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WILL HISTORY REPEAT ITSELF AGAIN?: AN ANALYSIS OF COPYRIGHT AND UNFAIR COMPETITION SOLUTIONS TO FACT-BASED-JOURNALISM AGAINST NEWS AGGREGATORS?

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Abstract

Traditional news organisations that are a vital tool for the dissemination of knowledge are on their deathbeds because they have lost their economic power in the last decades in the US. News aggregators are having a debilitating effect on traditional news organisations' profitability. Copyright protection does not extend to facts in journalistic articles but only expression therein. This article argues that we should offer enough protection to traditional news gatherers to survive in the digital era. For such protection, this article specifically discusses whether the hot news doctrine in the shape of federal legislation could help news producers against free riders in the market.

Keywords: traditional news organizations, copyright and journalistic works, hot news, news aggregators, unfair competition.

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INTRODUCTION

> "I want journalists, publishers and authors to be paid fairly for their work, whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via a copying machine or commercially hyperlinked on the web."– President Juncker, State of the Union 2016

News organisations have been in decline for more than a decade in the US. Some have closed their doors, others survive but have laid off many journalists. We are at risk not only of the disappearance of traditional news organisations as we have known them, but also–at least potentially–of the attenuation of democracy itself. This is especially true if the role these organizations have played in disseminating news and vital information as a public good is not met adequately in the information age. This decline cannot be explained merely by shifting patterns in newspaper readership. Although news aggregators certainly constitute and innovation, presenting news conveniently and in a way that people can readily digest online, they are also having a debilitating effect on traditional news organisations' profitability. Leaving aside their utility for consumers of news, their impact in the news market might be considered analogous to that of parasites. Profiting from the efforts of established news gathering organizations–without compensating them–news aggregators provide no original informational content. That is, they do none of the work in generating vital news information for citizens in the public interest. Take Hurricane Irma as an example. Established news organisations put the

lives of news crews at stake to provide the general public with the coverage they needed to stay informed and-potentially-safe and secure.[2] News aggregators, such as Google News, then muscled in on the news market without contributing anything to the cost of gathering this factual information when Irma struck. Facts are in the public domain, and everyone can surely use them. That being said, the commercial use of facts gathered by others may well harm more than established news organizations – how are we to address the potential costs to society at large?

The first chapter will discuss the revenue problem within the traditional news market and the role news aggregators play in exacerbating it. Following that, the second chapter will examine the scope of news protection and whether property rights could be extended to factual information in news and - if not - what cognate problems could arise under copyright law. The third chapter subsequently investigates whether newspapers can reasonably expect to find their saviour on grounds of unfair competition. The last chapter will then discuss whether federal regulation might be a more efficient way to resolve the problem, and if so, what its possible scope of protection might be. It will also assess the likelihood that regulation proposed to offer such protection would violate the First Amendment.

[2] Chloe Watson, 'Covering Hurricane Irma: journalists go to extremes to report storm' *The Guardian* (New York, 11 September 2017) <https://www.theguardian.com/world/2017/sep/11/gone-with-the-wind-reporters-get-a-soaking-in-hurricane-irma> accessed 18 December 2017.

THE STATE OF THE AMERICAN NEWS INDUSTRY

Traditional news organisations are on their deathbeds. The news industry is bleeding revenue: advertising income figures fell from roughly $60 billion to just under $20 billion between 2010-15.[3] Consumer behaviour in the news market has been transformed since the dawn of the internet age, with readers now increasingly reading their daily news through online aggregators that charge no subscription fee, rather than paying for news companies' printed newspapers or online contexts.[4] According to a study released in 2010, nearly sixty-one percent of Americans read their daily news online.[5] To keep up with technological advances, fact-based journalism companies have typically added an online presence to an existing print offering (thereby seeking additional profit from digital subscriptions).[6] Online media start-ups –such as Politico or Vox Media– have also flourished although may not be as profitable as established news companies once were and

[3] Mark J. Perry, 'Creative Destruction: Newspaper ad revenue continued its precipitous free fall in 2014, and it's likely to continue' *AEI* (Washington, 30 April 2015) <https://www.aei.org/publication/creative-destruction-newspaper-ad-revenue-continued-its-precipitous-free-fall-in-2014-and-its-likely-to-continue/ > accessed 18 December 2017.

[4] Federal Trade Commission(FTC), 'Extra! Extra! FTC Announces Workshop: Can News Media Survive the Internet Age? Competition, Consumer Protection, and First Amendment Perspectives' Federal Trade Commission (Washington, 19 May 2009) <https://www.ftc.gov/news-events/press-releases/2009/05/extra-extra-ftc-announces-workshop-can-news-media-survive> accessed 18 December 2017.

[5] Kimberley A. Isbell, 'The Rise of the News Aggregator: Legal Implications and Best Practices' (2010) Publication No. 2010-10, 1 Berkman Center Research <https://ssrn.com/abstract=1670339> accessed 18 December 2017.

