FIRST AMENDMENT, FOURTH ESTATE, AND HOT NEWS: MISAPPROPRIATION IS NOT A SOLUTION TO THE JOURNALISM CRISIS

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“The New York Times invents the news
I did not see where they were going.”
-Nellie McKay, “Bruise on the Sky”

INTRODUCTION

The Daily Show and The Colbert Report would not exist, or at least not flourish, but for a crisis in journalism. While these programs regularly criticize politicians, they equally criticize shortcomings in media coverage on issues of public concern. A contributing factor to the journalism crisis is the economic condition of the institutional press. Massive layoffs of journalists, diminishing content, and the shuttering of newspapers are all easily identifiable areas of concern. There is widespread agreement that society

1. NELLIE MCKAY, Bruise on the Sky, on HOME SWEET MOBILE HOME (Verve Music Group 2010).
2. See generally The Daily Show with John Stewart (Comedy Partners television broadcast); The Colbert Report (Comedy Partners television broadcast).
3. See, e.g., Julie Moos, As ‘Daily Show’ Turns 15 Years Old, Jon Stewart’s Best Media Criticism Moments, POYNTER (July 23, 2011, 9:57 AM), http://www.poynter.org/latest-news/mediawire/140282/as-daily-show-turns-15-years-old-jon-stewarts-best-media-criticism-moments; Mallary Jean Tenore, ‘Daily Show’ Producers, Writers Say They’re Serious About Media Criticism, POYNTER (Mar. 4, 2011, 8:31 AM), http://www.poynter.org/latest-news/top-stories/99431/daily-show-producers-writers-say-theyre-serious-about-media-criticism (“‘I feel like there are lot of critics of the government but there are very few critics of the media who have an audience and are credible and keep a watch on things,’ said ‘Daily Show’ writer Elliott Kalan. ‘That’s a role that we provide that we take very seriously.’”).
4. The institutional press is comprised of those organizations large enough to provide in-depth, investigative coverage of important public issues, including foreign affairs. See Potter Stewart, “Or of the Press,” 26 HASTINGS L.J. 631, 631-33 (1975). Whereas most of the Bill of Rights protects individual liberties or rights, the Press Clause is a structural provision that protects an institution for the purpose of ensuring these other liberties and rights remain protected. Id. at 633. But see Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today, 160 U. PA. L. REV. 459, 462-63 (2012) (noting that from a textual and originalist perspective, the Press Clause protects technology, not an industry).
5. David M. Schizer, Subsidizing the Press, 3 J. LEGAL ANALYSIS 1, 19 (2011) (“33,000 reporters ... lost their jobs in 2008 and 2009.”); Leonard Downie Jr. & Michael Schudson, The Reconstruction of American Journalism, COLUM. JOURNALISM REV., Nov./Dec. 2009, at 28, 32 (“Overall, according to various studies, the number of newspaper editorial employees, which had grown from about 40,000 in 1971 to more than 60,000 in 1992, had fallen back to around 40,000 in 2009.”).
6. Downie & Schudson, supra note 5, at 32 (noting that before the rise of the Internet, “newspapers already were doing less news reporting”).
cannot ignore the economic condition of the Fourth Estate because democracy cannot function without the institutional press. One proposed solution to the journalism crisis is the reinvigoration of the hot news misappropriation doctrine. This nearly century-old doctrine has recently received renewed attention from litigants, amici, commentators, scholars, and law students.

In the seminal hot news decision, *International News Service v. Associated Press* (INS), the Supreme Court described hot news misappropriation as an unfair competition doctrine that creates “quasi property” rights for a

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8. The Fourth Estate is a metaphor for the press as the “fourth branch” of our self-governing society. The press serves as a check and balance on all three branches of government. Stewart, *supra* note 4, at 634.

9. *E.g.*, C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 131 (2007) ("Almost universally accepted is the view that a free press is an essential *institution* of democracy."); LEE C. BOLLINGER, *UNINHIBITED, ROBUST, AND WIDE OPEN: A FREE PRESS FOR A NEW CENTURY* 109 (2010). If we lost news organizations, information would not be lost. "But something else would be lost, and we would be reminded that there is a need not just for information, but for news judgment oriented to a public agenda and a general audience. We would be reminded that there is a need not just for news but for newsrooms." Downie & Schudson, *supra* note 5, at 32.


limited time in factual information gathered at a cost. The claim allows a content originator, such as a newspaper, to prohibit a competitor from free riding on its investment in gathering and publishing information until the originator has had the opportunity to reap the benefits of its investment. While hot news misappropriation protects the economic incentive to gather and publish information, the ultimate purpose of the claim is to serve the public interest. Specifically, the underlying rationale of INS is a utilitarian concern: Without protecting the economic incentive to gather and publish news, no one will have an incentive to enter or remain in the market because competitors can free ride on the originator’s efforts immediately upon publication; and, this structure will substantially threaten the existence or quality of news, thus depriving the public of information necessary for a self-governing society.

Challenging economic conditions and the ability to disseminate information via the Internet at a low cost and nearly instantaneous speed are the main factors reviving interest in this doctrine. In a hot news misappropriation case recently decided by the Second Circuit, a group of fourteen newspaper organizations, including the Associated Press, the Newspaper Association of America, Gannett, and the New York Times, filed an amicus brief in support of the validity and expansion of the doctrine. More recently, the Associated Press filed a hot news claim against Meltwater Group, a company that provides digital news clipping services. While there is a journalism crisis and the economic condition of the press is of serious concern for a self-governing society, hot news misappropriation is not a solution to the journalism crisis for at least three reasons.

First, while the Internet has exacerbated the journalism crisis, media ownership concentration and the influence of advertising are prior and more causative factors of the decline of the Fourth Estate. Second, hot news misappropriation...
appropriation likely violates the First Amendment because it seeks to restrain the dissemination of publicly available factual information. In his recent Columbia University Law Review article, Shyamkrishna Balganesh notes that courts have failed to consider whether the hot news doctrine violates the First Amendment and provides his preliminary thoughts. This Article expands that First Amendment analysis, including the implications of the holding in *Golan v. Holder* that works may be removed from the public domain.

Finally, if a hot news claim is constitutionally permissible, the ability to satisfy the utilitarian requirement of the claim is increasingly difficult in the digital age. Hot news proponents agree that the "doctrine ultimately rests on the public interest." Because of the low cost of access to and wide dissemination ability of digital communications technologies, it is increasingly difficult to establish that hot news claims are necessary to prevent the loss of news altogether. Technological advancements provide increased opportunities for new market entrants and business models. The hot news doctrine, however, interferes with known and yet-to-be-discovered opportunities that digital communications technologies provide and uses legal regulation to sustain the flawed twentieth-century news business model of concentrated ownership dependent on direct advertising revenue.

Part I describes two primary causes of the journalism crisis: the negative effects of advertising revenue and increased media ownership concentration. Part II describes the law of hot news misappropriation, extracting key principles, observations, and contested issues. Part III explains why the First Amendment is a constitutional obstacle to the hot news doctrine; and, that if it is constitutionally permissible, technological developments make proving the essential utilitarian requirement of the doctrine practically difficult in the digital age. Part IV describes alternative solutions to the journalism crisis, including why taxation of all online advertising and using some portion to fund non-profit members of the institutional press is appealing from both normative and pragmatic perspectives.

Beyond the specific hot news analysis, this Article seeks to contribute to the broader discourse about the journalism crisis by helping to widen the lens through which society views ways to sustain the Fourth Estate. The view that the twentieth-century, advertising-based, for-profit model is the only viable way to sustain public access to news is a dominant and largely unquestioned premise that requires scrutiny. The importance of the free press cannot be limited to revenue stream analysis and a singular focus on

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market incentives.\textsuperscript{23} The conversation must at least equally involve an appreciation that the legitimacy of the press rests on its contributions to public enlightenment.

I. **KEY CAUSES OF THE JOURNALISM CRISIS: ADVERTISING REVENUE AND MEDIA OWNERSHIP CONCENTRATION**

The journalism crisis is both substantive and economic. There is a lack of sufficient coverage on issues of public importance.\textsuperscript{24} Many newsrooms are understaffed and some newspapers have been shuttered altogether. Financially, news organizations are struggling, although there is skepticism about whether they sometimes exaggerate claims of economic crisis as a basis for more favorable regulation.\textsuperscript{25} In any case, to address the journalism crisis, some offer hot news misappropriation as a solution.\textsuperscript{26}

A key flaw in the argument for hot news as a solution to the journalism crisis is that it does not address the negative effects of advertising revenue and media ownership concentration. One reason for the conspicuous absence of discussion about these negative effects on journalism is that the economic interests of media owners may be harmed by such reporting.\textsuperscript{27}

Reviving hot news because of the Internet’s effect on the news industry places too much weight on one factor that merely exacerbates pre-existing


\textsuperscript{24.} A key example is the failure of the traditional media to adequately investigate and report on the claims of pre-war intelligence that led to the United States’ invasion of Iraq in 2003. See The Times and Iraq, N.Y. Times (May 26, 2004), http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html. The New York Times published a mea culpa editorial in 2004 admitting its failure to properly investigate and report on the Bush Administration’s pre-war intelligence assertions. Id. The Times’s editors wrote: “[W]e have found a number of instances of coverage that was not as rigorous as it should have been. . . . Looking back, we wish we had been more aggressive in re-examining the claims as new evidence emerged—or failed to emerge.” *Id.; see also* Howard Kurtz, *The Post on WMDs: An Inside Story: Prewar Articles Questioning Threat Often Didn’t Make Front Page*, WASH. POST, Aug. 12, 2004, at A1, available at http://www.washingtonpost.com/ac2/wp-dyn/A58127-2004Aug11?language=printer; *Media Takes Critical Look at Prewar Intelligence Coverage*, PBS (Aug. 18, 2004), http://www.pbs.org/newshour/bb/media/july-dec04/wmd_8-18.html.


\textsuperscript{27.} Ben H. Bagdikian, *The New Media Monopoly* 102-03 (2004). One example is the television networks’ failure to cover the 1979 announcement that for the first time in forty-five years a bill altering communications law was introduced. *Id.* at 207. Another example is the absence of news coverage of the 1996 Telecommunications Act. *Mark Cooper, Media Ownership and Democracy in the Digital Information Age* 48-49 (2003).
problems. Media ownership concentration and the influence of advertising revenue are prior and more concerning causative factors of the crisis. The influence of these factors must be considered in an analysis of the desirability, necessity, and effectiveness of the hot news doctrine as part of the solution.

A. The Negative Influence of Advertising Revenue on Journalism

Solving the journalism crisis requires structural reforms that address the negative influence of advertising. Advertising has not always provided the main source of revenue for journalism. Not until the late 1800s did advertising begin providing the main source of revenue for newspapers and magazines. Harper's Magazine, for example, published more advertisements in 1900 alone than in the prior twenty-two years combined. By 2004, advertising accounted for 80% of newspaper revenue, 50% for general circulation magazines, and nearly 100% for broadcasting. Although financially beneficial to news business owners and shareholders, advertising revenue has harmed the content and quality of journalism.

C. Edwin Baker listed four specific ways that advertising negatively affects non-advertising content: (1) advertisers' interests are treated charitably in news and editorials; (2) lighter content is emphasized to create a "buying mood" and favorable reader reaction to advertisements; (3) there is a reduction in partisanship and controversial comments to avoid offending advertisers' potential customers; and (4) the media caters content towards the interests of middle- to higher-income readers because they possess greater purchasing power. Although Baker is critical of advertising’s influence on the news, he readily acknowledges the financial significance of advertising for the press. The financial importance of advertising cannot be

28. See Downie & Schudson, supra note 5, at 32 ("In many cities, by the turn of the [twenty-first] century—even before Web sites noticeably competed for readers or Craigslislist attracted large amounts of classified advertising—newspapers already were doing less news reporting. The Internet revolution helped to accelerate the decline.").
31. MCCHESNEY & NICHOLS, supra note 30, at 133.
32. BAGDIKIAN, supra note 27, at 243.
33. Id. at 230-31.
34. See COMM’N ON FREEDOM OF THE PRESS, A FREE & RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS 95 (1947) [hereinafter Hutchins Commission Report] ("Radio cannot become a responsible agency of communication as long as its programming is controlled by the advertisers.").
35. BAKER, supra note 29, at 44.
36. BAKER, supra note 9, at 117.
disregarded in addressing the journalism crisis. Hot news, however, would only perpetuate the problems associated with the corrosive influence of advertising revenue on news content and quality because it seeks to sustain the current news business model. Recognizing the negative influence of advertising on the press is an important step in creating this structural reform.

Advertising did not always have the degree of influence on the press it does today. In the mid-nineteenth century, "95% of all U.S. newspapers had a political affiliation."\(^ {37} \) By the late nineteenth century, however, newspaper competition began its steep decline,\(^ {38} \) as did the partisan nature of the press.\(^ {39} \) Because politics are divisive, advertisers preferred less controversial topics to maintain and increase mass audiences.\(^ {40} \) Both the decline in competition and movement away from partisan news occurred as the role of advertising increased.\(^ {41} \) Partisanship, coupled with diversity of ownership, may be a social good for democracy because the press must be a mobilizing force, not just a watchdog.\(^ {42} \) The rise of advertising influence over the press that began in the late nineteenth century quickly became viewed as dangerous to the role of the press in democracy.

At least as early as 1922, concerns about advertising affecting editorial decisions entered the national dialogue. Addressing the first National Radio Conference in 1922, Herbert Hoover stated that "[i]t is inconceivable that we should allow so great a possibility for service, for news, for entertainment, for education and for vital commercial purposes to be drowned in advertising chatter."\(^ {43} \) The influence of advertising revenue has only worsened over the last several decades since Hoover's remarks. In 1947, the Hutchins Commission Report, a report on the proper function and current assessment of the press in a democracy, stated: "The American newspaper is now as much a medium of entertainment, specialized information, and advertising as it is of news."\(^ {44} \) Ten years later, Walter Lippmann declared

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\(^ {37} \) BAKER, supra note 29, at 28 (citing Gerald J. Baldasty & Jeffrey B. Rutenbeck, Money, Politics and Newspapers: The Business Environment of Press Partisanship in the Late 19th Century, 15 JOURNALISM HIST. 60, 68 (1988)); Downie & Schudson, supra note 5, at 30 ("Most of what American newspapers did from the time that the First Amendment was ratified, in 1791, until well into the nineteenth century was to provide an outlet for opinion, often stridently partisan.").

\(^ {38} \) BAKER, supra note 29, at 16.

\(^ {39} \) Id. at 29.

\(^ {40} \) See id. at 56.

\(^ {41} \) See id. at 39, 42.

\(^ {42} \) Id. at 43.


\(^ {44} \) HUTCHINS COMMISSION REPORT, supra note 34, at 53.
that television had become a “prostitute” of advertising. Media companies now compete for hundreds of billions of dollars spent each year on advertising.

The pursuit of advertising revenue has harmed the quality and type of content covered. Much more than government censorship, advertisers are the main censors of media content. There are examples of direct censorship by advertisers, such as advertisers threatening not only to cease buying ad space in Ken, a liberal magazine, but also Esquire, owned by the same company; or the “most shameful” example, the media’s systemic failure to cover the dangers of cigarettes. The negative influence of advertising revenue on news content is not necessarily, nor usually, the exercise of overt control by advertisers. Rather, because media owners rely heavily on advertising revenue and understand that the likely consequence of negative coverage of an advertiser is the loss of further advertising buys from that advertiser, self-censorship is a powerful force that dictates media coverage.

Self-censorship includes avoidance of serious news. In a 1978 interview, Gannett’s president explained that local newspapers should not provide too much sophisticated news because doing so would make them “‘out of touch with [their] community.”

One troubling example is CBS’ 1991 decision to reduce war coverage specials because of low advertising sales for that programming, even though those programs received higher ratings than other networks’ entertainment programming. Advertisers worried about product juxtaposition with images of dead or injured soldiers and cit-


46. BAGDIKIAN, supra note 27, at 29.

47. BAKER, supra note 29, at 3.

48. BAGDIKIAN, supra note 27, at 244-45.

49. Id. at 250-56. Another example is Reader’s Digest Association ordering its book publishing subsidiary to cancel a book criticizing the advertising industry a month before the publication date. Id. at 245.

