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Federal Court Affirms News Wire Services' Rights in "Hot News" under New York Law

On February 17, 2009, a federal court in Manhattan ruled that the Associated Press ("AP") had the right under New York law to stop a news aggregation website from unlawfully copying, altering, and disseminating AP breaking news, also known as "hot news," over the internet. The case, *Associated Press v. All Headline News Corp.*, No. 08-CV-323(PKC) (Feb. 17, 2008), arose out of claims by the AP that defendant All Headline News Corp. ("AHN") hired writers to locate and re-write breaking AP news, remove AP copyright notices, and distribute the rewritten articles over the internet to paying clients-web sites to which AHN markets itself as a news provider. AP alleged that AHN was free-riding on AP's original reporting in violation of AP's rights under federal copyright and trademark law, as well as New York common law. AHN sought dismissal of all counts of the complaint except the copyright claims on the grounds that the allegations, even if true, were insufficient to state a legal claim.

Although news articles are subject to copyright protection, the facts contained in those articles are not. Over ninety years ago, however, the United States Supreme Court recognized a "hot news exception" in a case involving the AP, *International News Service v. Associated Press*, 248 U.S. 215 (1918). In that case, the Supreme Court recognized that AP spent considerable resources obtaining its news stories and concluded that AP had a limited "quasi property" right in its recent stories which its competitors could not take without compensating AP. Although changes to federal jurisprudence later rendered *International News Service* not binding as federal common law, New York and certain other state courts subsequently recognized the same claim for "hot news misappropriation" under state common law.

The Court rejected AHN's arguments that AP had failed to plead a claim for misappropriation and that the hot news claim was pre-empted by the Copyright Act. Following a 1997 Second Circuit case, *Nat'l Basketball Ass'n v. Motorola, Inc.*, 205 F.3d 841 (2d Cir. 1997), the Court held that AP sufficiently alleged the five elements under which New York recognizes a hot news claim, not pre-empted by the Copyright Act. These elements include when:

- (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

IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

Mitchell C. Stein
212 660 3042
mstein@sandw.com

Gretchen S. Silver
212 660 3029
gsilver@sandw.com

BOSTON

Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109

NEW YORK

Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, NY 10104

WASHINGTON, DC

Sullivan & Worcester LLP
1666 K Street, NW
Washington, DC 20006

ISRAEL

Zysman, Aharoni, Gayer &
Ady Kaplan & Co. / S&W LLP
41-45 Rothschild Blvd., Beit Zion
Tel Aviv, 65784 Israel

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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.

The Court further denied AHN's motion to dismiss AP's claims under the Digital Millennium Copyright Act, 17 U.S.C. §1202 ("DMCA") on the grounds that the DMCA applied only to removal of copyright management performed by the technological measures of automated systems. The court held instead that removal of information identifying AP as the author and owner of the articles by itself was sufficient to state such a claim under the DMCA. Finally, the court dismissed AP's claim of unfair competition under federal trademark law as insufficiently pled, although the court allowed AP's claim of unfair competition under New York law to proceed because AHN had failed to articulate sufficient reason why it should be dismissed.

The *AP v. AHN* decision is an important and, as far as we can tell, first application of the ninety-year old "hot news misappropriation" claim under New York law to news dissemination via the internet, where news cycles can be measured in hours or even minutes depending on the circumstances. Even in cyberspace, however, courts will protect the efforts of news gatherers and news generators from others seeking to free ride on their work.