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I. INTRODUCTION

In 1917,[1] the Associated Press (AP), a news agency that distributes original reporting and news gathered by member organizations to subscribing media outlets around the globe,[2] sued a rival news service for "pirating" its content.[3] The International News Service (INS) copied AP reports from early editions of East Coast newspapers and sold that news content—sometimes rewritten and sometimes not—to its own customers, in time for many INS newspapers on the West Coast to print it at the same time or sooner than western AP member newspapers.[4]

That the AP and other news organizations today face similar pirating activity, now online as well as in print, should hardly surprise. In a handful of actions filed in the last several years, the AP and other news organizations have sought relief from rivals alleged to have pirated content.[5] But a legal theory relied upon by the plaintiffs in these modern pirating cases is surprising, both because it is the same theory under which the AP ultimately prevailed against the INS in 1918[6] and because of the significant developments that have occurred in the legal and news landscapes since that case was decided.

The tort doctrine of misappropriation was crafted by the United States Supreme Court in *International News Service v. Associated Press* to afford relief to a business from the use of its own, pirated product

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1. VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE 15 (2005).

2. Associated Press, About Us, http://www.ap.org/pages/about/about.html (last visited Aug. 23, 2010).

3. Associated Press v. Int'l News Serv. (*INS I*), 240 F. 983 (S.D.N.Y. 1917), *modified*, 245 F. 244 (2d Cir. 1917), *aff'd*, 248 U.S. 215 (1918).

4. *Id.*

5. *See, e.g.*, Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings); Complaint, Associated Press v. Moreover Techs., Inc., No. 07 Civ. 8699(GBD) (S.D.N.Y. Oct. 9, 2007), *dismissed per stipulation* (S.D.N.Y. Aug. 15, 2008).

6. Int'l News Serv. v. Associated Press (*INS III*), 248 U.S. 215 (1918).

against it in commercial competition by a business rival.[7] The scope of protection against misappropriation was soon questioned, however,[8] and the subsequent abolition of federal common law[9] and expansion of federal copyright protection to the preclusion of certain state law claims[10] dealt blows to the doctrine. The legal status of the misappropriation tort today is unsettled. Recent actions for "hot news misappropriation," as piracy of fresh news content by a news competitor has come to be known,[11] have been decided differently[12] or have been resolved out of court.[13]

Apart from the questions whether and in what form the misappropriation tort survives is another question: do today's news organizations need the doctrine? The advent and widespread use of computers and the Internet have fundamentally reshaped the consumption of news and the economics of newsgathering.[14] An examination of the availability of the hot news misappropriation cause of action would be incomplete without considering what use twenty-first century news organizations have for the early twentieth century remedy.

In light of recent hot news misappropriation decisions and non-legal developments affecting newsgathering, this Comment examines both the availability and the importance of the misappropriation tort as a remedy

7. *Id.* at 239–40.

8. *See* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280–81 (2d Cir. 1929).

9. Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).

10. *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 391 (prior to amendments enacted in 1976) (adding protection for sound recordings); 17 U.S.C. § 301 (2006) (preemption clause enacted in 1976 and effective Jan. 1, 1978).

11. *See, e.g.*, Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 843, 850 (2d Cir. 1997); Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 494 (D. Md. 2010) (report and recommendation).

12. *Compare* Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 458–61 (S.D.N.Y. 2009) (denying a motion to dismiss a claim alleging misappropriation of hot news), *with* Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 754–56 (D. Md. 2003), Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, at *16 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings), *Agora*, 725 F. Supp. 2d at 494–503, *and* Barclay's Capital Inc. v. Theflyonthewall.com, No. 10-1372-cv, 2011 U.S. App. LEXIS 12421, at *76–77 (2d Cir. June 20, 2011) (all holding plaintiffs' particular hot news misappropriation claims preempted by the Copyright Act, with some disagreement among the courts about which hot news misappropriation claims might survive preemption).

13. X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102 (C.D. Cal. 2007) (order regarding defendant's motion to dismiss), *injunction denied*, No. CV06-7608-VBF(JCX), 2007 U.S. Dist. LEXIS 17279 (C.D. Cal. Mar. 8, 2007), *dismissed per stipulation*, No. 206CV07608, 2008 WL 2071607 (C.D. Cal. Apr. 20, 2008) (hot news misappropriation claim settled after district court held that the claim was cognizable under California law and encompassed copyrightable photographs but denied plaintiff's motion for an injunction); Associated Press v. Moreover Techs., Inc., No. 07 Civ. 8699(GBD) (S.D.N.Y. dismissed per stipulation Aug. 15, 2008) (hot news misappropriation claim dismissed with prejudice by stipulation of the parties).

14. *See infra* Part V.

for a news organization threatened by a competitor's piracy for profit of content not otherwise entitled to meaningful protection as intellectual property.

Part II details the birth of misappropriation in *INS v. AP* and the tale of the tort's improbable survival during its first four decades. Part III explains the statutory and case law at the center of the unsettled debate—ongoing since the 1960s—over whether and in what form the misappropriation cause of action survives preemption by federal copyright law. Part IV enters the preemption debate, analyzing whether the legal developments addressed in Part III have effectively eliminated the misappropriation remedy and, if not, what a plaintiff must establish to have an actionable claim for hot news misappropriation.

Part V details non-legal developments since the *INS* case—namely, the Internet's disruption of the economics of newsgathering—relevant to the question whether the tort retains utility as a remedy for piracy of news content for profit. That question is addressed in Part VI.

Part VII summarizes the conclusions reached in Parts IV and VI. First, claims alleging misappropriation of hot news likely are not preempted by federal law, though the misappropriation cause of action that survives is largely limited to *INS*-like facts. Second, judicial disagreement over the requirements for a plaintiff to avoid preemption of a misappropriation claim should be resolved by following decisions imposing a lower threshold so that a remedy remains available to redress true hot news piracy. Finally, the misappropriation tort remains a vital tool that news organizations—left without meaningful protection against news piracy under federal intellectual property law—can employ to fight back against piracy that, in the wake of the Internet's decimation of the traditional newsgathering business model and facilitation of content piracy, poses a very real threat to their survival and to the continued availability of news to the public.

II. ORIGIN AND EVOLUTION OF THE MISAPPROPRIATION TORT

The tort of misappropriation is a species of unfair competition.[15] Misappropriation is free riding on the plaintiff's business product by a commercial competitor, whose avoidance of the plaintiff's investment

15. *INS III*, 248 U.S. 215, 240 (1918); Am. Television & Commc'ns Corp. v. Manning, 651 P.2d 440, 445 (Colo. App. 1982); McKevitt v. Pallasch, 339 F.3d 530, 534–35 (7th Cir. 2003); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 1013, 1020–22 (5th ed. 1984); 2 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 15:2 (4th ed. 2007); Elizabeth T. Tsai, Annotation, *Unfair Competition by Direct Reproduction of Literary, Artistic, or Musical Property*, 40 A.L.R.3d 566, § 6 (1971).

costs gives it an unfair advantage over the plaintiff in the marketplace and whose free riding diverts to it the profits that constitute the plaintiff's incentive to produce.[16]

More than the economic harm already suffered, a misappropriation plaintiff fears the greater economic harm to come if the free riding on its investment is allowed to continue, and therefore, usually seeks an injunction against its free-riding competitor.[17] The misappropriation doctrine developed to protect—and has usually been available only to—plaintiffs whose pirated products fall outside the scope of statutory intellectual property protection.[18]

By creating the misappropriation tort in *INS v. AP*, the U.S. Supreme Court recognized a new, limited property interest in uncopyrighted news content beyond any before contemplated by the laws of intellectual property or unfair competition. The origin of the misappropriation tort in *INS* is detailed in subpart A. Federal courts' conservative interpretation of the new tort doctrine and the early adoption of the tort by several state courts are discussed in subpart B. Subpart C describes how the nascent tort, which could have suffered a fatal blow upon the abolition of federal common law in 1938, transitioned instead from federal common law to the common law of numerous states, where application of the tort expanded beyond the news business.

A. INS v. AP*: Birth of the Misappropriation Tort*

The AP and INS competed with each other to supply domestic and foreign news to their member newspapers, which supplemented staff news reports with news agency accounts of events the newspapers' finite resources left them unable to cover.[19] Three INS practices drew the ire

16. This definition of misappropriation is derived from courts' treatment of the tort in the following: *INS III*, 248 U.S. at 240; *McKevitt*, 339 F.3d at 534 (7th Cir. 2003); Sioux Biochemical, Inc. v. Cargill, Inc., 410 F. Supp. 2d 785, 806 (N.D. Iowa 2005); Veatch v. Wagner, 116 F. Supp. 904, 906 (D. Alaska 1953); Mercury Record Prods., Inc. v. Econ. Consultants, Inc., 218 N.W.2d 705, 714–15 (Wis. 1974); *Nat'l Basketball Ass'n*, 105 F.3d at 852.

17. *See, e.g.*, *INS III*, 248 U.S. at 231–32; McCord v. Plotnick, 239 P.2d 32, 33 (Cal. Ct. App. 1952); Complaint, Associated Press v. Moreover Techs., Inc., No. 07 Civ. 8699(GBD) 2 (S.D.N.Y. Oct. 9, 2007), *dismissed per stipulation* (S.D.N.Y. Aug. 15, 2008).

18. *See* Powell Prods., Inc. v. Marks, 948 F. Supp. 1469, 1476 (D. Colo. 1996); Balboa Ins. Co. v. Trans Global Equities, 267 Cal. Rptr. 787, 795 (Cal. Ct. App. 1990). *But see X17, Inc.*, 563 F. Supp. 2d at 1108 (finding that uncopyrightability is not a prerequisite for protection against piracy of photographs under the California hot news misappropriation tort); Waring v. WDAS Broad. Station, Inc., 194 A. 631, 638 (Pa. 1937) (holding plaintiff with a common-law property right entitled to protection on the "additional ground" of misappropriation). For the same reason, the doctrine of misappropriation has always been controversial. *See, e.g.*, *INS III*, 248 U.S. at 246–51 (Holmes, J., and Brandeis, J., dissenting); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995).

19. *INS I*, 240 F. 983, 984–85 (S.D.N.Y. 1917), *modified*, 245 F. 244 (2d Cir. 1917), *aff'd*, 248

of the AP and drove the latter to file suit in the U.S. District Court for the Southern District of New York seeking an injunction.[20] Two amounted to inducement by the INS of breaches by AP member newspapers of their agreement with the AP, and profiting from that inducement—wrongs recognized as actionable under then-existing contract law.[21]

The third practice became the focus of appeals and amounted to what the U.S. Supreme Court would ultimately recognize as the tort of misappropriation.[22] The INS copied AP news published in early-edition East Coast newspapers and sold the copied stories, either verbatim or in reworded form, to INS-subscribing West Coast newspapers, which published them at the same time or sooner than AP-subscribing West Coast newspapers could.[23] Whether such copying and resale of a news agency's news after the first publication of the news but before the agency could distribute it for widespread publication amounted to unfair competition entitling the aggrieved agency to an injunction against its free-riding competitor was a question of first impression.[24]

The INS defended its post-publication use of AP news as lawful because all it took from the AP were facts,[25] which were entitled to no copyright protection—a point the AP conceded.[26] The INS further argued that even if the AP had a property interest in its news, it abandoned that interest to the public upon first publication of the news in an AP-member newspaper.[27]

The district court was inclined to enjoin the post-publication piracy by

U.S. 215 (1918).

20. *Id.* at 985.

21. *See id.* at 985, 988 (citing Bd. of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905) and several other cases); Associated Press v. Int'l News Serv. (*INS II*), 245 F. 244, 247 (2d Cir. 1917) (citing Am. Malting Co. v. Keitel, 209 F. 351 (2d Cir. 1913)), *aff'd*, 248 U.S. 215 (1918); Peabody v. Norfolk, 98 Mass. 452 (1868); F. W. Dodge Co. v. Constr. Info. Co., 183 Mass. 62 (1903). The INS paid employees of AP-member newspapers to tip it off to not-yet-published local news that each newspaper was obligated to supply to the AP and to global news that the AP supplied to its members, in violation of the agreement that the AP had with its members. *INS I*, 240 F. at 985–87. INS employees also daily read and sometimes took notes from the sheets of AP-transmitted news received by one of its member newspapers that was located in the same building as an INS office, a practice the newspaper apparently allowed in breach of its contract with the AP. *INS I*, 240 F. at 988.

22. *INS I*, 240 F. at 985, 990–96.

23. *Id.* at 985, 991; *INS III*, 248 U.S. at 231–32, 238.

24. *INS I*, 240 F. at 995–96.

25. *INS II*, 245 F. at 248.

26. *INS III*, 248 U.S. at 233. For background on the AP's decision to argue in *INS v. AP* that news fell outside the scope of copyright protection, see Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate Over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 359–70 (2009); EKSTRAND, *supra* note 1, at 67–69.

27. *INS I*, 240 F. at 992–93; *INS II*, 245 F. at 248.

the INS of AP news for three or four hours, which it thought "ought to be sufficient time to protect the business interests of the news service that first acquired [the news]," but ultimately declined to do so because such an injunction was without precedent.[28] On appeal the U.S. Court of Appeals for the Second Circuit modified the district court's order to enjoin the INS from "any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has . . . passed away."[29] The court found a property interest in news and held that the AP's property right in news it gathered endured until its "most Western member has enjoyed his reward, which is, not to have his local competitor supplied in time for competition with what he has paid for."[30]

The only question before the Supreme Court was whether the INS could be restrained from pirating published AP news and selling that news to INS clients.[31] The Court found it necessary to decide first whether a news organization possesses a property interest in its news.[32] It focused on news agencies' relationship to each other as competitors, not on any property status the federal copyright statute or common law might confer on news.[33] The Court held that although no news agency could claim a property interest as against the public in published, uncopyrighted news, as between competing news agencies, news must be regarded as "*quasi* property."[34]

28. *INS I*, 240 F. at 995–96.

29. *INS II*, 245 F. at 253.

30. *Id.* at 248–50.

31. *INS III*, 248 U.S. at 232.

32. *Id.*

33. *Id.* at 235–36.

