News Services* to include activities which the courts now saw as under the scope of copyright law.

(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 plaintiff; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product that its existence or quality would be substantially threatened.⁵⁸

Under these factors, the Second Circuit overturned the district court's decision and held that the NBA did not present a valid "hot news" claim because it did not show "any damage to any of its products based on free-riding by Motorola."⁵⁹ In other words, Motorola's alleged misappropriation "did not undermine the financial incentive to continue promoting, marketing, and selling professional basketball games."⁶⁰ Although the tort remained alive, according to one scholar, "the modern form of the [hot news] misappropriation doctrine thus affords plaintiffs some limited copyright-like protection for facts under narrowly defined circumstances."⁶¹

II. *BARCLAYS II*: THE "HOT NEWS" KILLER?

The Second Circuit Court of Appeals, in 2011, ruled on whether the "hot news" misappropriation tort could be applied in instances when the suing party creates news. In *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, the Second Circuit held that an online financial news aggregator did not

See id. at 851–52. ("The broad misappropriation doctrine relied upon by the district court [based on concepts such as commercial immorality or society's ethics] is, therefore, the equivalent of exclusive rights in copyright law" because "[s]uch concepts are virtually synonymous with wrongful copying and are in no meaningful fashion distinguishable from infringement of a copyright."). Thus, in practice, the Second Circuit's decision limited the application of "hot news" misappropriation in industries that at the state level had been successful in using the tort to protect their products through temporary injunctions. *See id.* (noting that state cases such as *Metropolitan Opera Ass'n* and *Mut. Broad. Sys.*, highlighted *supra* note 37, would not have been able to proceed under misappropriation after the enactment of the 1976 Copyright Act). However, the Second Circuit in 2011 would make clear that "hot news" misappropriation still protects the traditional news industry. *See infra* Sections II.C, III; *see also* Frank C. Gomez, Note, *Misappropriation: Washington Post v. Total News, Inc.*, 13 BERKELEY TECH. L.J. 21, 28–29 (1998) (illustrating how "hot news" misappropriation might still protect the traditional news industry after *National Basketball Ass'n*).

58. *See Nat'l Basketball Ass'n*, 105 F.3d at 850. *But see, infra* Section II.C (explaining that in *Barclays II* the Second Circuit would say that this supposed "test" is only one a series of tests presented in *NBA* that has no precedential value in deciding the existence of an "extra element").

59. *Nat'l Basketball Ass'n*, 105 F.3d at 854.

60. Isbell, *supra* note 4, at 17.

61. *Id.*

engage in “hot news” misappropriation when it published, on its website for a profit, the confidential financial recommendations that several financial firms had created for their select actual or potential subscribers.⁶² At first glance, this Second Circuit decision presumably limits the reach of the already-weakened “hot news” tort because it appears to present a parallel *International News Service*-like factual scenario, but one in which the court does not find misappropriation. Accordingly, the tort could not be used in place of, or in addition to, Posner’s copyright extension proposal to protect the traditional news industries from the threats of the online world.⁶³

However, as this Part will argue, the Second Circuit decision in *Barclays II* actually does away with the precedential constraints of the *NBA* “tests”⁶⁴ and instead attempts to develop a more streamlined way to distinguish who can make a valid “hot news” claim. The Second Circuit formulates a “make versus break” distinction to analyze direct competition and free-riding between two industries.⁶⁵ In doing so, the court draws a line between information makers and information gatherers.⁶⁶ The Second Circuit notes that “creating”/“making” news is not the same as “acquiring”/“breaking” news; the financial firms do the former while the online news aggregator does the latter.⁶⁷ Thus, if Company A creates valuable information and Company B reports Company A’s information, Company A cannot claim its creation is news in order to make a tortious claim because the *International News Service* decision only protects “acquired” and not “created” information.⁶⁸ Though the Second Circuit’s “make versus break” distinction is not without its problems, discussed *infra* Part III, the decision at least re-emphasizes the one point that has not been lost in “hot news” jurisprudence since the *International News Service* decision: that traditional news industries can still bring a “hot news” misappropriation claim that may survive federal copyright preemption.⁶⁹

62. See *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, 650 F.3d 876, 907 (2d Cir. 2011), *rev’g* *Barclays Capital, Inc. v. Theflyonthewall.com. (Barclays I)*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

63. Posner, *supra* note 1.

64. As the *Barclays II* court explains in its decision, the *National Basketball Ass’n* court actually outlined two five-part tests and one three-extra element test that are inconsistent with each other, a point discussed *infra* Section II.C.

