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# A Hot Mess: How Hot-News Misappropriation Bypassed Copyright Law in Barclays v. TheFlyontheWall.com and Gave Originators a Propriety Right in Facts

## **Cover Page Footnote**

J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A., 2006, The College of William and Mary. The author would like to thank Professor Lucia A. Silecchia for her insight and guidance and her colleagues on the Catholic University Law Review for their tremendous work on this Note. The author also wishes to thank her family and friends, whose love and support have made the last three years possible. Lastly, the author dedicates this Note to Tommy. Without his love and encouragement, the author would be a hot mess.

A HOT MESS: HOW  
HOT-NEWS MISAPPROPRIATION BYPASSED  
COPYRIGHT LAW IN *BARCLAYS V.*  
*THEFLYONTHEWALL.COM* AND GAVE  
ORIGINATORS A PROPERTY RIGHT IN FACTS

*Julya E. Vekstein*<sup>+</sup>

Imagine you write a popular poker blog that attracts thousands of poker enthusiasts each day. You fly to a different national poker tournament every week, find a seat near one of the tables, and transcribe the game in minute detail. Your blog's success stems from avid tournament poker players visiting your website and reviewing the tournament transcripts to learn from the high-stake successes and failures of the big-name pros and wealthy amateurs. For hours you watch every poker hand, meticulously write down the players' names, and keep track of the winners and the cards that they held. Immediately after the tournament, you upload these facts in chronological order to your blog.

This market is a lucrative one, and your work is in high demand. Now imagine that within seconds of your upload, your main competitor, with a quick CTRL+C and CTRL+V, copies and pastes your transcripts onto his website. Before you even notify your blog subscribers of your latest post, they are already reading it on your competitor's blog.<sup>1</sup> You want a property right in the information you painstakingly collected, but traditional copyright law<sup>2</sup>

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1. This hypothetical situation reflects recent hot-news-misappropriation litigation between online news originators and aggregators. *See, e.g., X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1103, 1108–09 (C.D. Cal. 2007) (denying the defendant's motion to dismiss the plaintiff's claim that blogger Perez Hilton misappropriated photos that had a time-sensitive value); Letter from Christopher P. Beall, Attorney, Levine, Sullivan, Koch & Schulz, LLP, to Jason D. Bane, Colorado Pols, LLC 1–3 (May 21, 2010), *available at* <http://coloradopols.com/upload/Pols-Post-Letter.pdf> (demanding that a Colorado political blog cease and desist “unauthorized [fact] copying from the website versions” of a number of high-profile Colorado newspapers).

2. The Copyright Clause of the U. S. Constitution advances the need “[t]o promote the Progress of Science and useful Arts” by protecting the works of Authors and Inventors.” U.S. CONST. art. I, § 8, cl. 8; *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[The Copyright Clause] is intended to motivate the creative activity of authors and

protects neither news nor facts, and therefore provides no redress.<sup>3</sup> However, the common law tort of hot-news misappropriation—a theory of unfair competition that recognizes a property right in time-sensitive information<sup>4</sup>—could provide a solution.<sup>5</sup> Although this tort is based on an archaic case,<sup>6</sup> it has been used to protect online news originators in the recent *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.* decision, which revitalized both the tort and the tort’s underlying doctrine, albeit implicitly.<sup>7</sup>

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inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

3. See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) (“It is well settled that copyright protection extends only to an author’s expression of facts and not to the facts themselves.” (footnote omitted)); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir. 1980) (noting that “historical facts, themes, and research have been deliberately exempted from the scope of copyright protection”).

4. Hot-news misappropriation is “concerned with the copying and publication of information gathered by another before he has been able to utilize his competitive edge.” *Fin. Info., Inc. v. Moody’s Investors Serv.*, 808 F.2d 204, 209 (2d Cir. 1986). The misappropriation is “hot” “not [because of] the salacious or arousing quality of the published material but rather [because of] its time sensitive nature.” *X17*, 563 F. Supp. 2d at 1103; Thomas Shevory, *Book Review*, 15 L. & POL. BOOK REV. 1037, 1037 (2005) (describing hot news as “written material, often ‘facts, that have value for a short duration, and which will soon move into the ‘public realm’ losing their value completely”).

5. See *Barclays Capital Inc. v. Theflyonthewall.com (Barclays I)*, 700 F. Supp. 2d 310, 313, 348 (S.D.N.Y. 2010) (enforcing a permanent injunction against the defendant, an Internet news service, to prohibit misappropriation of the plaintiffs’ hot-news stock recommendations), *rev’d in part*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011) (upholding the viability of the hot-news-misappropriation claim but reversing on the facts of the case); see also J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:47, at 527 (2d ed. 2011) (“The state law [m]isappropriation doctrine is a residual commercial tort which is an offshoot of unfair competition law.”). The hot-news-misappropriation doctrine is not the only remedy available in the poker-blogger hypothetical; courts have also protected factual compilations using a trespass-to-chattels theory. See, e.g., *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1070 (N.D. Cal. 2000) (rejecting the defendant’s argument that the trespass claim was unsustainable because eBay is a publicly available website).

6. See *Int’l News Serv. v. Associated Press (INS)*, 248 U.S. 215, 236 (1918) (noting that news compilation is a labor-intensive endeavor, and therefore deserves “quasi-property” protection). *International News Service v. Associated Press* was decided over ninety years ago and is the cornerstone of the hot-news-misappropriation doctrine. See “Hot News” *Misappropriation: Implications for Bloggers? For Bloomberg News?*, PRAWFSBLAWG (Apr. 2, 2010), <http://prawnsblawg.blogspot.com/prawnsblawg/2010/04/hot-news-misappropriation-implications-for-bloggers.html> (“The theory of ‘hot news’ misappropriation stems from *International News Service v. Associated Press* . . . in which the Supreme Court held, under federal common law, that ‘hot’ news is ‘quasi-property.’”).

7. *Barclays Capital Inc. v. Theflyonthewall.com, Inc. (Barclays II)*, No. 10-1372-CV, 2011 WL 2437554, at \*24–25 (2d Cir. June 20, 2011) (holding that a hot-news-misappropriation claim is viable, but not under the facts of this case); *Barclays I*, 700 F. Supp. 2d at 331–43. *But see* *Agora Fin., LLC v. Samler*, 724 F. Supp. 2d 491, 502–03 (D. Md. 2010) (declining to extend hot-news-misappropriation protection to financial recommendations because they are more like copyrightable original works than misappropriated facts).

The underlying and now-defunct “sweat of the brow” doctrine<sup>8</sup> was developed in 1922 and allowed courts to extend copyright protection to works that authors had invested substantial time and effort creating.<sup>9</sup> In *International News Service v. Associated Press (INS)*, the Supreme Court extended the “sweat of the brow” doctrine beyond copyright law and held that a property right exists in news.<sup>10</sup> In effect, *INS* created the federal common law tort of hot-news misappropriation.<sup>11</sup> Although the hot-news-misappropriation tort was viewed as a “historical oddity” and rarely used,<sup>12</sup> courts readily applied the “sweat of the brow doctrine” for seventy years following *INS*.<sup>13</sup>

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court overturned the application of the “sweat of the brow” doctrine in copyright law and determined that the Constitution mandated at least a minimum amount of originality for copyright protection.<sup>14</sup> Although *Feist*

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8. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–44 (1991) (rejecting the “sweat of the brow” doctrine in copyright).

9. *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83, 84, 88 (2d Cir. 1922) (articulating the “sweat of the brow” doctrine and finding that a directory publisher infringed upon the plaintiff's directory because copyright protection extends to those who “produce[] [a compilation] by his [own] labor”).

10. 248 U.S. at 236.

11. See *id.* at 242 (“Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as *quasi* property[,] . . . defendant's conduct . . . substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.”); see also Jared O. Freedman & Duane C. Pozza, *Renewed Interest In “Hot News” Misappropriation Claims Against Online Aggregators of News and Information*, 22 INTELL. PROP. & TECH. L.J. 1, 1, 5 (2010) (stating that *INS* “gave life to the modern tort of ‘hot news’ misappropriation,” and claiming that the tort will have “continued viability in the online context”).

12. Andrew L. Deutsch et al., *‘Hot News’ and the ‘Duty to Police’ It*, L. TECH. NEWS (May 18, 2010) <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202458321278>, available at LEXIS, Doc. No. 1202458321278 (explaining that the hot-news-misappropriation doctrine, “nearly a century old, was for many years considered something of a historical oddity, but it has gained new relevance as timely news information has become valuable to a variety of digital platforms”); see also *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (declining to apply the *INS* reasoning and noting “[w]hile it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. . . . [W]e think that no more was covered than situations substantially similar to those then at bar”).

13. See *Feist*, 499 U.S. at 359–60 (ending seventy years of copyright protection and stating that “originality, not ‘sweat of the brow,’ is the touchstone of copyright protection”); see also *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131–32 (8th Cir. 1985) (extending copyright protection to a residential-directory compiler because he invested substantial amounts of labor in its creation); *Jeweler's Circular Publ'g*, 281 F. at 85, 88 (finding that the Copyright Act protected a book because of the labor invested by the plaintiff in its creation).