[6] Brett Edkins, 'The New York Times Is Not 'Failing' Announces Strong 2Q Profits And 2.3M Digital Subscribers' *Forbes* (New Jersey, 2017) <https://www.forbes.com/sites/brettedkins/2017/07/27/the-new-york-times-is-not-failing-announces-strong-2q-profits-and-2-3m-digital-subscribers/#57cc228a3869> accessed 18 December 2017(New York Times' digital subscriptions doubled in 2015-16.)

certainly lack the audience reach of traditional mass media.[7] News agencies, which gather the global and local news via journalists located in all over the world, are news 'wholesalers' that market news to bigger mass-market players. They have blamed news aggregators, such as Google News, for deteriorating market conditions, arguing the latter are making profit by using 'news' that is gathered by news companies at significant cost while paying nothing in return.[8]

So, how are we to preserve the role news gathering has traditionally played in ensuring the wide dissemination of news and information as a public good, such as in the case of Hurricane Irma illustrated above? Some news organizations and scholars have proposed an extended intellectual property (IP) regime as a solution, whereby additional revenue can be raised by ensuring news aggregators must pay a fee to license the content from others they republish.[9] To that extent, the next

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[7] David Carr, 'Ezra Kelin Is Joining Vox Media as Web Journalism Asserts Itself' *The New York Times* (New York, 26 January 2014) <https://www.nytimes.com/2014/01/27/business/media/ezra-klein-joining-vox-media-as-web-journalism-asserts-itself.html> accessed 18 December 2017 (Online news companies, such as Vox, are based on only the digital environment unlike traditional news companies that provide news content both in printed newspapers and their own websites.)

[8] Isbell (n 5) 1.

[9] Federal Trade Commission(FTC), 'Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism (2010) 6 <https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf> accessed 18 December 2017, Ryan T Holte, 'Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting' (2008) 13 Journal of Technology Law & Policy 1, 32., Richard Posner 'The Future of Newspapers' (*The Becker-Posner Blog*, 23 June 2009) <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html> (He proposes extending

chapter will discuss the probability of IP right on factual information in the US.

THE LEGAL FRAMEWORK OF NEWS

A. Preliminary Historical Background and the Scope of Copyright Protection in Journalistic Articles

News for the purposes of this paper is defined as newly received or noteworthy information, especially about recent events that is marketed to consumers or offered to citizens as a broadcast, in print, or online.[10] The news industry is a modern phenomenon – closely linked to the development of mass literacy – that emerged in nineteenth century in the wake of the invention of telegraph, which accelerated the pace of information transfer across the globe.[11] The telegraph shortened transmission of noteworthy information between continent from weeks to days, or even hours.[12]

a copyright protection to prohibit online access copyrighted elements, showing a link to original context or paraphrasing those elements without copyright holder's assent.)

[10] James Hamilton, *All the News That's Fit to Sell: How the Market Transforms Information Into News* (Princeton University Press 2004) 6.

[11] Sam Ricketson & Jane C. Ginsburg 'Intellectual Property in News? Why Not?' (2016) Columbia Public Law Research Paper No.14-511, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773797> accessed 18 December 2017.

[12] Lionel Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia Symposium - Intellectual Property at a Crossroads: The Use of the Past in Intellectual Property Jurisprudence' (2004) 38 Loyola of Los Angeles Law Review 71, 78-81.

Almost as soon as the telegraph was invented, the challenge of recouping the costs of investing in news gathering emerged.[13] Competitors could quickly beat each other to a 'scoop', essentially freeriding on the investments of others and lessening the value of gathered 'news'. The traditional organisations thus sought a remedy - a limited monopoly to exploit news against competitors while it was fresh.[14] One of Britain's Australian colonies *Harper* provided for such an exclusive right – called a 'telegraphic message copyright' – of between twenty-four and thirty-six hours for news sent by telegraph from abroad.[15] The term 'copyright' here is something of a misnomer – really this was a *sui generis* right of exclusive use against free riders' tortious acts based on principles of unfair competition.[16] Although this legislation was relatively local, and did not last that long, it's underlying logic continues to inform the controversies of today.[17]

The Berne Convention was the first international agreement to set the boundaries of news protection with a few mandatory limitations.[18] One of these is that the news of the day or miscellaneous facts shall not constitute copyrightable work.[19] Journalistic works are protected to the

[13] Ricketson & Ginsburg (n 11) 3.
[14] ibid.
[15] The Victorian Act, An Act to Secure in Certain Cases the right of Property in Telegraphic Messages 1871 (Vic) 35 Vict No 414.
[16] Ricketson & Ginsburg (n 11) 4.
[17] ibid.
[18] Janice T. Pilch, 'Fair Use and Beyond: The Status of Copyright Limitations and Exceptions in the Commonwealth of Independent States' (2004) 65 6 C&RL 468, 477.
[19] Berne Convention for the Protection of Literary and Artistic Works (adopted 16 November 1988, entered into force 1 March 1989) 828 UNTS 221 art 2(8).

degree that they are literary or artistic, yet the legislator left the interpretation of that principle to national jurisdictions.[20] This notion was later expanded[21] in the WIPO Copyright Treaty, which states that copyright protects 'expression' rather than 'ideas, procedures, methods of operation or mathematical concepts as such'.[22]

Journalistic articles, apart from the facts in them, are protected under copyright law provided that they are literary works.[23] To be eligible for copyright protection, they should be original.[24] The Copyright Act of 1976 explicitly approves the fundamental principle of originality if the authorship is 'fixed in tangible medium of expression'.[25] The originality requirement, was relatively low so that even basic creativity could acquire copyright protection.[26] In this sense, the journalist's words phrase, depiction and recital would be considered to be original, but facts in the news articles are not in the scope of copyright protection.[27] Copyright protection would not extend to the snippets in the news articles on the ground that short word combinations or phrases