65. See *Barclays II*, 650 F.3d at 903–06.

66. See *id.*

67. See *id.* at 903–04.

68. See *id.*

69. See *id.* at 905–06.

A. THE PARTIES AND FACTUAL BACKGROUND

In *Barclays Capital Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, Plaintiffs-Appellees were several prominent financial firms (Firms) that provide securities brokerage services to their customers.⁷⁰ In connection with their businesses, the Firms produce daily research reports and recommendations to be distributed to their clients or prospective clients before major trading markets open.⁷¹ These items give recipients an “informational advantage,”⁷² and they are an integral part of the Firms’ business models insofar as recipients pay the Firms a brokerage commission fee to execute a trade based on the Firms’ information.⁷³ In particular, the Firms’ recommendations are “likely to spur any investor into making an immediate trading decision.”⁷⁴

Defendant-Appellant, Theflyonthewall.com (Fly), is an online financial “news aggregator”⁷⁵ that charges twenty-five to fifty dollars a month for access to its website.⁷⁶ Through its online news feeds and circulation to third-party distributors,⁷⁷ Fly provides its paid subscribers with access to the Firms’ recommendations—access that would otherwise only be available to the Firms’ clients, which primarily entail “hedge funds, private equity firms, pension funds, endowments, and wealthy investors.”⁷⁸ The recommendations

70. *See id.* at 878.

71. *See id.* at 879.

72. *Id.* This advantage has two parts: learning the contents of the report before most people, and, more importantly, having knowledge of *the fact* that the Firms make certain recommendations, which “is likely to result in purchases or sales of the securities in question . . . and a corresponding short-term increase or decrease in the securities’ markets price.” *Id.* The Second Circuit recognized that these firms have market-moving capacity at least in the short term simply by virtue of giving *any* kind of information, a point which becomes important in the distinction the court creates between those entities that “make” news and those that “break” it. *See infra* Section II.C.

73. *Barclays II*, 650 F.3d at 881–82. The value of the reports and recommendations are directly connected to their “informational advantage.” As a result, most of the trading based on this information happens in the early hours of the business day when the information is held only by a relative few and therefore is more valuable. *Id.*

74. *Id.* at 881 (citing *Barclays Capital, Inc. v. Theflyonthewall.com (Barclays I)*, 700 F. Supp. 2d 310, 316 (S.D.N.Y. 2010), *rev’d*, *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, 650 F.3d 876 (2d Cir. 2011)).

75. A rough definition of a “news aggregator” is as “a website that collects headlines and snippets of news stories from other websites. Examples include Google News and the Huffington Post.” *Barclays II*, 650 F.3d at 882. However, not all “news aggregators” are created or function in the same way, a point analyzed *infra* Part III.

76. *Barclays II*, 650 F.3d at 883.

77. These include trading platforms such as Bloomberg and Thomson Reuters. As the court notes, these services “also separately provide authorized dissemination of the Firms’ Recommendations.” *Id.* at 882.

78. *Id.* at 880.

typically become available in the form of one-line headlines each business day before the New York Stock Exchange opens at 9:30 A.M. Eastern Standard Time.⁷⁹ During the time period covered by this lawsuit, the excerpts from the research reports that underlie these recommendations would sometimes accompany them.⁸⁰ After the Firms informed Fly in March and April 2005 that their practice allegedly infringed on the Firms' copyrights and was tortious under New York's doctrine of "hot news" misappropriation, Fly removed the detailed excerpts from the research papers, but continued to post the Firms' recommendations on its website.⁸¹

B. LEGAL ALLEGATIONS AND THE DISTRICT COURT DECISION

The Firms then sued Fly in the District Court for the Southern District of New York based on two causes of action: copyright infringement due to Fly's excerpting of seventeen research reports in February and March of 2005, and a "hot news" misappropriation claim based on Fly's continual publication of the Firms' recommendations on its website.⁸² Before the trial, Fly agreed to drop its First Amendment defense claim, and it also abandoned its fair use claim.⁸³ For the copyright infringement claim, the district court awarded the Firms statutory damages (with prejudgment interest), attorney's fees, and a permanent injunction to restrain Fly from further infringement of the copyrighted material.⁸⁴ For the misappropriation claim, the district court found Fly liable and enjoined it from publishing the Firms' recommendations for a period ranging from thirty minutes to several hours after their release.⁸⁵ Fly appealed the ruling only as to the misappropriation claim,⁸⁶ arguing in

79. *Id.* at 881.

80. *Id.* at 885.

81. *Id.*

82. *Id.*

83. *Id.* at 886–87.

84. *Barclays Capital, Inc. v. Theflyonthewall.com (Barclays I)*, 700 F. Supp. 2d 310, 328–31 (S.D.N.Y. 2010), *rev'd on other grounds*, *Barclays Capital, Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, 650 F.3d 876 (2d Cir. 2011).

