

THE ASSOCIATED PRESS V. ALL HEADLINE NEWS: HOW HOT NEWS MISAPPROPRIATION WILL SHAPE THE UNSETTLED CUSTOMARY PRACTICES OF ONLINE JOURNALISM

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I. INTRODUCTION

The newspaper industry has entered “something perilously close to a freefall.”¹ Profits are declining,² daily newspapers have lost about 17% of their staff since 2001,³ and some fear deterioration into a vicious cycle of lost quality and further cost cutting.⁴ In a recent interview, President Obama worried that a failing industry would adversely affect the quality of reporting to the point that the news would become “all blogosphere, all opinions, with no serious fact-checking.”⁵ He emphasized that “serious investigative reporting . . . is absolutely critical to the health of our democracy.”⁶ The president echoed a growing—and increasingly shared—concern about the future of the media. Rep. Henry Waxman observed recently that “[a] vigorous free press and a vigorous democracy have been inextricably

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1. PEW PROJECT FOR EXCELLENCE IN JOURNALISM, *Newspapers*, THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM, http://www.stateofthedia.org/2009/printable_newspapers_chapter.htm [hereinafter PEW, *Newspapers*].

2. PEW PROJECT FOR EXCELLENCE IN JOURNALISM, *Overview*, THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM, http://www.stateofthedia.org/2009/printable_overview_chapter.htm (“Newspaper ad revenues have fallen 23% in the last two years. Some papers are in bankruptcy, and others have lost three-quarters of their value.”) [hereinafter PEW, *Overview*].

3. PEW, *Newspapers*, *supra* note 1.

4. Representative Henry Waxman, Chairman, Comm. on Energy and Commerce, Remarks to the Federal Trade Commission News Media Workshop (Dec. 2, 2009), <http://www.ftc.gov/opp/workshops/news/docs/waxman.pdf>.

5. Dave Murray, *Newspaper Journalism Gets Words of Praise; Print Media’s Role Vital, Obama Says*, TOLEDO BLADE, Sept. 20, 2009, <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20090920/NEWS16/909200326>; *see also* PEW, *Newspapers*, *supra* note 1 (“Fewer people and less space equates to significant erosion of the serious, accountability reporting that newspapers do more than any other medium.”).

6. Murray, *supra* note 5.

linked We cannot risk the loss of an informed public and all that means because of a ‘market failure.’”⁷

The ease of disseminating information over the Internet has caused deep structural distress within the reporting industry.⁸ News aggregators have become a prominent new player, gathering articles written by news reporting agencies and offering a combination of headlines, ledes, summaries, and links back to the original story. In so doing, aggregators provide a useful service to consumers and generate their own ad revenue. Newspapers, however, struggle to capture a larger share of the ad revenue attached to their stories since large portions now go to aggregators.⁹ In short, customary practices in the news-reporting world are in a state of flux.

The Associated Press (“AP”), the largest and oldest news organization in the world,¹⁰ took one news aggregator to court for copying its news. In January 2008, AP sued All Headline News (“AHN”) for copying, rewriting, and reselling AP’s news.¹¹ AP alleged that AHN committed, among other improprieties,¹² the tort of “hot news” misappropriation.¹³ Judge Castel of the Southern District of New York denied AHN’s motion to dismiss the misappropriation claim.¹⁴ He found that the action, though originating from an old case of federal common law, was viable under New York law.¹⁵

The parties settled in June 2009. Although the terms of the agreement were confidential, an AP spokesperson emphasized in a joint press release that the settlement would “safeguard[] AP’s investments in journalism, and [would] serve[] as notice to others that AP will fully defend its intellectual property rights against unfair competition.”¹⁶ AHN also acknowledged its

7. Waxman, *supra* note 4.

8. PEW, *Newspapers*, *supra* note 1 (estimating that roughly half of newspapers’ recent distress can be attributed to cyclical problems such as the recession, with the rest of it due to structural problems).

9. *Id.*

10. Complaint ¶ 2, *The Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. Jan. 14, 2009) (No. 08 Civ. 323), *available at* <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-01-14-AP%20v.%20AHN%20Complaint.PDF> [hereinafter *Complaint*].

11. *Id.*

12. The other claims are briefly described *infra* Part III.B, but are outside this Note’s scope.

13. *Complaint*, *supra* note 10, ¶ 2.

14. *The Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009).

15. *Id.* at 458–59.

16. Joint Press Release, *The Associated Press and AHN Media, AP and AHN Media Settle AP’s Lawsuit Against AHN Media and Individual Defendants* (July 13, 2009), http://www.ap.org/pages/about/pressreleases/pr_071309a.html.

improper use of AP's content and that the tort of hot news misappropriation had been ruled viable and applicable in the case.¹⁷ Implicit in the settlement, particularly when coupled with AP's earlier announcement that it would aggressively pursue claims of misappropriation to protect its content,¹⁸ was AP's underlying theory that an enforceable claim of hot news misappropriation strongly serves its news reporting interests.

This Note argues that the doctrine of hot news misappropriation will play an important role in shaping the online newspaper journalism landscape. Cases like *All Headline News* signal to an adapting industry that some behaviors are unsustainable and cannot become customary practices. Part II of this Note describes how the newspaper industry once thrived, now struggles, and is poised to adapt in the Internet age. Part III explains that the doctrine of hot news misappropriation reflects the customary practices of traditional newspaper journalism. Part IV argues that hot news misappropriation in *All Headline News* will serve as a significant but behind-the-scenes anchor as new customary practices develop in online journalism.

II. JOURNALISM: THEN AND NOW

A. TRADITIONAL NEWSPAPER JOURNALISM

Historically, media industries—including newspapers, magazines, and television—delivered regular content to a stable audience and faced little competition for readers across local markets or for advertiser dollars.¹⁹ They were able to turn consistently exceptional profits, almost regardless of the quality of their product.²⁰

About 80% of newspaper revenue traditionally derived from advertising dollars, most of it from classified and retail ads.²¹ Subscription prices

17. *Id.*

18. See Dean Singleton, Chairman, The Associated Press, Remarks at the AP Annual Meeting (Apr. 6, 2009), http://www.ap.org/pages/about/pressreleases/pr_040609c.html.

19. See Susan Athey, Presentation at the Federal Trade Commission News Media Workshop: Economics of Publishing in the Age of the Internet 3 (Dec. 1, 2009), <http://www.ftc.gov/opp/workshops/news/docs/athay.pdf>.

20. Letter from Warren E. Buffett, Chairman of the Bd., Berkshire Hathaway Inc., to Shareholders of Berkshire Hathaway Inc. (Feb. 28, 1992), *available at* <http://www.berkshirehathaway.com/letters/1991.html> (observing that newspaper, television, and magazine properties were what he described as “franchises”—needed or desired, not easily substitutable, and not subject to price regulation—and therefore earned high returns regardless of the quality of management or product).

21. Jon Leibowitz, Chairman and Comm’r of the Fed. Trade Comm., Opening Remarks at the Federal Trade Commission News Media Workshop: “Creative Destruction” or Just “Destruction”: How Will Journalism Survive the Internet Age? (Dec. 1, 2009),

accounted for only a minority of newspaper revenue; in other words, newspapers were sold to readers at a price that did not offset the costs of gathering the news, writing and editing articles, and printing the paper.²² This pricing model worked because reader and advertiser demand were interdependent: a lower subscription price attracted more readers, which attracted advertisers who wanted to target those readers. Newspapers could reinvest advertising revenue to improve their product and thus attract even more readers. In short, advertising dollars heavily cross-subsidized investigative reporting.

