

HOT NEWS MISAPPROPRIATION IN THE INTERNET AGE

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INTRODUCTION

The current battle over piracy of news reports did not begin on the Internet, and the newspaper industry’s latest efforts to crack down on unauthorized use of its content have in many ways come full circle. In 1918 The Associated Press (“AP”) sued International News Service (“INS”), alleging that the rival news wire engaged in unfair competition by copying AP news from bulletin boards and early editions of member newspapers and reselling it at a profit.¹ By affirming an injunction against this practice in *International News Service v. Associated Press* (“INS”), the U.S. Supreme Court established the common-law doctrine of hot news misappropriation and made several observations relevant to newsgathering in the 21st century. Although Justice Brandeis dissented

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1. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 231 (1918).

from the majority in *INS*, he noted that:

The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts and to use news so obtained gainfully in competition with the original collector.²

Brandeis was referring to intelligence transmitted by telegraph and telephone, but his recognition of the role of technological change in competition among news organizations foreshadows many of today's battles about information on the Internet. As traditional newspapers struggle to compete with free alternatives, bloggers and social media users have increasingly asserted the view that the future of journalism will involve an unrestricted flow of information between numerous individuals rather than an obsolete ideal of paid, professional newsgathering. However, while the transformative power of the Internet is undisputed, it is far from clear that the demise of conventional news reporting in favor of a free online model of information sharing will be a good thing for journalism, or society.

Writing for the majority in *INS*, Justice Pitney recognized the fundamental unfairness of allowing one news outlet to profit from information gathered through the labor of an uncompensated competitor:

In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown³

Beyond its Lockean emphasis on the rewards of labor, the Court in *INS* advanced a utilitarian rationale for a legal system that protects the investments involved in professional newsgathering—which it recognized as a legitimate business that:

[C]onsists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the

2. *Id.* at 262 (Brandeis, J., dissenting).

3. *Id.* at 239.

cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.⁴

As the *INS* Court understood, and as other cases have helped to illustrate, although the First Amendment guarantees a free press, the viability of the news media that the Framers sought to protect from government interference also depends on the ability of private enterprise to cover the cost of gathering news. Despite a popular backlash against mainstream media, new forms of digital communication depend on their traditional counterparts more than they are willing to admit. Developing new ways to monetize information gathered by others may reflect technological innovation, but it is no substitute for original news reporting, and recycling existing content as a business model presents the same threat to professional journalism as the low-tech piracy enjoined in *INS*. Accordingly, modern news media must recognize their continued interdependence and adapt industry norms of fair play and financial support for original reporting to new forms of communication on the Internet.

Indeed, in 2009, The Associated Press filed suit against an online competitor, alleging that All Headline News Corp. misappropriated AP content by hiring writers to find breaking news on the Internet and rewrite—or simply copy—it for sale to its own subscribers.⁵ Notwithstanding the technical differences, the facts of *The Associated Press v. All Headline News Corp* (“*AHN*”) parallel those in *INS*: The AP pays the substantial cost of gathering news around the world and publishing it through its members. Once that information becomes public, a competing news service resells it at a profit. The Southern District of New York’s holding that the AP stated a claim against All Headline News for hot news misappropriation suggests that *INS* remains good law in the Internet age despite technological and legal complications in the interim.⁶

An apparent resurgence of the hot news doctrine continued with *Barclays Capital Inc. v. Theflyonthewall.com* (“*Theflyonthewall*”), a 2010 case involving the reproduction of stock tips from investment banking firms through a third-party website.⁷ Following a bench trial, the Southern District of New York again found the doctrine applicable against an online aggregator.⁸ The court issued a permanent injunction forbidding Theflyonthewall from disseminating proprietary equity

4. *Id.* at 235.

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

6. *See id.* at 461.

7. *See* 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

8. *Id.* at 336.

research until one half-hour after the opening of the New York Stock Exchange, providing an opportunity for brokerage clients most likely to trade on those tips to place orders through the firms that originated them.⁹ In May 2010, however, the United States Court of Appeals for the Second Circuit cast doubt on that result by staying the injunction against *Theflyonthewall* and granting an expedited appeal, which was still pending as of this writing.¹⁰

Perhaps not coincidentally, both cases came as the AP—on behalf of a struggling newspaper business—announced “an industry initiative to protect news content from misappropriation online” by tracking the use of its stories and pursuing “legal and legislative actions” against users who fail to license its content.¹¹ However, unanswered questions about how the law applies to bloggers, news aggregators, and other forms of digital media show that the AP’s campaign will not be simple, or easy. Furthermore, today’s battles over misappropriation on the Internet occur within a framework of intellectual property law that has become far more complicated than in 1918, when even the AP conceded that its content “could not, in practice, be copyrighted” in a regime requiring registration of copyrights.¹² News organizations must now consider common-law misappropriation against a range of statutory intellectual property (“IP”) rights and decide which remedy best protects their content at the lowest cost—both to the industry and to society.

This note will reexamine hot news misappropriation in light of *AHN* and *Theflyonthewall* with the hope of clarifying the doctrine’s role in the fight against piracy of news content online. Part I will compare the facts and law of *INS* with more recent hot news claims in the context of the news business at the time of each case. Part II will explore the advantages and disadvantages of relying on hot news misappropriation to protect news content on the Internet, particularly when measured against modern copyright law. Part III will address the argument that traditional news reporting is obsolete and examine the danger that free-riding competitors pose to the American institution of a free press. Part IV will argue that while the misappropriation doctrine could prove more valuable than statutory IP law in the newspaper industry’s campaign against content piracy, a resurgence of hot news claims alone will not solve the

9. *Id.* at 347.

10. *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv (2d Cir. filed May 19, 2010).

11. Press Release, The Associated Press, AP Board Announces Initiative to Protect Industry’s Content (April 6, 2009), *available at* http://www.ap.org/pages/about/pressreleases/pr_040609a.html; *see also* Richard Pérez-Peña, *A.P. Seeks to Reign in Sites Using its Content*, N.Y. TIMES, April 7, 2009, at B1.

12. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 233 (1918) (concluding that “news is not within the operation of the copyright act.”).

problem. This note will propose that a lasting resolution will not emerge until the diverse news media of the 21st century reach a new, customs-based understanding of property rights in online news with misappropriation as an enforcement mechanism against competitors who violate industry norms. If applied wisely, the hot news doctrine could help separate innovative new models of online journalism with the potential to revitalize the industry from the free riders that risk destroying it.

I. THE CONTEXT AND LAW OF *INS*

The background of *INS* reflects both the customs of the newspaper business in the early 20th century and the unique challenges of reporting news from the European front during World War I. The AP was incorporated under New York law in 1900 and by 1918 had about 950 newspaper members and an annual expenditure of \$3.5 million.¹³ *INS* was a New Jersey corporation established in 1909 with about 400 members.¹⁴ It was comprised mainly of newspapers controlled by William Randolph Hearst, and it had annual expenses of around \$2 million.¹⁵ The piracy of AP stories at issue in *INS* began in 1916, when British and French authorities barred *INS* correspondents from the front lines and prohibited their use of the European cable system because Hearst “had taken positions that were strongly sympathetic to the German cause.”¹⁶ Although the AP and *INS* competed for several years before the war, neither company’s original business model relied on reproduction of rivals’ content until the practice became necessary to continue supplying members with news from the front.¹⁷ In fact, “there developed an industry custom (as opposed to a conscious agreement), in which all wire services joined, not to use information from rivals’ bulletin boards or early editions.”¹⁸

The *INS* case raised multiple allegations, including outright bribery of AP employees to furnish news prior to publication. The district court found this practice sufficiently inequitable to warrant a preliminary injunction. However, the claim most relevant here was that *INS* engaged in unfair competition by copying published news from bulletin boards

13. Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 90-91 (1992).

14. *Id.* at 91.

15. *Id.*

16. *Id.* at 91-92.

