

## Notes

# The Case for Uniform Hot News Preemption

JOSHUA KORR\*

*Hot news misappropriation is a ninety-year-old tort that provides a quasi-property right in factual information to fact-gathering organizations. When available, the right prevents free riders from copying factual information while it remains hot. The question is whether section 301 of the Copyright Act preempts hot news misappropriation claims in all circumstances. Although courts have had little trouble finding that most misappropriation claims are preempted, the issue is complicated in the hot news context by legislative history suggesting that hot news claims survive preemption. That suggestion conflicts with the actual language of the Copyright Act's preemption provision, which seems to require the universal preemption of hot news claims.*

*In the 1990s, hot news cases were rare enough that one might have reasonably concluded that the tort had died out. Nonetheless, courts left open the suggestion that a hypothetical hot news claim might survive preemption. There the issue might have remained, but revolutionary technological expansion has made copying, the actus reus of hot news misappropriation, exponentially more harmful to traditional fact gathering organizations. In recent years, the hot news tort rose from its dormancy through aggressive litigation by institutions like the Associated Press and Barclays Capital Inc. Because these lawsuits are anti-competitive and threaten the public domain, it is time to put the specter of hot news to rest. Fortunately, faithful application of section 301 of the Copyright Act compels that exact result. This Note presents the case for uniform hot news preemption.*

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\* J.D., University of California, Hastings College of the Law, 2013, and Executive Notes Editor of the *Hastings Law Journal*. I would like to thank Professor Margreth Barrett for her insightful comments, Professor Geoffrey Hazard for his wisdom, Dr. Kenneth Korr for his logic and work ethic, and Mary Korr, my lifelong editor. Also, a special thank you to the members of the *Hastings Law Journal* staff who spend countless hours making each issue of the journal more perfect.

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## INTRODUCTION

Exponential technological growth has defined the twenty-first century, especially in the field of information technology. As a result, factual information is transmitted at ever-increasing speeds to an increasingly global audience. For example, when a politician makes a controversial comment, that statement is copied and transmitted to thousands of websites in a matter of minutes. Rapid factual exchange is beneficial to society because it encourages cultural dialogue through public debate, satire, and parody. That benefit has constitutional origins: The Intellectual Property Clause of the Constitution allows Congress to

grant private property rights to intellectual property.<sup>1</sup> The negative implication, according to the Supreme Court, is that facts—which are not authored—are not capable of private ownership.<sup>2</sup> On a fundamental level, our democracy depends on factually driven critical discourse. Factual property rights are antithetical to that discourse.

While the public benefits from fast and easy access to facts, news organizations and financial consulting firms have experienced a dramatic decline in profits over the past decade.<sup>3</sup> Both industries pin part of the blame on news aggregators that republish facts without bearing the cost of discovery.<sup>4</sup> While facts themselves are not a depletable resource,<sup>5</sup> fast and free access to current factual information depletes the value of that information and impedes fact-gathering organizations from monetizing a return on their investments. As a result, organizations like the Associated Press and Barclays Capital have raised “hot news” misappropriation claims to stop news aggregators from free-riding off of their investments.<sup>6</sup> These organizations contend that if direct competitors can appropriate content at a fraction of the cost and offer it at a lower price, the “reading public [will] suffer because no one [will] have an incentive to collect ‘hot news.’”<sup>7</sup>

A hot news claim arises when a defendant copies time-sensitive factual information from a plaintiff in lieu of discovering those facts independently. While hot news plaintiffs are primarily concerned with enjoining defendants from free-riding, monetary damages are also available. Hot news claims have largely been unsuccessful because courts have held that they are preempted by section 301 of the 1976 Copyright Act (“Copyright Act”).<sup>8</sup> Courts have preempted hot news claims under an interpretation of § 301 that causes significant policy problems.<sup>9</sup> The heart of § 301 is the two-prong preemption test contained in § 301(a). The first prong asks whether the subject matter of the litigation—here

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1. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”).

2. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

3. See Richard A. Posner, *The Future of Newspapers*, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), <http://www.becker-posner-blog.com>.

4. See *id.*

5. Unlike physical resources (oil, for example), facts are not a depletable resource. They are capable of endless consumption. No matter how many people learn the fact that humans have contributed substantially to changes in the Earth's climate, countless others may learn that fact. In contrast, once I burn a gallon of oil, it is depleted.

6. See, e.g., *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).

7. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

8. See 17 U.S.C. § 301(a) (2012).

9. See *infra* Part III.C.

“hot” factual information—falls within the scope of the Copyright Act.<sup>10</sup> The second prong asks whether the cause of action vindicates rights that are “equivalent” to the ones protected by the Copyright Act.<sup>11</sup> In a hot news case, those rights include the right to control the reproduction of factual content. Taken together, if a claim seeks to protect the same subject matter as the Copyright Act with the same rights as the Copyright Act, it is preempted.

This Note focuses on whether the Copyright Act uniformly preempts hot news claims. Though no court has explicitly held this, hot news claims should be uniformly preempted and the doctrine should be discarded as a potentially viable cause of action because it is inconsistent with § 301. This issue is relevant in light of the recent Second Circuit decision, *Barclays Capital Inc. v. Theflyonthewall.com, Inc.* (“*Barclays*”),<sup>12</sup> and its relation to the formerly seminal hot news case *National Basketball Ass’n v. Motorola, Inc.* (“*NBA*”).<sup>13</sup> This Note argues that both cases incorrectly interpret § 301’s second prong.

In *NBA*, the Second Circuit held that a hot news claim theoretically survives preemption if it contains “extra elements” that set the claim outside of the general scope of the Copyright Act.<sup>14</sup> Those extra elements are: “(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.”<sup>15</sup> The *NBA* three-part test has come to define the parameters of non-preempted hot news claims in a majority of the federal circuits. But *NBA*’s three “extra elements” fail to save a hot news claim from preemption because those elements do not vindicate rights that are different from a copyright holder’s exclusive rights.<sup>16</sup> The real question under the second prong of § 301—and the central question of this Note—is whether a hot news claim ever vindicates rights that are “qualitatively different” from the ones protected by the Copyright Act.<sup>17</sup>

In *Barclays*, the Second Circuit revised its approach to hot news claims.<sup>18</sup> There, the court characterized *NBA*’s three-part test as dicta.<sup>19</sup> But the *Barclays* court adhered to *NBA*’s view that an appropriately

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10. See *infra* Part II.A.

11. See *infra* Part II.C.

12. 650 F.3d 876 (2d Cir. 2011).

13. 105 F.3d 841 (2d Cir. 1997).

14. *Id.* at 853.

15. *Id.*

16. See *infra* Part II.C.

17. See *infra* Part II.B.

18. 650 F.3d 876 (2d Cir. 2011).

19. *Id.* at 899–901.

narrow hot news claim might survive Copyright Act preemption.<sup>20</sup> For these reasons, *Barclays* reached the appropriate result in the case before it—a finding of preemption—but nonetheless reinforced *NBA*'s acute logical flaws.

Even if *NBA* correctly suggested that hot news claims survive preemption, a viable hot news misappropriation doctrine is bad policy.<sup>21</sup> First, the doctrine is anticompetitive because it allows large media corporations to crush small competitors under the weight of litigation. Second, hot news claims will encroach on the public domain. Third, hot news claims are minimally useful. Though hot news plaintiffs point to rapidly dwindling profits and claim that misappropriation will lead to the end of news gathering, misappropriation has not caused the large-scale problems of the newspaper industry. The real causes are changing consumer preferences, dwindling newspaper circulation, the loss of classified ad and print revenue, the inability of digital revenue to fill the void, and the loss of the geographical monopolies that insulated local newspapers for much of the twentieth century.

This Note distills the entire line of hot news cases into a coherent whole and proposes a framework to guide future courts. Part I outlines the emergence of the hot news doctrine from its earliest roots in *International News Service v. Associated Press* and its subsequent treatment under the 1976 Copyright Act. Part II refutes the *NBA* court's conclusion that an appropriately narrow hot news claim theoretically survives Copyright Act preemption. Part III discusses the logical problems inherent in the *Barclays* decision and argues that a viable hot news cause of action is bad policy. Part IV concludes that uniformly preempting hot news claims is consistent with section 301 of the Copyright Act and reflects sound public policy.