B. JOURNALISM TODAY

Print media today is characterized by reduced circulation,²³ fewer advertising dollars,²⁴ and increased layoffs.²⁵ These trends began well before the Internet boom in the mid-1990s,²⁶ but the huge shift to online media and the recession exacerbated the trends.²⁷ It remains unclear where the bottom lies: as David Evans noted, print is either going the way of the typewriter or settling into the reduced but stable existence of the bicycle.²⁸

A primary driver of print media's downward trend has been vastly increased competition for readers' eyes on the Internet.²⁹ As sources of the news, newspapers face competition from myriad low-cost entrants into the news reporting and commenting sphere—namely, bloggers. But newspapers also must indirectly compete for advertising dollars with websites such as

<http://www.ftc.gov/speeches/leibowitz/091201newsmedia.pdf>; PEW, *Newspapers*, *supra* note 1.

22. Some scholars call this kind of industry a “two-sided platform market.” See, e.g., David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 329 (2003). Other examples of two-sided platform markets include video game consoles (players and game developers), shopping malls (shoppers and retailers), and payment cards (cardholders and merchants). *Id.* at 328.

23. PEW, *Newspapers*, *supra* note 1 (“The print circulation slide from 2001 to 2008 totals roughly 13.5% daily and 17.3% Sunday.”).

24. *Id.* (finding that the advertising revenue has fallen 23% in two years).

25. *Id.* (giving a *low* estimate of “roughly 25% of the industry’s news workforce lost in nine years”).

26. Bruce C. Greenwald, et al., *The Moguls’ New Clothes*, THE ATLANTIC, Oct. 2009, available at <http://www.theatlantic.com/doc/200910/moguls> (“[Media companies], as a group, had . . . underperformed the S&P for much of the previous decade, *before* the Internet upended their industry.”) (emphasis in original).

27. See generally PEW, *Newspapers*, *supra* note 1.

28. David S. Evans, Presentation at the Federal Trade Commission News Media Workshop: Advertising-Supported Journalism 13 (Dec. 1, 2009), <http://www.ftc.gov/opp/workshops/news/docs/evans.pdf>.

29. PEW, *Newspapers*, *supra* note 1. Note, however, that “roughly half of the downturn in the last year was . . . related to the economic downturn.” *Id.*

Craigslist and careerbuilder.com³⁰ and even video games.³¹ These alternative channels are especially attractive to advertisers because their targeted audiences facilitate more focused advertising.

The downward trend is worrisome because it reflects far more than the cyclical problems brought by a recession. Newspapers, as Rep. Waxman noted, may be falling into a vicious cycle of cost-cutting and reduced quality attracting fewer readers and less revenue.³² The fear is that the downward trend will be permanent, because “[a] serious, protracted economic crisis can result in changes in consumer behavior that persist after the end of the crisis. A change in consumption, even in some sense involuntary, can be a learning experience. . . . [Readers and businesses] may never go back.”³³

Newspapers also struggle because they failed to monetize online distribution methods.³⁴ *The New York Times* (“NYT”), for example, has until recently³⁵ adopted the free distribution model,³⁶ perhaps under the assumption that, like in traditional print media, the revenue generated from online advertising would offset the costs of gathering, writing, and distributing the news. This calculus proved faulty. When factoring in online readers, readership of newspapers has in fact increased in recent years.³⁷ Half of those readers, however, obtain their news online where the industry produces only 10% of its revenue.³⁸

30. *Id.* (highlighting the effect of these sources of competition on newspaper advertising revenue).

31. See Erika Brown, *Product Placement on the Rise in Video Games*, FORBES, July 21, 2006, <http://www.msnbc.msn.com/id/13960083/>.

32. Waxman, *supra* note 4.

33. Posting of Richard Posner to The Becker-Posner Blog, *The Future of Newspapers*, http://www.becker-posner-blog.com/2009/06/the_future_of_n.html (June 23, 2009) [hereinafter Posner, *The Future of Newspapers*].

34. PEW, *Newspapers*, *supra* note 1 (“[A] mistake may have been to make website content, much of it still drawn from big and expensive legacy newsroom operations, available for free.”).

35. Eliot Van Buskirk, *New York Times Plans to Charge for Articles*, WIRED, Jan. 20, 2010, <http://www.wired.com/epicenter/2010/01/new-york-times-plans-to-charge-for-articles/>.

36. David Carlson’s Virtual World, *The Online Timeline*, <http://iml.jou.ufl.edu/CARLSON/1995s.shtml#1996> (“Jan. 21[, 1996]: The New York Times on the Web opens to the public. Registration is required, but access is free to U.S. residents.”).

37. PEW, *Newspapers*, *supra* note 1.

38. *Id.*; see also Peter R. Kann, *Quality Reporting Doesn’t Come Cheap: The Decline of Newspapers is a Tragedy for Democracy. How Can It Be Stopped?*, THE WALL STREET JOURNAL, Sept. 26, 2009, <http://online.wsj.com/article/SB10001424052970203440104574400582081349944.html> (“Online edition ad rates and online edition ad revenues are only small fractions of those in traditional print.”); Posner, *The Future of Newspapers*, *supra* note 33 (“Online

The Wall Street Journal (“*WSJ*”) chose a different approach and offered its content over the Internet for a yearly subscription fee.³⁹ Rupert Murdoch claims that *WSJ*’s subscriber model has largely succeeded⁴⁰ and plans to extend the pay-to-read model to his other holdings,⁴¹ such as *Times of London*.⁴² Other papers such as *The Economist* employ alternative steps to charge for content, such as for older or premium articles.⁴³ Note, however, that although the charging model may perform better than the free model, *WSJ*’s subscription fee has increased over the years at a rate far outstripping the rate of inflation,⁴⁴ suggesting uncertainty in *WSJ*’s ability to value its own model.

Those problems and models aside, online reporting raises another new challenge to traditional newspaper journalism: the news aggregator. News aggregators gather stories from content originators and repackage it for a reader. Many aggregators exist. For example, Google News is a large aggregator that automatically gathers headlines and ledes and provides links

viewership and revenues have grown but not nearly enough to offset the decline in ad revenues.”).

39. *WSJ*’s online edition was released in May 1996 at the price of \$49 annually, *see* Carlson, *supra* note 36, which was considerably more expensive than the print subscription of \$29 annually, *see* Media Advisory, Dow Jones & Company, Inc., *The Wall Street Journal Interactive Edition Introduces E-Mart, the Internet Version of the Wall Street Journal’s Popular Classified Section*, BUSINESS WIRE, July 29, 1996, *available at* <http://www.thefreelibrary.com/Media+Adisory%2FThe+Wall+Street+Journal+Interactive+Edition+introduces...-a018531210>. Today, however, a subscription to the online edition is cheaper than for the print edition. *See* *The Wall Street Journal Online, Subscribe Now*, <https://order.wsj.com/sub/f3> (last visited Jan. 31, 2010).

40. Rupert Murdoch, Presentation at the Federal Trade Commission News Media Workshop: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age? 11 (Dec. 1, 2009), <http://www.ftc.gov/opp/workshops/news/docs/murdoch.PDF> (stating that *WSJ.com* had one million subscribers and *Barrons.com* has 150,000 subscribers).

41. Paul McIntyre, *News Corp Moves Up A Gear for Pay Sites*, SYDNEY MORNING HERALD, Sept. 25, 2009, <http://www.smh.com.au/technology/biz-tech/news-corp-moves-up-a-gear-for-pay-sites-20090925-g5s1.html>.

42. Salamander Davoudi, *Times and Sunday Times Unveil Membership Schemes*, FINANCIAL TIMES, Oct. 5, 2009, <http://www.ft.com/cms/s/0/5627d30c-b1b6-11de-a271-00144feab49a.html>.

