THE "HOT NEWS" MISAPPROPRIATION DOCTRINE, THE CRUMBLING NEWSPAPER INDUSTRY, AND FAIR USE AS FRIEND AND FOE: WHAT IS NECESSARY TO PRESERVE "HOT NEWS"?

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Introduction

We used to have to wait for the morning newspaper to update ourselves with the most recent news developments, which were still only as recent as yesterday. Today, we have access to breaking news virtually instantaneously and we have it, quite literally, at our fingertips. While advancements in technology have made breaking news, or so called "hot news," easily accessible mere moments after it occurs, it has also provided scrapers,¹ those who copy and paste large portions, or even whole articles pertaining to breaking news onto their own websites, with the necessary tools to steal faster than ever.²

The concept of hot news, a judicially created concept,³ refers to breaking news—news coverage of events that occurred in the very recent past. Thus, hot news is composed of facts,⁴ and today, more than ever before, readers who wish to learn the latest set of facts have a choice of numerous mediums with which to update themselves. It makes very little difference to some readers whether the website they receive their news from is affiliated with the organization that expended resources to collect and deliver the news to them, such as the Associated Press ("AP"), or if they

Id.

¹ "A scraper site is a website that displays no original . . . information. . . . All the content showed in a scraper site is taken without permission from other open-content websites and their webmasters. Unlike search engines, a scraper site does not direct a visitor to the original site where the content came from. Scraper sites do not respect copyright and repost content without including the original authors' name and information." TopBits.Com, Scraper Site, http://www.topbits.com/scraper-site.html (last visited Oct. 16, 2010).

² See Julian Sanchez, AP Launches Campaign Against Internet "Misappropriation," ARS TECHNICA, Apr. 6, 2009, http://arstechnica.com/tech-policy/news/2009/04/ap-launches-campaign-against-internet-misappropriation.ars.

The Internet compounds the problem [W]hat AP is selling isn't really the scintillating prose of its writers: it's 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.

³ See generally Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

⁴ Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) ("consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news").

receive their news from a scraper who copied the article from the original source. Which avenue the readers choose to receive their hot news from, however, makes a huge difference to both free-riding scrapers and the organizations that expend resources to collect and deliver hot news.

Websites generate revenue through advertisements. The more visits a website garners, the more attractive they become to advertisers, which in turn means the owners can charge higher rates for advertising space on their webpage. Thus, advertising on popular websites like Google and Yahoo! is comparable to advertising in Times Square, for which companies spend millions of dollars yearly, while advertising on rarely visited websites is comparable to advertising on a desolate highway. Accordingly, a website owner's earnings are directly correlated to the website's popularity. While it is inconceivable to entertain the idea that the deserted highway owner somehow "steals" and redirects the traffic of Times Square to her own property, this is precisely the type of activity that is happening with rapidly increasing frequency in cyber world.

The problem arises when scrapers take the content of news organizations, like the Associated Press, an international news gathering organization, without paying for it, which hurts the AP in two ways. First, since other new organizations pay large sums of money for AP generated content, scrapers are gaining an unfair advantage against competitors who abide by the law. Second, by displaying the stolen content on their website and collecting advertising revenue from the traffic it generates, they are stealing advertising revenue from paying AP customers. When legitimate news organizations go under as a result of not being able to recoup their expenses, the AP is left without a customer base. Simply put, scraping means news organizations are not going to accrue enough advertising revenue to survive, which, in turn, means that organizations like the AP will also go under.

Recently, there was a revived interest in the hot news issue, and courts spoke on the hot news misappropriation doctrine. In 2009, the issue of hot news was brought up in Associated Press v. All

⁵ See WebsiteGear.com, Website Traffic & Revenue (Jan. 18, 2004), http://content.websitegear.com/article/revenue_traffic.htm ("Traffic can be related to ad publishing revenue for content based websites because higher page views generate more ad revenue.").

⁶ See Sanchez, supra note 2.

⁷ Associated Press, Facts & Figures, http://www.ap.org/pages/about/about.html (last visited Oct. 16, 2010) (The AP sells news stories to thousands of newspapers, radio and television programs, and online customers around the world—their customer base includes big names in the news industry, such as Yahoo News, which attracts even more traffic than Google News.). In this Note, the AP will be used as the primary example of a news organization which funds its own news-gathering.

Headline News.⁸ The case presents the quintessential issue of hot news: the problem of non-paying customers who derive a profit from use of stolen content, in this case AP stories, which cost money to produce, and, as a result, rendering the news process economically infeasible. The AP brought suit against All Headline News (AHN), claiming that AHN hired people to find AP content on the Internet in order to prepare the content for republication under AHN's banner. During this process, AHN was either rewriting the text or simply copying the full content of AP's stories.

AHN filed a motion to dismiss with the following arguments: (1) hot news is not protected by copyright because it is composed of facts; and (2) misappropriation is not good law because International News Service v. Associated Press ("INS"), which was decided in 1918, was repudiated in 1938 in Erie Railroad Co. v. Tompkins; While the Supreme Court occasionally cites to the INS decision, it has never reaffirmed the misappropriation doctrine.¹⁰ The doctrine establishes that news matter which is collected at a cost, with the intent to distribute to others at a cost, will be regarded as "quasi property." Despite the fact that the Supreme Court has never reaffirmed the doctrine, the Southern District of New York denied AHN's motion to dismiss because AP's "cause of action is still recognized."12 While the case ultimately settled, this was a significant victory for the AP; in addition to the payment by AHN to the agency for an "unspecified sum," AHN agreed not to "make competitive use of content or expression from AP stories." ¹³

The most significant recent development in hot news occurred in March 2010, when investment firms Barclays Capital, Merrill Lynch, and Morgan Stanley sued TheFlyOnTheWall.com, a website which aggregates financial news, which was gathered by research analysts from the three plaintiff companies. The Southern District of New York initially held in favor of plaintiff firms in *Barclays Capital Inc. v. TheFlyOnTheWall.com (Barclays)*, ¹⁴ by ordering TheFlyOnTheWall.com to wait 30 minutes after the stock

^{8 608} F. Supp. 2d 454 (S.D.N.Y. 2009).

⁹ 304 U.S. ⁶⁴ (1938). AHN argued that since INS was common law created by a federal court, Erie repudiated INS because Erie held that "[t]here is no federal general common law." *Id.* at 78.

 $^{^{10}}$ All Headline News Corp.'s Reply in Support of Their Renewed Motion to Dismiss, Associated Press v. All Headline News Corp., No. 1:08-CV-000323 (PKC), 2008 WL 4521849 (July 2, 2008) (citations omitted) [hereinafter Headline News Motion].

¹¹ Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

¹² All Headline News, 608 F. Supp. 2d at 459.

¹³ Amanda Ernst, *AP Settles "Hot News" Lawsuit with AHN Media*, FISH BOWL NY, July 13, 2009

 $http://www.mediabistro.com/fishbowlny/new_media/ap_settles_hot_news_lawsuit_with_ahn_media_121428.asp.$

¹⁴ 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

market opens to publish pre-market research and to wait two hours while the stock market is open to publish their research.¹⁵ This case was one of the few hot news cases to go to trial and while this decision was a huge win for content creators, the victory was short-lived. The FlyOn The Wall.com sought an expedited appeal, arguing their First Amendment rights were violated, and in May 2010, pending the appeal, the Second Circuit placed Judge Cote's injunction on hold for the duration of the appeal.¹⁶ TheFlyOntheWall.com received support surprisingly, Google, Inc. and Twitter, Inc., other websites whose success is based at least partially on their ability to aggregate. Final briefs were submitted in July 2010 and the three-judge appeals court fired dozens of questions at the parties in an attempt to determine (1) what type of information would be considered fact rather than opinion, and (2) at what point in time the creator of that information would lose their right to control how it is distributed.¹⁷ Judge Robert Sack, one of the judges presiding over the appeals, asked "whether The New York Times could have sued NBC News for reporting on a Saturday night that it planned on Sunday to endorse John F. Kennedy's presidential candidacy, if doing so cost the newspaper 30,000 sales."18 Kathleen Sullivan, a representative of Google, brazenly responded there was "no property right in the fact of that information once it has been disclosed."¹⁹ Whatever the outcome, the appeals court will finally be addressing significant issues regarding the hot news misappropriation doctrine. For instance, we have yet to receive a satisfying answer from courts as to what length of time the facts in question have value.20

This Note will examine the current state of the newspaper industry as well as the misappropriation doctrine: the impact it has had in the past, the role it is playing in the present, and what it needs to become for the future of the industry. Part I will track the development of the misappropriation doctrine in case law and

¹⁵ Id. at 346.

¹⁶ *Id*.

 $^{^{17}}$ Jonathan Stempel, Wall Street Urges Courts to Let It Control "Hot News," REUTERS, Aug. 6, 2010, http://www.reuters.com/article/idUSTRE6753YA20100806.

¹⁸ Id.