50. BAKER, supra note 29, at 49 (“As Frank Stanton, a leader in American journalism, explained in 1960, ‘since we are advertiser-supported we must take into account the general objectives and desires of advertisers as a whole.’” (quoting ERIK BARNOW, THE SPONSOR: NOTES ON A MODERN POTENTATE 57 (1978))); Hutchins Commission Report, supra note 34, at 73 (“The desire to reach the largest possible audience and to avoid the slightest risk of offending any potential customer has produced the kind of radio we have today.”).


ed a general reluctance to place upbeat commercials in programs about the war.\textsuperscript{53}

Of course, there are times when a member of the press does not succumb to pressure based on advertising revenue. After publishing a series of articles on medical malpractice in the \textit{New York Times}, an advertiser that published in a medical magazine owned by the \textit{Times} threatened to pull 260 pages of advertisements.\textsuperscript{54} Rather than alter its coverage, the \textit{Times} sold the magazine.\textsuperscript{55} At a time when most newspapers, including the \textit{New York Times} and \textit{Washington Post}, editorially supported the Vietnam War, the \textit{New Yorker} began a series of articles opposing the war.\textsuperscript{56} The \textit{New Yorker} continued its coverage opposing the Vietnam War, despite a disastrous decline in advertising revenue that started once such coverage began.\textsuperscript{57}

Not only has advertising revenue affected the content of news, it has affected target audiences. Although advertisers seek mass audiences, they do not seek to include all segments of society.\textsuperscript{58} In the quest for increased profits, newspaper owners cater to the middle and upper classes.\textsuperscript{59} The \textit{Daily Herald} is an example of a British newspaper that went out of business not because of lack of readers, but “because its readers were disproportionately poor working class and consequently did not constitute a valuable advertising market to reach.”\textsuperscript{60} When the \textit{Herald} went out of business, its circulation nearly doubled the combined circulation of the \textit{Times}, \textit{Financial Times}, and \textit{Guardian}.\textsuperscript{61}

In 1978, ABC drew the largest audience share among the major networks.\textsuperscript{62} To counter an attack by NBC that ABC’s large audience was filled with “‘kids and dummies,’” ABC courted potential advertisers with a defensive booklet including a section titled, “‘Some people are more valuable

\begin{flushleft}
53. \textit{Id.}
54. \textit{BAGDIKIAN, supra note 27, at 245.}
55. \textit{Id.}
56. \textit{Id. at 222.}
57. In 1966, \textit{The New Yorker} had a historic year for number of ad pages sold compared to the magazines of general circulation. \textit{Id. at 219.} In 1967, it began covering and opposing the Vietnam War. \textit{Id. at 220-22.} During this time, the \textit{New York Times} and \textit{Washington Post} editorially supported the war. \textit{Id. at 222.} Even though the \textit{New Yorker’s} circulation did not decrease, it began attracting the “‘wrong kind” of reader. \textit{Id. at 223.} Despite the dramatic decline in ad sales, the \textit{New Yorker} continued to publish its opposition coverage of the war. \textit{Id. at 224.} The following year, the \textit{New Yorker} was sold to Newhouse Publishing, and the editor who decided to continue the Vietnam coverage was replaced. \textit{Id.}
58. \textit{HUTCHINS COMMISSION REPORT, supra note 34, at 52 n.1.}
59. \textit{BAGDIKIAN, supra note 27, at 120-21.}
61. \textit{Id.}
62. \textit{BAGDIKIAN, supra note 27, at 228.}
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than others." In a 1979 interview, the president of the Times Mirror, the fourth largest newspaper chain and then-owner of the Los Angeles Times, explained that it targeted upper- and middle-class audiences because "[w]e are not trying to get mass circulation, but quality circulation." In a 1981 study, a scholar concluded that Gannett, owner of the largest chain of newspapers, aimed for richer subscribers and that the loss of less affluent subscribers might not have been a marketing concern. Ten years later, a U.S. Department of Commerce industrial forecast found that more publishers may follow a trend of reducing circulation that is not valuable to advertisers. Not only do these examples show that advertising revenue adversely affects a newspaper's decision not to serve all members of a community, it shows that the journalism crisis began long before the development of online communication. Press in a self-governing society that depends on an enlightened citizenry cannot decline to serve parts of the population simply because it lacks market incentives.

Structural change is required to restore the vitality of the Fourth Estate. Part of that structural change is reducing the negative influence that advertising revenue has on press content and quality. Acknowledging the financial significance of advertising on press revenue is necessary, but does not necessarily mean that the twentieth-century news business model is the only or best way to move forward.

B. Media Ownership Concentration as a Cause of the Journalism Crisis

Concentrated media ownership is also a primary cause of the journalism crisis and is not unrelated to the advertising problem. Shortly follow-
ing the late nineteenth century development of the commodification of news and long before the rise of the Internet, media ownership began growing increasingly concentrated. From the end of the Civil War until the early years of the twentieth century, large cities usually had ten or more daily newspapers. Rarely did a person own more than one paper. Beginning around 1909, the number of daily newspapers began declining. In 1910, more than half of all cities had multiple newspapers, but by the early twenty-first century, 99.9% of all daily newspapers had become monopolies in their respective cities. Not only did newspapers become monopolies within their respective cities, they became increasingly owned by fewer and fewer companies. By 1947, media ownership concentration became a major concern, as reflected in the Hutchins Commission Report. In the late 1970s large corporate chains accelerated the decades-long trend of consolidation. By 1983, there were only fifty dominant media corporations. Today, that number has dwindled to approximately eight.

Three observations about increasing concentration identify it as a cause of the journalism crisis. First, increased ownership concentration negatively affects the quality and content of news. Second, newsroom reductions began long before the digital age and even when the news industry remained very profitable. Third, media concentration attracts the wrong kind of owners because they fail to respect and promote the intended role of the Fourth Estate in our self-governing society.

Just as the influence of advertising revenue negatively affects the content and quality of news, so does increased media ownership concentration. Studies dating to at least 1967 illustrate some of the negative effects of ownership concentration. A study of fifteen years of editorials shows that after an independent newspaper is purchased by a chain, local residents lose

MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY 265, 278 (Mark N. Cooper ed., 2007).

71. McCHESNEY & NICHOLS, supra note 30, at 134. "[I]n the late nineteenth century, every American city of any size had half a dozen papers or more, and their politics both in editorials and news emphasis ranged from far left to far right and everything in between." BAGDIKIAN, supra note 27, at 121.

72. McCHESNEY & NICHOLS, supra note 30, at 134.

73. HUTCHINS COMMISSION REPORT, supra note 34, at 37.

74. BAGDIKIAN, supra note 27, at 121.

75. See HUTCHINS COMMISSION REPORT, supra note 34.

76. McCHESNEY & NICHOLS, supra note 30, at 33.

77. BAGDIKIAN, supra note 27, at 16.

information of local importance. Chain ownership results in higher prices and lower quality. Chain-owned newspapers produce 8% less news than independently owned newspapers. They also produce less serious news than independently owned newspapers. This reduction in coverage accelerated in the 1990s, and included the virtual elimination of science journalism and beat coverage of labor issues. Political endorsements typically become uniform under chain ownership. And notably, conglomerates rarely provide adequate coverage of the media itself.

Media companies blame the Internet for their economic woes, but ownership concentration resulted in reduction of newsroom staff prior to the digital age, including during times when companies were very profitable. David Simon, journalist and writer and producer of The Wire, testified before the Senate in 2009 on the future of journalism. He testified that the Baltimore Sun was making 37% profit when it was “eliminating its afternoon edition and trimming nearly 100 reporters and editors.” The Baltimore Sun could have remained profitable without such drastic cuts to its newsroom staff.

Gannett first listed shares on Wall Street in 1967. The year before going public, Gannett’s newspapers averaged forty-five employees per paper. By 1980, the number of Gannett’s newspapers increased exponentially, but the average number of employees per paper dropped to twenty-six. When Gannett purchased the Asbury Park Press in 1997, it immediately reduced

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81. BAGDIKIAN, supra note 27, at 196.
83. MCCHESNEY & NICHOLS, supra note 30, at 35, 50.
85. BAGDIKIAN, supra note 27, at 102-03.
87. Id. at 29.
88. BAGDIKIAN, supra note 27, at 197.
89. In 1966, Gannett owned twenty-six dailies and six Sunday papers. Id. In 1980, Gannett owned eighty-one dailies, fifty-three Sunday papers, and twenty-three less-than-daily newspapers. Id.
its newsroom staff by 25%. These cuts continue today. In 2008, Gannett eliminated 3,000 employees (10% of its workforce) and required the remaining employees to take a week-long, unpaid furlough. Meanwhile, Gannett executives received six-figure bonuses in 2008. Like CEOs in other industries, the salaries of media company CEOs skyrocketed in comparison to those of average employees over the last several decades.

Lack of profitability between 1967 and 1980 cannot explain Gannett’s decision to reduce the number of employees because its quarterly profits increased every quarter for eighteen years from 1967 to 1985, with some papers making thirty to fifty percent profit in a year. Gannett is not unique in attaining significant profits, but the media industry is unique compared to profits made in other industries. Media industry profits often outperform the profitability of other industries. These above-average profits were made at the expense of journalism and were a result of Wall Street’s demands for ever-increasing profits and the excessive salaries of consolidated media owners. Increased ownership concentration exacerbates the drive for profits at the expense of news quality and content.

Increased ownership concentration is not unique to the media industry. Although the Hutchins Commission Report specifically focuses on media ownership concentration, it casts the problem in the larger context of business ownership concentration generally, noting that “concentration of economic power. . . is a threat to democracy.”

90. Mark Cooper & Steve Cooper, Study 10: Concerns About Print Journalism and Cross-Ownership, in THE CASE AGAINST MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY, supra note 70, at 159, 172-73.


92. Id. at 14.

93. In 1976, the average media CEO salary was $300,000. Id. at 38. In 2009, the average was $15.5 million. Id. In 1970, the average media CEO to reporter compensation was 29-1. Id. In 2007, the gap widened to 275-1. Id.

94. Bagdikian, supra note 27, at 185.

95. See generally Mark Cooper, Study 9: Local Media and the Failure of the Consolidation/Conglomeration Model, in THE CASE AGAINST MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY, supra note 70, at 137, 137-54; see also Klinenberg, supra note 25, at 115. During Gannett’s eighteen-year run of increased quarterly profits every quarter, the average return on stockholder equity was 15%, but Gannett averaged 21%. Bagdikian, supra note 27, at 185. In 2003, the Wall Street Journal reported Jeffrey Immelt as saying that while “old industries” were paying single-digit profits, media companies were paying 25 to 60%. Id. at 23.

96. Bagdikian, supra note 27, at 104.

97. Id. at 9.

98. Hutchins Commission Report, supra note 34, at 104.

99. Id. at 5; see also Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283, 346 (1996).
context, as opposed to say the potato industry, because of the importance of uninhibited communication in a democracy.100

The Hutchins Commission concluded that the press has “become big business”101 and that this concentration limited the variety of news and opinion in mass communication.102 As a result of becoming big business, the press lost focus on serving the role of the Fourth Estate and focused more on the economic interests of investors and owners.103 The concerns raised in the 1947 Hutchins Commission Report about the threat posed by concentrated media ownership to democracy persist today.104 Relentless pursuit of profits adversely affects quality, depth, and breadth of news coverage,105 particularly at publicly-traded companies and larger companies generally.106

The influence of concentrated wealth from other industries on news companies, including advertising as discussed above, exacerbates the problem of the press itself becoming big business.107 The Hutchins Commission Report noted that economic interests outside those of journalism erode the press through ownership and investment in media companies.108 Publicly traded media conglomerates focus on profit margins, not providing information necessary for an informed citizenry.109 These ownership models are a far cry from the family-owned newspapers that, while not free from flaws, demonstrated a greater understanding and respect for the role of the press in our society. The change from family ownership to consolidated corporate ownership that began decades ago accounts for the never-ending quest for quarterly profits and contributes to the journalism crisis more than the Internet and more than the current economic recession.110

100. See Associated Press v. United States, 326 U.S. 1, 28 (1945) (“Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth . . . calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.”); see also KLINENBERG, supra note 25, at 14; Wu, supra note 43, at 302; BAKER, supra note 9, at 49.
101. HUTCHINS COMMISSION REPORT, supra note 34, at 15.
102. Id. at 17.
103. See id. at 59.
105. BAKER, supra note 9, at 28-29.
106. Id. at 29.
107. HUTCHINS COMMISSION REPORT, supra note 34, at 59.
108. Id. at 45.
109. Downie & Schudson, supra note 5, at 32 (“Ownership of newspapers and television stations became increasingly concentrated in publicly traded corporations that were determined to maintain large profit margins and correspondingly high stock prices.”).
110. McCHESNEY & NICHOLS, supra note 30, at 34 (“Where family ownership might have been content with ten or 15 percent profit, the chains demanded double that and more. And the cutting began, long before the threat of new technology was ever sensed.”).
Media concentration attracts the wrong kind of owner because it attracts ownership that fails to appreciate and promote the important role that the Fourth Estate is intended to play in our constitutional structure. Rupert Murdoch and News Corp are obvious examples that are familiar to many through the widespread hacking in England, if not the incredulous "fair and balanced" catchphrase for Fox News. A Clear Channel executive did not mince words when he told Fortune Magazine, "We're not in the business of providing news and information... We're simply in the business of selling our customers products." Sam Zell, a real estate magnate, drove the Tribune Company into bankruptcy, destroyed the professional culture of the company, and displayed a lack of understanding, let alone respect, for the role of the press in a self-governing society. Similarly, private equity firms own newspapers. The goal of private equity firms is not a ro-

111. See BAGDIKIAN, supra note 27, at 9 ("[M]edia products are unique in one vital respect. They do not manufacture nuts and bolts: they manufacture a social and political world.").

112. E.g., CULTURE, MEDIA AND SPORT COMMITTEE, NEWS INTERNATIONAL AND PHONE-HACKING, 2012-1, H.C. 903-L, at 70 (U.K.) (concluding that Rupert Murdoch is "not a fit person to exercise the stewardship of a major international company").

113. Anthony E. Varona, Toward a Broadband Public Interest Standard, 61 ADMIN. L. REV. 1, 65-66 (2009) (noting that Fox News is "self avowedly" conservative despite its slogan of "fair and balanced"). While Fox News is far from "fair and balanced," its partisan perspective harkens back to the early American press where most newspapers were not fair and balanced. See Downie & Schudson, supra note 5, at 30. It is possible that such a structure provides value to a democracy, assuming there are a variety of publications expressing diverse viewpoints and assuming they provide facts to support positions.


115. Downie & Schudson, supra note 5, at 32 ("The Tribune chain of newspapers, which stretched from the Los Angeles Times and the Chicago Tribune to Newsday, the Baltimore Sun, and the Orlando Sentinel, went into bankruptcy. So did several smaller chains and individually owned newspapers in large cities such as Minneapolis and Philadelphia.").


118. Bain Capital and Thomas H. Lee are partners who own Clear Channel. Who Owns the Media?, supra note 78. When Platinum Equity purchased the San Diego Tribune, it had no prior journalism experience and made significant reductions in employees. Downie & Schudson, supra note 5, at 36.
bust Fourth Estate. Their goal is profits, and increased profits does not equate with increased quality of journalism. 119

As it turns out, newsroom layoffs, diminishing content, and the shuttering of newspapers are not as much causes of the journalism crisis as they are the consequences of ownership concentration. Baker concludes that one way to improve the health of the Fourth Estate is to develop “an ownership policy designed to get media ownership (of either the old or new media) in the hands of those most willing to make non-profit-maximizing investments in quality journalism or creative products.” 120

Because of the interconnections between the giants of the media industry and other industries, addressing media ownership concentration may require addressing other consolidated industries. 121 In any case, hot news does not help facilitate the right kind of media ownership. It does the opposite by providing further protection for concentrated ownership from new market entrants or business models. 122 Alternative solutions to the journalism crisis must be considered because hot news perpetuates the negative influences of advertising revenue and ownership concentration, and does not improve the prospects of new business models or market entrants.

II. THE LAW OF HOT NEWS MISAPPROPRIATION

Nearly a century ago, the U.S. Supreme Court recognized a hot news misappropriation claim under federal common law in International News Services v. Associated Press (INS). 123 The hot news misappropriation doctrine is based on unfair competition and is intended to protect the economic incentive to gather and publish news. 124 The underlying rationale for protecting this economic incentive is, ultimately, the public interest, not the self-interest of the specific entity asserting a hot news claim. In other words, hot news misappropriation seeks to solve a collective action problem. 125 The collective action problem is that without protecting those that invest in gathering and publishing news from free riders, there is a substantial risk that there will be an insufficient incentive to gather and publish news and, consequently, the public will lack the information necessary to have a function-

119. See Baker, supra note 9, at 42 (“[M]ergers are often undesirable because they often create new profitable opportunities to eliminate socially desirable expenditures.”).
120. Id. at 120.
121. BAGDIKIAN, supra note 27, at 136.
122. See id. at 7.
123. 248 U.S. 215, 229-46 (1918).
124. AP Amici Brief, supra note 11, at 13.
self-governing society.126 As the doctrine has developed over the years, nine key principles, observations, and contested issues have emerged.

A. The Roots of the Hot News Doctrine

The Supreme Court issued INS in 1918, but the roots of the doctrine extend further back and are temporally connected to the commodification of news. In the late nineteenth century, advertising sales began to serve as the main source of revenue for newspapers.127 Perhaps not surprisingly, the effort to create property rights in news began around the same time.128 Although the Associated Press (AP) originally argued that news was not property and thus could not be regulated under antitrust law, it changed its position in the late nineteenth century.129 The AP is largely responsible for the development and continuation of the doctrine.130

In 1884, AP members unsuccessfully lobbied Congress to establish a property right in news.131 Melville Stone, general manager of the AP, influenced the jurisprudence of his friend and Seventh Circuit judge, Peter S. Grosscup, who established an unfair competition claim that protected factual information in a 1902 decision.132 In National Telegraph News Co. v. Western Union Telegraph Co., Grosscup used equity to recognize a claim for the misappropriation of sports and news information.133 Grosscup’s opinion introduced the term “parasite,”134 which remains a common invective to describe the free rider in hot news commentary.135 Grosscup based his decision on the utilitarian concern that failure to protect the plaintiff would create the risk of losing news altogether and that this risk harmed the public interest.136 Although National Telegraph did not involve publicly available factual information, it was an influential decision that the INS Court relied

126. See Balganesh, supra note 13, at 426-29.
127. See supra Section I.A.
129. Id. at 21-22.
130. Id. at 47 (“The development of the hot news doctrine was the direct result of a successfully organized campaign by AP General Manager Melville Stone to establish a property right in news and to help prevent the theft of AP news which Stone thought threatened AP’s stability.”).
131. Id. at 19.
132. Id. at 22-24 (describing Stone’s efforts to persuade Judge Grosscup of the need for property rights in news and quoting Judge Grosscup who stated that Stone’s views on property rights in news influenced his opinion in National Telegraph News Co. v. Western Union Telegraph Co., 119 F. 294 (7th Cir. 1902)).
134. Id. at 296.
135. E.g., Deutsch, supra note 12, at 513.
136. Nat’l Tel. News Co., 119 F. at 296 (“The parasite that killed, would itself be killed, and the public would be left without any service at any price.”).
on; the INS Court also adopted several of its principles. Since INS, the AP has brought several hot news claims, most recently in 2012.

