THE HOT NEWS
MISAPPROPRIATION DOCTRINE:
CONFUSION IN THE INTERNET AGE AND
THE CALL FOR LEGISLATIVE ACTION

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ABSTRACT: In an increasingly connected world, copying information and disseminating it has never been easier. Unfortunately, this rise in technology and connectivity has also led to an increased taking—without permission or attribution—from compilers of factual content and creators of uncopyrightable works. Currently, where the factual content is not copyright protected, the available remedy to the victims of such free riding is the state law hot news misappropriation doctrine. Regardless of the availability of the remedy, courts in recent cases have struggled to adapt this doctrine appropriately to apply to the situations created by the Internet age. Although some scholars argue that federal copyright law preempts the hot news misappropriation doctrine, even if it survives preemption it is still an inappropriate remedy in modern society.

Simply put, the hot news misappropriation doctrine is failing to work in today’s technological world. The confusion surrounding the hot news misappropriation doctrine indicates that the courts’ current solution addressing free riding concerns is ineffective. The doctrine fails because it is vague and can be interpreted to both over- and underprotect information, depending on the context. Legislative action is needed to protect uncopyrightable information that (1) is an essential feature of a plaintiff’s business, (2) provides a benefit to society, and (3) is unlikely to be generated without an incentive of protection for an appropriate time to allow the creator of the work to recover his costs.


The concern of free riding on the time and expense of others did not originate with the Internet age. Concerns about unauthorized copying have existed since the printing press was invented. In 1918, the Supreme Court first

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addressed free riding in International News Service v. Associated Press.¹ Justice Brandeis, in dissent, noted that technology was beginning to make it possible for an agency to obtain, without payment, the fruit of another’s labor and use those fruits to compete with the originator.² Brandeis’s prophecy regarding the role technological advancements would play in misappropriation between competitors has come to fruition. The arrival of the Internet has caused a global marketplace to emerge and the concern of misappropriation among competitors to reach new heights.

Ultimately, the goal of the hot news misappropriation doctrine is to prevent competitors from free riding off of the originator’s uncopyrightable works. The primary concern is that if we fail to protect the originators of these works, the creators will no longer invest the money or time to create them. Allowing free riding would result in killing the goose that laid the golden egg—without works being created, there would be no content to leverage. Today, this concern is greater than ever with the low cost of digital copying and the ease of dissemination via the Internet. Much has changed since the hot news misappropriation doctrine was first established in 1918. Technology has gone beyond what was imaginable at the time of International News, altering the application of the doctrine so significantly that a change is needed.

The current standard for hot news fails to reach the core of the misappropriation problem. Because of the doctrine’s vagueness, the standard can be interpreted as both over- and underprotecting information depending on the context. The only hot-news-type information that truly needs protection is uncopyrightable information that (1) is an essential feature of a plaintiff’s business, (2) provides a benefit to society, and (3) is unlikely to be generated without the incentive of protection. This type of information can be protected by legislative action granting an adequate limited-time protection, while ensuring the information is not protected for an inappropriately lengthy duration that copyright law would allow.

This comment proposes that legislative action is needed and articulates a new framework for the hot news misappropriation doctrine by proceeding in three Parts. Part I examines the courts’ current solution to the free riding concern—the hot news misappropriation doctrine. In addition, Part I examines why the doctrine has so vigorously returned to the forefront of debate. Part II discusses the insufficiency of the current hot news misappropriation doctrine in today’s technological world. Finally, Part III begins by noting that there is a limit to the types of works that ought to be protected by the hot news misappropriation doctrine—those that are (1) uncopyrightable, (2) essential features of a plaintiff’s business, (3) a benefit to society, and (4) unlikely to be generated without the incentive of protection. Part III then continues by explaining that Congress should provide a limited-time protection for the information created.

¹ 248 U.S. 215, 231 (1918).
² Id. at 262 (Brandeis, J., dissenting).
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I. THE CURRENT SOLUTION TO FREE RIDING: THE HOT NEWS MISAPPROPRIATION DOCTRINE

This Part looks first at the development of the hot news misappropriation doctrine. It starts with the doctrine’s origins in the International News case and looks at how the doctrine has developed into the hot news misappropriation tort at the state law level. Turning to the modern day, this Part also examines why hot news has returned to the spotlight, including an exploration of recent social changes and technological advancements, and finishes with an assessment of modern cases applying the doctrine.

A. The Development of the Doctrine

The hot news misappropriation doctrine originated in 1918 with the Supreme Court case International News Service v. Associated Press when a unique news reporting challenge arose during World War I with news reports from the European front. Associated Press (AP) and International News Service (INS) were competitors in the news gathering industry when AP accused INS of misappropriation. At that time, AP provided news stories to 950 daily newspapers, whereas INS served around 400 newspapers that were mostly controlled by William Randolph Hearst. Because Hearst took “positions that were strongly sympathetic to the German cause,” British and French authorities barred INS reporters from the front lines and banned INS from using the European cable system to transmit its stories from the front. Soon after, AP discovered that INS was taking AP’s breaking news stories and reselling them as if they were original INS war reports.

AP had invested significant resources into the gathering and transmission of the news stories. However, the advent of the telegraph and telephone allowed INS to take AP’s news upon its release in eastern cities and transmit it to INS’s western papers for the measly cost of a telegraphic transmission. INS could come in and “scoop” AP rivals in the western United States using AP’s own stories even though INS had not played any role in the news gathering itself. This allowed INS to publish the news stories at least as early as AP could.

The majority opinion stated that not only did the “acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort,” but also that the exchange value was highly dependent on its “novelty and freshness,” “regularity of the service,” and

3. Id. at 215.
4. Id. at 229–30.
5. Id. at 230.
8. Id. at 238–39.
“reputed reliability and thoroughness.”\textsuperscript{11} The majority also found it evident that there was an exchange value for the news to anyone who could misappropriate it.\textsuperscript{12} Finding INS’s practice to be unjust, the Court stated: “Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant’s legitimate business precisely at the point where the profit is to be reaped.”\textsuperscript{13} The Court was concerned with the unfair advantage given to INS because, unlike AP, it was not burdened with the expenses required to acquire the news.\textsuperscript{14}

The Court upheld injunctions against INS in the misappropriation of AP news, which prevented INS from “taking or gainfully using” AP’s news until the commercial value of the news to AP had ended. Thus, the hot news misappropriation doctrine was created.\textsuperscript{15} The Court rejected the common notion that any property right in news was lost the moment it was published or the moment that it became “the common possession of all to whom it is accessible.”\textsuperscript{16} Rather, the Court recognized the “dual character” of the news—that is, the needed ability to distinguish between the “substance of the information and the particular form or collocation of words in which the writer has communicated it.”\textsuperscript{17} Once the Court was able to perform this idea-expression separation, the Court could then determine what, if anything, should be protected.

