

1-1-2016

Defining the Press Clause: The End of Hot News and the Attempt to Save Traditional Media

Adam Tragone
Duquesne University School of Law

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/ckjip>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Adam Tragone, *Defining the Press Clause: The End of Hot News and the Attempt to Save Traditional Media*, 15 Chi. -Kent J. Intell. Prop. 237 (2016).

Available at: <https://scholarship.kentlaw.iit.edu/ckjip/vol15/iss1/8>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Journal of Intellectual Property by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

*Defining the Press Clause: The End of Hot News and the Attempt to
Save Traditional Media*

ADAM J. TRAGONE*

TABLE OF CONTENTS

I. INTRODUCTION.....	237
II. THE HISTORY OF HOT NEWS	240
A. Complicating Hot News: Feist and the Copyright Act	242
B. Hot News Hits the Internet	243
C. Barclays and TVEyes	246
III. THE APPROACH TO SAVE HOT NEWS.....	249
A. Federal Codification of Hot News	251
B. Statutory Limits on Fair Use	252
C. Mandatory Licensing.....	253
IV. THE REST OF THE STORY: HOT NEWS MISAPPROPRIATION IS UNCONSTITUTIONAL AND ALMOST IMPOSSIBLE TO PROVE	253
V. THE SOLUTION: TIME TO GO TO PRESS	255
VI. CONCLUSION	258

I. INTRODUCTION

The newsroom buzzes with excitement at the big scoop brought in by one of its investigative reporters, a “hot news” item that will certainly be an above-the-fold-worthy news story. The investigative reporter went through pain-staking effort to probe her sources, obtain the information, and write the story. However, as soon as the piece was published, another news

* J.D., 2016, Duquesne University School of Law; Executive Editor, *Duquesne Law Review*, Vol. 54.

outlet took the story and re-reported it on the Internet. The subsequent story then gained traction and created a buzz, simultaneously raking in web traffic hits and raising ad revenue.

This incident happens to many journalists on an almost daily basis. Many attribute such occurrences as the simple result of modern journalistic practices and reason that the first news outlet in this scenario will likely reap the reward of a big news story in the near future.

However, according to Jeffrey Harrison and Robyn Shelton, the current reality of the journalism industry causes significant problems:

The critical element in hot news is lead time. In periods of less technological sophistication, the discoverer and reporter of news could depend on lead time, even if only a few hours, during which it was the exclusive source of the information. In today's internet-based world, lead time is nonexistent. The most painstakingly gathered and expensive fact-based research can be re-reported within moments of its publication. *This inevitably decreases the incentive to do original reporting.*¹

Harrison and Shelton's observation thus raises a few questions. Should some protection be granted for original reporting? Should the law give greater protection to traditional news outlets, journalists, reporters, and editors who do all the work, just to later allow the product to be taken and repurposed? These questions resurfaced in *Fox News Network, LLC v. TVEyes, Inc.*² In that case, the United States District Court for the Southern District of New York held the defendant, TVEyes, successfully claimed a fair use defense against Fox News when it clipped and edited the network's television broadcasts and converted the content into a subscription database.³ Subscribers to TVEyes' service use keywords to search for a particular type of television show, segment of a show, or word used in a specific show.⁴ According to Fox News, clipping services such as this are destroying the news outlet's incentive to continue original news reporting;⁵ as Fox News explained in its brief, "TVEyes' use . . . of Fox News' information causes Fox News' services to be less profitable and, as a result, reduces Fox News' incentive to gather and report the news."⁶ Fox News further explained that it has its own licensing service that distributes its

1. Jeffrey L. Harrison & Robyn Shelton, *Deconstructing and Reconstructing Hot News: Toward A Functional Approach*, 34 *CARDOZO L. REV.* 1649, 1654 (2013) (emphasis added).

2. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

3. *Id.* at 383–84.

4. *Id.*

5. Brief for Plaintiff at 10, *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (No. 13 Civ. 5315).

6. *Id.* at 50.

online clips to subscribers similar to those using TVEyes' service.⁷ Therefore, by allowing TVEyes to continue operating its own service, Fox News's licensing service would be severely obstructed from furthering its own business objectives.⁸

However, TVEyes contended that repurposing Fox News' clips constituted fair use based on both the reason the repurposing occurred and on its unique subscribers, including: government agencies, members of Congress, and trade associates conducting research and monitoring important topics pertinent to their business interests.⁹ TVEyes' brief stated, "TVEyes and its users access broadcast content for purposes entirely different from those served by the underlying broadcasts themselves. Clients use TVEyes to monitor the news, not to watch it."¹⁰ Ultimately, TVEyes contended, if TVEyes could not create excerpts of Fox News' broadcasts, Fox would obtain "exclusive ownership and control over the public's right to continue to access information and effectively engage in political discourse."¹¹

Since the court subsequently found TVEyes' database constituted fair use and granted summary judgment in favor of TVEyes,¹² a bigger question remains: Is it equitable for a non-news-gathering source engaged in a for-profit enterprise to appropriate copyrighted video clips from a legitimate news gathering entity—regardless of fair use claims of research, comment, and criticism? Certainly, video clips are not the only type of news that can

7. *Id.* at 15.

8. *Id.* at 37–38.

9. Brief for Defendant at 4, Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (No. 13 Civ. 5315).

10. *Id.* at 18.

11. *Id.* at 54.

12. *TVEyes*, 43 F. Supp. 3d at 383. Judge Hellerstein's order asked for the record to be developed regarding the question on "whether or not the features that allow searches by date and time, and that allow clips to be archived, downloaded, emailed, and shared via social media are integral services and protected by a fair use defense." *Id.* at 19. On August 25, 2015, Judge Hellerstein ruled that "TVEyes' archiving function qualifies as fair use, and its downloading and 'Date-Time search' functions do not qualify as fair use. Its e-mailing feature can qualify as fair use, but only if TVEyes develops and implements adequate protective measures." Fox News Network, LLC v. TVEyes, Inc., No. 13 CIV. 5315 AKH, 2015 WL 5025274 (S.D.N.Y. Aug. 25, 2015). On November 6, 2015, Judge Hellerstein issued a final order enjoining (1) TVEyes' users from downloading and saving clips of content from Fox Business Channel and Fox News Channel to their own computers; (2) the users' ability to search for Fox News and Fox Business clips by channel, date, and time; (3) and sharing clips via social media. Order Setting Terms of Injunction, Fox News Network, LLC v. TVEyes, Inc., 13 Civ. 5315 (AKH), 2015 WL 7769374 (S.D.N.Y. Nov. 6, 2015). As of publication, TVEyes has filed an appeal of that order, and Fox News has cross-appealed. Corrected Notice of Appeal, No. 1:13-cv-05315 (S.D.N.Y. Jul 30, 2013) ECF No. 192; Notice of Cross Appeal, No. 1:13-cv-05315 (S.D.N.Y. Jul 30, 2013) ECF No. 193.

be placed in a database, because nothing would prevent TVEyes, or a print equivalent, from collating print articles from Fox News, CNN, *The New York Times*, or *The Washington Post* into a searchable database. But can news outlets protect their copyrights in their video clips? The answer to this question lies in a hybrid analysis of past and current copyright law, tort law, and constitutional law.