34. *Id.* at 236. Jurists and commentators have disagreed about the locus of the quasi-property interest the Supreme Court held the AP retained as against its free-riding competitor. *See* Nat'l Exhibition Co. v. Teleflash, Inc., 24 F. Supp. 488, 490 (S.D.N.Y. 1936) (the quasi property interest was in the "current news" gathered at the news agency's expense and with its industry); Dale P. Olson, *Common Law Misappropriation in the Digital Era*, 64 MO. L. REV. 837, 876 (1999) (in the value of that news); Mercury Record Prods., Inc., v. Econ. Consultants, Inc., 218 N.W.2d 705, 714 (Wis. 1974) (in the "investment of time, skill, and money," rather than the resulting product); McKevitt v. Pallasch, 339 F.3d 530, 534 (7th Cir. 2003) (in the act of gathering); Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657, 663 n.7 (Pa. 1963) (in the gathering infrastructure); EKSTRAND, *supra* note 1, at 72 (the AP argued that it possessed a property right in the "quality of firstness in news" to the extent that the news was the product of its labor, skill, and expense); Edmund J. Sease, *Misappropriation is Seventy-Five Years Old; Should We Bury It or Revive It?*, 70 N.D. L. REV. 781, 805 (1994) (property interest in "the economic value of being first in the marketplace with the news"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995) (the INS deprived the AP of the "opportunity to exploit the advantage of a lead time in the market"). None of these pinpoint the quasi-property interest incorrectly, for the Court's holding hinged on all of these factors: the exchange value of time-sensitive news, the AP's investment in procuring it, free riding by the INS on that investment in direct competition with the AP, and the long-term threat to the AP if it remained unable to cash in on the value

A news agency does not abandon its "*quasi* property" interest in its news when the news first appears in print, the Court held, rejecting the INS's argument to the contrary.[35] The costs of newsgathering would be prohibitive if news organizations' assured reward were limited to sale of their news prior to first publication, the Court recognized.[36] Without protection against competitors' piracy of its published as well as unpublished news, a newsgathering business would be "so little profitable as in effect to cut off the service."[37]

Piracy of AP news by the INS constituted unfair competition, the Supreme Court concluded: by selling AP news as its own to newspapers competing with AP client newspapers, the INS "is endeavoring to reap where it has not sown, and . . . is appropriating to itself the harvest of those who have sown."[38] Describing the essence of what it recognized as the new tort of misappropriation, the Court characterized the INS's pirating activity as:

> an unauthorized interference with the normal operation of the complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.[39]

The *INS v. AP* decision expanded the definition of unfair competition, which had previously required "either fraud or force or the doing of acts otherwise prohibited by law," such as misrepresenting, or "passing off," one's product as the plaintiff's.[40] The decision was also the first to find a protectable property interest in published news; several earlier decisions finding a property interest in trade news or market quotations rested on the notion that the material had been pirated prior to its dedication to the public by publication.[41]

Still, the decision afforded newsgatherers facing piracy only a limited, temporary protection: postponement of participation by a free-riding

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it created.

35. *INS III*, 248 U.S. at 240. Abandonment turned on intent. *Id.* The AP's purpose in disseminating its news, and that of AP-member newspapers in printing it, was to benefit readers, not to permit "indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer." *Id.* at 240–41.

36. *See INS III*, 248 U.S. at 240–41.

37. *See id.* at 241.

38. *Id.* at 239–40.

39. *Id.*

40. *See id.* at 258 (Brandeis, J., dissenting).

41. *See INS III*, 248 U.S. at 256; Olson, *supra* note 34, at 873–75; EKSTRAND, *supra* note 1, at 43–46.

competitor "in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure" by partially excluding the newsgatherer from its own profits.[42] It created no monopoly in the gathering or distribution of news and permitted use by a news organization of competitors' news as tips to be independently verified and then sold as news.[43]

B. Misappropriation as Federal Common Law, 1918–1938

Recognition of the tort of misappropriation by the Supreme Court in *INS v. AP* was a matter of federal common law—the authority of federal courts at the time to formulate common-law principles rather than defer to state common law when hearing a state-law claim.[44] The *INS v. AP* holding therefore bound lower federal courts.

Federal courts applying the new doctrine tended to find against misappropriation plaintiffs, because cases were factually dissimilar from *INS v. AP*, relief was available in the form of another claim, or one or more elements critical to the *INS v. AP* holding was lacking.[45] Given some federal judges' narrow interpretation of *INS v. AP*, including Judge Learned Hand of the Second Circuit,[46] and the general reluctance of federal courts in the years following the decision to find misappropriation in factually dissimilar cases, the relevance of the decision and scope of the new tort were not immediately clear.

Though not bound by the *INS v. AP* decision, state courts in four states—Missouri, Texas, New York, and Pennsylvania—adopted the tort of misappropriation between 1924 and 1937.[47] The actionable

42. *INS III*, 248 U.S. at 241 (majority opinion).

43. *Id.* at 241, 245.

44. *See* McKevitt v. Pallasch, 339 F.3d 530, 534 (7th Cir. 2003); ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 960 (7th Cir. 2006).

45. Sease, *supra* note 34, at 787–90; EKSTRAND, *supra* note 1, at 84–85.

46. Judge Hand emerged as a strong critic of applying the misappropriation tort outside the factual confines of *INS v. AP*. Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280–81 (2d Cir. 1929); RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 89–90 (2d Cir. 1940); *see also* EKSTRAND, *supra* note 1, at 85. The *INS v. AP* decision was limited to the facts sub judice and did not, despite its broad language, "lay down a general doctrine," Judge Hand said. *Cheney Bros.*, 35 F.2d at 280; *RCA*, 114 F.2d at 90. *Accord* G. Ricordi & Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952). He believed any such doctrine would "flagrantly conflict" with copyright and patent statutes. *Cheney Bros.*, 35 F.2d at 280. He declined on that basis to find misappropriation, for example, where a silk manufacturer's pattern was copied by another manufacturer and sold at a lower price in the same season, undercutting the first manufacturer's profits. *Id.* at 279, 281.

47. Sease, *supra* note 34, at 789 (citing Nat'l Tel. Directory Co. v. Dawson Mfg. Co., 263 S.W. 483 (Mo. Ct. App. 1924); Gilmore v. Sammons, 269 S.W. 861 (Tex. Civ. App. 1925); F.W. Dodge Corp. v. Comstock, 251 N.Y.S. 172 (N.Y. Sup. Ct. 1931); Waring v. WDAS Broad. Station, Inc., 194 A.

misappropriation in early state court cases ranged from piracy of construction trade news[48] to a radio station's plan to broadcast an unauthorized play-by-play of a boxing match by essentially listening to and copying the authorized broadcast.[49]

Twenty years after *INS v. AP*, the U.S. Supreme Court abolished federal common law in *Erie Railroad Co. v. Thompkins*.[50] That decision transformed the *INS v. AP* holding from binding on federal courts to binding on none and could have rendered it—and the young misappropriation doctrine—irrelevant. If news organizations or any other businesses were to secure protection against misappropriation, it would have to be through recognition and application of the tort by state courts.

*C. State Courts' Recognition of Misappropriation Post-*Erie

Though relegated by *Erie* to purely advisory effect, the Supreme Court's *INS v. AP* decision has remained a lasting influence on state courts and on federal courts charged with following states' common law when adjudicating state-law claims.[51] Courts in at least fourteen states have recognized the misappropriation tort.[52] By contrast, only Massachusetts seems to have rejected the doctrine outright.[53] In many

631 (Pa. 1937)).

48. *Gilmore*, 269 S.W. at 862; *F.W. Dodge Corp.*, 251 N.Y.S. at 173–74.

49. Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc., 300 N.Y.S. 159, 159–60 (N.Y. Sup. Ct. 1937); *see also Waring*, 194 A. at 633 (radio broadcast of an orchestra's recorded performance in competition with its live performance on another station); *Nat'l Tel. Directory*, 263 S.W. at 483–84 (attachment of false covers filled with advertising to the original covers of telephone directories produced by the plaintiff, obscuring lucrative cover advertisements sold by the plaintiff); Sease, *supra* note 34, at 788–89.

50. Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).

51. *See, e.g.*, Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483, 490–92 (N.Y. Sup. Ct. 1950), *aff'd*, 279 A.D. 632 (N.Y. App. Div. 1951); Mercury Record Prods., Inc. v. Econ. Consultants, Inc., 218 N.W.2d 705, 709–15 (Wis. 1974); Am. Television & Commc'ns Corp. v. Manning, 651 P.2d 440, 444–45 (Colo. App. 1982); Sioux Biochemical, Inc. v. Cargill, Inc., 410 F. Supp. 2d 785, 805–06 (N.D. Iowa 2005).

52. According to Sease, *supra* note 34, at 801–02 (citing cases), as of 1994, state courts in Missouri, Texas, New York, Pennsylvania, California, Colorado, Illinois, North Carolina, South Carolina, Wisconsin, New Jersey, and Maryland adopted the misappropriation doctrine, and federal courts applying state law predicted the tort would be recognized by state courts in Alaska and Delaware. This list remains accurate as of late 2010.

53. *See id.* at 791, 802; Triangle Publ'ns, Inc. v. New England Newspaper Publ'g Co., 46 F. Supp. 198, 203–04 (D. Mass. 1942); New England Tel. & Tel. Co. v. Nat'l Merch. Corp., 141 N.E.2d 702, 707–08, 711 (Mass. 1957). The Supreme Judicial Court of Massachusetts squarely rejected the extension of unfair competition to include the misappropriation tort described in *INS*. *New England Tel. & Tel. Co.*, 141 N.E.2d at 707–08, 711. The cause of action may be unavailable in several other states due to decisions holding misappropriation claims preempted. According to Sease, who published in 1994, only federal courts in Massachusetts and Hawaii, and no state court, had specifically held

states, case law on misappropriation is nonexistent,[54] and the question of recognition or rejection of the tort in those states remains undecided and unpredictable.

In states recognizing the misappropriation tort, news piracy has, predictably, been held to constitute actionable misappropriation.[55] For example, a California publisher of credit- and textile-industry trade news, which it gathered at great expense and sold to subscribers, won an injunction against and damages from a publisher that copied its news in lieu of employing a reporting staff for a competing newsletter that demonstrably diverted the plaintiff's customers.[56]

Protection against hot news misappropriation was not long limited to the print realm, but carried over to radio and television; courts have recognized that a hot news misappropriation plaintiff and defendant may be news competitors though producing news in different media. Courts in Alaska and Pennsylvania, for example, held that radio stations' use in news broadcasts of news items taken from local newspapers constituted misappropriation entitling the plaintiff publishers to relief.[57] The Pennsylvania Supreme Court recognized that a plaintiff publisher and defendant broadcaster were competing not only to attract news consumers, but vied also for the advertising dollars that sustain most news operations: "Advertising is the life-blood of newspapers, radio and television and the presentation of news by all three media is a service designed to attract advertisers."[58]

Courts also applied the doctrine beyond situations strictly analogous to that in *INS v. AP*. Plaintiffs successfully invoked the misappropriation doctrine to restrain unauthorized broadcasts or duplication of sound recordings prior to their protection under federal copyright law[59] and to stop the broadcast of pirated play-by-play

misappropriation claims preempted by federal law as of that time. Sease, *supra* note 34, at 802. Since then, federal courts in Maryland and Pennsylvania and a state court in Arizona have also held misappropriation claims preempted. *See* Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737 (D. Md. 2003); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings); Fairway Constructors, Inc. v. Ahern, 970 P.2d 954 (Ariz. Ct. App. 1998).

54. Olson, *supra* note 34, at 889.

55. McCord v. Plotnick, 239 P.2d 32, 33–35 (Cal. Ct. App. 1952); Veatch v. Wagner, 116 F. Supp. 904, 906 (D. Alaska 1953); Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657, 658–59, 663–64 (Pa. 1963).

56. *McCord*, 239 P.2d at 32–35.

57. *Veatch*, 116 F. Supp. at 905–07; *Pottstown*, 192 A.2d at 658–59, 663–64.

58. *Pottstown*, 192 A.2d at 663.

59. Olson, *supra* note 34, at 884–86; EKSTRAND, *supra* note 1, at 88–91; Sease, *supra* note 34, at 788–89.

accounts of sporting events.[60] Except for New York courts, which recognized a more expansive tort of misappropriation than courts in other states,[61] state courts have applied the doctrine consistently and "within the lines laid down by the Supreme Court in the *INS* case."[62]

III. PREEMPTION OF MISAPPROPRIATION CLAIMS: DEVELOPMENTS AND DEBATE

Initial debate about misappropriation centered on its merits as an actionable form of unfair competition.[63] Beginning in the mid-1960s, a series of copyright law decisions and amendments, summarized in subpart A, raised new questions about the preclusive effect of federal copyright and patent statutes on misappropriation claims. Debate, as indicated by recent court decisions summarized in subpart B, continues today about the extent to which federal law preempts misappropriation claims and whether any survive.

A. Federal Copyright Law and Preemption

Congress derives its authority to enact copyright and patent laws from the U.S. Constitution.[64] The purpose of giving authors and inventors rights in their work is to incentivize creation and invention, thereby benefitting the public.[65] Copyright statutes protect certain expressive works, while patent statutes protect inventions.

At the time of the *INS v. AP* decision, federal copyright protections were set forth in the Copyright Act of 1909.[66] Newspapers and other

60. EKSTRAND, *supra* note 1, at 91–94; Sease, *supra* note 34, at 788.

61. *See* EKSTRAND, *supra* note 1, at 90; Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 851 (2d Cir. 1997); Sease, *supra* note 34, at 801–02.

62. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 640 (2003); *see also* Ryan T. Holte, Comment, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1, 26 (2008) (stating that the misappropriation "doctrine essentially remained as it was created in *INS v. AP* until the 1964 Supreme Court *Sears-Compco* decisions").

63. This debate started with the dissents of Justices Holmes and Brandeis and continues today. *See, e.g.*, *INS III*, 248 U.S. 215, 246–67 (1918) (Holmes, J., and Brandeis, J., dissenting); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280–81 (2d Cir. 1929); Sease, *supra* note 34; Posner, *supra* note 62.

64. U.S. CONST. art. I, § 8, cl. 8. Among the congressional powers enumerated in Article I, Section 8 is the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

65. *See* Holte, *supra* note 62, at 10.

66. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (current version at 17 U.S.C. §§ 101–1332 (2006)). The Copyright Act of 1909 named certain categories as protected as "the writings of an author." Copyright Act of 1909, Pub. L. No. 60-349, §§ 4, 5, 35 Stat. 1075, 1076–77 (1909).

periodicals had become eligible for federal copyright in 1909,[67] but the requirements for securing copyright protection for an eligible work—publication, registration with the copyright office, and notice[68]—was impracticable for a daily news organization and effectively left news stories unprotected by federal law.[69]

Changes in federal copyright law and in courts' interpretation of federal copyright law since *INS v. AP* have affected the availability of the misappropriation tort on two levels. Changes to the list of copyright-eligible subject matter have tended to impact the *scope* of the misappropriation tort—the range of materials a state can protect against piracy. There are two reasons for this: First, plaintiffs have tended to resort to and courts have tended to recognize the misappropriation tort when no other cause of action—such as copyright infringement—has been available to remedy the piracy at issue.[70] Second, congressional action to confer federal copyright protection on certain subject matter or to leave it without federal protection can signal an intent to preclude state action with respect to that category of subject matter.[71] But certain congressional action in the intellectual property arena may also affect the *existence* of a cause of action such as misappropriation. When Congress has not been clear on whether action is intended to supplement or to preclude state action, courts are tasked with deciding the extent to which a disputed state cause of action survives preemption, if at all. This subpart summarizes, in chronological order, major developments affecting the scope and survival of the misappropriation tort. The focus is on developments calling into question the very existence of the misappropriation tort, which remains an unsettled question.