## I. THE DOCTRINAL EVOLUTION OF HOT NEWS MISAPPROPRIATION CLAIMS

The viability of hot news misappropriation claims is best understood on a bell curve. The doctrine originated in the Supreme Court's 1918 case *International News Service v. Associated Press* ("*INS*"), which also created the broader doctrine of misappropriation.<sup>22</sup> Hot news claims are a subset of misappropriation claims that specifically concern time-sensitive factual content. Although *INS*'s holding was subsequently nullified by *Erie Railroad Co. v. Tompkins*,<sup>23</sup> *INS*-like misappropriation

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20. *Id.* at 898.

21. See *infra* Part III.C.

22. 248 U.S. 215 (1918).

23. 304 U.S. 64 (1938).

claims rooted in state common law enjoyed substantial growth in the years following *INS*.<sup>24</sup> Broad use of the doctrine reached its zenith in the 1950s and 1960s because significant gaps in the 1909 Copyright Act left valuable content unprotected.<sup>25</sup> But misappropriation and hot news entered a period of decline following the passage of the 1976 Copyright Act and its broad preemption provision.<sup>26</sup>

A. THE ORIGIN OF HOT NEWS: *INTERNATIONAL NEWS SERVICE v. ASSOCIATED PRESS*

The *INS* case arose amid unusual circumstances. During World War I, William Randolph Hearst—the American owner of the International News Service (“INS”)—publicly sided with Germany.<sup>27</sup> In response, British and French censors barred INS from sending war dispatches from Europe to the United States.<sup>28</sup> Because INS feared that it would lose substantial market share to the Associated Press (“AP”) if it did not cover the war, it systematically re-wrote, and sometimes directly copied, AP’s war dispatches and sold them to INS-affiliated newspapers while the news was still hot.<sup>29</sup> The Supreme Court decided that it was fundamentally inequitable for INS to “reap where it had not sown”<sup>30</sup> and enjoined INS from copying the underlying facts from AP news articles “until its commercial value as news had passed away.”<sup>31</sup> The Court reasoned that a systemic pattern of indiscriminate free-riding by direct competitors was intolerable because it would in effect “cut off the service by rendering the cost prohibitive in comparison with the return.”<sup>32</sup> The

24. See, e.g., *Metro. Opera Ass’n v. Wagner-Nichols Record Corp.*, 101 N.Y.S.2d 483 (1950), *aff’d*, 107 N.Y.S.2d 795 (1951).

25. See Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (currently 17 U.S.C. §§ 101–22 (2012)).

26. See 17 U.S.C. § 301 (1976).

27. Richard A. Posner, *Misappropriation: A Dirge*, 40 Hous. L. Rev. 621, 627 (2003).

28. *Id.*

29. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 216 (1918).

30. *Id.* at 239. To “reap where one has not sown” is the foundation of a moral theory of misappropriation that views free-riding pejoratively. But when it comes to copying, the Copyright Act clearly tolerates some acts of free-riding that are useful to society, and this includes factual copying. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). The moral theory of misappropriation itself has been squarely rejected, and thus it is impossible to tell what free-riding is moral or immoral except by reference to free-riding that is prohibited by law. See *Fin. Info., Inc. v. Moody’s Investors Servs.*, 808 F.2d 205, 208–09 (2d Cir. 1986).

31. *Int’l News Serv.*, 248 U.S. at 232.

32. *Id.* at 241. For a critique of *INS*, see Posner, *supra* note 27, at 628 (challenging the Supreme Court’s conclusion that INS’s free-riding threatened the continued vitality of AP’s business because INS’s free-riding was limited in scope and in time: “INS was not paraphrasing *all* the AP’s dispatches, just those concerning the war in Europe. And it was doing so not to save money but because it was prevented by the British and French censors from reporting from the war zone. This was a special situation . . . and [was] therefore unlikely to be a serious threat to the continued viability of AP.”).

Court's rationale laid the foundation for the Second Circuit's three-part *NBA* test some eighty years later.

After *INS*, the scope of the misappropriation doctrine took center stage in the Second Circuit case *Cheney Bros. v. Doris Silk Corp.*<sup>33</sup> In that case, Doris Silk directly copied Cheney Brothers' silk scarf design while it was fashionable.<sup>34</sup> Cheney Brothers brought an *INS* misappropriation claim and requested an eight-month injunction that corresponded to the length of time that a scarf design remained "hot" in the fashion world.<sup>35</sup> Judge Learned Hand disagreed: He was concerned that granting Cheney Brothers an injunction would perpetuate a dual system of common-law and federal copyrights where rights varied from state to state and between federal and state court.<sup>36</sup> Limiting *INS* to its facts, Judge Hand stated:

[I]f [*INS*] meant to lay down a general doctrine, it would cover this case . . . . We do not believe that it did. . . . [W]e think that no more was covered than situations substantially similar to those then at bar . . . . We are to suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter.<sup>37</sup>

Judge Hand's analysis emphasizes the importance of the uniform application of federal copyright law across the United States. His conclusions coincide with the broad preemptive scope of the 1976 Copyright Act.<sup>38</sup> Judge Hand also voiced skepticism because Cheney Brothers' silk scarf designs, unlike factual information, were eligible for copyright protection.<sup>39</sup> A separate line of cases emerged after *Cheney Bros.* that dealt primarily with content that was not protected by the 1909 Copyright Act.

In *Metropolitan Opera Ass'n v. Wagner-Nichols Record Corp.* ("Metropolitan Opera"), Metropolitan Opera brought a misappropriation claim to enjoin Wagner-Nichols from making and selling copies of its live opera radio broadcasts.<sup>40</sup> The 1909 Copyright Act did not extend copyright protection to live broadcasts because they failed the fixation requirement.<sup>41</sup>

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33. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929).

34. *Id.* at 279.

35. *Id.*

36. *Id.* at 280.

37. *Id.*

38. See 17 U.S.C. § 301 (1976).

39. *Cheney Bros.*, 35 F.2d at 279.

40. 101 N.Y.S.2d 483, 486 (1950).

41. Under the current Copyright Act, copyright extends to works of authorship that are fixed in a tangible medium of expression. 17 U.S.C. § 101 (2012). Live broadcasts, of course, are not fixed in a tangible medium of expression, although recordings of those broadcasts are. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997).

Still, the district court granted an injunction under the broad “principle that property rights of commercial value are to be and will be protected from any form of commercial immorality.”<sup>42</sup> *Metropolitan Opera’s* suggestion that misappropriation has a moral component is notable but flawed. The suggestion is notable for hot news cases because free-riding, the actus reus of hot news defendants, connotes wrongful (i.e., immoral) copying. The suggestion is flawed because it confuses normative wrongs with legal wrongs. Cases interpreting the 1976 Copyright Act have overwhelmingly rejected a moral theory of misappropriation that is not directly tethered to a legal wrong.<sup>43</sup>

#### B. THE 1976 COPYRIGHT ACT

Passage of the 1976 Copyright Act caused a decline in misappropriation claims and specifically hot news claims. There are two notable aspects of the 1976 Amendments. First, Congress expanded the types of copyrightable subject matter to protect several categories of works that were previously ineligible for copyright protection, including simultaneous broadcasts.<sup>44</sup> Second, Congress included § 301, which is a broad preemption provision that protects the uniform application of federal copyright law: “[T]he federal legislative scheme . . . is best understood as implying[] a jurisdictional purpose on the part of Congress to occupy the field.”<sup>45</sup> Section 301(a) states:

[A]ll legal or equitable rights that are *equivalent* to any of the exclusive rights within the *general scope* of copyright as specified by section 106 in works of authorship that . . . come within the *subject matter* of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title.<sup>46</sup>

Thus, § 301(a) contemplates a two-prong inquiry that compares a state-created cause of action to the *subject matter* and the *general scope*

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42. Nat’l Basketball Ass’n v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071, 1099–101 (S.D.N.Y. 1996), *aff’d in part, vacated in part*, 105 F.3d 841 (2d Cir. 1997) (quoting Metro. Opera Ass’n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483, 492 (N.Y. App. Div. 1950)). Under a moral theory of misappropriation, a defendant can be liable solely on the basis of conduct that appears immoral in the eyes of the court. *Id.* In *INS*, for example, the Supreme Court found *INS’s* copying immoral because it enabled *INS* to reap where it had not sown, and thus to obtain an unfair advantage of *AP*. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918). This theory of liability has been replaced by a theory of liability that focuses on property rights—a defendant’s copying is illegal if it infringes on the plaintiff’s legally enforceable right to the information and it is illegal if the information is in the public domain. See *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 208–09 (2d Cir. 1986).