The purpose of this Comment is to analyze the history of the hot news misappropriation tort and its legal rationale, along with the current state of hot news misappropriation in light of the *TVEyes* decision, and its diminished value as a viable remedy for journalistic plaintiffs. As a result, this Comment will urge the Supreme Court to reconsider the definition of the Press Clause in the First Amendment, change the definition of the press to better reflect modern journalism, and grant greater protections to legitimate news-gathering entities and their journalists for their work in producing print or video content. By providing serious protections to legitimate news outlets that expend countless hours and funds gathering the news, a self-sustaining, representative democracy can be preserved.

II. THE HISTORY OF HOT NEWS

The tort of hot news misappropriation was first addressed in the 1876 New York Supreme Court case, *Kiernan v. The Manhattan Quotation Telegraph Company*.¹³ In *Kiernan*, the plaintiff had a license from the Gold and Stock Telegraph Company on all “foreign financial news” that came across the Associated Press’ wires for fifteen minutes.¹⁴ The defendant used the ticker tapes from the plaintiff’s customers to write its stories. The New York Supreme Court ruled in favor of the plaintiff, noting “it would be an atrocious doctrine to hold that dispatches, the result of the diligence and expenditure of one man, could with impunity be pilfered and published by another.”¹⁵ *Kiernan* acknowledged that publication of facts acquired by the diligence of the company’s agents should not be completely prohibited. However, the court further recognized that “if [a party] seeks to profit by the superior diligence of his

13. *Kiernan v. The Manhattan Quotation Tel. Co.*, 50 How. Pr. 194 (N.Y. Sup. Ct. 1876). The reader should note that in New York, the state supreme court is a court of general jurisdiction, while the Court of Appeals is the state’s highest court.

14. *Id.* at 195.

15. *Id.* at 196.

rivals, it is unjust that he should be allowed to do so until the right of property has been abandoned by publication.”¹⁶

The United States Supreme Court first addressed the hot news doctrine¹⁷ in *International News Service v. Associated Press*.¹⁸ During World War I, the Associated Press sent reporters to Europe to chronicle the events and transmit stories by wire to its office in New York.¹⁹ Newspapers around the country subscribed to the wire service, and the subscribers would print the Associated Press’ stories in their own newspapers.²⁰ International News Service, much like the Associated Press, was a wire service that provided stories to its member newspapers.²¹ To compete in the war coverage, International News Service copied the Associated Press’ stories that were transmitted from Europe and held them out as their own for the use of their west coast member newspapers.²² The Associated Press accused International News Service of unfair competition due to this copying.²³

In an 8-1 decision, the Supreme Court held that repurposing and repackaging the Associated Press’ news stories amounted to unfair competition and that the Associated Press held a “quasi-property” interest in its stories for a certain period of time due to the great “news gathering” resources expended by the Associated Press.²⁴ Because copyright does not provide for protection in fact, but rather original expression of those facts, the Court applied the common law misappropriation and unfair competition doctrines and gave facts value for a short period of time.²⁵ Because both

16. *Id.*

17. See generally, Lauren M. Gregory, *Hot Off the Presses: How Traditional Journalism Can Help Reinvent The “Hot News”*. *Misappropriation Tort in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577, 586–90 (2011).

18. *Intl. News Serv. v. Associated Press*, 248 U.S. 215 (1918).

19. *Id.* at 238.

20. *Id.* at 230.

21. *Id.* at 263. (reporting that the reason International News Service copied and repurposed the Associated Press’ news stories as their own was the fact that International News Service was barred from using Allied telegraph lines after unfavorable reporting regarding British casualties); see also *News Pirating Case In Supreme Court*, N.Y. TIMES, May 3, 1918, https://h2o.law.harvard.edu/text_blocks/7184.

22. *Intl. News Serv.*, 248 U.S. at 231; see also Richard A. Posner, *Misappropriation: A Guide*, 40 HOUS. L. REV. 621, 627 (2003).

23. *Intl. News Serv.*, 248 U.S. at 232.

24. *Id.* at 236, 241. (Acknowledging that the Associated Press does not have a monopoly on its stories, rather the “hot news” doctrine “postpones participation by complainant’s competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant’s efforts and expenditure.”).

25. *Id.* at 245; see Posner, *supra* note 22, at 627.

Kiernan and *International News Service* failed to provide courts specific guidance on how long “hot news” remains “hot,” circuit courts were not uniform in determining the length of time for which facts remained valuable.²⁶ Not until Judge Learned Hand’s decision in *Cheney Bros. v. Doris Silk Corp.*²⁷ did the “hot news doctrine” first receive criticism for being incompatible with copyright law.²⁸ As the century moved on, this incompatibility remained, as states continued to recognize a common law hot news tort.²⁹ But, as this Comment will explain, Congress’s passing of the Copyright Act put the hot news tort and federal law on a crash course.

A. Complicating Hot News: *Feist* and the Copyright Act

In 1976, Congress passed a federal statutory scheme that sought to codify state common law copyright actions to comport with the Copyright Clause of the United States Constitution.³⁰ Section 301 of the Copyright Act created a doctrine preempting all common law or state law protections for original works of “authorship that are fixed in a tangible medium of expression.”³¹ The new doctrine states that copyright protection does not extend to facts, concepts, principles, or procedures.³² Therefore, the underlying factual scenarios that form news broadcasts, newspaper stories, and public record data are not original expressions, and therefore, are not copyrightable.³³

26. VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE: ORIGINS IN LAW AND IMPLICATIONS FOR THE DIGITAL AGE 44 (2005).

27. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d. Cir. 1929).

28. *Id.* at 280. (“[W]e are to suppose that the [*International News Service*] court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter.”).