¹⁹ Id.

²⁰ Brian Westley, "Hot News" Case Could Impact Online News Aggregation, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, May 26, 2010, http://www.rcfp.org/newsitems/index.php?i=11441.

^{&#}x27;It is definitely the first case to really consider the remedy phase of the hot news claim—how long, how exclusive can an injunction [against an aggregator] be,' said Andrew L. Deutsch, an attorney with DLA Piper who recently represented The Associated Press in its case against news aggregator All Headline News. That case was ultimately settled out of court.

examine the current viability of the hot news claim. It will also explore the current points of contention between bloggers and news collectives with some of the main arguments from both sides. Part I will conclude with an analysis of fair use in regard to hot news and a look at the factors currently molding the future of the doctrine. Part II will illustrate how necessary the doctrine is for the newspaper industry to survive and will also provide a peek into a world which may very soon become our reality: a world void of newspapers as we know them. Part II will end with a look at the incentives for collaboration by existing major news collectives to make a joint effort to prevent further "scraping" of their publications. Finally, Part III will explore proposed legislative change to the Copyright Act and various business models for monetizing the news industry. Part III will conclude with a proposal that, if adopted, will likely have the most brawn in newspaper's fight for survival in today's cyber world.

A thorough analysis of the current self-help measures taken by the newspaper industry has made it clear that a legislative amendment to the Copyright Act is necessary to save the industry. By incorporating the misappropriation doctrine into the Copyright Act, we will eliminate the uncertainty of litigation because, if history is any indication of the future, it appears that most litigation between newspapers and bloggers will result in settlements.²¹ Settlements fail to set a clear precedent for future cases and thus fail to be very effective in attempting to regulate scraping. Furthermore, rather than requiring an inquiry into the individual facts and circumstances surrounding each instance of scraping in order to determine monetary damages, it is much more beneficial and effective to implement statutory damages in the Copyright Act for newspapers to rely on when a scraping cause of action arises. An overview of the various proposed business models employed by the newspapers shows one common theme which supports my proposal for a legislative change: unification. Many newspapers have joined forces to share their content amongst fellow newspapers as their own resources and profits dwindle. Furthermore, it has become clear that newspapers need to act in unison if any sort of change, especially one which will significantly benefit the industry, is to be made.

²¹ See David Kravets, Newspaper Chain's New Business Plan: Copyright Suits, WIRED.COM, July 22, 2010, http://www.wired.com/threatlevel/2010/07/copyright-trolling-for-dollars ("People are settling with us,' says Thomas Dunlap, the head lawyer of Copyright Group's litigation. The out-of-court settlements . . . are ranging in value from \$1,500 to \$3,500 – about the price it would cost defendants to retain a lawyer.").

I. THE HOT NEWS MISAPPROPRIATION DOCTRINE

A. Development of the Hot News Misappropriation Doctrine

It has been established for over a century that news reports can be property worthy of copyright protection.²² In 1918, the Supreme Court *INS* held that news "gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise . . . must be regarded as quasi property."²³ The reasoning behind the Court's decision was one of equity and practicality. Allowing news agencies to free-ride off the work of other news agencies 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."²⁴ In subsequent decades, the notion of news as protectable property was upheld in numerous cases,²⁵ and the logic and reasoning supporting the holding remains consistent to this day.

In 1966, the Court confirmed INS' reasoning in Bond Buyer v. Dealers Digest Publication Co., stating that "[i]t is now no longer subject to question that there is a property in the gathering of news which may not be pirated."26 In 1997, a highly specific test for hot news misappropriation was delineated in National Basketball Association v. Motorola, Inc. ("NBA"). 27 The test requires five factors to be present in order to claim protection of the hot news misappropriation doctrine. First, the plaintiff must incur a cost when gathering the information. Second, the gathered information must be time sensitive. Third, defendant's use of the gathered information must be the equivalent of free-riding off of the work of the plaintiff. Fourth, the defendant must be competing directly with the plaintiff's product or service. Finally, allowing defendant to free-ride off the plaintiff's work and efforts must so discourage the production of the product or service in

 $^{^{22}\,\}mathrm{Int'l}$ News Serv. v. Associated Press, 248 U.S. 215, 236 (1918). (The court stated that news is protectable:

[[]N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.).

²³ Int'l News Serv., 248 U.S. at 236.

²⁴ Int'l News Serv., 248 U.S. at 241.

²⁵ See, e.g., Bond Buyer v. Dealers Digest Publ'g. Co., 25 A.D.2d 158 (1966); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

²⁶ Bond Buyer, 25 A.D.2d at 159 (citing Int'l News Serv., 248 U.S. 215).

²⁷ 105 F.3d 841 (2d Cir. 1997).

question that its very existence or quality is seriously threatened.²⁸ *NBA* also provided clarification as the definition of misappropriation: "'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto."²⁹

Although the hot news misappropriation doctrine was protected in INS and reaffirmed in cases such as Bond Buyer and NBA, it was also firmly established, in Feist Publ'n, Inc. v. Rural Telephone Service Co. Inc.,30 that facts themselves are not copyrightable, but a compilation of facts, if original in its selection and coordination, will be protected under copyright law.³¹ The court acknowledged the tension between facts and compilations, as many compilations consist solely of data: "if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them."32 The court then defined the necessary requirements for a work to be considered original: the work had to be independently created by the author rather than being copied and it had to possess a minimal degree of creativity.³³ What is vital to the hot news misappropriation issue from *Feist* is the standard that was set for originality:

[f]actual compilations . . . may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal

30 499 U.S. 340 (1991).

'No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its 'maker' or 'originator.' 'The discoverer merely finds and records.' . . . Factual compilations, on the other hand, may possess the requisite originality. . . . Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.

²⁸ Nat'l Basketball Ass'n, 105 F.3d at 845.

²⁹ *Id*.

³¹ Id. at 347-48.

Id. (citations omitted).

³² Id. at 348. The court further clarified by drawing from Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), that in order to receive copyright protection, the work needs to be "original to the author." Feist, 499 U.S. at 345.

³³ See Feist, 499 U.S. at 345 (citing 1 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT §§ 2.01[A], [B] (1990) [hereinafter Nimmer]).

degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.³⁴

B. The Hot News Misappropriation Doctrine is Necessary for the Newspapers' Survival

If the hot news misappropriation doctrine ceased to exist, the lack of protections for newspapers would lead to a lack of incentive for news organizations to expend the effort to gather, compile, and publish hot news-meaning hot news may not be accessible to us, the public. Thus, not only would hot news be extinguished or drastically diminished, but also, since no protection equates into an inability to recoup advertising revenue, newspapers, as we know them, would be a thing of the past. In other words, misappropriation of newspapers' work will lead to broke newspaper. Scott Baradell, a former journalist, succinctly sums up the current state of affairs for the newspaper industry: "now we have thousands of Web sites all reporting the same news—with only a small handful actually paying for the reportage that supports this entire infrastructure of information. And that small handful—the newspapers—are running out of money, and out of time."35 David Simon, a former Baltimore Sun reporter shared a similar sentiment during the Senate Committee on Commerce, Science, and Transportation hearing regarding the future of journalism: "The Internet . . . does not deliver much first generation reporting. Instead, it leeches that reporting from mainstream news publications whereupon aggregating websites and bloggers contribute little more than repetition, commentary and froth."36

How much longer can the giants of the industry, such as the Wall Street Journal and the New York Times, continue to fund their operations when others are relentlessly reaping the profits of their work product? In 2009, the *New York Times* announced their plans to cut a hundred newsroom jobs, eight percent of their total newsroom staff.³⁷ At this juncture, it seems the only option the newspapers are left with is downsizing. While some of the layoffs could be due to the transition of the industry from print to online, nonetheless further stresses the importance of the

³⁴ Feist, 499 U.S. at 348 (citing Nimmer §§ 2.11[D], 3.03; Robert C. Denicola, Copyright in

Collections of Facts, 81 COLUM. L. REV. 516, 523, n. 38 (1981)).

35 Scott Baradell, Newspapers Are Running Out of Time to Solve the Problem of Content Theft, BLACK STAR RISING, Feb. 9, 2009, http://rising.blackstar.com/newspapers-are-runningout-of-time-to-solve-the-problem-of-content-theft.html.

³⁶ On the Media: Old and New Media Go to Washington (NPR radio broadcast and transcript May 8, 2009), available at http://www.onthemedia.org/transcripts/2009/05/08/01. 37 Menachem Kaiser, Spare a Dime for the Times?: Can Needy Newspapers Accept Donations?,

SLATE, Oct. 21, 2009, http://www.slate.com/id/2233151.

misappropriation doctrine. As more news is available online, and hence more readily accessible, more newspapers will be increasingly susceptible to scrapers.

