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When News Doesn't Want to Be Free: Rethinking "Hot News" to Help Counter Free Riding on Newspaper Content Online

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WHEN NEWS DOESN'T WANT TO BE FREE: RETHINKING "HOT NEWS" TO HELP COUNTER FREE RIDING ON NEWSPAPER CONTENT ONLINE

ABSTRACT

Newspaper executives, facing dropping circulation and revenue, are fighting to protect their content from online aggregators that are siphoning off the newspapers' articles—and their readers. Many online-news readers have abandoned newspapers' own websites for the sites of aggregators who link to, copy, or repackage the content of traditional news organizations. In most cases, aggregators pay nothing for the use of this content. For this reason, content creators have accused aggregators of stealing their work by skirting the law. But as members of the new media point out, most aggregators are operating inside the parameters of the law as it currently stands.

This Comment first explores how copyright law fails to protect content creators from a number of online uses of their content. It argues that where copyright law falls short, the almost-century-old doctrine of "hot news" misappropriation can help content creators address certain types of unfair competition. A federal statute codifying this doctrine would ultimately offer the most protection for content creators. This Comment argues, however, that such a statute must be limited in scope, and thus its utility would be likewise limited. Ultimately, if news gatherers wish to survive, they must adapt to the needs of consumers and challenge the prevailing idea that those who collect the news and disseminate it online require no compensation for their work.

INTRODUCTION

> *[T]here are those who think they have a right to take our news content and use it for their own purposes without contributing a penny to its production. . . . To be impolite, it's theft.*
>
> —Rupert Murdoch, chairman and CEO of News Corp.[1]

> *It's understandable to look to find someone else to blame. But as Rupert Murdoch has said, it is complacency caused by past monopolies, not technology, that has been the real threat to the news industry.*
>
> —Eric Schmidt, chairman and CEO of Google Inc.[2]

As newspapers struggle to hold onto readers and profits, the debate over their future and who, or what, is to blame for their potential demise has been playing out online[3] and on the pages of newspapers across the globe. Circulation numbers have dropped as fewer consumers opt for the delivery of a daily newspaper to their front porch,[4] especially now that nearly every news organization has moved some of its content online. And on the internet, newspapers have faced new challenges as they battle increased competition from sites that gather and present news in ways unimagined in the strictly ink-and-newsprint days.

This move online has placed some old and new media at odds. Traditional news organizations have attacked internet news "aggregators"[5] for siphoning

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[1] Rupert Murdoch, *Journalism and Freedom*, WALL ST. J., Dec. 8, 2009, at A21.

[2] Eric Schmidt, *How Google Can Help Newspapers*, WALL ST. J., Dec. 3, 2009, at A23. As of April 4, 2011, Eric Schmidt will transition from CEO to Executive Chairman of Google. Press Release, Google Inc., Google Announces Fourth Quarter and Fiscal Year 2010 Results and Management Changes (Jan. 20, 2011), *available at* http://investor.google.com/earnings/2010/Q4_google_earnings.html.

[3] *See, e.g.*, Jeff Jarvis, *First, Kill the Lawyers—Before They Kill the News*, BUZZ MACHINE (June 28, 2009, 12:10 PM), http://www.buzzmachine.com/2009/06/28/first-kill-the-lawyers-before-they-kill-the-news/ (criticizing proposals to increase legal protection for news content); Mike Masnick, *News Corp Lawyer: Aggregators Steal from Us! News Corp: Hey Check Out Our Aggregator!*, TECHDIRT (Oct. 15, 2009, 8:51 AM), http://www.techdirt.com/articles/20091014/1831246537.shtml (accusing owners of traditional news organizations of hypocrisy in their criticism of aggregators).

[4] *See* Martin Langeveld, *Moderating Declines: Parsing the NAA's Spin on Newspaper Circ Data*, NEIMAN JOURNALISM LAB (May 4, 2010, 10:00 AM), http://www.niemanlab.org/2010/05/moderating-declines-parsing-the-naas-spin-on-newspaper-circ-data/ ("Since 1945, the number of papers sold per 100 households has dropped steadily, declining in 61 of the last 64 years.").

[5] The term *aggregator* can be applied to sites that use and index news content in a variety of ways, ranging from offering a simple list of links to rewriting content with a credit to the originator, but no link. Popular examples include Google News, the *Huffington Post*, and the *Drudge Report*.

off their circulation by copying newspaper content for free and reposting this content on the aggregators' advertising-supported sites. Current and former newspaper executives have called aggregators and bloggers[6] "free-riders and pirates"[7] and "parasites living off journalism produced by others."[8]

The bloggers and aggregators, on the other hand, argue that evolving tastes and the nature of the internet, rather than their own behavior, have led viewers to their sites. They point out that their practices often add value to news content and even increase viewership of the originating sites.[9] As one aggregator wrote in an open letter to United Kingdom newspapers:

> The truth is, if anything, it is the growth of the internet itself—not link aggregation—that has undermined your business by destroying the virtual monopoly that you once held over the mass distribution of written news. If you are seeking to blame something for your current predicament, we suggest you start there.[10]

No matter which side of the debate one is on, there is no question that newspapers have experienced a steep decline. By the end of 2010, a site tracking layoffs at U.S. newspapers had counted more than 17,588 jobs lost in 2009 and 2010.[11] At least twelve metropolitan daily newspapers have closed

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[6] A blog, short for weblog, is an online journal. Many bloggers comment on news or conduct original reporting on a variety of subjects. Because blogs are not often a substitute for news sites, they are not the focus of this Comment.

[7] Zachary M. Seward, *AP's Tom Curley on the "Oversupply" of News and What He's Doing About It*, NIEMAN JOURNALISM LAB (Oct. 13, 2009, 8:40 AM), http://www.niemanlab.org/2009/10/aps-tom-curley-on-the-oversupply-of-news-and-what-hes-doing-about-it/ (reciting remarks made by AP President and CEO Tom Curley at the World Media Summit in Beijing).

[8] Jack Shafer, *Len Downie Calls Arianna Huffington a Parasite*, SLATE (Sept. 23, 2010, 6:20 PM), http://www.slate.com/id/2268459/.

[9] *See, e.g.*, Mike Masnick, *People Overestimate the Value of Content; Underestimate the Value of a Service That Makes It Useful*, TECHDIRT (Apr. 14, 2008, 11:58 AM), http://techdirt.com/articles/20080414/015112835.shtml ("The reason that people go to [aggregator] sites, and the reason why these sites can build a business, is because they add value to the content in the form of some sort of service that does more with it.").

[10] Struan Bartlett, *An Open Letter to the UK's National, Regional, and Local Newspapers*, NEWSNOW (Oct. 20, 2009), http://www.newsnow.co.uk/press/openletter.html (informing newspapers that his aggregating service provides "a means for readers to find [their] content more readily").

[11] *2009 Layoffs and Buyouts at U.S. Newspapers*, PAPER CUTS, http://newspaperlayoffs.com/maps/2009-layoffs/ (last visited Jan. 11, 2011); *2010 Layoffs and Buyouts at U.S. Newspapers*, PAPER CUTS, http://newspaperlayoffs.com/maps/2010-layoffs/ (last visited Jan. 11, 2011).

since March 2007.[12] Eight other daily newspapers have scaled back their print editions or now offer their news exclusively online.[13]

Newspapers are posting decreasing circulations and revenues. Both of the six-month circulation reports released in 2010 showed declines in circulation for all but one of the top ten U.S. newspapers.[14] The *Wall Street Journal*, which has adopted a paid online subscription model, was the only newspaper to gain readers with a 1.8% rise in the period ending in September when counting print and online subscribers.[15] Among the top twenty-five newspapers, average weekday circulation fell 5% from the same period a year earlier.[16] Newspaper advertising revenue has also fallen precipitously. In 2009, the industry's advertising revenue dropped 26%.[17] The economic downturn drove down profits from display advertising in print editions, while websites like Monster and Craigslist siphoned off classified advertising.[18] At the same time, newspapers still earn about 90% of their revenue from print advertising because of the low price of online advertisements.[19] In the face of these realities, News Corporation Chairman Rupert Murdoch has gone so far as to declare the death of the advertising-supported model of newspapers.[20]

News organizations, fighting for their share of shrinking advertising revenues, have become more concerned about keeping news consumers on their sites and finding ways to better profit from their content. They see news aggregators as posing one obstacle to this goal. One news executive has charged that aggregators "steal" his company's copyrights[21] or take more than

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12 NEWSPAPER DEATH WATCH, http://www.newspaperdeathwatch.com/ (last visited Jan. 11, 2011).

13 *Id.*

14 Walter Hamilton, *Newspapers' Declines Ease*, L.A. TIMES, Oct. 26, 2010, at B2 (citing numbers from the Audit Bureau of Circulations for the six-month periods ending in March 2010 and September 2010).

15 *Id.*

16 *Id.*

17 Pew Project for Excellence in Journalism, *Newspapers: Economics*, JOURNALISM.ORG–THE STATE OF THE NEWS MEDIA 2010, http://www.stateofthemedia.org/2010/newspapers_economics.php (last visited Jan. 11, 2010).

18 *See id.*

19 *See id.*

20 *Newspapers Ponder New Web Revenue Streams*, SUNDAY BUS. POST (Dec. 15, 2009, 12:01 PM), http://www.computersinbusiness.com/2009/12/15/newspapers-ponder-new-web-revenue-streams/ ("Online advertising is increasingly only a fraction of what is being lost from print advertising, and it is under constant pressure.").

21 Dirk Smillie, *Murdoch Wants a Google Rebellion*, FORBES (Apr. 3, 2009, 5:40 PM), http://www.forbes.com/2009/04/03/rupert-murdoch-google-business-media-murdoch.html?feed=rss_news.

what is "fair" under the copyright doctrine of fair use.[22] However, few content originators have filed lawsuits, and for good reason: the law is not on their side.

Part I of this Comment explores what is at stake in the fight over the use of newspaper content and the arguments on each side. Part II describes how copyright law, which governs the use of written works like news content, falls short of giving news organizations the protection they seek. It then presents other commentators' proposals to change the law to aid newspapers and explains why these proposals generally fail. Part III discusses a more promising avenue of protection for newspapers, the state law doctrine of "hot news" misappropriation. The availability of this doctrine was most recently confirmed in the Southern District of New York in a case brought by financial firms against aggregator Theflyonthewall.com.[23] Part III argues that a codification of the hot news doctrine as a federal law is the most promising legal solution because it could allow newspapers to counter egregious uses of their content that give the sources little credit or opportunity for profit. A statute must be limited in scope, however, and will therefore give newspapers limited relief. Part IV argues that due to a statute's inevitable limitations, ultimately market forces should be the main catalyst for change. Fundamental shifts in how news is valued and presented are likely to offer more success to news organizations in the long run. Market shifts are also more likely to benefit consumers by forcing the industry to adapt to new realities.

I. THE FIGHT OVER NEWS CONTENT AND WHAT IS AT STAKE

Numerous speeches, news columns, and internet pages have been devoted to the issue of when users should be able to copy or reuse newspaper content for free. The arguments rely on legal, moral, or capitalistic beliefs. As the debate continues, a yet unanswered question looms: What happens if traditional news organizations can no longer survive or thrive in the online world? This Part explores the arguments on each side of the debate over free

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[22] In an interview, Rupert Murdoch said of search engines' use of news stories, "There's a doctrine called fair use, which we believe to be challenged in the courts and would bar it altogether . . . but we'll take that slowly." Bobbie Johnson, *Murdoch Could Block Google Searches Entirely*, GUARDIAN (Nov. 9, 2009, 9:08 AM), http://www.guardian.co.uk/media/2009/nov/09/murdoch-google. The copyright doctrine of fair use will be discussed in Part II.A.2.

[23] Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

use of news content and the benefits of maintaining strong traditional news organizations.

In their own publications and elsewhere, a number of news executives have spoken harshly of aggregators who repost news organizations' content on sites that profit from advertising revenue.[24] Attorneys from Baker Hostetler, a law firm that represents a number of news organizations,[25] have also been vocal in their opposition to certain aggregators.[26] They liken some aggregators, those that essentially rewrite newspaper articles and potentially serve as replacements for the original,[27] to "parasites" that will eventually kill their hosts.[28] Aggregators' low overhead, they argue, allows them to undercut newspapers' advertising rates while attracting their readers.[29]

In a column titled "The Death of Journalism (Gawker Edition)," *Washington Post* reporter Ian Shapira echoed these points.[30] He detailed the measures he took to write a 1,500-word profile that *Gawker* retold in eight paragraphs, with a link to the *Post*'s version at the bottom.[31] While Shapira spent a day writing the piece—which required a phone interview, transcription, and sitting in on a speech given by his subject—the *Gawker* writer spent no more than an hour reworking the article for his site.[32] Shapira said: "Current law basically allows the Gawkers of the world to appropriate others' work,

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[24] *See, e.g.*, Michael Liedtke, *Newspapers Provide Most Local News Despite Internet-Driven Upheaval*, LEWISTON MORNING TRIB., Jan. 11, 2010, at A4 (recounting the efforts of the AP's Tom Curley and the *Wall Street Journal*'s Rupert Murdoch).