Ultimately, \textit{International News} turned on the consideration of unfair competition and the need to safeguard the incentives of newsgathering, which was deemed to benefit society as a whole.\textsuperscript{18} The Court considered the societal implications of protection when it granted the limited-time protection to AP. As Professor Richard Epstein noted, “Surely it cannot be the right to be the sole person to speak about the event, which is news itself . . . the thought that only persons who deal with the AP can speak of Pearl Harbor after it breaks the story . . . it is too grotesque to admit any serious consideration.”\textsuperscript{19} The social loss that would result from such an extensive property right is “too large to deny.”\textsuperscript{20}

The \textit{International News} decision created the hot news misappropriation doctrine as a federal common law copyright protection by granting a “quasiproperty” right for AP against INS, because within the news industry valuable property interests could not be retained by keeping the information secret.\textsuperscript{21} \textit{International News} lost its precedential value in federal courts in 1938.

\textsuperscript{11} Id. at 238.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 240.
\textsuperscript{14} Id. at 240–41.
\textsuperscript{15} Id. at 245.
\textsuperscript{16} Id. at 239.
\textsuperscript{17} Id. at 234.
\textsuperscript{18} Id. at 234–35.
\textsuperscript{20} Id.
\textsuperscript{21} Int’l News Serv., 248 U.S. at 235–36.
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with the holding in a later case.\textsuperscript{22} Various state courts, however, have continued to recognize the hot news misappropriation cause as a valid claim.\textsuperscript{23} Despite the survival in several state jurisdictions, the American Law Institute states that the developed state-law misappropriation torts will have “little enduring effect” because of their narrow scope and the inconsistency of application throughout the years.\textsuperscript{24} Moreover, many of the state cases predate the Copyright Act of 1976 and its express preemption provisions.

B. Hot News: Back in the Spotlight

Social changes and technological advancements have led to an increase in the number of cases brought stating hot news claims. With the decline in the printed news business, advances in technology and the onset of the Internet age are responsible for bringing hot news misappropriation to the forefront of public attention.\textsuperscript{25}

Since the early 1990s, the newspaper industry has been declining because of the increased use of the Internet as a news source. The Shaping the Future of Newspaper project and World Association of Newspapers reported that as of July 5, 2010, more than 166 U.S. newspapers had closed or stopped printing since 2008, and that as of May 2010, “more than 1,797 job losses or buyouts in newspaper companies” had occurred.\textsuperscript{26} By 2011, paid daily newspaper circulation had declined in the United States from over sixty-three million copies in 1984 to just over forty-four million copies.\textsuperscript{27} Expenditures on print advertising have also declined in U.S. newspapers from over forty-seven billion dollars in 2005 to just under twenty-three billion dollars in 2010.\textsuperscript{28}

While the practice of printed news has been decreasing, the use of technological advancements to create and share information has been increasing. Internet and digital media have reduced both the cost of creating

\textsuperscript{22} Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).


\textsuperscript{24} Restatement (Third) of Unfair Competition § 38 (2010).

\textsuperscript{25} Victoria Smith Ekstrand, News Piracy and the Hot News Doctrine 3 (2005).

\textsuperscript{26} Erina Lin, SFN report: More than 166 U.S. Newspapers Have Closed or Stopped Printing Since '08, SFN BLOG (July 5, 2010, 9:25 PM), http://www.sfnblog.com/2010/07/05/sfn-report-more-than-166-us-newspapers-have-closed-or-stopped-printing-since-08/.


new works and the cost of redistribution.\textsuperscript{29} With the increased ease in copying, the claims of copyright infringement have risen. A recent study conducted by the \textit{Wall Street Journal} “during a 30-day period found 36,000 instances . . . in which ‘[j]ournal articles were reposted on the Internet without permission.’”\textsuperscript{30} Even under the assumption that some of these reposts may be considered fair use, there still is a large number of potential infringing uses.

One reason for the increase in the number of claims is the reposting and copying that occurs on social media sites. As of August 23, 2011, the estimated number of social networking users was more than 1 billion.\textsuperscript{31} Over seventy percent of Internet users are active on at least one social network.\textsuperscript{32} Apart from an increase in the number of users, there has also been an increase in the actual use of these sites. According to a 2010 survey conducted by the Pew Research Center’s Pew Internet and American Life Project, seventy-five percent of Americans said they acquired their news through e-mail or updates on social media sites.\textsuperscript{33} The study additionally found that thirty-seven percent “of [I]nternet users have contributed to the creation of news,” made a comment about it, or disseminated the news via postings on social networking sites.\textsuperscript{34} The popularity of the Internet as a news platform has now surpassed that of newspapers and radio, ranking just behind local and national television news.\textsuperscript{35}

Current trends in technology—including news aggregators, blogs, and social networking sites—have brought misappropriation back into the limelight. News aggregators function by gathering news information from many sources and making the information available through a single site. Additionally, blogs and social media sites allow users to serve as their own personal disseminators of information. Sites such as Facebook, Twitter, LinkedIn, MySpace, Google+, and Bebo grant users the opportunity to “repost” online media, sharing with the Internet community information they find useful or entertaining. Currently there are more than 850 websites that

\begin{footnotes}
\footnote{29. \textsc{Ekstrand}, supra note 25, at 3 (citing J.D. Lasica, \textit{Preventing Content Sites from Being Napsterized: New Technologies Target Theft of Online Intellectual Property}, NEWSPAPER ASS’N Am. (May 1, 2001), reposted at http://www.jdlasica.com/2001/05/01/preventing-content-sites-from-being-napsterized/).}
\footnote{30. Id.}
\footnote{31. \textsc{Kristen Purcell et al., Pew Internet and American Life Project Understanding the Participatory News Consumer: How Internet and Cell Phone Users Have Turned News into a Social Experience 4 (2010), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf.}
\footnote{32. Id.}
\footnote{34. Id.}
\footnote{35. Id.}
\end{footnotes}
consider themselves social networking sites, and experts anticipate that number will grow.\textsuperscript{36}

These societal changes in news consumption and technological gains have led to recent lawsuits that have reinvigorated the hot news misappropriation doctrine, bringing it back to life in the courtroom.\textsuperscript{37} In two recent cases, the Second Circuit has struggled to define the hot news misappropriation doctrine within the context of modern-day technology.

