

Framing a Semantic Hot-News Quagmire in *Barclays Capital v. Theflyonthewall.com*: *Of Missed Opportunities and Unresolved First Amendment Issues*

CLAY CALVERT AND MATTHEW D. BUNKER[†]

ABSTRACT

Using the June 2011 federal appellate court decision in *Barclays Capital v. Theflyonthewall.com* as an analytical springboard, this timely Article examines and analyzes both the semantic and constitutional issues that plague the aging hot news misappropriation tort in the era of digital journalism. In particular, the article explores: 1) the definitional difficulties with the critical term at the heart of the tort – namely, news – and other journalistic jargon that was used repeatedly by the U.S. Court of Appeals for the Second Circuit in *Barclays* to frame and inform its judgment on the hot news preemption issue; and 2) the First Amendment freedom of expression interests that were at stake in the case but were never explicitly addressed. The article, which blends literature from the field of journalism with the province of law, concludes that the hot news tort today suffers from an absence of analytic rigor, both in its terminology and its constitutionality, and that these problems demand judicial analysis if the tort is to remain at all viable nearly a full century after it was created.

© 2012 Virginia Journal of Law & Technology Association, at <http://www.vjolt.net>.

[†] Clay Calvert, Professor & Brechner Eminent Scholar in Mass Communication and Founding Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. Matthew Bunker, Reese Phifer Professor of Journalism, College of Communication and Information Sciences, University of Alabama, Tuscaloosa, Alabama. B.S., 1979, Business Administration, Kansas State University; J.D., 1985, University of Kansas; M.S., 1989, Mass Communication, Kansas State University; Ph.D., 1993, Mass Communication, University of Florida. The authors thank students Rebekah Rich and Michael Russo of the University of Florida for their thoughtful reviews of early versions of this article.

TABLE OF CONTENTS

I. Introduction.....	51
II. Taking Stock of the Lawsuit: A Primer on the Facts and Allegations in <i>Barclays</i> ..	54
III. Framing A Case in Journalistic Lingo: How the Second Circuit Employed Journalism Vernacular to Analyze the Question of Hot News Preemption.....	58
A. Framing	58
B. Using Journalistic Language to Frame the Barclays Opinion.....	60
1. The Appellate Court’s Use of Journalistic Language	60
2. A News Tort That Fails to Adequately Define News?	62
3. The Making News vs. Breaking News Dichotomy.....	65
4. Summary	65
IV. The Semantic Morass and Problems Produced When the Law Borrows Terms from Journalism that Lack Clear or Definitive Explication	66
V. Hot News Versus the First Amendment: A Conflict Between Tort and Constitutional Principles.....	68
VI. Conclusion	73



I. INTRODUCTION

When the United States Court of Appeals for the Second Circuit issued its June 2011 opinion in *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*,¹ the appellate court did more than simply reject, on copyright preemption² grounds,³ a hot news misappropriation⁴ tort claim filed by several major banking institutions⁵ against an online aggregator⁶ of buy-and-sell stock market recommendations and tips.⁷ It also

¹ 650 F.3d 876 (2d Cir. 2011).

² See 17 U.S.C. § 301 (2010) (setting forth the terms of the federal statute governing the preemption of common law and state statutory claims under federal copyright law).

³ Writing the Opinion of the Court, Judge Robert D. Sack reasoned that applying “copyright preemption principles to the facts of this case, the Firms’ claim for ‘hot news’ misappropriation fails because it is preempted by the Copyright Act.” *Barclays Capital*, 650 F.3d at 902.

⁴ See generally Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011) (providing a timely and thorough analysis of the hot news misappropriation tort and tracing its roots through much more recent cases).

⁵ Barclays Capital, the lead plaintiff in the case, boasts on its website of holding “a leading presence in all major markets and across all major lines of business including equities, credit, fixed income, mergers and acquisitions, commodities trading and foreign exchange.” Barclays Capital, *Our History, About Barclays Capital*, <http://www.barcap.com/About+Barclays+Capital/Our+Firm/Our+History> (last visited Feb. 15, 2011). The other plaintiffs in the case are Merrill Lynch, Pierce, Fenner & Smith Inc. and Morgan Stanley & Co. Inc. *Barclays Capital*, 650 F.3d at 876.

⁶ See generally Michelle Bond, *Aggregating without Aggravating*, AM. JOURNALISM REV., Oct. — Nov. 2011, at 8 (examining the practice of news aggregation and what it portends for the future of journalism).

⁷ The Theflyonthewall.com describes itself as “the fastest live news feed on the web” producing “an average of 800 stories, headlines and analyses a day, featuring analyst commentary, hot stocks, technical

simultaneously dodged opportunities to: 1) abolish altogether the hot news misappropriation tort in New York state;⁸ 2) confine it narrowly to cases involving competing organizations engaged in the news and journalism business;⁹ and 3) explore important First Amendment¹⁰ questions raised by the hot news tort.¹¹ The appellate court failed to take any of these three steps, while nonetheless holding that the seminal U.S. Supreme Court decision that gave rise to the hot news misappropriation tort nearly 100 years ago, *International News Service v. Associated Press*,¹² is “no longer good law”¹³ and lingers only as “a ghostly presence as a description of a tort theory.”¹⁴

The hot news doctrine, as Professor Victoria Smith Ekstrand writes in a dissertation-like tome devoted to the subject, is premised on the theory that “those who free-ride on the labor of a competitor may be liable for misappropriation.”¹⁵ Although developed in an era when print newspapers ruled the day and the telegraph provided the primary means of transporting news,¹⁶ the tort, Ekstrand observes, “has regained attention because it provides publishers an important weapon against those who steal fact-based works using . . . new technologies.”¹⁷ *Barclays* thus provided a propitious opportunity, even if only in mere *dicta*, to flesh out the limits – or even the non-existence – of the tort in the Internet era.

As Judge Sack saw it, however, the unfairness or injustice of the techniques used by Theflyonthewall.com (hereinafter “Fly”) simply didn’t matter in rendering the hot news tort a legal non-starter for the plaintiff Firms.¹⁸ Technology had outstripped the

and quantitative analysis, proprietary options commentary, market rumors, and much more.” Theflyonthewall.com, <http://www.theflyonthewall.com/> (last visited Feb. 15, 2011).

⁸ See *Barclays Capital*, 650 F.3d at 890 (concluding that it probably was without authority to repudiate the hot news tort as it exists under New York law, and reasoning that it was bound by an earlier Second Circuit ruling in *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997), that determined the tort survived in New York).

⁹ See *infra* Part III (contending that Judge Sack had the opportunity, based upon his framing of the *Barclays* case in journalistic terms, to confine it to situations like those in *International News Service v. Associated Press*, 248 U.S. 215 (1918), involving competing journalism organizations or providers of news).

¹⁰ The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹¹ See *infra* Part V (describing the First Amendment problems that afflict the hot news misappropriation tort).

¹² 248 U.S. 215 (1918).

¹³ *Barclays Capital*, 650 F.3d at 894.

¹⁴ *Id.*

¹⁵ VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE 6 (2005).

¹⁶ As Professor Ekstrand writes about the two key allegations in *INS*, “[f]irst, the AP accused INS of obtaining AP news from a telegrapher at an AP member newspaper in Cleveland. Second, the AP said INS telegraphers copied AP news from AP receiving equipment at the *New York American* in New York City.” *Id.* at 50.

¹⁷ *Id.* at 8.