29. *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 492–94 (W.D. Pa. 1938) (holding that defendant radio station interfered with the “normal and legitimate business” of plaintiff’s baseball team, because defendant used its reporters to provide play-by-play game reports from outside the stadium); *see also Nat’l Exhibition Co. v. Fass*, 133 N.Y.S.2d 379 (N.Y. Sup. Ct. 1954) (finding that owner of baseball team was granted injunctive relief against defendant who broadcasted detailed results of baseball games from authorized radio and television broadcasts of the same games); *Metro. Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950) (holding in favor of the plaintiff on an unfair competition claim when defendant phonograph company sold recordings of plaintiff’s performances); *Pottstown Daily News Pub. Co. v. Pottstown Broad. Co.*, 192 A.2d 657 (Pa. 1963) (holding that plaintiff sufficiently stated an unfair competition claim against defendant by showing that defendant broadcasting company “pirated” newspaper stories for broadcast).

30. U.S. CONST. art. I, § 8, cl. 8; *see generally* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01(A) (Matthew Bender, ed. 2010).

31. Copyright Act of 1976, 17 U.S.C.A. § 301(a) (West 2014).

32. *Id.* at § 102(b).

33. *Harrison & Shelton, supra* note 1, at 1654.

This notion was reinforced in *Feist Publications v. Rural Telephone Service*,³⁴ when the Supreme Court ruled that a publishing company's compilation of telephone numbers and addresses for their directory was not copyrightable because it did "not satisfy the minimum constitutional standards for copyright protection."³⁵ Using the Court's previous holding in *The Trademark Cases* as the basis for its analysis, the *Feist* court reiterated that for an original writing to exist, the writing must be of "independent creation plus a modicum of creativity."³⁶ Because the publishing company only arranged the addresses and numbers alphabetically, the telephone directory lacked this modicum of creativity, and, therefore, did not warrant protection.³⁷ As the doctrine and case law have indicated, facts will never be copyrightable. However, Justice Sandra Day O'Connor's majority opinion in *Feist* conceded that "fruits" stemming from fact gathering and research "may in certain circumstances be available under a theory of unfair competition."³⁸ While the *Feist* decision made clear that journalists could not rely on copyright law for protection, it did not entirely foreclose protection through the hot news tort.

B. Hot News Hits the Internet

As the twentieth century ended, new and more creative technologies, particularly the Internet, created new mediums of expression. In 1997, the United States Court of Appeals for the Second Circuit first decided a hot news claim in the context of the Internet Age.³⁹ In *National Basketball Ass'n v. Motorola, Inc.*,⁴⁰ defendant Motorola created a pager that provided

34. *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

35. *Id.* at 362.

36. *Id.* at 346; *see In re Trademark Cases*, 100 U.S. 82, 94 (1879)

[W]hile the word writings may be liberally construed, as it has been, to include original designs for engraving, prints . . . , It is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like. (emphasis omitted).

37. *Feist*, 499 U.S. at 362–63; *See also* *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enter.*, 945 F.2d 509, 515–16 (2d Cir. 1991) (holding that a directory of New York's Chinese-American businesses was sufficiently copyrightable because the directory arranged the businesses was "original and creative"); *Kregos v. Associated Press*, 937 F.2d 700 (2d. Cir. 1991) (holding that plaintiff's baseball pitcher statistics sheet was unique enough because it used several particular statistics to determine a performance out of the entire world of possible statistics to be chosen).

38. *Feist*, 499 U.S. at 354 (citing 1 NIMMER & NIMMER, *supra* note 30, at § 3.04).

39. Edward L. Carter, *Copyright Ownership of Online News: Cultivating A Transformation Ethos in America's Emerging Statutory Attribution Right*, 16 COMM. L. & POL'Y 161, 172 (2011).

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

subscribers with real-time game statistics, scores, and news from the National Basketball Association (NBA).⁴¹ At the time, the two were negotiating licensing agreements, but the negotiations collapsed and Motorola transmitted the scores anyway.⁴² The NBA filed suit, alleging copyright infringement and misappropriation against Motorola's pager transmissions.⁴³ The district court granted an injunction in favor of the NBA to keep Motorola from providing game scores.⁴⁴ The Second Circuit reversed, holding that the Copyright Act of 1976 did not preempt the "hot news misappropriation" tort, but finding that the plaintiff's failed to prove all of the elements of the tort had been met.⁴⁵ The court held that in order to prove that a defendant has engaged in the hot news misappropriation tort, the plaintiff must show: (1) the expression "generates or gathers the information at a cost; (2) the information is time-sensitive; (3) the defendant's use of the information constitutes free riding; (4) the defendant and plaintiff are direct competitors; and (5) the defendant's use of the information 'substantially threatens' the plaintiff's existence."⁴⁶

When evaluating these factors, the Second Circuit concluded that some of the required elements were missing.⁴⁷ While the information being transmitted was time-sensitive, and the NBA-produced service Gamestats already existed,⁴⁸ the court found that the NBA did not meet the "direct competition factor" because "the NBA's primary business [is] . . . producing basketball games for live attendance . . . licensing copyrighted broadcasts of those games [and] the collection and retransmission of strictly factual material about the games is a different product."⁴⁹

Importantly, like *International News Service* and *KQV Broadcasting*, the court noted that if Motorola were to take the statistics and game information directly from NBA's Gamestats product, the fifth element of the hot news misappropriation tort test could be met, even if there was no evidence of "free riding" in the case.⁵⁰ Interestingly, the Second Circuit

41. *Id.* at 843.

42. Harrison & Shelton, *supra* note 1, at 1656.

43. *Nat'l Basketball Ass'n*, 105 F.3d at 844.

44. *Id.*

45. *Id.* at 845.

46. *Id.* at 852; *See also* *Fin. Investors, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204, 209 (2d Cir. 1986).

47. *Nat'l Basketball Ass'n*, 105 F.3d at 854.

48. *Id.* at 853.

49. *Id.*

50. *Id.* at 854 (emphasis omitted).

found that the hot news misappropriation tort was valid and reasonable under a property right theory, rather than unfair competition.⁵¹ The court stated that “[i]f services like AP were not assured of property rights in the news they pay to collect, they would cease to collect it.”⁵²

With the *National Basketball Ass’n* decision, hot news was still in legal purgatory, with scholars such as Judge Posner declaring its viability as limited, if not completely inoperable.⁵³ Theorists like Posner, along with media law commentators, posited that due to the nature of the Internet, individuals consume their news around the clock from a myriad of outlets, and that therefore, the tort has no viability in this era.⁵⁴ Online-only newspapers and blogs are not hindered by strict to-press deadlines, thus ensuring a perpetual lag of print journalism behind online news in terms of breaking the news and holding onto hot news scoops.⁵⁵ Nonetheless, decisions emerged in the latter half of the 2000s that attempted to resuscitate the hot news doctrine, specifically *Associated Press v. All Headline News*.⁵⁶

The Associated Press filed suit against the online news aggregator, All Headline News, for the alleged copying of the Associated Press’s online news stories and rewriting such stories as All Headline News’ own.⁵⁷ The Southern District of New York, citing *National Basketball Ass’n* regarding Copyright Act preemption, ruled that the hot news misappropriation tort

51. Harrison & Shelton, *supra* note 1, at 1658 (citing *Nat’l Basketball Ass’n*, 105 F.3d at 853).

52. *Nat’l Basketball Ass’n*, 105 F.3d at 853.