17. *See id.* at 105 (“Although there may have been sporadic pirating from the time the *INS* was formed in 1909, the practice of lifting stories probably started in earnest, as *INS* policy, only after the British and French troops barred its reporters from the European theater.”).

18. *Id.* at 97.

and early editions of AP member newspapers and reselling it, either verbatim or rewritten, to its own customers without attribution to the AP.¹⁹ As the *INS* Court observed:

[S]ince in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant.²⁰

The anticompetitive consequence was that *INS* papers in the western United States could “scoop” AP rivals with their own stories despite having played no role in gathering the news itself. The district court condemned this practice but declined to enjoin it pending *INS*'s appeal to the Second Circuit, which remanded with directions to enjoin “any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has . . . passed away.”²¹

The Supreme Court in *INS* reached several fundamental conclusions about property rights in news before ultimately affirming the injunction against misappropriation of AP stories. First, the Court rejected *INS*'s argument that any property right in news reporting is lost at the moment of publication, becoming “the common possession of all to whom it is accessible.”²² The key, the Court observed, is the “dual character” of news: a distinction between “the substance of the information and the particular form or collocation of words in which the writer has communicated it.”²³ As Professor Richard Epstein has noted, “the thought that only persons who deal with the AP can speak of Pearl Harbor after it breaks the story . . . is too grotesque to admit any serious consideration.”²⁴ However, the dual nature of news limits the overbroad claim to possession of historical facts to a narrower property right rewarding the effort required to gather and communicate news to society—but not barring others from independent investigation of the same underlying information.

For similar reasons, the *INS* Court recognized a distinction between the utilization of tips leading to independent reporting of news events and “the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and

19. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231 (1918).

20. *Id.* at 238.

21. *Associated Press v. Int'l News Serv.*, 245 F. 244, 253 (2d Cir. 1917).

22. *INS*, 248 U.S. at 239.

23. *Id.* at 234.

24. Epstein, *supra* note 13, at 113.

verification.”²⁵ *INS* had invoked the equitable doctrine of unclean hands as a bar to relief, arguing that the AP’s practice of scanning rival news wires for story tips was no different than its own reproduction of AP reports from the European front.²⁶ The Court, however, rejected this argument on the ground that independent verification of a tip previously reported by a competitor did not reflect the same anticompetitive free-riding as simply reproducing the work of others.²⁷ The property interest in original news reporting requires independent effort to confirm underlying facts that remain freely accessible to everyone.

Second, the *INS* Court limited possession of news reports to a “quasi property” right enforceable against competitors but not the world at large.²⁸ Consequently, the misappropriation doctrine focuses on business rivals seeking to profit from the same breaking news reports, not a general right of exclusion allowing news sources to control use of their stories by the general public. While the *INS* decision forbade newspapers from pirating stories produced by uncompensated rivals, nothing about the case prevents newspaper readers from appropriating the same hot news for their own purposes, as long as that purpose does not amount to direct competition with the original source. This focus on unfair trade practices and the market value of news provides both advantages and disadvantages over statutory IP rights, as will be discussed later in this note. For now, suffice it to say that the distinction between competing news sources and the general public was clearer in 1918 before the advent of bloggers, citizen journalism, and other developments blurring the line between professional news reporting and everyday public discourse.

A. *AHN and the Declining Newspaper Industry*

While similar in principle to *INS*, the *AHN* case reflects the new reality of online competitors diverting readers away from traditional newspapers, which have lost the market dominance and profitability that they enjoyed in 1918. In 2008, the AP had 1,700 daily newspaper members and operating expenses of \$725 million.²⁹ However, paid daily newspaper circulation in America declined from a high of more than 63

25. *INS*, 248 U.S. at 243–44.

26. *Id.* at 242.

27. *See id.* at 245.

28. *See id.* at 236 (“The question here is not so much the rights of either party as against the public but their rights as between themselves.”); *see also* Michelle L. Spaulding, *The Doctrine of Misappropriation*, BERKMAN CENTER FOR INTERNET & SOC’Y, (March 21, 1998), <http://cyber.law.harvard.edu/metaschool/fisher/linking/doctrine/index.html> (“This right existed not against the world at large, because news is based on unprotectable facts, but against competitors.”).

29. THE ASSOCIATED PRESS, CONSOLIDATED FINANCIAL STATEMENTS: YEARS ENDED DECEMBER 31, 2008 AND 2007 3, 5 (2007–2008).

million copies in 1984 to 48.6 million in 2008.³⁰ Similarly, expenditures on print advertising in the nation's newspapers declined from more than \$47 billion in 2005 to \$34.7 billion in 2008.³¹ Numerous newspaper companies—including the owners of the Los Angeles Times, Chicago Tribune, Chicago Sun-Times, Minneapolis Star Tribune, Philadelphia Inquirer, New Haven Register, and Orange County Register—have filed for bankruptcy, and Denver's Rocky Mountain News published its final edition in February 2009 after 149 years in business.³² The AP's annual report observed that “[l]ike nearly all in our industry, AP faces unprecedented economic challenges in 2009. The new member pricing program, coupled with attrition in renewals, will result in a revenue decline not seen by the company since the Great Depression.”³³

AHN also illustrates the expanded range of statutory IP remedies now available to news gatherers seeking to protect their content—if not their superiority to the misappropriation doctrine as a workable solution. The AP's complaint alleged copyright infringement under the Digital Millennium Copyright Act (“DMCA”), trademark violations under the Lanham Act, and hot news misappropriation under New York common law.³⁴ As described by the district court, *AHN*'s newsgathering operation consisted of hiring “poorly paid individuals to find news stories on the Internet and prepare them for republication under the *AHN* banner, either by rewriting the text or copying the stories in full.”³⁵ *AHN*'s managers instructed writers to remove copyright notices identifying the AP as the author of articles, which the company then sold to other websites by marketing itself as a news provider.³⁶

Perhaps because the conceptual foundations of *INS* remain settled law, *AHN* did not raise big-picture arguments about the dual nature of news and the societal benefits of free access to information. Instead, the Florida-based defendant moved to dismiss the suit on procedural grounds, arguing that the AP's misappropriation claim would not be recognized under Florida law and contending that common-law

30. *Total Paid Circulation, NEWSPAPER ASS'N OF AM.*, <http://www.naa.org/TrendsandNumbers/Total-Paid-Circulation.aspx> (last visited Nov. 15, 2010).

31. *Advertising Expenditures, NEWSPAPER ASS'N OF AM.*, <http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx> (last updated March 2010).

32. The Associated Press, *Status of Newspaper Publishers that Filed Ch. 11, THE SEATTLE TIMES*, (Sept. 14, 2009), http://seattletimes.nwsourc.com/html/business/technology/2009864388_apusstartribuneglance.html; see also *Goodbye, Colorado, ROCKY MOUNTAIN NEWS*, Feb. 27, 2009, at A1.

33. THE ASSOCIATED PRESS, 2008 ANNUAL REPORT, 4 (2009).

34. *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009).

35. *Id.* (internal quotation marks omitted).

36. *Id.* at 458.

misappropriation had been preempted by the federal Copyright Act.³⁷ By holding that the AP successfully stated a misappropriation claim against AHN, the court did not directly address the merits of the case, but suggested that the hot news doctrine applies with equal force to the Internet. The *AHN* court also went beyond the scope of the *INS* decision to uphold claims that AHN had removed or altered copyright management information in violation of the DMCA.³⁸ The court, however, dismissed the AP's trademark infringement claims, finding AHN's use of phrases like "according to an AP report" insufficient to support a theory that potential clients had been misled into thinking that the news carried the AP's brand name.³⁹ The court also dismissed claims of unfair competition under the Lanham Act, which prohibits false designation of the origin of goods or services.⁴⁰ It found that the question of whether AHN could claim to be a "news service" despite its lack of original reporting was outside the scope of the Lanham Act, which focuses on commercial acts that deceive customers and impair a producer's goodwill.⁴¹

Following the *AHN* court's initial ruling, the parties reached a settlement whereby AHN paid the AP an undisclosed sum for unauthorized use of its content and agreed to "not make competitive use of content or expression from AP stories."⁴² Consequently, the district court dismissed the case without reaching its merits or applying a full analysis to the AP's misappropriation claim. However, the AP's announcement of the settlement specifically stated that "[d]efendants further acknowledge the tort of 'hot news misappropriation' has been upheld by other courts and was ruled applicable in this case."⁴³ Whether this represents a shot across the bow of other online competitors is hard to say, but it does suggest that the AP considers the misappropriation doctrine a tool for deterrence and enforcement important enough to merit public mention.