¹⁸ As Judge Sack wrote, “[n]o matter how ‘unfair’ Motorola’s use of NBA facts and statistics may have been to the NBA – or Fly’s use of the fact of the Firms’ Recommendations may be to the Firms – then,

plaintiffs' business models and there was nothing that an aging tort from a bygone era of telecommunications could do to salvage a strategy that depended on the plaintiffs getting their own market recommendations out to their clients first, well before Fly announced those same recommendations to its own set of customers.¹⁹

Significantly, Judge Sack never reached or addressed the First Amendment considerations that swirl around the hot news tort, causing Corynne McSherry,²⁰ the intellectual property director for the Electronic Frontier Foundation, to lament:

[I]t still seems strange to us that this vestigial doctrine that clearly impacts speech about news of the day has never received First Amendment scrutiny. That scrutiny seems especially necessary now, when the Internet is increasingly allowing Americans to publicly gather, share, and comment on the news of the day. Misuse of the "hot news" doctrine could stifle this extraordinary growth of free expression.²¹

Kathleen Sullivan, the former dean of Stanford Law School who filed a friend-of-the-court brief in *Barclays* on behalf of Google and Twitter, trumpeted the Second Circuit's ruling as "a great decision for the free flow of information in the new media age."²² In stark contrast, Benjamin Marks, an attorney for the plaintiffs, expressed how his clients were "disappointed in the court's decision, and we are reviewing the decision to determine our next steps."²³ Marks added that "[e]ach of the plaintiffs remains committed to protecting their equity research against unauthorized appropriation. We note that the appellate court left undisturbed the trial court's determination that Theflyonthewall.com had infringed copyrights in equity research and left in place the injunction against further such infringement."²⁴

This Article examines two issues, both of which were unexplored and/or unexplained by the Second Circuit in *Barclays* and both of which beg for judicial clarification in the near future:

such unfairness alone is immaterial to a determination whether a cause of action for misappropriation has been preempted by the Copyright Act. The adoption of new technology that injures or destroys present business models is commonplace. Whether fair or not, that cannot, without more, be prevented by application of the misappropriation tort." *Barclays Capital*, 650 F.3d at 896.

¹⁹ *Id.*

²⁰ See Corynne McSherry, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/about/staff/corynne-mcsherry> (last visited Nov. 15, 2011) (describing McSherry as "Intellectual Property Director at EFF, specializing in intellectual property and free speech issues. Prior to joining EFF, Corynne was a civil litigator at the law firm of Bingham McCutchen, LLP").

²¹ Corynne McSherry, *The "Hot News" Doctrine After Fly On the Wall: Surviving, But on Life Support*, ELECTRONIC FRONTIER FOUNDATION, June 24, 2011, available at <http://www.eff.org/deeplinks/2011/06/hot-news-doctrine-surviving-life-support>.

²² Peter Lattman, *Big Banks Lose Ruling On Research*, N.Y. TIMES, June 21, 2011, at B1.

²³ Bob Van Voris, *Barclays, BofA Can't Block Flyonthewall.Com Reports on Stocks, Court Rules*, BLOOMBERG, June 20, 2011, available at <http://www.bloomberg.com/news/2011-06-20/flyonthewall-com-injunction-on-disseminating-news-overturned-by-u-s-court.html>.

²⁴ *Id.*

- 1) the definitional difficulties with the critical term at the heart of the tort – namely, “news” – and other journalistic jargon that was used repeatedly by the appellate court in *Barclays* to frame and inform its judgment on the hot news preemption issue;²⁵ and
- 2) the First Amendment freedom of expression interests that were at stake in the case but were never explicitly addressed.²⁶

On the first issue, this Article not only illustrates the problems for the legal system when it attempts to borrow and extrapolate terms from the realm of journalism to frame a tort cause of action, but it also argues that, had the Second Circuit better explicated the concept of news, it perhaps could have more readily dismissed the hot news misappropriation claim out of hand. On the second issue, this Article asserts that the development of a significant body of First Amendment doctrine subsequent to the high court’s 1918 ruling in *INS* today renders the hot news misappropriation seriously suspect, if not nugatory.²⁷

Part II of this Article provides a brief overview of the hot news tort, the facts in *Barclays* and the causes of action at stake in the case.²⁸ Part III then explores the Second Circuit’s framing of the case in terms borrowed from the realm of journalism, initially describing the concept of framing as it is used in communications research and then identifying the specific journalism concepts employed by the appellate court in *Barclays*.²⁹ Next, Part IV critiques the Second Circuit’s rather loose deployment of journalism terms—particularly the notion of news—arguing that lack of clear legal explication plagues the very notion of the hot news tort in the Internet era.³⁰ Part V then examines First Amendment issues that, although not addressed by the appellate court, are factually ripe for review.³¹ Finally, the Article concludes by urging courts in the coming years to resolve both the definitional difficulties and constitutional concerns that afflict the hot news misappropriation doctrine in the digital era.³²

II. TAKING STOCK OF THE LAWSUIT: A PRIMER ON THE FACTS AND ALLEGATIONS IN *BARCLAYS*

The plaintiffs (hereinafter “the Firms”) in *Barclays* are a trio of powerful financial institutions that “invest in research about companies and markets and then share their market-moving trading recommendations with their biggest trading customers. They make the recommendations public only later, after funding the research through trading

²⁵ See discussion *infra* Part III (addressing framing, both generally and more specifically within the context of the Second Circuit’s opinion in *Barclays*).

²⁶ See discussion *infra* Part V (addressing the First Amendment issues).

²⁷ *Id.*

²⁸ *Infra* notes 33 – 63 and accompanying text.

²⁹ *Infra* notes 64 – 106 and accompanying text.

³⁰ *Infra* notes 107 – 23 and accompanying text.

³¹ *Infra* notes 124 – 65 and accompanying text.

³² *Infra* notes 166 – 77 and accompanying text.

commissions.”³³ The Firms publish both research reports—often extensive analyses of specific publicly traded companies—and recommendations that upgrade or downgrade securities and are intended to induce the Firms’ clients to execute trades in those securities, thereby generating brokerage commissions for the Firms.

In contrast, defendant Fly was described by the Second Circuit as a news aggregator and, more specifically, as one of “several aggregators [that] compile securities-firm recommendations, including the Recommendations of the Firms, sometimes with the associated reports or summaries thereof, and timely provide the information to their own subscribers for a fee.”³⁴ The key to Fly’s business model is a newsfeed that, prior to the opening of the New York Stock Exchange, streams to its subscribers “more than 600 headlines a day in ten different categories, including ‘hot stocks,’ ‘rumors,’ ‘technical analysis,’ and ‘earnings,’”³⁵ as well as recommendations. Of its total content, Fly represented to the appellate court that the Firms’ recommendations amount to only about 2.5 percent.³⁶

The two legal theories at the heart of the case, as well as the factual premises behind them, were encapsulated succinctly by Judge Sack:

The Firms assert two causes of action in their complaint: copyright infringement based on Fly’s extensive excerpting of 17 research reports released in February and March 2005, and “hot news” misappropriation based on Fly’s continual electronic publication of the Firms’ Recommendations. The gravamen of the latter claim is that the aggregate widespread, unauthorized reporting of Recommendations by Fly and other financial news providers – including better known, better financed, more broadly accessed outlets – has threatened the viability of the Firms’ equity research operations.³⁷

New York is one of only five states today to explicitly recognize this latter theory of hot news misappropriation.³⁸ Although created in 1918 in the *INS* case³⁹ that stemmed from a battle between competing news services in which the International News Service was accused “of copying and distributing news stories from earlier editions of Associated Press publications,”⁴⁰ a New York federal district court in 2009 reaffirmed the tort’s viability in a dispute between the Associated Press (“AP”) and a Florida-based online

³³ L. Gordon Crovitz, *Information Age: Hot News: Technology Trumps Law*, WALL ST. J., June 27, 2011, at A15.

³⁴ *Barclays Capital, Inc. v. Theflyonthewall.com*, 650 F.3d 876, 882 (2d Cir. 2011).

³⁵ *Id.* at 883.

³⁶ *Id.*

³⁷ *Id.* at 885.

³⁸ Bruce Sanford et al., *Saving Journalism With Copyright Reform and the Doctrine of Hot News*, COMM. LAW., Dec. 2009, at 8, 9.

³⁹ *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

⁴⁰ *Scranton Times, L.P. v. Wilkes-Barre Publ’g Co.*, No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, *12 (M.D. Pa. Sept. 23, 2009).

news aggregator, All Headline News Corporation (“AHN”).⁴¹ That lawsuit, which settled in July 2009, involved the following allegations by the Associated Press:

AHN instructed its staff to rewrite the AP stories and to submit the rewritten text to AHN’s computers without AP’s name and copyright management information. AP further alleged that AHN then added its own byline to the rewritten version of the AP stories and that AHN then reproduced, distributed, publicly displayed and published the rewritten version of the AP stories in competition with AP’s news services.⁴²

One commentator observed that the “AP struck a powerful blow against at least one unsustainable online [journalism] model: an aggregator that commits large-scale copying, rewriting, and reselling of a newspaper’s stories.”⁴³ Another legal observer asserted that the case represented “the quintessential issue of hot news: the problem of non-paying customers who derive a profit from use of stolen content, in this case AP stories, which cost money to produce, and, as a result, rendering the news process economically infeasible.”⁴⁴ Veteran media defense attorney Bruce Sanford⁴⁵ wrote shortly after the case settled that the hot news tort appeared “to be gaining traction.”⁴⁶ Will it continue to gain momentum in *Barclays*?