53. Posner, *supra* note 22, at 625

Once it is acknowledged that free riding on intellectual property is not always a bad thing, it becomes difficult to give a simple meaning to ‘misappropriation’ that will enable it to serve as the organizing principle of intellectual property law. If misappropriation means free riding, then the meaning is simple enough but too broad to serve as a guiding principle of the law . . . and would extinguish the free-use defense in copyright.

54. Heather Sherrod, *The “Hot News” Doctrine: It’s Not 1918 Anymore—Why the “Hot News” Doctrine Shouldn’t Be Used to Save the Newspapers*, 48 HOUS. L. REV. 1205, 1235 (2012) (addressing hot news strictly from the traditional newspaper perspective, and arguing that keeping hot news as a viable cause of action for “dying business model[s]” will have a “chilling effect” on free speech and “the dissemination of newsworthy information”).

55. See generally Daniel S. Park, *The Associated Press v. All Headline News: How Hot News Misappropriation Will Shape The Unsettled Customary Practices of Online Journalism*, 25 BERKELEY TECH. L.J. 369 (2010); Richard Posner, *The Future of Newspapers*, THE BECKER-POSNER BLOG (June 23, 2009) <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers—posner.html>; David S. Evans, Presentation at the Federal Trade Commission News Media Workshop, *Advertising-Supported Media and the Future of Journalism* 13 (Dec. 1, 2009), http://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/evans.pdf.

56. See Park, *supra* note 55, at 8–9.

57. Complaint at 17, *Associated Press v. All-Headline News Corp.*, 608 F.Supp.2d 454 (S.D.N.Y. Jan. 14, 2008) (No. 108CV00323).

was a viable, non-preempted claim⁵⁸ and denied the aggregator's motion to dismiss the hot news tort claim.⁵⁹ Eventually, the case settled out of court with the defendant news aggregator "acknowledg[ing] its improper use of Associated Press' content and that the tort of hot news misappropriation had been ruled viable and applicable in the case."⁶⁰

C. *Barclays and TVEyes*

After recognizing a narrow application of the hot news misappropriation tort in *National Basketball Ass'n*, the Second Circuit revisited the tort in *Barclays Capital v. Theflyonthewall.com, Inc.*⁶¹ The defendant website had a live news feed that consolidated Wall Street research, company announcements, regulatory filings, market rumors, media reports, and real-time stock information.⁶² Barclays, along with several other banks, sued the website based on hot news misappropriation for what the banks argued was "the rapid and widespread dissemination of financial services firms' equity research recommendations through unauthorized channels of electronic distribution."⁶³ The plaintiffs went further and argued that the "dissemination frequently occurs before the firms have an opportunity to share these recommendations with their clients—for whom the research is intended—and to encourage the clients to trade on those recommendations."⁶⁴

At the trial level, the Southern District of New York used the five-factor test provided in *National Basketball Ass'n* to rule for the plaintiffs, finding that the banks and investment firms incurred substantial costs in collecting the information;⁶⁵ the information was time-sensitive, as seen from the website's marketing;⁶⁶ the website did not do any of the leg work in compiling the reports and was free-riding off of the firms' information;⁶⁷ and the firms and the website were in direct competition regarding the

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

59. *Id.*

60. Park, *supra* note 55, at 370–371; see also Amanda Ernst, *AP Settles "Hot News" Lawsuit with AHN Media*, FISHBOWLNY (July 13, 2009), <http://www.adweek.com/fishbowlny/ap-settles-hot-news-lawsuit-with-ahn-media/13125>.

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

62. *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp.2d 310, 322 (S.D. N.Y. 2010).

63. *Id.* at 313.

64. *Id.*

65. *Id.* at 335.

66. *Id.* at 336.

67. *Id.* at 338.

dissemination of the information and the subsequent recommendations based on the gleaned information.⁶⁸ Most importantly, the court found that the continued conduct of the website would “reduce [the plaintiff firms’] incentive to invest the resources necessary to produce equity research reports that the continued viability of plaintiffs’ research business is and ‘would be substantially threatened.’”⁶⁹ The Court issued an injunction that barred the website from publishing the information gleaned from the reports for “two hours after the firms released it.”⁷⁰

The defendant website appealed, and the Second Circuit overturned the lower court’s decision, finding that the court was not mandated to apply the five-factor test from *National Basketball Ass’n*.⁷¹ The Second Circuit instead restricted the analysis to three “extra” factors that the *National Basketball Ass’n* decision laid out: “(i) the time-sensitive value of factual information; (ii) the free-riding by a defendant; and (iii) the threat to the very existence of the product or service provided by the plaintiff.”⁷² The financial firms, according to Judge Robert Sack’s opinion, failed to show that enough evidence to support the free-riding factor and that the existence of the product was a viable threat to plaintiffs’ services by specifically noting that the website was not selling the recommendations as their own, but providing “attribution to the specific [f]irm.”⁷³

After this decision, some scholars looked to Justice Oliver Holmes’ dissent in *International News Service*,⁷⁴ and argued that by providing attribution, defendants were insulated from liability from a hot news misappropriation claim.⁷⁵ More succinctly, “Fly was merely collecting, collating, and disseminating factual information, as well as attributing the information to its source. Sack’s opinion distinguished how the securities firms were ‘making’ the news, while Fly was ‘breaking’ that news.”⁷⁶ Further, the court indicated that the only way a state law claim for hot news misappropriation could go forward was if “news, data, and the like,

68. *Barclays*, 700 F. Supp. 2d at 339.

69. *Id.* at 341.

70. Harrison & Shelton, *supra* note 1, at 1659 (citing *Barclays*, 700 F. Supp. 2d at 347).

71. *Barclays*, 650 F.3d at 901.

72. *Id.* at 899–900 (citing *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d. Cir. 1997)).

73. *Id.* at 903 (internal citations omitted) (emphasis added).

74. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 248 (1918) (Holmes, J., dissenting) (articulating that “suitable acknowledgement of the source is all that the plaintiff can require”).

