10-1372-cv

United States Court of Appeals

for the

Second Circuit

BARCLAYS CAPITAL INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED and MORGAN STANLEY & CO. INCORPORATED,

Plaintiffs-Appellees,

– v. –

THEFLYONTHEWALL.COM, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* STREETACCOUNT LLC IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae StreetAccount LLC is incorporated as a Wyoming limited liability corporation, has no parent corporation, and has no stock or other interest owned by a publicly held company.

TABLE OF CONTENTS

INTERESTS OF THE AMICUS 1

PRELIMINARY STATEMENT 4

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. THE "HOT NEWS" MISAPPROPRIATION DOCTRINE RUNS AFOUL OF WELL-ESTABLISHED FIRST AMENDMENT PRINCIPLES UNLESS IT IS NARROWLY DEFINED AND CAUTIOUSLY APPLIED 9

A. Uncensored Access to Factual Information Is a Core Right Under The First Amendment 9

B. Publication of Truthful Information of Public Interest and Concern, Lawfully Acquired, Is Protected Under the First Amendment 10

C. The First Amendment Precludes Claims Against Publishers of News Leaks 11

D. Except in the Most Extraordinary Circumstances, Enjoining the Publication of Newsworthy Information – Even for a Very Brief Period – Is a Prohibited "Prior Restraint" 13

E. Because It Presents First Amendment Issues of Constitutional Concern, the Decision Below Must Be Subject to this Court's "Independent Examination" 14

II. THE DISTRICT COURT ADOPTED AN OVERLY BROAD FORMULATION OF THE HOT NEWS DOCTRINE AND APPLIED IT WITHOUT REGARD TO FIRST AMENDMENT PRINCIPLES 15

A. Hot News Misappropriation Must Be Subjected to the Same First Amendment Considerations As Are Incorporated Within Copyright Law 15

B. The District Court Misapplied the *NBA* Test 16

1. Reporting on the Newsworthy Fact of Recommendations Issued by Financial Services Firms Is Not "Free Riding" on Their Research 17

2. Financial News Publishers and Financial Services Firms Are Not "Direct Competitors" for News 19

3. Publication of the Firms' Recommendations by Financial News Publishers Does Not Substantially Threaten the Continued Existence of the Firms' Equity Research 21

III. THE INJUNCTION IS LEGALLY UNSUPPORTED BY PROPER FINDINGS AND CONSTITUTIONALLY INFIRM DUE TO ITS EXTRAORDINARY AND UNJUSTIFIED IMPACT ON NON-PARTY PUBLISHERS 23

A. The District Court Failed to Make the Requisite Factual Findings Relating to Injury Required by *eBay* and *Salinger* 23

B. Because the Injunction is Vague, Overbroad and Mandates Ongoing Policing, It Casts a Shadow over the Lawful, Constitutionally-Protected Activities of Legitimate Financial News Publishers, Such as StreetAccount, and Provides them with Inadequate Guidance on How to Comply 24

1. The Injunction is Unconstitutionally Vague 26

2. The Injunction is Unconstitutionally Overbroad 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Associated Press v. All-Headline News, 608 F. Supp.2d 454 (S.D.N.Y. 2009) 19 n.14

Barclays Capital Inc. v. Theflyonthewall, 2010 U.S. Dist. LEXIS 25728 ..... *passim*

Barclays Capital Inc. v. Theflyonthewall, 2010 U.S. Dist. LEXIS 45093 ..... 16 n.12

Bartnicki v. Vopper, 532 U.S. 514 (2001) 11, 12

Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987) 29

Board of Education v. Pico, 457 U.S. 853 (1982) 9

Broadrick v. Oklahoma, 413 U.S. 601, 611(1973) 24

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968) 14, 26

Cheney Brothers v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929) 16

Confold Pacific, Inc. v. Polaris Industries, Inc., 433 F.3d 952 (7th Cir. 2006) 17

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 10

Dow Jones v. Briefing.com, 10-cv-03321 (S.D.N.Y. April 20, 2010) 19 n.14

eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) 23, 24

G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952) 16

Griswold v. Connecticut, 381 U.S. 479 (1965) 10

Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539 (1985) 15

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

Landmark Communications, Inc., v. Commonwealth of Virginia, 435 U.S. 829 (1978).....12

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) 26, 28, 29

Massachusetts v. Oakes, 491 U.S. 576 (1989).....30 n.17

McKevitt v. Abdon Pallasch, 339 F.3d 530 (7th Cir. 2003) 21

Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees International Union, 239 F.3d 172 (2d Cir. 2001).....13, 15, 26

Near v. Minnesota, 283 U.S. 697 (1931) 13, 14

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).....13

New York Times Co. v. United States, 403 U.S. 713 (1971) 14, 15

Parker v. Levy, 417 U.S. 733 (1974) 25

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).....26

RCA Mfg. Co., Inc., v. Whiteman, 114 F.2d 86 (2d Cir. 1940) 16

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).....25, 26

Salinger v. Colting, 2010 U.S. App. LEXIS 8956 (2d Cir. 2010).....23, 24

Smith v. Daily Mail Publishing Co., 443 U.S. 97(1979) 11

Smith v. Goguen, 415 U.S. 566 (1974) 25

Stanley v. Georgia, 394 U.S. 557 (1969).....9

The Florida Star v. B. J. F., 491 U.S. 524 (1989) 11

The National Basketball Association v. Motorola,
105 F.3d 841 (2d Cir. 1997)..... *passim*

The Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000), *cert. denied*,
531 U.S. 1113 (2001).....30 n.17

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).....10

OTHER AUTHORITIES

Booz/Allen/Hamilton, "Saving Sell-Side Research" (2006)..... 7-8 n.9, 21 n.16

Greenwich Associates, "U.S. Equity Trading Business Falling Short of Expectations in 2010" (June 2010).....21 n.15

Remarks of SEC Chairman Arthur Levitt, The Economic Club of New York, October 18, 1999.....5 n.6

Saxton, Gregory D., "Financial Blogs and Information Asymmetry between Firm Insiders and Outsiders".....6 n.7

SEC Mission Statement 6 n.8

SEC Regulation FD (Fair Disclosure) 5 n.5

Smith Eckstrand, Victoria, *News Piracy and the Hot News Doctrine* (LFB Scholarly Publishing 2005) .....18 n. 13

Smolla, Rodney A., *Smolla & Nimmer on Freedom of Speech* 30 n.17

INTERESTS OF AMICUS CURIAE

StreetAccount LLC ("StreetAccount") respectfully submits this brief, as amicus curiae[1], in support of Appellant, urging reversal of the judgment for "hot news" misappropriation, and dissolution (or substantial modification) of the injunction entered based on the hot news claim.[2]

StreetAccount is an online publisher of financial news, information, and analysis. Founded in 2003, StreetAccount delivers to its subscriber base a filtered and contextualized view of important investment-related news, based on its own original reporting of truthful facts that it gathers legally from a vast array of sources. Among its subscribers are financial professionals – institutional portfolio managers, analysts, traders and sales people, including many employed by bulge-bracket Wall Street banks such as the Firms.

StreetAccount's interest in the outcome of this appeal, and in the important legal and constitutional concerns that are presented by overbroad enforcement of the hot news doctrine, is palpable and direct. Indeed, if the extraordinary and unprecedented ruling of the District Court is not reversed, and if the hot news doctrine is not limited within the narrow confines previously recognized by this

[1] StreetAccount has obtained consent to file this brief from both Appellant and Appellees. No party or party's counsel authored this brief in whole or in part; and no party or party's counsel, other than StreetAccount, contributed money intended to fund preparing or submitting the brief.

[2] StreetAccount takes no position on Fly's appeal related to the copyright infringement claims, liability for which Fly no longer contests.

Court, StreetAccount will remain under the looming threat of insupportable claims by the Firms or others, and its protected activities as a legitimate financial publisher will be chilled, in breach of its First Amendment rights.

StreetAccount was not named as a party in the action. Nonetheless, without any basis in the record for a finding that StreetAccount has violated the Firms' rights, or that it has acted unlawfully in any way, and without an opportunity to defend itself from such charges, StreetAccount was identified by name on a number of occasions during the trial.[3] Ultimately, the District Court's opinion went so far as to suggest that a long list of non-party publishers, including StreetAccount, might be in the target zone for policing and future enforcement.[4]

[3] In addressing the contention that "certain third parties allegedly are engaging in similar conduct," the Firms' own counsel acknowledged that, "[u]nlike as to Fly, no comprehensive record has been developed here as to the nature of these third-party businesses, the extent to which they attempt or succeed in systematically tracking without authorization the firm's research reports, the periods of time they have been so acting, the advertising surrounding any such practices or the like. Moreover, none of the other services identified by Fly is appearing here to defend participating in this unlawful practice." Opening Statement of Benjamin Marks (A732).

[4] The Court's opinion identified StreetAccount, along with Briefing.com, TTN, StreetInsider.com, TheStreet.com, Midnight Trader and Jagnotes.com as among the "financial news organizations that provide services similar to that of Fly." (A1454) Elsewhere in its opinion "media giants like Bloomberg, Thomson Reuters, or Dow Jones" were named as additional subjects of the Firms' claims of damaging, unauthorized redistribution of their Recommendations. (A1443)

Indeed, the District Court required in its injunction that the Firms undertake enforcement action "to restrain the systematic, unauthorized misappropriation of their Recommendations" – presumably by other unspecified non-party publishers – within one year as a condition for maintaining the injunction against Fly. (A1512)

But in fact, StreetAccount is not similarly situated to Fly. Unlike Fly, StreetAccount has never indulged in the kind of actionable infringement of copyrighted expression that Fly conceded in this case. Unlike Fly, StreetAccount has no relationship, and has never attempted to develop one, with any discount brokerage firm that competes with the Firms for brokerage business or that trades on published information about Firm "Recommendations." Unlike Fly, StreetAccount has never published confidential password and call-in information regarding internal conference calls intended solely for clients of the Firms. And unlike Fly, StreetAccount has never asserted hot news claims against its competitors based on the same publicly-available, newsworthy, constitutionally-protected factual information that is the subject of the Firms' overreaching hot news claims.

In numerous other respects, StreetAccount's content, methods, marketing and audience differ materially from those of Fly.