85. *Barclays II*, 650 F.3d at 887.

86. Fly conceded infringement on the copyright of the seventeen reports at issue. *Id.* at 886. In order to successfully create an argument for copyright infringement, however, the Firms had gone to the lengths of registering all seventeen reports with the Copyright Office and adjoining copies of the certificates of registration to the original district court complaint for the purpose of being able to hold Fly liable. *See Barclays I*, 700 F. Supp. 2d at 328; Complaint at Ex. A, *Barclays I*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010) (No. 1:06-CV-04908). As Part I of this Note indicates, this method is impractical for traditional news outlet for two reasons: (1) the news industry is fast-paced, and (2) there are uncopyrightable aspects of the news—the facts—that nonetheless have been gathered through some expense and hold some temporal value. *See supra* Part I.

part that the Firms had not established a “hot news” misappropriation under New York state law and that the Copyright Act preempted the misappropriation claim.⁸⁷

C. THE SECOND CIRCUIT’S RULING

The issue for the Second Circuit was therefore whether the Firms had presented the “extra element” required to survive federal copyright preemption. The Second Circuit in *Barclays II* wrote that although it was bound to follow precedent with regard to the existence of *International News Service*-like claims, the *National Basketball Ass’n* court had actually provided one three-factor test and two five-factor tests to determine what could constitute such a claim⁸⁸ that were not entirely consistent and thus could not have precedential value.⁸⁹

The *Barclays II* court instead focused on the factor that *NBA* had listed as “indispensable” to its ruling: the existence or absence of defendant’s “free-riding” on plaintiff’s efforts.⁹⁰ First, the court determined that the Firms and Fly each sell different products: “[t]he Firms are making the news; Fly, despite the Firms’ understandable desire to protect [the news of their recommendations], is breaking it.”⁹¹ Unlike in *International News Service*, where Defendant appropriated the news gathered by Plaintiff and sold it as if Defendant had collected it, Fly was selling the news that the Firms had made.⁹² Second, the court also noted that the Firms’ “hot news” claim sought to protect recommendations that are created and not acquired, whereas the

87. *Barclays II*, 650 F.3d at 890.

88. *Id.* at 898–902. The court also goes through an extended discussion of what constitutes precedent, but analyzing their reasoning goes beyond the scope of this Note. Before the *Barclays II* court declared that none of the tests in *National Basketball Ass’n* had precedential value, scholars and other commentators had generally concluded that there indeed was one single five-factor test under which to analyze “hot news” claims. *See, e.g.*, Balganes, *supra* note 34, at 423 (listing one of the five-factor sets in *National Basketball Ass’n* as the test to analyze); Amy E. Jensen, Note, *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, 562–64 (2010) (also noting only one form of the five-factor test and indicating various courts that had used this form in their misappropriation analyses).

89. *Barclays II*, 650 F.3d at 898–902. The court also mentions how the Firms sought to “use the multiplicity of the factors-lists to their advantage” in their briefs. *Id.* at 900 n.33. “By mixing two different iterations of the factors . . . the Firms thus set forth an easier test for them to meet to avoid preemption than is actually articulated in [*National Basketball Ass’n*].” *Id.* This reasoning perhaps led the court in *Barclays II* to move away from reconciling the different factors from the various tests in *National Basketball Ass’n*.

90. *See id.* at 901–07.

91. *Id.* at 902.

92. *See id.* at 903–04.

original *International News Service* language protects only acquired material.⁹³ Third, nothing in the district court's opinion or the record suggested that a significant portion of the Firms' profits were being diverted to Fly, its subscribers, or anyone else with access to the service.⁹⁴ Finally, based on the difference between the two products, the *Barclays II* court concluded that Fly did not free-ride because it had created its own separate "substantial organized effort" to report financial news—"factual information on Firm Recommendations."⁹⁵ Therefore, because the "free-rider" element was missing, the Firms' "hot news" claim was not exempted from federal preemption.⁹⁶

Although the *Barclays II* court lists several factors related to "free-riding," listed above, that encompass its decision, these all stem from the court's creation of a "make versus break" distinction in the "hot news" environment. The Second Circuit will be less likely to find a "hot news" misappropriation when the two parties at issue are not directly competing.⁹⁷ In the world of the "hot news" tort post-*Barclays II*, the Second Circuit recognizes the existence or absence of a competitive relationship as one of "make versus break."⁹⁸

The *Barclays II* court noted that in the case at hand the Firms only wanted to protect their financial recommendations, "something they *create* using their expertise rather than *acquire* through efforts akin to reporting."⁹⁹ When a company creates valuable information,¹⁰⁰ then it is the business of "making" the news; when a company gathers information akin to news reporting, then it is in the business of breaking the news.¹⁰¹ Because the *Barclays II* court found that the Firms "made" the news and Fly "broke" such news, the rest

93. *Id.* at 903.