Formulating the modern definition and application of the hot news misappropriation doctrine, the United States Court of Appeals for the Second Circuit heard a case brought by the National Basketball Association (NBA).\textsuperscript{38} The NBA wanted to prevent a paging service called SportsTrax from delivering real-time game statistics and information to SportsTrax’s subscribers.\textsuperscript{39} The court, emphasizing that only a narrow claim of hot news misappropriation could survive federal preemption under the Copyright Act, developed the modern day hot news analysis.\textsuperscript{40} The court decided to narrow the application of the hot news misappropriation doctrine because of a concern that some of the uniformity achieved by the 1976 Copyright Act had been undermined.\textsuperscript{41} One of the major goals of the Copyright Act was to create a “national, uniform copyright law by broadly preempting state statutory and common-law copyright regulation.”\textsuperscript{42}

Ultimately, the NBA’s claim failed to fit within the narrowed definition of hot news misappropriation.\textsuperscript{43} The court did, however, determine the current hot news standard that has been applied by later courts:

\begin{quote}
[T]he surviving “hot-news” INS-like claim is limited to cases where (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.\textsuperscript{44}
\end{quote}

\textit{NBA v. Motorola} was significant because it was the first time that “a court laid out a definitive series of five elements required for a hot news claim.”\textsuperscript{45}

\begin{thebibliography}{9}
\bibitem{38} Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).
\bibitem{39} Id. at 843–44.
\bibitem{40} Id. at 848–52.
\bibitem{41} Barclays Capital, Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876,896–97 (2d Cir. 2011).
\bibitem{42} Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989); see also 17 U.S.C. § 301(a) (2006).
\bibitem{43} Nat’l Basketball Ass’n, 105 F.3d at 854.
\bibitem{44} Id. at 845.
\bibitem{45} EKSTRAND, supra note 25, at 142.
\end{thebibliography}
However, in later cases, courts' applications of the *NBA v. Motorola* elements continue to lack uniformity.\(^{46}\)

One of the most recent hot news cases continued *NBA v. Motorola*’s trend of narrowing the application of the hot news misappropriation doctrine.\(^{47}\) *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.* involved a claim brought by large financial services firms alleging misappropriation of news by an online investor aggregator service because the aggregator reposted the large firms’ research analysts’ investment recommendations.\(^{48}\) In *Barclays*, the Second Circuit expressed its concern with the lack of uniformity in the application of hot news misappropriation: “To the extent that hot news misappropriation causes of action are not preempted the aggregators’ actions may have different legal significance from state to state.”\(^{49}\) As discussed, one of the major goals of the Copyright Act was to create a “national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation.”\(^{50}\)

The Second Circuit determined that to survive federal preemption, hot news applies only to information that is *collected* by an entity that seeks to protect the information, not to information *created* by the entity itself.\(^{51}\) The court found that the financial firms were making the news and therefore Theflyonthewall.com was not free riding, but rather collecting and disseminating factual information.\(^{52}\) A key element to a non-preempted hot news claim, the court stated, is free riding by a defendant on the plaintiff’s product.\(^{53}\) The taking of the investment recommendations and reposting would constitute free riding, but the court’s analysis was surprisingly silent in acknowledging this concern.

Overruling the United States District Court for the Southern District of New York, the Second Circuit found for Theflyonthewall.com, determining that the federal Copyright Act preempted the financial firms’ hot news misappropriation claim because the firms had created the news and not merely acquired it.\(^{54}\) The court found that the firms were creating news because the news’ value was derived from the recommendation being attributed to the firms themselves.\(^{55}\) By using this new non-free-riding analysis, the Second Circuit has contributed to the inconsistency in the application of the hot news doctrine.

\(^{46}\) EKSTRAND, supra note 25, at 162.


\(^{48}\) Id. at 878–80.

\(^{49}\) Id. at 897–98.

\(^{50}\) Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989); see also 17 U.S.C. § 301(a) (2006).

\(^{51}\) Barclays, 650 F.3d at 905.

\(^{52}\) Id. at 902.

\(^{53}\) Id. at 898.

\(^{54}\) Id. at 902.

\(^{55}\) Id. at 903.
II. THE HOT NEWS MISAPPROPRIATION DOCTRINE
AND ITS FAILURE TO SUFFICE

Varying decisions from different courts indicate that it is unclear whether hot news misappropriation claims may survive federal preemption. However, even if such claims survive preemption, the current hot news misappropriation doctrine is not the right solution for the free riding concern. The doctrine is an inappropriate remedy that can lead to both over- and underprotection. Additionally, an examination of hot news cases showcases the inappropriateness of the current remedy through the judicial confusion in applying this vague standard. Therefore, it is not shocking that the hot news misappropriation doctrine has been disdained by noted jurists such as Richard Posner of the Seventh Circuit Court of Appeals.

A. Hot News and Federal Preemption

It remains highly debated in circuit and district courts whether hot news misappropriation claims survive federal preemption. Many courts, including the Second Circuit, have determined that if the doctrine does survive federal preemption, it does so only in a limited number of circumstances. 56

Congress passed the 1976 Copyright Act specifically in furtherance of one of its enumerated powers. Congress, under the so-called I.P. Clause, has 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.” 57 Arguably, if the Framers intended Congress to have the power to regulate and occupy the field of regulating authors and their writings, it appears that state law within that field, including the hot news misappropriation doctrine, would be preempted. The 1976 Copyright Act arguably indicates that Congress occupies the field by specifically noting preemption with respect to other laws. Section 301 provides:

All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title . . . no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. 58

Additionally, as previously mentioned, one of the major goals of the Copyright Act was to create a “national, uniform copyright law by broadly preempting state statutory and common-law copyright regulation.” 59 This goal indicates

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56. Id. at 896–98; see also Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
that Congress desired to preempt a majority of state regulations in copyright protection.

According to the House Report for the 1976 Copyright Act, Congress desired the provisions in section 301 “to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.”\(^{60}\) Under section 301, states maintain the right to regulate unfixed works and any legal right that is not contained in the grant of exclusive rights to copyright holders in section 106\(^{61}\) of the federal Copyright Act.\(^{62}\) Despite this goal, the plethora of preemption cases indicates that Congress failed utterly in standardization.