B. *Theflyonthewall* and New Challenges to the Hot News Doctrine

Although not a case about journalism as such, *Theflyonthewall* may be the most thorough application by a modern court of the hot news doctrine to an online aggregator. As the district court observed,

37. *Id.*

38. *Id.* at 461.

39. *Id.* at 462.

40. See 15 U.S.C. §1125(a)(1)(B) (2006).

41. *AHN*, 608 F. Supp. 2d at 463.

42. Press Release, The Associated Press, AP and AHN Media Settle AP's Lawsuit Against AHN Media and Individual Defendants (July 13, 2009), *available at* http://www.ap.org/pages/about/pressreleases/pr_071309a.html.

43. *Id.*

proprietary “equity research” recommending whether to buy, sell, or hold stocks is a “foundational element” in the relationship between investment banking firms and their most significant clients.⁴⁴ Although many of these recommendations ultimately become public information through delayed release to the news media, brokerage clients derive added value from the ability to act quickly before the general public, driving commissions back to each firm.⁴⁵ Billed as the “fastest news feed on the web,” Theflyonthewall provided subscribers with a continuous stream of investment recommendations leaked from brokerage houses, often before the opening of the stock market each day.⁴⁶

The court held Theflyonthewall liable for copyright infringement and hot news misappropriation, enjoining its reproduction of proprietary equity research “until one half-hour after the opening of the New York Stock Exchange or 10:00 a.m., whichever is later.”⁴⁷ In a detailed discussion of the origins and evolution of the hot news doctrine, *Theflyonthewall* court observed that the Supreme Court’s decision in *INS* “was strongly influenced by several policy ideals: a ‘sweat-of-the-brow’ or ‘labor’ theory of property; norms of commercial morality and fair dealing; and a utilitarian desire to preserve incentives to produce socially useful services.”⁴⁸ The court concluded that despite several periods of “flux” over the years,⁴⁹ hot news misappropriation remains a viable claim under New York law, as defined by the five-factor test articulated by the Second Circuit in *National Basketball Association v. Motorola*,⁵⁰ which will be discussed later in this note. Oral arguments before the Second Circuit in August 2010 focused on whether Theflyonthewall.com was a direct competitor in the same primary market as the investment banks, as well as the difficulty of punishing free riding without preventing news aggregation in general.⁵¹ The court’s pending response to these arguments may well chart the course of future hot news litigation.

Theflyonthewall appears to have catalyzed opposition to the hot news doctrine among critics who contend that it conflicts with modern IP law, stifles free speech, and chills innovation in an Internet economy based on an unrestricted flow of information. Google and Twitter, for

44. *Barclays Capital, Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 315 (S.D.N.Y. 2010).

45. *See id.* at 319 (“The value of the research derives not just from its quality . . . but also from its exclusivity and timeliness.”).

46. *Id.* at 322–23.

47. *Id.* at 347.

48. *Id.* at 332.

49. *Id.* at 334.

50. 105 F.3d 841, 845 (2d Cir. 1997).

51. *See* Eric P. Robinson, *Second Circuit Abuzz About FlyontheWall Case*, BLOG LAW ONLINE (Aug. 7, 2010), <http://bloglawonline.blogspot.com/2010/08/second-circuit-abuzz-about-flyontheWall.html>.

example, filed an amicus brief in *Theflyonthewall*'s appeal arguing that the hot news doctrine is "obsolete" and unworkable in a world where news breaks rapidly over blogs and social networks.⁵² The Electronic Frontier Foundation ("EFF") urged the court to consider the First Amendment implications of time restrictions on the communication of factual information, noting that "[s]urprisingly, no court has carefully explored the tension between the so-called 'hot news misappropriation' doctrine and freedom of speech and freedom of the press."⁵³ The EFF went on to argue that "[a]pplying heightened First Amendment scrutiny is especially important now, as the Internet is increasingly allowing Americans to publicly gather, share, and comment on the news of the day. Misuse of the 'hot news' doctrine could stifle this extraordinary growth of free expression."⁵⁴ From a law-and-economics perspective, Judge Richard Posner has argued that free riding on intellectual property is distinct from the theft of tangible goods and is not always a bad thing for society.⁵⁵ Posner has called for an end to the misappropriation doctrine in general, arguing that "unless misappropriation is defined narrowly with respect to particular forms of copying rather than equated to free riding, it is too sprawling a concept to serve as the organizing principle of intellectual property law."⁵⁶

Although *AHN* and *Theflyonthewall* suggest that the hot news doctrine remains viable, neither case examined the full scope of misappropriation as a legal remedy in the modern Internet economy. For one thing, the *AHN* court addressed only one of many online practices that traditional news services now consider a threat to their profitability. As one commentator observed:

The ruling in *The Associated Press v. All Headlines News Corp.* is certainly a big win for the AP, but it does not answer all outstanding questions concerning the use of news reports in the online arena. First, it does not address the use of headlines and lead-ins, also an open issue and the subject of dispute. Second, it is not a ruling on the merits of the AP hot news claims against AHN, although the opinion strongly favors the AP position on the merits. Third, it does not address the more difficult and complex questions concerning the use of news reports by bloggers and others who do not merely excerpt

52. See Jacqui Cheng, *Google and Twitter Pour Cold Water on "Hot News,"* ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/06/google-and-twitter-call-hot-news-an-obsolete-concept.ars> (last visited November 29, 2010).

53. Press Release, Electronic Frontier Foundation, 'Hot News' Doctrine Could Stifle Online Commentary and Criticism (June 22, 2010) (<http://www.eff.org/press/archives/2010/06/22>).

54. *Id.*

55. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 623 (2003).

56. *Id.* at 625.

and link to online news reports such as those produced by the AP, but add commentary to them as well.⁵⁷

Moreover, critics reacting to *Theflyonthewall* have begun to raise foundational objections not just to nuances of applying the hot news doctrine, but to the doctrine itself.⁵⁸ The stage may be set for the U.S. Supreme Court to ultimately reconsider the compatibility of its 1918 decision in *INS* with Internet communication, content aggregation, and changing conceptions of free speech and freedom of the press. Accordingly, this note now turns to these and other unanswered questions about the doctrine's applicability—and desirability—in the context of protecting original news reporting online.

II. MISAPPROPRIATION AS AN ALTERNATIVE TO STATUTORY IP LAW

Perhaps the greatest advantage of the hot news doctrine over statutory IP remedies, such as copyright infringement, is its focus on anticompetitive conduct rather than the technicalities of what constitutes fair use, idea versus expression, and other legal terms of art. With origins in equity instead of the minutia of the United States Code, misappropriation is both a broader remedy than copyright, and one difficult to define outside the facts of individual cases. Most importantly for news gatherers, misappropriation protects content whether or not it is reproduced verbatim.⁵⁹ Re-wording a competitor's news report might avoid a copyright claim, but it will not escape misappropriation liability if the substance of the report is taken from an uncompensated rival in an attempt to exploit its value. In other words, the inquiry is whether the market value of news—not the language used to communicate it—has been pirated by a competitor without the effort of gathering it independently. This difference provides obvious benefits in an industry where the market value of news is in its freshness more than its literary merit. As technology writer Julian Sanchez has observed:

The [Recording Industry Association of America] and [Motion Picture Association of America] can at least try—however ineffectively—to use copyright law to stanch unauthorized copying of

57. Jeff Neuburger, *Want Some Hot News? AP Hot News Case Against Online News Aggregator Survives Motion to Dismiss*, NEW MEDIA & TECH. LAW BLOG (Feb. 26, 2009), <http://newmedialaw.proskauer.com/2009/02/articles/online-content/want-some-hot-news-ap-hot-news-case-against-online-news-aggregator-survives-motion-to-dismiss>.