[25] Clients include ABC, Inc., Boston Herald, Cleveland Plain Dealer, FOX Television, and Tribune Co. *Media Industry: Leaders in the Evolving World of Media Law*, BAKER HOSTETLER, http://www.bakerlaw.com/medialaw/ (last visited Jan. 11, 2010).

[26] Cleveland lawyer and partner David Marburger has drafted a proposal with his brother, Daniel Marburger, and authored an op-ed in the *Los Angeles Times* in August 2009. Similarly, two Washington, D.C. partners published an op-ed in the *Washington Post* in May 2009. *See* David Marburger & Dan Marburger, Op-Ed., *Internet Parasites; Websites Protected by Copyright Law Are Killing Newspapers by Sucking Up Content That Is Gathered at a Hefty Cost*, L.A. TIMES, Aug. 2, 2009, at A28; Bruce W. Sanford & Bruce D. Brown, Op-Ed., *Laws That Could Save Journalism*, WASH. POST, May 16, 2009, at A15.

[27] DAN MARBURGER & DAVID MARBURGER, REVIVING THE ECONOMIC VIABILITY OF NEWSPAPERS AND OTHER ORIGINATORS OF DAILY NEWS CONTENT 1, 11–12 (2009), *available at* http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/MainAnalysis.pdf (citing *Newser* and *The Daily Beast* as examples).

[28] *Id.* at 11–12.

[29] *Id.* at 13, 25–32.

[30] Ian Shapira, *The Death of Journalism (Gawker Edition)*, WASH. POST, Aug. 2, 2009, at B1.

[31] *Id.*

[32] *Id.*

repurpose it and sell ads against it with no payment to or legal recourse for the company that paid me while I sat through two hours of a . . . seminar."[33]

Conversely, news aggregators point out that they increase viewership of news stories on the original posting sites.[34] (Shapira does admit that *Gawker* was the "second-biggest referrer" to his story on the *Post* website.)[35] Aggregators also praise their model for giving consumers news when and how they want it,[36] after newspapers failed to meet consumers' needs. The founder of *Newser*, an aggregator identified by traditional media as one of the worst "parasites" due to its practice of rewriting articles without linking to the original,[37] has said, "We aren't stealing from the [*New York*] *Times* and other big news brands, we're making their stuff better—or at least different. We're doing what journalism is supposed to do best: giving the customer what he wants."[38] Similarly, another writer has argued that news aggregators can actually help newspapers build their brand and reader loyalty by offering repeated links to the same source when that source offers strong content.[39]

While copying news content is a practice dating back to the advent of newspapers,[40] the difficulty of reproducing content in the days of the printing press meant the originating newspaper typically monopolized its content until the next day's edition, or up to twenty-four hours.[41] However, as technology has improved with the telegraph, telephones, and now the internet, copying can occur within seconds of the first dissemination of news.[42] And, upon copying,

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[33] *Id.*

[34] *See* Masnick, *supra* note 9 ("That's why you have newspapers that sue Google, even as it's bringing them more traffic.").

[35] Shapira, *supra* note 30, at B1.

[36] *See, e.g.*, Jeff Jarvis, *News' Forbidden City*, BUZZ MACHINE (Oct. 9, 2009, 7:26 AM), http://www.buzzmachine.com/2009/10/09/news-forbidden-city/ (arguing that spreading stories through links is the "new (free) distribution" that "provid[es] value to news").

[37] MARBURGER & MARBURGER, *supra* note 27, at 12 (calling *Newser* a "parasitic" rather than "pure" aggregator because, in rewriting stories provided by traditional media, it draws traffic from, rather than to, the originator's site).

[38] Michael Wolff, *I'm Proud to Kill the News*, NEWSER (Aug. 20, 2009, 6:47 AM), http://www.newser.com/off-the-grid/post/248/im-proud-to-kill-the-news.html.

[39] Erick Schonfeld, *The Media Bundle Is Dead, Long Live the News Aggregators*, TECHCRUNCH (Aug. 16, 2009), http://techcrunch.com/2009/08/16/the-media-bundle-is-dead-long-live-the-news-aggregators/.

[40] RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 259 (1912).

[41] Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate Over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 339–42 (2009).

[42] Much of the copying, like that done by search engines, can even be automated to be performed by "spiders" that "follow hyperlinks from page to page" and record information. Kevin Werbach, *The Centripetal*

aggregators are not necessarily sending traffic back to newspaper sites. A study conducted in January 2010 by Outsell, a research and advisory firm serving the publishing industry, showed that 44% of visitors to Google News only scanned headlines rather than clicked through to newspapers' individual sites.[43] The limited window of monopoly now afforded to content creators gives them less opportunity to benefit financially and reputationally.[44]

These dwindling benefits have made it harder for content creators to justify large newsroom staffs and comprehensive coverage.[45] While some in the "new media"[46] question the continued need for traditional news organizations,[47] they overlook the fact that their business model depends on those organizations' investment in newsgathering. A 2010 study of local news in Baltimore, Maryland, showed that traditional media produced 95% of stories containing new information, with print newspapers responsible for almost half.[48] The study further noted that new media were "mainly an alert system and a way to disseminate stories from other places."[49]

At a May 2009 U.S. Senate committee hearing, former *Baltimore Sun* reporter David Simon praised the on-the-ground reporting undertaken by traditional news organizations. Members of the new media are not seen "at city hall or in the courthouse hallways or at the bars where police officers gather," he said. "You don't see them consistently nurturing and

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Network: How the Internet Holds Itself Together, and the Forces Tearing It Apart, 42 U.C. DAVIS L. REV. 343, 379 (2008).

[43] 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/.

[44] For a discussion of how technology has altered the ability of content creators to profit from their works, see William R. Johnson, *The Economics of Ideas and the Ideas of Economists*, 73 S. ECON. J. 1, 2, 5 (2006) (noting that Shakespeare was able to earn "a very good living" despite the fact that his plays were not copyrighted in his lifetime).

[45] *See* Rick Edmonds, *Shrinking Newspapers Have Created $1.6 Billion News Deficit*, POYNTER ONLINE (Oct. 12, 2009, 6:39 AM), http://www.poynter.org/column.asp?id=123&aid=171536 (estimating that newspapers spend at least $1.6 billion less annually on news than they did three years ago).

[46] Generally, the term *new media* refers to online-only media including aggregators and bloggers.

[47] *See, e.g.*, Wolff, *supra* note 38.

[48] PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, HOW NEWS HAPPENS: A STUDY OF THE NEWS ECOSYSTEM OF ONE AMERICAN CITY 1–2 (2010), *available at* http://www.journalism.org/sites/journalism.org/files/Baltimore%20Study_Jan2010_0.pdf.

[49] *Id.* at 2.

then . . . pressing sources. You don't see them holding institutions accountable on a daily basis."[50]

Elected officials and at least one government agency have expressed their concern for the industry by holding a number of hearings on the future of newspapers. House and Senate subcommittees, as well as Congress's Joint Economic Committee, have discussed competition in the industry, the impact of the internet, the importance of strong news organizations, and how newspapers might evolve.[51] Speakers at the hearings suggested possible government involvement, such as allowing news organizations to claim nonprofit status,[52] or relaxing antitrust prohibitions on media companies.[53] The Federal Trade Commission issued a paper in 2010 discussing numerous policy changes that would aid newspapers, as well as the positive and negative aspects of each proposal.[54] The average taxpayer is probably unaware that the government already subsidizes newspapers in the form of reduced mailing rates, paid public notices, and tax breaks.[55] This support, however, has been

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[50] *The Future of Journalism: Hearing Before the S. Subcomm. on Commc'ns, Tech. & the Internet of the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 28, 29 (2009) (statement of David Simon, Former Reporter, *Baltimore Sun*), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:52162.wais.pdf.

[51] *E.g.*, *The Future of Newspapers: The Impact on the Economy and Democracy: Hearing Before the Joint Econ. Comm.*, 111th Cong. (2009), *available at* http://jex.senate.gov/public/ (search "Hearings"; then follow "Hearings - US Congress Joint Economic Committee" hyperlink; then follow "JEC HEARING: "The Future of Newspapers: The Impact on the Economy and Democracy" hyperlink); *The Future of Journalism: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:52162.wais.pdf; *A New Age for Newspapers: Diversity of Voices, Competition and the Internet: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-38_48745.PDF. In addition, the Federal Trade Commission has held three two-day workshops since December 2009 for panelists and attendees to discuss the future of journalism. *How Will Journalism Survive the Internet Age?*, FED. TRADE COMM'N, http://ftc.gov/opp/workshops/news/index.shtml (last visited Jan. 11, 2011).

[52] In March 2009, Senator Benjamin L. Cardin introduced the Newspaper Revitalization Act. Press Release, Senator Benjamin L. Cardin, Senator Cardin Introduces Bill That Would Allow American Newspapers to Operate as Non-Profits (Mar. 24, 2009), *available at* http://cardin.senate.gov/pdfs/newspaper.pdf. The bill would have exempted newspapers from taxes by allowing them to claim § 501(c)(3) status as a nonprofit corporation or association. *Id.* Accordingly, these newspapers would have been prevented from making political endorsements. *Id.* The bill never made it out of committee. *See* S. 673, 111th Cong. (2009).

[53] *See infra* note 61.

[54] FED. TRADE COMM'N STAFF, POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM (2010), *available at* http://ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf.

[55] GEOFFREY COWAN & DAVID WESTPHAL, PUBLIC POLICY AND FUNDING THE NEWS 1 (2010), *available at* http://communicationleadership.usc.edu/pubs/Funding%20the%20News.pdf.

decreasing at the same time the financial struggles of newspapers have been increasing.[56]

Further financial support from the government would likely be counterproductive for the industry, and suggestions for such highlight the need for alternative solutions. Particularly in the eyes of the public, allowing media companies to claim nonprofit status would alter the balance of power between independent news organizations and the government.[57] Outright support of newspapers could lead to the notion of government-backed newspapers and further undermine the credibility of news organizations.[58]

Media companies have not appeared to embrace the option of claiming nonprofit status, with Rupert Murdoch stating the idea "ought to be chilling for anyone who cares about freedom of speech."[59] The rhetoric from some executives indicates they would rather just directly pursue those who are finding new ways to profit from newspaper content. The problem is, their options are limited.

II. HOW COPYRIGHT LAW FALLS SHORT

In their drive to protect their news content, news producers have not found much of an ally in the law. Content creators in the United States and abroad have filed several cases to fight some of the practices complained about by news executives, but nearly all have settled out of court, offering little guidance to the industry.[60] News originators have likely not been willing to

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[56] *Id.* at 8.

[57] The Supreme Court has stated that "an independent press stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse." Times-Picayune Publ'n Co. v. United States, 345 U.S. 594, 602 (1953).

[58] *See* Jennifer Harper, *News Industry Needs a Bailout?: More Layoffs and Huge Losses*, WASH. TIMES, Dec. 9, 2008, at A3 (quoting a journalism ethicist who suggested that government support of newspapers "could raise questions about press independence and credibility").

[59] Murdoch, *supra* note 1.

[60] For example, in January 2009, The New York Times Co., Boston.com's owner, reached a settlement with GateHouse media just a day before trial in a dispute over Boston.com's practice of automatically capturing headlines and excerpts from GateHouse stories and linking to them from Boston.com's pages covering local communities. *See* Bruce W. Sanford et al., *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. LAW. 8, 8–9 (2009); Letter Agreement between R. David Hosp, Counsel, New York Times Co., and Michael J. Grygiel, Counsel, GateHouse Media (Jan. 25, 2009) [hereinafter Letter Agreement], *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-01-25-Letter%20Agreement.pdf (memorializing the central parameters of a reached agreement). Objecting to the word-for-word use of its content by Boston.com, GateHouse charged in its complaint that Boston.com's practice could

take their rhetoric against aggregators to court, because the law, as it stands, allows many of the aggregators' practices.

Section A explores copyright law to show how it fails to help content creators counter several practices of aggregators. Section B introduces proposals made by others to change the law and demonstrates how they are unwise. While commentators have suggested changing other bodies of law, namely antitrust[61] and tax,[62] to aid newspapers, such proposals are beyond the scope of this Comment as they do not directly deal with how content is used.

A. Provisions Affecting News Organizations

Most news executives are referring to the Copyright Act when they question the legality of aggregators' practices, but several aspects of copyright law make it inadequate to protect newspapers' content. Copyright law seeks both to incentivize creation and to enrich the public domain by strictly protecting some materials while leaving others free for all to use.[63] In light of those dual goals, the law does not prohibit all "free riding."[64] Instead, it reflects the utilitarian view of copyright law, which holds that just enough

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confuse readers about the source of the stories and that "deep linking" allowed readers to bypass the ads on its homepage. David Kaplan, *NYTCo and Gatehouse Settle Aggregation Lawsuit*, PAIDCONTENT.ORG (Jan. 26, 2009, 11:21 AM), http://paidcontent.org/article/419-nytco-and-gatehouse-settle-aggregation-lawsuit/. Under the settlement, Boston.com agreed to remove GateHouse content (headlines and lead paragraphs) currently on its pages and to honor technical barriers set up by GateHouse. *See* Letter Agreement, *supra*.