43. Robert Andrews, *Economist.com Builds Its Pay Wall Higher, But All The New Stuff Stays Free*, PAIDCONTENT.ORG, Oct. 6, 2009, <http://paidcontent.org/article/419-economist.com-builds-its-pay-wall-higher-but-all-the-new-stuff-stays-fr/>.

44. *Compare* Media Advisory, Dow Jones, *supra* note 39 (showing that in 1996 *WSJ*’s online subscription price was \$49 annually), *with* *Wall Street Journal, Subscribe Now*, *supra* note 39 (showing an increase in online subscription price by 210% to \$103 annually). Comparatively, a dollar in 1996 now has the buying power of approximately \$1.41, showing a total inflation of 37%. *See* *Dollar Times, Inflation Calculator*, <http://www.dollartimes.com/calculators/inflation.htm> (last visited Jan. 31, 2010).

to the original stories.⁴⁵ Others, such as Huffington Post or Breitbart.com, contribute opinion reporting or editorial summaries of the news items in addition to or in place of links to the source of the original story.⁴⁶ Individual bloggers can also act as small-scale aggregators, providing summaries of stories and links, usually to a very specialized audience.⁴⁷ And some outfits behave as All Headline News once did, by copying, rewriting, and repackaging others' news stories as their own.⁴⁸

News aggregators are easy to establish due to the low cost of entry into the market. The majority of newspapers adhered to the free model and made their content available for free online. Ease of access to content combined with the low cost of aggregation and linking provided aggregators the means to build a new industry. Aggregators provide a useful and valuable service by catering to consumers' limited time and have quickly proven profitable.

Moreover, news aggregators provide economic value to content originators because most aggregators link to original sources. Linking is more than a courtesy to the original source; it lies at the heart of Internet economics as the "distinguishing feature of the Web."⁴⁹ News aggregators generate their own revenue by displaying ads alongside aggregated or summarized content. Newspapers frequently argue that aggregators take more than their fair share of the advertising revenue attached to a story.⁵⁰ Nonetheless, the majority of newspapers' online readers arrive via search engines and news aggregators.⁵¹ Although online revenue contributes only 10% of the newspaper industry's revenue, and in its current form cannot alone sustain the costs of news gathering, newspapers are loath to lose any

45. See Google News, <http://news.google.com> (last visited Jan. 31, 2010).

46. See Huffington Post, <http://www.huffingtonpost.com> (last visited Jan. 31, 2010); Breitbart, <http://www.breitbart.com>, (last visited Jan. 31, 2010); see also Drudge Report, <http://www.drudgereport.com> (last visited Jan. 31, 2010).

47. See, e.g., Nuts & Boalts, <http://boaltalk.blogspot.com> (last visited Jan. 31, 2010).

48. See Complaint, *supra* note 10, ¶ 5.

49. Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 617 (2001). See also Wikipedia Entry for PageRank, <http://en.wikipedia.org/wiki/PageRank> (describing how Google's ranking of search results depends in part on the number of hyperlinks to a searched item).

50. See, e.g., Bobbie Johnson, *Murdoch Could Block Google Searches Entirely*, GUARDIAN, Nov. 9, 2009, <http://www.guardian.co.uk/media/2009/nov/09/murdoch-google>.

51. PEW, *Newspapers*, *supra* note 1 ("Newspapers are reconciled to having many visitors arriving by search or from sites that aggregate news reports from many sources, at the same time hoping to have enough to offer that local users will linger. The companies seem to be betting that online advertising, disappointing in the last several years, will increase in volume and command higher rates with better targeting.").

readers at all. For example, although major news sites could remove themselves from Google's search results,⁵² they generally do not.⁵³

C. THE MULTI-PRONGED EFFORT TO SAVE NEWSPAPER JOURNALISM

Commenters have pitched various approaches to preserving the quality of journalism in the Internet age. None are panacean. Instead, each approach may contribute to a sustainable, multi-pronged ecosystem that supports quality news-gathering and profitable dissemination. The most frequently discussed approaches include: (1) protecting news content through sui generis legislation, (2) focusing on niche or hyperlocal reporting, which can lead to new pay models, (3) sharing revenue with aggregators, (4) controlling unauthorized dissemination through technological means, (5) offering new payment models, and (6) receiving public support.

1. *Legislative Proposals*

One proposed legislative solution would bolster federal copyright law either to award reporters temporary rights in the news they gather,⁵⁴ or to provide a federal cause of action for hot news misappropriation.⁵⁵ In 2009, for example, Judge Richard Posner wrote that it might be necessary to “[e]xpand[] copyright law to bar online access to copyrighted materials without the copyright holder’s consent, or to bar linking to or paraphrasing copyrighted materials without the copyright holder’s consent.”⁵⁶

52. Josh Cohen, Presentation at the Federal Trade Commission News Media Workshop: Innovation and the News Industry 13 (Dec. 1, 2009), <http://www.ftc.gov/opp/workshops/news/docs/cohen.pdf> (explaining to industry workshop participants how to remove content from Google searches).

53. Rupert Murdoch has stated that he will be removing News Corp content from Google's search. Johnson, *supra* note 50, at 1.

54. See, e.g., Ryan T. Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1, 32–33 (2008) (proposing that the Copyright Act be amended to give news reporters rights in their gathered facts for 24 hours).

55. See, e.g., Connie Schultz, *Tighter Copyright Law Could Save Newspapers*, CLEVELAND.COM, June 28, 2009, http://www.cleveland.com/schultz/index.ssf/2009/06/tighter_copyright_law_could_sa.html.

56. Posner, *The Future of Newspapers*, *supra* note 33. Note that this blog entry marks a significant shift from Posner's position in 2008 that “copyright law cannot prevent [the free-riding behavior of bloggers], because a newspaper can prevent the copying of its articles—that is, the verbal form in which the information in an article is expressed—and not the information itself.” Posting of Richard Posner to The Becker-Posner Blog, *Are Newspapers Doomed?*, http://www.becker-posner-blog.com/archives/2008/06/are_newspapers.html (June 29, 2008) [hereinafter Posner, *Are Newspapers Doomed*].

Senator Benjamin L. Cardin (D-MD) recently introduced a different kind of bill called the Newspaper Revitalization Act of 2009.⁵⁷ This bill targets only small local newspapers and allows them to operate as non-profits, thereby exempting them from paying taxes on advertising and subscription revenue. Newspapers electing to take on tax-exempt status would be prohibited from making political endorsements, but would retain independence in all other operations,⁵⁸ and would essentially be treated like public broadcasting stations.⁵⁹

2. *Niche and Hyperlocal Reporting*

Niches offer a promising target for many smaller newspapers and subsidiaries of larger newspapers. By offering news keyed to a particular location or a specialized audience, newspapers can create monopolies with a stable audience, albeit on a smaller scale than in the heyday of traditional journalism.⁶⁰ These monopolies would enable niche newspapers to secure steady advertising revenue, and perhaps even adopt new subscription models. Arguably, *WSJ's* pay-to-subscribe model has succeeded⁶¹ because *WSJ* offers specialized financial news not otherwise readily obtainable.⁶²

A recently developing joint venture between private equity founder Warren Hellman, KQED-FM public broadcasting, and the Berkeley Graduate School of Journalism is working to create a nonprofit local news website.⁶³ The website would fill a local niche and be paid for by benefactors, similar to public broadcasting.⁶⁴ The project emerged during an effort to save the existing area paper, *The San Francisco Chronicle*, but quickly shifted toward an entirely new direction in order to “support[] local journalism in any form,

57. S. 673, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.673>.

58. *Id.* § 1.(k).