58. See *supra* notes 52-54 (suggesting the hot news doctrine is “obsolete” and could violate the First Amendment).

59. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231 (1918) (finding misappropriation in news copied “either bodily or after rewriting it”).

their works. But what AP is selling isn't really the scintillating prose of its writers: its fast access to the facts of breaking news. Now, though, a writer for any one of a million websites can read an AP story on the site of a subscribing news organization, write up their own paraphrase of the story, and have it posted—and drawing eyeballs from AP subscribers—within an hour of the original's going live.⁶⁰

Thus, an emphasis on misappropriation rather than copyright infringement addresses the real issue affecting the profitability of newsgathering: free-riding off of original reporting, regardless of the literal similarity.

In many ways, the foundations of copyright law are incompatible with the desire of news organizations to monopolize news until they can recoup their investments in gathering it. The Copyright Act expressly provides that ideas and discoveries of natural occurrences are not eligible for protection.⁶¹ Moreover, U.S. copyright law has long recognized an “idea-expression dichotomy” distinguishing original expressions of an idea from the idea itself, which is either a matter for patent law or not protectable at all. In the 1879 case of *Baker v. Selden*, the Supreme Court held that the copyright for a book describing an improved method of bookkeeping protected the prose of that book but did not prevent others from using the same method on their own accounting forms.⁶² In *Feist Publications, Inc. v. Rural Telephone Service Co.* the Supreme Court reiterated that facts themselves are not copyrightable and emphatically rejected a “sweat of the brow” justification for copyright law.⁶³ The *Feist* Court held that an alphabetical list of names, towns, and telephone numbers in a phone directory was factual information not arranged with sufficiently originality to merit copyright protection, regardless of the effort and expense of compiling the directory.⁶⁴ The Court further remarked that “[t]he most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates.”⁶⁵ Thus, copyright law is hostile to the notion that the first person to publish an account of an event has any right to exclude others from using the same

60. Julian Sanchez, *AP Launches Campaign Against Internet 'Misappropriation,'* ARS TECHNICA (Apr. 6, 2009, 8:40 PM) <http://arstechnica.com/tech-policy/news/2009/04/ap-launches-campaign-against-internet-misappropriation.ars>.

61. 17 U.S.C. §102 (2006) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

62. 101 U.S. 99, 107 (1879).

63. 499 U.S. 340, 354 (1991).

64. *Id.* at 363-64.

65. *Id.* at 344-45 (internal quotation marks omitted).

information, regardless of the cost of gathering it.

Furthermore, the 1976 Copyright Act expressly includes news reporting within its definition of fair use,⁶⁶ raising questions about whether copyright law provides any recourse to news organizations seeking to protect their content from others claiming to gather news themselves. Consequently, “even if a court was to hold and find that the facts of a news story are copyrightable, if a subsequent news writer used them[,] it would most likely be considered a ‘fair use.’”⁶⁷ Moreover, as Epstein has observed, the extended duration of copyright protection is better suited to literary works that retain their value over time than news reports whose relevance is often measured in days or hours.

At one level, ordinary copyright protection is insufficient in the short run because a rewrite of the news story does not offend copyright, although it results in the misappropriation of the AP's effort to collect the information for the story. Yet, in another sense, copyright protection is overbroad, for the optimal length of copyright protection, always measured in years, is wildly excessive for news.⁶⁸

Thus, the fact that news reports are now subject to copyright protection has not proven a solution to anticompetitive misappropriation, in part because of irreconcilable philosophical differences between the two doctrines.

Furthermore, other developments in IP law since the *INS* decision have not yielded remedies that are obviously superior to misappropriation in the context of the news business. The DMCA provides new tools for online news operations by prohibiting circumvention of encryption technologies and removal or alteration of copyright management information (“CMI”).⁶⁹ The *AHN* court found that the AP stated a claim that AHN writers violated §1202(b) of the DMCA by intentionally removing copyright notices from AP stories.⁷⁰ The court rejected AHN's argument that the DMCA applies only to circumvention of automated copyright management systems, citing with approval another federal case holding that the language of the Act does not limit the statute's application merely to digital encryption or automated copyright protection.⁷¹ However, other courts have reached the opposite

66. See 17 U.S.C. §107 (2006).

67. 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, 21 (2008).

68. Epstein, *supra* note 13, at 116.

69. 17 U.S.C. §§1201-02 (2009).

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

71. *Id.* at 462 (citing *McClatchey v. The Associated Press*, 2007 WL 776103 (W.D. Pa. 2007)).

conclusion, holding that CMI, within the meaning of the DMCA, is limited to technological measures or processes controlling access to the protected work.⁷² Either way, the DMCA could provide an enforcement mechanism for news organizations employing technological measures to prevent their copyrighted content from being “hacked” by competitors. News Corporation chairman Rupert Murdoch, for example, has announced his intention to transition his news websites to pay models and then block them from being indexed on Google.⁷³ The real question, however, is whether the potential benefits are worth the loss in traffic brought in by the same search engines supposedly stealing copyrighted content. Commentators have differed on whether Murdoch’s announcement reflects shrewd business sense or a high-stakes bluff designed to extract licensing revenue from Google’s competitors.⁷⁴ In any case, although the DMCA creates new remedies applicable to online piracy, it is not clear that it reaches the kind of conduct at issue in *INS*.

Despite its focus on protecting brand identity, trademark law also has proven inadequate to prevent free-riders from “passing off” original news reporting as their own. The AP’s trademark claim in *AHN* asserted that use of phrases such as “according to an AP report” caused consumer confusion as to the origin of the stories by misleading readers into believing they carried the AP’s brand name.⁷⁵ The district court dismissed this argument for lack of factual support, finding that conclusory allegations of consumer confusion were insufficient to support the AP’s claim. The *AHN* court also dismissed a separate trademark claim alleging that *AHN* misrepresented the source of its product by marketing itself as a “newsgathering organization”—a matter of semantics that the court found to be outside the scope of the Lanham Act.⁷⁶ It is unclear whether dismissal of these claims reflects an inherent weakness in trademark law or merely deficiencies in the AP’s pleadings. However, the outcome is consistent with the Supreme Court’s holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.* that the Lanham Act does not prevent unattributed copying of works in the public domain.⁷⁷ Thus, it is safe to conclude that piracy of news content involves more

72. See, e.g., *Textile Secrets Int’l, Inc. v. Ya-Ya Brand, Inc.*, 524 F. Supp. 2d 1184, 1201-1202 (C.D. Cal. 2007) (holding that the CMI provision of the DMCA did not extend to a copyright notice printed on the border of a fabric design); *IQ Group, Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 598 (D.N.J. 2006) (finding that removal of an e-mail advertiser’s logo and hyperlink to its website did not violate the DMCA).

73. Eric Etheridge, *Murdoch’s Google Gambit*, N.Y. TIMES (Nov. 10, 2009, 5:31 PM), <http://opinionator.blogs.nytimes.com/2009/11/10/murdochs-google-gambit>.

74. See *id.* (comparing bloggers’ reactions to Murdoch’s plan).

75. *All Headline News Corp.*, 608 F. Supp. 2d at 462-63.

76. *Id.* at 463.

77. See 539 U.S. 23, 35 (2003) (“Reading ‘origin’ in § 43(a) [of the Lanham Act] to require attribution of uncopyrighted materials would pose serious practical problems.”).

than confusion over brand names. Free riders such as AHN exploit the value of information itself, apart from the value they derive from obscuring the true origin or the details of their business model.