94. *See id.* at 904. The *Barclays II* court notes that this is relevant given that *International News Service* described the defendant's tortious behavior as "amounting to an unauthorized interference with the normal operation of complainant'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." *Id.* (emphasis added).

95. *Id.* at 905.

96. *Id.* at 905–07.

97. *See id.* at 903–05.

98. *See id.* at 907 (concluding that a Firm's ability to create news does not give it the right to control who breaks the news).

99. *Id.* at 903 (emphasis added).

100. *See id.* at 903–04. The court wrote that created information is valuable when it is "the result of organization and the expenditure of labor, skill, and money, and which is (presumably) salable by a Firm for money." *Id.*

101. *See id.*

of the Second Circuit's "free-riding" analysis was dictated by this newly-created distinction.¹⁰²

In addition to the "make versus break" distinction, the Second Circuit considered, at least in dicta, that its decision could potentially either prevent or allow the despotic monopoly that INS had warned about in the 1918 Supreme Court case *International News Service*. As the Second Circuit noted, there were two interests that could be affected by their decision: (1) an interest in incentivizing the Firms to continue to research and report on enterprises whose securities are publicly traded, and (2) an interest in the right of the public, particularly those who trade in the shares mentioned in the recommendations, to know what the Firms are saying.¹⁰³ If the Second Circuit had granted the Firms relief under a "hot news" claim, then the court would have allowed a court-enforced monopoly of information that favors one group of traders over another to flourish.¹⁰⁴ A decision in favor of the Firms would have made the Firms the prime, if not the only, transmitter of impactful financial news. The Firms would then have the sole ability to both "make" and "break" news of value that could have consequences in the public arena. Although the Second Circuit noted that this did not affect its analysis, in practice the decision favors the interest in sharing and disseminating the information over maintaining an intact incentive for the Firms.¹⁰⁵

A similar line of reasoning can be found in *International News Service*. As Shyamkrishna Balganesh notes, the Supreme Court in that case also tried to balance two contending values, albeit with one key distinction:

The [*International News Service* decision] needed to provide *news collectors* with a sufficient incentive to continue to invest in the process of collecting news and information with promptness. All the same, it needed to recognize and deal with the fact that news was a common pool resource, whose ultimate social value lay in its widest possible dissemination to the public.¹⁰⁶

Whereas both cases acknowledge the need to preserve the dissemination of what is considered news to the public at large, only *International News Service* makes an argument for preserving the incentives for the news industry "collectors" to continue their practices. Since *Barclays II* distinctively refers to the Firms as "news makers" and not "news breakers," they are thus outside

102. *See id.* at 903–05.

103. *Id.* at 896 n.29.

104. *Id.*

105. *See id.*

106. *See* Balganesh, *supra* note 34, at 444.

the scope of news collection and, therefore, also not covered by the protection envisioned under *International News Service*.¹⁰⁷

III. THE CONSEQUENCES FOR “HOT NEWS” MISAPPROPRIATION IN LIGHT OF *BARCLAYS II* IN THE TRADITIONAL NEWS INDUSTRIES AND BEYOND

The Second Circuit’s “make versus break” distinction clarifies that “hot news” misappropriation survives. Indeed, the court provides an instance of when a “hot news” claim is likely to have the extra element required to survive preemption:

107. See *Barclays II*, 650 F.3d at 905 (“[I]n talking about a [hot news] claim . . . we are mindful that the [*International News Service*] court was tightly focused on the practices of the parties to the suit before it: news, data, and the like . . .”). Balganesch provides an overview of the unique problem in the news industry that *International News Service* sought to address in its decision: “While the [hot news] doctrine is directed at deterring free riding, it does so in the context of solving a collective action problem that was and is unique to the newspaper industry, related to the practice of cooperative newsgathering.” Balganesch, *supra* note 34, at 426. Newspapers realized early on that spending time and resources to collect the same news accessible to the public was a needless expenditure. Thus, a practice developed, first informally and later formally, whereby these newspapers would pool their resources into collectives that cooperated with one another and shared information. Free-riding would only be troublesome because it could affect this market cooperation and create a collective action problem, not because it deprived any one source of an intangible it produced—thus explaining why the *International News Service* Court chose to frame its decision in terms of unfair competition and unjust enrichment that offered a gain-based remedy instead of an absolute property right that would have granted a “first-possession-based exclusive entitlement in the news.” See *id.* at 426. But see Epstein, *Protection of “Hot News,” supra* note 48, at 79 (arguing that by the time of *International News Service*, most newspapers had already solved their collective action problems, “such that the ultimate litigation [between AP and INS] operates on the same principles that would govern a dispute between natural persons.”). The Second Circuit’s reasoning and language strengthens Balganesch’s thesis that *International News Service* did not create, and in fact sought to avoid, the creation of a property right in the news. The court writes that applying the “hot news” tort to the Firms’ recommendations would provide protection by making the information available only to the Firms and their licensees (just as an absolute property right would have provided ex ante protection for AP in *International News Service*), but the court uses language rooted in the doctrines of unfair competition and unjust enrichment to describe why this kind of protection should not be granted:

