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By John C. McDonnell*

I. INTRODUCTION

¶1 On March 18, 2010, the United States District Court for the Southern District of New York released an opinion in *Barclays Capital Inc. v. Theflyonthewall.com* (*Barclays I*)[1] that many journalists, newspaper owners, and other content producers likely found reassuring. The opinion held that the hot news misappropriation doctrine prohibits a financial news aggregation website from sending subscribers stock recommendations that were researched and developed by analysts from various other financial firms.[2] The court found that the website, Theflyonthewall.com, was liable under the hot news misappropriation doctrine for disseminating time-sensitive information[3] gathered by the firms in direct competition with the website.[4] While the firms gathered the information at a cost,[5] the website was free-riding on those efforts,[6] potentially reducing the incentive to produce the information. The court found this free-riding substantially threatened the existence or quality of the gathered information.[7]

¶2 There are many similarities between the facts of this case and the situations many content producers face with news aggregators. This resemblance suggests that the hot news misappropriation doctrine may be a viable legal tool to protect these content producers from news aggregators which rely on them for content, yet may be responsible for a decline in the content producers' revenues.

¶3 The hot news misappropriation doctrine states that while the facts and ideas produced by a content producer may not be copyrightable, the content producer invested time and resources in obtaining this content and should retain some right to derive revenue from that content until its commercial value has passed.[8] For a competitor to take that content and resell it, without incurring the costs associated with gathering it, unfairly injures the content producer.[9] While created as part of the federal common law, the hot news misappropriation doctrine is currently only recognized in five states as part

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[1] 700 F. Supp. 2d 310 (S.D.N.Y. 2010), *rev'd*, 650 F.3d 876 (2d Cir. 2011).
[2] *Id.* at 313.
[3] *Id.* at 336.
[4] *Id.* at 339–41.
[5] *Id.* at 334.
[6] *Id.* at 335–40.
[7] *Id.* at 341–45.
[8] *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 245 (1918).
[9] *See id.*

of state unfair competition law.[10] The rise over the past decade of news aggregator websites, such as Google News and the Huffington Post, and the concurrent downfall of traditional news media makes the question of the applicability of this doctrine to the current news environment a important and necessary inquiry.

¶4 On June 20, 2011, the United States Court of Appeals for the Second Circuit handed down an opinion in *Barclays Capital Inc. v. Theflyonthewall.com, Inc.* (*Barclays II*).[11] The court held that federal copyright law preempted the financial firms' hot news misappropriation claim under the facts at issue,[12] but did not reject the hot news misappropriation doctrine in general.[13] Although the court clarified the doctrine[14] and in some ways limited it,[15] the remaining hot news misappropriation doctrine may still be sufficient to protect content producers.

¶5 This Comment explores why the hot news misappropriation doctrine is the most effective tool currently available to protect the journalism industry and why it is superior to other proposals. However, this Comment does not take a position as to whether pursuing action under the doctrine is in the best interest of content producers. In some circumstances, the public's increased familiarity with the producer, as acquired through aggregation, may be more valuable to the producer than any resulting decrease in revenue. This Comment simply discusses whether content producers can successfully sue Internet aggregators under the hot news misappropriation doctrine for aggregating the producer's content to its detriment.

¶6 Part II of this Comment discusses the district court's opinion in *Barclays I*. Part III delves into the history of the hot news misappropriation doctrine and its transformation into its modern form. Part IV discusses the Second Circuit Court of Appeal's opinion in *Barclays II* and how it affects the hot news misappropriation doctrine. Part V focuses on the current relationship between the journalism industry and news aggregators. Part VI explains why copyright law alone is insufficient to protect the journalism industry. Part VII applies the hot news misappropriation element test to news aggregators. Part VIII explains why other proposals to save the journalism industry are inadequate. Finally, Part IX explains why the hot news misappropriation doctrine, as it is currently recognized, is sufficient to protect journalism.

II. *BARCLAYS CAPITAL INC. V. THEFLYONTHEWALL.COM*

¶7 *Barclays I* is predicated on a fact pattern where a number of financial services firms expended considerable resources in developing and marketing research on publicly traded stocks for their most significant clients and making recommendations on whether to buy or sell those stocks.[16] The firms' reputations for reliable and valuable stock

[10] KIMBERLY ISBELL, CITIZEN MEDIA LAW PROJECT, THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES 16 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339.
[11] 650 F.3d 876 (2d Cir. 2011).
[12] *Id.* at 896–903.
[13] *Id.* at 890.
[14] *See id* at 898–901.
[15] *See id.*
[16] 700 F. Supp. 2d 310, 315 (S.D.N.Y. 2010), *rev'd*, 650 F.3d 876 (2d Cir. 2011).

recommendations was the basis for attracting and retaining their clients.[17] Most recommendations were issued each day between midnight and 7:00 a.m. and may have affected the market price of a stock significantly.[18] Such movement usually happened within hours of the market opening, so timely access to the recommendations was a valuable benefit to each firm's clients.[19]

¶8 Theflyonthewall.com (Fly) collects financial news and rumors and publishes them to its clients via a subscription newsfeed.[20] A chief component of its business is its online newsfeed, which is updated continuously between 5:00 a.m. and 7:00 p.m. each day and presents a constant stream of financial headlines, none of which are independently researched.[21] It was on this newsfeed that Fly posted the recommendations of the various financial firms.[22] Generally, the posts included the name of the firm making the recommendation.[23] Frequently, Fly obtained its information directly from employees of the financial firms, who did not have authorization to disseminate this information.[24] Other times, Fly obtained the information legitimately from firms or through various independent sources.[25] Fly's subscribers consist of individual investors, institutional investors, and brokers.[26] The client bases of the financial firms are similar.[27]

¶9 The firms sued Fly for hot news misappropriation in New York federal court.[28] In deciding the case, the district court looked to the previously established elements of a hot news misappropriation claim. It described them as:

> (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[29]

¶10 The court had no trouble finding that generating the stock recommendations involves substantial cost and that the information was time-sensitive.[30] It also found that the core business of Fly involved free-riding on the sustained, costly efforts of the firms and that, since it made no investment of its own in equity research, it could sell the