Misappropriation could prove a simpler and more effective solution to piracy of online news than statutory IP regimes such as copyright and trademark. For better or worse, courts applying the misappropriation doctrine rely on an intuitive sense of fair play more than black-letter law enacted by Congress under pressure from powerful constituents. The misappropriation doctrine provides an equitable alternative to IP law that is more flexible, but also leaves more power in the hands of the courts. That troubles commentators such as Posner, who has criticized the misappropriation doctrine as “alarmingly fuzzy” due to its “lack of clear boundaries.”⁷⁸ Still, as Professor Henry Smith has observed, misappropriation may be a useful alternative to the equally problematic expansion of statutory IP rights:

In IP there has been, in reaction to *International News Service*, a tendency to use formal IP law where once misappropriation might have served. Might some of the impetus for business method patents and expansive uses of copyright have been somewhat dulled if the most egregious problems of freeriding in violation of existing industry custom could have been addressed through suits for misappropriation and unjust enrichment? Again, it is hard to say because it has hardly been tried.⁷⁹

In many ways, hot news misappropriation gets to the heart of the matter by focusing on the fundamental unfairness of profiting from the work of others rather than splitting hairs over statutory interpretation and the difficulties of applying existing IP rights to evolving industries. The reasoning of *INS* applies now to news transmitted over the Internet as it did in 1918 to the telephone and telegraph because misappropriation focuses on anticompetitive conduct and its effect on market value, not regulation of any particular technology. Measured against the ever-increasing complexity of statutory IP—a body of law filled with legislative compromises, assumptions based on obsolete technologies, and loopholes for special interests—the misappropriation doctrine offers a relatively straightforward alternative that is well suited to the realities of the news business.

78. Posner, *supra* note 55, at 638.

79. Henry E. Smith, *Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman*, 95 VA. L. REV. IN BRIEF 9, 16 (2009); *but see* Posner, *supra* note 55, at 638 (“Society has dealt with this problem primarily though not exclusively by specifying intellectual property rights statutorily rather than by leaving it to the courts to decide on a case-by-case basis whether the incentive-access trade-off favors protection or nonprotection.”).

A. *Disadvantages of the Misappropriation Doctrine*

Beyond the risk of judicial activism inherent in equitable remedies, there are practical concerns that call into question the viability of misappropriation as a solution to piracy of news content. For one, the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins* weakened the precedential force of *INS* by declaring that "[t]here is no federal general common law" and requiring federal courts to apply the law of the forum state unless deciding a question of constitutional or federal law.⁸⁰ In contrast to the exclusively federal jurisdiction over patents and copyrights, there is no federal misappropriation statute.⁸¹ As the *AHN* court observed, "[a]lthough *Erie* would render the federal common law origins of *International News Service* non-binding in the federal courts, the cause of action is still recognized under the laws of various states"⁸² However, a misappropriation claim might come out differently in each of the 50 states, presenting a serious problem when news on the Internet is often national or international in scope. *AHN* sought to exploit this difficulty by arguing that even if New York recognized the tort of hot news misappropriation, its home state of Florida would not.⁸³ The district court rejected this argument through a choice-of-law analysis, concluding that the alleged harm to the AP occurred in New York, so New York law should apply.⁸⁴ However, its discussion of the Florida cases cited by both parties illustrates the difficulty of misappropriation claims turning on the varied laws of each state. With no case directly on point, the AP argued that Florida "would" recognize a hot news misappropriation claim based on an antitrust opinion citing a Second Circuit misappropriation case as part of its application of the Sherman Act.⁸⁵ *AHN*, on the other hand, argued that a 1943 case declining to extend the reasoning of *INS* to a magic act involving the production of beverages from seemingly empty beakers had established that Florida would never recognize hot news misappropriation in any context.⁸⁶ Although the AP prevailed in that argument, it is clear that the misappropriation doctrine as a matter of state law is less binding and less predictable than in the days of *INS*. This uncertainty adds to the cost and risk of misappropriation litigation, and may weigh in favor of other remedies codified at the federal level and

80. 304 U.S. 64, 78 (1938).

81. Spaulding, *supra* note 28.

82. *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 459 (S.D.N.Y. 2009).

83. *Id.* at 458-59.

84. *Id.* at 460.

85. *Id.* at 459 (citing *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322, 1328-29 (M.D. Fla. 2000)).

86. *Id.* at 460 (citing *Glazer v. Hoffman*, 16 So. 2d 53, 55-56 (Fla. 1943)).

enforced uniformly across the county.

Because of the varied application of hot news misappropriation in different states, it remains unclear to what extent the doctrine has been preempted by federal law. As the Supreme Court remarked in *Kewanee Oil Co. v. Bicron Corporation*:

States may hold diverse viewpoints in protecting intellectual property to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress⁸⁷

In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Supreme Court reaffirmed the doctrine that “state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress.”⁸⁸ The *Bonito* Court held that a state law protecting the design of unpatented boat hulls was preempted by the federal patent system, remarking that “the States may not offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law.”⁸⁹

Similarly, the 1976 Copyright Act expressly preempts recognition under state law of rights “equivalent to any of the exclusive rights of copyright in works that are within the subject matter” of copyright law.⁹⁰ However, the Act exempts from federal preemption “activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright”⁹¹ As discussed previously, it remains unclear whether misappropriation is an alternative approach to subject matter eligible for copyright or a backup plan when the limited scope of copyright fails to protect the investments required to gather news. Accordingly, “[s]ome courts and commentators have argued that the exclusion of ideas and facts from copyright protection in § 102(b) of the Copyright Act demonstrates that such material is not ‘within the subject matter of copyright,’ thus permitting protection under state law.”⁹²

State restrictions on appropriating the copyrightable aspects of works

87. 416 U.S. 470, 479 (1974).

88. 489 U.S. 141, 152 (1989) (reaffirming *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964)).

89. *Id.* at 156.

90. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §38 cmt. e (1995) (citing 17 U.S.C. § 301(2009)).

91. 17 U.S.C. § 301(b)(3) (2009).

92. RESTATEMENT, *supra* note 90.

fixed in a tangible medium of expression, however, are clearly preempted. A more difficult issue arises in connection with the application of the misappropriation doctrine to protect the non-copyrightable aspects or elements of such works, including ideas or facts taken apart from the form in which they are expressed.⁹³

This unsettled area of misappropriation law continues to challenge courts applying the common law of various states.

In the leading case of *National Basketball Association v. Motorola*, the Second Circuit held that under New York law, “only a narrow ‘hot-news’ misappropriation claim survives preemption for actions concerning material within the realm of copyright[,]” rejecting the view of earlier cases that misappropriation applied broadly to “any form of commercial immorality” including copying from competitors.⁹⁴ In *Motorola*, the NBA alleged hot news misappropriation, false advertising, copyright infringement, and other claims against a pager service broadcasting information about basketball games in progress.⁹⁵ The district court found Motorola liable for misappropriation, but dismissed the other claims.⁹⁶ The Second Circuit held that while the underlying facts of basketball games were not copyrightable subject matter, the 1976 Copyright Act specifically extended protection to simultaneously recorded transmissions of live sporting events, satisfying the subject matter requirement of a preemption analysis.⁹⁷ The *Motorola* court rejected a “partial preemption” standard that would have made it “possible for a plaintiff to assert claims both for infringement of its copyright in a broadcast and misappropriation of its rights in the underlying event[,]”⁹⁸ effectively circumventing preemption by the Copyright Act. Instead, the court adopted a five-element test to determine when a state-law misappropriation claim is sufficiently distinct from copyright infringement to survive federal preemption:

- (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

93. *Id.*

94. 105 F.3d 841, 851-52 (2d Cir. 1997) (disapproving of *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950)).

95. *Id.* at 844.

96. *Id.*

97. *Id.* at 848.