B. Political Circumstances Influenced INS v. AP

The political background of INS provides context for analyzing its persuasive value. The AP and INS were antagonistic competitors for over twenty years by the time INS reached the Court. William Randolph Hearst owned INS. His newspapers were sympathetic to the German cause in the early period of World War I and opposed U.S. involvement in the war. In October 1916, Great Britain refused to allow INS to use its cable and mail systems unless Hearst agreed to submit INS dispatches for approval by the British government before transmission. Hearst refused. France, Canada, Portugal, and Japan followed Great Britain and prohibited access to their respective communication systems. Because INS was prohibited from access to warfront communication systems, it was forced to use news published by the AP in early edition East Coast newspapers in its own newspapers. The AP sued INS for using its published news, a practice that was an accepted custom until the late nineteenth century when the commodification of news and use of the telegraph in the news industry disrupted this custom.

Because of Hearst’s opposition to U.S. involvement in the war and his earlier sympathy for the German cause, Hearst and INS were in a defensive position by the time the AP brought suit. The U.S. government investigated Hearst for ties to the German government. In late 1918, after the war ended, a Senate Judiciary subcommittee accused Hearst of associating with German spies, and accusations of sedition rumbled through Congress. These charged circumstances make it difficult to separate political considerations from the Court’s INS decision, issued in December 1918, and raise

137. National Telegraph received unauthorized access to news on its competitor’s ticker and, “with the loss of a few moments only,” distributed that information to its customers over its own wires. Id. at 295.
139. EKSTRAND, supra note 128, at 25-32.
140. Id. at 32.
141. Id. at 26.
142. Id.
143. See id.
144. Id. at 28.
145. Id.
146. See infra notes 155-57 and accompanying text.
147. EKSTRAND, supra note 128, at 28.
148. Id. at 28-29.
questions as to whether Hearst was in a weakened position to fully defend the case. Although the INS majority opinion does not directly address these political circumstances, Brandeis' dissent does note that "the facts of this case admonish us of the danger involved in recognizing such a property right in news." Because of this political background and viewpoint discrimination against Hearst and INS, the persuasive value of INS is tempered.

C. Hot News Claims Arise in Times of Technological Disruption

Hot news claims are commonly associated with technological developments that disrupt existing business models. Since colonial times, it was an accepted and common practice for newspapers to use news published by competitors. This custom developed because of the free exchange of newspapers during colonial times and the belief that news existed in the public domain. In the late nineteenth century, however, the introduction of the telegraph, coupled with the commodification of news, disrupted this industry custom. The increased ability to transmit information quickly across great distances and the increased pursuit of profits changed the nature of the news industry.

The use of the telegraph played no small role in INS. Political circumstances during World War I resulted in INS using information published in early edition East Coast AP newspapers for its own publications. Using the telegraph, INS was able to quickly publish this information in its West Coast newspapers. The AP found this practice a threat to its economic interests. Prior to the late nineteenth century, INS' actions would have been considered within accepted industry custom. Indeed, the AP engaged in similar behavior. The INS Court acknowledged that technological advancements influenced its decision.

149. Id. at 32.
151. EKSTRAND, supra note 128, at 154; NBA v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) ("The issues before us are ones that have arisen in various forms over the course of this century as technology has steadily increased the speed and quantity of information transmission.").
152. EKSTRAND, supra note 128, at 2, 16.
153. Id. at 2.
154. Id. at 2, 47.
155. See supra Section II.B.
156. INS was not alone in "lifting" news, and it raised an unclean hands defense against AP. EKSTRAND, supra note 128, at 49, 61-62. Ekstrand's review of the court records suggests that there was more than fleeting evidence that AP had been using information published by INS, but the court undervalued the weight of this evidence. Id.
In the early to mid-twentieth century, the introduction of radio resulted in the use of hot news claims to prohibit the re-transmission or recording of radio broadcasts, as well as to prohibit radio broadcasters from reading verbatim from newspapers on the air.\textsuperscript{158} The competition for advertising revenue played a factor in these cases and involved competition between newspapers and radio stations.\textsuperscript{159} In \textit{Associated Press v. KVOS},\textsuperscript{160} the AP alleged a hot news claim against a radio station for reading published AP news over the radio.\textsuperscript{161} Although the Supreme Court reversed the decision for lack of proof of injury,\textsuperscript{162} the Ninth Circuit had previously found that the AP and the radio station competed for the same advertising revenue.\textsuperscript{163}

In the 1990s, interest in the hot news doctrine resurfaced because of the nascent commercialization of the Internet, developments in mobile communications, and the increasing opportunities for computer databases. Several computer database protection bills were introduced in Congress in the 1990s, but none passed.\textsuperscript{164} \textit{National Basketball Ass'n v. Motorola} is a key hot news case of that era and involved competition between an eighty-six-year-old technology company and a fifty-year-old professional sports organization.\textsuperscript{165} Motorola and the NBA were competing for the new technological market of using pagers and early commercial Internet services to deliver real-time basketball scores and statistics.\textsuperscript{166} The Second Circuit held that New York common law would recognize the hot news misappropriation doctrine, but that the NBA failed to prove its claim.\textsuperscript{167}

\begin{thebibliography}{99}
\bibitem{158} Ekstrand, \textit{supra} note 128, at 84-94.
\bibitem{159} \textit{E.g.,} Waring v. WDAS Broad. Station, Inc., 27 Pa. D. & C. 297, 301 (1936), aff'd, 194 A. 631, 641-42 (Pa. 1937). In \textit{Waring v. WDAS}, the court found an orchestra conductor competed with a radio station by selling recordings of performances because both competed for the same advertising dollars. 194 A. at 641.
\bibitem{161} \textit{KVOS, Inc.}, 299 U.S. at 273.
\bibitem{162} \textit{Id.} at 280.
\bibitem{163} \textit{KVOS, Inc.}, 80 F.2d at 577.
\bibitem{164} Ekstrand, \textit{supra} note 128, at 10-12. Although Ekstrand states that the growth of computer databases slowed due in part to piracy, James Boyle contends that protecting computer databases from competitive use through legal regulation in Europe significantly stunted the growth of the computer database industry, while the U.S. industry continued to grow in the absence of such legal protection. \textit{Compare Ekstrand, \textit{supra} note 128, at 10-12, with James Boyle, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 49, 238 (2008).}
\bibitem{165} NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997). NBA also involved copyright infringement and Lanham Act claims that are not relevant here. \textit{Id.} at 844.
\bibitem{166} Ekstrand, \textit{supra} note 128, at 130-32. Although the companies were negotiating for a license agreement, similar to one that Motorola entered with Major League Baseball, things fell apart. \textit{Id.} Motorola and its partner in the project, STATS, struck out on their own and the NBA sued them both for hot news misappropriation. \textit{Id.} at 131-32.
\bibitem{167} NBA, 105 F.3d at 853-54. The Second Circuit held that the NBA failed to prove its hot news claim because the NBA and Motorola were not competitors and Motorola was
In the early twenty-first century, hot news law is once again active, and the Second Circuit has recently issued another defining opinion in Barclays v. Theflyonthewall.com.\(^{168}\) Although only fourteen years passed between the Second Circuit’s NBA and Barclays opinions, the technological innovation in and commercialization of cyberspace since NBA was nothing short of exponential. What is a “pager”\(^{169}\)?

Barclays is centrally about the use of hot news in the financial industry, but it drew significant interest from traditional news companies, as well as technology companies, including Google and Twitter, as indicated by amicus briefs filed in Barclays.\(^{169}\) Because it was the speed of online communication that Barclays viewed as a threat to its business, Barclays is another example of hot news arising in a time of technological disruption.

Lehman Brothers,\(^{170}\) Morgan Stanley, and Merrill Lynch filed suit against Theflyonthewall.com (“Fly”) in 2006 for hot news misappropriation.\(^{171}\) Based on equity research, these investment firms provide stock recommendations to their respective “clients of particular importance”\(^{172}\) in advance of further publication of this information. More specifically, they provide this information to “U.S. hedge funds, private equity firms, money managers, mutual funds, pension funds, and wealthy individual[s]”\(^{173}\) before not free riding on the NBA. \(^{id}\). They were not competitors because the NBA’s primary products were live basketball games and the ability to license their broadcasting copyrights. \(^{id}\). Motorola was not free riding because it invested in its own resources in gathering in and transmitting the basketball score and statistics. \(^{id}\) at 854.

\(^{168}\) Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011).

\(^{169}\) Some of the largest newspaper publishers, including the AP, Gannett, and the New York Times, filed an amicus brief in support of the validity and expansion of hot news misappropriation. AP Amici Brief, \textit{supra} note 11, at 2-4. Other entities filed an amicus brief questioning the constitutionality of the doctrine, arguing that if it is constitutional, it should have a limited scope and high burden of proof. Brief for Citizen Media Law Project, Electronic Frontier Foundation, & Public Citizen, Inc. as Amici Curiae Not Supporting Any Party at 2-4, \textit{Barclays Capital Inc.}, 650 F.3d 876 (No. 10-1372) [hereinafter EFF Brief]. Both AP amici and EFF amici expressly refrained from supporting any party or commenting on the merits of the case. \textit{id.} at 3-4; AP Amici Brief, \textit{supra} note 11, at 3. Google and Twitter filed an amicus brief, but unlike the AP or EFF amici, they filed their brief in support of Theflyonthewall.com. Google Brief, \textit{supra} note 11, at 6. The main relevance of these briefs for purposes of this Article is addressed below when discussing the level of proof required to establish the utilitarian, fifth factor of the NBA “test.” \textit{See infra} Section III.B.


\(^{171}\) After a four day bench trial, the United States District Court for the Southern District of New York found that the investment firms established a hot news claim against Fly and issued a permanent injunction against it. \textit{id.} at 313, 331. The case also involved copyright infringement claims that are not relevant here. \textit{id.} at 313. The Second Circuit stayed the injunction pending appeal. \textit{Barclays Capital Inc.}, 650 F.3d at 890.

\(^{172}\) \textit{Barclays Capital Inc.}, 700 F. Supp. 2d at 315.

\(^{173}\) \textit{Id.}
that information is available to the public. The purpose of providing these recommendations is to provide their preferred clients an "early informational advantage" in making trades.174

Fly is not a direct competitor of these financial investment firms because it does not make recommendations or execute trades on behalf of clients.175 Instead, Fly is a financial news aggregation service.176 After gaining access to the recommendations of investment firms through confidential sources and its own investigation, Fly posted the information on its website.177 According to the investment firms, the effect of Fly’s service was to take away the early informational advantage that they sought to provide their clients of particular importance, and thereby substantially threaten the incentive of financial investment firms to engage in the equity research that is required to produce these reports.178 The Second Circuit dealt Barclays and the other plaintiff investment firms the same fate as the NBA: a loss on its hot news claim but an affirmance that the "ghostly presence" of the claim lives on for some future plaintiff.179

Barclays is not the only hot news case of the early twenty-first century. The AP has filed hot news claims against online news aggregators, such as All Headline News180 and, most recently, Meltwater.181 Parties other than the AP have also recently filed hot news claims.182

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174. Id. at 316.
175. Id. at 322-23.
176. Id.
177. Subscribers paid to access Fly’s website. Id. at 324-25.
178. Id. at 341.
179. Barclays refers to hot news misappropriation as a "ghostly presence" because INS is no longer good law under the Erie doctrine, but some state law hot news claims still exist. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 894 (2d Cir. 2011) ("INS . . . maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action."). The Second Circuit held that the investment firms’ particular hot news claims were preempted by § 301 of the 1976 Copyright Act. See infra Section II.H.

180. Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009). The AP’s complaint alleged that All Headline News (AHN) systematically rewrote AP articles and republished that content on its websites without attribution to and in competition with the AP. Id. at 457. The parties reached a settlement after the court denied AHN’s motion to dismiss. See Elinor Mills, AP, AHN Media Settle Intellectual Property Lawsuit, CNET (July 13, 6:11 PM), http://news.cnet.com/8301-1023_3-10285827-93.html. As part of the settlement, the parties issued a joint press release whereby AHN expressly acknowledged the validity of hot news misappropriation. Id.

181. Complaint, supra note 10. Additionally, Meltwater has faced legal liability in foreign jurisdictions. Id. at 17. In 2009, a Norwegian court ordered Meltwater to pay a large judgment to a Norwegian media company for copyright violations. Id. In 2011, an appellate court in England affirmed a decision requiring Meltwater to pay license fees to the publishers of content that Meltwater provides to its customers. Id. These foreign decisions are relevant because they show that technology is disrupting the news industry around the globe; and, if
Perhaps reflecting just how dramatically times have changed from 1996 to 2010 in terms of the effects of technological developments on the financial health of the news industry, the New York Times went from a staunch defender of the free flow of publicly available information and an opponent of hot news claims to an advocate for the viability and desirability of the doctrine. In NBA, the Times filed its own amicus brief in support of Motorola and against the NBA’s attempt to use the hot news doctrine to restrain the publication of basketball scores and statistics. From both a journalistic and legal perspective, the Times argued that “facts have forever been viewed as in the public domain” and that the NBA’s position “stems from an unfounded view of its ‘property.’” The Times further argued that the district court’s decision in NBA hindered the use of new technology and threatened foundational free speech principles by providing less First Amendment protection to this new medium.

The Times even conceded that the burgeoning digital revolution negatively affected its bottom line, but as a proud member of the Fourth Estate, asserted that such a cost was worth paying because the benefits of the free flow of publicly available information trumped the private financial gain from creating legally protectable rights in public information. The Times called the NBA’s investment an “irrelevant factor” in the legal analysis of whether it could prohibit others from disseminating publicly available information. The irrelevance of a hot news claimant’s economic interests when confronted with the First Amendment protections for the dissemination of publicly available information is a strong theme in the Times’ 1996 NBA amicus brief.

hot news claims are constitutionally permissible, that the proper remedy might be monetary damages or compulsory license fees, not injunctive relief. See infra Section III.A.

182. E.g., Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 492, 496 (D. Md. 2010) (hot news claim involving distribution of stock recommendations preempted by Copyright Act); Scranton Times, L.P. v. Wilkes-Barre Publ’g Co., No. 3:08-cv-2135, 2009 WL 585502, at *4 (M.D. Pa. Mar. 6, 2009) (stating that the use of obituaries did not give rise to a hot news claim because it did not threaten plaintiff’s ability to provide the service); X17, Inc. v. Lavandiera, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007) (stating that hot news is broad enough to include photographs).

183. Brief for The New York Times as Amici Curiae in Support of Appellants Motorola, Inc. and Stats, Inc. at 4-6, NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (No. 96-7975) [hereinafter NYT Amicus Brief].

184. Id. at 4.
185. Id. at 19-20.
186. Id. at 6.
187. See id. at 3-4.
188. Id. at 15.
189. Id. at 3 (“By allowing a private entrepreneur’s financial interests to override news reporting, and by imposing a prior restraint on the reporting of public NBA scores to enforce those interests, the holding below impermissibly violates the First Amendment.”); Id. at 9 (“Contrary to the lower court’s analysis, the First Amendment does not condition the
In 2010, however, the Times joined an amicus brief with several other media companies, including the AP and Gannett ("AP Amici"); they filed their brief in Barclays, and advocated for recognizing the continuing validity and desirability of the hot news doctrine. This brief self-describes the amici as some the country's "largest newspaper publishers." The Times' about-face on the hot news doctrine seems more borne out of challenging economic conditions and navigating the technological disruption to the news industry, rather than a true change of heart on its prior arguments a mere fourteen years earlier in NBA, or at least one might so hope.

D. The Policy Behind and the Elements of a Hot News Claim

Hot news has two clear rationales but is of uncertain scope. INS did not set forth an express test for proving hot news and this lack of clarity has resulted in various expansions and constrictions of the claim over time. Despite INS' lack of a clear test, two rationales supporting the decision are certain and remain essential to providing a basis for the doctrine. The Court relied on both a natural rights theory and a utilitarian rationale to support its decision.

As a matter of natural rights, the Court reasoned that the AP was entitled to the economic benefits of the information it had gathered at a cost. INS sought to benefit from the AP's efforts "precisely at the point where the right to collect and disseminate facts to the public upon a publisher's willingness or ability to pay for news."); Id. at 10 ("The Constitution does not allow First Amendment freedoms to be so subservient to marketplace economics. . . . Until now, however, it has never been asserted that once information, having occurred in public, is published by one publisher, other publishers are not free to republish the same information without payment."); Id. at 12 ("The lower court mistakenly allowed the narrow and speculative economic interest of the NBA to trump one of the most fundamental constitutional principles in our jurisprudence, the right to disseminate newsworthy information to the public."); Id. at 29 ("Putting speculative commercial interests ahead of our ability to freely and rapidly report factual and public news information should not be countenanced.").