In the context of the foregoing, StreetAccount respectfully submits this brief as amicus curiae. It does so as a legitimate publisher of factual information of

interest and concern to the public at large, in order to draw to the Court's attention the serious impact that the ruling of the District Court would, if not reversed, have on the legal and First Amendment rights of StreetAccount and all publishers as well as on consumers of important news and information in the financial marketplace.

PRELIMINARY STATEMENT

In *The National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997) ("*NBA*") this Court approved – but took great care to narrowly confine – the doctrine of "hot news" misappropriation, limiting its reach essentially to the facts of *International News Service v. The Associated Press*, 248 U.S. 215 (1918) ("*INS*"), a case involving *direct* competitors, *both* of whom were *in the news business*.

Because *NBA* adopted and applied the narrowest possible construction of the type of hot news misappropriation claim that would survive preemption, it had no need to address the serious First Amendment concerns presented where the doctrine has been applied overbroadly.

Unfortunately, Judge Cote failed to confine her ruling to the narrow strictures of *NBA*. She then compounded that failure by overlooking the serious First Amendment implications of her overbroad ruling and injunction.

Judge Cote also failed to apprehend the broader factual context of her decision, its potentially grave impact on the legitimate interests of the financial publishing industry and its far-reaching negative implications for the public interest in unfettered and transparent availability of truthful information in the securities marketplace – to *all* investors, small as well as large.[5] This public interest has in fact been markedly advanced by the revolutionary and explosive development of financial publishing and the widespread availability of financial news on cable and other media over the past two decades.[6]

The financial publishing industry has evolved with even greater rapidity since the Internet made it possible to reach a mass market without first developing

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[5] *See, e.g.*, from SEC Regulation FD (Fair Disclosure): "We believe that the practice of selective disclosure leads to a loss of investor confidence in the integrity of our capital markets. *Investors who see a security's price change dramatically and only later are given access to the information responsible for that move rightly question whether they are on a level playing field with market insiders.*" http://www.sec.gov/rules/final/33-7881.htm (emphasis added); *see also* comment on Regulation FD by the Firms' counsel in this case, Weil Gotshal & Manges: "Regulation FD, which becomes the law on October 23, 2000, provides the SEC a powerful new enforcement tool to police discussions by corporate officials with analysts in order to further the SEC's *goal of assuring a level playing field for all investors*." http://www.weil.com/news/pubdetail.aspx?pub=2897 (emphasis added).

[6] *See, e.g.*, Remarks of SEC Chairman Arthur Levitt, The Economic Club of New York, October 18, 1999: "An explosion of on-line information sources, real-time news feeds, and TV channels devoted to business news has reinvented how we gather and disseminate financial information." http://www.sec.gov/news/speech/speecharchive/1999/spch304.htm.

a very expensive private digital or terrestrial distribution network. The result has been that far more voices and opinions are now heard than simply those of the leading financial services firms and a handful of legacy media companies.

This development has not only been revolutionary but it has been a positive boon for investors and the functioning of global markets.[7] Greater transparency regarding securities prices translates into a level playing field for investors, increased trust in financial markets, and greater economic efficiency.[8]

Judge Cote's decision attempts to turn back the clock. But the technological genie cannot be put back in the bottle under the guise of hot news misappropriation. Nor should it at the expense of the public's right to know and

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[7] *See, e.g.*, Gregory D. Saxton, "Financial Blogs and Information Asymmetry between Firm Insiders and Outsiders," paper presented to the American Accounting Association, August 3-6, 2008, finding that: "Financial blogs are an important component of 'new media,' which have collectively led to an incredible democratization of information; one consequence is that 'Information Asymmetries everywhere have been mortally wounded by the Internet (Levitt and Dubner, 2005)." http://www.acsu.buffalo.edu/~gdsaxton/papers/FinancialBlogs.pdf.

[8] *See, e.g.*, excerpt from SEC Mission Statement, "The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation": "*Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.* The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation's economy." (emphasis added) http://www.sec.gov/about/whatwedo.shtml.

the press's right to publish publicly available information of significance in the financial marketplace.

In any event, it simply defies credulity to conclude that "premature" publication by Fly of some or even all of the Firms' already widely distributed Recommendations substantially threatens continuation of the equity research that is an integral part of their multi-billion dollar operations.

It is equally absurd to conclude as a factual matter that Fly's reporting is anything more than a minor nuisance relative to other overriding factors that have caused the Firms to reduce their equity research staffing and budgets in recent years: prominent among them the rise of electronic trading, Regulation FD's impact on the Firms' "edge" in research, a trend toward unbundling research spending from commissions, cyclical economic meltdowns, and legal and regulatory challenges to the independence, integrity and control of equity research in bulge-bracket Wall Street firms. There is no realistic prospect that the Firms will ever eliminate their sell-side research function entirely or, if they do, that such a revolutionary change in their business model would be due in any meaningful respect to publication of hot news of their Recommendations before the opening bell on Wall Street by Fly or any other publisher.[9]

[9] For an assessment of the many pressures on sell-side research, with no mention of premature third-party publication of Recommendations, *see* Booz/Allen/Hamilton,