Prior to trial in *Barclays*, defendant Fly essentially conceded the copyright claim by deserting the fair use defense with regard to the excerpted research reports.⁴⁷ The trial court, in turn, entered an injunction that forbade Fly from future infringement of the copyrighted elements in the Firms’ reports.⁴⁸

More importantly for purposes of this Article, the trial court also enjoined Fly from “reporting Recommendations for a period ranging from thirty minutes to several hours after they are released by plaintiffs” based on the New York hot news

⁴¹ See *Assoc. Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009) (writing that “[a] cause of action for misappropriation of hot news remains viable under New York law, and the Second Circuit has unambiguously held that it is not preempted by federal law”).

⁴² *AP and AHN Media Settle AP’s Lawsuit Against AHN Media and Individual Defendants*, ASSOCIATED PRESS, July 13, 2009, http://www.ap.org/pages/about/pressreleases/pr_071309a.html.

⁴³ Daniel S. Park, Note, *The Associated Press v. All Headline News: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism*, 25 BERKELEY TECH. L.J. 369, 393 (2010).

⁴⁴ Jeena Moon, Note and Recent Development, *The “Hot News” Misappropriation Doctrine, the Crumbling Newspaper Industry, and Fair Use as Friend and Foe: What is Necessary to Preserve “Hot News,”* 28 CARDOZO ARTS & ENT. L.J. 631, 634 (2011).

⁴⁵ See Bruce W. Sanford, BAKER HOSTETLER, <http://www.bakerlaw.com/brucewsanford> (providing a brief biography of Sanford’s legal career, noting that Sanford “has been described by *American Journalism Review* as one of the most accomplished press lawyers in the nation,” and adding that he “has represented President Clinton in the negotiation and publication of a book and won libel and copyright cases brought against First Lady Barbara Bush and John Grisham, respectively”).

⁴⁶ Sanford, *supra* note 38, at 9.

⁴⁷ See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 886 (writing that “Fly also abandoned the ‘fair use’ copyright-infringement defense, thereby effectively conceding liability on the copyright claim”).

⁴⁸ *Id.*

misappropriation claim.⁴⁹ The hot news tort, first articulated by the Supreme Court of the United States in 1918 in *International News Service v. Associated Press* (“INS”),⁵⁰ is now solely a matter of state law following the abolition of a federal common law in *Erie Railroad Co. v. Tompkins*.⁵¹ As the Second Circuit put it, “Some seventy-five years after its death under *Erie*, *INS* thus maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action.”⁵² Because the trial court determined that Fly had waived its First Amendment defenses to the hot news claim, the Second Circuit panel ignored that aspect of Fly’s argument and, instead, focused on whether the tort, as applied to Fly, was preempted by the federal Copyright Act.⁵³

The *Barclays* court noted that under the Copyright Act’s preemption provision,⁵⁴ a state-law claim is preempted “(i) if it seeks to vindicate ‘legal or equitable rights that are equivalent’ to one of the bundle of exclusive rights already protected by copyright law . . . and (ii) if the work in question is of the type of works protected by the Copyright Act.”⁵⁵ Thus, if the work involved in the state law claim falls within the subject matter of copyright and the state claim regulates activity roughly equivalent to one of the exclusive rights, the state claim is appropriately preempted since it is considered duplicative of federal copyright law and interferes with exclusive federal regulation of copyright. These two requirements – the “general scope” prong and the “subject matter” condition – are supplemented, the *Barclays* court observed, by a so-called extra-element test.⁵⁶ This third requirement holds that state-law claims can survive federal preemption if the state claim requires some extra element beyond simple reproduction, distribution or one of the other exclusive rights of copyright holders under the Copyright Act.⁵⁷

Following the reasoning of the Second Circuit’s 1997 decision in *National Basketball v. Motorola, Inc.* (“*NBA*”),⁵⁸ the *Barclays* court found that the Firms’ hot news claim met the subject matter test because the works in question were “original works of authorship fixed in a tangible medium of expression,”⁵⁹ and thus fell within the ambit of copyright law, even if the individual Recommendations themselves were uncopyrightable

⁴⁹ *Id.* at 887.

⁵⁰ 248 U.S. 215 (1918).

⁵¹ 304 U.S. 64 (1938).

⁵² *Barclays Capital*, 650 F.3d at 894.

⁵³ *See id.* at 890 (writing that “[t]he issue we address, however, is federal preemption. As a federal court, we answer that question ourselves”).

⁵⁴ 17 U.S.C. § 301 (2011).

⁵⁵ *Barclays Capital*, 650 F.3d at 892.

⁵⁶ *Id.* at 893.

⁵⁷ *See* 17 U.S.C. § 106 (2010) (granting copyright owners the exclusive rights, *inter alia*, to reproduce, distribute, perform, and prepare derivative works of the copyrighted work).

⁵⁸ 105 F.2d 841 (2d Cir. 1997). The *Fly* court declined to follow exactly the *NBA* court’s articulation of several different iterations of a five-part (and, in one version, three-part) test to determine if an *INS*-like tort could survive preemption under the “extra element” standard. Instead, the court found the multi-part *NBA* formulation to be *dicta* and thus not binding. In a concurring opinion, Judge Reena Raggi opined that the *NBA* test was in fact not *dicta*, and that applying it led to the conclusion that the Firms’ hot-news claim was preempted due to the absence of direct competition between the Firms and Fly. *Barclays Capital*, 650 F.3d at 907–915 (Raggi, J., concurring).

⁵⁹ 17 U.S.C. § 102 (2010).

facts in isolation.⁶⁰ The “general scope” requirement was also met, the panel found, since the state hot-news claim was triggered by acts analogous to the exclusive copyright bundle of rights, such as reproduction, distribution, etc.⁶¹

Because the “subject matter” and “general scope” requirements were met, the Firms could only avoid preemption if their hot news claim satisfied the extra-element test. The Second Circuit panel ruled that the hot news claim in *Barclays* was not analogous to an *INS*-type, non-preempted claim because Fly was not free-riding on the efforts of the Firms. Instead, Judge Sack explained that Fly “is collecting, collating and disseminating factual information – the facts that Firms and others in the securities business have made recommendations with respect to the value of and the wisdom of purchasing or selling securities – and attributing the information to its source.”⁶² Because Fly’s activities in reporting the Recommendations were not like those in the seminal *INS* case but were, in contrast, similar to what traditional news organizations routinely do with respect to factual information, the hot news claim was preempted by the Copyright Act.⁶³

With this overview of the case in mind, the Article now examines more closely the journalistic vernacular and language employed by the Second Circuit to frame the dispute in *Barclays*. In the process, it attempts to expose the slipperiness of the critical concepts at the heart of the hot news tort – a slipperiness that ultimately plagues the tort’s application to a set of facts like those in *Barclays*.

III. FRAMING A CASE IN JOURNALISTIC LINGO: HOW THE SECOND CIRCUIT EMPLOYED JOURNALISM VERNACULAR TO ANALYZE THE QUESTION OF HOT NEWS PREEMPTION

This part has two sections, the first of which briefly introduces the concept of framing in communication research. The second section then highlights the journalism terms and language employed by the Second Circuit in *Barclays* and, in particular, provides the meaning or meanings of those terms as they traditionally have been used in journalism. In the process, the second section demonstrates some of the definitional difficulties that inevitably plague the hot news misappropriation tort.

A. Framing

In a recent article, George Washington University Professor Robert Entman writes that framing “involves selecting a few aspects of a perceived reality and connecting them together in a narrative that promotes a particular interpretation. Frames can perform up to four functions: define problems, specify causes, convey moral assessments, and endorse remedies.”⁶⁴ Frames, in turn, “introduce or raise the salience or

⁶⁰ *Barclays Capital*, 650 F.3d at 902.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 905 – 06.