190. AP Amici Brief, supra note 11, at 3-4.
191. Id. at 1.
192. See generally NYT Amicus Brief, supra note 183, at 4-7. The Times' NBA amicus brief does not completely foreclose the continuing viability the hot news doctrine. Id. at 28 ("In sum, both INS and the play-by-play cases may arguably allow for narrow misappropriation exceptions in derogation of the First Amendment."). This thin defense of INS' continuing viability, however, seems unpersuasive in the overall context of the Times' NBA amicus brief. E.g., id. at 11 ("It is fundamental that one is free to publish truthful newsworthy information which is legally obtained; the First Amendment mandates that the publication of such information cannot be punished after the fact, let alone restrained.").
193. See generally Ekstrand, supra note 128.
195. Id. at 239.
profit is to be reaped."

Although this "sweat of the brow" rationale has been rejected by the Supreme Court as a basis for copyright protection, it remains a factor in state law hot news claims.

Next, the Court articulated the utilitarian concern that allowing free riding by INS and others would risk the collapse of the news industry, an unacceptable result, especially in a self-governing society that depends on the press to provide the public with the information it needs to be an enlightened citizenry. Thus, the underlying purpose of providing a window for the AP to reap the economic benefits of time-sensitive information that it gathered at a cost was to preserve a public good. Absent this utilitarian concern, the hot news doctrine is without merit. Because the Court found that the AP had satisfied these dual rationales, it permitted an injunction against INS for a limited, but undefined, time. Although INS provided clear dual rationales for this misappropriation claim, it did not provide a clear test or elements.

NBA helped clarify the elements of a hot news claim under New York law. The five elements under the NBA articulation of a hot news claim are:

(i) the plaintiff generates or collects information at some cost or expense;

(ii) the value of the information is highly time-sensitive;

(iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it;

(iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and

(v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

196. Id. at 240.


198. E.g., NBA v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).


200. See, e.g., Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he greatest menace to freedom is an inert people; that public discussion is a political duty."); New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry.").

201. Int'l News Serv., 248 U.S. at 245-46; See infra Section III.A.

202. NBA, 105 F.3d at 852 (citations omitted). NBA provided three slightly different iterations of these factors. Id. at 853. Barclays describes the iterations as serving different purposes: a general introduction to the claim; the elements of the tort; and the extra elements necessary to avoid preemption under the copyright act. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 900-01 (2d Cir. 2011) (providing the elements iteration). A Maryland court listed the elements as: "(1) time, labor, and money spent in the creation of the thing misappropriated, (2) a competitive relationship between plaintiff and defendant and
These factors serve the dual rationales of INS. The first three factors reflect the “sweat of the brow” theory because they focus on protecting the time-sensitive value of information gathered at a cost from free riders. The last factor serves the utilitarian purpose of ensuring the existence (or quality) of the information product or service.

The clarity NBA brought to a hot news analysis, however, was diminished by Barclays. In Barclays, the majority stated that NBA did not provide the “test” or elements for a hot news claim, but only provided mere dicta to help engage in a copyright preemption analysis under the particular facts of the case. 203 Although Barclays muddied the test for a hot news claim, it did not diminish the importance of the utilitarian rationale.

E. Proving the Utilitarian Requirement

What kind and what level of proof is required to establish the utilitarian factor remain contested issues. Judge Posner referred to the fifth factor of NBA, the utilitarian consideration, as the “meat” of the analysis. 204 Is the


203. Barclays Capital Inc., 650 F.3d at 901. In concurrence, Judge Raggi disagreed with the majority and did not reject the five-part NBA test. Id. at 907 (Raggi, J., concurring). Judge Raggi, however, did state the five-factor NBA test is not the sole test for hot news under New York law because only New York courts can create New York state common law. Id. at 911 n.3. “Rather, the NBA test attempts to define a subset of New York ‘hot news’ claims surviving preemption.” Id. Preemption is discussed below. See infra Section II.H.

204. Richard A. Posner, Misappropriation: A Dirge, 40 Hous. L. Rev. 621, 632 (2003) [hereinafter Posner, A Dirge]. In A Dirge, Posner argued from a normative perspective for the elimination of misappropriation, both as a doctrine and a unifying rationale for intellectual property. Id. at 638. Posner rejected misappropriation as a unifying rationale for intellectual property law because free riding is not always behavior that law ought to preclude and because the analogies between tangible property and intangible property breakdown. Id. at 622-26. After expressing doubt that INS v. AP was correctly decided, id. at 627-28, Posner stated two major concerns regarding misappropriation as a doctrine: its “lack of clear boundaries” and the “most fundamental difficulty with the doctrine” is that it “lacks clear normative significance.” Id. at 637-38. Judge Posner, however, has subsequent commentary on the viability and desirability of hot news misappropriation. In 2006, Posner stated in dicta his legal perspective that an “INS-type claim probably is not preempted.” ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 960 (7th Cir. 2006). ConFold involved an unsuccessful claim of product design misappropriation in the context of a non-disclosure agreement and the claimant did not make any effort to establish the five factors set forth in NBA v. Motorola. Id. at 960. In 2009, Judge Posner blogged, from a policy perspective, that it “might be necessary” to revise the Copyright Act to allow the prohibition of links to online new sources or bar online access altogether to serve the utilitarian function of the hot news doctrine. Richard A. Posner, The Future of Newspapers, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers­posner.html [hereinafter Posner, Future]. Posner’s policy concern arose during a peak of the recession, a time when the economic stability of the media raised many questions. See id. Although Posner’s argument for ending the use of the misappropriation doctrine in intellec-
utilitarian factor of a hot news analysis satisfied by showing merely that the specific plaintiff's incentive is threatened, or must the plaintiff establish that the incentive for anyone to enter or remain in the industry is threatened?

Because the hot news doctrine ultimately seeks to protect the public interest, the normatively better interpretation is that the utilitarian factor does not protect a particular plaintiff. Rather, the utilitarian factor is only satisfied if the entire industry is substantially threatened. A defendant's free riding may harm a particular plaintiff's incentive to remain or enter the news industry, but harm to the particular plaintiff's incentive alone does not satisfy the utilitarian concern. If others remain incentivized to stay in or enter the market for that news service, then the utilitarian requirement is not satisfied because the information product itself is not substantially threatened. Although case law does not explicitly resolve this question, it does provide some support for requiring a substantial threat to anyone's incentive to enter or remain in the market, not just the particular plaintiff.

Further, because the hot news doctrine is ultimately based on preserving the public interest in the existence of news, and because it seeks to restrain the use of publicly available factual information, the level of proof required to establish a threat to the existence of the news must involve some rigor. This utilitarian factor is further analyzed in Section III.B, below.

F. What Qualifies as Sufficient Competition?

Another contested issue is what qualifies as sufficient competition. A hot news claim requires some level of competition. INS expressly stated that the AP had a claim against its competitor, but not against the public at large. To hold otherwise would be illogical because it would restrain the

tual property law is earlier in time than his 2009 blog post and does not necessarily contradict his 2006 dicta regarding preemption, the normative value of his 2003 article directly addressing misappropriation carries more weight than fleeting thoughts on a blog during a time of heightened concern for the state of the institutional press or "casual dicta" in an opinion on a product design misappropriation claim in the context of a non-disclosure agreement. See Barclays Capital Inc., 650 F.3d at 912 (Raggi, J., concurring) (quoting United States v. Garcia, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, J., concurring)) (discussing how less weight should be afforded to casual dicta as opposed to emphatic dicta).

205. E.g., NBA, 105 F.3d at 853 ("The newspaper-reading public would suffer because no one would have the incentive to collect 'hot news.'" (emphasis added)); id. at 854 ("INS was intended to prevent . . . the lack of any such product or service because of the anticipation of free-riding." (emphasis added)); id. at 854 n.9 (noting that in INS, "the free-riding created the danger of no wire service being viable" (emphasis added)). But see GAI Audio, 340 A.2d at 747 (pointing out that hot news only considers "commercial damage to the plaintiff," not the industry as a whole). The GAI Audio iteration fails to sufficiently account for the utilitarian rationale that hot news claims ultimately serve the public interest, not a particular plaintiff. See id.

public from making use of information that the AP provided to the public through published newspapers.

\textit{NBA} stated that “direct” competition was a necessary element.\textsuperscript{207} In \textit{INS}, direct competition clearly existed between the AP and INS.\textsuperscript{208} NBA did not exhibit the same direct competition as \textit{INS} and was one reason why the Second Circuit held that the NBA failed to establish a hot news claim against Motorola.\textsuperscript{209} Barclays did not decide whether “direct” competition existed between the investment firms and Fly because it held that the investments firms’ hot news claim was preempted by \textsection{}301, which is part of the Copyright Act.\textsuperscript{210} The concurring Barclays judge, however, stated she believed that “direct” competition is required for a hot news claim and that the “critical consideration for purposes of identifying direct competition is the substantial similarity of the products in satisfying relevant market demand.”\textsuperscript{211} Strangely, the Barclays majority stated that NBA was not decided based “on the basis of the presence or absence of direct competition.”\textsuperscript{212}

Hot news proponents argue for an expansive definition of competition. They argue that competition for advertising dollars is sufficient.\textsuperscript{213} Some case law supports that interpretation.\textsuperscript{214} While the type of competition required to satisfy a hot news claim is unresolved and deserves further exploration, resolution of that issue is beyond the scope of this Article because it is not necessary to address the First Amendment and utilitarian analyses.

G. Does Hot News Create a “Property” Right?

The classification of hot news as establishing a “property” right is contested.\textsuperscript{215} \textit{INS} set forth three questions to consider, including whether a

\begin{itemize}
  \item \textsuperscript{207} NBA, 105 F.3d at 845.
  \item \textsuperscript{208} Int’l News Serv., 248 U.S. at 230.
  \item \textsuperscript{209} NBA, 105 F.3d at 853. Direct competition did not exist because real-time statistics did not substitute for attending or watching basketball games on television. \textit{Id.} at 854. NBA also held that the NBA failed to establish free-riding because Motorola expended its own resources in gathering and transmitting the basketball scores and statistics. \textit{Id.}
  \item \textsuperscript{210} Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 906 (2d Cir. 2011).
  \item \textsuperscript{211} \textit{Id.} at 913 (Raggi, J., concurring).
  \item \textsuperscript{212} \textit{Id.} at 906 (majority opinion). This is strange because NBA does state that the NBA’s failure to establish direct competition—one of the five factors it required for proving a hot news claim—was one basis for its decision. NBA, 105 F.3d at 853.
  \item \textsuperscript{213} AP Amici Brief, \textit{supra} note 11, at 17-18.
  \item \textsuperscript{215} Compare Balganesh, \textit{supra} note 13 (analyzing hot news as a solution to a collective action problem involving unfair competition), with Epstein, \textit{supra} note 125 (describing \textit{INS} as creating a two-dimensional property right with one dimension limiting who is exclud-
property right in news exists. The Court, however, expressly refrained from answering that question because it was not required for resolution of the case. The Court stated that "the case must turn upon the question of unfair competition in business." Recent commentary by a hot news proponent demonstrates agreement that hot news is about unfair competition. Although INS used the term "quasi property" to describe the AP’s right against its competitor, some courts and scholars have subsequently found that term "meaningless."

In their respective INS dissents, both Justice Brandeis and Justice Holmes were skeptical that the Court created a property right. Both justices focused on the "sweat of the brow" rationale, noting that the existence of a property right is not determined based on investment cost. Because investment cost is a key element of a hot news claim, the doctrine does not establish a property right. Brandeis’ and Holmes’ view of property, however, is not dispositive. Under a Lockean view, property rights can arise from one’s labor in transforming some part of the commons. And, the Supreme Court has held that "investment-backed expectations" deserve Fifth Amendment property protection.
A scholar recently sought to demystify the notion that hot news created property rights in news.226 Shyamkrishna Balganesh focused on the utilitarian aspect of the claim. He views hot news as a "theory of competitive unjust enrichment directed at solving a collective action problem."227 Although other scholars maintain that hot news does create a property right,228 Balganesh's analysis is consistent with the INS majority's explicit refusal to decide whether it was creating a property right in news, as well as the respective dissents of Brandeis and Holmes, who doubted that property rights could arise from investment.229 On the other hand, scholars who view INS as creating a property right also have support in the INS majority opinion, which provides a broad and loose definition of property:

The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right . . . and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. . . . It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.230

Whether one views hot news misappropriation as a property right or under a liability framework based on unfair competition appears to depend on one's theory of property.

Balganesh's analysis of hot news as arising from a liability framework, rather than a property right, is normatively persuasive because it helps place emphasis on the public interest. A party's investment in gathering and disseminating news is only protected to serve a public good—the existence of the news industry. A property rights view of hot news focuses on the plaintiff bringing the claim, not the public interest at stake, and falsely assumes that increased property rights in news will result in more or better news.231 Under a property rights view, the public interest is lost because courts focus on the harm to a particular plaintiff instead of the threat to the news industry as a whole. Focusing on the collective action problem, as opposed to property rights, is helpful because it centers the analysis on the utilitarian rationale of the doctrine that ultimately seeks to protect the public interest. While the economic incentive of a hot news plaintiff cannot be ignored, its importance should be secondary to the utilitarian goal that hot
news undisputedly serves. Even hot news proponents acknowledge that the underlying basis of the hot news doctrine is to serve the public interest in the availability of news. A property rights view of hot news diminishes attention on the public interest of the doctrine, whereas a liability framework helps ensure that the importance of preserving the free use of published news remains central to a court's hot news analysis.

H. Hot News and Preemption Under the Copyright Act

Whether § 301 of the 1976 Copyright Act preempts hot news misappropriation involves some uncertainty. Because INS was a pre-Erie federal common law decision, it is no longer binding precedent. Although several states recognize a state law misappropriation claim, few have expressly recognized the hot news variety of misappropriation. Cases involving a hot news claim often include a defense that § 301 preempts the state law claim. Most courts considering the issue have found that some narrow version of the hot news doctrine survives preemption. At least three decisions, however, have held that § 301 preempts the hot news doctrine in the

232. AP Amici Brief, supra note 11, at 2 ("The INS doctrine ultimately rests on the public interest."); Deutsch, supra note 12, at 595-96.


235. X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1106-07 (C.D. Cal. 2007) (using an analysis of California state case law, the court "concludes that California would recognize the 'hot news' species of the misappropriation tort as a cognizable theory of recovery"); McKevitt v. Pallasch, 339 F.3d 530, 534 (7th Cir. 2003) (citing Board of Trade v. Dow Jones & Co., 456 N.E.2d 84, 88 (Ill. 1983), as support for the position that Illinois law recognizes hot news misappropriation); Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999) (stating that the district court "believes that Missouri would allow a cause of action based on misappropriation of 'hot news'"); Barclays Capital Inc., 650 F.3d at 890 (stating that the court would have been held bound by the Second Circuit's determination in NBA that New York law recognizes a hot news claim); Pottstown Daily News Pub'g Co. v. Pottstown Broad. Co., 192 A.2d 657, 663-64 (Pa. 1963) ("[I]nsofar as the News Company pleads that the Broadcasting Company has 'pirated' news items gathered through the special services of the News Company, such states a violation of a property right and a claim of unfair competition which the state courts have jurisdiction to determine.").

236. E.g., NBA v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997); ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 960 (7th Cir. 2006) (stating in cursory dicta that INS-type misappropriation claim is probably not preempted); Fred Wehrenberg Circuit of Theatres, Inc., 73 F. Supp. 2d at 1048-50; X17, Inc., 563 F. Supp. 2d at 1103-07.
context of investment recommendations, the concurring Barclays judge expressed doubts that any hot news misappropriation claim survives preemption, and one decision has rejected the claim.

The 1976 Copyright Act introduced § 301, which preempts state law claims protecting items that “come within the subject matter of copyright” and that provide state rights that are “equivalent to any of the exclusive rights within the general scope of copyright.” The legislative history of the Copyright Act is unclear as to whether Congress intended to preempt the hot news doctrine. A House Report on the 1976 Copyright Act amendments stated that “[m]isappropriation” is not necessarily synonymous with copyright infringement . . . . [and] state law should have the flexibility to afford a remedy . . . against a consistent pattern of unauthorized appropriation by a competitor of facts . . . constituting ‘hot’ news.” That House Report also references an earlier version of the Copyright Act that incorporated a list of non-preempted state claims, including hot news misappropriation. That entire list, however, was omitted from the final version of the Act after the Justice Department voiced concerns about including misappropriation. Thus, the House Report cannot serve as irrefutable proof that Congress intended to exempt hot news misappropriation from preemption.

237. In Barclays, the court held that investment recommendations are “original works” and thus, come within the subject matter of copyright and that the investment firms sought to protect a right within the “general scope” of the exclusive rights provided under the Copyright Act because they sought to prevent Fly from reproducing, displaying, or distributing the recommendations. Barclays Capital Inc., 650 F.3d at 878, 902; see also Lowry’s Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 754-56 (D. Md. 2003); Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 502-04 (D. Md. 2010). Barclays, Lowry’s Reports, and Agora Financial, however, do allow for the possibility that some hot news misappropriation claims may survive preemption. Barclays Capital Inc., 650 F.3d at 898; Lowry’s Reports, 271 F. Supp. 2d at 756; Agora Fin., 725 F. Supp. 2d at 501-03.


240. 17 U.S.C. § 301 (2006). Copyrightable subject matter includes literary works, but not ideas or facts. Id. §§ 102, 103. The exclusive rights protected by copyright include the rights to distribute, reproduce, and display. Id. § 106.


