How Far Will News Organizations Go to Take the "Lede?" Hot News Misappropriation in the Digital Age

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In a time when news aggregation web sites share the news as quickly as it's being reported, and it's easy to post a story on Facebook, tweet a news update on Twitter, or post breaking news on Reddit, there's a greater need to understand the hot button topic of news piracy, otherwise known as Hot News Misappropriation.

As the public increasingly has easier access to information, traditional news organizations struggle to reap the return on their newsgathering investment. The tort of Hot News Misappropriation provides for a quasi-intellectual property interest in uncopyrightable facts. Essentially, Hot News Misappropriation may be perceived as the cross-over between intellectual property and unfair competition law. For example, the doctrine allows a journalist, under certain circumstances, to enjoin a news organization from publishing the facts underlying their story. The tort of Hot News Misappropriation reached our nation's highest court more than ninety years ago, but is more relevant than ever today.

I. NEWS YOU CAN'T USE? COPYRIGHT AND NEWS AGGREGATION

A recent case has put Hot News in the headlines, prompting renewed examination of when the tort will be actionable in the information age. In

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March 2013, the Associated Press ("AP") prevailed at summary judgment for copyright infringement against Meltwater, a company that provided its customers excerpts of AP articles for a fee to its customers, but never bought a license from the AP.[1] Among the causes of action the AP asserted was Hot News Misappropriation under New York law. The service used a computer algorithm to "scrape" new stories from the internet. This is noteworthy because in the realm of copyright law, "transformative use" can help an alleged infringer defend against a copyright infringement claim. "After all, '[c]opyright holders rarely write parodies of their own works, or write reviews of them, and are even less likely to write news analyses of their underlying data from the opposite political perspective.'"[2] Meltwater argued that it was like a web search engine, that does not merely appropriate content, but rather transforms it through an "information-location tool."[3] Although the court's opinion did not address Meltwater's motion for judgment on the pleadings for the AP's claim of Hot News Misappropriation, the case demonstrates that Hot News Misappropriation is relevant in the digital age. Meltwater argued the fair use defense, as provided in the Copyright Act's 17 USC § 107:

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work."[4]

However, the court disagreed, finding that Meltwater's use replaced, rather than transformed, the original work. In practice, people rarely clicked beyond the article snippets to the actual article, so the abstract in a sense "replaced" the article for the consuming public. Instead of the abstract creatively drawing the reader in to click onto the actual news piece, the abstract substituted the article because it was sufficient to satisfy the reader's interest in information. So if the court were to consider the Hot News Misappropriation argument in that opinion, how might it rule?

AP v. All Headline News Corp.[5] might provide some guidance. In that case, the AP sued All Headline News Corp. ("AHN"), an Internet service that disseminated the AP's breaking news stories. AHN "[did] not undertake any original reporting" but rather would either rewrite the AP's stories or use them as the originally applied. AHN then disseminated the stories to its paying

1. AP v. Meltwater U.S. Holdings, Inc., 2013 U.S. Dist. LEXIS 39573 (S.D.N.Y. Mar. 20, 2013).

2. *AP v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 560 (S.D.N.Y. 2013) (citation omitted).

3. *Id.* at 541.

4. *AP v. Meltwater U.S. Holdings, Inc*., 931 F. Supp. 2d at 550, citing 17 USC § 107.

5. *AP v. All Headline News Corp*., 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

clients.[6] The court denied AHN's motion to dismiss, holding that the AP stated a claim for Hot News Misappropriation. The court stated that the five pronged analysis, as described in the case, *NBA v. Motorola*,[7] still applied, and that Copyright law did not preempt Hot News Misappropriation claims.

II. GETTING THE STORY STRAIGHT

The News is all about "getting the story," and the newsgatherers play an important role in that process. Thus, Hot News Misappropriation is especially relevant to news wire services.

This interest has been visible in the nation's highest court since the early 20th Century: The United States Supreme Court case, *International News Service v. Associated Press*[8], held that even though the news itself is not copyrightable, a newsgatherer has a protectable "quasi-property interest" in the news product. During World War I, two newspapers were having their own battle. William Randolph Hearst's International News Service ("INS"), was able to access its competitor's news bulletins before the AP published them as news stories. INS then merely rewrote the stories but never gave the AP any credit.