SUMMARY OF THE ARGUMENT

The Court below failed to recognize that the "hot news" misappropriation doctrine, if not narrowly defined and cautiously applied, runs afoul of well-established, black-letter principles of First Amendment law. (Point I)

Having failed to acknowledge, or even consider, the First Amendment principles and interests at stake, the Court below formulated and applied an overly broad interpretation of hot news that misreads this Court's governing precedent and infringes upon the First Amendment rights of Fly, non-party publishers such as StreetAccount and the public at large. (Point II)

Finally, even if there were any basis for the District Court's hot news analysis and judgment of liability against Fly, the injunction must nonetheless be dissolved because the Court below failed to make the findings required by *eBay* and *Salinger* in support of injunctive relief. Moreover, the vagueness, overbreadth and ongoing policing requirement of the injunction not only impacts Fly, but the rights of non-party publishers such as StreetAccount as well. At the very least, therefore, the injunction must be substantially narrowed and clarified, and its policing requirement eliminated, in order to assure that it does not unduly chill the legitimate activities of these non-parties. (Point III).

[*footnote continued*] "Saving Sell-Side Research" (2006), http://www.boozallen.com/media/file/Saving_Sell-Side_Research.pdf.

ARGUMENT

I.

THE "HOT NEWS" MISAPPROPRIATION DOCTRINE RUNS AFOUL OF WELL-ESTABLISHED FIRST AMENDMENT PRINCIPLES UNLESS IT IS NARROWLY DEFINED AND CAUTIOUSLY APPLIED[10]

A. Uncensored Access to Factual Information Is a Core Right Under The First Amendment

The public's access to information has long been recognized as a core right under the First Amendment, even when First Amendment jurisprudence was in its infancy:

> The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use.

INS, *supra*, 248 U.S. at 250 (Brandeis, J., dissenting).

Since *INS*, it has become well established that "the Constitution protects the right to receive information and ideas . . . and is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Brennan, J., concurring); *see also Board of Education v. Pico*, 457 U.S. 853, 866 (1982) (noting "the role of the First Amendment in fostering individual self-expression [and] … in affording the public access to discussion, debate, and the dissemination of information and ideas.");

[10] For purposes of this brief, StreetAccount assumes that the doctrine of hot news misappropriation, if appropriately limited and applied, does not violate the First Amendment.

Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.").

This right to receive information and ideas applies not only to political expression that lies at the heart of the First Amendment, but also to commercial information vital to consumers. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("a particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

B. Publication of Truthful Information of Public Interest and Concern, Lawfully Acquired, Is Protected Under the First Amendment

It is well established that the First Amendment protects publication of truthful information. The Supreme Court has consistently refused to sanction publishers of truthful information, lawfully acquired, even in the face of substantial competing claims. In a case involving broadcast of the name of a rape-murder victim, in violation of a state criminal statute, the Court held:

> [T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

In a case involving publication of the name of a juvenile offender, the Court concluded: "[o]ur recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). *Accord*, *The Florida Star v. B. J. F.*, 491 U.S. 524, 533 (1989) ("if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.").

C. The First Amendment Precludes Claims Against Publishers of News Leaks

Here, the root cause of the Firms' complaints against Fly and others is their own inability to control leaks of information by employees and the many other authorized recipients of their Recommendations. However, once truthful information comes into the hands of a publisher, the only constitutional remedy for such leaks or breaches of confidence – assuming they are actionable at all – would be against the leakers and not the press. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Bartnicki involved broadcast of an illegally intercepted cellular phone conversation. The government's undoubted interest in "removing an incentive for parties to intercept private conversations," did not justify sanctioning the broadcaster:

> The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions … do not provide sufficient deterrence, perhaps those sanctions should be made more severe. *But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.* 532 U.S. at 529-530 (emphasis added).

Here, the effect of the District Court's decision was precisely the reverse. Judge Cote punished the publisher and not the leakers.

And in *Landmark Communications, Inc., v. Commonwealth of Virginia*, 435 U.S. 829 (1978), a newspaper that accurately reported on a judicial inquiry was convicted under a statute criminalizing the unlawful disclosure of such information. The Supreme Court reversed the conviction, suggesting that the statute's goals should be pursued "through careful internal procedures to protect the confidentiality of the Commission proceedings." *Id*. at 845 (Burger, C.J.).

> Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.

Id. at 849 (Stewart, J., concurring).

It cannot seriously be maintained that the need for secrecy here even begins to approach that constitutional bar, much less surmount it. If the Firms genuinely believe themselves harmed by publication of the very information they have already made available to thousands of their clients, their efforts would be more

properly directed at protecting the "exclusivity" of their equity research by limiting the scope of its authorized circulation and by enforcing confidentiality agreements with employees and licensees.

D. Except in the Most Extraordinary Circumstances, Enjoining the Publication of Newsworthy Information – Even for a Very Brief Period – Is a Prohibited "Prior Restraint"

The Supreme Court has characterized "prior restraints" as "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and "one of the most extraordinary remedies known to our jurisprudence." *Id*. at 562. Indeed, elimination of prior restraints is the "chief purpose" of the First Amendment. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

As this Court has recognized, "the risk of infringing on speech protected under the First Amendment increases" when a prior restraint involves a court-ordered injunction. *Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees International Union*, 239 F.3d 172, 176 (2d Cir. 2001). An injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, [a] prior restraint 'freezes' it, at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 559.