[20] *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol 2 (Stockholm Intellectual Property Conference, WIPO 1971) 1155.
[21] Ricketson & Ginsburg (n 11) 9.
[22] WIPO Copyright Treaty (Geneva, 20 December 1996), 2186 UNTS 121, signed on 12 April 1997, entered into force 6 March 2002 Art.(2) (emphasis added).
[23] Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (2003), 10–11., Ricketson & Ginsburg (n 11) 13.
[24] See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
[25] 17 U.S.C.S. § 102.
[26] Feist (n 24) 345.
[27] Jeffrey L Harrison and Robyn Shelton, 'Deconstructing and Reconstructing Hot News: Toward a Functional Approach' (2012) 34 Cardozo Law Review 1649, 1654.

are not considered as copyrightable subject matter as far as US Copyright Office is concerned.[28]

B. The Question of the Likelihood of Extending IP Rights to 'News'

Some have suggested that IP rights could be extended to 'news',[29] a move that would offer the prospect of additional revenue for traditional organisations (the newswires, public broadcasters, and newspapers) from aggregators and search engines.[30] Their argument goes that news aggregators currently 'free ride' on the effort, skill and labour these organisations exercise to gather news which costs a lot of money. Under the terms of the Copyright Act of 1976, they can do so because copyright protects expression rather than facts in the news.[31]

Nevertheless, it could be overly naive to think that traditional news organisations can be saved by extending copyright protection to the 'discoverers' of news. First, copyright only protects original works of authorship because facts might only be 'discovered' not 'produced'.[32] 'Discovery' is distinguished from 'creation' in so far as the first person who finds a specific fact only discovers its 'existence' (and does not create it as such).[33] Second, major news companies often exchange their

[28] 37 C.F.R. § 202.1
[29] FTC (n 9) 6 , Holte n (9) 32.
[30] FTC (n 9) 6.
[31] ibid 9.
[32] Harrison and Shelton (n 27) 1653.
[33] Feist (n 24) 347.

news openly and freely, since collecting news 'in isolation' would otherwise require an unmanageable investment. [34] Plus, disputes over who owned the news first would be highly likely to arise, thereby producing high transaction costs for news so acquired.[35] The view of having a property right in news is a result of economic considerations, rather than the bedrock IP principles.[36] 'News' and 'copyrighted work' shares only 'free ride' problem, news is not distinguishable in determining of property right compared to copyrighted work.[37]

C. Fair Use

Assuming a property on 'news', news aggregators' use of information may not constitute a 'copyright infringement' because of the 'fair use' principle. [38] The using of a copyrighted work fairly for criticism, comment, *news reporting,* teaching, scholarship, or research does not constitute a copyright infringement.[39] In determining 'fair use', judges consider the following factors: '(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in the copyrighted work

[34] Shyamkrishna Balganesh, 'Hot News: The Enduring Myth of Property in News' (2011) 111 Columbia Law Review 419, 426.
[35] Amy E Jensen, 'When News Doesn't Want to Be Free: Rethinking Hot News to Help Counter Free Riding on Newspaper Content Online Comment' (2010) 60 Emory Law Journal 537, 557.
[36] Holte (n 9) 32.
[37] Harrison and Shelton (n 27).
[38] Isbell (n 5) 9.
[39] 17 U.S.C.S. § 107 (emphasis added).

(4) the effect of the use upon the potential market for or value of the copyrighted work.'[40]

When judges assess the first criterion, they question whether the new organisation's contribution to the work is distinctive, and if it differs from the original work in terms of 'expression, meaning, or message', which is called being 'transformative'.[41] In our case, news aggregators subjectively interpret the facts instead of copying the same information outright.[42] Although they usually have income from advertising,[43] if the degree of transformability of work is higher than other factors–including commercial ones–the finding of fair use will be highly likely in favour of news aggregators.[44]

The second requirement relating to the nature of the work was discussed by the Supreme Court in *Harper v. Row*. In that case, the Supreme Court held that the defendant's use of copyrighted work could not be considered 'fair use' because the plaintiff had not published the factual information prior to the defendant's use of it.[45] The Supreme Court further held that the defendant's use constituted copyright infringement as the former President's 'specific expression' was directly used in the magazine article.[46] When applying this decision to news aggregators, the finding of fair use is highly probable because they usually use

[40] ibid.
[41] See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
[42] Jensen (n 35) 552.
[43] Isbell (n 5) 10.
[44] Jensen (n 35) 552.
[45] Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539, 551 (1985).
[46] ibid 555.

published news[47] and factual information which has relatively low copyrightable subject matter.[48]

With reference to the third requirement, the courts assess how much copyrighted work is used in the alleged infringer's work in terms of portion and legibility.[49] Since major news aggregators' use of factual information is relatively narrow, fair use would likely apply.[50] Yet, if the use of factual information is located at 'the heart' of the work, then it is not entitled to a 'fair use' claim.[51] This is likely to cause a question as to whether some aggregator's use is 'the heart' of the work or not. To attract potential customers, news aggregators sometimes use the crucial part of the copyrighted work.[52] Given that use of 'the heart the copyrighted work' varies from case to case, judicial reaction to news aggregators is likely to remain unclear.[53]

Lastly, in determining whether or not the effect of the news aggregators' use the copyrighted work regarding the potential market, news producers claim that they are deprived of licensing fees as news aggregators rewrite content without providing compensation.[54] News aggregators would counterclaim that they provide a link to the news article.[55] On the other hand, one study shows that 44% of internet users of Google News leave after reading headlines without clicking the

[47] Isbell (n 5) 12.
[48] Jensen (n 35) 552.
[49] Isbell (n 5) 12.
[50] Jensen (n 35) 553.
[51] Harper & Row (n 45) 54.
[52] Isbell (n 5) 12.
[53] ibid 12.
[54] ibid 13.
[55] Jensen (n 35).

producing organisation's website.[56] News aggregators' answer to this would be that they enhance internet traffic–leading news readers to the news producers' website–to the overall benefit of everyone.[57] This requirement is highly unclear in deciding fair use for news aggregators.