⁶⁴ Robert M. Entman, *Media Framing Biases and Political Power*, 11 JOURNALISM 389, 391 (2010).

apparent importance of certain ideas, activating schemas that encourage target audiences to think, feel, and decide in a particular way.”⁶⁵ It is a concept that is used across disciplines.⁶⁶

Framing is prevalent in the practice of law.⁶⁷ As a 2007 article in the *International Journal of Speech, Language & the Law* notes, “[l]awyers make strategic linguistic choices that will reliably trigger either positive or negative associations to the subject-matter being dealt with in the trial.”⁶⁸ Law itself, of course, is “a language system. The vernacular staples of law – rights, duties, privileges, prohibitions, remedies, and so on – construct and express ideas of social conflict and their resolution.”⁶⁹ The venerable marketplace of ideas theory⁷⁰ is itself a framing metaphor that provides a controlling image and representation of free speech issues and how we understand them.⁷¹ Indeed, metaphors, as one type of framing device, “play an important role in shaping the development and interpretation of communication law and policy.”⁷²

Just as “journalists construct the symbolic representations of society that members of the public use to make sense of events and issues,”⁷³ so too do judges when they write opinions that help attorneys and the parties involved try to make sense of the facts, issues and holdings in any given case. As Professor Derigan Silver wrote in 2010, “[o]ne way judges have the ability to influence case outcomes is by strategically identifying what

See Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 52 (1993) (asserting that “[t]o frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described”).

⁶⁵ Robert M. Entman, *Framing Bias: Media in the Distribution of Power*, 57 J. COMM. 163, 164 (2007). See generally Thomas Patterson & Philip Seib, *Informing the Public*, in THE PRESS 189, 193 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (writing that “framing is the process by which journalists give interpretation or definition to an event or development in order to provide an explanation or judgment about it” and contending that “it is the frame, as much as the event or development itself, which affects how the citizen will interpret and respond to news events”).

⁶⁶ See Jennifer L. Lambe & Myriah S. Lipke, *A Balancing Act: The Impact of News Framing on Support for Requiring Internet Filters in Public Libraries and Schools*, 43 FREE SPEECH YEARBOOK 2006 192, 192 (2006) (observing that “[f]raming is a concept used across disciplines, including communication, sociology, psychology and political science”).

⁶⁷ See generally Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 551 – 56 (1998) (discussing the framing of legal options with metaphors and, specifically, within the metaphor of the information superhighway).

⁶⁸ Michelle Aldridge and June Luchjenbroers, *Linguistic Manipulation in Legal Discourse: Framing Questions and ‘Smuggling’ Information*, 14 INT’L J. SPEECH, LANGUAGE & L. 85, 86 (2007).

⁶⁹ Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOCIOLOGY 1718, 1727 (2006).

⁷⁰ The marketplace of ideas theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH* 2 (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 237 (1991).

⁷¹ Donna L. Dickerson, *Freedom of Expression and Cultural Meaning: An Analysis of Metaphors in Selected Supreme Court Texts*, 1 COMM. L. & POL’Y 367, 368 – 69 (1996).

⁷² Bill D. Herman, *Breaking And Entering My Own Computer: The Contest Of Copyright Metaphors*, 13 COMM. L. & POL’Y 231, 239 (2008).

⁷³ Carolyn Bronstein, *Representing the Third Wave: Mainstream Print Media Framing of New Feminist Movement*, 82 JOURNALISM & MASS COMM. Q. 783, 785 (2005).

legal issues are presented by a case or ‘framing’ the case.”⁷⁴

In *Barclays*, as described below, the appellate court defined the problems, specified their causes and addressed the moral dimensions—three of the four framing functions Entman identifies⁷⁵—with concepts and terms borrowed from the realm of journalism. At first blush, such application of journalism terms to the situation in *Barclays* seems unremarkable. After all, the name of the tort under consideration—hot news misappropriation—includes the word “news.” But what is remarkable is the court’s rather sloppy use of those terms, something explored in Part IV of this Article, and the disconnect between their legal and journalistic usages. Before reaching Part IV, however, the next section illustrates the use of journalism nomenclature by the Second Circuit in *Barclays* and then considers the journalistic definitions and issues surrounding the terms used by the court.

B. Using Journalistic Language to Frame the Barclays Opinion

1. The Appellate Court’s Use of Journalistic Language

For the Second Circuit, the dispute in *Barclays*, as well as its outcome, was framed as a battle over news—in particular, the ability to *make* news, to *break* news, to *gather* news, to *report* news and to *attribute* news to its source, as the following quotations indicate:

• “*The Firms are making the news; Fly . . . is breaking it.*”⁷⁶ This assertion suggests that the plaintiff Firms in *Barclays* are in the news business and, in particular, that they are in the business of making news. These assumptions are challenged in Part IV.⁷⁷ Perhaps, as Part IV suggests, it is much more accurate to characterize the Firms as being in either the information or opinion businesses, rather than the news business. Similarly, a Las Vegas odds maker is not in the news business; he is in the speculation and gambling business. It is only when someone else in the news media chooses to publish the odds maker’s predictions on future events that the predictions become news.

Lindsay Lohan, of course, is not in the news business either. She is merely the *subject* of news coverage—the *object* of news media attention.⁷⁸ It is only when members

⁷⁴ Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL’Y 129, 141 (2010).

⁷⁵ Entman, *supra* note 64, at 391.

⁷⁶ *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 902 (2d Cir. 2011) (emphasis added).

⁷⁷ *Infra* Part IVB.

⁷⁸ Lohan is a frequent subject of national news media coverage, as one recent example illustrates. *See, e.g.*, Dave Itzkoff, *Lohan Goes to Jail. No, Wait, She’s Out Again*, N.Y. TIMES, Nov. 7, 2011, at C3 (reporting that the “revolving door of justice continued to spin for Lindsay Lohan as the troubled actress spent about five hours in a Los Angeles County jail before her release on Monday morning”); Frank Lovece, *Lindsay Lohan Jailed For Less Than 5 Hours*, NEWSDAY (N.Y.), Nov. 7, 2011, at A20 (reporting that Lohan was “released from her 30-day jail sentence yesterday after serving fewer than five hours, due to systemic overcrowding - and announced she is appearing nude in Playboy next month”); Rick Rojas and

of the news media exercise their judgment—however flawed that might be in the case of celebrity coverage—to cover Ms. Lohan’s mishaps and legal misadventures that news actually is being “made.”

If this line of logic is correct, then Barclays Capital is not making news. Its recommendations—its opinions and information—are converted into news only when they are selected for reportage by Fly and other news media outlets. In other words, Barclays Capital, like Lindsay Lohan, is merely the object of news media attention. Viewed in this light, it is perhaps more accurate to say that Fly both makes *and* breaks the news.

Even if one disagrees with the logic, this way of viewing the case and, in particular, Judge Sack’s use of news as a concept, illustrates the tortured verbal gymnastics that afflict the hot news tort and demands further judicial scrutiny.

- “*A Firm’s ability to make news—by issuing a Recommendation that is likely to affect the market price of a security—does not give rise to a right for it to control who breaks that news and how.*”⁷⁹ What is notable here is that making news is equated with issuing an opinion—a recommendation—about a possible future financial transaction, rather than being equated with reporting on public events of the day, which is how the *INS* court defined news in the case that gave rise to the hot news tort.⁸⁰ In brief, there is a vast disconnect between how news was conceptualized by the U.S. Supreme Court in *INS* in 1918 and how it was characterized by the Second Circuit in *Barclays* in 2011.

- “*Fly, having obtained news of a Recommendation, is hardly selling the Recommendation ‘as its own.’ . . . It is selling the information with specific attribution to the issuing Firm.*”⁸¹ Judge Sack here again frames the case with the term “news,” but his use in this instance seemingly is different from the uses described above. Here what Judge Sack appears to mean is that Fly *learned about* a Recommendation when he uses the term “obtained news.” But if the Recommendation itself is news, as Sack elsewhere characterizes it,⁸² then what this sentence translates to once unpacked is: “Fly, having obtained news of news . . .” This adds to the semantic quagmire that permeates and plagues the hot news tort.

- “[*T*]he Firms seem to be asking us to use state tort law and judicial injunction to enable one class of traders to profit at the expense of another class based on their court-enforced unequal access to knowledge of a fact – the fact of the Firm’s Recommendation.”⁸³ In this sentence, Judge Sack seems to blur the distinction between news and facts; he refers to “the fact of the Firm’s recommendation,” while the recommendation itself is an opinion produced for something other than its news value. In

Richard Winton, *Lohan Lohan Out of Jail After Serving Less Than Five Hours*, L.A. TIMES, Nov. 7, 2011, at AA3 (reporting on Lohan’s release from jail “after serving 4 1/2 hours of a 30-day sentence for violating her probation in jewelry-theft and drunk-driving cases”).

⁷⁹ *Barclays Capital*, 650 F.3d at 907 (emphasis added).

⁸⁰ See *infra* notes 87-90 and accompanying text.