67. Copyright Act of 1909, Pub. L. No. 60-349, § 5(b), 35 Stat. 1075, 1076 (1909).

68. Copyright Act of 1909, Pub. L. No. 60-349, §§ 9, 12–13, 18–19, 35 Stat. 1075, 1077–79 (1909).

69. *See* EKSTRAND, *supra* note 1, at 39–40 ("[N]ews organizations found it generally impractical to file for copyright protection on each dispatch."). State common-law copyright protection was also available at the time of *INS v. AP*. Olson, *supra* note 34, at 844–45; *see also* Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 256–62 (N.Y. 2005) (discussing the former dual system of federal and state copyright protection). It gave authors a right of first publication, but provided no protection once a work was published and thereby dedicated to the public. *Capitol Records*, 830 N.E.2d at 256–62. This served as the basis for the INS argument that the news it pirated from the AP fell under common law copyright, had been published, and was therefore free to use. EKSTRAND, *supra* note 1, at 42.

70. Relief under the misappropriation doctrine has traditionally been limited to plaintiffs whose pirated products fall outside the scope of the federal system of intellectual property protection. *See* Powell Prods., Inc. v. Marks, 948 F. Supp. 1469, 1476 (D. Colo. 1996); Balboa Ins. Co. v. Trans Global Equities, 267 Cal. Rptr. 787, 795 (Cal. Ct. App. 1990).

71. *See* Goldstein v. California, 412 U.S. 559 (1973).

1. *Sears-Compco*

Two 1964 Supreme Court decisions cast the misappropriation doctrine into serious doubt as potentially preempted by federal intellectual property law[72]: *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.*[73] In both cases, the Supreme Court held that a state's common law of unfair competition could not protect product manufacturers against copying by competitors of their product designs where the designs did not meet the criteria for federal design patent protection.[74] The Court's language in the *Sears-Compco* decisions suggested to some the end of the misappropriation doctrine:[75]

> [W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.[76]

In the wake of *Sears-Compco*, the First and Second Circuits disagreed about whether misappropriation claims were preempted.[77]

2. *Goldstein*

Nearly a decade after *Sears-Compco*, another Supreme Court decision, *Goldstein v. California*, rehabilitated the misappropriation doctrine.[78] In *Goldstein*, the Court held that federal copyright law, prior to an amendment making sound recordings copyright eligible, had not preempted a California statute criminalizing the piracy of sound recordings.[79] What breathed new life into the misappropriation doctrine was the Court's distinction, central to its holding, between affirmative congressional decisions to give federal protection to categories of

72. Sease, *supra* note 34, at 793; EKSTRAND, *supra* note 1, at 96–97; Holte, *supra* note 62, at 26–27.

73. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

74. *Sears*, 376 U.S. at 225–26, 231; *Compco*, 376 U.S. at 234–35, 237.

75. EKSTRAND, *supra* note 1, at 97. If not the end of the misappropriation doctrine, the language of the *Sears-Compco* decisions suggested that a misappropriation plaintiff might, in order to avoid preemption of the claim by federal copyright law, have to show that the defendant engaged in "palming off," such as by failing to cite the source of pirated information. Holte, *supra* note 62, at 27.

76. *Compco*, 376 U.S. at 237.

77. Sease, *supra* note 34, at 795 (citing Columbia Broad. Sys., Inc. v. DeCosta, 377 F.2d 315 (1st Cir. 1967); Flexitized, Inc. v. Nat'l Flexitized Corp., 335 F.2d 774 (2d Cir. 1964)).

78. *See* Sease, *supra* note 34, at 796; EKSTRAND, *supra* note 1, at 103.

79. Goldstein v. California, 412 U.S. 546, 548–51, 571 (1973).

"writings" deemed worthy and to exclude from protection certain categories when the national interest required their "free and unrestricted distribution,"[80] on one hand, and congressional inaction, on the other.[81] Affirmative congressional action preempts state action "to protect that which Congress intended to be free from restraint or to free that which Congress had protected."[82] But, the Court reasoned, congressional inaction cannot conflict with and therefore does not preempt state action.[83]

In contrast to the sound recording protections in *Goldstein*, which survived because the lack of copyright protection for sound recordings resulted from congressional inaction, Congress intended the patent system at issue in *Sears-Compco* to leave free from state protection inventions that did not meet the criteria for federal protection, and that action preempted state protections.[84]

The same reasoning permitting a state to extend statutory protection to works unprotected under federal copyright law as long as the lack of protection was a result of congressional inaction rather than affirmative decision-making meant that a state could do the same by common law, such as misappropriation.[85] Two Supreme Court cases after *Goldstein*, *Kewanee Oil Co. v. Bicron Corp.* in 1974 and *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* in 1989, also left room for states to provide intellectual property protections not in conflict with federal law.[86]

3. The 1971 Copyright Amendments

Congress amended copyright law in 1971 to extend protection to sound recordings "fixed, published, and copyrighted" on and after February 15, 1972.[87] The preemptive effect of this extension of copyright protection to sound recordings on state protections for such

80. *Id.* at 559.

81. *Id.*

82. *Id.*

83. *Id.*

84. Goldstein, 412 U.S. at 569–70.

85. The closest the Court came in *Goldstein* to referencing the misappropriation tort was a brief rebuke, in dicta, of Justice Brandeis's dissent in *INS v. AP*. *Id.* at 570–71. But the direct applicability of the *Goldstein* holding and rationale to the misappropriation doctrine was clear. According to the Wisconsin Supreme Court, "*Goldstein* completely repudiates Judge Hand's rationale criticizing *I.N.S.*" Mercury Record Prods., Inc. v. Econ. Consultants, Inc., 218 N.W.2d 705, 714 (Wis. 1974).

86. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 478–79 (1974); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 165–66 (1989).

87. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (prior to 1976 amendments); *see also Goldstein*, 412 U.S. at 551–52.

recordings was not before the Supreme Court in *Goldstein*.[88] However, it follows that, just as the misappropriation tort expanded to protect against sound recording piracy in the absence of copyright protection for sound recordings, the misappropriation cause of action would contract to exclude sound recordings once they gained copyright protection.[89]

4. The Copyright Act of 1976

In 1976, Congress passed a new copyright law that took effect on January 1, 1978.[90] Rather than limiting protection to certain categories of works, federal copyright law now protects "original works of authorship fixed in any tangible medium of expression" except for "any idea, procedure, process, system, method of operation, concept, principle, or discovery."[91] Under a "fair use" provision, some uses of copyrighted material without permission for purposes such as "criticism," "comment," and "news reporting," are not considered copyright infringement.[92]

The addition of a preemption clause[93] marked another key change—one that governs courts' present-day determinations on whether federal law preempts particular misappropriation claims, but whose uncertain language and history leaves much to debate.[94] Section 301 of the Act contains the clause,[95] meant to "summariz[e] . . . the combined principles of *Sears/Compco* and *Goldstein*."[96] It states that, as of January 1, 1978, no rights are available under state law—statutory or

88. *Goldstein*, 412 U.S. at 552 n.7.

89. *See supra* note 70. The expansion of federal copyright protection to new subject matter would seem to require a corresponding contraction of misappropriation protection against piracy available under state common law. *Cf.* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 847, 852 (2d Cir. 1997) (explaining that 1976 amendments to the Copyright Act that afforded copyright protection to simultaneously-recorded broadcasts also preempted state law misappropriation claims concerning such broadcasts). In fact, to settle a controversy over whether pre-1972 recordings remained eligible for state common law copyright protection, Congress amended § 303 of the Copyright Act, which recognizes the eligibility of such recordings for state common law copyright protection until 2067. Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 262 (N.Y. 2005). For discussion of misappropriation protection of sound recordings, see Olson, *supra* note 34, at 884–86; EKSTRAND, *supra* note 1, at 88–91; Sease, *supra* note 34, at 788. For a concise history of the scope of federal copyright protection through 1972, see *Goldstein*, 412 U.S. at 562 n.17.

90. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2006)).

91. 17 U.S.C. § 102 (2006).

92. 17 U.S.C. § 107 (2006).

93. 17 U.S.C. § 301 (2006).

94. *See* Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 537–50, 575–81 (1983).

95. 17 U.S.C. § 301.

96. EKSTRAND, *supra* note 1, at 106–07.

common—"that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright."[97]

Exclusive rights within the general scope of copyright are the reproduction, distribution, performance, and display of the copyrighted work and the preparation of derivative works.[98] Copyrightable subject matter includes literary, musical, dramatic, and architectural works, pantomimes and choreographic works, sound recordings, audiovisual works, such as motion pictures, and pictorial, graphic, and sculptural works.[99] Compilations and derivative works are also copyrightable subject matter, but only to the extent of the material newly contributed.[100]

Rights and remedies available under state law are not preempted by federal copyright law where either the subject matter protected by state law "does not come within the subject matter of copyright," or the legal or equitable rights protected by state law "are not equivalent to any of the exclusive rights within the general scope of copyright."[101] Courts trying to determine whether federal law preempts a misappropriation claim begin their analysis with this "subject matter" and "general scope" inquiry: if a misappropriation claim comes within both the subject matter and general scope of federal copyright, then it is preempted, but if a misappropriation claim fails to come within the subject matter or the general scope of federal copyright then the misappropriation claim is heard on the merits.[102]

While passage of the Copyright Act of 1976 clearly narrowed the scope of the misappropriation tort and other remedies of state law origin by preempting some claims available to plaintiffs before the Act took effect, courts have had difficulty determining which, if any, misappropriation claims survive preemption.[103] One reason for the difficulty is the law's lack of guidance on how to go about the general scope inquiry. Courts must determine what it means for a right under state law to be "equivalent" to a right conferred by copyright.[104]

The law's legislative history hardly illuminates whether and when a misappropriation claim is equivalent to a right conferred by the federal

97. 17 U.S.C. § 301(a).
98. 17 U.S.C. §§ 106, 301(a) (2006).
99. 17 U.S.C. §§ 102, 301(a) (2006).
100. 17 U.S.C. §§ 103, 301(a) (2006).
101. 17 U.S.C. § 301(b)(1), (3) (2006).
102. *See* EKSTRAND, *supra* note 1, at 107.
103. *See id. at* 107–08.
104. *See id.* at 107.

copyright scheme.[105] An early version of the bill that became the Copyright Act of 1976 contained a list of activities, including misappropriation, deemed "not equivalent to any of the exclusive rights within the general scope of copyright."[106] A 1976 House of Representatives report is also cited often as evidence that a misappropriation claim survives federal preemption in some form.[107] But the legislative history, as thoroughly reviewed by Professor Howard B. Abrams, reveals events from which "almost any position for or against preemption of the misappropriation doctrine can be plausibly argued."[108]

In their general scope inquiry, some courts—including courts recently weighing in on the preemption of hot news misappropriation claims[109]—use an "extra element" test to determine whether the rights protected by a state cause of action are equivalent to any of the exclusive rights conferred by copyright law.[110] If a claim requires an "extra element . . . instead of or in addition to the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the right does not lie 'within the general scope of copyright,' and there is no preemption."[111] But courts have

105. *See* Abrams, *supra* note 94, at 537–50, 575–81.

106. *See id.* at 541, 541 n.151 (citing S. 22, 94th Cong. § 301 (1975) (as amended in committee), reported in S. Rep. No. 473, at 20 (1975), and in H.R. Rep. No. 1476, at 24 (1976)).

107. *See, e.g.*, Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997); EKSTRAND, *supra* note 1, at 107 (both citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748). The report states

> "Misappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is . . . based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business or financial data bases.

H.R. Rep. No. 1476, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748.

108. *See* Abrams, *supra* note 94, at 548. Abrams details the legislative history of the law at *id.* at 537–48.

109. *See, e.g.*, *Nat'l Basketball Ass'n*, 105 F.3d at 850; Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 17278, at *9–14 (M.D. Pa. Mar. 6, 2009) (mem. and order denying plaintiff's motion to remand); Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 754 (D. Md. 2003).

110. *See* Olson, *supra* note 34, at 897–99.

111. Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992) (cited by *Nat'l Basketball Ass'n*, 105 F.3d at 850); *Scranton Times*, 2009 U.S. Dist. LEXIS 17278, at *11. Only certain elements qualify. *See* EKSTRAND, *supra* note 1, at 112–17; Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 306 (2d Cir. 2004).

disagreed on how to apply the extra element test,[112] and even courts purporting to use the same test have reached opposite conclusions on the equivalence of the rights protected by hot news misappropriation actions and copyright law.[113]

5. *Feist*

The preemption calculus mandated by the 1976 law was potentially complicated by a 1991 Supreme Court decision, *Feist Publications, Inc. v. Rural Telephone Service Co.*[114] *Feist* clarified the prerequisites for and extent of copyright protection of compilations of facts, but in so doing, raised new questions about the preemption of state law anti-piracy protections for fact-based works.[115] At issue was the copyrightability of a telephone directory: one directory publisher sued another for allegedly infringing its copyright by reprinting its directory listings.[116]

The Court held that the plaintiff's telephone directory lacked "the minimal creative spark required by the Copyright Act and the Constitution" in order to gain copyright protection.[117] The Court affirmed two well-established legal propositions: first, "that facts are not copyrightable," and second, "that compilations of facts are within the subject matter of copyright."[118] But factual compilations are not automatically copyrightable, the Court explained, rejecting the "sweat of the brow" doctrine some courts had adopted under which the hard work of compiling facts justified copyright protection for any compilation.[119] The word "authors" in the Constitution's Copyright Clause limits

112. *Compare Nat'l Basketball Ass'n*, 105 F.3d at 850–53 (Second Circuit explaining and applying its version of the extra elements test), *with Lowry's*, 271 F. Supp. 2d at 756 (U.S. District Court for District of Maryland rejecting Second Circuit's version of the extra elements and explaining its own).

113. *Compare Nat'l Basketball Ass'n*, 105 F.3d at 852–53 (suggesting that a hot news misappropriation claim on facts similar to those in *INS v. AP* would contain the extra elements necessary to avoid federal preemption), *with* Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, at *11–16 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings) (accepting *NBA* analysis but holding that a newspaper's plagiarism of a competing newspaper's obituaries preempted by federal copyright law due to lack of extra elements).

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

115. *See* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 357–65 (1992); Sease, *supra* note 34, at 800–01.

116. *Feist*, 499 U.S. at 342–44.

117. *Id.* at 363.

118. *Id.* at 344–45.

119. *Id.* at 352.

congressional power to enact federal protections, the Court reasoned; only original works are eligible.[120]

Facts cannot be original, so all facts, including "news of the day," must remain in the public domain, the Court said.[121] Factual compilations are copyright eligible when they feature an original selection or arrangement of facts, but the protection extends only to the compiler's original contributions and not to the facts themselves, the Court said.[122] Anyone "may copy the underlying facts from the publication, but not the precise words used to present them."[123]

The Court cited *INS v. AP* approvingly as recognizing this distinction, but did not indicate in *Feist* whether a misappropriation claim like the AP's against the INS remains available or is preempted.[124] The Court's quotation, in dicta, of a copyright treatise for the proposition that, while copyright protection is not available for compilations of public domain materials on "sweat of the brow" grounds, protection may sometimes be available on an unfair competition theory[125] suggests that misappropriation claims, at least in some cases, may remain available.[126]

The precise effect, if any, of *Feist* on the 1976 Copyright Act's test for federal preemption of a state law claim such as misappropriation is not clear by reference to the decision. Because facts are never copyrightable, a case could be made that they are outside the subject matter of copyright, and state causes of action protecting "the factual content of informational works" therefore survive.[127] But *Feist* could also be read as requiring as a matter of copyright law that facts remain in the public domain, which would make state protections for factual content subject to preemption[128] unless the state claim required an "extra element."[129]

120. *Id.* at 346–51.