59. Press Release, Senator Benjamin Cardin, Senator Cardin Introduces Bill That Would Allow American Newspapers to Operate as Non-Profits, (Mar. 24, 2009), <http://cardin.senate.gov/news/record.cfm?id=310392>.

60. *See, e.g.*, www.WickedLocal.com, which features over a hundred hyperlocal blogs in Massachusetts (last visited Jan. 31, 2010).

61. As indicated by Rupert Murdoch, *supra* note 40, at 11, and Peter Kann, *supra* note 38, at 2.

62. Kann, *supra* note 38 (*WSJ's* content was “distinctive and very largely unduplicated”).

63. Richard Pérez-Peña, *In San Francisco, Plans to Start a New Web Site*, THE NEW YORK TIMES, Sept. 24, 2009, http://www.nytimes.com/2009/09/25/business/media/25bay.html?_r=1.

64. *Id.*

[and] to pick up some of what newspapers have dropped.”⁶⁵ Discussions have included a possible alliance with *NYT*.⁶⁶

Hyperlocal reporting in the context of the Hellman-Berkeley endeavor refers to the creation of a neighborhood-specific website, or one specific to a single type of news, such as the arts in the Bay Area. Once established as a community fixture, these kinds of sites could enjoy customer loyalty.⁶⁷ Sites like these also benefit from a lead time advantage over competitors,⁶⁸ if competitors exist.⁶⁹

3. *Sharing Revenue With Aggregators*

Another major effort of the news industry has focused on developing relationships with aggregators to recapture advertising revenue directed at aggregators' sites. For example, Google pays AP an undisclosed license fee to aggregate AP's content on Google News.⁷⁰ The parties are actively negotiating compensation schemes going forward. AP considers receiving the licensing fee akin to being “thrown a bone” in lieu of receiving the much larger compensation possible through sharing advertising revenue.⁷¹

Google, however, has showcased new technologies in addition to its existing AdSense service⁷² that could change the way that content producers earn revenue. Three technologies in particular may change the game for revenue sharing: FastFlip, the DoubleClick Ad Exchange, and a micropayments platform.⁷³ FastFlip is an automated aggregator that acts as a

65. *Id.*

66. *Id.*

67. *See also* Smith, *supra* note 62.

68. *See, e.g.*, Robert Weisman, *NYT, Gatehouse Release Settlement Details*, BOSTON.COM, Jan. 26, 2009, http://www.boston.com/business/ticker/2009/01/nyt_gatehouse_r.html (describing the settlement in which Boston.com agreed not to post excerpts taken from GateHouse Media's “Wicked Local” blogs that covered Massachusetts communities).

69. Note, however, that a potential drawback to a lack of competition could be a lack of quality checks.

70. Dirk Smillie, *AP's Curley Has Fightin' Words For Google*, FORBES, Apr. 30, 2009, <http://www.forbes.com/2009/04/30/associated-press-google-business-media-apee.html>.

71. *Id.*

72. AdSense allows website owners to place third party ads on their page for a share of the revenue that Google receives from the third parties. Wikipedia Entry for AdSense, <http://en.wikipedia.org/wiki/AdSense> (last visited Jan. 31, 2010). Some have criticized the program for being a “black box” in which users can't figure out how much of the cash Google is pocketing for any particular ad.” Nate Anderson, *“Tech Tapeworms”: Bloggers Denounce “Parasite” Label at FTC*, ARS TECHNICA, Dec. 1, 2009, <http://arstechnica.com/tech-policy/news/2009/12/tech-tapeworms-bloggers-denounce-parasite-label-at-ftc.ars> (quoting blogger Danny Sullivan).

73. James Temple, *Google Fast Flip May Not Be Great for Media*, SAN FRANCISCO CHRONICLE, Sept. 27, 2009, at D1.

hub for news from many different sources, but notably offers a share of associated advertising revenue to the content originator. DoubleClick Ad Exchange is a real-time auction for Internet ads that allows publishers to increase the number of advertisers. The micropayments platform facilitates the monetization of digital content. Such technologies have the potential to more fairly distribute advertising dollars to news companies.

But Google will not be monopolizing the future of content aggregator relationships. News Corp has reportedly been in talks with Microsoft about creating an exclusive partnership for the Bing search engine: News Corp would block other search engines from displaying its stories, and Bing would link only to News Corp stories.⁷⁴ Apple made headlines as well when it recently announced the upcoming iPad, which is designed to integrate closely with print media.⁷⁵

Newspapers and aggregators face a substantial hurdle: overcoming an Internet-is-free mentality,⁷⁶ or at least a consumer expectation for free news that newspapers may have themselves created by adopting the free online distribution model.⁷⁷ A basic tenet of the Internet link economy is that the aggregation of content by linking generates ad revenue both for the aggregators and the linked-to sites. Furthermore, some scholars contend that anyone who posts content to the web naturally consents to linking, at least to some reasonable degree.⁷⁸ The problem with the link economy is that being linked to is far less lucrative than being the linker.⁷⁹ Aggregators receive far more ad revenue, especially when they provide enough of a headline or summary that readers need not click through to the originating site.

4. *Controlling Unauthorized Dissemination through Technological Means*

AP and others sponsor a Digital Rights Management approach to controlling and monetizing their content. In July 2009, AP announced that it would build a news registry to “encapsulate AP and member content in an

74. Sarah Rabil & Dina Bass, *News Corp. Said to Talk to Microsoft on News Search*, BLOOMBERG.COM, Nov. 23, 2009, <http://www.bloomberg.com/apps/news?pid=20601103&sid=aRbJZSQRVjEM>.

75. Brian Lam, *Apple Tablet Aiming to Redefine Newspapers, Textbooks, and Magazines*, GIZMODO: THE GADGET BLOG, Sept. 30, 2009, <http://gizmodo.com/5370252/apple-tablet-aiming-to-redefine-newspapers-textbooks-and-magazines>.

76. See O'Rourke, *supra* note 49, at 615. (“The Internet is rooted in a tradition of openness and information sharing, and the web is intentionally designed to facilitate this through linking.”).

77. PEW, *Newspapers*, *supra* note 1.

78. See O'Rourke, *supra* note 49, at 620.

79. PEW, *Newspapers*, *supra* note 1.

informational ‘wrapper’ that includes a digital permissions framework.”⁸⁰ In other words, AP would track all of its content to assure compliance with terms of use.⁸¹

Attributor offers a similar line of products called “FairShare” that periodically scans billions of web pages to look for unauthorized copies of a copyrighted work to help a copyright holder enforce its rights.⁸² FairShare works by digitally fingerprinting the essential features of protected content. AP is counted among its customers.⁸³

5. *New Payment Models*

Some newspapers attempt to generate revenue directly from readers. The charge model requires an annual subscription to gain access to the paper’s full content.⁸⁴ Other newspapers have attempted partial subscription models, such as the short-lived *NYT* “TimesSelect” program, which required a subscription to access editorial content.⁸⁵ Some commenters have encouraged the development of a micropayments model much like iTunes,⁸⁶ emphasizing the smaller unit of consumption typical with consumers’ use of the Internet.

However, a newspaper largely subsidized by readers’ direct payment for content—as opposed to traditional newspapers’ cross-subsidization by advertising revenue—raises the question of whether the quality of reporting could decline as a result. Rupert Murdoch extolled News Corp’s “good record” in “looking for ways—whether better content or delivery—to meet [its] customers’ needs and interests.”⁸⁷ News Corp gives readers what they want to read, but at what cost? The market for newsworthy but unpopular

80. Press Release, The Associated Press, Associated Press to Build News Registry To Protect Content (July 23, 2009), http://www.ap.org/pages/about/pressreleases/pr_072309a.html.

