



IP Innovations Class

Is Your News 'Hot': The Hot News Exception, Copyright Law, and Protecting Content in the Digital Age

July 16, 2009

Presented by **Barry M. Benjamin** and **Marc A. Lieberstein**

“HOT NEWS” DEFINED

International News Service v. Associated Press,
248 U.S. 215 (1918)

- US Supreme Court ruled that Associated Press (“AP”) could protect its uncopyrightable factual news content from a rival news organization, International News Service (“INS”).
- The Court recognized a limited property right in factual news content under a **misappropriation** theory - an exception to copyright law.
- Essentially, **protection for the work of the news gatherer.**

Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991)

- “Fact/Expression dichotomy” = principle of copyright law that “limits severely the scope of protection in fact-based works.”
- Copyright protection is limited to expression, not to facts or ideas.



“HOT NEWS” RE-DEFINED

National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997)

- Dispute over Motorola service – real time sports scores to a handheld pager.
- NBA sought to restrain Motorola from providing paying subscribers with information about NBA scores, game details, in near-real time. NBA wins at District Court level.



“HOT NEWS” RE-DEFINED

National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997)

Elements for a Hot News claim:

1. P generates information at a cost;
2. Info is time sensitive;
3. D’s use of info constitutes free-riding on P’s efforts;
4. D is in direct competition with a product or service being offered by the parties;
5. Ability of others to free-ride on P’s efforts would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997)

- Second Circuit reverses.
- Holds that Motorola’s service did not meet the “hot news” exception – not a directly competing product, more like publishing box scores in newspapers.
- Also noted: “INS has long been regarded with skepticism by many courts and scholars and often confined strictly to its facts.”

AP v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (Note: *Settled on July 13, 2009*)

- AP claimed AHN hired people to find AP news stories on the Internet and prepare them for republication under the AHN banner, either rewriting the text or copying the stories in full.
- The court denied AHN's motion to dismiss. It stated, "the cause of action is still recognized under the laws of various states, including the state of New York."
- The AP said the settlement includes payment by AHN to the agency of an "unspecified sum" and an agreement by AHN that it "would not make competitive use of content or expression from AP stories."

Scranton Times, L.P., et al. v. Wilkes-Barre Publishing Co., 2009 WL 585502 (M.D. Pa. 2009).

- ST claimed that Wilkes-Barre copied obituaries from its daily paper, and such copying was “Hot News” misappropriation under *NBA v. Motorola*.
- District court analyzed hot news doctrine carefully, but concluded that ST did not meet the fifth criterion, i.e., defendant’s copying “did not pose a threat to the existence of [ST’s] existing business relations, profits, and good will.”

SEARCH ENGINE DILEMMA

Google, Yahoo!, etc. crawl all news sites and re-publish headlines and snippets

- Is this directly competing with newspapers?
- Is this free riding?
- Are Google and Yahoo! diminishing incentive to produce news so that news gathers are substantially threatened?
- AP proposes tagging news articles (tracking author's name, publisher).
 - Once you track, is a fee/tax far behind?

EXPAND COPYRIGHT LAW?

“Expanding 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, might be necessary to keep free riding on content financed by online newspapers from so impairing the incentive to create costly news-gathering operations that news services like Reuters and the Associated Press would become the only professional, nongovernmental sources of news and opinion.”
Judge Richard Posner, blog post June 23, 2009

(http://www.becker-posner-blog.com/archives/2009/06/the_future_of_n.html)



HOT NEWS SITUATION NO. 1

TNT and The Bug compete in the market for Wall Street and trader-oriented, real-time financial market information. Both run subscriber based audio and web based feeds.

The Bug alleges that TNT systematically accesses and copies its news feed. TNT admits that it takes short factual phrases and snippets from The Bug's publication, and re-publishes that information over TNT's feed. TNT is able to re-publish within 10-15 seconds after The Bug's publication.

If no "substantial similarity" between the news snippets published by TNT, is there a copyright claim? Is this different from CNN copying NBC? Or ABC copying TMZ.com?



HOT NEWS SITUATION NO. 2

TNT and The Kingdom. The Kingdom publishes a monthly business index survey called The Business Barometer. Index is created by The Kingdom's survey of all businesses in the metropolitan area. The Kingdom is the creator of this content (unlike The Bug, which is a news-gathering organization).

The Business Barometer is published monthly, on the last business day of each month, to The Kingdom's paying subscribers three (3) minutes before it is widely released to the public ("embargo period").

TNT accesses and publishes parts of The Business Barometer over its feed during the embargo period.

The Kingdom sues alleging copyright infringement. Correct? Is there a Hot News claim?



YOUR OPTIONS IN HOT NEWS SITUATIONS

- Settlement/License
- Avoid the NBA Factors
- The AP idea: format/tagging content/publications
- Last resort: Litigate Aggressively



THANK YOU

THANK YOU!

Barry M. Benjamin

BBenjamin@KilpatrickStockton.com

(212) 775-8783

Marc A. Lieberstein

MLieberstein@KilpatrickStockton.com

(212) 775-8781