

2011

How a Narrow Application of 'Hot News' Missappropriation Can Help Save Journalism

Brian Westley

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aclr>



Part of the [Law Commons](#)

Recommended Citation

Westley, Brian (2011) "How a Narrow Application of 'Hot News' Missappropriation Can Help Save Journalism," *American University Law Review*: Vol. 60: Iss. 3, Article 4.

Available at: <http://digitalcommons.wcl.american.edu/aclr/vol60/iss3/4>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

How a Narrow Application of 'Hot News' Missappropriation Can Help Save Journalism

HOW A NARROW APPLICATION OF ‘HOT NEWS’ MISAPPROPRIATION CAN HELP SAVE JOURNALISM

BRIAN WESTLEY*

TABLE OF CONTENTS

Introduction	692
I. Background.....	696
A. Copyright Law’s Limited Protection of Facts	696
1. Copyright and original expression.....	697
2. Copyright and fair use.....	699
B. The Emergence and Evolution of Hot News Misappropriation	701
1. <i>INS</i> and hot news’ beginnings	701
2. Hot news and federal preemption	704
C. Hot News, Intellectual Property, and the First Amendment....	708
II. Copyright’s Inability to Protect Facts Leaves a Critical Gap in the Law That Hot News Misappropriation Should Fill	712
A. Copyright Law is Unable to Protect Significant Portions of News Stories from Free-Riding	712
B. A Narrow Application of Hot News Misappropriation Should Fill the Void Left by Copyright.....	716
III. Why a Narrow Application of Hot News Misappropriation is a Workable Solution	722
A. Hot News Survives Preemption Because the Doctrine Does Not Cover Copyrightable Subject Matter	722
B. Hot News, Like Other Forms of Intellectual Property, Does Not Undermine the First Amendment	725
Conclusion	729

INTRODUCTION

In July 2009, *The Washington Post* ran a 1600-word story about a former Kenyan hotel executive turned “leadership coach” who teaches baby boomer executives how to understand their younger employees.¹ That

* Junior Staff Member, *American University Law Review*, Volume 60; J.D. Candidate, May 2012, *American University, Washington College of Law*; B.S., Journalism, 2000, *James Madison University*. I gratefully acknowledge professors Peter Jaszi and Stephen Wermiel for their feedback and advice, and my Note and Comment editor, Jim Turner, for his outstanding suggestions and guidance throughout the writing process. Thanks also to my family and friends, particularly Brett Zongker and Margaret McElligott, for their endless support. Finally, a special thanks to my former colleagues at The Associated Press, whose dedication to top-notch journalism gave me the inspiration for this Comment.

1. Ian Shapira, *Speaking to Generation Nexus*, WASH. POST, July 9, 2009, at C1.

same day, a condensed version of the story appeared on the culture and media website Gawker featuring quotes, biographical information and other tidbits—all cut-and-pasted or rewritten from the *Post*.² Just like that, in a process that took roughly thirty minutes, Gawker was able to republish and generate advertising revenue off a story that took *Post* staff writer Ian Shapira hours to report and about a full day to write.³

Gawker's unauthorized use of the *Post*'s content illustrates an increasing problem in the Internet age that threatens to cripple organizations that invest in original reporting, thereby harming American democracy by leaving citizens less informed.⁴ While readers are flocking online to get their news,⁵ news originators like the *Post* are earning little revenue from online advertising.⁶ This is partly because with a few mouse clicks, anyone with Internet access can copy news stories online and repost the information while it is fresh,⁷ eliminating the typical "lead time" advantage of being first.⁸ This activity—commonly referred to as free-riding⁹—costs

2. Compare *id.* (showing the original *Washington Post* story), with Hamilton Nolan, 'Generational Consultant' Holds America's Fakest Job, GAWKER.COM (July 9, 2009, 11:52 AM), <http://gawker.com/5310986/generational-consultant-holds-americas-fakest-job> (showing Gawker's version of the *Post* story).

3. See Ian Shapira, *How Gawker Ripped Off My Story & Why It's Destroying Journalism* *And There's Pretty Much Nothing I Can Do About It*, WASH. POST, Aug. 2, 2009, at B1 (explaining that the *Post* writer conducted a lengthy phone interview with leadership coach Anne Loehr, traveled to Loehr's two-hour seminar, and spent four hours transcribing the session).

4. There has always been some form of free-riding with respect to news, but prior to the Internet the reproduction costs were greater and there was more of a lag-time to reproduce content. See 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, 12 (2008) (explaining that newspapers and broadcasters could choose when to release stories so as not to allow competitors to repeat them during peak hours, and in some cases not until the following day); see also David Marburger & Dan Marburger, Op-Ed., *Com Internet Parasites*, L.A. TIMES, Aug. 2, 2009, at A28 (asserting that while television stations have long aired rewritten newspaper stories, those broadcasts were not direct substitutes for newspapers, unlike Internet aggregators).

5. See Pew Project for Excellence in Journalism & Pew Internet & American Life Project, *Online: Audience Behavior*, THE STATE OF THE NEWS MEDIA 2010, http://www.stateofthemediamedia.org/2010/online_audience.php (last visited Jan. 24, 2011) (finding that sixty-one percent of Americans typically get their news online each day, a greater share than newspapers).

6. Cf. Marburger, *supra* note 4 (noting that although the *San Francisco Chronicle*'s website attracts millions of readers, the paper almost closed recently because it was losing massive amounts of money).

7. See Brief Amici Curiae of Advance Publ'ns, Inc. et al. Not in Support of Any Party at 9, *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv (2d Cir. June 22, 2010) (hereinafter Amici Curiae of Advance Publ'ns) (explaining that modern technology allows a free-rider to immediately republish original news content and earn revenue from that content).

8. See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995) (stating that situations in which a plaintiff is deprived of its lead time provide "the most compelling case for protection against appropriation").

9. See *Chi. Prof'l Sports LP v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) (defining free-riding as "the diversion of value from a business rival's efforts without payment").

next to nothing, allowing websites that heavily excerpt news stories to compete directly with news originators for readers while driving down the cost of ads and the value of original news content.¹⁰

Although the public typically benefits from increased competition, those who free-ride on news originators have the opposite effect.¹¹ First, free-riders are not more efficient at reporting the news (they are not reporting at all); they are simply *taking* news obtained by others.¹² While free-riders can survive with steeply discounted advertising, companies that gather and report the news cannot because they must bear the enormous cost of gathering information.¹³ Second, these free-riders are siphoning away readers from newspaper websites. Assuming a site such as Gawker even bothers to link to the original story, there is often little reason for someone to read the same material twice.¹⁴ The result: fewer clicks on a newspaper website hurt the paper's ability to recover its costs through advertising, subscriptions, and content-licensing, which in turn leaves less money to invest in newsgathering.¹⁵

10. See Marburger, *supra* note 4 (discussing the practice of surrounding rewritten news stories with inexpensive ads).

11. The practice of free-riding on the news comes in various forms. In some cases, a website such as Google News will use software that combs the Internet for headlines and the first few sentences of a story and then repost the information onto the free-rider's own sites. See KIMBERLY ISBELL, CITIZEN MEDIA LAW PROJECT, THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES, available at <http://ssrn.com/abstract=1670339> (detailing the various models of news aggregators). In other cases, similar to the Gawker example above, the website will hire its own staff to troll the Internet for news and then rewrite the stories—sometimes even claiming credit for the content. See, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009) (explaining that All Headline News was accused of hiring “poorly paid individuals” to find stories online and then rewrite and publish the stories under its own name).

12. Media mogul Rupert Murdoch, who owns *The Wall Street Journal*, has equated aggregators with thieves. See David Sarno, *Murdoch Accuses Google of News Theft*, L.A. TIMES, Dec. 2, 2009, at B1 (quoting Murdoch, who argued that: “[t]heir almost wholesale misappropriation of our stories is not fair use. To be impolite, it's theft”).

13. See Amici Curiae of Advance Publ'ns, *supra* note 7, at 9–10 (pointing out that news organizations spend hundreds of millions of dollars annually to pay the salaries of reporters and editors and to send journalists to war zones and other remote locations where news occurs, which is a cost that free-riders do not face). Indeed, major newspapers are ailing across the country as ad revenue plummets. See Douglas A. McIntyre, *The 10 Most Endangered Newspapers in America*, TIME (Mar. 9, 2009), <http://www.time.com/time/business/article/0,8599,1883785,00.html> (highlighting those newspapers that have already closed and those that are at the greatest risk of closing).

14. Even the author of a newspaper story detailing how his story was republished by a free-rider admits he probably would *not* have read the piece if he first saw the condensed version that appeared on a blog. See Shapira, *supra*, note 3 (contemplating whether the average blog visitor would click on a hyperlink to the original news provider after reading the condensed version, and answering: “I probably wouldn't have”).

15. See generally Jennifer Saba, *More Readers Skimming Google Headlines Than Going Directly to Newspaper Web Sites?*, EDITOR & PUBLISHER, (Jan. 19, 2010), available at <http://www.editorandpublisher.com/Headlines/more-readers-skimming-google-headlines-than-going-directly-to-newspaper-web-sites-27131.aspx> (explaining that readers are increasingly skimming headlines on news aggregator sites rather than clicking on newspaper websites).

Media organizations are increasingly fighting back against those who republish their content without authorization,¹⁶ but putting a stop to free-riding is problematic and better legal remedies are needed.¹⁷ Copyright law is not always useful because while it protects expression, it does not protect facts.¹⁸

One such legal solution is hot news misappropriation, a doctrine that stems from the law of unfair competition.¹⁹ The doctrine, which the Supreme Court established more than ninety years ago in *International News Service v. Associated Press*,²⁰ (“INS”), allows the original publisher of a news story to prevent a competitor from using the facts, “until its commercial value as news . . . has passed away.”²¹ The Supreme Court has never directly revisited *INS*, and legal scholars question whether the doctrine remains viable in light of the 1976 Copyright Act’s federal preemption provision²² and the Court’s modern rulings on free speech.²³ Today, only a handful of states recognize hot news misappropriation.²⁴

16. See, e.g., *All Headline News*, 608 F. Supp. 2d at 457–58 (detailing that Associated Press (AP) sued All Headline News for allegedly rewriting AP stories and then passing them off as its own); Complaint and Demand for Jury Trial ¶ 3–9, *Dow Jones & Co. v. Briefing.com, Inc.*, No. 1: 10-cv-03321-VM (S.D.N.Y. filed Apr. 20, 2010) (hereinafter *Dow Jones Complaint*) (describing Dow Jones’ lawsuit against briefing.com for misappropriating its news and headlines in near real-time); First Amended Complaint for Preliminary and Permanent Injunction and Copyright Infringement ¶ 20–93, *Agence France Presse v. Google, Inc.*, No. 1: 05-cv-00546-GK (D.D.C. filed Apr. 29, 2005) (outlining Agence France Presse’s lawsuit against Google over the unauthorized use of its headlines, stories, and photos). Besides these cases, the *Las Vegas Review-Journal* is suing more than thirty websites for copyright infringement for using the newspaper’s content without permission. See James Rainey, *Review-Journal Bares Its Claws*, L.A. TIMES, June 9, 2010, at D1 (describing dozens of lawsuits filed against publishers, such as a blog for cat enthusiasts to sites about sports betting and advertising).

17. See generally Bruce W. Sanford & Bruce D. Brown, *Laws That Could Save Journalism*, WASH. POST, May 16, 2009, at A15 (suggesting myriad solutions to support the ailing news business, including a recommendation to federalize the hot news doctrine).

18. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (stating that facts and ideas within a work are “free for the taking”). For example, as further illustrated in the text accompanying endnotes 173–77, the facts within a news story (e.g. the number of people killed in a plane crash) are free for others to use, but the way those facts are stated and arranged in a news story is protected expression.