14. *Feist*, 499 U.S. at 363–64 (holding that a compiler of an alphabetical fact-based white pages directory was not entitled to copyright protection).

signaled the doctrine's demise for copyright protection,<sup>15</sup> it remains a central component of state tort law in hot-news misappropriation,<sup>16</sup> and *Barclays Capital Inc. v. Theflyonthewall.com, Inc.* illustrates the doctrine's rejuvenation.<sup>17</sup> In *Barclays*, financial firms Barclays Capital, Merrill Lynch, and Morgan Stanley (the Firms) expended an enormous amount of time and money preparing financial recommendations for their investors.<sup>18</sup> Minutes after the Firms released these recommendations, and before they even had an opportunity to contact their investors with updates, Theflyonthewall.com (Fly)<sup>19</sup> copied and published the reports on its own website.<sup>20</sup> The Firms sued, claiming that Fly's actions violated New York's hot-news-misappropriation laws and effectively neutralized any competitive advantage the Firms held.<sup>21</sup>

Both the U.S. Court of Appeals for the Second Circuit and the U.S. District Court of the Southern District of New York utilized the five-prong hot-news-misappropriation test enunciated in *National Basketball Association v. Motorola (NBA)*<sup>22</sup> to determine whether the Firms had a claim under New York common law.<sup>23</sup> The *NBA* test requires that: 1) the plaintiff "gather[ed] information at cost"; 2) "the information is time-sensitive"; 3) the defendant's actions are considered free-riding; 4) the defendant and plaintiff are in direct competition; and 5) without protection, the incentive to produce the information is so diminished that it would substantially jeopardize that part of the plaintiff's business.<sup>24</sup> The district court held that the Firms had produced sufficient evidence to satisfy the five-prong test and awarded an injunction

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15. *Id.* at 359–60 ("[T]he Copyright Act leave[s] no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection . . .").

16. *See, e.g., Nat'l Basketball Ass'n v. Motorola, Inc. (NBA)*, 105 F.3d 841, 845 (2d Cir. 1997) (creating a hot-news-misappropriation test through which liability incurs based on the time, money, and labor a plaintiff expends).

17. *See Barclays II*, No. 10-1372-CV, 2011 WL 2437554, at \*23 (2d Cir. June 20, 2011) (factoring in the labor, cost, and time an author spends compiling facts when analyzing hot-news-misappropriation claims).

18. *Barclays I*, 700 F. Supp. 2d 310, 313, 316 (S.D.N.Y. 2010), *rev'd in part*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011).

19. Fly's name indicates that its members will be able to gain access to valuable Wall Street information as if they were a "fly on the wall," capable of observing the inner workings of a financial firm's research department without notice. *Id.* at 323.

20. *Id.* at 322–24.

21. *Id.* at 313, 316.

22. 105 F.3d 841, 845 (2d Cir. 1997).

23. *Barclays II*, 2011 WL 2437555, at \*20–21; *Barclays I*, 700 F. Supp. 2d at 334–35.

24. *NBA*, 105 F.3d at 845.

against Fly.<sup>25</sup> However, on appeal, the Second Circuit found that the element of free-riding had not been met and reversed the lower court's decision.<sup>26</sup>

Despite this reversal, the Second Circuit upheld the viability of the hot-news-misappropriation tort, which gives news originators a property right in news facts against aggregators such as Google, Yahoo, and Twitter, and against bloggers such as Perez Hilton.<sup>27</sup> A cursory review of the hot-news-misappropriation test reveals striking similarities to the supposedly defunct “sweat of the brow” doctrine,<sup>28</sup> even though the hot-news-misappropriation test in tort and the “sweat of the brow” doctrine in copyright developed during two vastly different technological periods.<sup>29</sup> Although the Supreme Court rejected the “sweat of the brow” doctrine in *Feist* and clearly refused to extend copyright protection to works without some degree of originality,<sup>30</sup> the protection of such information through tort law could circumvent the Supreme Court's decision in *Feist* and provide protection to all those in need of it.<sup>31</sup> The Internet's function as a local and global news disseminator makes the need to provide protection to online news originators imperative.<sup>32</sup> However, because of the problems posed by divergent state

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25. *Id.* at 345–47 (“[A]n injunction will issue forbidding the dissemination of the Firms’ Recommendations until one half-hour after the opening of the New York Stock Exchange or 10:00 a.m., whichever is later.”).

26. *Barclays II*, 2011 WL 2437554, at \*21.

27. *Id.* at \*24 (holding that on different facts, a news aggregator might be “liable . . . on a ‘hot-news’ misappropriation theory”); see Freedman & Pozza, *supra* note 11, at 4 (“[H]ot news claims can serve as valuable additions to the legal arsenal available to content owners, especially in the online context.”).

28. Compare *NBA*, 105 F.3d at 845 (creating the five-part hot-news-misappropriation test), with *INS*, 248 U.S. 215, 236 (1918) (advancing protection to news based on the “sweat of the brow” doctrine). Part III.A also offers a comparison of each element of the hot-news-misappropriation test and the “sweat of the brow” doctrine and determines that the two are identical.

29. See *NBA*, 105 F.3d at 845 (advancing the five-part test integral to hot-news misappropriations in 1997); *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 95 (2d Cir. 1922) (issuing the standard formulation of the “sweat of the brow” doctrine in 1922).

30. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360 (1991) (holding that the 1976 revisions to the Copyright Act “explain with painstaking clarity that copyright requires originality . . . [and] that facts are never original”).

31. Cf. *id.* at 353–54 (“Protection for the fruits of such research . . . may in certain circumstances be available under a theory of unfair competition.” (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 3.01[B][1], at 3-22.12 (2011)) (internal quotation marks omitted)); see also *infra* notes 154–62 and accompanying text (arguing that the *Feist* court’s limitation of fact protection applies only to exceptional cases such as *INS*, and does not affect the protection of all facts under state tort law, as seen in *Barclays*).

32. See, e.g., *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 492–94 (D. Md. 2010) (discussing a financial-investor-news originator’s suit seeking protection of online content under state hot-news-misappropriation tort); see also Freedman & Pozza, *supra* note 11, at 4 (“With the continued proliferation and popularity of such sites [that aggregate hot news], . . . cases [such as

Internet regulations, protection—if any—should come from a federal congressional mandate.<sup>33</sup>

This Note begins in Part I by tracing the “sweat of the brow” doctrine from its British origins to its incorporation in American copyright jurisprudence. Part I further describes the “sweat of the brow” doctrine’s original intersection with hot news in *INS*, and the implementation of the doctrine until its rejection in *Feist*. Part I also discusses the foundation of the state hot-news-misappropriation tort. Then, Part II explores the recent *Barclays* decisions and the Second Circuit’s rationale for not extending state tort protection to Fly’s use of financial recommendations. Next, Part III explains how the *Barclays* decision circumvents the Supreme Court’s *Feist* decision by noting: 1) the “sweat of the brow” doctrine and the hot-news-misappropriation test are the same, and 2) the Supreme Court did not intend to extend protection to cases such as *Barclays*. Part III also recognizes the value that Internet news originators provide to the modern media marketplace, and the inadequacy of state safeguards for these news providers. Finally, this Note concludes that to avoid the application of a doctrine rejected by the Supreme Court and untenable as applied by the states, Congress must pass federal legislation to protect news while it is “hot.”

## I. THE LIFE AND DEATH OF THE “SWEAT OF THE BROW” DOCTRINE

### A. *The Growth of the “Sweat of the Brow” Doctrine in American Copyright Jurisprudence*

The “sweat of the brow” doctrine originated from English courts’ interpretations of Great Britain’s original copyright law—the Statute of Anne.<sup>34</sup> The doctrine’s “underlying notion was that copyright was a reward for

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*Barclays*] and others like them may establish important precedents that affect the use of a wide array of content online.”)

33. See *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (stating Congress should regulate the Internet to avoid inconsistent state regulations); see also *infra* notes 179–81 and accompanying text (comparing the benefits of a national community standard in First Amendment obscenity jurisprudence to national legislation for online news misappropriation).

34. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyright-history.com/anne.html>. The Statute of Anne declared:

Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing . . . without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books . . . the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy . . . shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years . . .

*Id.*; see also Tracy Lea Meade, *Ex-Post Feist: Applications of a Landmark Copyright Decision*, 2 J. INTELL. PROP. L. 245, 248 (1994) (“English courts applying the Statute of Anne developed the

the hard work that went into compiling facts.”<sup>35</sup> Authors invoked the doctrine to protect their labor and cost-intensive work, even if the work possessed no element of creativity or ingenuity.<sup>36</sup>

*1. Statutory Lists of Protectable Works in U.S. Copyright Acts Encouraged the Use of the “Sweat of the Brow” Doctrine*

The framers of the U.S. Constitution included the Copyright Clause under Article I to provide Congress with the power “[t]o promote the Progress of Science . . . by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings.”<sup>37</sup> Relying on this constitutional authority, Congress passed the Copyright Act of 1790, which not only mirrored the Statute of Anne, but also expanded its protection beyond books to include maps and charts.<sup>38</sup> However, the inclusion of maps—which require labor and accuracy, but not necessarily creativity—in the statutory list of protectable works confused the meaning of copyright’s originality requirement.<sup>39</sup> Thus, courts reasoned that originality meant independent creation rather than creativity, and accepted the “sweat of the brow” doctrine as early as 1845 as a valid rationale for copyright protection.<sup>40</sup> This early jurisprudence provided a

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principle that a second author may not gain an advantage by taking a free ride on the labors of another.” (footnote omitted)).

35. *Feist*, 499 U.S. at 352.

