Hot Off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the "Hot News" Misappropriation Tort in the Internet Age

ABSTRACT

Ironically, in an increasingly digital world, print newspapers are pinning their hopes of survival on a legal doctrine created during the telegraph era. Internet-based competitors are taking original newspaper content without permission or attribution, and the traditional Fourth Estate is taking them to court, claiming "hot news" misappropriation, a nearly century-old tort protecting against free riding in the newsgathering business. In recent years, some commentators have written off common law misappropriation as obsolete due to technological advances, updates to federal copyright law, and First Amendment concerns. Courts still recognize misappropriation claims in a handful of jurisdictions, but the muddled jurisprudence in this area has yet to make much of an impact on the free riding problem in journalism today.

This Note examines the doctrinal roots of hot news misappropriation and analyzes the manner in which modern courts have strayed from the original nature and scope of its protection. The original foundation of the tort, unfair competition, has been forgotten as courts have focused too much on traditional exclusionary rights over information, bumping up against free speech concerns along the way. The author concludes that the instinctive reliance by newspapers on misappropriation is correct: The original formation of the tort is indeed relevant to the current online news market. It can help protect the investments in newsgathering made by newspapers—still the primary generators of original news content today—so that their business is not prematurely swallowed by a fledgling online news community with an infrastructure still too weak to fully satisfy the public's newsgathering needs. The tort should be codified, rather than left for courts to apply in traditional common law fashion, so that the law will apply uniformly across jurisdictions and allow participants in the news

market to shape their behavior accordingly. At the same time, lawmakers should leave a little room for judicial discretion in crafting remedies in individual cases, as the technology, motives, and other circumstances are bound to vary.

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The future of the news industry is unquestionably online.[1] Traditional press outlets can no longer afford to sink money into ink

1. *See* Paul Grabowicz, *The Transition to Digital Journalism: Print Editions Decline*, KNIGHT DIGITAL MEDIA CENTER, http://multimedia.journalism.berkeley.edu/tutorials/digital-transform/print-editions-decline (last updated Feb. 5, 2011); *see also* SUZANNE M. KIRCHHOFF, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION (2010), *available at* http://www.fas.org/sgp/crs/misc/R40700.pdf; Megan McArdle, *This Is the End of the Newspaper Business*, THE ATLANTIC, Oct. 26, 2009, http://www.theatlantic.com/business/archive/ 2009/10/this-is-the-end-of-the-newspaper-business/29083; NEWSPAPER DEATH WATCH, http://newspaperdeathwatch.com (last visited Jan. 15, 2011); Pew Project for Excellence in Journalism & Rick Edmonds, Poynter Inst., *Newspapers*, JOURNALISM.ORG, http://www. stateofthemedia.org/2010/newspapers_summary_essay.php (last visited Feb. 8, 2011) [hereinafter *Newspapers*]; Richard Posner, *Are Newspapers Doomed?*, BECKER-POSNER BLOG (June 29, 2008, 2:07 PM), http://www.becker-posner-blog.com/2008/06/are-newspapers-doomed--posner.html; Linton

and home delivery when the modern news consumer wants what only the Internet can offer: free, paperless, real-time updates on the go.[2] Having lost subscribers,[3] and consequently advertisers,[4] to Internet-based competitors with lower overhead and more technologically appealing platforms, print newspapers have had to slash budgets, declare bankruptcy, or close down completely.[5] At least a dozen metropolitan dailies across the United States have shuttered operations since March 2007, while several other outlets have been forced to scale back print production to only a few days per week.[6] Meanwhile, online-only outlets are thriving; the popular news aggregator *The Huffington Post*, for example, predicted in January 2011 that it would double revenues for the second year in a row.[7] The following month, the company announced AOL was acquiring it for $315 million.[8]

In an attempt to resuscitate the industry's outdated business model, some newspapers have switched to a print-online hybrid or online-only delivery via "e-editions."[9] They have succeeded in retaining some readers,[10] but their online advertising revenue is "dramatically less" than it had been for their print versions.[11] The

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Weeks, *Chronicling the Death of American Newspapers*, NAT'L PUB. RADIO (Mar. 2, 2009), http://www.npr.org/templates/story/story.php?storyId=101237069; Press Release, Fed. Trade Comm'n, FTC Announces Third Workshop for the Future of Journalism June 15 at the National Press Club (May 24, 2010), *available at* http://www.ftc.gov/opa/2010/05/newmedia.shtm.

2. *See* Grabowicz, *supra* note 1; *Newspapers*, *supra* note 1. The Congressional Research Service notes that in addition to competition from online sources, economic constraints of advertisers during the recent recession, existing debts acquired prior to the recession, and souring interest from investors has also impacted newspapers' financial well-being. *See* KIRCHHOFF, *supra* note 1, at 5–8.

3. Newspapers have lost almost 17% of their circulation in the past three years, and more than 25% since 2000. *Newspapers*, *supra* note 1.

4. Grabowicz, *supra* note 1; *Newspapers*, *supra* note 1.

5. Grabowicz, *supra* note 1; *Newspapers*, *supra* note 1.

6. NEWSPAPER DEATH WATCH, *supra* note 1. The *Detroit Free Press* and the *Detroit News*, which operate under a joint business agreement, ceased home delivery on Mondays, Tuesdays, Wednesdays, and Saturdays in March 2009 in response to huge revenue declines. Bill Shea, *Circulation Declines 12.1 Percent for Detroit Free Press, 10 Percent for Detroit News*, CRAIN'S DETROIT BUSINESS, Apr. 27, 2010, http://www.crainsdetroit.com/article/20100427/FREE/100429878/circulation-declines-12-1-percent-for-detroit-free-press-10-percent-for-the-detroit-news.

7. David Kaplan, *HuffPo's Coleman: 'We'll Double Revenues Again This Year,'* PAIDCONTENT.ORG (Jan. 14, 2011), http://paidcontent.org/article/419-huffpos-coleman-well-double-revenues-again-this-year.

8. Bryony Jones, *What Will AOL-Huffington Post Merger Mean?*, CNN.com, http://edition.cnn.com/2011/BUSINESS/02/07/huffington.post.aol.merger/index.html.

9. Grabowicz, *supra* note 1.

10. *See id.*

11. Weeks, *supra* note 1. The aftermath of the Detroit newspapers' hybrid model, as described above, is the perfect example. *See* Shea, *supra* note 6. While visitors to both the newspapers' websites noticed some increase in traffic the year following the change, there was a

print media have yet to determine exactly how to make up the difference, but they are still gunning for survival on the Web,[12] which the Pew Research Center has dubbed "the first place of publication" in journalism today.[13]

Some commentators see the rivalry between traditional media and "new media" as a boon for modern society, since it drives the marketplace to provide the most efficient and widespread news delivery possible.[14] The resulting competition can also enrich public discourse by providing a platform for a variety of voices and perspectives, from trained newspaper reporters to citizen bloggers. However, the digitalization of news delivery could spiral out of control without a proper legal framework to enable a successful print-to-online transition.[15]

As it stands, traditional newspapers buttress the entire news industry by generating the majority of all original news content,[16] because, unlike new-media startups, newspapers tend to have the resources and infrastructure to support robust, original

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disproportionate loss in circulation of print editions: 12% for the *Free Press* and 10% for the *News*. *Id.*

12. *See id.* The emergence of online news sites has engendered debate about various modes of improving revenue streams, including creating "pay walls," selling online subscriptions, creating various content-sharing and licensing schemes, and soliciting donations from the public and/or government. *Id.*; *see also* KIRCHHOFF, *supra* note 1, at 17–18; Jacob Weisberg, *The New Hybrids: Why the Debate About Financing Journalism Misses the Point*, SLATE (Feb. 21, 2009), http://www.slate.com/id/2211678/. One of the biggest–if not *the* biggest–player in the newspaper industry, *The New York Times*, announced in March 2011 that it would begin capping free access at twenty articles per month, after which point readers will be asked to pay a digital subscription fee. Arthur Sulzberger, Jr., *Letter to Our Readers: Times Begins Digital Subscriptions*, N.Y. TIMES, Mar. 28, 2011, http://www.nytimes.com/2011/03/28/opinion/l28times.html.

13. Pew Project for Excellence in Journalism, *How News Happens: A Study of the News Ecosystem of One American City*, JOURNALISM.ORG (Jan. 11, 2010), http://www.journalism.org/analysis_report/how_news_happens [hereinafter *How News Happens*]. The Pew Research Center's Project for Excellence in Journalism, conducted through a nonpartisan Washington, D.C.-based think tank, provides empirical analysis of the performance of the press, releasing an annual report entitled The State of the News Media. *About the Center*, THE PEW RES. CENTER FOR THE PEOPLE & THE PRESS, http://people-press.org/about (last visited Feb. 2, 2011). "How News Happens," released as part of the 2010 State of the News Media, analyzed a week's worth of local news coverage in Baltimore, Maryland, to learn more about the "modern news 'ecosystem' of a large American city." *How News Happens*, *supra*. The study revealed that most news breaks first on the Web. *Id.*

14. *See* KIRCHHOFF, *supra* note 1, at 21 ("[O]bservers see the decline of newspapers as part of a natural, even necessary, transition for an industry that is variously described as having become too liberal, too corporate, too smug, or too ineffectual and generally in need of a good shaking up. In a market-based economy, some argue, the best approach is to let new models arise without government direction or interference.").

15. *See* Andrew L. Deutsch, *Protecting News in the Digital Era: The Case for a Federalized Hot News Misappropriation Tort*, PRACTISING L. INST., Apr. 2010, at 513–16.

16. *How News Happens*, *supra* note 13. ("[M]ost of what the public learns is still overwhelmingly driven by traditional media–particularly newspapers.").

newsgathering.[17] A reporter for a traditional newspaper will invest time and effort to develop a source network throughout his entire career; these sources tip him off to news as it breaks on a daily basis.[18] Once he catches wind of a developing story, his sources also assist him in getting the right information from the right people, fleshing out both sides of the story, and double-checking his facts prior to publication.[19]

After a day's worth of effort in this regard, the reporter writes a story that will be published in the newspaper scheduled to land on subscribers' doorsteps the following morning. But the shadow of Internet-based competition looms large, and the newspaper reporter feels pressure to break the news online first,[20] either by publishing the entire story online or by "teasing" to the full story that will appear in the following day's newspaper with a headline and brief synopsis of his report.[21] The idea is to create a dual-platform model that captures

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17. Pew Project for Excellence in Journalism, *Community Journalism*, JOURNALISM.ORG, http://www.stateofthemedia.org/2010/specialreports_community_journalism.php (last visited Feb. 8, 2011).

18. Personal knowledge of the author, based on her six-year career in newspaper journalism. *See also* Linda Austin, *Beyond Flacks–Top Reporters Tell How to Develop Sources Inside Companies*, BUSINESSJOURNALISM.ORG (Mar. 20, 2010), http://businessjournalism.org/2010/03/20/beyond-flacks-how-to-develop-sources-in-companies (quoting *New York Times* reporter and Pulitzer Prize finalist Diana Henriques: "source development and source management is really job [one] for journalists"); Steve Buttry, *Developing and Cultivating Sources*, INT'L JOURNALISTS' NETWORK (June 27, 2008), http://ijnet.org/stories/developing-and-cultivating-sources.