43. See, e.g., *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Fin. Info.*, 808 F.2d 205.

44. See 17 U.S.C. §§ 101–02.

45. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1172–73 (3d ed. 1999) (internal quotation marks omitted).

46. 17 U.S.C. § 301(a) (emphasis added).



of the Copyright Act—that is, the rights protected by the Act. In a hot news case, the central question under the subject matter prong is whether time-sensitive factual information falls within the subject matter of copyright even though that information is not copyrightable.<sup>47</sup> Courts have answered this question affirmatively: Facts do come within the subject matter of copyright even though they are not copyrightable.<sup>48</sup> The central question under the general scope prong is whether the rights that a hot news claim protects are *equivalent* to the rights afforded to copyright holders.<sup>49</sup> This Note answers this affirmatively: A hot news misappropriation claim is only preempted if the answer to both of these questions is yes.

The confusing legislative history behind § 301, which went through some notable and controversial changes, is a primary reason that hot news misappropriation claims have survived longer than other misappropriation claims. On June 13, 1975, the Senate added an illustrative list of claims that might survive preemption in appropriate circumstances as § 301(b)(3).<sup>50</sup> That list included “rights against misappropriation” that were not equivalent to any of the exclusive rights specified in section 106 of the Copyright Act.<sup>51</sup> This directly bears on whether hot news claims are preempted, as the Senate Judiciary Committee report accompanying the Copyright Act explains:

[S]tate law should have the flexibility to afford a remedy . . . 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.<sup>52</sup>

The Senate Report expressly states that hot news claims survive preemption. However, it is not clear why an *INS*-like claim would survive preemption given that misappropriation “is a broad, common law anticopying doctrine” that is inherently at odds with the Copyright Act’s preemption provision.<sup>53</sup> In any event, reliance on the Senate Judiciary Committee’s report is misplaced because the report corresponds to a portion of § 301 that was removed from the Copyright Act prior to publication at the request of the Department of Justice (“DOJ”).

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47. See *infra* Part II.A.

48. See, e.g., *Feist*, 499 U.S. 340; *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

49. See *infra* Part II.B.

50. See S. 22, 94th Cong. § 301, at 33 (1975).

51. *Id.*

52. S. REP. NO. 473, at 116 (1975) (citation omitted); see H.R. REP. NO. 1476, at 132 (1976).

53. Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 157 (1997).

The DOJ opposed enumerating misappropriation in § 301(b)(3) because it feared that the provision would allow state law claims that made “actionable the mere unauthorized reproduction of a work” to survive preemption.<sup>54</sup> This, they claimed, would make the preemption meaningless.<sup>55</sup> The DOJ’s fears were unfounded because the list of non-preempted claims in § 301(b)(3) was explicitly subject to the preemption standard set out in § 301(a). Thus, § 301(a) would not have been rendered meaningless because it trumped the illustrative list in § 301(b)(3). Regardless, Congress agreed with the DOJ and deleted the language in § 301(b)(3) that explicitly saved *non-equivalent* misappropriation claims from preemption.<sup>56</sup> But Congress inexplicably retained the Senate Judiciary Committee’s suggestion that an *INS*-like misappropriation claim might survive preemption. It republished that sentiment verbatim in the House Judiciary Committee Report (“House Report”) that accompanied the bill.<sup>57</sup>

Judicial reliance on the House Report, though widespread, is misplaced. Because the House Report refers to an earlier version of the Copyright Act, scholars suggest that it “should not be taken as persuasive evidence of Congress’s intent.”<sup>58</sup> “[M]ore likely, those involved in drafting the House Report simply did not carefully examine exactly why *International News*-type claims should survive preemption.”<sup>59</sup> *Nimmer on Copyright* suggests that because the legislative history is ambiguous with respect to misappropriation, courts ought to rely exclusively on the language of the statute.<sup>60</sup> William Patry argues that, in light of the “refusal by some judges to rely on legislative report language, it is insufficient to merely cite to report language if there is concern that language is contrary to the statute.”<sup>61</sup> However, in light of the Copyright Act’s contradictory legislative history, courts failed to appreciate the full preemptive scope of § 301 in hot news cases.

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54. See WILLIAM F. PATRY, 6 PATRY ON COPYRIGHTS § 18:8 (2012). Patry goes on to explain that the DOJ’s fears were likely unfounded based on the statutory language that incorporated limitations from § 301(a) into (b)(3). *Id.*

55. See 122 CONG. REC. 32,015 (Sept. 22, 1976) (explaining why § 301 was amended to exclude the misappropriation savings provision).

56. *Id.* Section 301(b)(3)’s use of the phrase “non-equivalent” expressly invokes § 301(a)’s general scope prong. See 17 U.S.C. § 301(a) (2012) (“[A]ll legal or equitable rights that are *equivalent* to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.” (emphasis added)).

57. See H.R. REP. NO. 1476, at 132.

58. Ginsburg, *supra* note 53, at 162 n.46.

59. Nicholas Khadder, *National Basketball Association v. Motorola, Inc.*, 1998 BERKELEY TECH. L.J. 3, 17.

60. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][f][iv] (1997).

61. PATRY, *supra* note 54, § 18:40.

### C. COURTS STRUGGLE TO INTERPRET § 301 IN HOT NEWS CASES

Prior to *NBA*, there were two categories of hot news cases: those that failed to acknowledge § 301, and those that failed to appreciate its full preemptive scope. *Standard & Poor's Corp. v. Commodity Exchange, Inc.*<sup>62</sup> is representative of the former category. In *Standard & Poor's*, Standard & Poor's sued to prevent Commodity Exchange from copying its weighted compilation of stocks (factual information) for use on Commodity Exchange's stock exchange.<sup>63</sup> Standard & Poor's pled several causes of action at the district court level, including copyright infringement and misappropriation.<sup>64</sup> The district court granted a preliminary injunction that was upheld on appeal to the Second Circuit.<sup>65</sup> However, the Second Circuit did not discuss § 301 and the obvious preemption problems facing Standard & Poor's misappropriation claim.<sup>66</sup> This is not an isolated omission. Several other courts have failed to appreciate the broad preemptive scope of § 301 in the wake of the 1976 Act and erroneously upheld *INS*-like misappropriation claims.<sup>67</sup> However, certain courts gradually began to head in the right direction.

In *Financial Information, Inc. v. Moody's Investors Service* ("*FII*"), the Second Circuit held that § 301 preempted a misappropriation claim that sought to enjoin the unauthorized copying of non-copyrightable bond reports.<sup>68</sup> However, the *FII* court reached the right result for the wrong reason because it relied on the House Report to assess § 301's second prong. The court stated: "The legislative history attempts to describe the forms of unfair competition which are 'equivalent' to rights protected by federal copyright law and which are not . . . ."<sup>69</sup> Thus, citing the House Report, *FII* stated in dicta that hot news claims are "a branch of the unfair competition doctrine not preempted by the Copyright Act."<sup>70</sup> Although the court opined that hot news claims theoretically survive preemption, it held that *FII*'s claim simply was not hot: "[T]o the extent that Moody's did copy from *FII*, the information it published

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62. 683 F.2d 704 (2d Cir. 1982).

63. *Id.* at 706.

64. *Id.* at 707.

65. *Id.* at 709–10.

66. *Id.*

67. *See, e.g., Lynch, Jones, & Ryan, Inc. v. Standard & Poor's*, No. 117064/97, 1998 WL 574166 (N.Y. Sup. Ct. June 11, 1998); *Bd. of Trade v. Dow Jones & Co.*, 98 Ill. 2d 109 (1983). *But see* U.S. Golf Ass'n v. St. Andrews Sys., 749 F.2d 1028, 1041 (3d Cir. 1984) (holding that a misappropriation claim for the use of a mathematical formula failed to make out a prima facie case for misappropriation under New Jersey law, but also failing to discuss § 301's preemptive effect on that claim).

68. 808 F.2d 204, 209 (2d Cir. 1986).

69. *Id.* at 208.

70. *Id.* at 209.

would have been at least ten days old.”<sup>71</sup> Part II.C.1 explains why, even if *FII*’s information had been hot, its claim is preempted by § 301.