244. See id. at 911.
One way courts analyze copyright preemption is the "extra elements" test. If a state cause of action has elements beyond what is required to prove copyright infringement, then such a cause of action is not preempted by § 301. The extra element(s) must change more than the scope of the claim, it must change the nature of the claim. Examples of non-preempted claims due to the existence of extra elements include breach of contract or breach of fiduciary duty. In NBA, the Second Circuit held that three of the five elements it listed for a hot news claim were extra elements: (1) the time-sensitive nature of the factual information; (2) the defendant's free riding on the plaintiff's investment; and (3) the threat to the existence of the product or service. Whether these three items are truly extra elements has been questioned.

The free riding element of a hot news claim has been described as a "pejorative" term that is synonymous with copying, an element of copyright infringement. The other four elements may simply narrow the scope of a hot news claim without altering its nature to something different than a copyright infringement claim. Thus, although the majority of courts addressing the preemption analysis have held that hot news misappropriation is not entirely preempted by § 301 of the Copyright Act, there is some doubt about that conclusion.

I. Hot News and the First Amendment

Courts and hot news proponents have underexplored the First Amendment implications of a hot news claim. The First Amendment is barely whispered in hot news misappropriation case law. Although Justice Brandeis raised the issue of "free speech" in his INS dissent, nowhere in INS

246. Id.
247. Id.; accord NBA v. Motorola, Inc., 105 F.3d 841, 851 (2d Cir. 1997).
249. NBA, 105 F.3d at 853.
252. One court summarized its analysis that the NBA iteration of hot news misappropriation does not contain extra elements from a copyright infringement claim as follows: "[F]ree-riding . . . may be a pejorative description of copying, but it is still copying." The other elements do not describe behavior at all. The cost of generating the information, its time-sensitivity, and direct competition between the parties merely define pre-existing conditions; the threat to the plaintiff's business merely identifies a consequence of the act of "free-riding." Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 756 (D. Md. 2003) (alterations in original) (citations omitted).
is the "First Amendment" mentioned.\textsuperscript{253} The absence of First Amendment discussion in \textit{INS} may be due, in part, to the lack of any substantial First Amendment jurisprudence when the case was decided in 1918.\textsuperscript{254}

Brandeis' dissent raises free speech concerns in two contexts. First, when speculating on whether Congress might pass hot news misappropriation legislation, Brandeis wondered whether legislators might conclude that damages, as opposed to injunctions, would be the limit of the remedy in light of free speech concerns.\textsuperscript{255} Second, Brandeis eloquently and famously stated: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."\textsuperscript{256}

In a footnote, the NBA Court declined to address the First Amendment issue because it held that the NBA could not satisfy the factors for a hot news claim, and therefore, it did not need to reach the constitutional issue.\textsuperscript{257} According to the district court opinion in \textit{Barclays}, Fly "expressly disclaimed" its First Amendment argument at trial.\textsuperscript{258} One reason that Fly might have disclaimed its First Amendment defense is that Fly had brought a lawsuit, including a hot news claim, against a website that competed with Fly in providing financial news.\textsuperscript{259} Although Fly raised First Amendment defenses in its appellate brief,\textsuperscript{260} the Second Circuit did not reach the constitutional issue because it resolved the case on non-constitutional grounds.\textsuperscript{261}

\begin{itemize}
\item \textsuperscript{253} \textit{Int'l News Serv. v. Associated Press}, 248 U.S. 215, 266 (1918) (Brandeis, J., dissenting). The \textit{INS} majority does, however, discuss the Copyright and Patent Clause and concludes that the Framers did not intend for it to apply to facts, news, or the history of the day. \textit{See id.} at 234 (majority opinion).
\item \textsuperscript{254} Zimmerman, \textit{supra} note 224, at 726; EFF Brief, \textit{supra} note 169, at 5 (stating that modern First Amendment jurisprudence began the year after \textit{INS} "with the landmark decisions in \textit{Abrams v. United States}, 290 U.S. 616 (1919), and \textit{Schenck v. United States}, 249 U.S. 47 (1919)").
\item \textsuperscript{255} \textit{Int'l News Serv.}, 248 U.S. at 266 (Brandeis, J., dissenting).
\item \textsuperscript{256} \textit{Id.} at 250.
\item \textsuperscript{257} \textit{NBA v. Motorola, Inc.}, 105 F.3d 841, 854 n.10 (2d Cir. 1997).
\item \textsuperscript{258} \textit{Barclays Capital Inc. v. Theflyonthewall.com}, 700 F. Supp. 2d 310, 352-53 (S.D.N.Y. 2010).
\item \textsuperscript{259} The Second Circuit stated that Fly's hot news lawsuit against its competitor had no legal significance as to why it did not pursue a First Amendment defense in \textit{Barclays}. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 906 n.39 (2d Cir. 2011). Despite the Second Circuit's dicta, there is some legal significance. \textit{See id.} Fly could not reasonably argue that the hot news doctrine inherently violates the First Amendment and simultaneously maintain a hot news lawsuit against one of its competitors. \textit{See id.}
\item \textsuperscript{260} \textit{Brief of Defendant-Appellant at 35-38, Barclays Capital Inc.}, 650 F.3d 876 (No. 10-1372-CV).
\item \textsuperscript{261} \textit{Barclays Capital Inc.}, 650 F.3d at 889 n.21. In dicta, the Second Circuit stated that the injunction may raise constitutional or statutory concern, but the court only expressly discussed the duty to police imposed on the plaintiffs in this context. \textit{Id.}
\end{itemize}
Hot news advocates have not sufficiently considered the First Amendment implications. In a 2010 Practicing Law Institute (PLI) article, attorney Andrew Deutsch advocated for a federal hot news misappropriation tort, but only mentions the First Amendment once, in the second to last footnote.\textsuperscript{262} In 2009, attorney David Marburger and his brother Dan, an economics professor, drafted a proposal for state law hot news misappropriation as a solution to the journalism crisis, but did not provide First Amendment analysis.\textsuperscript{263} Although their subsequent article, Responses to Critics, does provide some First Amendment discussion, it is largely based on unsupported conclusory assertions.\textsuperscript{264} At least one proponent of hot news misappropriation as a solution to the journalism crisis directly addressed the First Amendment and conceded that the First Amendment does pose limits on the permissible scope of the doctrine.\textsuperscript{265} The commentator observed that prior restraint is a concern, that the remedy should be limited to monetary damages, and that the doctrine should not apply against non-profit uses of the information.\textsuperscript{266} The First Amendment concerns involving hot news misappropriation are more fully considered in Part III, below.

III. LEGAL OBSTACLES TO HOT NEWS MISAPPROPRIATION

At least two legal obstacles exist to the hot news doctrine: the First Amendment and proving the utilitarian requirement of the claim. First Amendment law is the "elephant in the room" when considering hot news claims because court opinions and much commentary supporting the doctrine lack rigorous, if any, First Amendment analysis.\textsuperscript{267} Whether a hot news claim can survive First Amendment review is questionable for at least four reasons: (1) the policy in favor of widespread dissemination of information

\textsuperscript{262} Deutsch, supra note 12, at 595 n.310 ("[In United States v. Martignon, 492 F.3d 140 (2d Cir. 2007), t]he Second Circuit did note that there could be due process and First Amendment concerns were Congress to criminalize conduct permitted under the Copyright Clause, such as the sale of works in the public domain."). When discussing INS v. AP, Deutsch quotes Justice Brandeis's INS dissent where he notes that public knowledge is free as the air to common use. \textit{Id.} at 549. Interestingly, Deutsch represented Motorola in \textit{NBA v. Motorola} where he defended against the applicability of the hot news doctrine. See NBA, 105 F.3d at 843.

\textsuperscript{263} MARBURGER & MARBURGER, supra note 241.

\textsuperscript{264} DAVID MARBURGER & DAN MARBURGER, RESPONSES TO CRITICS 14-17 (2009), available at http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/Responses%20to%20questions.PDF.

\textsuperscript{265} Holte, supra note 26, at 36-38. Holte argues for amending the fair use provision of the Copyright Act (17 U.S.C. § 107) to allow for a 24-hour period whereby only the headline and a link to the original article would be allowed and that even this restriction would not prohibit a "purely nonprofit organization from posting the story." \textit{Id.} at 33.

\textsuperscript{266} \textit{Id.} at 36.

\textsuperscript{267} See EFF Brief, supra note 169, at 6.
from diverse and antagonistic sources; (2) the strong presumption against prior restraints of speech; (3) vagueness; and (4) the Daily Mail\textsuperscript{268} principle.

Even if a hot news claim is constitutionally permissible, the digital age makes satisfaction of the claim difficult, perhaps nearly impossible. Hot news claims require a utilitarian justification, as indicated by one of the dual rationales of \textit{INS} and the fifth factor of the \textit{NBA} analysis. Because dissemination of information on the Internet is relatively inexpensive, can be done by nearly anyone, and can be transmitted almost instantaneously around the globe, it is unlikely that the existence of an information product or service as a whole will be substantially threatened, as distinguished from the existence of a particular provider.\textsuperscript{269}

A. First Amendment Concerns

Because of the lack of First Amendment analysis in hot news case law, it is uncertain how courts will resolve the tension between free speech rights and unfair competition law. Although, some hot news opponents concede that a narrow hot news claim may possibly survive First Amendment scrutiny.\textsuperscript{270} This Article seeks to expand the First Amendment analysis and discourse by offering four reasons why a hot news cause of action may be unconstitutional under the First Amendment.

First, a core First Amendment value, as stated in \textit{Associated Press v. United States}, is that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."\textsuperscript{271} The events leading \textit{INS} to use information in the AP’s published East Coast newspapers suggest that this First Amendment value may have been harmed by the Court’s holding.

Political opposition to Hearst’s early sympathy for the German position in World War I led several countries to ban \textit{INS}’ use of their communication systems and resulted in a Congressional investigation regarding his possible association with German spies.\textsuperscript{272} Because of these circumstances, it has been suggested that it would likely have been politically difficult for the U.S. Supreme Court to rule in favor of \textit{INS}.\textsuperscript{273} In light of the Court’s statement that a free society functions best when there is wide dissemination of information from diverse and antagonistic sources, it is easy to view \textit{INS}...

\textsuperscript{269} Of course, the survival of the institutional press is the main concern, not the survival of merely anyone that chooses to transmit information online. \textit{See infra} Part IV.
\textsuperscript{270} \textit{See, e.g., EFF Brief, supra note 169, at 4.}
\textsuperscript{271} 326 U.S. 1, 20 (1945) (holding that the AP’s bylaws violated the Sherman Antitrust Act).
\textsuperscript{272} \textit{See supra} Section II.B.
\textsuperscript{273} EKSTRAND, \textit{supra} note 128, at 29.
as contradicting this principle. Of course, \textit{INS} was decided over two decades prior to \textit{AP v. United States}. Nonetheless, this First Amendment value should shape hot news jurisprudence going forward, and the political background of \textit{INS} should be taken into account when considering the limits of its persuasive value.

Second, the usual remedy that parties seek and courts afford in hot news cases is an injunction. Injunctive relief concerns about prior restraint. Prior restraints on speech are well-established violations of First Amendment rights. A preliminary injunction is especially problematic because there has been no final determination that the speech at issue may be constitutionally restrained. A permanent injunction ordered after a final determination that the speech may restrained, however, is likely considered a constitutional prior restraint, at least as to the specific speech considered.

In \textit{Barclays}, the district court issued a permanent injunction that raises a prior restraint concern, albeit a nuanced one. After a four-day bench trial, the district court entered a permanent injunction that prohibited Fly from publishing the plaintiff investment firms' trade recommendations for a set period of time. In one sense, this permanent injunction can be viewed as an unconstitutional prior restraint because it applied to trade recommendations that had not yet been published or even created. In another sense, one could argue that it is merely prohibiting the very type of speech already found to violate the hot news doctrine—publication of the investment firms' trade recommendations. This same issue—an injunction applied to yet-to-occur speech based on similar existing speech considered by the court—existed in \textit{INS}. The \textit{INS} injunction was even more troubling because \textit{INS} involved an appeal from a preliminary injunction imposed by the Second Circuit—a preliminary injunction that the district court declined to order

\begin{itemize}
  \item 275. Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")
  \item 277. The Barclays's district court framed the scope of the injunction as follows: [I]n the case of research reports released when the market is closed, an injunction will issue forbidding the dissemination of the Firms' Recommendations until one half-hour after the opening of the New York Stock Exchange or 10:00 a.m., whichever is later. . . . For Recommendations issued while the market in New York is open for trading, the defendant will be enjoined from publishing the Recommendations until two hours after their release by the Firms.
\end{itemize}

precisely because it was uncertain as to the propriety of such a restraint on
publicly available factual information.\textsuperscript{278}

Assuming a hot news claim is constitutionally permissible, it is possible
that the injunctive remedy is not.\textsuperscript{279} Just as there is a lack of First
Amendment analysis by the courts, there is a lack of analysis as to whether
an injunction is an appropriate remedy.\textsuperscript{280} Justice Brandeis’s \textit{INS}
dissent touched upon this question when considering whether Congress might deny
such relief if it passed a hot news misappropriation statute,\textsuperscript{281} but the \textit{INS}
Court provided no analysis as to whether injunctive relief is a proper reme­
dy. The \textit{INS} Court did, however, acknowledge that it lacked the ability to
define the proper scope of the injunctive relief.\textsuperscript{282} The Court’s doubt about
its ability to craft an injunction that protects the incentive to gather and pub­
lish news without encroaching too far on the right to use publicly available
factual information sheds light on the inherent difficulty of injunctive relief
as a remedy for hot news claims.

In \textit{Barclays}, the Second Circuit expressly declined to analyze the pro­
piety of the injunction because it reversed the judgment on other grounds.\textsuperscript{283} Similarly, the Second Circuit did not analyze whether an injunction
was appropriate in \textit{NBA} because it held that the NBA failed to prove
the elements for its hot news claim.\textsuperscript{284} Neither the district court opinion in
\textit{NBA} nor in \textit{Barclays} provides in-depth analysis on whether injunctive relief

\textsuperscript{278} Although the district court judge believed that the AP had established the right
to prevent a competitor from using the news in early edition newspapers as a matter of unfair
competition, he concluded that “the matter is one of first impression, and my decision cannot
be regarded as sufficiently free from doubt to justify the granting of a preliminary injunction
upon this branch of the case.” \textit{Associated Press v. Int’l News Serv.}, 240 F. 983, 996
(S.D.N.Y. 1917).

\textsuperscript{279} Clay Calvert & Matthew D. Bunker, \textit{Framing a Semantic Hot-News Quagmire
in Barclays Capital v. Theflyonthewall.com: Of Missed Opportunities and Unresolved First

\textsuperscript{280} Balganesh, supra note 13, at 452, 489.

\textsuperscript{281} See \textit{Int’l News Serv. v. Associated Press}, 248 U.S. 215, 266 (1918) (Brandeis, J.,
dissenting).

\textsuperscript{282} The \textit{INS} Court was at a loss as to how much time was needed to protect the AP’s
incentive to gather and publish information:

\textit{But the case presents practical difficulties; and we have not the materials, either in
the way of a definite suggestion of amendment, or in the way of proofs, upon
which to frame a specific injunction; hence, while not expressing approval of the
form adopted by the District Court, we decline to modify it at this preliminary
stage of the case, and will leave that court to deal with the matter upon appropriate
application made to it for the purpose.}
\textit{Id.} at 246 (majority opinion). The difficulty in determining the appropriate scope of the in­
junctive relief in a hot news cases raises questions about its constitutionality, or at least prac­
ticality as a remedy.

\textsuperscript{283} \textit{Barclays Capital Inc. v. Theflyonthewall.com, Inc.}, 650 F.3d 876, 889 n.21 (2d
Cir. 2011).

\textsuperscript{284} \textit{NBA v. Motorola, Inc.}, 105 F.3d 841, 853 (2d Cir. 1997).
is proper. The NBA district court opinion provides little more than a conclusory assertion that monetary damages are inadequate. The Barclays district court opinion analyzes the proper scope of the injunctive relief, but does not analyze the threshold issue of whether injunctive relief is permissible. The lack of analysis by the district court in Barclays may be explained, in part, by Fly not disputing—at least as to the copyright infringement claim—the investment firms’ right to a permanent injunction. Assuming injunctive relief is a constitutionally permissible remedy for a hot news claim, the burden of proof must be rigorous to protect the First Amendment concerns in the free flow of information, especially in the context of a preliminary injunction where the claim has not been fully adjudicated.

A consideration in analyzing the constitutionality of injunctive relief, as well as the broader First Amendment analysis, is the level of scrutiny to apply. Strict scrutiny applies to content-based regulations. Intermediate scrutiny applies to content-neutral regulations. Whether hot news misappropriation is a content-based or content-neutral regulation is subject to dispute. A definitive answer to this question is elusive, but hot news misappropriation seems more like a content-neutral regulation than a content-based regulation.

On the one hand, the argument could be made that hot news is content-based, especially if it is limited to breaking news of the INS-type, as


286. See Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 343-47 (S.D.N.Y. 2010) (analyzing the proper scope of the content covered and the duration of the injunction, but not whether injunctive relief is an appropriate remedy).