19. This is, at least, the ideal model for responsible journalism. *See* ROBERT J. HAIMAN, BEST PRACTICES FOR NEWSPAPER JOURNALISTS, *available at* http://www.freedomforum.org/publications/diversity/bestpractices/bestpractices.pdf. The Internet's speed and wide reach can tempt those looking to scoop competitors to publish prior to thorough fact-checking, and this may lead to unfortunate results. *See, e.g.*, Laurie Sullivan, "*A Little Bird Told Me: Twitter as News Source*," MEDIAPOST BLOGS (Sept. 7, 2010, 2:27 PM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=135284. When a *Washington Post* sports columnist posted erroneous information on Twitter regarding the number of days Pittsburgh Steelers quarterback Ben Roethlisberger had been suspended, he ended up being temporarily suspended himself. *Id.* But the information had already "spread like wildfire" by that point, having been picked up by other news sources. *Id.*

20. *See* Mark Van Patten, *Does 'Web First' Strategy Make Sense for Small Newspapers?*, PBS.ORG (Sept. 12, 2008), http://www.pbs.org/mediashift/2008/09/does-web-first-strategy-make-sense-for-small-newspapers256.html.

21. The Poynter Institute, a nationally recognized training ground for journalists, promotes Internet-based news platforms for media outlets of all types. *See generally* POYNTER.ORG, www.poynter.org (last visited Jan. 17, 2011). The Institute's Internet-based News University cites to *Financial Times* Editor Lionel Barber's comments on the future of newspapers: "You don't give up on the newspaper. But you have to adapt it to make it complementary with the Web. You no longer worry about a scoop in a newspaper. You point it out online." *Financial Times Editor Dismisses Notion That Newspapers Are Like Dinosaurs*, POYNTER'S NEWS U. (Nov. 22, 2010), http://www.newsu.org/node/220388. Commentators disagree over whether the print industry should make a complete transition to the web, or whether it should use online "teases" to drive readers back to the print product, which is the revenue

potential readers online, using the tease to drive them to the print product, which is still the newspaper's primary revenue generator.[22] As soon as the information appears online, however, it becomes easy and nearly costless for Internet-based competitors to transpose those scrupulously gathered facts onto their own sites, with or without attribution.[23]

A recent study shows that such free riding occurs on a regular basis.[24] While newspapers are not blameless and often use competitors' breaking news reports as a basis for their own stories,[25] studies show they are victims more often than victimizers.[26] Recently, the Fair Syndication Consortium, a group of publishers working to improve content distribution on the web, found that within a thirty-day period, more than 75,000 websites reused newspaper content from all over the country without permission.[27] Sometimes this meant borrowing a headline; other times, it involved the reuse of large chunks of text.[28] But the number of words taken is immaterial, as any content-lift—no matter how small—has damaging consequences: It forces one news outlet to absorb the cost of newsgathering, while the other capitalizes on the output for free.

Blogs, popular news aggregators such as Google and Yahoo, and social networking sites like Facebook serve as platforms for this

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generator for newspapers. Terry Heaton, *Local Media in a Postmodern World: Using Free to Sell Paid*, THE DIGITAL JOURNALIST, July 2009, http://www.digitaljournalist.org/issue0907/using-free-to-sell-paid.html.

22. *See* Heaton, *supra* note 22.

23. FAIR SYNDICATION CONSORTIUM, RESEARCH BRIEF: HOW U.S. NEWSPAPER CONTENT IS REUSED AND MONETIZED ONLINE (2009), *available at* http://fairsyndication.org/guidelines/USnewspapercontentreusestudy.pdf. Take, for example, Gawker's quick turnaround of a 2009 *Washington Post* article, as recounted by *Post* reporter Ian Shapira. Ian Shapira, *The Death of Journalism (Gawker Edition)*, WASH. POST, Aug. 2, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/31/AR2009073102476.html. Shapira estimates it took him an entire workday to complete a 1,500-word profile of a business consultant. *Id.* Gawker repackaged Shapira's original story for its own site in "a half-hour to an hour," failing to attribute any of the information to the *Post* in the body of the piece but including a small link at the bottom of the blog post to Shapira's story. *Id.* Gawker enjoyed thousands of hits on its rewrite. *Id.* Shapira says his story received more web traffic than it otherwise would have thanks to the link to the *Post*'s site. *Id.* However, he worries that a relatively small boost in attention is not enough to help save the newspaper's bottom line–not to mention his own 401(k)–in light of the number of readers he estimates did not take time to click through to the original. *See id.*

24. FAIR SYNDICATION CONSORTIUM, *supra* note 23.

25. Shapira, *supra* note 23.

26. *See* FAIR SYNDICATION CONSORTIUM, *supra* note 23.

27. *Id.* The study took place during a thirty-day period ending November 15, 2009. *Id.*

28. *Id.* The websites reproduced almost 112,000 near-exact copies of newspaper content (including more than 80% of the original article); used less than 80% but more than 125 words of the article 163,000 times; and used headlines or less than 125 words 357,000 times. *Id.*

type of behavior.[29] They all depend on newspapers to originate content, which their visitors may then access and share without contributing any original reporting or commentary.[30] This facilitates a free flow of information, but does little to incentivize further exploration of the facts. The process largely preserves newspapers' original version of events; therefore, newspapers quietly "set the narrative agenda for most other media outlets."[31]

Unfortunately, because it does all the work at the front end without compensation, the newspaper falls victim to a classic free rider scenario that threatens the continuity of this news-sharing cycle.[32] The Newspaper Association of America reports that the average online news consumer looking for a quick update tends to choose aggregator sites over newspaper websites, scanning headlines without ever clicking through to the original source.[33] Loss of readers (of both print and online editions) translates to loss of advertising revenue, which forces newspapers to lay off reporters and thus make shortcuts in news coverage.[34] This means less original news reporting by newspapers, and therefore a diminished source of information for the public at large.[35] Yet, instead of diverting resources toward newsgathering to help fill the growing void in news coverage, Internet sites continue their cannibalistic behavior,[36] apparently too myopic to

29. *Id.*; *see also Top Sites*, ALEXA.COM, http://www.alexa.com/topsites (listing Google, Yahoo, and Facebook among the most visited sites as of Oct. 22, 2010).

30. Pew Project for Excellence in Journalism, *Understanding the Participatory News Consumer*, JOURNALISM.ORG (Mar. 1, 2010), http://www.journalism.org/analysis_report/understanding_participatory_news_consumer [hereinafter *Participatory Consumer*]. More than 70% of consumers the Pew Center surveyed recently said they got news forwarded through e-mail or posts on social networking sites. *Id.* However, only 37% of Internet users said they contributed to the creation of news, commentary about it, or dissemination of information via social media. *Id.*

31. *How News Happens*, *supra* note 13.

32. Deutsch, *supra* note 15, at 514–17. News is a "public good" in economic terms, which means it is non-rivalrous and non-excludable. Staff Discussion Draft, FED. TRADE COMM'N, POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 4 (June 15, 2010) [hereinafter FTC DISCUSSION DRAFT], *available at* http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf. In other words, "one person's consumption of the news does not preclude another person's consumption of the same news," and "once the news producer supplies anyone, it cannot exclude anyone." *Id.* Free riding becomes easy in such circumstances, and it becomes difficult "to ensure that producers of public goods are appropriately compensated." *Id.*

33. COMMENTS OF NEWSPAPER ASSOCIATION OF AMERICA BEFORE THE OFFICE OF MANAGEMENT AND BUDGET 9 (Mar. 24, 2010), *available at* http://www.naa.org/docs/Public-Policy/NAA_Comments_IPEC.3.24.2010.pdf. The NAA cites data from a January 2010 study by Outsell, Inc., showing that 44% of visitors to Google News simply used the site to scan headlines and never clicked through to individual newspaper sites. *Id.*

34. *Newspapers*, *supra* note 1.

35. *See How News Happens*, *supra* note 13.

36. *See id.*; *see also Participatory Consumer*, *supra* note 30.

see—or too greedy to care—that a focus on short-term advertising profits threatens their livelihood in the long term.

Without an effective legal remedy to protect against unauthorized use of newspapers' online content, the original Fourth Estate will vanish before an adequate newsgathering infrastructure can develop to support its digitalized replacement.[37] Government officials recognize this danger and are studying proposals on how to avoid a collapse of the news industry.[38] Last year, the Federal Trade Commission (FTC) hosted a series of workshops on the topic, soliciting comments and proposals for a viable solution.[39]

As the FTC continues to deliberate from a policy standpoint,[40] legal scholars bat doctrinal arguments back and forth.[41] They have recognized the need to provide a proper legal framework to govern the news industry for years.[42] Yet the literature has only recently picked up on the special role newspapers play in newsgathering generally;[43] and even those commentators who do zero in on the newspaper crisis fail to explain exactly how newspapers can fit into a concrete, viable solution for the industry as a whole.[44] This Note uses newspapers as a

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37. *See* FTC Discussion Draft, *supra* note 32.

38. *See id.*

39. *Id.*

40. The FTC is still accepting public comment on the issue. *See Notice of Public Workshop and Request for Comments*, FED. TRADE COMM'N, https://ftcpublic.commentworks.com//ftc/newsmediaworkshop (last visited May 17, 2011).

41. *See, e.g.*, Deutsch, *supra* note 15; Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421, 470–71 (1998).

42. *See* sources cited *supra* note 41.

43. *See, e.g.*, Jeena Moon, Note, *The "Hot News" Misappropriation Doctrine, the Crumbling Newspaper Industry, and Fair Use as Friend and Foe: What is Necessary to Preserve "Hot News,"* 28 CARDOZO ARTS & ENT. L. J. 631 (2011); Brian Westley, Comment, *How a Narrow Application of "Hot News" Misappropriation Can Help Save Journalism*, 60 AM. U. L. REV. 691 (2011).