121. *Feist*, 499 U.S. at 347–48.

122. *Id.* at 348–51.

123. *Id.* at 348–49.

124. *See id.* at 353–54.

125. *Id.* at 354 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 304 (1990)).

126. *See* Kelly A. Ryan, *Copyright Law: Do State Misappropriation Rights Survive* Feist Publications *Copyright Laws?*, 1992 ANN. SURV. AM. L. 329, 336–37 (1993).

127. Ginsburg, *supra* note 115, at 360, 365; *see also* Sease, *supra* note 34, at 800–01.

128. *See* Sease, *supra* note 34, at 800–01.

129. Ginsburg, *supra* note 115, at 358–59.

B. Recent Hot News Misappropriation Cases

Few misappropriation claims since *INS v. AP* have alleged piracy of hot news. Smaller still is the number of post-*Feist* decisions addressing the question whether any hot news misappropriation claim survives the preemptive effect of current copyright law. This subpart summarizes key aspects of the post-*Feist* hot news misappropriation decisions.

1. Courts Agree Some Form of a Hot News Misappropriation Claim Survives

Several conclusions can be extracted from the body of post-*Feist* hot news misappropriation preemption decisions. The first is that courts agree that some form of the hot news misappropriation cause of action survives federal preemption and remains available to plaintiffs in states recognizing the tort.[130] Even courts dismissing hot news misappropriation claims as preempted acknowledge that some hot news misappropriation claims apparently avoid preemption.[131]

These courts do not share precisely the same view of which hot news misappropriation claims survive, but the prevailing position seems to be that the closer a claim resembles the AP's in *INS v. AP*, the greater the likelihood that copyright law does not preempt it.[132] The Seventh Circuit has concluded that an "*INS*-type claim probably is not preempted."[133] The U.S. District Court for the Northern District of Illinois pointed to the specific types of claims cited in the House Judiciary Committee Report on the 1976 Amendments to the Copyright Act—hot news misappropriation claims like that in *INS* and those alleging consistent piracy "of data updates from scientific, business or financial data bases"—as the only misappropriation claims not

130. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 844–45, 850–52 (2d Cir. 1997) (stating that "[c]ourts are generally agreed that some form of [a hot news misappropriation] claim survives preemption" and describing the form of the claim that the Second Circuit believes survives); *see also* Gannett Satellite Info. Network, Inc. v. Rock Valley Cmty. Press, Inc., No. 93 C 20244, 1994 WL 606171, at *4–5 (N.D. Ill. Oct. 24, 1994); ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 960 (2006); McKevitt v. Pallasch, 339 F.3d 530, 534–35 (7th Cir. 2003); Lowry's Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 756 (D. Md. 2003); Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, at *12–14 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings); BanxCorp. v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 614 (S.D.N.Y. 2010).

131. *See, e.g.*, *Lowry's*, 271 F. Supp. 2d at 756; *McKevitt*, 339 F.3d at 534–35.

132. *See Nat'l Basketball Ass'n*, 105 F. 3d at 844–45, 851–52; *Gannett Satellite Info. Network*, 1994 WL 606171, at *4–5; *ConFold*, 433 F.3d at 960; Barclays Capital Inc. v. Theflyonthewall.com, No. 10-1372-cv, 2011 U.S. App. LEXIS 12421, at *77, 85–86 (2d Cir. June 20, 2011).

133. *ConFold*, 433 F.3d at 960.

preempted.[134] And, in the most detailed and influential judicial consideration to date of which hot news misappropriation claims survive preemption by federal copyright law, the Second Circuit in *National Basketball Association v. Motorola* identified five elements necessary for a hot news misappropriation claim to survive preemption:

> (i) the plaintiff generates or collects information at some cost or expense;
> (ii) the value of the information is highly time-sensitive;
> (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it;
> (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff;
> (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[135]

2. Consensus that "Hot News" Falls Within the Subject Matter of Copyright

In addition to their consensus that some hot news misappropriation claims survive preemption by federal copyright law, courts deciding hot news misappropriation cases post-*Feist* have assumed almost universally that plaintiffs' "hot news" falls within the subject matter of copyright, and that preemption or survival of the claim therefore hinges on whether, under the general scope inquiry, the misappropriation claim vindicates rights equivalent to those conferred by copyright or contains an "extra element."[136]

134. *Gannett Satellite Info. Network*, 1994 WL 606171, at *4–5.

135. *Nat'l Basketball Ass'n*, 105 F. 3d at 845, 852 (citations omitted).

136. *See, e.g.*, *id.* at 848–50 (explaining the court's conclusion that the subject matter requirement for federal preemption was met when plaintiff had copied only the underlying facts of an expressive broadcast and none of the expressive elements; preemption therefore turned on general scope inquiry and the existence of an "extra element"); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, at *8–9, 19 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings) (adopting Second Circuit's analysis and finding that subject matter of plaintiff's state-law claim was within the subject matter of copyright law); X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1108 (C.D. Cal. 2007) (seeming to presume that pirated photographs at issue were within subject matter of copyright); *Lowry's*, 271 F. Supp. 2d at 754 (assuming that pirated reports, which contained uncopyrightable facts, fell within the scope of the subject matter of copyright and that hot news misappropriation claim, to survive, must therefore contain an "extra element"). But another portion of the *Lowry's* decision seems to imply, by citation to a 1975 Maryland case, that to avoid preemption a misappropriation claim would have to involve piracy of material outside the subject matter of copyright law. *See id.* at 756 (citing GAI Audio of N.Y., Inc. v. Columbia Broad. Sys., Inc., 340 A.2d 736 (Md. Ct. Spec. App. 1975)).

3. Two Competing "Extra Element" Tests

Two very different "extra element" tests for whether a state law misappropriation claim avoids preemption because the rights it protects are not equivalent to the exclusive rights within the general scope of federal copyright protection have appeared in the recent hot news misappropriation decisions: one announced by the Second Circuit in *NBA v. Motorola*,[137] and the other, by the U.S. District Court for the District of Maryland in *Lowry's Reports, Inc. v. Legg Mason, Inc.*[138]

The Second Circuit presented the requirements for a hot news misappropriation claim to survive preemption by federal copyright law in the form of the five-element, *INS*-like claim discussed *supra* at Part III.B.1. No misappropriation claim failing to meet one or more of the five elements survived preemption in the court's view.[139] The court explained why this narrow class of *INS*-like hot news misappropriation claims avoids the fate of the misappropriation claims preempted as indistinguishable from a copyright infringement complaint:

> *INS* is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit-seeking entrepreneurs. If services like AP were not assured of property rights in the news they pay to collect, they would cease to collect it. The ability of their competitors to appropriate their product at only nominal cost and thereby to disseminate a competing product at a lower price would destroy the incentive to collect news in the first place. The newspaper-reading public would suffer because no one would have an incentive to collect "hot news."[140]

Three of the five elements of the surviving hot news misappropriation claim qualify as extra elements that allow the claim to survive preemption under the general scope inquiry, the court said: "the time sensitive value of factual information, . . . the free-riding by a defendant, and . . . the threat to the very existence of the product or service provided by the plaintiff."[141]

Beginning with *Lowry's*, the U.S. District Court for the District of Maryland has twice rejected the Second Circuit's version of the "extra element" test, conducting its general scope inquiry instead with a more restrictive interpretation of what qualifies as an "extra element."[142] In

137. *Nat'l Basketball Ass'n*, 105 F. 3d at 853.
138. *Lowry's*, 271 F. Supp. 2d at 756.
139. *Nat'l Basketball Ass'n*, 105 F. 3d at 845.
140. *Id.* at 853.
141. *Id.*
142. *See Lowry's*, 271 F. Supp. 2d at 756; Agora Fin., LLC v. Samler, 725 F. Supp. 2d 491, 499–

Lowry's, the court held preempted a hot news misappropriation claim—complaining of ten years' worth of pirating and widespread electronic and telephone redistribution of the plaintiff's daily reports analyzing the stock market—that seemed to meet all five *NBA* elements for surviving preemption.[143] The court compared the elements articulated by the Second Circuit in *NBA* with the exclusive rights conferred by the Copyright Act and concluded that a hot news misappropriation claim as articulated in *NBA* contained no "extra element" necessary to save the claim from preemption.[144]

To save the claim, an element would have to constitute an *act* not equivalent to the exclusive rights within the general scope of copyright: "'Free-riding,' . . . the only element that constitutes a wrongful act, seems indistinguishable from the right to reproduce, perform, distribute or display a work," the court said.[145] The court considered the defendant's sharing of information from the plaintiff's reports over the telephone public performance of the reports, one of the exclusive rights conferred to an author under copyright law.[146] The court also found that "[t]he other elements do not describe any behavior at all. The cost of generating the information, its time-sensitivity, and direct competition between the parties merely define pre-existing conditions; the threat to the plaintiff's business merely identifies a consequence of the act of 'free-riding.'"[147]

Courts undertaking the general scope inquiry in hot news misappropriation cases have favored the Second Circuit's *INS*-based "extra element" test over the action- or behavior-based test announced by the U.S. District Court for the District of Maryland in *Lowry's*.[148] The U.S. District Court for the Central District of California rejected and criticized the latter in *X17, Inc. v. Lavandeira*.[149] The court found "no support in the law for the *Lowry's* court's suggestion that 'events' or 'actions' can be [extra] elements of a claim, but that 'conditions' cannot."[150]

500 (D. Md. 2010).

143. *See Lowry's*, 271 F. Supp. 2d 737.

144. *See id.* at 756.

145. *Id.*

146. *Id.* at 755.

147. *Id.* at 756.

148. Apparently the only decision besides *Lowry's* among hot news misappropriation cases decided through 2010 to adopt the behavior-based "extra element" test was *Agora Financial, LLC v. Samler*, 725 F. Supp. 2d 491 (D. Md. 2010), in which the U.S. District Court for the District of Maryland followed its own *Lowry's* opinion.

149. X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102 (C.D. Cal. 2007) (order denying defendant's motion to dismiss).

150. *Id.* at 1106.

4. Divergent Versions of the Second Circuit's Fifth Element

Though most courts agree on the Second Circuit's preemption analysis, courts purporting to apply it have actually diverged on the application of the fifth element, which has been called the "meat"[151] or "heart"[152] of the hot news misappropriation cause of action. To establish the fifth element, the Second Circuit requires a misappropriation plaintiff to show that the ability of "other parties"—not only the defendant—to free ride on its efforts would so reduce the plaintiff's incentive to produce its product or service that the product's "existence or quality" would be threatened.[153] The Second Circuit does not require that the defendant's particular piracy threaten the existence of the plaintiff's product or service, but requires only that free riding of the sort the defendant committed, if allowed to continue without remedy, would reduce the plaintiff's incentive to continue producing its product or providing its service at least to the extent that the quality of the plaintiff's product or service could decline.[154]

At least two decisions purporting to adopt the *NBA v. Motorola* analysis have actually articulated a far more severe fifth element than the Second Circuit's version. The Seventh Circuit, in *McKevitt v. Pallasch*, reformulated the fifth element when it explained that "legal protection for the gathering of facts is available only when unauthorized copying of the facts gathered is likely to deter the plaintiff, or others similarly situated, from gathering and disseminating . . . facts."[155] In contrast to the lower threshold the Second Circuit would impose for a plaintiff to establish the fifth *NBA* element, the Seventh Circuit would seem to require that the actual copying committed by the misappropriation defendant would deter one in the plaintiff's position from producing the product or service.

The U.S. District Court for the Middle District of Pennsylvania also raised the fifth-element hurdle for hot news misappropriation plaintiffs trying to avoid preemption of their claims, in *Scranton Times, L.P. v. Wilkes-Barre Publishing Co.*[156] The court said that the fifth element required a hot news misappropriation plaintiff to "have alleged that the

151. McKevitt v. Pallasch, 339 F.3d 530, 534–35 (7th Cir. 2003).

152. Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 341 (S.D.N.Y. 2010), *rev'd*, No. 10-1372-cv, 2011 U.S. App. LEXIS 12421 (2d Cir. June 20, 2011).

153. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997).

154. *See id.*

155. *McKevitt*, 339 F.3d at 534.

156. *See* Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, at *14–15 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings).

Defendant's activities have threatened the entire existence of their publications or has compromised or provided reduced incentive for Plaintiff's to continue collecting [news] and printing [it] for public distribution."[157] The fifth element as articulated by the Second Circuit does not limit court consideration of the deterrent effect of the free riding of the sort committed by the defendant to the defendant's free riding alone, nor to past, as opposed to future, free riding.

5. Facts Key to Outcome

Finally, the recent hot news misappropriation cases show that for a hot news misappropriation claim, as with other types of claims, the facts matter. How comfortably the product or service pirated fits within a traditional understanding of "news" may well affect the outcome of the decision. The AP, nine decades after prevailing in *INS v. AP*, succeeded again on a similar hot news misappropriation claim against an online news organization that pirated and resold AP news content to other sites while undertaking no original reporting of its own.[158] But a pager service updating users on the latest basketball scores did not constitute hot news misappropriation for which a cause of action survived preemption,[159] and a court declined to decide summarily whether a Web site's concert information qualified as the kind of information protectable as hot news.[160]

The timing of the defendant's piracy matters, too. Republication of a daily newspaper's news stories in a weekly "shopper" newspaper did not constitute actionable misappropriation when the republication occurred many days after the stories' original appearance.[161] But copying breaking news from the AP and selling it to other Web sites for immediate online republication gave rise to a viable misappropriation

157. *See id.*

158. *See* Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009). The court declined to dismiss the AP's hot news misappropriation claim. The decision drew some attention from legal commentators, who said it showed the resilience of the misappropriation doctrine, Lewis R. Clayton, *District Court Finds AP Has 'Quasi-Property' Right to News*, N.Y. L.J., Apr. 16, 2009, and highlighted the tort as a potential remedy for "potentially weak copyright case[s]" such as those involving news, Edwin Komen, *Hot News Meets DMCA*, INTELL. PROP. LAW BLOG (Mar. 6, 2009), http://www.intellectualpropertylawblog.com/archives/copyrights-hot-news-meets-dmca.html, including the copying of Internet-based news content. Ryan Smith & Thomas F. Zuber, AP v. All Headline News*: Applying the "Hot News" Doctrine to the Internet*, LAWUPDATES.COM, May 20, 2009, http://www.lawupdates.com/commentary/1527.

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

160. Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 980 (E.D. Cal. 2000).

161. *See* Gannett Satellite Info. Network, Inc. v. Rock Valley Cmty. Press, Inc., No. 93 C 20244, 1994 WL 606171, at *5 (N.D. Ill. Oct. 24, 1994).

claim.[162] From the time of *INS v. AP* onward, the quasi-property interest the misappropriation tort has recognized is a fleeting interest—one that lasts just long enough for the plaintiff to reap the economic benefits of its labor and expense, not one intended to indefinitely shield the plaintiff's product from copying.

