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## Extending Copyright Protection to Combat Free-Riding by Digital News Aggregators and Online Search Engines

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# EXTENDING COPYRIGHT PROTECTION TO COMBAT FREE-RIDING BY DIGITAL NEWS AGGREGATORS AND ONLINE SEARCH ENGINES

Nancy J. Whitmore\*

## I. INTRODUCTION

Much has been made of the digital disruption in the news business and the subsequent cascade in print advertising revenues<sup>1</sup> and workforce numbers.<sup>2</sup> When The New York Times (“The Times”) announced in the spring of 2014 plans to eliminate 100 newsroom jobs, Executive Editor Dean Baquet told his newsroom staff that “no magic bullet” existed for the “current financial plight of the news business.”<sup>3</sup> Six months prior to its announcement, The Times finalized a 96-page *Innovation Report* that recognized the disruptive forces in the news industry and how rapidly new digital players have poised themselves to

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<sup>1</sup> See *Newspapers: Print and Online Ad Revenue*, PEW RES. CTR. (Apr. 29, 2015), <http://www.journalism.org/media-indicators/newspaper-print-and-online-ad-revenue/> (recognizing the according to figures released by the Pew Research Center, print and online advertising revenue has fallen nearly 60% since 2005).

<sup>2</sup> See generally MARK JURKOWITZ, ET AL., PEW RES. CTR., *THE GROWTH IN DIGITAL REPORTING: WHAT IT MEANS FOR JOURNALISM AND NEWS CONSUMERS* 2-6 (2014), [http://www.journalism.org/files/2014/03/Shifts-in-Reporting\\_For-uploading.pdf](http://www.journalism.org/files/2014/03/Shifts-in-Reporting_For-uploading.pdf) (“The American Society of Newspaper Editors counted 38,000 full-time newsroom jobs in 2012, down from more than 54,000 a decade earlier. And in 2013, there were hundreds of new layoffs at such companies as Gannett and Tribune.”) (noting also the rise of digital source of news, content, and media from outlets such as BuzzFeed, The Huffington Post, and Bleacher Report).

<sup>3</sup> Ravi Somaiya, *New York Times Plans to Eliminate 100 Jobs in the Newsroom*, N.Y. TIMES (Oct. 1, 2014), <http://www.nytimes.com/2014/10/02/business/media/new-york-times-plans-cutbacks-in-newsroom-staff.html>.

take market share away from storied news organizations like itself.<sup>4</sup> The report, which focused on the digital health of The Times, addressed the fact that digital native news sites, such as the Huffington Post, have surpassed it in terms of reader traffic<sup>5</sup> and often using content produced by The Times.<sup>6</sup>

The practice of aggregating and repackaging the journalism produced by The Times and other incumbent news organizations and optimizing that content for search, social, and other distribution channels became a business strategy upon which digital startups monetized stories created by others and attracted a significant share of the audience.<sup>7</sup> To that point, the *Innovation Report* references a Huffington Post executive who described watching the traffic numbers for both the aggregated content posted by the Huffington Post after Nelson Mandela's death and the original content produced by The Times.<sup>8</sup> The Times "got crushed" in this battle for eyeballs.<sup>9</sup> In this new competitive landscape incumbent news organizations need to defend themselves against "digital pick-pockets" who steal their "stuff with better headlines, better social."<sup>10</sup>

For The Times and countless other news organizations, the "stuff" referred to is the billions of dollars the news industry invests in journalism each year,<sup>11</sup>

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<sup>4</sup> N.Y. TIMES, INNOVATION 14-16 (2014) [hereinafter N.Y. TIMES, INNOVATION], [http://www.presscouncil.org.au/uploads/52321/ufiles/The\\_New\\_York\\_Times\\_Innovation\\_Report\\_-\\_March\\_2014.pdf](http://www.presscouncil.org.au/uploads/52321/ufiles/The_New_York_Times_Innovation_Report_-_March_2014.pdf).

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 44.

<sup>7</sup> Joshua Benton, *The Leaked New York Times Innovation Report is One of the Key Documents of this Media Age*, NIEMANLAB (May 15, 2014, 5:55 PM), <http://www.niemanlab.org/2014/05/the-leaked-new-york-times-innovation-report-is-one-of-the-key-documents-of-this-media-age> (explaining that other news outlets regularly outperform The Times by repackaging their journalism).

<sup>8</sup> N.Y. TIMES, INNOVATION *supra* note 4, at 44.

<sup>9</sup> Blaise Lucy, *The New York Times has a Big Data Problem- Do You?*, MARCH COMM'NS (Jun. 19, 2014), <http://www.marchpr.com/blog/pr/2014/06/the-new-york-times-big-data-problem> (describing the competition as more digital-savvy competitors as opposed to "traditionally objective, serious journalism" sources); cf. Adrianna Huffington, *Making News and Getting Views: Huffpost Live Hits a Billion*, HUFF. POST: MEDIA (Apr. 16, 2014, 5:59 AM), [http://www.huffingtonpost.com/arianna-huffington/making-news-and-getting-views-huffpost-live-hits-a-billion\\_b\\_4784622.html](http://www.huffingtonpost.com/arianna-huffington/making-news-and-getting-views-huffpost-live-hits-a-billion_b_4784622.html) (explaining how the site received a billion views through the various types of videos shown).

<sup>10</sup> Myles Tanzer, Exclusive: New York Times Internal Report Painted Dire Digital Picture, BUZZFEED: BUSINESS (May 15, 2014, 11:06 AM), <http://www.buzzfeed.com/mylestanzer/exclusive-times-internal-report-painted-dire-digital-picture#.kaBrGZrPA>.

<sup>11</sup> See JESSE HOLCOMB & AMY MITCHELL, PEW RES. CTR., THE REVENUE PICTURE FOR AMERICAN JOURNALISM AND HOW IT IS CHANGING 2 (2014) [hereinafter HOLCOMB & MITCHELL, REVENUE PICTURE], <http://www.journalism.org/files/2014/03/Revnue-Picture-for-American-Journalism.pdf> (explaining while the U.S. news industry generates roughly \$63-65 billion in annual revenue, the "financial support for journalism has become more complex and more varied" and now includes venture capital, individual and corporate in-

and represents the same investment that is harvested and monetized by “aggregators from Google to the tens of thousands of websites that actually steal full-text content.”<sup>12</sup> A 2009 study by a consortium of publishers found that, during a thirty-day period, more than 75,000 websites reused U.S. newspaper content online without permission.<sup>13</sup> On these sites, the consortium found nearly 112,000 near-exact copies of articles in addition to more than 500,000 excerpts and headlines used.<sup>14</sup> On average, each article was reused, at least in part, 4.4 times, with stories from large national newspapers reused as many as 15 times.<sup>15</sup> As a business model, this type of content aggregation has helped launch a number of highly publicized revenue producing digital news organizations, such as Huffington Post,<sup>16</sup> BuzzFeed,<sup>17</sup> Gawker,<sup>18</sup> and Business Insider.<sup>19</sup>

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vestments, and philanthropy.); PEW RES. CTR., REVENUE SOURCES FOR NEWS: AGGREGATED ESTIMATES AND NOTES (2014), <http://www.journalism.org/files/2014/03/Revenue-Sources-for-News-Data-Topline.pdf> (noting venture capital and owner investment added approximately \$300 to \$440 million to the nascent for-profit digital news sector, bringing its total revenue in the range of \$800 million to \$1.2 billion); Caroline Little, *Strong Copyright Law Supports Journalism and Informed Communities*, NEWSPAPER ASS'N. OF AM. (May 2014) [hereinafter Little, *Strong Copyright Law*], <http://www.naa.org/News-and-Media/CEO-Update/2014-May-Copyright-Law.aspx> (remarking the Newspaper Association of America, newspapers alone invest more than \$5 billion annually in journalism); Peter Osnos, *These Journalists Spent Two Years and \$750,000 Covering One Story*, THE ATLANTIC (Oct. 2, 2013), <http://www.theatlantic.com/national/archive/2013/10/these-journalists-spent-two-years-and-750-000-covering-one-story/280151> (noting ProPublica, a nonprofit digital news organization, “conservatively estimated” that it spent \$750,000 covering just one story); Somaiya, *supra* note 3 (“Some of that growth is a result of adding jobs for digital efforts, like web producers and video journalists.”) (noting The Times employs about 1,330 journalists its newsroom).

<sup>12</sup> Ken Doctor, *The Newsonomics of Where NewsRight Went Wrong*, NIEMANLAB (May 15, 2013, 8:20 AM), <http://www.niemanlab.org/2013/05/the-newsonomics-of-where-newsright-went-wrong/>.

<sup>13</sup> FAIR SYND. CONSORT., HOW U.S. NEWSPAPER CONTENT IS REUSED AND MONETIZED ONLINE 1 (2009), <http://www.courantalumni.org/wp-content/uploads/2009/12/USnewspapercontentreusementudy.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> HOLCOMB & MITCHELL, REVENUE PICTURE, *supra* note 11, at 8 (estimating that Huffington Post’s annual estimated revenue in 2013 was some \$100 million).

<sup>17</sup> *Id.* (noting and BuzzFeed reportedly made an estimated \$60 million in 2013); Josh Halliday, *11 things you need to know about Buzzfeed*, GUARDIAN (Jan. 6, 2013, 1:45 PM), <http://www.theguardian.com/media/2013/jan/06/buzzfeed-social-news-open-uk> (outlining BuzzFeed’s successful business approach).

<sup>18</sup> Andrew Phelps, *I Can’t Stop Reading this Analysis of Gawker’s Editorial Strategy*, NIEMANLAB (Mar. 21, 2012, 11:45 AM), <http://www.niemanlab.org/2012/03/i-cant-stop-reading-this-analysis-of-gawkers-editorial-strategy/> (explaining *Gawker’s* method of journalism).

<sup>19</sup> Jason Del Ray, *Here’s Business Insider’s Crazy New Strategy to Boost Ad Revenue*, BUS. INSIDER (Oct. 10, 2012), <http://adage.com/article/digital/business-insider-s-crazy-strategy-boost-ad-revenue/237672/> (outlining Business Insider’s business plan and noting in

The issues surrounding news consumption today are complex and involve major shifts in the way news is disseminated, discovered, and shared. Each year, since 2006, a larger share of the audience has turned to digital devices to access news content.<sup>20</sup> In 2012, digital devices surpassed newspapers and the radio as the go-to distribution source for news.<sup>21</sup> Studies indicate the increasing move to digital news is driven in large part by the growing use of mobile devices.<sup>22</sup>

As audiences move online, the challenge for news organizations, as The Times' *Innovation Report* points out, is audience development and engagement.<sup>23</sup> With multiple pathways to news, a cluttered online environment, and distracted mobile users, connecting with an audience requires dedicated effort, skills, and resources.<sup>24</sup> To that extent, digital natives like the Huffington Post and BuzzFeed were early to the data science game of managing site traffic and audience behavior.<sup>25</sup> Armed with the strategies and mindset of a tech company, BuzzFeed, in its early years, saw itself as a laboratory<sup>26</sup> that experimented with content and the spread of content on the Internet.<sup>27</sup> Today every item of content

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2012 they had advertising revenue of \$12 million).

<sup>20</sup> See PEW RES. CTR., IN CHANGING NEWS LANDSCAPE, EVEN TELEVISION IS VULNERABLE 9-11 (2012), <http://www.people-press.org/files/legacy-pdf/2012%20News%20Consumption%20Report.pdf> (noting specifically the compiled data provide in the supporting charts).

<sup>21</sup> *Id.*

<sup>22</sup> See AMY MITCHELL, ET AL., PEW RES. CTR., STATE OF THE NEWS MEDIA 2015, at 4-9 (2015), <http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf>; TOM ROSENSTIEL, ET AL., PEW RES. CTR., THE FUTURE OF MOBILE NEWS 2 (2012), [http://www.journalism.org/files/legacy/Futureofmobilenews%20\\_final1.pdf](http://www.journalism.org/files/legacy/Futureofmobilenews%20_final1.pdf) ("Half of all U.S. adults now have a mobile connection to the web through either a smartphone or tablet, significantly more than a year ago, and this has major implications for how news will be consumed and paid for...").

<sup>23</sup> N.Y. TIMES, INNOVATION, *supra* note 4, at 3-4.

<sup>24</sup> See generally Richard Lorenzen, *How to Make Sure Your Press Release Reaches the Right Audience*, HUFFINGTON POST (July 30, 2015, 1:59 PM), [http://www.huffingtonpost.com/richard-lorenzen/how-to-make-sure-your-pre\\_b\\_7903672.html](http://www.huffingtonpost.com/richard-lorenzen/how-to-make-sure-your-pre_b_7903672.html).

<sup>25</sup> See AMY MITCHELL & DANA PAGE, PEW RES. CTR., SOCIAL, SEARCH AND DIRECT: PATHWAYS TO DIGITAL NEWS 5 (2014) [hereinafter MITCHELL & PAGE, PATHWAYS] [http://www.journalism.org/files/2014/03/SocialSearchandDirect\\_PathwaystoDigitalNews.pdf](http://www.journalism.org/files/2014/03/SocialSearchandDirect_PathwaystoDigitalNews.pdf).

<sup>26</sup> Craig Silverman, *BuzzFeed's Ben Smith: 'We Didn't Fully Think Through' the Removal of Old Posts*, POYNTER (updated Nov. 25, 2014, 8:21 AM), <http://www.poynter.org/latest-news/regret-the-error/264007/buzzfeeds-ben-smith-we-didnt-fully-think-through-the-removal-of-old-posts>.

<sup>27</sup> David Rowan, *How BuzzFeed Mastered Social Sharing to Become a Media Giant for a New Era*, WIRED: TECH. (Jan. 2, 2014), <http://www.wired.co.uk/magazine/archive/2014/02/features/buzzfeed>.

is measured<sup>28</sup> from “seed views” on websites to the “viral views” from social media.<sup>29</sup> Editors use these analytics to “boost under-performing stories with higher visibility or tweaked headlines.”<sup>30</sup>

As a laboratory initially only focused on social network optimization, BuzzFeed was not interested in building a loyal, returning audience with original, well-sourced, and well-reported content like traditional news organizations.<sup>31</sup> Instead, the company built a business strategy around finding, copying, polishing, and inserting content from the Web into lists and blogs that people wanted to share.<sup>32</sup> In doing so, BuzzFeed now boasts a unique monthly visitor count of 150 million,<sup>33</sup> and forecasted revenue in 2014 of \$120 million.<sup>34</sup>

Like the Huffington Post—which was sold to AOL, Inc. for \$315 million in 2011<sup>35</sup>—BuzzFeed appears to have built a successful business model largely using other people’s content.<sup>36</sup> In an official apology to readers for plagiarism that occurred in 2013, BuzzFeed rationalized its business philosophy by ex-

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<sup>28</sup> Id.

<sup>29</sup> Mathew Ingram, *BuzzFeed Opens Up Access to Its Viral Dashboard*, GIGAOM (Sept. 2, 2010, 7:23 AM), <https://gigaom.com/2010/09/02/buzzfeed-opens-up-access-to-its-viral-dashboard/>.

<sup>30</sup> Rowan, *supra* note 27.

<sup>31</sup> MITCHELL & PAGE, *PATHWAYS*, *supra* note 25, at 5.

<sup>32</sup> See Dylan Byers, *Plagiarism and BuzzFeed’s Achilles’ Heel*, POLITICO (July 25, 2014, 1:51 PM), <http://www.politico.com/blogs/media/2014/07/plagiarism-and-buzzfeeds-achilles-heel-192858> (setting forth the process through which BuzzFeed acquires its content from the website/blog known as Reddit); see also Felix Gillette, *BuzzFeed, the Ad Model for the Facebook Era?*, BLOOMBERG BUSINESS (Mar. 22, 2012), <http://www.bloomberg.com/bw/articles/2012-03-22/buzzfeed-the-ad-model-for-the-facebook-era> (noting specifically the statement of Matt Stopera, Senior Editor at BuzzFeed) (“The way I do most of my posts . . . is I think, how can I get someone to press ‘like’ on this?”); see also Farhad Manjoo, *How To Make a Viral Hit in Four Easy Steps*, SLATE (June 26, 2012, 6:39 PM), [http://www.slate.com/articles/technology/technology/2012/06/\\_21\\_pictures\\_that\\_will\\_restore\\_your\\_faith\\_in\\_humanity\\_how\\_buzzfeed\\_makes\\_viral\\_hits\\_in\\_four\\_easy\\_steps\\_.html](http://www.slate.com/articles/technology/technology/2012/06/_21_pictures_that_will_restore_your_faith_in_humanity_how_buzzfeed_makes_viral_hits_in_four_easy_steps_.html); see also MITCHELL & PAGE, *PATHWAYS*, *supra* note 25, at 5 (“The strategy of BuzzFeed, for example, is very different from that of traditional news organizations. It is not built around building a loyal, returning audience. Instead, it is built around ‘being a part of the conversation. . .’”) (quoting Ben Smith, former Editor-in-Chief of BuzzFeed).

<sup>33</sup> Christine Lagorio-Chafkin, *Meet BuzzFeed’s Secret Weapon*, INC.COM, <http://www.inc.com/christine-lagorio/buzzfeed-secret-growth-weapon.html>.

<sup>34</sup> Alex Barinka & Jon Erlichman, *BuzzFeed Said to Expect 2014 Sales of Up to \$120 million*, BLOOMBERG BUSINESS (Dec. 3, 2013, 5:53 PM), <http://www.bloomberg.com/news/articles/2013-12-03/buzzfeed-said-to-expect-2014-sales-of-up-to-120-million>.

<sup>35</sup> Richard Adams, *Huffington Post Sold to AOL for \$315m*, GUARDIAN (Feb. 7, 2011, 1:16 AM), <http://www.theguardian.com/world/richard-adams-blog/2011/feb/07/huffington-post-sale-aol-ariana>.

<sup>36</sup> See Byers, *supra* note 32 (statement of Farhad Manjoo, N.Y. Times) (“BuzzFeed’s staff . . . polish and repackage what they find. And often . . . their posts are hard to trace back to the original source material.”).

plaining that when it was created in 2006, it was not “doing journalism” and its staff, which was not trained in the discipline, was not “held to traditional journalistic standards.”<sup>37</sup> The contention surrounding these news aggregators is the role they play in diverting readers and revenue from news organizations that hold themselves and their work to traditional journalistic standards.<sup>38</sup> In the battle for reader traffic, the Huffington Post surpassed The Times years ago and “BuzzFeed pulled ahead in 2013.”<sup>39</sup> By taking content without paying for it, these companies “undercut the fundamental economic business model that supports traditional journalism.”<sup>40</sup>

As The Times and other news organizations divert more of their resources to attracting reader traffic and enhancing their connection with subscribers in an effort to compete with these new organizations, they are doing so while continuing to produce great journalism.<sup>41</sup> In order to maintain the vital role that journalism plays in communities across the United States, the Newspaper Association of America (“NAA”) has taken up the fight for effective copyright protection.<sup>42</sup> According to the NAA, “[n]ewspaper content makes up 66 percent of the content on news aggregation platforms such as Google News” and “more than half of the content on many popular digital platforms.”<sup>43</sup>

Today, almost every news site practices some form of aggregation.<sup>44</sup> Even The Times launched “Watching,” which is an aggregated feed of news, multimedia, and tweets from other sources that appears on the NYTimes.com homepage.<sup>45</sup> Using a process similar to other news aggregators, Times report-

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<sup>37</sup> Ben Smith, *Editor’s Note: An Apology to Our Readers*, BUZZFEED (July 25, 2014, 11:32 PM), <http://www.buzzfeed.com/bensmith/editors-note-an-apology-to-our-readers#1xos9hh>.