⁸¹ *Barclays Capital*, 650 F.3d at 903 (emphasis added).

⁸² *Supra* note 76 and accompanying text.

⁸³ *Barclays Capital*, 650 F.3d at 896, n.29 (emphasis added).

brief, while it is a fact that the Firms make recommendations, the recommendations themselves are opinions.

In addition to these instances of Judge Sack framing the case in language borrowed from the world of journalism, two other instances with *Barclays* include:

- “Fly is reporting financial news – factual information on Firm Recommendations – through a substantial organizational effort. Therefore, Fly’s service – which collects, summarizes, and disseminates the news of the Firms’ Recommendations – is not the ‘INS-like’ product that could support a non-preempted cause of action for misappropriation.”⁸⁴

- “It is Fly’s accurate attribution of the Recommendation to the creator that gives this news its value.”⁸⁵

Did the use of such journalistic nomenclature play an important role in the resolution of the case? No less than First Amendment Scholar and Furman University President Rodney Smolla asserts that “the distinction between making and breaking news recently proved critical”⁸⁶ in *Barclays*. It thus is helpful to explore how journalists conceive of and deploy some of the key concepts that Judge Sack borrowed for the Second Circuit’s analysis in the case.

2. A News Tort That Fails to Adequately Define News?

The most pivotal and important concept of the hot news misappropriation tort, of course, is that of news, which Judge Sack contends is something that the plaintiff-investment firms “make” and that the defendant, Fly, “breaks.” The problem, however, is that the appellate court in *Barclays* failed to define what it meant by news.

Judge Sack’s only indication of what news means came when he quoted the Supreme Court’s 1918 decision in *International News Service* – “[T]he news element – the information respecting current events contained in the literary production – is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the *history of the day*.”⁸⁷ The emphasized Latin phrase means “belonging to the public: subject to a right of the public to enjoy.”⁸⁸ As such, it suggests that news is a report of

⁸⁴ *Id.* at 905 (emphasis added).

⁸⁵ *Id.* at 903 (emphasis added).

⁸⁶ Rodney Smolla, *Making News or Breaking News*, MEDIA INSTITUTE, Aug. 16, 2011, available at <http://www.mediainstitute.org/IPI/2011/081611.php>.

⁸⁷ *Barclays Capital*, 650 F.3d at 903 (quoting *International News Service v. Assoc. Press*, 248 U.S. 215, 234 (1918)).

⁸⁸ *Publici Juris*, Merriam-webster.com, <http://www.merriam-webster.com/dictionary/publici%20juris> (last visited Feb. 17, 2012).

matters that are common property⁸⁹ or that belong in the public domain,⁹⁰ and that news ultimately is a report on the history of the day.

This definition of news is troublesome for two reasons. First, it clearly does not comport or fit with the product generated by the Firms that was at issue in *Barclays*; the Firms' recommendations are in no way reports on current events or histories of the day that the public has a right to enjoy. In contrast, the recommendations are predictions, prognostications and opinions of what might transpire in the future regarding financial markets, stocks and funds that a select group of clients has the right to enjoy.

Second, should the hot news tort really rely on this aging definition from *INS* today? After all, Judge Sack held that "*INS* itself is no longer good law,"⁹¹ so there certainly is no requirement or need for the court to rely on it as precedent. On the other hand, as Part IV later asserts, applying this same definition would eliminate plaintiffs like Barclays Capital from asserting the hot news tort because they simply are not involved in publishing reports about the history of the day and current events.⁹²

From a journalistic perspective, such a nearly century-old definition seems unsatisfactory. As Professor Katherine Fry wrote in 2008:

A mere decade ago, news was in some ways a different genre than it is today. It was not defined the same way because it was produced and distributed by a much more narrowly-defined set of journalism professionals via traditional news outlets: newspapers, magazines, radio and television. Today there are many more outlets for producing and circulating information. Most of these are digital.⁹³

As addressed later in Part IV, the shifting nature of technology between *International News Service* and *Barclays* would seem, in accord with Professor Fry's observation, to militate in favor of the law updating its own conception of news within the hot news tort itself. Michael Schudson observes that "the distinction among tweet, blog post, newspaper story, magazine article and book has blurred."⁹⁴ Ellen Hume adds that technological changes require a new paradigm for news if news "is to be here tomorrow as something different from pure entertainment or propaganda."⁹⁵

⁸⁹ Cf. Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 563 (2006) (observing that "[w]ords and symbols in regular use were considered 'common property' or 'publici juris,' free for everyone to use and thus incapable of private appropriation").

⁹⁰ Cf. Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 787 (2009) (writing that the term public domain "has gradually displaced other, older terms such as 'public property' and publici juris as the preferred catch-all phrase for material generally unprotected by IPRs" [intellectual property rights]).

⁹¹ *Barclays Capital Inc. v. Theflyonthewall.com*, 650 F.3d 876, 892 (2d Cir. 2011).

⁹² *Infra* Part IV.

⁹³ Katherine G. Fry, *News as Subject: What is It? Where is It? Whose is it?: The Case of the Virginia Tech Massacre*, 9 JOURNALISM STUD. 545, 546 (2008).

⁹⁴ MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 210 (2d ed. 2011).

⁹⁵ Ellen Hume, *The New Paradigm for News*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 152-53 (1996).

While Part IV of this Article addresses the First Amendment interests at stake, it is important to note judicial reticence to defining news – the U.S. Supreme Court has observed in the realm of copyright law that courts “should be chary of deciding what is and what is not news.”⁹⁶ How then can the common law sustain a tort called “hot news” if, in fact, the legal system cannot define news?

Some state legislative bodies, however, have defined news as part of their shield laws,⁹⁷ and thus creating a definition is not an impossibility for the hot news tort. Yet when it comes to defining the closely related concept of newsworthiness in the realm of privacy torts, “most judges share the Supreme Court’s reluctance to engage in line drawing over newsworthiness and simply accept the press’s judgment about what is and is not newsworthy.”⁹⁸ While Professor Amy Gajda points out that such judicial deference to journalists in defining newsworthiness in the realm of privacy may be waning, she nonetheless adds that “[e]ven today, most courts continue to side with the media in determining newsworthiness, sometimes even in cases involving deeply private disclosures.”⁹⁹

Compounding the problem of the law borrowing the word “news” from journalism is that journalists themselves have a difficult time defining news. As communication scholars Kathleen Hall Jamieson and Karlyn Kohrs Campbell write, “Just what is news? Despite many efforts, no neat, satisfactory answer to that question can be given.”¹⁰⁰ Journalists thus typically rely on a series of variables to determine if a story qualifies as news: impact, immediacy, proximity, prominence, novelty, conflict, and emotions.¹⁰¹

The bottom line is that if the hot news misappropriation tort is to remain at all viable today, courts must do a better job defining the type of content that constitutes “news” and thus falls within the ambit of the tort. As Part IV later argues, there is good reason to argue that the hot news misappropriation claim brought by Barclays Capital

⁹⁶ *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 215 (2d Cir. 1983) (Meskill, J., dissenting)).

⁹⁷ FLA. STAT. §90.5015 (1) (a) - (b) (2010) (limiting the privilege to those who are “regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news” and defining “news” as “information of public concern relating to local, statewide, national, or worldwide issues or events”); LA. REV. STAT. ANN. §45:1459 (a) (2010) (defining “news” as “any written, oral, pictorial, photographic, electronic, or other information or communication, whether or not recorded, concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare”); N.Y. CIV. RIGHTS LAW §79-h (a) (8) (McKinney 1992) (defining “news” as “written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare”).

⁹⁸ Diane Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 353 (1983).

⁹⁹ Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1104 (2009).

¹⁰⁰ KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS AND THE INTERNET* 40 (6th ed. 2006).

¹⁰¹ TIM HARROWER, *INSIDE REPORTING: A PRACTICAL GUIDE TO THE CRAFT OF JOURNALISM* 19 (2d ed. 2010).

never should have been allowed to proceed at all, since the content Barclays produces is not even news in the first place.¹⁰²

3. The Making News vs. Breaking News Dichotomy

The notion of breaking the news – recall Judge Sack’s framing the conflict as one between making news (what Sack alleges Barclays Capital does) and breaking news (what he contends Fly does)¹⁰³ – and scooping the competition has a long, storied tradition in journalism.¹⁰⁴ Journalism scholars Justin Lewis and Stephen Cushion assert in a recent article:

If immediacy has become the new life-blood of 24-hour news culture, breaking news is its apotheosis. There is nothing very surprising about this – the urgency and excitement suggested by the idea of breaking news is steeped in journalistic tradition. The “scoop,” the “exclusive” and the competitive ethos between news outlets all find echoes in the notion of breaking news.¹⁰⁵

In the Internet era, journalists often break news – in accord with Judge Sack’s description of Fly’s breaking of news – online rather than in hard-copy print.¹⁰⁶ Judge Sack thus imbued his framing in *Barclays* with another trope from the world of journalism.