98. *Id.* (quoting *Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F.Supp. 1071, 1098 n.24 (S.D.N.Y. 1996)).

produce the product or service that its existence or quality would be substantially threatened.⁹⁹

The *Motorola* court concluded that although the pager service transmitted time-sensitive information and competed directly with a similar service being developed by the NBA, it did not free-ride on the plaintiff's efforts because it bore its own costs of collecting and transmitting factual information from each game.¹⁰⁰ Thus, while *Motorola* affirmed the theoretical possibility of state-law misappropriation surviving federal preemption, it simultaneously narrowed the scope of *INS* by preempting a misappropriation claim based on underlying facts subject to copyright when recorded for broadcast.

In light of the complex legal analysis required to determine whether a state misappropriation claim is preempted by copyright law, uncertainty over federal preemption is another practical challenge to the viability of hot news misappropriation. The *Motorola* court's rejection of "partial preemption" suggests that plaintiffs cannot have it both ways by claiming copyright infringement as to written news reports and misappropriation as to the underlying facts, even if the facts themselves fall outside the scope of copyright. Consequently:

[I]t seems clear that there is no standardized national policy of whether state laws concerning the misappropriation of facts are preempted by federal copyright laws. Additionally, with respect to national news specifically being misappropriated on the Internet, it is obvious that individual state misappropriation laws will not provide clear messages to large media corporations.¹⁰¹

It is possible that free-riding competitors pirating time-sensitive information from news organizations struggling to finance their own operations could consistently satisfy the *Motorola* court's "extra elements" test.¹⁰² However, when the *Scranton Times* sued a rival newspaper in 2009 for republishing obituary information, a federal court denied its misappropriation claim on preemption grounds.¹⁰³ The court held that the *Times* failed to satisfy the final prong of the *Motorola* test by alleging

99. *Id.* at 845.

100. *Id.* at 853-54.

101. Holte, *supra* note 67, at 31.

102. *But see* Posner, *supra* note 55, at 638 ("The apparent precision of [the *Motorola* court's] five-factor test may be illusory. The precision is purely verbal, and cannot tell a would-be 'misappropriator' whether his conduct is likely to cross the legal line.")

103. *Scranton Times, L.P. v. Wilkes-Barre Publ'g Co.*, No. 3:08-cv-2135, *available at* 2009 WL 585502, at *4 (M.D. Pa. Mar. 6, 2009).

a threat to its very existence from the reproduction of its obituaries.¹⁰⁴ Thus, the mere threat of federal preemption and the extra steps of litigation required to avoid it are likely to give pause to any news organization considering a state-law misappropriation action.

Another difficulty is that *INS* recognized hot news misappropriation by competitors but not by the public at large.¹⁰⁵ Subsequent cases have made clear that direct competition in business is a virtual prerequisite for the anticompetitive free-riding required to sustain a misappropriation claim.

In most of the small number of cases in which the misappropriation doctrine has been determinative, the defendant's appropriation, like that in *INS*, resulted in direct competition in the plaintiff's primary market. . . . Appeals to the misappropriation doctrine are almost always rejected when the appropriation does not intrude upon the plaintiff's primary market. Only rarely have courts applied the doctrine to appropriations of intangible trade values for use in secondary or derivative markets.¹⁰⁶

In *National Football League v. Governor of State of Delaware*, a federal court rejected a misappropriation claim against a state lottery game based on the scores of NFL games, finding that while the lottery sought to profit from the popularity of professional football, it was a "collateral service" not in direct competition with the NFL.¹⁰⁷ The court remarked that:

It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs' fans who want to go to the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges towards the gate.¹⁰⁸

In a rare case finding misappropriation between non-competitors, the Illinois Supreme Court in *Board of Trade of the City of Chicago v. Dow Jones & Co.* held that the Board of Trade could not use the Dow Jones

104. *Id.* But see David Johnson, *Digital Media Lawyer Beware: Court's Rejection of "Hot News" Cause of Action Appears to Be Based on Misunderstanding of Pleading Standards For Hot News Claim*, DAVID JOHNSON'S DIGITAL MEDIA LAWYER BLOG, Mar. 23, 2009, http://www.digitalmedialawyerblog.com/copyright/hot_news_misappropriation_1.

105. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918) ("The question here is not so much the rights of either party as against the public but their rights as between themselves.").

106. RESTATEMENT, *supra* note 90, § 38 cmt. c.

107. 435 F. Supp. 1372, 1378 (D. Del. 1977).

108. *Id.*

stock market index as the basis for its stock index futures contracts without permission.¹⁰⁹ The Board of Trade disclaimed any association with Dow Jones and argued that it had not caused competitive injury, but “merely created a new product which is outside the primary market which the producer of the original product originally set out to satisfy.”¹¹⁰ While acknowledging that the parties were not in direct competition, the court applied a balancing test to conclude that any harm resulting from the Board of Trade’s inability to tie its futures contracts to the Dow Jones index would be outweighed by the benefits of encouraging the development of new indexes specifically designed for the futures market.¹¹¹ Three dissenting justices, however, rejected this approach, arguing that “[t]he common law tort of misappropriation has been limited to cases where intellectual property, lawfully obtained, is used in direct competition with the person who created it.”¹¹² Thus, the potential for misappropriation between non-competing parties is another unsettled area of law that may discourage use of the doctrine in borderline cases.

The difficulty of defining direct competition is especially troublesome in the context of modern news distribution, which is no longer dominated by print newspapers with circulation limited by geography. Bloggers and citizen journalists now copy or link to news reports and then add their own commentary, blurring the line between the business of newsgathering and non-commercial political speech. Although the *AHN* court found misappropriation applicable to an online AP competitor, the defendant’s role as a self-described “news service” distributing stories to other websites was so similar to the AP’s business model that it was difficult to deny direct competition. While bloggers and news aggregators do not compete directly with the AP as a wire service, their distribution of the same content for free could inevitably affect the AP’s ability to retain paying customers. To date, the AP’s legal battles against bloggers have focused on fair use under the DMCA—and provoked a backlash among bloggers who accuse the wire service of chilling free speech by threatening litigation over quotes as short as 40 words.¹¹³ Given the AP’s difficulties with these copyright claims, it makes sense that its initial foray into misappropriation on the Internet

109. Spaulding, *supra* note 28 (citing Bd. of Trade of Chi. v. Dow Jones & Co., 456 N.E.2d 84, 90 (Ill. 1983)).

110. *Bd. of Trade*, 456 N.E.2d at 87 (internal quotation marks omitted).

111. *Id.* at 90.

112. *Id.* at 91 (Simon, J., dissenting).

113. Saul Hansell, *The A.P. Asserts Tough (and Still Secret) View of Copyright on Blogs*, N.Y. TIMES (June 20, 2008, 4:29 PM), <http://bits.blogs.nytimes.com/2008/06/20/the-ap-asserts-tough-and-still-secret-view-of-copyright-on-blogs>; *see also* Blogger Boycott of AP, UNASSOCIATED PRESS, http://unassociatedpress.net/index.php?option=com_beamspetition&Itemid=27&func=sign&pet=1 (last visited Nov. 28, 2010).

targeted a business that was unquestionably a competitor. However, if the misappropriation doctrine is to provide a broader remedy against free-riding by other Internet news sources, courts will face difficult questions concerning what counts as a competitor and how to balance that definition with the free-speech rights of bloggers and social media users.