All these requirements discussed above make it difficult to determine clearly whether or not parasitic news aggregators' activities constitute fair use. The case law is vague. This is because Congress has allowed the courts to interpret the requirements in specific disputes owing to technological developments.[58] The requirements have been indicated merely for the general scope of fair use and the goal behind it.[59] So, copyrights provide no good answer to the problem.

Although in international level there were attempts that proposes granting news to *sui generis* or neighbouring right protection, none of them succeed in doing this.[60] Nevertheless, protection for the rewards of research and discovery of news may be found under unfair competition theory, without the need to create an artificial monopoly

[56] Robin Wauters, 'Report: 44% Of Google Newspapers Scan Headlines, Don't Click Through' (19 January 2010) <https://techcrunch.com/2010/01/19/outsell-google-news/> accessed 13 December 2017

[57] Isbell (n 5) 13.

[58] House of Representatives Report (H.R.Rep.) 'Copyright Law Revision' No. 94-1476 (1976) 66.

[59] ibid.

[60] Ricketson & Ginsburg (n 11) 9-13. (These attempts were, first, a specific inclusion under categories of unfair competition clause, Art.10 of the Paris Convention for the Protection of Industrial Property, that prohibits illegitimate using of news of the day and miscellaneous information within particular hours without attribution. Secondly, granting the owner of newspapers, regular publications and press agencies to a special protection as author's neighboring rights.)

on public facts.[61] The Convention left the door open to this option at national level.[62] The next section will discuss the potential of unfair competition rules as a solution for the news industry.

CAN THE 'HOT NEWS' DOCTRINE SAVE TRADITIONAL NEWS ORGANISATIONS?

A. Int'l News Serv. *v.* AP': The Birth of the 'Hot News' Doctrine in the United States

The International New Service (INS) and Associated Press (AP) competed ferociously in the US news market at the beginning of the twentieth century. William Randolph Hearst, who owned INS, explicitly supported Germany in World War I and was thus critical of both Britain's actions and the US decision to enter the war in 1917.[63] Afterward, due to British objections, INS was prevented from sending cables related to the war to the US, and consequently from producing news.[64] The AP was under no such restriction, and INS therefore started to reproduce and sell the AP's news as its own, by taking material from AP's bulletin boards and previous publications. This resulted in AP suing INS in court, with a final a judgment that later came to be known

[61] Melville B. Nimmer & David *Nimmer on Copyright* (Matthew Bender, 2017) § 3.04.
[62] *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, vol 1 (Stockholm Intellectual Property Conference, WIPO 1971) 155.
[63] Isbell (n 5) 14.
[64] Douglas G Baird, 'Common Law Intellectual Property and the Legacy of International News Service v. Associated Press' (1983) 50 University of Chicago Law Review 411, 412.

as the 'hot news' doctrine.[65] The Supreme Court explicitly stated that although the news element would count as common property and was thus not copyrightable, the news producers has to compete fairly in the market.[66] Both the plaintiff and the defendant were in the market to generate profit from publishing news, and devoted money, organisation, labour and skill to do so.[67] The competitors therefore had 'quasi property' rights between themselves in news regardless of the public's rights to facts in news.[68] The Supreme Court's famous quote regarding the defendant was that it would otherwise 'reap where it has not sown'.[69]

However, another question was raised as to whether classic unfair competition theory extended to the defendant's actions or not. Conventional unfair competition allegations are a form of tort – also known as misrepresentation – whereby a defendant passes off its own product as if it were that of another more prestigious or famous producer. However, INS sold AP's news under its own name and did not represent it's product as if it were AP's.[70] The Court held that the defendant's actions differed from classic unfair competition because its actions constituted 'misappropriation' rather than

[65] Int'l News Serv. v. AP, 248 U.S. 215, 231 (1918)
[66] ibid 235-236.
[67] Ibid 236.
[68] ibid 236.
[69] ibid 239.
[70] Roger E. Schechter & John R. Thomas *Principles of Copyright Law: Concise Hornbook Series* (West, 2010) 498.

'misrepresentation'. [71] The Court finally granted the plaintiff an injunction against the defendant's bodily taking of news until the economic worth that news had had disappeared.[72]

The justifications behind the decision in *INS v. AP* could be considered as a mixture of John Locke's property and utilitarian theories because the Court's purpose was to give an award for AP's efforts to produce news, which requires organisation, labour, skill and money, thereby increasing the public benefit from factual information.[73] The principle of a right to 'reap what one has sown' could however be thought somewhat vague because tangible and intangible property differs considerably in many ways.[74] That is to say, for example, one can prevent others from thieving your harvest, however information may be used by millions people all over the world.[75] However, the scope of *INS* should be only interpreted that the facts can be protected if a contestant appropriates this information that was first gathered by another contestant with causing detrimental effect.[76]