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[17] *Id.*
[18] *Id.* at 316.
[19] *Id.*
[20] *Id.* at 322.
[21] *Id.* at 323.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 325.
[25] *Id.* at 326.
[26] *Id.* at 325.
[27] *Id.* at 339–40.
[28] *Id.* at 313. The firms also sued for damages, fees, and an injunction related to a few instances of copyright infringement. *Id.* at 328.
[29] *Id.* at 334–35 (quoting Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997)).
[30] *Id.* at 335–36.

reworded stock recommendations at a cut-rate price to its subscribers and still make a profit.[31] The court did not find attributing the recommendation to the financial firm to be a mitigating factor, since it is the firm's expert reputation that gives the recommendation value.[32] Despite Fly's claims that it only competed directly with other financial news aggregators,[33] the court found that it directly competed with the firms to the extent that it disseminated recommendations to investors for making investment decisions.[34] Finally, the court found that the firms supplied ample evidence that allowing such conduct to continue "would so reduce [the firms'] incentive to invest the resources necessary to produce equity research reports that the continued viability of plaintiffs' research business is and 'would be substantially threatened.'"[35]

¶11 The court enjoined Fly from releasing the firms' recommendations until one half-hour after the New York Stock Exchange opens each day or 10:00 a.m., whichever is later.[36] The purpose of this injunction was to allow the financial firms to exploit benefit from the information they generate until its commercial value to the firms passes.[37]

¶12 The relationship between the financial services firms and Fly in *Barclays I* has some similarity to the relationship between news content producers and various news aggregation websites currently in existence. For the most part, the content on news aggregator websites is generated or gathered by content producers and then selected, summarized, commented upon, or linked to by the aggregators.

¶13 As more and more news content producers suffer from decreased revenue, news aggregation sites frequently draw upon the same news-reading clientele. While the aggregators provide readers with content that was gleaned from these producers and receive ad revenue in the process, they do not incur similar substantial costs in obtaining that content.

¶14 Before examining the legal consequences of the relationship between content producers and news aggregators, a review of the development of the hot news misappropriation doctrine is in order.

III. THE HOT NEWS MISAPPROPRIATION DOCTRINE

A. A Brief History[38]

¶15 The hot news misappropriation doctrine originated with the U.S. Supreme Court's decision in *International News Service v. Associated Press*.[39] International News Service (INS) and the Associated Press (AP) were competitors in the gathering and distribution of news to newspapers and other media sources throughout the United States and other

[31] *Id.* at 336.
[32] *See id.*
[33] *Id.* at 340.
[34] *Id.* at 339.
[35] *Id.* at 341.
[36] *Id.* at 347.
[37] *Id.* at 345.
[38] For a differing account of the facts behind this case, see Douglas G. Baird, *Property, Natural Monopoly, and the Uneasy Legacy of* INS v. AP (Univ. of Chi. Law Sch., John M. Olin Law & Economics, Working Paper No. 246, 2005), *available at* http://ssrn.com/abstract=730024.
[39] 248 U.S. 215 (1918).

nations.[40] This news would not have otherwise been accessible to the papers in a timely manner due to the expense associated with setting up their own foreign bureaus.[41] The most important news in 1916 related to World War I, which the United States had not yet entered.[42] American journalists covering the war in Europe sent back news via cable.[43] During the early part of the war, the owner of INS sympathized with Germany.[44] As a result, British censors prevented INS correspondents from sending back dispatches from the war, thus hindering INS from reporting on war developments.[45]

¶16 To continue providing its subscriber papers with war news, INS bribed AP employees, employees of newspapers using the AP service, and telegraph operators for war news before AP member papers printed it.[46] More importantly, INS also copied AP news from early editions of papers in the eastern United States, as well as from bulletin boards outside of the offices of AP newspapers.[47] INS would rewrite the stories using the facts obtained from AP and distribute them to its member papers across the United States, in some cases scooping AP member papers on the west coast.[48] AP sued for an injunction.[49] After the district court granted the injunction, the case made its way to the U.S. Supreme Court.[50]

¶17 The Court recognized that this case was a question of unfair competition rather than copyright.[51] It found that while individual newspaper buyers have the right to disseminate the news non-commercially, a competitor's transmission for commercial purposes is a different matter.[52] Between news-gathering competitors that concurrently expend labor, skill, and money to make profits, the news becomes a "quasi-property," regardless of either competitor's rights against the public.[53] The Court held that by selling a competitor's material that required organization and expenditure as its own, INS committed an unauthorized interference with the normal operation of AP's business "precisely at the point where the profit is to be reaped, in order to divert . . . profit from those who have earned it to those who have not."[54] This gave INS a special advantage because it was not burdened with the expense of gathering the news.[55] Thus, the Supreme Court created the hot news misappropriation doctrine. The underlying justifications for creating this doctrine include the labor (or "sweat of the brow") theory

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[40] *Id.* at 229.
[41] ISBELL, *supra* note 10, at 14.
[42] Andrew L. Deutsch, *Protecting News in the Digital Era: The Case for a Federalized Hot News Misappropriation Tort*, *in* ADVANCED SEMINAR ON COPYRIGHT LAW 2010, at 511, 545 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 1003, 2010).
[43] *Id.*
[44] 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, 23 (2008).
[45] ISBELL, *supra* note 10, at 14.
[46] Deutsch, *supra* note 42, at 546.
[47] *Id.*
[48] ISBELL, *supra* note 10, at 14.
[49] Deutsch, *supra* note 42, at 546.
[50] *Id.* at 547.
[51] Int'l News Serv. v. Associated Press, 248 U.S. 215, 234–35 (1918).
[52] *Id.* at 239.
[53] *Id.* at 236.
[54] *Id.* at 240.
[55] *Id.*

of property, commercial immorality, and the preservation of an incentive to invest in information gathering.[56]

B. The Doctrine Shifts to the States

¶18 Because the Supreme Court created the hot news misappropriation doctrine in a diversity jurisdiction case, it became part of federal common law. Thus, the doctrine ceased to be formal precedent in 1938 when *Erie Railroad Co. v. Tompkins* overruled *Swift v. Tyson*, which had established federal common law.[57] Nonetheless, *INS* greatly influenced state common law development, and a number of states adopted the doctrine *INS* created.[58] A number of state decisions subsequently expanded the misappropriation doctrine from the narrow hot news fact pattern to other instances where a party reaped what it had not sown, frequently restraining any commercial activity of which the court disapproved.[59] Thus, the doctrine expanded to include many misappropriation claims involving "commercial immorality."[60]