IV. SURVIVAL OF, AND APPROPRIATE PREEMPTION TEST FOR, HOT NEWS MISAPPROPRIATION CLAIMS

Legal developments since *INS v. AP*, including amendments to federal copyright law, Supreme Court copyright and patent decisions bearing on federal preemption of state law claims, and recent hot news misappropriation decisions, have raised questions: Does a hot news misappropriation claim survive preemption? If so, what must a plaintiff show to avoid preemption of a hot news misappropriation claim? This Part addresses these questions in turn. Subpart A expresses agreement with those who have reached the conclusion that hot news misappropriation claims do survive preemption. Subpart B argues that the appropriate test for preemption of a hot news misappropriation claim is that articulated in *NBA*, not that set forth in *Lowry's*. It further argues that courts requiring a plaintiff to show that the defendant's piracy threatens the very existence of the plaintiff or the plaintiff's product have misapplied *NBA*.

A. Hot News Misappropriation Claims Not Preempted

The question whether any misappropriation claim survives preemption by federal copyright law has not been definitively settled.[163] Reference to the Copyright Act's preemption clause provides no clear answer, nor does the clause's legislative history. The U.S. Supreme Court, which has not directly taken up the question, has provided inconsistent guidance in cases from *Sears-Compco* to *Feist*. This subpart briefly expresses agreement with those who have concluded that

162. *All Headline News Corp.*, 608 F. Supp. 2d at 457–58, 461.

163. Abrams, *supra* note 94, at 575–81; Holte, *supra* note 62, at 30; *see also* Ginsburg, *supra* note 115, at 355–65, 367. This question is of particular importance to those concerned with how to protect database producers, who, like news companies, devote substantial resources to producing products that can be characterized, like news articles, as collections of uncopyrightable facts. *See, e.g.*, Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 151–64 (1997); David Djavaherian, *Hot News and No Cold Facts:* NBA v. Motorola *and the Protection of Database Contents*, 5 RICH. J.L. & TECH. 8 (1998); Cynthia M. Bott, Comment, *Protection of Information Products: Balancing Commercial Reality and the Public Domain*, 67 U. CIN. L. REV. 237, 245–47 (1998).

at least the "hot news" form of the misappropriation claim survives.[164]

First, state law claims conferring rights not "equivalent to any of the exclusive rights within the general scope of copyright" survive preemption by the terms of the 1976 Copyright Act's preemption clause.[165] The right protected by the hot news misappropriation doctrine is the right of a news- or fact-based business to insist that direct competitors compete not by exploiting its investments unfairly but by making their own—the right, in other words, to avoid putting oneself out of business by becoming the efficiency that enables a competitor to sell substantially the same news product for less. This fleeting right to exclude a limited class from reaping a share of profits flowing from costly investments in gathering, compiling, and disseminating facts seems fundamentally different from the long-term right of a copyright holder to bar everyone but fair users from reproducing, distributing, performing, or displaying the copyrighted.[166] If the differences between hot news misappropriation protections and the protections of copyright are fundamental rather than illusory, the former are not the equivalent of the latter, and the hot news misappropriation cause of action survives federal preemption.

Second, if it is a news organization's investment in fact gathering that a hot news misappropriation claim protects, rather than the news product authored from those facts, then *Feist*'s holding that facts are never copyrightable warrants the conclusion that the hot news misappropriation claim survives preemption because the subject matter protected by state law, facts or "sweat of the brow" fact-gathering, falls outside the subject matter of copyright, original works of authorship.[167] Many courts explaining *INS* have located the quasi-property interest recognized in that decision in the fact-gathering investment or process, not in the resulting news product.[168] The availability of the tort's protections regardless of whether the defendant republished the

164. *See, e.g.*, Ryan, *supra* note 126, at 341–46; *Gannett Satellite Info. Network*, 1994 WL 606171, at *4; *Nat'l Basketball Ass'n*, 105 F.3d at 845; *Pollstar*, 170 F. Supp. 2d at 979; ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 960 (2006); X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1105–07 (C.D. Cal. 2007).

165. 17 U.S.C. § 301(a) (2006).

166. *See* Ryan, *supra* note 126, at 342–44 (distinguishing between the rights afforded by the misappropriation doctrine and by federal copyright law on the bases that misappropriation protects labor while copyright protects original works, that misappropriation grants protection only against competitors whereas copyright grants exclusive rights as against the public, and that misappropriation protections are of brief duration while copyright protections endure decades after an author's death).

167. *See* Ginsburg, *supra* note 115, at 360–61, 365.

168. *See, e.g.*, Mercury Record Prods., Inc. v. Econ. Consultants, Inc., 218 N.W.2d 705, 714 (Wis. 1974); Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657, 663 n.7 (1963); McKevitt v. Pallasch, 339 F.3d 530, 534 (7th Cir. 2003).

plaintiff's content word-for-word or in reworded form[169] supports that interpretation.

Third, even though the legislative history of the 1976 Copyright Act is too murky to prove a congressional intent to preserve some state law misappropriation claims,[170] congressional consideration in recent years of proposals to federalize misappropriation protections for producers of hot news and of databases evinces some legislative will to ensure the preservation of traditional misappropriation protections.[171]

Finally, statements by most courts confronted with hot news misappropriation claims in recent years to the effect that that some form of the misappropriation tort survives federal preemption lend support to a reading of the 1976 Copyright Act as preserving at least those misappropriation claims alleging *INS*-like facts.[172]

B. NBA*: The Better Standard for Deciding Which Hot News Claims Survive*

As the earlier review of post-*Feist* misappropriation cases observed, courts recently considering which hot news misappropriation claims survive preemption by the Copyright Act have used conflicting "extra element" tests in their general scope inquiry: the *NBA* test and the *Lowry's* test.[173] The five-element test articulated by the Second Circuit in *NBA* is the appropriate test. Furthermore, courts imposing a stricter set of fifth element requirements[174] have misapplied *NBA* and imposed too great a burden on hot news misappropriation plaintiffs.

The act-based extra element test propounded by the U.S. District Court for the District of Maryland in *Lowry's* for determining whether a particular misappropriation claim avoids preemption by protecting a

169. *INS I*, 240 F. 983, 990 (S.D.N.Y. 1917) (AP charged INS with, and INS was ultimately enjoined for a limited period from, "taking news from early editions of newspapers which are members of the Associated Press and selling it to defendant's customers *in the same text or in a paraphrase of its own*" (emphasis added)), *modified*, 245 F. 244 (2d Cir. 1917), *aff'd*, 248 U.S. 215 (1918).

170. *See* Abrams, *supra* note 94, at 537–50, 575–81.

171. *See* EKSTRAND, *supra* note 1, at 10–12 (reviewing congressional proposals, from 1996 through 2003, to federalize misappropriation protection).

172. *See* Gannett Satellite Info. Network, Inc. v. Rock Valley Cmty. Press, Inc., No. 93 C 20244, 1994 WL 606171, at *4 (N.D. Ill. Oct. 24, 1994); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845, 852 (2d Cir. 1997); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 979–80 (E.D. Cal. 2000); Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 87261, at *12, 14 (M.D. Pa. Sept. 23, 2009) (mem. and order denying in part and granting in part defendant's motion for judgment on the pleadings); *see also* ConFold Pac., Inc. v. Polaris Indus., Inc., 433 F.3d 952, 960 (2006).

173. *See supra* Part III.B.3.

174. *See supra* Part III.B.4.

right that lies outside the general scope of copyright lacks support in the text of the Copyright Act. By the terms of the Copyright Act, to avoid preemption on general scope grounds a state law claim need only protect legal or equitable rights not equivalent to the exclusive rights conferred by copyright law.[175] According to the *Lowry's* decision, however, the only state law claims that survive federal preemption on general scope grounds are those alleging a wrongful act by the defendant not equivalent to reproduction, performance, distribution, or display of a work.[176] The district court's conclusion that because the exclusive rights conferred by copyright law are acts, only an act could qualify as an extra element that saves a claim from preemption does not follow from the text of the Copyright Act's preemption provision.[177]

The Second Circuit followed the provision more closely in *NBA* when it analyzed when a misappropriation claim survives federal preemption because the right protected by state law is outside the general scope of copyright. The court used an extra element test,[178] but it did not attempt at the outset, as the *Lowry's* court did, to define that test in terms of the characteristics an extra element must have. Instead, the Second Circuit focused on the Copyright Act's requirement that any surviving state law protection be "not the equivalent of exclusive rights under a copyright" and looked for the presence of extra elements that would render a state law claim non-equivalent to rights available under federal copyright law.[179] After excluding "amorphous concepts such as 'commercial immorality' or society's 'ethics'" from its definition of extra element, finding them indistinguishable from copyright infringement, and by deeming preempted all misappropriation claims "grounded solely in the copying of a plaintiff's protected expression," the court found the requisite extra elements in only a narrow class of misappropriation claims: those concerning hot news.[180] The three "extra" elements of a five-element hot news misappropriation claim that allow it to survive preemption according to the Second Circuit—"the time-sensitive value of factual information, . . . the free-riding by a defendant, and . . . the threat to the very existence of the product or service provided by the plaintiff"—are not acts, but they do transform an action centered on copying from one equivalent to a copyright infringement claim to one

175. 17 U.S.C. § 301(a), (b)(3) (2006).

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

177. 17 U.S.C. § 301(a), (b)(3).

178. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997).

179. *Id.* at 850–51.

180. *Id.* at 851–52.

that vindicates a substantively different right.[181]

The *NBA* extra element test, unlike that in *Lowry's*, recognizes that "conditions," in addition to acts, can constitute extra elements sufficient to save a claim from federal preemption.[182] The interpretation in *Lowry's* of an extra element as an action imposes on plaintiffs a requirement that the Copyright Act does not and ignores the ability of a conditional element to render a claim based, but not solely, on copying non-equivalent to a copyright infringement claim. The *Lowry's* extra element test also asserts that some hot news misappropriation claims probably survive Copyright Act preemption without explaining what acts of hot news piracy would not take the form of reproduction, public performance, distribution, or display.[183] For these reasons, the *NBA* extra element test is the appropriate one, and the act-based test announced in *Lowry's* ought to be abandoned.

Even courts adopting the *NBA* preemption analysis have applied it differently, some effectively narrowing the class of surviving hot news misappropriation claims by making it harder for plaintiffs to establish the fifth element.[184] This divergence in prerequisites for avoiding preemption on the fifth element should be resolved in favor of those originally articulated in *NBA*. Courts imposing a stricter set of fifth element requirements have misapplied *NBA* and imposed too great a burden on hot news misappropriation plaintiffs.

The Supreme Court's concern in *INS v. AP* was not that the INS's profitable news piracy had already disincentivized and damaged the AP's newsgathering operations, but that future free riding would effect that result if unabated.[185] That concern with preventing future free riding, although past free riding is what gives rise to a misappropriation claim, is evidenced by the language of the *INS v. AP* decision and by the

181. *Id.* at 853.

182. X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1105–06 (C.D. Cal. 2007); *see also Nat'l Basketball Ass'n*, 105 F.3d at 845, 850 (citing ProCD v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996)).

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

184. *Compare Nat'l Basketball Ass'n*, 105 F.3d at 852 (requiring proof that the ability of other parties to free ride on the plaintiff's efforts would so reduce plaintiff's production incentive that the existence or quality of the product would be substantially threatened if the free riding were allowed to continue), *with* McKevitt v. Pallasch, 339 F.3d 530, 534–35 (7th Cir. 2003), X17, Inc. v. Lavandeira, No. CV-06-7608-VBF(JCx), 2007 U.S. Dist. LEXIS 17279, at *12–13 (C.D. Cal. Mar. 8, 2007), *and* Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 17278, at *12–13 (Mar. 6, 2009) (mem. and order denying plaintiff's motion to remand) (all requiring the defendant's own free riding to date to have threatened the continued existence of the plaintiff's product or service).

185. *INS III*, 248 U.S. 215, 240–41 (1918).

injunctive relief afforded to the AP in *INS*[186] and much sought by subsequent misappropriation plaintiffs. The same prospective concern is evident in the Second Circuit's articulation of the fifth element in *NBA*.[187] Under *NBA*, a plaintiff satisfies the fifth element by showing that "the *ability* of *other parties* to free-ride on the efforts of the plaintiff *would* so reduce the incentive to produce the product or service that *its existence or quality would be* substantially threatened."[188] If the Second Circuit meant for plaintiffs to prove that the defendant's free riding to date had already so reduced the plaintiff's incentive to produce that the existence or quality of the plaintiff's product or service was substantially threatened, it would have said so. Instead, it required proof only that anyone's ability to free ride on the plaintiff's efforts in the manner of the defendant's free riding would, without relief for the plaintiff, reduce the plaintiff's economic incentive to produce such that the quality, if not existence, of the plaintiff's product or service would be substantially threatened.[189]

Yet some courts—in *McKevitt*, *X17*, and *Scranton Times*—have applied the *NBA* decision to require that the defendant's specific free-riding activities to date pose a substantial threat to the existence either of the plaintiff's product or service or of the plaintiff itself.[190] That standard places too great a burden on the hot news misappropriation plaintiff, who would have to wait to protest piracy of news content until that piracy had already inflicted upon it economic damage so great that without court intervention, the piracy would force plaintiff out of the business of offering the pirated product or service, or out of business altogether. Such a requirement contradicts the mandate of the *NBA* decision and is antithetical to the prospectively concerned misappropriation tort and its offer of injunctive relief. A remedy unavailable until the plaintiff suffers substantial economic harm is no remedy at all.

186. *See id.*

187. *Nat'l Basketball Ass'n*, 105 F.3d at 845, 852–53.

188. *Id.* at 852 (emphasis added).

189. *Id.*

190. McKevitt v. Pallasch, 339 F.3d 530, 534–35 (7th Cir. 2003); X17, Inc. v. Lavandeira, No. CV-06-7608-VBF(JCx), 2007 U.S. Dist. LEXIS 17279, at *12–13 (C.D. Cal. Mar. 8, 2007); Scranton Times, L.P. v. Wilkes-Barre Publ'g Co., No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 17278, at *12–13 (M.D. Pa. Mar. 6, 2009) (mem. and order denying plaintiff's motion to remand).

V. NON-LEGAL DEVELOPMENTS SINCE *INS*: TECHNOLOGY TRANSFORMS NEWSGATHERING ECONOMICS

The continued existence of the hot news misappropriation cause of action would be irrelevant if producers of hot news no longer had a need for the tort. This Part summarizes news industry developments bearing on the question whether they still do, nine decades after *INS v. AP*. An answer to that question is ventured in Part VI. Both focus on developments in print journalism. There are a couple of reasons for this focus. First, piracy of news published in print led to the creation of a remedy for news piracy in *INS v. AP*, so comparison of news producers' need then for the misappropriation tort with their present need is easiest when focusing on the economics of gathering and publishing news in, and the threat posed by news piracy occurring in, the same medium. A second reason for viewing the non-legal developments discussed herein through a lens focused on print journalism is that the economics of that segment of the news media in particular have changed dramatically in recent years, touching on a core concern of the misappropriation doctrine: the continued existence of an economic incentive to keep producing a socially valued but potentially threatened product.[191]

Subpart A explains print journalism's traditional business model. Subpart B describes the collapse of that model, attributable largely to the advent of the Internet and the changes the new medium wrought in the behaviors of news consumers and advertisers. Subpart C describes several other forces exerting pressure on the economics of print journalism. Subpart D sums up the present revenue crisis of organizations engaged in print journalism, whose continued existence depends upon the discovery—soon—of a new business model.