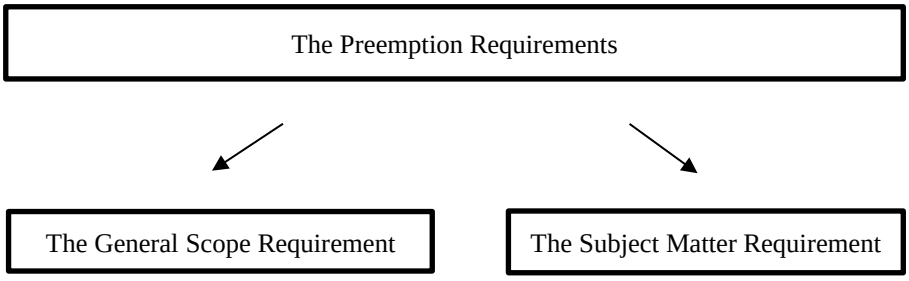
It was not until the end of the 1930s that the US Supreme Court in *Erie R.R. v. Tompkins* stated that deciding whether or not conduct is a tortious act is a job for state law.[77] Since the misappropriation doctrine

[71] Int'l News Serv. v. AP (n 65) 242.
[72] ibid 245.
[73] Isbell (n 5) 14-15, Eric P Schmidt, 'Hot News Misappropriation in the Internet Age Student Note' (2011) 9 Journal on Telecommunications & High Technology Law 313., Schechter & Thomas (n 70) 499.
[74] Baird (n 64) 413.
[75] ibid.
[76] Schechter & Thomas (n 70) 500.
[77] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

is based on a tortious act, there are only five states that still apply the 'hot news' doctrine after *Erie*.[78]

B. The 1976 Copyright Act Brings Pre-emption to the Fore

There is a pre-emption provision in the Copyright Act of 1976 that forbids state-law claims that offer equivalent rights of copyrighted work under the Act.[79] The justification behind this clause is not only to harmonise state and federal laws but also to widen the scope of the 'public domain'.[80].



[78] Harrison and Shelton (n 27) 1663.

[79] 17 U.S.C. §301 states as follows:

> 'All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright … in works of authorship that are fixed in a tangible medium of expression …….. are governed exclusively by this title.'

[80] Joseph P Bauer, 'Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976' (2007) 10 Vanderbilt Journal of Entertainment and Technology Law 1, 15.

-If there are equivalent rights of reproduction, performance, distribution or display (The Copyright Act of 1976 §301)	-Literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural, motion pictures, other audio-visual, sound recordings, architectural works (The Copyright Act of 1976 § 102) - All works above are assessed as a 'whole', the Act do not distinguish between copyrightable and uncopyrightable subject matter in the work

When looking at the requirements, one could argue that the 'hot news' doctrine *is* pre-empted by the Act. First, the misappropriation doctrine is based on reproduction of facts. It does not matter whether or not it is copyrightable because state law's aim by 'hot news' doctrine is merely to prohibit reproduction of underlying facts.[81] Second, in case journalistic articles as a whole could be considered as 'literary work', they fall within the scope of copyrightable subject matter even though the underlying factual information is in the public domain[82]. On the other hand, the House Report stated that misappropriation does not always mean the same as copyright infringement so that

[81] Jane C Ginsburg, 'No Sweat Copyright and Other Protection of Works of Information after Feist v. Rural Telephone' (1992) 92 Columbia Law Review 338, 356. Schechter & Thomas (n 70) 530.
[82] ibid.

misappropriation claims are not pre-empted.[83] Against unfair and unnecessary acts of a competitor, including appropriating facts similar to 'hot news' in *INS*, a set of remedies should be offered.[84] The Second Circuit answered affirmatively, however, they required an 'extra element' test for the doctrine to survive.[85]

C. The 'Hot News' Doctrine Reborn: '*Motorola v. NBA*'

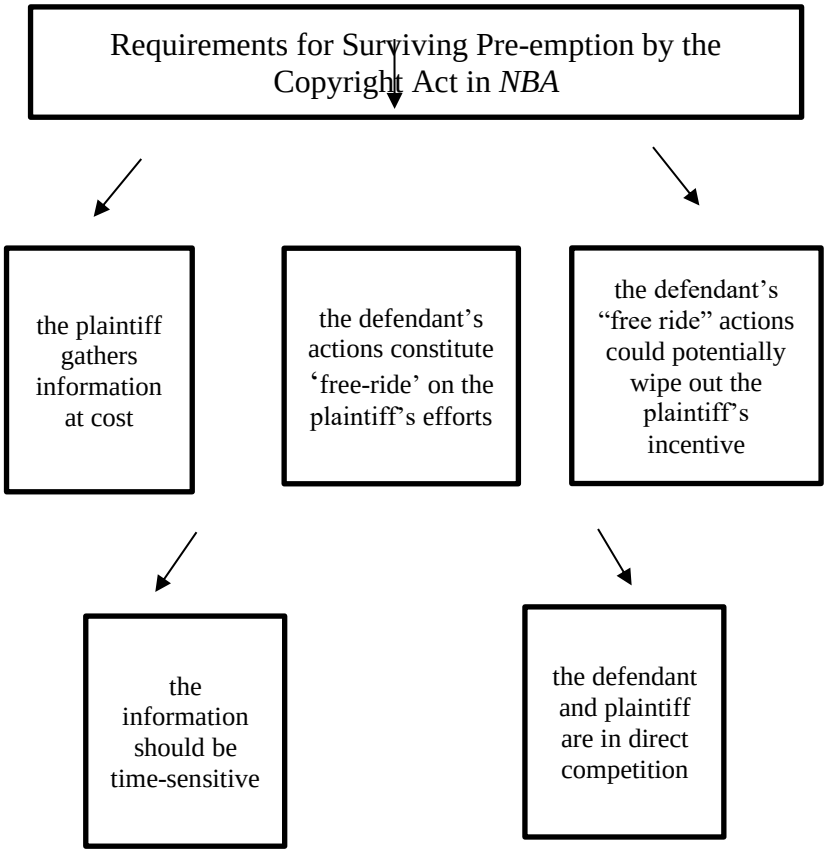
Motorola was producing and selling a product called 'SportsTrax', whereby a Sports Team Analysis and Tracking System (STATS) uploads the latest NBA games' information to a central site.[86] The SportsTrax offer consists of four sections: 'current', 'statistics', 'final scores' and 'demonstration'.[87] The dispute arose from the 'current' sections, which show the latest information on ongoing NBA games.[88] The information was uploaded two or three minutes after the facts of the game arose.[89] The NBA filed a suit against Motorola including copyright infringement and unfair competition by misappropriation