19. *FTC Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism*, FED. TRADE COMM’N, 8, available at <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf> (hereinafter *FTC Staff Discussion Draft*) (discussing that hot news misappropriation can protect an organization’s investment in the facts for a limited time) (last visited Nov. 17, 2010).

20. 248 U.S. 215 (1918).

21. *Id.* at 245.

22. See *infra* note 234 (pointing out the differing viewpoints on the issue of preemption).

23. See *infra* text accompanying notes 134–142 (explaining how First Amendment doctrine has evolved since *INS*).

24. See Bruce W. Sanford et al., *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. LAW. 8, 9 (2009) (stating that the hot news misappropriation doctrine is recognized in five states). Those states are: California, Illinois, Missouri, New York, and Pennsylvania. See *McKevitt v. Pallasch*, 339 F.3d 530, 534 (7th Cir. 2003) (applying Illinois law); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841,

This Comment will argue that in addition to remaining viable, hot news misappropriation is an increasingly important legal tool in the digital era that more states should embrace—particularly to protect original newsgathering. However, to ensure that hot news misappropriation survives federal preemption and does not encroach on free speech rights, this Comment will suggest a framework that courts should follow to ensure that the doctrine is narrowly applied.

Part I of this Comment will discuss the limitations of copyright protections, the history of hot news misappropriation, and how courts have addressed the seemingly divergent goals of the First Amendment and intellectual property rights. Part II will argue that copyright law cannot adequately protect news organizations in the digital age, leaving a void that a narrow application of hot news misappropriation should fill. This Part will also recommend that courts should apply the doctrine by building on a legal framework first established by the Second Circuit Court of Appeals. Finally, Part III will argue that this narrow application of hot news misappropriation is not federally preempted and that the doctrine has the same policy goals as the First Amendment.

I. BACKGROUND

A. *Copyright Law's Limited Protection of Facts*

News organizations generally turn first to copyright law when seeking to halt the unauthorized republication of their content.²⁵ Copyright is the primary legal tool for protecting works of authorship in the United States,²⁶ and its importance is underscored by the fact that federal copyright protections have existed almost since the nation's inception.²⁷ The

845 (2d. Cir. 1997) (applying New York law); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 980 (E.D. Cal. 2000) (applying California law); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999) (applying Missouri law); *Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co.*, 192 A.2d 657, 663–64 (Pa. 1963) (applying Pennsylvania law); *see also* *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 332 (S.D.N.Y. 2010) (asserting that New York is the most enthusiastic supporter of hot news).

25. *See, e.g., Barclays Capital Inc.*, 700 F. Supp. 2d at 328 (holding that *Theflyonthewall.com* infringed copyrights by engaging in “verbatim copying of key excerpts” of seventeen research reports published by Morgan Stanley and Lehman Brothers); *see also* Rainey, *supra* note 16, at D1 (reporting that a newspaper filed more than thirty copyright infringement lawsuits against websites and blogs that were using its content without permission).

26. *See* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 411 (5th ed. 2010) (characterizing copyright law as “a principal means for protecting works of authorship” and noting that it is a broad domain that is continuously expanding).

27. The first federal copyright act was passed in 1790, three years after the Constitution was adopted. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124.

Constitution expressly authorizes Congress to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.”²⁸

Despite the importance of copyright, the law’s protections are limited. While copyright protects an author’s original expression, it does not protect the facts, ideas, or information within a work.²⁹ Copyright protection is also limited by the “fair use” doctrine (codified in the 1976 Copyright Act), which allows for the sharing of copyrighted material without the owner’s authorization for certain purposes such as criticism, comment, news reporting, teaching, and research.³⁰ Finally, copyright protections do not last indefinitely; the law generally offers protections for the life of the author, plus seventy years.³¹ Supreme Court Justice Potter Stewart articulated a key policy reason for these limitations in *Twentieth Century Music Corp. v. Aiken*:³² “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”³³

1. Copyright and original expression

Before 1991, courts sometimes awarded copyrights to works that lacked original expression, provided the data or facts were gathered independently.³⁴ Generally, these courts wanted to encourage authors to invest the time and labor needed to create databases and other fact-based works requiring significant research because these works would have broad

28. U.S. CONST. art. 1, § 8, cl. 8.

29. 17 U.S.C. § 102(b) (2006) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

30. *Id.* § 107 (explaining that in addition to the purposes for which a work will be used, courts should also consider “the nature of the copyrighted work; [t]he amount and substantiality of the portion used . . . ; and the effect of the use on the potential market for or value of the copyrighted work”). Congress has indicated that the factors listed in § 107 are illustrative rather than exhaustive. See H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 (explaining that because an infinite number of circumstances can potentially arise in the fair use context courts must be free to apply the fair use doctrine on a case-by-case basis).

31. 17 U.S.C. § 302(a). For a joint work prepared by at least two authors who did not work for hire, copyright lasts for the life of the last surviving author plus seventy years after the last surviving author’s death. *Id.* § 302(b). If the work is anonymous, pseudonymous, or made for hire, the copyright lasts either ninety-five years from the year of its first publication, or 120 years from the year of its creation, whichever expires first. *Id.* § 302(c).

32. 422 U.S. 151 (1975).

33. *Id.* at 156; see also Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 420 (1983) (stating that copyright seeks “to give the gatherer of information an incentive [to create] against the countervailing need to give the public free access to ideas”).

34. See, e.g., *Hutchinson Tel. Co. v. Frontier Directory Co. of Minn.*, 770 F.2d 128, 132 (8th Cir. 1985) (holding that the facts in a telephone directory were copyrightable); *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922) (stating that the right to copyright a book does not depend on whether its contents are original).

benefits to society.³⁵ This approach, first articulated by a U.S. court in 1922,³⁶ came to be known as the “sweat of the brow” doctrine.³⁷ Nearly seventy years later, the Supreme Court emphatically rejected “sweat of the brow” in *Feist Publications v. Rural Telephone Service*,³⁸ a case involving two competing telephone directory white pages. Rural Telephone Service was a public utility that annually published a directory that alphabetically listed the names of its subscribers, their towns, and phone numbers.³⁹ Feist, a publishing company that specialized in telephone directories, lacked independent access to Rural’s subscriber information and offered to pay Rural for the rights to use its listings.⁴⁰ When Rural refused, Feist copied the information anyway.⁴¹ In the end, more than 1300 of Feist’s listings were identical to Rural’s.⁴² Rural sued for copyright infringement, but the Court rejected its claim and held that not all copying is copyright infringement.⁴³

As explained by the *Feist* Court, copyright infringement requires two elements: (1) the owner must hold a valid copyright, and (2) the alleged infringer must copy elements of an original work.⁴⁴ The Court quickly determined that the first element was not an issue by finding that Rural’s telephone directory, as a whole, was copyrightable because it contained some original expression such as foreword text and yellow pages advertisements.⁴⁵ The second element, Feist’s copying of 1300 listings, was problematic. The Court stated that even if Rural was the first to discover and publish the names, towns, and phone numbers in a telephone directory, this information already existed—and would continue to exist—

35. See generally Charles Brill, *Legal Protection of Collection of Facts*, 1998 COMPUTER L. REV. & TECH. J. 1, 2 (1998) (discussing that when compilers put raw data into searchable databases it benefits society by making the information readily accessible and digestible, and warning that society will lose these benefits if the compilers of this data can no longer recoup their investment).

36. See *Jeweler’s Circular Publ’g Co.*, 281 F. at 88 (explaining that when a person records the names, addresses, and occupations of a town’s inhabitants, he is the author of that material, and commenting further that “[h]e produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work”).

37. E.g., *Earth Flag Ltd. v. Alamo Flag Co.*, 154 F. Supp. 2d 663, 668 n.2 (S.D.N.Y. 2001) (citation omitted) (explaining that the underlying principle behind the “sweat of the brow” doctrine was to offer “copyright [as] a reward for the hard work that went into compiling facts”).

38. 499 U.S. 340 (1991).

39. *Id.* at 342.

40. *Id.* at 342–43.

41. *Id.* at 343.

42. *Id.* at 344.

43. *Id.* at 361.

44. *Id.*; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) (providing the basis for *Feist*’s two-part test by explaining that while a work as a whole may be copyrighted, non-original elements within that work are free for the taking).

45. *Feist*, 499 U.S. at 361.

regardless of whether the directory was ever published.⁴⁶ Put more simply, the names, towns, and phone numbers were facts that no one could claim as their own.⁴⁷

This is because facts 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 the fact; he or she has merely discovered its existence. . . . The same is true of all facts—scientific, historical, biographical, and *news of the day*.⁴⁸

Thus, even though Rural had a valid copyright for its directory, the facts within the directory remained free for others to use.⁴⁹ Copyright protection is limited to the particular selection or arrangement of those facts.⁵⁰

The Court explained that although it may seem unfair that a competitor can use the fruit of another's labor without compensation, it is "the essence of copyright" and a constitutional requirement that others be allowed to freely build on information contained in a work.⁵¹ Yet, the Court also commented, without further elaboration, that in certain circumstances the fruits of research may be protectable outside of copyright law under the theory of unfair competition.⁵²

2. Copyright and fair use

The fair use doctrine also limits a plaintiff's ability to recover under copyright law. Section 107 of the 1976 Copyright Act states: "[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, *news reporting*, teaching . . . scholarship, or research, is not an infringement of copyright."⁵³ Section 107 then lists four factors for the courts to consider when determining whether the use is fair: (1) the purpose of the use, including whether it is for commercial or nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount of the work that is used, and (4) the

46. *Id.* The Court explained that "[t]he *sine qua non* of copyright is originality." *Id.* at 345.

47. *Id.* at 347.

48. *Id.* at 347–48 (emphasis added). The Court referenced *INS* to explain that the news element within a work is not copyrightable because it is not the creation of the writer, but rather "the history of the day." *Id.* at 353–54.

49. *Id.* at 349.

50. *Id.*

51. *Id.* at 349–50 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting)).

52. *Id.* at 354. One commentator notes that despite this suggestion by the Court, it is not clear how unfair competition law would provide protection for the fruits of labor. See S. Leigh Fulwood, *Feist v. Rural: Did the Supreme Court Give License to Reap Where One Has Not Sown?*, 9 COMM. LAW. 15, 16 (1991) (calling the Court's remark about unfair competition "cryptic" and noting that the Court supported its language with a treatise that is equally unclear).

53. 17 U.S.C. § 107 (2006) (emphasis added).

effect of the use upon the potential market for the copyrighted work.⁵⁴ The House report that accompanied § 107 indicates that courts are not expected to follow a specific formula when considering these factors.⁵⁵ Instead, the fair use doctrine should be applied on a case-by-case basis using an “equitable rule of reason” analysis.⁵⁶

The only Supreme Court ruling involving fair use and news reporting is *Harper & Row, Publishers, Inc. v. Nation Enterprises*.⁵⁷ In that case, *The Nation* magazine received a leaked manuscript of President Ford’s autobiography and published an unauthorized excerpt, thereby “scooping” *Time* magazine, which had paid for the exclusive rights to print prepublication excerpts.⁵⁸ *The Nation* admitted to directly copying portions of the manuscript author’s original language, but argued that its actions constituted fair use of copyrighted material.⁵⁹ The Second Circuit agreed, holding that the purpose of the article was “news reporting,” which is specifically mentioned as an example of activities that may be considered fair use under section 107.⁶⁰

The Supreme Court reversed, ruling that the article’s news content was just one factor to consider.⁶¹ The Court went on to examine each of the four factors in section 107, ruling against *The Nation* for each one.⁶² For the first factor, the Court determined that the article’s commercial publication, rather than nonprofit use, weighed against fair use.⁶³ For the second factor, the Court explained that the law “generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”⁶⁴ Although this language seemed to favor *The Nation*, the Court explained that the magazine focused on the most expressive elements of the Ford manuscript rather than the brief phrases or quotes necessary to disseminate the facts.⁶⁵ For the third factor, the Court noted that although the words quoted by *The Nation* were a small portion of the manuscript, they were “essentially the heart of the book.”⁶⁶ Finally, for the fourth

54. *Id.*

55. H.R. REP. NO. 94-1476, ch. 1, at 65–66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679–80.

56. *Id.* at 65.