4. Summary

With all of this effort by Judge Sack to frame the dispute in *Barclays* in terms and concepts borrowed from the province of journalism, one would anticipate that the hot news tort – a tort with “news” in its name – would only apply to cases involving news organizations. But as the next part suggests, this arguably was not the case in *Barclays* and Judge Sack, who spent so much effort using journalistic vernacular, failed to limit the tort to lawsuits involving competing journalism organizations.

¹⁰² *Infra* pp. 17-19.

¹⁰³ *Supra* note 76.

¹⁰⁴ Indeed, “the issue of when to break news so the competition does not steal it has been debated for decades by wire services and broadcast outlets. And as more and more newspapers launch their on Web sites, print operations are confronting their own need for immediacy.” Kelly Heyboer, *When Posting a Scoop Backfires*, AM. JOURNALISM REV., Nov. 1999, at 30, 31. See generally, e.g., Don Blair, *The News Scoop to End All News Scoops*, TELEVISION Q., Spring–Summer 2005, at 63 (providing a detailed example and analysis of one famous news scoop).

¹⁰⁵ Justin Lewis & Stephen Cushion, *The Thirst to be First: An Analysis of Breaking News Stories and Their Impact on the Quality of 24-hour News Coverage in the UK*, 3 JOURNALISM PRAC. 304, 304 (2009).

¹⁰⁶ See generally Donna Shaw, *Online Scoops*, AM. JOURNALISM REV., Oct.–Nov. 2006, at 58 (examining how traditional journalists break news on the Internet).

IV. THE SEMANTIC MORASS AND PROBLEMS PRODUCED WHEN THE LAW BORROWS TERMS FROM JOURNALISM THAT LACK CLEAR OR DEFINITIVE EXPLICATION

The pivotal problem with the Second Circuit's deployment of concepts like making news and breaking news to frame the legal issues is that it assumes that Barclays Capital and the other plaintiff firms are, in fact, in the news business – the journalism business – in the first place. In fact, they are not.

Instead, they are in the *opinion business* – rendering judgments and evaluations about stocks and other investments for purposes of propriety profit, not for the public good – with those opinions disseminated for *private* consumption. As intellectual property attorney Rod Berman points out, Barclays Capital provides its opinions “as a service to its clients to encourage them to invest with Barclays. It employs sophisticated, password-protected Internet platforms to minimize the chances that investors who are not clients of Barclays will gain access to its recommendations before the New York Stock Exchange opens.”¹⁰⁷ Such security measures indicate that the opinions dispensed by Barclays are not intended to enlighten the public or the citizenry at large, but rather are designed for a select few individuals who hope to turn a monetary profit.

In stark contrast, as Bill Kovach and Tom Rosenstiel write, “[t]he primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.”¹⁰⁸ And if Michael Schudson is correct that “news is the product of journalistic activity,”¹⁰⁹ then for Judge Sack to characterize Barclays Capital as “making the news”¹¹⁰ is patently incorrect for the simple reason that Barclays Capital is not engaged in journalistic activity.

It thus may be considered somewhat disingenuous to call the tort “hot news” if plaintiffs who are not dispensing “news” are able to plead a claim for it, even if that claim is later preempted. Because Judge Sack specifically wrote that he was not bound by the elements of the hot news test fashioned by the Second Circuit in *National Basketball Association v. Motorola, Inc.*,¹¹¹ he had the opportunity – even if it was only in dicta – to try to cabin and confine the tort to the same type of factual situations and scenarios from which it originally sprung back in 1918, namely to clashes between competitors engaged

¹⁰⁷ Rod S. Berman, *Some Like It Hot: Digital Technology and the Reach of the Tort of the Misappropriation of Hot News*, 28 COMPUTER & INTERNET LAW. 14, 14 (Apr. 2011).

¹⁰⁸ BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 12 (Rev. Update ed. 2007).

¹⁰⁹ MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 4 (2d ed. 2011).

¹¹⁰ *Barclays Capital, Inc. v. Theflyonthewall.com*, 650 F.3d 876, 902 (2d Cir. 2011).

¹¹¹ 105 F.3d 841 (2d Cir. 1997). Judge Sack explained that the Second Circuit's language in *NBA*:

...regarding the elements that might in some later case allow a claim to avoid preemption, and its discussion of why such an exception to preemption was narrow, were *useful commentaries* on the reasoning and possible implications of the Court's holding. *But the language itself was not meant to, and did not, bind us, the district court, or any other court to subsequently consider this subject.*

Barclays Capital, 650 F.3d 876, 899, n.32 (emphasis added).

in the business of producing news stories about daily events.

Recall that Justice Pitney in *INS* defined news as “information respecting current events”¹¹² and “the history of the day.”¹¹³ If Judge Sack is correct that *INS* still remains as “a ghostly presence as a description of a tort theory,”¹¹⁴ then perhaps the “description” of news in *INS* confines the “tort theory” to situations in which both the plaintiff and the defendant are engaged in the business of producing news.

While Fly may have been in the news business, however one characterizes the business in which Barclays Capital trades, it certainly is a far cry from the news businesses that gave rise to the hot news misappropriation in *INS*. Justice Pitney wrote in *INS* that “[w]hat we are concerned with is *the business of making it known to the world*, in which *both parties to the present suit are engaged*.”¹¹⁵ While that was the case for both the Associated Press and the International News Service in 1918, it was definitely not the case for Barclays Capital in 2011. Barclays Capital was not in the business of making anything “known to the world,”¹¹⁶ but was, instead, in the business of making opinions known to a select few clients.

If the elements from *NBA* are not binding¹¹⁷ and, in turn, if *INS* still remains as a ghostly presence useful in describing the theory of the hot news tort,¹¹⁸ then it is possible to limit the hot news tort to situations in which, to quote *INS*, “both parties”¹¹⁹ are engaged in the news business. If Judge Sack had adopted this interpretation, then Barclays Capital would never have been able to succeed with its hot news claim because it is not in the news business.

Justice Pitney added in *INS* that the business of the Associated Press and the International News Service “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*.”¹²⁰ By way of contrast, Barclays Capital was not transmitting any information about “daily events of the world,”¹²¹ but rather was transmitting opinions and predictions to be used for future sales and transactions. Furthermore, Barclays Capital’s audience was not millions of people sitting at their breakfast tables, but rather a finite number of clients likely poised at their computers ready to make financial transactions.

INS dealt with actual newspaper stories, not advice about when to buy or sell stocks. As Professor Douglas Baird describes the key facts in *INS*, the case:

¹¹² *International News Service v. Assoc. Press*, 248 U.S. 215, 234 (1918).

¹¹³ *Id.*

¹¹⁴ *Barclays Capital*, 650 F.3d at 894.

¹¹⁵ *International News Service*, 248 U.S. at 235 (emphasis added).

¹¹⁶ *Id.*

¹¹⁷ *Supra* note 58.

¹¹⁸ *Barclays Capital*, 650 F.3d at 894.

¹¹⁹ *International News Service*, 248 U.S. at 235.

¹²⁰ *Id.*

¹²¹ *Id.*

arose during World War I, when British censors barred the Hearst news service, INS, from sending cables about the war to the United States. To provide news about the war to its member newspapers, INS bought early east coast editions of newspapers published by subscribers to the Associated Press (“AP”), paraphrased the war news, and sent the stories to its own newspapers. Because some INS newspapers on the west coast came out before rival AP newspapers in the same cities, INS newspapers sometimes reported war news before those served by AP.¹²²

As asserted earlier in the analogy to celebrity Lindsay Lohan not being in the news making business but merely being the focus of news media organizations,¹²³ Barclay Capital’s recommendations are merely the subject or object of news media coverage. Those recommendations only become news when they are selected for reportage by journalism organizations like Fly. If this is the case, then Judge Sack quickly could have dismissed Barclays Capital’s hot news claim for the simple reason that: *The hot news tort is intended to apply only to news media organizations, as was the case in INS.*

V. HOT NEWS VERSUS THE FIRST AMENDMENT: A CONFLICT BETWEEN TORT AND CONSTITUTIONAL PRINCIPLES

Although the Second Circuit in *Barclays* declined to explore the First Amendment difficulties posed by the hot news doctrine,¹²⁴ the free speech obstacles facing the tort nonetheless loom large and it finally is time for a court to squarely address them.¹²⁵ In the very case that gave rise to the tort nearly 100 years ago, counter-speech champion Justice Louis Brandeis¹²⁶ argued in dissent that “the rule for which the plaintiff contends would effect [sic] an important extension of property rights and a corresponding curtailment of the *free use of knowledge and of ideas.*”¹²⁷ He further observed that the “general rule of law is, that the noblest of human productions – knowledge, truths

¹²² Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 412 (1983).