36. *See id.*

37. U.S. CONST. art. I, § 8, cl. 8.

38. *Compare* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802) [hereinafter Copyright Act of 1790] (“[T]he author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books . . .”), *with* Statute of Anne, 1710, 8 Ann., c. 19 (“[T]he Author of any Book or Books already Printed, who hath not Transferred to any other the Copy . . . shall have the sole Right and Liberty of Printing such Book . . .”). The 1790 statute, the first Copyright Act in the United States, has been amended or partially repealed numerous times. *See* Sue Ann Mota, *Secondary Liability for Third Parties’ Copyright Infringement Upheld by the Supreme Court: MGM Studios, Inc. v. Grokster, Ltd.*, 32 RUTGERS COMPUTER & TECH. L.J. 62, 63 n.11 (listing the various changes to the Copyright Act).

39. *Farmer v. Calvert Lithographing, Etc., Co.*, 8 F.Cas. 1022, 1026 (C.C.E.D. Mich. 1872) (“[A]ll original materials from which maps are made . . . are open to all. But no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials . . .”); *see also* Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 51 (1999) (“Maps are archetypical ‘sweat of the brow works’ requiring labor and accuracy, but not necessarily creativity. Without Supreme Court guidance, the federal circuits split on the protectability of such sweat works.”).

40. *See, e.g., Emerson v. Davies*, 8 F.Cas. 615, 619 (C.C.D. Mass. 1845) (“A man has a right to the copy-right of a map . . . [at] his own expense, or skill, or labor, or money.”); *see also* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1876 (1990) (“The true test of originality is whether the

legally protected right to authors who compiled collections of facts.<sup>41</sup>

The Copyright Act of 1909 expanded the statutory list of protectable works to include collections.<sup>42</sup> The inclusion of compilations and directories in the language of the Act further encouraged the use of the “sweat of the brow” doctrine. American courts necessarily began to grapple with the conflicting precept that although facts were not copyrightable, compilations of facts potentially were.<sup>43</sup>

## 2. *The Court’s Use of “Sweat of the Brow” to Extend Quasi-Property Protection to News in INS*

The Supreme Court looked to the Copyright Act in *INS* to determine whether there was a property right in news.<sup>44</sup> In *INS*, the Associated Press (AP) sued International News Service (INS) for taking AP’s news from its bulletin boards, members, and published newspapers, and subsequently representing and selling the news as its own.<sup>45</sup> The Supreme Court granted

production is the result of independent labor or of copying.” (quoting EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 208 (1879)).

41. See *Emerson*, 8 F.Cas. at 619 (“A man has a right to a copy-right in a translation, upon which he has bestowed his time and labor.”).

42. Copyright Act of March 4, 1909, ch. 320, § 6, 35 Stat. 1075, 1077 (repealed 1976). This Note does not discuss copyright protection of compilations, which are defined as “work[s] 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.” 17 U.S.C. § 101 (2006).

43. See, e.g., *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 542 (1st Cir. 1905) (extending copyright protection to a work whose author “expended a great deal of time and labor in th[e] compilation” of a residential directory (quoting *Ager v. Peninsular & Oriental Stream Navigation Co.*, 26 Ch.D. 637 at 642 (Eng.)); see also Copyright Act of March 4, 1909, ch. 320, § 5 (stating that “[b]ooks, including composite and cyclopedic works, directories, gazetteers, and other compilations” are protected under the statute).

44. *INS*, 248 U.S. 215, 234 (1918).

45. *Id.* at 239. AP invested “considerable amounts of money and time in developing a worldwide system of news-gathering.” MCCARTHY, *supra* note 5, § 5:50, at 530. Newspapers that subscribed to AP would receive news stories for publication. *Id.* INS competed with AP, and when INS was barred from sending news back to the United States by British transmissions during World War I, INS took AP’s breaking news stories from published early editions of New York newspapers and sent them to its news affiliates on the West Coast for publication. *Id.* § 5:50, at 530–31. AP sought recourse for INS’s theft in three ways:

First, by bribing employees of newspapers published by complainant’s members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant’s clients for publication by them; Second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and Third, by copying news from bulletin boards and from early editions of complainant’s newspapers and selling this, either bodily or after rewriting it, to defendant’s customers.

certiorari to determine: 1) whether a property right exists in uncopyrightable news; 2) if such a property right exists, whether “it survives the instant of its publication”; and 3) whether INS’s actions amounted to unfair competition.<sup>46</sup> Writing for the majority, Justice Mahlon Pitney stated:

[When INS takes] material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money . . . and that [INS] in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of [AP’s] members is appropriating to itself the harvest of those who have sown.<sup>47</sup>

The Court’s reference to the labor, skill, and money necessary to create news represents a clear acknowledgement of the “sweat of the brow” doctrine.<sup>48</sup>

The Court also noted that AP did not have a claim based on traditional copyright law, which does not protect facts or news.<sup>49</sup> Nonetheless, the Court chose to extend some protection to news in recognition of the large amount of organization, money, and effort put into news acquisition, as well as the relatively short time period during which news retains value.<sup>50</sup> The Court resolved the case by relying on the “sweat of the brow” doctrine to find that news is “quasi property,”<sup>51</sup> which thus allowed AP to recover under a theory of unfair competition.<sup>52</sup> The *INS* court effectively created what would become known as the hot-news<sup>53</sup>-misappropriation<sup>54</sup> tort.<sup>55</sup> A plaintiff bringing suit for

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*INS*, 248 U.S. at 231. Only the third issue was argued before the Supreme Court. *Id.* at 231–32.

46. *INS*, 248 U.S. at 232.

47. *Id.* at 239–40.

48. *See id.* at 238.

49. *See id.* at 233 (“[N]ews is not within the operation of the copyright act.”); *see also* Copyright Act of March 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076 (repealed 1976) (protecting only “[b]ooks, including composite and cyclopedic works, directories, gazetteers, and other compilations”).

50. *INS*, 248 U.S. at 238.

51. Quasi-property is “property that is to be treated as if it were a tangible thing, so as to fit within accepted conceptualizations of property rights.” Jeffery Lawrence Weeden, *Genetic Liberty, Genetic Property: Protecting Genetic Information*, 4 AVE MARIA L. REV. 611, 641 (2006). Even though quasi-property has been widely used in copyright jurisprudence, *Black’s Law Dictionary* does not define it. *See id.*; *see also* BLACK’S LAW DICTIONARY 1364 (9th ed. 2009).

52. *INS*, 248 U.S. at 236–37.

53. Hot news is “concerned with the copying and publication of information gathered by another before he has been able to utilize his competitive edge.” *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 209 (2d Cir. 1986).

54. *Black’s Law Dictionary* defines “misappropriation” as “[t]he common-law tort of using the noncopyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization.” BLACK’S LAW DICTIONARY 1088 (9th ed. 2009).

this tort must establish: 1) the plaintiff invested time and money to acquire the news; 2) the appropriated news had market value; 3) the parties were in direct competition; and 4) protecting the news would incentivize news gathering.<sup>56</sup> In a subsequent Second Circuit case, Judge Learned Hand attempted to narrow the *INS* holding by opining that *INS* was not meant to “lay down a general doctrine.”<sup>57</sup> This narrowing made the hot-news-misappropriation tort a “historical oddity.”<sup>58</sup>

3. *Public Policy Considerations Advanced the “Sweat of the Brow” Doctrine in Jeweler’s Circular Publishing Co. v. Keystone Publishing Co. and Beyond*

In *Jeweler’s Circular Publishing Co. v. Keystone Publishing Co.*, the Second Circuit issued “[t]he classic formulation” of the “sweat of the brow” doctrine.<sup>59</sup> Noting that “no one ha[d] a right to take the results of the labor and expense incurred by another for the purpose of a rival publication, and thereby save himself the expense and labor of working out and arriving at these results by some independent road,”<sup>60</sup> the court found that copyright protection extends to works even if they consist of public facts.<sup>61</sup> Thus, the court extended copyright protection to a town directory compiled by traveling door to door to

55. MCCARTHY, *supra* note 5, § 5:50, at 530 (noting that the misappropriation doctrine is often dubbed “the *INS* v. AP rule” (internal quotation marks omitted)). The court in *INS* held that an author of uncopyrightable news facts could recover under the theory of misappropriation, which is based on the theory of unfair competition. *INS*, 248 U.S. at 241–42. The misappropriation doctrine is recognized as a “residual commercial tort which is an offshoot of unfair competition law.” MCCARTHY, *supra* note 5, § 5:47, at 527. In its current form, the misappropriation tort has become “[s]pacious and open-ended in concept . . . [and] must be analyzed for possible preemption by federal copyright and patent law.” *Id.*

56. *INS*, 248 U.S. at 239–40; *Mercury Record Prods., Inc. v. Econ. Consultants, Inc.* 218 N.W.2d 705, 710 (Wis. 1974). In deciding to extend protection, the Court considered it crucial that *INS* and AP were direct competitors. *INS*, 248 U.S. at 236 (“And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves.”).

57. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 279–80 (2d Cir. 1929) (holding that a silk manufacturer whose competitor replicated its popular design could not rely on *INS* because that case only applied to “situations substantially similar to those then at bar”).

58. Deutsch, *supra* note 12, at 1 (claiming that plaintiffs rarely relied on the hot-news tort, but that it has found relevance in the digital age).

59. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991); *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922) (explaining the “sweat of the brow” doctrine and holding in favor of copyright protection for a directory publisher who “produce[d] by his labor” a compilation); see also Meade, *supra* note 34, at 249 (“[*Jeweler’s*] is the seminal case outlining the sweat of the brow theory.”).

60. *Jeweler’s Circular Publ’g*, 281 F. at 89 (quoting *Morris v. Ashbee* (1868) 7 L.R. Eq. 34, 40–41).