The Supreme Court held that newsgathering requires "the expenditure of labor, skill, and money" and allowing one news agency to appropriate another's product would destroy the incentive to gather news, thereby incentivizing each news agency to be the second to cover the story, not the first.[9] In other words, if a news agency could just as easily re-phrase the information learned from another news source, thus free-riding on the information that the first news agency learned through its hard work, it could lead to important stories being delayed or haphazardly reported in an effort to save resources. This is because each entity would seek to invest as few resources as possible in obtaining the information as long as another news agency is willing to do so. Hot News Misappropriation fills a necessary void, since Copyright law protects creative expression, and not facts.[10] For example, *Feist Publ's, Inc. v. Rural Tel. Serv. Co.*,[11] held that names and phone numbers in the phonebook did not merit copyright protection. After all, it would be dangerous for a society to have the information about world events concentrated in the hands of a few news organizations which happened to uncover the information first.

However, under the tort of unfair competition, a company may assert a very limited "quasi-property" interest against its competitor. Arguably, the practices that amount to violations under Hot News misappropriation harm the public just as much as the direct competitor. If the defendant copies

6. *Id.* at 457.
7. *NBA v. Motorola*, 105 F.3d 841 (2d Cir. N.Y. 1997).
8. *International News Service v. Associated Press*, 248 U.S. 215 (1918).
9. *Id.* at 239.
10. 17 U.S.C. § 102.
11. *Feist Publ's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (U.S. 1991).

information from an early edition or bulletin and sells it without performing its own research (as in *INS*), then not only is the AP disincentivized to invest in good journalism, but it may result in the dissemination of false information if the AP got it wrong.

Journalism at its finest faces competition not necessarily to get the story first, but to get the story right. If there is only one source doing the research, and all the rest are just waiting in the wings to copy the information (not the expression, since that of course, is protected by Copyright Law) behind the story, then there is no healthy competition to get the information correct.

III. THE COPYRIGHT ACT DOES NOT PREEMPT HOT NEWS MISAPPROPRIATION

In *NBA v. Motorola*[12], the Second Circuit held that a maker of a pager with real-time sports scores was not be liable for Hot News Misappropriation. Motorola made a pager called "SportsTrax" that would give users contemporaneous information about basketball games. Motorola appealed a lower court injunction that prevented "SportsTrax" from disseminating the real-time updates without the NBA's permission. The Court noted that basketball games were not copyrightable because they were not "original works of authorship" within the subject matter of copyright.[13] The Court further reasoned that copyright law does not preempt Hot News Misappropriation if "(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 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."[14]

Copyright law did not preempt the Plaintiff's Hot News Misappropriation claim because the tort had extra elements that copyright infringement did not, such as "(i) the time-sensitive value of factual information, (ii) free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff."[15]

As applied to the facts, the NBA's "informational products" include the games themselves and licensing the live games for broadcast. However, the gathering of pure stats to be transmitted constituted a separate product, one for which the Court did not see any evidence of Motorola free-riding on the NBA's newsgathering efforts to do so. As opposed to copyright law's protection of expression, Hot News Misappropriation seeks to incentivize the sharing of

12. *NBA v. Motorola*, 105 F.3d 841 (2d Cir. N.Y. 1997).
13. 17 U.S.C. § 102(a).
14. *N.B.A. v. Motorola*, 105 F.3d 841, 845 (2d Cir. N.Y. 1997).
15. *Id.* at 853.

information with the public, recognizing that news has a short expiration date and companies devote resources to obtain the information.

California also recognizes the tort of Hot News Misappropriation, even as applied to photos.[16] In *X17*, the Defendant's name, Mario Lavandeira, may not seem familiar, but that's because he uses the pen name Perez Hilton . X17 sued Hilton for copyright infringement and Hot News Misappropriation, claiming that Hilton used X17's photographs, depriving the company of revenue because he published them first. Hilton argued that copyright law preempted the claim for Hot Mews Misappropriation and that the tort only applied to "words and data," and not to photos. The court disagreed as to both arguments. "The [H]ot [N]ews claim, which the Court concluded encompasses photographs as well as words and data, is a subset of the common law tort of misappropriation, which California recognizes."[17] Though far from the sobering battlefield updates from World War I, celebrity photos can still make up the basis for a Hot News Misappropriation claim. After all, photos featuring celebrities walking out of the supermarket, walking their dogs, or playing with their kids lose their value very quickly after being disseminated initially.

"While most material subject to copyright has a significant, sometimes indefinite, shelf-life, the value of '[H]ot [N]ews' depends entirely on its being timely published—and once disseminated, the '[H]ot[N]news' ceases to be 'news' at all, instead taking on possible historical significance, or, in the case of information regarding a trip to the grocery, no significance at all."[18] X17 claimed that it incurred (1) "substantial costs" to get the celebrity photos; (2) the photos "are time-sensitive"; (3) X17 and Perez Hilton are competitors since they both make money publishing the photos and X17 also has a blog type format where gossip articles accompany the photos; (4) Hilton made money by "free-riding" on X17's investment; (5) if the situation continues, X17 will have less of an "incentive" to do its work; and finally that (6) Hilton's actions have "substantially harmed X17."[19] Thus, the court denied Hilton's motion to dismiss, stating that X17 adequately pled its case of action. The fact that a case involving celebrity photographs was actionable may have implications for traditional journalism forging its path in the digital age. These cases may provide newspapers a claim against aggregator websites. Indeed, part of what makes the tort compelling is not just that its quasi-intellectual property nature, but also its protection of a reporter's ability to inform the public. If the key factor is timing of the appropriation, as the cases may suggest, then the scope of the content that might make up the basis for a cause of action is relatively large.