<sup>38</sup> *Id.*

<sup>39</sup> N.Y. TIMES, INNOVATION, *supra* note 4, at 5.

<sup>40</sup> Little, *supra* note 11 (arguing for fair copyright laws that would “enable newspapers to receive fair compensation” in return for BuzzFeed’s and other similar websites’ pilfering of original content).

<sup>41</sup> Susan B. Glasser, *The New York Times is Not Going to Turn into BuzzFeed*, POLITICO (Apr. 2014), <http://www.politico.com/magazine/story/2014/04/brauchli-keller-interview-the-new-york-times-is-not-going-to-turn-into-buzzfeed-105900?paginate=false>.

<sup>42</sup> Little, *supra* note 11.

<sup>43</sup> *Scope of Fair Use: Register’s Call for Updates to U.S. Copyright Law Before H. Subcomm. on Crts., Intell. Prop. & the Internet*, 113th Cong. (2014) 40 (quoting Kurt Wimmer, the General Counsel of Newspaper Association of America).

<sup>44</sup> BILL GRUESKIN, ET. AL., THE STORY SO FAR: WHAT WE KNOW ABOUT THE BUSINESS OF DIGITAL JOURNALISM 84 (2011) (ebook); see also Ann Friedman, *We’re All Aggregators Now*, COLUM. JOURNALISM REV. (May 23, 2014), [http://www.cjr.org/realtalk/rules\\_for\\_ethical\\_aggregators.php](http://www.cjr.org/realtalk/rules_for_ethical_aggregators.php);

<sup>45</sup> Justin Ellis, *Watching what happens: The New York Times is Making a Front-Page Bet on Real-Time Aggregation*, NIEMANLAB, (Sept. 23, 2014 9:15 AM), <http://www.niemanlab.org/2014/09/watching-what-happens-the-new-york-times-is-making-a-front-page-bet-on-real-time-aggregation>.

ers and editors “search the web and social media for reliable breaking and developing news.”<sup>46</sup> In addition, The Times’ NYT Now app features an aggregated feed called “Our Picks” and “NYT Now” mobile application.<sup>47</sup>

Some critics argue that the practice of journalism itself is a form of aggregation.<sup>48</sup> Reporters lift the most useful information from a source and repurpose it for an article.<sup>49</sup> They link to material found elsewhere, reference it, and build on stories reported in other media outlets.<sup>50</sup> In newscasts, they use reporters from other media organizations as sources, asking them to describe situations on the ground or interviewing them about the work they produced for another news organization.<sup>51</sup> Viewed in this light, the aggregation of news content is ubiquitous.

According to the Reporters Committee for Freedom of the Press, the question of “what separates healthy and legitimate information sharing from unlawful and harmful copyright infringement” is unclear.<sup>52</sup> In recent cases against appropriation of news content, plaintiffs have argued that in addition to copyright infringement, aggregators have also run afoul of misappropriation of “hot news.”<sup>53</sup> While the outcome of these cases has been mixed,<sup>54</sup> most recently, the news industry experienced a significant victory in a case brought by the Associated Press (“AP”) against Meltwater, a global online media monitoring service that claimed its process for indexing and delivering snippets of AP news stories fell within the fair use doctrine of U.S. copyright law.<sup>55</sup>

In an effort to delineate the scope of property protection news reporting receives and to more conclusively define the line between lawful and unlawful

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<sup>46</sup> Press Release, N.Y. Times, The New York Times Launches New Homepage “Watching” Feature (Sept. 23, 2014) (available at <http://investors.nytimes.com/press/press-releases/press-release-details/2014/The-New-York-Times-Launches-New-Homepage-Watching-Feature/default.aspx>).

<sup>47</sup> Friedman, *supra* note 44; *Help* (section of the website), N.Y. TIMES, <http://www.nytimes.com/content/help/mobile/nyt-now/nyt-now.html#now-our-picks> (last visited Oct. 25, 2015) (“We heard such positive feedback about our curation of news from other sources we wanted to make it easier to get to. We have merged Our Picks and Top Stories into a single feed, giving you the best stories of the New York Times and from around the web.”).

<sup>48</sup> See Joel Achenbach, *Journalism is Aggregation*, WASH. POST, (Apr. 9, 2014), <http://www.washingtonpost.com/blogs/achenblog/wp/2014/04/09/journalism-is-aggregation/>; Raymond Baldino, *Content Aggregation: Spreading or Stealing the News?*, 34 NEWS MEDIA & L., no. 3, Summer 2012, at 21.

<sup>49</sup> Achenbach, *supra* note 48.

<sup>50</sup> GRUESKIN, ET AL., *supra* note 44, at 84.

<sup>51</sup> Abraham Moussako, *NewsHour at a Crossroads*, COLUM. JOURNALISM REV. (Aug. 22, 2013), [http://www.cjr.org/behind\\_the\\_news/newshour\\_at\\_a\\_crossroads.php](http://www.cjr.org/behind_the_news/newshour_at_a_crossroads.php).

<sup>52</sup> Baldino, *supra* note 48, at 21.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

aggregation and search engine practices, this article provides a comprehensive analysis of the legal and economic principles at issue in the aggregation battle. The article begins with a discussion of the quest for a property right in news and the tentative development of the “hot news” misappropriation doctrine. In this discussion, special attention is paid to the close relationship between “hot news” and copyright law and the role direct competition and free-riding play in the adjudication of cases of misappropriation. A five-part exploration of news as a form of intellectual property follows. This exploration discusses the evolution in legal thought regarding the fair use doctrine; the relationship of fair use to journalism and the aggregation of news content; the *Meltwater*<sup>56</sup> decision and the degree of protection fact-laden news reporting receives under copyright law; the role transformation has played in subsequent cases involving search engines; and the monetization and commoditization of news content.

Ultimately, this Article calls for a stronger commitment to originality and transformation in copyright law and a more defined line between fact and expression that reserves “thin” copyright protection for factual compilations void of any written expression. In the adjudication of fair use claims involving the appropriation of news content, courts need to understand and recognize the economic realities of the digital news marketplace. In this environment, transformative uses of original news content must advance public knowledge and the goals of copyright law.<sup>57</sup> This can be accomplished through the standard journalistic practice of advancing the story through the inclusion of additional, independent investigation and reporting or the creation of transformative digital tools that encourage new types of research and advance knowledge without supplanting the market for and value of the original authorship. These practices effectively balance the economic and competitive concerns of the news organization with the need to share and provide access to high quality information products that enlighten and enrich public thought and debate.

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<sup>56</sup> See *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. 2013); see also *AP, Meltwater Settle Copyright Dispute*, U.S.A. TODAY, (July 29, 2013, 11:53 AM), <http://www.usatoday.com/story/money/business/2013/07/29/ap-meltwater-settle-copyright-dispute/2595769>.

<sup>57</sup> See generally Harv. Univ. Office of Gen. Counsel, Copyright and Fair Use: A Guide for the Harvard Community 1 (2009), [http://ogc.harvard.edu/files/ogc/files/copyright\\_and\\_fair\\_use\\_a\\_guide\\_for\\_the\\_harvard\\_community\\_0.pdf](http://ogc.harvard.edu/files/ogc/files/copyright_and_fair_use_a_guide_for_the_harvard_community_0.pdf).

## II. EVOLUTION IN LEGAL THOUGHT REGARDING COPYRIGHT LAW

## A. News as Property

The question of a property right in news can be traced back to the early twentieth century and the case *International News Service v. The Associated Press*.<sup>58</sup> The case involved a breach in the professional practice of independent news reporting that occurred when the British and French governments effectively barred International News Service (“INS”) from sending war dispatches across international cable lines to the United States.<sup>59</sup> Without a means to distribute war news to its subscribers in a timely manner, INS appropriated the information from the AP bulletin boards and the early editions of AP newspapers.<sup>60</sup> This practice, according to one commentator, allowed INS to compete against its rivals in the short run “without upsetting the entire fabric of the customary system of property rights that had developed” among news agencies.<sup>61</sup> A social biography of William Randolph Hearst, then-owner of INS, noted AP attorneys “introduced into the record hundreds of examples of news theft” by INS and its founding parent company, the Hearst organization.<sup>62</sup> The evidence also showed that Hearst appropriated domestic news and pre-World War I foreign news by INS contained the same misspellings and other mistakes as the AP stories, which the INS claimed to have gathered on its own.<sup>63</sup> The AP did not retaliate by lifting stories from the INS.<sup>64</sup> The news agency prided itself on the accuracy of its news reports<sup>65</sup> while INS routinely added fictitious material to substantiate its international reports.<sup>66</sup> In addition, a prominent member of the AP’s legal team believed that an unfettered practice of appropriation would result in the demise of the gathering and distribution of news as a business en-

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<sup>58</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

<sup>59</sup> *Int’l News Serv.*, 248 U.S. at 231-32; see also Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 92, 94-95 (1992) (providing a more detailed historical account of the facts surrounding case) [hereinafter Epstein, *Custom & Law*].

<sup>60</sup> Epstein, *Custom & Law*, *supra* note 59 at 91; see also Douglas G. Baird, *Property, Natural Monopoly, and the Uneasy Legacy of INS v. AP 2* (John M. Olin L. & Econ. Chicago Working Paper Series, Working Paper No. 246, 2005) [hereinafter Baird, *Uneasy Legacy*].

<sup>61</sup> Epstein, *Custom & Law*, *supra* note 59 at 105.

<sup>62</sup> FERDINAND LUNDBERG, *IMPERIAL HEARST: A SOCIAL BIOGRAPHY* 207 (1936); see also Baird, *Uneasy Legacy*, *supra* note 60, at 24 (“Most INS subscribers were newspapers that, like INS itself, were owned by William Randolph Hearst.”).

<sup>63</sup> *Id.*

<sup>64</sup> Epstein, *Custom & Law*, *supra* note 59 at 105-106.

<sup>65</sup> Baird, *Uneasy Legacy*, *supra* note 60, at 23.

<sup>66</sup> *Id.* at 26.

terprise.<sup>67</sup>

In its opinion, the Court recognized the “literary quality” of news articles and the copyright interest in the “particular form or collocation of words” used by the writer.<sup>68</sup> But because INS largely steered clear of outright copying,<sup>69</sup> the Court focused the case on the question of a property right in the news element and the use of gathered information as a commodity in a competitive business environment.<sup>70</sup> News as property presented several challenges for the Court. First, the news is essentially the “history of the day”<sup>71</sup>—a virtual stream of facts and figures that the wire services of the day transmitted in a highly compressed form to their subscribers.<sup>72</sup> Subscribers then shaped the raw information into stories that were disseminated to the public for consumption and sharing.<sup>73</sup> Public sharing presented a second issue. Published news, at this time, was widely regarded as public property<sup>74</sup> and its taking was customary.<sup>75</sup> INS was doing essentially what the public was free to do—spread their version of the facts and figures they gleaned from reading AP bulletin boards and newspapers.<sup>76</sup> Moreover, the fact that AP routinely used published news items from rival wire services as starting points for the stories it produced further complicated the property question.<sup>77</sup> In its argument, the AP was asking the Court to essentially draw a line between the practice of lifting news and reworking it through a process of independent verification and investigation, and lifting news and reworking it through a process of rewriting that frequently included the addition of fictitious content.<sup>78</sup> From the standpoint of competition, the expense required to conduct an independent investigation separated the two practices and was the determining factor in a finding of fair use from an industry standpoint.<sup>79</sup> The money and labor expended leveled the playing field from a

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<sup>67</sup> Nat’l Tel. News Co. v. W. Union Tel. Co., 119 F. 294, 296 (7th Cir. 1902) (noting that the lawful appropriation of news products would likely result in the demise of news-gathering as a business enterprise, because “[t]he parasite that killed, would itself be killed, and the public would be left without any service at any price.”); *see also* Epstein, *Custom & Law*, *supra* note 59 at 96-97 (explaining how “modern game theory” grow out of this case).

<sup>68</sup> Int’l News Serv., 248 U.S. at 234.

<sup>69</sup> Baird, *Uneasy Legacy*, *supra* note 60, at 4.

<sup>70</sup> *See* Int’l News Serv., 248 U.S. at 232, 234-36.

<sup>71</sup> *Id.* at 234-35.

<sup>72</sup> *See* Baird, *Uneasy Legacy*, *supra* note 60, at 10.

<sup>73</sup> *Id.*

<sup>74</sup> JONATHAN SIBERSTEIN-LOEB, *THE INTERNATIONAL DISTRIBUTION OF NEWS: THE ASSOCIATED PRESS, PRESS ASSOCIATION AND REUTERS 1848-1947*, at 60-61 (2014).

<sup>75</sup> *Id.* at 62.

<sup>76</sup> Int’l News Serv., 248 U.S. at 238-39.

<sup>77</sup> Baird, *Uneasy Legacy*, *supra* note 60, at 22; Epstein, *Custom & Law*, *supra* note 59 at 97-98.

<sup>78</sup> Baird, *Uneasy Legacy*, *supra* note 60, at 26.

<sup>79</sup> Epstein, *Custom & Law*, *supra* note 59 at 98.

cost perspective and, in turn, worked to maintain the overall stability of the business of gathering and disseminating news.<sup>80</sup>

Faced with the evanescent nature and economic realities of news production, the Court found a quasi-property right in news that existed for a short, specified time period after publication and could be invoked against a direct competitor but not the public.<sup>81</sup> News, in this sense, was regarded as the material both parties used at essentially the same time and in the same field to produce the products they sold to generate profits.<sup>82</sup> For this purpose in this competitive situation, the Court said, news must be regarded as quasi property.<sup>83</sup> To rule otherwise would allow INS and the Hearst organization to “appropriate the harvest of those who have sown.”<sup>84</sup>

The outcome of the case resulted in a settlement in which the AP and INS agreed that neither would appropriate the “words or substance of the other’s wire services,”<sup>85</sup> but in the short term the settlement did little to change INS’s practices or the power William Randolph Hearst held within the AP.<sup>86</sup> With his chain of “dailies,” Hearst was a valuable member of the AP, especially if he could be persuaded to limit the distribution of appropriated AP reports to newspapers under his control.<sup>87</sup> Through private negotiation rather than litigation, the AP was able to do just that and craft a solution that worked for both organizations.<sup>88</sup> In the end, the Supreme Court decision gave the AP a tool to use when other tactics failed and allowed the news agency to make claims of ownership as it shifted its focus from transporting information to producing the day’s bylined news and feature articles.<sup>89</sup>

While the opinion may have helped the AP transition to a new business model, it also created a subset of property rights that, commentators have argued, exist at the “margins of intellectual property law.”<sup>90</sup> Since its inception in *INS*, “hot news” misappropriation has been a “doctrine of fashion,” disappearing for a time and then reappearing when suitable fact patterns that fell outside

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<sup>80</sup> *Id.* at 102

<sup>81</sup> *See Int’l News Serv.*, 248 U.S. at 236.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 239-40.

<sup>85</sup> Baird, *Uneasy Legacy*, *supra* note 60, at 30.

<sup>86</sup> *See id.*

<sup>87</sup> LUNDBERG, *supra* note 62, at 209.

<sup>88</sup> *Id.*; Baird, *Uneasy Legacy*, *supra* note 60, at 29-30, n.53 (explaining the dispute involved the distribution of the Universal Service, the morning news division of INS, while the Universal Service appropriated its reports from the previous evening’s AP reports) (noting that Hearst agreed to limit the distribution of Universal Service reports to newspapers under the direct or remote control of the Hearst organization).

<sup>89</sup> Baird, *Uneasy Legacy*, *supra* note 60, at 30.

<sup>90</sup> *Id.* at 35.

the traditional bounds of intellectual property law emerged.<sup>91</sup> Today, it exists as an element of unfair competition law in a handful of states<sup>92</sup> and is directed at deterring the free riding of time sensitive information by a direct competitor.<sup>93</sup>

#### B. Misappropriation and Copyright Law

In order to carve out a place for misappropriation alongside copyright law, the Second Circuit in *National Basketball Association v. Motorola*,<sup>94</sup> sufficiently narrowed the *INS*-like protection of property rights in time sensitive information. In *National Basketball Association* (“*NBA*”), the court confronted the question of whether the *NBA*’s misappropriation claim intersected with federal copyright law.<sup>95</sup> Under the Copyright Act,<sup>96</sup> state law claims that fall within the general scope and subject matter of copyright law are preempted<sup>97</sup> unless they involve extra elements that in turn establish a distinct cause of action that is not the equivalent of copyright law.<sup>98</sup> Using the extra-element exception, the *NBA* court described five features that taken together constitute a misappropriation claim under New York’s hot news doctrine.<sup>99</sup> The elements central to such a claim are:

The plaintiff generates or collects information at some cost or expense.<sup>100</sup>

The value of the information is highly time-sensitive.<sup>101</sup>

The defendant’s use of the information constitutes free riding on the plaintiff’s costly efforts to generate or collect it.<sup>102</sup>

The defendant’s use of the information is in direct competition with a product or ser-

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<sup>91</sup> C. Own Paepke, *An Economic Interpretation of the Misappropriation Doctrine: Common Law Protection for Investments in Innovation*, 2 HIGH TECH. L. J. 55, 58 (1987).

<sup>92</sup> See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (establishing that federal common law was generally abolished, which was after *Int’l News Serv.* (1918)); see also Kimberley Isbell and Citizen Media Law Proj., *The Rise of the News Aggregator: Legal Implications and Best Practices* 16 (2010), <http://www.dmlp.org/sites/citmedialaw.org/files/news%20aggregation%20white%20paper.pdf> (“Today, only five states have adopted the *INS* hot news tort as part of state unfair competition law.”).

<sup>93</sup> See generally *Nat’l Basketball Ass’n (NBA) v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997).

<sup>94</sup> *Id.* at 841.

<sup>95</sup> *Id.* at 843.

<sup>96</sup> “Preemption with respect to other [copyright] laws,” 17 U.S.C. § 301(a) (2012).

<sup>97</sup> *NBA*, 105 F.3d at 848.

<sup>98</sup> *Id.* at 850.