61. *Id.* at 88.

collect the names and addresses of town residents.<sup>62</sup> As *Jeweler's* remains the leading case for “sweat of the brow,” courts adopting the doctrine frequently cite to the *Jeweler's* court’s rationale when extending copyright protection to works consisting of facts.<sup>63</sup>

Courts have historically defended the “sweat of the brow” doctrine because it promotes public policy by fostering ideas and spreading knowledge.<sup>64</sup> Specifically, “sweat of the brow” “allow[ed] the authors of factual compilations to reap the economic benefits of their work through full control of the material embodied in their production . . . [without] halt[ing] the dissemination of information.”<sup>65</sup> Courts posited that, in the absence of copyright protection, individuals would wait until an author had completed a compilation, and then copy and distribute the material—an unfair result that would discourage authors from compiling facts in the first place.<sup>66</sup>

Several years after *Jeweler's*, the Supreme Court decided *Erie Railroad Company v. Tompkins* and abolished the majority of federal common law, including the *INS* hot-news-misappropriation tort.<sup>67</sup> *Erie* led numerous states to adopt the “sweat of the brow” doctrine so that courts could apply misappropriation remedies in lieu of traditional copyright law.<sup>68</sup> State misappropriation laws, supported by the rationales articulated in *INS* and *Jeweler's*, helped advance the “sweat of the brow” doctrine through the 1980s.<sup>69</sup>

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62. *Id.*

63. Meade, *supra* note 34, at 249 (footnote omitted).

64. *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (“[T]he limited grant [of protection for sweat of the brow works] is a means by which an important public purpose may be achieved.”). *But see* David Nocilly, *The Second Circuit Raises a Red Flag: The Impact of Matthew Bender & Co. v. West Publishing Co. on Star Pagnation and the Legal Publishing Industry*, SYRACUSE L. & TECH. J. 1, 32–33 (Spring 2001), <http://web.archive.org/web/20030803143956/http://www.law.syr.edu/studentlife/pdf/redflag.pdf> (accessed through the Internet Archive Wayback Machine) (explaining that copyright law “balance[s] the need for an incentive to create with the desire for the free flow of ideas”).

65. Meade, *supra* note 34, at 248 (footnote omitted).

66. *Id.*

67. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (abolishing federal general common law in diversity cases); *see also* *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 491 (D. Md. 2010) (“*INS* was a pre-*Erie* case premised upon federal common law and, therefore, is no longer binding precedent in its own right . . .”).

68. Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 210 (1998) (footnote omitted); *see also* Katherine F. Horvath, *NBA v. Motorola: A Case for Federal Preemption of Misappropriation?*, 73 NOTRE DAME L. REV. 461, 467 (1998) (noting that “[t]wenty years after *INS*, misappropriation had been adopted as the law in Pennsylvania, Texas, New York, and Missouri” (footnote omitted)).

69. *See* Ill. Bell Tel. Co. v. Haines & Co., 905 F.2d 1081, 1085 (7th Cir. 1990) (extending protection to a residential directory consisting of facts), *rev'd*, 932 F.2d 610 (7th Cir. 1991) (citing *Feist* and noting that a telephone directory is not an original, copyrighted work);

### B. Rejection of the “Sweat of the Brow” Doctrine

While some courts willingly embraced “sweat of the brow,” other courts deemed the doctrine contrary to the language and intent of copyright law due to the lack of a creativity requirement.<sup>70</sup> Thus, courts developed an alternative rationale in copyright protection cases—the creative-selection theory.<sup>71</sup> Under this theory, copyright protection only extends to works that possess some element of creativity in arrangement or selection.<sup>72</sup>

#### 1. The Tension Between the “Sweat of the Brow” Doctrine and the Creative-Selection Theory

The “sweat of the brow” doctrine and the creative selection theory coexisted throughout the nineteenth and twentieth centuries, but their conflicting principles often proved difficult to resolve.<sup>73</sup> The inconsistent application of copyright protection caused by contradictory theories, culminated in a circuit split between the courts adopting the “sweat of the brow” doctrine, and those criticizing it.<sup>74</sup> By 1990, seven circuit courts had taken a position on whether “sweat of the brow” sufficed for an author to receive protection.<sup>75</sup> The

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Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128, 131–32 (8th Cir. 1985) (protecting the compiler of a white-pages directory because he expended substantial labor and independently created it); Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co., 281 F. 83, 88 (2d Cir. 1922) (extending copyright protection to a book because of the labor invested).

70. See, e.g., *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 207–08 (2d Cir. 1986) (rejecting the “sweat of the brow” approach and holding copyright protection requires an element of creativity); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368–69 (5th Cir. 1981) (rejecting the “sweat of the brow” approach and finding that “facts do not owe their origin to any individual . . . [and] may not be copyrighted”).

71. See *Fin. Info.*, 808 F.2d at 207–08; *Eckes v. Card Prices Update*, 736 F.2d 859, 862–63 (2d Cir. 1984) (finding “appellants exercised selection, creativity and judgment in choosing among the 18,000 or so different baseball cards in order to determine which were the 5000 premium cards”).

72. See *Eckes*, 736 F.2d at 862; see also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884) (stating that originality is independent conception of the work plus minimal creativity); *Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (holding that the Constitution only extends copyright protection to works with an element of originality); Meade, *supra* note 34, at 249–50 (noting that only those original, creative elements receive protection and not necessarily the work as a whole).

73. See Meade, *supra* note 34, at 249–51 (describing the conflict between these two doctrines).

74. William Patry, *Copyright in Compilations of Facts (or Why the “White Pages” Are Not Copyrightable)*, 12 COMM. & L. 37, 39 (1990). Compare *Miller*, 650 F.2d at 1368–69 (holding that creative selection requires original selection or arrangement for copyright protection), with *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977) (finding that “sweat of the brow” principles warranted copyright protection for a compilation).

75. Patry, *supra* note 74, at 39 n.6 (noting that the Seventh, Eighth, and Tenth Circuits advocated the “sweat of the brow” doctrine, which the Second, Fifth, Ninth, and Eleventh Circuits rejected); see also *Ill. Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081, 1085 (7th Cir. 1991)

Supreme Court granted certiorari to address the split and unanimously held in favor of creative selection.<sup>76</sup>

2. *Feist Publications, Inc. v. Rural Telephone Service Co.: The Supreme Court Decides to Kill “Sweat of the Brow”*

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court determined that a white-pages distributor who copied the residential names, addresses, and telephone numbers from its competitor was not liable for copyright infringement.<sup>77</sup> The Court, noting that “originality, not ‘sweat of the brow’ is the touchstone of copyright protection,”<sup>78</sup> found two constitutionally mandated requirements for copyright protection: “the work was independently created by the author (as opposed to copied from other works), and . . . it possesses at least some minimal degree of creativity.”<sup>79</sup>

The *Feist* Court held that the directory lacked the requisite originality element, thereby precluding an infringement claim.<sup>80</sup> The Court reasoned that the goal of copyright law is not to protect the hard work of an author, but to protect creativity by “promot[ing] the Progress of Science and useful Arts.”<sup>81</sup> According to the Court, the Constitution mandates some originality for all works, requiring at least a minimum level of creativity to meet that standard.<sup>82</sup> The Court’s unanimous decision that an author’s labor and effort does not alone suffice for protection explicitly killed the “sweat of the brow” doctrine.<sup>83</sup>

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(accepting sweat of the brow), *rev’d*, 932 F.2d 610 (7th Cir. 1991); *Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128, 131–32 (8th Cir. 1985) (endorsing protections under “sweat of the brow” doctrine); *Fin. Info.*, 808 F.2d at 207 (rejecting the “sweat of the brow” doctrine); *Miller*, 650 F.2d at 1368–69 (rejecting the “sweat of the brow” theory).

76. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360–62 (1991) (holding that a white-pages compiler, by just listing names alphabetically, did not create the requisite originality for copyright protection).

77. *Id.* at 362.

78. *Id.* at 359–60.

79. *Id.* at 345 (citation omitted).

80. *Id.* at 362–63.

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

82. *Id.* at 346, 362 (citing *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)) (defining originality as “independent creation plus a modicum of creativity”). The Court also found that although facts themselves were not copyrightable, the arrangement of those facts might be protected if displaying a creative structure. *Id.* at 360, 362.

83. *See id.* at 359–60. *Feist* rejected the “sweat of the brow” doctrine, which had been integral to the *INS* decision; however, the *Feist* court declined to overrule *INS*, but instead distinguished *INS* as a case decided “on noncopyright grounds that are not relevant here.” *Id.* at 353–54. Chief Justice William Rehnquist and Justices Byron White, Thurgood Marshall, John Paul Stevens, Antonin Scalia, Anthony Kennedy, and David Souter all joined Justice Sandra Day O’Connor’s *Feist* opinion, while Justice Harold Blackmun concurred in the judgment. *Id.* at 340.