[61] Antitrust law limits the ability of newspapers to take collective action to protect or charge for their content. Companies that fix prices are subject to civil or criminal penalties under the Sherman Act for creating a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (2006). Violations of the Sherman Act also violate the Federal Trade Commission Act, which allows the Federal Trade Commission to take administrative action for "[u]nfair methods of competition in or affecting commerce." *Id.* § 45(a)(1). Some proposals have suggested exempting newspapers from antitrust rules so they could implement collective pricing, while others have focused on giving newspaper companies more leeway to merge or consolidate. *See* Randall Mikkelsen, *U.S. Law Chief Open to Antitrust Aid for Newspapers*, REUTERS, Mar. 18, 2009, *available at* http://www.reuters.com/article/idUSTRE52H81K20090318 (Speaker of the House Nancy Pelosi suggesting the Justice Department alter antitrust rules to allow mergers); Sanford & Brown, *supra* note 26, at A15 (proposing temporary antitrust exemptions).

[62] *See, e.g.*, C. Edwin Baker, Editorial, *A Not-So-Radical Idea for Preserving Journalism's Society-Building Role*, SEATTLE TIMES, Jan. 16, 2009, http://seattletimes.nwsource.com/html/opinion/2008638058_opinc18baker.html (proposing tax credits to news organizations for journalists' salaries).

[63] SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 21 (2001).

[64] *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037–40 (2005) ("The professed fear is that property owners won't invest sufficient resources in their property if others can free ride on that investment.").

copyright protection should exist to incentivize creation of new works.[65] Congress has thus imposed limits on the scope of protection for copyrightable works such as news articles.

While aggregators structure their services in a variety of ways, most either (1) rewrite newspaper content, with or without a link to the original, or (2) offer links to the original, with a headline and sometimes an excerpt or picture from the original. With regard to the first practice, newspapers may seek protection against wholesale copying of their articles, but not against copying of just the facts because copyright law does not allow one person to gain ownership over facts. With regard to the second practice, copyright law features the doctrine of "fair use," which allows limited word-for-word copying. The Copyright Act further limits newspapers' claims by preempting any state causes of action that provide copyright-like protections. Finally, the Digital Millennium Copyright Act, which added some internet-specific copyright protections, offers a possible claim for newspapers in only limited cases.

1. The Originality Requirement

The Copyright Act protects only "original works of authorship fixed in any tangible medium."[66] To be original, a work must (1) have been independently created by the author and (2) possess at least minimal creativity.[67] The first requirement, independent creation, is the biggest hurdle for newspapers seeking protection under copyright law.

Facts appearing in newspaper articles are not independently created by their author; they are discovered.[68] Therefore, the facts of a news report can never possess the requisite originality for protection.[69] Before the passage of the 1976 Copyright Act, some courts tried to protect discoverers by recognizing

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[65] Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009); *see also* Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 440 (2009) ("Property rights [in copyright] are therefore a utilitarian legal measure used to encourage the production of literary and artistic works for the greater good of society by maximizing social welfare and redistributing wealth through market institutions in the system.").

[66] 17 U.S.C. § 102 (2006).

[67] MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2009).

[68] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

[69] *Id.* at 347–48.

their hard work, or the "sweat of the[ir] brow."[70] However, Congress expressly disallowed the "sweat of the brow" justification of copyright in the 1976 Act by including language which states, "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . ."[71]

The Supreme Court's seminal case explaining this idea/expression dichotomy is *Feist Publications, Inc. v. Rural Telephone Service Co.*[72] In *Feist*, the Court considered whether the producer of a local telephone directory could prevent the producer of regional telephone directories from copying its data.[73] The Court held that the names and telephone numbers in the local directory were facts that lacked originality and were thus free for use by others.[74] The Court noted that the "primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"[75]

The refusal of copyright protection to a discoverer of facts strictly limits claims by news executives against aggregators who use facts gathered by others to rewrite news content. A reporter could spend months working a source to write a great investigative piece, only to risk that another person might gain wind of the facts and get the story out faster. The copyright law offers no protection for bare research.

Despite an inability to protect facts themselves, however, the owner of an article can gain copyright protection over its "expression" of the facts, which is the specific words the reporter chooses to present her discoveries.[76] As the next subsection discusses, this protection is not absolute.

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[70] *See, e.g.*, Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83, 88 (2d Cir. 1922) ("The man who goes through the streets of a town and puts down the names of each of the inhabitants . . . produces by his labor a meritorious composition, in which he may obtain a copyright . . . .").

[71] 17 U.S.C. § 102(b).

[72] 499 U.S. at 340.

[73] *Id.* at 344.

[74] *Id.* at 364.

[75] *Id.* at 349 (citing U.S. CONST. art. I, § 8, cl. 8).

[76] *See id.* at 348 ("[I]f 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.").

2. The Fair Use Defense

While some aggregators rewrite other news articles' facts, other aggregators employ links that copy a headline or word-for-word portions of a story, and sometimes include a thumbnail photograph from the article. Even though this user is taking more than just the facts, the use is not necessarily unlawful because the doctrine of fair use limits a copyright holder's protection of her expression.[77]

The fair use doctrine protects the taking of a limited amount of expression for purposes including "criticism, comment, news reporting, teaching . . . , scholarship, or research."[78] In considering such cases, courts weigh four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the use, and (4) the effect of the use on the copyrighted work's potential market.[79] The fact that the borrowed expression might be particularly newsworthy should not militate in favor of fair use if the user oversteps the doctrine's boundaries.[80]

While newspapers have initiated few lawsuits, at least one court deemed a blogger's use of a news article fair use in an order dismissing an action brought by the article's copyright owner.[81] In an October 2010 ruling, the U.S. District Court for Nevada held that the use of eight sentences of factual news content in a realtor's blog post was fair use as a matter of law.[82]

In the absence of more cases directly on point, a case upholding an internet search engine's automated copying of photographs offers insight into how courts might view the work of aggregators. In *Kelly v. Arriba Soft Corp.*, a

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[77] Fair use has been justified under economic terms, because "transaction costs can prevent low-value users from obtaining access to copyrighted works even though economic welfare would increase if they were permitted to do so." Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 650 (2007).

[78] 17 U.S.C. § 107 (2006).

[79] *Id.*

[80] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Iowa State Univ. Research Found., Inc. v. ABC, Inc., 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.").

[81] Righthaven LLC v. Realty One Group, No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19, 2010). The plaintiff, Righthaven, had obtained a transfer of the story's copyright from the *Las Vegas Review Journal*. *Id.* at *1. Righthaven's business model as a "copyright troll" is discussed *infra* at text accompanying notes 260–262.

[82] *Id.* at *2–3.

photographer sued the operator of a search engine that copied the plaintiff's photographs to serve as thumbnail images in search results.[83] Relying heavily on the first factor of the doctrine,[84] the Ninth Circuit held that the use was "fair" because the thumbnail search results served a different function than the original work and thus were transformative.[85] Other cases have similarly upheld the actions of search engines in allowing searchers to view part of a work with a link to the original site.[86] According to scholar Anthony Reese, when considering transformativeness, courts focus on whether the work serves a different purpose than the original rather than whether the user transformed the actual content.[87]

A court's finding that a work is transformative is often key to deciding that the use was "fair." In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that when a work is transformative under the first factor it often outweighs other considerations like commercialism.[88] Once the Court in *Campbell* deemed the defendant's work transformative, that finding influenced its analysis under the remaining factors, leading to its ultimate determination that the use was fair.[89]

In the case of aggregators, their use is likely transformative under the first factor because they collect and catalog news rather than report it themselves. This showing of a transformative nature would likely outweigh the commercial nature of aggregators' businesses under the Court's precedent in *Campbell*. The second factor, the nature of the copyrighted work, weighs in favor of aggregators because they are taking from factual works that receive minimal copyright protection.[90] The third factor, amount and substantiality of the use,

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[83] 336 F.3d 811, 815 (9th Cir. 2003).

[84] In considering the purpose and character of the use, courts look at whether the use is transformative and whether it is commercial. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994). A use is transformative when it alters the original work with "new expression, meaning, or message." *Id.* at 579.

[85] *Kelly*, 336 F.3d at 819, 822.

[86] *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that Google's use of thumbnail images in its search results was fair use).

[87] R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

[88] *Campbell*, 510 U.S. at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

[89] *See, e.g.*, *id.* at 591 (stating that, in the context of the fourth factor, when the use is transformative, "market substitution is at least less certain, and market harm may not be so readily inferred").

[90] *See* L.A. News Serv. v. KCAL-TV, 108 F.3d 1119, 1122 (9th Cir. 1997) (finding that, since the work was "informational and factual" news coverage, the second factor weighed in favor of the defendant).

could weigh in aggregators' favor because their use is only a small percentage of the overall work. However, the use of key parts of a story, regardless of their size in relation to the entire work, would weigh against an aggregator.[91] This is particularly relevant to the many aggregators who take the key parts of a story so readers do not have to visit the originating site. Finally, under the fourth factor, aggregators would argue that they do not harm the market for the original because many viewers will follow the link to the original work to get the full story. The more an aggregator uses of the original, though, the less users need to visit the original site and the better a news organization's case for harm to its market under the fourth factor. News organizations could point to studies like that conducted by Outsell[92] to show that more users stay on an aggregator's site than click through to the originator.

Ultimately, the key argument for news organizations looking to defeat a fair use defense is that aggregators' use of their work is not transformative because aggregators also function as news sources. Until suit is brought over the issue, though, the current state of the law favors the practices of aggregators.[93]

3. The Act's Preemption of State Claims

Further complicating the situation, the 1976 Copyright Act preempts state causes of action that could theoretically protect news content. The Act preempts state law when the work in question is within the Act's subject matter and the rights sought to be protected are "equivalent to any of the exclusive rights" protected by the Act.[94] The preemption clause does allow Congress to adopt a law that would offer protection similar to that of copyright law under a clause of the Constitution other than the Copyright Clause.[95] Congress added the preemption clause to the 1976 Act to maintain a consistent federal regime

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[91] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (finding the defendant took the "heart" of the work); *L.A. News Serv.*, 108 F.3d at 1122 (finding for the plaintiff on the third factor because, while the defendant took only a "small amount" of the plaintiff's videotape footage, it took the most valuable part).

[92] *See* Wauters, *supra* note 43 (showing that 44% of visitors to *Google News* only scanned headlines rather than clicked through to newspapers' individual sites).

[93] *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 819 (9th Cir. 2003).

[94] 17 U.S.C. § 301 (2006); *see also* Daboub v. Gibbons, 42 F.3d 285, 289 (5th Cir. 1995) (laying out the test for preemption). The main exclusive rights granted to a copyright holder are that of reproduction, adaptation, distribution, public performance, and public display. 17 U.S.C. § 106.

[95] H.R. REP. NO. 94-553, at 131 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746–47.

for copyrighted works that incentivizes creation while allowing some works to be open to all.[96]

In determining whether a state law provides an "equivalent" claim, courts consider whether the claim requires proof of an "extra element" beyond those required to show infringement under the Copyright Act.[97] One example of an extra element in a contract claim would be an infringer's promise not to copy a work.[98] Applying this test, courts have found preemption of state claims that newspaper organizations may have used to protect their content, including unfair competition,[99] unjust enrichment,[100] misappropriation,[101] unfair business practices,[102] and conversion.[103] At least one scholar, however, has noted inconsistency among courts in applying the extra element test and deciding preemption.[104] "Hot news" claims, a variant on misappropriation, have survived preemption claims in several cases, and the doctrine will be discussed in detail in Part III.

For the Act to preempt a state claim, the work at issue must also be within the subject matter of the Act. Work is considered to be within the subject matter of the Act even if the Act specifically *excludes* it from copyright

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[96] *See* Joseph P. Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 VAND. J. ENT. & TECH. L. 1, 14 (2007) ("The extension of rights under state law, beyond those provided for by the federal Copyright Act, would distort [the] federally crafted balancing of interests.").

[97] *See* Ritchie v. Williams, 395 F.3d 283, 287 n.3 (6th Cir. 2005) (noting that most circuits have referred to the extra element test).

[98] *See* NIMMER, *supra* note 67, at § 1.01[B][1][a][i] ("[C]onversely a promise on the part of one who engages in unlicensed reproduction is not a prerequisite to his being a copyright infringer.").

[99] *See, e.g.*, Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1213 (9th Cir. 1998) (holding that an unfair competition claim over drawings of characters purportedly used in the defendant's television show was preempted); Ehat v. Tanner, 780 F.2d 876, 878 (10th Cir. 1986) (holding that unfair competition and unjust enrichment claims over the theft of literary material were preempted).

[100] Orange Cnty. Choppers, Inc. v. Olaes Enters., Inc., 497 F. Supp. 2d 541, 555 (S.D.N.Y. 2007) (holding that a claim of unjust enrichment over use of graphic designs was preempted by the Copyright Act).

[101] Nash v. CBS, Inc., 704 F. Supp. 823, 835 (N.D. Ill. 1989), *aff'd*, 899 F.2d 1537 (holding that an author's misappropriation claim was preempted by the Copyright Act).

[102] Frontier Grp., Inc. v. Nw. Drafting & Design, Inc., 493 F. Supp. 2d 291, 301 (D. Conn. 2007) (holding that a Connecticut Unfair Trade Practices Act claim challenging the defendant's use of the plaintiff's architectural drawings was preempted by the Copyright Act).