<sup>99</sup> *Id.* at 852.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

vice offered by the plaintiff.<sup>103</sup>

The ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.<sup>104</sup>

Of these elements, the time-sensitive nature of the information, the free riding by a direct competitor, and the threat to the existence of the product separates the property rights in hot news from the property rights in expressive works.<sup>105</sup> The five-factor approach in *NBA* showed that “principled limitations” could be placed on, what commentators argue was, a largely unbounded doctrine.<sup>106</sup>

While the narrowed *INS*-like protection that emerged from the *NBA* decision was intended to preserve the collection of news and the public’s access to information,<sup>107</sup> it has had mixed success in the courts.<sup>108</sup> In *NBA*, the court found that Motorola and Sports Team Analysis and Tracking Systems did not engage in free riding by transmitting real-time information from television and radio broadcasts of NBA games to handheld pagers sold by Motorola.<sup>109</sup> The court explained that the free riding element in a hot news claim involves the ability of the “defendant to produce a directly competitive product for less money because it has lower costs.”<sup>110</sup> The SportsTrax product produced by Motorola and STATS was not such a product, given that the defendants “expend their own resources” to collect, assemble, and transmit factual game information over their own network.<sup>111</sup>

The free riding element prevented a finding of unlawful misappropriation in a case involving a financial news aggregator that acquired copies of daily securities reports produced by three brokerage firms.<sup>112</sup> In *Barclays Capital, Inc. v.*

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<sup>103</sup> *NBA*, 105 F.3d at 852.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 853.

<sup>106</sup> Richard A. Epstein, *The Protection of “Hot News”*: Putting Balganesch’s “Enduring Myth” About *International News Service v. Associated Press* in Perspective, 111 COLUM. L. REV. SIDEBAR 79, 86 (2011) [hereinafter Epstein, *Protection of Hot News*]; see also Baird, *Uneasy Legacy*, *supra* note 60, at 32 (describing the reasoning in *INS* as a “pronouncement of grand principle that has no obvious boundaries”); Richard Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 625 (2003) (arguing that “unless misappropriation is defined narrowly...it is too sprawling a concept to serve as the organizing principle of intellectual property law”).

<sup>107</sup> *NBA*, 105 F.3d at 853.

<sup>108</sup> See, e.g., *Agora Financial, LLC v. Samler*, 725 F.Supp.2d 491, 499 (D.Md. 2010) (describing the Fourth Circuit’s failure to apply the *NBA* test within its jurisdiction despite being applied elsewhere outside the Second Circuit).

<sup>109</sup> *NBA*, 105 F.3d at 854.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Barclays Cap., Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 914-15 (2d Cir. 2011).

*TheFlyOnTheWall.com, Inc.*, the financial firms of Barclays Capital, Merrill Lynch, and Morgan Stanley charged that FlyOnTheWall's practice of obtaining and releasing the recommendations from those reports to their subscribers for a fee constituted hot news misappropriation.<sup>113</sup>

At issue were the complimentary copies of securities reports the Firms provide to clients and prospective clients before the principal U.S. securities markets open each day.<sup>114</sup> This service is intended to provide recipients with an information advantage over non-recipients.<sup>115</sup> The Firms make money from the service when a recipient executes a trade,<sup>116</sup> which the Firms contend is "much more likely" to occur when clients receive a recommendation directly from the Firms.<sup>117</sup>

### *1. The Indispensable Element*

As an aggregator of financial news, Fly offered an online newsfeed that streamed more than 600 headlines between 5 AM and 7 PM during days on which the New York Stock Exchange was open.<sup>118</sup> The newsfeed consisted of ten different categories, including a searchable and sortable recommendations category that contained securities recommendations from 65 investment firms.<sup>119</sup> Fly obtained its securities information from a variety of sources that included investment firms, other news outlets, chat rooms, "blasts IMs," and conversations with traders, money managers, and others involved in the securities market.<sup>120</sup> It had also obtained information from the Firms' employees although that practice ceased in 2005 amid threats of litigation.<sup>121</sup>

At the U.S. district court level, Fly argued that it "invests substantial resources to quickly gather, edit, and disseminate financial news" and the aggregation service it performs adds value to the released information it gathers.<sup>122</sup> Fly further contended that once released into the marketplace, the information ceases to be proprietary and excludable.<sup>123</sup> In her opinion, Judge Denise Cote noted that free riding exists "where a defendant invests little in order to profit

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<sup>113</sup> *Id.* at 878.

<sup>114</sup> *Id.* at 879.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 882.

<sup>118</sup> *Theflyonthewall.com*, 650 F.3d at 883.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 883-84.

<sup>121</sup> *Id.* at 883.

<sup>122</sup> *Barclays Cap., Inc. v. Theflyonthewall.com, Inc.*, 700 F.Supp.2d 310, 337 (S.D.N.Y. 2010).

<sup>123</sup> *Id.* at 337.

from information generated or collected by the plaintiff at great cost.”<sup>124</sup> Given that definition, she concluded that Fly’s “core business is its free-riding off the sustained, costly efforts” of the defendants.<sup>125</sup> Fly, she said, does not conduct any “equity research of its own, nor does it undertake any original reporting or analysis that could generate the opinions” that are reflected in its recommendations category.<sup>126</sup> Instead, Judge Cote found that Fly built the “most valuable section of its newsfeed” by simply regurgitating the recommendations produced by the Firms and other financial entities,<sup>127</sup> and in doing so engaged in direct competition with the Firms in the dissemination of highly respected and thoroughly researched<sup>128</sup> recommendations to potential investors for their use in making investment decisions.<sup>129</sup>

After finding that Fly engaged in hot news misappropriation, Judge Cote issued a permanent injunction that required Fly to hold its release of the Firms’ recommendations until thirty minutes after the opening of the New York Stock Exchange or 10 AM, whichever is later.<sup>130</sup> The recommendations issued during the trading day would be delayed for two hours.<sup>131</sup> On appeal, the Second Circuit majority reversed, holding that the misappropriation claim was preempted by the Copyright Act.<sup>132</sup> The court narrowed the circumstances that could constitute a claim of hot news misappropriation by scrapping the nascent five-factor *NBA* test, finding flaws in its consistency, interpretation, and precedential significance.<sup>133</sup>

A primary element of concern for the Second Circuit majority was the legal uniformity of federal law.<sup>134</sup> Theoretically, hot news misappropriation exists for claims that lay on the outer edges of copyright law. Such claims, however, will fall within the general scope and subject matter of copyright law in that they most often involve the reproduction, distribution, or adaptation of a copyright protected work of authorship.<sup>135</sup> The fact that, for example, the copyright protected basketball games in *NBA* and financial reports in *Barclays* also contained non-copyrightable facts and opinions does not exempt these works from

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<sup>124</sup> *Id.* at 336.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 339.

<sup>128</sup> *See* *Theflyonthewall.com*, 700 F.Supp.2d at 316-17 (explaining the extensive research done by the Firm’s analysts in preparing equity research reports).

<sup>129</sup> *Id.* at 339.

<sup>130</sup> *Id.* at 347.

<sup>131</sup> *Id.*

<sup>132</sup> *Theflyonthewall.com*, 650 F.3d at 878.

<sup>133</sup> *Id.* at 899-900 (noting the two five-part tests in *NBA* are “not entirely consistent”).

<sup>134</sup> *Id.* at 897.

<sup>135</sup> *Id.* at 892.

preemption by the Copyright Act.<sup>136</sup> The subject matter requirement is met and the work is preempted if the entire work as a whole receives federal copyright protection.<sup>137</sup>

Once a hot news claim satisfies the two-part preemption test, it falls within the confines of copyright law unless extra elements exist that place it outside the reach of copyright protection.<sup>138</sup> According to *Barclays*, the extra element review must be narrowly focused in order to maintain the uniformity of federal copyright law.<sup>139</sup> The central problem the majority faced was the fact that hot news misappropriation is recognized in only a handful of states, which means that a hot news claim may be permissible in one state and not in another.<sup>140</sup> As a result, the actions of aggregators like Fly “may have different legal significance from state to state—permitted, at least to some extent, in some; prohibited, at least to some extent, in others.”<sup>141</sup> The Copyright Act preemption provision strives to minimize this sort of patchwork protection, which, in turn, counsels courts to locate “only a ‘narrow’ exception” to the preemption provision.<sup>142</sup>

The majority began its review of the extra element exception with a discussion that discarded the *NBA* five-factor analysis as precedent.<sup>143</sup> According to the majority, the *NBA* court did not reach its decision through an application of the five elements.<sup>144</sup> Instead, the statements describing the approach were used as “sophisticated observations” intended to aid in the analysis of the case.<sup>145</sup> The majority based its conclusion, in part, on the inconsistencies in the various statements the *NBA* court used to describe the “test.”<sup>146</sup> In the end, the majority concluded that the five factors were dicta and not binding upon the *Barclays* court.<sup>147</sup>

After discarding the *NBA* test, the majority turned to the “indispensable ele-

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<sup>136</sup> *See id.* (“[I]t is not determinative that the plaintiff seeks redress with respect to a defendant’s alleged misappropriation of uncopyrightable material—e.g., facts—contained in a copyrightable work.”).

<sup>137</sup> *Id.*

<sup>138</sup> Theflyonthewall.com, 650 F.3d at 892.

<sup>139</sup> *Id.* at 897-98.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (specifying Fly’s behavior in question may be permissible in New York but not in Florida).

<sup>142</sup> *Id.* at 898.

<sup>143</sup> *See id.* at 898-901 (explaining the five-factor test was an inappropriate test).

<sup>144</sup> Theflyonthewall.com, 650 F.3d at 900-01.

<sup>145</sup> *Id.* at 901.

<sup>146</sup> *See id.* at 898-901 (“Then, in rehearsing the “extra elements” that may avoid preemption, the panel referred to ‘the threat to the very existence of the product or service provided by the plaintiff.’”) (internal citations omitted) (noting also in the *NBA* opinion, the court identified the five-factor test twice). Three factors from the test appeared later in the opinion in an abbreviated and inconsistent manner. *NBA*, 105 F.3d at 853.

<sup>147</sup> Theflyonthewall.com, 650 F.3d at 906-07.

ment”<sup>148</sup> of free riding to determine whether the Firms’ claim was an “INS-type non-preempted claim.”<sup>149</sup> *INS*, the majority wrote, “maintains a ghostly presence as a description” of the hot news tort and the practice of free riding.<sup>150</sup> In *INS*, free riding consisted of the taking of material that is:

Acquired by the plaintiff through organization and the expenditure of labor, skill, and money,

Salable by the plaintiff for money, and

Appropriated and sold by the defendant as the defendant’s own.<sup>151</sup>

*INS* took news gathered and disseminated by the AP and sold that news as though *INS* had gathered it.<sup>152</sup> In *Barclays*, the majority explained, the Firms do not acquire their recommendations through efforts akin to reporting but instead create the recommendations using their own expertise.<sup>153</sup> Moreover, Fly does not sell the recommendations as its own.<sup>154</sup> Instead, it is the accurate attribution of the recommendations to the Firms that give the information its value.<sup>155</sup>

“The Firms,” the majority said, “are making the news; Fly ... is breaking it”<sup>156</sup> through an organizational effort that involves approximately half of its 28 employees in the collection, summarization, and dissemination of the Firms’ recommendations.<sup>157</sup> Fly’s actions and business model mirror that of the traditional news media that report on such things as the winners of Tony Awards.<sup>158</sup> Free riding, on the other hand, is a practice that allows the defendant “to produce a directly competitive product for less money because it has lower costs.”<sup>159</sup> In the end, the majority followed the *NBA* court and ruled solely based on its free riding analysis,<sup>160</sup> finding that the claim did not constitute an *INS*-like, non-preempted ‘hot news’ misappropriation cause of action.<sup>161</sup>

In its amicus brief, 14 leading news organizations asked the *Barclays* court to preserve the hot news doctrine and the economic incentive it provides, argu-

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<sup>148</sup> *Id.* at 905 (quoting *NBA*, 105 F.3d at 854).

<sup>149</sup> *Id.* at 902.

<sup>150</sup> *Id.* at 894.

<sup>151</sup> *Int’l News Serv.*, 248 U.S. at 239.

<sup>152</sup> *Id.*

<sup>153</sup> *Theflyonthewall.com*, 650 F.3d at 903.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 902.

<sup>157</sup> *Id.* at 904.

<sup>158</sup> *Id.* at 905.

<sup>159</sup> *Theflyonthewall.com*, 650 F.3d at 905 (quoting *NBA*, 105 F.3d at 854).

<sup>160</sup> *Id.* at 906-07 (applying the five-part *NBA* test and concluding that the Firms failed to satisfy the direct competition requirement) (explaining that the majority, on the other hand, expressed no opinion on the element of direct competition, arguing that they were bound by the holding in *NBA* that found preemption given an absence of free riding).

<sup>161</sup> *Id.* at 906.

ing that “unchecked, widespread free-riding on news origination” would severely cripple publishers, provide a strong disincentive for investment in the news business, and result in “fewer sources of reliable, professionally-gathered” news and public information.<sup>162</sup> *INS*, it maintained, is sufficiently limited in that it applies only to a defendant who “systematically and continuously copies the originator’s published news while it is still timely and then republishes that news in a product that competes with the originator’s own product.”<sup>163</sup> Given this limitation, the doctrine is not applicable to the “vast category of situations” in which news content may be communicated without a license, including the use of news as a tip on which to base a subsequent story that includes further investigation and reporting.<sup>164</sup>

### C. Competitive Practices and Market Failure

On the other end of the spectrum, Internet giants Google and Twitter argued for the abolition of hot news misappropriation, asserting that the doctrine is obsolete given the ubiquity of news in today’s information marketplace.<sup>165</sup> The Internet companies centered their legal argument on a 1991 Supreme Court case, *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>166</sup> In *Feist*, the Court reinforced the propositions that facts are not copyrightable<sup>167</sup> and that “originality, not the ‘sweat of the brow,’ is the touchstone of copyright protection.”<sup>168</sup> Hot news, the companies asserted, circumvents copyright law by protecting an ownership interest in facts in direct contradiction to *Feist*.<sup>169</sup>

With the hot news doctrine largely intact—albeit on a limited and somewhat unpopular scale<sup>170</sup>—and a finding of copyright preemption, both interests

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<sup>162</sup> Brief for Advance Publications, Inc., et al. as Amici Curiae Not in Support of Any Party at 11, *Barclays Cap., Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv).

<sup>163</sup> *Id.* at 2.

<sup>164</sup> *Id.* at 12.

<sup>165</sup> Brief for Google Inc. and Twitter, Inc., as Amici Curiae in Support of Reversal at 14, *Barclays Cap., Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv).

<sup>166</sup> *Feist Publ’n, Inc. v. Rural Tel. Co., Inc.*, 499 U.S. 340 (1991).

<sup>167</sup> *Id.* at 344.

<sup>168</sup> *Id.* at 359-60.

<sup>169</sup> Brief for Google Inc. and Twitter, Inc., as Amici Curiae in Support of Reversal at 3, *Barclays Capital Inc. v. Theflyonthewall.com*, 650 F.3d 876 (2d Cir. 2011) (No. 10-1372-cv).

<sup>170</sup> See Nicole Marimon, *Shutting Down the Turbine: How the News Industry and News Aggregators Can Coexist in a Post-Barclays v. Theflyonthewall.com World*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1441, 1470 (2013).

found a reason to applaud the *Barclays* opinion.<sup>171</sup> The decision, however, has not stopped members of the tech community from calling for the demise of hot news misappropriation or members of the news media from successfully invoking the doctrine in lawsuits and subsequent settlements against aggregators of news content.<sup>172</sup> Commentators continue to critique the doctrine as an attempt to subvert free market principles and free speech activity.<sup>173</sup> Circuit Judge Sacks, writing on behalf of majority in *Barclays*, noted that the adoption of new technology often disrupts business models, but without more, even unfair practices cannot be prevented by hot news misappropriation.<sup>174</sup> Commentators argue that in a free market system, free riding and ruinous competition are acceptable marketplace conduct.<sup>175</sup> In this environment, all businesses are subject to societal changes and technological advances that have the ability to destroy an organization's economic vitality.<sup>176</sup> To survive, organizations must develop new strategies, services, and business models to counteract the consequences of free riding.<sup>177</sup> Under this line of thought, reliance on hot news misappropriation to combat market conduct is problematic given that it grants a property right in factual information that is inconsistent with copyright law and the free speech provision of the First Amendment.<sup>178</sup>

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<sup>171</sup> See Peter Lattman, *Big Banks Lose Ruling on Research*, N.Y. TIMES (June 20, 2011, 10:54 AM), <http://dealbook.nytimes.com/2011/06/20/wall-street-banks-lose-ruling-on-research/>.

<sup>172</sup> See, e.g., Mike Masnick, *Judge Issues \$5 Million Award to Dow Jones in Hot News Case...But It's Meaningless*, TECHDIRT (Oct. 8, 2014, 9:02 PM) [hereinafter Masnick, *Judge Issues \$5 Million*], <https://www.techdirt.com/articles/20141007/17204128756/judge-issues-5-million-award-to-dow-jones-hot-news-case-its-meaningless.shtml> (stating that Dow Jones filed a complaint against Ransquak, alleging hot news misappropriation for the systematic copying and redistribution of breaking news headlines and articles as well as copyright infringement for posting verbatim or nearly verbatim copies of works produced by Dow Jones Newswires); Complaint & Demand for Jury Trial at 32, 41, Dow Jones & Co., Inc., v. Briefing.com, Inc., (S.D.N.Y. 2010) (No. 1: 10-cv-03321-VM); Joe Mullin, *Briefing.com Admits It Broke Copyright Laws, Pays Dow Jones*, GIGAOM (Nov. 15, 2010), <https://gigaom.com/2010/11/15/419-briefing-com-admits-it-broke-copyright-laws-pays-dow-jones-to-end-lawsu/> (explaining that in an out-of-court settlement for an undisclosed sum of money, Briefing.com admitted to copyright infringement and hot news misappropriation) (noting, however, clear evidence of cutting-and-pasting existed in violation of copyright law, the admission to hot news was thought to be an attempt by Dow Jones to strengthen the doctrine and its position in filing hot news lawsuits in the future); Joseph Ax, *Dow Jones Wins \$5 Million Judgment Against 'Hot News' Provider Ransquawk*, REUTERS (Oct. 7, 2014), <http://uk.reuters.com/article/2014/10/07/uk-dowjones-ransquawk-lawsuit-idUKKCN0HW24720141007>.

<sup>173</sup> See Masnick, *Judge Issues \$5 Million*, *supra* note 172.

<sup>174</sup> Theflyonthewall.com, 650 F.3d at 896.

<sup>175</sup> Andrew Beckerman-Rodau, *Ideas and the Public Domain: Revisiting INS v. AP in the Internet Age*, 1 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 5 (2011).