[a decision in favor of the Firms] would ensure that the authorized recipients of the Recommendations would in significant part be profiting because of their knowledge of the fact of a market-moving Recommendation before other traders learn of that fact . . . [these people] would literally be profiting at the expense of persons from whom such knowledge has been withheld who also trade in the shares in question ignorant of the Recommendation.

Barclays II, 650 F.3d at 896 n.29.

If a Firm were to collect and disseminate to some portion of public facts about securities and recommendations in the brokerage industry (including, perhaps, such facts it generated itself—its own Recommendations), and were Fly to copy the facts contained in the Firm’s hypothetical service, it might be liable to the Firm on a ‘hot news’ misappropriation theory.¹⁰⁸

Therefore, a “hot news” claim likely still exists when both industries “break” the news, a situation likely to arise between companies that engage in news-gathering efforts or allege to do so. Furthermore, although one amicus brief asked the *Barclays II* court to repudiate the “hot news” tort altogether,¹⁰⁹ the court decided against it, stating: “[w]ere we to [address the viability of the ‘hot news’ tort *vel non*], though, plainly we would be bound by the conclusion of the previous Second Circuit panel in [*National Basketball Ass’n*] that the tort survives.”¹¹⁰

A. PREVIOUS TRADITIONAL NEWS INDUSTRY CASES ANALYZED UNDER *BARCLAYS II*

Given the court’s clear statement that the tort survives, it is important to consider how it could be applied successfully in modern circumstances. Although the Second Circuit has not heard any recent cases where a “hot news” claim has survived preemption, applying the “make versus break” distinction to cases that have settled suggests that perhaps such a claim survives when more traditional news agencies are the plaintiffs.

Two cases illustrate this point. In *Associated Press v. All Headline News*,¹¹¹ AP sued All Headline News (“AHN”), an online news aggregator¹¹² that had

108. *Barclays II*, 650 F.3d at 905–06.

109. Brief for Google, Inc. and Twitter, Inc. as Amici Curiae Supporting Reversal at 3, *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv), 2010 WL 2589770.

110. *Barclays II*, 650 F.3d at 890.

111. 608 F. Supp. 2d 454 (S.D.N.Y. 2009). The court refused to dismiss AP’s hot news claim because AHN’s briefing papers had “lumped” it together with AP’s trademark claim, thus failing to properly analyze the boundaries of the tort. *See id.* at 464. The parties, however, eventually settled out of court and the hot news claim was never heard on the merits. *See* Order of Dismissal, No. 1:08-CV-323, ECF. No. 42 (S.D.N.Y. dismissed June 15, 2009).

112. The *Barclays II* court described an aggregator as “a website that collects headlines and snippets of news stories from other websites.” *Barclays II*, 650 F.3d at 883 (citation omitted). As Kimberley Isbell explains, however, there are several kinds of news aggregators that can be categorized based on the sources the aggregators use, the topics on which they focus, the amount of content they take, and what they do with the information (whether they copy and display it verbatim or use it as part of a larger narrative). *See* Isbell, *supra* note 4, at 2–6.

previously been a licensee of AP's wire service for "hot news" misappropriation and other claims.¹¹³ AP alleged that AHN sourced news from AP stories without attribution and rewrote some of AP's stories to place the material on AHN's website.¹¹⁴ Similarly, in *Washington Post v. Total News*,¹¹⁵ the plaintiffs—which included the Washington Post, the Cable News Network, and Reuters—sued Total News ("TN") in part alleging that TN "openly free-rides on plaintiff's efforts by simply lifting plaintiff's content wholesale and selling advertising based on proximity to that content" on TN's website.¹¹⁶

Although *All Headline News* and *Total News* were settled out of court, both involve a "hot news" misappropriation claim. Under a *Barclays II* analysis, a court would likely decide that the AP and Washington Post staffs do not "create" news in the same way that the Firms' staffs in *Barclays II* created their financial reports.¹¹⁷ Rather, the plaintiffs in both cases "acquire" the news through traditional newsgathering efforts, methods that *International News Service*, *Barclays II*, and *National Basketball Ass'n* describe.¹¹⁸ Similarly, based on the description of the online news aggregators at issue,¹¹⁹ both TN and AHN are in the same business of "breaking" the news for an audience,¹²⁰ news that had been gathered but not created (at least in most instances) by the plaintiffs.¹²¹ Therefore, under a *Barclays II* analysis it is likely that today the

113. The other claims included copyright infringement, trademark violation, and breach of contract. *See id.*

114. *See id.* at 7.