C. Copyright Preemption Concerns

¶19 While some states eagerly adopted the misappropriation doctrine in the years following *Erie*, it was not clear whether federal intellectual property law preempted the doctrine. After New York adopted the misappropriation doctrine in 1950,[61] the Second Circuit Court of Appeals held in 1955 that the 1909 Copyright Act did not preempt the state misappropriation doctrine.[62] However, in 1964 the Supreme Court ruled in two cases that the federal patent law preempted Illinois state unfair competition law.[63] Broad application of the language in these decisions suggests that federal copyright and patent law would preempt state intellectual property protection if the state law conflicts, even indirectly, with the objectives of the federal protection.[64] Applied to copyright law, this indicates that state misappropriation claims would be preempted unless the misappropriating party had not cited the original source of information.[65] A decade later, the Court clarified its position in two rulings,[66] holding that states can protect certain

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[56] Holte, *supra* note 44, at 24 (citing Rex Y. Fujichaku, Comment, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421, 442 (1998)).
[57] *Barclays I*, 700 F. Supp. 2d 310, 332 (S.D.N.Y. 2010) (noting that *Erie* abrogated federal common law and ended *INS*'s formal precedent), *rev'd*, 650 F.3d 876 (2d Cir. 2011); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").
[58] *See* Deutsch, *supra* note 42, at 551.
[59] *See id.* at 551–53.
[60] *Id.* at 552.
[61] *See* Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950).
[62] *See* Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 661–63 (2d Cir. 1955).
[63] *See* Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964).
[64] Holte, *supra* note 44, at 27.
[65] *Id.*
[66] *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Goldstein v. California, 412 U.S. 546 (1973).

intellectual property rights under state copyright law, as long as the laws do not interfere with federal copyright laws.[67] They also held that states can make trade secret legislation in any area that Congress does not regulate.[68]

¶20 The 1976 Copyright Act directly addresses the issue of state law preemption.[69] Section 301 "explicitly preempts all state causes of action that protect any right equivalent to any of the exclusive rights protected by the Copyright Act, including copying and distribution."[70] This preempts many of the "commercial immorality" misappropriation claims that were essentially the same as wrongful copying.[71] However, the legislative history of the Act indicates that a hot news misappropriation claim survives preemption.[72]

D. The Modern Hot News Misappropriation Doctrine

¶21 The landmark case of *National Basketball Ass'n v. Motorola, Inc.*[73] also addressed whether the hot news misappropriation doctrine survived preemption. In this case, the National Basketball Association (NBA) brought an action against the manufacturer and the promoter of pagers that provided real-time information about professional basketball games.[74] A group of employees who watched basketball games on television or listened to them on the radio updated this information, entering data on a computer. Motorola then compiled and analyzed the data and transmitted it to the pagers.[75] In addition to misappropriation claims, the NBA asserted claims for false advertising, false representation of origin, copyright infringement, and unlawful interception of communications.[76] The district court found for the NBA on the misappropriation claim, dismissed all the other claims, and granted a permanent injunction against the defendants, who appealed to the Second Circuit Court of Appeals.[77]

¶22 The Second Circuit reversed and lifted the injunction.[78] However, it also held that a narrow hot news misappropriation claim survives preemption by the 1976 Copyright Act.[79] Looking back to *INS*, the court set out the elements central to a hot news

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[67] Holte, *supra* note 44, at 27.
[68] *Id.*
[69] *Id.* at 28.
[70] *Barclays I*, 700 F. Supp. 2d 310, 333 (S.D.N.Y. 2010), *rev'd*, 650 F.3d 876 (2d Cir. 2011); *see also* 17 U.S.C.§ 301 (2006).
[71] Deutsch, *supra* note 42, at 555.
[72] H.R. REP. NO. 94-1476, at 132 (1976) ("'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 . . . nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy . . . against a consistent pattern of unauthorized appropriation by a competitor of the facts . . . constituting 'hot' news, whether in the traditional mold of *International News Service v. Associated Press* or in the newer form of data updates from scientific, business, or financial data bases.") (internal citation omitted).
[73] 105 F.3d 841 (2d Cir. 1997).
[74] *See id.* at 843–44.
[75] *Id.* at 844.
[76] *Id.*
[77] *Id.* The NBA also appealed the dismissal of the false advertising claim. The court affirmed the district court's dismissal of the claim. *Id.* at 855.
[78] *Id.*
[79] *Id.* at 852.

misappropriation claim that would survive preemption.[80] It stated that the rationale for the doctrine is that protecting property rights in time-sensitive information incentivizes profit-seeking entrepreneurs to make information available to the public.[81] Without an incentive for private actors to collect "hot news," the general public would suffer.[82] The court found that it was the time-sensitive nature of the information's value, the defendant's free-riding, and "the threat to the very existence of a product or service provided by the plaintiff" that allows a hot news misappropriation claim to survive preemption.[83]

¶23 In addition to New York, Pennsylvania,[84] Missouri,[85] California,[86] and Illinois[87] have each adopted the hot news misappropriation tort as part of state unfair competition law.[88] The claim has also been asserted in Massachusetts[89] and Washington D.C.,[90] though not ruled on.

IV. BARCLAYS ON APPEAL

¶24 In holding that the financial firms' hot news misappropriation claim against Fly was preempted by the 1976 Copyright Act, the Second Circuit extensively examined its previous *NBA* opinion. After first noting that it was bound by the conclusion of the *NBA* court that the hot news misappropriation tort survives,[91] the court moved on to its preemption analysis.[92] In short, under § 301 of the Copyright Act,[93] federal copyright law preempts a state law claim that "seeks to vindicate 'legal or equitable rights that are equivalent' to one of the bundle of exclusive rights already protected by copyright law" (the "general scope requirement") "if the work in question is of the type of works protected by the Copyright Act" (under the "subject matter requirement").[94] It is not determinative that the material at issue is itself uncopyrightable—such as facts or ideas—if the material is contained in a work of the type that is generally protected.[95] However, if the state law claim requires an "extra element" instead of or in addition to the rights