<sup>176</sup> *Id.* at 25.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.* at 19-21.

To preserve the uniformity of law and competitive market practices, the *Barclays* court restricted the exercise of an *INS-like* property right in news, data, and the like to a very narrow band of anti-competitive conduct involving the appropriation and unfair commercialization of an information-based product by a direct competitor. The actions of a direct competitor who employs a revenue strategy structured on the appropriation of information gathered, distributed, and marketed by a rival company would most likely fall within this narrow band of prohibited conduct. By restricting a specific and limited type of market failure through a content-neutral doctrine, the *Barclays* court preserved the constitutional status of the speech involved. The tort, if challenged on free speech grounds, would likely withstand constitutional scrutiny given its viewpoint - neutral and narrowly tailored design. Likewise, the court's tight focus on the practice of free riding places an *INS-type* claim outside the reach of copyright law. Instead, what has emerged from the *Barclays* decision is a very limited and narrow right to protect the capital investment in the reporting function of a news product from its appropriation and commercialization by a competitor. The ability to exercise this right helps to correct the market's failure to accurately account for the cost of and the revenue received from the production and distribution of news and works to eliminate any consumer misconceptions regarding the actual source of the reporting.

#### D. History of Copyright Law

Adopted in 1787, the Copyright and Patent Clause of the U.S. Constitution gave Congress the power to promote the advancement of an enlightened and productive society by giving to authors and inventors exclusive rights in their original creations for a limited period of time.<sup>179</sup> First codified in 1790, the Framers intended copyright law to be the “engine of free expression”<sup>180</sup> through the establishment of a marketable right in the creation and dissemination of original, expressive works.<sup>181</sup> Today, the law extends to copyright holders the exclusive right to reproduce, distribute, perform, display, and adapt their works of authorship.<sup>182</sup> This entitlement also includes the legal authority to prevent others from exercising these rights<sup>183</sup> and creates a tension between ownership and the restriction on expression that occurs with every grant of

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<sup>179</sup> U.S. CONST. art. I, § 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 Writing and Discoveries; . . .”).

<sup>180</sup> Harper & Row, Publ'rs, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).

<sup>181</sup> *Id.*

<sup>182</sup> 17 U.S.C. § 106 (2012).

<sup>183</sup> *Id.*

copyright.<sup>184</sup>

To ease this tension and preserve the free flow of information, the law contains two First Amendment accommodations that limit a copyright owner's exclusive rights— fair use and the fact/expression dichotomy.<sup>185</sup> The most widely employed of the two is fair use, an affirmative defense used against a claim of copyright infringement. Fair use allows for the use of copyrighted material for private personal purposes and in the creation of transformative works.<sup>186</sup> This is the legal acknowledgement of the evolutionary nature of expressive creativity.<sup>187</sup> Judicial thought dating back to the mid-1800s recognized the paucity of truly new and original works of art, literature, and science and began formulating a judge-made fair use doctrine that was eventually codified in the 1976 Copyright Act.<sup>188</sup>

Today, fair use is determined by a case-specific analysis of four statutory factors:<sup>189</sup> 1) purpose and character of the secondary use; 2) nature of the original work; 3) quantity and significance of the material taken; and 4) effect of the taking on the market value of the original work.<sup>190</sup> In its analysis, a court may assign varying levels of significance to each of the four factors depending on the facts of the case.<sup>191</sup> In the end, the results from each of the four factors are weighed together in light of the law's purpose,<sup>192</sup> which is to incentivize and stimulate progress in science and the arts “for the intellectual enrichment of the public.”<sup>193</sup>

Whether an appropriation deserves breathing space as a catalyst for creativi-

<sup>184</sup> *Golan v. Holder*, 565 U.S. \_\_\_, 132 S.Ct. 873, 889-890 (2012).

<sup>185</sup> *See id.* at 890 (explaining fact/expression dichotomy is also known as the idea/expression dichotomy).

<sup>186</sup> *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001).

<sup>187</sup> *See* PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 18-19 (2011) [hereinafter AUFDERHEIDE & JASZI, RECLAIMING FAIR USE]; *See Campbell v. Acuff-Rose Music*, 510 U.S. 569, 575-77 (1994).

<sup>188</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 575-76 (citing *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (1994)).

<sup>189</sup> *Id.* at 560; *see Harper & Row*, 471 U.S. at 549 (“Fair use is a mixed question of law and fact.”) (noting that the judicial determination of whether a particular use is fair requires a case-by-case application of the defense).

<sup>190</sup> 17 U.S.C. § 107 (2012).

<sup>191</sup> *See* AUFDERHEIDE & JASZI, RECLAIMING FAIR USE, *supra* note 187, at 24; *see also Campbell*, 510 U.S. at 579-91 (explaining that the Court placed the significance on the first factor in relation to the subsequent three factors).

<sup>192</sup> *See Campbell*, 510 U.S. at 581 (clarifying that any use of copyrighted material must work its way through the four factors of the fair use defense with a determination of whether the use is fair based on the facts of the case in light of the purpose of copyright law).

<sup>193</sup> When the U.S. Constitution was written in the late eighteenth century, the word “science” referred to knowledge or learning. *See Pierre N. Leval, Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1450 n.3 (1997) [hereinafter, Leval, *Fair Use Rescued*]; *see also Pierre N. Leval, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) [hereinafter Leval, *Fair Use Standard*].

ty and public discourse, or constitutes actionable infringement has proven difficult to forecast given the variability of the fair use defense in copyright law.<sup>194</sup> Commentators complain that the case-by-case application of the four-prong fair use defense is inconsistent, largely unpredictable, and partly subjective.<sup>195</sup> They argue that “what fair use means, and what it should mean, is no more clear as a theoretical matter than it is as doctrinal matter.”<sup>196</sup> Among commentators, fair use has been viewed in a variety of doctrinal lights: from a means to curb market failures, induce economic efficiencies, and balance the incentives derived from protection against the interests associated with an unconsented use, to a defense that privileges certain special uses, such as parody and criticism, that further democratic values and public participation in the marketplace of ideas.<sup>197</sup>

From 1960 to 1990, courts and legal scholars largely viewed fair use as an exemption reserved for secondary uses that did not impair the potential market for the original work.<sup>198</sup> Under this approach, the effect of the secondary use on the value or marketability of the original work became the single most important factor of a fair use analysis.<sup>199</sup> From a doctrinal perspective, an emphasis on the economic effects of a secondary use fits well in a property framework, where copyrights are viewed as intangible assets.<sup>200</sup> As an asset, copyrights have actual economic value that can be used to generate revenue, obtain investment capital, and increase the overall financial worth of a company.<sup>201</sup> The value of a company’s intellectual property may sometimes dwarf the value of its physical assets.<sup>202</sup> Under this doctrinal approach, the emphasis lies in the economic value of the copyright owner’s work and the owner’s authority to control any unauthorized use.<sup>203</sup> Both the informational and cultural value of

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<sup>194</sup> See MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 10 (2005), <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>.

<sup>195</sup> See, e.g., *id.*; Rachel Isabelle Butt, *Appropriation Art and Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055, 1055 (2010); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 605-06 (2001); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1577 (2004); David Nimmer, *The Public Domain: “Fairest of Them All” and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280-81 (2003); Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 233 (2007).

<sup>196</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1569 (2004).

<sup>197</sup> See *id.* at 1565-68.

<sup>198</sup> AUFDERHEIDE & JASZI, RECLAIMING FAIR USE, *supra* note 187, at 82.

<sup>199</sup> Harper & Row, 471 U.S. at 566.

<sup>200</sup> Beckerman-Rodau, *supra* note 175, at 13.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 15.

<sup>203</sup> See *id.* at 19, 42.

the secondary work to the free speech marketplace as well as any attempt to foster important public interest goals is minimized.

### *1. Foundational Goals of Copyright Law*

In 1990, a federal trial judge recognized the inconsistencies and confusion that surrounded the adjudication of fair use. In an influential journal article, Judge Pierre N. Leval noted that the meaning of fair use differed widely among judges, and that the precedent surrounding fair use offered little guidance in the adjudication of copyright cases.<sup>204</sup> According to Leval, earlier decisions provided little basis for predicting subsequent case outcomes and “reversals and divided courts [were] commonplace.”<sup>205</sup> Leval maintained that fair use decisions were “not governed by consistent principles, but seemed to result from intuitive reactions to individual fact patterns” and notions of fairness that were more responsive to private property concerns than to the objectives of copyright.<sup>206</sup>

In an effort to fashion a set of governing principles, Leval examined the historical roots and foundational goals of copyright.<sup>207</sup> Copyright law, he asserted, embodies the public recognition that “creative intellectual activity is vital to the well-being of society.”<sup>208</sup> In order for society to benefit from the “intellectual and practical enrichment that results from creative endeavors,” copyright law grants monopoly rights to authors and artists for a limited duration of time.<sup>209</sup> Furthermore, fair use, he explained, is not some bizarre diversion from this grand principle, but a necessary part of the law’s commitment to “stimulating productive thought and public instruction.”<sup>210</sup> Given the law’s public interest goal, the four statutory factors provide a mechanism for examining the societal issues that arise with unconsented uses of protected works.<sup>211</sup> As such, these factors direct the judiciary to “ask in each case whether, and how powerfully, a finding of fair use would serve or disserve” the stimulation of creativity for public enlightenment.<sup>212</sup>

Under Leval’s examination, the emphasis shifted from the economic effects of an unconsented use to the purpose and character of that use.<sup>213</sup> Thus, the

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<sup>204</sup> Leval, *Fair Use Standard*, *supra* note 193, at 1107.

<sup>205</sup> *Id.* at 1106-07.

<sup>206</sup> *Id.* at 1107.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1109.

<sup>209</sup> *Id.*

<sup>210</sup> Leval, *Fair Use Standard*, *supra* note 193, at 1110.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1110-11.

<sup>213</sup> *Id.* at 1111.

transformation of quoted material became the key focus in a fair use analysis.<sup>214</sup> A transformative use, Leval wrote, “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”<sup>215</sup> A secondary work that uses copyright protected material as raw material in the creation of “new information, new aesthetics, and new insights and understanding” enriches society and constitutes the very type of pursuit fair use protects.<sup>216</sup> In contrast, uses that merely repackage or republish the original diminish the progress of knowledge by dampening the economic incentive to create new works. Such uses are, therefore, unlikely to pass the four-part analysis.<sup>217</sup>

## 2. Transformation Standard

In *Campbell v. Acuff-Rose*, the Supreme Court embraced the transformation standard.<sup>218</sup> While stating that transformation is “not absolutely necessary for a finding of fair use,” the Court affirmed that the promotion of science and the arts is “generally furthered by the creation of transformative works.”<sup>219</sup> The protection of such works, the Court maintained, advances the fair use doctrine’s guarantee of providing a breathing space for cultural enrichment and free expression within the confines of copyright law.<sup>220</sup> Given the importance of the societal interests at stake, the Court concluded that the more transformative the new work, the less significance a court will place on economic factors, like commercialism, that may weigh against a finding of fair use.<sup>221</sup>

Leval called *Campbell* the “finest opinion ever written on the subject of fair use”<sup>222</sup> in that it “restored order and good sense” to the doctrine.<sup>223</sup> In *Campbell*, the Court rejects the notion that the commercial nature of a challenged use is dispositive.<sup>224</sup> Even where the intent of the secondary use is for commercial gain, the Court said, market harm may not be presumed.<sup>225</sup> Instead, economic harm must be evaluated in relation to the purpose and character of the use.<sup>226</sup> If

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Leval, *Fair Use Standard*, *supra* note 193, at 1111.

<sup>217</sup> *Id.*

<sup>218</sup> *Campbell*, 510 U.S. at 579.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Leval, *Fair Use Rescued*, *supra* note 193, at 1464.

<sup>223</sup> *Id.* at 1451.

<sup>224</sup> *Campbell*, 510 U.S. at 584.

<sup>225</sup> *Id.* at 591.

<sup>226</sup> *Id.* at 593.

the challenged use is transformative, market substitution is less certain and economic harm may not be so readily inferred.<sup>227</sup> If, however, the secondary use serves as a market replacement for the original work, it is more likely that economic harm will occur.<sup>228</sup>

As a public policy goal, “fair use does not protect the interests of any one individual or group so much as it protects freedom of expression and the capacity of the culture to develop.”<sup>229</sup> Consequently, a typical fair use analysis is formulated around two main inquiries.<sup>230</sup> The first examines the extent to which the unlicensed secondary use transformed the original work by using the copyrighted material for a new and different purpose.<sup>231</sup> Uses that merely supplant, repackage, or provide a market substitute for the original do not further the public policy interest that fair use is designed to protect, and, thus, are likely to fail a fair use analysis.<sup>232</sup> The second area of investigation explores the link between the amount and significance of the material taken and the articulated purpose of the new use.<sup>233</sup> Judges will question whether the quantity and quality of material taken was appropriate and proportional considering the nature and character of the new use.<sup>234</sup> Both areas of inquiry touch upon the degree to which the secondary use is likely to cause economic harm to the copyright owner.<sup>235</sup> A third area of consideration that centers on the reasonableness of use in professional practice may further illuminate the judicial decision.<sup>236</sup> This consideration examines the degree to which the secondary use conformed to the professional standards and best practices commonly observed in the field.<sup>237</sup>

### III. JOURNALISM AND FAIR USE

For journalists, fair use is essential in that it provides breathing space for the use of a wide variety of original works of authorship in the production of news reports. As members of an evidence-based profession, journalists routinely

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<sup>227</sup> *Id.* at 591.

<sup>228</sup> *Id.*

<sup>229</sup> AUFDERHEIDE & JASZI, RECLAIMING FAIR USE, *supra* note 187, at 26.

<sup>230</sup> *Id.* at 24.

<sup>231</sup> *Id.*

<sup>232</sup> AM. UNIV. CTR. FOR SOC. MEDIA, SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM 5 (2013) [hereafter PRINCIPLES IN FAIR USE], [http://www.cmsimpact.org/sites/default/files/documents/pages/principles\\_in\\_fair\\_use\\_for\\_journalism.pdf](http://www.cmsimpact.org/sites/default/files/documents/pages/principles_in_fair_use_for_journalism.pdf).

<sup>233</sup> AUFDERHEIDE & JASZI, RECLAIMING FAIR USE, *supra* note 187, at 24.

<sup>234</sup> *Id.*

<sup>235</sup> PRINCIPLES IN FAIR USE, *supra* note 232, at 5.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

quote and excerpt from copyrighted material to provide proof, historical context, and depth to a news coverage.<sup>238</sup> Copyrighted material is frequently used to illustrate stories, enhance commentaries on cultural events and works of art, and often appears incidentally in photographs, video, and audio clips produced by journalists.<sup>239</sup>

In a world where original works of authorship are copyrighted by default<sup>240</sup> and terms of copyright protection extend 70 years past the author's death and 95 years from date of publication,<sup>241</sup> more works than ever are copyright protected.<sup>242</sup> In this day and age, more and more individuals and organizations produce and publish works of authorship, creating a culture that conflicts with the professional standards of journalism. On the journalistic side, professional members of respected news organizations are driven largely by a strong commitment to seek and report the truth in an independent, transparent, and ethical manner.<sup>243</sup> The goal is to find, extract, and verify information gleaned from documents, interviews, and observations and to disseminate that knowledge to the public.<sup>244</sup> In this culture, originality is the key when it comes to advancing a published story.<sup>245</sup> Journalistic reputations are built on independent, accurate, and honest reporting. Consequently, plagiarism, patch-writing, and other forms of dishonesty have no place in this environment and have, at times, cost reporters their jobs.<sup>246</sup> In this culture, crafting a story on the knowledge-based report-

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<sup>238</sup> PATRICIA AUFDERHEIDE & PETER JASZI, AM. UNIV. CTR. FOR SOC. MEDIA, COPYRIGHT, FREE SPEECH, AND THE PUBLIC'S RIGHT TO KNOW: HOW JOURNALISTS THINK ABOUT FAIR USE 2-3 (2012) [hereinafter AUFDERHEIDE & JASZI, HOW JOURNALISTS THINK], [http://cmsimpact.org/sites/default/files/documents/pages/journalists\\_and\\_fair\\_use\\_final\\_0.pdf](http://cmsimpact.org/sites/default/files/documents/pages/journalists_and_fair_use_final_0.pdf).

<sup>239</sup> *Id.* at 3.

<sup>240</sup> *Id.* at 3.

<sup>241</sup> 17 U.S.C. § 302(a).

<sup>242</sup> See generally *A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/circs/circ1a.html> (last visited Sept. 16, 2015) (“[A]pproximately 150,000 copyright registrations from 1790 through 1870 were registered in the office of the clerk of each U.S. district court” while the Copyright Office now registers half a million claims to copyright annually).

<sup>243</sup> See SOC'Y OF PROF'L JOURNALISTS, SOCIETY OF PROFESSIONAL JOURNALISTS CODE OF ETHICS (2014), <http://www.spi.org/pdf/spi-code-of-ethics.pdf>.

<sup>244</sup> *IFJ Declaration of Principles on the Conduct of Journalists*, ETHICNET, [http://ethicnet.uta.fi/international/declaration\\_of\\_principles\\_on\\_the\\_conduct\\_of\\_journalists](http://ethicnet.uta.fi/international/declaration_of_principles_on_the_conduct_of_journalists) (last visited Sept. 16, 2015).

<sup>245</sup> Kelly McBride, *'Patchwriting' is More Common than Plagiarism, Just as Dishonest*, POYNTER (Sept. 18, 2012, 1:07 PM), <http://www.poynter.org/news/mediawire/188789/patchwriting-is-more-common-than-plagiarism-just-as-dishonest/>.

<sup>246</sup> See Andrew Beaujon, *Columbia Spectator Fires Editor Who Plagiarized from New York Times Article*, POYNTER (Sept. 7, 2012, 7:54 AM), <http://www.poynter.org/news/mediawire/187744/columbia-university-editor-plagiarizes->

ing skills of another by lifting, rearranging, and paraphrasing information without citation is considered deceitful and unprincipled.<sup>247</sup> Such actions undervalue the important role original reporting plays in the advancement of public knowledge, debate, and enlightenment.<sup>248</sup> In this regard, journalistic practices and standards are consistent with the fair use principle that separates transformative uses from uses that simply serve as a substitute for the original work.<sup>249</sup>

#### A. Reusing News Content

A problem arises, however, when aggregators, bloggers, and other curators of content on the Web build and market businesses on the unlicensed and unacknowledged reporting and authorship of others. This practice raises concerns among journalists regarding its effect on the financial viability and reputation of the news organizations for which they work as well as the importance and value of their work.<sup>250</sup> In the context of fair use, the practice of extensively excerpting, rewriting, or paraphrasing the essential content in an article creates an unfair market substitute for the authorship of copyright holder.<sup>251</sup>

While aggregators often argue that the repurposed version of the content increases traffic to the original article, case studies show otherwise.<sup>252</sup> On June 8, 2011, Simon Dumenco published a story on Ad Age that examined how the roll out of the iCloud—Apple’s cloud storage and cloud computing service—was over shadowed on social media by coverage of U.S. Representative Anthony Weiner’s admission to sending lewd photographs of himself on Twitter.<sup>253</sup> Dumenco’s article, *Poor Steve Jobs Had to Go Head to Head With*

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from-new-york-times-article (explaining how a writer was fired due to plagiarizing); McBride, *supra* note 245 (describing what “patchwork” is and why it is dishonest); David Uberti, *Journalism has a Plagiarism Problem. But it’s not the one you’d expect*, COLUM. JOURNALISM REV. (Nov. 18, 2014), [http://www.cjr.org/behind\\_the\\_news/journalism\\_has\\_a\\_plagiarism\\_pr.php?page=all](http://www.cjr.org/behind_the_news/journalism_has_a_plagiarism_pr.php?page=all) (remarking on how an increasing number of students have been expelled for plagiarizing).