16. *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2007).
17. *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007).
18. *Id.*at 1106.
19. *Id.* at 1108-1109.

IV. ON *THE FLY*: HOT NEWS AND INTERNET NEWS AGGREGATORS

One of the reasons Hot News Misappropriation is more relevant than ever is the increasing presence of news aggregators on the internet. However, the tort was dealt a serious blow in *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*[20] which held that Copyright Law preempted the Plaintiffs' claim of Hot News Misappropriation.[21] The court reasoned that "because the plaintiffs' claim falls within the 'general scope' of copyright, 17 U.S.C. § 106, and involves the type of works protected by the Copyright Act, 17 U.S.C. §§ 102 and 103, and because the defendant's acts did not meet the exceptions for a 'hot news' misappropriation claim as recognized by *NBA*, the claim was preempted."[22]

Theflyonthewall.com an internet news aggregator that disseminated financial news.[23] "The cornerstone of Fly's offerings is its online newsfeed . . . . The newsfeed typically streams more than 600 headlines a day in ten different categories . . . . One such category is 'recommendations.' There, Fly posts the recommendations (but not the underlying research reports or supporting analysis) produced by sixty-five investment firms' analysts, including those at the plaintiff Firms.[24] It was precisely the "Recommendations" that the Plaintiff financial services companies, Barclays Capital, Merrill Lynch and Morgan Stanley claimed diminished their ability to profit from their research. Thus, they brought suit against the website for Hot News Misappropriation and copyright infringement.

While the District Court held that the very business model of Theflyonthewall.com was based upon Hot News Misappropriation, "Fly's core business . . . is its free-riding off the research done by Firms and other financial institutions."[25] The District Court held that although Theflyonthewall.com attributed each of its Recommendations to the firm in which the research originated, it is after all a news aggregator that did not do its own research or reporting, but reaped the benefits of the financial institutions' research.

The District Court seemed to strike a balance in its holding by enjoining the website from publishing research from the Plaintiffs both while the market was open, and for a certain time period after it closed. The court of appeal, however, took a different approach, and through its 5-factor *NBA* analysis, it weighed whether to consider Fly's actions as "'free-riding"'[26] or to "conclude that there is insufficient record evidence to sustain a finding either that the

20. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).
21. *Id.* at 878.
22. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.,* 650 F.3d 876 (2d Cir. 2011).
23. *Id.* at , 882.
24. *Id.* at 883.
25. *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 355 (S.D.N.Y. 2010).
26. *Barclays Capital Inc. v. Theflyonthewall.com, Inc*., 650 F.3d 876, 900 (2d Cir. 2011).

alleged free-riding by Fly and similar aggregators 'in effect . . . cut off the [Firms'] service by rendering the cost prohibitive in comparison with the return,' [citation omitted] or were a 'threat to the very existence of the product or service provided by the plaintiff[s],'[citation omitted].[27] Thus, the Court of Appeal held that the "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."[28]

CONCLUSION: TOO HOT TO HANDLE?

When it comes to newsgathering, getting the story first is the key. But in the digital age, being the first to publish it is another story. Hot News Misappropriation presents one approach to examining the legal rights behind news that's hot off the presses. Hot News Misappropriation recognizes that news organizations often have to dedicate significant resources to perform their work, and the ability of a direct competitor to use their information before they publish disincentivizes them against undertaking the pursuit. While Hot News Misappropriation suits are still uncommon, we may see the issue being litigated more frequently as the technological world increasingly becomes involved in the news industry. Moreover, we may see more litigation in the area of celebrity news photos as the *Lavanderia* case shows that it may be helpful to plaintiffs to add the Hot News Misappropriation claim. While a snapshot of Kate Middleton or Kim Kardashian may be of great value, once it gets published for the first time, generally its worth has been diminished. Thus, between news aggregation sites and celebrity photos, Hot News Misappropriation may also have a greater role in the realm of intellectual property suits.

27. *Id.*

28. *Barclays Capital Inc. v. Theflyonthewall.com, Inc*., 650 F.3d 876, 900,907. (2d Cir. 2011).