### 3. American Jurisprudence Lays the “Sweat of the Brow” Doctrine to Rest

Following *Feist*, judges and scholars—especially those in the Second Circuit—have voiced the conclusion that the “sweat of the brow” doctrine is dead.<sup>84</sup> In 1998, the Second Circuit decided *Matthew Bender & Co. v. West Publishing Co.* and rejected prior case law that “rest[ed] upon the now defunct ‘sweat of the brow’ doctrine.”<sup>85</sup> The court explained that the doctrine erroneously “protected [the] industrious collection [of work] rather than its original creation.”<sup>86</sup> Similarly, in 2002, the U.S. District Court for the Southern District of Florida stated that “[t]he theory that investment of time and energy to compile a set of facts entitles a publisher to copyright protection has been rejected by Congress and the Supreme Court.”<sup>87</sup> A later decision of the same district simply noted that “‘sweat of the brow’ was eliminated long ago.”<sup>88</sup> With the numerous citations to its death, American jurisprudence evidences a clear assumption by the courts that the doctrine has become defunct.<sup>89</sup>

#### C. Return of the “Sweat of the Brow” Doctrine in State Hot-News-Misappropriation Law

Although the *Feist* Court clearly rejected the “sweat of the brow” doctrine, it simultaneously claimed that “[p]rotection for the fruits of . . . [factual] research . . . may in certain circumstances be available under a theory of unfair competition.”<sup>90</sup> This language ultimately fostered the reemergence of the

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84. See, e.g., *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 636 (8th Cir. 1989) (extending copyright protection, not based on the labor itself, but because the plaintiffs “made certain adjustments on the basis of their expertise and . . . experience”); *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2d Cir. 1984) (“[F]ruits of another’s labor in lieu of independent research obtained through the sweat of a researcher’s brow, does not merit copyright protection absent, perhaps, wholesale appropriation.”).

85. 158 F.3d 693, 708 (2d Cir. 1998).

86. *Id.* (holding that the defendant’s substantial labor was not enough to provide copyright protection of an internal pagination system in case reporters). Industrious collection is another term used to describe the “sweat of the brow” doctrine. James E. Schatz et al., *What’s Mine Is Yours? The Dilemma of a Factual Compilation*, 17 U. DAYTON L. REV. 423, 425 (1992).

87. *Buc Int’l Corp. v. Int’l Yacht Council Ltd.*, No. 02-60772-CIV, 2002 WL 31399604, at \*3 (S.D. Fla. July 5, 2002), *aff’d*, 483 F.3d 1129 (11th Cir. 2007).

88. *Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C.*, No. 07-60654-CIV, 2009 WL 248376, at \*6 n.5 (S.D. Fla. Feb. 2, 2009) (holding that a system for medical charts did not earn copyright protection), *aff’d*, 596 F.3d 1313 (11th Cir. 2010).

89. See, e.g., *Eng’g Dynamics Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1346 (5th Cir. 1994) (noting that *Feist* marked the demise of the “sweat of the brow”); *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987) (holding that the plaintiff did not have copyright protections for a trivia book that he compiled at great expense and with great effort).

90. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (quoting NIMMER & NIMMER, *supra* note 31, § 3.04[B][1], at 3-22.12).

“sweat of the brow” doctrine through hot-news-misappropriation theory under state law.<sup>91</sup>

Several years later in *National Basketball Association v. Motorola, Inc.* (*NBA*), the Second Circuit determined that the plaintiff’s hot-news-misappropriation claim survived federal preemption,<sup>92</sup> and provided a remedy under *INS*’s hot-news-misappropriation doctrine.<sup>93</sup> The court held that a “hot-news’ *INS*-like claim” could be upheld where:

- (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of the other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.<sup>94</sup>

Under this five-part test, the Second Circuit revitalized the “sweat of the brow” doctrine by providing “proprietary interests in facts.”<sup>95</sup> *NBA*’s application of the hot-news-misappropriation test, which first appeared in *INS*, provided an avenue for those Internet news aggregators seeking copyright protection to invoke the “sweat of the brow” doctrine.<sup>96</sup>

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91. See *NBA*, 105 F.3d 841, 844–45 (2d Cir. 1997) (promoting the use of the hot-news-misappropriation tort—a theory of unfair competition that protects factual compilations).

92. *Id.* at 845 (citing H.R. REP. NO. 94-1476, at 132 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5748). State hot-news-misappropriation laws must survive federal preemption under § 301 of the 1976 Copyright Act. See 17 U.S.C. § 301 (2006).

93. *NBA*, 105 F.3d at 845. But see *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 754 (D. Md. 2003) (noting that an “unfair competition claim” will not survive federal preemption under 17 U.S.C. § 301 unless it “adds or substitutes ‘an extra element that changes the nature of the state-law action so that it is qualitatively different from a copyright infringement claim’” (quoting *United States ex rel. Berge v. Bd. of Trs.*, 104 F.3d 1453, 1463 (4th Cir. 1997))).

94. *NBA*, 105 F.3d at 845, 852 (noting that only narrow hot-news-misappropriation suits survive federal preemption). Some courts interpreted the fifth element of the *NBA* test to require “direct competition in the plaintiff’s primary market.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995).

95. See *Feist*, 499 U.S. at 354.

96. See Dov S. Greenbaum, *The Database Debate: In Support of an Inequitable Solution*, 13 ALB. L.J. SCI. & TECH. 431, 492–93 (2003) (arguing that *NBA*’s misappropriation law is a “more desirable legal protection than other possibilities” for hot-news originators).

## II. REVITALIZING THE HOT-NEWS-MISAPPROPRIATION DOCTRINE AS A STATE TORT REMEDY IN *BARCLAYS CAPITAL, INC. V. THEFLYONTHEWALL.COM*

### A. Copying and Pasting for a Profit

The financial firms in *Barclays* expend a great deal of time and resources compiling and disseminating financial reports and recommendations for their elite, high-paying investors.<sup>97</sup> After distribution, the sales employees of the Firms personally contact investors to encourage trading on one or more of the just-released recommendations.<sup>98</sup> Simultaneously, Fly, “an internet subscription news service that aggregates and publishes research analysts’ stock recommendations,”<sup>99</sup> will seek out these recommendations, and copy and paste them on to Fly’s website for its own paying customers.<sup>100</sup> Often, Fly disseminates the recommendations before the Firms are even able to contact their investors.<sup>101</sup> As a result, the Firms’ clients receive their recommendations elsewhere, and execute trades with other firms; this prevents the Firms from earning commission on the trade.<sup>102</sup>

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97. *Barclays I*, 700 F. Supp. 2d 310, 316–17 (S.D.N.Y. 2010), *rev’d in part*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011). The court recognized and described the extensive efforts of the Firms:

The preparation of research reports . . . is at the core of everything that the research departments at the Firms do. . . . To carry out their work, analysts gather company-specific and industry-wide financial results; visit a company’s facilities; build and maintain relationships with sources of information, including salespeople, corporate representatives, traders, clients, experts, and fellow analysts; conduct surveys of customers and competitors; track industry and economic trends; assess relative stock valuations; create and update financial models; synthesize the gathered data; make quantitative projections about future earnings, cash flow, balance sheet items, and stock valuations; draw conclusions; and, finally, collaborate with team members to arrive at a formal Recommendation.

*Id.* at 316–17. The Firms do not make their recommendations available to the general public, but instead distribute their reports through a password-protected Internet platform or through third-party distributors. *Id.* at 317. The length of these reports and recommendations range from one to several hundreds of pages and include future stock-price forecasts, opinions on how a company will perform in its industry, and analysis of whether one should buy, sell, or hold a company’s stock. *Id.* at 315. The reports may be published at any time of the day, but most reports are published between midnight and seven o’clock in the morning, before the stock market opens. *Id.* at 316.

98. *Id.* at 318.

99. *Id.* at 313.

100. *Id.* at 325. Theflyonthewall.com is a website featuring financial news, events, and rumors. *Id.* at 322. Fly markets its services to Wall Street outsiders to distribute “‘breaking analyst comments as they are being disseminated by Wall Street trading desks,’ [while] ‘consistently beating the news wires.’” *Id.* at 323. Fly’s customers pay up to \$480 per year for a full-access subscription to the website. *Id.* at 325.

101. *Id.* at 322.

102. See Corrected Brief for Plaintiffs-Appellees at 11, *Barclays II*, No. 10-1372-CV (2d Cir. June 20, 2011) 2011 WL 2437554, at \*24–25.

*B. The District Court Balances Public Policy and Finds Fly Liable for Hot-News Misappropriation*

In response to Fly's conduct, the Firms brought suit in the U.S. District Court for the Southern District of New York in March 2010; the Firms claimed their recommendations constituted hot news, and that Fly misappropriated the news in violation of New York's unfair-competition laws.<sup>103</sup> Although the district court recognized that the recommendations did not consist of purely objective facts, the court found that the case still turned on the hot-news-misappropriation doctrine and applied the five-prong misappropriation test from *NBA* to determine if Fly had violated the tort under New York common law.<sup>104</sup>

First, the court recognized that the Firms incur substantial expense generating recommendations through employing hundreds of analysts and expending millions of dollars to compile necessary information.<sup>105</sup> Second, the court found that the recommendations had a highly time-sensitive value.<sup>106</sup> The parties themselves did not dispute this issue because they understood that a recommendation's value comes from the "spreading of it while it is fresh."<sup>107</sup> Third, the court determined that, per Fly's business model, Fly was free-riding on the Firms and producing no original recommendations of its own.<sup>108</sup> The court also noted that the Firms and Fly were in direct competition because "dissemination of the [r]ecommendations is the 'primary business'" of both.<sup>109</sup> Lastly, the court reasoned that allowing other parties to free-ride on the Firms' efforts would discourage the Firms from producing recommendations, thereby substantially threatening their financial-research business.<sup>110</sup>

Although the district court did not cite *INS* directly, it provided *INS*-esque public policy considerations<sup>111</sup> and found that the production of recommendations fulfills "a valuable social good."<sup>112</sup> The court also claimed that failing to extend protection would discourage the Firms from producing recommendations, as they will not "achieve an economic return on their

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103. *Barclays I*, 700 F. Supp. 2d at 313.

104. *Id.* at 334–35.

105. *Id.* at 335.

106. *Id.* at 335–36.