44. This Note rejects current proposals on the table as either doctrinally fallible or practically unworkable, given their relatively vague, superficial analysis. *See, e.g.*, Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011) (recognizing the doctrinal tension inherent in hot news misappropriation, but failing to offer a concrete solution), *available a*t http://www.chicagoip.com/balganesh.pdf; Alfred C. Yen, *A Preliminary First Amendment Analysis of Legislation Treating News Aggregation as Copyright Infringement*, 12 VAND. J. ENT. & TECH. L. 947 (2010) (ignoring existing common law doctrine and considering only statutory remedies in copyright, ultimately rejecting them as unworkable); Jeena Moon, *supra* note 43 (arguing for an amendment to the Copyright Act to solve the news crisis); Daniel S. Park, Note, The Associated Press v. All Headline News*: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism*, 25 BERKELEY TECH. L.J. 369 (2010) (accepting dated common law doctrine at face value); Eric P. Schmidt, Note, *Hot News Misappropriation in the Internet Age*, 9 J. TELECOMM. & HIGH TECH. L. 313, 343 (2011) (postulating in very general terms that "news media in the 21st century must develop new norms of fair competition," using existing common law doctrine as a "workable foundation"); Brian Westley, Comment, *How a Narrow Application of "Hot News"*

lens through which to analyze legal protection for information products, concluding that courts have shifted too far from the original purpose and scope of this protection to offer any meaningful remedy for victims of information piracy in the Digital Age.[45] By focusing almost entirely on content originators' proprietary rights over information rather than the inequitable conduct of those who misuse that information,[46] current law fails to cure the free riding problem that undermines optimal newsgathering incentives. At the same time, this line of jurisprudence threatens the free flow of information to the public, and that concern deserves equal attention.[47]

Statutory guidance is necessary to bring courts back in line with a doctrinal scheme that, while developed in the era of the telegraph, remains vital to the news industry of the twenty-first century. This Note envisions a new law that marries a correct interpretation of this precedent, nearly one hundred years old, and the practical realities of newsgathering in the twenty-first century. Part I provides background on the law currently in place to protect newsgatherers, including the state common law tort of "hot news" misappropriation and the federal Copyright Act. Part II analyzes various proposed improvements to the current system. Part III proposes a statutory remedy inspired by the reasoning of a recent case in which the court exercised its equitable powers to restrain the conduct of a "hot news" misappropriator rather than expand the property rights of the original newsgatherer. Part IV concludes that the statute created to address this problem should be uniform across jurisdictions, either as a federal statute or a model statute for states. This new law would create uniform standards for tort liability while leaving room for some judicial discretion in applying those standards in individual cases, given that technology moves much faster than the average statutory amendment.

Misappropriation Can Help Save Journalism, 60 AM. U. L. REV. 691 (2011) (arguing for a variation on current common law protection over a statutory remedy).

45. This theory aligns with a more generalized postulate Professor Michael D. Pendleton advanced in 2005: When crafting new laws to protect information products, we tend to fall back on traditional exclusivity principles grounded in copyright law as a default without evaluating whether they are appropriate for the situation at hand. Michael D. Pendleton, *Balancing Competing Interests in Information Products: A Conceptual Rethink*, 14 INFO & COMM. TECH. L. 241, 247 (2005). Often those rigid property-based regimes are not flexible enough to accommodate the balancing of interests at play regarding intangibles such as information products: the interests of the creators of those products, the interests of competitors, and the interest of the public at large. *Id.* at 246. This point resonates well in the news context, where freedom of information concerns and commercial practicability come into play; yet the concept appears to have caught scholars' attention only recently. *See* sources cited *supra* note 44.

46. *See infra* text accompanying notes 129–90.

47. *See* Yen, *supra* note 44.

I. YESTERDAY'S NEWS: THE ORIGIN OF LEGAL PROTECTION OR FACT-FINDERS

News outlets typically allege misappropriation under two bodies of law: the state law tort of "hot news" misappropriation and federal copyright law.[48] Opinions diverge on whether Congress meant to include the offense of misappropriation within its overarching federal copyright scheme—thereby preempting any state laws addressing that offense—or whether the two are so fundamentally different that the misappropriation doctrine falls outside the field that Congress expressly preempted in the Copyright Act.[49] This Part outlines the development of both the hot news doctrine and federal copyright law and demonstrates that because each body of law arose to serve a distinct purpose, each vindicates a fundamentally different set of rights. Therefore, the Copyright Act does not cover both; each remains a unique and viable cause of action in the newsgathering context.

A. The "Hot News" Doctrine

The Supreme Court issued the seminal opinion in hot news jurisprudence, *International News Service v. Associated Press*, in 1918.[50] In *INS*, the Court upheld an injunction preventing the International News Service from "taking or gainfully using" the Associated Press' news until its "commercial value as news" to the AP and its member newspapers had "passed away."[51] While some critics find it outmoded because technology has changed significantly since then,[52] modern claims still rely on the case to support the proposition that misappropriation of newsgathering efforts for commercial gain is tortious and deserving of equitable sanction by the court.[53]

48. *See, e.g.*, Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491 (D. Md. 2010); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 WL 3100963 (M.D. Pa. Sept. 23, 2009); Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009); X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102 (C.D. Cal. 2007).

49. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][f] (Matthew Bender, ed. 2010).

50. 248 U.S. 215 (1918).

51. *Id.* at 245–46.

52. *See* Brief for Google Inc. & Twitter Inc. as Amici Curiae in Support of Reversal, Barclays Capital, Inc. v. Theflyonthewall.com, Inc., No. 10-1372-cv, 2010 WL 2589770 (2d Cir. Apr. 9, 2010) [hereinafter Google & Twitter Brief].

53. *See, e.g.*, cases cited *supra* note 48.

1. *International News Service v. Associated Press*

The *INS* decision marked the birth of the "hot news" misappropriation tort that inspired vigorous dissent at the time and draws criticism even today.[54] The dispute at the center of *INS* began when the AP—a cooperative organization that gathered news for nearly one thousand member newspapers—discovered that rival newsgathering corporation INS had been taking the AP's breaking news reports about the war in Europe and reselling them as if they represented original INS reporting.[55] This practice began after foreign governments blocked INS—which served about four hundred newspapers at the time—from gathering or transmitting any news from their soil.[56] To compensate, INS allegedly began bribing employees of the AP's member publications to feed them AP-generated news prior to publication.[57] INS also copied news that had already been published on bulletin boards or in early editions of the AP's member newspapers.[58] The organization waited for the AP's East Coast dispatches and then telephoned or telegraphed the information to its own West Coast publications, taking advantage of the time difference to permit "pirated news to be placed in the hands of [its] readers sometimes simultaneously with the service of competing Associated Press papers, occasionally even earlier."[59]

Justice Pitney, writing for the majority, recognized that the AP had invested significant resources in the gathering and transmission of its war dispatches, only to have INS appropriate for itself "the harvest of those who have sown."[60] Pitney saw this practice as incredibly unjust:

> Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not.[61]

He awarded the AP a "quasi property" right against INS because, to competitors in the news industry, information is "stock in trade" that retains value only as long as it remains fresh.[62] But

54. *See Int'l News Serv.*, 248 U.S. at 246–67 (Brandeis, J., dissenting); Google & Twitter Brief, *supra* note 52.

55. *Int'l News Serv.*, 248 U.S. at 221–31; *id.* at 263 (Brandeis, J., dissenting).

56. *Id.* at 263 (Brandeis, J., dissenting).

57. *Id.* at 231 (majority opinion).

58. *Id.*

59. *Id.* at 238–39.

60. *Id.* at 239–40.

61. *Id.* at 240.

62. *Id.* at 235–36.

ultimately, Justice Pitney wrote, the case turned on unfair competition and the need to safeguard incentives to invest in newsgathering, which benefits society as a whole.[63] The Court upheld an injunction against misappropriating "hot news" gathered by a competitor—not to provide the AP with a monopoly over the news, but simply to give it enough lead time to profit from its entrepreneurship.[64]

Justice Holmes dissented, finding an injunction unnecessary so long as INS provided proper attribution to the AP.[65] Justice Brandeis opposed Justice Pitney's holding even more strongly, objecting to any limitation on the free flow of information.[66] Creating a property right in news contravened the public interest, he thought; and in any event, it was Congress, not the Court, that should take on such a far-reaching policy choice.[67]

2. State Responses to *INS*

Although *INS* lost its precedential value in 1938 when the Supreme Court abrogated federal common law in *Erie Railroad Co. v. Tompkins*, litigants alleging misappropriation still cite the case for its rationale.[68] For several decades after *Erie*, at least three states—Pennsylvania, California, and New York—continued to recognize the tort of misappropriation, even beyond the bounds of the news industry.[69] In *McCord v. Plotnick*, decided in 1951, the California District Court of Appeal cited *INS* as the determinative legal precedent for its finding that a trade publication in the textile industry had misappropriated content from another textile publication.[70] Colorado, Illinois, Maryland, Missouri, North Carolina, South Carolina, and Wisconsin followed suit in the 1970s and 1980s.[71]

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63. *Id.* at 235.

64. *Id.* at 239–41.

65. *Id.* at 246–47 (Holmes, J., dissenting).

66. *Id.* at 250–63 (Brandeis, J. dissenting).

67. *Id.* at 267.

68. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

69. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 (2010); *see* McCord v. Plotnick, 239 P.2d 32 (Cal. Dist. Ct. App. 1951) (affirming a judgment that found one news outlet liable for misappropriating news from a competing publication); Nat'l Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (N.Y. Sup. Ct. 1955) (finding that recreation of radio broadcasts for immediate rebroadcast constituted misappropriation); Pottstown Daily News Pub. Co. v. Pottstown Broad. Co., 192 A.2d 657 (Pa. 1963) (allowing a misappropriation claim to go forward against a radio station).

70. *McCord*, 239 P.2d at 33.

71. *See* Am. Television & Commc'ns Corp. v. Manning, 651 P.2d 440, 445 (Colo. App. 1982) (holding that the tort of unfair competition, based on the misappropriation doctrine stemming from *INS*, was available in Colorado); Bd. of Trade of Chi. v. Dow Jones & Co., 456 N.E.2d 84, 88 (Ill. 1983) (recognizing the tort of misappropriation as applied to defendant's use of

The courts of these states recognized general, *INS*-based misappropriation claims alleging piracy of subscription-based television programming, financial data, and recorded music via emerging technology.[72]

At the same time, courts in other jurisdictions hesitated to adopt a general misappropriation tort.[73] A federal district court in Massachusetts, applying state law, explicitly rejected *INS* in 1942.[74] It concluded that "[e]xcept where there has been a breach of trust or contract . . . it is not unfair competition in Massachusetts to use information assembled by a competitor."[75] Similarly, courts in other jurisdictions, including Florida and Texas, cabined the misappropriation tort within the limited scenario contemplated in the *INS* opinion: one party attempting to pass off a competitor's goods as its own.[76] Both states declined to recognize *INS*-based causes of action without those elements.[77]

The tort still survives in several jurisdictions, as evidenced by recent cases in federal courts applying California, Maryland, New York, and Pennsylvania law.[78] However, the American Law Institute sees "little enduring effect" in the state-law misappropriation tort as envisioned by the *INS* Court because of its narrow scope and

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plaintiff's stock market index as the basis of its own stock index futures contracts without permission); GAI Audio of N.Y., Inc. v. Columbia Broad. Sys., Inc., 340 A.2d 736, 745–46 (Md. Ct. Spec. App. 1975) (recognizing the tort of misappropriation with regard to piracy of musical recordings); Nat'l Broad. Co. v. Nance, 506 S.W.2d 483, 485 (Mo. App. 1974) (holding that "tape piracy" amounted to a form of misappropriation and deserved an injunction to prevent future misuse); Liberty/UA, Inc. v. E. Tape Corp., 180 S.E.2d 414, 416 (N.C. Ct. App. 1971) (finding *INS* "particularly applicable" to a music piracy case); Columbia Broad. Sys., Inc. v. Custom Recording Co., 189 S.E.2d 305, 312 (S.C. 1972) (finding *INS* and its progeny to be "persuasive, if indeed not mandatory," in unfair competition cases); Mercury Record Prods., Inc. v. Econ. Consultants, Inc., 218 N.W.2d 705, 714 (Wis. 1974) (deciding that *INS* "stands" with relation to record piracy).

72. *See* cases cited *supra* note 71.

73. *See, e.g.*, Triangle Publ'ns, Inc. v. New Eng. Newspaper Publ'g Co., 46 F. Supp. 198, 203 (D. Mass. 1942).