The challenge with the hot news misappropriation doctrine is that it is one of the vague, borderline areas blurred between state and federal law. According to the legislative history, this type of borderline area is just the type of doctrine that Congress intended to preempt with the incorporation of section 301 of the 1976 Copyright Act.\(^{63}\) Ultimately, the goal of uniformity and clarity in copyright law is at least partially undercut by the current hot news misappropriation doctrine. However, there is at least one statement contained in the House Report that indicates AP’s hot news claim in *International News* was to be preserved under the 1976 Copyright Act.\(^{64}\) Despite this statement, it seems that by allowing individual states to create their own respective hot news copyright-like protection, the larger goal of Congress to create a uniform body of copyright law would be severely undercut.

Some argue that works deemed to be hot news fail to fall within the scope of copyrighted works, and therefore, the doctrine is not preempted. Admittedly, the hot news misappropriation doctrine occasionally does protect facts, and under section 102(b) of the Copyright Act, it is clear that copyright law cannot protect facts.\(^{65}\) However, commentators argue that because facts are not within the copyrightable subject matter specified in section 102(a) of


\(^{61}\) 17 U.S.C. § 106 (2006) delineates the exclusive bundle of rights granted to copyright owners. These rights include the right to do and authorize the following: “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”


\(^{64}\) Id. at 87.

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the Copyright Act and are expressly denied protection under section 102(b), they cannot be preempted by section 301.66 Congress’s goal in denying protection to facts was the preservation of the uncopyrightable contents for the public domain, even if these facts were contained within the whole of a copyrighted work.67 An unprotectible collection of facts is nevertheless copyrightable subject matter as a compiled literary work, but this protection does not extend to the underlying facts themselves.68 Congress specifically intended for facts to remain in the public domain—free from copyright protection. Yet, the current hot news misappropriation doctrine undermines Congress’s intent by providing copyright-like protection for facts themselves.

The House Report for the 1976 Copyright Act expressly stated that hot news misappropriation claims, specifically INS-like claims, survive section 301 preemption.69 Congress noted

. . . 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.70

Despite clear congressional language, the incoherency of case law highlights the courts’ struggle to determine whether the hot news misappropriation doctrine is preempted by the Supremacy Clause or section 301 of the Copyright Act. Initially, courts ruled that a version of the hot news misappropriation doctrine survived federal preemption, but one of the more recent decisions by the Second Circuit has rattled this rationale.

In NBA, the Second Circuit found that a narrower interpretation of the hot news misappropriation doctrine survived federal preemption when all five elements of the court-created test were met:

(i) the plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.71

NBA v. Motorola appeared to limit state protection of fact gathering, only allowing the protection when the copying of the gathered facts was likely to

66. Id. §§ 102, 301.
68. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996).
70. Id. at 132.
71. Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
result in deterring the plaintiff or others from gathering and disseminating the facts that the defendant copied.\textsuperscript{72}

Another recent decision discussing preemption is \textit{Barclays}. Prior to the Second Circuit hearing \textit{Barclays}, the Southern District of New York heard the case.\textsuperscript{73} The district court found that the true value of the firms’ financial research was not just derived from the quality of the research the firms provided, but also from the research being timely and exclusive, as the value of the information was greatest before the stock market opening.\textsuperscript{74}

Looking to the legislative history of the Copyright Act, the district court determined that Congress did not intend to preempt hot news misappropriation claims because they were not the same as copyright infringement claims.\textsuperscript{75} Misappropriation, the court rationalized, was not preempted because it was based neither on a right within the general scope of copyright rights under section 106 nor an equivalent right.\textsuperscript{76} What the district court failed to consider is that Congress may have intended to leave facts outside the scope of copyright protection apart from protection through a copyrightable factual compilation. The financial recommendations, deriving their value from attribution to the firms the recommendations came from, were just that: facts.

The Second Circuit Court of Appeals, reversing the district court, determined that the case failed to survive federal preemption.\textsuperscript{77} Decided in June 2011, it seems that the hot news misappropriation doctrine may frequently fail to survive federal preemption when there is no free riding concern.\textsuperscript{78} The Second Circuit explained that section 301 of the Copyright Act preempts state laws that would overlap a section 106 exclusive right granted by the Copyright Act.\textsuperscript{79} Also, the 1976 Copyright Act had the “express objective of creating national uniform copyright law by broadly preempting state statutory and common-law copyright regulation.”\textsuperscript{80} Based on \textit{Barclays}, it now seems that nearly all of hot news misappropriation claims will end up being preempted by federal law. The only remaining claim that may survive after \textit{Barclays} would be subject matter that are not fixed in a tangible medium that use unfairly the labor, money, and skill that are monetarily profitable.\textsuperscript{81} Even if a hot news claim somehow survives federal preemption, the hot news doctrine as it currently stands is an inadequate solution to the free riding problem.

\begin{itemize}
\item \textsuperscript{72} Symposium, \textit{Misappropriation: A Dirge}, supra note 67, at 632.
\item \textsuperscript{73} Barclays Capital, Inc. v. Theflyonthewall.com, 700 F.Supp.2d 310, 313 (S.D.N.Y. 2010).
\item \textsuperscript{74} Id. at 319.
\item \textsuperscript{75} Id. at 333.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Barclays Capital, Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 878 (2d Cir. 2011).
\item \textsuperscript{78} Id. at 896–97.
\item \textsuperscript{79} Id. at 893.
\item \textsuperscript{80} Id. at 897 (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)).
\item \textsuperscript{81} Id. at 903.
\end{itemize}
B. The Unsuitable Remedy of Copyright Law

The hot news misappropriation doctrine is an unsuitable remedy for the concern of free riding on the effort, expenditure, and time invested by gatherers of facts and information. Because of the vagueness of the doctrine, the application of hot news misappropriation can lead to the overprotection or underprotection of works. The hot news misappropriation doctrine also has led to judicial confusion in the application of the doctrine, concern over policy issues, and disdain by noted jurists because of this ambiguity in application and vagueness. The hot news misappropriation doctrine is laden with issues because of the confusing nature and vague standards it requires the courts to apply.

1. Over and Under Protection of Works

One challenge to the current hot news misappropriation doctrine is that it can lead to misaligned protection of certain works based on the length of time a court decides to protect the work. Often courts will grant protection for the duration equivalent to that of a copyright term, despite the fact that the information protected under the hot news misappropriation doctrine loses its commercial value at a much faster rate than that of traditional copyrightable subject matter. To justify this significant term of protection, it appears that courts are finding the hot news information copyright protected and at times addressing the concern of free riding. After the passage of the 1976 Copyright Act and the Sonny Bono Copyright Term Extension Act, the total copyright term for works is ninety-five years of protection after publication. This ninety-five year term of protection is too long, so a finding that a work is copyright protected leads to the overprotection of most facts and works that might fairly be protected by some form of the hot news misappropriation doctrine. These hot news works only need adequate protection for a minimal amount of time—that is, when the monetary value of the news still exists—but not for the extensive ninety-five year term copyright grants.