107. *Id.* at 336 (quoting *INS*, 248 U.S. 215, 235 (1918)).

108. *Id.* at 336 ("[F]ree-riding exists where a defendant invests little in order to profit from information generated or collected by the plaintiff at great cost.").

109. *Id.* at 339.

110. *Id.* at 341.

111. *Id.*

112. *Id.* at 343. These financial recommendations "play[] a vital role in modern capital markets by helping to disclose information material to the market, to price stocks more fairly and, as a result, to produce a more efficient allocation of capital." *Id.*

investment.”<sup>113</sup> The court did acknowledge that choosing *not* to extend protection to fact-based works would serve an important public interest of providing “widespread access to information,”<sup>114</sup> and maintaining scientific and artistic progression.<sup>115</sup> However, the district court found Fly liable for hot-news misappropriation and ordered a permanent injunction, restricting Fly from copying the Firm’s recommendations for a specified period of time after the Firms released the recommendations.<sup>116</sup> Unsettled by the decision, Fly appealed.<sup>117</sup>

*C. The Second Circuit Finds the Hot-News-Misappropriation Doctrine Viable but Forecloses Barclays’ Claim*

On appeal, the Second Circuit reversed the district court’s decision to extend protection and held that federal copyright law preempted the Firms’ claim.<sup>118</sup> The court reasoned that the claim: 1) fell within the “general scope” of the Copyright Act; 2) featured a work that the Act protects; and 3) did not satisfy the five-factor hot-news-misappropriation test from *NBA*.<sup>119</sup> Most important for purposes of this Note, the Second Circuit upheld the hot-news-misappropriation doctrine as a theory of state law.<sup>120</sup>

However, the Second Circuit found that Fly did not free-ride on the work of the Firms because almost half of Fly’s employees “collect[ed], summarize[d], and disseminat[ed] the news of the Firms’ [r]ecommendations.”<sup>121</sup> After extensively quoting *INS* for notions of unfair competition, the court noted that the New York misappropriation doctrine “encompass[es] any form of commercial immorality,” when there is “taking [of] skill, expenditures and

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113. *Id.* at 344.

114. *Id.*

115. *Id.* (quoting U.S. CONST. art I, § 8, cl. 8).

116. *Id.* at 343, 345. Under the terms of the permanent injunction, if the Firms released their recommendations before the market opened, Fly could publish a copy of recommendations thirty minutes after the New York Stock Exchange opened. *Id.* at 347. If the Firm released recommendations during the trading day, Fly had to wait two hours after its release before publishing a copy. *Id.*

117. *See generally Barclays II*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011).

118. *Id.* at \*24–25.

119. *Id.*

120. *Id.* at \*13 (discussing circumstances in which the Copyright Act preempts state law). The court explained,

We might . . . speculate about a product a Firm *might* produce which *might* indeed give rise to a non-preempted “hot news” misappropriation claim. If a Firm were to collect and disseminate to some portion of the public facts about securities recommendations in the brokerage industry . . . and were Fly to copy the facts contained in the Firm’s hypothetical service, it might be liable to the Firm on a ‘hot-news’ misappropriation theory.

*Id.* at \*24 (internal citation and footnote omitted).

121. *Id.* at \*24.

labors of a competitor.”<sup>122</sup> In comparison to *INS*, the court stated that “[t]he Firms are making the news; Fly, despite the Firms’ understandable desire to protect their business model, is breaking it.”<sup>123</sup> For these reasons, the Second Circuit held that although the hot-news-misappropriation doctrine remains viable, “on the facts of this case, [the Firms] do not have an ‘*INS*-like’ non-preempted ‘hot news’ misappropriation cause of action against Fly.”<sup>124</sup>

### III. THE SECOND CIRCUIT ERRED BY NOT REJECTING THE HOT-NEWS-MISAPPROPRIATION DOCTRINE IN *BARCLAYS*

#### A. *The Hot-News-Misappropriation Test is “Sweat of the Brow” in Sheep’s Clothing*

On the surface, it appears as though the defunct “sweat of the brow” doctrine and the state tort of hot-news misappropriation were products of different eras—set on a course never to collide.<sup>125</sup> However, *Barclays I* and *II* illustrate how the hot-news-misappropriation test is merely a modernization of the “sweat of the brow” doctrine, because each element of the test reflects a characteristic or goal of the defunct doctrine.<sup>126</sup>

First, the cost of gathering information is essential to both the “sweat of the brow” doctrine and the five-part hot-news-misappropriation test.<sup>127</sup> Like the hot-news-misappropriation test, which requires the plaintiff to “generate[] or gather[] information at a cost,”<sup>128</sup> the “sweat of the brow” doctrine affords a

122. *Id.* at \*15–16 (quoting *Roy Exp. Co. Establishment of Vaduz, Liech v. Columbia Broad Sys., Inc.* 672 F.2d 1095, 1105 (2d Cir. 1982)).

123. *Id.* at \*1 (comparing *INS*, and noting that, unlike Fly’s actions, *INS* had not been “breaking” news “made” by AP).

124. *Id.* at \*24.

125. *Compare Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 84, 88–89 (2d Cir. 1922) (issuing the standard formulation of the “sweat of the brow” doctrine to an individual who compiled the names of jewelers and their trademarks), *with NBA*, 105 F.3d 841, 843–45 (2d Cir. 1997) (advancing the five-part hot-news-misappropriation test and holding that reporting sports scores in real-time via hand-held pagers does not constitute hot-news misappropriation).

126. *See* text accompanying notes 127–47. *Compare NBA*, 105 F.3d at 845 (advancing the misappropriation test), *with INS*, 248 U.S. 215, 236 (1918) (extending protection to news using the “sweat of the brow” rationale). Although the Second Circuit grappled with the *NBA* test in *Barclays II* and ultimately stated that the “language itself was not meant to, and did not, bind us, the district court, or any other court to subsequently consider this subject,” the Second Circuit still discussed each element before reaching its holding. *Barclays II*, 2011 WL 2437554, at \*19 n.32.

127. *See Barclays I*, 700 F. Supp. 2d 310, 332 (S.D.N.Y. 2010) (“[T]he misappropriation doctrine was developed to protect costly efforts to gather . . . information . . .”), *rev’d in part*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011); *Jeweler’s Circular Publ’g*, 281 F. at 89 (“He produces by his *labor* a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.”(emphasis added)).

128. *Barclays I*, 700 F. Supp. 2d at 334 (quoting *NBA*, 105 F.3d at 845).

remedy when an author has invested substantial labor, time, and money in a work.<sup>129</sup> In *Barclays II*, the Second Circuit held that a hypothetical news originator could gain a property interest in hot news if he invested labor, capital, and time.<sup>130</sup> Similarly, the court in *INS* used the “sweat of the brow” doctrine to protect a news originator’s investment of money and effort in acquiring news facts.<sup>131</sup>

Second, the time-sensitive nature of the material is a crucial component of both doctrines.<sup>132</sup> Both the *INS* and *Barclays* courts protected news, in part, because its value directly correlates to its freshness.<sup>133</sup>

Next, preventing the free-rider effect underlies both theories’ rationales for extending protection to hot-news originators.<sup>134</sup> The “sweat of the brow” doctrine prevents free-riding on the labor of news originators by requiring any subsequent author to work independently on the material as if he never saw the former’s labor.<sup>135</sup> Likewise, the misappropriation tort holds hot-news

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129. *INS*, 248 U.S. at 241 (ruling in favor of the news originator “to prevent the competitor from reaping the fruits of complainant’s efforts and expenditure”); *Jeweler’s Circular Publ’g*, 281 F. at 89 (“[N]o one has a right to take the results of the labor and expense incurred by another . . .” (quoting *Morris v. Ashbee* [1868] 7 L.R.Eq. 34, 40)).

130. *Barclays II*, 2011 WL 2437554, at \*24 (“If a Firm were to collect and disseminate to some portion of the public facts about securities recommendations in the brokerage industry . . . and were Fly to copy the facts contained in the Firm’s hypothetical service, it might be liable to the Firm on a ‘hot-news’ misappropriation theory.”).

131. *INS*, 248 U.S. at 238 (giving quasi-property protection to news because “acquisition and transmission of news require[s] elaborate organization and a large expenditure of money, skill, and effort”).

132. See *id.* at 235 (“The peculiar value of news is in the spreading of it while it is fresh.”); *NBA*, 105 F.3d at 845 (explaining that the time-sensitivity of information is crucial to the hot-news-misappropriation tort).

133. See *Barclays I*, 700 F. Supp. 2d at 336 (“The Firms’ Recommendations are clearly time-sensitive; the ‘peculiar value [of research] is in the spreading of it while it is fresh.’” (quoting *INS*, 248 U.S. at 235)); *INS*, 248 U.S. at 238 (noting that news has “an exchange value to the gatherer, dependent chiefly upon its novelty and freshness”).

134. See *INS*, 248 U.S. at 239–40 (“[D]efendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown.”); *Barclays I*, 700 F. Supp. 2d at 336 (“The third element of the *NBA* hot-news misappropriation tort is that ‘the defendant’s use of the information constitutes free-riding on the plaintiff’s costly efforts to generate or collect it.’” (quoting *NBA*, 105 F.3d at 852)).