[103] Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc., 264 F.3d 622, 636–37 (6th Cir. 2001) (holding a conversion cause of action was preempted because the song in question was a subject covered by the Copyright Act and the plaintiff was suing over acts including reproduction).

[104] Bauer, *supra* note 96, at 39 ("[J]udicial application of the test to the large number and variety of claims has given rise to a host of interesting, controversial, oftentimes troubling, and, not surprisingly, inconsistent decisions.").

protection.[105] Ideas, for instance, can be protected by state law before they are captured in tangible form because the Act only covers "fixed" works.[106] But once ideas are captured, particularly in a copyrightable work, courts often find preemption even though ideas are expressly not protected under the Copyright Act.[107] As one court noted, "[S]tates may not create copyright-like protections in materials that are not original enough for federal protection."[108] Thus, the Copyright Act denies protection to the facts of news articles as well as forecloses their protection under equivalent state laws.

4. The Impact of the Digital Millennium Copyright Act

The Digital Millennium Copyright Act, enacted on October 28, 1998, implemented two World Intellectual Property Organization treaties and addressed copyright issues related to technology and the internet.[109] While protection under the DMCA has been successfully argued in at least one suit by a news content creator,[110] the utility of the Act's protections for news organizations is mostly unclear and likely limited.

The provision with the most relevance to news organizations' problems forbids the removal or alteration of "copyright management information."[111] The Act defines "copyright management information" as including the title, copyright notice information, name of the author, name of the copyright owner, and terms and conditions of use.[112] The first court to decide the issue found that the DMCA's overall legislative history indicated that the law should

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105 *See* NIMMER, *supra* note 67, at § 19D.03[A][2][b] (stating that courts apply preemption to works under the subject matter of the Act but purposefully left unprotected).

106 *See* 17 U.S.C. § 102 (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship *fixed* in any tangible medium of expression . . . ." (emphasis added)).

107 *See* Entous v. Viacom Int'l, Inc., 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001) ("While 'ideas' do not enjoy copyright protection, courts have consistently held that they fall within the 'subject matter of copyright' for the purposes of preemption analysis." (citation omitted)); *accord* H.R. REP. NO. 94-553, *supra* note 95, at 131 ("As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify . . . .").

108 Toney v. L'Oreal USA, Inc., 406 F.3d 905, 911 (7th Cir. 2005).

109 Amy P. Bunk, Annotation, *Validity, Construction, and Application of Digital Millennium Copyright Act*, 179 A.L.R. FED. 319, 326–27 (2002).

110 AP v. All Headline News Corp., 608 F. Supp. 2d 454, 462 (S.D.N.Y. 2009) (denying the defendant-news service's motion to dismiss the AP's DMCA claim based on the defendant's practice of rewriting AP stories and distributing them in its own name)

111 17 U.S.C. § 1202(b)(1).

112 *Id.* § 1202(c).

only apply to technological measures that control access to a work.[113] The court held that the DMCA "should not be construed to cover copyright management performed by people, which is covered by the Copyright Act . . . ; it should be construed to protect copyright management performed by the technological measures of automated systems."[114] Other courts, however, have found that the DMCA provision applies to claims in which a person removed the name of an author or copyright owner from the work.[115] Under these precedents, news producers could potentially bring suit under the DMCA for uses of content in which the user removes any attribution to the original. However, since most bloggers and aggregators do include attribution to the original, this is not likely to offer much relief to news creators.

B. Proposals to Change Copyright Law

While modification of copyright law might better protect news content, this is not the best avenue for relief. Several proposals have responded to content gatherers' inability to protect their collections of facts through copyright law by criticizing *Feist*[116] or by suggesting new schemes to protect factual works other than news—like databases.[117] However, using copyright law to protect facts would conflict with the Act's bedrock principle that protection hinges on creation and originality rather than discovery. Such a change would also seriously short-circuit the newsgathering process. Many stories build on the work of others,[118] and requiring each reporter to discover the basic facts for

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[113] IQ Grp., Ltd. v. Wiesner Publ'g, LLC, 409 F. Supp. 2d 587, 597 (D.N.J. 2006) ("To come within § 1202, the information removed must function as a component of an automated copyright protection or management system."); *accord* Textile Secrets Int'l, Inc. v. Ya-Ya Brand, Inc., 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007) (holding the DMCA inapplicable where copyright information was removed from a tag on fabric because the provision "was [not] intended to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated in the DMCA as a whole").

[114] *IQ Grp.*, 409 F. Supp. 2d at 597.

[115] *E.g.*, *All Headline News Corp.*, 608 F. Supp. 2d at 462; McClatchey v. AP, No. 3:05-CV-145, 2007 WL 776103, at *5 (W.D. Pa. Mar. 9, 2007) (holding that, since the statute refers to "any" of the information included in the Act, it "must also protect non-digital information" like the copyright notice at issue).

[116] *See* Sanford et al., *supra* note 60, at 8 (calling the facts of *Feist* "comically out of step with the realities of publishing today").

[117] *See, e.g.*, Amol Pachnanda, *Scientific Databases Should Be Protected Under a* Sui Generis *Regime*, 51 BUFF. L. REV. 219, 222 (2003).

[118] *See* Richard A. Epstein, International News Service v. Associated Press*: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 95 n.24 (1992) (discussing reporters who use "tips" from other articles to start their own research).

himself would be inefficient and unnecessarily burden the sources of information.[119] Additionally, providing anyone with a lifetime-long-plus monopoly[120] on the facts they discover would severely limit the newsworthy information that makes it to the public.

A couple of proposals have suggested a drastic change to the fair use doctrine because of the difficulties posed by the four-factor approach.[121] To allow content creators to profit more from their research and work,[122] Ryan Holte suggested amending the Copyright Act to give reporters a copyright in their research for twenty-four hours.[123] Under this proposal, violators would be forced to reimburse the news owner for any use of its work that occurred within this initial time period.[124] Holte also suggested that other online news sources could link to the story as long as they did not use any of its content,[125] but otherwise use would be banned regardless of its type or whether it harmed the creator financially.

Such a strict prohibition would be unwise and unworkable. As noted earlier, most stories benefit from increased publicity because other news gatherers can uncover additional information that continues to build the story. If organizations cannot repeat the work of others for a full twenty-four hours, they will be less likely to work quickly to build on the original. This prohibition would hamper the work of traditional news organizations as much as online sources. Ultimately, the most difficult part of this proposal would be determining who first earns the right to a copyright in particular facts when a number of news gatherers discover a story around the same time.

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119 *See* Miller v. Universal City Studios, 650 F.2d 1365, 1371 (5th Cir. 1981) (refusing, under the Copyright Act, to protect research so as not to create "unnecessary duplication of effort").

120 The current length of copyright protection is the life of the author plus seventy years. 17 U.S.C. § 302 (2006).

121 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 (2008); Eric Clemons & Nehal Medhani, *We Need to Change Copyright Law to Save Newspapers*, BUSINESS INSIDER (Aug. 18, 2010), http://www.businessinsider.com/technology-changes-strategy-which-then-changes-the-risks-of-abuse-why-online-technology-may-require-major-revisions-in-the-law-2010-8 (Wharton School of Business professor and graduate arguing that the "[f]air use doctrine was never intended to protect nearly instantaneous re-posting or re-broadcast").

122 Holte, *supra* note 121, at 12–13 (noting that the twenty-four hour news cycle allows "second-comers" to reproduce a story or information within minutes and at minimal cost, leaving the originator with little advantage).

123 *Id.* at 22.

124 *Id.* at 36.

125 *Id.* at 33.

Because the DMCA does not modify the Copyright Act to better apply to the internet,[126] other proposals have suggested changes to copyright law that consider the linking and searching capabilities available online. One proposal suggested bringing "copyright laws into the age of the search engine" by prohibiting the copying of whole web pages by search engines.[127] Baker Hostetler partners Bruce Sanford and Bruce Brown argued that such a change would force operators of search engines to negotiate with copyright owners for licenses to content.[128] However, such a change would unwisely and dramatically limit the amount of copyrighted material available for web searchers because of sky-high transaction costs, hurting researchers and content creators who want the public to be able to view their work freely.

In another proposal, Judge Richard Posner drew the ire of hundreds of internet commentators and commenters when he suggested in a blog post that copyright law should be expanded to bar linking to or paraphrasing copyrighted material without the copyright owner's consent.[129] While a 1996 case decided under Scottish law questioned the practice of linking from one news site to another,[130] free linking has generally been accepted in the United States, usually as a positive practice of driving readership.[131] After Posner detailed the plight of newspapers, he determined that such a change "might be

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[126] The DMCA does not change the "rights, remedies, and defenses" of copyright law; rather, it "focuses on technological means of copyright infringement." Colin Folawn, *Neighborhood Watch: The Negation of Rights Caused by the Notice Requirement in Copyright Enforcement Under the Digital Millenium Copyright Act*, 26 SEATTLE U. L. REV. 979, 988 (2003).

[127] Sanford & Brown, *supra* note 26, at A15. As discussed *supra* in text accompanying notes 83–86, this practice was deemed fair use in cases, including *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

[128] Sanford & Brown, *supra* note 26, at A15; *see also* Bruce W. Sanford, Partner, Baker Hostetler, Statement Before the Federal Trade Commission: How Will Journalism Survive the Internet Age? 3–4 (Mar. 9, 2010) (arguing that Congress should adapt "the fair use doctrine to the digital age" by clarifying that "the routine copying and repeated commercialization of an entire website's content is not fair use").

[129] Richard Posner, *The Future of Newspapers*, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html.

[130] In *Shetland Times Ltd. v. Wills*, a newspaper filed a copyright infringement suit against a rival newspaper that linked to the plaintiff's stories. (1996) S.C. 316, 318 (Scot.). The court issued an injunction prohibiting the defendant from linking to the plaintiff's site, claiming the links allowed readers to bypass the plaintiff-newspaper's front page, which was heavier with advertising. *Id.* at 320.

[131] *See* Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1276 (2001) ("[M]ost Internet users see links as desirable on all sides and are puzzled by any legal scheme that would penalize or restrict use of such mutually beneficial indexes, roadmaps, and accolades. . . . Undoubtedly, most linkers and linkees perceive established links as beneficial to them, for reasons of commerce, prestige, and ease of Internet navigation.").

necessary to keep free riding on content financed by online newspapers from so impairing the incentive to create costly news-gathering operations."[132]

Posner's idea was roundly criticized, both in the comments on his post and in blog posts elsewhere on the internet, many of which linked to Posner's article.[133] Many noted that links actually direct readers to the original source of the content, in theory allowing the content creator to profit.[134] Requiring a user to ask permission each time he wants to link to copyrighted material would undermine the very nature of the internet, where links help users jump from page to page with ease. Most owners of copyrighted works would be hurt by such a requirement since it would only reduce links and create less exposure for their works.

Regardless of the problems copyright principles pose to news executives looking for greater protections, proposals to change the law in this area would cause more harm than good. The current scheme's rules balance the competing interests of creators and the public by prohibiting wholesale copying while allowing some work to be open to all. Any changes would unnecessarily enrich a subset of creators at the expense of the public.

III. THE PROMISE OF "HOT NEWS" MISAPPROPRIATION

The state cause of action of hot news misappropriation best aligns with the legal claims made by newspapers today and has been a focus of several proposals aimed at assisting news organizations. Section A explores the origins of the doctrine and its development, then analyzes *Barclays v. Theflyonthewall.com*, a 2010 case reaffirming the doctrine's availability to news organizations. Section B then argues that codifying the doctrine in a

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132 Posner, *supra* note 129.

133 *See, e.g.*, Julie Hilden, *Would a Law Requiring Consent to Link Violate the First Amendment?*, FINDLAW (July 20, 2009), http://writ.news.findlaw.com/hilden/20090720.html (questioning whether a ban on linking would violate the First Amendment); Jarvis, *supra* note 3 (calling Posner's idea "frighteningly dangerous thinking"); Dan Kennedy, *Should Linking Be Illegal?*, GUARDIAN (July 1, 2009, 2:00 PM), http://www.guardian.co.uk/commentisfree/cifamerica/2009/jul/01/richard-posner-copyright-linking-newspapers ("Posner comes across as willfully blind to the ways in which bloggers and aggregators actually drive traffic to news sites . . . .").

134 This argument offers little financial comfort to newspapers, however, since the price of online advertising is a fraction of that of print and likely cannot sustain large-scale news operations. *See* Michael Hirschorn, *End Times*, ATLANTIC, Jan.–Feb. 2009, at 44 ("Common estimates suggest that a Web-driven product could support only 20 percent of the current staff . . . .").

federal statute would be the best legal option for news organizations looking to better protect their content.

A. Defining Hot News Misappropriation

1. Development of the Doctrine

The tort of hot news misappropriation originated with the Supreme Court in *International News Service v. Associated Press*, a 1918 case between two competing news agencies that employed reporters to gather stories from around the world for their member newspapers.[135] During World War I, International News Service employees on the East Coast gained access to the AP's war coverage before publication.[136] INS employees then used the telegraph or telephone to transmit those stories to the West Coast, where they repackaged and sold them to newspapers that paid for INS's services.[137]

The Court acknowledged that "the news of current events may be regarded as common property,"[138] but expressed its concern for the profitability of those in business to disseminate the news[139]:

> That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.[140]

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135 *See* 248 U.S. 215, 229–30 (1918).