A. The Traditional Business Model

Journalism has long been funded indirectly, in contrast to most products, whose production costs are built into the prices their consumers pay.[192] Sales of U.S. newspapers to readers have not covered production costs[193] because newspapers have maximized readership

191. *See* Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 341–42 (S.D.N.Y. 2010) (quoting *INS III*, 248 U.S. 215, 235 (1918), and explaining that "[t]he *INS* holding cannot be understood without understanding the court's desire to 'afford compensation for the cost of gathering and distributing [the news], with the added profit so necessary as an incentive to effective action in the commercial world'"), *rev'd*, No. 10-1372-cv, 2011 U.S. App. LEXIS 12421 (2d Cir. June 20, 2011).

192. JEFF KAYE & STEPHEN QUINN, FUNDING JOURNALISM IN THE DIGITAL AGE: BUSINESS MODELS, STRATEGIES, ISSUES AND TRENDS 5–6 (2010).

193. *Id.* at 5.

with artificially low prices.[194] Sales of advertising space within a newspaper to those wishing to reach its large audience supplement revenues from readers.[195] Those two revenue sources must cover the great costs involved in running a newspaper: the price and operating costs of a printing press,[196] the salaries of the editorial staff who gather and edit the news,[197] the price of newsprint, and the expense involved in "hauling paper around."[198] Until the late twentieth century, they did.[199]

Traditionally the high costs of starting a new newspaper limited business competition.[200] Where newspapers competed within the same market, the one most able to attract readers and advertisers forced the other out of business, into pursuit of a different demographic or demographic target audience,[201] or into a merger with the more successful newspaper.[202] Most local newspapers thus enjoyed a monopoly within their market on display and classified advertising.[203] Though radio and television emerged to compete with newspapers as outlets for advertising,[204] the three learned to coexist profitably by emphasizing their different strengths—for newspapers, in-depth coverage and a local news focus—to attract different audiences.[205] Because radio and television provided no alternative means to reach consumers with print advertisements and coupons, advertisers continued

194. Robert G. Picard, *Commercialism and Newspaper Quality*, 25 NEWSPAPER RES. J. 54, 58 (2004).

195. KAYE & QUINN, *supra* note 192, at 6; Picard, *supra* note 194, at 58.

196. Clay Shirky, *Newspapers and Thinking the Unthinkable*, SHIRKY.COM (Mar. 13, 2009, 9:22 PM), http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable.

197. *See* Picard, *supra* note 194, at 61; James Fallows, *How to Save the News*, THE ATLANTIC, June 2010, at 44, 47.

198. Fallows, *supra* note 197, at 47.

199. ALEX S. JONES, LOSING THE NEWS: THE FUTURE OF THE NEWS THAT FEEDS DEMOCRACY 160–61 (2009) ("disturbing" trends started in late 1990s); *see also* PROJECT FOR EXCELLENCE IN JOURNALISM & RICK EDMONDS, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM: NEWSPAPERS (2010), http://www.stateofthemedia.org/2010/printable_newspaper_chapter.htm [hereinafter STATE OF THE NEWS MEDIA: NEWSPAPERS] (stating that by 2009, newspaper revenue model had undergone "15 years of transition"); Christine Ogan & Randal E. Beam, *Internet Challenges for Media Businesses*, *in* THE INTERNET AND AMERICAN BUSINESS 279, 285, 292–93 (William Aspray & Paul E. Ceruzzi eds., 2008) (pinpointing 1987 as peak year of newspaper readership and identifying Internet origins of the undermining of the traditional business model).

200. Shirky, *supra* note 196.

201. *Id.*

202. JONES, *supra* note 199, at 157.

203. *Id.*; *see also* Shirky, *supra* note 196; Picard, *supra* note 194, at 56.

204. *See* Ogan & Beam, *supra* note 199, at 283. Ironically, by competing with newspapers for advertising dollars, radio and television made it especially difficult for more than one newspaper to operate in the same city, enabling the sole paper to reap monopoly profits on display and classified advertising. *See* JONES, *supra* note 199, at 157; Shirky, *supra* note 196; Picard, *supra* note 194, at 56.

205. Ogan & Beam, *supra* note 199, at 283.

to pay whatever price the local newspaper set.[206] Lucrative advertising revenues funded not only coverage of local news, but also much more expensive newsgathering, such as foreign news bureaus and investigative projects.[207] By the turn of the twenty-first century, eighty percent of newspaper revenues were from advertising sales.[208]

B. The Internet and the Collapse of the Traditional Business Model

The Internet is not the only cause of what may fairly be described as the collapse of the newspaper industry's business model, but it is almost universally identified as a main culprit.[209] Newspapers' heavy dependence upon advertising revenues to fund the labor-intensive newsgathering process and to recoup high production costs is key to understanding how the Internet upended a business model that had adapted to previous technological advances.

The Internet helped to "break" newspaper journalism's traditional business model in several ways. First, it opened the classified and display advertising markets to competition, drastically reducing the advertising revenues upon which newspapers had become so dependent.[210] Perhaps most devastating to newspapers' profitability was the flight of classified advertising to online sites offering free,

206. Clay Shirky, Assoc. Teacher, Tisch Sch. of the Arts at N.Y. Univ., Address at the Shorenstein Center at Harvard University: Let a Thousand Flowers Bloom to Replace Newspapers; Don't Build a Paywall Around a Public Good (Sept. 22, 2009) [hereinafter Shirky Address], *available at* http://www.niemanlab.org/2009/09/clay-shirky-let-a-thousand-flowers-bloom-to-replace-newspapers-dont-build-a-paywall-around-a-public-good/.

207. Shirky, *supra* note 196; *see also* Shirky Address, *supra* note 206.

208. Picard, *supra* note 194, at 58; FED. TRADE COMM'N, DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 2–3 (2010) [hereinafter FTC DISCUSSION DRAFT], *available at* http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf. The Federal Trade Commission places the current percentage of newspaper revenues from advertising at approximately ninety percent. FTC DISCUSSION DRAFT, *supra*, at 3.

209. *See, e.g.*, Shirky, *supra* note 196 ("There is no general model for newspapers to replace the one the internet just broke."); Shirky Address, *supra* note 206 ("What the Internet does is it makes all commercial models of journalism harder to sustain . . . ."); Ogan & Beam, *supra* note 199, at 292–93; NEWSPAPER ASS'N OF AM., COMMENT ON FEDERAL TRADE COMMISSION WORKSHOP "FROM TOWN CRIER TO BLOGGERS: HOW WILL JOURNALISM SURVIVE THE INTERNET AGE?," 1, 5, 7, 10 (2009), http://www.ftc.gov/os/comments/newsmediaworkshop/544505-00015.pdf; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (citing loss of classified advertising revenues to electronic competitors, low rates for online display advertising, and audience shift away from print to online news sources); JONES, *supra* note 199, at 161; Kip Cassino, *Newspapers' Pendulum Swing*, BORRELL ASSOCS. (July 28, 2010, 3:36 PM), http://www.borrellassociates.com/wordpress/2010/07/28/newspapers'-pendulum-swing/ ("Once the Internet was monetized, the old ways no longer applied."); FTC DISCUSSION DRAFT, *supra* note 208, at 2–3; Fallows, *supra* note 197, at 46–48.

210. *See* Shirky, *supra* note 196 ("The competition-deflecting effects of printing cost got destroyed by the internet," and when former newspaper advertisers "were all able to use that infrastructure to get out of their old relationship with the publisher, they did.").

searchable, electronic classified advertising.[211] These include Craigslist[212] as well as employment-, automotive-, and real estate-specific sites.[213] The Internet also presented advertisers with affordable opportunities for display advertising[214] and with innovative new forms of advertising more effective than print advertising at linking sellers of products and services with their target audiences of potential buyers.[215] For example, Google's keyword search advertising system auctions to advertisers the right to have their text advertisements appear when someone using Google's search engine types in certain keywords.[216]

Second, the abundance of advertising opportunities online—on Web sites of news organizations, bloggers, social media, "aggregators" of content or links to content published originally by other sites—resulted in "dirt-cheap" rates for online advertising compared to print advertising prices.[217] The low rates online advertising commands, though sufficient to sustain blogs and other sites with low operating costs, are a problem for news organizations because of the high costs of newsgathering, such as maintaining a staff of reporters and editors. Even if a newspaper decided to publish online only, thereby saving the expenses of printing and distributing newspapers, the costs savings and the income from online advertising sales would not make up the shortfall of losing the more lucrative print advertising revenues and, to a lesser extent, the prices that can be charged for sales of a print edition.[218] In sum, newspapers reeling from the flight of their classified and display

211. Fallows, *supra* note 197, at 46; NEWSPAPER ASS'N OF AM., *supra* note 209, at 4; JONES, *supra* note 199, at 20; Ogan & Beam, *supra* note 199, at 293; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (see section on "Economics," subsection on "Advertising: Anatomy of an Advertising Crash"). By the year 2000, classified advertising—especially employment, automobile, and real estate classifieds—accounted for approximately forty percent of newspapers' advertising revenues. KAYE & QUINN, *supra* note 192, at 6. That percentage dropped to just twenty-four percent of newspapers' print advertising revenues by late 2009. NEWSPAPER ASS'N OF AM., *supra* note 209, at 4.

212. KAYE & QUINN, *supra* note 192, at 25; JONES, *supra* note 199, at 20.

213. JONES, *supra* note 199, at 20.

214. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199.

215. Ogan & Beam, *supra* note 199, at 293; KAYE & QUINN, *supra* note 192, at 25.

216. KAYE & QUINN, *supra* note 192, at 25. Google charges an advertiser for the appearances of its advertisements only when someone clicks on one. *Id.* Google's contextual advertising system, which analyzes the content of a particular Web page to determine which advertisements to display, is another example of the precise matching of advertiser and audience possible on the Internet but not in the newspaper and partly responsible for the flight of advertisers from newspapers to the Internet. *Id.*

217. *Id.* at 9; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199; FTC DISCUSSION DRAFT, *supra* note 208, at 3; NEWSPAPER ASS'N OF AM., *supra* note 209, at 7; JONES, *supra* note 199, at 164–65; *see also* Shirky Address, *supra* note 206 ("[W]hen you have an advertising market that balances supply and demand efficiently, the price plummets. . . . The answer may be that we are seeing advertising priced at its real value for the first time in history, and that value is a tiny fraction of what we had gotten used to.").

218. *See* FTC DISCUSSION DRAFT, *supra* note 208, at 3; JONES, *supra* note 199, at 164–65.

advertising to the Internet are unable themselves to look to the Internet to make up that shortfall: "Online, advertising by itself won't soon and may never be sufficient to support a strong, comprehensive newsgathering operation."[219]

Third, the Internet created a consumer expectation of free content and allowed consumers easy access to news sources from around the world, making difficult many news organizations' efforts to charge readers for content.[220] Newspapers' recent efforts to recoup some lost revenue by charging more for print editions accelerated a trend of declining circulation.[221] Prospects for significant revenue from charging readers for online access to news content—currently provided online for free by most news organizations with a Web presence[222]—are even worse. Newspapers face consumer resistance to paying for online news, a resistance rooted in their habit of receiving the same online content free for years; in the concept that digital content generally should be free, a notion encouraged by the "free" price tag of much digital music, videos, online encyclopedia entries, and other content online; and in the availability of many free online news alternatives should any particular site begin charging for content.[223] Both surveys and prior attempts to charge online users for content suggest that most are unwilling to pay.[224]

219. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (at "Economics" discussion); *see also* FTC DISCUSSION DRAFT, *supra* note 208, at 3.

220. Fallows, *supra* note 197, at 46; KAYE & QUINN, *supra* note 192, at 10–11.

221. *See* STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (at discussion of "Audience"). Many newspapers increased the price of their print editions in 2009. By the end of the year, newspaper companies reported at least moderate gains in circulation revenue, but the increased prices also accelerated circulation declines. *Id.* Newspapers saw their biggest year-over-year drop in print circulation to date, *id.*, since circulation began dropping in the 1980s. *See* KAYE & QUINN, *supra* note 192, at 7; *see also* JONES, *supra* note 199, at 160. Because newspaper circulation is already declining and circulation figures will fall faster the higher the price charged to readers climbs, and as print advertising rates are based on circulation figures, it is clear that raising revenues by increasing the price for newspapers' print editions is a short-term solution, not a realistic long-term strategy.

222. *See* KAYE & QUINN, *supra* note 192, at 9–10; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (discussing "New Revenue Prospects").

223. *See* KAYE & QUINN, *supra* note 192, at 10 (discussing consumer expectation of free digital content on the Internet); STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (discussing unlikelihood that news consumers will pay fees that news organizations institute for access to online content "when there are free local, national and international alternatives").

224. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199. A 2006 survey "found that although more than half of online news readers are willing to register on a news site, only about 6 percent have ever paid for news content." Ogan & Beam, *supra* note 199, at 285 (citing JOHN HORRIGAN, PEW INTERNET & AMERICAN LIFE PROJECT, FOR MANY HOME BROADBAND USERS, THE INTERNET IS A PRIMARY NEWS SOURCE (2006), http://www.pewinternet.org/~/media//Files/Reports/2006/PIP_News.and.Broadband.pdf.pdf). In a January 2010 survey, only thirty-five percent of online news consumers said they had a favorite news site, and only nineteen percent of those with a favorite news site—presumably the "most loyal news customers"—said that they were willing to pay for news online. *Id.* More than eighty percent of those with a favorite news site said that if their favorite site

Fourth, the Internet "unbundled" newspaper content, so that news stories are no longer subsidized by advertisers and by consumers interested in other content.[225] Printed newspapers "bundle" a wide range of content into a single package, requiring a reader interested in one section of the paper to pay for and receive all the news and advertising content contained in every other section, and requiring an advertiser interested in a certain kind of consumer to pay to "advertise to an entire class of readers."[226] The result, in the pre-Internet era, was that the lucrative sections of the newspaper—the advertisements and the content most attractive to advertisers—subsidized the expensive process of newsgathering.[227] The Internet effectively "unbundled" news content. Online news consumers need not receive content in which they are uninterested, nor must they receive it from a single, local source.[228] Advertisers can target their desired customers very specifically online and need not pay inflated rates that subsidize the production of news content unrelated to their target audience.[229] Google engineers and executives working on initiatives aimed at helping news organizations fix their broken business model have emphasized unbundling as "an insurmountable business problem for journalism."[230]

Finally, digital technology and the Internet have facilitated not only content distribution, but rampant content piracy,[231] diverting some profits news organizations would otherwise reap to free riders.[232] The

charged for news content, they would find news content elsewhere rather than pay. *Id. Newsday*, the *New York Times*, and the *Los Angeles Times*, among other news organizations, tried restricting access to some of their online content to those who paid a subscription fee, but later abandoned their online subscription models. KAYE & QUINN, *supra* note 192, at 35–38; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199. The *New York Times* began charging for some access to its online content in early 2011. *See* Richard Pérez-Peña, *The* Times *to Charge for Frequent Access to its Web Site*, N.Y. TIMES, Jam. 20, 2010, http://www.nytimes.com/2010/01/21/business/media/21times.html.