[80] *Id.* at 845; *see also supra* Part II.
[81] *NBA*, 105 F.3d at 853.
[82] *Id.*
[83] *Id.*
[84] *See, e.g.*, Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657 (Pa. 1963).
[85] *See, e.g.*, Fred Wehrenberg Circuit of Theaters, Inc. v. Moviefone, Inc., 73 F. Supp. 2d 1044 (E.D. Mo. 1999).
[86] *See, e.g.*, Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000).
[87] *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).
[88] ISBELL, *supra* note 10, at 16.
[89] *See, e.g.*, Complaint, GateHouse Media Mass. I, Inc. v. N.Y. Times Co., No. 08-cv-12114-WGY (D. Mass. Dec. 22, 2008).
[90] *See, e.g.*, First Amended Complaint, Agence France Presse v. Google, Inc., No. 05CV00546 (GK) (D. D.C. Apr. 29, 2005).
[91] *Barclays II,* 650 F.3d 876, 890 (2d Cir. 2011).
[92] *See id.* at 890–94.
[93] 17 U.S.C. § 301 (2006).
[94] *Barclays II*, 650 F.3d at 892.
[95] *Id.* at 893 (citing Nat'l Basketball Ass'n v. Motorola, Inc.,, 105 F.3d 841, 849 (2d Cir. 1997)).

protected by federal copyright law, then there is no preemption because the claim is not covered by the general scope of copyright.[96]

¶25 The court then went on to discuss the elements of the hot news misappropriation claim that *NBA* laid out and the district court relied on.[97] Noting some slight inconsistencies in the wording of multiple reiterations of the free-riding element in *NBA*, the court held that *NBA*'s five-element hot news misappropriation claim test was not binding because it essentially amounted to dicta.[98]

¶26 Applying its review of the law to the facts of *Barclays*, the court found it determinative that the information that Fly distributed to clients was the fact that the firms were making certain recommendations and that Fly attributed the recommendations to the source firms.[99] Fly was not repackaging the research and recommendations as its own.[100] Rather, the court found that Fly was merely reporting on the fact that the firms made the recommendations.[101]

¶27 The court first held that the claim met the requirements for preemption, as the recommendations met the subject matter requirement as "original works of authorship fixed in a[] tangible medium of expression."[102] The general scope requirement was met—the violated right was the right of reproduction, which the Copyright Act addresses.[103] However, the court held that the claim at issue did not have the extra element required to avoid preemption because it found that Fly did not "free-ride" on the efforts of the firms.[104] In addressing this finding, the court noted that the firms were only seeking to protect their recommendations, not the underlying research conducted to reach those recommendations, and that the recommendations were a product of the firms' expertise and experience rather than information acquired through efforts akin to reporting.[105] The court also noted that, while Fly may be interfering with the firms' business at a point where the firms' profits are to be reaped, it was not clear that profit was being diverted to Fly.[106] While the firms earned revenue through commissions on trades placed through their brokers after their clients received the recommendations,[107] Fly received its revenue through subscribers to its information bulletins.[108] The court felt that instead of diverting profits to itself, Fly was most likely diverting profits to "whatever broker happens to execute a trade placed by the recipient of news of the [r]ecommendation from Fly."[109] Furthermore, the court made note of the fact that Fly has a staff dedicated to collecting the recommendations and reporting on them, a "substantial

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[96] *Id.* at 893 (citing *NBA*, 105 F.3d at 850).
[97] *See id.* at 898.
[98] *See id.* at 899–901.
[99] *See id.* at 903–04.
[100] *Id.* at 904.
[101] *See id.* at 903.
[102] *Id.* at 902 (alteration in original) (internal quotation marks omitted) (citing 17 U.S.C. § 102 (2006)).
[103] *Id.*
[104] *See id.*
[105] *Id.* at 903.
[106] *Id.* at 904.
[107] *Id.* at 879, 882.
[108] *Id.* at 883.
[109] *Id.* at 904.

organizational effort" bearing its own costs of collecting factual information, thus weighing against a determination of "free-riding."[110]

¶28 Reflecting on what sort of hot news misappropriation case would survive preemption, the court stated that it was mindful of the facts before the *INS* court: "news, data, and the like, gathered and disseminated by one organization as a significant part of its business, taken by another entity and published as the latter's own in competition with the former."[111] Finally, the court noted that the firms might have had a hot news misappropriation claim against Fly if they "were to collect and disseminate to some portion of the public facts about securities recommendations in the brokerage industry" and were to "copy the facts contained in the [f]irms' hypothetical service" and distribute them as their own research.[112]

¶29 As a result of this opinion, it appears that for a hot news misappropriation claim to survive federal preemption, one party must expend resources collecting news or information as part of its business, while another party copies that news or information and distributes it as its own research in competition with the first party. Fortunately, this standard may be applicable to many situations involving news aggregators.

V. THE JOURNALISM INDUSTRY AND NEWS AGGREGATION

A. The Current State of the Journalism Industry

¶30 The journalism industry in the United States is changing. Newspaper daily print circulation decreased thirty percent since 1990.[113] More importantly, print and online advertising revenue for newspaper organizations has fallen nearly forty-eight percent since 2006.[114] Circulation revenues have fallen ten percent since 2003.[115] While radio, magazines, and cable, network, and local television news have each suffered from declining audiences over the past year, advertising revenue for each has actually increased.[116] However, only Internet news providers grew both in audience and revenue over the past year, with more people now getting their news online than through newspapers for the first time and more money being spent on online advertising than print newspaper advertising for the first time as well.[117]

¶31 More importantly, the changes that have affected the journalism industry over the past decade have led to a significant decline in investment in news gathering. Newspaper newsroom jobs are down almost a third since 2000.[118] Network news staffs are roughly half the size they were in the 1980s.[119] The trend is similar at news magazines.[120]

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[110] *Id.* at 905.
[111] *Id.*
[112] *Id.* at 905–06.
[113] Rick Edmonds et al., *Newspapers: By the Numbers*, STATE NEWS MEDIA, http://stateofthemedia.org/2011/newspapers-essay/data-page-6/ (last visited Nov. 21, 2011).
[114] *Id.*
[115] *Id.*
[116] *Key Findings*, State News Media, http://stateofthemedia.org/2011/overview-2/key-findings/ (last visited Dec. 18, 2011).
[117] *Id.*
[118] Edmonds et al., *supra* note 113.
[119] *Id.*

Newspapers are now devoting $1.6 billion less annually to news gathering than they did four years ago.[121] However, there are some signs that online news entities are starting to invest more in news gathering.[122]

B. The Rise of Internet News Aggregation

¶32 Coinciding with this change in traditional journalism is the rise of the Internet news aggregator. Generally speaking, a news aggregator is a website that displays information from multiple sources in a single place.[123] News aggregators take on a number of forms, including what are commonly referred to as feed aggregators, specialty aggregators, user-curated aggregators, and blog aggregators.[124] For the purposes here, this Comment only discusses feed aggregators and blog aggregators.