136 *Id.* at 231; MARY JANE MOSSMAN & WILLIAM F. FLANAGAN, PROPERTY LAW: CASES AND COMMENTARY 23 (2d ed. 2004). For an interesting discussion of the lesser-known facts of the case, see Douglas G. Baird, *The Story of* INS v. AP, *in* INTELLECTUAL PROPERTY STORIES 26 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006). At the time, the Associated Press had a monopoly on war news because INS had been banned from sending cables from the front lines. *Id.* "If INS could not use AP bulletins, it seemed it had no way to provide war news." *Id.* But INS declined to argue against the AP's monopoly in the case. *Id.* at 28.

137 *Int'l News Serv.*, 248 U.S. at 231; MOSSMAN & FLANAGAN, *supra* note 136, at 23.

138 *Int'l News Serv.*, 248 U.S. at 235.

139 *Id.*

140 *Id.*

While the Court found that the AP had a quasi-property right in its news, the case hinged on the issue of unfair competition.[141] The Court upheld an injunction by the district court that restrained INS from taking news from the AP until the AP and its member newspapers were able first to reap its "commercial value."[142]

The Court's rhetoric resembles that articulated by newspaper publishers today. The Court noted that the AP put forth "elaborate organization and a large expenditure of money, skill, and effort"[143] to report the news "and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown . . . ."[144] The defendant's actions could "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."[145]

In dissent, Justice Brandeis disputed the idea that news could be thought of as property.[146] "The general rule of law is," he said, "that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[147] Brandeis also argued that any protection of news agencies' business should come from the legislature, not the courts.[148] Legislators, he said, are better equipped to investigate the issues and prescribe a rule, as well as its limits.[149]

The doctrine lives on today in state law. Because *INS* was decided as a matter of federal common law, the decision is no longer recognized as binding after the Supreme Court's decision in *Erie R.R. v. Tompkins* in 1938.[150] Still, at least five states have explicitly recognized hot news misappropriation claims since *INS*.[151] In New York, where the doctrine is strongest,[152] the Second

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141 *Id.*
142 *Id.* at 245.
143 *Id.* at 238.
144 *Id.* at 239.
145 *Id.* at 241.
146 *Id.* at 250 (Brandeis, J., dissenting).
147 *Id.*
148 *Id.* at 266.
149 *Id.* at 267.
150 CBS, Inc. v. Capital Cities Broad. Corp., 377 F.2d 315, 318 (1st Cir. 1967).
151 *See* Bruce W. Sanford et al., *supra* note 60, at *9 (listing New York, California, Illinois, Missouri, and Pennsylvania).

Circuit created a five-part test for the claim in *NBA v. Motorola, Inc.*[153] In that case, the NBA objected to a service provided by Motorola and STATS that allowed users of a Motorola pager to receive scores and other information about an NBA game while it was still in progress.[154] The NBA had a similar product in development.[155] The court noted that the law created by New York courts was loosely based on *INS* and held that the claim survived preemption under the Copyright Act.[156] It found, however, that the NBA's claim did not fit into the narrow requirements of the law.[157] The court limited hot news claims to cases in which

> (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.[158]

The court held that the NBA had not demonstrated free riding on the NBA's pager service because the defendants were not using NBA resources to distribute their product.[159] Rather, the defendants employed people to collect each game's facts for transmission on the defendants' own network.[160] The court noted that the case may have been different if the defendants were

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[152] Edmund J. Sease, *Misappropriation Is Seventy-Five Years Old; Should We Bury It or Revive It?*, 70 N.D. L. REV. 781, 801 (1994) ("Unquestionably, New York is the state that has most heartily embraced the doctrine.").

[153] 105 F.3d 841, 841 (2d Cir. 1997).

[154] *Id.* at 843–44. STATS employed reporters to listen to or watch the games and report the statistics for transmission to the pagers. *Id.* at 844.

[155] *Id.* at 853.

[156] *Id.* at 845. The legislative history of the 1976 Copyright Act indicates its authors did not intend the legislation to preempt hot news claims, stating that "state law should have the flexibility to afford a remedy . . . against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news, whether in the traditional mold of [*INS*], or in the newer form of data updates from scientific, business, or financial data bases." H.R. REP. NO. 94-553, *supra* note 95, at 133. However, commentators have noted that this legislative history accompanied an earlier version of the bill that explicitly mentioned several claims that were not to be preempted. *See* Bauer, *supra* note 96, at 81 n.354 (noting that these examples of claims "were deleted in the final version").

[157] *NBA*, 105 F.3d at 845.

[158] *Id.*

[159] *Id.* at 854.

[160] *Id.*

copying the facts directly from an NBA pager system.[161] Further, the court held, the NBA had failed to show how Motorola's service would directly compete with live NBA games or television broadcasts, since statistics appearing on a pager would not be an adequate substitute for attending or watching a game.[162]

Since *NBA*, a number of federal courts have adopted the Second Circuit test and agreed that the Copyright Act does not preempt hot news claims.[163] But, also like the court in *NBA*, most courts have been hesitant to offer relief under the doctrine. For most claimants, the second and fifth factors have been the hardest to demonstrate. At least two courts evaluating hot news claims before the *NBA* decision denied the plaintiffs' claims for failing to show that the relevant material was that which was most valuable immediately after distribution.[164] In one of those cases, *Gannett Satellite Information Network, Inc. v. Rock Valley Community Press Inc.*, the Northern District of Illinois denied a local newspaper's claim against a competing free publication for lifting quotes because the articles had already appeared in the plaintiff's print edition.[165] Thus, the court held that the plaintiff already had "received the full value of its newsgathering efforts" by publishing the article in its newspaper.[166] Other courts have denied similar claims for failing to show that the existence or quality of the plaintiffs' work would be threatened.[167] While the district court in *Scranton Times v. Wilkes-Barre Publishing Co.* acknowledged that the plaintiff-newspaper claimed to suffer actual losses from the defendant's theft of its obituary content, the court still denied the claim because the plaintiff did

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161 *Id.*

162 *Id.*

163 *See, e.g.*, X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1106 (C.D. Cal. 2007); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 979 (E.D. Cal. 2000); Fred Wehrenberg Cir. of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999).

164 Fin. Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 209 (2d Cir. 1986) (suit over copying of bond data); Gannett Satellite Info. Network, Inc. v. Rock Valley Cmty. Press, Inc., No. 93 C 20244, 1994 WL 606171, at *5 (N.D. Ill. Oct. 24, 1994) (suit over use of quotes from news articles after plaintiff had published stories in its print edition).

165 *Gannett*, 1994 WL 606171, at *5.

166 *Id.*

167 Scranton Times v. Wilkes-Barre Publ'g Co., No. 3:08-CV-2135, 2009 WL 585502, at *4 (M.D. Pa. Mar. 6, 2009) (finding that the preemption provisions of the Copyright Act barred the plaintiff's hot news misappropriation claim because the plaintiff failed to show certain "extra elements"); *Fred Wehrenberg Cir. of Theatres*, 73 F. Supp. 2d at 1050 (holding that the defendant's use of the plaintiff's movie schedules would not reduce the plaintiff's incentive to create them because the schedules were not the plaintiff's core business).

not allege that the copying threatened the very existence of its service of collecting and distributing obituary content.[168]

Courts have more easily found a showing of the other three factors: that information was gathered at a cost, that the defendant is free riding on the plaintiff's efforts, and that the parties are in direct competition.[169] In 2009, a news provider successfully argued the hot news doctrine, but not against an aggregator. In *Associated Press v. All Headline News Corp.*, the Southern District of New York refused to dismiss several claims by the AP against All Headline News, a competing news service.[170] The AP sued over All Headline News's practice of finding AP's stories on the internet and copying or rewriting them to distribute in All Headline News's name.[171] In denying All Headline News's motion to dismiss on the AP's misappropriation claim, the court reiterated that a claim for misappropriation of hot news "remains viable under New York law" and has not been preempted by the Copyright Act.[172] About five months after the decision, the AP and All Headline News reached a settlement, ending the case.[173]

2. New Life for the Doctrine: Barclays Capital Inc. v. Theflyonthewall.com

The viability of the hot news doctrine for news organizations' claims was most recently confirmed by the Southern District of New York in *Barclays Capital Inc. v. Theflyonthewall.com*.[174] The case has prompted a flurry of amicus briefs to the Second Circuit from traditional news organizations, new media, and First Amendment activists as that court considers an appeal.[175] *Barclays* was brought by three financial services firms that employed analysts to write stock recommendations for investors.[176] The companies usually issued their recommendations each morning before the market opened and distributed them only to paying customers through a number of channels.[177]

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168 *Scranton Times*, 2009 WL 585502, at *4.

169 *See, e.g.*, *id.*; Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 979–80 (E.D. Cal. 2000).

170 608 F. Supp. 2d 454, 454 (S.D.N.Y. 2009).

171 *Id.* at 457.

172 *Id.* at 461.

173 David Kravets, *AP Defeats Online Aggregator That Rewrote Its News*, WIRED (July 13, 2010, 5:06 PM), http://www.wired.com/threatlevel/2009/07/hot-news-doctrine-defeats-aggregator-site/.

174 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

175 *See infra* text accompanying notes 197–205.

176 *Barclays*, 700 F. Supp. 2d at 313–16.

177 *Id.* at 316–17.

Theflyonthewall.com (Fly) aggregated financial news and rumors for its paying subscribers.[178] Fly did not employ its own analysts, but posted the recommendations of the financial services firms on its newsfeed, which was updated daily before the market opened.[179] At the time of the suit, Fly was no longer obtaining the firms' recommendations directly from inside sources.[180] One employee found information for the newsfeed by checking news sources, other financial websites, and chat rooms, and by contacting his sources in the business.[181]

The district court in *Barclays* applied the *NBA* test to the plaintiffs' hot news claims.[182] The court determined that the plaintiffs had generated information at some expense, and thus demonstrated the first element, because they "collectively employ[ed] hundreds of skilled analysts and expend[ed] hundreds of millions of dollars each year to produce their equity research reports."[183] The second element requires that the information be time-sensitive, and the court determined that the plaintiffs satisfied this element because the research in question was only valuable when it was fresh.[184] For the third element, the court held that Fly's use constituted free riding on the plaintiffs' efforts, because Fly employed none of its own analysts and thus could reprint the recommendations for a much lower cost.[185] The fact that Fly credited the recommendations to the originating firms did not weigh in its favor because the credit was only to encourage investors to rely on the recommendation, not to benefit the originating firms.[186] The court held that just because some of the firms' recommendations were available from other sources did not make them "free for the taking" and absolve Fly from liability.[187] Nor could Fly escape liability because its site consisted of more than the firms' recommendations and did not publish all of the recommendations issued.[188] Under the fourth factor, direct competition, the court determined that a primary business of both parties was issuing

178 *Id.* at 322, 325.
179 *Id.* at 323.
180 *Id.* at 326.
181 *Id.*
182 *Id.* at 335.
183 *Id.*
184 *Id.* at 336.
185 *Id.*
186 *Id.*
187 *Id.* at 337.
188 *Id.* at 338.

recommendations to investors and that both distributed the recommendations through similar channels.[189] The court also sided with the plaintiffs under the fifth factor, which considers whether the free riding reduces the plaintiff's incentive to produce a product or service such that it threatens its existence.[190] The court relied on testimony by the firms' senior research executives that Fly's activities, if allowed to continue, would reduce their incentive to issue the analysts' reports.[191] This testimony satisfied this element, even without quantifiable damage attributable to Fly or evidence of other factors impacting the firms' research budgets.[192]

The court, in issuing an injunction, considered the public interest in equity research as well as the free flow of information.[193] The court reasoned that the length of an injunction must be the minimum amount of time that would preserve the plaintiffs' incentive to employ analysts who create reports and recommendations.[194] It set that time as a half-hour after the opening of the market or 10:00 a.m., whichever was later, for recommendations issued in the morning, and two hours for recommendations issued during the trading period.[195] The court further held that the plaintiffs had a duty to stop other companies from engaging in the same activities as Fly, or Fly could ask the court to revisit the ruling in a year so that it was not disadvantaged in relation to its competitors.[196] The Second Circuit granted Fly's motion to stay the injunction on May 19, 2010. On August 6, 2010, the Court heard oral argument on the case but has yet to issue an opinion as of this printing.