<sup>247</sup> McBride, *supra* note 245.

<sup>248</sup> See Molly Bingham, *The Future of Journalism in an Interdependent World*, NEIMAN RPTS. (Jun. 24, 2013), <http://niemanreports.org/articles/the-future-of-journalism-in-an-interdependent-world/> (explaining journalism’s responsibility in the global community).

<sup>249</sup> PRINCIPLES IN FAIR USE, *supra* note 232, at 6.

<sup>250</sup> *Id.* at 9.

<sup>251</sup> James Clark, *Is Open Journalism Commercially Viable?*, OPEN JOURNALISM (May 1, 2012), <https://openjournalism.wordpress.com/2012/05/01/is-open-journalism-commercially-viable/>.

<sup>252</sup> Simon Dumenco, *What It’s Like to Get Used and Abused by The Huffington Post. The Blog Queen Defends Her Aggregation Practices by Saying She Drives Traffic. Oh, Really?*, ADVERT. AGE (July 10, 2011) [hereinafter Dumenco, *What It’s Like*], <http://adage.com/article/the-media-guy/abused-huffington-post/228607/>.

<sup>253</sup> *Id.*; Simon Dumenco, *Poor Steve Jobs had to Go Head to Head with Weingate in*

*Weinergate in the Twitter Buzzstakes*, noted that while any launch of a new Apple product usually dominates Twitter, Weiner's press conference outperformed iCloud by some 75,000 additional tweets.<sup>254</sup> Dumenco's post, which hit No. 1 on AdAge.com's "most read" chart, was aggregated by Techmeme and the Huffington Post.<sup>255</sup> Techmeme took the headline and the first two lines of the article.<sup>256</sup> The Huffington Post, on the other hand, produced a "short but thorough paraphrasing/rewriting" of Dumenco's story that used the same setup and data and buried the link to *Poor Steve Jobs* in the last line of the aggregated post.<sup>257</sup> By July 11, 2011, the Techmeme site drove 746 page views to Dumenco's Ad Age article while The Huffington Post drove 57 page views.<sup>258</sup>

As content swirls around the Internet, original reporting and news copy gets reused as tips for investigations, fodder for commentators and comedians, facts and excerpts for new narratives, aggregated links for news feeds, tools to attract and retain target audiences, devices to optimize search engine results, and products on which to build a content delivery business.<sup>259</sup> In this environment, the creation of compelling and useful content has never been more valuable. According to Google, it is the single most important thing operators of websites can do to build site traffic and improve search engine results.<sup>260</sup> Quality content enhances the value and credibility of a website, entices others to link to the site, and improves the page rank of the website during a Google search. With the number of websites topping one billion,<sup>261</sup> Google's algorithms filter

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*the Twitter Buzzstakes*, ADVERT. AGE (June 8, 2011) [hereinafter Dumenco, *Poor Steve Jobs*], <http://adage.com/article/trending-topics/steve-jobs-head-head-weinergate-twitter/228058>.

<sup>254</sup> Dumenco, *Poor Steve Jobs*, *supra* note 253.

<sup>255</sup> Dumenco, *What It's Like*, *supra* note 252.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*; Amy Lee, *Anthony Weiner vs. Steve Jobs: Who Won On Twitter?*, HUFF. POST (June 9, 2011, 11:20 AM), [http://www.huffingtonpost.com/2011/06/09/anthony-weiner-steve-jobs-twitter\\_n\\_873844.html](http://www.huffingtonpost.com/2011/06/09/anthony-weiner-steve-jobs-twitter_n_873844.html).

<sup>258</sup> Dumenco, *What It's Like*, *supra* note 252.

<sup>259</sup> See, e.g., *Police Investigating Report that Whole Foods Guard in California Beat, Choked Shopper*, FOX NEWS (Sept. 5, 2015), <http://www.foxnews.com/us/2015/09/04/police-investigating-report-that-whole-foods-guard-in-california-beat-choked/print> (indicating that the police used the news report to begin their investigation); John Macks, *Donald Trump: God's Gift to Comedy*, CNN.COM (July 14, 2015, 10:28 PM), <http://www.cnn.com/2015/07/14/opinions/macks-comics-love-trump/> (demonstrating that the original reporting of Trump's campaign has become fodder for comedians); Dumenco, *What It's Like*, *supra* note 252 (showing that original news reporting has been used for aggregated links for news feeds, and as a tool to attract a target audience).

<sup>260</sup> *Steps to a Google-friendly site*, GOOGLE, <https://support.google.com/webmasters/answer/40349?hl=en> (last visited Sept. 9, 2015).

<sup>261</sup> *Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Sept. 9, 2015).

content to provide the most beneficial and relevant search results to the user.<sup>262</sup> In the filtering process, Google looks for longer, topic-focused content that is clearly and concisely written with correct spelling, proper grammar, and text formatting.<sup>263</sup> Favored content also contains images, videos, inbound and outbound links to and from other high quality sites,<sup>264</sup> and fresh, high quality content, such as original pieces of research, breaking new reports, and useful long-form information that is specifically related to a unique user base.<sup>265</sup>

## B. Content Syndication

Given Google's penchant for high quality content, website operators who want to increase traffic to their sites have developed a content marketing practice called "content syndication."<sup>266</sup> Online content syndication is built on the same principles as print syndication—the only difference is the customer.<sup>267</sup> Under the print model, content was licensed primarily to publishers of newspapers and magazines.<sup>268</sup> Under the online model, top publishers like The Guardian, The Washington Post, and The New York Times license their content primarily to brands like Pepsi, Johnson & Johnson, and Bank of America through business-to-business intermediaries such as NewsCred.<sup>269</sup> NewsCred co-founder and CEO Shafqat Islam told Forbes that the company's goal is to "license, provide access to and organize all of the world's premium-quality content."<sup>270</sup> Under its business model, NewsCred pays publishers for the con-

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<sup>262</sup> *Steps to a Google-friendly site*, *supra* note 260.

<sup>263</sup> *See, e.g.*, Sujan Patel, *Why is Content Part of a Smart SEO Strategy?*, SEARCH ENG. J. (Sept. 16, 2013), <http://www.searchenginejournal.com/content-part-smart-seo-strategy/67975/>; GOOGLE, SEARCH ENGINE OPTIMIZATION STARTER GUIDE 15 (2010), <http://static.googleusercontent.com/media/www.google.com/en/us/webmasters/docs/search-engine-optimization-starter-guide.pdf>.

<sup>264</sup> *See, e.g.*, Patel, *supra* note 263.

<sup>265</sup> *Id.*

<sup>266</sup> Jason Bowden, *Boost Your Traffic with Content Syndication Strategies*, BUS. 2 COMMUNITY (July 16, 2014), <http://www.business2community.com/content-marketing/boost-traffic-content-syndication-strategies-0935705>.

<sup>267</sup> Andrew Delamarter, *Content Syndication: How to Get Started*, SEARCH ENG. WATCH (Aug. 19, 2013), <http://searchenginewatch.com/sew/how-to/2049167/content-syndication-how-to-get-started#>; *Make Money for your Blog through Print Syndication*, PENELOPE TRUNK (Jan. 17, 2007), <http://blog.penelopetrunk.com/2007/01/17/make-money-from-your-blog-through-print-syndication/> (explaining the primary purpose of print syndication is exposure).

<sup>268</sup> *Make Money for your Blog through Print Syndication*, *supra* note 267 (indicating that the two places to syndicate a column or article are newspapers and magazines).

<sup>269</sup> Josh Sternberg, *Should Publishers Rent Content to Brands?*, DIGIDAY (Jan. 28, 2013), <http://digiday.com/publishers/should-publishers-rent-content-to-brands/>.

<sup>270</sup> Elaine Pofeldt, *NewsCred Raises \$15 Million. Can It Save Old Media?*, FORBES (Mar. 19, 2013), <http://www.forbes.com/sites/elainepofeldt/2013/03/19/news-syndication-startup-raises-15-million/>.

tent it licenses to brand marketers.<sup>271</sup> Top publishers can earn more than \$1 million in revenue through this syndication process.<sup>272</sup> In 2014, more than 5,000 publishers and media organizations license their content through NewsCred.<sup>273</sup> Each month, more than 1.2 million licensed articles covering 160,000 topics across every industry are added to NewsCred.<sup>274</sup> In addition, the company contracts directly with freelance journalists, photographers, and designers to commission high-quality original content.<sup>275</sup> The company reported that it pays its award-winning journalists “more than any other company in the market” and that demand for this service has experienced a weekly growth rate of 20 percent in 2014.<sup>276</sup>

### C. Copying Content

Search engine optimization and content marketing have not only created a robust market for original, high quality content, but they have also produced a strong incentive to copy content from other sites. To stay on the right side of copyright law, commentators for content curation software and marketing companies caution against rewording or reprinting a news article or quote with the addition of only a few lines of original commentary.<sup>277</sup> Instead they recommend the use of more original content than appropriated content.<sup>278</sup> Blog aggregators who engage in content marketing are advised to use a variety of appropriated source materials to create a distinctively original article by filling

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<sup>271</sup> *Id.*

<sup>272</sup> Sternberg, *supra* note 269.

<sup>273</sup> *NewsCred Expands Content Marketing Software Capabilities; Publisher Network Tops 5,000 Licensed Sources, Demand for Original Content Grows 20% Weekly*, BUSINESS WIRE (Nov. 20, 2014), <http://www.businesswire.com/news/home/20141120005960/en/NewsCred-Expands-Content-Marketing-Software-Capabilities-Publisher#.VIs75XkipuY>.

<sup>274</sup> Press Release, NewsCred, *NewsCred Expands Content Marketing Software Capabilities; Publisher Network Tops 5,000 Licensed Sources, Demand for Original Content Grows 20% Weekly* (Nov. 20, 2014) (available at <http://www.businesswire.com/news/home/20141120005960/en/NewsCred-Expands-Content-Marketing-Software-Capabilities-Publisher#.VIs75XkipuY>).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*; see also Todd Wasserman, *It's Come to This: A Newsroom Devoted to Brands*, MASHABLE (Oct. 17, 2013), <http://mashable.com/2013/10/17/content-marketing-newsroom/> (reporting that in 2013, NewsCred freelancers earned a minimum of \$500 per blog post and \$1,000 per article and journalists receive 100 percent of the fees NewsCred charges for the articles).

<sup>277</sup> Alex Butzbach, *Fair Use: A guide to citations & avoiding plagiarism on the web*, BRAFTON (Aug. 26, 2014), <http://www.brafton.com/blog/fair-use-guide-citations-avoiding-plagiarism-web>.

<sup>278</sup> *Id.*

in gaps in the knowledge with independently gathered information, explanations, and commentary.<sup>279</sup> One commentator offered a 70 percent original content to 30 percent appropriated content guideline,<sup>280</sup> meanwhile, others warned against lifting quotes, excerpts, headlines, and photos.<sup>281</sup> Full attribution and credit, as well as prominent links inserted in the text of the new article that take the user to the appropriated content are also advised.<sup>282</sup>

The use of copyrighted information in the creation of new information with a new purpose and meaning advances the governing principles upon which fair use rests. Such uses expand knowledge and avoid the market substitution effect that takes hold when verbatim excerpts of news stories are appropriated without attribution and prominent links. To combat the problem of copyright infringement and plagiarism, best practice guidelines are needed to promote the creation of transformative works that appropriate only small amounts of material from a variety of sources while engaging in independent investigation and analysis. To comply with best practice guidelines, organizations that engage in content marketing would then have the choice of either entering a license agreement or hiring individuals who can transform appropriated information. In reality, however, website operators who want to increase site traffic, search engine optimization, and visitor retention are still able to appropriate content without investing the capital required to create or license that content.<sup>283</sup> To this point, deceptive aggregation practices are common and are concentrated around the scraping<sup>284</sup> and reposting of web content.<sup>285</sup> Scraped content reposted on blogs may be found in a variety of altered or unaltered states from verbatim reposting to small snippets of excerpted material.<sup>286</sup> In this context,

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<sup>279</sup> See, e.g., *id.*; Pawan Deshpande, *Is Your Content Curation Ethical? A 10-Step Checklist*, CONTENT MKTG. INST. (Nov. 22, 2013) [hereinafter Deshpande, *Ethical Content Curation*], <http://contentmarketinginstitute.com/2013/11/ethical-content-curation-checklist/>.

<sup>280</sup> Butzbach, *supra* note 277.

<sup>281</sup> See Deshpande, *Ethical Content Curation*, *supra* note 279; Molly Siems, *Copyright Rules: Attribution is Not Enough*, NEWSURED BLOG (Dec. 5, 2014), <http://blog.newsured.com/copyright-rules-attribution-is-not-enough>.

<sup>282</sup> See Jonathan Bailey, *5 Simple Rules for Reusing Online Content*, PLAGIARISM TODAY (May 9, 2013), <https://www.plagiarismtoday.com/2013/05/Q9/5-simple-rules-for-reusing-online-content/>; Butzbach, *supra* note 277; Deshpande, *Ethical Content Curation*, *supra* note 279.

<sup>283</sup> Pawan Deshpande, *Content Curation: Copyright, Ethics & Fair Use*, CURATA (Feb. 20, 2013) [hereinafter Deshpande, *Content Curation*], <http://www.contentcurationmarketing.com/content-curation-copyright-ethics-fair-use>.

<sup>284</sup> “Scraping” is a commonly used term to describe the surreptitious extraction of original content from websites either through manual copy and paste techniques or computer software that can automatically access and retrieve data. *Content Scraping*, TECHOPEDIA, <https://www.techopedia.com/definition/27564/content-scraping> (last visited Sept. 16, 2015).

<sup>285</sup> Jonathan Bailey, *Modified Scraping on the Rise*, PLAGIARISM TODAY (Nov. 8, 2007), <https://www.plagiarismtoday.com/2007/11/08/modified-scraping-on-the-rise>.

<sup>286</sup> *Id.*

the literal, non-transformative reposting of stories raises legal issues; however, the degree of liability is not clear when smaller segments of articles are copied and reused or other forms of deceptive behavior are employed. Other practices include: concealing or disguising links through choices in placement, color, typeface, text style, and omitting links, attribution, credit, and other source identifiers, or using the same or similar headline or title, embedding videos as well as images without substantial additional information.<sup>287</sup> Liability issues are even more complicated when the content scraped and reused is largely fact-laden news ledes<sup>288</sup> and small snippets of news articles.

#### IV. MELTWATER: FAIR USE AND FACT-BASED NEWS

The question of whether fair use protects the use of fact-based ledes and smaller snippets of news articles was confronted by Judge Denise Cote in *AP v. Meltwater*.<sup>289</sup> At issue in the case was Meltwater's practice of providing News Reports to its monitoring service subscribers.<sup>290</sup> Each News Report contained the results from a subscriber-directed search conducted by Meltwater of published news items from websites around the world.<sup>291</sup> To conduct its searches, Meltwater employs automated computer programs to scan publicly available websites.<sup>292</sup> The information obtained from the scan is used to create a search index, consisting of "millions of news items, including articles published in newspapers, trade journals, and blogs."<sup>293</sup> Customers set up standing search word queries that Meltwater runs periodically against its index.<sup>294</sup> The results generated by these searches and distributed to subscribers contain the headline or title of the article, URL link to the article, information identifying the source of article, and two short excerpts from the article, consisting of up to 300 characters (including white space) of the opening text or lede and approximately 140 characters (not including white spaces) of the text immediately

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<sup>287</sup> For examples of various practices, see, e.g., Deshpande, *Content Curation*, *supra* note 283; *Quality Guidelines: Scraped Content*, GOOGLE, <https://support.google.com/webmasters/answer/2721312?hl=en> (last visited Sept. 16, 2015).

<sup>288</sup> Chip Scanlan, *The Power of Leads*, POYNTER (Nov. 25, 2014, 9:32 AM), <http://www.poynter.org/news/media-innovation/11745/the-power-of-leads/> (explaining the meaning of "ledes").

<sup>289</sup> *Meltwater*, 931 F.Supp.2d 537.

<sup>290</sup> *Id.* at 541.

<sup>291</sup> See Defendants' Answer to Complaint & Counterclaims at 29, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. 2013) (No. 1:12-CV-01087-DLC).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 34.

surrounding one of subscriber's search terms.<sup>295</sup> In the case, Meltwater claimed that it did not store actual copies of the articles it indexes.<sup>296</sup> However, its service allowed customers to copy and paste articles from publishing websites into an external archive folder that is saved on Meltwater's system for as long as the subscriber remains a customer.<sup>297</sup> Once archived, customers using the Newsletter tool could incorporate articles or excerpts of articles into a branded newsletter that they could then send to third-party recipients.<sup>298</sup>

The AP brought suit against Meltwater for copyright infringement for distributing excerpts from 33 registered articles.<sup>299</sup> According to the opinion, the 33 articles varied in length from 75 words to 1,321 words, with the average length of a story standing at 504 words.<sup>300</sup> The court estimated that the percentage of each news story excerpted ranged from 4.5 percent to slightly over 60 percent.<sup>301</sup> However, some Meltwater customers received multiple excerpts from the same AP article, which most likely would have increased the overall percentage excerpted.<sup>302</sup> Meltwater's records, which covered only 24 of the 33 articles, showed that the company made more than 22,000 excerpts from these articles available to subscribers in the United States in response to their queries.<sup>303</sup> In addition, excerpts from the articles appeared in 10 newsletters created by Meltwater customers, and customers clicked through to seven of the 33 articles.<sup>304</sup> In the end, the average click-through rate for the 33 articles was roughly 0.08 percent.<sup>305</sup>

For its part, the AP addressed the argument that any copyright protection in journalism is limited and does not extend to snippets of fact-based news articles. The argument for a limited scope of copyright protection in news articles stems most prominently from *Feist*.<sup>306</sup> In *Feist*, the Court asserted that it is well established that facts are not copyrightable.<sup>307</sup> Members of the tech industry who fear that a strong copyright protection in news products would undermine the development of innovative online services often point to the fact/expression dichotomy when arguing for the fair use right to provide head-

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<sup>295</sup> Meltwater, 931 F.Supp.2d at 545.