Any prior restraint thus comes with a "heavy presumption against its constitutional validity." *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968). Indeed, the Supreme Court has never upheld a prior restraint on publication or expression, and has recognized the theoretical possibility of such a restraint only in the most exceptional of circumstances.

In *Near*, *supra*, 283 U.S. at 715-716, the Supreme Court suggested a hypothetical exception during times of war to the otherwise absolute bar on prior restraints. Decades later, the Court refused to apply this national security exception when it denied a prior restraint against publication of the *Pentagon Papers*. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Obviously, the speech that Judge Cote has enjoined hardly rises to the gravity of an imminent threat to national security in time of war.

E. Because It Presents First Amendment Issues of Constitutional Concern, the Decision Below Must Be Subject to this Court's "Independent Examination"

The District Court's complete failure to address the foregoing First Amendment concerns presents serious questions going to the constitutionality of its Judgment. As this Court has recognized, when "considering the validity of [an] injunction under the First Amendment, we have an obligation to 'make an independent examination of the whole record in order to make sure that the

judgment does not constitute a forbidden intrusion of the field of free expression.'" *Metropolitan Opera, supra*, 239 F.3d at 176.

II.

THE COURT BELOW ADOPTED AN OVERLY BROAD FORMULATION OF THE HOT NEWS DOCTRINE AND APPLIED IT WITHOUT REGARD TO FIRST AMENDMENT PRINCIPLES[11]

A. Hot News Misappropriation Must Be Subjected to the Same First Amendment Considerations As Are Incorporated Within Copyright Law

Copyright law incorporates the First Amendment through the "idea-expression dichotomy" and the "fair use" doctrine. *See Harper & Row, Publrs. v. Nation Enters*., 471 U.S. 539, 560 (1985) Copyright law thus accommodates free speech principles by "permitting free communication of facts while still protecting an author's expression" but recognizing that "[n]o author may copyright his ideas or the facts he narrates." *Id*. at 556; *accord, New York Times Co. v. United States*, 403 U.S. 713, 726, n. (1971) (Brennan, J., concurring) (copyright does not restrict freedom of speech because copyright protects "only the form of expression and not the ideas expressed").

First Amendment concerns are inherently greater in cases involving claims of hot news misappropriation, as hot news goes beyond copyright law in seeking to

[11] For purposes of this brief, StreetAccount assumes that an appropriately narrow application of the hot news doctrine, as required by *NBA*, raises no issue of preemption under the Copyright Act.

sanction the publication of facts rather than expression. In *NBA*, this Court found it unnecessary to address the First Amendment "in view of our disposition of this matter." 105 F.3d at 855, n.10. Judge Cote's failure to consider the need for First Amendment limitations on hot news,[12] coupled with her overly broad application of the doctrine, now puts these questions front and center.

B. The District Court Misapplied the *NBA* Test

The Second Circuit has viewed misappropriation claims with suspicion and has always insisted on confining *INS* to its facts. *See Cheney Brothers v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (Hand, L., J.) ("we think that no more was covered than situations substantially similar to those then at bar"); *RCA Mfg. Co., Inc., v. Whiteman*, 114 F.2d 86, 90 (2d Cir. 1940) (Hand, L., J.) (*INS* "cannot be used as a cover to prevent competitors from ever appropriating the results of the industry, skill, and expense of others."); *G. Ricordi & Co. v. Haendler*, 194 F.2d 914, 916 (2d Cir. 1952) (*INS* to be "strictly confined' to its facts).

NBA emphasizes that, to survive preemption, misappropriation claims must be narrowly construed: "Our conclusion, therefore, is that only a narrow 'hot-news' misappropriation claim survives preemption for actions concerning material

[12] Judge Cote's only discussion of the First Amendment issues was in her decision denying Fly's motion for a stay pending appeal. She there declined to address Fly's First Amendment defense on the ground that Fly had failed to raise it at trial. *See* Opinion and Order of May 7, 2010, 2010 U.S. Dist. LEXIS 45093 at *20.

within the realm of copyright." 105 F.3d at 852. *See also Confold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 960 (7th Cir. 2006) (Posner, J.) (approving the "Second Circuit's effort to keep this concept of unfair competition or misappropriation … within reasonable limits").

1. Reporting on the Newsworthy Fact of Recommendations Issued by Financial Services Firms Is Not "Free Riding" on Their Research

The District Court went beyond *NBA* in concluding that Fly was "free riding" simply because its rapid reporting of the Firms' newsworthy Recommendations required little effort in comparison to the labor involved in producing the underlying research reports. It also found that crediting the Recommendations to the Firms was not a fair reporting practice, but merely a means for Fly to exploit the credibility of the Firms rather than expending resources to develop its own reputation.

This analysis totally misapprehends the nature of news reporting. The New York Times does not free ride when it reports on a newly-released cancer research study by a prominent organization simply because it takes the reporter mere minutes or hours to write a headline or news story, while the underlying research may have required years, teams of workers and millions of dollars to produce. Systematic reporting of a series of newsworthy events involving the same source,

each potentially reflecting a similar disparity of effort and cost, should be treated no differently so long as the news was gathered independently.