81. *Id.*

82. Attributor, Your Full Service Anti-Piracy Solution, <http://www.attributor.com/products/products.php> (last visited Jan. 31, 2010).

83. Attributor, About Us, http://www.attributor.com/about_us.php (last visited Jan. 31, 2010).

84. See Wall Street Journal Online, *Subscribe Now*, *supra* note 39.

85. NYTimes.com, Frequently Asked Questions About TimesSelect, <http://www.nytimes.com/membercenter/faq/timesselect.html> (last visited Jan. 31, 2010).

86. See, e.g., Walter Isaacson, *How To Save Your Newspaper*, *TIME*, Feb. 5, 2009, <http://www.time.com/time/printout/0,8816,1877191,00.html>.

87. Murdoch, *supra* note 40, at 6.

stories diminishes when those stories can no longer be bundled with merely popular stories.⁸⁸

6. *Public Funding*

An October 2009 report entitled *The Reconstruction of American Journalism* makes several recommendations to save local media, one of which would enable public funding through a system similar to the National Endowment for the Arts.⁸⁹ Funding could flow from a surcharge for radio and television licenses, spectrum auctions, or Internet service provider fees.⁹⁰ The report downplayed a potential counterargument in the loss of reporters' autonomy by highlighting public broadcasting's resilience to political pressure.⁹¹

III. HOT NEWS MISAPPROPRIATION REFLECTS CUSTOMARY PRACTICES IN TRADITIONAL JOURNALISM

A. THE ORIGIN OF HOT NEWS MISAPPROPRIATION IN *INTERNATIONAL NEWS SERVICE*

In 1918, AP was a large cooperative organization, gathering news from all over the world and distributing it daily to its 950 member newspapers.⁹² Under AP's bylaws, members agreed to publish in their newspapers only the news disseminated by AP.⁹³ Members could make no other use of that news.⁹⁴ The International News Service ("INS") directly competed in newsgathering and dissemination though at a somewhat smaller scale, reaching 400 newspapers across the nation.⁹⁵

88. See OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM* (Kessinger Publishing 2004) ("The fact is, that the public have an insatiable curiosity to know everything, except what is worth knowing.") (emphasis omitted).

89. Mac Slocum, *Downie and Schudson's 6 Steps Toward "Reconstructing" Journalism*, NIEMAN JOURNALISM LAB, Oct. 19, 2009, <http://www.niemanlab.org/2009/10/downie-and-schudsons-6-steps-toward-reconstructing-journalism/> (summarizing the Leonard Downie & Michael Schudson's report, *The Reconstruction of American Journalism*).

90. LEONARD DOWNIE, JR. & MICHAEL SCHUDSON, *THE RECONSTRUCTION OF AMERICAN JOURNALISM* 92 (Columbia University School of Journalism 2009), available at <https://stgcms.journalism.columbia.edu/cs/ContentServer/jrn/1212611716674/page/1212611716651/JRNSimplePage2.htm>.

91. *Id.* at 86.

92. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 229 (1918).

93. *Id.* at 230.

94. *Id.*

95. *Id.*

At issue in the case was INS's practice of copying news from AP's published bulletins during World War I.⁹⁶ This practice emerged in light of two developments—the first technological and the other political. First, the invention of the telegraph enabled INS to take the news from bulletins published in eastern cities and transmit it to western papers for instant publication.⁹⁷ Second, Britain and France banned INS from reporting from the front lines because the Hearst papers—then in control of INS—showed sympathy for the German cause.⁹⁸ INS's inability to otherwise report on the War notwithstanding, AP filed a bill to restrain INS's "pirating of [its] news"⁹⁹ for constituting an unfair competition in business and for violating AP's property right in the news.¹⁰⁰

The Supreme Court's analysis turned on the unusual nature of the business at issue—that news has a "peculiar value . . . in the spreading of it while it is fresh; . . . [a value that] cannot be maintained by keeping it secret."¹⁰¹ Making the news of current events known to the world was an "innocent but extremely useful" trade.¹⁰² Due to the character and circumstance of this valuable trade, the Court accepted as unquestionable the right of the public to uncopyrighted news after the moment of first publication.¹⁰³ The Court focused instead on the relative right of exclusion between AP and INS. "[A]s between them, [the news] must be regarded as quasi property, irrespective of the rights of either as against the public."¹⁰⁴

The Court held that AP had earned a temporary "quasi property" right against INS, for such duration as to prevent INS from "reaping the fruits of

96. *Id.* at 231.

97. *Id.* at 238–39. The Court explained:

[S]ince in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from . . . eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers . . . sometimes simultaneously with the service of competing Associated Press papers, occasionally even earlier.

Id.

98. Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 91–92 (1992).

99. *Int'l News Serv.*, 248 U.S. at 231.

100. *Id.* at 231–32. AP also filed for restraint to stop INS from bribing employees to obtain news earlier and from inducing AP members to violate the AP by-laws. Those matters were not argued before the Court. *Id.* at 232.

101. *Id.* at 235.

102. *Id.*

103. *Id.* at 236.

104. *Id.*

[AP's] efforts and expenditure."¹⁰⁵ The Court perceived INS's free-riding conduct as inequitable: "[News] has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because [it is] *contrary to good conscience*."¹⁰⁶ The Court, standing in equity, assigned to the news an evaporating property right to reward the great cost in acquiring it and the great value in its distribution and exchange.¹⁰⁷

The Court's decision was accompanied by a partial concurrence by Justice Holmes¹⁰⁸ and a somewhat longer dissent by Justice Brandeis. In his concurrence, Justice Holmes stressed that property, a creation of law, does not necessarily flow from the exertion of labor.¹⁰⁹ He agreed with the majority that INS was engaged in potentially fraudulent and unfair appropriation of AP's news, but concluded that an accurate acknowledgement of the source of news by INS would defeat a claim of misappropriation.¹¹⁰

On the other hand, Justice Brandeis dissented from the majority's creation of a quasi property right in news because he viewed property as a positive legal construct that had never before "conferred the attributes of property" to the news.¹¹¹ Brandeis conceded that INS's practice of appropriating AP's news and using it for profit "may be inconsistent with a finer sense of propriety" but separated this notion of propriety from the law's definition of property.¹¹² According to Brandeis, absent a showing of malice or intent to commit fraud, "the law sanctions, indeed encourages, the pursuit."¹¹³ He allowed that there were some instances where public policy would require awarding property rights to knowledge, but noted that such cases typically included artistic creations, inventions, or discoveries.¹¹⁴ He saw no merit in protecting the "mere record of isolated happenings, whether in

105. *Id.* at 241.

106. *Id.* at 240 (emphasis added).

107. The Court further treated INS's practice as fraudulent, even though it conceded that INS had not clearly attempted to palm off its goods as those of AP. The Court instead determined that INS had been fraudulent in a more "direct and obvious" manner, by selling AP's goods as its own. *Id.* at 240.

108. Holmes's concurrence is arguably a dissent. LexisNexis refers to Holmes' contribution as a concurrence, unlike Westlaw, which refers to it as a dissent. *Compare Int'l News Serv.*, 1918 U.S. LEXIS 1664 *with Int'l News Serv.*, 248 U.S. 215.

109. *Int'l News Serv.*, 248 U.S. at 246 (Holmes, J., concurring).

110. *Id.* at 248.

111. *Id.* at 251 (Brandeis, J., dissenting).

112. *Id.* at 257.

113. *Id.* at 259.