74. *Id.*

75. *Id.*

76. *See* Herald Publ'g Co. v. Fla. Antennavision, Inc., 173 So. 2d 469, 474 (Fla. Dist. Ct. App. 1965) (finding it inappropriate to enjoin the rebroadcast of television signals "that lacked the element of palming off. It is incontrovertible that all broadcasts are received and distributed by the community antenna without any modification of program content; therefore no question of 'implied misrepresentation' by failing to give the originator proper credit, a misrepresentation present in [*INS*]"(quoting Cable Vision, Inc. v. KUTV, Inc. 335 F.2d 348, 351 (9th Cir. 1964))); Loeb v. Turner, 257 S.W.2d 800, 803 (Tex. App. 1953) (recognizing that, post-*Erie*, *INS* was no longer controlling; but if it were, it would not apply where a Texas radio station rebroadcast facts originally broadcast on an Arizona station, because there was no direct competition as there had been between INS and AP).

77. *Herald Publ'g Co.*, 173 So.2d at 474; *Loeb*, 257 S.W.2d at 803.

78. *See* cases cited *supra* note 48.

inconsistent application over the years.[79] Furthermore, the United States Supreme Court apparently views misappropriation as purely a state tort law issue and therefore sees no need to develop federal doctrine in this area.[80]

B. Copyright Protection Versus the Hot News Misappropriation Tort

While state courts have applied misappropriation inconsistently over the years, Congress and the courts have molded copyright law into a much more centralized regime.[81] Initially, two copyright schemes coexisted in parallel: state common law remedies inherited from England and a federal statutory scheme enacted pursuant to the Copyright Clause of the United States Constitution.[82] Federal copyright law, first codified in 1790, protected published works, while state law persisted as a remedy for authors of unpublished materials.[83] State copyright regimes endured even after Congress updated the federal statute in 1909.[84] The last major overhaul of the Copyright Act, in 1976, sought to unify the disparate mechanisms for copyright protection by broadly preempting state law claims.[85] As a result, some scholars and judges believe this overarching federal scheme supersedes state law claims of hot news misappropriation.[86]

1. Modern Copyright Law as Applied to News

Although the Copyright Clause does not explicitly require the "writings" it protects to be "original," the Supreme Court has defined the scope of copyright protection in terms of originality since the late

79. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 (2010).

80. The Court occasionally cites *INS* for general rules such as the proposition that facts are not copyrightable. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353–54 (1991); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985). However, it has yet to reaffirm the case's substantive holding. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (2010). Instead, it has left standing a 1941 decision that declares the issue a matter of state law post-*Erie*. *See* Fashion Originators' Guild, Inc. v. Fed. Trade Comm'n, 312 U.S. 457, 468 (1941).

81. *See* NIMMER & NIMMER, *supra* note 49, § 1.01[B].

82. U.S. CONST. art. I, § 8, cl. 8; NIMMER & NIMMER, *supra* note 49, § 1.01[A]. The Framers had envisioned a federal scheme to protect the rights of authors and innovators, giving Congress the power "to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8.

83. NIMMER & NIMMER, *supra* note 49, § 1.01[B].

84. *Id.* The 1909 statute did include a preemption provision, but stipulated that there was still no preemption for unpublished works. *Id.*

85. *Id.*

86. *See id.*

nineteenth century.[87] According to the Court, the crucial terms "authors" and "writings" within the Clause "presuppose a degree of originality" that "remains the touchstone of copyright protection today."[88] In other words, a work must embody "independent creation plus a modicum of creativity" to receive copyright protection.[89] Congress implicitly approved of this interpretation in the 1976 Copyright Act, dropping the phrase "all the writings of an author" in favor of "original works of authorship."[90]

News items are crafted from facts, which cannot meet this originality requirement because they "do not owe their origin to an act of authorship. The distinction is one between creation and discovery. The first person to find and report a particular fact has not created it, but merely discovered its existence."[91] While original compilations of facts may be copyrighted, the underlying facts themselves receive no protection.[92]

The Court recognized this distinction in *Feist Publications, Inc. v. Rural Telephone Service Co.*, a 1991 case exploring the copyrightability of a telephone directory.[93] While it emphasized that facts—specifically, the names and addresses found in the directory—may never be copyrighted, the Court simultaneously acknowledged that the manner in which factual information is selected and arranged can be copyrightable.[94] Copyright protection for a factual compilation is "thin," the Court explained, because "[n]o matter how original the format, . . . the facts themselves do not become original by association."[95] The Court denied protection to the directory at issue,[96] because not only was the information factual, but its traditional alphabetical arrangement lacked the "*de minimis* quantum of creativity" the Copyright Act requires.[97]

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87. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346–47 (1991).

88. *Id.* at 346. *Feist* traces the originality requirement to *The Trade-Mark Cases*, 100 U.S. 82 (1879), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). *Id.* In *The Trade-Mark Cases*, the Court explored the constitutional scope of "writings," ultimately finding that "[f]or a particular work to be classified 'under the head of writings of authors [within U.S. Const. Art. I, § 8, cl. 8],' . . . 'originality is required.'" *Id.* (quoting *The Trade-Mark Cases*, 100 U.S. at 94). In *Burrow-Giles*, the Court deemed the term "authors" in that same clause as equally demanding of originality. *Id.* "Author," in a constitutional sense, meant "he to whom anything owes its origin; originator; maker." *Id.* (quoting *Burrow-Giles*, 111 U.S. at 58).

89. *Id.*

90. *Id.* at 355.

91. *Id.* at 347.

92. *Id.* at 349.

93. *Id.* at 342–64.

94. *Id.* at 361–62.

95. *Id.* at 349.

96. *Id.* at 364.

97. *Id.* at 363.

Feist acknowledged a concern that first emerged in *INS*: a fear of creating a monopoly over information rightfully belonging to the public.[98] The *INS* Court surmised that the Framers would not have wanted the copyright power abused in this manner: "It is not to be supposed that the framers of the Constitution, when they empowered Congress [through the Copyright Clause], intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."[99] For this reason, misappropriation of news could not be redressed under the Copyright Act; rather, claimants should resort to the law of unfair competition.[100] *Feist* recognized and amplified this point, noting that the *INS* decision turned "on noncopyright grounds that are not relevant here."[101]

Codification of the "fair use" doctrine in the 1976 Act made it even more unlikely that courts would address misappropriation through copyright law.[102] The fair use provision explicitly states that proving use of copyrighted material for news reporting is a defense to infringement.[103] Yet some courts and legal scholars, relying on the preemption provision in § 301 of the Act, perceive some overlap between copyright law and the misappropriation doctrine in *INS*-type cases, conflating two distinct bodies of law in their analysis.

2. Distinguishing Copyright from Misappropriation

Congress included the preemption provision in the 1976 Act to subsume any and all state laws that endangered the uniformity of the federal copyright regime.[104] "By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system," the new Act "would greatly improve the operation of the copyright law and would be much more effective in

98. *Id.* at 353–54 (citing to *INS*'s holding that factual information within articles may not be copyrighted).

99. Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918).

100. *Id.* at 234–35.

101. *Feist*, 499 U.S. at 354.

102. 17 U.S.C. § 107 (2006).

103. The fair use provision provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research" is not copyright infringement. *Id.* But to determine whether an alleged infringement actually falls within one of those fair use exceptions, the court must weigh four factors individually in each case: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work. *Id.*

104. *See* H.R. REP. NO. 94-1476, at 130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745.

carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship."[105] The Copyright Act preempts state law when: (1) the state law at issue protects rights "equivalent to any of the exclusive rights within the general scope of copyright"; and (2) the works protected under that law "come within the subject matter of copyright" as specified in the federal statute.[106]

Feist, interpreting *INS* in light of the 1976 Act, clarified the copyrightability of news articles as original compilations and arrangements of fact.[107] Therefore, the question of whether federal copyright law preempts a claim of hot news misappropriation depends only upon the first statutory factor: whether the right protected by a state law is equivalent to any of the exclusivity rights in the Copyright Act.[108]

A hot news misappropriation claim would initially seem to vindicate a right equivalent to copyright, since it stems from unauthorized reproduction, which copyright law explicitly prohibits.[109] However, reproduction for the purpose of news reporting is considered "fair use" and therefore does not qualify as copyright infringement.[110] And even if it did, the equivalence analysis would require courts to look more closely at the state misappropriation law to see whether it passes the "extra element" test: If the statute requires any elements "instead of, or in addition to, the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the right does not lie 'within the general scope of copyright,' and there is no pre-emption."[111]

a. The "Extra Element" Debate

Courts and scholars are divided as to whether misappropriation passes the "extra element" test, which the Second Circuit created in *NBA v. Motorola, Inc.* in 1997 to help distinguish misappropriation claims from claims grounded in copyright.[112] The

105. *Id.*

106. 17 U.S.C. § 301(a).

107. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 353–58 (1991); *see also* 17 U.S.C. § 102 (defining the subject matter of copyright as "original works of authorship fixed in any tangible medium of expression," but not any idea or concept embodied in the work); *id.* § 103 (specifying that the subject matter covered under copyright includes compilations of material defined in 17 U.S.C. § 102).

108. *See Feist*, 499 U.S. at 353–58; *see also* 17 U.S.C. §§ 102, 103.

109. 17 U.S.C. § 106 (outlining the exclusivity rights protected in copyright); *see also* NIMMER & NIMMER, *supra* note 49, § 1.01.

110. 17 U.S.C. § 107.

111. 1 NIMMER & NIMMER, *supra* note 49, § 1.01.

112. NBA v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997).

NBA court was tasked with determining whether a hot news claim could properly be alleged against the manufacturer and promoter of hand-held pagers that emitted real-time information about ongoing NBA games.[113]

The court began by articulating the five elements it viewed as central to an *INS* hot news claim: (1) a plaintiff generates or gathers information at a cost; (2) the information is time-sensitive; (3) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (4) the defendant directly competes with a product or service offered by the plaintiffs; and, (5) 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.[114] The Second Circuit deemed three of the hot news elements "extra elements" that prevent copyright preemption: (1) the time-sensitive value of information; (2) free riding by the defendant; and (3) the threat to the very existence of the product or service provided by plaintiff.[115] NBA's claim ultimately failed because it could not prove the pager company competed directly with NBA or had benefited from free riding on data collected by NBA, given that the company had collected and processed the data for its own independent purpose.[116] However, the court intoned that, in the future, federal copyright law would not preempt any misappropriation claim meeting its "extra element" test; therefore, such a claim would be a viable cause of action in "unusual circumstances" such as those present in the original *INS* case.[117]

The *NBA* court grounded its argument for preemption survival in the legislative history of the 1976 Act.[118] It quoted a House report stating that misappropriation "is not necessarily synonymous with copyright" for preemption purposes, and acknowledging a role for common law misappropriation:

> [S]tate law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news, whether in the traditional mold of *International News Service v. Associated Press* . . . or in the newer form of data updates from scientific, business, or financial data bases.[119]

113. *NBA*, 105 F.3d at 843.

114. *Id.* at 845.

115. *Id.* at 853.

116. *Id.* at 853–54.

117. *Id.* at 852.