57. 471 U.S. 539 (1985).

58. *Id.* at 542.

59. *See id.* at 548 (explaining that 300 to 400 words were directly copied, constituting about thirteen percent of *The Nation* article).

60. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 208 (2d Cir. 1983); *rev’d*, 471 U.S. 539 (1985); *see supra* text accompanying note 53 (quoting § 107).

61. *See Harper & Row*, 471 U.S. at 561 (explaining that § 107 was not intended to provide a list of uses that automatically qualified as fair use).

62. *Id.* at 561–69.

63. *Id.* at 562.

64. *Id.* at 563.

65. *Id.* at 563–64.

66. *Id.* at 564–65.

factor, the Court determined that *The Nation*'s actions significantly undermined the potential market for the copyrighted work.⁶⁷ In this case, *Time* canceled its plans to write about the Ford manuscript and refused to pay \$12,500 to Harper & Row.⁶⁸

B. The Emergence and Evolution of Hot News Misappropriation

When copyright law is unable to provide adequate relief, some news organizations have turned to another doctrine: hot news misappropriation. Hot news has been called “one of the strangest torts in intellectual property law”—in part because it protects facts already in the public domain.⁶⁹ A United States court first addressed whether a news organization's facts could be protected by the law in 1876.⁷⁰ But *INS*, decided more than thirty years later, marked the first time the Supreme Court established hot news misappropriation by ruling that news, gathered at great expense, was entitled to protection, otherwise the information provider might cease to exist.⁷¹

1. INS and hot news' beginnings

INS involved two wire services that were competing to deliver news about World War I to newspapers across the United States.⁷² International News Service (“INS”) had been kicked out of Europe, leaving the company without reporters to cover the war and prompting INS to rely on dispatches from The Associated Press (AP).⁷³ The AP alleged that INS was obtaining its stories in several ways: from early-edition newspapers on the East Coast, by reading bulletin board postings, or even by bribing AP

67. *Id.* at 566–67. The Court stated that the fourth element was the most important factor to determining fair use. *Id.* at 566. But nine years later, the Court backed away from that stance. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (holding that the fourth factor provides no evidentiary presumption of whether the use is fair).

68. *Harper & Row*, 471 U.S. at 567.

69. *See* Stephen M. Kramarsky, ‘Hot News’ Tort Swats Flyonthewall.com, N.Y.L.J., (Mar. 31, 2010), <http://www.law.com/jsp/article.jsp?id=1202447125430> (explaining that the use of publicly available information does not usually infringe on any legal rights). The author also states that hot news is unusual because one of the elements is “sweat of the brow,” which the Supreme Court rejected in 1991. *Id.*; *see also supra* notes 38–52 and accompanying text (discussing *Feist* and the Court's rationale for rejecting “sweat of the brow”).

70. *See* VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE: ORIGINS IN LAW AND IMPLICATIONS FOR THE DIGITAL AGE 43–44 (2005) (“It would be an atrocious doctrine to hold that dispatches, the result of the diligence and expenditure of one man, could with impunity be pilfered and published by another.” (quoting *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194, 196 (N.Y. Sup. Ct. 1876))).

71. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 240 (1918); EKSTRAND, *supra* note 70, at 43–44.

72. *Int'l News Serv.*, 248 U.S. at 229–30.

73. *See* EKSTRAND, *supra* note 70, at 47 (explaining that INS reporters were kicked off the continent because both Europeans and Congress believed INS Chief William Randolph Hearst was pro-German).

employees.⁷⁴ INS, according to AP, then rewrote the stories to sell to INS clients out West.⁷⁵ Despite INS' behavior, the Court had few tools with which to help AP: there was no copyright infringement because in most instances INS was simply copying the facts,⁷⁶ and there was no theft of trade secrets because AP's stories were accessible to the public.⁷⁷ The Court, however, made it clear that it was nevertheless disturbed by INS' business practices:

Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of [AP's] legitimate business precisely at the point where the 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; with special advantage to [INS] in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.⁷⁸

The Court ruled that INS could be enjoined from using the AP's stories because it was engaged in a form of unfair competition.⁷⁹ The Court declined to elaborate on how long the injunction should last.⁸⁰ Instead, the Court reaffirmed the language of the district court in stating that INS was prevented from using AP's content until the commercial value of AP's news "has passed away."⁸¹ The Court stated that without providing such protection, the AP could no longer justify the cost of gathering the news.⁸²

Unfortunately for the lower courts, the *INS* decision provided little guidance about when hot news misappropriation applies and how long news should remain "hot."⁸³ More than a decade after the decision, Judge Learned Hand—then sitting on the Second Circuit Court of Appeals—warned of the difficulties of expanding *INS*' holding beyond the narrow facts of the case because it "flagrantly conflict[ed]" with copyright and patent laws.⁸⁴ *INS*' precedential value also was limited because federal

74. *Int'l News Serv.*, 248 U.S. at 231.

75. *Id.*

76. *See id.* at 234 (observing that the "news element . . . is not the creation of the writer, but . . . [rather] the history of the day").

77. *See id.* at 235 (noting that news gets its value by being spread to the world, not by remaining a secret).

78. *Id.* at 240.

79. *Id.*

80. *See id.* at 245–46 (declining to specify the exact terms of the injunction because of the "practical difficulties" of the case).

81. *Id.* (citation omitted).

82. *See id.* at 240–41 (stating that "[t]he cost . . . would be prohibited if the reward were to be so limited").

83. *See* EKSTRAND, *supra* note 70, at 83 (explaining that the Court did not outline a formal legal test, or whether the tort applied to content other than news, or how much harm was needed for a successful claim).

84. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929). Judge Hand also stated:

While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided.

general common law in diversity jurisdiction cases, on which *INS* was based, was abolished twenty years after the Court's decision.⁸⁵ Since then, *INS* has survived only where it has been adopted as state common law.⁸⁶

Despite Judge Hand's concerns and the precedential limits placed on *INS*, the Court's holding was expanded under state common law far beyond the narrow circumstances of the original case—particularly to situations involving new technologies not addressed by copyright law where some form of unfair competition occurred. For example, in the 1938 case *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,⁸⁷ the owners of the Pittsburgh Pirates had an arrangement in which local NBC radio affiliates paid a fee for the exclusive right to broadcast the baseball team's games.⁸⁸ But another station, KQV, announced its intention to broadcast its own play-by-play reports by stationing reporters at certain locations outside the stadium.⁸⁹ The Pirates sued, fearing that KQV's actions undermined the team's arrangement with the other stations.⁹⁰ A federal court, relying heavily on *INS*, ruled for the Pirates, holding that KQV's actions interfered with the team's "normal and legitimate business" and prevented the team from benefitting from its labor and expenditures in the games.⁹¹

In 1950, *INS*' reach expanded even further when a New York state court held in *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*⁹² that direct competition—a key aspect of the *INS* decision—was no longer a necessary element.⁹³ The court concluded that "persons in theoretically non-competitive fields may, by unethical business practices, inflict as severe and reprehensible injuries upon others as can direct competitors."⁹⁴

[*INS*] appears to us such an instance The difficulties of understanding it otherwise are insuperable.

Id.

85. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that "[t]here is no federal general common law" and that, except in matters governed by the U.S. Constitution or by acts of Congress, federal courts must abide by the law of the state in which the case arose); see also *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) (explaining that the holding in *Erie* was at least partly in response to forum-shopping, in which the parties choose a venue most likely to provide a favorable judgment).

86. See *supra* note 24 (indicating that only five states have adopted hot news misappropriation).

87. 24 F. Supp. 490 (W.D. Pa. 1938). The case involved Pennsylvania common law, but was heard in district court because of the parties' diversity of citizenship and the amount in controversy. *Id.* at 493.

88. *Id.* at 492.

89. *Id.*

90. *Id.*

91. *Id.* at 492–94.

92. 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950).

93. *Id.* at 491–92.

94. *Id.* at 492.

2. *Hot news and federal preemption*

Decades after *INS* was decided, the case's broad applicability was significantly reduced. With the Copyright Act of 1976, Congress made it easier to protect emerging technologies so that *INS*-like protections were no longer needed.⁹⁵ More significantly, the Copyright Act included a provision preempting all common or state law protections that: (1) cover works "that are fixed in a tangible medium of expression," (2) cover subject matter specifically defined by federal copyright law, and (3) create legal or equitable rights that are equivalent to any of the exclusive rights within the "general scope" of copyright law.⁹⁶

Since then, misappropriation cases loosely based on *INS* have typically not been recognized by the courts.⁹⁷ However, some courts, particularly the Second Circuit, continue to find that narrow *INS*-like claims remain viable.⁹⁸ Until recently, though, there was much uncertainty about what elements were necessary to bring a successful claim.⁹⁹ Finally, in 1997, the Second Circuit addressed much of the confusion about hot news misappropriation in *National Basketball Ass'n v. Motorola, Inc.*¹⁰⁰—a case in which the NBA filed a hot news claim against Motorola for the unauthorized transmission of the league's scores and other real-time data about games in progress to handheld pagers.¹⁰¹ The Court held that to survive preemption, the following five elements *must* be met:

- (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information

95. 17 U.S.C. § 102 (2006) (permitting copyright protections for original works of authorship "now known or *later* developed") (emphasis added).

96. *Id.* at § 301(a).

97. See, e.g., *Pinnacle Pizza Co. v. Little Caesar Enters.*, 395 F. Supp. 2d 891, 901 (D.S.D. 2005) (holding that a pizza franchisee's misappropriation claim against a franchisor over an advertising slogan was preempted by federal copyright law); *Travel Bug Ltd. v. Muscarello*, No. 84 C 5467, 1986 WL 6941, at *5 (N.D. Ill. June 4, 1986) (ruling against a claim of misappropriation involving the alleged copying of a travel agency academy's policy manual because the claim was preempted by copyright law); *Mitchell v. Penton/Indus. Publ'g Co.*, 486 F. Supp. 22, 26 (N.D. Ohio 1979) (dismissing claim that defendant misappropriated certain information in plaintiff's book because such a claim was preempted by copyright law).

98. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (establishing the five elements that must be met for a state claim of hot news misappropriation to survive); see also *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1106 (C.D. Cal. 2007) (holding that California's cause of action for hot news misappropriation should not be preempted based on the Second Circuit's reasoning in *Motorola*); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999) (asserting that Missouri would likely allow a cause of action under a narrow application of hot news misappropriation).

99. See EKSTRAND, *supra* note 70, at 117 (explaining that *INS* indicated that labor and investment, time, free-riding, competition, and harm are all elements of hot news misappropriation, but noting that the Court did not outline these elements as a legal test or explain whether all needed to be met).

100. 105 F.3d 841 (2d Cir. 1997).