¹²³ *Supra* note 78 and accompanying text.

¹²⁴ See *Barclays Capital*, 650 F.3d at 37 (noting that “Fly purported to waive its First Amendment defenses”).

¹²⁵ See Clay Calvert et al., *All the News That’s Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture*, 10 WAKE FOREST INTELL. PROP. L.J. 1, 17 (2009) (observing that the majority opinion in *INS* “has been criticized as being at odds with the First Amendment freedom of speech”).

¹²⁶ Brandeis wrote for the nation’s high court eighty-five years ago, “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See generally Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (2000) (providing an overview of the counterspeech doctrine and examples of its use).

¹²⁷ *International News Service v. Assoc. Press*, 248 U.S. 215, 263 (1918). (Brandeis, J., dissenting) (emphasis added).

ascertained, conceptions, and ideas – become, after voluntary communication to others free as the air to common use.”¹²⁸

Despite this powerful admonishing language at the doctrine’s inception, the fact is that in 1918, when *INS* was decided, modern First Amendment jurisprudence was barely a glimmer in the eyes of the high court’s justices.¹²⁹ For instance, seminal decisions in the clear-and-present danger cases of *United States v. Schenck*¹³⁰ and *Abrams v. United States*¹³¹ would not be rendered until the following year. The leading prior restraint decision of the first half of the twentieth century, *Near v. Minnesota*,¹³² would not be handed down for more than a decade, and it would be more than a half-century before commercial speech would receive any First Amendment protection.¹³³

Beyond the verbiage and vernacular problems described earlier that plague it,¹³⁴ the hot news doctrine simply has not undergone thorough First Amendment review and evaluation by the U.S. Supreme Court since the development of strict scrutiny¹³⁵ and other rigorous First Amendment doctrines. As an amicus brief filed by the Citizen Media Law Project and several other organizations in *Barclays* asserted, there is:

an uneasy tension between the so-called “hot news misappropriation” doctrine and the First Amendment, one that has not yet been carefully explored by any court. In order to protect freedom of speech and the press, courts applying the hot news misappropriation doctrine must consider the strong First Amendment protections the Supreme Court has developed to help encourage and protect the sharing of truthful statements on matters of public concern.¹³⁶

Moreover, although the hot news doctrine is sometimes characterized as a property right, that description must not shield it from demanding First Amendment scrutiny. As UCLA Professor Eugene Volokh has noted, “[c]alling a speech restriction a

¹²⁸ *Id.* at 250.

¹²⁹ Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 490 (2011).

¹³⁰ 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”).

¹³¹ 250 U.S. 616 (1919).

¹³² 283 U.S. 697 (1931).

¹³³ *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹³⁴ *Supra* Part III.

¹³⁵ See generally Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349 (2011) (providing an overview of the strict scrutiny standard).

¹³⁶ Brief Amici Curiae of Citizen Media Law Project, Electronic Frontier Foundation, and Public Citizen, Inc. in Support of Neither Party at 1, *Barclays Capital, Inc. v. Theflyonthewall.com* (No. 10 – 1372) (filed June 21, 2010), available at https://www.eff.org/sites/default/files/filenode/barclays_v_fly/FlyBriefFinal.pdf.

‘property right’ . . . doesn’t make it any less a speech restriction, and it doesn’t make it constitutionally permissible.”¹³⁷

State-enforced tort law – in *Barclays*, New York’s recognition and implementation of the hot news misappropriation tort – must be balanced against First Amendment free speech concerns. That, of course, is the fundamental lesson from decades-old cases such as *New York Times Co. v. Sullivan*¹³⁸ and *Hustler Magazine v. Falwell*,¹³⁹ in which the Supreme Court held, respectively, that the torts of defamation¹⁴⁰ and intentional infliction of emotional distress¹⁴¹ are cabined by First Amendment interests.

Assuming the hot news tort underwent a modern-day First Amendment analysis under contemporary speech doctrine, its constitutionality seems decidedly dubious. The tort clearly imposes a content-based restriction on speech because it targets specific content in which the hot-news plaintiff claims a quasi-property interest. In *Barclays*, for instance, that content consisted of financial recommendations on specific companies and stocks.¹⁴²

Moreover, since that content purportedly is “news” as characterized, at least, by the Second Circuit – that is, truthful information about public matters, namely stocks and monetary funds – it is necessarily fully protected speech and should be subject to the strict scrutiny test. As the U.S. Supreme Court noted in *Smith v. Daily Mail Publishing*

¹³⁷ 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, 1063 (2000).

¹³⁸ 376 U.S. 254 (1964). In *Sullivan*, a defamation case in which Alabama applied a strict liability fault standard, the Court held that:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279 – 280. See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 906 (2001) (calling *Sullivan* “perhaps the most important First Amendment case of the modern era”); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 601, n.332 (2001) (calling *Sullivan* “[t]he most important First Amendment case of recent times”).

¹³⁹ 485 U.S. 46 (1988). In *Falwell*, the high court held that when public figures and public officials sue for IIED based upon outrageous expression, they are required to prove – in addition to the underlying elements of IIED – that “that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” *Id.* at 56.

¹⁴⁰ See generally ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS (4th ed. 2011) (providing a comprehensive and current review of defamation law).

¹⁴¹ Intentional infliction of emotional distress typically “consists of four elements: (1) the defendant’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant’s conduct must cause the plaintiff emotional distress and (4) the distress must be severe.” Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469, 476 (2000).

¹⁴² See *supra* note 33 and accompanying text.

Co.,¹⁴³ if a speaker “lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”¹⁴⁴ Thus, as long as Fly lawfully obtained the recommendations of Barclays Capital and other investment firms – as opposed to either stealing them or bribing Barclays employees to leak them – there would be a steep, up-hill battle to suppress its publication or to punish it via tort law.

In its standard formulation, strict scrutiny demands that the government justify content-based regulations of fully protected speech by proving that the law or statute in question is narrowly tailored to advance a compelling state interest.¹⁴⁵ The compelling interest prong of the test, although of somewhat varying rigor,¹⁴⁶ historically has been a very high bar to speech regulation, requiring an exceptional rationale of some sort to justify content-based speech restrictions.

While hot news plaintiffs such as Barclays Capital might argue that preservation of their proprietary information constitutes a compelling interest, such a claim pales beside such well-established compelling interests as national security, the physical and psychological well-being of minors, and other vital governmental concerns.¹⁴⁷ Indeed, as one federal court put it recently, “the universe of interests sufficiently compelling to justify content-based restrictions on pure speech is extraordinarily limited.”¹⁴⁸ Not all contemporary courts set quite as high a bar on the compelling interest aspect of strict scrutiny, but the hot news tort nonetheless seems to lack a sufficiently powerful justification to overcome that hurdle.

Strict scrutiny also requires that speech restrictions be narrowly tailored, mandating that the regulation be the least restrictive means of achieving the compelling interest. As Internet giant Google (along with Twitter) argued in an *amicus* brief in *Barclays*, less intrusive means exist for hot news plaintiffs to control their proprietary content. For example, “originators of information may (and in this case did) enter confidentiality agreements with employees and licensing or non-disclosure agreements with authorized recipients of factual information,” the Google brief argued.¹⁴⁹ Pursuing leakers under such agreements, Google noted, poses far less First Amendment risk than restrictions on those publishing the information. Google also argued that various technological fixes designed to avoid linking could serve as a less restrictive approach by hot news plaintiffs.¹⁵⁰

¹⁴³ 443 U.S. 97 (1979).

¹⁴⁴ *Id.* at 103.

¹⁴⁵ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

¹⁴⁶ *See* Bunker, *supra* note 135, at 364 – 372 (arguing that some courts have diluted compelling interest requirement in the course of strict scrutiny, First Amendment analysis).