*FII*, though imperfect, was a step in the right direction. The decision successfully refuted the moral theory of misappropriation upon which cases like *Metropolitan Opera* and *INS* relied.<sup>72</sup> *FII* stands for the commonly accepted proposition that the wrongfulness of a defendant’s unauthorized copying depends on whether that copying violates the law, not upon amorphous concepts of morality.<sup>73</sup> “If, for example, the work is in the public domain, then its use would not be wrongful. Likewise, if, as here, the work is unprotected by federal law because of lack of originality, then its use is neither unfair nor unjustified.”<sup>74</sup>

Following *FII*, the Supreme Court paved the way for uniform hot news preemption in a non-hot-news case, *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>75</sup> In *Feist*, Rural Telephone compiled the names and phone numbers of its subscribers into a phonebook.<sup>76</sup> When Rural’s competitor, Feist Publications, copied the names and phone numbers from Rural’s phonebook and reproduced them in its own phonebook, Rural sued for copyright infringement.<sup>77</sup> The Court rejected Rural’s claim because the information in the phonebook was not sufficiently original to qualify for copyright protection.<sup>78</sup> The Court stated that 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 by-product of a statutory scheme. It is, rather, the essence of copyright, and a constitutional requirement.”<sup>79</sup> This quotation suggests that facts fall within the subject matter of the Copyright Act—even though they are not copyright eligible—because the Copyright Act intentionally left factual information in the public domain.

The Court also suggested that there is a constitutional right to appropriate factual material that is embedded in the Intellectual Property Clause, which extends to situations in which others have labored to discover that material.<sup>80</sup> Some argue that the Court “announced constitutional principles that would invalidate an *INS*-type misappropriation claim . . . even if it was Congress’s clear intention to

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71. *Id.*

72. *Id.* at 208.

73. *Id.*

74. *Id.*

75. 499 U.S. 340 (1991).

76. *Id.* at 342.

77. *Id.* at 343.

78. *Id.* at 364.

79. *Id.* at 349 (citation omitted) (internal quotation marks omitted).

80. *Id.*

permit the states to extend such protection.”<sup>81</sup> One commentator has gone so far as to suggest that “because there is a constitutional right of appropriation, there cannot be a state claim of misappropriation of such material.”<sup>82</sup> However, information providers have sought *sui generis* legislation for factual compilations and databases.<sup>83</sup> They argue that fact-protecting legislation is constitutional under the Commerce Clause.<sup>84</sup> Constitutional arguments aside, the *Feist* Court’s statements about the subject matter of copyright strengthen the subject matter analysis in *NBA*.

## II. *NBA v. MOTOROLA* AND THE EXTRA ELEMENTS TEST

*NBA* is the seminal hot news case. Its “extra elements” test has been adopted in a majority of jurisdictions.<sup>85</sup> The case involved an innovative sports-facts application that Motorola developed to transmit real-time information about NBA games to cellular phones.<sup>86</sup> Motorola gathered that information by collecting data from live NBA broadcasts.<sup>87</sup> The NBA filed a hot news claim alleging that Motorola unlawfully misappropriated the underlying facts of NBA games without bearing the expense of producing those games.<sup>88</sup> Motorola raised federal preemption as its defense.<sup>89</sup>

The *NBA* decision provides an excellent vehicle to analyze both parts of the § 301 two-prong test for preemption. This Part uses the lower court’s opinion<sup>90</sup> to explain why hot news claims meet the § 301 subject matter requirement and uses the appellate court’s opinion to explain why hot news claims meet the § 301 general scope requirement. A claim is only preempted if it meets both prongs of § 301. Even though the subject matter debate is now settled, satisfying the first prong of § 301(a) is necessary to support an argument for uniform hot news preemption.

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81. PATRY, *supra* note 54, § 18:40.

82. *Id.*

83. H.R. REP. NO. 108-421, pt. 1, at 8 (2004).

84. *Id.* at 15.

85. *See, e.g.*, *Confold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 960 (7th Cir. 2006); *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 499 (D. Md. 2010); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1105 (C.D. Cal. 2007); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 979 (E.D. Cal. 2002); *Fred Wehrenberger Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999); *Scranton Times, L.P. v. Wilkes-Barre Publ’g Co.*, No. 3:08-cv-2135, 2009 WL 3100963, at \*5 (M.D. Pa. Sept. 23, 2009).

86. *See Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 843–44 (2nd Cir. 1997).

87. *Id.* at 844.

88. *Id.*

89. *Id.* at 843.

90. *Nat’l Basketball Ass’n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp. 1071 (S.D.N.Y. 1996).

#### A. HOT NEWS FALLS WITHIN THE SUBJECT MATTER OF THE COPYRIGHT ACT

The first prong of § 301(a) requires courts to determine whether a state law claim comes “within the subject matter of copyright as specified by sections 102 and 103.”<sup>91</sup> In other words, did the Copyright Act legislate with respect to the subject matter allegedly misappropriated—here the historical facts that occur during NBA basketball games? Before *NBA*, it was not clear if facts fell within the subject matter of copyright because facts themselves were ineligible for copyright protection.

In *NBA*, the district court held that the underlying facts of an NBA basketball game—as opposed to the live broadcast of the game—did not fall within the subject matter of copyright.<sup>92</sup> Nimmer and Nimmer support this theory, otherwise known as partial preemption. “[P]reemption may be avoided . . . [because] the subject matter of misappropriation falls outside copyright’s sphere to the extent that it applies to facts *per se*, which are ineligible for statutory copyright protection.”<sup>93</sup> However, the partial preemption theory does not fully comport with § 301.

Section 301 requires a comparison between the subject matter at issue in a lawsuit and the subject matter contained in sections 102 and 103 of the Copyright Act. Sections 102 and 103 both describe material that is eligible for copyright protection,<sup>94</sup> and also material that is not eligible for copyright protection.<sup>95</sup> Thus, the mere fact that content is ineligible for copyright protection does not mean that it falls outside the subject matter defined in sections 102 and 103 of the Act. For example, “compilations of facts are within the subject matter of copyright,”<sup>96</sup> but § 103(b) limits the scope of the copyright to the material authored by the copyright holder, which excludes any preexisting facts contained within the work. Section 102(b) also excludes facts from copyright protection: “In no case does copyright protection for an original work of authorship

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91. 17 U.S.C. § 301 (2012).

92. *Nat’l Basketball Ass’n*, 939 F. Supp. at 1088.

93. NIMMER & NIMMER, *supra* note 60, § 1.01[B][2][a].

94. See 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship . . . . Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”); see also *id.* § 103(a) (“The subject matter of copyright as specified by section 102 includes compilations and derivative works.”).

95. See *id.* § 102(b) (“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*.” (emphasis added)); see also *id.* § 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”).

96. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

extend to any idea . . . or discovery . . . .”<sup>97</sup> According to *Feist*, facts are just such a discovery: “The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”<sup>98</sup> Thus, while facts are not copyrightable, they easily fall within the subject matter of copyright as § 301 defines the term. But the district court in *NBA* held otherwise.<sup>99</sup>

When Motorola appealed the district court’s ruling in *NBA*, the Second Circuit rejected the district court’s reliance on a partial preemption theory.<sup>100</sup> It held that the underlying facts of NBA games did meet the § 301 subject matter requirement.<sup>101</sup> The court stated: “Copyrightable material often contains uncopyrightable elements within it, but Section 301 preemption bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements.”<sup>102</sup> The court also noted that partial preemption does not fit with § 301’s underlying policy in favor of uniformity because “a partial preemption doctrine—preemption of claims based on misappropriation of broadcasts but no preemption of claims based on misappropriation of underlying facts—would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable.”<sup>103</sup> Thus, the Second Circuit rejected the district court’s analysis of the § 301 subject matter requirement.

Once the court concluded that the NBA’s misappropriation claim fell within the subject matter of copyright, it necessarily proceeded to analyze § 301’s second prong, the general scope requirement.<sup>104</sup> Based on the facts in evidence, the Second Circuit held that the NBA’s hot news claim was preempted because it fell within the general scope of copyright.<sup>105</sup> But the court went on to suggest that if a hot news claim contained certain “extra elements,” it would not meet the § 301 general scope prong and would thus survive preemption.<sup>106</sup> The Second Circuit’s extra elements test fundamentally misconceives the general scope inquiry.