225. Fallows, *supra* note 197, at 46–47; PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM: INTRODUCTION (2010), http://www.stateofthemedia.org/2010/printable_overview_chapter.htm [hereinafter STATE OF THE NEWS MEDIA: INTRODUCTION] (citing unbundling as a "major trend").

226. Fallows, *supra* note 197, at 46–47.

227. *Id.*; STATE OF THE NEWS MEDIA: INTRODUCTION, *supra* note 225.

228. STATE OF THE NEWS MEDIA: INTRODUCTION, *supra* note 225.

229. *See* Fallows, *supra* note 197, at 47.

230. *Id.* at 46.

231. DANIEL CASTRO ET AL., THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, STEAL THESE POLICIES: STRATEGIES FOR REDUCING DIGITAL PIRACY i, 1–2 (2009).

232. *See, e.g.*, NEWSPAPER ASS'N OF AM., *supra* note 209, at 10–11; DAN MARBURGER & DAVID MARBURGER, REVIVING THE ECONOMIC VIABILITY OF NEWSPAPERS AND OTHER ORIGINATORS OF DAILY NEWS CONTENT 1–2 (2009), http://www.bakerlaw.com/files/uploads/documents/news/articles/mainanalysis.pdf; Richard Posner, *The Future of Newspapers*, BECKER–POSNER BLOG (June 23, 2009), http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html [hereinafter Posner Blog Post] (discussing free riding at end of post).

spread of high speed Internet access[233] and the advent of Web browsers[234] and other online publishing tools have allowed ordinary people as well as traditional content producers[235] to publish content[236] faster[237] and at lower cost[238] than ever before, to a global audience[239] able, with the use of search engines, RSS feeds, and many other tools, to easily access the precise content in which they are interested.[240] The same technologies that have made publication of original content easier, cheaper, and possible on a global scale have also "led to an explosion of digital piracy."[241] Unauthorized copying of motion pictures, sound recordings, software, video games, and electronic books costs producers and retailers of such content billions of dollars annually.[242] News organizations have not been spared the technology-assisted, unauthorized redistribution of their content.[243]

233. *See* CASTRO ET AL., *supra* note 231, at 2 (noting "[t]he growing availability of high-speed Internet connections and cheap storage").

234. *See* Ogan & Beam, *supra* note 199, at 279–80 (discussing "the introduction of Web browsers with a graphic-interface capability," "a tool that made it easy to distribute information and display images").

235. *See id.* at 299–300 (crediting the Internet with changing not what content is created but who creates it and with giving "[o]rdinary people . . . opportunities never before imagined" to produce content); KAYE & QUINN, *supra* note 192, at 29 ("Content consumers were now content producers as well.").

236. *See* JONES, *supra* note 199, at 184, 190 (discussing the proliferation of blogs and "the power the Web creates for any individual to be part of the journalism universe" by publishing written accounts and photographs online); PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM: CITIZEN-BASED MEDIA (2009), http://www.stateofthemedia.org/2009/narrative_special_citzenbasedmedia.php?cat=0&media=12 [hereinafter CITIZEN-BASED MEDIA] (noting "the potential that the Web offers to create content," but also the failure of most Americans to produce and post original content).

237. *See* PROJECT FOR EXCELLENCE IN JOURNALISM, HOW NEWS HAPPENS: A STUDY OF THE NEWS ECOSYSTEM OF ONE AMERICAN CITY 2 (2010), http://www.journalism.org/sites/journalism.org/files/Baltimore%20Study_Jan2010_0.pdf [hereinafter HOW NEWS HAPPENS] (stating that new technology allows faster dissemination of news and calling the Web "clearly the first place of publication"); Ogan & Beam, *supra* note 199, at 299 (citing Robert Picard for the proposition that one of the Internet's major impacts "on communications is in increasing the speed and flexibility of transmission" of content).

238. *See* CASTRO ET AL., *supra* note 231, at 2 (noting the Internet's "promise of slashing costs by reducing the role of middlemen who produce, distribute, and sell . . . physical copies").

239. *See id.* at 2 (discussing the Internet's facilitation of the "global distribution of content").

240. *See* Ogan & Beam, *supra* note 199, at 295, 305–06 (discussing search engines, RSS feeds, and other technologies and noting that whereas content producers used to target consumers, the opposite is true in the Internet age).

241. *See* CASTRO ET AL., *supra* note 231, at i, 1–2; *see also* Shirky, *supra* note 196 ("Even ferocious litigation [is] inadequate to constrain massive, sustained law-breaking.").

242. CASTRO ET AL., *supra* note 231, at 3–4.

243. *See* NEWSPAPER ASS'N OF AM., *supra* note 209, at 10–11, 13 (discussing piracy of newspapers' content "for someone else's commercial benefit"); Shirky, *supra* note 196 (discussing piracy of Dave Barry's newspaper column); Adam Hochberg, *Are Newspaper Copyright Lawsuits Fair Enforcement or 'Legal Extortion'?*, POYNTER ONLINE, Aug. 31, 2010, http://www.poynter.org/

Some such activity poses a real threat to the economic viability of newspapers.[244] Bloggers, for-profit companies, and advocacy groups are among those found to have engaged in word-for-word reposting of whole or substantial portions of news content[245] despite copyright law's prohibition on unauthorized copying of the precise words used to express facts.[246] A 2009 study found tens of thousands of instances of word-for-word republication of newspaper articles in a single month.[247] Sites reposting the newspapers' content sold advertising around that content, the Newspaper Association of America reported, "generating revenue for the webpage owners, the ad networks (e.g., Google and Yahoo!) and the advertisers—*and not the newspapers, the original creators of the content*."[248]

Rather than republish portions of news stories word-for-word, some sites publish reworded summaries that may or may not credit the original source, or post copied headlines and links that direct interested readers to the article's original source.[249] Sites that regularly engage in either form of collecting and re-posting news content are "aggregators."[250] Aggregators posting headlines or summaries rather

column.asp?id=136&aid=189803&view=print (discussing dozens of copyright infringement suits brought by Righthaven and Stephens Media Group in 2010 against small-time bloggers, for-profit companies, and advocacy groups who have republished copyrighted news articles online, sometimes word-for-word in their entirety); KAYE & QUINN, *supra* note 192, at 38 (discussing wide dissemination by bloggers of columns from the *New York Times* while the *Times* was charging for access to the columns); *see also* MARBURGER & MARBURGER, *supra* note 232, at 2–3, 8, 14–16, 21–24, 32–35, 37–40 (discussing potentially legal practice, and the effects, of "parasitic aggregators'" republication of and profiting from "timely versions of news reports" originated by newspapers); HOW NEWS HAPPENS, *supra* note 237, at 2 (study of Baltimore's traditional news organizations and new media "found numerous examples of websites carrying sections of other people's work without attribution and often suggesting original reporting was added when none was"); Fallows, *supra* note 197, at 49 (comparing Google's use on its Google News site of little of newspapers' original content with the republication by sites such as the Huffington Post of much of newspapers' stories); FTC DISCUSSION DRAFT, *supra* note 208, at 5–9 (discussing use by aggregators and commercial Web sites of news content in context of copyright and hot news misappropriation law); JONES, *supra* note 199, at 189–90 (calling Google News and most political and news-related bloggers "parasites"); *supra* Part III.B. (summarizing recent hot news misappropriation litigation).

244. Posner Blog Post, *supra* note 232; NEWSPAPER ASS'N OF AM., *supra* note 209, at 10–11; MARBURGER & MARBURGER, *supra* note 232, at 5–6, 8.

245. *See* NEWSPAPER ASS'N OF AM., *supra* note 209, at 13; Hochberg, *supra* note 243; *see also* Shirky, *supra* note 196; KAYE & QUINN, *supra* note 192, at 38 (both discussing unauthorized republication of columns in their entirety).

246. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348–49 (1991).

247. NEWSPAPER ASS'N OF AM., *supra* note 209, at 13. Attributor, Inc. tracked 51,000 articles over a thirty-day period and found more than 45,000 sites that re-posted some part of at least one article. Of those, "59 percent republished either the entire article or a significant excerpt of it." *Id.*

248. *Id.*

249. *See* Fallows, *supra* note 197, at 49; MARBURGER & MARBURGER, *supra* note 232, at 1–2.

250. MARBURGER & MARBURGER, *supra* note 232, at 1–2; *see also* KAYE & QUINN, *supra* note 192, at 41–42.

than republishing entire, word-for-word news accounts probably avoid infringing newspapers' copyrights in the original articles.[251] But other re-uses of news content may fairly be called digital piracy or free riding,[252] though the line separating fair re-users from objectionable free riders is debated.[253]

"The original reporting that is done by newspapers each and every day cannot be sustained over the long term if newspapers are not able to obtain fair and reasonable compensation for the investments they make in the content that they produce," the NAA asserts.[254] Economist-attorney duo Dan and David Marburger classify aggregators as either "pure" or "parasitic."[255] Pure aggregators are those "economically good for originators of news" who, by linking to news stories and providing only bare-bones descriptions or headlines, "function as reader-dispatchers that advertise newspaper websites."[256] Parasitic aggregators "post enough of the originator's content to cause most interested readers to substitute the aggregator's summary for the originator's report"—and they post these substitutes for original news accounts "nearly as quickly as the originators can provide them, . . . exploit[ing] those reports before they lose their short-lived commercial value."[257] Parasitic aggregators, able to start and run their businesses at low cost and to attract advertising dollars easily, will proliferate and threaten newspapers' viability unless "[t]he legal system . . . provide[s] a brief window during which aggregators cannot freely exploit others' original news reports in near-simultaneous direct competition with them."[258] Proposals for changes to copyright law to solve this problem[259] have not gained

251. *See Feist*, 499 U.S. at 348–49; 17 U.S.C. § 107 (2006); *see also* MARBURGER & MARBURGER, *supra* note 232, at 22.

252. *See* NEWSPAPER ASS'N OF AM., *supra* note 209, at 10–11; Posner Blog Post, *supra* note 232; JONES, *supra* note 199, at 187; MARBURGER & MARBURGER, *supra* note 232, at 1–2, 36–37, 51.

253. *See, e.g.*, NEWSPAPER ASS'N OF AM., *supra* note 209, at 10 (depends on whether advertising is sold around the re-used news content); MARBURGER & MARBURGER, *supra* note 232, at 17 (depends on whether amount of content posted causes reader to substitute re-posting site for original); Fallows, *supra* note 197, at 49 (same); JONES, *supra* note 199, at 187, 189–90 (calling all aggregators free riders); KAYE & QUINN, *supra* note 192, at 41–42 (summarizing debate over whether Google News engages in "theft" or "fair use"); FTC DISCUSSION DRAFT, *supra* note 208, at 5–8 (taking no position on whether search engines and aggregators are free riders or fair users).

254. NEWSPAPER ASS'N OF AM., *supra* note 209, at 10.

255. MARBURGER & MARBURGER, *supra* note 232, at 1–2, 15–17.

256. *Id.* at 1, 53.

257. *Id.* at 17, 32.

258. *Id.* at 32–33, 38.

259. The Marburgers propose an amendment to the Copyright Act explicitly stating that the Act does not preempt common law or statutory actions for unfair competition or unjust enrichment, regardless of the availability of copyright infringement claims. *Id.* at 4. Recognizing the likelihood that free riding will put newspapers out of business, Seventh Circuit Judge Richard Posner has proposed a

traction.

C. Other Economic Pressures on News Organizations

The Internet's destruction of newspapers' traditional business model may be the most urgent threat to their economic viability, but it is far from the only serious threat. Long-term circulation declines,[260] significant debt loads left over from a series of media company mergers,[261] and an economic recession has devastated the sectors of the economy upon which newspapers were most dependent for advertising revenue[262] have all contributed to newspapers' precarious financial position.

D. No New Business Model Yet

Though some have found reasons for optimism in the efforts underway to find a new business model to sustain newsgathering in the Internet age,[263] the fact remains that none yet exists.[264] The time for discovering one is running out: the Project for Excellence in Journalism, which undertakes a comprehensive study of the state of the news media each year, concluded in its latest that newspapers have a "window for reinvention and transformation" of "longer than a year or two, but less

slightly different change to copyright law: "[e]xpanding copyright law to bar online access to copyrighted materials without the copyright holder's consent, or to bar linking to or paraphrasing copyrighted materials without the copyright holder's consent." Posner Blog Post, *supra* note 232.

260. Fallows, *supra* note 197, at 44, 46; *see also* Ogan & Beam, *supra* note 199, at 285; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199. Total daily print subscriptions have fallen 31.5% in the last twenty-five years, and Sunday edition subscriptions have fallen 27% in that period. *Id.* (discussing "Audience"). The number of newspaper subscriptions per household, an important indicator of newspapers' long-term prospects, "has headed straight down . . . ever since World War II." Fallows, *supra* note 197, at 44.

261. JONES, *supra* note 199, at 21, 161; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199; FTC DISCUSSION DRAFT, *supra* note 208, at 3. In more profitable times, newspaper companies financed the purchase of more newspapers in a series of acquisitions that left "most . . . newspaper companies . . . weighed down with debt." JONES, *supra* note 199, at 21, 161. Tribune Company's $13 billion debt illustrates the severity of the newspaper companies' burden. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199; James Rainey & Michael A. Hiltzik, *Owner of L.A. Times Files for Bankruptcy*, L.A. TIMES, Dec. 9, 2008, http://articles.latimes.com/2008/dec/09/business/fi-tribune9.

262. *See* KAYE & QUINN, *supra* note 192, at 6–7, 19; STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199; *see also* FTC DISCUSSION DRAFT, *supra* note 208, at 3; JONES, *supra* note 199, at 153.

263. KAYE & QUINN, *supra* note 192, at 173–77; Fallows, *supra* note 197, at 50–56.

264. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 ("There is no agreed-upon business model for the future."); FTC DISCUSSION DRAFT, *supra* note 208, at 5 ("In sum, newspapers have not yet found a new, sustainable business model, and there is reason for concern that such a business model may not emerge.").

than 10."[265] If advertising revenue continues to drop as projected, the newspaper industry could be half the size in 2012 as it was in 2005.[266] Meanwhile, newspapers have turned to severe cost-cutting in order to remain profitable, shedding twenty-seven percent—15,000—of their full-time reporting and editing jobs in the three year period from 2007 through 2009.[267]

In this Internet age, "there is one possible answer to the question 'If the old model is broken, what will work in its place?'" New York University professor Clay Shirky wrote in a 2009 essay assessing the future of newspapers.[268] "The answer is: Nothing will work, but everything might. Now is the time for experiments."[269]

VI. NECESSITY OF THE HOT NEWS MISAPPROPRIATION TORT IN THE DIGITAL ERA

This Part concludes, given the developments discussed in Part V, that the availability of the misappropriation tort is more important now than ever before. It argues first that, while continued protection against piracy will not itself save the newspaper industry, hot news misappropriation actions could prove a critical tool for prolonging the existence of newspapers on the brink of financial ruin long enough for a new business model or some combination of new revenue sources that will sustain them to emerge. Second, it argues that by shortening the period of time in which news remains "hot" and by providing conditions conducive to profitable free riding, the Internet has further increased newspapers' need for the misappropriation tort. Finally, it considers evidence that much of the "new media" content online is derivative of newspapers' reporting and argues that news content piracy in the Internet era, if not enjoined, threatens the continued existence not only of newspapers and news, but also of the blogs, aggregators, search services, and other sites whose content and value depend upon the survival of news producers.