115. *The Washington Post Co. v. Total News, Inc.*, No. 1:97-CV-01190 (S.D.N.Y. dismissed June 6, 1997).

116. *See* Complaint at ¶ 39, *The Washington Post Co. v. Total News, Inc.*, No. 1:97-CV-01190 (S.D.N.Y. dismissed June 6, 1997), available at <http://legal.web.aol.com/decisions/dlip/washcomp.html>.

117. *See Barclays II*, 650 F.3d at 903 (noting that the suit at hand focuses on the material the Firms created, not acquired).

118. *See, e.g.*, *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 238–41 (1918); *Barclays II*, 650 F.3d at 903–05; *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853–54 (2d Cir. 1997).

119. The plaintiffs described TN and AHN as outfits that merely took newspaper articles and rewrote them for the aggregator's website. *See* Isbell, *supra* note 4, at 6–7.

120. "Break" in this sense, however, does not mean that TN and AHN were necessarily the first to post these stories (as had sometimes happened in *International News Service* when INS would publish first on the West Coast the stories it had misappropriated from AP). In this case, TN and AHN reprinted the stories the news companies sought to break themselves to readers.

121. In *All Headline News*, AP described itself as engaging "in effort and great expense to get access to news and to gather, report, package and transmit news stories from every country in the world" while calling AHN an organization that "does not undertake any original reporting" and "hires poorly paid individuals to find news stories on the internet and

plaintiffs would have still had a stronger claim of “hot news” misappropriation claim than the Firms in *Barclays II* did.¹²²

The one notable exception to such a claim would occur when the plaintiff’s reporting of news was in itself news. Under *Barclays II*, this situation would be akin to the Firms’ “creating” the news, and a “hot news” misappropriation claim would not prevail. The Second Circuit gives such an example when it states, for example, that “the fact that the *New York Times* endorses a particular candidate seems to us to be news. When the newspaper publishes its endorsement, that fact is widely reported, without controversy as far as we know, by other news outlets.”¹²³

B. CAN ANY ONLINE NEWS AGGREGATORS EXIST UNDER *BARCLAYS II*?

Even though traditional news agencies are the prime example of a suing party that may be able to bring a successful “hot news” claim, this does not mean that all online aggregators will lose in court. As this Note has explained, a court will first use the “make versus break” distinction to decide whether a competitive relationship exists between the entities at hand, but the analysis does not end there. Although a court using the *Barclays II* analysis will likely almost always decide that both traditional news agencies and online news aggregators are in the “breaking news” business, the court may then engage in a traditional free-riding analysis to decide if an online aggregator’s actions indeed constitute a “hot news” misappropriation.¹²⁴

prepare them for republication under the AHN banner.” *Associated Press v. All Headline News*, 608 F. Supp. 2d 454, 457–58 (S.D.N.Y. 2009) (internal quotation marks omitted). The contrasting description of both parties in *Total News* is similar. *See* Complaint at ¶¶ 7–8, *The Washington Post Co. v. Total News, Inc.*, No. 1:97-CV-01190 (S.D.N.Y. dismissed June 6, 1997), available at <http://legal.web.aol.com/decisions/dlip/washcomp.html>. Because both cases were dismissed before a full trial, a court did not scrutinize the accuracy of these statements. *See, e.g., All Headline News*, 608 F. Supp. 2d at 457 (“For the purposes of the motion [to dismiss AP’s Amended Complaint], the allegations of the Amended Complaint are accepted as true, and all reasonable inferences are drawn in favor of plaintiff Associated Press as the non-movant.”).

122. *See Barclays II*, 650 F.3d at 906 (suggesting that *All Headline News* presents facts closer to a “hot news” claim).

123. *See id.* at 904 n.38.