III. WHAT IS AT STAKE

The *INS* Court recognized that the case involved more than the AP losing profits to an unscrupulous business rival. Instead, the broader issue was the long-term viability of a free press, an American institution protected by the Constitution and historically defended by the courts. Perhaps one reason that the “sweat of the brow” justification for hot news misappropriation has endured, despite being rejected in copyright law, is that courts have long recognized the unique importance of professional journalism in a democratic society. While the First Amendment protects journalists from government interference, survival of the press as a viable business depends on the continued investment of time and money required to gather breaking news. The *INS* Court expressed concern that without legal protection for the market value of news, businesses like the AP would ultimately cease to provide information to the public:

Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return.¹¹⁴

Justice Pitney's reasoning in *INS* relied on *National Telegraph News Co. v. Western Union Telegraph Co.*, a 1902 case cited with approval in *INS*.¹¹⁵ In that case, the Seventh Circuit held that while news reports on Western Union “tickers” were not copyrightable, they were a commercial product entitled to equitable protection from a competing telegraph service that obtained ticker tapes from Western Union offices and quickly retransmitted the information over its own network.¹¹⁶ The key point of the *Western Union* opinion is that not only would it harm the plaintiff to allow a competitor to free-ride off of its efforts to gather

114. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 241 (1918).

115. See Epstein, *supra* note 13, at 95-96 (discussing *Nat'l Tel. News Co. v. W. Union Tel. Co.*, 119 F. 294 (7th Cir. 1902)).

116. *Nat'l Tel. News Co.*, 119 F. at 295-96.

news—it would ultimately harm the public by causing the distribution of news as a business enterprise to “cease altogether.”¹¹⁷

And in the withdrawal of appellee from this business, there would come death to the business of appellants as well; for without the use of appellee’s tape, appellants would have nothing to distribute. The parasite that killed, would itself be killed, and the public would be left without any service at any price.¹¹⁸

The parasite analogy is a strong but apt way of describing free riders that divert revenue away from the same entities they depend upon for their own existence. In the short term, misappropriation produces a windfall for competitors recouping the investments of others. But over time, free riders run the risk that their impact on the market will be so great that there will no longer be any profits to share. To borrow another analogy, “the eventual effect would be to kill the goose that laid the golden eggs.”¹¹⁹

Justice Brandeis’s dissent in *INS* provides a strong counterpoint about the societal importance of unfettered communication and foreshadows today’s debate about freedom of information on the Internet. Brandeis was skeptical of property rights in news of interest to the general public, noting that “[a]n essential element of individual property is the legal right to exclude others from enjoying it.”¹²⁰ In Brandeis’s view, if the purpose of a free press is to promote democracy by keeping society informed, the law should not frustrate that goal by allowing news sources to restrict access to vital information to ensure their own profit. Thus, he observed:

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. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property.¹²¹

Brandeis’s view of free access to ideas and information anticipates the

117. *Id.* at 296.

118. *Id.*

119. Posner, *supra* note 55, at 628.

120. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

121. *Id.*

modern argument that unrestricted communication is a basic human right, especially in light of the Internet's potential to inform underserved populations and allow them to express their own opinions without fear of censorship.¹²² Still, if all published information is "free as the air to common use," the question becomes who pays for that information to be published in the first place—and how long they will continue absent some assurance of return on their investment. Despite the appeal of a world where all information is exchanged freely, the mere absence of government censorship does not guarantee widespread access to information unless the business of gathering it remains worthwhile.

In 21st century America, it is not easy to elicit sympathy for traditional media, which are either too liberal, too corporate, too lazy, or too intrusive for the tastes of many news consumers. Consequently, some observers scoff at the notion of preserving journalism as a profession, asking instead why the greedy, biased, anachronistic remnants of the Fourth Estate deserve to be saved from their own incompetence. Public hostility toward mainstream media and the persistent belief that information on the Internet is inherently free have made it tempting for bloggers and online aggregators to dismiss newspapers as obsolete relics being replaced by modern equivalents that perform the same function at no cost. The claim is that it is survival of the fittest, and dinosaurs deserve extinction; cheaper, smarter, and more transparent forms of news distribution will evolve to take their place. Even if the final result is not perfect, it could not possibly be worse than the media we already have.

This view, however, ignores that while the Internet facilitates the broad distribution of news content, news does not originate *from* the Internet and never will. As former Los Angeles Times editor John Carroll said in a 2006 interview:

I estimate that roughly 85 percent of the original reporting that gets done in America gets done by newspapers They're the people who are going out and knocking on doors and rummaging through records and covering events and so on. And most of the other media that provide news to people are really recycling news that's gathered by newspapers.¹²³

122. See, e.g., DECLARATION OF PRINCIPLES, WORLD SUMMIT ON THE INFO. SOC'Y, (2003), *available at* <http://www.itu.int/wsis/docs/geneva/official/dop.html> ("[E]veryone has the right to freedom of opinion and expression; that . . . right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

123. Interview by PBS Frontline with John Carroll, Fellow at Harvard's John F. Kennedy School of Gov't's Shorenstein Ctr. for Press, Politics and Pub. Policy, former editor of the Los Angeles Times (July 8, 2006), *available at* <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/carroll.html> (quoted and

By contrast, a survey of seven leading blogs by the Project for Excellence in Journalism found that only five percent of postings included original research, and one percent involved original interviews.¹²⁴ The highest level of original reporting in 79 percent of postings was commentary by the blogger.¹²⁵ The authors concluded that “[w]e found little of what would be considered journalistic reporting done by these bloggers, as in examining public documents, conducting interviews, or acting as a direct witness to events.”¹²⁶ True, bloggers occasionally break news based on their own tips and research or provoke traditional media to cover previously underreported issues.¹²⁷ However, blogs that report their own stories have nothing to fear from newspapers invoking the hot news doctrine, which since *INS* has explicitly allowed the independent pursuit of news tips.¹²⁸ If anything, hot news protection might encourage more bloggers to do their own reporting by rewarding added value beyond the personal commentary that presently dominates blog postings.

As the *INS* Court recognized, original news reporting is time-consuming and expensive, while reproduction is easy and cheap thanks to evolving technology. The dramatic rise of Web 2.0 applications allowing users to share their own content has led some commentators to predict that the death of the newspaper industry will lead to the rebirth of a new—and better—model of journalism.¹²⁹ Social media strategist Paul Gillin, for example, argues that the inevitable demise of traditional newspapers will lead to a new market for online news in which “[e]ditorial content is outsourced to an army of individual enthusiasts and bloggers who find interesting information on the Web and feed it to the site operators,” thereby reducing editorial expenses to practically nothing.¹³⁰

However, each blog comment and search engine link still depends

discussed in Holte, *supra* note 67, at 4).

124. PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2006: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2006), http://www.stateofthedia.org/2006/narrative_daymedia_blogs.asp.

125. *Id.*

126. *Id.*

127. See, e.g., Paul Kedrosky, *Do Bloggers Break News?* INFECTIOUS GREED, (March 14, 2006) http://paul.kedrosky.com/archives/2006/03/14/do_bloggers_bre.html (criticizing methodology of Project for Excellence in Journalism survey and citing several blogs that break original news).

128. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 245 (1918).

129. See, e.g., Paul Gillin, *About the Blogger*, NEWSPAPER DEATH WATCH, <http://www.newspaperdeathwatch.com/about> (last visited Dec. 21, 2010) (“Ultimately, this painful decline will give birth to a new model of journalism built upon aggregation and reader-generated content. I’m an optimist, and I think the new journalism will be better in many ways than what preceded it.”).

