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MISAPPROPRIATION

BARCLAYS CAPITAL INC. V. THEFLYONTHEWALL.COM

700 F. Supp.2d 310 (S.D.N.Y. 2010)

In *Barclays Capital Inc. v. Theflyonthewall.com*, the Southern District of New York enjoined Theflyonthewall.com, an internet subscription news service that compiles and publishes research analysts' stock recommendations, from misappropriating "hot news" from various financial services firms' ("Firms") daily research reports. This decision shows that the "hot news" misappropriation doctrine is still alive and well. Furthermore, the case raises questions about the future of sharing information on the Internet.

The "hot news" doctrine covers the misappropriation of time-sensitive information. The doctrine originated in a 1918 Supreme Court case, *International News Service v. Associated Press*, 248 U.S. 215 (1918). In that case, INS copied news from bulletin boards and from early editions of the AP's news reports on the east coast. INS then sold this information to AP's customers on the west coast before AP's publications came out there. The Court held that even though copyright law did not extend to the facts in the reports, INS could be enjoined from using AP's news reports in direct competition because this type of free-riding is unfair competition in business.

In *Barclays*, the Southern District of New York relied on the Second Circuit's opinion in *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997), which used a five-part test to determine if "hot news" had been misappropriated. The test asks whether: (1) the plaintiff gathered or generated information at a cost; (2) the information was time sensitive; (3) the defendant is in fact free-riding on the plaintiff's work; (4) the defendant was in direct competition with a product or service at issue offered by the plaintiff; and (5) others free-riding on the plaintiff would reduce the incentive to produce the product or service such that its existence or quality would be substantially threatened.

After applying the test, the court found for the Firms. The court entered a permanent injunction that restricted Theflyonthewall.com from disseminating information from financial service research reports until either one half-hour after the opening of the New York Stock Exchange or 10:00 a.m., whichever is later. The purpose of the lead time is to enable the Firms to "conduct a reasonable sales effort" and to retain the advantage of being the first to reach key investors. With that lead time, the Firms will retain an incentive to create their research without "squeezing every last cent out of their efforts to the exclusion of others."