287. Id. at 328.

288. See Pamela Samuelson & Krzysztof Bebenek, Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases, 61/5: J.L. & POL’Y FOR INFO. SOC’Y 67, 68 (2010) (“The presumption of irreparable harm is particularly troublesome and inappropriate in cases involving transformative uses of existing works . . . because free expression and free speech interests of creative users are at stake and transformative use cases are often close.”). The position taken in Samuelson’s & Bebenek’s article carries persuasive analogous value in the context of hot news misappropriation claims because similar free speech interests in the use of publicly available news exist. The free speech interests are arguably more important in the hot news context because there is no use of copyrightable material.


some advocate. On the other hand, one could reasonably argue that hot news is content-neutral because it is not based on the content of the news, but on the timeliness of the news, regardless of whether the specific subject matter concerns war, general interest news, sports, financial news, or celebrity photos. Thus, unless the timeliness of the news is considered content as opposed to more reasonably being described as a quality of news, it appears that hot news misappropriation is a content-neutral regulation. Regardless of whether hot news is subject to strict or intermediate scrutiny, it appears to violate either standard.

One difference between strict and intermediate scrutiny is the burden on the speech. Strict scrutiny requires the burden on speech to be the least restrictive burden possible. Intermediate scrutiny is a less demanding test and requires that the regulation does not burden substantially more speech than is necessary. If strict scrutiny applies, then the injunctive remedy seems clearly unconstitutional because an injunction on speech is not the least restrictive means of serving the government interest involved (i.e. protecting the incentive to invest resources in the gathering and dissemination of news for the ultimate purpose of serving the public interest in the availability of news). Because the concern is the economic incentive in the gathering and dissemination of news, there is an adequate remedy at law—money damages.

In Barclays, the AP amici argued that money damages will almost always be inadequate because the defendant may be judgment-proof or lack sufficient revenue. This argument, however, partially contradicts the argument that the AP amici's lead attorney made a year prior to filing the amicus brief in a Practicing Law Institute (PLI) article. In his PLI article, Deutsch cites Google News as an example of the type of harmful aggregator for which a federal hot news tort is needed. Google is certainly not the

\[\text{\textsuperscript{292}}. \text{See, e.g., Calvert & Bunker, supra note 279.} \]
\[\text{\textsuperscript{293}}. \text{See, e.g., Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).} \]
\[\text{\textsuperscript{294}}. \text{See, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009).} \]
\[\text{\textsuperscript{295}}. \text{See, e.g., NBA, 939 F. Supp. at 1087; U.S. Golf Ass'n v. St. Andrews Sys., DataMax, Inc., 749 F.2d 1028, 1034-41 (3d Cir. 1984).} \]
\[\text{\textsuperscript{296}}. \text{See, e.g., Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011); Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491 (D. Md. 2010).} \]
\[\text{\textsuperscript{297}}. \text{E.g., X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102 (C.D. Cal. 2007).} \]
\[\text{\textsuperscript{298}}. \text{See Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004).} \]
\[\text{\textsuperscript{299}}. \text{Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 186 (1997).} \]
\[\text{\textsuperscript{300}}. \text{See Balganesh, supra note 13, at 452.} \]
\[\text{\textsuperscript{301}}. \text{AP Amici Brief, supra note 11, at 27-28.} \]
\[\text{\textsuperscript{302}}. \text{Deutsch, supra note 12, at 568. In critiquing the Marburgers' proposal that targets parasitic aggregators and not pure aggregators, like Google News, Deutsch stated: 'The primary economic threat to originators comes from 'pure' aggregators (e.g. Google News-style) aggregators. 'Parasitic' aggregation is relatively uncommon, because it requires con-} \]
type of aggregator that is likely to lack adequate capital to pay money damages, let alone be judgment-proof.303

Assuming the less rigorous intermediate scrutiny standard applies, it is a closer call as to whether an injunction burdens substantially more speech than is necessary to serve the government interest of protecting the incentive to invest in news gathering and dissemination for the public interest. Yet, one could ask why money damages are insufficient, and perhaps the same answer should result: money damages are sufficient and injunctive relief burdens substantially more speech than is necessary to remedy the harm to a hot news claimant’s profitability.

Another difference between strict and intermediate scrutiny is the level of the government interest involved. Strict scrutiny requires a compelling government interest,304 whereas intermediate scrutiny only requires a substantial or important government interest.305 Assuming the governmental interest is the availability of information necessary for a self-governing society, then, in theory, a hot news misappropriation claim should easily satisfy the substantial government interest standard and likely should satisfy the compelling interest standard as well. After all, “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”306 Hot news misappropriation likely satisfies both the substantial and compelling interest standards, but fails to satisfy the requirement that the regulation does not burden substantially more speech than necessary or is the least restrictive means to serve the government interest.

Third, the hot news doctrine raises constitutional concerns of vagueness.307 A central rationale of INS and critical factor of the NBA “test” is the utilitarian consideration that hot news misappropriation protects the economic incentive to gather and disseminate news because without such pro-


307. Although the source of the vagueness doctrine is the Due Process Clause of the Fifth Amendment, it is commonly applied in cases involving First Amendment issues. E.g., FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012); United States v. Williams, 553 U.S. 285, 304 (2008).
Protection the existence or quality of news itself may be threatened. Judge Posner has described the NBA articulation of this utilitarian factor as "alarmingly fuzzy." A law is unconstitutionally vague based on a lack of notice if "a person of ordinary intelligence" must necessarily guess at its meaning. More specifically, a law is unconstitutionally vague if indeterminacy exists as to whether a particular activity is prohibited. The NBA articulation of a hot news claim is, and perhaps any formulation of a hot news claim may be, unconstitutionally vague.

Even proponents of hot news misappropriation concede that several exceptions are warranted, including: (1) not covering emergency news; (2) not applying the claim against the public, only against direct competitors; (3) allowing even a competitor to use another's news as a tip, so long as it engages in its own independent investigation; (4) applying the claim only applies to a competitor that "engages in systematic, continuous and competitive republication of the plaintiff's news content"; and (5) exempting a competitor that provides "occasional commentary or criticism of the journalism in a particular story." These exceptions, deemed necessary by hot news proponents, contribute to the vagueness of the claim, leaving one to wonder what exactly the claim protects.

Where is the line between taking a "tip" and "stealing" information? How much independent investment is enough? Where is the line between "occasional" commentary or criticism and "stealing" information? Also, how much information can one use when providing "occasional" commentary or criticism? When does one cease being a member of the public and become a direct competitor? Is the mere competition for advertising dollars enough, even if the competitors are an individual blogger with low traffic and the AP?

Not only do proponents of hot news misappropriation acknowledge the need for multiple exceptions, but they probably have been in breach of hot news misappropriation, according to at least one scholar and one reporter. Professor James Boyle testified: "Much of what is done by newspapers..."
with each other is actually problematic under existing hot news doctrine."³¹⁴ A Washington state journalist stated:

"[I]t's common practice for radio and TV 'news' readers to simply rip their stories off from their local newspaper, seldom bothering to credit the newspaper. This kind of theft has been commonplace for decades, and we newspaper people call it 'rip and read' and joked that you could often hear the sound of the newspaper being folded on the air."³¹⁵

Determining who qualifies as a competitor for purposes of a hot news claim also involves vagueness concerns. Importantly, the NBA "test" only applies to "direct competitors," although there is disagreement about who qualifies as a direct competitor and whether direct competition is even required. It can be argued that newspapers are not direct competitors with broadcast news, and thus the "'rip and read'"³¹⁶ practice of broadcast news does not violate hot news misappropriation. Another complication is a proposal that the competition element be interpreted "flexibly."³¹⁷ This flexible approach to defining direct competition is vague and expansive because, for example, it could allow for a finding of competition even when the online site provides a hyperlink to the original source.³¹⁸ A narrower proposal is to "make clear that 'direct competition' in NBA factor four means something more than just attracting 'eyeballs' away from a plaintiff's print publication or website."³¹⁹ There is, however, case law for the position that merely competing for advertising is sufficient competition for a hot news claim, including instances when the parties operate in different media.³²⁰

Another vagueness concern arises from the proposal for "prolonged" hot news protection for updated articles on the Internet.³²¹ This proposal seeks to provide extended hot news protection to an article that has been

³¹⁶. "Rip and read" refers to the practice of broadcasters taking information from newspapers and using that information for the content of broadcast news programs. Id.
³¹⁷. See AP Amici Brief, supra note 11, at 17.
³¹⁸. The AP amici also argue for possibly finding "direct competition" through mere use of hyperlinks to a news originator because "the risk remains that readers will find that reading the aggregator's output keeps them sufficiently informed of the latest news." Id.
³¹⁹. EFF Brief, supra note 169, at 26.
³²¹. AP Amici Brief, supra note 11, at 13 n.4.
updated with new content, as is often done with online news. Prolonged protection based on updated articles is fraught with several difficulties. First, it is difficult to segregate updated information from previously-available information. Next, the updates may often be the most relevant information of public concern. Finally, continuous updating can be used as a pretext to extend the hot news claim beyond its intended purpose.

The NBA Court's articulation of the utilitarian factor also raises vagueness concerns because it protects not only the existence of an information product, but also the "quality" of the information product. Determinations of quality seem rife with vagueness issues. What qualifies as a substantial threat to the quality of news? Who decides what qualifies as quality news? How do they decide? Assessing the threat to the quality of the news seems inevitably subjective and content-based, thus requiring strict scrutiny review. At the very least, because no court has engaged the First Amendment issue, nor sought to provide an explanation of how to analyze the quality of the news, a person of ordinary intelligence must necessarily guess as to when its actions would substantially threaten the quality of the news. Because the hot news doctrine raises several vagueness concerns, it is constitutionally questionable.

Fourth, a line of cases involving the constitutionality of publishing lawfully obtained, truthful information warrants particular attention in analyzing the constitutionality of the hot news doctrine. In _Smith v. Daily Mail Publishing Co._, the Supreme Court held unconstitutional a state statute that prohibited publishing the name of a juvenile charged with a crime without first receiving permission from the juvenile judge. The Court stated that laws prohibiting the publication of truthful information "seldom can satisfy constitutional standards." Known as the _Daily Mail_ principle, the Supreme Court has routinely held that publication of lawfully obtained, truthful information is constitutionally protected, unless there is a state interest of the highest order.

323. _Id._ at 105-06.
324. _Id._ at 102.
325. There are cases pre-dating _Daily Mail_ that also provide constitutional protection for publication of lawfully obtained information. E.g., _Cox Broad. Corp. v. Cohn_, 420 U.S. 469 (1975) (finding it unconstitutional to allow a civil damages award against a television station from broadcasting the name of a rape-murder victim that it lawfully obtained from courthouse records); _Okla. Publ'g Co. v. Dist. Court_, 430 U.S. 308 (1977) (finding it unconstitutional to prohibit publication of a photograph of a juvenile defendant that reporters obtained from attending a prior public proceeding involving the juvenile); _Landmark Commc'ns, Inc. v. Virginia_, 435 U.S. 829 (1978) (finding it unconstitutional to prohibit third parties from publishing truthful information concerning confidential proceedings of a judicial review commission).
In *Florida Star v. B.J.F.*, a newspaper learned the name of a rape victim from a police report made available in the sheriff department's pressroom. In violation of its own internal policy, as well as a state statute that prohibited disclosing the identity of sexual assault victims through means of mass communication, the newspaper published the victim's name. The victim sued the newspaper for civil damages. Following the *Daily Mail* principle, the Court held the statute unconstitutional because the newspaper published lawfully obtained, truthful information. While the Court acknowledged that the privacy and physical safety of sexual assault victims, as well as the goal of encouraging them to come forward, were "highly significant interests," the Court held that they did not rise to the level of interests of the "highest order," such that they would qualify for the exception to the *Daily Mail* rule.

In *Bartnicki v. Vopper*, the Court held that someone who publishes information of public concern that was intercepted in violation of state and federal wiretapping law is not subject to liability, so long as that party did not participate in the illegal interception. It is counterintuitive that publication of information received as a result of illegal wiretapping is protected, but publication of publicly available factual information could result in liability under hot news misappropriation where no underlying law was broken to receive that information.

If protecting personal privacy and safety interests by prohibiting the publication of a rape victim's or juvenile criminal defendant's name are not interests of the highest order, it is difficult to imagine how protecting the economic interests of corporations is such an interest. Of course, the response to this line of reasoning may be that the interest protected is the public interest in the availability of news itself. The existence of the Fourth Estate and thus an enlightened citizenry reasonably seems to be an interest of the highest order and can serve as the basis for finding that hot news misappropriation is an exception to the *Daily Mail* principle. Assuming hot news is constitutionally permissible, a plaintiff still must prove that without

327. *Id.* at 527.
328. *Id.* at 526, 528.
329. *Id.* at 528.
330. *Id.* at 536, 541.
331. *Id.* at 537. The Court added a caveat to this conclusion by expressly stating that this decision does not "rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the *Daily Mail* standard." *Id.*
332. *Id.* at 541.
334. *Id.* at 517-18.
335. Google Brief, *supra* note 11, at 22 n.10 ("Surely an individual's right to privacy is a stronger interest than a corporation's private economic interests.").
First Amendment, Fourth Estate, and Hot News

hot news protection, the existence (or quality) of news is substantially threatened. As discussed in Section III.B, below, establishing this utilitarian factor is increasingly difficult in the age of rapid and relatively low-cost technological communications.

Before turning to an analysis of the utilitarian requirement of the hot news doctrine, exploring the possible implications of *Golan v. Holder* is appropriate because the case includes analysis on the constitutional significance of the public domain.

In a 6-2 decision, the *Golan* Court upheld the constitutionality of a provision of the Uruguay Round Agreements Act that "restored" copyright protection to certain foreign works that did not previously qualify for copyright protection in the United States. The Court allowed copyright protection for foreign works that had been in the public domain. It held that neither the First Amendment nor the Copyright Clause "make[] the public domain, in any and all cases, a territory that works may never exit." Additionally, the Court dismissed the notions that the public domain was a "category of constitutional significance" and that *Cox Broadcasting Corp. v. Cohn*, a precursor to *Daily Mail*, controlled. *Golan* could be read as support for the conclusion that "removing" facts from the public domain pursuant to the hot news doctrine is constitutionally permissible. A closer reading of *Golan*, however, shows that such a conclusion is questionable at best.

*Golan* repeatedly and specifically states that "works" in the public domain may be removed. Facts are decidedly not works, not copyrightable,

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337. *Id.* at 882 & n.13 (stating that "restored" is a misnomer because the works never received U.S. copyright protection prior to § 514 of the URAA).
338. Under § 514 of the URAA, a foreign work is eligible to have U.S. copyright protection "restored" for one of three reasons: (1) the U.S. did not protect works from the country of origin at the time of publication; (2) the U.S. did not protect sound recordings fixed prior to 1972; or (3) the author failed to comply with statutory formalities. *Id.* at 878.
339. *Id.*
340. *Id.* at 888 n.26.
341. 420 U.S. 469 (1975). In *Cox Broadcasting*, the Court held that a Georgia statute violated the First Amendment because it prevented the publication of the name of rape victim that a broadcast station learned from a public record. *Id.* at 496-97.
342. In a footnote, the Court stated that *Cox Broadcasting Corp. v. Cohn* does not "remotely ascribe[] constitutional significance to a work's public domain status." *Golan*, 132 S. Ct. at 891 n.32.
343. *Id.* at 878, 884 ("The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain."); *id.* at 885 ("Undoubtedly, federal copyright legislation generally has not affected works in the public domain."); *id.* ("On occasion, however, Congress has seen fit to protect works once freely available."); *id.* at 886 ("Several private bills restored the copyrights of works that previously had been in the public domain."); *id.* at 891 ("And nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works..."
and are available for public use. While a copyrightable work may be removed from the public domain, it does not logically follow that bare facts may be removed from the public domain. Because hot news prohibits competitors from using facts available in the public domain, it contradicts the Court's well-established rules under copyright law and Daily Mail that publicly available facts are available for all to use.

The Golan Court's assertion that Cox Broadcasting is irrelevant to the constitutional analysis of removing works from the public domain further bolsters the conclusion that Golan's logic does not extend to the removal of facts from the public domain. In a footnote, the Golan Court stated that Cox Broadcasting does not "remotely ascribe[] constitutional significance to a work's public domain status." To the extent that the Golan Court is focused on the significance that the material at issue is a copyrighted "work," then it is correct that Cox Broadcasting did not involve copyright.

Cox Broadcasting, however, certainly found constitutional significance in the public availability of the information. The publisher would not have fared well if it had broken into an office to get the information or hacked an email system. Of course, even if such illegal behavior occurs, the information can be published by someone other than the wrongdoer, at least when the information is a matter of public importance. Daily Mail expressly stated that "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." Thus, to accept the legitimacy of the Golan Court's dismissal of the constitutional relevance of information existing in the public domain, its decision must be limited to "works" in the public domain. Otherwise, its assertion that the public domain is of no constitutional significance in the use of publicly available information would contradict the Daily Mail principle, as well as the Golan Court's reiteration that every "fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."
Unlike the majority, Justice Breyer's Golan dissent, joined by Justice Alito, does emphasize the significance of the public domain. Whereas the Golan majority consistently referred to "works" being removed from the public domain, Breyer's dissent consistently referred to "material" being removed from the public domain. Breyer acknowledged the free speech interests involved in removing material from the public domain, but expressly declined to determine if the Act violated the First Amendment. Breyer based his dissent on the conclusion that the Copyright Clause does not authorize Congress to restore copyright protection to material in the public domain because it does not promote the progress of science. Although Breyer expressly stated that he was not deciding whether the Act violated the First Amendment, it does play a role in his analysis that the Copyright Clause does not authorize restoring copyright to works in the public domain.