Protecting the misappropriation doctrine is necessary to provide the economic incentive for organizations to continue spending money to gather and report time-sensitive news.³⁸ Not only does equity demand that the "news collectives" reap the benefits of their labor, but, as discussed above, the future of these organizations necessarily requires the hot news doctrine to remain viable.³⁹ Newspapers need to be able to take legal recourse against those who infringe upon their hot news, and the limited protection granted by the doctrine provides newspapers and news collectives with a necessary tool in maintaining a fighting chance of survival. After all, "[u]ltimately, *INS* is intended to protect the public, for without its limited protection, no one would go into the hot-news business."⁴⁰

The AP, in an attempt to protect their property and recoup some of their lost profits, tried numerous strategies in the past, many of which were met with contempt by bloggers. One of their more unpopular attempts, which was quickly discarded, involved the sale of "quotation licenses" to those who wished to quote their articles, while still reserving the right to terminate the license at their discretion.⁴¹ The bloggers responded in a variety of ways: some ridiculed the AP,⁴² some called the AP "deranged,"⁴³ and others accused the AP of attempting to upset the established legal and social order with a system of private law, one which allows a

³⁸ See generally Rex Y. Fujichaku, The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information, 20 U. HAW. L. REV. 421, 425 (1998) (noting that "[t]he ease of free riding on he investment of others via Internet-related technological advances threatens to be a serious disincentive to investment in the development of databased informational products").

³⁹ Sonia Katyal, *Harmless Use: Gleaning From Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411, 2423 (2009) (Associate Professor Katyal, Fordham Law School states her view on INS' stance on not allowing one to "reap" the benefits of what they did not sow:

[[]Y]ou can't 'reap' if using the product of others' intelligence and effort is going to be so harmful to them as to make it impossible to get an important product to the public. . . . [I]t is not about prohibiting somebody . . . from taking some grain she did not plant; it is about prohibiting a whole crowd from taking the entire field of grain.

Id. (citations omitted).

⁴⁰ Andrew L. Deutsch, Copyright, Misappropriation and Hot-News Doctrine, 217 NEW L.J. 46 (1997).

⁴¹ Mike Masnick, AP Will Sell You a License to Words it has No Right to Sell, TECH DIRT, Aug. 3, 2009, http://www.techdirt.com/articles/20090803/0344305756.shtml ("The AP keeps making a mockery of itself."); James Grimmelmann, The AP Will Sell You a "License" to Words It Doesn't Own, THE LABORATORIUM, Aug. 3, 2009, http://laboratorium.net/archive/2009/08/03/the_ap_will_sell_you_a_license_to_words_it_doesnt; Cory Doctorow, Associated Press Expects You to Pay to License 5-word Quotations, BOINGBOING, June 17, 2008, http://boingboing.net/2008/06/17/associated-pressexp.html.

⁴² Masnick, *supra* note 41.

⁴³ Grimmelmann, supra note 41.

few private organizations to dictate rules for the rest of society to follow.⁴⁴

Every time the AP claims infringement of copyrighted material and posits to create "new guidelines" for bloggers to follow when using its material, it is almost certain that a heated response from the blogging community will follow. Michael Arrington from TechCrunch.com,⁴⁵ a popular technology blog, argued the AP was attempting to place stricter guidelines than what was legally required for use of their content and, as such, he encouraged other bloggers to join him in a new policy regarding AP stories: "We don't see them, we don't quote them, we don't link to them. They're banned until they abandon this new strategy . . . [and their] ridiculous attempts to stop the spread of information around the Internet."⁴⁶ Jeff Jarvis, on his blog, BuzzMachine,⁴⁷ went so far as to declare a boycott against the AP⁴⁸ while simultaneously urging bloggers to reproduce AP material in a show of solidarity for blogs targeted by the AP.⁴⁹

On the other side of the debate is the view that hot news is unquestionably copyrightable property; therefore, direct copying and pasting from one publication to another is copyright infringement.⁵⁰ Proponents of this argument, such as the *NBA* court,⁵¹ emphasize the considerable time, money, and effort that go into the process of publishing time-sensitive news in an increasingly globalized world.⁵² Thus, when others simply copy

⁴⁴ Doctorow, supra note 41.

⁴⁵ TechCrunch.com, http://techcrunch.com (last visited Oct. 29, 2010).

⁴⁶ Michael Arrington, *Here's Our Policy on A.P. Stories: They're Banned*, TECHCRUNCH, June 16, 2008, http://www.techcrunch.com/2008/06/16/heres-our-new-policy-on-ap-stories-theyre-banned.

⁴⁷ BuzzMachine.com, http://www.buzzmachine.com (last visited Oct. 29, 2010).

⁴⁸ Saul Hansell, a writer for *The New York Times* and a blogger, points out the ludicrous and ineffective nature of such a boycott because the bloggers are not paying the AP to begin with. Saul Hansell, *The A.P., Hot News and Hotheaded Blogs*, N.Y. Times Bits Blog, http://bits.blogs.nytimes.com/2008/06/16/the-ap-hot-news-and-hotheaded-blogs (June 16, 2008, 11:28 EST); *see also On the Media: Give it Back* (NPR radio broadcast Jul. 31, 2009), *available at* http://www.onthemedia.org/transcripts/2009/07/31/05 (discussing a proposed solution to the problem presented by those who use Associated Press articles without paying for them).

⁴⁹ Jeff Jarvis, *FU AP*, BUZZMACHINE, June 12, 2008, http://www.buzzmachine.com/2008/06/12/fu-ap.

⁵⁰ See generally On the Media: Give it Back, supra note 48.

⁵¹ 105 F.3d 841, 845 (2d Cir. 1997) (The court explicitly listed "free-riding" as one of the instances where the hot news claim would protect a work: "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."). ⁵² Katyal, *supra* note 39. Katyal summarizes the reasoning behind the *NBA* decision in her keynote address:

In most of the cases where the "reap without sowing" command has been recognized, like INS, the situation isn't simply one where the defendant has benefited without paying. Rather, the benefit is taken at the expense of the plaintiff. For the reaping [analogizing to scraping] to be condemned, it usually must be harmful, usually not only to the plaintiff, but to the society as a whole. This was clearly recognized in the Motorola case, where the Second Circuit said

and paste news segments or entire articles, which are published by organizations that actually expend resources in collecting that news, they are stealing the profits those organizations need in order to continue publishing breaking news.⁵³ Consequentially, allowing this "scraping" will inevitably lead to hot news becoming inaccessible.⁵⁴

First, newsgathering is not a cheap process. It cannot be contested that "news collectives" like the AP generate information at a cost. The AP employs 3,700 employees, located in more than 300 locations throughout the world.⁵⁵ Second, hot news is, by its very nature, time sensitive: its value and worth are derived from the fact that it is "breaking news," based on an event that occurred a short time ago. Third, when one copies information and news that has been gathered at another's expense and efforts, that clearly falls under the definition of free-riding. Fourth, those who copy breaking news from entities like the AP are deriving profits from the advertising revenues one can collect from having more new-seeking readers visit their websites. Thus, the scrapers are effectively stealing profits that news gatherers such as the AP need to recoup in order to continue paying their 3,700 employees. Ted Bridis, a news editor at the AP, sheds some light on the struggles and stance of the company:

There are commercial websites, not even bloggers, necessarily . . . that take some of our best AP stories, and rewrite them with a word or two here, and say "the Associated Press has reported, the AP said." That's not fair. We pay our reporters. We set up the bureaus that are very expensive to run . . . if they want to report what the AP is reporting they either need to buy the service or they need to staff their own bureaus. ⁵⁶

If an international news gathering operation such as the AP ceased to be profitable, there would, arguably, no longer be any

that it would save a hot-news misappropriation claim from preemption only when the defendant's actions were so harmful that they threatened to leave the public without the service.

Id. at 2420-21 (citation omitted).

⁵³ See generally Fujichaku, supra note 38.

The furnishing of property rights, including exclusive rights to possess, use, and sell to providers of hot news information would serve to maximize its commercial value and to reward the initial investment of time, energy, and resources expended to generate or gather such information. From early on, information providers generally sought exclusive rights for informational works through the law of copyright.

Id. at 423.

⁵⁴ See Richard Posner, The Future of Newspapers (June 23, 2009), http://www.beckerposner-blog.com/2009/06/the-future-of-newspapers-posner.html.

⁵⁵ Associated Press, Facts & Figures, http://www.ap.org/pages/about/about.html (last visited Oct. 18, 2010).