<sup>296</sup> Defendants' Answer to Complaint and Counterclaims at 34, Meltwater, 931 F.Supp.2d 537 (No. 1:12-CV-01087-DLC).

<sup>297</sup> Meltwater, 931 F.Supp.2d at 546.

<sup>298</sup> See Defendants' Answer to Complaint and Counterclaims at 36-37, Meltwater, 931 F.Supp.2d 537 (No. 1:12-CV-01087-DLC).

<sup>299</sup> Meltwater, 931 F.Supp.2d at 541-42.

<sup>300</sup> *Id.* at 546-47.

<sup>301</sup> *Id.* at 546.

<sup>302</sup> *Id.* at 547.

<sup>303</sup> *Id.* at 546.

<sup>304</sup> *Id.* at 547.

<sup>305</sup> Meltwater, 931 F.Supp.2d at 547.

<sup>306</sup> *Feist*, 499 U.S. at 340.

<sup>307</sup> *Id.* at 344.

lines, ledes, and other snippets of text from news articles in feeds, blogs, and search results.<sup>308</sup> In their amicus brief, the Computer and Communications Industry Association asserted that while an entire AP news article in its “full and complete” form “may in some cases qualify for some copyright protection,” any protection it does receive is thin.<sup>309</sup> In *Feist*, the Court noted that while facts reside outside the scope of copyright protection, compilations of facts lie within the subject matter of copyright law.<sup>310</sup> To resolve the tension that these two propositions pose for copyright law, the *Feist* Court explored the *sine qua non* of copyright—originality.<sup>311</sup>

The Court noted that while facts in and of themselves are discoverable, they “do not owe their origin to an act of authorship.”<sup>312</sup> Factual compilations, on the other hand, are typically the result of an author’s subjective judgment.<sup>313</sup> To produce a compilation, authors need to choose the facts to include and determine their most effective placement and arrangement.<sup>314</sup> These independent choices even in a factual work void of any written expression contain a sufficient degree of creativity and originality to warrant copyright protection, but the protection is limited in that it extends “only to those components of a work that are original to the author.”<sup>315</sup> In a fact-based compilation that contains no original expression, only the selection and arrangement of the facts are eligible for copyright protection.<sup>316</sup> According to the Court, the degree of protection this type of compilation receives is thin.<sup>317</sup> In expressive works based on facts, subsequent authors are free to use the facts contained in another’s publication even when preparing a competing work, but the written expression of those facts, i.e. the “precise words used to present them,” may not be copied.<sup>318</sup> The fact/expression dichotomy allows facts to be divorced from the expression, “restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.”<sup>319</sup>

The works at issue in *Feist* were competing telephone directories, consisting

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<sup>308</sup> *Id.* at 349-50.

<sup>309</sup> Brief for Comp. & Comm’n Indus. Ass’n as Amici Curiae Supporting Neither Party at 9, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. 2013) (No. 1:12-CV-01087-DLC).

<sup>310</sup> *See Feist*, 499 U.S. at 344.

<sup>311</sup> *Id.* at 345.

<sup>312</sup> *Id.* at 347.

<sup>313</sup> *Id.* at 348.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Feist*, 499 U.S. at 348.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 349 (1991) (quoting Jane C. Ginsburg, *Creation and Commercial Value: Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990)).

of white pages and yellow pages. As a certified public utility, Rural Telephone Service Company used the names, towns, and telephone numbers of its subscribers to create its white page directory.<sup>320</sup> Feist Publications, Inc., used Rural's white page listings in its compilation of a directory covering a much larger geographical area.<sup>321</sup> The Court held that as a purely factual compilation Rural's white page directory lacked originality and was not entitled to copyright protection.<sup>322</sup> To reach its decision, the Court revisited the statutory definition of a compilation.<sup>323</sup> The 1976 Copyright Act defined a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."<sup>324</sup> To receive copyright protection as a compilation, then, a work must contain: "(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship."<sup>325</sup> The key consideration in determining whether an author of a compilation can claim originality is whether the selection, coordination, and arrangement of the facts are sufficiently original to merit protection.<sup>326</sup> Originality, the Court explained, "requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity."<sup>327</sup> The Court acknowledged that the vast majority of compilations will pass this test, and only those works "in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent" will be denied copyright protection.<sup>328</sup>

#### A. A Substitute for News Sites

In their complaint, the AP explained the creative process that reporters and editors undertake to produce news stories.<sup>329</sup> From the selection of the news topic to the final draft of the story, the process involves numerous creative decisions in terms of data collection, assembly, selection, coordination, and ar-

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<sup>320</sup> *Id.* at 342.

<sup>321</sup> *Id.* at 343.

<sup>322</sup> Feist, 499 U.S. at 363-64.

<sup>323</sup> *Id.* at 356.

<sup>324</sup> Copyright Act of 1976, 17 U.S.C. § 101 (2012).

<sup>325</sup> Feist, 499 U.S. at 357.

<sup>326</sup> *Id.* at 358.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 359.

<sup>329</sup> Complaint at 13, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. 2013) (No. 1:12-CV-01087-DLC).

rangement.<sup>330</sup> AP reporters are highly skilled in gathering, selecting, and arranging data and often compile information and shape narratives that chronicle the human condition, and provide detailed descriptions of events directly from the scenes of news conferences, disasters, government proceedings, and armed conflicts.<sup>331</sup> Their approach to storytelling takes a variety of forms and structures intended to effectively convey the information, issues, personalities, details, and descriptions involved.<sup>332</sup> On the whole, each story and headline is carefully constructed to engage the reader.<sup>333</sup> With a focus on reader engagement, the reporter and editor hold ongoing consultations regarding the most effective and compelling way to present the story.<sup>334</sup> During those consultations, reporters may be asked to gather additional facts, find additional sources, and re-draft the story.<sup>335</sup> Editors also “conduct additional reviews for completeness, clarity, balance and accuracy before releasing the story for distribution.”<sup>336</sup> In the end, the compilation process results in independently produced news stories of original and creative authorship.<sup>337</sup>

While Meltwater did not challenge the copyright interest in AP news stories, it argued that as a search engine its use of source links and limited amounts of copyrighted content in response to subscriber queries constituted a transformative fair use.<sup>338</sup> Judge Cote disagreed, finding that Meltwater did not add commentary or insight to its News Reports or otherwise transform AP content in any way.<sup>339</sup> Instead the monitoring service intuitively designed its business to make money directly from the undiluted use of copyrighted material.<sup>340</sup> Its intent, Judge Cote asserted, is to serve as a substitute for AP’s news service by trumpeting the Meltwater News products as “News at a glance,” “News brought to you,” and “news . . . delivered in easy to read morning and/or afternoon reports.”<sup>341</sup>

Judge Cote, while assuming for the purposes of the opinion that search engines are transformative, rejected Meltwater’s characterization of itself as one.<sup>342</sup> Meltwater, she wrote, “is an expensive subscription service that markets

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<sup>330</sup> *Id.* at 12-14.

<sup>331</sup> *Id.* at 12-13.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 12.

<sup>334</sup> *Id.* at 13.

<sup>335</sup> Complaint at 13, Meltwater, 931 F.Supp.2d 537 (No. 1:12-CV-01087-DLC).

<sup>336</sup> *Id.* at 14.

<sup>337</sup> *Id.*

<sup>338</sup> Meltwater, 931 F.Supp.2d at 550.

<sup>339</sup> *Id.* at 552.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 541.

itself as a news clipping service” and not as a tool designed to improve access to the linked news story.<sup>343</sup> Judge Cote based her assertion on evidence that showed a click through rate of 0.08 percent and a lack of any evidence showing that Meltwater “customers actually use its service to improve their access to the underlying news stories that are excerpted in its news feed.”<sup>344</sup> Moreover, the judge noted that Meltwater’s News service returns more information than is customarily provided by search engines such as Google, indexes only a defined list of content providers, and distributes only those excerpts that are most relevant to each subscriber.<sup>345</sup> Given these findings, Judge Cote concluded that “[i]nstead of driving subscribers to third-party websites, Meltwater News acts as a substitute for news sites operated or licensed by AP.”<sup>346</sup> Valid search engines, she pointed out, do not act as substitutes for news sites.<sup>347</sup> They are transformative in that they use copyrighted content for a completely different purpose than the original purpose for which the content was created.<sup>348</sup>

After finding that Meltwater’s use of the articles was non-transformative and noting that news articles are more vulnerable to a finding of fair use under prong two of the fair use defense, Judge Cote examined the quantity and substance of Meltwater’s copying.<sup>349</sup> Under this prong, courts determine whether the amount and significance of the portions copied are justified given the character and purpose of the secondary use.<sup>350</sup> This area of inquiry also provides insight into the degree to which the secondary use is likely to serve as a market substitute for the original work.<sup>351</sup> Secondary uses that copy substantial amounts and central features of the copyrighted work are viewed as more likely to cause an economic disincentive to the production of original works of art and science and to be weighed against a finding of fair use.<sup>352</sup>

Meltwater’s News Service took between 4.5 percent and 61 percent of the registered articles.<sup>353</sup> This amount included up to 300 characters (counting white space) of the opening text or lede of the article.<sup>354</sup> In their complaint, the AP explained that in breaking news stories, the lede is “meant to convey the

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<sup>343</sup> *Id.* at 553-54.

<sup>344</sup> Meltwater, 931 F.Supp.2d at 554 (noting Meltwater executive substantiated the 0.08 percent click-through rate and, in a deposition, an executive testified that a click-through rate of 0.05 percent would be consistent with company expectations).

<sup>345</sup> *Id.* at 554-55.

<sup>346</sup> *Id.* at 554.

<sup>347</sup> *Id.* at 553.

<sup>348</sup> *Id.* at 556.

<sup>349</sup> *Id.* at 557 (holding “the purpose and character of Meltwater’s use of AP’s articles weigh[ed] against a finding of fair use”).

<sup>350</sup> Campbell, 510 U.S. at 586.

<sup>351</sup> Meltwater, 931 F.Supp.2d at 546.

<sup>352</sup> Campbell, 510 U.S. at 593.

<sup>353</sup> Meltwater, 931 F.Supp.2d at 558.

<sup>354</sup> *Id.* at 545.

heart of the story rather than [serve] as a teaser for the remainder of the story.”<sup>355</sup> The heart of the work doctrine as set forth in *Harper & Row, Publishers v. Nation Enterprises* considers the centrality of content quoted in relation to the work as a whole and places significant weight on the taking of expression that comprises the core of the work.<sup>356</sup> In *Harper*, the Court found that a verbatim excerpt of some 300 words of an unpublished autobiography constituted the heart of the work, given the newsworthiness, distinctiveness, and market value of the expression quoted.<sup>357</sup> According to the *Harper* Court, the expressive value of the excerpts and the key role they played in the secondary work overshadowed any fair use consideration a court may have afforded the rather insignificant amount of material taken.<sup>358</sup> Works composed primarily of the heart of the original work with little transformation are more likely to serve as a market substitute, fulfilling a demand for the original.<sup>359</sup>

#### B. Heart of a News Story

In their amicus brief, digital rights groups urged the court to reject AP’s heart of the work theory.<sup>360</sup> The Electronic Frontier Foundation (EFF) and Public Knowledge asserted that reliance on the theory would effectively eliminate any examination of the third fair use factor for excerpts of news content containing the lede.<sup>361</sup> When it comes to the public sharing of information, amici argued, a news lede is key in that it contains the most useful and important information a user would wish to share with others.<sup>362</sup> The EFF and Public Knowledge contended, however, that the lede’s overall importance comes from the non-copyrighable facts it contains—not the expressive talent of the journalists who created it.<sup>363</sup> For a court to decide otherwise and treat the opening text of a news article as the heart of the work would effectively favor publishers in a factor three fair analysis no matter how short an excerpt is shared.<sup>364</sup>

In her factor three analysis, Judge Cote found that Meltwater’s actions were

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<sup>355</sup> Complaint at 12-13, *Meltwater*, 931 F.Supp.2d 537 (No. 1:12-CV-01087-DLC).

<sup>356</sup> *Harper & Row*, 471 U.S. at 564-65.

<sup>357</sup> *See id.* at 565.

<sup>358</sup> *Id.* at 566.

<sup>359</sup> *Campbell*, 510 U.S. at 588.

<sup>360</sup> Brief for Elec. Frontier Found., et al. as Amici Curiae Supporting Defendant at 10, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp.2d 537 (S.D.N.Y. 2013) (No. 1:12-CV-01087-DLC).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 11.

<sup>363</sup> *Id.* at 10.

<sup>364</sup> *Id.* at 11-12.

indefensible from both a quantitative and qualitative perspective.<sup>365</sup> The company consistently took quantitatively more material than was necessary to perform a search engine function, more material than is consistent with industry practices for search engines, and more material than the company delivers to customers in Canada and the United Kingdom.<sup>366</sup> Moreover, Meltwater offered no evidence to justify the larger amount of text it provided to its U.S. customers or to suggest that its practices are consistent with industry standards.<sup>367</sup> Qualitatively, Judge Cote accepted the AP's characterization of the lede as the heart of the story.<sup>368</sup> The lede, she wrote, "takes significant journalist skill to craft."<sup>369</sup> In fact, "no other single sentence ... is as consistently important from article to article—neither the final sentence nor any sentence that begins any succeeding paragraph in the story."<sup>370</sup> To say, as Meltwater argued, that ledes are teasers and not summaries of the news only underscores the expressive creativity and skill involved in writing an opening piece of text that will capture a reader's interest.<sup>371</sup>

In the end, the third factor analysis exposed the incongruity between the material taken and the articulated purpose of Meltwater's use of AP content and challenged the notion that news ledes are mere factual skeletons upon which pieces of expression are slung. By observing that ledes represent the heart of a news article, the court signaled that relatively small takings of the opening text are off limits given the expressive originality and qualitative importance of this content to the work as a whole.<sup>372</sup> Consequently, anyone intending to excerpt or summarize the opening text should be aware that they are effectively reproducing the one element in the story that is not only highly original but also quite likely to serve as a substitute for the article.

The substitution effect came into play in the analysis of the fourth and final fair use factor. This factor requires a court to consider both the extent of market harm caused by the defendant's actions and whether unrestricted and widespread conduct of this sort would substantially and adversely impact the potential market for or value of the original work.<sup>373</sup> In its analysis, the District Court found that Meltwater's actions deprived the AP of potential licensing revenues and reduced the value of AP's work among competing media monitor services

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<sup>365</sup> Meltwater, 931 F.Supp.2d at 559.

<sup>366</sup> *Id.* at 558-59.

<sup>367</sup> See *id.* at 558.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> Meltwater, 931 F.Supp.2d at 559.

<sup>372</sup> *Id.*

<sup>373</sup> Campbell, 510 U.S. at 590.

that do pay a licensing fee for AP content.<sup>374</sup> As the amicus brief from The Times, et. al pointed out, “the AP sells in precisely the same submarket that Meltwater tries to carve out as its own: the market for digitally delivered news reporting generally, and specifically, the market for media monitor services.”<sup>375</sup> In this fully functioning market for AP content, the AP and its licensees are disadvantaged given Meltwater’s ability to offer the same content to subscribers at reduced prices.<sup>376</sup> In view of the active market for AP content, the court found that Meltwater “obtained an unfair commercial advantage in the marketplace” and directly harmed the AP through its practice of taking copyright protected content and selling it to customers without paying a licensing fee.<sup>377</sup> In its defense, Judge Cote noted, Meltwater ignored most of this evidence and relied instead on the flawed characterization of its service as that of a search engine with a transformative purpose.<sup>378</sup> “Adopting technology used by search engines,” she wrote, “does not by itself make one a search engine” in the transformative sense.<sup>379</sup>

### C. Knowledge of Access

In the end, Meltwater’s fair use defense fell apart given the pretense of its search engine claim. Search engines, Judge Cote explained, operate in the public interest by delivering the world’s knowledge, including the work of news organizations, to the “fingertips of multitudes across the globe.”<sup>380</sup> In this regard, no tension exists between search engines and news reporting. The two are complementary public goods. Meltwater, on the other hand, may well provide an important monitoring service to its customers, but this service does not outweigh the strong public interest in the economic preservation of news reporting or justify a practice of free riding on the expensive undertaking news gathering demands.<sup>381</sup> “[T]he world,” Judge Cote asserted, “is indebted to the press for triumphs which have been gained by reason and humanity over error and oppression.”<sup>382</sup> The enforcement of copyright laws furthers these achievements and permits the AP and other news organizations to earn the revenue

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<sup>374</sup> Meltwater, 931 F.Supp.2d at 561.

<sup>375</sup> Brief for The N.Y. Times Co., et al. as Amici Curiae Supporting Plaintiff at 15, Associated Press v. Meltwater U.S. Holdings, Inc., 931 F.Supp.2d 537 (S.D.N.Y. 2013) (No. 1:12-CV-01087-DLC).

<sup>376</sup> *See id.*

<sup>377</sup> Meltwater, 931 F.Supp.2d at 561.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 553.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

that underwrites its investigations and news production.<sup>383</sup> “Permitting Meltwater to take the fruit of AP’s labor for its own profit, without compensating the AP, injures the AP’s ability to perform this essential function of democracy.”<sup>384</sup>

Like *INS v. AP*, the *Meltwater* decision underscored the need to secure economic incentives for investigative news reporting. With a strong acknowledgement of the public interest value in investigative news, the decision looked to provide strong copyright protection for fact-based news reports.<sup>385</sup> Commentators called the ruling significant and “one of the most comprehensive judicial discussions to date of the legal issues raised by Internet news aggregation.”<sup>386</sup> AP President and CEO Gary Pruitt praised the decision as a “victory for the public and for democracy” and a repudiation of the notion that everything is free for the taking on the Internet.<sup>387</sup> Meltwater, for its part, maintained that the ruling misapplied the fair use doctrine and, if allowed to stand, would chill the free flow and discovery of online information.<sup>388</sup> Internet activists and tech bloggers followed suit and called the ruling troubling for its dismissal of Meltwater’s search engine claim and affirmation of the AP’s heart of the work argument.<sup>389</sup>

## V. SEARCH ENGINE TECHNOLOGIES AND FAIR USE

In a move reminiscent of the aftermath in *INS*, the AP was able to use its victory in the case to reach a settlement with Meltwater, even though Meltwa-

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<sup>383</sup> Meltwater, 931 F.Supp.2d at 553.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> JAMES G. SNELL & DEREK CARE, BINGHAM MCCUTCHEN, ALL THE NEWS THAT’S NOT FIT TO SCRAPE: THE ASSOCIATED PRESS GRANTED SUMMARY JUDGMENT ON ITS COPYRIGHT CLAIMS AGAINST INTERNET NEWS AGGREGATOR MELT WATER 1 (2013), <http://www.morganlewis.com/~media/files/docs/archive/ap-meltwater-case.ashx>; see Larry Neumeister, *Judge: Aggregator of AP News Can’t Have Free Ride*, ASSOCIATED PRESS (Mar. 21, 2013), <http://www.ap.org/Content/AP-In-The-News/2013/Meltwater-cant-use-APs-copyrighted-articles-for-free-iudge-says>.