¹⁴⁷ *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010).

¹⁴⁸ *Id.*

¹⁴⁹ Brief for Amici Curiae Google Inc. and Twitter, Inc. in Support of Reversal at 24, *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv), *available at* <http://articles.law360.s3.amazonaws.com/0176000/176629/google%20brief.pdf>.

¹⁵⁰ *Id.* at 24-25.

The First Amendment difficulties with the hot news tort are greatly magnified by the fact that a frequent remedy of choice for plaintiffs is injunctive relief, which in First Amendment parlance is the largely forbidden technique of prior restraint.¹⁵¹ In *Barclays*, for example, the heart of the dispute was over the lower court's injunctions against Fly's reporting on both the recommendations and the reports of the Firms.¹⁵² Such landmark cases as *Near v. Minnesota*,¹⁵³ *New York Times Co. v. United States*,¹⁵⁴ and *Nebraska Press Association v. Stuart*¹⁵⁵ have established an extraordinary constitutional presumption against the validity of prior restraints. These cases, all decided post-*INS*, of course, stand for the proposition that, as the Court put it, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"¹⁵⁶ and that "[p]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."¹⁵⁷ Moreover, the Court has stated that the harm from prior restraints "can be particularly great when the prior restraint falls upon the communication of news and commentary on current events."¹⁵⁸ At least one lower federal court has in the *NBA* case rejected the argument that prior restraints against hot news defendants violate the First Amendment, basing this conclusion on the claimed content-neutrality of the injunction, although this conclusion went un-reviewed by the Second Circuit on appeal.¹⁵⁹

What about the argument that the hot news doctrine is analogous to copyright law and thus somewhat immune from the rigors of the First Amendment, whether in the domain of prior restraints or that of subsequent punishment? This line of logic seems suspect for several reasons. First, copyright law's near-immunity from the First Amendment has been justified by the Supreme Court, in part, on the grounds that the Copyright Clause of the U.S. Constitution was enacted nearly contemporaneously with the First Amendment: "This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."¹⁶⁰ Although this originalist approach is not without its problems in the realm of copyright,¹⁶¹ it is

¹⁵¹ See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (observing when "determining the extent of the constitutional protection [of freedom of the press], is has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints on publication"). Prior restraints are at times less problematic in copyright and other intellectual property cases. See generally Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998). The authors here, however, argue that the hot news tort lacks certain characteristics of copyright law that arguably justify different treatment, as is discussed later in this Part.

¹⁵² *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 880 (2d Cir. 2011).

¹⁵³ 283 U.S. 697 (1931).

¹⁵⁴ 403 U.S. 713 (1971).

¹⁵⁵ 427 U.S. 539 (1976).

¹⁵⁶ *New York Times*, 403 U.S. at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

¹⁵⁷ *Stuart*, 427 U.S. at 559.

¹⁵⁸ *Id.*

¹⁵⁹ *NBA v. Sports Team Analysis & Tracking Sys.*, 939 F.Supp. 1071, 1087-88 (S.D.N.Y. 1996), *aff'd in part*, *NBA v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

¹⁶⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

¹⁶¹ See Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL'Y 273, 279-80 (2009) (arguing that contemporaneous adoption thesis is flawed).

completely unavailable to hot news claimants, since of course the hot news tort is a much more recent innovation and has no constitutional pedigree.

Second, copyright's resistance to First Amendment scrutiny has also been based, the Court has stated, on "built-in free speech safeguards"¹⁶² in copyright doctrine that act to protect First Amendment interests. Copyright's idea/expression and fact/expression dichotomies, under which both abstract ideas and raw facts are unprotected by copyright, while expression *about* those facts or ideas is copyrightable, along with the fair use doctrine, have been held to adequately safeguard free speech interests. For example, in *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹⁶³ the Supreme Court in 1985 pointed to the "distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use,"¹⁶⁴ as sufficient guardians of First Amendment values, obviating the need for more direct First Amendment intervention in copyright law. Similarly, in *Eldred*, the Court, while denying that copyright was "categorically immune" from First Amendment scrutiny, nonetheless stated, "copyright's built-in free speech safeguards are generally adequate."¹⁶⁵ The hot news tort, however, appears to have no such built-in safeguards.

In fact, not only does the hot news tort lack any equivalent of the fact/expression dichotomy, the tort stands for precisely the opposite proposition – that facts *can* be subject to protection in the hot news context, even though copyright law explicitly reserves such facts to the public domain. Thus, one could argue that not only does the hot news doctrine lack First Amendment safeguards equivalent to those contained in copyright doctrine, it actively transgresses the safeguards established by the federal copyright scheme.

The hot news tort is a First Amendment anomaly that predates contemporary free speech doctrine. Under standard First Amendment analysis, the tort, even if not preempted by federal copyright law, could very well be unconstitutional.

VI. CONCLUSION

Although the Second Circuit's ruling in *Barclays* did not put an end to judicial recognition of the hot news misappropriation tort within New York, this Article has demonstrated that both semantic and constitutional flaws plague what remains of it today. The Article has suggested that courts must clearly define what they mean by news, a task that is extremely difficult today in the digital world.¹⁶⁶ The Article has contended that Barclays Capital is not in either the news or journalism business, in stark contrast to the two news-service litigants in the seminal hot news case of *International News Service v. Associated Press* that fashioned the tort. What's more, the product at issue in *INS* –

¹⁶² *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

¹⁶³ 471 U.S. 539 (1985).

¹⁶⁴ *Id.* at 560.

¹⁶⁵ 537 U.S. at 221.

¹⁶⁶ *See supra* Part III, Section B, Subsection 2 (addressing problems with the definition of news both in the tort and in journalism).

reports on “current events”¹⁶⁷ that are ordinarily “*publici juris*,”¹⁶⁸ namely the events in World War I¹⁶⁹ – is a far cry from the product at issue in *Barclays*, namely financial recommendations not intended for public consumption but produced specifically for a select group of clients.

Perhaps, then, a change is needed in the very name of the tort to better reflect and represent its expansive use today by courts like the Second Circuit in *Barclays* to sweep up privately targeted stock recommendations:

• ***The Hot Information Misappropriation Tort.***

Now, at least in New York, may be the time to make such a change because, while the Second Circuit in *Barclays* rejected the *NBA* five-part hot news test as mere dictum, Judge Sack failed to offer up a new test to replace it.¹⁷⁰ If the elements of the hot news tort itself are in flux, then the entire tort is up for grabs in New York, including relabeling it to better mirror the range of factual scenarios to which it applies.

This Article’s focus on two sets of issues – semantic and constitutional – in no way is designed to suggest that there are not other problems plaguing the viability of the hot news tort in the digital era. For instance, one such issue “is determining for exactly how long news actually remains ‘hot’ or ‘fresh’ in a world of instantaneous, digital communication. When, in other words, does news become cold?”¹⁷¹ As one legal commentator bluntly put it, “the common law understanding of linear hot news lacks relevance for the modern internet news cycle. The variability associated with long tail patterns of online news consumption makes determination of the scope and length of the proposed hot news monopoly challenging.”¹⁷²

The bottom line is that the hot news tort today suffers from an absence of analytic rigor, both in its terminology and its constitutionality. This Article has attempted to problematize the tort in both of these areas at a time when, as Leonard Downie Jr. and Michael Schudson wrote in an extended analysis of the changing nature of journalism, “the character of news is being reconstructed.”¹⁷³ The time is ripe for a similar reconstruction of the hot news misappropriation tort.

¹⁶⁷ *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 235 (holding that it is possible to limit the hot news tort to situations in which “both parties” are engaged in the news business).

¹⁷⁰ See Quinn Emanuel, Second Circuit Severely Limits Reach of “Hot News” Misappropriation (Aug. 2011), available at <http://www.quinnemanuel.com/news/victory-august-2011-second-circuit-severely-limits-reach-of-“hot-news”-misappropriation.aspx> (writing that “held that *Motorola*’s five-part test was dictum because it was based on a hypothetical “hot news” misappropriation claim rather than the facts before the Court,” and adding that “the Second Circuit did not offer a new test”).

¹⁷¹ Clay Calvert et. al., *All the News That's Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture*, 10 WAKE FOREST INTELL. PROP. L.J. 1, 29 (2009).

¹⁷² Nick Gamse, *Legal Remedies for Saving Public Interest Journalism in America*, 105 NW. U. L. REV. 329, 354 (2011).

¹⁷³ Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REV., Nov. – Dec. 2009, at 28.