75. Dorothy Heyl & James R. Klaiber, *The Future of “Hot News” Misappropriation After Barclays v. The Flyonthewall.com*, 24 NO. 2 INTELL. PROP. & TECH. L.J. 12, 13 (2012).

76. *Id.*

gathered and disseminated by one organization as a significant part of its business, [is] taken by another entity and published as the latter's own *in competition* with the former."⁷⁷ Essentially, if the alleged infringer is not in competition with the infringer, a court will more than likely find no instance of free riding. With the lines blurred as to who or what is a news source, traditional news sites have virtually no protection in the hot news tort after *Barclays*.

With hot news on its deathbed⁷⁸ from the *Barclays* decision, non-traditional news sites could not seek much solace in the tort to protect their diligence and hard work. However, the hot news tort would again be an issue as non-traditional news and information consumption evolved⁷⁹ from real-time stock quotes and NBA scores to full-length television shows and broadcasts.

In *Fox News Network, LLC v. TVEyes, Inc.*,⁸⁰ the court evaluated the plaintiff network's claim that the defendant copied and distributed clips of Fox News programs through its subscriber-only online searchable database.⁸¹ The plaintiff network stated that when TVEyes "clipped" the network's broadcasts and segments, it "stole Fox News' 'hot news' and thereby 'free-r[ode]' on Fox News' hard work and labor in the same way [International News Service] free-rode on the [Associated Press]'s labor."⁸² The court first addressed preemption, ruling that the state law hot news misappropriation claims are pre-empted by federal copyright law if the "claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by [the Copyright Act] . . . [and] if the work in question is of the type of works protected by the Copyright Act."⁸³ The court surmised that both of these elements were met, and used the "extra element test" to "determine whether the claim should survive because of some extra element in the tort bringing it outside the realm of copyright."⁸⁴

77. *Barclays*, 650 F.3d at 906 (emphasis added).

78. Harrison & Shelton, *supra* note 1, at 1660.

79. Kenneth Olmstead, Amy Mitchell, Jesse Holcomb & Nancy Vogt, *News Video on the Web: A Growing, if Uncertain, Part of the News*, PEW RESEARCH JOURNALISM PROJECT (Mar. 26, 2014) <http://www.journalism.org/2014/03/26/news-video-on-the-web/>.

80. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

81. *Id.* at 384.

82. *Id.* at 399.

83. *Id.* (citing *Barclays Capital Inc. v. Theflyonthewall.com*, 650 F.3d 876, 892 (2d Cir. 2011)) (internal citation omitted).

84. *TVEyes*, at 398–99.

As the court noted, Fox News' argument that the "extra element" was TVEyes "free riding" off the labor of Fox News to compile, write, and air its news broadcasts and segments was not found to be persuasive because it disregarded the definition of "free riding" from *International News Service*.⁸⁵ "The term "'free-riding' means taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and . . . appropriating it and selling it as the [defendant's] own."⁸⁶ The court found that TVEyes was simply not doing that, and was actually in the business of providing reports on the stories news outlets chose to report on, and therefore, was not free-riding.⁸⁷ The district court dismissed Fox News' motion with respect to transformative fair use.⁸⁸

With another decision holding against a news outlet that was seeking protection in its content, the questions posed at the outset of this Comment must be addressed: Should some protection be granted for original reporting? Should the law give greater protection to traditional news outlets, journalists, reporters, and editors who do all the work, just to later allow the product to be taken and repurposed? A possible solution follows below.

III. THE APPROACH TO SAVE HOT NEWS

Current copyright law provides that facts cannot be protected.⁸⁹ As a result, Plaintiffs in hot news misappropriation actions must frequently base their arguments on a "sweat of the brow" doctrine that was first articulated in 1922.⁹⁰ Moreover, with the advent of round-the-clock online media, a hard-working print journalist's scoop will always be gobbled up and

85. *Id.*

86. *Id.* (citing *Barclays*, 650 F.3d at 903) (citation omitted).

87. *Id.* at 399.

88. *Id.* at 400 (noting that the record was incomplete regarding whether the search and archival functions of TVEyes's database were protected under a fair use defense and that further hearings would be necessary to determine that question).

89. Copyright Act of 1976, 17 U.S.C.A. § 102(b) (West 2014).

90. See *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83, 88 (2d Cir. 1922) (noting that an author, regardless of whether the work is "original" or not, "produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work"); see also *Earth Flag, Ltd. v. Alamo Flag Co.*, 154 F.Supp.2d 663, 668 n.2 (S.D.N.Y. 2001) ("[C]opyright was a reward for the hard work that went into compiling facts"); *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 352 (1991).

published within seconds on social media or by a news aggregator.⁹¹ Accompanied by the rise of these news aggregators and social media, and the decline of news dailies and weeklies as the main source for America's news,⁹² the tort is essentially of no help to traditional media outlets who attempt to protect their hard work and ingenuity. However, this has not stopped academics and commentators from trying to find ways to save the tort.

Some commentators believe that the only viable option to save the traditional print newspaper is to continue to allow aggrieved plaintiffs to bring hot news misappropriation claims to force online news aggregators, bloggers, and news outlets operating strictly online to quit their piracy.⁹³ Some look at groundbreaking journalistic endeavors, such as *The Washington Post's* earthshattering report on the Watergate Hotel break-in that doomed President Richard Nixon's presidency, to reinforce their position that the Copyright Act does little to protect journalists from these types of monumental scoops in today's shifting media landscape.⁹⁴

For example, using the test enumerated in *Feist*, the infamous Watergate story written by *The Washington Post's* reporters Bob Woodward and Carl Bernstein would be protected by copyright. However, it would be narrowly protected because the original expression and compilation of the seedy details of a slush fund, gross abuses of power, and the resignation of President Nixon "feature[d] an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement."⁹⁵ Therefore, because the "copyright in a factual compilation is thin,"⁹⁶ the second prong of the *Feist* test would essentially allow any digital journalist in the future to take the facts compiled by Woodward and Bernstein and write it in their own language, being free from liability for copyright infringement of the original work.⁹⁷

91. David Marburger & Dan Marburger, Op/Ed., *.Com Internet Parasites*, L.A. TIMES (Aug. 2, 2009) <http://articles.latimes.com/2009/aug/02/opinion/oe-marburger2>.

92. See generally Mark Jurkowitz, *The Growth in Digital Reporting: What it Means for Journalism and News Consumers*, PEW RESEARCH JOURNALISM PROJECT (March 26, 2014), <http://www.journalism.org/2014/03/26/the-growth-in-digital-reporting/>.