114. *Id.* at 251.

words or by photographs not involving artistic skill.”¹¹⁵ He argued that only legislatures, and not the courts, were equipped to decide matters of public policy that could have such far-reaching effects in an increasingly complex society.¹¹⁶

B. MISAPPROPRIATION REAPPLIED IN *ALL HEADLINE NEWS*

Ninety years later, AP once again alleged misappropriation of its content in *All Headline News*.¹¹⁷ AP was still a newsgathering and disseminating organization, albeit on a larger scale than at the time of *International News Service*.¹¹⁸ The notable difference between the cases is that AHN, unlike INS, did no original reporting.¹¹⁹ As AP alleged, AHN hired “poorly paid individuals” to find news stories on the Internet, copy or rewrite them, and resell them in competition with AP.¹²⁰ AHN sold those rewritten stories as their own product either without attributing AP as an original source, or by attributing stories to AP and giving the false impression that it was a licensed member of AP.¹²¹

AP filed a bill in the Southern District of New York to restrain AHN from “free riding” on AP’s original stories.¹²² AP brought its complaint against AHN on six counts: (1) hot news misappropriation; (2) copyright infringement; (3) violation of the Digital Millennium Copyright Act (“DMCA”) by altering or removing copyright-management information; (4) trademark infringement of the trademarks “AP,” “ASSOCIATED PRESS,” and “THE ASSOCIATED PRESS”; (5) unfair competition under the Lanham Act; and (6) unfair competition under New York common law. AHN moved to dismiss all claims but the second, copyright infringement.¹²³ This Note only examines count one.¹²⁴

115. *Id.* at 254.

116. *Id.* at 264.

117. *The Associated Press v. All Headline News*, 608 F. Supp. 2d 454, 457–58 (S.D.N.Y. 2009).

118. *See* Complaint, *supra* note 10, ¶ 2.

119. *See id.*

120. *Id.*

121. *Id.*

122. *All Headline News*, 608 F. Supp. 2d at 458.

123. *Id.* at 457.

124. The court handled the remaining motions to dismiss for each count as follows: (3) denied because AHN did not show that the copyright management information section of the DMCA would not apply here; (4) granted because AP’s trademark claim was thin and AP’s conclusory allegations of confusion among clients lacked factual support; (5) granted because AP’s unfair competition claim should not be extended to situations of no consequence to purchasers; and (6) denied because AHN failed to support its motion and because preemption of New York unfair competition law was unclear. *Id.* at 454–55.

The *All Headline News* court first noted that *International News Service* turned on federal common law and was consequently non-binding after *Erie*.¹²⁵ Hot news misappropriation, however, still appears in the laws of some states. Therefore, two issues remained: whether *All Headline News* should be decided under New York law, which recognizes hot news misappropriation, and if so, whether AP had a valid hot news misappropriation claim.

AHN argued that the law of Florida, which lacks a state hot news misappropriation claim, should apply because AHN located its servers there.¹²⁶ The district court applied New York law because it was the state where AP was incorporated and headquartered, where it suffered economic loss, and where AHN maintained an office.¹²⁷

The court then turned to the Second Circuit's decision in *National Basketball Association v. Motorola, Inc.*,¹²⁸ which "unambiguously held that [hot news misappropriation under New York law] is not preempted by federal law."¹²⁹ The Second Circuit defined the claim as surviving preemption if it met five elements:

(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.¹³⁰

After acknowledging the existence of the New York claim for misappropriation and noting AHN's failure to address this claim, the district court denied AHN's motion to dismiss count one.¹³¹ The court did not adjudicate AP's claim on the merits.

In July 2009, five months after the district court denied AHN's motion to dismiss the hot news misappropriation claim, the parties settled on terms favorable to AP.¹³² AHN agreed to cease making competitive use of AP's

125. *Id.* at 458–59 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

126. *Id.*

127. *Id.* at 460–61.

128. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

129. *All Headline News*, 608 F. Supp. 2d at 461.

130. *Nat'l Basketball Ass'n*, 105 F.3d at 845.

131. *All Headline News*, 608 F. Supp. 2d at 461.

132. Joint Press Release, The Associated Press and AHN Media, *supra* note 16.

content, paid AP an unspecified sum, admitted to using AP's content improperly, and acknowledged the validity and applicability of the tort of hot news misappropriation.¹³³ AP also used the joint press release as an opportunity to declare its willingness to "fully defend its intellectual property rights against unfair competition,"¹³⁴ echoing its statement in April that it would "take all actions necessary to protect the content of the Associated Press . . . from misappropriation on the Internet."¹³⁵

C. CRITICISMS OF THE DOCTRINE OF HOT NEWS MISAPPROPRIATION

International News Service has been questioned and criticized ever since its publication. The criticism comes from two corners. First, some argue the case depends on non-binding federal common law and is preempted by federal copyright law. Second, some argue the Pitney majority simply got it wrong and that Holmes's or Brandeis's dissents were either more cohesive with intellectual property law or represented better policy.

After *Erie*, the federal courts abandoned the authority to create federal common law, which rendered *INS* "no longer . . . legally authoritative."¹³⁶ The *INS* doctrine, however, persists in some states,¹³⁷ and was never specifically overturned by the Supreme Court in any later decision. Some have argued that the misappropriation doctrine was never adopted into federal copyright statutes and therefore Congress intended to preempt the doctrine.¹³⁸ The Second Circuit nonetheless held that a narrowly constructed, five-element hot news misappropriation claim survives.¹³⁹

Another criticism derives from the exclusion of facts from the protection of copyright.¹⁴⁰ As the Supreme Court explained, facts are unoriginal, not copyrightable, and "free for the taking."¹⁴¹ Copyright law would allow a news aggregator to use the facts underlying a reported story, though mere reproduction would violate the copyright in the writing of the story. Critics argue that hot news misappropriation runs counter to a primary purpose of

133. *Id.*

134. *Id.*

135. Singleton, *supra* note 18.

136. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 627 (2003) [hereinafter Posner, *Misappropriation*].

137. *Id.* at 629.

138. *See, e.g., Nat'l Basketball Ass'n*, 105 F.3d 841, 843 (2d Cir. 1997).

139. *Nat'l Basketball Ass'n*, 105 F.3d at 845.

140. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

141. *Id.*

copyright: to “encourage[] others to build freely upon the ideas and information conveyed by a work.”¹⁴²

One response to this criticism is that the extreme time-sensitivity of the news adds an extra element that sets it apart from typical, uncopyrightable facts. Intellectual property often struggles to balance the interests of rights holders against those of the public; here, the public has a strong interest in preserving the quality of news reporting agencies, and those agencies depend on being able to profit from the timeliness of its news.¹⁴³

Other critics focus on the case’s creation of a cause of action without clearly defining any boundaries.¹⁴⁴ In 2003, Judge Posner argued that *International News Service* was not only invalid law, but also based only on the vague and unproven assumption that free-riding constituted significantly harmful activity and therefore made it difficult to calculate the proper duration of an injunction against misappropriation.¹⁴⁵ Such critics prefer that the legislature and not the courts determine the proper lead time.

Some of the loudest criticism of misappropriation comes from the bloggers’ corner. Bloggers responded clamorously to Judge Richard Posner’s 2009 posting, which supported misappropriation; they argued the misappropriation cause of action would “outlaw linking”¹⁴⁶ and that Posner was “out of touch with social media.”¹⁴⁷ They argued that a strengthened copyright law and the application of hot news misappropriation would lead to absurd results,¹⁴⁸ that such a change would harm newspapers more than

142. *Id.* at 350.

143. *See Int’l News Serv.*, 248 U.S. 215, 241 (1918).

144. *See, e.g.*, Posner, Misappropriation, *supra* note 136, at 637–38. Again, however, note that Judge Posner has as recently as July 2009 viewed misappropriation in a more positive light. *See* Posner, *Are Newspapers Doomed*, *supra* note 56.