1. Feed Aggregators

¶33 Feed aggregators are websites that contain material from a number of other sources—generally arranged by source, topic, or story—and are closest to the traditional conception of a news aggregator.[125] They generally display the headline of a story and link back to the original source.[126] Sometimes the first few lines of a story's lead are included, and the name of the originating website is often listed.[127] Google News[128] is an example of a feed aggregator.

¶34 The problem with feed aggregators is that readers receive a significant proportion (or "heart") of the story from the story's headline and lead without ever having to click on the link to the source. Thus, while the aggregator receives ad revenue for the views, the source website does not. This problem is significant. A recent study indicated that forty-four percent of people who visit Google News scan headlines without accessing the source websites.[129]

2. Blog Aggregators

¶35 Blog aggregators, such as the Huffington Post,[130] use third-party content to create a blog about a particular topic.[131] Posts frequently consist either of synthesizing third-party

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[120] Katerina-Eva Matsa et al., *Magazines: By the Numbers*, State News Media, http://stateofthemedia.org/2011/magazines-essay/data-page-4/ (last visited Dec. 18, 2011).
[121] Rick Edmonds, *Shrinking Newspapers Have Created $1.6 Billion News Deficit*, Poynter Biz Blog (Oct. 10, 2009, 12:00 PM), http://www.poynter.org/latest-news/business-news/the-biz-blog/98784/shrinking-newspapers-have-created-1-6-billion-news-deficit/.
[122] *See* Tom Rosenstiel & Amy Mitchell, *Key Findings*, STATE NEWS MEDIA, http://stateofthemedia.org/2011/overview-2/key-findings/ (last visited Nov. 21, 2011).
[123] ISBELL, *supra* note 10, at 2.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] GOOGLE NEWS, http://news.google.com (last visited Nov. 21, 2011).
[129] Robin Wauters, *Report: 44% of Google News Visitors Scan Headlines, Don't Click Through*, TECHCRUNCH (Jan. 19, 2010), http://techcrunch.com/2010/01/19/outsell-google-news/.
[130] HUFFINGTON POST, http://www.huffingtonpost.com/ (last visited Nov. 21, 2011).
[131] ISBELL, *supra* note 10, at 5.

content from multiple sources into a single story and linking to the original content, either in the article or at the end of the article, or of a two or three sentence summary of a third-party article with a link to the original.[132] In linking to the original content, blog aggregators either use the original headline or create a new one.[133] Unlike feed aggregators, blog aggregators take original content and generally add new content or interpretation.

¶36 With this understanding of the current state of journalism and news aggregation, this Comment next looks to the legal remedies available to protect the journalism industry and other content producers.

VI. WHY COPYRIGHT LAW IS INSUFFICIENT TO PROTECT CONTENT PRODUCERS

¶37 The chance of recovery by a content producer against a news aggregator's infringement under current federal copyright law is poor. A major reason for this is that news aggregators primarily take the "heart" of the source content and reword it, instead of copying and reprinting large portions of it. For instance, blog aggregators will frequently only summarize the original content. To the extent that blog aggregators print small sections of the source headline or content and feed aggregators print source headlines and leads, the copyright doctrines of the idea/expression merger and fair use become important factors in the determination of copyright infringement.

A. The Idea/Expression Merger

¶38 Under U.S. copyright law, while the expression of a particular fact or idea is generally copyrightable, the underlying fact or idea is not.[134] Thus, if an aggregator copies a full paragraph of source content and prints it verbatim, the aggregator will most likely be liable for copyright infringement. However, if a blogger rewrites a story, using the underlying facts but putting them in his own words, it is not copyright infringement. This is the theoretical underpinning in the *INS* decision. Copyright infringement was not found in *INS* because most of the stories were rewritten. Therefore, the court created the misappropriation doctrine to alleviate what it perceived to be an unfair business practice.

¶39 The concept of the idea/expression merger comes into play when there is essentially only one way to express an idea. In such cases, the idea and the expression are considered to have merged, and the expression is not copyrightable.[135] Under similar reasoning, titles and short phrases generally do not receive copyright protection.[136]

¶40 Aggregators will thus not be liable for copyright infringement for any underlying facts or ideas that they take from a source. They will also not be liable for any expression they take when that expression is the only way of expressing the underlying fact or idea. This concept is especially relevant to feed aggregators. Generally, the source headlines or leads express the facts of the story in as few words as possible. Using fewer words

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[132] *Id.*
[133] *Id.*
[134] *See* 17 U.S.C. § 102(b) (2006).
[135] *See* ATC Distrib. Grp., Inc. v. Whatever It Takes Transmission & Parts, Inc., 402 F.3d 700, 707–08 (6th Cir. 2005).
[136] *See* CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1519–20 (1st Cir. 1996).

leads to fewer ways of expressing particular facts, thus leading to a higher likelihood of a merger. The aggregators' case is only strengthened when one considers that headlines are generally just titles or short phrases. For all of these reasons, a successful copyright infringement case against a feed aggregator is unlikely.

B. Fair Use

¶41 Even when a blog aggregator reprints a portion of copyrighted material, it has an argument against infringement due to the fair use doctrine. To comport with First Amendment concerns regarding free expression, the Copyright Act contains a Fair Use clause, which sets forth four nonexclusive factors for a court to consider when determining whether a use qualifies as fair. Fair use precludes a finding of infringement. The fair use factors include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[137]

1. The Purpose and Character of the Use

¶42 The first thing that courts look to when evaluating this factor is whether the use is commercial in nature.[138] As almost every aggregator relies on ad revenue to one extent or another, this factor should weigh in favor of the content producers. However, courts then look to whether the use is transformative—whether it adds something to the content, by either repurposing it or adding some new meaning or expression.[139]

¶43 Both feed and blog aggregators may have an advantage on this factor. Courts have found that the categorization and indexing functions generally performed by feed aggregators qualify as transformative uses.[140] While this transformative use may not be sufficient to overcome the free-riding aspect of a hot news misappropriation claim,[141] it appears that it is sufficient for this factor of a fair use claim. Blog aggregators have an even stronger claim, as they generally add their own thoughts and expressions to the original content.