118. *Id.* at 850.

119. *NBA*, 105 F.3d at 850 (quoting H.R. REP. NO. 94-1476, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748).

The court saw this language as conclusive evidence that Congress meant to set misappropriation apart from copyright protection.[120] But a deeper exploration of the legislative history yields a less certain result. While an initial draft of the Act listed misappropriation among exceptions to federal copyright preemption, that language did not appear in the final version of the bill, after the Justice Department and several House members expressed concern over allowing states free reign to develop far-reaching misappropriation laws.[121] Representative John Seiberling, who proposed the amendment, explained that he worried a specific reference to misappropriation in the Act "could easily be construed by the courts as authorizing the States to pass misappropriation laws. We should not approve such enabling legislation . . . because a misappropriation law could be so broad as to render the pre-emption provision meaningless."[122]

Those commentators who view misappropriation and copyright protection as one and the same have latched onto this murky legislative history in support of their position.[123] *Nimmer on Copyright* takes the position that "misappropriation is but another label for reproduction, and as such, is a preempted right 'within the general scope of copyright'" as defined in the Copyright Act's preemption provision.[124] A federal district court in Maryland agreed in 2003.[125] In *Lowry's Reports, Inc. v. Legg Mason, Inc.*, the court found that "free riding," the "extra element" the plaintiff had alleged to save its misappropriation claim from copyright preemption, "seems indistinguishable from the right to reproduce, perform, distribute or display a work."[126] This argument is flawed, however, because it glosses over the fundamental distinction between the property right that copyright conveys and the unfair competition rationale behind the misappropriation tort as originally defined in *INS*.[127]

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120. *NBA*, 105 F.3d at 850 (determining that the only question left unanswered was "the *breadth* of the 'hot-news' claim that survives preemption").

121. NIMMER & NIMMER, *supra* note 49.

122. 122 CONG. REC. 32,015 (1976) (statement of Rep. Seiberling). It is unclear whether Rep. Seiberling actually understood the import of this statement, however. *See id*. In a subsequent exchange with Rep. Railsback of Illinois, Seiberling professed that he was "trying to have this bill leave the state law alone," and that state misappropriation laws would be allowed to persist notwithstanding the preemption clause. *Id.*

123. *See* NIMMER & NIMMER, *supra* note 49, § 1.01.

124. *Id.* § 1.01[B][1][f][iii].

125. Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 755–56 (D. Md. 2003).

126. *Id.*

127. *See infra* text accompanying notes 130–46.

b. The True Distinction

The *NBA* court itself missed this nuance. Nonetheless, the "extra element" test it produced is useful in defining the boundaries of hot news misappropriation, because this test makes the correct distinction between misappropriation and copyright—it just does so in incorrect terms.[128] When it declared that *INS* "is not about ethics; it is about the protection of property rights in time-sensitive information,"[129] the court was trying to demonstrate that misappropriation is distinct enough from copyright infringement to stand on its own legal footing. In other words, misappropriation—stealing from a competitor to get ahead in business—is distinct from the generalized bad-faith taking that copyright law prohibits, and is not, therefore, preempted by copyright law. Only where litigants frame misappropriation in terms of "amorphous concepts such as 'commercial immorality' or society's 'ethics'" does preemption become an issue, because "[s]uch concepts are virtually synonymous for wrongful copying and are in no meaningful fashion distinguishable from infringement of a copyright."[130]

This preemption analysis is correct, but the court's poor choice of wording reveals a lack of sensitivity to the complex doctrinal tension underlying misappropriation. While this portion of the *NBA* opinion represents an admirable attempt to rebuff criticism from commentators like Nimmer, who do not recognize a truly independent misappropriation tort,[131] it fails to recognize that the "quasi-property" right in *INS* does, in fact, contemplate a significant ethical dimension. The *NBA* court took the grant of this right too literally. In coining this term, the *INS* Court meant only that "news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade."[132] This "quasi property" concept simply served as a vehicle through which to reflect the *value* of the intangible assets INS had raided: "[the] organization and the expenditure of labor, skill, and money" AP invested in newsgathering.[133] The Court did not view the behavior of INS as a violation of the right to exclude; instead, it amounted to a violation of traditional business ethics.[134]

128. *See* NBA v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997).
129. *Id.*
130. *Id.* at 851.
131. NIMMER & NIMMER, *supra* note 49, § 1.01[B][1][f][iii].
132. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).
133. *See id.* at 239–40.
134. *Id.*

The ultimate wrong in the *INS* case was the defendant's attempt "to reap where it ha[d] not sown."[135] Though some scholars might call this "sweat of the brow" doctrine an extension of the Lockean labor theory of property, the *INS* Court placed it squarely within unfair competition doctrine.[136] It seems the Court feared hewing too closely to traditional property rights, lest it give "to complainant the right to monopolize either the gathering or the distribution of the news."[137]

Copyright law explicitly rejects the "sweat of the brow" reasoning on which *INS* stands, because it "flout[s] basic copyright principles."[138] The Court in *Feist* explored the development of the "sweat of the brow" doctrine in copyright, which it deemed the result of a misunderstanding of the 1909 Copyright Act.[139] The "underlying notion was that copyright was a reward for the hard work that went into compiling facts."[140] This theory dangerously extended copyright protection beyond the originality of compilation—it protected the underlying facts themselves, unless a subsequent author "independently work[ed] out the matter for himself, so as to arrive at the same result from the same common sources of information."[141] The *Feist* Court explained that the Framers sought to avoid this senseless duplication of work while drafting the Copyright Clause.[142]

"It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation," Justice O'Connor wrote. However, she explained, this relative inequity is a necessary—even intended—consequence of achieving the ultimate goal of copyright as set out in the Constitution.

> The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.[143]

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135. *Id.*

136. *Id.* at 240 ("Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where profit is to be reaped . . . . The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.").

137. *Id.* at 241.

138. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353–54 (1991).

139. *Id.* at 352.

140. *Id.*

141. *Id.* at 352–53.

142. *Id.* at 349.

143. *Id.* at 349–50 (quoting U.S. CONST. art. I, § 8, cl. 8.).

The opinion went on to distance copyright law from the *INS* misappropriation tort even more explicitly, remarking in a footnote that *INS* turned on grounds irrelevant to copyright.[144]

Had the Second Circuit described *INS* this way in *NBA*, its "extra element" test would stand on sturdier analytical footing. The test nonetheless yields the correct result: Misappropriation falls outside the umbrella of copyright law if and when time-sensitivity, free riding, and competitive disadvantage come into play.[145] So in the end, its test remains a valid means of parsing the two claims.

C. Post-NBA Application of the Hot News Doctrine

Despite criticism from those commentators who believe federal copyright law preempts misappropriation, a line of cases following the *NBA* test have kept the hot news misappropriation tort alive in at least five jurisdictions.[146] Those courts construe the tort as broad enough to cover scenarios even outside the context of newsgathering.[147] For example, in 1999, a federal district court held that Missouri law recognized a cause of action for hot news misappropriation.[148] The court applied the *NBA* test to a movie theater's claim that Moviefone misappropriated movie schedules broadcast over the theater's automated telephone service.[149] However, the court found that Moviefone's actions did not rise to the level of misappropriation because they did not "reduce plaintiff's incentive to generate movie schedules or publicize them to the point that the existence or quality would be threatened."[150] Four years later, even the District Court of Maryland, which had rejected the *NBA* test in *Lowry's Reports*,[151] held that Maryland still recognizes a "hot news" tort so that such claims "may yet survive" under that state's laws.[152]

In 2007, a federal court in California rebuffed a pretrial challenge to a photographer's claim under state misappropriation law against celebrity gossip blogger Perez Hilton.[153] The court rejected Hilton's argument that because photographs are copyrightable, they

144. *See id.* at 354 n.*

145. NBA v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997).

146. *See* cases cited *supra* note 48.

147. *Id.*

148. Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999).

149. *Id.*

150. *Id.*

151. *See supra* text accompanying notes 125–28.

152. Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 756 (D. Md. 2003).

153. X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007).

cannot fall under "hot news" claims.[154] "[T]he tort is conceptually broad enough to include photographs," the court explained, because while subject matter is relevant to preemption analysis, the "extra element" test to determine equivalence of rights must also be met.[155] Because the photographer had properly alleged all five of the *NBA* elements, the court declined to dismiss the claim on preemption grounds.[156]

Several recent cases in New York and Pennsylvania have recognized the "hot news" tort specifically within the newsgathering industry.[157] First, in February 2009, the Southern District of New York refused to dismiss AP's hot news claim against the rival news service All Headline News.[158] In a fact pattern remarkably similar to *INS*, AP accused All Headline News of repackaging original AP reporting.[159] The parties settled in July 2009, so the court did not reach the merits of the claim.[160]

A second newsgathering case ended in an equally unsatisfying result. In 2009, the Middle District of Pennsylvania rejected the *Scranton Times*' misappropriation claim against the Wilkes-Barre Publishing Company at the pleading stage of the litigation.[161] Had the claim met all five of the *NBA* factors, the court opined, it could have moved forward;[162] however, "Defendant's alleged copying and re-use of obituaries originally found in Plaintiffs' publications did not pose a threat to the existence of Plaintiffs' publications or the ability of those publications to continue the timely publication of obituaries."[163]

A decision from March 2010, *Barclays Capital, Inc. v. Theflyonthewall.com,* analyzed the doctrine in the context of financial news.[164] The Southern District of New York applied the *NBA* test to a

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154. *Id.* at 1108.

155. *Id.*; *see supra* note 111 and accompanying text.

156. *X17, Inc.*, 563 F. Supp. 2d at 1109.

157. Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 331 (S.D.N.Y. 2010); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 WL 3100963, at *5–6 (M.D. Pa. Sept. 23, 2009); Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 459 (S.D.N.Y. 2009).

158. *All Headline News*, 608 F. Supp. 2d at 464.

159. *Id.* at 457.

160. Press Release, Associated Press, AP and AHN Media Settle AP's Lawsuit Against AHN Media and Individual Defendants (July 13, 2009), *available at* http://www.ap.org/pages/about/pressreleases/pr_071309a.html. As part of the settlement, AHN paid AP an undisclosed amount in damages and agreed not to make competitive use out of any content or expression in AP stories. *Id.*

161. *Scranton Times*, 2009 WL 3100963, at *6.