⁵⁶ Matthew Lasar, *AP: Tech Coming to Stop "Wholesale Theft" on 'Net*, ARS TECHNICA, June 1, 2009, http://arstechnica.com/tech-policy/news/2009/06/ap-tech-coming-to-stop-wholesale-theft-on-net.ars.

incentive to collect news. Furthermore, if the AP was no longer able to fund its operations, 1,700 daily, weekly, non-English, and college newspapers in the United States, 5,000 radio and television outlets, 850 AP Radio News Affiliates, and 550 international broadcasters in 121 countries would no longer be supplied with a stream of continuously updated news.⁵⁷

C. The Current Viability of the Hot News Misappropriation Claim

Since 1928, the misappropriation doctrine has been a highly contested issue. As recently as 2009, the Southern District of New York confirmed in *All Headline News* that the hot news claim remains a viable state law claim in New York.⁵⁸ However, as AHN pointed out in their motion to dismiss, many states, such as Massachusetts and Florida, have declined to follow *INS*.⁵⁹ This contentious issue is far from settled as the hot news claim is under constant attack by bloggers, specifically "aggregating bloggers," who appear to be growing in number by the day.⁶¹

On one side of the debate, bloggers argue that news, even hot news, cannot be copyrightable because it is comprised of facts and thus, uncopyrightable under *Feist*.⁶² The other side of the debate is demonstrated by defendants in *All Headline News*—defendants attacked AP's argument positing that its work product, news, should be protected because it expends "massive, continuing investments' in its collection and reporting of facts." The defendants analogized this argument to the one made by the plaintiff in *Feist*,⁶⁴ which was famously rejected by the Supreme

⁵⁷ ProCon.org, Source Biographies: Associated Press (AP), http://euthanasia.procon.org/view.source.php?sourceID=5540 (last visited Nov. 23, 2010)

⁵⁸ Associated Press v. All Headline News, 608 F. Supp. 2d 454, 459 (S.D.N.Y. 2009).

⁵⁹ See Glazer v. Hoffman, 16 So. 2d 53, 55-56 (Fla. 1943); Triangle Publications, Inc. v. New England Newspaper Publ'g Co., 46 F. Supp. 198, 202-03 (D. Mass. 1942).

⁶⁰ See e.g., Huffington Post, http://www.huffingtonpost.com (last visited Oct. 29, 2010). The Huffington Post is an aggregating blog–a blog whose content is created from content that the bloggers have "aggregated" from other websites and creators of content—with a focus on news and current events.

⁶¹ Adam Singer, 49 Amazing Social Media, Web 2.0 And Internet Stats, THE FUTURE BUZZ, Jan. 12, 2009, http://thefuturebuzz.com/2009/01/12/social-media-web-20-internet-numbers-stats. The Future Buzz reports that 133,000,000 blogs have been indexed by Technorati since 2002 and the average number of blog posts in a 24 hour period is 900,000. Id. ⁶² Feist Publ'n, Inc. v. Rural Tele. Serv. Co. Inc., 499 U.S. 340, 350 (1991). The defendants in All Headline News argued:

AP candidly admits its ultimate goal of obtaining 'proprietary rights' in publicly-reported facts [in their First Amended Complaint]. This it cannot do. As Justice Brandeis correctly foreshadowed in his dissent in *INS*, and the unanimous Supreme Court effectively agreed in *Feist*, those facts remain 'free as the air to common use.'

See Headline News Motion, supra note 10 (citations omitted).

⁶³ Headline News Motion, supra note 10.

⁶⁴ See id.; Feist, 499 U.S. at 347:

^{&#}x27;No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and

Court under the "sweat of the brow" analysis⁶⁵: "This alleges nothing more than 'sweat of the brow.' Under *Feist*, parties are free and encouraged to copy others, so long as they do not infringe."⁶⁶

D. The Defense of the Fair Use Doctrine

Many bloggers vehemently claim that their use of content produced by organizations such as the AP is securely protected under the fair use doctrine. But are the actions of aggregating bloggers, those who collect headlines on their websites and those who copy articles in their entirety, truly what the fair use doctrine intended to protect? Saul Hansell, a writer for a mainstream news organization, *The New York Times*, and a blogger, shares his view: "It's not an extreme position to suggest that it is legitimate for The Associated Press to protect its rights in some cases when its work is duplicated verbatim and in some cases when its work is paraphrased." Furthermore, when hot news is analyzed under the four factors provided by the fair use doctrine, it is not clear if the bloggers are indeed provided with a free pass to copy and aggregate content as they please.

The fair use doctrine protects the "use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research." Section 107 gives us four factors to consider when determining if a particular

discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.

Feist, 499 U.S. at 347 (quoting Nimmer) (citations omitted).

65 Feist, 499 U.S. at 353 (citations omitted):

The 'sweat of the brow' doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions-to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was 'not entitled to take one word of information previously published,' but had to 'independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information.'

66 Headline News Motion, supra note 10.

⁶⁷ Arrington, *supra* note 46. Arrington lashed out at the AP for attempting to claim infringement:

They [AP] do not want people quoting their stories, despite the fact that such activity very clearly falls within the fair use exception to copyright law . . . they are trying to claw their way to a set of property rights that don't exist today and that they are not legally entitled to.

Id. See also Jarvis, supra note 49; AP: "Hot News" Doctrine for Me, But Not for Thee, PATTERICO'S PONTIFICATIONS, Feb. 22, 2009, http://patterico.com/2009/02/22/ap-hotnews-doctrine-for-me-but-not-for-thee (claiming the 'hot news' concept flies directly in the face of fair use.).

⁶⁸ Hansell, supra note 48.

^{69 17} U.S.C. §107 (2006).

⁷⁰ Id.

use is "fair": first, "the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes"; second, "the nature of the copyrighted work"; third, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and finally, "the effect of the use upon the potential market for, or value of, the copyrighted work."71

1. The First Factor of the Fair Use Doctrine: Purpose and Character

Under the first factor, purpose and character of the use, courts have looked at whether the use is for a commercial or nonprofit purpose.⁷² When bloggers copy hot news, it is difficult to argue a non-profit use, if the bloggers are collecting advertising revenue.⁷³ Some of the most popular aggregating blogs such as the Huffington Post⁷⁴ and the Drudge Report,⁷⁵ would have a difficult time arguing that their blogs are non-profit when they have blatant advertisements littering their pages. 76 Thus, the first factor of fair use does not appear to favor aggregating bloggers such as the Huffington Post and the Drudge Report, who reap financial benefits from their advertising revenue.

2. The Second Factor of the Fair Use Doctrine: Nature of the Copyrighted Work

The second factor of the fair use analysis, nature of the copyrighted work, leans in favor of the bloggers' use. Harper \mathcal{E} Row v. Nation Enterprises established that the "scope of fair use is narrower with respect to unpublished works"77 as opposed to published works. The Court further provided that "the scope of

⁷² See Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 562-63 (1985); Castle Rock Entm't Inc. v. Carol Publ'g Group Inc., 150 F.3d 132, 141 (2d Cir. 1998); New Era Publications Int'l v. Carol Publ'g Group, Inc. 904 F.2d 152, 156 (2d Cir. 1990).

73 Paul Chaney, Advertising Revenue for Your Blog, ALL BUSINESS, Aug. 5, 2005,

http://www.allbusiness.com/marketing-advertising/internet-marketing/3874761-1.html

Blogs aren't just for publishing content, they are also a way to drive revenue. For all of the reasons mentioned above and more your blog is itself a sales machine [I]t can also become a vehicle for driving a secondary form of revenue through the use of ads served on the blog . . . [.] Blog advertising is becoming an industry unto itself.

⁷⁴ The Huffington Post is an aggregating blog with a focus on news and current events. Huffington Post, http://www.huffingtonpost.com (last visited Oct. 29, 2010).

⁷⁵ The Drudge Report is similarly an aggregating blog with a focus on news and current events. Drudge Report, http://www.drudgereport.com (last visited Oct. 29, 2010).

⁷⁶ The Huffington Post even provides a link on its main website, which directs potential advertisers to an entire page devoted to the very specific general and creative requirements for advertising on its website. Huffington Post, Advertising Specifications, http://www.huffingtonpost.com/ads/specs (last visited Oct. 29, 2010).

⁷⁷ Harper, 471 U.S. at 564.

fair use is generally broader when the source of the borrowed expression is a factual or historic work."⁷⁸ Hot news originates from facts and is published. Thus, bloggers have a strong fair use argument running in their favor under this particular factor.⁷⁹

3. The Third Factor of the Fair Use Doctrine: Amount and Substantiality of the Portion Used

The analysis occurring under the third factor of fair use, amount and substantiality of the portion used in relation to the copyrighted work as a whole, differs depending on the type of blog. Some aggregating blogs, like the Drudge Report, will primarily reproduce collected headlines and provide links to stories. On the other side of the spectrum, blogs such as the Huffington Post, reproduce much more than collected headlines; they consistently reproduce entire articles on their website, articles which were created by other entities. The analysis is clearer when applied to the Drudge Report rather than the Huffington Post because the prior uses a minimal amount of content in relation to the copyrighted work as a whole, and works in favor of the blogger's argument, while the latter is copying the work in its entirety, and weighs heavily in favor of the original content owners' argument.