The courts face a challenge, however, because there is no gray area for them to determine an adequate time to protect these works. Often a court sees its decision as an all or nothing dichotomy with the hot news misappropriation doctrine—either grant the protection to the work for the full copyright term, or leave the creator of the work with no protection and therefore no incentive to create these works. Courts struggle to find the appropriate balance, just like the NBA court did. The goal is to ensure that the originators have the incentive to create the works while also safeguarding against overprotection. When a work is overprotected, it can be detrimental to society because the public forum does not get the benefit of the work falling into the public domain for the public’s use. While state law misappropriation can be limited to the time the news is

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83. See Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
“hot,” it is difficult to square this policy goal with the preemption provisions of section 301.

Even though the value of the work may be diminished to nothing within a matter of minutes, the grant of a longer period of protection in the form of ninety-five years can lead to problems. As discussed, the public welfare suffers from the granting of extended periods of protection in hot news works because they do not fall into the public domain until long after the date of initial publication and long after the works cease to have value. Congress never intended hot news works to be protected for this long, if at all. One solution is for courts to simply find any other use to be a fair use under section 107 of the Copyright Act once the free-riding period of concern is over. The fact that copying does not necessarily deprive the owner of the original work of the value of his work creates room for trade-offs, for asking whether social welfare as a whole might be increased by allowing some copying because the gain to the copier might exceed the cost to the owner of the original—sometimes both would gain. This black and white, all-or-nothing approach to the hot news protection fails to work adequately; a middle ground can and should be established. There still is the risk that overprotection could occur if the courts are careless in application, but so long as the collector needs an incentive to perform the work, some sort of protection ought to be granted. If there is no need for an incentive to create the work, there is no need for protection and protection should not be granted.

2. Judicial Confusion in Application

In addition to the concern of over- or underprotection of hot news works, there has been significant confusion within the courts regarding how to apply the hot news misappropriation doctrine. This judicial confusion reinforces the impracticability and unsuitableness of the current hot news solution. The current hot news misappropriation test is alarmingly unclear. It is inherently subjective and at the same time necessarily fact specific as a standard. This standard ends up being vague and leaves the courts with the power to interpret the doctrine to either over- or underprotect the underlying work. An examination of recent case law demonstrates how confusing the application of the hot news misappropriation doctrine has been for courts.

The Supreme Court of Illinois in *Board of Trade v. Dow Jones & Co.* held that the Board of Trade of the City of Chicago had misappropriated the investment that Dow Jones had made on its index. The Chicago Board of Trade was the largest U.S. commodities exchange market in which member

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84. 17 U.S.C. §107 (2006) (codifies the Fair Use Doctrine and contains a list of different uses for which the reproduction of a copyrighted work may be fair and not in violation of the copyright owner’s section 106 rights).

85. Symposium, Misappropriation: A Dirge, supra note 67, at 624.

86. For example, the NBA would host basketball games regardless of whether people are reporting the scores via social media or news coverage. There is no need for the incentive of copyright protection to ensure the work itself is created. In cases like these, providing copyright protection would result in overprotection.

brokerages traded commodities contracts, much in the same way that stock is traded within a stock exchange. As the practice of trading in stock market futures contracts increased, the success of these particular investments within the Board of Trade depended on the direction the market went. Dow Jones & Co., offering a diverse mix of financial services, offered the closest watched stock index in the United States, the Dow Jones Industrial Average (DJIA). The Board of Trade adopted an index based on the same companies as DJIA and disclaimed any relation with Dow Jones & Co. The result was that DJIA and the Board of Trade’s indices were identical. Inclusion of a company in the DJIA is not really considered “hot” because everyone knows what those companies are, yet anticipating Dow Jones’s reaction upon learning the index the Board of Trade had selected, the Board sought a declaratory judgment stating that its practice was permitted.

The Supreme Court of Illinois determined that there was hot news misappropriation and enjoined the Board of Trade, notwithstanding the fact that there was neither competition nor a concern of decreased profits to Dow Jones & Co. “Despite the fact that plaintiff’s proposed use is not in competition with the use defendant presently makes of them, defendant is entitled to protection against their [sic] misappropriation.” Thus, under the hot news misappropriation doctrine, a product or service could be misappropriated regardless of whether the appropriating party’s product is unlike any product offered by the creating company. This is not the kind of misappropriation that the hot news misappropriation doctrine is typically concerned with because there is no concern of a diminished incentive for Dow Jones to create the DJIA. The free riding that was occurring here was only happening on a potential, future derivative work for Dow Jones & Co. that was unlikely to generate income for the company.

Despite finding there was neither competition between Dow Jones & Co. and the Board of Trade nor a concern that Dow Jones & Co. would lose its incentive to create the DJIA, the court held that Dow Jones & Co. was protected. The court rationalized its decision on the substantial time, money, and energy that was expended to achieve the highly respected status as the industry norm in stock market averages. Judge Richard Posner of the Seventh Circuit Court of Appeals criticized the decision, noting that Jones is “a publisher rather than a stock exchange, and it had no plans to create a futures contract or likely prospects for doing so.” Posner was concerned that although there was free riding in the case, it was not the type of free riding that

88. Id. at 85.
89. Id.
90. Id.
91. Id. at 86.
92. Id.
93. Id. at 90.
94. Id.
95. Id. at 90–91.
96. Id. at 89.
would “kill the goose that lays the golden eggs because it was free riding on a merely potential derivative work unlikely to generate essential income for the owner of the primary work.”\textsuperscript{98} Posner states that this is an area that should not be protected by the hot news misappropriation doctrine under the NBA test because there is no threat to the existence of the product or service offered by Dow Jones & Co.\textsuperscript{99} Arguably, even if it were protectable under hot news as a literary work or compilation, the product offered by Dow Jones & Co. may not be protected because it is functional, therefore falling out of copyright law’s domain.