While the case is on appeal, interested parties have weighed in on the ruling and the hot news doctrine in general. A group of top media companies, including the AP, the New York Times Co., and Time Inc., argued for the continued recognition of the hot news doctrine in an amicus brief submitted in June 2010 to the Second Circuit.[197] They made no statement on whether the

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189 *Id.* at 339.
190 *Id.* at 341.
191 *Id.* at 341–42.
192 *Id.* at 343.
193 *Id.* at 343–45.
194 *Id.* at 346.
195 *Id.* at 347.
196 *Id.* at 347–48.
197 Brief for Advance Publications, Inc. et al. as Amici Curiae Supporting Neither Party, Barclays Capital Inc. v. Theflyonthewall.com, Inc., No. 10-1372 (2d Cir. June 21, 2010), *available at* http://www.scribd.com/doc/33455984/APA-Amicus-Brief-Barclays-2nd-Circuit.

district court rightly decided the case except for criticizing the "duty to police" included in the injunction.[198] The brief characterized the reasoning of *INS* as "rest[ing] on the public interest" by preventing free riders with minimal infrastructure investments from killing news originators' incentive to report the news and ultimately reducing the number of news sources.[199] The organizations pointed out that the *INS* doctrine is only applicable when a free rider "engages in systematic, continuous and competitive republication of the plaintiff's news content," and not in all situations where news content is used, such as for a lead to new reporting or for commentary on the original.[200]

In contrast, another amicus brief filed in the case urged the court to consider the First Amendment issues raised when "a party seeks to restrain the publication of lawfully obtained newsworthy information."[201] The Citizen Media Law Project and other organizations urged the court to apply heightened scrutiny to hot news claims so the doctrine does not stifle public discourse on the internet.[202] The brief noted that other forms of intellectual property protection, including copyright and trademark law, incorporate some kinds of First Amendment "safety valve[s]."[203] Fair use is one example.[204] Ultimately, the brief argued that the risk of litigation under the current hot news doctrine "threatens to chill [the] real-time spread of newsworthy information" across the internet.[205]

Until the Second Circuit weighs in, news organizations can find helpful arguments in the existing precedent, particularly the *Barclays* decision. Some of the five factors articulated by the *NBA* test[206] are easier to prove than others. The first factor, that the plaintiff generates information at some expense, is easily shown by news organizations that employ reporters and editors, and

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198 *Id.* at 3. The brief stated that, for the first time in "'hot-news' jurisprudence," the district court "imposed an equitable duty on plaintiffs to enforce its legal rights not only against a particular infringer, but *all* infringers." *Id.* at 28–29.

199 *Id.* at 2.

200 *Id.* at 11–12.

201 Brief for Citizen Media Law Project et al. as Amici Curiae Supporting Neither Party at 3, Barclays Capital Inc. v. Theflyonthewall.com, Inc., No. 10-1372, (2d Cir. June 21, 2010), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/Fly%20Amicus%20Brief.pdf.

202 *Id.* at 3–4. The brief references a number of First Amendment cases to support its view that no hot news case has yet addressed how the doctrine interacts with the First Amendment. *Id.* at 5–10.

203 *Id.* at 11–17.

204 *Id.*

205 *Id.* at 23.

206 *See supra* text accompanying note 158.

expend financial resources to collect the news. In proving the second factor, that the information is time-sensitive, news organizations would likely have to focus their complaints on the types of articles readers consider "breaking news." Most long-form narrative stories aimed at exploring an issue or personality are unlikely to qualify as time-sensitive since their impact depends on factors other than time. The third factor, that the defendant's use constitutes free riding, is easy to demonstrate in most cases. The *Barclays* court defined free riding as when "a defendant invests little in order to profit from information generated or collected by the plaintiff at great cost."[207] Unlike the defendants in *NBA*, news aggregators lift their content directly from their competitors without engaging in independent fact-finding. Thus, these aggregators' costs are minimal, as their competitors incur the expenses associated with the fact-finding process. The fourth factor considers whether there is direct competition between the plaintiff and defendant. A court may, as did the court in *NBA*,[208] distinguish between a news organization's main products: their print editions and online editions. News organizations would argue that aggregators are in competition with both services, because reading online news has often become a substitute for buying a daily print newspaper. Furthermore, an online aggregator could copy from either source at its moment of release, although it could not copy the print material with the same ease as it could the online material. Regardless, the fourth factor should be satisfied easily, at least for online news, because consumers often turn to an aggregator or a newspaper website, not both. Under the fifth factor, a news organization must show how the free riding reduces its incentive to produce the news. For the *Barclays* court, it was sufficient for the plaintiffs' employees to testify to that fact.[209] News organizations may also be able to present financial information showing a loss of advertising revenue along with their loss of readers. Thus, based on the decision in *Barclays*, news organizations may be able to state a claim against certain unfair uses of their content, especially in New York. But because the doctrine has been little used until recently, uncertainty remains.

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[207] Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 336 (S.D.N.Y. 2010).

[208] The *NBA* court believed that the plaintiff's claim "confus[ed] three different informational products": factual information created during game play, live broadcasts of the games, and facts about the games. NBA v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997).

[209] *Barclays*, 700 F. Supp. 2d at 342.

B. A Promising but Limited Solution: Adoption of a Federal "Hot News" Statute

While the state common law doctrine of hot news may allow news organizations to press certain claims in court, a federal statute could better account for and balance the interests of content creators, content aggregators, and consumers. The conflict between news providers and news aggregators, as framed by news organizations, is that aggregators reap where they do not sow.[210] However, it is also apparent that many in the online media are taking a public good—news—and broadening its reach as well as adding context, commentary, and content. Any legal initiatives should recognize these realities, because consumers benefit not only when traditional news organizations can afford to report and cover the news, but also when new media can enrich that news. The internet has offered great promise for news organizations once limited by the reach of their physical circulation areas.

At the same time, a change in the law would give news organizations better legal recourse in response to unfair uses of their content and possibly bolster their ability to continue investing in newsgathering. This Comment proposes as the best legal solution the adoption of a federal statute resembling the hot news misappropriation doctrine recognized most clearly in *NBA v. Motorola, Inc*. This section explores the benefits of a statute, proposes its key elements, addresses how to balance the interests of content creators with those of aggregators and consumers, and discusses the pitfalls of adopting a hot news statute.

1. Key Considerations for This Proposal

Before the *Barclays* decision, several commentators had argued for a broader revival of the hot news doctrine, either through the adoption of a federal statute[211] or common law development.[212] Adopting a statute rather

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[210] In *International News Service v. Associated Press*, the Court said INS was "endeavoring to reap where it has not sown." 248 U.S. 215, 239 (1918).

[211] *See* Jason R. Boyarski, Note, *The Heist of* Feist*: Protection for Collections of Information and the Possible Federalization of "Hot News*,*"* 21 CARDOZO L. REV. 871, 895–97 (1999); Sanford et al., *supra* note 60, at 10 ("It is no secret that Congress has been openly looking for ways to save journalism, and codifying the hot news doctrine may provide one answer.").

[212] MARBURGER & MARBURGER, *supra* note 27, at 37. The Marburgers propose that Congress amend the Copyright Act to clearly allow *INS*-type state claims under an unjust enrichment theory. *Id.* The authors stated that they "do not endorse the 'misappropriation' of 'quasi-property' that *INS* describes." *Id.*

than permitting the issue to develop at common law better deals with the issues between news organizations and aggregators, because, as Justice Brandeis stated in his famous dissent in *INS*, "[c]ourts are ill-equipped" to determine the outlines and limits of a right.[213] The *Restatement (Third) of Unfair Competition*, which rejects a common law misappropriation cause of action like that recognized in *INS*,[214] notes however that "the implementation of enduring and appropriately circumscribed protection is generally best achieved through legislation rather than common law adjudication."[215] A statute would provide creators and users of news content more guidance regarding their rights and obligations with respect to one another without requiring a case to arise in order to define those rights.[216]

Furthermore, a federal statute is preferable to the variety of existing state laws. News organizations often operate with a nationwide, if not worldwide, focus, and their claims are better suited for federal courts.[217] The current variety of state laws also creates uncertainty for content creators desiring a clear statement of their rights. While a number of district courts have embraced the Second Circuit's five-part test from *NBA*, courts are under no obligation to do so without a mandate from their circuit. Leaving the doctrine to state law further creates the possibility that a court will find the cause of action preempted under federal copyright law. Congress, unlike states, is not constrained by the preemption provisions of the Copyright Act and could adopt a federal statute under the authority of the Commerce Clause.[218]

2. A Proposed Statute

The *NBA v. Motorola, Inc.* decision[219] offers a helpful framework for federal legislation on hot news. The five-factor test[220] creates a narrow claim in an attempt to limit the doctrine to specific cases. Its factors are so narrow,

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213 *Int'l News Serv.*, 248 U.S. at 267 (Brandeis, J., dissenting).

214 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995) ("The better approach, and the one most likely to achieve an appropriate balance between the competing interests, does not recognize a residual common law tort of misappropriation.").

215 *Id.* at § 38 cmt. c.

216 *See* Sanford et al., *supra* note 60, at 10 (noting that media companies would have to bring fact-rich cases for further common law development).

217 Boyarski, *supra* note 211, at 896.

218 For more on this issue, see *infra* discussion accompanying notes 243–245.

219 105 F.3d 841, 845 (2d Cir. 1997).

220 *See supra* text accompanying note 151.

though, that they can be difficult to show, especially if a court strictly interprets the fifth factor, which asks whether "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."[221] Requiring a court to determine when the harm reaches the point of substantially threatening the service itself leaves too much discretion in the hands of the fact-finder. Furthermore, the law should carry a lower harm threshold "because competition should not have to be lethal to be unfair."[222] The plaintiff should only have to show harm to its ability to profit and a benefit to the defendant from use of the content. Defining the last element in terms of this type of loss and gain would make the requisite harm easier to quantify and create more certainty for both parties.

David Tomlin has argued that the *NBA* court wrongly interpreted *INS* in making the fifth factor an essential element of the claim.[223] The *INS* court, he argues, was only making a statement of the magnitude of the threat at issue in "rebuttal to the defendant's assertion that publication of a news report puts its facts immediately in the public domain."[224] Instead, Tomlin argued that any hot news statute should consist of a three-factor test: "(1) that the plaintiff have an investment in creation of its reports, (2) that the misappropriated data be highly time-sensitive, and (3) that the defendant have appropriated and used the data to obtain an advantage in competition with the plaintiff."[225] Tomlin noted that while the threat of the defendant's use to the plaintiff could be grounds for strengthening the claim, it should not be a prerequisite.[226]

Lawmakers looking to codify hot news misappropriation to provide a cause of action for news organizations must ensure that any statute focuses on rectifying issues of unfair competition, rather than punishing mere copying. This Comment argues that the key elements of a federal statute should be: (1) the plaintiff generates information at some cost or risk, (2) the information is most economically valuable within six hours of publication, (3) the defendant has not financed or contributed to the plaintiff's gathering of information but

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221 *NBA*, 105 F.3d at 845 (emphasis added).

222 David H. Tomlin, *Sui Generis Database Protection: Cold Comfort for "Hot News,"* COMM. LAW., Spring 2001, at 19 (criticizing the *NBA* court's inclusion of the fifth factor in its "hot news" test).

223 *Id.* at 18–19.

224 *Id.* at 18.

225 *Id.* at 19.

226 *Id.*

profits from use of the information when it is most economically valuable, and (4) the defendant's use harms the plaintiff's ability to profit financially or reputationally from its information gathering.

This proposal differs from the five-factor test articulated in *NBA* in that it does not require that the parties be in direct competition. The law should not require this because the internet has fundamentally changed the nature of competition. Before the internet, a newspaper typically only competed with news providers in its city or state. But today, for example, if a newspaper in Detroit were to break a story of national importance, the article might be copied by aggregators that usually carry the news of national news providers (e.g., the *New York Times*). So while the aggregator and local newspaper are not traditional competitors, their websites now compete for viewers of a particular story. Due to the uncertainty over which entities are competitors, the law should not add this additional hurdle for news organizations. The requirement that a news organization show harm to itself and a benefit to the user will account for the fact that two sites that do not typically compete are now seeking to attract the same readers.

While harm would likely be de minimus in the case of a one-time use, upon a pattern of use, a plaintiff could show that the defendant is appropriating the plaintiff's work for itself and enacting calculable harm. Alternatively, if the defendant's use results in an increase of visitors (and advertising revenue) for the originating site due to increased publicity for the story, the elements of the claim would not be met.

Importantly, the law would only cover truly "hot" news, which this Comment defines as that which is most valuable in the first six hours of publication. The six-hour period suggested by this Comment serves more as a starting point for discussion rather than an absolute, ideal timeframe. Specifically defining hot news with a particular timeframe provides more certainty than mandating a general requirement of timeliness, because content creators would be able to use page views to satisfy their evidentiary burden of showing that the story was only valuable for a short period of time. An ideal timeframe would extend protection to articles that are read because of their shocking nature (e.g., a political scandal uncovered), their timeliness (e.g., an explanatory piece on a much-talked-about issue), or their sheer news value (e.g., a natural disaster). The value of other kinds of articles (e.g., a long-form historical piece) does not depend on when they are read, and they will remain

valuable for days, weeks, or months. As the common law doctrine on which a statute would be based was designed to target and protect only information with fleeting value, use of articles that are not most valuable in the six hours after release would not be governed by the statute.

The six-hour timeframe would also limit the availability of the doctrine to enjoin copying. Regardless of whether an article was subject to the statute in the first place, the doctrine would impose no limitations on copying once an article had been released to the market for six hours. In a twenty-four-hour news cycle, six hours should be sufficient time for a content generator to profit from a story without creating a disincentive for second-comers to follow and build on the story themselves. As the *Barclays* court reasoned, the duration of protection of the content originator's information should be the minimum amount of time needed to preserve the originator's incentive to create the reports.[227] The court in that case prohibited the use of the plaintiff's investment reports for two hours after their release during the trading day, but news reports carry a longer lifespan than investment recommendations.