101. *Id.* at 843.

constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of the 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.¹⁰²

The Second Circuit ultimately ruled against the NBA, holding that only some of these elements existed.¹⁰³ The information was time-sensitive and the league did provide a similar service to Motorola's, known as Gamestats.¹⁰⁴ However, the court ruled that Motorola's paging system was not in direct competition with the NBA's primary business of producing basketball games and licensing copyrighted broadcasts of those games.¹⁰⁵ The court also held that there was no evidence that Motorola had engaged in free-riding on the league's collection of factual material about the games, such as scores and statistics, because Motorola used its own resources to collect that information.¹⁰⁶ However, the court explained that free-riding would exist if Motorola were to collect facts directly from the NBA's Gamestats and retransmit the data to its own pagers, and that such free-riding could threaten the viability of Gamestats due to a lower-cost competitor.¹⁰⁷

Despite the guidance provided by *Motorola*, only eight cases have specifically addressed the five-part test in the past thirteen years.¹⁰⁸ And, putting preemption concerns aside, critics question whether hot news misappropriation is even feasible.¹⁰⁹ They argue that *INS*-like scenarios no longer exist because in today's media environment many stories build off each other and no one is simply breaking news that others steal or rewrite.¹¹⁰ As one commentator asserted, in the Internet age "a true scoop lasts for about a minute."¹¹¹

102. *Id.* at 845.

103. *Id.* at 854.

104. *Id.* at 853.

105. *Id.*

106. *See id.* at 854 (explaining further that Motorola also used its own network to transmit the information).

107. *See id.* (holding that in this case, such free-riding was not occurring because Motorola's Gamestats was fairly competing with the NBA's SportsTrax in the marketplace).

108. The Second Circuit's decision in *Motorola*, 105 F.3d 841, was Keycited through Sept. 11, 2010.

109. *See, e.g.,* Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 625 (2003) (declaring that free-riding is "too broad to serve as a guiding principle of the law" because it encompasses acceptable competition); David Blau, *This Just In: "Hot News" Law Is Yesterday's News*, SUNSTEIN KANN MURPHY & TIMBERS LLP (March 2009), <http://www.sunsteinlaw.com/publications-news/news-letters/2009/03/200903hotNews.html> (asserting that the doctrine's time has passed because the economics of the news business have changed since *INS* was decided).

110. *See* Jeff Jarvis, *There is No Hot News. All News is Hot News.*, BUZZ MACHINE (June 28, 2010, 10:52 AM), <http://www.buzzmachine.com/2010/06/28/there-is-no-hot->

Yet media organizations have increasingly turned to the doctrine as they seek to protect their content from free-riders.¹¹² In *Associated Press v. All Headline News Corp.*,¹¹³ New York district court Judge P. Kevin Castel ruled in 2009 that AP had a viable claim when it sued an Internet-based news service that was allegedly distributing AP content under its own name.¹¹⁴ Although the suit was eventually settled out of court, the decision marked the first time a hot news claim was found viable in the Internet age and signaled the continued relevance of the doctrine.¹¹⁵

The same district court gave hot news misappropriation another boost in March when three Wall Street banks successfully sued Theflyonthewall.com (“Fly”) for hot news misappropriation, claiming the financial website took the firms’ investment research without authorization and redistributed the recommendations before the firms had a chance to share it with their clients.¹¹⁶ In *Barclays Capital Inc. v. Theflyonthewall.com*,¹¹⁷ district court judge Denise Cote ruled in favor of the firms after finding that all five elements established in *Motorola* were met.¹¹⁸ The judge first stated that Fly did not dispute that the banks incurred significant expense coming up with recommendations to help their clients maximize returns on investments.¹¹⁹ Second, the judge determined that the recommendations were clearly time-sensitive because the clients used the information to make trades in anticipation of stock price

news-all-news-is-hot-news/ (arguing that the idea of hot news should be “repellant” to journalists because the restrictions would limit all efforts to disseminate information freely). See generally Nate Anderson, *Who Owns the Facts? The AP and the “Hot News” Controversy*, ARS TECHNICA (May 6, 2009, 11:18 PM), <http://arstechnica.com/tech-policy/news/2009/05/who-owns-the-facts-the-ap-and-the-hot-news-controversy.ars> (stating that unlike the early “hot news” cases, today’s process of newsgathering is “mixed, blended, [and] messy”).

111. Erick Schonfeld, *Hot News: The AP is Living in the Last Century*, TECHCRUNCH (Feb. 22, 2009), <http://techcrunch.com/2009/02/22/hot-news-the-ap-is-living-in-the-last-century/>.

112. See, e.g., *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457–58 (S.D.N.Y. 2009) (involving AP’s claims against an Internet-based news service for copying AP stories from websites and reselling the content); *Dow Jones Complaint*, *supra* note 16, ¶¶ 2–3, 7 (alleging that a website was routinely copying Dow Jones’s stories and headlines).

113. 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

114. See *id.* at 461 (stating that the hot news doctrine remains viable under New York law and that the defendants did not persuasively argue why the five-factor test in *Motorola* should be rejected).

115. See generally Blau, *supra* note 109 (asserting that the real story of *Associated Press v. All Headline News Corp.* is the “possible revival” of the hot news doctrine and arguing that its granting of a “quasi-property” right to news is problematic).

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

117. 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

118. See *id.* at 335–42, 348 (analyzing each of the five factors in the *Motorola* test and ordering an injunction of Fly’s copyright and misappropriation activities).

119. See *id.* at 335 (stating that the banks employ hundreds of analysts and spend millions annually on producing the reports).

movement.¹²⁰ Third, Fly engaged in free-riding by making no investment of its own in equity research.¹²¹ Fourth, the banks and Fly were in direct competition because disseminating the recommendations was Fly's primary business and producing such reports was among the banks' primary businesses.¹²² The banks and Fly also distributed the recommendations in a similar fashion.¹²³ Finally, the judge held that the banks' economic incentive to produce the recommendations was substantially threatened because, although the banks presented no statistical evidence, "common sense and the circumstantial evidence about the plaintiffs' business model make the [banks'] contentions about its reduced incentives utterly credible."¹²⁴ The judge also set a specific time limit on how long the facts in question had value,¹²⁵ preventing Fly from publishing pre-market research until thirty minutes after the stock market opens.¹²⁶ Fly was also ordered to wait two hours to publish research issued while the market is open.¹²⁷

In May, however, the Second Circuit set aside the injunction pending an appeal by Fly.¹²⁸ If the ruling survives, one commentator asserts that *Theflyonthewall.com* could be welcome news for traditional media organizations and bad news for aggregators because the district court's decision was detailed, thoroughly reasoned, and "the product of a full-blown trial, giving it a concreteness and specificity that other, Internet-related hot news decisions . . . lack."¹²⁹

C. Hot News, Intellectual Property, and the First Amendment

Aside from preemption concerns, the First Amendment has been described as the "elephant in the room" when it comes to hot news

120. See *id.* at 336 (noting that the banks engaged in a "frenzied process" to be first to inform their clients).

121. *Id.* at 336–37 (explaining that although Fly attributed the information to the banks, such attribution only underscored Fly's free-riding because it was the banks' backing that gave the recommendations any perceived value).

122. *Id.* at 339.

123. *Id.* at 339–40 (noting that the parties use "similar, and in some instances identical, channels of distribution").

124. *Id.* at 342.

125. See *id.* at 345–46 (stating that "the goal is a period of lead time long enough to enable the Firms to conduct a reasonable sales effort and to retain the advantage of being the first to reach key institutional investors who may react promptly to a Firm's Recommendation").

126. *Id.* at 347.

127. *Id.*

128. *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010), *appeal docketed*, No. 10-1372-cv (2d Cir. May 19, 2010) (granting an expedited appeal).

129. Sam Bayard, *Barclays v. Theflyonthewall.com: Hot News Doctrine Alive and Kicking; Will News Aggregators Be Next?*, CITIZEN MEDIA LAW PROJECT, Mar. 23, 2010, <http://www.citmedialaw.org/blog/2010/barclays-v-theflyonthewallcom-hot-news-doctrine-alive-and-kicking-will-news-aggregators-be>.

misappropriation.¹³⁰ This issue has gone unaddressed by the Supreme Court since the doctrine’s beginnings. In establishing hot news misappropriation in *INS*, the Court never discussed how a doctrine that restricts others from using facts in the public domain could co-exist with the First Amendment,¹³¹ which declares that “Congress shall make no law . . . abridging the freedom of speech.”¹³² Justice Louis Brandeis’ dissent in *INS* came closest: “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become after voluntary communication to others, free as the air to common use.”¹³³

In the more than ninety years since *INS*, First Amendment case law has developed more fully. In particular, the Supreme Court has established that prior restraints—official restrictions of speech before publication—are the most serious infringement of free speech.¹³⁴ Since 1931, the Court has consistently found that such attempts to censor information are presumed unconstitutional.¹³⁵ In the landmark case of *Nebraska Press Ass’n v. Stuart*,¹³⁶ for instance, the Court noted that “[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity,”¹³⁷ and that this burden is not diminished merely because the restraint is temporary.¹³⁸ “The damage,” the Court asserted, “can be particularly great when the prior restraint falls upon the communication of *news* and commentary on current

130. See Brief Amici Curiae of Citizen Media Law Project et al. in Support of Neither Party at 6, *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv (2d Cir. June 24, 2010) (urging the Second Circuit to recognize the First Amendment implications of hot news when ruling on the *Flyonthewall.com* appeal).

131. *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (discussing copyright, property, unfair competition but not the First Amendment).

132. U.S. CONST. amend I.

133. *Int’l News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting). One commentator suggests that the Supreme Court never bothered addressing whether hot news can sustain a First Amendment challenge because cases invoking the doctrine had largely disappeared from the courts. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1070 (2000).

134. See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 541, 559 (1976) (denouncing prior restraint in the context of a state judge’s order restricting the publishing of a murder suspect’s possible admissions and calling prior restraint “the most serious and the least tolerable infringement on First Amendment rights”).

135. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722–23 (1931) (holding that the primary purpose of constitutional protections for the press is preventing previous restraints on publication); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (stating that “the Government ‘thus carries a heavy burden’” to justify the imposition of a prior restraint (citation omitted)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

136. 427 U.S. 539 (1976).

137. *Id.* at 558 (citation omitted).

138. *Id.* at 559.

events.”¹³⁹ The presumption against prior restraints is so significant, the Court continued, because such actions freeze speech—at least for a limited time.¹⁴⁰ Even in instances where damages are sought *after* publication, like in *Smith v. Daily Mail Publishing Co.*,¹⁴¹ the Court emphasized that the First Amendment protects the publication of truthful information on matters of public interest, provided such information is lawfully obtained, and “absent a need to further a state interest of the highest order.”¹⁴²

While First Amendment protections have grown more robust since *INS*, the Court has also recognized that the right to free speech has important limitations when intellectual property rights are involved.¹⁴³ The Court emphasized this point in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁴⁴ a case involving the common law “right to publicity” doctrine, which prohibits the appropriation of a private citizen’s name or likeness for commercial benefit.¹⁴⁵ In *Zacchini*, a “human cannonball” performer sued a television broadcasting company for broadcasting his entire act on television, claiming that the broadcast “was an appropriation of his professional property.”¹⁴⁶ In ruling for the performer, the Court held that the First Amendment does *not* “immunize” a media organization that broadcasts an entire performance without the performer’s consent.¹⁴⁷ The Court explained that the protection granted by the right of publicity provided the performer with an “economic incentive” to produce a performance of public interest.¹⁴⁸ “This same consideration,” the court added, “underlies the patent and copyright laws long enforced by this Court.”¹⁴⁹

Indeed, eight years later in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court explained why defendants in copyright cases, where preliminary injunctions are frequently granted,¹⁵⁰ also were not shielded by the First Amendment. In language closely mirroring *Zacchini*, the Court

139. *Id.* (emphasis added).

140. *Id.* (“If it can be said that a threat of criminal or civil sanctions after publications ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”).

141. 443 U.S. 97 (1979).

142. *Id.* at 103.