[83] H.R.Rep. (n 58) 132, Ricketson and Ginsburg (n 11) 23. (In discussing whether or not the Berne Convention pre-empted unfair competition claims, Ricketson and Ginsburg argue that the quotation right under Art.10(1) does not prohibit those claims in cases where the quotation right goes beyond the purpose of the provision. Therefore, the excessive use of the right could be balanced with the fair competition requirement in member states.)
[84] H.R.Rep. (n 58) 132.
[85] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).
[86] ibid 844.
[87] ibid 843.
[88] ibid 844. (This information was related to the teams, scores, who owns the ball, if the team is in the three-shot bonus or not, which quarter of the game, how much time remain in the quarter.)
[89] ibid 844 – 845.

claims. However, the district court only accepted the misappropriation claim, while granting an injunction against Motorola and STATS.[90]

Upon the appeal of Motorola and STATS, the Court of Appeals held that although underlying games as a performance were not copyrightable–unlike broadcasting of the game itself–the Copyright Act of 1976 did not distinguish between two in determining the pre-emption of a misappropriation claim.[91] The court concluded that solely a narrow misappropriation claim endures regarding actions in relation to the subject matter under the Act.[92] But this requires a five-element test[93]:

[90] ibid 845.
[91] ibid 849.
[92] ibid 852.
[93] ibid 852.



After applying the requirements, the court reached a conclusion that the actions of Motorola and STATS did not constitute misappropriation because their products did not compete with the NBA directly.[94] This case showed how *INS*-type claims have endured under the Act and are

[94] ibid 853.

not pre-empted. By doing this, however, it also narrowed the scope of misappropriation in order not to neglect the aim of Congress that leaves facts and intangible concepts in the public domain.[95]

D. 'Hot News' Today

In another case related to the misappropriation doctrine, *Barclays v. Theflyonthewall,* the Second Circuit applied the misappropriation doctrine in depth against the news aggregator. The plaintiffs (The Firms) in the case offer brokerage services to clients by researching extensively, and summarising this extensive research into reports, which include suggestions of buying, selling or holding bonds.[96] For many years, the Firms had usually sent these reports to clients every morning before the market opening.[97] The defendant (Fly), a financial news aggregator, acquired and excerpted the Firms' seventeen reports, and published them on its website before the beginning of the trading day.[98] The Firms commenced legal action against Fly on the basis of copyright infringement and 'hot news' misappropriation.[99] The district court granted the Firms statutory damages for the copyright claims, and also enjoined Fly from releasing the Firms' recommendations no sooner than between half an hour and several hours after publication, as a direct answer to the Firms misappropriation claims.[100] Fly conceded the copyright infringement allegations and only appealed the

[95] Schechter & Thomas (n 70) 533.
[96] Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 879 (2d Cir. 2011)
[97] ibid.
[98] ibid.
[99] ibid 880.
[100] ibid 887.

misappropriation claims on the ground that its actions did not constitute 'misappropriation'.[101]

However, the Second Circuit applied a three-element test–in contrast to the five-element test in *NBA*–to prevent misappropriation claims from being pre-empted. These are: (1) time-sensitive valuable information; (2) the defendant's free riding, and; (3) the free riding's threat to the plaintiff's existence or that of the product or service. [102] By applying this test, the court reversed the decision on the basis that Fly did not free ride on the Firms because the latter produce news whereas the defendant is 'breaking' it.[103] The court compared *INS* facts to *Barclays*, and concluded that the actions of INS (i.e., appropriating news and selling it as its own), are not as the same as Fly's actions. This is because, first of all, the Firms were creating recommendations rather than acquiring (as in *INS*), and secondly Fly was selling recommendations with precise attribution to the Firms instead of representing as its own.[104] Moreover, there was no evidence that the Firms lost substantial revenue after Fly's publications so that third requirement was similarly not satisfied.[105]

Both *INS* and *Barclays* emphasise that sharing of facts is necessarily in the public interest, whereas entities that gather facts and make profit from it in the market shall be incentivised to keep their business for the

[101] ibid 886.
[102] ibid 900. (However, in his concurrence opinion, Judge Raggi applied the five-element test in determining direct competition between Fly and the Firms.)
[103] ibid 902.
[104] ibid 902-904.
[105] ibid 904.

benefit of the public.[106] So, the Second Circuit left the door open to keep misappropriation claims alive by giving a hypothetical example. The court said that were a Firm to gather and disseminate some public facts related to securities recommendations, and had Fly taken and reproduced the facts from the Firm's assumed service, Fly could have been enjoined from reproducing the facts under an *INS*-type claim.[107] Taking two requirements out of the five-element test of NBA would make misappropriation claims unfairly broad because the connection between free riding and the factual information that was obtained by huge investing is significant.[108].

