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In Victory for News Aggregators, Federal Appellate Court Erodes 'Hot News' Misappropriation Doctrine

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In a decision that could hamper the ability of news organizations to protect their content from aggregators, a federal appellate court has rejected a claim of "hot news" misappropriation against an aggregator of financial news in *Barclays Capital Inc. v. Theflyonthewall.com*. The Second Circuit Court of Appeals held that the lawsuit by several investment firms against the website Theflyonthewall.com for misappropriation under New York law was preempted by federal copyright law.

The ruling overturned a contrary finding by Judge Denise L. Cote of the United States District Court for the Southern District of New York, who issued an injunction limiting Theflyonthewall.com's ability to disseminate the firms' stock recommendations. The investment firms, including Barclays Capital, Merrill Lynch and Morgan Stanley, claim that Theflyonthewall.com misappropriated stock recommendations that they had invested substantial resources to create.

Those firms disseminate stock reports and associated recommendations between midnight and 7 a.m. Eastern Time, providing sales representatives with an opportunity to contact clients before the 9:30 a.m. market opening to try to persuade them to execute trades based on the proprietary information. The firms profit from the commissions generated by those trades. Thus, the firms argued, by making their recommendations available to persons who are not clients of the firms or who would not use the information to execute trades using the firms' services, Theflyonthewall.com was

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misappropriating the commercial value of their products.

The "hot news" doctrine, under which the plaintiffs brought their misappropriation claim, dates back to the 1918 Supreme Court case *International News Service v. Associated Press*. There, AP sued rival wire service INS for transmitting factual stories from AP bulletins and AP-affiliated newspapers on the east coast and sending them by wire to INS-affiliated newspapers. The Supreme Court sided with AP, finding that INS' conduct constituted common-law misappropriation. While the Supreme Court has since abandoned the concept of federal common law (thus effectively overturning its holding in INS), many states have adopted their own misappropriation laws.

At issue in Theflyonthewall.com was whether such state laws are preempted by the federal Copyright Act. The Second Circuit previously held in *National Basketball Association v. Motorola* that a claim under New York's misappropriation law was preempted by the Copyright Act. There, the NBA claimed that a service providing sports scores and statistics over Motorola's pager service misappropriated facts generated by the NBA in its games. While the district court found for the NBA under the "hot news" doctrine and enjoined Motorola's service, the Second Circuit, on appeal, held that the Copyright Act preempted the NBA's claim – both because the claim sought to vindicate rights within the "general scope" of the Copyright Act and because the material was of the same the "subject matter" as that protected by the Copyright Act. Importantly, the court in *NBA* determined that even though facts are not subject to copyright protection, they can still fall within the "subject matter of copyright for the court's preemption analysis" because the accompanying broadcasts of the games were copyrightable.

Despite finding that the claims met both requirements for preemption, the *NBA* court recognized that Congress intended to preserve certain "hot news" misappropriation claims similar to those from INS when it adopted the Copyright Act. It found that non-preempted claims can be differentiated where they contain an "extra element" beyond that required to establish a claim under the Copyright Act. Thus, the court offered a five-part test for determining when a "hot news" misappropriation claim is not preempted:

(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 of 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.

The court in Theflyonthewall.com, however, did not apply the test from *NBA*, calling it non-binding "dicta" and finding that the court in *NBA* could not have meant it as a test because it restated it differently in three different parts of the opinion. Rather, the Second Circuit looked to the "subject matter" of the plaintiffs' claims, the "general scope" of the plaintiff's claims, and whether the principles behind the *NBA* test support exemption.

On the first two prongs, the court quickly determined that the reports and accompanying recommendations were "of a type covered by" and within the "general scope" of the Copyright Act. Accordingly, the claims were subject to preemption unless they qualified for an INS-like exemption. Here, the court found that they did not.

In so finding, the court focused on the original concerns in INS, namely whether the defendant took "material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money . . . and . . . appropriating it and selling it as [the defendant's] own . . . ." First, the court found that the firms did not "acquire" the material at issue in the sense of INS, but rather created it using their own expertise. Second, the court determined that Theflyonthewall.com did not pass off the recommendations as its own, but properly attributed the issuing firm.

Additionally, the court emphasized the "substantial organization effort" undertaken by Theflyonthewall.com to conduct "the financial-industry equivalent of observing and summarizing facts about basketball games and selling those packaged facts to consumers." Thus, it found that the service "is not the INS-like product that could support a non-preempted cause of action for misappropriation."

The Second Circuit's decision raises the specter that news coverage might not be protected by "hot news" misappropriation laws. While the court sought to distinguish cases where the plaintiff "acquires" or "breaks" news as opposed to making the news itself, finding the former "more closely analogous to INS," the decision at best appears to blur the line between the type of cases subject to preemption and the type that can sustain a claim under the "hot news" doctrine. Until this result is interpreted in other cases, it remains to be seen whether the "hot news" doctrine can persevere.