162. *Id.*

163. *Id.*

164. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 700 F. Supp. 2d 310, 313 (S.D.N.Y. 2010).

suit against an online outlet posting investment advice from top financial firms without permission.[165] The business model of these Wall Street firms relied upon their ability to relay personal investment advice to clients,[166] so it troubled them to discover that Theflyonthewall.com (Fly) was getting tips from firm insiders and posting them on its newsfeed before the financial markets opened each day.[167] The firms argued that this practice compromised their control over valuable information, and that Fly continued this "systematic and egregious" behavior even after they warned the outlet that its activity amounted to "the essence of unfair competition."[168]

Unlike the defendant in *INS*, the alleged misappropriator in *Barclays Capital* did cite the original sources of its recommendations.[169] But the court found that in this case, attribution contributed to the severity of the taking more than it mitigated any negative effects.[170] A financial recommendation is not valuable in and of itself; its value is derived almost entirely from the reputability of its source.[171] Highlighting this difference, the court in *Barclays Capital* focused on the underlying current of unfair competition that distinguishes misappropriation cases from traditional copyright disputes.[172]

The court centered its misappropriation inquiry around three main "policy ideals" it distilled from *INS*: (1) the "sweat of the brow" theory eschewed by *Feist*; (2) "norms of commerciality and fair dealing"; and (3) "a utilitarian desire to preserve incentives to produce socially useful services."[173] The *Barclays Capital* court explained that "the misappropriation doctrine was developed to protect costly efforts to gather commercially valuable, time-sensitive information that would otherwise be unprotected by law."[174] Perhaps viewing misappropriation as an equitable safety net for claims founded upon unfairness, as well as unauthorized copying, the court crafted a unique injunction for Fly.[175] In its analysis, the court attempted to balance the interests of the financial firms, Fly, and the public at

165. *Id.* at 334–40.
166. *Id.* at 319.
167. *Id.* at 325–26.
168. *Id.* at 336.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 332.
173. *Id.*
174. *Id.*
175. *Id.* at 343–47.

large.[176] The court declined to bar Fly's financial reporting completely lest it stifle the free flow of information.[177] Instead, it sought to balance the competing interests in much the same way as the *INS* court itself:

> Ultimately, the purpose of the *INS* tort, like the traditionally accepted goal of intellectual property law more generally, is to provide an incentive for the production of socially useful information without either under- or over-protecting efforts to gather such information. A balance must be struck between establishing rewards to stimulate socially useful efforts on the one hand, and permitting maximum access to the fruits of those efforts to facilitate still further innovation and progress on the other.[178]

The court took a cue from the head-start injunction in *INS*, which allowed exclusivity rights in information, but only for as long as that information remained commercially viable as news.[179] Unfortunately, *INS* did not provide a yardstick for commercial viability,[180] so the court simply balanced the issues at stake in the particular case at hand. After weighing both sides,[181] the court issued an injunction against the defendant, preventing Fly from publishing financial recommendations until thirty minutes after the opening bell of the stock exchange.[182] If information developed after the opening of the market, the firms would enjoy two hours lead time before Fly could publish the tips.[183]

Attempts to protect financial forecasts with hot news misappropriation claims caught on, as two additional opinions addressed the issue in a matter of months.[184] Unfortunately, neither

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176. *Id.* at 344. Note that this balance among proprietor, competitor, and public represents the exact dynamic that Professor Pendleton singles out as inappropriate for a strict property-based, exclusionary remedy. *See supra* note 45.

177. *Barclays Capital, Inc.*, 700 F. Supp. 2d at 344.

178. *Id.*

179. *Id.* at 345 (noting that exclusivity exists "until after its commercial value as news to the complainant and all of its members has passed away" (quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 245–46 (1918))).

180. *Int'l News Serv.*, 248 U.S. at 246. The Supreme Court declined to say exactly what period of time would be appropriate for the injunction against INS, explaining that "the case presents practical difficulties; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction . . . [We] will leave [the District Court] to deal with the matter upon appropriate application made to it for the purpose." *Id.* The parties then settled out of court before the injunction issue could be decided in the lower court. LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 24 (2010), *available at* http://semaphorepress.com/books.html.

181. The plaintiffs requested a four-hour injunction following release of their report, or in the alternative until 12 p.m. each day; Fly wanted a delay of no longer than ten minutes. *Barclays Capital, Inc.*, 700 F. Supp. 2d at 346.

182. *Id.* at 347.

183. *Id.*

184. Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 500–01 (D. Md. 2010); BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596 (S.D.N.Y. 2010).

decision did much to clarify the law in this area. In June 2010, the District of Maryland completely misconstrued the purpose and scope of a state law underlying the hot news claim in *Agora Financial v. Samler,* characterizing hot news protection as a property right over facts, and finding that copyright law preempted the misappropriation claim.[185] This conclusion stretches *INS* too far and conflicts with *Feist*'s established doctrine.

The following month, the Southern District of New York further obfuscated the *NBA* holding. While upholding a hot news misappropriation claim in *BanxCorp v. Costco Wholesale Corp.*, the court granted a motion to dismiss additional unfair competition and unjust enrichment claims.[186] The court found both claims preempted by copyright law, because the acts alleged in each count would infringe rights protected by the Copyright Act.[187] In so holding, the court cited a 2004 case from the Second Circuit that had derived this rule from what it described as the *NBA* court's "restrictive view" of the types of claims that may survive copyright preemption.[188]

The *BanxCorp* holding is unfortunate because it elevates careless, unreasoned dicta from *NBA*[189] to the status of binding precedent in the Second Circuit in a manner bound to confuse trial courts. Because this reincarnation of the *NBA* test explicitly preempts unfair competition and unjust enrichment, other courts may assume that these equitable principles cannot possibly serve as the legal foundation for misappropriation. Should they rely on *BanxCorp* for precedent (or to *Agora Financial* for inspiration), they will most likely perpetuate the problematic property-driven regime that modern misappropriation doctrine unfortunately embodies.

II. DEVELOPING LEADS: THE SEARCH FOR A LEGAL FRAMEWORK TO FIT JOURNALISM IN THE DIGITAL AGE

Barclays Capital addressed an important question that had remained unanswered in previous hot news jurisprudence: just how long might information require protection to vindicate past misappropriation and prevent future misconduct?[190] While an appeal

185. *Agora Fin., LLC*, 725 F. Supp. 2d at 500-01.

186. *BanxCorp*, 723 F. Supp. 2d at 612–13.

187. *Id.* at 617–19.

188. *See id.* The *BanxCorp* court cited *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004), which in turn cited a section of the *NBA* opinion that rejected "broad misappropriation doctrine based on amorphous concepts such as 'commercial immorality' or society's 'ethics.'" NBA v. Motorola, Inc., 105 F.3d 841, 851 (2d Cir. 1997).

189. *See supra* text accompanying notes 129–145.

190. *See supra* note 181.

of that decision[191] (as well as confusing applications of the case law in *Agora Financial* and *BanxCorp*)[192] leaves the jurisprudence in this area somewhat unsettled, the district court's reasoning in *Barclays Capital* nonetheless provides helpful guidance as to what constitutes an appropriate equitable remedy in misappropriation cases. Furthermore, the debate it engendered can inform a more general discussion of the viability of misappropriation in the Internet Age.[193]

Policymakers in Washington have recognized that the dispute underlying the *Barclays Capital* appeal has significant implications.[194] The FTC has asked for public comment on misappropriation in the news context and is now considering several proposals.[195] The idea, according to an FTC document circulated in June 2010, is to create a policy that will allow news outlets that have the infrastructure to gather news the means to continue doing so in an economically feasible manner.[196] Some proposals have focused on technological innovation that might facilitate newsgathering at a lower cost, while others have suggested the creation of a statutory scheme to increase revenues for news organizations.[197] Three main legal proposals are pending before the FTC and circulating in academic literature: (1) abolish the misappropriation tort in favor of a copyright-based solution; (2) amend the Copyright Act's preemption provision to encourage and perpetuate state misappropriation torts; and, (3) create a federal hot news tort, as distinct from copyright infringement.[198] Each of these suggestions is inadequate, because each fails to acknowledge the equitable undercurrent of unfair competition and

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191. *See* Order Granting Expedited Appeal, Barclays Capital Inc. v. Theflyonthewall.com, Inc., No. 10-1372-cv (2d Cir. May 19, 2010), *available at* http://www.scribd.com/doc/31737596/Barclays-Order-2nd-Cir-May-19-2010. Oral arguments in the case took place in August 2010, but the court had yet to issue an opinion as of this writing. Eric P. Robinson, *Second Circuit Abuzz About FlyontheWall Case*, BLOG LAW ONLINE (Aug. 7, 2010), http://bloglawonline.blogspot.com/2010/08/second-circuit-abuzz-about-flyonthewall.html; *see also Court Notices*, U. S. CT. OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov (last visited May 17, 2011) (showing upon date of last visit that the court had yet to publish a decision in the case).

192. *See* Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 500–01 (D. Md. 2010); *BanxCorp* 723 F. Supp. 2d 596.

193. *See* Order Granting Expedited Appeal, Barclays Capital Inc. v. Theflyonthewall.com, Inc., No. 10-1372-cv (2d Cir. May 19, 2010), *available at* http://www.scribd.com/doc/31737596/Barclays-Order-2nd-Cir-May-19-2010.

194. *See* FTC DISCUSSION DRAFT, *supra* note 33.

195. *Id.*

196. *See id.* at 5.

197. *See id.*

198. Google & Twitter Brief, *supra* note 52; DAN MARBURGER & DAVID MARBURGER, REVIVING THE ECONOMIC VIABILITY OF NEWSPAPERS AND OTHER ORIGINATORS OF DAILY NEWS CONTENT (2009), *available at* http://www.bakerlaw.com/files/uploads/documents/news/articles/mainanalysis.pdf; Fujichaku, *supra* note 41.

unjust enrichment that underlie the *INS* decision, which can serve as a point of departure for a solution to this problem.[199]

A. Abolishing the Misappropriation Tort in Favor of a Copyright-Based Solution

Misappropriation certainly has its critics, including the Restatement (Third) of Unfair Competition and famed Seventh Circuit Judge Richard Posner.[200] Internet-based powerhouses Google and Twitter have added themselves to the list of detractors by filing an amicus brief in June 2010 in support of the *Barclays Capital* appeal.[201] In their brief, the companies ask the Second Circuit to "repudiate the tort" altogether on the grounds that it undermines the timely communication of valuable news to the public in violation of the First Amendment and without regard for the realities of the Internet age.[202] They assert that because mobile technology allows "anyone with a cell phone" to disseminate news instantaneously, "the notion that a single media outlet should have a monopoly on time-sensitive facts is not only contrary to law, it is, as a practical matter, futile."[203] Google and Twitter contend that *Feist* requires that facts "remain in the public domain, free from any restraint or encumbrance."[204]

The *amici* suggest that if misappropriation must be retained, the federal Copyright Act should explicitly limit its reach.[205] They propose an eight-part test that "would hew closely to *INS* and retain the essence of the Court's holding in [*NBA*], while properly accounting for the modern reality of news dissemination."[206] They also propose adding specific elements to the Copyright Act's preemption provision at § 301 to require plaintiffs to show the following: (1) the information the plaintiff seeks to protect must have been gathered exclusively by the plaintiff; (2) the plaintiff must have expended substantial resources in terms of cost or effort; (3) the plaintiff must have taken steps to keep the information confidential or highly restricted until its

199. *See* Google & Twitter Brief, *supra* note 52; MARBURGER & MARBURGER, *supra* note 198; Fujichaku, *supra* note 41.

200. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 (2010) (concluding that "[t]he better approach, and the one most likely to achieve a balance between the competing interests, does not recognize a residual common law tort of misappropriation"); Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 621 (2003) (arguing that "the doctrine can be jettisoned").

201. Google & Twitter Brief, *supra* note 52.

202. *Id.* at *3.

203. *Id.*

204. *Id.* at *7.

205. *Id.* at *15–16.