A. Misappropriation Tort Could Affect Newspapers' Fate

The mere availability of the hot news misappropriation cause of action to newspapers will not "save" the newspaper industry, whose

265. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199.

266. KAYE & QUINN, *supra* note 192, at 7.

267. STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199.

268. Shirky, *supra* note 196.

269. *Id.*

financial trouble extends far beyond the diversion of some of the online advertising dollars it would otherwise generate to sites reaping advertising profits from pirated news content. But if, as Clay Shirky suggests, no single thing will work to save newspapers, "but everything might,"[270] the misappropriation tort is one component of the "everything" necessary to realize the industry's survival.

The newspaper industry's current fragile economic condition exponentially increases the likelihood that acts of news content piracy for profit will, if allowed to continue, so reduce newspapers' incentive to gather and publish news that the quality or very existence of their news product is substantially threatened by the piracy.[271] This reduced production incentive amounting to a substantial threat to continued production—the crux of the misappropriation tort[272]—warrants injunctive relief.[273] The absence of that relief would hasten the newspaper industry's demise and thereby dramatically decrease the availability of news to the public, a scenario that has always served as the primary justification for the hot news misappropriation tort[274] but is particularly likely in the near future to become reality if current conditions persist.[275] On the other hand, the ability to enjoin free riders competing with newspapers for online advertising sales using newspapers' own content would, by reducing the disincentive to continue producing news, increase the likelihood of newspapers' survival for long enough to find one or more sustainable alternatives to their traditional but unsustainable model.

Newspapers' current vulnerable financial status means that each and every act of piracy of news content for profit stands a greater chance today of "destroy[ing newspapers'] incentive to collect news in the first place"[276] than similar acts would have before the Internet wreaked havoc on the newspaper industry's business model. For even without the additional threat that piracy poses to newspapers' bottom lines, their economic incentive to gather news has not been, at any time since that incentive first gained limited legal recognition and protection in *INS v.*

270. *Id.*

271. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997).

272. *See* McKevitt v. Pallasch, 339 F.3d 530, 534 (7th Cir. 2003); Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 341–42 (S.D.N.Y. 2010), *rev'd*, No. 10-1372-cv, 2011 U.S. App. LEXIS 12421 (2d Cir. June 20, 2011).

273. *See INS III*, 248 U.S. 215, 241 (1918).

274. *See Nat'l Basketball Ass'n*, 105 F.3d at 845, 853.

275. *See, e.g.*, STATE OF THE NEWS MEDIA: NEWSPAPERS, *supra* note 199 (estimating more than one or two but less than ten years of newspapers' survival without "reinvention and transformation").

276. *Nat'l Basketball Ass'n*, 105 F.3d at 853.

AP, as little as it is now.[277] Any erosion of what little economic incentive remains for newspapers to go on gathering the news could send newspapers already approaching insolvency over that precipice. Or, it could cause newspapers to cut costs to such a degree that they manage to continue producing news only of poor quality.[278]

Either result is the essence of the fifth *NBA* element: the ability of others to free ride on a producer's efforts would so reduce the production incentive that the product's existence or quality would be substantially threatened if the free riding were permitted to continue.[279] Behind the injunctive relief made available to a producer faced with free riding of this substantially threatening sort was the concern that without such relief for the producer, the public might lose the benefit of the product.[280] Because free riding for profit on newspapers' content while newspapers are in their current economic predicament inevitably substantially threatens the newspapers' continued production of quality news or of any news at all, and because a scenario in which the public is deprived of newspaper reporting is not only possible but is now being forecast if newspapers lack protections against free riding,[281] newspapers are presently in dire need of the injunctive remedy afforded by the misappropriation tort.

Though injunctions, as well as statutory damages, are available for copyright holders against infringers, that avenue of injunctive relief is unavailable post-*Feist* to news organizations facing piracy of facts from their news content without plagiarism of the expression used to convey those facts. News content producers faced with free riding by competitors in the market for online advertising that poses a threat to the continued production of news need a tool to stop such free riding well before the substantial threat it poses if unaddressed is realized.

Because the survival of the newspaper industry until a new business model is found depends upon its ability to reap every last, disappearing dollar it can from newsgathering, the ability of newspapers to obtain injunctive relief against so-called "parasitic aggregators"[282] could prove critical to newspapers' ultimate fate. The availability of such relief through the hot news misappropriation cause of action creates the possibility that newspapers will be able to employ it to prolong their

277. *See supra* Part V.

278. JONES, *supra* note 199, at xviii.

279. *Nat'l Basketball Ass'n*, 105 F.3d at 852.

280. *See id.* at 853.

281. *See, e.g.*, Posner Blog Post, *supra* note 232; MARBURGER & MARBURGER, *supra* note 232, at 38; *see also* FTC DISCUSSION DRAFT, *supra* note 208, at 4–5.

282. MARBURGER & MARBURGER, *supra* note 232, at 32.

survival—by preserving whatever portion of their online advertising revenue unremedied piracy would otherwise divert—for long enough to discover and transition to a new business model that will sustain newsgathering over the long term.

B. Shortened News Cycle and Ease of Free Riding Increase the Need for Relief

Two other developments since *INS v. AP*—a shorter news cycle and the ease of free riding online—have also increased the newspaper industry's need for the continued availability of the misappropriation tort.

Television and the Internet have transformed the period during which news retains its "hot" status—and thus, its value as a vehicle for advertising sales—from the approximately twenty-four hour news cycle in effect while news was still consumed primarily in print to a much shorter period measured in hours and even minutes.[283] Legitimate competition online between news organizations previously isolated, before television and the Internet, from competing with each other to be "first" with news largely explains the shorter period today during which news retains its "hot" status. But modern technology that allows content pirates to copy and disseminate information almost instantly after its initial electronic publication has also reduced the window of opportunity for news organizations to recover their investment in gathering and publishing "exclusive" news to nearly no time at all.[284] This change in "lead time"[285] implicates the second element of a classic hot news misappropriation claim as articulated by the Second Circuit in *NBA*, the requirement that the value of the information that the misappropriation plaintiff produces be "highly time-sensitive."[286] In the Internet era, even minutes really matter, and this smaller window of opportunity for a news producer reap the reward, in advertising revenue, of its newsgathering investment renders the producer's ability to do so without competition from free riders more important than ever.

The Internet has also made free riding on costly news content, in

283. Ogan & Beam, *supra* note 199, at 292.

284. *See* Gary Myers, *The Restatement's Rejection of the Misappropriation Tort: A Victory for the Public Domain*, 47 S.C. L. REV. 673, 688 (1996) (stating that today, compared with the time of INS's transmission of AP content by telegraph, "instant copying and transmission can be accomplished even more readily. . . . Thus, the lead time once enjoyed by the producers of information is largely non-existent today."); *see also* Djavaherian, *supra* note 163, at IV.B.2 ("[E]lectronically stored information can be copied and disseminated with an ease unknown in prior mediums.").

285. Myers, *supra* note 284, at 688.

286. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997).

direct competition with news producers in the online advertising market—the third and fourth elements, respectively, of *NBA*[287]—very easy, and consequently, more of a threat.[288] At the time of *INS v. AP*, news organizations required the misappropriation tort to guard against piracy of their content namely by other members of the media. But the Internet has effectively turned members of the public—at least those who run advertising-supported Web sites—against whom news producers' quasi-property interest in their content would not otherwise extend, into direct competitors with news producers as sellers of online advertising. The Internet has also made it easy and economically rewarding to republish, almost instantaneously, content produced by others. Consequently, the economic threat to the newspaper industry posed collectively by free riders[289] is greater in the Internet age than before it, and news producers' need for the misappropriation tort as a tool to prevent the diversion of revenue by free riding direct competitors has increased.[290]

C. Loss of Newspapers Means Loss of News and of Derivative Content

Despite the opportunities that the Internet and digital technology provide for inexpensive and easy electronic publication of content to a worldwide audience, relatively few are taking advantage of the medium to report original news. Rather, studies show that most of the news published online originates with "legacy media" organizations such as newspapers.[291] Blogs, social media, and other Internet sites, insofar as they concern news, function to repeat, more widely disseminate, and comment upon news originally reported by legacy media.[292] As a result, newspapers' cutbacks have resulted in a net loss of news despite the

287. *Id.*

288. *See supra* Part V.B.

289. *See* MARBURGER & MARBURGER, *supra* note 232, at 32–33, 37–38.

290. That said, not every use of news content by an advertising-supported online site would amount to free riding. The free riding requirement leaves a hot news misappropriation claim unavailable to a news organization faced with direct, harmful competition in the market for advertisers by one whose use of hot news content is not actually parasitic. The more commentary or analysis that a supposed free rider has added to a news organization's original content, or the more the alleged free rider has driven readers and advertising revenue to, rather than diverted them from, the news organization's site, the harder it would be for the news organization to establish actionable free riding as contemplated by *INS* and *NBA*.

291. *See* STATE OF THE NEWS MEDIA 2010: INTRODUCTION, *supra* note 225 (see third and sixth "major trends"); HOW NEWS HAPPENS, *supra* note 237, at 2.

292. *See* STATE OF THE NEWS MEDIA 2010: INTRODUCTION, *supra* note 225; HOW NEWS HAPPENS, *supra* note 237.

proliferation of content sites online,[293] and the disappearance of newspaper reporting in any substantial quantity would reverberate across the Internet, threatening the quality and continued existence of many sites that do not actually produce original news reports but that depend upon their continued availability.[294] The dependence of so many online sites for their existence, relevance, or utility on the continued investment by newspapers in producing original news reports greatly increases the import of affording newspapers a remedy against free riding that threatens to eliminate their incentive to continue that investment.

Two 2010 reports underscore the dependence of online sites upon news content produced by others. The Project for Excellence in Journalism noted, in its report on *The State of the News Media 2010*, that the amount of reportorial journalism is decreasing, while commentary and discussion dependent upon such reporting is increasing, online and across other media.[295] According to that report, "[N]ew media are largely filled with debate dependent on the shrinking base of reporting that began in the old media. Our ongoing analysis of more than a million blogs and social media sites, for instance, finds that 80% of the links are to U.S. legacy media."[296] The same report also concluded, based upon the results of an analysis of traffic to "news sites," that "cutbacks in old media heavily impact what the public is learning through the new."[297] Of the most heavily trafficked "news sites," sixty-seven percent are sites run by legacy news media, thirteen percent "are aggregators whose content is derived from legacy media," and just fourteen percent "are online-only operations that produce mostly original reportorial content rather than commentary."[298]

The Project for Excellence in Journalism also conducted an in-depth study of the news content produced by all local news outlets in Baltimore—including new media—during one week, reporting the results in *How News Happens: A Study of the News Ecosystem of One American City*.[299] The study found an "echo chamber" online: local sites and blogs repeated information published by legacy media but contributed just four percent of the enterprise reporting during that

293. *See* STATE OF THE NEWS MEDIA 2010: INTRODUCTION, *supra* note 225; HOW NEWS HAPPENS, *supra* note 237.

294. *See, e.g.*, Fallows, *supra* note 197, at 49–50.

295. STATE OF THE NEWS MEDIA 2010: INTRODUCTION, *supra* note 225 (discussing third of six "major trends" noted).

296. *Id.*

297. *Id.* (discussing sixth "major trend").

298. *Id.*

299. HOW NEWS HAPPENS, *supra* note 237.

week.[300] A majority of news stories published by all local news outlets during the study period contained no original reporting, "[a]nd of the stories that did contain new information nearly all, 95%, came from traditional media—most of them newspapers."[301] News accounts published online by new media were "brief," "derivative of other news accounts," and "played little role in broadening the reporting or the discussion."[302] The Internet served mostly as a tool for traditional media to break news and for new media sites to parrot news originating elsewhere: "technology enhanced dissemination but did not add reporting."[303] The study quantified the loss of news content—for example, the Baltimore Sun in 2009 produced thirty-two percent fewer stories than it did in 1999 and seventy-three percent fewer than it did in 1991—and concluded that "the addition of new media has not come close to making up the difference."[304]

The failure of the Internet to spawn new producers—rather than repeaters—of news content in any quantity sufficient to replace the news content lost as traditional news producers slash their budgets results in a net loss of news when newspapers struggle economically. That net loss of news, coupled with the dependence of a great percentage of online sites upon the availability of news content that they publish but do not produce themselves, portends a threat posed by newspapers' current crisis far beyond that to the existence and quality of newspapers alone. If newspapers do not replace current revenue shortfalls with revenues from new sources, the quality and very existence of news-dependent online sites will also be at risk.

That risk is being felt even by the Internet giant Google. Google's business, employees explained in a magazine article about the company's efforts to make newsgathering sustainable again, "depends on the existence of information worth searching for," which in turn requires news organizations to produce "great content."[305]

The risk posed not only to the quality and existence of newspapers should their incentive to produce news disappear, but also to the quality and existence of so many news-dependent sites on the Internet, weighs in favor of guarding against the erosion of that production incentive. The misappropriation tort, which helps serve that function by providing a remedy for newspapers faced with free riding that threatens to divert

300. *Id.* at 2–3, 6, 9, 13, 16, 32–33, 37.

301. *Id.* at 1–2.

302. *Id.* at 6, 9.

303. *Id.* at 2–3, 13, 26, 33.

304. *Id.* at 2.

305. Fallows, *supra* note 197, at 49–50.

some of the profits that constitute that production incentive, is therefore a more necessary tool in the Internet age than ever before.

VII. CONCLUSIONS

The misappropriation tort, at least in its hot news form, has proven improbably resilient in the nine decades since the U.S. Supreme Court granted the Associated Press the remedy that equity, if not precedent, demanded the news agency have against its free-riding competitor. Hot news misappropriation likely survives federal preemption and remains available, in jurisdictions recognizing the tort, to remedy piracy for profit of news content resembling that described in *INS v. AP*. The *NBA* decision preserves the essence of the *INS* decision and should be applied to effectuate the purpose of the misappropriation tort: to preserve, for the benefit of the public, the availability of news by providing news producers with the means, in the form of a temporary injunction, to reap what they have sown. Though it will not, alone, save newspapers and other producers of costly news reporting from their myriad economic challenges, the hot news misappropriation tort is, especially in the absence of any explicit, meaningful protection for news producers under federal law against free riders, an important remedy. Now, as newspapers face an unprecedented revenue shortfall that itself threatens the quality and existence of their news content, as the Internet incentivizes and facilitates content piracy, and as a great many Internet sites depend upon news content produced by others for their existence, the misappropriation tort is even more important than it ever has been since its birth almost a century ago.