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[137] 17 U.S.C. § 107.
[138] ISBELL, *supra* note 10, at 10.
[139] *Id.*
[140] *See generally* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
[141] *See Barclays I*, 700 F. Supp. 2d 310, 337 (S.D.N.Y. 2010), *rev'd*, 650 F.3d 876 (2d Cir. 2011).

2. The Nature of the Copyrighted Work

¶44 For this factor, courts generally look to whether the work is expressive or creative, or more factual.[142] Fair use claims receive more deference when they involve factual works.[143] The court also looks to whether the work is published, giving more deference to usage of published works.[144] The fact that the content at issue in this Comment is published work of a factual nature leads to a fair use finding on this factor in favor of feed and blog aggregators.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

¶45 For this factor, courts look to the amount of the source work that is reproduced—both quantitatively and qualitatively.[145] Quantitatively, most aggregators only use a small amount of the source work—just a few sentences and maybe a headline for a blog aggregator and just the headline and maybe a few sentences of lead for a feed aggregator. But examined from a qualitative perspective, the borrowing of content is greater. In general, the headlines and lead contain the heart of the source content. The remaining information is frequently mere detail to flesh out the story. The same is frequently true for blog aggregators. The Supreme Court has held that reprinting a short excerpt can weigh against fair use if the excerpt is the heart of the source work.[146] Thus, this factor could easily go for the content producers.

4. The Effect of the Use on the Potential Market for the Copyrighted Work

¶46 As in the misappropriation test, the fact that forty-four percent of Google News readers do not click through to the source content indicates that feed aggregators frequently function as a substitute for the source, thus hindering the potential market for the source material. The case with blog aggregators is less clear, but it is certainly conceivable that this factor will weigh in favor of the content producers.

¶47 While content producers are likely to be favored in the last two factors of the test, aggregators have much stronger arguments for the first two factors. Thus, depending on the facts of each case, a finding of fair use is certainly possible. Consequently, content producers cannot rely on copyright law alone to protect their content.

VII. APPLYING THE HOT NEWS MISAPPROPRIATION DOCTRINE TO NEWS AGGREGATORS

A. Intent of the Doctrine

¶48 Courts can apply the same fundamental factors at the base of the opinions in *INS*, *NBA*, *Barclays I* and *Barclays II* to protect the news gathered by content producers from misappropriation by news aggregators. While the "sweat of the brow" theory of property

[142] ISBELL, *supra* note 10, at 11–12.
[143] *Id.* at 12.
[144] *Id.*
[145] *Id.*
[146] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564–65 (1985).

is no longer a viable factor in copyright law,[147] it is still a valid justification for unfair competition law. In the news aggregator setting, traditional news media and other content producers are expending significant amounts of labor, skill, and money to gather hot news from around the world and distribute it to their paying customers. However, precisely at the point where profits are to be reaped—via the viewing of an ad on a content producer's site as the reader views the news or through the sale of a physical paper—news aggregators are diverting the profit to themselves by displaying the heart of the news and receiving ad revenue on their sites instead. As in *INS*, news aggregators do not bear the expense of gathering the news they are reporting and, thus, are reaping what they did not sow.

¶49 The same principles of commercial immorality that support the hot news doctrine in *INS* are present in these current practices. Most importantly, the need to preserve an incentive to invest in information gathering is readily apparent. As the gathering and dissemination of news is a benefit to the public as a whole, the journalism industry should be protected and given the opportunity to receive a return on its investment in news gathering. This incentivizes industry members to continue gathering and disseminating news. Thus, courts should follow the lead of *INS*, *NBA*, and *Barclays I* and apply the test for a hot news misappropriation claim to news aggregators.

¶50 While the court in *Barclays II* seemed to dismiss the *NBA* element test as dicta, it is not clear from the opinion that the test is completely incompatible with the court's federal preemption analysis or its conception of a valid hot news misappropriation claim. As such, it is possible that the test is still valid and that future courts will use it. The following analysis assumes that courts will continue to apply the *NBA* element test in deciding hot news misappropriation claims.

B. Applying the NBA *Element Test to News Aggregators*

1. The Plaintiff Generates or Gathers Information at a Cost

¶51 News media and other content producers are likely to satisfy this element.[148] There is no doubt that the journalism industry expends great sums of money in gathering the news that it distributes. This element should thus be easy to meet. There is a slight chance that feed aggregators may be able to escape this element if the part of the headline or lead reproduced was not costly to gather.[149] For instance, if a feed aggregator uses a headline or lead from a content producer that says a particular politician won an election, the content producer probably did not incur significant costs to gather that particular piece of information.

2. The Information Is Time-Sensitive

¶52 This factor is determined on a case-by-case basis,[150] but it is not difficult to see that the information most relevant to this test is the information that is most in demand. As

[147] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991).
[148] *See* ISBELL, *supra* note 10, at 18.
[149] *See id.*
[150] *Id.* at 19.

the "hotness" of the news is fleeting, it is the time-sensitive news that is most in demand and would be the subject of this examination.

3. Free-Riding on the Plaintiff's Efforts

¶53 While feed aggregators may argue that they add their own effort to that of content producers by selecting and collecting certain information in one place, a court may consider such aggregation activities insufficient to overcome the fact that the aggregator expended no effort to produce the information and did not contribute to the underlying research and analysis. While blog aggregators do add additional information and analysis to a story, courts may follow similar logic and hold that contribution insufficient to counter the amount of free-riding. It is not clear at what point courts would find that the level of additional contribution outweighs the level of free-riding.