143. See, e.g., *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (noting that the First Amendment does not give citizens the right “to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare”).

144. 433 U.S. 562 (1977).

145. See CRAIG JOYCE ET AL., COPYRIGHT LAW 13–14, (8th ed. 2010) (explaining the history and policy reasons for granting a “right of publicity”).

146. *Zacchini*, 433 U.S. at 562, 569.

147. *Id.* at 575.

148. *Id.* at 576.

149. *Id.*

150. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 150 (1998) (asserting that in copyright cases, preliminary injunctions are granted as a matter of course).

stated that copyright is “the engine of free expression” because it provides an economic incentive for the creation and dissemination of ideas that benefit the public.¹⁵¹ The Court emphasized that copyright protections and the First Amendment’s guarantee of free speech were not in conflict because copyright merely protects expression, not facts and ideas.¹⁵² The Court also went on to stress that copyright should not be used “as an instrument to suppress facts.”¹⁵³

The Supreme Court has not provided a similar analysis involving hot news misappropriation and the First Amendment. However, a U.S. district court in New York addressed the issue in an early version of the *Motorola* case,¹⁵⁴ which was eventually appealed to the Second Circuit.¹⁵⁵ The defendant argued that granting the NBA injunctive relief on its hot news misappropriation claim would be an unconstitutional prior restraint.¹⁵⁶ The district court rejected this argument,¹⁵⁷ citing a Supreme Court decision that concluded that not all injunctions that affect expression rise to the level of a prior restraint.¹⁵⁸ Based on the Court’s reasoning in *Madsen v. Women’s Health Center*,¹⁵⁹ the district court explained that an injunction was not an unconstitutional prior restraint if: (1) the justification for the injunction was content neutral (in other words, the injunction was not used to favor or suppress a particular point of view)¹⁶⁰ and (2) the injunction did not permanently bar expression.¹⁶¹

151. *Harper*, 471 U.S. at 558.

152. *See id.* at 556 (“[C]opyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” (citation omitted)). For a more detailed explanation of copyright law and the facts, *see supra* notes 34–52 and accompanying text.

153. *Harper*, 471 U.S. at 559.

154. *Nat’l Basketball Ass’n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp. 1071 (S.D.N.Y. 1996), *aff’d in part and vacated in part*, *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

155. The Second Circuit did not address the parties’ First Amendment arguments after finding that the plaintiff’s hot news misappropriation claim failed. *Motorola*, 105 F.3d at 854. For a more thorough discussion of the Second Circuit’s ruling, *see supra* text accompanying notes 100–107.

156. *Sports Team Analysis*, 939 F. Supp. at 1086.

157. *Id.*

158. *Id.* at 1087; *see Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 770 (1994) (holding that an injunction keeping protesters thirty-six feet from an abortion clinic did not violate the First Amendment).

159. 512 U.S. 753 (1994).

160. For example, the Supreme Court held that a noise ordinance targeting a performance venue in New York City did not violate the First Amendment because the ordinance was aimed at preserving a quiet area for recreational activities like walking and reading, not because of any disagreement with a particular message that the noise conveyed. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (explaining that the city was concerned with the volume of sound, not the value of particular performers emitting the sound). Because content-neutral restrictions do not target the content of speech, such restrictions are not usually considered censorship and the Court sometimes applies intermediate scrutiny instead of strict scrutiny. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 (1987) (noting that when applying intermediate

In applying the two-part test, the district court quickly concluded that granting injunctive relief for the NBA's hot news claim did not violate the First Amendment. For the first element, the court explained that preventing the defendant from commercially misappropriating the NBA's proprietary rights by transmitting the league's scores and other data was a content-neutral speech restriction.¹⁶² The court next held that the defendant was not "totally thwarted" in its efforts to use data from NBA games; the defendant simply could not do so in the unlawful manner chosen.¹⁶³

II. COPYRIGHT'S INABILITY TO PROTECT FACTS LEAVES A CRITICAL GAP IN THE LAW THAT HOT NEWS MISAPPROPRIATION SHOULD FILL

The Supreme Court's decision in *Feist* discussed in Part I demonstrates that the Court is unwilling to protect facts when applying copyright law.¹⁶⁴ Copyright therefore does little to prevent free-riders from profiting off original reporting, which this Comment will demonstrate by applying *Feist*'s two-part analysis to a famous news story.¹⁶⁵ Yet there is a readily available solution: hot news misappropriation.¹⁶⁶ The Court left open the possibility of protecting facts outside copyright law when it stated in *Feist* that, in certain circumstances, protecting "the fruits of such research" might be possible.¹⁶⁷ Although hot news misappropriation is now only recognized in a handful of states, this Comment will also explain why more courts should adopt the doctrine, provided that certain elements are readily met.¹⁶⁸

A. Copyright Law is Unable to Protect Significant Portions of News Stories from Free-Riding

Under the two-part test articulated in *Feist*, copyright law is woefully ineffective at protecting news stories from free-riders. According to *Feist*,

scrutiny to content-neutral restrictions, the Court considers the substantiality of the governmental interest and the availability of less restrictive alternatives).

161. *Sports Team Analysis*, 939 F. Supp. at 1087. In articulating this two-part test, the district court cited *Pro-Choice Network v. Schenck*, 67 F.3d 359, 368 n.5 (2d Cir. 1994) (interpreting *Madsen*), *vacated in part on other grounds*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part and rev'd in part*, 519 U.S. 357 (1997).

162. *Sports Team Analysis*, 939 F. Supp. at 1087.

163. *Id.*

164. See *supra* Part I.A (discussing the Court's rejection of "sweat of the brow" and the justification for that rejection).

165. See *infra* Part II.A (showing how the two-part test limits a news organization's ability to protect the work that goes into lengthy investigative reporting, such as the Watergate scandal).

166. See *supra* Part I.B (explaining the history and evolution of the hot news doctrine from *INS* to the present day).

167. *Feist Publ'ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 354 (1991).

168. See *infra* Part II.B (recommending the various elements that should be met for a valid claim of hot news misappropriation).

infringement occurs only when: (1) the author of the work holds a valid copyright, and (2) the elements of the work that are copied are original.¹⁶⁹ To illustrate how this test applies to original reporting, consider just one example of the famous investigative reporting by *Washington Post* reporters Carl Bernstein and Bob Woodward during the Watergate scandal that led to President Nixon's resignation.¹⁷⁰

On October 17, 1972, the *Post* reported that Nixon's re-election committee was engaged in a massive spying campaign aimed at discrediting Democratic challengers, and that the Watergate break-in was tied to this effort.¹⁷¹ The carefully reported 2900-word story cited law enforcement sources, FBI and Justice Department files, and quoted a White House spokesman and several other officials.¹⁷²

Under the first element of the *Feist* test, the *Post*'s story as a whole is protectable by copyright because it involves original expression, such as how Woodward and Bernstein arranged the facts detailing the spying campaign and the specific language used to articulate those facts.¹⁷³ Thus, a competitor could not simply cut and paste or closely paraphrase the entire story onto a competing website (had such sites existed thirty years ago, of course).¹⁷⁴ However, as the Court stated in *Feist*, protection for "a factual compilation is *thin*."¹⁷⁵ Under *Feist*'s second prong, others remain free to take the facts that make up the story—in other words, they can write about the spying campaign and the players involved—as long as those facts are not presented in the same language.¹⁷⁶ Thus, a free-rider could get around the second element in *Feist* by simply rewriting and rearranging the *Post*'s story, thereby avoiding any duplication of the reporters' original expression.¹⁷⁷

169. *Feist*, 499 U.S. at 361.

170. Nixon resigned in 1974, but the *Post* first reported on the Watergate break-in two years earlier. See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 13 (1974) (describing that the tip for the Watergate break-in occurred on a Saturday in June of 1972).

171. See Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1 (describing in considerable detail the actions that Nixon campaign aides took to undermine Democratic candidates, such as leaking made up information to the press).

172. *Id.*

173. See *Feist*, 499 U.S. at 344 (explaining that while facts are not copyrightable, compilations of facts typically are protected); see also *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95–96 (2d Cir. 1977) (explaining that copyright protects "the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments").

174. See generally *Baker v. Selden*, 101 U.S. 99, 102 (1879) (articulating the notion that while individual facts can be used, copyright can come into play when they are incorporated into a larger work).

175. *Feist*, 499 U.S. at 349 (emphasis added).

176. *Id.*

177. See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71 (2d Cir. 1999) (holding that there was no copyright violation by the defendant when the facts

In the Internet era, it is easy to see how painstaking hours of research that went into Woodward and Bernstein's reporting could be rewritten, posted, and then used by free-riders in near real time, leaving the *Post* with little opportunity to exploit the advantage of being first. As *Associated Press v. All Headline News Corp.* demonstrates, the business model for aggregators seeking to free-ride on news organizations while avoiding copyright infringement is clear: first, hire poorly paid writers to find breaking news stories on the Internet; second, have the writers pull out the facts and then rewrite the information; finally, turn around and sell the stories to others while marketing the product as your own.¹⁷⁸ A prominent media attorney who represented the Associated Press against All Headline News acknowledged that an aggregator who pursues such a strategy is likely to defeat a news organization's argument of copyright infringement.¹⁷⁹

Even if a news organization can demonstrate that a free-rider copied expression, copyright law provides another hurdle that a successful claim must overcome: fair use. Faced with such a lawsuit, a free-rider would almost certainly argue that at least a portion of the copying, such as headlines and other brief snippets, was protected under the fair use doctrine.¹⁸⁰ As discussed in Part I.A, the federal Copyright Act specifically states that fair use of a copyrighted work for news reporting is not infringement.¹⁸¹ Yet no controlling precedent exists specifically involving aggregators and fair use, making it difficult to determine whether a fair use defense would ultimately succeed.¹⁸²

News organizations can take some solace in *Harper*, where the Court ruled there was no fair use when *The Nation* directly copied portions of a leaked manuscript, at least in part because of *The Nation's* commercial use of the work.¹⁸³ Since many news free-riders stand to profit financially,¹⁸⁴

were presented "in a different arrangement, with a different sentence structure and different phrasing").

178. 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009).

179. See Andrew L. Deutsch, *Protecting News in the Digital Era: The Case for a Federalized Hot News Misappropriation Tort*, in ADVANCED SEMINAR ON COPYRIGHT LAW 2010, 511, 514 (2010) (commenting that free-riders compete with original news gatherers because they provide a cheap alternative for news content).

180. See *id.* at 525 (asserting that an aggregator would "certainly seek dismissal" of the case on fair use grounds).

181. See *supra* note 53 and accompanying text (detailing what types of use are considered fair use under the Copyright Act).

182. See generally *FTC Staff Discussion Draft*, *supra* note 19, at 7–8 (stating that there are many views as to whether aggregators fall within the fair use exception and that a "quick . . . resolution is unlikely").

183. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

184. See generally *supra* text accompanying notes 8–15 (discussing how aggregators are able to undersell traditional newspapers in online advertising).

Harper seems to indicate that a fair use argument would fail.¹⁸⁵ However, in *Campbell v. Acuff-Rose Music Inc.*,¹⁸⁶ a fair use ruling nine years after *Harper* that did not involve news reporting,¹⁸⁷ the Court made it clear that commercial use does not *automatically* disqualify a work from fair use.¹⁸⁸ Instead, the Court stated, “the more *transformative* the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁸⁹

Transformative works, according to the Court, “add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁹⁰ One commentator suggests that at least one type of free-riding—search engines, which republish the headline and initial paragraphs of a news story—might be transformative by providing a reference tool for users to seek out myriad stories on a particular subject.¹⁹¹ Regardless of whether such an argument is successful, fair use is another wrinkle in copyright law that threatens to undermine attempts to protect original journalism.