It remains unclear whether the Court intended to create three-element test or merely applied this once.[109] Nor has addressed news aggregators' free ride on newspapers companies yet. If *INS*-type claims are applied to today's news aggregators by using *NBA* test, it is likely to be tough examination unlike *INS*.[110] First, a court will look at a make-or-break examination as the Second Circuit in *Barclays* did.[111] Since newspaper companies and news aggregators are both in the 'breaking news' market, the court would apply a classical free-ride investigation.[112] The first factor in *NBA* could be satisfied simply because major newspapers companies gather the news at cost by recruiting journalists, providing

[106] Luis Zambrano, 'Still an Alternative Way to Protect Traditional News: Why Barclays Did Not Kill the Hot News Tort Other Developments in Intellectual Property' (2012) 27 Berkeley Technology Law Journal 957, 972.
[107] Barclays (n 96) 905-906.
[108] Harrison and Shelton (n 27) 1660.
[109] ibid.
[110] Schmidt (n 73) 976.
[111] Zambrano (n 106).
[112] ibid.

office, state-of-the-art equipment and so on.[113] Regarding second requirement, the characteristic of the newspapers' product is time-sensitive, however, the news aggregators' use of news could vary, and require specific determination each case.[114] When it comes to third requirement, news aggregators' use of content would satisfy 'free riding' conditions because they heavily based on factual information gathered by news companies, and their investments are relatively small compared to news companies.[115]

In determining a direct competition requirement, since bloggers and individual journalists use factual information by reproducing, showing linkage or adding their personal judgment, they make unclear the correlation between the news industry and freedom of speech.[116] It can be argued that due to the shift in news readers' habits (consuming news online, for free), the fourth requirement would be satisfied by showing that traditional news organisations' websites are in direct competition with those of the news aggregators.[117] But to counterclaim that they lacked 'press agency' characteristics would not be a sufficient defence for news aggregators because their effect on the news industry is highly detrimental.[118] Lastly, when considering the fifth element, this might

[113] Jensen (n 35) 567.
[114] Isbell (n 5) 18-19.
[115] Jensen (n 35) 568, Isbell (n 5) 19. (However, Isbell argues that 'free ride' requirements depend on a type of aggregators. For example, blog aggregators generally use additional content so 'free ride' requirements would not be satisfied in these types of aggregators compared to AHN's actions.)
[116] Schmidt (n 73) 334.
[117] Jensen (n 35) 568.
[118] Schmidt (n 73) 334.

still remain controversial because the major new organisations may invest in other markets so the question of whether the threat should be against merely news business or all the plaintiff's investments would remain unclear.[119]

To summarize, misapprapriation doctrine has been narrowly used so far, and the question of whether or how the doctrine would be applied to news aggregators remains unclear.[120] Pre-emption analysis is another factor that results in the ambiguity of the doctrine.[121] Since different jurisdictions resolve disputes in distinct ways, the adoption of the misappropriation doctrine in a broader number of states would culminate in inconsistencies.[122]

THE NEED OF FEDERAL REGULATION TO SAVE JOURNALISM

The two proposals posed here to rescue journalism –misappropriation and IP protection– are not efficient solutions due to the many reasons as discussed above. However, a federal statute protecting hot news against free riders for a limited time might prove the answer, with benefits for both traditional news and journalism and society at large.[123] Accordingly, the European Commission has recently proposed a directive, and some European countries have implemented similar

[119] Harrison and Shelton (n 27) 1685.
[120] Jensen (n 35) 568., Zambrano (n 106) 980.
[121] Schmidt (n 73) 331.
[122] Harrison and Shelton (n 27) 1675.
[123] ibid 1680. , Rex Y Fujichaku, 'The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of Hot News Information Recent Development' (1998) 20 University of Hawai'i Law Review 421, 471., Jensen (n 35) 569.

regulation at the national level, granting ancillary rights to news organisations, newspapers, magazines, and other media organizations to prevent digital reproduction of their publications.[124]

The main advantages of federal regulation would be to establish a distinct national scheme for implication of the hot news doctrine,[125] and to foreclose pre-emption controversies.[126] This national hot news regulation could provide remedies that contain injunctions or damages against free riders. The proposed regulation would not have to be under of the Copyright Code, so it would be under the Commerce Code instead to escape from criticisms over proprietorial rights over factual information.[127] However, proposed solution of granting proprietorial-like protection to facts would raise the question of whether it contradicts the First Amendment of the US Constitution.[128]

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[124] Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market' 0280 COM (2016) 593 final, Art.11 (The justification behind the proposed directive is to make sure the consistency of news industry mainly because they are deprived of licensing revenues from their publications' use in the digital environment by news aggregators, thereby having detrimental impact on society's access to information. Although the Directive proposes twenty-year protection, this should be considered as a *sui generis* right based on unfair competition principles as discussed above); Matthew Karnitschnig and Chris Spillane 'Plant to Make Google Pay for News Hits Rocks' *Politico* (Belgium, 15 February 2017) <https://www.politico.eu/article/plan-to-make-google-pay-for-news-hits-rocks-copyright-reform-european-commission/> accessed 18 December 2017 (Germany and Spain implemented parallel regulation that gives ancillary rights to news publishers.)