4. Direct Competition

¶54 The fact that a significant proportion of the viewers of feed aggregators never click through to the source material is a strong indication that the aggregator serves as a replacement for the source and, thus, qualifies as direct competition. Due to the content added by a blog aggregator, it seems there would be less of a chance of direct competition between online newspapers and blog aggregators, but it is not difficult to imagine a case where there would be direct competition for readers between the two. For instance, some readers might consider the analysis provided by the Huffington Post to be a sufficient substitute for that provided by the New York Times.

5. Reduce the Incentive to Produce

¶55 The burden for this element is low. The content producer does not even have to show that the defendant "caused them actual, quantifiable damage"—as may be possible with news aggregators—just that "the free-riding, if left unrestrained, '*would* so reduce the incentive to produce the product or service that its existence or quality *would be* substantially threatened.'"[151] A content provider should be able to meet this element by showing a correlation between reduced media revenues due to aggregation and reduced investment in news gathering.

C. Applying the Hot News Misappropriation Doctrine Under Barclays II

¶56 If courts follow the lead of *Barclays II* and limit application of the hot news misappropriation doctrine to cases with facts similar to *INS*—i.e., where the copying party passes the information off as the result of its own research—aggregators will gain a significant advantage. An aggregator would be able to avoid all liability for a hot news misappropriation claim by giving credit for the content to the content producer. Currently, many aggregators provide attribution or link to the original source of their material. Thus, applying this interpretation of the doctrine is not likely to help content producers as much as the doctrine under *NBA*. Nonetheless, the doctrine will likely still

[151] *Barclays I*, 700 F. Supp. 2d 310, 342 (S.D.N.Y. 2010) (quoting Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997)), *rev'd*, 650 F.3d 876 (2d Cir. 2011).

be a useful tool for content producers in some instances to address improper misappropriation.

VIII. OTHER PROPOSALS FOR PROTECTING JOURNALISM

¶57 There have been a number of proposals for other methods of protecting journalism.[152] While breach of contract as a cause of action and proposals to modify copyright law to cover news and to restrict fair use each have their benefits, only a proposal to create a federal hot news misappropriation tort is a viable solution to the problems journalism currently faces.

A. Breach of Contract

¶58 Both Andrew Deutsch and Ryan Holte have discussed protecting information through a breach of contract claim.[153] A content producer could include contractual terms on its website expressly prohibiting the usage of the content for aggregation purposes.[154] If the terms of the agreement were violated, the content producer would have a breach of contract claim, which would not be federally preempted by § 301 of the Copyright Act.[155]

¶59 However, there are problems with this method. Consent to the terms and conditions of a website is judged by the visibility of those terms and a clear method for expressing consent.[156] To take advantage of a breach of contract cause of action, many content producers will have to change their practices to make their terms and conditions more obvious to aggregators, which may include making those terms and conditions more prominent on the website and, ideally, requiring the user to express affirmative consent to the terms and conditions (such as by clicking some sort of "I consent" link before they have access to the content).[157] Many content producers may not like to put that many hurdles between their content and their readers. In addition, it is unclear how difficult it would be to track down violators.[158]

B. Modify Copyright Law to Close Gaps

¶60 Alfred Yen discusses proposals to protect newspapers by aggressively closing gaps in current copyright law through legislation.[159] Specifically, this would require: "(1) defining newspaper headlines and lead sentences as copyrightable subject matter even if

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[152] *See generally, e.g.*, Deutsch, *supra* note 42; Eric B. Easton, *Who Owns 'The First Rough Draft of History?': Reconsidering Copyright in News*, 27 COLUM. J.L. & ARTS 521 (2004); Holte, *supra* note 44; Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement*, 12 VAND. J. ENT. & TECH. L. 947 (2010).
[153] *See* Deutsch, *supra* note 42, at 558; Holte, *supra* note 44, at 31.
[154] *See* Deutsch, *supra* note 42, at 558.
[155] *See* Holte, *supra* note 44, at 31; *see also* 17 U.S.C. § 301 (2006).
[156] Deutsch, *supra* note 42, at 559.
[157] *Id.* at 559–61.
[158] Holte, *supra* note 44, at 31.
[159] *See* Yen, *supra* note 152, at 959.

they lack originality or represent the merger of idea and expression, (2) curtailing the scope of fair use, and (3) treating linking as a form of infringement."[160]

¶61 As Yen himself points out, this proposal immediately runs afoul of the First Amendment. As it is, the Copyright Act already infringes on free speech to some extent.[161] It is only through the safety valves of fair use and the idea/expression dichotomy that courts have determined the Copyright Act does not violate free speech rights.[162] In addition, the protections guaranteed by the Copyright Act incentivize the creation of new speech, which helps overcome any concern over restrictions.[163] The proposed changes to copyright law would alter the traditional contours of copyright protection, eliminating some of the safety valves that prevent copyright law from unduly restricting speech.[164] These proposals would also prevent aggregators from distributing their own speech regarding news stories by not allowing them to provide information on articles or where they can be found.[165] In addition, the proposals would impermissibly extend copyright protection to material already in the public domain by automatically defining headlines and leads as copyrightable, regardless of whether they contain protectable material.[166] Due to these constitutional violations, these proposals are unfeasible.

C. Restricting Fair Use

¶62 Ryan Holte proposes a slight change in fair use to protect the journalism industry.[167] He proposes changing fair use to extend a twenty-four hour monopoly to content producers on their content so that they can reap profits from it.[168] After that period, the story can be reproduced freely to allow the dissemination of ideas.[169] Holte believes that giving content producers these additional limited rights would allow them to find additional profits in news gathering. This would incentivize the gathering and dissemination of information to the public benefit.[170] To lessen the negative consequences of this proposal, such as reduced dissemination of information among the public, Holte suggests not extending this additional protection to news headlines so that other websites may advertise and link to the story.[171] He also proposes a loophole that would allow non-profit entities to post the content.[172] To further lessen the negative impact of this proposal, he suggests limiting damages for violations to "the cost of litigation plus the amount of profits the defendant gained from publishing the story during the time the plaintiff had monopoly rights to it."[173]

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[160] *Id.* at 959–60 (footnote omitted).
[161] *Id.* at 960.
[162] *See id.* at 961.
[163] *See id.* at 959–61.
[164] *Id.* at 963–64.
[165] *Id.* at 969–70.
[166] *Id.* at 964, 969.
[167] *See* Holte, *supra* note 44, at 32–33.
[168] *Id.* at 33.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

¶63 This proposal is far superior to the one Yen discusses, as it alters the traditional contours of copyright protection much less significantly. However, while the negative consequences are far less severe, they still raise similar First Amendment concerns. Holte acknowledges this issue, but argues that the exception for not-for-profit entities and the limitation on damages are sufficient to mitigate any free speech concerns.[174] Yet these qualifications are unlikely to sufficiently mitigate these concerns because this proposal would still restrict fair use. Courts have found that the safety valves of fair use and the idea/expression dichotomy are necessary to protect free speech amidst copyright law's inherent free speech restrictions. Given this tenuous balance, it seems unlikely that a restriction on one of these safety valves would survive judicial scrutiny.