These concerns underscore a significant problem with copyright law post-*Feist*, which is the lack of incentive for authors to create fact-based works involving little creative expression. If news organizations stop investing resources to cover major stories, such as Watergate, it would undermine one of the key goals of copyright: promoting the broad availability of new works.¹⁹² Legal commentators suggest that the *Feist* Court might have appreciated the value of protecting facts under the “sweat of the brow” theory if *Feist* had involved the struggles of news organizations rather than a low-stakes case that involved alphabetical listings in a rural Kansas phone book.¹⁹³

185. See *Harper*, 471 U.S. at 562 (asserting that commercial use “is presumptively an unfair exploitation” of copyrighted material (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984))).

186. 510 U.S. 569 (1994).

187. Instead, the case involved the musical group 2 Live Crew, which was accused of violating the copyright of the song “Oh Pretty Woman” after parodying it. *Id.* at 571–72.

188. See *id.* at 572 (announcing that a work’s “commercial character is only one element to be weighed in a fair use enquiry”).

189. *Id.* at 579 (emphasis added).

190. *Id.*

191. Deutsch, *supra* note 179, at 531–32. For support, Deutsch cites to *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir.), *amended on reh’g by*, 508 F.3d 1146 (9th Cir. 2007), in which the Ninth Circuit held that Google’s use of thumbnail images of copyrighted works was “highly transformative” and thus likely fair use. However, no other circuit has adopted this ruling.

192. See Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 349 (1992) (noting that granting authors exclusive rights to their works was “thought to encourage production,” thereby benefitting society).

193. See generally Sanford et al., *supra* note 24, at 8 (stating that *Feist* shows that “bad facts make bad law” and that the facts in *Feist* are “comically out of step with the realities of publishing today”).

Yet, these commentators note, “the trouble with *Feist* as the high noon moment for the ‘sweat of the brow’ theory is that there just wasn’t much sweat to speak of.”¹⁹⁴ Unfortunately, any attempt to amend copyright law post-*Feist* to protect facts is unlikely because the Court rooted its decision in the Constitution.¹⁹⁵ A clear alternative is needed.

B. A Narrow Application of Hot News Misappropriation Should Fill the Void Left by Copyright

Because copyright law fails to adequately protect original news content from free-riders, more courts should allow plaintiffs to invoke narrow, *INS*-like hot news misappropriation claims. Applying a slight variation of the five-part test established by the Second Circuit in *Motorola* is a critical starting point.¹⁹⁶ However, those elements are not enough; courts should take two additional steps as part of an expanded legal framework that is intended to minimize First Amendment concerns and further ensure that successful claims closely conform with *INS*.¹⁹⁷ This Comment will refer to the expanded test as “*Motorola* plus.”

To determine whether a claim survives preemption, courts should first turn to the *Motorola* analysis,¹⁹⁸ with a slight change to the fifth element:¹⁹⁹ (1) the plaintiff generates information at a cost, (2) the information is time-sensitive, (3) the defendant’s use of the information constitutes free-riding, (4) the defendant’s product or service is in direct competition with the plaintiff’s product or service, and (5) the defendant’s free-riding is likely to reduce the plaintiff’s incentive to produce the product or service, thereby threatening its existence.²⁰⁰ As the Second Circuit plainly stated in *Motorola*, elements two, three, and five distinguish hot news claims from those involving copyright infringement, thus allowing the doctrine to survive preemption.²⁰¹ This Comment will discuss preemption in more detail in Part III.A.

194. *Id.*

195. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. . . . [H]owever, this is not some unforeseen byproduct of a statutory scheme. It is, rather, the essence of copyright and a *constitutional* requirement.”(internal quotations and citations omitted) (emphasis added)).

196. *See infra* text accompanying notes 198–204 (laying out the five-part test and explaining why changes were made to the fifth element).

197. *See infra* text accompanying notes 208–218 (explaining the two extra elements and why they are needed).

198. *See* *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (establishing five elements that the court asserts must be met for an *INS*-like claim to survive federal preemption).

199. *See generally infra* text accompanying notes 201–204 (explaining the reason for the change in wording from *Motorola*).

200. *Motorola*, 105 F.3d at 845.

201. *Id.* at 853.

The wording of the fifth element has been altered slightly from *Motorola* to make it clear that the plaintiff is not required to show statistical proof that its business has already been damaged, similar to the facts in *INS*.²⁰² Rather, a court should be able to infer that such damage would likely occur if the defendant's free-riding continued.²⁰³ This ensures that the doctrine is applied by the courts before extensive economic damage is inflicted on the plaintiff, at which point accurate monetary damages might be difficult—if not impossible—to calculate, and the court would be forced to speculate.²⁰⁴

Besides fortifying hot news misappropriation from preemption concerns, the fourth and fifth elements of the *Motorola* test play an important public policy role by ensuring that successful claims are limited to instances of *systematic* copying that *substantially* harm the plaintiff. This should ease fears that news organizations will use hot news misappropriation to target individuals who post occasional news headlines and blurbs on social networking sites like Facebook and Twitter—claims that could become so numerous as to be impractical for courts to handle given the minor damages likely to be at stake.²⁰⁵ Indeed, without evidence of systematic copying, a plaintiff will be hard-pressed to show that occasional copying threatens its existence, as required by element five.²⁰⁶ And the direct competition requirement in element four eliminates claims where the alleged harm is insignificant, such as when the defendant is not competing with the plaintiff for the same revenue or market share.²⁰⁷

202. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 230 (1918) (discussing the considerable cost AP incurred in gathering the news but failing to address the specific financial harm suffered by the wire service as a result of INS' free-riding); see also *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 342 (S.D.N.Y. 2010) (rejecting defendant's attempt to require the plaintiffs to show actual damages).

203. In *INS*, the Court did not require direct proof that AP had been harmed in order to rule in its favor. See *Int'l News Serv.*, 248 U.S. at 241 (noting the "obvious results" of INS' actions toward AP).

204. See generally *Which Kind of Damages Are Available in IP Disputes?*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/enforcement/en/faq/judiciary/faq08.html> (last visited Jan. 24, 2011) (explaining that establishing the true extent of infringement for purposes of calculating damages in intellectual property cases is "notoriously difficult," especially if the infringement occurs online).

205. See Brief for Amici Curiae Google, Inc. & Twitter, Inc. in Support of Reversal at 12, *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv (2nd Cir. June 21, 2010) (asserting that it would be impossible to restrict the dissemination of news in a world of citizen journalists).

206. Systematic copying was a key element in the first hot news misappropriation case. See *Int'l News Serv.*, 248 U.S. at 231 (detailing that INS repeatedly misappropriated AP's stories by taking numerous articles off bulletin boards or from early-edition newspapers that included AP content). Systematic copying also occurred in a recent, successful hot news misappropriation case. See *Barclays Capital Inc.*, 700 F. Supp. 2d at 342–43 (explaining that Theflyonthewall.com frequently misappropriated and reported the banks' research recommendations).

207. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997) (defeating a hot news claim because the NBA, which primarily produces live basketball games, did not directly compete with the defendant, which sold and marketed a pager featuring sports data).

If all five elements in *Motorola* are satisfied, courts should next inquire whether protecting the plaintiff's information will provide a tangible, useful benefit to society.²⁰⁸ After all, the primary goal of protecting intellectual property under the commonly used utilitarian theory is not to reward the author; instead, the goal is to provide authors with adequate economic incentive to create new works that promote "the [p]rogress of Science and *useful Arts*."²⁰⁹ As this Comment will discuss more thoroughly in Part III.B, these goals mirror those of the First Amendment.²¹⁰ If authors do not have adequate economic incentive to create useful works, then fewer such works will be created and one of the amendment's key objectives—promoting the exchange of ideas—will be lessened.²¹¹ While ensuring the survival of original news reporting, which keeps the citizenry informed, clearly meets this additional standard,²¹² other fact-based works outside the scope of this Comment might also pass this test.²¹³ Ultimately, the courts have wide discretion in determining what is useful and thus deserving of hot news protection.

Next, the plaintiff should be required to show that it had the information first. As the Supreme Court stated in *INS*, the value of news depends "chiefly upon its novelty and freshness."²¹⁴ Thus, if the plaintiff is not first with the information, the work's societal value may be diminished to the point where the benefits of providing protection no longer outweigh the costs.²¹⁵ The element of "firstness" also should help courts weed out claims for which there is no effective remedy. Consider, for example, situations in which myriad organizations are covering a breaking news story such as a natural disaster, when news unfolds rapidly and information

208. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 355 (1999) (insisting that any departure from the idea that communicated information is free be "specifically justified").

209. U.S. CONST. art. 1, § 8, cl. 8 (emphasis added); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (emphasizing the role copyright plays in promoting the progress of science and useful arts); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (concluding that while motivating the author is important, copyright's ultimate goal is to "stimulate artistic creativity for the general public good").

210. See *infra* text accompanying notes 260–266. The *Motorola* court did not address the First Amendment after determining that the plaintiff's claim was preempted by the five-part test. See *Motorola*, 105 F.3d at 854 n.10 (relegating to a footnote the statement that there was no need to address the defendant's free speech concerns).

211. See *infra* note 261 and accompanying text.

212. See *FTC Staff Discussion Draft*, *supra* note 19, at 5 (illustrating how reporting can improve society by providing an example of how investigative reporting can bring about reforms at a local hospital, which in turn can lead to better health care).

213. See *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 343 (S.D.N.Y. 2010) (stating that banks' equity research plays an important role in pricing stocks fairly, thereby helping to ensure an efficient allocation of capital).

214. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 238 (1918).

215. Cf. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 14 (2003) (explaining that if a good is not scarce and has no exchange value, then "the social value of property rights will be slight or even negative").

that is valuable one moment is stale the next.²¹⁶ In these instances, establishing a limited property right in the news has little practical value—a point AP itself made in its brief to the Supreme Court in *INS*.²¹⁷ In many other circumstances, however, firstness will be clearly discernable—such as when a news organization is first to report a story after an investigation or when the organization has the only reporter covering an event in a remote region.²¹⁸

Besides meeting these seven requirements, the plaintiff must overcome several key defenses by an alleged hot news infringer. The plaintiff must show that it not only broke the news, but that the copying outlet did not independently report the story on its own.²¹⁹ Additionally, courts should allow defendants to defeat a plaintiff's hot news claim if the defendant shows that the information was used for commentary or criticism of news reporting, similar to some of the fair use protections under copyright law.²²⁰

If all these elements are met, the plaintiff's remedy should be injunctive relief that lasts only until the commercial value of the news has "passed away."²²¹ As addressed by element five of the *Motorola* test, a monetary remedy is unworkable because it would place courts in the awkward position of speculating on the exact impact of the unauthorized copying.²²² Injunctive relief also has an obvious shortcoming: it cannot reverse the harm caused by unauthorized copying that has already occurred. However, injunctions will allow news organizations to halt the *systematic* free-riding of valuable content that, if unchecked, could bring about the industry's demise.²²³

216. Cf. Jarvis, *supra* note 110 (quoting the head of Thomson Reuters, who stated that his news is valuable for mere "milliseconds").

217. See EKSTRAND, *supra* note 70, at 73 ("If conditions of the world were such that every happening anywhere became automatically known to everybody everywhere, there could hardly be any property value in news; but as the world actually is, a great organization of vigilance, investigation, transmission and distribution is necessary to connect the fact with those who wish to know it." (quoting Brief for Respondent, at 11–12, *INS*)).

218. *The Washington Post's* coverage of Watergate is one example. See *supra* text accompanying notes 170–172 (describing how the *Post* spent two years investigating aspects of the Watergate break-in).