#### B. THE GENERAL SCOPE REQUIREMENT: TESTING EQUIVALENCY

The second prong of the § 301 preemption analysis is the general scope requirement. The general scope requirement is met if a state-created claim vindicates “rights that are *equivalent* to any of the exclusive

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97. *Id.* at 356 (quoting 17 U.S.C. § 102(b)).

98. *Id.* at 347.

99. Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997).

100. *Id.* at 849.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 849–50.

105. *Id.* at 854.

106. *Id.* at 853.

rights within the general scope” of section 106 of the Copyright Act.<sup>107</sup> The key to the general scope requirement is *equivalency*: Courts must determine if the plaintiff’s claim vindicates rights that are *equivalent*<sup>108</sup> to the rights afforded by section 106 of the Copyright Act. Section 106 provides authors the exclusive right, among other things, to reproduce and distribute copies of a copyrighted work and to prepare derivative works based upon the copyrighted work.<sup>109</sup>

Many courts employ an “extra elements” test to determine whether a state-created cause of action, hot news or otherwise, falls outside of the general scope of the Copyright Act.<sup>110</sup> This test only comports with § 301 if those extra elements address the concept of equivalency. But some extra elements merely limit “the scope of the claim but leave[] its fundamental nature unaltered.”<sup>111</sup> These claims are preempted if the state right is violated by an act that would, by itself, also violate one of the § 106 rights.<sup>112</sup> Thus, “unfair competition, misappropriation, or unjust enrichment claims are preempted when based on alleged acts such as distribution or reproduction.”<sup>113</sup> Even if an element alters the scope of a state claim (by, for example, narrowing the pool of eligible plaintiffs), the claim remains *equivalent* to rights vindicated in § 106. Thus, scholars suggest a more precise test that asks whether the extra elements create a claim that is *qualitatively different* from—and thus not equivalent to—a copyright infringement claim.<sup>114</sup>

Conversion is a simple example of a state-created cause of action that vindicates rights that are qualitatively different from the rights protected by the Copyright Act. In a conversion action, the plaintiff sues to recover a physical object that she owns and that the defendant possesses. Consider a manuscript, a work clearly within the subject matter of the Copyright Act.<sup>115</sup> If an author’s only copy of her new manuscript is stolen, the author’s only recourse is to sue under a conversion theory and have her physical manuscript returned. Section 106 of the Copyright Act affords the plaintiff no relief. This hypothetical

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107. 17 U.S.C. § 301(a) (2012) (emphasis added).

108. *Id.*

109. *Id.* § 106.

110. *See, e.g., Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004) (stating that elements altering the “action’s scope but not its nature” are insufficient to avoid preemption); *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (same).

111. *Briarpatch*, 373 F.3d at 306.

112. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992).

113. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 909 (2011) (Raggi, J., concurring). *See Briarpatch*, 373 F.3d at 306 (stating that the “enrichment element,” like intent or awareness, limited the claim’s scope but left its “fundamental nature unaltered”).

114. *See, e.g., PATRY, supra note 54, §§ 18:18–19.*

115. *See 17 U.S.C. § 102* (2012).



conversion claim is qualitatively different from a copyright infringement claim because it vindicates the author's exclusive right to possess the physical manuscript—but not her exclusive right to copy the manuscript or make derivative use of it. Therefore, the conversion claim falls outside of the general scope of copyright and is not preempted. Other non-preempted claims include reverse palming-off, breach of fiduciary relationship, and trade secrets.<sup>116</sup>

### C. HOT NEWS CLAIMS FALL WITHIN THE GENERAL SCOPE OF THE COPYRIGHT ACT

In *NBA*, the Second Circuit described three extra elements that purportedly save a hot news claim from preemption.<sup>117</sup> Those elements are “(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.”<sup>118</sup> The *NBA* opinion failed to explain how any of these elements are qualitatively different from a claim based on the unauthorized reproduction of factual material. Instead, the court erroneously relied on the House Report's suggestion that hot news claims survive preemption.<sup>119</sup> The court pole-vaulted this essential part of a § 301 inquiry because of the court's reliance on the House Report. This presupposed that a hot news claim should survive preemption, and the court then tried to articulate a test that fit that result as opposed to a test that fit the statute.

The court also failed to explain why all three of these elements are necessary. Logically, if any one of the elements were qualitatively different from rights vindicated by § 106, the claim falls outside of the scope of the Copyright Act and the presence of other elements is superfluous. Since the court did not analyze whether its extra elements were equivalent to the rights provided in § 106, it is necessary to reconstruct that inquiry in order to see if *NBA* identified any element that should allow a hot news claim to survive preemption.

In addition to the three extra elements quoted above, the *NBA* court suggested that two other elements are essential to a hot news claim:

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116. These claims all contain elements that infringe rights that are qualitatively different than those in Copyright Act § 106. For example, reverse palming-off requires affirmative acts that deceive consumers about the source of an item. None of the exclusive rights in § 106 protect against source confusion. Trade secret claims and breach of fiduciary duty claims both involve the breach of a confidential relationship. The Copyright Act does not regulate special relationships between parties. For an extensive treatment of the subject, see PATRY, *supra* note 54, §§ 18:20–47.

117. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

118. *Id.* Applying these elements to the case at bar, the *NBA* court held that the *NBA*'s hot news claim was preempted because Motorola expended its own resources to collect factual data about *NBA* games and thus was not free-riding. *Id.* at 854.

119. See *supra* Part I.B.

(1) The “plaintiff generates or gathers information at a cost,” and (2) “the defendant is in direct competition with a product or service offered by the plaintiffs.”<sup>120</sup> Some courts have adopted *NBA* in a five-part formulation that incorporates these two extra elements.<sup>121</sup> The following Subparts analyze all five elements in turn to see if they create a cause of action that is qualitatively different from, and thus not equivalent to, the rights protected by section 106 of the Copyright Act. In my view, the five extra elements merely limit the scope of a claim based on unauthorized reproduction, but fail to alter the fundamental nature of that claim. Thus, the Copyright Act should preempt a hot news claim in all circumstances.

### I. *The Time-Sensitive Value of Factual Information*

The time-sensitive value of factual information is an element that narrows the pool of potentially viable infringement actions but does not alter their fundamental nature.<sup>122</sup> This element reduces the universe of potential claims from the unauthorized reproduction of factual material to the unauthorized reproduction of hot facts.<sup>123</sup> In either case, the nature of the claim involves the unauthorized reproduction of facts. Since reproduction is one of the rights enumerated in § 106, narrowing the pool of unauthorized reproduction claims does not save hot news from preemption. The time-sensitive element might also narrow the scope of the remedy to the amount of time that the factual information is “hot.” However, tinkering with the scope of a remedy is not enough to save a state-created cause of action from preemption.<sup>124</sup>

Furthermore, the Copyright Act already vindicates an author’s right to exploit the time-sensitive value of a copyright because § 106 protects an author’s exclusive right to “distribute copies . . . of the copyrighted work to the public.”<sup>125</sup> For example, in *Harper & Row Publishing, Inc. v. Nation Enterprises*, the Supreme Court found copyright infringement when *The Nation* “broke” bits of Gerald Ford’s memoirs to the public before his licensee, *Time Magazine*, had released the same material.<sup>126</sup> At the time, President Ford’s memoirs were unreleased and they contained

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120. *Nat’l Basketball Ass’n*, 105 F.3d at 845.

121. *See, e.g., Confold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 960–62 (7th Cir. 2006).

122. *Cf. Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004).

123. *Cf. Ginsburg, supra* note 53, at 163 (arguing that the time-sensitive value of factual information puts it outside the scope of copyright because “the feature of the work for which the claimant is seeking protection—its time sensitivity—is irrelevant to copyrightability”). Ginsburg’s argument is flawed because it relies on a modified partial preemption theory—that some features of the work are within the subject matter of copyright, but the valuable features of the work are not. *Id.*

124. *See* PATRY, *supra* note 54, § 18:19.

125. 17 U.S.C. § 106(3) (2012).

126. 471 U.S. at 539, 569 (1985).

time-sensitive factual information of great public interest.<sup>127</sup> The Court held that *The Nation* infringed section 106 of the Copyright Act when it copied parts of Ford's Memoirs and incorporated them into a derivative work.<sup>128</sup> Despite the quasi-factual nature of President Ford's autobiography, the Supreme Court granted it "thick" copyright protection in order to protect the right of first release.<sup>129</sup> Thus, *Harper & Row* supports the proposition that section 106 of the Copyright Act vindicates the right to exploit the time-sensitive value of factual material that is part of a larger copyrightable work.