130. PAUL GILLIN, HOW THE COMING NEWSPAPER INDUSTRY COLLAPSE WILL REINVENT JOURNALISM 3 (2006).

on an original source of information. The danger is that without newspapers and wire services reporting news in the first place, bloggers and aggregators will have nothing to opine about and nothing to feed to other websites. Declining profits, layoffs, and bankruptcies at newspapers across the country show that there is a real danger of the industry's collapse under the weight of free-riding competitors. As the court predicted in *Western Union*, “[t]he parasite that killed, would itself be killed, and the public would be left without any service at any price.”¹³¹

IV. TOWARD A NEW UNDERSTANDING OF INDUSTRY NORMS

The hot news doctrine could play a valuable role in the newspaper industry's survival, but it must be part of a broader realignment of norms in the news business in order to balance the Internet's potential for free access to information with the realization that free-riding as a business model is ultimately bad for everyone. In contrast to statutory IP rights, “customs that reflect commercial morality mainly have entered the law (or equity) through doctrines of misappropriation and unjust enrichment.”¹³² Consequently, the power of misappropriation as a legal remedy depends on the existence of industry norms to guide its application. The hot news doctrine originated as an equitable enforcement of the customs of the news business in the early 1900s. The doctrine could serve as an equally powerful tool in the 21st century, but only when the divergent interests that now comprise the news media reach a rough consensus of what is fair competition—and what is not—in light of the technological and social changes that have disrupted the industry. This means that wire services, newspapers, broadcasters, and bloggers must agree—not on everything, but on a basic set of norms outlining a new sense of fair play between news gatherers, distributors, and consumers. Given the backlash against copyright enforcement and fundamental differences over intellectual property on the Internet, this agreement will not come easily. However, the stakes are high for everyone involved.

Epstein argues that the competitive understanding that developed among wire services before World War I was not just polite, but rational, because newspapers depended on the wires for content and appreciated the risk of not paying their share of the cost.¹³³ Such a “self-enforcing contract” arises when actors involved in repeat transactions recognize that the long-term value of their relationship is greater than the potential gain from a single breach.¹³⁴

131. *Nat'l Tel. News Co. v. W. Union Tel. Co.*, 119 F. 294, 295-96 (7th Cir. 1902).

132. Smith, *supra* note 79, at 13.

133. Epstein, *supra* note 13, at 101-02.

134. *Id.* at 102-04.

Each party knows that the danger of retaliation is so great that once it decides to adopt a free-rider position, it will, over time, lose its own investment in the news-gathering business. As repeat players, the newspapers that rely upon these agencies or constitute their membership or clients also must fear the destruction of their sources of information, which constitutes a powerful incentive to respect the customary rules in their ordinary business.¹³⁵

However, self-enforcing contracts are vulnerable to disruptions—such as the outbreak of war or the development of new technologies—that alter the value of maintaining the status quo.¹³⁶

The secret of the self-enforcing contract, then, is to ensure that the short-term gains from defection never exceed the long-term benefits from preserving general stability. But these short-term gains from defection may be increased dramatically by events beyond the control of the parties, which would undermine the apparent permanence of the overall relationship.¹³⁷

Epstein observes that INS broke the industry custom against pirating stories from competitors only when it became necessary to salvage its business after being barred from the front in World War I.¹³⁸ The immediate need to continue supplying its papers with news from Europe outweighed the value of maintaining stability in the industry, so INS sought to redefine the accepted understanding of property rights in news. Epstein's analysis shows how changing circumstances can lead to disequilibrium in industries that previously policed themselves through mutual understandings, and it also underscores the value of the misappropriation doctrine as a legal backup when self-enforcing contracts break down.

The Internet has had the effect of a world war on the global distribution of information, and the news business remains in a state of disequilibrium struggling to adapt. The norms that governed newsgathering while the industry was still dominated by print publications are now challenged by Internet business models that find more value in destroying the status quo than maintaining it. In the short term, it is understandable that newcomers see opportunity in an unrestricted flow of information because even modest revenues are pure profit when content can be recycled at no cost. Part of the current turmoil involves testing the legal boundaries of new technologies and

135. *Id.* at 101.

136. *Id.* at 104.

137. *Id.* at 105.

138. *Id.*

business models, and enforcement through traditional IP law has had mixed results. Considering the legal uncertainty and the profit motive for reproducing existing content rather than gathering it independently, it is not surprising that many businesses have calculated that the immediate gains of piracy outweigh the long-term risk of cannibalizing the news business itself. This, however, is a serious gamble, and one that free-riding news sources take at their own peril. If the industry determines that all information is free for the taking only to realize there is no longer a steady stream of news to reproduce, nobody will emerge the winner. It is not that there will be *nothing* on the Internet—a point proven every day by blogs and websites that value quantity over quality. The question is whether what remains of journalism will continue to supply readers with new information, or merely provide a forum to recirculate what they already know. The ultimate danger is that if originators of news can no longer finance their own reporting, free-riding news sources will become just as obsolete as the traditional media they sought to replace.

Clearly, the solution to disequilibrium in the news business goes deeper than a volley of DMCA takedown notices or letters to Congress seeking regulation of emerging technologies; it calls for a fundamental reexamination of customs and norms in an industry where market power has shifted significantly in recent years. The values embodied in the hot news misappropriation doctrine provide a workable starting point for this process by focusing on fair competition irrespective of technology or medium. The legal system has been understandably reluctant to grant property rights in historical facts, and no news report should result in a permanent monopoly over the event itself. However, the misappropriation doctrine's concern with the market value of news correctly shifts the focus from fair use that may not harm anyone to anticompetitive conduct that poses a serious threat to professional journalism. Furthermore, the *Motorola* court's "extra elements" test helps narrow the scope of what could otherwise be an overbroad remedy, targeting free-riding on time-sensitive information that directly affects the viability of newsgathering as a profession.¹³⁹ The appellate court's injunction in *INS* against "any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has . . . passed away"¹⁴⁰ raises the still-unanswered question of how long is long enough for a news organization to adequately recoup its investment in original reporting. It also is worth considering that news may have remained "hot" longer in 1918, before the current shift from a 24-hour news cycle to virtually continuous publication. However, these questions are ones of degree and not of the basic soundness of the premise that the law should

139. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

140. *Associated Press v. Int'l News Serv.*, 245 F. 244, 253 (2d Cir. 1917).

enforce industry norms of fair competition, thereby providing an economic incentive to continue producing original news reports. The *INS* opinion is not the end of this conversation, but it is a good start.

The development of a new self-enforcing contract for fair play in newsgathering is surely in the public interest, but it is also in the interest of industry players who depend on each other's work to coexist. The value of hot news misappropriation as a tool in this process is that it provides legal teeth to industry norms and protects those who play by the rules against defectors who value short-term gains over symbiotic relationships. The answer is not to add more complexity to a convoluted intellectual property regime that is poorly suited to protecting the time value of news. Despite its procedural challenges, the misappropriation doctrine provides an alternative that is simpler, more flexible, and more likely to foster fair competition in the news business, instead of creating new statutory loopholes for free-riders to exploit. The point is not to stifle innovation by forcing the news sources of the future to conform to the outdated customs of a dying newspaper industry. The goal, rather, should be for the legal system to protect the viability of professional newsgathering in the 21st century by enforcing a new set of norms that ultimately benefit everyone.

CONCLUSION

The hot news misappropriation doctrine announced in *INS* remains relevant nearly a century later thanks to its flexibility to adapt to new technologies and its focus on the market value of news rather than the language or medium used to report it. However, both the newsgathering business and the statutory scheme of intellectual property law have become far more complex than in the days of World War I. The *AHN* and *Theflyonthewall* decisions show that common-law misappropriation may be at least as effective as copyright or trademark law for modern newsgathering organizations seeking to protect the fruits of their labor against free-riding competitors. However, the uncertainty of an equitable remedy applied differently in each state and possibly preempted by federal law may discourage news organizations from relying on the doctrine in their fight against online piracy.

While the challenges of applying misappropriation to the Internet are real, the broad range of interests that now comprise the news media must remember that they depend on each other for their long-term survival and share an interest in preventing conduct that ultimately harms everyone. The assumption that newspapers and news wires are obsolete relics of the 20th century that will soon be replaced by bloggers and news aggregators rests on the false premise that reproduction of existing information is the same as original reporting. Free-riders currently

exploiting a declining newspaper industry risk creating a future where there are no professional news reports to recycle at a profit, undermining their own business models and jeopardizing the American tradition of a free press. Accordingly, news media in the 21st century must develop new norms of fair competition, balancing the openness of the Internet with the realization that nothing is ever “free” in the long run. The flexibility of the misappropriation doctrine provides a workable foundation for this process, as well as a powerful tool for enforcing the result.