145. Posner, Misappropriation, *supra* note 136, at 637–38.

146. Posting of Kevin O’Keefe to Real Lawyers Have Blogs, *Lawyers Ill Equipped to Advise on Intersection of Social Media and Copyright Laws*, <http://kevin.lexblog.com/2009/06/articles/blog-law-and-ethics/lawyers-ill-equipped-to-advise-on-intersection-of-social-media-and-copyright-laws/> (June 28, 2009).

147. Posting of Dave Rein to Owners, Borrowers & Thieves 2.0, *Judge Posner’s Copyright Proposal To Save Newspapers – A Cosmic Paperboy?*, <http://iplitigator.huschblackwell.com/2009/07/articles/copyright/judge-posners-copyright-proposal-to-save-newspapers-a-cosmic-paperboy/> (July 1, 2009); *see also* Dan Kennedy, *Should Linking Be Illegal?*, THE GUARDIAN, July 1, 2009, <http://www.guardian.co.uk/commentisfree/cifamerica/2009/jul/01/richard-posner-copyright-linking-newspapers>.

148. Posting of Danny Sullivan to Dabble, *Justice Richard Posner’s Copyright Law No One Can Talk About (Or Link To)*, <http://dabble.com/posner-copyright-law-798> (June 29, 2009) (describing as ludicrous a situation in which the first person to report Michael Jackson’s death would be the only one to report it).

help them,¹⁴⁹ and that newspapers should be allowed to fail in order to make way for new and better substitutes.¹⁵⁰

Rep. Henry Waxman voiced the primary counterargument in his recent address to the FTC:

Journalism on the Internet could try to fill the void. But it is not certain that it can generate replacement revenues of such an extent as to ensure a restoration of the resources devoted to journalism by mainstream media over the past several decades—or anything close to it.¹⁵¹

It remains to be seen whether newspapers are too important to fail.

D. HOT NEWS MISAPPROPRIATION IN *INTERNATIONAL NEWS SERVICE* REFLECTS CUSTOMARY PRACTICES

This Note adopts Richard Epstein's view that Justice Pitney's majority opinion in *International News Service*, whether purposefully or not,¹⁵² created a rule that aligned with customary practices within the news industry.¹⁵³ The relevant custom, as AP described it in its brief in *International News Service*, was that taking a story in whole or in part without independent investigation was improper, whereas using a story as a basis for independent investigation or verification is proper.¹⁵⁴ Pitney's rule essentially added that custom to federal law by creating a temporary, quasiproperty right enforceable against competitors—but only to the extent that no independent investigation occurred.

This custom likely developed from the fact that AP and INS were frequent competitors with repeated interactions.¹⁵⁵ It was a classic prisoner's

149. See posting of Erick Schonfeld to TechCrunch, *How to Save the Newspapers, Vol. XII: Outlaw Linking*, <http://www.techcrunch.com/2009/06/28/how-to-save-the-newspapers-vol-xii-outlaw-linking/> (June 28, 2009) ("A link on its own is valuable. . . . [N]ewspaper sites get their readers . . . through links, not direct traffic.").

150. Posting of Gary Becker to the Becker-Posner Blog, *The Social Cost of the Decline of Newspapers*, http://www.becker-posner-blog.com/2009/06/the_social_cost.html (June 23, 2009) ("Although the printed newspaper industry is doomed, . . . they are being replaced by good substitutes in the form of blogs, social networks like Facebook and Twitter, online news gathering by various groups, including newspapers, and other electronic forms of communication.").

151. Waxman, *supra* note 4, at 2.

152. Epstein, *supra* note 98, at 124 ("[T]he INS decision . . . reached results consistent with the custom of the news-gathering industry, although [Justice Pitney] did not purport to derive [his] rules from custom.").

153. *Id.* at 115.

154. *Id.* at 98 (citing AP's brief).

155. *Id.* at 101.

dilemma: if either INS or AP defected and began misappropriating the other's news, then the other would retaliate in kind, and both would suffer. Thus INS and AP followed conventional rules of independent investigation in order to avoid upsetting the equilibrium, the benefit being that they could use each other's stories as tips for independent investigation.¹⁵⁶

The resilience of this self-enforced system is highlighted by INS misappropriating AP's news about the war in Europe. INS limited its acts of misappropriation only to those cases where it could claim necessity¹⁵⁷ due to its political ban from reporting in Europe.¹⁵⁸ But this does not represent a breakdown in self-enforcement; on the contrary, AP sued instead of misappropriating INS's news in kind.¹⁵⁹ AP's lawsuit represented not retaliation, but rather reinforcement of the established antipathy toward misappropriation.¹⁶⁰

As scholars noted, however, courts should not always defer to customary practices.¹⁶¹ Mark A. Lemley argues that customary practices change over time,¹⁶² only work for homogeneous groups,¹⁶³ have no clear enforcement mechanism,¹⁶⁴ and may not account for externalities that affect those outside the industry.¹⁶⁵

Perhaps the strongest response to these criticisms is simply that customary practices are particularly useful when "there are repeat and reciprocal interactions between the same parties, for then their incentives to reach the correct rule are exceedingly powerful,"¹⁶⁶ but should only apply to situations where customary practice was developed by directly competing parties.¹⁶⁷ Also, when externalities affecting those outside of the industry trigger the public's interest, then courts should not blindly follow customary practices.

156. *Id.* at 102.

157. *Id.* at 105.

158. *Id.* at 91–92.

159. *Id.* at 105–06.

160. Professor Epstein notes that INS perhaps should have prevailed with a defense of necessity, or at least that Justice Pitney should have left open such a defense to hot news misappropriation in certain cases. *Id.* at 118.

161. *See, e.g.*, Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

162. Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1267 (1998).

163. *Id.* at 1270.

164. *Id.* at 1284.

165. *Id.* at 1277.

166. Epstein, *supra* note 98, at 126.

167. *Id.* at 122.

IV. THE ROLE OF HOT NEWS MISAPPROPRIATION IN SHAPING UNDEVELOPED CUSTOMARY PRACTICES IN ONLINE JOURNALISM

Part IV.A explains how *All Headline News* is similar to *International News* and that both cases represent a manifestation of strong customary practices. Part IV.B argues that, going forward, hot news misappropriation actions should apply when the defendant's behavior leads to unsustainable practices. On the whole, however, the doctrine will serve as a quiet influence as the news industry adapts to online journalism.

A. *ALL HEADLINE NEWS* AND *INTERNATIONAL NEWS SERVICE* BOTH MIRROR CUSTOMARY PRACTICES

AP's strategy in *All Headline News* becomes apparent after answering the following questions: (1) Why AHN and why now? and (2) Why settle? Many news aggregators, large and small, perform functions similar to AHN. And yet content originators rarely raise claims of hot news misappropriation.¹⁶⁸ This Note argues that the similarities between the *International News Service* and *All Headline News* cases, coupled with AP's other litigious endeavors, exemplify AP's attempt to shape industry custom—a process that must occur between parties and not solely through the courts.

1. *AHN was a Perfect Candidate*

The similar facts in *All Headline News* and *International News Service* bridge a ninety-year gap. Both cases feature the same party, AP, a news-gathering entity that today continues to practice independent investigation when verifying tips gleaned from outside sources.¹⁶⁹ Both cases also feature the right to control the news a party has gathered, at least against a competitor. The main differences are that the technology underlying the misappropriation has shifted from the telegraph to the Internet and that the defendant in *All Headline News* does not perform its own independent news gathering.