<sup>387</sup> Press Release, Associated Press, AP CEO: Win vs. Meltwater ‘a victory for public and democracy’ (Mar. 21, 2013), <http://www.ap.org/Content/Press-Release/2013/AP-CEO-Win-against-Meltwater-a-victory-for-public-and-democracy>.

<sup>388</sup> See Press Release, Meltwater, Meltwater Comments on the Ruling of AP vs. Meltwater (Mar. 21, 2013) (*available at* <http://www.meltwater.com/press/meltwater-statement-regarding-ap-copyright-litigation/>).

<sup>389</sup> See, e.g., Mike Masnick, *Sorry Fair Use, Court Says News Clipping Service Infringes On AP Copyrights*, TECHDIRT, (Mar. 21, 2013, 2:08 PM) [hereinafter Masnick, *Sorry Fair Use*], <https://www.techdirt.com/articles/20130321/13345322408/court-finds-meltwaters-news-clipping-service-infringes-ap-copyrights.shtml>; Kurt Opsahl & Corynne McSherry, *AP v. Meltwater: Disappointing Ruling for News Search*, ELEC. FRONTIER FOUND., (Mar. 21, 2013), <https://www EFF.org/deeplinks/2013/03/ap-v-meltwater-disappointing-ruling-news-search>.

ter initially vowed to appeal the decision.<sup>390</sup> The two organizations reached a partnership deal to combine the AP's content with Meltwater's media analytics capabilities in the development of new products that will generate revenue for both companies.<sup>391</sup> As the AP and Meltwater move on, the decision has reinforced the call for ethical blogging and linking practices that drive users to the original story as well as raised the liability concerns for blog aggregators who cut and paste excerpts from news stories.<sup>392</sup> Given the decision in *Meltwater*, publishers and content creators now have a case that challenges the tightly held assumption that aggregators who copy headlines, ledes, and brief snippets of articles are protected by the fair use defense and fact/expression dichotomy.<sup>393</sup> Moreover, Judge Cote's affirmation of the creative nature and expressive importance of news ledes, if adopted by appellate courts, could cabin the reach of *Feist* and extend substantial copyright protection to the written expression of factual works. Reserving "thin" copyright protection for factual compilations void of any written expression would allow the news industry to protect their investment in expensive news gathering activities while largely negating the need for the hot news misappropriation tort. In turn, stronger copyright protection for fact-based works could conceivably help curtail parasitic newsgathering practices by penalizing aggregators who act in their own interest without clear fair use guidelines.<sup>394</sup>

Moving forward, the question remains as to how courts will differentiate among search engine technologies in cases of copyright infringement and fair use. If courts follow the reasoning in *Meltwater*, fair use will be reserved solely for search engines that locate, rank, sort, and display the content for which users are searching. Under this analysis, search engines and aggregators would

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<sup>390</sup> Press Release, The Associated Press, AP, Meltwater settle copyright dispute (July 29, 2013) [hereinafter AP, Meltwater settle], <http://www.ap.org/Content/AP-In-The-News/2013/AP-Meltwater-settle-copyright-dispute>; Mackenzie Weinger, *Meltwater vows appeal in AP copyright suit*, POLITICO, (Mar. 21, 2013, 11:18 AM) <http://www.politico.com/blogs/media/2013/03/meltwater-vows-appeal-in-ap-copyright-suit-159930.html>.

<sup>391</sup> AP, Meltwater settle, *supra* note 390.

<sup>392</sup> See Anthony J. Dreyer & Xiyin Tang, *Cut, Paste, Infringe: Southern District rejects news aggregator's fair use defense*, N.Y.L.J., June 3, 2013, at 2.

<sup>393</sup> See Marimon, *supra* note 170, at 1472-74; Dylan J. Quinn, *Associated Press v. Meltwater: Are Courts Being Fair to News Aggregators?* 15 MINN. J. L. SCI. & TECH. 1189, 1189-90, 1201 (2014); Bruce W. Sanford et al., *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. L. 8, 8-9 (2009); see also Quinn, *supra* note 393, at 1201; see generally Neumeister, *supra* note 386.

<sup>394</sup> See Lauren M. Gregory, *Hot Off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the "Hot News" Misappropriation Tort in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577, 610 (2011) ("Countless bloggers and citizens journalists act in their own interest, and will continue to do so without clear guidelines that have penalties attached to curtail parasitic newsgathering practices.").

need to direct users to original stories by supplying just enough information to fulfill the search without providing so much material that the original source becomes unnecessary. This line of thought follows a pair of Ninth Circuit Court decisions involving search engines that display results in the form of small pictures rather than text.<sup>395</sup> The court found that the low-resolution thumbnail images that appeared in the search results functioned as an informational indexing tool that directed users to the artistic source of the original photograph or aesthetic work.<sup>396</sup> By converting the artistic work into an electronic reference tool, the defendants transformed the original copyright protected image into a new creation with new purpose and meaning.<sup>397</sup> Even though the search engine displayed the entire image, the substantial reduction in size and quality of the image returned in the search essentially negated the aesthetic purpose of the original work.<sup>398</sup> Once transformed in this manner, the thumbnail images were unable to serve as a substitute for the original full-size photograph or artistic work.<sup>399</sup>

#### A. Differentiating Among Search Engine Technologies

With the continuing evolution of information-finding technologies, some commentators question whether *Meltwater's* narrow interpretation of what constitutes a transformative search engine use will limit the ability of aggregators to disseminate information to consumers.<sup>400</sup> However, two recent court cases suggest otherwise. Shortly after the *Meltwater* decision was handed down, the District Court for the Southern District of New York held that Google's use of such technology to compile and index a large database of books without obtaining permission from the copyright holders was transformative.<sup>401</sup> In 2004, Google began systematically digitalizing and indexing the full text of more than 20 million books using a newly developed scanning technology.<sup>402</sup> In 2005, the Authors Guild brought a class action lawsuit, charging

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<sup>395</sup> See *Perfect 10, Inc. v. Amazon*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>396</sup> *Perfect 10, Inc.*, 508 F.3d at 1165; *Kelly*, 336 F.3d at 818.

<sup>397</sup> *Perfect 10, Inc.*, 508 F.3d at 1165; *Kelly*, 336 F.3d at 819.

<sup>398</sup> *Perfect 10, Inc.*, 508 F.3d at 1165; *Kelly*, 336 F.3d at 818.

<sup>399</sup> *Perfect 10, Inc.*, 508 F.3d at 1165, 1168 (citing *Kelly*, 336 F.3d at 819) (noting *Perfect 10* argued that Google's use of thumbnail images superseded its right to sell reduced-size images for use on cell phones) (holding, ultimately that the superseding use was not significant enough to outweigh the transformative nature and public benefit of the thumbnail use).

<sup>400</sup> Quinn, *supra* note 393, at 1212; Dreyer & Tang, *supra* note 392, at 1; Snell & Care, *supra* note 386, at 8-9.

<sup>401</sup> *Authors Guild, Inc. v. Google, Inc.*, 954 F.Supp.2d 282, 291 (S.D.N.Y. 2013).

<sup>402</sup> *Id.* at 286.

Google with copyright infringement.<sup>403</sup> At the center of the dispute was whether Google's library book project, which scans the holdings of participating libraries for public use, was protected by the fair use defense.<sup>404</sup> The library project allows the public to conduct word searches of Google's database, and returns a list of books containing the search words.<sup>405</sup> The ease with which a user can search the entire text of a book listed on the search results page varies depending on the book's copyright status.<sup>406</sup> For in-copyright books, users receive basic information about the book, including where they can buy or borrow the book, and three or fewer short snippets of text related to the search.<sup>407</sup> To view several different snippets of the book, a user must conduct a series of consecutive searches, each with slightly different search terms, but because at least one out of every ten pages in the book is blocked, a user cannot view the entire book.<sup>408</sup>

In its analysis, the court concluded that Google's use of snippets of text in its search results was analogous to the use of thumbnail images in the search queries of photographs.<sup>409</sup> Both used copyright protected material as location tools that pointed users to the larger work.<sup>410</sup> The snippets Google returns to users are not designed to supplant the original book or to be used as a tool to read the book.<sup>411</sup> Instead, the project was designed to transform the words in books into data that provides new and efficient ways of conducting research, encourages new types of research, and expands and preserves access to books, thereby generating new audiences and new sources of income for authors and publishers.<sup>412</sup> "Words in books," the court explained, "are being used in a way they have not been used before," and this new use provides significant public benefits "without adversely impacting the rights of copyright holders."<sup>413</sup>

## B. Serving a Different Function

Unlike Meltwater, Google does not sell the scans it indexes or engage in di-

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<sup>403</sup> *Id.* at 284.

<sup>404</sup> *Id.* at 289.

<sup>405</sup> *Id.* at 286.

<sup>406</sup> Lawrence Jordan, *The Google Book Search Project Litigation: "Massive Copyright Infringement" or "Fair Use"?* 86 MICH. BAR J., 32, 34 (2007), <https://www.michbar.org/journal/pdf/pdf4article1210.pdf>.

<sup>407</sup> *Id.* (explaining that each excerpt measures approximately one vertical inch).

<sup>408</sup> Authors Guild, 954 F.Supp.2d at 287.

<sup>409</sup> *Id.* at 291.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *See id.* at 287-88.

<sup>413</sup> *Id.* at 293.

rect commercialization of the copyrighted works, and allows copyright holders to opt-out of the project.<sup>414</sup> More analogous to Meltwater is TVEyes, a media monitoring service that created a comprehensive, searchable database of television and radio content that business subscribers can use to monitor and track how the media covered certain topics, terms, and events over a defined period of time.<sup>415</sup> Subscribers initiate a search by entering terms and phrases into a watch list.<sup>416</sup> The watch list organizes the search results by each day for a 32-day period and tabulates the number of times the search terms were used on a particular day.<sup>417</sup> From the watch list, a subscriber can click through to the results page and obtain each mention of the search term in reverse chronological order, the portion of the transcript highlighting the search term, a thumbnail image of the particular show that used the term, and a video clip that plays automatically alongside the transcript, beginning 14 seconds before the search term is mentioned.<sup>418</sup> The service, which is used by some 2,200 subscribers including the federal government, U.S. military, and national news and financial organizations, also provides detailed program information, including the precise date and time of the clip; name, location, and web address of the channel; and viewership ratings and publicity value of the clip.<sup>419</sup>

Using closed caption and speech-to-text technology, TVEyes records the entire content of more than 1,400 television and radio channels, including Fox News Channel and Fox Business Network, 24 hours a day, seven days a week.<sup>420</sup> More than 27,000 hours of content is captured, aggregated, and turned into a searchable database every day.<sup>421</sup> In 2013, Fox News Network filed a lawsuit against TVEyes for copyright infringement, arguing that the monitoring service diverts viewers from the Fox News Channel and Fox Business Network to the financial detriment of the Fox Network.<sup>422</sup> Unlike broadcast stations that are aired free of charge, Fox News receives revenue from cable providers based on the total number of viewers that Fox channels deliver.<sup>423</sup> Advertising revenue is also based on Nielsen Ratings and similar ratings of traffic on Fox News websites.<sup>424</sup> By diverting viewers and visitors from its ca-

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<sup>414</sup> See *id.* at 286, 291-92; see also *Exclude Books for Library Scanning*, GOOGLE, <https://support.google.com/books/partner/answer/3365282?hl=en> (last visited Sept. 6, 2015).

<sup>415</sup> See *Fox News Network, LLC v. TVEyes, Inc.*, 43 F.Supp.3d 379, 383-84 (S.D.N.Y. 2014).

<sup>416</sup> See *id.* at 384.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 384-85.

<sup>420</sup> *Id.* at 383, 394.

<sup>421</sup> TVEyes, 43 F.Supp.3d at 383, 396-97.

<sup>422</sup> See *id.* at 387 (explaining Fox News's concern over loss in viewership).

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*; Eriq Gardner, *More on How a Fox News Lawsuit Might Impact the Future of*

ble channels and websites, Fox argued that the monitoring service decreases the overall value of the content that Fox News Network produces.<sup>425</sup> TVEyes, for its part, asserted the fair use defense.<sup>426</sup>

The court's legal analysis, once again, centered on prong one of the fair use defense and the question of transformation. Transformation, the court said, "almost always occurs when the new work 'does something more than repack-age or republish the original copyrighted work.'"<sup>427</sup> Even uses that do not alter or add to the original work but instead serve a different function or purpose can be transformative.<sup>428</sup> TVEyes, the court reasoned, created a service that gave users the means to discover, scrutinize, and critique television and radio content in ways otherwise unavailable.<sup>429</sup> In this regard, the service provided by TVEyes was more analogous to Google's library project than Meltwater's monitoring service.

Google, which developed an important and distinctive research tool from millions of library books, provided users with the means to expand knowledge without supplanting the market for and value of the original authorship.<sup>430</sup> Meltwater, on the other hand, aggregated content already available to a user who was willing to perform a series of online searches.<sup>431</sup> Its service basically republished segments of news articles without adding any commentary or insight or serving any different function or purpose.<sup>432</sup> In its defense, Meltwater failed to show that its subscribers used the service for any distinctive or altered purpose beyond that of the original news article.<sup>433</sup> This failure set Meltwater apart from TVEyes. Unlike the service provided by TVEyes, Meltwater's indexing and excerpting of news articles conveyed the same meaning as the original printed or posted AP story even though the content Meltwater provided

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*News*, HOLLYWOOD RPTR. (Sept. 2, 2014, 5:49 PM), <http://www.hollywoodreporter.com/thr-esq/more-how-a-fox-news-729643>;

<sup>425</sup> TVEyes, 43 F.Supp.3d at 387

<sup>426</sup> *Id.* at 393.

<sup>427</sup> *Id.* at 390 (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014)).

<sup>428</sup> *Id.* (quoting *Swatch Group Mgmt. Servs. v. Bloomberg LP*, 756 F.3d 73 (2d Cir. 2014)).

<sup>429</sup> *See id.* at 393, 396 (presenting TVEyes as a novel way to search a library of television broadcast content).

<sup>430</sup> *See id.* at 390-91 (comparing the ease and simplicity of searching with Google books to TV Eyes).

<sup>431</sup> TVEyes, 43 F.Supp.3d at 393.

<sup>432</sup> *See id.* at 391-92 (finding computer programs that merely "capture and republish designated segments of text from news articles" are not transformative).

<sup>433</sup> *See id.* at 392 (mentioning that by choosing not to offer evidence that their customers "used its service to improve their access to the underlying news stories" Meltwater failed to prove its defense).

was accessed and viewed in a different forum.<sup>434</sup> TVEyes, on the other hand, provided a service that turned television and radio content into data that could be compared, contrasted, and analyzed in a variety of ways.<sup>435</sup> For example, TVEyes gave subscribers the ability to dissect the verbal and nonverbal characteristics of speakers; evaluate how various programs presented, colored, and processed the same information; and scrutinize how similar facts were interpreted by commentators.<sup>436</sup> The service basically transformed the news product into its discrete qualities and provided access to those qualities to subscribing organizations in order to further their knowledge of and response to the presentation of relevant facts, events, and news topics.<sup>437</sup>

The fact that TVEyes copies all of the television content provided by the Fox News Network and other stations neither weighed in favor of nor against a finding of fair use.<sup>438</sup> The court maintained that the value of the database, which no other organization provides, depends on the all-inclusive nature of the copying.<sup>439</sup> Moreover, the court noted that the content TVEyes copied is available for only 32 days.<sup>440</sup> After that length of time, programs are erased.<sup>441</sup> In terms of the 19 hour-long programs at issue in the case, the court found that within the 32-day window 560 clips were played for an average length of 53.4 seconds.<sup>442</sup> Given this and other similar evidence, the court concluded that there was no realistic economic harm to Fox News from the TVEyes monitoring service.<sup>443</sup> “No reasonable juror,” the court explained, “could find that people are using TVEyes as a substitute for Fox News broadcasts on television.”<sup>444</sup> As in *Authors Guild*, the *TVEyes* court found that search engines that transform copyrighted material into research tools for further learning serve the public interest goal copyright law was designed to promote.<sup>445</sup> Even though TVEyes is not available to the public,<sup>446</sup> the court asserted that the monitoring service

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<sup>434</sup> *See id.* (explaining how the Meltwater news monitoring service worked).

<sup>435</sup> *See id.* (“TVEyes subscribers use this service to comment on and criticize broadcast news channels.”).

<sup>436</sup> *See id.* at 392-93.

<sup>437</sup> *See id.* at 385-86 (describing also that TVEyes charges subscribers \$500 a month for the service and advertises in its marketing materials that its users can “watch live TV, 24/7,” “monitor Breaking News,” and “download unlimited clips” of television programming in high definition).

<sup>438</sup> TVEyes, 43 F.Supp.3d at 394.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 395.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 388, 395

<sup>443</sup> *Id.* at 396.

<sup>444</sup> TVEyes, 43 F.Supp.3d at 396.

<sup>445</sup> *Id.* at 390.

<sup>446</sup> *Id.* at 385.

“provides a substantial benefit to the public.”<sup>447</sup> TVEyes, the court noted, allows government bodies and elected officials to monitor and respond to news stories and the accuracy of facts reported; to political advertising and the appearances of candidates; and to the coverage of military operations and the safety of American troops.<sup>448</sup> In addition, “journalists use TVEyes to research, report on, compare, and criticize broadcast news coverage.”<sup>449</sup>

## VI. COMMODITIZATION OF NEWS CONTENT

While the digital marketplace continues to produce an astoundingly diverse array of content, the monetization of that market chiefly rewards content products that can be cheaply acquired, promoted, and distributed. In this environment, misinformation, and viral content—which spreads much farther than the truth—is largely left unchallenged.<sup>450</sup> The digital landscape, with its extremely low barriers to entry for both creators and users of content, possesses many of the key components of a robust marketplace of ideas, and yet this marketplace has largely failed to effectively incentivize the production of high quality, accurate information that is thoroughly investigated and verified.<sup>451</sup> This is particularly troubling given the total benefit to society from the production and distribution of accurate information. The abundant supply of such information facilitates the discovery and spread of provisional truth and is uniquely tied to the quality of democratic government.<sup>452</sup> Given the importance of democracy in advancing human welfare throughout the globe, a rich supply of accurate information and the public debate it generates has become more valued for the collective benefits it produces for society than for the self-fulfillment it fosters for the individual speaker.<sup>453</sup> The open debate process, which works to cleanse

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<sup>447</sup> *Id.* at 397.

