"Hot-News" Misappropriation After *Barclays*

Thomas G. Field, Jr.

Professor Field finds the facts in *Barclays* interesting, but he is not enlightened by two opinions that address copyright preemption of hot-news misappropriation

Fourteen years after resolving National Basketball Association v. Motorola, Inc., 105 F.3d 841 (2d Cir.1997) (NBA), the Second Circuit in Barclays Capital Inc. v. Theflyonthewall.com, Inc., 2011 WL 2437554 (Barclays), grapples with the reach of that opinion. The issue is the extent to which explicit preemption in 17 U.S.C. § 301(a) bars those who collect or generate information from preventing its unauthorized use.

Most famously recognized in International News Service v. Associated Press, 248 U.S. 215 (1918) (INS), such unauthorized use is known as "hot-news misappropriation." Since 1938, however, it can be tortious only under state law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (no support for federal common law). It may therefore vary. New York's version of the tort was at issue in *NBA* and *Barclays,* but Assoc. Press v. All Headline News Corp., 608 F.Supp.2d 454, 459-60 (S.D.N.Y.2009), finds no evidence that the tort exists in Florida.

Although *INS* only permitted a creator to delay use of time-sensitive information, Justice Holmes, apparently joined by Justice McKenna, dissented, arguing that, without copyright, plaintiff could prevail only as needed to prevent source misrepresentation. 248 U.S. at 247-48. Justice Brandeis also dissented at length, maintaining that, copyrights, patents or other statutory protection aside, "The general rule of law is, that

the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — became, after voluntary communication to others, free as the air to common use. *Id.* at 250. He also pointed out that proposed federal legislation to address the specific free riding at issue in *INS* had failed to garner support. *Id.* at 264-6.

State protection for fixed works, published or unpublished, was not explicitly preempted until 1978, but courts began to speak of implied preemption in the 1960s. *See, e.g.,* Columbia Broadcasting System, Inc. v. DeCosta, 377 F.2d 315, 321 (1st Cir. 1967) (DeCosta) ("[T]his case falls squarely under the rule of *Sears* and *Compco.* Not having copyrighted [his work], the plaintiff cannot preclude others from copying [it].").

Although federal-state preemption would not apply to a federal common-law tort, Learned Hand read *INS* very narrowly, "[If INS] meant to create a sort of common-law patent or copyright for reasons of justice[, e]ither would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter." Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir.1929), *cert. denied,* 281 U.S. 728 (1930). *See also, NBA,* 105 F.3d at 852 n. 7.

NBA also flags a district court opinion finding free riding on game results "difficult to distinguish from [free riding by] the multitude of charter bus companies who generate profit from servicing those of plaintiffs' fans who want to go to the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges towards the gate." 105 F.3d at 853, n. 8 (quoting Nat'l Football League v. Gov. Delaware, 435 F.Supp. 1372, 1378 (D. Del. 1977)).

Buttressing its view of preemption, lack of a limiting principle led the First Circuit to reject a suit by the creator of Paladin because his winning would "allow a hard case to make some intolerably bad law." *DeCosta,* 377 F.2d at 317.

Despite evident misgivings, *NBA* relies in part on legislative history to conclude that some form of hot-news misappropriation survives. 105 F.3d at 850 (quoting H.R. Rep. No. 94-1476 at 132). Having considered two versions of a five-part test derived from *INS,* the court then identifies three necessary elements: "(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." 105 F.3d at 853. Defendant's distriibution of game statistics did not directly compete with televised broadcasts, nor did NBA offer a similar service. Thus, NBA's claim failed because defendant did not sell "a directly competitive product for less money because it has lower costs." *Id.* at 854.

The defendant in *Barclays* merely reported plaintiffs' stock recommendations (e.g., Analyst A now lists Company X as hold rather than buy), but erosion of their value seemed clear. The district court therefore tentatively ordered defendant to wait from one-half to two hours before distributing such information. 2011 WL 2437554 at *10.

Despite its brevity, no member of the *Barclays* panel finds delay warranted. After belaboring inconsistencies in *NBA's* articulation of referenced tests, the majority says, "Inconsistent as they were, they could not all be equivalent to a statutory command to which we or the district court are expected to adhere." *Id.* at 20. It therefore focuses on free riding rather than direct competition. *Id.* at *22-24. "Here, analogous to the

defendant's in *NBA*, Fly's employees are… observing and summarizing facts… and selling those packaged facts to consumers; it is simply the content of the facts at issue that is different." *Id.* at *24. The majority also goes on to speculate that disseminating facts collected by plaintiffs rather than recommendations derived from those facts, might constitute tortious activity. *Id.*

Judge Raggi concurs but believes that the relief should be preempted for lack of direct competition between parties. *Id.* at *25. "*NBA* emphasized the need for a 'hot news' plaintiff to show 'free riding... enabling the defendant to produce a directly competitive product for less money because it has lower costs.' Direct competition is thus essential to a non-preempted claim, whether such competition is identified as a distinct element of a five-part test or as part of the free-riding component of a three-part test." *Id.* at 29 (citation and emphasis omitted).

Lacking evidence that she sees direct competition as a substitute for free riding, her point is unclear, however. Nor is it evident that the majority would find competition irrelevant once free riding had been established. Therefore, to survive preemption, a claim should establish both, as well as *NBA's* third element. Indeed, one must wonder if any claim of hot-news misappropriation, preemption aside, could succeed absent a "threat to the very existence of the product or service provided by the plaintiff." *NBA,* 105 F.3d at 853.