206. *Id.* at *16.

release; (4) the plaintiff's release of the information must have been to a restricted audience and not accessible to the general public; (5) the information must have commercial value; (6) the information must be time-sensitive, and the defendant's use of the information must specifically exploit its time-sensitive nature; (7) the plaintiff and defendant must be direct competitors for the commercial value of the information; and, (8) the plaintiff's ability to produce the product or service will be severely impaired as a direct result of defendant's use of the time-sensitive information.[207]

A student note in the *Journal of Technology Law and Policy* also champions the addition of more specific language to the Copyright Act.[208] The author sees no need for complicated preemption analysis, because he finds an answer in the Act's fair use provision rather than its preemption section.[209] He proposes amending the portion of § 107 that contains a fair use exception for news reporting to protect information reporters gather for a twenty-four-hour period.[210] This would provide a temporary buffer against competition to allow the reporter a chance to reap profit from his work, according to the author; at the same time, it would not completely obstruct the free dissemination of ideas.[211] All nonprofit copying would be exempted, as would headlines and links to the original reporting online, in order to avoid First Amendment concerns.[212]

Unfortunately, both copyright-based approaches are flawed because both would attempt to stuff the square peg of misappropriation torts into the round hole of copyright law.[213] While copyright does contemplate timeframes to protect original works,[214] this body of law should not usurp misappropriation entirely. Eliminating the misappropriation tort would force victims of piracy to seek redress in a body of law not designed to address their problem. Copyright, like other property rights, is about exclusion, and this proposal presupposes that misappropriation is about exclusion too. Repeating the mistake made by the Second Circuit in *NBA*—one that other courts have since compounded—the proponents of this solution

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207. Id. at *15–16.

208. Ryan T. Holte, Note, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1, 29–30 (2008).

209. *Id.*

210. *Id.* at 33.

211. *Id.*

212. *Id.*

213. *See* Google & Twitter Brief, *supra* note 52, at *2; Holte, *supra* note 208.

214. An embodiment of the Copyright Clause's "limited Times" requirement, *see* U.S. CONST. art. I, § 8, cl. 8, the Copyright Act provides protection lasting for the life of the last surviving author plus seventy years, or ninety-five years after publication for works made for hire. 17 U.S.C. § 302 (2006).

have misconstrued "quasi property" in *INS* to mean exclusion in the traditional property framework, failing to understand the unfair competition rationale underlying that decision.[215] *INS* explicitly provided that reporters could use information to secure "tips" from a competing news agency for independent investigation; the court simply took exception to competitors appropriating articles without rewriting them or conducting an independent investigation.[216] Ultimately, *INS* counsels that unfair competition lies at the core of hot news misappropriation.[217] Thus, unfair competition is what the law must seek to redress.

B. Encouraging All States to Recognize a Common Law Misappropriation Tort

While few states have officially recognized a hot news misappropriation tort, some legal scholars believe more states would do so if Congress were to revise the preemption provision of the 1976 Copyright Act to explicitly exempt misappropriation.[218] Case law indicates that the five states discussed in Part I—Maryland, Missouri, California, New York, and Pennsylvania—continue to recognize misappropriation claims under the *NBA* test.[219] Massachusetts rejected misappropriation in the 1940s and has not revisited the issue.[220]

David Marburger, a former journalist and current partner at Baker Hostetler's office in Cleveland, Ohio, and his brother Daniel Marburger, an economist at Arkansas State University, co-authored an article suggesting that revision of the Copyright Act would allow

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215. *See* Int'l News Serv. v. Associated Press, 248 U.S. 214, 236 (1918).

216. *See id.* at 243–44.

217. *See id.* Professor Balganesh argues that the opinion contains a separate dimension of unjust enrichment that must be analyzed in addition to the unfair competition angle. Balganesh, *supra* note 45. While it is true that some free riders are probably enjoying fat profit margins because of their reduced newsgathering costs, this can be viewed as a byproduct of the root of the problem: unfair competition. As a result, this Note focuses on unfair competition as the most important aspect of hot news misappropriation.

218. Bruce W. Sanford, Bruce D. Brown & Laurie A. Babinski, *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. LAW. 8, 9 (2009); *see also* MARBURGER & MARBURGER, *supra* note 198.

219. Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 495–505 (D. Md. 2010); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 WL 3100963, at *3–6 (M.D. Pa. Sept. 23, 2009); Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 497–503 (S.D.N.Y. 2009); X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1105–06 (C.D. Cal. 2007); Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999).

220. Sanford et al., *supra* note 218, at 9.

for better development of a state law misappropriation tort.[221] The Marburgers argue that *INS* "has lost much of its juice" following the adoption of the 1976 Act, but that the unjust enrichment aspect of misappropriation could be revived if Congress were to expressly encourage it.[222] A federal misappropriation statute would be too rigid, they contend, but a robust body of state law precedent would provide sufficient malleability and could even encourage negotiation among parties hoping to avoid tort liability.[223]

The problems with this approach to the news crisis have been apparent for some time. Congress worried about excessive flexibility during its debates in 1976 over the copyright amendments, choosing not to include a specific misappropriation provision in § 301 precisely because it feared providing states too much leeway to misinterpret or misapply a very carefully tailored doctrine.[224] That attitude seems prudent in light of the recent misapplications of *NBA* in both *Agora Financial* and *BanxCorp*.[225] Without unified guidelines, the *INS* doctrine could be carried much too far in individual jurisdictions across the country, to the detriment of the public and newsgatherers alike.

C. Creating a Federal Hot News Tort

Advocates for a federal hot news tort recognize the clash between copyright law and misappropriation and see value in retaining the tort.[226] Scholar Rex Y. Fujichaku believes that eliminating misappropriation altogether could restrict access to information products.

> As control over reproduction of factual information eludes information providers, they will be forced to tighten their control over the manner by which the information they produce will be disseminated . . . . Therefore, misappropriation protection for hot news and other types of factual information in the age of the Internet should not be totally foreclosed.[227]

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221. MARBURGER & MARBURGER, *supra* note 198, at 46.

222. *Id.* at 43.

223. *Id.* at 49; *cf.* discussion of Eric P. Schmidt's argument regarding the viability of misappropriation, *infra* text accompanying notes 244–245.

224. *See* H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

225. *See supra* text accompanying notes 184–89.

226. *See, e.g.*, Fujichaku, *supra* note 41, at 470–71 ("The policy impetus behind the constitutional requirement of originality, i.e. protection of information and the public domain, must drive similar considerations in disciplining misappropriation from protecting what copyright may not. Hot news misappropriation, in its current form, directly conflicts with the idea/expression principle of copyright.").

227. *Id.* at 471.

However, Fujichaku takes the tack of Justice Brandeis' *INS* dissent; he views the legislature, not the judiciary, as the proper vehicle for carrying out the misappropriation regime.[228] Congress, he believes, could properly balance the interests of news providers and of the public while creating a unified standard for the sake of fairness and consistency.[229]

Commentators who champion this approach understand that Congress should enact legislation pursuant to the Commerce Clause rather than the Copyright Clause because misappropriation is a hybrid between traditional intellectual property law and the law of unfair competition.[230] Congress has, in fact, tried to do just that by proposing various codifications of the *NBA* factors.[231] Introduced in the House in 2003, the Database and Collections of Information Misappropriation Act borrowed all three "extra elements" from the *NBA* five-factor test that allow a misappropriation claim to survive copyright preemption: the time-sensitive value of factual information; free riding by the defendant; and a threat to the existence of products or services provided by the plaintiff.[232] However, the bill never passed, because Congress determined it would provide protection over facts—something both the Copyright Clause and *Feist*, interpreting that Clause, have prohibited.[233] The House Report detailing the bill's background concluded: "It defies the parameters articulated by the Supreme Court in the *Feist* decision. It attempts to rely on the Commerce Clause of the United States Constitution to do what the [Copyright] Clause prohibits."[234]

This language reveals that this third approach to the misappropriation problem suffers from the same defects as the other two approaches: It focuses solely on property rights in a realm where property rights are not appropriate.[235] Andrew L. Deutsch, the attorney who represented the coalition of media companies intervening in the *Barclays Capital* appeal, simply got it wrong when

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228. *Id.* at 472.

229. *Id.*

230. *Id.*; *see also* Deutsch, *supra* note 15, at 591–95.

231. *See, e.g.*, Database Collections of Information Misappropriation Act, H.R. 3261, 108th Cong. § 3 (2004); Consumer Access to Information Act, H.R. 3872, 108th Cong. § 2 (2004).

232. NBA v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997); H.R. 3261. Note that the original *NBA* test included five factors, but the *NBA* court specified that three of them were the "extra elements" that allowed a misappropriation claim to survive copyright preemption. *NBA*, 105 F.3d at 853.

233. *See* H.R. REP. NO. 108-421, pt. 2 (2004), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr421p2&dbname=108.

234. *Id.*

235. *See* H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659; *see also* Deutsch, *supra* note 15, at 591.

he declared in a recent scholarly publication that the "*property* protected in a federal hot news tort would be the 'quasi property' recognized in *INS*: the investment made by originators in gathering news for distribution."[236]

III. THIS JUST IN: THE CODIFICATION OF A UNIFORM HOT NEWS TORT AS A MEANS OF PROMOTING OFFLINE INVESTIGATION IN AN ONLINE WORLD

None of the solutions proposed thus far are viable because they stretch property rights farther than they should—to a point where the public's interest in the free flow of information is threatened drastically.[237] Though they attempt to balance various interests and purport to consider First Amendment rights, each solution focuses too much on *providing rights* to the newsgatherer rather than *limiting the rights* of the news parasites whose behavior is killing the host.[238] Probably taking a cue from the misleading terminology contained in the *NBA* opinion,[239] these theorists take the term "quasi property" from *INS* too literally and miss the essence of the tort of misappropriation: unfair competition.[240] The tort is rooted in equity,[241] so the law must provide a remedy with that focus in mind. Otherwise, the potential to begin treating facts as proprietary would have dire consequences for the public, which deserves to have complete and up-to-date information regarding current events. Clamping down on dissemination, even for a twenty-four-hour period,[242] would be unwise, given both the pace of modern technology and the need for legitimate news organizations to collaborate and share information.

A few recent publications have come close to offering a workable solution.[243] Commentator Eric P. Schmidt has recognized that the misappropriation doctrine is rooted in unfair competition and, as such, is flexible enough to serve modern journalists well.[244]

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236. Deutsch, *supra* note 15, at 591 (emphasis added).

237. *See* Google & Twitter Brief, *supra* note 52; MARBURGER & MARBURGER, *supra* note 198, at 51–53; Fujichaku, *supra* note 41, at 436.

238. *See* Google & Twitter Brief, *supra* note 52; MARBURGER & MARBURGER, *supra* note 198, at 51–53; Fujichaku, *supra* note 41.

239. *Supra* text supporting notes 129–46.

240. *See* Int'l News Serv. v. Associated Press, 248 U.S. 214, 242–44 (1918); *cf. supra* note 220.

241. *See id.* at 240–44.

242. *See* Holte, *supra* note 208, at 33.

243. *See* Schmidt, *supra* note 45; Westley, *supra* note 44.