[125] Harrison and Shelton (n 27) 1680.

[126] Jensen (n 35) 570.

[127] Ginsburg (n 81) 369-374.

[128] Eugene Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You Symposium:

A. First Amendment Concerns

Since sharing facts is strongly protected within the ambit of freedom of speech under the Constitution, a proposed statutory hot news right might violate First Amendment.[129] Some take the view that the protection of 'facts' and the First Amendment have the same aim, which is to create an incentive progress the flow of knowledge in the public interest.[130] The principle, however, requires extensively accessible information in the public domain since its aim is to disseminate the knowledge as extensively as possible by rewarding original works.[131]

In other words, copyright functions in a democratic society to maintain a balance between economic motivations and the broadest possible scope of the public domain.[132] Free riders can either collect the facts independently or wait until hot news' limited time ends.[133] It therefore can be thought that a hot news statute would not contradict the First Amendment; conversely it protects it by sharing same concerns.[134]

Cyberspace and Privacy: A New Legal Paradigm' (1999) 52 Stanford Law Review 1049, 1070-1071.

[129] 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" (2010) 17 <https://www.ftc.gov/sites/default/files/documents/public_comments/2010/07/544505-05218-55014.pdf> accessed 20 November 2017.

[130] Ginsburg (n 81) 386.

[131] Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 Yale Law Journal 283, 363.

[132] ibid 363-364.

[133] Brian Westley, 'How a Narrow Application of Hot News Misappropriation Can Help Save Journalism Comment' (2010) 60 American University Law Review 691, 728.

[134] Harrison and Shelton (n 27) 1682.

B. The Scope of Hot News Rights

In designing 'hot news' rights, the proposed statute should be based on unfair competition instead of prohibiting only reproducing or copying.[135] The *NBA* test could be taken an example for determining misappropriation regulation apart from fifth element, which is likely to create difficulties.[136]

First of all, the fresher the news is, the more valuable it is. That said, the freshness–value nexus depends on the type of news because some news, such as information about natural phenomena, may have merely a few hours protection whereas theatre listings may be still considered hot news until the showing time has passed.[137]

Regarding the second condition, major news companies would easily satisfy it because most of time factual information in hot news should be gathered at cost by them.[138] With reference to 'free riding', as discussed earlier, this will be easily satisfied since most free riders rely heavily on news gathered by traditional news outlets – newspapers, news agencies and public broadcasters.

The 'direct competition' requirement is should be allowed in determining 'hot news' in order to differentiate between interests of

[135] Jensen (n 35) 571.
[136] Harrison and Shelton (n 27) 1685.
[137] ibid 1686. (Harrison and Shelton argue that in case of public safety and public's need to know the emergency situation, public safety weighs upon hot news rights.)
[138] Harrison and Shelton (n 27) 1687. (Harrison and Shelton make an exception for some news gathered at no cost, thereby having no right of these news.)

copyright protection and hot news misappropriation.[139] This is because in case of being downloaded a copyrighted work, the author's loss is merely a price of one book, whereas in a hot news dispute the court will look at if any lost revenue since news pirate makes profit from factual information that it did not invest.[140] The fifth is problematic because since the news companies may deal with different markets, the question of whether a free rider's threat against the plaintiff should be only against the plaintiff's news business or all the plaintiff's investments is unclear.[141] Regarding the question of which type of news should be protected, particular types of news that require extensive research and impact on society to advance in knowledge would deserve more protection than other news that merely about entertainment, staged events or produced without at cost.[142]

CONCLUSION

Dissemination of knowledge is an essential part of society. Traditional news gathering outlets– newspapers, news agencies, and public broadcasters –are a key tool for the dissemination of knowledge in the public interest, with great benefit to democracy. Society must be able to secure this tool against free riders in the digital age. We therefore should offer enough protection to traditional news gatherers to survive in the new millennium. The limited protection of copyright law does

[139] Harrison and Shelton (n 27) 1687.
[140] ibid 1688. (Harrison and Shelton explain that hot news policy should focus on the unfair competitiveness as in *Feist.*)
[141] ibid 1685.
[142] ibid 1668.

not address the problem efficiently. However promising the *INS* decision was as federal common law, the 'hot news' doctrine has been applied little after *Erie*. Moreover, the Copyright Act of 1976 made the pre-emption provision the main focus of the Act to widen the public domain with factual information. Despite this aim of the Act, free riders have benefit from public's facts by commercialising it. 'Hot news' has survived, but it has been used quite narrowly via thorough tests in *NBA* and *Barclays*.

Federal hot news legislation, which would grant news producers sole use of factual information that they had gathered at cost for a specific time and would give remedies against free riders in the market, would overcome these difficulties better than proprietorial or state-common-law approaches. This would definitely bring up First Amendment concerns, and of course free speech. To prevent news aggregators from using commercially valuable news while it is fresh does not violate the First Amendment; conversely it supports First Amendment values. This is because if there is not trustworthy news in the market, no news aggregators could reproduce factual information, thereby preventing public benefit from knowledge. The legislation's aim would therefore be to keep a balance between trustworthy news producers' incentives and the public interest, as pointed out in *INS.*

The *NBA* test is a reasonable path to follow in the legislation. News that requires extensive research and reporting skills should get hot news protection, whereas news for magazines, entertainment or that becomes

public naturally without investment in research to uncover it does not need to have such protection.

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