135. See *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922) (noting that an author “‘must count the milestones for himself’” (quoting *Kelly v. Morris*, [1866] 1 L.R.Eq. 697 at 701 (Eng.)). But see *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991) (claiming that the 1909 Copyright Act did not require a compiler to work independently on a project as if he never saw the original, and noting that facts from the original work can be copied freely because copyright protection only extends to the “selection, coordination, and arrangement of facts”).

aggregators liable for free-riding and misappropriating news from news originators.<sup>136</sup>

The five-prong hot-news-misappropriation test also explicitly requires that the plaintiff and defendant compete directly<sup>137</sup>—an element that the “sweat of the brow” doctrine assumes.<sup>138</sup> For instance, in applying “sweat of the brow,” the *INS* court clearly noted that it extended protection only because the news aggregators were direct competitors.<sup>139</sup>

Finally, both the hot-news-misappropriation tort and the “sweat of the brow” doctrine protect works that would otherwise cease to exist absent protection.<sup>140</sup> *NBA* recognized that, without the misappropriation tort to protect originators, the incentive to produce the product or service would diminish and substantially threaten the existence of the material.<sup>141</sup> Similarly, the “sweat of the brow” doctrine incentivizes compilers to continue to invest labor, money, and time into their work.<sup>142</sup> Furthermore, the *INS* and *Barclays I* courts found

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136. See *Barclays II*, No. 10-1372-CV, 2011 WL 2437554, at \*22 (2d Cir. June 20, 2011).

137. *NBA*, 105 F.3d at 845.

138. See *INS*, 248 U.S. at 236 (“Regarding the news, therefore, as but the material out of which both parties are seeking to make profits *at the same time and in the same field*, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.” (first emphasis added)); *Jeweler’s Circular Publ’g*, 281 F. at 89 (“In a case such as this, no one has a right to take the results of the labor and expense incurred by another *for the purpose of a rival publication . . .*” (emphasis added) (quoting *Morris v. Ashbee*, [1868] 7 L.R.Eq. 34 at 40 (Eng.)) (internal quotation marks omitted)).

139. See *INS*, 248 U.S. at 229, 235–36 (protecting AP’s hot news because the litigants were competing news wire services). The notion of *direct* competition was perhaps clearer in *INS*, during a time when the two litigants were large, global news collectors. See *id.* In the modern age, the meaning of direct competition is more difficult to discern. Interview with Lucia A. Silecchia, Professor of Law, The Catholic Univ. of Am., Columbus Sch. of Law, in Wash., D.C. (Nov. 19, 2010). For example, is a sports website in direct competition with the *Washington Post*? *Id.* Does direct competition mean entities offering the same material, or entities that require consumers to choose between them, or both? See *id.* It seems unlikely that the general public will not purchase the *Washington Post* because some of its sports-related hot news was aggregated and available on a sports website. *Id.*

140. See *INS*, 248 U.S. at 241 (protecting news under the “sweat of the brow” doctrine because otherwise indiscriminate publication “would render publication profitless”); *Barclays I*, 700 F. Supp. 2d 310, 341 (S.D.N.Y. 2010) (protecting news under the misappropriation tort to “protect socially valuable products or services in danger of being underproduced”), *rev’d in part*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011).

141. *NBA*, 105 F.3d at 845 (asserting that a compulsory element of the hot-news-misappropriation test is that the aggregator’s free-riding “reduce[s] the incentive to produce the product”). But see Shevory, *supra* note 4, at 1037 (questioning the value of protecting news that loses relevance after a short period of time).

142. See *INS*, 248 U.S. at 235 (“That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to

that providing protection for news originators was crucial to stopping potential free-riding from extinguishing news gathering altogether.<sup>143</sup>

Ultimately, both standards are concerned with the author's efforts and labor,<sup>144</sup> and neither requires any element of creativity.<sup>145</sup> In addition, both the "sweat of the brow" doctrine and hot-news-misappropriation tort extend protection to facts—an indication that they have similar scope and intent.<sup>146</sup> This cursory review of the language of both the "sweat of the brow" doctrine and the hot-news-misappropriation test reveals that the two are functionally equivalent theories, operating under two different names.<sup>147</sup>

*B. Feist's Rejection of "Sweat of the Brow" Should Apply to Barclays Despite the Firm's Failure To Seek Copyright Protection*

Because the hot-news-misappropriation test and "sweat of the brow" are functionally equivalent, it is logical to conclude that the hot-news-misappropriation test suffers from the same defects that led the *Feist* Court to reject "sweat of the brow."<sup>148</sup> In realizing "the most fundamental axiom of copyright law—that no one may copyright facts,"<sup>149</sup> the *Feist* Court did not intend to extend protection to hot news in state tort law, despite stating that such protection could be available "in certain circumstances."<sup>150</sup>

The *Feist* court provided little guidance as to what "certain circumstances" requires,<sup>151</sup> but the facts of *INS* provide an example of such protection for a quasi-property right in a misappropriation action.<sup>152</sup> The *INS* Court held in

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afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.").

143. *Id.* at 241; *Barclays I*, 700 F. Supp. 2d at 341.

144. *See supra* text accompanying notes 127–31.

145. *See INS*, 248 U.S. at 234–35 (protecting laborious news compilations that consist of facts, rather than creative material).

146. *Compare id.* at 236 (extending protection to news facts), with *Barclays II*, No. 10-1372-CV, 2011 WL 2437554, at \*24 (2d Cir. June 20, 2011) (stating that protection is available to stock-market facts in the right circumstances), and *NBA*, 105 F.3d at 845–46 (determining whether protection should be extended to prevent the copying of sports facts).

147. *See supra* notes 126–47 and accompanying text.

148. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991) ("The 'sweat of the brow' doctrine had numerous flaws, the most glaring being that it extended copyright protection . . . to the facts themselves.").

149. *Id.*

150. *See id.* at 354 ("Protection for the fruits of such research . . . may in certain circumstances be available under a theory of unfair competition.") (quoting *NIMMER & NIMMER*, *supra* note 31, § 3.04[B][1], at 3-22.12)).

151. *See Feist*, 499 U.S. at 354.

152. *See INS*, 248 U.S. 215, 235–36 (1918) (creating the federal hot-news-misappropriation tort to protect news compiled by a large news wire service); *see also* *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 756 (D. Md. 2003) (explaining that some state-law

favor of AP because it found that without protection, there would be no “prompt, sure, steady, and reliable service . . . [of] daily events of the world at the breakfast table of the millions.”<sup>153</sup> It is not surprising that *INS* fell within the “certain circumstances,” considering the difficulty in compiling an exhaustive daily news wire in 1919 when few competitors and news outlets existed.<sup>154</sup> Conversely, the value of the Firms’ recommendations lies not in their sheer magnitude, but because of their specialized predications.<sup>155</sup> The Firms’ recommendations regarding niche financial facts do not have enormous cost implications to general society, unlike the protected news in *INS*.<sup>156</sup>

Moreover, *INS* sold AP news as its own.<sup>157</sup> Fly, on the other hand, sold “the information with specific attribution to the issuing Firm . . . [because] accurate attribution of the Recommendation to the creator . . . gives this news its value.”<sup>158</sup> With *INS* serving as the only example of what the *Feist* Court interpreted as “certain circumstances,” it is apparent that the factual differences between *Barclays* and *INS* are too great for the two decisions to deserve the same protection under hot-news-misappropriation law.<sup>159</sup> Thus, even the ideal financial hot-news-misappropriation fact pattern cited by the Second Circuit in *Barclays* would protect facts outside the purview of *Feist* and circumvent the Constitution’s Copyright Clause and Supreme Court precedent,<sup>160</sup> thus “creat[ing] a monopoly in public domain materials.”<sup>161</sup>

claims “may be protected under certain circumstances,” but not specifically indicating what a successful claim looks like).

153. *INS*, 248 U.S. at 235 (stressing that protection is necessary because AP’s business affected the majority of Americans).

154. See *id.* (noting that *INS* copied AP’s bulletins during World War I because “a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public was suddenly closed” (internal quotation marks omitted)); see also *NBA*, 105 F.3d 841, 852 n.7 (2d Cir. 1997) (claiming that *INS* is a “response to unusual circumstances rather than . . . a statement of generally applicable principles of common law”) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995)).

155. *Barclays I*, 700 F. Supp. 2d 310, 336–37 (S.D.N.Y. 2010), *rev’d in part*, No. 10-1372-CV, 2011 WL 2437554 (2d Cir. June 20, 2011).

156. Compare *INS*, 248 U.S. at 229–31, 235 (protecting general news that contributed to hundreds of newspapers, thus affecting millions of American readers), with *Barclays I*, 700 F. Supp. 2d at 315–17, 348 (protecting a very specific type of financial news, relevant only to wealthy investors and large firms).

157. *INS*, 248 U.S. at 239.

158. *Barclays II*, No. 10-1372-CV, 2011 WL 2437554, at \*22 (2d Cir. June 20, 2011).

159. See *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (noting the exceptional circumstances of *INS* did not “mean[] to lay down a general doctrine” and that the case instead applied to “no more . . . than situations substantially similar to those then at bar”).

160. *Barclays II*, 2011 WL 2437554, at \*11 (noting that Amici, Google and Twitter, urged the court to find the tort not viable); Brief for Google Inc. & Twitter Inc. as Amici Curiae Supporting Appellant at 2–4, *Barclays II*, 2011 WL 2437554 (No. 10-1372) (arguing that the hot-news-misappropriation doctrine circumvents the Constitution and Supreme Court precedent).

161. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991) (citing *NIMMER*

Instead, the Second Circuit should have rejected the application of the hot-news-misappropriation tort in all circumstances, which would have forced the Firms to seek a remedy under copyright-infringement law.<sup>162</sup> Upon review of the Firms' financial recommendations,<sup>163</sup> the court should have held that Barclay's labor-intensive recommendations lacked the requisite originality component for copyright protection.<sup>164</sup>

*C. Review of the Nearly Hundred-Year-Old Misappropriation Tort Is Necessary as Internet Hot-News Originators Rely on It at Increasing Rates*

Although the Second Circuit in *Barclays II* kept the hot-news-misappropriation doctrine viable in error, some form of protection is necessary for news originators due to the enormity of news aggregation on the Internet.<sup>165</sup> As society grows more reliant on the Internet to get news,<sup>166</sup> hot-news aggregators like Google,<sup>167</sup> Yahoo,<sup>168</sup> Facebook,<sup>169</sup>

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& NIMMER, *supra* note 31, § 3.04[B][1], at 3-22.12)).

162. See *id.* at 363 (interpreting a "sweat of the brow" work under a claim of copyright infringement).

163. *Barclays I*, 700 F. Supp. 2d 310, 344 (S.D.N.Y. 2010), *rev'd in part*, No. 10-1372-CV 2011 WL 2437554 (2d Cir. June 20, 2011) (applying the misappropriation test as if the recommendations were objective facts, even though the court acknowledged, and disregarded, that the recommendations also had subjective judgments).

164. *Feist*, 499 U.S. at 364 ("Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement.").

165. See *Database and Collections of Information Misappropriations: Joint Hearing Before the Subcomm. on Courts, The Internet, and Intellectual Prop. of the Comm. on the Judiciary & Subcomm. on Commerce, Trade, and Consumer Prot. of the Comm. on Energy and Commerce*, 108th Cong. 11 (2003) [hereinafter *Database Misappropriations*] (statement of David O. Carson, Gen. Counsel, United States Copyright Office) (explaining that fact collectors, like hot-news aggregators, are looking for protection because there is "ease and speed with which a database can be copied and disseminated, using today's digital and scanning capabilities").

166. See *Internet Overtakes Newspapers as News Outlet*, PEW RES. CENTER (Dec. 23, 2008), <http://people-press.org/2008/12/23/internet-overtakes-newspapers-as-news-outlet> (reporting that in December 2008, forty percent of Americans received a majority of their news from Internet sources, as opposed to twenty-four percent in 2007); see also Thomas Baekdal, *Where Is Everyone?*, BAEKDAL.COM (Apr. 27, 2009), <http://www.baekdal.com/media/market-of-information> (claiming that traditional forms of media will die within the next ten years and social news will be a vital part of news communication).

167. See *Google News Statistics Analytics for All Google News Sources*, GSTAT THE GOOGLE NEWS STATS ENGINE, <http://gstat.techreply.com/> (last visited Sept. 1, 2011) (reporting 2033 original news sources for Google News).

168. Jon Friedman, *Why Old Media Dreads Yahoo News*, MARKETWATCH (Feb. 17, 2006), <http://www.marketwatch.com/story/yahoo-news-flexes-its-muscles> (reporting that even in 2006, Yahoo drew 27.6 million users and that the key to their success has been their "ability to capitalize on the revolutionary ways that people now 'consume news'").

169. See *Statistics*, FACEBOOK.COM, <http://www.facebook.com/press/info.php?statistics> (last visited Aug. 25, 2011) (noting that Facebook has over 750 million users actively sharing over "30

Twitter,<sup>170</sup> and bloggers,<sup>171</sup> are collecting and copying news from other sources to keep up with the demand for faster news.<sup>172</sup> This has led news originators to evoke the hot-news-misappropriation tort at an increasing frequency to protect their labor.<sup>173</sup> With *INS* creating the hot-news-misappropriation doctrine for protection of traditional news print and *Barclays* expanding the tort to cover financial news,<sup>174</sup> the next logical step is for hot-news originators to evoke the misappropriation tort for general hot news.<sup>175</sup> Review of this nearly one-hundred-year-old remedy is therefore necessary to determine if an equivalent federal, statutory cause of action is appropriate in the Internet era.<sup>176</sup>

*D. Congress Has the Duty To Provide a Remedy to Originators of Misappropriated Hot News*

In the Second Circuit's desire to protect labor through New York's misappropriation law, the judiciary problematically advanced a doctrine rejected by the Supreme Court in *Feist*.<sup>177</sup> To avoid this problem and to incentivize hot-news gathering, questions related to the protection of hot news are best left for the legislature rather than the judiciary.<sup>178</sup> Notably, Congress—not state legislatures—must bear the responsibility of determining

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billion pieces of content (web links, news stories, blog posts, notes, and photo albums, etc.) . . . each month”).

170. *What Is Twitter?*, TWITTER.COM, <http://business.twitter.com/basics/what-is/twitter/> (last visited Sept. 1, 2011) (noting Twitter's 200 million-plus users write 200 million tweets daily).

171. *See, e.g., X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007) (noting that the blog *perezhilton.com* uses photographs from original-news sources and allegedly generates millions of hits).

172. *See Freedman & Pozza, supra* note 11, at 1.

173. *See Deutsch, supra* note 12, at 1 (claiming that online news originators will evoke the misappropriation doctrine more frequently than in the past).

174. *See INS*, 248 U.S. 215, 235 (1918); *Barclays II*, No. 10-1372-CV, 2011 WL 2437554, at \*24 (2d Cir. June 20, 2011).

175. *See Database Misappropriations, supra* note 165, at 11.

176. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430–31 (1984) (claiming that federal copyright laws need to change if the law fails to encompass technological advancements), *superseded in part by statute*, Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

177. *Compare Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991) (rejecting protection for “sweat of the brow” works unless the requirements of originality are also met), *with Barclays II*, 2011 WL 2437554, at \*24 (protecting financial news that is costly to gather if the fact pattern is ideal).

178. *See U.S. CONST.* art. I, § 8, cl. 8 (*Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”* (emphasis added)); *INS*, 248 U.S. at 267 (Brandeis, J., dissenting) (“Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news . . .”).

protection due to the inter-jurisdictional nature of the Internet.<sup>179</sup> Such revisions are customary for Congress when technology outpaces statutory concepts.<sup>180</sup> In the case of hot news, it is impracticable for enormous Internet news originators to maintain various state rights and protections while conducting business across the country.<sup>181</sup> To remedy this potential legal quagmire, Congress should establish federal protection for hot news through federal legislation.<sup>182</sup> With federal legislation, news originators will acquire the necessary incentive to gather hot news and will not be able to circumvent general copyright principles through state hot-news tort law.<sup>183</sup>

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179. See U.S. CONST. art. I, § 8, cl. 3 (providing Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); see also *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (supporting congressional regulation of the Internet and noting that state regulations would lead to inconsistent regulations); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (“[C]ertain types of commerce [like the Internet] demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of these area . . .”). When regulating the Internet, courts have suggested that a uniform national standard is more feasible. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 586–87 (2002) (O’Connor, J. concurring) (explaining that a national, rather than a local, standard should be used to define and regulate obscenity on the Internet). Similar to sellers of online adult material who cannot fully control where distribution occurs, news originators also have little control over the geographic distribution of misappropriated hot news. See *id.* at 595. Furthermore, a national uniform standard is less burdensome on both news originators and aggregators who would otherwise need to know and understand a multitude of different state tort standards. See Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25, 57 (2004) (suggesting that it is burdensome for content providers of adult online materials to have a different standard in each state). Following the Supreme Court guidance that it “explicitly refuse[s] to tolerate a result . . . [that] would vary with state lines,” a well-regulated hot-news-misappropriation doctrine requires national uniformity that only federal legislation can provide. See *Jacobellis v. Ohio*, 378 U.S. 184, 194–95 (1964).

180. See 122 CONG. REC. 31,751, 31,978 (daily ed. Sept. 22, 1976) (statement of Sen. Peter Rodino) (“The present copyright law is essentially as enacted in 1909. The technological and communications developments since that time have rendered that law obsolete and inadequate. . . . [I]t is with the most profound respect that I urge my colleagues to vote to enact this monumental revision.”).

181. See *Am. Libraries*, 969 F. Supp. at 182 (“The Internet, like . . . rail and highway traffic . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations.”).

182. *Database Misappropriations*, *supra* note 165, at 11 (statement of David Carlson, Gen. Counsel, United States Copyright Office) (proposing “the restoration of the general level of protection provided in the past under copyright ‘sweat of the brow’ theories, but under a suitable constitutional power, with flexibility built in for uses in the public interest . . . . Such balanced legislation could optimize the availability of reliable information to the public”).

183. See *id.* at 24 (statement of Keith Kupferschmid, Vice President, Intellectual Property Policy and Enforcement Software and Information Industries Association) (explaining that originators are “not seeking ‘copyright plus’ to expand copyright law to acquire exclusive rights . . . [but are] merely trying to protect from free-riders . . . . We think this is a reasonable request”).

## IV. CONCLUSION

Judicial decisions created and then rejected the “sweat of the brow” doctrine in *INS* and *Feist*, respectively. However, the hot-news-misappropriation test expounded in *Barclays* is proof that “sweat of the brow” is still alive in state tort law. Notably, the *Barclays* decision to keep the hot-news-misappropriation doctrine alive has troublesome consequences for news aggregators, as it paves the way for the expansion of the rejected “sweat of the brow” doctrine beyond financial reporting and under inadequate state safeguards. This ruling potentially enables plaintiffs to make the jump from financial hot news to general hot news, thereby negatively affecting Internet news aggregators such as Google News and bloggers alike. If courts continue to advance the hot-news-misappropriation law and its corresponding quasi-property right, Congress must act to prevent the exposure of online news sources to varying state laws, while implementing statutory protections to encourage the creation of such news which is so valuable in today’s marketplace.