93. See generally Brian Westley, Comment, *How A Narrow Application of 'Hot News' Misappropriation Can Help Save Journalism*, 60 AM. U. L. REV. 691 (2011); Elaine Stoll, *Hot News Misappropriation: More Than Nine Decades After INS v. AP, Still an Important Remedy for News Piracy*, 79 U. CIN. L. REV. 1239, 1281-82 (2011) (asserting that "hot news" as a tool for injunctive relief against digital news outlets because of the shortened news cycle and proliferation of free-riding).

94. Westley, *supra* note 93, at 713-14.

95. *Id.* (citing *Feist*, 499 U.S. at 351-52) (emphasis added).

96. Westley, *supra* note 93, at 713.

97. *Id.* (citing *Feist*, 499 U.S. at 349).

There is at least some sense that the government is actively attempting to revitalize journalism and save the future Woodwards and Bernsteins of journalism from becoming victimized by online news outlets or social media. In 2010, after several Congressional hearings on the matter, the Federal Trade Commission (FTC), released a discussion draft that outlined solutions to keeping traditional journalism viable in spite of the growing online behemoth.⁹⁸ The agency drafted three potential solutions: (1) a federal law codifying the hot news misappropriation tort; (2) statutory limits on fair use and; (3) a compulsory licensing fee on the news.⁹⁹ A brief discussion of the three proposals is warranted.

A. *Federal Codification of Hot News*

Advocates of the tort see an attempt at codification by the federal government as the first line of defense in stopping news aggregators and bloggers from reaping the benefits of another's potential news scoops.¹⁰⁰ Proponents would seek to amend the Copyright Act, particularly Section 301, to explicitly state that the act does not preempt state law claims for hot news misappropriation.¹⁰¹ They argue that federally codifying the common law tort would help protect the revenue generated by traditional journalism entities. Moreover, this solution would mark the legislature's attempt to find recourse for the traditional media plaintiff in accordance with Justice Louis Brandeis's dissent in *International News Service*, where he posited the onus to address the hot news doctrine is on the legislature, rather than the judiciary.¹⁰²

Notably, the FTC discussion draft itself illustrates the difficulty of line drawing between types of media, and advocates realize that a rigid federal statutory scheme may not evolve along with the burgeoning types of new media as quickly as state laws would evolve.¹⁰³

98. Fed. Trade Comm'n, *Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism*, (2010), <http://communicationleadership.usc.edu/pubs/new-staff-discussion.pdf> (hereinafter FTC Discussion Draft).

99. *Id.* at 9–13.

100. David Marburger & Daniel Marburger, *Reviving the Economic Viability of Newspapers and Other Content Originators of Daily News Content*, 50 (2009), <http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/MainAnalysis.pdf>.

101. *Id.* at 46.

102. Bruce W. Sanford & Bruce D. Brown, *Google and the Copyright Wars*, WALL ST. J., (Nov. 12, 2009), <http://www.wsj.com/articles/SB10001424052748704402404574523454258004332>; see also *Intl. News Serv. v. Associated Press*, 248 U.S. 215, 264 (1918) (Brandeis, J. dissenting).

104. FTC Discussion Draft, *supra* note 98, at 1.

As the FTC draft explained:

[F]ederalization of the hot news doctrine would entail difficult line-drawing between proprietary facts and those in the public domain [I]t is unclear how to draw the scope of hot news protection broadly enough to provide significant incentive for news gathering, but narrowly enough to permit competition in the news.¹⁰⁴

However, proponents acknowledge that fifty separate bodies of state law would create a hodgepodge of laws where plaintiffs would potentially forum shop to find the most favorable body of law for their case.¹⁰⁵

If Congress enacted legislation, and therefore dissolved federal preemption of the state common law, the hot news misappropriation tort would have a “home to live” and would be coupled with the considerable resources of Congress. Such legislation could then “balance the competing interests of the public, news organizations, and Internet kingpins such as Google and Twitter.”¹⁰⁶ Furthermore, as Jeffrey L. Harrison and Robyn Shelton emphasize, federal codification would not allow potential infringers and free riders to hide in a jurisdiction that doesn’t recognize the tort.¹⁰⁷

B. Statutory Limits on Fair Use

Placing limits on the fair use defense¹⁰⁸ would probably be the most difficult of the FTC draft’s suggestions to implement. As the draft indicates, proponents argue that enacting federal legislation in the hopes of “clarifying that the routine copying of original content done by a search engine in order to conduct a search [otherwise known as caching] is copyright infringement not protected by fair use.”¹⁰⁹ Clarifying the role content aggregators play would be useful, given how pervasive they have become, but putting restrictions on the fair use defense would necessarily

104. *Id.* at 10.

105. Jane C. Ginsburg, “An Idea Whose Time Has Come” – But Where Will It Go?, 119 HARV. L. REV. F. 65, 65 (2006).

106. Harrison & Shelton, *supra* note 1, at 1680 (citing Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of “Hot New” Information*, 20 U. HAW. L. REV. 421, 471–73 (1998)).

107. *Id.* (“A national hot news law could force would-be misappropriators to face potential injunctions, damages or both, wherever they are located”).

108. See generally Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 141–50 (2011).

109. FTC Discussion Draft, *supra* note 98, at 11 (citing Bruce W. Sanford, Statement before the Federal Trade Commission, *How Will Journalism Survive the Internet Age?*, FTC, 4 (March 9, 2010) http://www.ftc.gov/sites/default/files/documents/public_comments/2010/03/544505-00041.pdf).

deter aggregators from using the material for educational, research, or criticism purposes.

For example, TVEyes's business model provides a service to subscribers for research, and arguably, for criticism. Essentially, the proposed statutory limits on the fair use defense would embody the "throwing the baby out with the bathwater" approach, and would stymie many of the copyright protections afforded to potential plaintiffs.

C. Mandatory Licensing

Finally, the FTC advanced the suggestion that news outlets and content creators impose a flat rate fee for its content, not only to create a consistent revenue stream for the news providers, but also to discourage free riding. Statutory licensing is codified within the Copyright Act,¹¹⁰ and as the FTC illustrated in the discussion draft, "[s]tandardized licensing arrangements offer the potential to reduce contracting and other transaction costs and may be especially useful for relatively simple, but frequent transactions."¹¹¹ Requiring mandatory licensing is essentially a tax on conduct, and the benefits of compensating content providers for their work, when juxtaposed against First Amendment principles, seems problematic.¹¹² Additionally, while the proposal again seems to work in theory, it would be impossible to balance a defendant's fair use defense against a copyright holder's claim of license infringement.