Analyzing the constitutionality of the hot news doctrine under the Daily Mail principle and Golan leads to at least three conclusions. First, the Daily Mail principle provides strong constitutional protection for the dissemination of lawfully obtained, truthful information, but it does not absolutely prohibit the possibility of restrictions on the uses of such information. Second, the Golan Court's determination that the public domain is not inviolate should be limited to removing "works" from the public domain and should not be extended to support the removal of facts from the public domain pursuant to a hot news claim. To extend Golan that far would have serious implications for the well-established Daily Mail principle that allows for the disseminating of lawfully obtained, truthful information, absent an interest of the highest order. Third, the existence of the Fourth Estate

349. Id. at 906 (Breyer, J., dissenting) ("Worst of all, 'restored copyright' protection removes material from the public domain.").

350. See id. ("This statute analogously restricts, and thereby diminishes, Americans' preexisting freedom to use formerly public domain material in their expressive activities"); id. at 907 ("By removing material from the public domain, the statute, in literal terms, 'abridges' a preexisting freedom to speak."); id. ("Given these speech implications, it is not surprising that Congress has long sought to protect public domain material when revising the copyright laws."); id. ("And this Court has assumed the particular importance of public domain material in roughly analogous circumstances."); id. at 912 ("[B]y withdrawing material from the public domain, the statute inhibits an important preexisting flow of information .

351. Id. at 907.

352. Id. at 912. Specifically, this restoration does not encourage the production of any new works. Id. at 900.

353. Id. at 912 ("[T]he Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.").

354. E.g., Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order .

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is likely an interest of the highest order because it is considered necessary to provide the people with the information required for an enlightened citizenry in a self-governing society. If the hot news doctrine survives constitutional review as an exception to the Daily Mail principle, then a rigorous analysis of the utilitarian requirement is necessary to balance the First Amendment protections for the use of publicly available factual information with the economic incentives of news businesses.

B. Proving Hot News in the Digital Age Is Increasingly Difficult

Assuming hot news misappropriation is constitutionally permissible because it serves an interest of the highest order—that thus, satisfying the Daily Mail exception—the likelihood of establishing a claim is increasingly difficult and uncertain in the Internet age because of the ability of numerous individuals and organizations to provide news. Plaintiffs will have a difficult time establishing the utilitarian requirement because the continuous innovations in digital communicative technologies allow for new market entrants and business models for the news industry, including developments that have not yet been envisioned.

The critical utilitarian requirement is that a hot news claim cannot be established unless the failure to prohibit the free riding would so reduce the incentive for anyone to enter or remain in the market that the very existence (or perhaps quality) of the product would be substantially threatened. In 2003, Judge Posner wrote that this utilitarian factor is the “meat” of the hot news analysis. The prescience of Judge Posner’s observation is borne out when comparing amicus briefs filed seven years later in Barclays. Three amicus briefs are relevant here: the AP amici, the Electronic Frontier Foundation amici (“EFF amici”), and the brief filed on behalf of Google and Twitter.

The AP amici argue for a circular and toothless analysis for “proving” the utilitarian factor, while other amici argue for a rigorous analysis. Some version of the latter approach is normatively preferable because it protects the use and dissemination of publicly available factual information, unless there is strong evidence that no one would continue to produce the information without hot news protection. This latter approach would also be consistent with the narrow Daily Mail exception that requires an interest of the “highest order” to prohibit the dissemination of lawfully obtained truthful information.

355. NBA v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
356. Posner, A Dirge, supra note 204, at 632.
357. The other amici signing this brief are listed at AP Amici Brief, supra note 11.
358. The other amici signing this brief are listed at EFF Brief, supra note 169.
A rigorous analysis of the utilitarian factor is the key to balancing the free flow of publicly available information with any protectable legal interest in that information. Knowing precisely who—or perhaps more accurately, what—is the focus of this analysis is crucial. Must a plaintiff asserting a hot news claim merely show that its business is substantially threatened, or must a plaintiff show that the existence of the entire industry—all who are currently in such a business and those considering entering that business—is substantially threatened?

Recall that the ultimate purpose of hot news misappropriation is to ensure the public has access to information, not to assist a particular plaintiff to stay in business for its own benefit. Hot news protects a plaintiff’s economic incentive to gather information so that such information will be publicly available. If a plaintiff cannot establish that a defendant’s actions substantially threaten the existence (or perhaps quality) of an information product as a whole—as distinguished from a plaintiff’s individual information product—then there is no practical reason to protect plaintiff because the public will still be able to receive the information product, albeit from other sources. Although a particular plaintiff may no longer gather information as result of a defendant’s free riding, that plaintiff cannot succeed on a hot news claim unless it can prove that there is a substantial threat that no one will continue to publish the information at issue. The utilitarian concern cannot be satisfied merely because one actor seeks protection from competition.359

Because of the importance of this utilitarian element to the success or failure of a hot news misappropriation claim, perhaps it is not surprising that this element is the most contested issue between hot news proponents and opponents. Under a rigorous analysis of the utilitarian requirement, courts should “require something akin to clear and convincing evidence that the defendant’s free riding threatens the very existence of the information in question.”360 Google and Twitter propose an even more rigorous standard that requires proof of eight factors, including proof that the information is not accessible to the general public.361 This public accessibility element

359.  Id. at 25.
360.  Id.
361.  The eight factors that Google and Twitter proposed are:
(1) the information plaintiff seeks to protect must have been gathered exclusively by plaintiff (2) at substantial cost or effort; (3) plaintiff must have taken steps to keep the information confidential or highly restricted until its release; (4) plaintiff’s release of the information must be to a restricted audience, and not be accessible to the general public; (5) the information must have commercial value; (6) the information must be time-sensitive, and defendant’s use of the information must specifically exploit its time-sensitive nature; (7) plaintiff and defendant must be direct competitors for the commercial value of the particular information in question; and
would have prevented the AP from success in *INS* and would seem to obviate the need for a hot news claim altogether because non-public information could be more directly protected by contract, trade secret law, or other laws that protect confidential information.

In its *NBA* amicus brief, the *New York Times* advocated that if a hot news claim is to “exist at all, it must only be in the most extreme circumstances and by the narrowest means.” The *Times* also took the position that the district court “mistakenly allowed the narrow and speculative economic interest of the NBA to trump one of the most fundamental constitutional principles in [American] jurisprudence, the right to disseminate newsworthy information to the public.” As noted, however, the *New York Times* joined the AP amici in *Barclays* in requesting a much less rigorous burden of proof, to say the least.

The AP amici essentially seek to create a presumption of satisfaction of this utilitarian element through the combination of two proposals. First, they propose allowing a court to conclude that “harm to incentive follows naturally from generalized free-riding on a news originator’s investments in journalism.” The consequence of this proposal would allow courts to presume that satisfaction of the utilitarian requirement “follows naturally” from proof of free riding. This is not an acceptable standard of proof for the factor that most focuses on the underlying public interest purpose of the hot news doctrine because it bootstraps proof of the utilitarian requirement to mere proof of free riding. Not all free riding will inherently threaten the existence of the news.

Second, the AP amici argue against use of the requirements for injunctive relief in intellectual property cases, as set out in *eBay Inc. v. MercExchange, L.L.C.* and *Salinger v. Colting* for hot news claims. In *eBay*, the Court held that an injunction could not be granted merely because patent infringement was established. Rather, the lower court must deter-

(8) as a direct result of defendant’s use of the time-sensitive information, plaintiff’s ability to produce the product or service will be severely impaired.


362. Perhaps one could make the case that this construction of a hot news claim would still be available against companies like Fly because they are publishing information that is not generally accessible by the public. But, assuming Fly did not induce a party to breach a confidentiality agreement, one could reasonably argue that the leaked information is now accessible to the general public and permissible to publish pursuant to *Bartnicki v. Vopper*, 532 U.S. 514 (2001).


364. *Id.* at 12.

365. AP Amici Brief, *supra* note 11, at 19 (emphasis added).


367. 607 F.3d 68 (2d Cir. 2010).


369. See *eBay*, 547 U.S. at 391.
mine the existence of irreparable injury and consider other equitable factors prior to entering a permanent injunction.\textsuperscript{370} In \textit{Salinger}, the Second Circuit held that eBay's injunction analysis requirements apply to copyright infringement claims.\textsuperscript{371} The AP amici argue that the eBay and Salinger requirement of proof of actual harm should not apply to a hot news claim because a "plaintiff will almost always satisfy these equitable factors by establishing the fifth element of Motorola, harm to incentive."\textsuperscript{372} But, as the AP amici also argued, they seek a presumption that proof of the utilitarian factor "follows naturally" from proof of free riding.\textsuperscript{373}

Through this sleight of hand, the AP amici argue that eBay's required analysis for injunctive relief in patent infringement cases should not apply to hot news claims because proof of the utilitarian factor of NBA "almost always" satisfies the equitable considerations in eBay, and that proof of this utilitarian factor "follows naturally" from mere proof of free riding.\textsuperscript{374} This proposed standard allows for satisfaction of the utilitarian factor and injunctive relief through little or no evidence, other than proof of free riding. This toothless standard is much like the low amount of proof of harm required for trademark dilution claims, and could be even lower.\textsuperscript{375}

Assuming the hot news doctrine is constitutionally permissible, this standard of proof is unacceptably low because it fails to provide sufficient weight to the utilitarian requirement that underlies the doctrine. Without a rigorous analysis of the utilitarian requirement, the hot news doctrine merely becomes a "sweat of the brow" theory to protect a plaintiff from competition in the dissemination of publicly available factual information.

One possible reason for the AP amici's position is that the rise of the digital dissemination of information actually makes it more difficult to satisfy the utilitarian factor of a hot news claim than ever before.\textsuperscript{376} Society no longer relies on a few competitors to disseminate information of public im-

\textsuperscript{370} Id.
\textsuperscript{371} 607 F.3d at 77.
\textsuperscript{372} AP Amici Brief, supra note 11, at 25.
\textsuperscript{373} See id. at 18-19.
\textsuperscript{374} Id. at 19, 25.
\textsuperscript{376} See Google Brief, supra note 11, at 3-4, 12 (noting that in the digital age, hot news misappropriation is "obsolete" and "as a practical matter, futile").
portance, as in the days of *INS v. AP*. Today there are countless creators of digital content.377 New developments in communicative technologies continue at a rapid pace and the law should not stunt the growth of these developments through the use of hot news claims. Rather than use legal restrictions that risk stunting the advancements of the dissemination of information via digital communicative technologies through an antiquated unfair competition doctrine, the law should allow them to flourish.378 There are times when more real-time reporting is needed, such as in 2009 when the State Department requested that Twitter reschedule site maintenance to avoid disrupting Iranian election updates.379

The AP amici proclaim that the hot news doctrine ultimately serves the public interest380 by preserving the economic incentive of for-profit news originators, but they seek to dramatically limit the level of proof required to establish the utilitarian requirement, which is the factor most focused on the public interest. Their position more accurately serves their own economic self-interest than the public interest.381 The consequences of a legal interpretation of the utilitarian factor that allows courts to presume that harm "follows naturally" from free riding or that a plaintiff will "almost always" satisfy the equitable elements required for injunctive relief based merely on the existence of free riding will harm the public interest, not serve it. Such presumptions amplify the uncertainty as to whether the hot news doctrine is necessary or desirable.

The hot news claim may not be constitutionally viable under the First Amendment. If it is constitutionally permissible, it is an increasingly difficult claim to establish in the digital age. Satisfying a hot news claim requires proof that failure to prohibit the alleged misappropriation would "so

377. See EFF Brief, *supra* note 169, at 3-4 ("Applying First Amendment scrutiny is particularly important now, as the emergence of the Internet has allowed many more people to publicly gathering, sharing, and commenting on the news of the day.").

378. See Shyamkrishna Balganesh, *The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 *COLUM. L. REV. SIDEBAR* 134, 143-44 (2012). Balganesh views the Second Circuit’s decision as a cautious use of the common law because it did not expand the hot news doctrine. *Id*. The court was aware of the hot news doctrine being used as a legal remedy to counteract the disruptive effect of digital technology on traditional news business models, but allowed for these disruptions to continue by not expanding the use of hot news misappropriation. *Id*. Balganesh goes further by wondering whether *Barclays* signifies the gradual death of the hot news doctrine. *See id.* at 145.

379. Ewen MacAskill, *US Confirms It Asked Twitter to Stay Open to Help Iran Protesters*, *GUARDIAN* (June 17, 2009, 4:03 AM), http://www.guardian.co.uk/world/2009/jun/17/obama-iran-twitter; *see also* James Boyle, *Hot News: The Next Bad Thing*, *FIN. TIMES* (Mar. 31, 2010, 11:03 PM), http://www.ft.com/cms/s/0/0c1efcf4-3d11-11df-b81b-00144feabde0.html#axzz1yvPZXQfp ("Is my blog or twitter feed allowed to say that there has been an earthquake or that some political scandal has erupted?").


381. See Google Brief, *supra* note 11, at 22-23 ("Here, the only interest[s] that [the financial investment firms] seek to protect are their economic interests.").
reduce the incentive to produce the [information] product or service that its
existence or quality would be substantially threatened. 382 In the digital age,
this utilitarian factor is more difficult to prove than any other time in the
history of the claim precisely because of the opportunities that the Internet
provides for individuals and organizations to provide information of public
concern. This conclusion, however, must be balanced with the need for an
economically viable institutional press.

IV. ALTERNATIVE SOLUTIONS

Journalism is a public good. 383 Although our self-governing society
does not necessarily need a commercial media business structure, we do
need an institutional press to fulfill the responsibility the Fourth Estate owes
citizens. Citizen journalism is important and is helping transform twenty-
first century reporting. Citizen journalists, however, cannot adequately cov-
er the war in Afghanistan, the causes and consequences of the transition in
Egypt, the changing political landscape in Greece and Spain, or a variety of
other issues that require in-depth, ongoing investigative reporting by profes-
sional journalists, and therefore require significant economic and profes-
sional human resources. 384 Thus, the concern about the economic viability of
the institutional press must be addressed.

Rather than help solve the journalism crisis, hot news misappropri-
tion exacerbates it by helping perpetuate a flawed and antiquated news
business model through legal regulation and will likely stunt innovations in
digital communications technology and news business models. This section
discusses other possible solutions that are supported with normative and
pragmatic reasons. Alternatives beyond those offered here are entirely pos-
sible. Indeed, it is likely that there is no single solution or business model to
resolve the journalism crisis. 385

Before providing some alternative solutions, some final points about
hot news and the journalism crisis are helpful in providing the framework
for this analysis. In Barclays, it was argued that “courts should be able to
conclude that if everyone were permitted to systematically appropriate origi-
nator news product as the defendant is doing, this would be a substantial
deterrent to profit-seeking companies entering or remaining in the news

382. NBA v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
383. Hutchins Commission Report, supra note 34, at viii (stating that there should
be a “serious and continuing concern for the moral relation of the press to society”); Id. at
90-91 (noting that while the press should remain a private industry, it is a “business affected
with a public interest”); Schizer, supra note 5, at 2 (noting that journalism has value to the
public at large, including those that do not buy a newspaper or read a website, such as when
government abuses are disclosed); McChesney & Nichols, supra note 30, at 101.
384. See Baker, supra note 9, at 119.
385. Downie & Schudson, supra note 5, at 44.
Deterring profit-seeking companies from entering or remaining in the news business may actually be a benefit to the public interest because the press provides a check on both private and government power. Consider the negative effects of advertising revenue, media consolidation, and private investment firm ownership on news content and quality, as discussed in Part I. All have had a distorting effect on the dissemination of information because of profit-seeking motives. Warren Buffet once noted that media companies can be profitable almost without regard to the quality of the product. If entrepreneurs like Rupert Murdoch and Sam Zell and Wall Street investors are deterred from entering or remaining in the news industry because of the lack of profits, perhaps society and journalism are better served because of the reduction of actors that do not sufficiently value the role that the press plays in a self-governing society.

“Profit-seeking companies” is not synonymous with the Fourth Estate, and they are not the only members of the Fourth Estate. The mere fact that a company seeks profit does not necessarily mean that it will serve the role of a free, open, and democratic press. Nothing in this Article, however, is intended to suggest a bar on ad-based, for-profit media companies as a business model. Rather, the point is that ad-based, for-profit media should not

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386. AP Amici Brief, supra note 11, at 21.
387. Recent examples of these concerns often arise. E.g., David Carr, Newspaper Barons Resurface, N.Y. TIMES, Apr. 9, 2012, at B1 (stating that new barons may be necessary to help save the news industry but giving examples where such ownership negatively affects coverage that conflicts with the owners’ interests); Brian Stelter, You Can Change the Channel, but the Local News Is Identical, N.Y. TIMES, May 29, 2012, at A1 (highlighting that local broadcasters are skirting media ownership rules that ban outright consolidation by sharing news staff and content, thereby reducing the diversity and depth of local news that is available in a community); John F. Burns & Ravi Somaiya, Official Says He Set Aside His Partiality to Murdochs, N.Y. TIMES, June 1, 2012, at A8 (describing the questionably close relationship between the senior British government official overseeing Rupert Murdoch’s bid to take over the British Sky Broadcasting network and the Murdochs).
389. See McChesney & Nichols, supra note 30, at 187 (“Bottom line: in seeking alternative ownership models, the place to begin is with journalists and the communities they serve—not with big media companies and the investors they serve.”).
be permitted to rely on a theory of exclusive legal rights in publicly availa-
ble factual information to sustain that business model. The institutional
press is not the same as, or dependent upon, a for-profit, ad-based media
compant business model. There are other ways to sustain the institutional
press. While no single idea is a panacea, here are a few alternative solutions.