It becomes less clear what an equitable analysis would be for blogs which use half of an article, or one-third of an article, or perhaps a collection of excerpts that range from thirty-three words to seventy-nine words, as the Drudge Retort, a blog which mimics the more well-known Drudge Report, did before the AP demanded that they take down all AP content.⁸² The AP's initial stance on the Drudge Retort's use was that "the use is not fair use simply because the work copied happened to be a news article and that the use is of the headline and the first few sentences only."⁸³ However, the AP retreated from this statement, claiming a "misunderstanding of the concept"⁸⁴ and supplied a different legal theory supporting their demands: "the company 'considers taking the headline and lead of a story without a proper license to be an infringement of its copyrights that additionally constitutes 'hot news' misappropriation.'"⁸⁵

While Rogers Cadenhead, owner of the Drudge Retort,

⁷⁸ Id. at 594.

⁷⁹ See Masnick, supra note 41.

⁸⁰ See Drudge Report, supra note 75.

⁸¹ See Huffington Post, supra note 74.

⁸² Lasar, supra note 56.

⁸³ Id.

⁸⁴ *Id*.

⁸⁵ *Id*.

complied by removing the contested content from his website, Cadenhead did have his own set of requests for the AP, which would benefit both the blogging community as well as original content creators. 6 Considering the fact that there are millions of people linking to news articles through a variety of mediums, such as blogs, message boards, and websites like Digg, 7 and the AP has shown concern over the copying of one or two sentences, Cadenhead asked the AP to draw some clear lines separating legal from illegal use. 88

Such requests have not gone unanswered: AP stressed its main concern is with "wholesale theft" and not with the bloggers who will excerpt a relevant passage to derive some commentary. When asked to further elaborate on what would constitute "wholesale theft," Ted Bridis, a news editor of the AP, clarified by providing examples of acceptable and unacceptable behavior. He stated that AP would not have a problem with those who copied a paragraph of AP content while providing a link to the original AP story. However, they would have a problem with bloggers who copy and paste an entire 800 word story onto their own website without even a comment regarding the article's authorship—a troubling problem which happens with a greater frequency than most people realize. He stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the story and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and paste and the stressed its main to story and the story and the stressed its main to story and the story and

Then again, we must be mindful of the fact that content cannot always be measured by the number of words copied. Courts have acknowledged that small amounts of copying may be sufficient to find infringement and violation of the fair use doctrine if the "heart" of the work is taken.⁹³ This analysis deals with the *quality* of the work taken, not the *quantity*. The court held in *Harper & Row*:

[T]he words actually quoted were an insubstantial portion of [the work] . . . however, [the infringing work] took what was essentially the heart of the book '[T]he most interesting and moving parts of the entire manuscript' . . . [which] qualitatively embodied [the author's] distinctive expression . . .

⁸⁶ Saul Hansall, The Associated Press to Set Guidelines for Using Its Articles in Blogs, N.Y. TIMES, June 16, 2008, at C7, available at http://www.nytimes.com/2008/06/16/business/media/16ap.html.

⁸⁷ Digg is an interactive news website allowing users to share content while commenting on stories and voting for them–users have two options: "share" or "bury." Digg, http://www.digg.com (last visited Oct. 29, 2010).

⁸⁸ Ĥansall, supra note 86.

⁸⁹ Lasar, supra note 56.

⁹⁰ Id.

⁹¹ Id.

⁹² Lasar, *supra* note 56. Jim Kennedy, vice president and strategy director of the AP, gave his opinion on the matter: "Cutting and pasting a lot of content into a blog is not what we want to see . . . [i]t is more consistent with the spirit of the Internet to link to content so people can read the whole thing in context." Hansall, *supra* note 86.

⁹³ See Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985).

. [A] taking may not be excused merely because it is insubstantial with respect to the *infringing work*. ⁹⁴

Hansell summarized the views of Jim Kennedy, the AP's Vice President and Strategy Director, who argues that "the essence of an article can be encapsulated in very few words. 'As content creators, we firmly believe that everything we create, from video footage all the way down to a structured headline, is creative content that has value. . . .""95

In line with Mr. Kennedy's statement, the esteemed Judge Learned Hand stated in *Sheldon v. Metro-Goldwyn Pictures Corp.*, "no plagiarist can excuse the wrong by showing how much of his work he did *not* pirate." In another case, *Meeropol v. Nizer*, there was even a finding of significant copying when the copied content amounted to less than one percent of the infringing work when they were prominently featured. After reviewing case law concerning the third factor of the fair use doctrine, the blogger's anger over the AP's demands to remove content quantifying as little as thirty-nine words no longer seems justified. If those thirty-nine words took the heart and essence of the article, then the fair use defense may very well be purported by the AP against the bloggers.

4. The Effect Of the Use Upon the Potential Market For, Or Value Of, the Copyrighted Work

The final factor of the fair use doctrine, the effect of the use upon the potential market for or value of the copyrighted work." Therefore, it is critical for bloggers to make the distinction between reproducing and referencing, as the AP requests of them, in order to not violate the fair use doctrine. When bloggers post enough copied original content so that readers no longer feel the need to visit the original content creator's website, their use has substantially affected the market and thus, the potential value of the copyrighted work. The AP has made no secret about the devastating effect scraping is having on their market. AP news editor Ted Bridis sums up the stance of the company: "You can't

⁹⁴ Harper, 471 U.S. at 564-65 (citations omitted).

⁹⁵ Hansell, *supra* note 86.

⁹⁶ Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (emphasis added).

⁹⁷ Meeropol v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977).

⁹⁸ See, e.g., Harper, 471 U.S. 539; Sheldon, 81 F.2d 49; Meeropol, 560 F.2d 1061 (all holding the amount copied is insufficient for finding infringement as the content does not constitute the "heart of the work").

⁹⁹ Harper, 471 U.S. 539, 566.

 $^{^{100}}$ "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." Nimmer, *supra* note 33 § 1.10[D].

just take an entire AP wire feed or even an entire AP story, or even half of an AP story, necessarily, and republish it or repurpose it We need the money. The industry is falling apart."¹⁰¹

5. Sum Up of the Fair Use Analysis

In conclusion, only one factor out of the four factors (nature of the copyrighted work) leans in favor of the bloggers. The remaining three factors all favor the owner of the copyrighted work, which in this case, is the creator of hot news content. Furthermore, one must keep in mind that courts weigh all four factors together when determining whether a use is fair. Finally, the 1961 *Register's Report on the General Revision of the U.S. Copyright Law* provided very specific circumstances as to when the Fair Use Doctrine would be applicable:

[Q]uotation of excerpts in a review or criticism for purposes of illustration or comment . . . [or] of short passages in a scholarly or technical work, for illustration or clarification of the author's observations . . . summary of an address or article, with brief quotations, in a news report . . . in a newsreel or broadcast, of a work located in the scene of an event being reported. ¹⁰³

While the above use should not be contested, the use of copyrighted content in full or even in part, is not an acceptable use. Thus, scrapers, such as popular celebrity blogger Mario Lavandeira, better known as Perez Hilton, use the fair use doctrine to shield their infringing actions, 104 but a careful legal analysis of the doctrine makes it clear that their actions are almost certainly not protectable under this doctrine.

E. The Future of the Hot News Doctrine

When one appraises the hard facts of the hot news dilemma, it is clear that allowing an organization to continuously copy whole or partial work product of another organization will eventually lead to the demise of breaking news. Breaking news draws in readers who, in turn, help the content provider raise profits, without which, organizations will not have the funds to report

¹⁰¹ Lasar, *supra* note 56.

¹⁰² See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 2008); New Era Publ'n Int'l v. Carol Publ'g Group, 904 F.2d 152 (2d Cir. 1990).

 $^{^{103}}$ U.S. Copyright Office, Register's Report on the General Revision of the U.S. Copyright Law (1961).

¹⁰⁴ X17 Inc. v. Mario Lavandeira, 563 F. Supp. 2d 1102 (C.D. Cal. 2007). X17 Inc. brought a copyright infringement claim over celebrity photographs against Mario Lavendeira who asserted fair use as an affirmative defense. *Id.* X17 Inc. then filed a second claim against Lavandeira: hot news misappropriation. *Id.* The case was not decided on its merits and the court denied X17's plea for a preliminary injunction because the court found that X17 Inc. failed to produce sufficient evidence. *Id.*

breaking news around the globe. Furthermore, equity demands that those who expend the time and resources to gather the news should be allowed to recoup their profits and be protected from scrapers. *Feist* certainly did hold that works created solely through "sweat of the brow" but lacking in originality is insufficient to garner copyright protection;¹⁰⁵ nevertheless, the need to protect hot news on equitable grounds was recognized in two other decisions: *International News Service v. Associated Press*¹⁰⁶ and *National Basketball Ass'n v. Motorola, Inc.*¹⁰⁷

The main issue with hot news misappropriation is that only some states continue to uphold the hot news claim as a viable one and, as a result, there seems to be very little that one can do to control the scraping that occurs on the Internet because it is a problem that expands across all states. While the state of New York has recently shown support for the hot news misappropriation claim in AP, a case which settled, and in Barclays, a case which is currently on appeal, this issue is sure to come up repeatedly in the future—and not just in New York.