<sup>448</sup> *See id.* at 396-97 (describing the various users and uses of TVEyes and the benefits it provides to those persons).

<sup>449</sup> *Id.* at 397.

<sup>450</sup> *See* CRAIG SILVERMAN, TOW CTR. FOR DIG. JOURNALISM, LIES, DAMN LIES, AND VIRAL CONTENT: HOW NEWS WEBSITES SPREAD (AND DEBUNK) ONLINE RUMORS, UNVERIFIED CLAIMS, AND MISINFORMATION 1 (2015) [hereinafter SILVERMAN, LIES & VIRAL CONTENT], [http://towcenter.org/wp-content/uploads/2015/02/LiesDamnLies\\_Silverman\\_TowCenter.pdf](http://towcenter.org/wp-content/uploads/2015/02/LiesDamnLies_Silverman_TowCenter.pdf).

<sup>451</sup> *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 863 n.30 (1997). The Court agreed with the District Court’s conclusion that the Internet provided no basis for qualifying the First Amendment protection it receives. *Id.* at 870.

<sup>452</sup> *See e.g.*, Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL’Y 21, 30 (2012) (discussing the evolution of the modern marketplace and its effect on judicial thought).

<sup>453</sup> *See id.* (linking the quality of public discussion to the quality of a democratic government).

the idea market of misinformation, elevates the position high quality investigations and reporting plays in the public deliberation of political, cultural, and societal issues. In so doing, this process produces a collective social benefit that is not fully captured in the return a news organization receives from the high quality investigation it produced.

#### A. The Economics

In economic terms, this social benefit is viewed as a positive externality of the market exchange process.<sup>454</sup> Externalities occur when the exchange process fails to incur the full cost of the good or service.<sup>455</sup> In the case of high quality news and information, the total benefit to society from its production is not fully captured in the price the organization charges for the product. In this way, the anticipated benefit from the consumption of quality news products is achieved at lower than the anticipated cost. A positive externality is created in that the distribution and sale of high quality news and information also benefits non-parties to the transaction. When this occurs, the market has failed to account for the full value of the product. As a result, non-party beneficiaries are able to free ride or benefit without paying. Given that the producer is unable to realize the full value of production, the very product that advances societal interests may be under-produced and under-consumed.<sup>456</sup>

In general, positive externalities discourage production of goods only to the degree that the market devaluation and third party free riding prevents producers from returning a reasonable profit.<sup>457</sup> The news industry largely avoided this outcome by achieving respectable profit margins through advertising sales.<sup>458</sup> Operating in a dual product market, news organizations commonly sell content to audiences and audiences, or more specifically audience attention, to advertisers. The dual market has allowed news organizations to effectively subsidize the production of news by sharing its information seeking audience with advertisers.<sup>459</sup> In the past, this relationship proved to be very beneficial for news organizations as advertising accounted for some 85 percent of the total

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<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 62.

<sup>456</sup> See, e.g., Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 9-10 (2005).

<sup>457</sup> See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1046 (2005).

<sup>458</sup> See STEVEN WALDMAN ET AL., FED. COMM'N COMM'N, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 36-38 (2011), [https://www.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](https://www.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf).

<sup>459</sup> Anthony J. Pennings, *The Dual Product Media Model*, WRITINGS ON DIG. STRATEGIES, ICT ECON., AND GLOBAL COMM'N, (Jan. 24, 2011), <http://apennings.com/media-strategies/the-dual-product-media-model>.

revenue at newspapers.<sup>460</sup> By 2013, it still accounted for more than two-thirds of the \$63 to \$65 billion in annual revenue generated by the entire U.S. news industry.<sup>461</sup> While this traditional business model remains the only viable business model to date, precipitous declines in print advertising and steady audience migration to digital news have left the news media scrambling to grow digital advertising, implement digital subscription plans, and experiment with other revenue streams.<sup>462</sup> The ability to generate revenue from digital news is particularly important given the high fixed costs associated with the production of news.

#### B. The Costs of the Digitalization of News

The news media incur significant first-copy costs in producing high quality investigations.<sup>463</sup> These costs can be recovered through economies of scale or the relatively low marginal cost associated with the reproduction and reuse of the resulting reports that spring from these investigations. These economies of scale are even greater with digital content as distribution costs and the costs to serve additional users are considered negligible.<sup>464</sup> The insignificant cost of distribution in the digital environment stands in stark contrast to the business model upon which the media industry was built. In that model, the distribution method was a key element in the monetization of news content.<sup>465</sup> News organizations carved out a product niche within the media landscape, segmented the market, and targeted specific audience groups and advertisers through a prod-

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<sup>460</sup> DIANNE LYNCH, KNIGHT FOUND., ABOVE AND BEYOND: LOOKING AT THE FUTURE OF JOURNALISM EDUCATION 5 (2015), [http://knightfoundation.org/media/uploads/publication\\_pdfs/KF-Above-and-Beyond-Report.pdf](http://knightfoundation.org/media/uploads/publication_pdfs/KF-Above-and-Beyond-Report.pdf).

<sup>461</sup> HOLCOMB & MITCHELL, REVENUE PICTURE, *supra* note 11, at 2.

<sup>462</sup> LYNCH, *supra* note 460, at 5; Mark J. Perry, *Creative Destruction: Newspaper Ad Revenue Has Gone into a Precipitous Free Fall, And It's Probably Not Over Yet*, AM. ENTERPRISE INST. (Aug. 6, 2013, 8:19 AM), <https://www.aei.org/publication/creative-destruction-newspaper-ad-revenue-has-gone-into-a-precipitous-free-fall-and-its-probably-not-over-yet>; HOLCOMB & MITCHELL, REVENUE PICTURE, *supra* note 11, at 27; NEWSPAPER ASSN. OF AM., NEWSPAPER DIGITAL AUDIENCE HITS NEW PEAK: YOUNG WOMEN, MOBILE DEVICES DRIVE GROWTH 1-3 (2014), [http://www.naa.org/~media/NAACorp/Public%20Files/TopicsAndTools/Digital/Newspaper\\_Digital\\_Audience\\_Aug2014.ashx](http://www.naa.org/~media/NAACorp/Public%20Files/TopicsAndTools/Digital/Newspaper_Digital_Audience_Aug2014.ashx).

<sup>463</sup> Eric Reimer, *The Effects of Monopolization on Newspaper Advertising Rates*, 36 AM. ECONOMIST, no. 1, Spring 1992, at 65.

<sup>464</sup> See Lemley, *supra* note 457, at 1053; see also Ben Thompson, *Blogging's Bright Future*, STRATECHERY (Feb. 2, 2015), <http://stratechery.com/2015/bloggings-bright-future> (noting that hosting costs are the exception).

<sup>465</sup> Lemley, *supra* note 457, at 1053.

uct differentiation strategy.<sup>466</sup> This strategy reduced the substitution effect among news products and lowered the level of direct competition the products encountered in the market.<sup>467</sup> Products were effectively differentiated by content choices, format, frequency and availability schedule, distribution reach, and production techniques.<sup>468</sup> Under this system, print and electronic news products were imperfect substitutes for one another as each existed in a closed, differentiated distribution channel that contained built-in scarcities in terms of space, time, and geographical reach.<sup>469</sup> In the end, these distinctive characteristics and limitations served to increase each product's pricing power and market appeal and prompted advertisers and audiences to rely on a mix of media at different times to fulfill their information and communication needs.<sup>470</sup>

Today, the landscape for news products is vastly different. The digitalization of news has largely dissolved the inherent scarcities that existed in the closed distribution system and greatly reduced the degree to which media organizations are able to engage in product differentiation. In the digital environment, news content appears in abundant supply, ad space is unlimited, and barriers no longer exist for advertisers who want to bypass the media and build direct relationships with customers.<sup>471</sup> The choices in format, frequency, reach, and display techniques have been flattened, and the ability to differentiate among news products has proven exceedingly challenging but ever so important to the financial health of the news organization.<sup>472</sup> At the same time, the upsurge in the aggregation of news content is threatening to turn high quality reporting and investigations into an indistinguishable commoditized product and thereby increase the risk that news organizations will not realize a reasonable return on the expenses incurred.<sup>473</sup>

Commoditization of news reports occurs for a number of interrelated reasons. First, news products are inherently non-rival in that the consumption of a digital news product by one person does not diminish the use of the same product by another person.<sup>474</sup> At the same time, the underlying facts gathered through expensive investigations are largely non-excludable under existing

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<sup>466</sup> See generally ROBERT G. PICARD, *THE ECONOMICS AND FINANCING OF MEDIA COMPANIES* 158 (2011).

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> JEFF JARVIS, *GEEKS BEARING GIFTS: IMAGINING NEW FUTURES FOR NEWS* 105 (2014).

<sup>470</sup> See *id.* at 136; Stephen Lacy & Ardyth Broadrick Sohn, *Market Journalism*, in *CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES* 159, 163 (Wilson Lowrey & Peter J. Gage, eds. 2011).

<sup>471</sup> JARVIS, *supra* note 469, at 105-106.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

<sup>474</sup> Jeffrey L. Harrison & Robyn Shelton, *Deconstructing and Reconstructing Hot News: Toward a Functional Approach*, 34 *CARDOZO L. REV.* 1649, 1650 (2013).

copyright law from use by rival news organizations and digital entrants.<sup>475</sup> The same dearth of legal protection also extends to small portions of the published news product. Lastly, digital news products can be reproduced and distributed at almost no cost.<sup>476</sup> This negligible cost structure coupled with the non-rival characteristic of news products and the absence of legal constraints to exclude competitors from copying the underlying facts gathered at much expense leads to a practice of free riding by digital entrants who can set up shop with drastically lower fixed costs than legacy news companies. This practice leads to an oversupply of low quality information goods that are largely crafted from appropriated news copy and unverified claims circulated online and in social media.<sup>477</sup> The practice also raises concerns that in an immensely crowded digital environment, large quantities of inferior digital products may eventually swamp high-quality news information.<sup>478</sup>

### C. Public Goods

The non-rival nature of news content and the non-rival and non-excludable nature of news reporting are particularly problematic for a profit-driven market economy. Given the inability to exclude free-riders, the efficient price for using a non-rival and non-excludable good is zero. Because pricing is the mechanism by which free markets control supply, non-rival and non-excludable goods, if left to the market, would be under-produced and under-consumed. As a result, these goods are most often supplied by the government and include such public welfare goods as national defense, roadways, streetlights, and public water supplies.<sup>479</sup> With public goods, the government determines the appropriate supply level based on its estimate of the goods' total costs and the bene-

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<sup>475</sup> 17 U.S.C. § 102 (“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”); Harrison & Shelton, *supra* note 474, at 1650, 1653-54.

<sup>476</sup> Fiona Morgan, *The Stories Not Told: A Case Study of the Information Needs of Siler City, North Carolina*, 8 ISJLP 481, 528-29 (2013) (noting that online journalism “tackle[s] the problem of high fixed costs of quality content creation,” because digital distribution is inexpensive).

<sup>477</sup> See SILVERMAN, LIES & VIRAL CONTENT, *supra* note 450, at 1-4.

<sup>478</sup> Enrico Coiera, *Information Economics and the Internet*, 7 J. AM. MED. INFORMATICS ASSN. 215, 215-16, 219-20.

<sup>479</sup> See generally Tim Worstall, *Why Government Should Spend More On Public Goods*, FORBES (May 5, 2013), <http://www.forbes.com/sites/timworstall/2013/05/05/why-government-should-spend-more-on-public-goods/>; Tyler Cowen, *Public Goods*, LIB. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/PublicGoods.html> (last visited on Sept. 16, 2015).

fits it will provide society.<sup>480</sup> When it comes to news and information, a government-directed public goods model is largely inconsistent with U.S. constitutional law, which values a highly competitive ideas market of independent, robust, and distinct voices.<sup>481</sup> The Supreme Court has explained that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>482</sup> As an indispensable source of diverse information, a free and independent news media is considered “a condition of a free society.”<sup>483</sup>

#### D. Incentivizing Quality News Products

In a constitutional system that values an independent and free news industry, copyright protection becomes a primary means to incentivize the gathering and production of high quality news and information. Copyright law—and to a lesser extent hot news misappropriation—has the ability to curb unbridled competition by free riders who are able to copy and distribute work without paying licensing fees or contributing by some other means to the costs incurred in the gathering, production, distribution, and marketing of news products.<sup>484</sup> The practice of free riding, if left unabated, will drive the “price for user access to its near-zero marginal cost.”<sup>485</sup> Copyright protection helps reverse this trend by giving the copyright holder the exclusive right to control the distribution of and access to the expressive product. The artificial scarcity created by copyright law allows producers and publishers to recover fixed production costs by constraining the subsequent use of the expressive product by aggregators and those who would otherwise build a business enterprise on the content created by others.<sup>486</sup> The need to recover first-copy costs is generally regarded as the primary rationale for the exclusive control authors have over their creations.<sup>487</sup> But as commentators point out, copyright law is not necessarily a perfect remedy for the free rider problem.<sup>488</sup> While strong copyright protection provides sufficient incentives to the production of information and other expressive

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<sup>480</sup> See generally Jonny Anomaly, *Public Goods and Government Action* 14 POL., PHIL. & ECON. 109, 116-17 (2015).

<sup>481</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 292-93 (1996) (explaining the necessity of copyright protection).

<sup>485</sup> *Id.* at 292.

<sup>486</sup> See *id.* 293-94 (pointing out the restrictions to the public copyright owners have over their work).

<sup>487</sup> Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 215 (2004).

<sup>488</sup> See, e.g., Netanel, *supra* note 485, at 293; Yoo, *supra* note 487, at 215-16.

products, the protection also reduces access to these products.<sup>489</sup> The tension between incentives and access has led commentators to conclude that copyright protection should be calibrated to the minimum level necessary to provide a sufficient incentive to support the creation of a work.<sup>490</sup> This argument is particularly salient when a work has few substitutes and high barriers exist that prevent entry into the market.<sup>491</sup> Under these conditions, the market for the work wields sufficient power on its own to incentivize the creation of such works.<sup>492</sup>

The economic and technical characteristics of the digital market for news and information, on the other hand, encourage the production of low-cost, low-quality works, and incentivizes the free riding practice of aggregation. In this new market, strong copyright protection is needed to encourage the investment in comprehensive reporting and investigation. Extensive research, verification, and a commitment to accuracy form the bedrock upon which high quality news and information is produced.<sup>493</sup> If that foundation is not incentivized in the digital marketplace, the quality of news and information will suffer. In a marketplace filled with inferior news products, the caliber of public discussion is reduced and the intellectual enrichment that should occur as a result is greatly diminished. A sort of garbage-in garbage-out effect takes place that degrades the quality of the public conversation and by extension the value and efficacy of the democratic process.

## VII. CONCLUSION

In *Associated Press v. Meltwater*, Judge Cote acknowledged the world's indebtedness to the news industry for triumphs that have been won by "reason and humanity over error and oppression."<sup>494</sup> She noted the cost of those triumphs and the role copyright law plays in their survival. "Investigating and writing about newsworthy events occurring around the globe," she wrote, "is

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<sup>489</sup> Yoo, *supra* note 487, at 216.

<sup>490</sup> *Id.* at 216-17.

<sup>491</sup> *Id.* at 217-18.

<sup>492</sup> See *id.* at 217; Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 82-83 (2001).

<sup>493</sup> See SILVERMAN, LIES & VIRAL CONTENT, *supra* note 450, at 8 ("At the same time, digital natives and legacy media alike all seek to build or maintain a trusted brand and to be seen as quality sources of information. Chasing clicks by jumping on stories that are too-good-to-check inevitably comes into conflict with the goal of audience loyalty."). *What makes journalism different from other forms of communication?*, AM. PRESS INST., <http://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/makes-journalism-different-forms-communication> (last visited Sept. 16, 2015).

<sup>494</sup> *Meltwater*, 931 F.Supp.2d at 553 (paraphrasing James Madison)

an expensive undertaking” that is largely underwritten by the enforcement of copyright laws.<sup>495</sup> According to Judge Cote, permitting free riders, like Meltwater, to profit from the costly newsgathering and coverage work performed by the Associated Press and other news organizations injures the ability of these organizations to perform their essential democratic function.<sup>496</sup> “The Internet,” she said, “would be far poorer if it were bereft of the reporting done by news organizations.”<sup>497</sup>

In order to safeguard high quality news and investigations, this article calls for a doctrinal sensitivity to the economic realities of the digital marketplace where information is used to drive traffic, optimize search engine results, retain users, and build business enterprises. In this market environment, deceptive aggregation practices are common as content is appropriated and commoditized without the capital investment required to investigate, gather, create, or license it. In light of these economic realities, a strong commitment to the copyright values of expressive originality and transformation is essential in balancing fair use interests against the intellectual property rights in digital news.

This commitment requires courts to recognize and more thoroughly understand the expressive creativity and originality expended in the production of original news stories and the qualitative importance of the opening paragraphs of the story. From compelling ledes driven by strong verbs and descriptive detail to character development evidenced by colorful anecdotes and direct quotes, news writing is a highly stylized form of nonfiction storytelling that competes each minute of each day with the sea of information that swirls around the Internet. In its battle for eyeballs, the lede is the most carefully crafted and qualitatively important element of a news story. As both gateway and hook, the lede is intended to capture and draw readers into the story, and the expressive creativity and originality needed to accomplish this feat is significant. In this regard, the presumption that news ledes and fragments of news stories are mere factual compilations void of expressive originality is misguided and unfounded and should be rejected by courts attempting to define the line between fact and expression in copyright disputes. Instead, courts need to reserve “thin” copyright protection—which protects only the selection and arrangement of facts—for factual compilations void of any written expression. Reserving “thin” copyright protection for factual compilations void of any written expression would allow the news industry to protect their investment in expensive newsgathering activities while largely negating the need for the hot news misappropriation tort.

In cases of appropriated news content, a finding of fair use would require a

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<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

secondary use that advanced public knowledge and the goals of copyright law. This could be accomplished through (1) the standard journalistic practice of advancing the story through original, independent investigation, reporting, and analysis, or (2) the creation of transformative digital tools that encourage new types of research and advance knowledge without supplanting the market for and value of the original authorship. In short, the goals of copyright law are not fulfilled by the practice of lifting content and reusing it for the same purpose. As a result, the appropriator needs to have sufficient transformative skin in the game to successfully claim a fair use defense. By narrowing the fair use standard along these lines, digital content providers will be dissuaded from building a business model on the appropriation of information gathered by news organizations that invest in extensive research and investigation. In this way, copyright law is directed at its core values and is able to provide the balance necessary to foster new ideas and expressive creations that enrich public discourse and knowledge while preserving this nation's finest journalism.