124. Even though the *Barclays II* majority calls Fly’s news gathering techniques a “substantial organizational effort,” *id.* at 905, the concurrence believes that these efforts were minimal, especially in light of the Firms’s own work in creating the recommendations. *See id.* at 914 (Raggi, J., concurring). Whereas the majority writes that Fly’s employees “are engaged in the financial-industry equivalent of observing and summarizing facts about basketball games and selling those packaged facts to consumers[,]” using this analogy, the Firms are actually the ones making the effort to play the game. *See id.* at 905. Therefore, it appears that the *Barclays II* court did not find free-riding because it was influenced by its determination

The two online aggregators in the litigation described in Section III.A., *supra*, do not represent how all news aggregators work. Kimberley Isbell and the Citizen Media Law Project have placed online news aggregators in four different categories: feed aggregators, specialty aggregators, user-curated aggregators, and blog aggregators.¹²⁵ Each is defined differently, and each provides a different level of content and presentation of the content that go beyond retaking a news item to place one's website. For example, blog aggregators, such as Gawker, often "add additional information or context to a story."¹²⁶ As Isbell suggests, a court is unlikely to find that case involving a blog aggregator like Gawker is entirely similar to a "spam blog or service like All Headline News" appeared to be.¹²⁷

Although the court first uses the "make versus break" distinction to define the existence or absence of a direct competitive relationship, the Second Circuit in *Barclays II* indicates that it also looks at the effort that the party being sued has put into their own enterprise when deciding whether that party has engaged in free-riding.¹²⁸ In *Barclays II*, the bar appears to be relatively low because under "make versus break" the court did not find direct competition and thus free-riding was unlikely.¹²⁹ If the Second Circuit were to find direct competition under the "break versus make" analysis—which it most likely would when deciding cases between traditional news agencies and online news aggregators—the aggregator could perhaps overcome this initial hurdle by proving both that it has an organizational structure akin to Fly and that it provides enough of a different service that prevents it from just being in the exact same "breaking news" business that

that because the Firms and Fly engaged in different business fields altogether, one could not directly free-ride from the other. *See id.* at 904–06. Thus, under the *Barclays II* rationale, even a "breaker's" minimal effort compared to that of a "maker" may prevent the "breaker" from being seen as a free-rider. *See id.* at 905–06. If free-riding can exist at all in a "maker versus breaker" suit, the bar for finding it will therefore likely be higher than a suit between just two "breakers."

125. *See* Isbell, *supra* note 4, at 2–5. Isbell notes that these categories are not universally agreed upon, but that they merely highlight the wide variety of websites that can be considered news aggregators. *Id.*

126. *See id.* at 19.

127. *Id.* Isbell does not explicitly define what a "spam blog" is in her four categories of online news aggregators, but she does offer one characteristic that can be attributed to a spam blog: "merely [rewriting] and [repurposing] the plaintiff's content." *See id.*

128. *See Barclays II*, 650 F.3d at 905–06.

129. *See id.* The Second Circuit quoted the district court in noting that Fly has its "own network and assemble[s] and transmit[s] data [it]sel[f]." *Id.* at 905. After engaging in the "make versus break" distinction, the court did not focus much on the specific content from the Firms that Fly provided other than to say that practically everything qualified as news fit for publication. *See id.* at 902–06.

“spam” aggregators such as *All Headline News* and *Total News* were alleged to be.¹³⁰

C. TWO ISSUES THAT REMAIN UNSETTLED UNDER *BARCLAYS II*: THE CREATION OF “VALUE” AND THE PROBLEM OF THE MAKER-BREAKER.

A peril of the “make versus break” distinction created in *Barclays II* is that a court will be deciding when a company, whether from the financial industry or another business field, creates valuable information that cannot be protected under the current federal intellectual property regime or be kept from the public for a period of time under a “hot news” claim. Under *Barclays II*, this analysis was relatively simple because all the firms in the case were considered market-moving players and thus any action they took was in itself defined as news.¹³¹

This principle, however, might not be as clearly applicable with other plaintiffs. One could imagine, for example, a case in which the plaintiff, against an online news aggregator, is a mid-size firm or an individual analyst with some vague market-moving power. These plaintiffs thus meet the basic definition of “creation” under *Barclays II*: there is an organization of some notoriety that uses its expertise and experience to create, not acquire, information to sell to their clients, and the fact that this product exists has some value that affects that public.¹³² But the Second Circuit left undefined the level at which information becomes sufficiently valuable to justify it as a newsworthy item not protectable under a “hot news” claim.¹³³ If the Second

130. See Isbell, *supra* note 4, at 9–13. This idea is similar to that of the first factor of a traditional fair use analysis under copyright law: the purpose and character of the use. Although Isbell writes about fair use when discussing potential defenses against copyright infringement, a court could adopt a similar analysis to differentiate between online news aggregators—i.e. the more an online aggregator provides new information in addition to the copied facts or the more different the original news information is presented, the more “transformative” the aggregator is compared to a “spam” aggregator that just rehashes the news.

131. See *Barclays II*, 650 F.3d at 907 (“We conclude that in this case, a Firm’s ability to make news—by issuing a Recommendation that is likely to affect the market price of a security—does not give rise to a right for it to control who breaks that news and how.” (emphasis added)).