The analysis is the same under the governing cases. It was free riding when INS caused disloyal telegraphers to gain unauthorized access to AP receiving equipment and then copied AP's wartime news feed wholesale rather than gathering it for themselves.[13] But in *NBA* this Court held it was *not* free riding for SportsTrax to *independently* gather NBA games scores by having reporters watch or listen to each game, even though it was surely far less costly to monitor the games than to produce them. On the other hand, *NBA* specifically noted that it *would* have been free riding if SportsTrax had gained access to statistical compilations prepared by the NBA and simply copied them wholesale.

Here, there is no claim that Fly or other financial publishers have unlawfully accessed Firm offices or reports (as in *INS*). Quite the contrary. The newsworthy information has already been released and often widely circulated by the time it comes into the hands of any publisher. The actions of Fly and other financial news publishers like StreetAccount are thus closely analogous to the conduct of SportsTrax approved by the Second Circuit in *NBA*. In publishing news of the Recommendations these reporters expend the same kind of effort as SportsTrax's

[13] *See* Victoria Smith Eckstrand, *News Piracy and the Hot News Doctrine* (LFB Scholarly Publishing 2005) at 50-60 (summarizing evidence in the record before District Judge Hand of INS's highly questionable activities).

reporters or any other journalists. They gather the newsworthy information (of Recommendations) from a variety of sources and report them. It is entirely irrelevant that it may be easier and less costly to report news of the Recommendations than it is to fund the research from which they are generated. Under the controlling cases, this is not free riding.

2. Financial News Publishers and Financial Services Firms Are Not "Direct Competitors" for News[14]

The fourth *NBA* factor asks whether "the defendant's use of the information is in direct competition with a product or service offered by the plaintiff." 105 F.3d at 852.

Judge Cote erred in identifying the competing product or service at issue as "disseminating Recommendations to investors for their use in making investment

[14] For purposes of this appeal StreetAccount need take no position on, and this Court need not decide, the validity, under factor (iv), or *NBA* generally, of other kinds of hot news misappropriation claims that, combined with allegations of extensive and systematic copyright infringement, have recently been pursued by media companies against certain online publishers – *see, e.g., Associated Press v. All-Headline News*, 608 F. Supp.2d 454 (S.D.N.Y. 2009)(denying motion to dismiss hot news claim); *Dow Jones v. Briefing.com*, 10-cv-03321 (S.D.N.Y. April 20, 2010). The outcome of such cases will depend on their particular facts. But, unlike here, both adverse parties in those cases would at least appear to be operating in the same business – *the news business* – and claimed damages will presumably be lost subscribers or advertising revenues. Here, the Firms are not claiming *publication* damages because they are *not* in any way competitors in the business of publishing financial news. The Firms claim only that they are losing the opportunity to earn commissions in their primary businesses of trading securities and investment banking.

decisions." (A1485) Fly publishes an online newsfeed that aggregates financial news and information from many sources. Fly does not produce Recommendations; it disseminates news of the Recommendations. The Firms, on the other hand, produce equity research in support of their wide-ranging financial services. The Firms are not in the business of disseminating news and do not compete with Fly either in the financial news business or in the investment banking business.

Nothing in the record – or in the realities of the financial marketplace – supports the claim that the dissemination of Recommendations is a separable business, much less a primary business, of the Firms. Rather, the Firms' primary incentive to produce equity research is to enhance investment banking opportunities where activity if not leadership in research coverage of particular companies or sectors can strengthen their claim to a share of this highly-lucrative business. Research may also assist the Firms in generating sales commissions. But clients who elect to trade with the Firms do so for many reasons, most of them unrelated to the dissemination of Recommendations. These include a desire to secure access to full printed research reports, to the Firms' research analysts, to the

Firms' conferences, and to the executive management of companies covered by the Firms' research analysts.[15]

3. Publication of the Firms' Recommendations by Financial News Publishers Does Not Substantially Threaten the Continued Existence of the Firms' Equity Research

The fifth *NBA* factor is the most significant. The threat to the continued existence of the Associated Press itself was at the heart of the Supreme Court's concern in *INS*. "The meat is in (v), with (i) through (iv) identifying the conditions in which the criterion stated in (v) is likely to be satisfied." *McKevitt v. Abdon Pallasch*, 339 F.3d 530, 534-35 (7th Cir. 2003) (Posner, J.)

Other than in the Firms' self-serving claims, there is no evidence significantly linking financial news publishers either to the decline in the funding of sell-side research or to a material loss in trading revenues in comparison to many other factors.[16] The Firms' failure to provide evidence of actual lost customers, trades, or (ultimately) profit because of Fly's conduct, but Judge Cote insisted that such proof is unnecessary:

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[15] A recent survey of buy-side firms, quantifying perceived value of sell-side research services, found these factors represented the majority of the value in those services, with "sales service" (including calls from brokers regarding Recommendations) representing only 12%. http://www.greenwich.com/Greenwich0.5/CMA/campaign_messages/campaign_docs/naeif-10-GLG.GR.pdf.