IV. THE REST OF THE STORY: HOT NEWS MISAPPROPRIATION IS UNCONSTITUTIONAL AND ALMOST IMPOSSIBLE TO PROVE

The opponents to the hot news tort are loud, and their arguments rest on sound reasoning. They argue that the First Amendment and the "utilitarian" requirement stemming from the fifth prong of the *Nat'l Basketball Ass'n* test preclude any use of hot news misappropriation as a cause of action.¹¹³ Scholars note that much of the case law addressing hot news misappropriation lacks a First Amendment analysis,¹¹⁴ and as Joseph

110. Copyright Act of 1976, 17 U.S.C.A. § 304 (West 2014).

111. FTC Discussion Draft, *supra* note 98, at 12.

112. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 439–40 (1999).

113. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d. Cir. 1997)

114. Joseph A. Tomain, *First Amendment, Fourth Estate, and Hot News: Misappropriation Is Not a Solution to the Journalism Crisis*, 2012 MICH. ST. L. REV. 769, 804 (2012) (citing Brief for Citizen Media Law Project, Electronic Frontier Found., & Public Citizen, Inc. as Amici Curiae Not Supporting

Tomain pointed out, the chance of a hot news misappropriation claim surviving First Amendment scrutiny is slim.¹¹⁵

Opponents to the tort further argue that preventing news aggregators and other news outlets from publishing newsworthy tidbits of information would be a restraint on prior speech.¹¹⁶ The Supreme Court has held for nearly thirty years that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”¹¹⁷ Permanent injunctions and preliminary orders delaying the dissemination of newsworthy information from second-hand sources, scholars argue, would be a typical instance of a prior restraint on speech.¹¹⁸ “If the press is ‘to fulfill its traditional function of bringing news to the public promptly,’ any meddling in the affairs of news publication must be viewed with skepticism.”¹¹⁹

Moreover, the fifth prong of the *Nat’l Basketball Ass’n* test leaves the tort in limbo, especially when considering the future of news reporting and journalism, and principally, the *TVEyes* summary judgment decision. As the court in *Nat’l Basketball Ass’n* stated, a plaintiff must prove five elements; and the fifth element, requiring that the “the defendant’s use of the information ‘substantially threatens’ the plaintiff’s existence,”¹²⁰ is especially difficult to prove.¹²¹ The growth of online news aggregators and all-digital news outlets is not the only threat to traditional newspapers as, theoretically, anyone with an Internet connection and a Twitter account can become a viable “news source,”¹²² thus essentially creating a multitude of free riders.¹²³

Any Party at 2–4, *Barclays Capital Inc. v. Theflyonthewall.com*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372) (hereinafter *Citizen Media Law Brief*)).

115. *See id.* at 804–05 (outlining four reasons: “(1) the policy in favor of widespread dissemination of information from diverse and antagonistic sources; (2) the strong presumption against prior restraints of speech; (3) vagueness; and (4) the *Daily Mail* principle”).

116. *See Sherrod, supra* note 54, at 1226.

117. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *see also* *Near v. Minn.*, 283 U.S. 697, 733 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 714 (1971).

118. *Sherrod, supra* note 54, at 1227 (citing *Neb. Press Ass’n*, 427 U.S. at 556–62).

119. *Id.* (citing *Neb. Press Ass’n*, 427 U.S. at 560–561).

120. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997).

121. *See* Tomain, *supra* note 114, at 796 (asking “Is the 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,” and choosing the latter).

122. *See generally* Stoll, *supra* note 93.

123. *See* *Citizen Media Law Brief, supra* note 114, at 3–4.

Some of the amici briefs filed in *Barclays* address the “utilitarian” requirement and flush out how the fifth prong of the *Nat’l Basketball Ass’n* test will be increasingly difficult to prove for plaintiffs in the new world dominated by online journalism.¹²⁴ The brief filed by Advanced Publications, Inc. on behalf of several other amici¹²⁵ argued that any proof of free riding satisfied the utilitarian prong of the *Nat’l Basketball Ass’n* test.¹²⁶ However, scholars believe that reading the fifth prong of the *Nat’l Basketball Ass’n* test following the Associated Press’s amici brief wrongfully stunts the growth of new, viable, and communicative technologies.¹²⁷ Further, the brief filed by Google in support of reversal in *Barclays* acknowledged “placing a time restriction on the dissemination of such information could be a dangerous step.”¹²⁸

V. THE SOLUTION: TIME TO GO TO PRESS

With the hot news misappropriation tort becoming increasingly difficult for plaintiffs to prove due to federal preemption, the demanding fifth prong of the *Nat’l Basketball Ass’n* test and prevailing legal precedent, the doctrine is still cloudy. Traditional journalistic outlets that are engaged in actual news gathering endeavors can seek refuge in the First Amendment’s Free Press Clause if the Supreme Court would re-examine the Clause, provide a narrow definition of the press, and grant them more protection from possible free riders and infringers.

However, the odds of the Supreme Court taking such an issue are slim, due to the serious First Amendment repercussions and vast ramifications that such a decision would have on the existing journalism world. Because there is an even more remote chance of Congress

124. Tomain, *supra* note 114, at 818.

125. Brief for Advance Publications, Inc., Agence France-Presse, A.H. Belo Corp., Associated Press, Belo Corp., E.W. Scripps Co., Gannett Co., McClatchy Co., Newspaper Ass’n. of America, New York Times Co., Phila. Media Holdings, LLC, Stephens Media LLC, Time Inc., & Washington Post as Amici Curiae Not Supporting Any Party, *Barclays Capital Inc. v. Theflyonthewall.com*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv).

126. *Id.* at 19.

127. See Tomain, *supra* note 114, at 822; Shyamkrishna Balganes, *The Uncertain Future of “Hot News” Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134, 143–44 (2012).

128. Zachary Davidson, *The Next Balancing Act: Can The Law Save The Traditional News Media Without Eliminating News Aggregators?*, 85 S. CAL. L. REV. POSTSCRIPT 88, 106 (2012) (citing Brief for Google Inc. et al. Amici Curiae in Support of Reversal at 13, *Barclays Capital Inc. v. Theflyonthewall.com*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv)).

addressing federal codification of the hot news tort, an argument for the judiciary to address the Press Clause must be made.