132. See *id.* at 903–04.

133. *International News Services* identified a value calculation problem analogous to that stems from *Barclays II*. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 266 (1918) (Brandeis, J., dissenting) (“Courts are ill-equipped to make investigations which should precede a determination of . . . the circumstances under which news gathered by a private agency should be deemed affected with a public interest.”). Whereas the dissent focused on a court’s inability to properly calculate the value of information that is *gathered*, the problem for a post-*Barclays II* court will be to calculate value for information that is created.

Circuit, in future cases, adopts an industry-wide rule applicable to any company within an industry,¹³⁴ such a demarcation would have significant consequences for smaller companies that would be adversely affected by the “reporting” actions of online aggregators.¹³⁵ Even a firm-by-firm analysis would be problematic because this would affect firms at the margin of a “creation” analysis; the biggest losers under this formulation of the *Barclays II* scheme would be those entities that are powerful enough to “create” news that cannot be protected under “hot news” but do not have the necessary resources to ward off the effects of dozens if not hundreds of Flies seeking to “break” these news items.

The *Barclays II* decision also does not address the problem of the “maker-breaker.” In her concurrence for the case, Judge Raggi notes that the majority only analyzes situations in which an entity either creates or breaks the news.¹³⁶ Judge Raggi then writes that, unlike the majority, she does not want to “foreclose the possibility of a ‘hot news’ claim by a party who disseminates news it happens to create.”¹³⁷ Although the majority explicitly states that it has no opinion on this point, its earlier suggestion of when a traditional news outlet would not be able to claim “hot news” misappropriation demonstrates that Judge Raggi’s conclusion is correct.¹³⁸ Under the majority’s *New York Times* endorsement example, the famous newspaper “creates” news by virtue of its endorsing a politician and then “breaks” that news by reporting the endorsement first.¹³⁹ Yet, the majority notes that the *New York Times* would likely not prevail if the paper attempted to sue another entity reporting this fact.¹⁴⁰

This “maker-breaker” problem, however, is ultimately related to the value problem because under *Barclays II* value determines whether factual news has

134. Expanding the *Barclays II* rationale, the Second Circuit could consider, for example, that all or most financial firms affect the public in ways that should not be shielded from news “breaking.”

135. As for the Firms in *Barclays II*, the Second Circuit highlighted that it saw nothing to indicate that a “significant portion of the diversion of profits to which the Firms object is lost to brokers in league with Fly or its competitors.” *Id.* at 904. The *Barclays II* court also wrote that “[t]he adoption of new technology that injures or destroys present business models is commonplace. Whether fair or not, that cannot, without more, be prevented by application of the misappropriation tort.” *Id.* at 896. Thus, since the Second Circuit noted that the Firms and Fly did not compete against other, it would be unlikely that even evidence of significant economic harm would have made a difference in favor of the Firms.

136. *See id.* at 913 (Raggi, J., concurring).

137. *See id.*

138. *See id.* at 904 n.38.

139. *See id.*

140. *See id.* at 903–04.

been created. If the Second Circuit plans to continue the “make versus break” analysis it developed in *Barclays II*, then it will have to develop a uniform way to define and calculate what constitutes value sufficient to create a news element that cannot be protected under copyright or “hot news.”

IV. CONCLUSION

Even as commentators propose expanding copyright law to protect the news industry, the “hot news” misappropriation claim in some instances still remains a viable cause of action for news agencies to use against online news aggregators. This Note traced the history of the tort, from its origins in the 1918 *International News Service* decision to its most modern application in the Second Circuit Court of Appeals. Although courts have limited the applicability of the doctrine since the 1976 Copyright Act, the tort remains alive and particularly pertinent as a cause of action for the traditional news industry, the same type of business discussed in the original Supreme Court case. The Second Circuit, however, made significant changes to the “hot news” doctrine in *Barclays II*. The court outright rejected the *National Basketball Ass’n* “tests” as precedent and instead apparently created a new test that emphasizes a “make versus break” distinction.

This Note argued that while the *Barclays II* result potentially prevented the creation of a court-enforced monopoly that benefits those who both make and break the news, the decision left certain issues unanswered. Without indicating a clear way to apply this new test to non-news entities, the Second Circuit will be presented with a “value” calculation problem in future cases. The Second Circuit will also have to contend with the problem of the maker-breaker; in particular, a court will have to decide when (if at all) an organization that makes news but is also in the business of disseminating such news can have “hot news” protection. However, when using the *Barclays II* court’s language and rationale to analyze recent “hot news” cases involving the traditional news industry as plaintiffs, it is likely that even under this new test these kinds of plaintiffs still have a cause of action for misappropriation. Thus, although “hot news” remains alive for the news industry, it has become even more narrow and uncertain for other business fields.