Just one year later, another court hearing a similar case arrived at the opposite result in \textit{United States Golf Association (USGA) v. Data-Max.}\textsuperscript{100} The USGA had developed a mathematical formula to compute the handicaps of amateur golfers.\textsuperscript{101} Using USGA’s formula, Data-Max marketed small computing devices that could be used to calculate a golfer’s handicap.\textsuperscript{102} Unlike \textit{Dow Jones & Co. v. Board of Trade}, the court refused to enjoin Data-Max not only because the USGA formula was considered functional, but also because the use of the formula by Data-Max would not directly compete with USGA.\textsuperscript{103} The court determined that because Data-Max’s product would not compete with the USGA, there would be no interference with the economic incentives for the USGA to maintain and update the handicap formula.\textsuperscript{104} This rationale is completely opposite that of the \textit{Dow Jones} court. As demonstrated by the contradictory decisions in \textit{Dow Jones} and \textit{USGA}, court confusion and inconsistencies have run rampant in the hot news misappropriation doctrine realm, indicating that even the courts do not know how this doctrine is to function as currently stated.

3. Policy Issues

In addition to judicial confusion and inappropriate protection, the current hot news misappropriation doctrine also carries with it some significant policy concerns. Judge Posner argues that the current doctrine is unhelpful to public policy.\textsuperscript{105} The challenge is that free riding is not always detrimental because at times it can lead to beneficial outcomes for society, like the fair use doctrine under copyright law.\textsuperscript{106} Free riding is relevant to the scope of rights, but it is

\textsuperscript{98} Id.
\textsuperscript{99} Id.; see also Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997) (for a hot news claim to survive preemption it must be a “threat to the very existence of the product or service . . . .”).
\textsuperscript{100} United States Golf Ass’n v. St. Andrew’s Sys., Data-Max, Inc., 749 F.2d 1028, 1029 (3d Cir. 1984).
\textsuperscript{101} Id. at 1029.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 1029–30.
\textsuperscript{104} Id.
\textsuperscript{105} Symposium, Misappropriation: A Dirge, supra note 67, at 626.
\textsuperscript{106} See 17 U.S.C. § 107 (2006) (codifying fair use, limiting the § 106 right of reproduction, by allowing certain types of would-be infringing works to be exempted from infringement because of the benefit for society outweighing the cost of protection).
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neither a necessary nor a sufficient condition for recognizing such rights under the hot news misappropriation doctrine.  

Public dissemination of works benefits society and is needed. As Justice Brandeis expressed in his dissent in International News, by protecting works through hot news misappropriation, the court may deprive the public of timely access to important works. The implications of protecting works that should not be covered under the hot news misappropriation doctrine protection are far reaching and impact the societal benefit of having an ever-expanding library of public works.

Apart from the dissemination of works, another concern with the current doctrine is its limited practical significance. Because of the lack of clear boundaries, the hot news misappropriation “doctrine . . . is alarmingly fuzzy,” unlike other intellectual property protections such as patent and copyright law. The idealized precision of the NBA v. Motorola test is illusory. Despite the initial thoughts that the NBA case would clarify the doctrine, there are a large number of subjective determinations that need to be made by the court in determining whether the facts of a given case meet the threshold of NBA v. Motorola. The test set out by NBA v. Motorola requires the court to determine whether there has been “free riding on the plaintiff’s efforts,” what direct competition is and whether the defendant and plaintiff are engaged in it, and also whether there would be a reduced incentive to create the works by allowing the free riding to occur. While courts normally do not make these types of subjective judgments, under the hot news misappropriation doctrine, judges are required to make these findings.

III. CREATING A BALANCED LAW OF PROTECTION: A CALL FOR ACTION

The current solution under NBA and Barclays for hot news is not viable. Congress not only has the power to regulate, but also is the appropriate institution to create an adequate solution to the free riding problem. The primary concern is how significantly a beneficial activity would be affected if free riding were allowed. With this touchstone in mind, there are a limited number of works that should be protected by the hot news misappropriation doctrine. Currently, the NBA v. Motorola standard for hot news fails to reach the core of the problem because of the unclarity of the standard. The only hot-news-type information that needs protection is an uncopyrightable work that is an essential feature of a plaintiff’s business, provides a benefit to society, and is unlikely to be generated without the incentive of protection. These works of information can be protected by legislative action granting adequate limited-time protection for the information that falls short of full copyright protection.

110. Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
A. Congressional Power to Legislate

Before discussing the standard that would best serve the public interest and ensure the hot news misappropriation doctrine is applied to adequately protect, we must look to where congressional power to act is derived. Congress has the power to act and legislate under either the Intellectual Property (IP) Clause or the Commerce Clause of the Constitution. Under one of these two areas of constitutional power, Congress can legislate to ensure that the hot news misappropriation doctrine is developed into a clearer, more appropriate standard of protection.

Congress has the power to legislate for the protection of hot-news-type information under the IP Clause. The Supreme Court case *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* is often misinterpreted as requiring that creativity exist in order for there to be congressional power to grant copyright-like protection.\(^{111}\) However, there is no language in the Constitution making such a demand. Additionally, *Feist’s* alleged creativity requirement is not part of the Court’s holding, but is merely dicta.\(^{112}\) Finally, *Feist* is no bar to congressional action because *Eldred v. Ashcroft* overruled the case in 2003.\(^{113}\)

In *Eldred v. Ashcroft*, the Court stated that the “limited times” language contained in the IP Clause was left for Congress to define.\(^{114}\) As an express limitation on congressional power, it is implied that Congress has the ability to define “limited times” because the language is constitutionally binding on Congress. Congress has the power to protect the hot-news-type works under the IP Clause. Additionally, neither “originality” nor “creativity” appear in the Constitution, so it seems a fortiori that Congress can determine what these supposed constitutional requirements mean. Even if some argue there is no power for Congress to protect copyright in factual information because the works arguably lack authorship, Congress still has legislative authority under the Commerce Clause.

The Commerce Clause of the United States Constitution provides that Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”\(^{115}\) Historically, this grant of power has been interpreted broadly to allow Congress the widespread power to regulate interstate and foreign commerce.\(^{116}\) With the advent of the Internet, many of the recent hot news claims involve commerce that crosses

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112. *Id.* at 345.
114. *Id.* at 196–97.
115. U.S. CONST. art. I, § 8, cl. 3.
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state lines, meaning it could be considered interstate commerce. Congress could therefore legislate to protect fact gathering and hot-news-type information under the Commerce Clause. By legislating under the Commerce Clause, Congress would be protecting the beneficial works; however, the protection would not be considered copyright protection. The fact that the protection would not be synonymous with copyright protection is of little concern because Congress would be addressing the needs of hot-news-type information, not that of copyrightable works.