On a practical note, if the time-sensitive value of factual information made a misappropriation claim qualitatively different from a copyright claim, § 301 would be reduced to absurdity because all valuable copyrights would fall outside the scope of copyright for however long they were "hot."

## 2. *Free-Riding by a Defendant*

Free-riding is the heart of a hot news claim because it defines the actus reus of the defendant's allegedly tortious appropriation. There are two elements embedded within free-riding: the act of free-riding, and a connotation that free-riding is wrong. Neither element vindicates a right that is different from the exclusive reproduction rights enshrined in section 106 of the Copyright Act.

First, the act of free-riding falls within the general scope of copyright. The Copyright Act's primary purpose is to protect against unlawful copying. As Jane Ginsburg explains, free-riding "may be a pejorative description of copying, but it is still copying."<sup>130</sup> In hot news cases, the actus reus side of free-riding occurs when the defendant copies the plaintiff's hot facts. For example, in *INS*, INS copied the facts underlying AP's news stories,<sup>131</sup> in *NBA*, Motorola copied the facts underlying NBA basketball games,<sup>132</sup> and in *Barclays*, Theflyonthewall.com copied the facts underlying Barclay's financial reports.<sup>133</sup>

Second, the normative description of free-riding as wrongful harkens back to a moral—or a sweat-of-the-brow—theory of copyright. Those respective theories have been rejected by the Second Circuit and the Supreme Court. The fact that a defendant might receive a competitive—and perhaps monetary—windfall because it used facts that

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127. *Id.*

128. *Id.*

129. *Id.*

130. Ginsburg, *supra* note 53, at 162.

131. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231 (1918).

132. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 843–44 (2d Cir. 1997).

133. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 878 (2d Cir. 2011).

another company uncovered through significant investment does not make a hot news claim qualitatively different from a copyright claim. As the Supreme Court noted, though the defendant's windfall may seem unfair, "this is not some unforeseen byproduct of a statutory scheme. It is, rather, the essence of copyright, and a constitutional requirement."<sup>134</sup> In other words, the unfair or immoral aspects of free-riding are contemplated in the Copyright Act.

Furthermore, the Second Circuit rejected any reliance on the amorphous concepts of morality unless morality is directly tethered to a legal wrong. "Whether or not reproduction of another's work is 'immoral' depends on whether such use of the work is wrongful. If, for example, the work is in the public domain, then its use would not be wrongful."<sup>135</sup> Thus, the second characteristic of free-riding, its immoral connotation, does not put a hot news misappropriation claim outside the general scope of copyright.

The *Restatement (Third) of Unfair Competition* suggests that an *INS*-like misappropriation claim survives preemption because a *systematic pattern* of free-riding falls outside the general scope of copyright.<sup>136</sup> The drafters of the *Restatement* are incorrect. A systematic pattern of free-riding, much like the time-sensitive value of factual information, is an element that alters the scope of a misappropriation claim without altering its nature. The scope of the claim is narrowed from all instances of copying to cases of systematic copying, but the nature of the claim is still unauthorized copying. The drafters erred because section 106 of the Copyright Act gives authors exclusive rights to prevent unauthorized copying whether that copying is done once or on a systematic basis. Since the Copyright Act already protects against systematic copying, a claim based on systematic copying is equivalent to a copyright infringement claim. However, Judge Richard Posner suggests that a systematic pattern of free-riding allows a hot news claim to survive preemption where that systematic pattern threatens the very existence of the industry in question.<sup>137</sup>

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134. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (citations omitted) (internal quotation marks omitted).

135. *Fin. Info., Inc. v. Moody's Investors Serv., Inc.*, 808 F.2d 205, 208 (2d Cir. 1986).

136. *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 38 cmt. c (1997). Note that despite its half-hearted argument that hot news claims survive § 301 preemption, the restatement disfavors the misappropriation doctrine generally because of its tendency to stifle competition. *Id.*

137. *See generally* Posner, *supra* note 27.

### 3. *Threat to the Very Existence of the Product or Service*

The threat to the very existence of a product or service is a concept drawn directly from *INS*.<sup>138</sup> “If services like AP were not assured of property rights in the news they pay to collect, . . . [t]he newspaper-reading public would suffer because no one would have an incentive to collect ‘hot news.’”<sup>139</sup> Judge Posner suggests that this is the key element that allows hot news claims to survive preemption.<sup>140</sup> He has argued that if unauthorized copying is going to “kill the goose that laid the golden eggs,” then state efforts to protect the goose are not preempted.<sup>141</sup> Judge Posner is incorrect.

There are two reasons why the threat to the very existence of a product or service, as an element, does not vindicate rights that are different in kind from section 106 of the Copyright Act. First, the threat to the existence of an industry is simply not an act, but is instead the result of an act.<sup>142</sup> The act is copying and § 106 vindicates the right to prevent copying. Second, Congress contemplated the incentive structures required to produce copyrightable subject matter when it passed the Copyright Act.<sup>143</sup> *Feist* suggests that Congress decided not to protect certain types of works<sup>144</sup> and, by extension, *Feist* suggests a legislative intent not to protect the industries that invest in producing those works. The threat to the very existence of a product or service, as an element, does not fundamentally differ from the constitutionally recognized idea that incentive is necessary to promote authorship. Section 106 embodies the exclusive rights that incentivize authors. Thus, *NBA*’s third and final element does not vindicate rights that are qualitatively different than those contained in § 106.

To summarize, *NBA* defined three extra elements that save a hot news claim from preemption: (i) the time-sensitive value of factual information; (ii) free-riding by a defendant; and (iii) the threat to the very existence of the product or service.<sup>145</sup> None of these three elements create a state-law cause of action that is *qualitatively different from*, and thus not *equivalent to*, section 106 of the Copyright Act.

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138. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918).

139. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

140. *See generally* Posner, *supra* note 27.

141. *See id.* at 628.

142. *See* Khadder, *supra* note 59, at 17; *see also* *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 906–07 (2d Cir. 2011) (Raggi, J., concurring).

143. *See* U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”).

144. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

145. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

#### 4. *NBA's Alternative Five-Part Test*

*NBA* also discussed a five-part test for hot news preemption.<sup>146</sup> The five-part test adds two elements to the three elements discussed above: (iv) the plaintiff gathers information at some cost; and (v) the parties are in direct competition.<sup>147</sup> Although some circuits have adopted *NBA*'s five-part test,<sup>148</sup> the two additional elements fail to save a hot news claim from preemption. First, the element that a plaintiff gathers information at some cost merely narrows the pool of potential plaintiffs to those who have expended resources to gather facts. The gravamen of the claim is still copying. The investment of time and resources is in no way unique to a hot news claim; it is a common element in most garden-variety copyright infringement claims.<sup>149</sup> In any event, the Supreme Court rejected sweat of the brow as a stand-alone basis for intellectual property in *Feist*.<sup>150</sup>

The element of direct competition between the parties also merely narrows the pool of eligible plaintiffs without altering the fundamental nature of the claim. Direct competition may have been included because it provides evidence that the defendant's free-riding actually will threaten the existence of the plaintiff's industry or service. While direct competition may be an essential element of a hot news claim as a tort, it is not an element that makes the claim qualitatively different from a copyright claim.

#### 5. *Summary*

The *NBA* court fundamentally misconceived of the extra elements inquiry because it did not link the extra elements test to the *equivalency* language of § 301. Extra elements are only useful when they reveal whether a state-created cause of action is truly protecting rights that are different in kind from the Copyright Act. If so, then the state claim is not *equivalent* to § 106 and is not preempted. When applied to the five elements mentioned in *NBA*, none of these elements save hot news claims from preemption.<sup>151</sup> Thus, *NBA*'s suggestion that a properly narrow hot news claim survives preemption is misguided. Hot news claims should be preempted by the Copyright Act in all circumstances.

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146. *Id.*

147. *Id.* at 845.

148. *See, e.g.,* *Confold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 962 (7th Cir. 2006).

149. *See* PATRY, *supra* note 54, § 18:40 (“[I]t will always require some cost or expense to gather material.”). If this element were qualitatively different, any state-law cause of action in which a plaintiff expended resources would avoid preemption per se.