The AP may have won this battle against All Headline News, but how many similar organizations must it fight in this war against hot news scrapers? Barclays' victory against TheFlyOnTheWall.com lasted a mere few weeks before their momentous injunction was set aside pending the defendant's appeal. What is certain at this juncture is that the only way to keep newspapers in our future is to control the scraping that is running rampant on the Internet. The task seems so great that an

¹⁰⁵ Feist Publ'n, Inc. v. Rural Tele. Serv. Co. Inc., 499 U.S. 340 (1991).

¹⁰⁶ Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

[[]N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

 $^{^{107}}$ Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997).

INS is not about ethics; it is about the protection of property rights in timesensitive information so that the information will be made available to the public by profit seeking entrepreneurs. If services like AP were not assured of property rights in the news they pay to collect, they would cease to collect it. The ability of their competitors to appropriate their product at only nominal cost and thereby to disseminate a competing product at a lower price would destroy the incentive to collect news in the first place. The newspaper-reading public would suffer because no one would have an incentive to collect 'hot news.'

Id.

¹⁰⁸ Associated Press v. All Headline News, 608 F. Supp. 2d 454 (2009).

¹⁰⁹ Barclays Capital Inc. v. TheFlyOnTheWall.com, Inc., 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

¹¹⁰ *Id*.

organization like the AP will almost certainly not be able to conquer it alone. However, if all news collectives—organizations whose business is to create and distribute news content—combined their efforts, they may have a chance to stop the abusive practices of scrapers, save the hot news misappropriation claim, and thus, maintain the profits necessary to save hot news and their organizations. With technological advancements, scraping has become easier than ever. Yet, advancements in technology may also provide news collectives with the proper weapons to fight back and track scraping soon after it occurs, thus providing them with the opportunity to deter scraping and the negative consequences associated with scraping.¹¹¹

II. THE CRUMBLING NEWSPAPER INDUSTRY

A. A Glimpse at a World Without Newspapers

If the newspaper industry, as we know it, does indeed become a thing of the past, and the remaining news mediums are blogs such as the Huffington Post, which is comprised heavily of aggregated excerpts from other newspapers and news collectives, where would we, as well as blogs such as the Huffington Post, actually get news from?¹¹² The aggregating blogs are not in the practice of collecting and reporting news. Instead, they are in the practice of *copying* and *pasting* news. David Simon, former *Baltimore Sun* reporter, points out the stark differences between an aggregating blog such as the Huffington Post and a newspaper which actually involves itself in the collecting and gathering of news: "The day I run into a Huffington Post reporter at a Baltimore zoning board hearing is the day that I will be confident that we've actually reached some sort of equilibrium."¹¹³

Tracy Record, owner of the prominent West Seattle Blog, does not subscribe to Simon's grim prediction that a future void of

¹¹¹ See On the Media: Getting Desperate (NPR radio broadcast Feb. 20, 2009), available at http://www.onthemedia.org/transcripts/2009/02/20/04 (discussing a proposed solution for the newspaper industry where reader voluntarily pay for websites they frequent regularly by using the Kachingle medallion); On the Media: Give it Back (NPR radio broadcast July 31, 2009), available at http://www.onthemedia.org/transcripts/2009/07/31/05 (discussing two digital proposed solutions for the newspaper industry).

¹¹² Katyal, *supra* note 39 (Katyal sums up the reasoning behind the *INS* court's holding to be founded on the fear that if the practice of copying without payment was allowed to continue and grow, "the company that had the only front-line access to war news could have collapsed, leaving the copyist without anyone to copy and unable to engage in war reportage itself . . . and the public would have been left without first-hand reportage.") (citation omitted).

¹¹³ On the Media: Old and New Media Go to Washington, supra note 36. Simon expressed a dire outlook on a future void of newspapers: "You know, the next 10 or 15 years in this country are going to be a halcyon era for state and local political corruption. It is going to be one of the great times to be a corrupt politician." *Id.*

newspapers will actually be void of news. Record resents the implication that news will no longer be gathered and reported if newspapers disappear, because the West Seattle Blog, unlike aggregating blogs such as the Huffington Post, "does a staggering amount of original nuts-and-bolts reporting on issues like real estate development, local schools and crime." Record acknowledges the industry change but argues that news will still be gathered and collected by the "growing neighborhood news movement," but it just will no longer be in the traditional manner we are accustomed. Whether the people "at the helm of sites" have traditional journalism experience, as Record does, or are learning the tricks of the trade on the job, members of the neighborhood are covering important events and meetings concerning the community. 117

While original newsgathering blogs like Record's do exist, Eli Sanders of *The Stranger*, a Seattle paper with a significant online presence, does not harbor high hopes for the survival of original newsgathering in a world void of newspapers. In his comments about *The Post-Intelligencer*, a former print newspaper which now only exists online, Sanders points to struggles that seem typical of newspapers that ceased to have a print version:

with a staff of 20 [the original staff consisted of over 150 members], and about 14 of those people being what they're calling news gatherers - not reporters anymore, or editors, but news gatherers . . . [y]ou can see them struggling to keep their heads above water . . . but it's an impossible task.¹¹⁸

Sanders acknowledges that papers like his, and community blogs like the West Seattle Blog, have somewhat filled the void which has been created after the print version of *The Post-Intelligencer* folded, but, the poorer neighborhoods have not been covered to the same degree by neighborhood blogs.¹¹⁹

Ironically, on a blog, Richard Posner agrees with Sander's view that newspapers cannot simply survive in paperless versions of their former selves, and does not harbor high hopes for the survival of organizations such as *The New York Times* once their content becomes solely available on the internet: "it is much easier to create a web site and free ride on other sites than to create a print newspaper and free ride on other print newspapers, in part

¹¹⁴ On the Media: The Inheritance of Loss (NPR radio broadcast May 29, 2009), available at http://www.onthemedia.org/transcripts/2009/05/29/05.

¹¹⁵ Id.

¹¹⁶ *Id*.

¹¹⁷ See id.

¹¹⁸ Id.

¹¹⁹ *Id.* ("Notable neighborhood blogs tend to be the wealthier ones. But in the poorer neighborhoods you don't have blogs that are as well known. They exist, and they certainly cover the poorer neighborhoods, but they are not as robust as the others.").

because of the lag in print publication; what is staler than last week's news[?]"¹²⁰ Posner posited the steps he believes are necessary to save newspapers, and they are reminiscent of the AP's sentiments on the issue:¹²¹

Expanding copyright law to bar online access to copyrighted materials without the copyright holder's consent, or to bar linking to or paraphrasing copyrighted materials without the copyright holder's consent, might be necessary to keep free riding . . . from so impairing the incentive to create costly newsgathering operations that news services like Reuters and the Associated Press [provide]. 122

The newspaper industry is struggling, to say the least, ¹²³ and courts have acknowledged the detrimental effects of time-sensitive news or facts being copied almost instantaneously by competing organizations. Accordingly, they created the hot news doctrine, which they hoped would protect those who expend costs to deliver hot news. ¹²⁴ However, as demonstrated by the dismal newspaper reform and as noted by the commentators above, few are convinced that sufficient measures have been taken to protect newspapers in today's world, where an increasing amount of media and information appear to be migrating onto the Internet for good. Thus, many predict that newspapers will soon meet their demise. ¹²⁵

B. The Incentive for the Existing Major News Collectives to Collaborate in a Joint Effort to Prevent Scraping of Their Publications.

Given this situation, there is an obvious incentive for the existing major news collectives to collaborate in a joint effort against the parasitic scraping of their publications.¹²⁶ It is

¹²⁰ Posner, supra note 54.

¹²¹ See Lasar, supra note 56; Hansell, supra note 48.

¹²² Posner, supra note 54.

¹²³ Ben Parr, *The Dive State of the Newspaper Industry*, MASHABLE, Mar. 26, 2010, http://mashable.com/2010/03/26/the-dire-state-of-the-newspaper-industry-stats ("In 2006, newspapers made \$49.275 billion in total revenue. In 2007, it was \$45.375 billion. In 2008, it dropped to \$37.848 billion. In 2009, it plummeted all the way to \$27.564 billion. In four years, newspaper ad revenue dropped by 44.24%. That's nearly half of the industry's revenue.").

¹²⁴ See, e.g., Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997).

¹²⁵ Eric Alterman, Out of Print: The Death and Life of the American Newspaper, NEW YORKER, Mar. 31, 2008, available at

http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman. In the Internet age . . . no one has figured out how to rescue the newspaper Newspapers have created Web sites that benefit from the growth of online advertising, but the sums are not nearly enough to replace the loss in revenue from circulation and print ads.

Id.