To maximize the free flow of information, the statute should limit recovery to damages, disallowing injunctions. Ideally, this would allow users to value their desire to use certain information as compared to the potential risks associated with such use. If content creators could not prospectively bar a particular user from their work, they would have to decide whether the use in question was worth the cost of pursuing legal action. This should help limit use of the statute to only egregious or repeated cases.

3. Addressing the Realities of the Online World

The *INS* decision has been described as reflecting the customs of news organizations of the time.[228] As the Court recognized in *INS*, one such custom of newspaper publishers was to use the work of others as tips for further investigation rather than material to copy verbatim.[229] Today, new legislation should likewise reflect the current customary practices exercised by news organizations trying to provide their services in good faith.

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[227] Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

[228] Epstein, *supra* note 118, at 106 ("In one sense, the easiest way to defend the result in *INS* is to recognize the force of custom in the creation of the property rights.").

[229] *Id.* at 117.

On the internet, one custom that should be accepted and encouraged by the law is simple linking between sites using an original story's headline. As one commentator has noted, a link is merely a "reference to a file" rather than a copy of the file itself.[230] A link can convey key facts to a reader without revealing details that the producer of the story invested time and effort to uncover. No one should be able to monopolize the bare facts of a story—five die, ten injured in Chicago building fire, for example—or it would be difficult for consumers just to learn of the existence of the news. While some readers will be satisfied simply knowing that an event occurred, most will want more information and follow the link to the story's creator. As this Comment discusses later,[231] it is up to content creators to learn how to monetize those clicks effectively. Prohibiting a link to news content would severely hamper consumers' ability to get news on the internet.

The ultimate goal of codifying hot news law is to encourage bargaining over parties' rights through licenses. Since most aggregators regularly use content from the same set of news sources, implementing licensing agreements would not necessarily add burdensome transaction costs to each use. Ideally, aggregators could set up a revenue-sharing plan with news producers in return for use of the content.[232] The law as proposed above would not unquestionably provide news content creators with full rights to their works. Rather, its application would be highly dependent on the specific facts of each case, creating what Dan Burk has called a "muddy rule."[233] With rules in which "ownership of the right is unclear," parties are encouraged to bargain, since "neither is certain of the extent of his claim" and would rather work out a deal than bet it all on a lawsuit.[234] As the law stands now, news aggregators have little incentive to offer news organizations payment for the use of content.

4. Problems with a "Hot News" Statute

Adopting a federal hot news statute would not come without problems, ranging from inconvenience to consumers to conflict with other bodies of law.

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230 Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 124 (1999).

231 *See infra* Part IV.

232 One model of revenue sharing is YouTube's partner program, through which YouTube sells ads against user content and splits the revenue with the content creator. Brian Stelter, *Those Funny YouTube Videos Are Pulling in Serious Money*, N.Y. TIMES, Dec. 11, 2008, at A1.

233 Burk, *supra* note 230, at 139.

234 *Id.*

The primary problem of such a law is also its virtue: While it must be narrow so as to avoid overrunning other doctrines governing content or choking freedom of expression, its narrowness limits its usefulness. It would foreclose uses like that in *All Headline News*[235] but not necessarily limit popular aggregators that simply provide bare links or news that is not primarily time-dependent. Due to these limits, a federal hot news statute ultimately would be insufficient to turn the tide for news organizations.

A hot news statute could also reduce news options for consumers. Fewer websites would be "one stop shops" for all the news of the day if they were limited, for a time, to using the content of only not-"hot" stories. Aggregators who wanted to provide more would have to license that content, creating transaction costs that could drive some lesser-known aggregators out of business.

Another challenge would be the law's effect on bloggers who often copy parts of stories to offer their comments or criticism. A hot news statute would impact bloggers' work because bloggers rely heavily on newspapers for source material. One study of current events blogs showed that blog operators linked to "mainstream news sources" more than any other category of sources.[236] Bloggers tend to offer perspectives and opinions on the news and to combine sources in a way that is more valuable to our democratic discourse than the straight copying performed by aggregators.[237] A hot news statute could curtail their ability to comment on the freshest news if their use of the story harmed the originator in some way.

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[235] *See supra* text accompanying notes 170–173.

[236] Linda Jean Kenix, *Blogs as Alternative*, 14 J. COMPUTER-MEDIATED COMM. 790, 800 (2009) (noting a study of current events blogs showing 620 links to "mainstream news sources" in contrast to 29 links to "alternative news sources" and 18 to "alternative news blogs"); *see also* Tanni Haas, *From "Public Journalism" to the "Public's Journalism"? Rhetoric and Reality in the Discourse on Weblogs*, 6 JOURNALISM STUD. 387, 390 (2005) (noting that, on blogs focusing on coverage of the U.S. war, "[o]nly about 5 percent of links were to alternative news providers").

[237] Jack M. Balkin argues that features of the internet illustrate "that the free speech principle is about, and always has been about, the promotion and development of a democratic culture." Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 34 (2004). He further stated that the rapid "growth of the Internet . . . shows how enormously creative ordinary people can be if given the chance to express themselves" and "allowed to be active producers rather than passive recipients of their cultural world." *Id.* at 33. "Digital media allow lots of people to comment, absorb, appropriate, and innovate—to add a wrinkle here, a criticism there. Internet speech continually develops through linkage, collage, annotation, mixture, and . . . like all speech, appropriates and transforms." *Id.*

Also problematic, the adoption of a hot news statute would likely stifle some speech on the internet by creating the threat of litigation for content users. Because of that threat, some have suggested that such a statute would conflict with other laws or the Constitution. Scholar Eugene Volokh has argued that codifying hot news misappropriation would conflict with the First Amendment right of free speech.[238] One could counter, though, that the specific characteristics of this statute—its allowances for some dissemination, the limited time period of protection, and its required showings of harm and profit—result in only a minor limitation on speech that is outweighed by the interest in maintaining incentives for content gatherers.

The statute would also clash with copyright's fair use defense in the six hours after hot news is first disseminated. But again, the public interest in protecting the investment of content creators outside of the scheme of copyright law may take precedence. The Supreme Court has also recognized applicable limits to the fair use doctrine in its decision in *Harper & Row, Publishers Inc. v. Nation Enterprises*.[239] In that case, the *Nation* magazine published an unauthorized copy of President Ford's memoirs in advance of a scheduled release of the work.[240] Rejecting the defendant's claim of fair use, the Court made special note of an author's right to determine "whether and in what form to release his work."[241] Likewise, this doctrine of hot news would allow an author to control the distribution of his work for a short time immediately after first publication. *Harper* also recognized the principle that the fair use defense is not stronger in the context of newsworthy content, limiting the ability of aggregators to argue they should receive protection above and beyond that afforded to other users of copyrighted works.[242]

Enactment of a hot news statute would also trigger the question of whether Congress could adopt a law under the Commerce Clause that would potentially conflict with the Copyright Clause. Several scholars have debated this issue in

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238 Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1070–71 (2000) (arguing that if the Court were to consider the hot news doctrine, "it should conclude that such a right to stop others from communicating hot news is . . . an unconstitutional content-based restriction on fully protected speech").

239 471 U.S. 539, 557 (1985).

240 *Id.* at 543.

241 *Id.* at 553.

242 *Id.* at 557 ("The fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication.").

their discussion over extra protection for databases (also factual works).[243] But a law with unfair competition at its basis rather than mere copying, one scholar has argued, can better coexist with the Copyright Clause.[244] Because the hot news law would require a showing of harm to the plaintiff, it focuses on the effect of the copying rather than the mere fact that copying occurred. Congress has also enacted laws protecting trademarks under the authority of the Commerce Clause, and those have remained unchallenged since 1905 "despite the fact that trademarks may be seen as a form of intellectual property; that trademark law protects material that does not meet standards for copyright and patent protection; and that the protection may last indefinitely."[245]

Besides the concerns outlined above, it is unclear whether members of Congress would be able to translate the concern they have expressed for the industry into action. The Court's initial establishment of the doctrine of hot news has been maligned over the years,[246] and growing numbers of news aggregators and bloggers today would oppose a broader revival.[247] Weakened news organizations would likely struggle to muster the political capital to bring about legislative change. Regardless of the potential concerns, however, codifying hot news in a federal statute is the best legal solution to protecting newspapers' investment in their content.

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243 *See, e.g.*, Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 538–39 ("Congress cannot use a power other than the Intellectual Property Clause . . . to enact exclusive rights inconsistent with the substantive constraints imposed by that clause."); Malla Pollack, *The Right to Know? Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 61 ("[A] database protection act grounded on the Commerce Clause can pass constitutional scrutiny only if the act is carefully limited to situations of market failure.").

244 Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159, 209 (2002).

245 *Database and Collections of Information Misappropriation Act of 2003: Hearing Before the Subcomm. on Courts, the Internet & Intell. Prop. of the H. Comm. on the Judiciary, and the Subcomm. on Commerce, Trade & Consumer Prot. of the H. Comm. on Energy & Commerce*, 108th Cong. (2003) (statement of David O. Carson, General Counsel, United States Copyright Office), *available at* http://www.copyright.gov/docs/regstat092303.html (expressing his opinion on database legislation pending before Congress that incorporated hot news elements).

246 *See, e.g.*, Baird, *supra* note 136, at 32 (calling the opinion's reasoning "ungrounded" and arguing that it "merely gave an abstract pronouncement of a grand principle that has no obvious boundaries").

247 A number of bloggers have criticized proposals circulated on the doctrine. *See, e.g.*, William McGeveran, *Invasion of the Copyright Parasites*, INFO/LAW (Aug. 31, 2009), http://blogs.law.harvard.edu/infolaw/2009/08/31/invasion-of-the-copyright-parasites/ (claiming that the Marburgers' proposal would "devastate fair use and shut down all the vibrant discussion in the blogosphere").

IV. EMBRACING THE PROMISE OF THE MARKET

While a change to the law would help newspapers counter egregious uses of their content, any legal initiatives should be coupled with a head-on challenge by content creators to today's prevailing view that news should be free. At the same time, news organizations must learn to adapt better to consumer demands.[248] The proliferation and success of aggregating sites illustrate traditional organizations' shortcomings, and these sites can be a model for how to package and present the news. Now that print newspapers have lost their monopoly on delivering the news, they must find creative solutions to attract readers. In comments submitted to the Federal Trade Commission, Google characterized the challenges faced by newspapers as "business problems, not legal problems" requiring "innovation and experimentation."[249] Ultimately, newspapers face a cash-flow problem. News organizations should target aggregators for payments through licensing. Alternatively, they could look to consumers directly for payment.

Both strategies are gaining momentum. News executives have begun taking a more aggressive approach against aggregators and have successfully negotiated some payments. The AP has declared that it will work to license its content to others and take legal action against sites that use it without permission.[250] At the group's annual meeting in 2009, its chairman, William Dean Singleton, declared, "We can no longer stand by and watch others walk off with our work under misguided legal theories."[251] In 2010, the AP

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[248] *See* Bill Grueskin, *Can WSJ Pay Model Work at Other Sites?*, REFLECTIONS OF A NEWSOSAUR (Mar. 23, 2009), http://newsosaur.blogspot.com/2009/03/can-wsj-pay-model-work-at-other-sites.html (quoting the former managing editor of the *Wall Street Journal* online telling other news organizations that "[c]harging readers for content might work, but it needs to be a consistent approach, with targeted content that enriches the lives of readers").

[249] GOOGLE INC., COMMENTS ON FEDERAL TRADE COMMISSION'S NEWS MEDIA WORKSHOP AND STAFF DISCUSSION DRAFT ON "POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM" 2, 4 (2010), *available at* http://www.scribd.com/doc/34593118/Comments-to-FTC-20-July-2010.

[250] Richard Pérez-Peña, *A.P. Seeks to Rein in Sites Using Its Content*, N.Y. TIMES, Apr. 7, 2009, at B1; *see also* Megan Taylor, *How AP's News Registry Will (and Won't) Work*, POYNTERONLINE (Aug. 7, 2009, 7:36 AM), http://www.poynter.org/column.asp?id=31&aid=167852 (describing the technology behind the AP's plans).

[251] Pérez-Peña, *supra* note 250.

successfully negotiated licensing agreements for its content with Google News and Yahoo.[252]

The AP has also been working with Attributor.com, which has developed a system to track how content is used on other sites.[253] Attributor provides its clients with a "dashboard" through which the client can see where and how its content is being used online.[254] Upon receiving that information, the client-publisher can decide whether to demand that the user take down its content, or to allow that publication to continue its use if the user agrees to share a portion of the advertising revenue that the content generates.[255] If the aggregator agrees to neither option, content providers could take further action depending on the extent of the use.[256] Blogger Steve Outing called the system "brilliant" for allowing both a broader distribution of content and greater profit for content creators.[257]

Other technological measures could likewise help news organizations regulate use of their content. News International, a British newspaper publisher owned by Rupert Murdoch's News Corp., has begun blocking an aggregator in Britain from cataloging its stories.[258] Murdoch has also threatened as much against Google for publishing content of the *Wall Street Journal*.[259] If more news organizations choose to do the same, aggregators could be forced to work out licensing agreements to secure sufficient content for their own sites.

Some news organizations are taking extreme measures to guard their content. The *Las Vegas Review-Journal* has partnered with Righthaven, a Las

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252 *See* Russell Adams, *AP Stories Reappear on Google News*, WALL ST. J. DIGITS BLOG (Feb. 9, 2010, 5:18 PM), http://blogs.wsj.com/digits/2010/02/09/ap-stories-reappear-on-google-news/.