AHN's status as a pure aggregator deserves further scrutiny because a vital element in a hot news misappropriation claim is that the parties must

168. Posting of Arthur Bright to Citizen Media Law Project, *Associated Press v. Drudge Retort*, <http://www.citmedialaw.org/threats/associated-press-v-drudge-retort> (June 16, 2008) (noting *National Basketball Association* was “one of the few cases to address a ‘hot news’ claim”).

169. See Press Release, The Associated Press, Statement of News Values and Principles, Feb. 16, 2006, <http://www.ap.org/newsvalues/index.html> (“We must satisfy ourselves, by our own reporting, that the material [used from any source] is credible.”).

compete directly.¹⁷⁰ At a glance, AHN and AP may not seem like direct competitors because the former engages only in news aggregation and the latter invests heavily in original reporting. But this difference is illusory. A defendant need not follow the exact same business model as the plaintiff in order to be a direct competitor; as *National Basketball Association* shows, a direct competitor is in competition with a product or service offered by the plaintiffs,¹⁷¹ so it does not need to employ the same means.

This result—that a misappropriator and a news gatherer may in fact compete directly—is in accord with the development of customary practice, in which the essential requirement is that the parties have repeated and reciprocal interactions.¹⁷² AHN, and news aggregators like it, reciprocates with AP by potentially offering tips to stories it takes from sources other than AP. Additional reciprocity occurs when aggregators direct readers via links to the original stories, and newspapers, by allowing indexing of their stories, generate hits for the aggregators.

The difference between *All Headline News* and *International News Service* is one of degree: AHN acted worse than INS. Both directly competed with AP, but only INS actually performed its own news gathering and therefore had a very strong incentive to maintain a good relationship with AP going forward. INS could even try to argue that it acted out of necessity.¹⁷³ AHN, in unscrupulously performing an almost entirely free-riding service in competition with AP, was an apt target for applying *International News Service*.¹⁷⁴ AHN's behavior is an outlier, which helps to explain why it suffered the lawsuit instead of any number of other news aggregators.

2. AP Endeavored to Shape Industry Practice

AP tried to apply hot news misappropriation in other cases before it sued AHN.¹⁷⁵ In *Associated Press v. Drudge Retort*, a suit that lasted all of one week,

170. *Int'l News Serv.*, 248 U.S. 215, 239 (1918) (applying quasi property in consideration of the “rights of complainant and defendant, *competitors in business*, as between themselves”) (emphasis added); *Nat'l Basketball Ass'n, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (stating that the fourth factor to be considered is whether “the defendant is in direct competition with a product or service offered by the plaintiffs.”).

171. *Nat'l Basketball Ass'n*, 105 F.3d at 845.

172. Epstein, *supra* note 98, at 126.

173. *Id.* at 105.

174. *See Int'l News Serv.*, 248 U.S. at 240 (finding that a competitor committing misappropriation to the disadvantage of complainant is behavior “contrary to good conscience”).

175. AP also sued Moreover Technologies, a headline and news aggregation service, under copyright infringement and misappropriation theories, but the case settled on undisclosed terms. *See* Press Release, The Associated Press, AP Settles Lawsuit Against

AP sued a news aggregator that published quotations of 33 to 79 words from several AP stories for the purpose of creating a liberal parody of the conservative Drudge Report.¹⁷⁶ AP sued under theories of copyright infringement and hot news misappropriation.¹⁷⁷

In a “quick about-face,” AP caved to pressure from well-known bloggers and withdrew its lawsuit.¹⁷⁸ AP stated that it would “challenge blog postings containing excerpts of AP articles ‘when [it] feel[s] the use is more reproduction than reference, or when others are encouraged to cut and paste.’”¹⁷⁹ AP promised to issue guidelines for fair use by bloggers,¹⁸⁰ but those standards are still forthcoming.

Drudge Retort reveals a persistent but remarkably cautious effort by AP to shape the industry custom. Jim Kennedy, the vice president and strategy director of AP, said, “We don’t want to cast a pall over the blogosphere by being heavy-handed, so we have to figure out a better and more positive way to do this.”¹⁸¹ Kennedy displayed awareness of a reciprocal relationship that AP shared with bloggers and aggregators.

In contrast with *Drudge Retort*, AP’s persistence in *All Headline News* indicates that AP felt compelled to show that hot news misappropriation claims remained viable. It is rare enough that hot news misappropriation cases surface at all, and commenters frequently criticize those that do.¹⁸² Nonetheless, AP, by carefully picking its target, and not retreating, reaffirmed an old and controversial doctrine.

But why would AP settle rather than win, or attempt to win, on the merits? This question lies at the heart of the theory that an industry’s customary practices should guide the law: competitors develop customs.¹⁸³ AP’s actions, whether consciously or not, represent a step toward creating a sustainable relationship with news aggregators instead of allowing a judge—who may not fully understand the newspaper industry—to interfere by

Moreover and VeriSign (Aug. 18, 2008), http://www.ap.org/pages/about/pressreleases/pr_081808a.html.

176. Bright, *supra* note 168.

177. *Id.*

178. Saul Hansell, *The Associated Press to Set Guidelines for Using its Articles in Blogs*, NEW YORK TIMES, June 16, 2008, http://www.nytimes.com/2008/06/16/business/media/16ap.html?_r=1&ref=business.

179. *Id.*

180. *Id.*

181. *Id.*

182. *See supra*, Section III.C.

183. Lemley, *supra* note 162, at 1270.

imposing rules of positive law.¹⁸⁴ The risk of allowing a court to interfere on the merits is too high.

B. THE ROLE HOT NEWS MISAPPROPRIATION WILL PLAY IN ONLINE JOURNALISM

With *All Headline News* and the subsequent settlement, AP struck a powerful blow against at least one unsustainable online model: an aggregator that commits large-scale copying, rewriting, and reselling of a newspaper's stories. The role that the case will play going forward is to remind industry participants that in order to develop customary practices, repeated and reciprocal interactions are required, and those interactions have to be sustainable.

This role, however, should not encourage AP to spring off its success in *All Headline News* to engage in more litigation. On the contrary, it should serve only as a warning to particularly aggressive aggregators like AHN. Aggregators and newspapers must both understand that, like it or not, they are in it for the long haul. Aggregators provide an extremely useful service for the public. Newspapers will continue to provide content valuable to a functioning democracy. They need each other to survive.

Because they are engaged in a repeating and reciprocal relationship, both newspapers and aggregators have a very strong incentive to create efficient and sustainable customary practices.¹⁸⁵ And there is plenty of reason to be optimistic that this can and will occur.¹⁸⁶

V. CONCLUSION

The future landscape of news reporting is still evolving. The newspaper industry has suffered a tremendous drop in revenue due to both the recession and the advent of news dissemination online. The industry has actively pursued new methods of saving quality journalism, such as emphasizing niche reporting and implementing new revenue streams through subscription models. There is hope that such new methods, in concert, will help chart the future of the industry.

Another, more controversial method has been to establish a working relationship with news aggregators, which raises the question of whether and

184. See Epstein, *supra* note 98, at 117 (“The risk of seeking out the immutable rules of positive law is that, had the composition of the Supreme Court been different, the three dissenting voices in [*International News Service*] would have established the legal norms for an industry whose internal operation they scarcely understood.”).

185. See *id.* at 126.

186. See *supra* Section II.C.3.

to what extent aggregators may use the content generated by reporters and agencies such as the Associated Press. The boundary between fair appropriation and misappropriation remains unclear despite the recent decision in *All Headline News*.

The very presence of *All Headline News* will influence the future relationships of newspapers and aggregators. Its primary significance, however, is as an indication of the evolving customary practices that, in combination with other newspaper-saving methods, will help create a sustainable equilibrium of newsgathering and dissemination.