150. *See* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991).

151. Even a claim that is narrowed to the facts of *INS* is preempted by § 301.

### III. THE CASE FOR UNIFORM HOT NEWS PREEMPTION

Following *NBA*, courts around the country adopted its test as the touchstone for hot news preemption.<sup>152</sup> However, the vast majority of these cases held that the plaintiff's hot news claim was preempted. One might conclude that the current hot news doctrine, while flawed, does little harm. But allowing hot news claims to survive in a weakened form is far from innocuous. Two recent cases help illustrate the logical and practical problems that hot news claims raise. Furthermore, if hot news claims were viable, this would cause significant policy problems. Therefore, courts ought to discard what vestiges of the hot news doctrine remain in favor of uniform hot news preemption. Although it perpetuated some of *NBA*'s logical fallacies, *Barclays* was a step in the right direction because it classified *NBA*'s three- and five-part tests as dicta.

#### A. *BARCLAYS CAPITAL INC. v. THEFLYONTHEWALL.COM*

The Second Circuit stepped back onto the center stage of hot news with its recent opinion in *Barclays Capital Inc. v. Theflyonthewall.com*.<sup>153</sup> In *Barclays*, several financial service firms (the "Firms") brought a hot news claim against an online news aggregator ("Fly") that reported the Firms' daily stock recommendations while those recommendations were still "hot."<sup>154</sup> These recommendations, which were distributed to a limited pool of major investors, were valuable because they were not generally known.<sup>155</sup> The Firms generated commissions by using their recommendation services to persuade major investors to buy and sell stocks.<sup>156</sup>

Fly was a financial news aggregator that did not offer the financial services or otherwise compete with the Firms.<sup>157</sup> Rather, it distributed financial information to its subscribers in exchange for subscription and ad revenue.<sup>158</sup> Fly obtained the Firms' financial recommendations from major investors and then reported those recommendations on its website.<sup>159</sup> After a three-day bench trial, the district court granted judgment in favor of the Firms on their hot news claim and enjoined Fly

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152. See, e.g., *Confold Pac.*, 433 F.3d at 960; *Agora Fin., L.L.C. v. Samler*, 725 F. Supp. 2d 491, 499 (D. Md. 2010); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1105 (C.D. Cal. 2007); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 979 (E.D. Cal. 2002); *Fred Wehrenberger Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999); *Scranton Times, L.P. v. Wilkes-Barre Publ'g Co.*, No. 3:08-cv-2135, 2009 WL 3100963, at \*5 (M.D. Pa. Sept. 23, 2009).

153. 650 F.3d 876 (2d Cir. 2011).

154. *Id.* at 880–82.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

from reporting the Firms' recommendations "for a period ranging from thirty minutes to several hours after they are released by the plaintiffs."<sup>160</sup>

The Second Circuit reversed. There are three key elements to its decision. First, the court held that the Firms' hot news claim was preempted because there was no evidence that Fly was free-riding off of the Firms' efforts.<sup>161</sup> Just as Motorola was not free-riding off of NBA's products because it collected the facts of NBA games itself, Fly was not free-riding because it collected the facts underlying the Firms' reports itself.<sup>162</sup> The court distinguished Fly's actions from the facts in *INS* because *INS* did not expend its own resources to collect the facts.<sup>163</sup>

Second, the court looked to *INS* for a more nuanced definition of free-riding: "[T]he term free-riding refers explicitly to a requirement for a cause of action as described by *INS*. . . . as 'taking material that has been acquired by complainant . . . [through] the expenditure of labor, skill, and money, and . . . appropriating it and selling it as [the defendant's] own. . . .'"<sup>164</sup> The court used this definition from the *INS* in two ways. First, it distinguished between plaintiffs who expend effort to *collect* facts from plaintiffs who expend effort to *create* facts.<sup>165</sup> For example, the AP collected the facts of World War I, whereas the NBA created facts by putting on basketball games, and the Firms created facts by announcing their daily stock recommendations. The *Barclays* court declared that a defendant free-rides in the *INS* sense when it appropriates facts that the plaintiff *collected*, but not facts that the plaintiff *created*.<sup>166</sup> Thus, the court concluded that Fly did not take an *INS*-like free-ride off of the Firms' financial reports.<sup>167</sup>

The court also used the *INS* definition of free-riding to suggest that there is a reverse palming-off component to free-riding.<sup>168</sup> The court concluded that because Fly attributed financial recommendations to the financial firms, it was not free-riding. But if Fly had claimed the recommendations were its own, it would have been free-riding.<sup>169</sup> Here the court misreads *INS*. Reverse palming-off is a separate doctrine from hot news misappropriation. In fact, Justice Holmes dissented from *INS* because he would have decided the case on reverse palming-off grounds,

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160. *Id.* at 887.

161. *Id.* at 878.

162. *Id.*

163. *Id.*

164. *Id.* at 903 (final two alterations in original).

165. *Id.*

166. *Id.*

167. *Id.* at 907.

168. *Id.*

169. *Id.*



as opposed to creating a quasi-property right in the news.<sup>170</sup> Reverse palming-off is likely not preempted by the Copyright Act because that tort is based on source confusion, a concept that falls outside the general scope of copyright.<sup>171</sup> If Fly held out the Firms' financial recommendations as its own, the Firms would have a non-preempted reverse palming-off claim. To the extent *Barclays* reads reverse palming-off into the elements of a hot news claim, it conflates its tort theories.

The third and most important feature of *Barclays* is that it classified the *NBA* hot news test as dicta.<sup>172</sup> The court stated: "We think that the *NBA* panel's decision that the absence of 'free riding' was fatal to the plaintiff's claim in that case is binding upon us on the facts presented here," explaining that the "*NBA* panel decided the case before it, and we think that the law it thus made regarding 'hot news' preemption is, as we have tried to explain, determinative here. But the Court's various explanations of its five-part approach are not."<sup>173</sup>

Thus, the court construed *NBA*'s hot news test as dicta, but suggested without explanation that a properly narrow hot news claim survives preemption.<sup>174</sup> It is just not clear why. For example, if Motorola had copied the scores of contemporaneous basketball games from an *NBA*-owned sports statistics application, would that claim survive preemption because Motorola *was* free-riding? I suggest that the claim ought to be preempted based on my previous conclusion that free-riding never saves a claim from preemption.<sup>175</sup> However, *Barclays* supports the opposite result. Here, *Barclays* obfuscates more than it clarifies. Equivocal precedent is inefficient for parties who may litigate through trial and appeal and is a waste of the trial court's time because the court will almost certainly find preemption but cannot dismiss the claim outright.

#### B. *ASSOCIATED PRESS V. ALL HEADLINE NEWS*

The problems of a dormant hot news doctrine become more acute when a well-heeled plaintiff seeks to stifle competition by using litigation

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170. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 246–48 (1918) (Holmes, J., dissenting).

171. For a full discussion of why reverse palming-off is not preempted by the Copyright Act, see PATRY, *supra* note 54, §§ 18:20–47.

172. The court also suggested that a three-part iteration of the *NBA* test is dicta. *See Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 899 n.32 ("[The court's] language regarding the elements that might in some later case allow a claim to avoid preemption, and its discussion of why such an exception to preemption was narrow, were useful commentaries on the reasoning and possible implications of the Court's holding. But the language itself was not meant to, and did not, bind us, the district court, or any other court to subsequently consider this subject.").

173. *Id.* at 906–07, 899.

174. *Id.* at 898.

175. *See supra* Part II.C.2.

to crush a small competitor who may not be able to fund a case past summary judgment. In *Associated Press v. All Headline News Co.* (“*AP v. AHN*”), AP brought a hot news claim against All Headline News Co. (“*AHN*”) because it allegedly hired “‘poorly paid individuals’ to find news stories on the internet and prepare them for republication under the *AHN* banner.”<sup>176</sup> *AHN* moved to dismiss, but instead of attacking the elements of the hot news claim directly, *AHN* argued that that Florida law governed the case and that Florida did not recognize a hot news cause of action.<sup>177</sup> The district court disagreed and, after dispatching with *AHN*’s defense to the hot news cause of action in one sentence, denied its motion to dismiss.<sup>178</sup> Following the court’s order, the parties settled the case and *AHN* agreed to pay AP an undisclosed amount.<sup>179</sup>

There are a few takeaways from *AP v. AHN*. First, deep-pocketed plaintiffs like AP can use the hot news cause of action in its current weakened form to attack small competitors who use facts that are in the public domain. Trial courts that follow *Barclays* and *NBA* are stuck with the proposition that hot news claims survive preemption if pled correctly. Thus, lower courts will have to retain hot news claims through pre-trial motions if they are pled accurately and plausibly. Second, small companies that appropriate facts and republish those facts are ill situated to defend hot news claims. *AHN*, for example, failed to make a compelling attack on the elements of AP’s hot news claim and also settled its case without even proceeding to summary judgment.