244. *See* Schmidt, *supra* note 45, at 341–43. Schmidt recognizes that too much flexibility can be a liability, however, as it leads to a lack of uniform standard for application among

Schmidt also points out that purely copyright-based statutory remedies are infeasible, and argues they will "add more complexity to a convoluted intellectual property regime that is poorly suited to protecting the time value of news," creating "new statutory loopholes for free-riders to exploit."[245]

Meanwhile, Brian Westley—a law student and former journalist—suggests a variation on the *NBA* test he has dubbed "Motorola plus," because it incorporates the five factors from *NBA v. Motorola*, but asks two additional questions: (1) is the information of tangible benefit to society? and (2) had the news outlet claiming misappropriation obtained the information prior to the alleged misappropriator?[246] Furthermore, Westley would allow defendants to rebut the plaintiff's prima facie case by showing they had obtained the information through their own independent reporting efforts.[247]

The fatal flaw with both arguments is their faith in the existing common law system to solve the problem. Schmidt dilutes his well-reasoned premise in a hazy, noncommittal conclusion that "news media in the 21st century must develop new norms of fair competition," using existing misappropriation doctrine as "a workable foundation."[248] Westley simply dismisses a statutory solution as "unnecessary."[249] Unfortunately, these arguments, though well-meaning, fail to account for the very problem they set out to address: a lack of uniformity in the application of misappropriation doctrine by courts, and the resulting lack of uniform parameters for proper industry conduct. Countless bloggers and citizen journalists act in their own interest, and will continue to do so without clear guidelines that have penalties attached to curtail parasitic newsgathering practices. Self-regulation simply cannot resolve the inevitable collective action problem, nor can the courts be expected to judge misappropriation claims consistently across jurisdictions.[250]

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jurisdictions. *See supra* text accompanying notes 222–23; *see also* Schmidt, *supra* note 45, at 342. However the *NBA* "extra elements" test helps reign the doctrine in to some extent, Schmidt points out. *Id.* at 341–42.

245. Schmidt, *supra* note 45, at 342.

246. Westley, *supra* note 44, at 716–17.

247. *Id.* at 720.

248. Schmidt, *supra* note 45, at 343.

249. Westley, *supra* note 44, at 721.

250. Commentators have suggested that, at least in the realm of digital music piracy, individual suits based on tort law do little to shape behavior in the long term. *See* Matthew Friedman, *Nine Years and Still Waiting: While Congress Continues to Hold Off on Amending Copyright Law for the Digital Age, Commercial Industry Has Largely Moved On*, 17 VILL. SPORTS & ENT. L.J. 637, 654–56 (2010). Friedman suggests that "[t]here can be no really satisfactory solution to the problem . . . until Congress acts." *Id.* at 680. The same rationale seems to apply in the news context.

Uniformity requires a statutory scheme, ideally enacted by Congress through its Commerce Clause power. In the alternative, the National Conference of Commissioners on Uniform State Laws could take up the project and create a model state code.[251] Either way, the new regime must remain relatively flexible, with factors couched in a scheme that allows for the kind of reasoning the District Court adopted in *Barclays Capital*.[252] A *Barclays*-based approach is key—by focusing on the conduct of the alleged misappropriator at bar, it provides the practical adaptability that a strict *NBA* test lacks. This individualized approach is essential given that technology tends to evolve faster than legislation.

The ideal formula would resemble that of Westley's "Motorola plus" framework, taking into account *NBA*'s five factors so that claimants must show the significant competitive threat that *INS* contemplated. Also key is the added element of having acquired the information first,[253] as this will create an evidentiary burden low enough to provide a remedy for worthy claimants, but high enough that bad-faith efforts to undercut competitors would be unlikely to succeed.

However, it seems impractical to require news outlets to demonstrate that the information in which they assert an interest provides "a tangible, useful benefit to society."[254] While the proposed misappropriation statute should be flexible, this factor allows courts too much subjectivity. The public surely does not want the judiciary defining what constitutes "useful" information. For this reason, only six of Westley's proposed seven elements should be required to make out a prima facie case of misappropriation.

As Westley suggests, the statute should explicitly allow for an affirmative defense of independent investigation to incentivize would-be misappropriators to do their own reporting. To satisfy this burden, defendants could present evidence showing the differences in content presented across the two platforms; the length of time between publication of the first fact-finder's report and the alleged

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251. The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission, drafts non-partisan model legislation to provide clarity in areas where various state statutes are disparate or unclear. *About the ULC*, UNIFORM L. COMMISSION, http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC (last visited Apr. 8, 2011). There were no publicized efforts in this area on ULC's agenda at the time this Note was sent to press. *See generally* UNIFORM LAW COMMISSION, http://www.nccusl.org (last visited Apr. 8, 2011).

252. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 700 F. Supp. 2d 310, 343–48 (S.D.N.Y. 2010).

253. Westley, *supra* note 44, at 719.

254. *Id.* at 718–19.

misappropriation; and the identity and number of sources the defendant cited.

Courts must take special note where the defendant cites the plaintiff as the original source of the information. While this provides the kind of attribution Justice Holmes envisioned as a perfect solution for INS,[255] it does not solve the problem of online news aggregators in today's world. As discussed in the introductory section of this Note, consumers choose online news aggregators precisely because those sites will have culled all the relevant headlines from the most reputable sources and put them all in one place for a quick and easy scan.[256] Readers of online news aggregators are unlikely to also read the news originators' full reports,[257] so no benefit ensues for the originator, even where the aggregator provides a direct link.[258] In fact, this kind of attribution, like that in *Barclay's Capital*, lends credibility to the misappropriator and makes its news product even more valuable—without any of the front end investment.[259]

The proposed statute should allow courts to select from a variety of remedies, including injunctions, compulsory licensing, and damages, depending upon the context and circumstances of each individual case. The lesson from *Barclay's Capital* is that fact-specific, context-dependent remedies are preferable to a one-size-fits-all rubric.[260] An injunction might be appropriate where a blogger is misappropriating original news blatantly and systematically. On the other hand, an injunction against a popular news aggregator would raise First Amendment concerns, so perhaps a court-ordered licensing scheme would best serve the parties in that scenario. Professor Balganesh favors a damage award system to deter misappropriation.[261] That may work in some situations, but an

255. Int'l News Serv. v. Associated Press, 248 U.S. at 246–247 (Holmes, J., dissenting).

256. COMMENTS OF NEWSPAPER ASSOCIATION OF AMERICA BEFORE THE OFFICE OF MANAGEMENT AND BUDGET 9 (Mar. 24, 2010), *available at* http://www.naa.org/docs/Public-Policy/NAA_Comments_IPEC.3.24.2010.pdf.

257. *Id.*

258. *Id.*

259. *See supra* notes 172–73 and accompanying text.

260. Barclays Capital Inc. v. Theflyonthewall.com, Inc., 700 F. Supp. 2d 310, 345 (S.D.N.Y. 2010). The district judge presiding over *Barclay's Capital* determined that the proper equitable remedy for misappropriation of investment advice was an injunction lasting just long enough to put the parties on a more level playing field. *Id.* The court emphasized that the two-hour injunction it placed on Fly's retransmission of financial firm recommendations "will not grant plaintiffs an effective monopoly over a particular financial concept, formula, or line of business. Anyone, including Fly, remains free to conduct equity research, write research reports, and make [r]ecommendations." *Id.* In other words, the court was not limiting the race for independent research–only the ability to unjustly enrich oneself by reaping where another had sown. *See id.*

261. Balganesh, *supra* note 44, at 38.

across-the-board rule would prove problematic because it would not deter small operations who know they are judgment-proof.

In cases where an injunction is deemed appropriate, courts should take a cue from the original *INS* rationale regarding "tips"[262] and permit any online news source to use newspaper Web updates throughout the day as leads for its own investigative purposes. If the second outlet does its own reporting, it should be able to report the results as soon as possible. However, it must be enjoined from republishing the information in the original Web update without attribution or independent investigation until the corresponding print edition hits newsstands.

The tip-versus-copying distinction of *INS* benefits both journalists engaged in newsgathering and the public at large. Journalists want to spread information as quickly as possible, while still reporting the news correctly and completely. While some newspaper journalists would probably want a complete bar on tips to protect their investment in original source networks,[263] this is neither realistic nor desirable. Allowing the initial breaking news bite to spur additional work by competing news outlets promotes the spreading of information and encourages competitors to seek out all of the perspectives and details they can in hopes of besting each other. Their work will be rewarded by increased Web traffic (and online advertising revenue) if they get the most complete story. Meanwhile, the public will benefit by having that thorough report, as opposed to a rehashing of the first version to make it online.

A law enacting this scheme should incorporate both the practical realities of enforcement as well as the underlying policy to create the proper incentives for would-be misappropriators. The Court in *INS* apparently found no difficulty "in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."[264] However, because of the faster pace of today's news market and the technology to misappropriate content with a few keystrokes, this distinction has become blurred. Plaintiffs may have only circumstantial evidence to help them prove that a competitor misappropriated a news story instead of independently investigating the facts to reach the same conclusion. This is why the proposed legal scheme must center around the conduct of the alleged misappropriator rather than the property rights of the content originator.

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262. Int'l News Serv. v. Associated Press, 248 U.S. 214, 243 (1918).

263. *See supra* text accompanying notes 18–19.

264. *Int'l News Serv.*, 248 U.S. at 243.

There is no sense in creating an absolute privilege for newspapers over online news sources, especially if that would mean artificially supporting a product the market no longer demands. At the same time, policymakers should remember that they cannot undercut the newspaper business too drastically without first building up the Internet-based infrastructure that will succeed it. By forcing online bloggers to either operate on newspapers' traditional timeline or else do their own reporting, the proposed solution would influence journalistic culture in a manner that would benefit everyone and ultimately make the transition to online-only news much smoother.

Of course, exactly how new technology will influence the news business is hard to predict. By taking a *Barclays Capital*-style approach, the task of determining the most appropriate action will fall to courts, which can weigh all the evidence and craft remedies that keep pace with emerging technologies. The court can shape its analysis based on the particular business model of the originator and any other relevant circumstances.

IV. THE FINAL WORD

The Internet's twenty-four-hour news cycle is running circles around the age-old newspaper business model, and the best source for legitimate news with it. But a smoother transition from a print-only paradigm to an online-only business model is possible with federal statutory protection to punish those news hunters who poach newspapers' original content without attribution or independent investigation. Previously proposed solutions are inadequate because they conflate property with commercial interests and fail to separate copyright infringement from misappropriation, a completely separate tort rooted in the equitable doctrine of unfair competition. Creating a property interest in news harms the public interest because it threatens to restrict the free flow of information; instead, a separate federal misappropriation tort is needed to deter the unfair business practices of would-be misappropriators across all jurisdictions.

A statute outlining several factors courts should consider in evaluating misappropriation liability would provide sufficient warning to influence behavior among modern journalists. But lawmakers should leave room for judicial discretion in applying the statutory factors they prescribe. This will allow for flexibility in remedial relief, including—but not limited to—a *Barclays Capital*-style injunction against Internet news poachers so those outlets are forced to either operate on a traditional newspaper schedule, attribute their reports to the proper originator, or engage in their own independent research. Ultimately, this would cabin misappropriation jurisprudence within a

uniform—yet somewhat flexible—system to provide the robust protection newspapers need in the Digital Age.

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