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹²⁹ History teaches us that these guarantees were to be separate and distinct from one another,¹³⁰ with the Founders’ “intent to establish a free and vigorous press as an essential part of our unique system of government.”¹³¹ Nonetheless, as countless legal scholars have recognized,¹³² the Supreme Court has dismissed this delineation as “constitutional redundancy.”¹³³ Essentially, “members of the press thus enjoy the same freedoms of expression as *any individual person, but nothing more.*”¹³⁴

Certainly, on its face, and arguably why the Supreme Court has hesitated to delineate, is the presumption that there would be favoritism in favor of a select and elite few journalists over “citizen journalists.”¹³⁵ The goal is not to create a small, elite class of individuals who have been given a right under the Constitution to be a journalist. However, there must be some give and take in ensuring that the hard work of professional journalists is duly compensated, and, in turn, the news outlets and agencies make money by selling newspapers or maximizing viewership or listenership.

Even in their hesitation, the justices have eluded to some sort of distinction between the infamous “blogger sitting in his pajamas”¹³⁶ and the “organized press,”¹³⁷ and separate and distinct functions of the Press and Speech Clauses of the First Amendment. Notably, Justice Potter Stewart defined the term “organized press” as the “daily newspapers and other established news media.”¹³⁸

129. U.S. CONST. amend. I, § 1.

130. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1026, 1033 (2011).

131. William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 243 (1984).

132. See generally West, *supra* note 130, at 1027; Camille Anjes Higham, *Mediagathering vs. Newsgathering: Giving the Freedom of the Press Clause Due Recognition*, 13 FLA. COASTAL L. REV. 417, 429 (2012).

133. West, *supra* note 130, at 1027–28.

134. *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)) (emphasis added).

135. See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 802 (1978) (White, J. dissenting).

136. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1156 (D.C. Cir. 2006).

137. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

138. *Id.* at 631.

Stewart's definition and view of the press must serve as a basis of any independent Press Clause significance. In Stewart's *Or of the Press*,¹³⁹ excerpted from a 1974 address at Yale Law School, he stressed that the primary purpose of the Press Clause was to "create a fourth institution outside the Government as an additional check on the three official branches."¹⁴⁰ The Founders, Stewart pointed out, explicitly wanted a free, organized, and independent press to scrutinize government, something that was not available in England where the King controlled the press.¹⁴¹ By giving a constitutional guarantee of a strong and robust press, the Founders acknowledged that the Clause protected "media entities because of their instrumental contribution to democracy and a free society."¹⁴²

Juxtaposing Stewart and Baker's "Fourth Estate" theory against the *TVEyes* decision makes clear that the decision could have feasibly been decided in Fox News' favor. As Baker points out, "a media enterprise's duplication of *the full content* of an item offered by a copyright holding competitor . . . clearly amounts to a copyright violation."¹⁴³ Granted, *TVEyes* is not a direct competitor of Fox News,¹⁴⁴ but the line between competitors for online revenue, whether subscription-based or advertising-based, becomes smaller as we become more interconnected.

While loud opposition to a narrow definition of the Press Clause is evident,¹⁴⁵ scholars believe that an identifiable press exists, "and that it is more selective than the general public."¹⁴⁶ Past attempts to define the press in the area of journalistic privilege have led to proposals that include defining the press from the general public by basis of the medium being used, and if the entity is a "part of the *news gathering* apparatus in the United States."¹⁴⁷

139. *See generally id.*

140. *Id.* at 634.

141. *Id.*

142. C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007).

143. *Id.* at 974 n.1 (arguing that "a better ground for decision in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), may have been an *unfair competition* (a "scoop") theory, which is arguably consistent with a Fourth Estate or utilitarian perspective").

144. Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379, 386 (S.D.N.Y. 2014).

145. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (Burger, C.J., majority); *see also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

146. West, *supra* note 130, at 1061.

147. *In re Napp Techs., Inc.*, 768 A.2d 274, 280 (N.J. Super. Ct. 2000) (emphasis added).

Other bases for definition have been interpreted on the circulation or regularity of publication¹⁴⁸ and whether or not the journalists are employed professionally.¹⁴⁹ In today's shifting media world, the best argument for a new definition of the press is one that would combine both the "news gathering"¹⁵⁰ element and the paid professional news-gatherer element. That definition should be "evaluated solely under the Press Clause and, thereby be distinguished both from the individual who has obvious liberty interests in her speech . . . arguably the lonely pamphleteer [from *Branzburg*] or part time 'volunteer' journalist."¹⁵¹

VI. CONCLUSION

Most recently, in 2013, in *Associated Press v. Meltwater U.S. Holdings, Inc.*,¹⁵² the Southern District of New York held that the defendant news-clipping service's use of webcrawlers and scrapers to copy and deliver verbatim excerpts of The Associated Press' news stories to its customers failed to prove a fair use defense.¹⁵³ The court ruled that the defendant's service essentially "act[ed] as a substitute for news sites operated or licensed by AP[,]" and ultimately failed to be an iteration with a transformative purpose.¹⁵⁴ Meltwater's service, just like TVEyes, is a subscription service that is not publically available. The court stated that "[t]he public interest in the existence of such commercial enterprise does not outweigh the strong public interest in the enforcement of the copyright laws or justify . . . free rid[ing] on the costly news gathering and coverage work performed by other organizations."¹⁵⁵ Moreover, the opinion offers important insight into the way "the press," whether legitimate print and online journalistic outlets, should be treated when pitted against online news aggregators, "clipping services," and various other media compilers:

Paraphrasing James Madison, the world is indebted to the press for triumphs which have been gained by reason and humanity over error and oppression. Investigating and writing about newsworthy events

148. See West, *supra* note 131, at 1066–67 (citing IND. CODE. ANN § 34-46-4-1 (2008); R.I. GEN. LAWS § 9-19.1-1 (1997)).

149. West, *supra* note 130, at 1066–67.

150. See Higham, *supra* note 132, at 445 (citing *Shulman v. Grp. W. Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998) (quoting Restatement (Second) of Torts § 652D cmt. H (1977)).

151. Baker, *supra* note 142, at 1020–21.

152. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. 2013).

153. *Id.*

154. *Id.* at 554.

155. *Id.* at 553.

occurring around the globe is an expensive undertaking and enforcement of the copyright laws permits [the Associated Press] to earn the revenue that underwrites that work.¹⁵⁶

Some cases, however, are not as clear-cut, and journalism plaintiffs will lose out in the name of fair use. These plaintiffs require greater protection for the “sweat of the brow” work of credible, professional journalists. Any protection of a journalist’s original reporting, whether it is a local news story, a two-minute segment on a news program, or a long investigative report for an online-only news outlet, may lie in the Press Clause of the Constitution. The Press Clause has been dormant for years, and with a proper definition of “the press” that includes not just classic print and television network journalism, but legitimate news gathering online news outlets, a world can co-exist between the First Amendment and American copyright law, while protecting a fundamental tenet of the American constitutional system—a free and uninhibited press.

156. *Id.*