

Collision Occurs Between Copyrights and Misappropriation in Electronic News Media Space

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Despite winning in court to protect valuable copyrights, Wall Street firms are unable to protect their valuable trading recommendations as federal and state laws collide in *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*¹ (pending any potential review on appeal). The electronic news media continues to lead the charge, and now the walls of exclusivity are beginning to crumble for these respected recommendations.

Wall Street firms have for long provided detailed research reports and trading recommendations—exclusively to firm customers—to drive order flow with the recommending firm, thereby generating commission revenue. Storming the walls, however, are those in the electronic news media blasting the once-exclusive information to all corners of the Internet, immediately upon its release by Wall Street. But for Wall Street, this widespread, uncontrolled dissemination has cut into profitability and has wreaked havoc on traditional business models for market research.

Although the electronic news media scored a fresh victory, Wall Street has not suffered a devastating loss. The copyrightable aspects of Wall Street research—the published models, insights, and facts, for example, are often more valuable to institutional customers than the basic recommendation itself (e.g., Buy, Sell, or Hold). These copyrightable aspects, of course, remain protected by federal copyright law.² Outside the realm of finance, however, this case may signal much broader implications for any business with both feet in the Information Age.

The appeals court received this case after the District Court for the Southern District of New York granted injunctive relief to plaintiffs Barclays Capital Inc.; Merrill Lynch; Pierce, Fenner & Smith Inc.; and Morgan Stanley & Co. Inc. ("the Firms"), which prohibited Theflyonthewall.com, Inc. ("Fly") from publishing information about the Firms' recommendations, within certain parameters.³ The issue presented on appeal was whether Fly could be enjoined from publishing "news," *i.e.*, bare facts, that the Firms [had] made certain recommendations.⁴ The appeals court vacated the injunction, paving the way for the electronic news media to publish Wall Street recommendations far and wide, and of course, to direct profits to publishers and sponsors, away from the recommending firm. In the wake of this decision, Wall Street firms must now reconsider business models built upon the value of their proprietary information.

Without further recourse from federal copyright law, which does not protect bare "facts" alone, the Firms sought relief under New York tort law through the doctrine of "hot news" misappropriation of information. The appeals court was bound to consider, however, whether federal copyright law preempted the applicability of state law in these circumstances. To survive preemption, Firms were required to prove that Fly's use of the information constitutes "free riding" on the Firms' efforts.⁵ By concluding that there was no "free riding," the appeals court significantly narrowed the circumstances in which similar state law misappropriation claims can survive preemption by federal copyright law. Accordingly, this case signals a broader victory for electronic publishers hoping to widely distribute, and to profit from, factual information created by others.

In determining whether Fly engaged in "free riding," the court looked to precedent in *National Basketball Association v. Motorola, Inc.*⁶ ("the NBA Case"). In the NBA Case, the NBA collected and broadcast information, based on live sports games, over a

communication network; and likewise, a competitor collected and broadcast its own information, based on live sports games, over a competing communication network. The appeals court noted that, in the NBA Case, there was no free riding, in part, because Motorola was bearing its own costs of collecting factual information.

In the present case, the appeals court's ultimate inquiry was whether any of the Firms' products enabled Fly "to produce a directly competitive product for less money because it has lower costs."⁷ Extending the reasoning from the NBA Case to cover Fly's actions, the appeals court concluded that there was no "free riding" because approximately half of Fly's twenty-eight employees were involved in the collection and distribution of Firms' recommendations.⁸ According to the appeals court, Fly "is reporting financial news—factual information on Firm Recommendations—through a substantial organizational effort."⁹

The appeals court, however, did not consider it important that the Firms had incurred substantial costs in research and analysis (*i.e.*, acquiring and creating information) as the basis for their recommendations, whereas Fly's only costs were in collecting and reporting the recommendations. The appeals court discarded the relevance of these basis costs—even though they provide an arguable distinction over the NBA Case—stating that although the Firms "may be 'acquiring material' in the course of preparing their reports . . . that is not the focus of this lawsuit. In pressing a 'hot news' claim against [Fly], [Firms] seek only to protect their Recommendations, something they create using their expertise and experience rather than acquire through efforts akin to reporting."¹⁰ The appeals court concluded that there was no meaningful difference between "taking material that a Firm has created . . . as the result of organization and the expenditure of labor, skill, and money . . . and selling it by ascribing the material to its creator" and the "unexceptional and easily recognized behavior by members of the traditional news media [reporting on] winners of Tony Awards . . . with proper attribution of the material to its creator."¹¹ We expect that the contours of these differences to be a key issue if this case [is] heard on appeal, either at the Second Circuit en banc or at the United States Supreme Court.

Absent any legal recourse to ensure the exclusivity of their recommendations, Wall Street firms must now scramble to implement even greater security and counter-intelligence measures. After all, publishers such as Fly rely on information leaks and intelligence to timely obtain the recommendations in the first place. More likely, however, is that Wall Street firms will soon refine their business models to otherwise adequately monetize, or else reduce expenditures in, their intensive research and analysis efforts.

The broader implications of this case—that the "ability to make news . . . does not give rise to a right for it to control who breaks that news and how"¹²—will bear critically on the development, funding, and overall power of rapidly-advancing electronic information sources. In particular, businesses providing information aggregation services of all stripes—including, for example, those provided by Google, Inc. and Twitter, Inc.—will rejoice in the ability to gather and publish information from multiple sources across the entire nation with a lower risk of encountering divergent legal standards for misappropriation, on a state-by-state basis.

¹ *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv (2d Cir. June 20, 2011).

² The District Court for the Southern District of New York awarded monetary relief for copyright infringement by Fly's unauthorized distribution of the Firm's actual reports. Issues concerning copyright infringement were not addressed on appeal.

³ The injunction allowed the Firms' customers to trade on the Firms' recommendations prior to the broader market. The injunction prohibited Fly from reporting a recommendation until (a) the later of one half-hour after the opening of the New York Stock Exchange or 10:00 am for those recommendations first distributed prior to 9:30 am, or (b) two hours after the

recommendation is first distributed by one of the Firms to its clients, for those recommendations first distributed at or after 9:30 am on a given day. See *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, slip op. at 29, n.20.

⁴ For example, a headline covering one of the Firms' recommendations may state: "EQIX initiated with a Buy at BofA/Merrill. Target \$110."

⁵ "Free riding" was but one factor in a five-pronged test, the remainder of which were not the basis of the decision. The appeals court speculated, however, that proving certain other factors may be troublesome, such as "direct competition" between Fly and the Firms.

⁶ 105 17 F.3d 841 (2d Cir. 1997).

⁷ *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, slip op. at 67.

⁸ Fly previously relied on employees at investment firms (without the firms' authorization) to e-mail the research reports to Fly as they were released. Fly's staff would summarize a recommendation as a headline, and sometimes, Fly would include in a published item an extended passage taken verbatim from the underlying report. Fly maintains that it no longer obtains recommendations directly from such investment firms and, instead, that it gathers them using a combination of other news outlets, chat rooms, "blast IMs" sent by people in the investment community to hundreds of recipients, and conversations with traders, money managers, and its other contacts involved in the securities markets. *Id.* at 16-17.

⁹ *Id.* at 67.

¹⁰ *Id.* at 62.

¹¹ *Id.* at 63-64.

¹² *Id.* at 71.