219. Cf. Schonfeld, *supra* note 111 (arguing that for *INS* to be valid today AP would have to demonstrate evidence of news stories in which its journalists broke the news *and* where it was the only news organization to do so).

220. See Deutsch, *supra* note 179, at 588 (urging the adoption of a similar defense while outlining a proposal for a federal hot news tort).

221. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 245–46 (1918) (declining to specify a specific injunction against *INS* and instead directing the lower court "to deal with the matter upon appropriate application made to it for the purpose").

222. See *supra* text accompanying notes 202–204.

223. Because hot news misappropriation deals with systematic copying, injunctive relief also should not prompt a rush to the courthouse every time unauthorized copying occurs, an issue that was not addressed by *INS* nor the most recent court that considered injunctive relief involving hot news misappropriation. See *Int'l News Serv.*, 248 U.S. at 245–46 (discussing only the amount of time an injunction should last, and even then avoiding prescribing any specific time limit); *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.

The Court in *INS* did not provide any specific guidance about the length of time an injunction should last,²²⁴ and this Comment sees no need to prescribe an exact time limit either. Instead, the courts should provide the plaintiff with just enough lead time necessary to ensure continued investment in newsgathering.²²⁵ Normally, the originator of valuable information has an opportunity to exploit the natural lead time of being first.²²⁶ The instantaneousness of the Internet, however, all but eliminates this advantage because information is copied and pasted almost instantly.²²⁷ While at least one commentator suggests that hot news protections last twenty-four hours,²²⁸ such a rigid approach is unhelpful. Hot news protections can expire sooner, depending on the facts of the case. For example, in *Theflyonthewall.com*, a New York federal court prevented a financial website from publishing some information until thirty minutes after the stock market opened.²²⁹

Rather than leaving hot news misappropriation in the common law, some commentators have suggested that Congress amend the Copyright Act to include hot news protections²³⁰ or federalize the doctrine by passing a hot news statute.²³¹ Such an approach is unnecessary—at least for now. The

Supp. 2d 310, 346–47 (S.D.N.Y. 2010) (prescribing only the amount of time the injunction should last).

224. *Int'l News Serv.*, 248 U.S. at 245–46.

225. See *Barclays Capital Inc.*, 700 F. Supp. 2d at 345–46 (stating that determining the right amount of lead time is important so as to give the plaintiff enough incentive to create the valued work without also giving the plaintiff an opportunity to “squeeze every last cent out of their efforts to the exclusion of others”). See also T.B. MACAULAY, *Copyright I* (February 5, 1941), in *THE COMPLETE WORKS OF THOMAS BABINGTON MACAULAY: SPEECHES AND LEGAL STUDIES* 235, 241 (Houghton, Mifflin & Co. 1900) (stating in an 1841 speech on copyright before Britain’s House of Commons that “monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good”).

226. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995) (stating that lead time typically allows the originator to recover the costs of gathering the valuable information, thereby encouraging continued investment).

227. See Marburger, *supra* note 4 (explaining that due to the ease with which one can repost material online, a reader can now find equally fresh news on both a newspaper’s official website and on a free-rider’s website).

228. See Clay Calvert et al., *All the News That’s Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture*, 10 WAKE FOREST INTELL. PROP. L.J. 1, 28–29 n.183 (2009–2010) (noting a suggested change to copyright law that would provide journalists protection for the facts they uncover for a twenty-four hour period following publication).

229. See *Barclays Capital Inc.*, 700 F. Supp. 2d at 347 (declining to provide injunctive relief beyond the “minimum level of protection necessary to ensure that a socially valuable product is not driven out of the market through unfair competition”).

230. See Holte, *supra* note 4 at 32–33 (suggesting that either the fair use provision of the Copyright Act should be amended to include added protections or an entirely new section should be added concerning news reporting).

231. See Deutsch, *supra* note 179, at 579–80 (arguing that leaving hot news to state judges could lead to a variety of standards while a federalized doctrine would instead streamline the process); Sanford & Brown, *supra* note 17, at A15 (arguing that the doctrine should be federalized because it is only recognized in a handful of states).

rapid evolution of the Internet and digital communications means that implementing legislation now could have unforeseen consequences, difficult to undo as technology evolves.²³² Instead, the courts should take a more measured approach, allowing hot news misappropriation cases to play out within the “*Motorola plus*” framework as new challenges unfold. Although this framework is rigorous, a plaintiff faced with the systematic, *INS*-like free-riding of its content—a growing problem in the Internet age²³³—should find success.

III. WHY A NARROW APPLICATION OF HOT NEWS MISAPPROPRIATION IS A WORKABLE SOLUTION

The two major criticisms of hot news—that the doctrine is preempted by federal copyright law and that it infringes on the First Amendment—are not an issue under the “*Motorola-plus*” framework. Some legal scholars argue that *all* hot news misappropriation claims are preempted by the 1976 Copyright Act.²³⁴ However, this Comment argues that the wording of the statute and congressional intent at the time the act was passed explicitly carve out an exception for narrow *INS*-like claims.²³⁵ This Comment also argues that hot news misappropriation preserves, rather than hinders, free speech by providing an economic incentive for the creation of useful new works.²³⁶ And, much like other intellectual property protections, such as copyright, the courts can limit the doctrine’s reach to alleviate these concerns.²³⁷

A. *Hot News Survives Preemption Because the Doctrine Does Not Cover Copyrightable Subject Matter*

Federal copyright law does not preempt hot news misappropriation if the doctrine is carefully applied. Although legal scholars and the courts have

232. See EKSTRAND, *supra* note 70, at 163 (concluding that a poorly designed statute could harm the public domain in ways that hot news currently does not).

233. See *supra* text accompanying notes 1–15 (illustrating the challenges that free-riding poses to the news industry).

234. There are two schools of thought on state law with respect to intellectual property: an expansive view and a minimalist view. See JOYCE ET AL., *supra* note 145, at 947 (explaining that the expansive approach believes state law can fill gaps in protection under federal law, while the minimalist approach views state laws more cautiously because of their tendency to remove information from the public domain). Marburger, *supra* note 6, provides an example of the minimalist approach by stating that there is no preemption exception for the ruling in *INS*.

235. H.R. REP. NO. 94-1476, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748.

236. See *infra* text accompanying notes 259–269.

237. See, e.g., *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 347 (S.D.N.Y. 2010) (limiting an injunction against a free-riding website to a two-hour period to allow the originally reporting party adequate lead time).

varying viewpoints that fail to definitively resolve the issue,²³⁸ the language of the Copyright Act provides a helpful starting point. As discussed in Part I.B, state laws are preempted by copyright law only when they: (1) cover works fixed in a tangible medium of expression, (2) cover subject matter specifically defined by copyright law, *and* (3) create legal or equitable rights that are equivalent to any of the exclusive rights within the “general scope” of the federal Copyright Act.²³⁹

The first and third elements are the most problematic for hot news misappropriation. Because nearly all news stories transmit facts in the form of words, sounds or pictures, the first preemption requirement will almost always be met.²⁴⁰ The third preemption requirement is also easily satisfied because hot news misappropriation, in allowing a court to issue an injunction that prevents a competitor from using the same facts, provides an equivalent remedy to the Copyright Act; both doctrines grant exclusivity to one party at the expense of another for a limited time.²⁴¹

However, there is little consistency among the courts’ various interpretations of the second element.²⁴² Prior to *Feist*, when some courts protected fact-based works to provide an incentive for their creation, the argument that copyright law preempted hot news misappropriation was stronger because facts, at least occasionally, came within the general subject matter of copyright protection.²⁴³ In *Feist*, however, the Court made it explicitly clear that copyright does not protect facts or ideas.²⁴⁴ This is so, the Court said, because “facts do not owe their origin to an act of authorship.”²⁴⁵ The Court even went so far as to state that the Constitution

238. See *supra* note 234 (illustrating the diverging scholarly viewpoints on the issue). Compare *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (holding that there is no federal preemption), with *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 756 (D. Md. 2003) (suggesting that hot news misappropriation might be preempted by the Copyright Act in limited circumstances).

239. 17 U.S.C. § 301(a) (2006).

240. See H.R. REP. NO. 94-1476, at 52 (explaining that under the Copyright Act, the form of fixation can mean “words, numbers, notes, sounds, pictures, or any other graphical or symbolic indicia”).

241. Compare *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 245 (1918) (holding that hot news misappropriation allows AP to prevent INS from copying its stories as long as the news has value), with 17 U.S.C. § 106 (stating that a copyright holder has the exclusive right to reproduce the protected work).

242. Contrary to the Second Circuit in *Motorola*, the Fifth Circuit has taken a strict approach, finding preemption as long as the work falls within the broad confines of copyright law. See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (holding that a state software protection statute is preempted because it “touches upon an area” of federal copyright law).

243. See *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 95 (2nd Cir. 1922) (establishing the “sweat of the brow” theory).

244. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”).

245. *Id.* at 347. To be clear, compilations of facts are a different matter altogether. See *id.* at 348 (explaining that in compiling facts, the author shows enough originality—by

required such a determination.²⁴⁶ Thus, *Feist* underscores a critical distinction between hot news, which protects *information*, and copyright, which protects *expression*. Justice Sandra Day O'Connor's majority opinion seems to acknowledge this distinction in a footnote addressing what impact *Feist* had on *INS*.²⁴⁷ Rather than overrule *INS*, as the Court could have done if copyright preempted hot news, O'Connor instead wrote that *INS* "ultimately rendered judgment for Associated Press on noncopyright grounds that are not relevant here."²⁴⁸

Additionally, the American Law Institute's formal commentary accompanying the Restatement (Third) of Unfair Competition stopped just short of suggesting there was no place for *INS* alongside the 1976 Copyright Act.²⁴⁹ Instead, the commentary urged against a broad application of *INS* so as not to undermine the policy reasons behind copyright law's limitations,²⁵⁰ yet acknowledged that the unusual circumstances of *INS* "present the most compelling case for protection against appropriation."²⁵¹

The 1976 Copyright Act and its legislative history provide still more evidence against the preemption of hot news. Section 102(b) specifies that certain elements contained within works of authorship do not fall under copyright's scope: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery"²⁵² More significantly, the House Report discussing the 1976 Copyright Act explicitly indicates that lawmakers intended for the hot news doctrine to survive preemption:

[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.²⁵³

Some commentators have downplayed this language because the bill that Congress ultimately passed deleted language that stated hot news

choosing which facts to include and in what order to place them—to receive protection through copyright law).

246. *Id.* at 340.

247. *See id.* at 354 n.* (stating in a footnote that judgment was ultimately granted in favor of Associated Press).

248. *Id.* (emphasis added).

249. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. e. (1995).

250. *Id.*

251. *Id.* at cmt. c.

252. 17 U.S.C. § 102(b) (2006).

253. H.R. REP. NO. 94-1476, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748.

misappropriation was saved from preemption.²⁵⁴ But the Second Circuit in *Motorola* cited the House Report in asserting that “it is generally agreed that a ‘hot-news’ *INS*-like claim survives preemption.”²⁵⁵ The Second Circuit stated that the central question was not whether hot news survived preemption, but rather the “*breadth* of the ‘hot news’ claim that survives.”²⁵⁶ As illustrated in Part II.B, the breath is narrow, but sufficient enough to provide news organizations relief from systematic free-riding.²⁵⁷

B. Hot News, Like Other Forms of Intellectual Property, Does Not Undermine the First Amendment

The other major concern about hot news misappropriation is that it violates free speech.²⁵⁸ To understand why this is not the case, it is important to view the principles behind hot news in the same context as other intellectual property protections that co-exist with the First Amendment.²⁵⁹

Reconciling the First Amendment with the Constitution’s so-called “Copyright Clause” might seem infeasible at first glance. After all, the First Amendment ensures the free flow of information and expression while Article I, Section 8 of the Constitution allows authors to restrict the free flow of certain information and expression.²⁶⁰ Yet the Supreme Court acknowledges that both parts of the Constitution actually serve the same goal of encouraging a robust exchange of ideas; each part just goes about it a different way.²⁶¹ While the First Amendment stands for the principle that

254. See Holte, *supra* note 4, at 28–29 (arguing that because Congress excluded such language from its final legislation, their intent remains unclear).

255. Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2nd Cir. 1997).

256. *Id.* at 850.

257. See *supra* discussion Part II.B.

258. See, e.g., Bayard *supra* note 129 (arguing that the First Amendment is an important issue because it was not addressed by *INS* and because the doctrine has grown stronger over the years); Art Brodsky, *Oh, the Hypocrisy: First Amendment Attorneys Would Destroy the Internet to Save Newspapers*, THE HUFFINGTON POST (May 18, 2009, 3:26 PM), http://www.huffingtonpost.com/art-brodsky/oh-the-hypocrisy-first-am_b_204809.html (denouncing added protections for the news industry because of the harm that would cause to freedom of expression).

259. See Andrew L. Deutsch et al., *‘Hot News’ and the ‘Duty to Police’ It*, LAW TECH. NEWS (May 18, 2010) <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202458321278> (asserting that “[h]ot-news’ misappropriation is akin to, although not the same as, copyright infringement”).

260. Compare U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”), with U.S. CONST. art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

261. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (stating that because the Copyright Clause and First Amendment were both adopted about the same time, the Framers must have viewed copyright’s limited monopolies as compatible with free speech); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (asserting that

government censorship of expression harms the flow of information, intellectual property protections stand for the principle that if authors are not provided with economic incentives to create works that require significant labor, fewer of such works will be created for society's benefit.²⁶²

Because hot news misappropriation provides the same economic incentives for useful works as other intellectual property protections, the doctrine is not in conflict with the First Amendment. There are, of course, important distinctions between the various intellectual property doctrines—including copyright and hot news. As discussed in Part I.C, the Supreme Court pointed out in *Harper* “that copyright’s idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of *facts* while still protecting an author’s *expression*.”²⁶³ Critics of hot news misappropriation argue that by protecting the facts, hot news obliterates this careful balance and treads on the First Amendment where copyright does not.²⁶⁴ However, such an argument ignores the very real threat to free speech if free-riding is allowed to continue unabated. If news organizations lack an economic incentive to produce original journalism, the creation and dissemination of information that the First Amendment purports to advance is harmed.²⁶⁵ As one commentator noted, if every work of public interest could be pirated away by a competitor, “the public [soon] would have nothing worth reading.”²⁶⁶

Additionally, even though hot news misappropriation protects facts, this protection is extremely limited. First, the five-part test established by the Second Circuit in *Motorola*, and incorporated into this Comment’s “*Motorola-plus*” framework, makes it clear that the hot news doctrine does not target members of the general public.²⁶⁷ Instead, the doctrine gives

intellectual property protections, specifically copyright law, encourage free expression by providing authors with an incentive to create new ideas).

262. See *Harper*, 471 U.S. at 558 (explaining that copyright provides the economic incentive to fuel new expression); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (noting that the right of publicity doctrine provided a performer with the economic incentive to produce a work of public interest).

263. *Harper*, 471 U.S. at 556 (emphasis added) (citation and internal punctuation omitted).

264. See Volokh, *supra* note 133 at 1070–71 (stating that if the Court were to confront the issue of hot news and the First Amendment, it should rule that the doctrine is unconstitutional).

265. See generally Marburger, *supra* note 4 (stating that the threat from free-riders will lead to fewer news gatherers, which in turn undermines the idea exchange the First Amendment was designed to encourage).

266. Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 78 (1971).

267. See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) (holding that hot news only survives preemption when five elements are met, including that the defendant is in direct competition with the plaintiff).

news gatherers a right to stop only systematic free-riding by direct competitors, and even then only for a limited time.²⁶⁸ Additionally, hot news does not limit competitors from researching and reporting the same facts on their own—it only prevents them from taking from others.²⁶⁹ Thus, concerns that hot news gives plaintiffs a monopoly on the facts are overblown.

Finally, although the Supreme Court has not directly addressed hot news and the First Amendment, the Court has asserted that not all injunctions are unconstitutional prior restraints.²⁷⁰ As discussed in Part I.C, subsequent courts have stated that an injunction is valid if: (1) the justification for the injunction was content neutral, and (2) the injunction itself did not permanently bar expression.²⁷¹

Although the Supreme Court has acknowledged that deciding whether a particular regulation is content-based or content neutral can be difficult,²⁷² hot news misappropriation is straightforward. Hot news is content neutral because the doctrine on its face does not seek to restrict particular types of facts; rather, the doctrine merely distinguishes the manner in which facts were obtained (whether through original newsgathering or by free-riding off someone else's work).²⁷³ The doctrine's objective is also unrelated to content. The purpose is not to favor one type of reporting over another, but to provide an economic incentive for original newsgathering so that Americans can remain informed.²⁷⁴ The Court has made similar arguments regarding other regulations that, like hot news misappropriation, were aimed at preserving valuable existing media organizations, specifically free

268. *Id.*

269. *See generally* Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 341 (S.D.N.Y. 2010) (stating that the key element in hot news misappropriation is free-riding on another's work).

270. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994) (holding that an injunction keeping protesters thirty-six feet from an abortion clinic did not violate the First Amendment).

271. *See supra* notes 160–161 and accompanying text (basing the two-part test off the Supreme Court's reasoning in *Madsen*).

272. *See* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (conceding that distinguishing between content-based and content-neutral speech "is not always a simple task").

273. *Cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 645 (1994) (determining in a First Amendment analysis that regulations requiring cable television systems to carry certain channels were content neutral because the rules distinguished between the manner that certain messages were transmitted to viewers, not the messages themselves).

274. *Cf. id.* at 649 (ruling that the cable television regulations were also content neutral because they were designed to preserve free, over-the-air local broadcasting from the threat of cable, not because broadcast television was considered more valuable); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 49 (2001) (asserting that copyright law protections are content neutral because they provide economic incentive for the creation and dissemination of works, rather than taking a position on a particular viewpoint).

over-the-air broadcast television stations against another then-emerging threat: cable.²⁷⁵

Besides being content neutral, granting injunctive relief for hot news misappropriation does not permanently bar expression. Like the district court's ruling in the decision that preceded *Motorola*, in which the judge stated that the defendant was "not totally thwarted" in its efforts to use particular facts,²⁷⁶ the same principle applies to hot news cases in general. Free-riders who are faced with an injunction but wish to publish the facts have two readily available options: they can either independently confirm the facts, at which point they will have a complete defense to hot news misappropriation, or they can wait for the time limit created by the injunction to expire.²⁷⁷ After all, hot news misappropriation—as recommended by this Comment and as applied by the courts—only restricts the use of the facts for a limited time.²⁷⁸ Moreover, although the Supreme Court has said that prior restraint "freezes" speech at least for as long as the injunction lasts,²⁷⁹ that is not the case with hot news. An injunction against a free-rider in no way prohibits the public from accessing the facts.

Finally, in any argument involving hot news and concerns about the First Amendment, it is important to keep in mind a statement made by Justice Robert H. Jackson more than 60 years ago. "There is danger," Justice Jackson said, "that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."²⁸⁰ Justice Jackson, writing a dissenting opinion in *Terminiello v. City of Chicago*,²⁸¹ was expressing concern that the Court had gone too far when it overturned a "breach of peace" ordinance in Chicago on First Amendment grounds.²⁸² The majority held that one purpose of free speech was to invite unrest and even stir people to anger.²⁸³ Thus, the Court reversed the conviction of Arthur Terminiello, who was fined for giving a speech in which he criticized numerous racial groups, angering the crowd that had gathered to the extent that police could not

275. See *supra* notes 273–274.

276. *Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp. 1071, 1087 (S.D.N.Y. 1996), *aff'd in part, vacated in part*, *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

277. See *generally* *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 345 (S.D.N.Y. 2010) (establishing a time limit before the defendant could use the bank's facts).

278. See *supra* notes 221–229 and accompanying text (explaining that the time limit depends on the unique facts of each case).

279. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

280. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

281. 337 U.S. 1 (1949).

282. *Id.* at 13–14 (Jackson, J., dissenting).

283. See *id.* at 4 (majority opinion) (asserting that speech is often provocative and that's why it is protected against censorship).

maintain order.²⁸⁴ Justice Jackson, however, explained that Terminiello was not being prevented from speaking, only that he could not claim the Constitution prohibited him from being punished.²⁸⁵ Jackson also warned that over the long run, free speech would become more endangered if people were not protected from its abuses.²⁸⁶

Like the suicide pact that Jackson articulated in *Terminiello*, the Constitution's First Amendment protections should not be used to destroy news organizations while supporting the abuses of free-riders; to do so would undermine—not advance—the purposes of free speech.

CONCLUSION

The news industry is very much in peril. The recent closings of daily newspapers like the *Rocky Mountain News* in Denver and the *Seattle Post-Intelligencer* reflect the economic pressures facing the media as more readers get their news online.²⁸⁷ News organizations are evolving to meet these needs.²⁸⁸ Yet unless something is done to stop free-riders from systematically rewriting fresh, original news reporting—often gathered at considerable cost—and undercutting its value by selling bargain-rate ads, the industry's ability to adapt could be thwarted.²⁸⁹

Hot news misappropriation is an important solution that, if carefully applied to *INS*-like situations, avoids federal preemption and does not conflict with the First Amendment. Specifically, courts should adopt the “*Motorola-plus*” framework that incorporates the five-element test established in *National Basketball Ass’n v. Motorola, Inc.*²⁹⁰ while ensuring that the plaintiff is not required to show statistical proof that its business has been damaged.²⁹¹ This framework also suggests that courts limit

284. *Id.* at 3.

285. *See id.* at 25 (Jackson, J., dissenting) (“A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment.”).

286. *See id.* at 24 (noting that real discussion “dries up and disappears” when people realize there is no law and order).

287. *See Future of Journalism Debated in US Senate*, AGENCE FRANCE-PRESSE (May 6, 2009), available at <http://www.google.com/hostednews/afp/article/ALeqM5gWvGizqEZzkGqCUEJZjb6ldVjcBw> (reporting that both papers were “casualties of the dramatic change in the media landscape brought about by the emergence of the Internet”).

288. *See FTC Staff Discussion Draft*, *supra* note 19, at 1, (stating that as old business models collapse in the Internet era, new forms of journalism are emerging).

289. *See generally* Marburger, *supra* note 4 (concluding that while newspapers have managed to adapt to myriad changes over the years, including radio and television, the threat from free-riders is even greater and may be insurmountable unless action is taken to protect those who compile fresh news).

290. *See supra* text accompanying notes 198–200 (discussing the five elements that must be met for a hot news misappropriation claim to survive federal preemption).

291. *See supra* notes 202–04 and accompanying text (explaining that the courts should be able to infer that such damages would occur, much as the Supreme Court did in *INS*).

successful hot news misappropriation claims to situations in which the information provides a useful benefit to society²⁹² and where the plaintiff obtained the protected information first.²⁹³ Critics are wrong to suggest that hot news has no place in the law. If courts carefully apply the doctrine, hot news misappropriation can be used to benefit society when no other form of intellectual property protection applies.

292. *See supra* text accompanying notes 208–213 (asserting that by grounding hot news misappropriation in public policy, the doctrine’s protections are justified for the same reason as other intellectual property laws).

293. *See supra* text accompanying notes 216–218 (discussing situations when this element will be met and when it likely will not).