Whether done under the IP Clause or the Commerce Clause, congressional action is the solution to the current hot news dilemma. The call for congressional action in this area aligns with the goals of the United States Copyright Act by addressing technological advances and new copyright issues created by them.\textsuperscript{117} In addition, the congressional action in the hot news arena also reinforces the goal of uniformity in copyright law.\textsuperscript{118} The new hot news legislation brings clarity to the mass confusion over what the uniform policy ought to be.

With advances in technology, the hot news misappropriation doctrine and copyright are mainly federal concerns. Today, our communications and businesses often cross state and even international boundaries because of the Internet. This nationwide and internationally impacting doctrine is ripe for congressional action and is the area in which Congress traditionally has acted. Posner stated that “[b]ecause intellectual property is uniquely insensitive to state boundaries and because the field of intellectual property law is predominantly federal . . . and immensely complex already, I am inclined to think that the misappropriation doctrine, if it is to be retained at all, should be federalized.”\textsuperscript{119}

B. The Proposed Remedy

The only hot-news-type information that needs protection is uncopyrightable information that (1) is an essential feature of the plaintiff’s business, (2) provides a benefit to society, and (3) is unlikely to be generated without the incentive of protection. This information can be protected through legislative action granting an appropriate limited-time protection for the information without protecting the information for the lengthy duration that copyright law allows.

1. Information that is Essential to the Plaintiff’s Business

For a hot news claim to succeed, the hot-news-type material must be an essential feature of the plaintiff’s business. This means that the plaintiff’s business must rely at least in part on the information to succeed and be lucrative. The rationale is that if the information is decidedly not essential to the business of the plaintiff, the hot news misappropriation doctrine’s chief

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\textsuperscript{118} Id. at 68.
\textsuperscript{119} Symposium, Misappropriation: A Dirge, supra note 67, at 640.
concern with free riding is inconsequential. The primary concern of free riding is negated if there is no feature of the plaintiff’s business that is harmed. If the material is unessential to the business, there is no justification to protect the hot-news-type material. Society benefits when information is in the public domain and open for use. When considering whether to protect works under the hot news misappropriation doctrine, Congress and the courts must keep this in mind. This rationale and idea behind allowing certain works to be open for copying has been part of intellectual property’s goals and ought to be maintained in the realm of “hot news.” If we are to protect information under state law that copyright law deliberately leaves free for the taking, we should have a good reason for trenching on what would otherwise be the public domain. Therefore, one of the main rationalizations for protecting works is that they are essential to a business’s survival.

The hot news misappropriation doctrine, like copyright and patent law, attempts to strike a balance between the author or inventor’s incentive to create the work and the exclusive rights or limited monopoly granted by Congress to provide protection. If a hot news claim lacks the ability to be distinguished as an essential feature of business, there is no concern that free riding will undercut the incentive to create the works. The balance has therefore been tipped entirely in the direction of allowing the work to be in the public domain. Considering the incentive rationale underlying intellectual property law, Congress would argue that if there is no essentialness of the work, there is no financial gain to protect. Therefore, Congress would not need to protect works under the hot news misappropriation doctrine that were not an essential feature of the plaintiff’s business because there is no need for the incentive of protection from a financial perspective.

One of the primary concerns addressed by the hot news misappropriation doctrine is the use and passing off of another’s information as the competitor’s own. Congress and the courts have struggled with this concern, trying to fit uncopyrightable works into copyright’s domain so that the works are protected and what they see as a free riding “wrong” is prevented. The courts’ disapproval of allegedly unfair or unjust copying is what inspired the hot news misappropriation doctrine to be created originally. This concern was expressed in International News, in which the Court stated that

news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of the enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. . . . [I]t must be regarded as a quasi property.120

Creating a quasi-property right for the creators of hot-news-type works protected them from what the Court felt was an unjust result of no protection. The key take away from International News was that the case involved “stock in trade,” which was referred to as an essential feature of AP’s business. Had

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the case not been questioning that essential feature, protection would not have seemed so necessary.

Under the new legislation, it will be important to keep in mind that the work must be an essential feature of the plaintiff’s business to justify the imposition on the public’s right to the works. While this requirement is necessary, it is not sufficient. The legislature and court must also require that the work be beneficial to society and unlikely to be generated without protection.

2. Beneficial Information for Society

To qualify for protection under the hot news claim, the information for which protection is sought must provide a utilitarian benefit to society. This requirement is critical to keep the hot news misappropriation doctrine in congruence with intellectual property legislation. In both patent and copyright law, legislation extends a limited time protection or monopoly under the premise that society is better off because of the work having been created. In copyright law, the idea is that society benefits from the stimulation of new works. Congress, in enacting the Copyright Act and the Patent Act, intended to promote science and the useful arts. The driving concern was that these works would not be created without ensured protection, thereby depriving society of the benefit of the works.

Under the hot news misappropriation doctrine, Congress must ensure that it is granting the rights and limited-time monopoly over hot-news-type information only when the works benefits society. If the works fail to meet this threshold, there is no need for Congress to give the author or creator of the works the bonus incentive of protection. The rationale underlying Congress’s decision to protect certain works is that the works protected contribute something valuable to society. Like the underlying rationale for copyright and patent, we want to incentivize creators to form these types of beneficial works by granting the creator a limited monopoly, thereby ensuring that the creation of these works continues.

This benefit requirement will likely be stretched in some cases to the extremes where no reasonable fact finder could find a benefit. There are, however, many cases where a benefit will be provided to society. If, for example, newly gathered information of an uncopyrightable work provides easier access to certain information, this would likely generate a benefit to society. The idea is that before the completion of this work, society could not access the information contained within the work with the same ease or efficiency. More likely than not, news aggregators and databases would be able to claim this as the societal benefit their works provide.

The benefit requirement may also be met in future cases by providing information that has never been gathered before or that is particularly challenging to obtain. In either circumstance, society benefits by the sweat and work of the gatherer. If there was no protection afforded to such beneficial works, there likely would be no incentive to undertake some of these challenges that benefit society. In *Feist*, the Court eliminated the “sweat of the
brow” doctrine that effectively extended copyright protection beyond the selection and coordination of facts to the facts themselves.\(^{121}\) It is likely that the Court was concerned with the all or nothing dichotomy at the time. This new solution is not an all or nothing application, but rather an open scale that courts can use to determine an appropriate scope of protection. The dilemma that faced the *Feist* court is no longer present with this new solution, which is distinguishable from the old sweat of the brow doctrine that granted copyright protection in facts for the full copyright term.