D. A Federal Hot News Misappropriation Tort

¶64 Andrew Deutsch makes a convincing case for a federal hot news misappropriation tort.[175] While he supports the logical underpinnings for the state cause of action, he expresses some concern for their uneven application and reliability.[176] His main concern is choice of law.[177] For a hot news misappropriation claim to succeed, the parties and the relevant facts must have a sufficient nexus to a state that has recognized the doctrine or is likely to recognize it.[178] Furthermore, he is concerned that the various states may not apply the third and fourth elements of the misappropriation claim uniformly.[179]

¶65 Deutsch believes the answer to this problem is a well-crafted federal hot news statute that provides uniform law across all states.[180] It would provide plaintiffs access to federal courts and federal rules of procedure and would theoretically provide clear elements for the claim, including the amount of competition between the parties and the threat to the plaintiff that is required.[181] Such legislation could also undo any limitations that *Barclays II* places on the doctrine and properly balance the rights of content producers with the benefit to society that aggregators provide. Legislators could also address free speech issues that the doctrine presents.

¶66 For these reasons, Deutsch's proposal would indeed be the best option for protecting journalism and other content producers. Unfortunately, there is currently no indication that Congress is considering this sort of legislation.[182] As such, content producers must turn to the current hot news misappropriation doctrine for protection.

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[174] *Id.* at 36.
[175] *See generally* Deutsch, *supra* note 42.
[176] *See id.* at 579.
[177] *Id.* at 580.
[178] *Id.*
[179] *Id.* at 580–81.
[180] *Id.* at 581.
[181] *Id.* at 581–82.
[182] The House had previously considered applying the *NBA* five-element test to databases in the Consumer Access to Information Act of 2004, H.R. 3872, 108th Cong. (2004).

IX. WHY THE CURRENT HOT NEWS MISAPPROPRIATION DOCTRINE IS STILL A VIABLE TOOL IN PROTECTING JOURNALISM

¶67 While the hot news misappropriation doctrine currently possesses a fraction of the strength it held ninety years ago, the journalism industry can still use this doctrine to protect itself, even after the *Barclays II* decision. Although misappropriation is not currently recognized in every state, eight of the top nine newspapers (by circulation) are located in jurisdictions that recognize the doctrine or have been presented with it.[183] Assuming that *USA Today* would be able to show substantial ties to a state that recognizes the doctrine, such as by demonstrating significant readership and resulting economic damage in New York, all nine papers are covered by the doctrine. Out of the top one hundred papers, a third are located in jurisdictions that recognize the doctrine or have been presented with it but have not ruled on it.[184] These figures suggest that if these content producers start enforcing their rights under the hot news misappropriation doctrine, the resulting damages and expenses that aggregators would be forced to pay could lead to a fundamental change in the way aggregators source content. New York in particular has embraced the doctrine. It is home to four of the top seven newspapers by circulation and nine of the top one hundred.[185] Furthermore, AP is based in New York.[186] These organizations have the potential to be powerful players in how the relationship between content producers and aggregators progresses.

¶68 Like with *INS*, AP is starting to fight back against aggregators. In a fact pattern eerily similar to *INS*, AP filed suit against All Headline News (AHN) in the Southern District of New York for hot news misappropriation and other claims.[187] AP alleged that AHN had no actual reporters, but instead prepared stories by having employees copy news reports off the Internet—some of which belonged to AP—and rewrite them.[188] These rewritten stories were then sold to newspapers, web portals, websites, and other news redistributors.[189] AHN filed a motion to dismiss most of the claims against it, but the court refused to dismiss the hot news misappropriation claim.[190] Before the case could go to trial, the parties settled, and AHN agreed to cease using AP content.[191] This is a strong indicator of the power that content producers still wield in jurisdictions that recognize the hot news misappropriation doctrine. The *Barclays II* opinion even alluded to this case as being an example of the hot news misappropriation tort that would survive its preemption analysis.[192]

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[183] *See eCirc for US Newspapers*, AUDIT BUREAU CIRCULATIONS, http://abcas3.accessabc.com/ecirc/newstitlesearchus.asp (last visited Nov. 21, 2011).
[184] *See id.*
[185] *See id.*
[186] *About AP*, ASSOCIATED PRESS, http://www.ap.org/pages/about/about.html (last visited Nov. 6, 2011).
[187] Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009).
[188] ISBELL, *supra* note 10, at 6.
[189] *Id.* at 7.
[190] *Id.*
[191] *Id.*
[192] *Barclays II*, 650 F.3d 876, 905–06 (2d Cir. 2011).

X. Conclusion

¶69 The current state of the hot news misappropriation doctrine is not the perfect tool for content producers to use against news aggregators to protect themselves from improper free-riding. It is currently only recognized in five states and has not been used extensively. Furthermore, *Barclays II* somewhat limits the doctrine. However, the currently available alternatives to the doctrine are insufficient to protect producers. The idea/expression merger, fair use doctrine, and limited amount of word-for-word copying by aggregators renders copyright law largely ineffective for this purpose. Breach of contract claims are hindered by consent requirements and the difficulty of tracking down violators. Finally, while proposals to modify copyright law could solve some of the problems that content producers are facing, they are unlikely to survive judicial scrutiny due to free speech concerns.

¶70 As the hot news misappropriation doctrine is available in states with a high percentage of content producers, it is still a viable tool that content producers can use to protect themselves. It is important to see how courts will apply the doctrine in light of *Barclays II*. Nonetheless, until a federal hot news misappropriation tort is created, the state hot news misappropriation doctrine is the best option that content producers have.