

When the U.S. Supreme Court first established a "hot news" misappropriation tort 89 years ago, Justice Mahlon Pitney could not have imagined his opinion would one day be cited by an aggressive celebrity photo agency battling a snarky entertainment blogger.

But Pitney's opinion and the common law doctrine of unfair competition through misappropriation created by *Int'l News Services Associated Press*, 248 U.S. 215 (1918), is now center stage after U.S. District Court Judge Gary Feess allowed paparazzi agency X17 Inc.'s claim against Mario Lavandeira – known in the blogosphere as Perez Hilton – to proceed.

Last month, Feess ruled X17's, "hot news" claims can encompass photographs as well as words, and they survive Copyright Act preemption.

Lavandeira is accused of printing X17's photos without authorization on his gossip blog, *PerezHilton.com*, sometimes before they are featured on X17's site. His attorneys argue the use of the photos falls within fair use – such as fake drool on actor Mark Walberg's mouth or "Crazy" scribbled over Britney Spears' head – are transformative.

X17 sued Lavandeira in December for copyright infringement after he allegedly ignored requests to stop using the company's images. X17 claims its damages total more than \$20 million because Lavandeira derives significant revenue from his site, which he has said draws millions of visitors, and the postings of photos destroys their value.

Lavandeira's attorney, Bryan Freedman of Los Angeles' Freedman & Taitelman, said removing the photos would be an admission that they are not fair use.

"Our client has made it clear: He will go all the way on behalf of bloggers every-where to make a statement that this is fair use and people can take photographs and transform them for the purpose of satirical comedy," Freedman said. Lavandeira also is represented by Gregory Doll and Michael Amir of Doll Amir & Eley in Los Angeles.

"The case tied into the politics of newsgathering in the early days of the media," Loyola Law School professor Jay Dougherty said. "We only just had wireless communications. It was an important case at the time."

The hot news tort lay mostly dormant for another eight decades until 1997, when the 2nd U.S. Circuit court of Appeal applied it in a case filed by the NBA against Motorola. *National Basketball Association v. Motorola Inc.*, 105 F.3d 841 (1997).

"X17 thus adequately states the hot news claim (notwithstanding any irony in the suggestion that Ms. Spears' travails qualify as newsworthy)," Feess wrote. No trial date has been set.

Dougherty said the decision opens the door for X17.

"If X17 can now persuade a court that its allegations are true, including, for example, that the photographs are time-sensitive, the parties are in direct competition and permitting the use would be "free-riding" that would threaten X17's ability to stay in that business, then it seems likely they will win on the "hot news" claim," Dougherty said.

But despite the decision, Dougherty said he doesn't think it will open the floodgates to more hot news claims.

"I think it will be limited to this sort of time-sensitive activity," he said.