253 Steve Outing, *Attributor: Will It Be Used for Good or Evil?*, STEVEOUTING.COM (Aug. 7, 2009), http://steveouting.com/2009/08/07/attributor-will-it-be-used-for-good-or-evil/.

254 *Id.*

255 *Id.*

256 *Id.* (noting that publishers could ask search engines to remove a site from their directories).

257 *Id.*

258 Ingrid Lunden, *Murdoch Paper Blocks UK Aggregator Before Paywall Goes Up*, PAIDCONTENT: UK (Jan. 8, 2010), http://paidcontent.co.uk/article/419-the-pay-wall-will-be-built-times-blocks-aggregator-newsnow/.

259 Nick Eaton, *Report: Microsoft, Publishers in Talks for Bing News Exclusivity*, SEATTLE POST-INTELLIGENCER, MICROSOFT BLOG (Nov. 23, 2009, 3:48 PM), http://blog.seattlepi.com/microsoft/archives/186042.asp.

Vegas company applying the "patent troll" model to copyrights.[260] Righthaven buys the newspaper's copyrights on articles it finds posted on other sites and then tries to force a settlement.[261] While Righthaven has lost one case in court on the fair use defense,[262] the company managed to bring more than 150 cases in 2010 and has obtained several settlements thus far.[263]

News organizations should also explore charging consumers directly for content. The deficit between the costs of producing the news and the revenue generated by online advertising[264] will likely make this route inevitable. Economists define the difference between the cost to produce a good and the revenues derived from selling the good as the producer surplus.[265] For some media companies today, this margin is minimal or nonexistent.[266] The gap between what consumers pay and the price they would be willing to pay is the consumer surplus.[267] Most of the tens of millions of readers who are visiting newspaper websites each month[268] are paying nothing for their consumption of the news. But the success of the handful of paid-content models[269] shows that some consumers are willing to pay for news that is valuable to them, even when there are free alternatives. Finding the most efficient balance between producer surplus and consumer surplus will require trial and error and will put

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[260] David Kravets, *Newspaper Chain's New Business Plan: Copyright Suits*, WIRED (July 22, 2010, 3:29 PM), http://www.wired.com/threatlevel/2010/07/copyright-trolling-for-dollars/.

[261] *Id.*

[262] Righthaven LLC v. Realty One Group, No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19, 2010); *see supra* text accompanying notes 81–82.

[263] David Kravets, *EFF Defends Former Prosecutor from Righthaven Copyright Suit*, WIRED (Nov. 1, 2010, 6:44 PM), http://www.wired.com/threatlevel/2010/11/eff-copyright-troll/.

[264] *See* Hirschorn, *supra* note 134, at 44 (noting that the price of online advertising is a fraction of that of print and likely cannot sustain large-scale news operations).

[265] *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 143 (5th ed. 2008).

[266] *See, e.g.*, Richard Pérez-Peña, *Times Company Reports Profit for Quarter and Year*, N.Y. TIMES, Feb. 11, 2010, at B5 (reporting that extensive cost cutting allowed the company to profit $19.9 million for the year after losing $57.8 million in 2008).

[267] MANKIW, *supra* note 265, at 139.

[268] *See* Press Release, Newspaper Ass'n of Am., Newspaper Web Sites Continue to Draw More Than One-Third of All Web Users (Feb. 2, 2010), [hereinafter Newspaper Ass'n of Am. Press Release], *available at* http://www.naa.org/PressCenter/SearchPressReleases/2010/NEWSPAPER-WEB-SITES-CONTINUE-TO-DRAW-MORE-THAN-ONE-THIRD-OF-ALL-WEB-USERS.aspx (reporting that newspaper websites drew an average of 72 million visitors each month in the fourth quarter of 2009).

[269] *See* Kevin Voigt, *Interview: Former WSJ Publisher Now Online Payment Entrepreneur*, CNN.COM, http://edition.cnn.com/2009/BUSINESS/05/18/crovitz.online/index.html ("[T]here are dozens of examples of successful cases where people are very happy to pay for access. . . . WSJ.com and the Financial Times have long done it. ESPN.com and Consumer Reports has [sic] successful premium content models." (quoting former *Wall Street Journal* publisher Gordon Crovitz)).

the onus on content creators to provide the products and services that offer value to readers.

The experiences of some news organizations demonstrate that some readers are willing to pay a modest price for valuable news content rather than not have it at all.[270] The *New York Times* and *Dallas Morning News* plan to start charging for access to their websites in 2011,[271] and other papers are likely to follow suit. As at least one survey has indicated that most consumers would just find their news on another site if a particular site began charging for content,[272] the key seems to be offering consumers content they cannot get anywhere else. The *Wall Street Journal*, for example, offers sophisticated business news. Local or statewide newspapers could offer unique local coverage of sports, schools, or government. Because consumer desire for news is so high,[273] newspapers should explore ways to monetize visits to their sites and offer readers options including specialized content and a variety of delivery methods.

Outside companies have devised ways to make it easier to charge for content. Ongo Inc., which launched its site on January 25, 2011, has contracted with news organizations including the *New York Times* and the *Washington Post* to offer their material on a site that consumers can access starting at $6.99 per month.[274] Ongo CEO Alex Kazim stated that while it is "doubtful" consumers will want to pay the subscription fee solely for the featured content, which is mostly free elsewhere on the internet, he believes

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[270] The *Wall Street Journal* is one example. A smaller newspaper that has been able to use a pay wall on its website to maintain its circulation while the numbers of many others have plummeted is the *Arkansas Democrat-Gazette*. Andrew Clark, *Out of Little Rock: A Model for Murdoch*, OBSERVER (Aug. 23, 2009), http://www.guardian.co.uk/media/2009/aug/23/online-news-charging-us-publishing. The article notes, "While rivals saw double-digit plunges, the Democrat-Gazette's weekday circulation rose 1.7% in the 10 years to 2008. The paper has no bank debt and made a profit last year." *Id.*

[271] Justin Ellis, *Dallas Morning News Publisher on Paywall Plans: "This Is a Big Risk,"* NEIMAN JOURNALISM LAB (Jan. 6, 2011, 2:00 PM), http://www.niemanlab.org/2011/01/dallas-morning-news-publisher-on-paywall-plans-this-is-a-big-risk/; Kat Stoeffel, NYT *CEO Janet Robinson Explains Paywall, Knocks the* Daily, N.Y. OBSERVER (Dec. 1, 2010, 10:55 PM), http://www.observer.com/2010/nyt-ceo-janet-robinson-explains-paywall-knocks-daily.

[272] Pew Project for Excellence in Journalism & Pew Internet & Am. Life Project, *Online: Economic Attitudes*, JOURNALISM.ORG: THE STATE OF THE NEWS MEDIA 2010, http://www.stateofthemedia.org/2010/specialreports_economic_attitudes.php (last visited Jan. 11, 2011) (reporting survey results that 82% of news consumers with a favorite site would go elsewhere if that site erected a pay wall).

[273] *See* Newspaper Ass'n of Am. Press Release, *supra* note 268.

[274] *News Site Counts on Readers to Pay for Experience*, WALL ST. J., Jan. 25, 2011, http://online.wsj.com/article/AP4057a89ac45848b991062c7edfc0e6e8.html.

consumers will be willing to pay for a better reading experience.[275] Ongo lays out the stories on its site in an ad-free, print-newspaper-like format and saves readers from having to visit multiple sites to read stories from the two dozen titles currently available on Ongo.[276] Ongo has captured the attention of several big media players—Gannett Co., The New York Times Co., and The Washington Post Co.—which provided $12 million in initial financing for the company in September 2010.[277]

Seattle-based iCopyright allows content owners, including newspapers, to put its system on their sites to allow for quick and easy "instant licensing" of content.[278] The company's business increased 400% from 2008 to 2009, with the system processing four million instant licenses over the year.[279] In a December 2009 blog post, a company representative bemoaned that so many content creators still were not adopting the company's system even though it had "proved that most users will respect creator and publisher rights if a simple (and affordable) mechanism is made available to them."[280]

Another company, Press+ from Journalism Online, is attempting to provide a system to decrease barriers for consumers who pay for content online. Readers could sign up for a Press+ account and have one username and password to purchase content from all affiliate sites.[281] The company expects most sites to allow users to read a few stories online before being prompted to sign up for a paid subscription.[282] The company has stated that it offers a metered approach rather than erecting paywalls.[283] Founder Steven Brill[284] said he believes the public will be willing to pay for news if news

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275 *Id.*

276 *Id.*; *How Ongo Works*, ONGO, http://ongo.com/how-it-works.php#seeAllTitles (last visited Feb. 6, 2011).

277 *About*, ONGO, http://ongo.com/about.php (last visited Feb. 6, 2011).

278 *iCopyright Launches One-Click Enterprise Licensing and Billing Service*, ICOPYRIGHT.COM (Jan. 14, 2010), http://info.icopyright.com/icopyright-launches-one-click-enterprise-licensing-and-billing-service.

279 *iCopyright Processed Four Million Instant Licenses in 2009*, ICOPYRIGHT, INC. BLOG (Dec. 31, 2009), http://icopyright.blogspot.com/2009_12_01_archive.html.

280 *Id.*

281 *Publishers*, PRESS+, http://www.mypressplus.com/publishers (last visited Jan. 11, 2011).

282 *Readers*, PRESS+, http://www.mypressplus.com/readers (last visited Jan. 11, 2011).

283 Andrew Pergam, *Sites Begin Using Press+ to Ask Readers for Support*, KNIGHT CITIZENS NEWS NETWORK (Dec. 10, 2010), http://www.kcnn.org/spotted/press_plus/.

284 Brill's past ventures include the *American Lawyer* magazine, Court TV, and a failed system for travelers to pay to bypass airport security lines. Richard Pérez-Peña, *Some Newspapers Prepare to Charge for Web Access*, N.Y. TIMES, Feb. 3, 2010, at B2.

organizations "declare that it's worth something."[285] He noted, "I have three kids who used to steal music. They don't anymore because Steve Jobs figured out a way to make it relatively inexpensive, but more importantly to make it simple and kinda cool."[286] While Brill said he has signed letters of intent covering 1,600 sites, newspapers have been slow to adopt the system.[287] News executives are understandably worried about making the plunge into paid content, but one virtue of Press+ is that it allows each newspaper to tailor its strategy.[288] A dozen sites have adopted the Press+ platform, with some just requesting—rather than requiring—readers to pay to support the site.[289] The *Intelligencer Journal-Lancaster New Era* began using the service by charging nonlocal readers once they read more than seven obituaries in a month.[290]

With the growing popularity of e-readers and tablet computers, it may be easier than ever for consumers to have a newspaper at their fingertips. Kindle users may buy daily newspapers in the Kindle Store, and Amazon.com recently increased the amount of revenue that it returns to the newspaper companies from 30% to 70%.[291] Another promising product is Google's Fast Flip, which allows users to browse several news stories from a number of newspapers and magazines at a single site.[292] Google shares the advertising revenue from the system with those who give permission for use of their content.[293]

Ultimately, news organizations' push in the market for greater compensation from commercial users and consumers will end up being more fruitful for publishers and less troublesome to consumers than any changes ushered in by new legislation. Allowing the market to value news will force content creators to adapt and improve, ultimately improving the experience for

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285 Jessica Ramirez, *Journalism's Savior?*, NEWSWEEK (Apr. 17, 2009), http://www.newsweek.com/id/194478.

286 *Id.*

287 Pergam, *supra* note 283.

288 *See* Ramirez, *supra* note 285.

289 Pergam, *supra* note 283.

290 Staci D. Kramer, *First Journalism Online Meter Starts Ticking: LancasterOnline Obits*, PAIDCONTENT.ORG (July 12, 2010, 8:45 AM), http://paidcontent.org/article/419-first-journalism-online-meter-starts-ticking-lancasteronline-obits/.

291 Mark Milian, *Amazon.com Courts Newspaper Publishers for Kindle*, CNN.COM (Nov. 9, 2010), http://edition.cnn.com/2010/TECH/mobile/11/09/kindle.newspapers/.

292 Emma Heald, *Google's Fast Flip Adopted by 55 New Publications*, EDITORSWEBLOG.ORG (Dec. 17, 2009, 11:59 AM), http://www.editorsweblog.org/multimedia/2009/12/googles_fast_flip_adopted_by_55_new_publ.php.

293 *Id.*

consumers. If technology, rather than the threat of lawsuits, is the driving force behind change, it will foster a better relationship between content providers and content creators, helping them create mutually beneficial solutions.

CONCLUSION

The war of words between news organization executives and creators of online-only sites underscores the pain faced by traditional news organizations and the gains reaped by their new competitors. While news executives would like to back up their rhetoric with suits against aggregators and bloggers, they have few legal arguments to make. Codifying the hot news misappropriation doctrine would give content creators another tool when copying of their online content reaches the level of unfair competition. Because a statute's relief would be limited, however, news organizations must continue to develop systems that help them value and market the news. Content creators could then use technology rather than the threat of litigation to regulate use of their content. If news providers offer work that adds value to consumers' lives and make it easy for consumers to pay, they can recapture some of the revenue they have lost to the free world of the internet.

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