Non-profit news business models provide part of the solution of the
journalism crisis. In addition to love, there are some things that money can-
not buy.390 A robustly functional Fourth Estate appears to be one of those
things, as support for public broadcasting may suggest.391 In Barclays, the
AP amici stated that the hot news doctrine “remains necessary to protect the
news industry’s incentive to gather and report news.”392 Perhaps more fully
and accurately stated, they believe that the hot news doctrine is necessary to
protect the for-profit news industry’s incentive to gather and report news,
even if the institutional press itself might survive without a hot news claim.
As noted above, the for-profit consolidated media industry is a cause of the
decline of an adequately functioning Fourth Estate, and this problem began
even before the nascent inter-networking of computers in the late 1960s.

National Public Radio (NPR) and the Corporation for Public Broad-
casting are two examples of at least moderately successful non-profit news
business models. In June 2010, the President of NPR told the Wall Street
Journal that “[m]obile is the second coming of radio” and that providing
free content is inextricably tied to the heart of its mission: to ensure an in-
formed citizenry.393 NPR focuses on national and international news, but it
is seeking to help fill the local news void.394

New non-profit online news business models are already emerging on
local, regional, national, and international levels. ProPublica is an “independent,
non-profit newsroom that produces investigative journalism in the
public interest.”395 It is led by a former managing editor of the Wall Street
Journal and investigative editor of the New York Times.396 ProPublica fo-
cuses on issues of national and international importance. Launched in 2004,
as a response to the lack of coverage by the San Diego Tribune, Voice of
San Diego is a non-profit news organization focusing on in-depth investiga-
tive reporting for the San Diego region.397 Voice of San Diego does not rely

390. See generally SANDEL, supra note 23.
391. See Baker, supra note 104, at 243.
392. AP Amici Brief, supra note 11, at 3.
393. Why Online Won’t Kill the Radio Star, WALL ST. J. (June 7, 2010),
http://online.wsj.com/article/SB10001424052748704764404575287070721094884.html.
394. Downie & Schudson, supra note 5, at 36.
395. About Us, PROPUBLICA, http://www.propublica.org/about (last visited Dec. 21,
2012).
396. Id.
397. Downie & Schudson, supra note 5, at 36.
on a mass audience for revenue, but a loyal one. MinnPost is a non-profit news organization similar to Voice of San Diego that provides original journalism regarding the state of Minnesota. These are just a few examples of new business models for the institutional press in the twenty-first century. Many more exist. Because these non-profit models struggle financially and because market incentives appear insufficient to sustain the Fourth Estate, subsidies are part of the solution to the economic aspect of the journalism crisis.

Subsidies are often used to sustain public goods. The free press is a public good that may require a significant public subsidy to sustain its role as the Fourth Estate. The use of subsidies to help sustain the press is not as radical as it might initially seem because the United States has subsidized the press from its founding. Early in our nation’s history, the government provided reduced rates for postage and printing of newspapers. The United States subsidized news in Germany and Japan following World War II in its post-war reconstruction efforts. Other industrialized nations that provide large press subsidies exhibit a correlation with high voter turnout rates and civic literacy. Several legal and journalism commentators have supported subsidies as part of the solution to the journalism crisis because it is a public good that requires public support to sustain its functionality.

One method for subsidizing the press is an excise tax on the sale of televisions or other technology to fund public media. Britain has such a tax on television sales and uses the revenue to fund the British Broadcasting Corporation. A similar plan was proposed by the Carnegie Commission in the mid-1960s, but was dropped in the final version of the Public Broadcast-

398. Id. at 37.
400. See generally Downie & Schudson, supra note 5.
401. Schizer, supra note 5, at 19.
402. Downie & Schudson, supra note 5, at 44; McCCHESNEY & NICHOLS, supra note 30, at 117.
403. Downie & Schudson, supra note 5, at 44 (“In the year following enactment of the First Amendment, Congress passed the Post Office Act of 1792 that put the postal system on a permanent foundation and authorized a subsidy for newspapers sent through the mail, as many were at the time.”).
404. See generally McCCHESNEY & NICHOLS, supra note 30, at 241-54.
405. Id. at 110.
406. E.g., BOLLINGER, supra note 9, at 110-11, 131; McCCHESNEY & NICHOLS, supra note 30, at 179. See generally BAKER, supra note 9; Downie & Schudson, supra note 5; Schizer, supra note 5.
407. Schizer, supra note 5, at 57. (“The fact that the BBC has a designated source of funding—a special tax on television ownership—is helpful to its independence, although the point should not be overstated, since Parliament has the power to repeal the tax or to redirect this funding.”).
ing Act of 1967. If the United States passed a 5% excise tax on television sales, that would have resulted in approximately $4 billion in 2009, still far below the per capita spending in Britain and Canada. In 2009, the United States spent $409 million to subsidize public media.

Other subsidies could include a tax credit for journalist salaries, creating a journalism division of AmeriCorps, expanding funding for high school media, and allowing a "Citizenship News Voucher" whereby a citizen could dedicate a limited amount of her taxes to any non-profit news medium of her choice. Scholars have provided statistics to show that subsidies are feasible. For example, Robert McChesney and John Nichols estimate the total cost of their press subsidy proposals at $35 billion per year. A more modest proposal comes from Baker, who proposed a tax credit subsidy for journalists' salaries that would be almost five times less in constant dollars than the postal subsidy provided to newspapers in the early twentieth century.

Professional-amateur collaborations are also part of the solution to the journalism crisis. There is a growing trend of professional journalists collaborating with amateurs to provide local coverage. One example is Patch, a community-specific news and information platform dedicated to providing comprehensive news, . . . revolutionizing the way neighbors connect

408. McCchesney & Nichols, supra note 30, at 194.
409. On a per capita basis, if the United States supported public media at the same level as Canada in 2009, it would be $7.5 billion; the same level as Britain would be $24 billion. Id. at 192.
410. Id.
411. See Baker, supra note 104, at 250-56.
413. Id. at 171.
414. Id. at 201-05.
415. Id. at 206. The set of their proposals is: postal subsidies, journalist tax credits, a news division of AmeriCorps, funding student media and public media, and citizen news vouchers. See generally id. at 157-211. For comparison, they state that the total cost of their proposals is slightly more than what Denmark and Finland spend per capita for press subsidies and these countries have "high civic literacy, astronomical rates of voter participation and . . . . low levels of economic inequality and government corruption." Id. at 206. Providing further context, they note that the United States spends approximately $1 trillion annually on the military. Id. at 207.
416. See Baker, supra note 104, at 254-56. Baker relies on government data cited by the Supreme Court for valuing the annual postal subsidy to newspapers in the early twentieth century at $70 million and extrapolates that this amount is roughly $6 billion in today's dollars on a per-person basis. Id. at 254 (citing Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 304 (1912)). He estimated his tax credit for a portion of journalists' salaries at approximately $1.25 billion. Id. at 255-56. David Schizer proposed a press subsidy of approximately $2.5 billion and said that it "would be enough to cover the cost of rehiring the 33,000 reporters who lost their jobs in 2008 and 2009, assuming the total annual cost of a reporter is approximately $75,000." Schizer, supra note 5, at 19.
with each other, their communities, and the national conversation.417 Also, journalism schools are teaming up with publishers, including Patch, to provide hyper-local content and simultaneously provide real world opportunities for journalism students.418 More collaboration between journalism schools and the press will help fulfill the common call of the Fourth Estate and universities to improve our understanding of the world.419 In 2009, a former reporter for the Baltimore Sun and the Washington Post launched Baltimore Brew, an online news source for local Baltimore news.420 Baltimore Brew also invites readers to collaborate in development of news stories.421

Another professional-amateur (pro-am) example is TalkingPointsMemo.com (TPM).422 In 2008, TPM received the George Polk Award for legal reporting based on its coverage of the U.S. Attorneys firing scandal.423 TPM fits into the pro-am relationship category because it was through tips from readers that it was able to uncover a pattern of firings around the country. This system of collaborative news gathering is a product of technological innovation and creativity in twenty-first century news business models. Josh Marshall, TPM's founder, stated that “[t]he way TPM came into existence—without any concept that it would be a company with multiple employees—simply wouldn’t have been possible in any technological universe before the one that existed in the last ten years.”424 Hot news misappropriation is a legal regulation that will stunt the opportunities provided by technological advancements in the dissemination of information.425 TPM, for example, regularly excerpts and links to other news sources, and one could conceivably find that TPM violates the hot news doctrine on a daily basis, even though it also provides original commentary. The Internet has opened up new opportunities for the press in both use of technology and

419. See BOLLINGER, supra note 9, at 81, 154-56.
421. Id.
425. The desire to suppress new technologies that threaten existing business models is not unique to the digital age. See generally WU, supra note 43; MCCCHESNEY & NICHOLS, supra note 30, at 80.
new business models for sustaining the Fourth Estate. The hot news misappropriation doctrine risks curtailment of these opportunities.

While non-profit business models and pro-am collaborations currently play a role in resolving the journalism crisis, the use of press subsidies has not yet occurred. Taxation of all online advertising with revenue used to subsidize non-profit news organizations, such as ProPublica and Voice of San Diego, is a solution that requires serious consideration. Taxing advertising revenue to help subsidize the press is not a new idea. In 1994, Baker preferred a tax on all advertising revenue over a tax solely on newspaper advertising alone. Taxing online advertising revenue is a pragmatic solution, not because it is politically likely, but because the revenue from online advertising is sufficient to provide the economic resources needed to help stabilize and grow the non-profit institutional press business model.

The migration of classified advertising to websites like Craigslist played no small role in the loss of advertising dollars from print newspapers. While advertising revenue for online editions of newspapers has not yet matched the advertising revenue for the print counterparts (which as described above is not desirous from a normative perspective), there is a wealth of advertising revenue online. That advertising revenue, however, flows to search engines and myriad other online companies beside the press, mostly to a handful of technology companies. In 2011, Internet advertising revenue reached $31 billion, a 22% increase from the year before. Google’s revenue neared $40 billion, most of it from search-related advertising. Thus, to the extent that cyberspace is a cause of the journalism


427. BAKER, supra note 29, at 83.

428. AMY MITCHELL & TOM ROSENSTIEL, PEW RESEARCH CTR., THE STATE OF THE NEWS MEDIA 2012: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2012) (“[I]n 2011, five technology companies accounted for 68% of all online ad revenue, and that list does not include Amazon and Apple, which get most of their dollars from transactions, downloads and devices. By 2015, Facebook is expected to account for one out of every five digital display ads sold.”).


crisis, it is not because advertising revenues have declined; they have mi­
gated away from newspapers.

Not only does a tax on advertising seem likely to provide the revenue necessary to help resolve the journalism crisis, but there are normative rea­
sons that support such a tax. First, this indirect method of providing adver­
tising revenue to members of the Fourth Estate is superior to the twentieth-
century business model where specific advertisers were directly funding specific news businesses. Under the twentieth-century model, an advertiser that objected to content in a newspaper or broadcast news could cease to purchase advertising in that paper or the particular program or station or company at large. Or, a newspaper might rationally decide not to cover a topic that it believed would risk offending important advertisers to avoid the conflict altogether. Under the model proposed here, advertisers could not directly influence the editorial content of a publication through their purse strings because the revenue would come in the form a subsidy, not direct advertising revenue. 431 Because the press is a public good, it is reasonable to suggest that a tax on online advertising revenue is warranted to help subsidize the Fourth Estate. 432

Second, the non-profit emphasis is normatively appealing because it would presumably disincentivize mere profit-seekers from entering or re­
aining in the news industry. The news industry does not need another Sam Zell, private equity owner, or CEO who views the news industry as just another business. 433 Cultivating the non-profit model for the institutional press may help continue to attract ownership like those who started ProPub­
lica or Voice of San Diego. This approach is normatively appealing because non-profit news organizations are more likely to focus on serving the public interest as the primary concern, rather than on increasing profits for share­
holders and owners. Subsidies may be necessary to help attract such owner­
ship 434 and should not be available to for-profit news organizations.

431. To be sure, there are complications in designing and implementing this model and they require further analysis beyond the scope of this Article. What should be remem­
bered, however, is that concentrated power, both public and private, threatens democracy.

432. That this solution is not politically likely is not a reason to ignore or fail to ex­
plore it. Schizer, supra note 5, at 31 (“This issue [of political feasibility] should not be over­
emphasized, since it is worth knowing about strong proposals, even if they would encounter stiff political opposition.”).

433. BAGDIKIAN, supra note 27, at 104-06. For example, Mark Willes became CEO of the Times Company after leaving his post at General Mills. Id. at 105. “Whatever his expertise in merchandising Cheerios and Chex, he was yet another example of an executive taking over a newspaper and assuming that news is ‘just another business.’ It isn’t.” Id. at 104-15.

434. “[N]ews organizations would not need government support if they could attract new owners who were willing to run them at a loss—just as some owners lose money on sports teams—in exchange for prestige or other nonfinancial benefits from owning a ‘trophy’
Imagine Gannett reorganized as a non-profit. Without being beholden to shareholders' golden desires, the company could experience an awakening of its role as a leading member of the institutional press and perhaps rehire a few thousand journalists along the way. Imagine the New York Times reorganized as a non-profit. While the Times still stands as a stronger than average member of the Fourth Estate, as a non-profit it could focus even closer on its core mission and return to praiseworthy First Amendment advocacy, as exhibited in its NBA amicus brief and other well-known First Amendment victories. Imagine if the AP once again faced competition. Imagine a union-based business model that is more responsive to the informational needs of the community instead of the economic needs of advertisers seeking consumers.435

While the specific details for implementing these alternative solutions are beyond the scope of the Article, this Section shows that there are several alternative solutions to the journalism crisis currently being tested, that journalism and legal scholars are addressing the financial considerations of such proposals, and that American history shows how the use of subsidies to sustain the Fourth Estate is as old as the nation itself.

CONCLUSION

The hot news doctrine is not a solution to the journalism crisis.436 As a hot news proponent notes, this doctrine will not solve the economic condition of the press.437 Recent calls for reviving hot news misappropriation are less about protecting the availability of factual information necessary for a democracy than they are about protecting a twentieth-century news business model that has been eroding for decades. Expanding or maintaining hot news misappropriation perpetuates that flawed model because it entrenches dependence on revenue directly from advertisers and a concentrated media

property,” but there are not enough wealthy individuals willing to do so. Schizer, supra note 5, at 18.

435. E.g., Chris Benner, Samantha Sommer & Luther Jackson, Univ. of Cal. Davis Ctr. for Reg’l Change, Next Generation Unionism and the Future of Newspapers: Networking, Entrepreneurship and Hybrid Ownership (2010) (exploring the possibility of a reconceptualized union-based business model as part of the solution to the journalism crisis).

436. Balganesh, supra note 13, at 429.

437. Brown, supra note 12, at 18. Brown believes that hot news is important, not for the bottom line, but for making a “normative statement that the labor that goes into the gathering of facts has value.” Id. While the labor invested in gathering and publishing news is normatively desirable, that does not mean that perpetuating the current advertising-based concentrated media ownership model is the proper way to ensure the public interest in the Fourth Estate is served.
ownership model. These flaws expose that the journalism crisis is a long-term crisis, not a product of the digital age. 438

There are several First Amendment concerns with the hot news doctrine, but courts have not yet engaged in First Amendment analysis. Because hot news seems contradictory to the *Daily Mail* principle—that lawfully obtained information of public concern cannot be restrained absent an interest of the highest order—courts confronted with hot new claims ought to directly address whether hot news is a constitutionally permissible claim under *Daily Mail* and other First Amendment doctrines. A possible argument is that hot news misappropriation is an exception to the *Daily Mail* principle because it seeks to preserve the existence of the Fourth Estate, an interest of the highest order. This argument is based on the utilitarian concern that hot news is necessary to protect the public interest in news gathering and dissemination.

Assuming it is constitutionally permissible, a plaintiff must satisfy the utilitarian rationale of the doctrine: a hot news claim exists only when the free riding threatens the existence of the incentive to gather or publish news. Otherwise, we are left with the mere “sweat of the brow” theory, and that theory alone cannot be the basis for prohibiting the dissemination of publicly available factual information. As stated in *Barclays*, a hot news claim serves the “utilitarian desire to preserve incentives to produce socially useful services.” 439

Because this utilitarian rationale focuses on the public interest in the gathering and dissemination of news, hot news should not be understood as protecting a particular content originator. Rather, the doctrine protects the existence of the news product or service as a whole. The mere fact that one industry actor might not remain in the industry or enter it in the first place does not satisfy the utilitarian rationale of *INS*. As illustrated above, there are many non-profits that are producing news on the local, regional, and international levels in the public interest, as opposed to the economic interests of for-profit news companies.

Solving the journalism crisis is broader than the financial condition of the press. Solving the crisis requires structural reform through law and policy, including getting ownership into the hands of those that place the public interest in a robust Fourth Estate above quarterly profits. 440 Hot news does the opposite by providing further protection for concentrated owners from innovative news business models made possible by technological developments. Before relying on the creation of questionable exclusive legal rights in publicly factual information, it is worth allowing the Fourth Estate to

440. *See Baker*, supra note 9, at 33.
continue developing in our technological age and focusing on alternative solutions, such as the ones discussed above.\footnote{See McChesney & Nichols, supra note 30, at 165 ("The technologies are such that there will almost certainly be many innovations in the development of journalism that we cannot anticipate. Healthy policymaking will embrace this prospect, not attempt to thwart it merely to protect the turf of old media.")} The emerging news business models may be better than the current model that has been eroding since long before the Internet.