[16] *See, e.g.*, Booz/Allen/Hamilton, *supra*, note 9.

> The Firms do not need to show that Fly has directly caused them actual, quantifiable damage – rather, they must show that the free-riding, if left unrestrained, "*would* so reduce the incentive to produce the product or service that its existence or quality *would be* substantially threatened." *NBA*, 105 F.3d at 845 (emphasis added). *INS* itself required no direct proof of lost profits in order to sustain a permanent injunction against unfair competition. *INS*, 248 U.S. at 241 (noting the "obvious results" of *INS's* conduct in terms of its effect on AP's profitability).

But Judge Cote's reliance on *NBA* is misplaced. In *NBA*, any damage was necessarily speculative because the plaintiff had not yet developed the product in question. Here, however, Fly, StreetAccount and others have been in business for many years, so the Firms' failure to muster any evidence of lost sales is highly relevant and, indeed, should be fatal to their claim. The fact that their incentive to continue providing research has not yet been threatened over many years strongly suggests that it neither *would* nor *will* be so threatened.

INS is also readily distinguishable because there the parties were indisputably *direct* competitors in their primary market for the publication of news. *See INS*, 248 U.S. at 230: "The parties are in the *keenest competition* between themselves in the distribution of news throughout the United States" (emphasis added).

Fly and the Firms are not direct competitors. The Firms' alleged damages are not lost *publishing* revenues but rather claimed lost profits from commissions

on stock trades. Fly and the Firms are hardly in the "keenest competition" for stock trades.

III.

THE INJUNCTION IS LEGALLY UNSUPPORTED BY PROPER FINDINGS AND CONSTITUTIONALLY INFIRM DUE TO ITS EXTRAORDINARY AND UNJUSTIFIED IMPACT ON NON-PARTY PUBLISHERS

A. The District Court Failed to Make the Requisite Factual Findings Relating to Injury Required by *eBay* and *Salinger*

Even were there any basis upon which to affirm the judgment below as to liability, the District Court's entry of the injunction is defective in light of *eBay, Inc. v. MercExchange, L.L.C.,* 547 U.S. 388 (2006), and *Salinger v. Colting,* 2010 U.S. App. LEXIS 8956 (2d Cir. 2010).

In *eBay*, the Supreme Court held that a plaintiff seeking a permanent injunction in a patent case must satisfy a four-part test: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." 547 U.S. at 391.

The Supreme Court explicitly rejected the "general rule … that a permanent injunction will issue once infringement and validity have been adjudged" and that

an injunction should be denied only in an "unusual case, under exceptional circumstances and in rare instances." *Id*. at 394.

In *Salinger*, this Court applied *eBay* to permanent injunctions in copyright infringement actions. Although the Court was not called upon to extend *eBay* beyond copyright cases, it saw "no reason that eBay would not apply with equal force to an injunction in any type of case." 2010 U.S. App. LEXIS 8956 at *26 n.7.

In issuing her injunction here, Judge Cote ritualistically applied the outdated presumption of irreparable harm rejected by *eBay* and *Salinger* and failed to address any of the factors set forth in *eBay*/*Salinger*, stating only: "Fly's liability for hot-news misappropriation having been established, the proper scope of injunctive relief must be determined." (A1495)

B. Because the Injunction is Vague, Overbroad and Mandates Ongoing Policing, It Casts a Shadow over the Lawful, Constitutionally-Protected Activities of Legitimate Financial News Publishers, Such as StreetAccount, and Provides them with Inadequate Guidance on How to Comply

It has long been recognized that First Amendment rights need "breathing space" and that statutes (or, as in this case, an injunction) restricting or burdening the exercise of First Amendment rights must be narrowly drawn. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973).

The Supreme Court has "repeatedly recognized that the dangers inherent in vague statutes are magnified where laws touch upon First Amendment freedoms." *Parker v. Levy*, 417 U.S. 733, 775 n. 5 (1974) (Stewart, J., dissenting). "Where a statute's literal scope, unaided by a narrowing … interpretation, is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). And where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms … [it] operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked … [t]hey also unquestionably silence[] some speakers whose messages would be entitled to constitutional protection." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (citation omitted).

Courts are rarely called upon to assess whether a prior restraint – as opposed to a statute – is drafted narrowly enough to pass constitutional muster. When this Court had occasion to do so, it did not need to reach the defendants' substantive constitutional defenses, focusing instead on the vagueness and overbreadth of the lower court's injunction:

> We agree that the injunction presents serious questions under the First Amendment and libel law, but find it unnecessary to ultimately determine these issues because we hold that the

> injunction must be vacated as its scope and meaning are unclear.

Metropolitan Opera, *supra*, 239 F.3d at 175-76.

Even were this Court to determine that the injunction here is not absolutely barred by the First Amendment, its contours must nonetheless be strictly scrutinized – both to minimize its First Amendment impact on non-party publishers and to ensure that any affected party is given notice of exactly what speech is prohibited. *See Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 184 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective ..."); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) (prior restraint must be "clear" and "sweep[] no more broadly than necessary"); *accord, Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994).