Third, a case like *AP v. AHN*, while non-binding, provides more leverage to companies like AP. After the *Barclays* decision was published, AP issued a press release that stated: “The Court contrasted [its] facts with a ‘hot news’ complaint that AP had previously brought against a media company alleged to have copied AP-gathered news and to have published that news as its own, in competition with AP’s services.”<sup>180</sup> AP was, of course, referring to *AP v. AHN*. Its press release stated further: “Such a case, the Court said, was likely a viable ‘hot news’ claim that would not be preempted by the Copyright Act.”<sup>181</sup> However,

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176. 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009). Note that *Barclays* probably cited *AP v. AHN* because, under the *Barclays* definition of free-riding, *AHN*’s actions would not be preempted by the Copyright Act. *AHN* allegedly copied the facts that AP had collected and republished them as its own. *Barclays*, 650 F.3d at 906.

177. *All Headline News*, 608 F. Supp. 2d at 459.

178. *Id.* at 461.

179. See Elinor Mills, *AP, AHN Media Settle Intellectual Property Lawsuit*, CNET (July 13, 2009, 6:11 PM), [http://news.cnet.com/8301-1023\\_3-10285827-93.html](http://news.cnet.com/8301-1023_3-10285827-93.html).

180. Press Release, Associated Press, *AP’s Statement on Barclays Capital Inc. v. Theflyonthewall.com, Inc.* (June 20, 2011), available at <http://www.noodls.com/viewNoodl/10443878/apf---the-associated-press/aps-statement-on-barclays-capital-inc-v-the-flyonthewallc>.

181. *Id.*; see *AP and AHN Media Settle AP’s Lawsuit Against AHN Media and Individual*

under a proper § 301 analysis, AP's claim against AHN should be preempted by the Copyright Act. Unfortunately, small parties do not have the resources to find out and often must settle their cases in the shadow of the law. Thus, *AP v. AHN* illustrates that hot news misappropriation claims stifle competition by limiting the competitive use of the public domain.

### C. A VIABLE HOT NEWS DOCTRINE WOULD CAUSE SIGNIFICANT PROBLEMS

In its current form, the hot news doctrine articulated in *NBA* and clarified in *Barclays* poses two problems: It is both inefficient and anticompetitive. If hot news claims became more widespread or more successful, the doctrine would stifle free access to facts, threaten the uniform application of national laws, and prove difficult for judges to administer.

The hot news doctrine is inefficient, particularly after *Barclays*, because it does not offer a coherent view of a non-preempted hot news claim. Assuming, for the sake of argument, that hot news claims are *not* universally preempted, how should a lower court apply the *Barclays-NBA* line of cases? Those cases suggest that (1) a theoretical hot news claim survives preemption, but (2) a claim is preempted if the defendant did not take a free ride, and (3) the three-part *NBA* test is not controlling. However, what should a lower court do if it reviews a case of clear free-riding but only some of the *NBA* elements are met? *Barclays* and *NBA* do not provide a clear answer. This is partly because of inherent logical problems in those opinions, but also because both cases found the hot news claim was preempted. *Barclays* and *NBA*'s preemption holdings are consistent with almost every other hot news case since the passage of the Copyright Act. Since courts find preemption in almost every hot news case,<sup>182</sup> universal preemption would allow courts to reach the same result more efficiently, while conserving the parties' resources.

A viable hot news doctrine is anticompetitive and has very limited utility.<sup>183</sup> *AP v. AHN* illustrates the problem of deep-pocketed plaintiffs leveraging litigation against small competitors.<sup>184</sup> If hot news litigation succeeds, those plaintiffs will stifle free access to facts by silencing sources that widely disseminate those facts with little public benefit.

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*Defendants*, ASSOCIATED PRESS (July 13, 2009), <http://www.ap.org/Content/AP-in-the-News/Archive/AP-AHN-Settle-Lawsuit>.

182. The very few cases that rule in favor of a hot news plaintiff are, as this Note has argued, in error.

183. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 136.

184. See *supra* Part III.B.

Although the newspaper industry is shrinking faster than any other industry in the United States,<sup>185</sup> the primary cause is not hot news misappropriation. Rather, the public's news consumption has changed. While newspaper circulation and ad revenue have decreased significantly over the past decade, digital ad revenue has not filled the void.<sup>186</sup> Revenue from classified ads, once a major source of newspaper revenue, has eroded given the rise of websites like craigslist.com.<sup>187</sup> Further, while newspapers once had geographic monopolies over local readers, the Internet now allows consumers to access a wider variety of news sources for their national and world news.<sup>188</sup> Therefore the hot news doctrine would not mitigate the real problems facing the newspaper industry and would not ensure that the public has broader access to high quality facts. But the doctrine would encroach on the public domain and stifle competition. That encroachment is not warranted unless it is justified by a tangible public benefit.

A viable hot news doctrine would also be difficult to administer and potentially unpredictable. First, courts are ill-equipped to make inherently legislative judgments about which industries deserve hot news protection.<sup>189</sup> Furthermore, how is a court contemplating a hot news injunction supposed to determine the exact length of time news remains hot? To the extent that circuits might reach different interpretations, the scope of the rights in factual material would be difficult to predict. Consider that most news is distributed online to a national audience. If the scope of rights varied from state to state, online news distributors might have to abide by the laws of the most restrictive state. When taken together, the problems inherent in a viable hot news doctrine illustrate Judge Posner's point: "Misappropriation doctrine . . . is alarmingly fuzzy once the extreme position of creating a legal right against *all* free riding is rejected."<sup>190</sup> By contrast, section 301 of the Copyright Act was created to ensure the uniform application of copyright law, which contemplates

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185. Christopher Zara, *Newspaper Industry Shrinks 40 Percent in a Decade: Report*, INT'L BUS. TIMES (Sept. 20, 2012, 11:02 AM), <http://www.ibtimes.com/newspaper-industry-shrinks-40-percent-decade-report-793706>.

186. John Barth, *How Newspapers Can Survive*, CNN (Mar. 20, 2012, 12:29 PM), <http://www.cnn.com/2012/03/20/opinion/barth-newspapers-decline>.

187. Jonathan Bailey, *Why Newspapers Are Struggling*, PLAGIARISM TODAY (June 4, 2012), <http://www.plagiarismtoday.com/2012/06/04/why-newspapers-are-struggling>.

188. *Id.*

189. *Compare* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929) (declining to extend *INS* to cover "hot" scarf designs), *with* Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483 (N.Y. App. Div. 1950) (extending misappropriation protection to "hot" opera broadcasts).

190. Posner, *supra* note 27, at 638.

the distribution of facts. It was specifically designed to prevent a patchwork of state regulations.

#### CONCLUSION

The touchstone of the hot news preemption analysis is the § 301 two-prong preemption test. In all cases, a hot news claim falls within the subject matter of the Copyright Act because these claims concern factual information. For a hot news claim to survive preemption then, the court must determine whether it contains extra elements that are qualitatively different from a copyright claim. In other words, the court must find extra elements that vindicate rights that are different from the rights protected by section 106 of the Copyright Act. But, as this Note has argued, there are no extra elements that place hot news claims outside of the general scope of copyright. Thus, even if a district court were confronted with the exact facts from *INS*, a logical general scope inquiry inevitably leads to the conclusion that the plaintiff has not identified a cause of action that falls outside the general scope of the Copyright Act. Properly understood, § 301's two-prong inquiry takes precedence over dicta from the Second Circuit and § 301's convoluted legislative history. A forward-thinking court of appeals should reject the dicta in *Barclays* and *NBA* in favor of a clear statement that the Copyright Act uniformly preempts hot news misappropriation claims. Uniform preemption is supported by the legal system's strong preference for judicial efficiency, free-market competition, and public access to factual information.