 $^{^{126}}$ On the Media: Give it Back (NPR radio broadcast July 31, 2009), available at http://www.onthemedia.org/transcripts/2009/07/31/05.

impossible for any *single* news collective to independently fight each of the millions of bloggers who copies protected content without consent. Litigation itself comes with a high price tag and when we think about the number of content-stealing bloggers actually out there, the enormity of the task at hand becomes apparent. Thus, it is necessary for newspapers to present a united front when introducing novel ideas regarding industry practices during this major restructuring, as news content shifts from print to the Internet.¹²⁷

Jim Moroney, of the *Dallas Morning News*, recognizes the futility of newspapers attempting to save their future without a unified front: "To try to bring it back one website at a time, one daily newspaper website at a time, will not work. If The Dallas Morning News today put up a pay wall over its content, people would go to The Fort Worth Star-Telegram." The solution proffered by David Simon, former *Baltimore Sun* reporter, and Alberto Ibarguen, the president of the Knight Foundation, rests in newspapers acting "in unison, whether that means retreating altogether behind a pay wall or collectively negotiating." 129

It is promising that newspapers are beginning to understand the need for unity, as evidenced by old rivalries being placed aside and cooperation becoming the emerging theme amongst newspapers: "[newspapers] are teaming up with once-hated competitors, striking alliances with strategic content partners, and looking at ways to share their content online, while still reaping the resulting clicks and ad revenue." The newspaper industry may be dying but if they unite on a macro-scale, they may reemerge in a form that will be profitable and successful in the new digital era. 131

¹²⁷ On the Media: Old and New Media Go to Washington, supra note 36. (When Huffington attempted to point to the failed plan by the New York Times to put some content behind a paywall as proof that news should be free, Simon provided the reason behind the failure: "The Times, acting alone, without The Washington Post, without other competitors, could not go it alone.").

 $^{^{128}}$ Id.

¹²⁹ *Id*.

¹³⁰ Craig Silverman, Mediashift Your Guide to the Digital Media Revolution: Cats Sleeping with Dogs? Rival News Orgs Share Content, Revenues, PBS, Oct. 21, 2009, http://www.pbs.org/mediashift/2009/10/cats-sleeping-with-dogs-rival-news-orgs-share-content-revenues294.html. The Seattle Post-Intelligencer, in its new online-only presence, illustrates the trend of putting aside old rivalries in the name of survival: "you'll see a lot of links to other news outlets in the region for basic stories, links to The Seattle Times, which is The P-I's former archrival, which it would never have, in the past, wanted to credit on basics news of the city." On the Media: The Inheritance of Loss (NPR radio broadcast May 29, 2009), available at http://www.onthemedia.org/transcripts/2009/05/29/05.

¹³¹ On the Media: The Inheritance of Loss (NPR radio broadcast May 29, 2009), available at http://www.onthemedia.org/transcripts/2009/05/29/05.

III. PROPOSALS

A. Various Proposed Business Models for Monetizing the News Industry

1. Proposed Legislative Changes.

While industry insiders agree newspapers need to act in unison, regardless of what specific path is chosen to save the newspaper industry, antitrust laws create an obstacle for newspapers and news collectives that want to act in concert towards a common goal. Moroney's solution to this obstacle is legislation that would provide "a limited antitrust exemption that will allow newspapers some breathing room to share ideas and jointly explore innovative business models." 133

First Amendment lawyer David Marburger agrees a legislative change is required before newspapers can be effectively protected from sites he refers to as "parasitic aggregators." The flaw with the Copyright Act, he argues, lies in the fact that it has a negative impact on those who invest their resources to originate expression. Marburger interprets the Copyright Act as saying:

I, the originator, must allow the aggregator to take my work for nothing, ... without my consent, and ... allow that aggregator to merely rewrite it a little bit, rephrase it and compete directly against me, in real time, for advertisers and readers, and on the exact same medium. ¹³⁶

He proposes the Act be amended with a single sentence: "The Copyright Act does not abolish common-law or statutory unfair competition and unjust enrichment, regardless of whether the publication infringes copyright." In his opinion, this amendment would address the problem of the daily news business being the only business in the United States that is not protected by common-law unfair competition. ¹³⁸

The most vehement opponents to Marburger's proposition are bloggers who think they will be prevented from linking to news stories twenty-four hours within their release. However, his

it as their own." Id.

¹³² See On the Media: Old and New Media Go to Washington, supra note 36 ("Antitrust laws bar competitors from discussing pricing and payment schemes.").

¹³⁴ On the Media: Copyright Flack (NPR radio broadcast July 24, 2009), available at http://www.onthemedia.org/transcripts/2009/07/24/05. Marburger refers to them as parasitic aggregators because of their practice of "rip[ping] off news stories, rewrit[ing] them a little bit, maybe credit[ing] the original source, maybe not, and then . . . post[ing]

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ *Id*.

¹³⁹ Id.

proposition is not against linking to news stories or even rewriting new stories twenty-four hours within their release; his proposal is to stop the unfair profiting that occurs by scrapers when they simply "rip off" news stories or perhaps minimally alter them and post the work as their own, sometimes without even a crediting link to the original website.¹⁴⁰ Thus, providing links to news stories on blogs without copying a majority of the content or the article in its entirety would be acceptable behavior.

2. Technological Advancements Now Being Used in Attempts to Save the Newspaper.

Technological advancements may be facilitating the demise of the print newspaper by allowing scrapers to copy news stories virtually instantaneously with great ease. However, the AP is now utilizing technological advancements to fight back. The AP plans to digitally track their content by embedding a computer code into all AP stories that are syndicated on Yahoo! News, Google News, and all other newspaper sites. Thus, every time an AP article is read, the computer code will alert them to sites that displayed their articles. This will at least provide the AP with an idea of all the places their articles are displayed and how many times they are read, which will then provide the information necessary to seek compensation from those using their articles without paying for them. However, the demise of the AP plans to digitally track their contents to fight back. The AP plans to digitally track their contents to fight back. The AP plans to digitally track their contents to fight back. The AP is now utilized in the AP with an idea of all the places their articles are displayed and how many times they are read, which will then provide the information necessary to seek compensation from those using their articles without paying for them.

Another tactic has been embraced by *The New York Times, The Washington Post,* Hearst, Reuters, MediaNews Group, McClathy, and Conde Nast these powerhouse media associations joined forces to create the Fair Syndication Consortium in an effort to determine ways to recoup advertising revenue earned by aggregating bloggers who place advertisements adjacent to linked content.¹⁴⁴ The Fair Syndication Consortium has hired the Attributor, a company that specifically deals with cases where an aggregator copies an entire article from a newspaper or magazine and pastes it onto their website with advertisements alongside it.¹⁴⁵ The Attributor locates such websites through a specialized search engine which "crawl[s]" the Internet and finds websites containing newspaper articles or content from magazines that have been copied in their entirety. With this information, they can now go to

¹⁴⁰ Id.

¹⁴¹ See generally Lasar, supra note 56; Hansall, supra note 86.

¹⁴² On the Media: Give it Back (NPR radio broadcast July 31, 2009), available at http://www.onthemedia.org/transcripts/2009/07/31/05 (discussing a proposed solution to the problem presented by those who use Associated Press articles without paying for them).

¹⁴³ Id.

¹⁴⁴ *Id*.

¹⁴⁵ *Id*.

the "Googles of the world,"¹⁴⁶ actors who place advertisements on aggregating blogs, and request the "Googles" to direct some of the money, which would originally be kept by the pirating aggregators, to the newspapers and magazines that created the copied content. This proposed solution would allow the pirates to run their sites while also providing the news collectives with revenue for their content. As a result, the "Googles" will no longer be paying aggregators for content they should not have in the first place.

3. Implementing Paywalls

Another proposed solution would be to charge readers for access to news articles on the Internet. *The New York Times* recently announced their support for this model and will implement a paywall, a system where readers need to pay to read content, starting in 2011.¹⁴⁷ *The Financial Times* in London has already implemented what is called the "metered model" of a paywall by allowing a set amount of content per month to be freely accessed by readers, while those who read a great amount of content will be asked to pay in order to access their news more frequently.¹⁴⁸ The metered model is not intended to put a complete stop to bloggers linking to the article or excerpting for the purpose of discussing the article.¹⁴⁹ The popularity of this particular paywall model appears to be on the rise.¹⁵⁰

A second proposed paywall scheme has been dubbed the "NPR model." This model allows free access to "basic content" such as news articles covering politics, but it also gives the reader

¹⁴⁶ *Id*.

 $^{^{147}}$ Richard Perez-Peña, $\it The\ Times\ to\ Set\ Fee\ for\ Some\ on\ Website$, N.Y. TIMES, Jan. 21, 2010, at R1

¹⁴⁸ On the Media: Give it Back (NPR radio broadcast July 31, 2009), available at http://www.onthemedia.org/transcripts/2009/07/31/05.