1. The Injunction is Unconstitutionally Vague

In *Reno*, the Supreme Court held that the prohibition on "indecent" and "patently offensive" communications in the Communications Decency Act raised special First Amendment concerns "because of its obvious chilling effect on free speech." 521 U.S. at 872. Here, as in *Reno*, the injunction's lack of clarity renders it is impossible for the parties affected to discern the precise scope of prohibited versus permitted activities and thus "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id*. at 874.

Moreover, because the permanence of the injunction depends upon the Firms' pursuit of Fly's competitors, StreetAccount and other financial publishers must either err in the direction of self-censorship or assume the risk or possible consequences of overstepping these poorly demarcated boundaries.

For example, during the embargo period the injunction prohibits Fly from disseminating "research reports, summaries, abstracts, headlines, or any other synopses of the plaintiffs' proprietary research recommendations or analyses" but provides no guidance as to what constitutes a summary, abstract or synopsis. If Fly (or StreetAccount) did not refer to a Firm's specific Recommendation or analysis, but reported that the Firm had downgraded (or upgraded) a stock, or simply that the Firm had issued a research note on that stock, would this be permissible under the injunction? Or can a financial publisher not so much as reference the reason for a stock's price movement during the embargo period if the publisher believes that the reason for that movement may be a Recommendation by one of the plaintiffs?

The time limitations of the injunction are also vague and unworkable. For example, the Firms do not generally make the timing of their distribution public, so there is no way of knowing when the "two hour" intraday provision would elapse. Moreover, European stocks begin trading on exchanges that open six to seven hours before the New York Stock Exchange. For Recommendations on European

stocks, does the "half hour after open" refer to the opening in New York or in Europe? The same question arises with respect to Recommendations on Asian stocks.

The supposed distinction between "independent analytical reporting" and the prohibited publication of Plaintiffs' Recommendations is also unworkable. Identifying any given news item (such as a brokerage firm upgrade) as the cause of a move in a stock price is in a very real sense independent analysis given the multitude of factors affecting a stock price on any given day. Is this sufficient to constitute "independent analysis" under the terms of the injunction? Further, the injunction specifies that the pre-open embargo does not apply to independent analysis after 9:30 am but before 10:00 am, but is silent as to how this exemption for "independent analysis" applies to the two-hour intraday embargo.

2. The Injunction is Unconstitutionally Overbroad

In *Madsen*, *supra*, 512 U.S. at 773, 774, the Supreme Court narrowed an injunction directed at protesters outside abortion clinics ("broad prohibition on all images" on signs carried by the protestors burdened more speech than necessary; prohibition on all unconsented approaches to women seeking services at the clinics swept more broadly than necessary because it barred not merely "fighting words," or threatening speech, but even peaceful contacts).

In *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 575 (1987), the Supreme Court struck down a local resolution that prohibited any form of "First Amendment" communications at the airport on the ground that it swept so broadly that "virtually every individual who enters LAX may be found to violate the resolution."

As in *Madsen*, Judge Cote's injunction sweeps up far more expression than necessary to remedy the perceived threat; and, as in *Board of Airport Commissioners*, it sweeps in far more publishers than merely Fly.

With regard to the injunction's overly-broad restraint on protected expression, it strains credulity to imagine that the continued existence of the Firms' research reports would be threatened if Fly (or StreetAccount), in its efforts to identify factors shaping equity market price movements, merely reported that a Firm had upgraded (or downgraded) its rating on a stock, or that a company's share price movement was attributable to a Recommendation by one of the Firms.

Still more significantly, beyond any definitional narrowing and clarification of the injunction, Judge Cote's ruling would still be of grave concern to StreetAccount and other publishers so long as her overbroad invitation to police

and pursue non-party publishers, without any proven basis for a legal claim against them, remains a condition of continued relief under the injunction.[17]

Although the injunction does not expressly apply to non-parties, its continuation beyond one year depends upon active policing by the Firms. The Firms are thus incentivized to pursue other non-party publishers, possibly including StreetAccount, with or without basis. As a result, non-party publishers' speech may be chilled by the vagueness and overbreadth of the terms of the injunction, potentially leading them to self-censor and publish less than they might otherwise be constitutionally entitled to publish. The vagueness and overbreadth of the injunction may also compel the Firms to overreach by pursuing claims against non-parties even if they consider or conclude that they are not well-founded, simply out of fear that otherwise the injunction against Fly might be lifted.

[17] The substantial threat that third party's free speech rights will be chilled outweighs the normal concerns that prohibit jus tertii claims. *See* Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 6:4 ("prudential standards governing the assertion of third party rights can be relaxed in First Amendment claims, when the court determines that society's interest in preventing the chilling of free speech outweighs the normal prudential concerns that prohibit jus tertii claims") (*citing Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989); *The Pitt News v. Fisher*, 215 F.3d 354, 363 (3d Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001)).

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed, and the injunction dissolved, or at the very least substantially narrowed and clarified, because they are based on an insupportable and intolerable expansion of the hot news misappropriation doctrine, whose overbroad application by the District Court threatens to severely abridge the First Amendment rights of Fly, StreetAccount, other publishers of important financial news, and the public at large.

Dated: June 21, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 6,988 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: June 21, 2010
New York, New York

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I, Maryna Sapyelkina, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On June 22, 2010

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