3. *unlikely to be Generated Without Protection*

Returning to the chief concern of intellectual property protection in general, the works the hot news misappropriation doctrine protects must be those that are unlikely to be generated without sufficient protection, ultimately resulting in a societal deprivation of the beneficial information generated by the author or creator of the hot-news-type works. On the other hand, if the work would continue to be generated regardless of whether Congress granted protection, there is no need for the hot news misappropriation doctrine to apply. This would indicate that the author or creator does not need the incentive of protection over his intellectual property to promote the creation of the work.

To show that a work is unlikely to be generated without protection, the final work must require the expenditure of time, money, or skill. Additionally, the court must consider how easily and whether the information, once generated, is likely to be appropriated by others before generation costs can be recouped. This requirement is not a huge bar for the plaintiff to overcome, but there must be some value in the work itself. Considering *International News*, the case would meet the threshold requirement that the work is unlikely to be generated without adequate protection and requires the expenditure of time, money, or skill. The acquisition and transmission of news requires substantial organization and a large amount of money, skill, and effort.\(^{122}\) Additionally, the news has an exchange value to anyone who misappropriates it.\(^{123}\) This example is unlike the game statistics and scores that the NBA was attempting to protect in *NBA v. Motorola*.\(^{124}\) In *NBA*, the game statistics and scores were going to be generated regardless of whether protection was granted,\(^{125}\) no hot news protection was required to ensure the creation of the work. When no protection is needed, it cuts against the incentive scheme of intellectual property protection. In these circumstances, it is not necessary for Congress to provide an incentive for the works to be created.

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122. *Int’l News Serv.*, 248 U.S. at 238.
123. *Id.*
124. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997).
125. *See id.* at 854.
4. The Scope of Protection

Once all three requirements are satisfied, thus calling for protection, the court must then determine what level of protection to provide the work. This is an area where Congress should leave ample room for the court to determine an appropriate timeframe for protection. The challenge with the determination is that much of the decision will turn on a factual analysis of a given case. What is clear, however, is that protection should be extended for an appropriate time to ensure the incentive to create the work remains and the creator has sufficient time to recover the costs of forming the work.

Based upon a preponderance of the fact-specific evidence, the court will be left discretion to determine the appropriate balance to provide an incentive to create the work while also ensuring that the public domain will be granted the work within an appropriate time. Unfortunately, there is no easier way to perform this analysis other than a case-by-case determination. This determination will mandate ambiguity in a proposed solution, but as seen with the current all-or-nothing hot news misappropriation doctrine, a gradient scale of protection will not lead to the same over- and underprotection concerns for which the current doctrine has been criticized.

The standard for determining the length of the protection period should be based on the economic lifetime of the information and allowing the creator a reasonable chance to recoup his investment in generating the information. Certain facts and hot-news-type works will inevitably lose their value much more quickly than others in the marketplace. Once a work has lost its value, it is prime for release into the public domain. By providing courts a suggested range or scale of protection times, Congress can ensure that works are released into the public domain as soon as reasonable. Once a work has lost its value in the marketplace, it will no longer be protected. One example of an appropriate balance would be granting twenty-minute protection for stock market recommendations provided by analysts, such as those in *Barclays v. Theflyonthewall.com*. Once the stock market opens, the value of the recommendations is short-lived and progressively diminishes. There is no need to protect the recommendations for any longer than the duration of the value. Another example is news stories. Once news breaks and is released to the public, it has lost significant value; therefore, it would no longer be protected, and would become part of the public domain.

C. Defending the Proposal

Critics of the new hot news misappropriation doctrine may argue against the proposed legislative activity. One concern is that providing courts room to determine the length of protection on a case-by-case basis will lead to confusion about whether one is misappropriating hot news or just reporting news or information that has already “cooled.” It seems unlikely that a competitor would be unaware of when the hot news had cooled. The determination of the length of protection would be based on how long the value of the work exists in the marketplace. A keen competitor could know
when the value of a work has diminished and the cooling off period has commenced. Additionally, as time goes on, courts will hear more and more hot news claims under the new legislation. As case law progresses, certain industries will likely be able to distinguish general standards of when the court determines the hot-news-type information has cooled and is available in the public domain. Critics may also argue that this case-by-case analysis will create an increase in litigation and uncertainty. However, once the courts have heard a few cases, a cooling period precedent will be set, indicating when the hot news can be used by others.

Another concern is that society will be unable to benefit from condensed information immediately because of the grant of protection the hot news legislation will afford. However, to be protected, the information must be of the type that would not be generated without the guarantee of protection. It is important to recall that if Congress and the courts did not provide protection, the general public would not have these works at all. Additionally, under the new legislation, the works will only be preserved for an adequate time to ensure the creator can recover the cost of creating the work while there is still a market value for the work. This new standard is more appropriate protection than the grant of a ninety-five-year copyright term. This new standard ensures works will enter the public domain at a more appropriate rate.

Finally, there are likely scholars who consider the hot news misappropriation doctrine to be unnecessary because contract law and technology can be used to prevent the copying of hot-news-type information. What these scholars fail to consider is that society should not be required to rely on technological fixes and contract law because Congress and the courts have failed to protect the works. It also seems unreasonable to ask companies and creators to invest in technological advances to protect their databases and information when there is a solution out there that can be enacted by Congress and enforced by the courts.

The concern of free riding did not originate with the Internet age, nor will it cease to be a concern. With the Internet, online media can reach across countless countries and industries, but today’s hot news standards fail to address the core of the misappropriation problem. Because of the ill-defined standard of the current doctrine, works are being under- and overprotected depending on the context.

Legislation is the solution to address the current unintelligible hot news misappropriation doctrine. The only type of information that needs protection is uncopyrightable information that (1) is an essential feature of a plaintiff’s business, (2) provides a benefit to society, and (3) is unlikely to be generated without protection as an incentive. This hot-news-type information can be protected by legislative action that enables courts to grant an adequate limited-time protection for the information but certainly does not protect the
information for the extended time that copyright law and the current hot news misappropriation doctrine allow.

The implementation of this legislation is vital to ensure that valuable works in the Internet age continue to be created while still ensuring that the public is gaining the benefit of such works in a reasonable time. Much has changed since 1918 when the hot news misappropriation doctrine was first created, and it is time for a facelift. With international competition expanding in the area of Internet and technological advances, Congress must act if the United States wishes to remain at the forefront of innovation. If the United States fails to protect the creators of these hot-news-type works, the innovators society needs will create the works elsewhere, depriving the public of the benefit. The call for Congress to act has never been greater nor had more at stake.