¹⁴⁹ Id. See also Peter Kafka, Media Memo: The Financial Times Strengthens its Pay Wall with Stern Words, ALL THINGS DIGITAL, Aug. 26, 2009, http://mediamemo.allthingsd.com/20090826/the-financial-times-strengthens-its-pay-wall-with-stern-words (questioning the strength of the Financial Time's pay wall in light of the apparent need to post the following at the bottom of each of their articles: "Copyright The Financial Times Limited 2009. You may share using our article tools. Please don't cut articles from FT.com and redistribute by email or post to the web."). Financial Time's spokeswoman Darcy Keller explained the purpose of the message: "The FT copyright simply protects our ownership of FT content. There is obviously a distinction between third parties referring to FT articles and linking back to FT.com and those that reuse and distribute our content without attributing it to the FT." Id.

¹⁵⁰ Paul Gillin, *Newsday Joins Paywall Party*, NEWSPAPER DEATH WATCH, Oct. 23, 2009, http://www.newspaperdeathwatch.com/newsday-joins-paywall-party.

Newsday will join the slowly growing ranks of newspaper publishers that charge for access. Beginning next Wednesday, the Long Island daily will begin charging a \$5 weekly fee for access to most of its content.... A limited amount of Newsday coverage will still be free online, including the home page, school closings, weather, obituaries, classified and entertainment listings, but nearly everything else will go behind the paywall.

the option to pay to become part of a membership, which will grant paraphernalia like hats and t-shirts, as well as insider access to "something special." This model is dependent on readers being loyal enough fans of a newspaper that they are willing to pay simply to show support and "feel a part of it." However, this proposed solution will not solve the problem for small newspapers with a small following: if Newspaper X implements a paywall, the readers will simply go to Newspaper Y. A strong reputation is necessary for readers to be willing to pay. 153

4. Content Sharing

Yet another novel strategy is content sharing, first utilized by non-competitive newspapers in Ohio that shared content with each other.¹⁵⁴ Their efforts were mimicked by the creation of informal associations by several other states. *Bloomberg* and *The Washington Post* have joined forces and created the *Washington Post-News Service with Bloomberg*, which includes a joint news service and an online page combining business news and transmission of Post stories on Bloomberg's financial terminals.¹⁵⁵ Their arrangement not only allows for content sharing but it also created a revenue-sharing agreement.¹⁵⁶

This type of coalition has been received positively by the newspaper industry, as evidenced by a group of members of the AP Sports Editors, who plan to launch a federate content-sharing alliance.¹⁵⁷ The members will allow other members to reprint each others' stories without the need for special permission. However, online excerpts will be limited to 150 words and accompanied with a link to the original source.¹⁵⁸ As of now, around sixty newspapers have shown interest in joining the content-sharing alliance.¹⁵⁹

¹⁵¹ On the Media: Give it Back (NPR radio broadcast July 31, 2009), available at http://www.onthemedia.org/transcripts/2009/07/31/05.

¹⁵³ Davey Winder, *Murdoch Paywall: Will You Pay For The Times Online*?, DANIWEB, Mar. 26, 2010, http://www.daniweb.com/news/story270929.html.

[[]N]ews will remain free, as it should be, and those charging for it online will be moved to the periphery of the online journalism world. After all, if you can search for a news headline at Google and find a hundred different articles reporting it for free why would anyone really want to pay for either the 1st or 101st version?

Id

 $^{^{154}}$ Simon Owens, Ohio Newspapers Share Content, But Don't Give up Hope for AP, MEDIASHIFT (Apr. 20, 2009), http://www.pbs.org/mediashift/2009/04/ohio-newspapers-share-content-but-dont-give-up-hope-for-ap110.html.

¹⁵⁵ Howard Kurtz, Washington Post Will Pair with Bloomberg Organizations to Share News Service, WASH. POST, Oct. 2, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/01/AR2009100104226.html.

 $^{^{157}}$ Gillin, supra note 150.

 $^{158 \} Id.$

¹⁵⁹ Silverman, supra note 130.

B. Learning From the Proposed Business Models and Proposing a Legislative Change: Incorporating a Revived Hot News Doctrine into the Copyright Act

Change is necessary for the future of the newspaper industry and accessible breaking news, which is evidenced by the warm welcome of drastic new measures by industry members. 160 overview of the various proposed business models for monetizing the news industry has made it clear that joint efforts by industry members are necessary for any sort of change to be effective in aiding the ailing industry. When one newspaper implements a paywall of sorts, by charging their readers for online content which used to be free, then their readers will simply go to another source for their news. This illustrates the need for a "united front" and also why legislative amendment is an attractive solution. Thus, David Marburger had the right idea in looking for a solution in the form of a legislative amendment.¹⁶¹ Legislation is the one way to enact a change applicable to the entire industry, and a uniform standard is necessary to save newspapers and creators of news content. A legislative amendment will eliminate the uncertainty we are left with when cases settle, as AP did. Furthermore, the hot news misappropriation doctrine is only followed in certain states while others have rejected it.¹⁶² Thus, in order to allow the members of the newspaper industry to act in unison in fighting the scrapers, a change with the power to reach across all the states and affect the entire industry is necessary. By taking the hot news claim away from the few states which have a misappropriation doctrine, and creating a federal hot news misappropriation claim, which will preempt state law, content creators will be much better equipped to act in uniformity across all state lines.

The following proposed amendment to the Copyright Act, which is in part a codification of the *NBA* court's test for the hot news doctrine, would grant those who collect and distribute news, necessary protection from scrapers: "Protection shall be granted to a distributor of information when: (1) costs were incurred in the gathering of facts and data; (2) the gathered information is time sensitive; (3) defendant's use of the gathered information is the equivalent of free riding off of the work of the plaintiff; (4) and the defendant is in direct competition with the creator's product

¹⁶⁰ See Kafka, supra note 149; Kurtz, supra note 155.

¹⁶¹ On the Media: Copyright Flack (NPR radio broadcast July 24, 2009), available at http://www.onthemedia.org/transcripts/2009/07/24/05.

¹⁶²Today, only five states have adopted the hot news misappropriation doctrine, born from *INS*, as a part of state unfair competition law. Kimberly Isbell, *What's the Law Around Aggregating News Online? A Harvard law Report on the Risks and Best Practices*, NIEMAN JOURNALISM LAB, Sept. 8, 2010, http://www.niemanlab.org/2010/09/whats-the-law-around-aggregating-news-online-a-harvard-law-report-on-the-risks-and-the-best-practices.

or services, for the period of time when the product is valuable for its time sensitivity."¹⁶³

Amending the Copyright Act by incorporating a revived hot news misappropriation doctrine is a necessary life preserver for the entire news gathering industry. By providing the creator of hot news content with a monopoly on their content for a limited amount of time, readers will only be able to get their hot news from sources that have expended resources to deliver this news to their readers. This, in turn, allows the creators of hot news to collect from the advertising revenue from which their websites generate profit. Furthermore, it will not do the industry much good if statutory damages, which specify the amount of news content creators can recoup from scrapers, do not exist. Statutory damages would effectively eliminate the need to calculate damages based on the factual circumstances surrounding each instance of scraping. A legislative change such as this would implement practices that will benefit the entire industry.

Lastly, in light of how the fair use doctrine has been and is currently being used by bloggers to defend their scraping habits, 164 it is apparent that there is much confusion surrounding this doctrine. Thus, amending § 107 of the Copyright Act with "this behavior will not constitute fair use," will greatly clarify the extent of the doctrine's reach. It would provide clearer guidelines to explicitly state what types of use, of copyrighted work, is permissible. Likewise, it would be helpful to establish clearer guidelines as to what would be appropriate with regards to copyrightable hot news. For instance, much clarification could be provided with the following text: "hot news should only be summarized with short quotations and always be accompanied with a link to the originator's website." Most importantly, the summary and amount of quotations derived from the original article should not replace the reader's need to read the entire story in context and at the originator's website.

CONCLUSION

A legislative amendment to the Copyright Act will implement a necessary change that will save newspapers and creators of news content. Currently, the hot news misappropriation doctrine is only followed in certain states and rejected in others. Allowing the members of the newspaper industry to act in concert with each other by providing the same applicable standards across all the

 $^{^{163}}$ Similar to NBA's multi-factor test for hot news misappropriation. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).

¹⁶⁴ See Jeff Jarvis, supra note 49; AP: "Hot News" Doctrine for Me, But Not for Thee, supra note 67.

states is the greatest tool we can provide them in their fight for self-preservation. An incorporation of a revived hot news doctrine into the Copyright Act will explicitly provide the original creator of hot news with a monopoly for a set period of time on time sensitive news. However, this monopoly will not ban usage of the news content entirely. Use may still be permitted as long as it is done in a manner that does not violate the fair use doctrine, but it should never be done in a manner that will replace the reader's need to read the story from the original content creator's website. Finally, this proposal will inject statutory certainty that parties can abide by, with prescribed actions that do and do not violate the hot news owner's copyright, while also providing an expectation of delineated statutory damages.

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