Sui Generis Database Protection: Cold Comfort for "Hot News"

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Newsworthy facts and events don't become news unless somebody observes the events or gathers the facts and submits a report for public distribution. Professional news organizations employ reporters to perform this work, paying the salary, travel, communication, and other expenses of covering the news.[1]

Because news gathering is a high-cost, labor-intensive business, less enterprising news operations sometimes wait for their competitors' reports to become public, extract the facts, and compose their own news products at little or no expense.[2] Some might consider this kind of freeloading to be wrongful conduct for which the law should provide a remedy. Indeed, the law has provided several remedies. Yet none so far has proven to be entirely reliable.

This article will review the various legal bases for protection of news reports from piracy and endorse a more durable solution. Part One will discuss copyright law and the idea/expression dichotomy that excludes most protection of the kinds of facts contained in news reports. Part Two will describe the unsettled status of "hot news" protection under state unfair competition law. The eighty-year-old doctrine of "hot news" misappropriation prevents a news company from redacting and distributing a competitor's reports while they remain fresh enough to have economic value as news. Part Three will discuss the creation of sui generis database protection in the European Union, its consideration in the United States, and the potential impact on "hot news" protection. Finally, Part Four will critique the most recent leading "hot news" misappropriation case and endorse a revised version of that doctrine as federal statute.

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No Refuge in Copyright Law

To the ordinary observer, a news company that doesn't send its own reporters out to cover the news but waits instead to rewrite a competitor's accounts might be guilty of copying. The strategy may seem no different from that of an exam cheater who peers over the shoulder of a classmate and uses the information he sees to compose his own answer. Editors who find themselves victimized in this way often believe that their complaint is copyright infringement.

In cases of word-for-word copying, it may be. But U.S. copyright law specifically excludes from protection all "ideas, procedures, systems, methods of operation, processes, concepts, discoveries or principles."[3] In other words, the facts reported in a news account are presumptively in the public domain. Only the expression, i.e., the arrangement of those facts in the particular words and sentences chosen by the author, can be the subject of copyright protection.

The author of a news story thus has the exclusive right to copy and distribute his particular account. The underlying facts themselves, on the other hand, were there before the reporter came upon them and in the eyes of the law are no more his property than anybody else's. Indeed, in the United States they may be less his property than everybody else's. In U.S. constitutional culture, the public interest in the free flow of information, especially news information about public affairs, demands that individual copyright interest not be permitted to obstruct public access to facts.[4]

Though it does not protect facts, copyright law contains one haven of potential use to news organizations. Authors of works that qualify as "compilations" may seek a special form of protection from infringers under copyright law. A compilation is "a collection or assembling of preexisting materials or data that are selected, coordinated, or arranged so the whole is an original work of authorship."[5] For most of the last century, many courts acknowledged a copyright interest in the effort required for compiling useful facts into a single work, a seeming contradiction of the idea/expression dichotomy that became known as the "sweat of the brow" doctrine.[6]

A newspaper might qualify as a compilation.[7] Even an individual news story could conceivably be encompassed within the statutory description of a compilation.[8] News organizations that market their reports from online databases are interested in using this approach to protect their work from freeloaders. But a copyright concept known as the "merger doctrine" and its application in the case of *Feist Publications v. Rural Telephone Service* have combined to cast a shadow on these hopes.[9]

The "merger doctrine" expresses anew the determination of copyright law to confine itself to expression, to withhold protection from facts or ideas. When the expression of an idea and the idea itself are indistinguishable, they are said to have "merged."[10] In such a case, the expression may no longer claim copyright protection. One way to show that merger has taken place is to demonstrate that there is only one way, or very few ways, to express the idea. For example, computer programs are copyrightable as literary works, but courts have sometimes refused to protect expression where the structure of the plaintiff's software seemed shaped almost entirely by the function it performed rather than by the author's creativity.[11]

The *Feist* decision rested on similar reasoning. The compilation in dispute was a telephone directory.[12] Feist was a publisher of regional directories and sought permission from Rural Telephone Service to incorporate Rural's local listings into the wider publication Feist planned. When Rural refused,

Feist used the listings anyway. Rural sued for infringement of its copyright in the phone book and won at trial. But the U.S. Supreme Court, in a ruling that has created widespread dismay and criticism, held that copyright in a compilation is limited to the scheme for selection and arrangement of the materials or data and cannot restrict others' use of the data themselves.[13] Feist appeared to mark the end of "sweat of the brow" protection.[14]

Furthermore, the Court held that if the selection and arrangement do not show the minimal creativity necessary for copyright protection, even these elements cannot claim protection.[15] The Court found that Rural's phone listings were ordinary columns of alphabetized names and addresses whose "expression" as a compilation was so plainly utilitarian that it merged with the facts and, as such, did not warrant copyright protection.[16]

The decision alarmed data compilers on both sides of the Atlantic Ocean.[17] They feared that the ruling could be used to eliminate all legal protection for their laboriously gathered databases. Digital databases in which users search not through any special indexing system, as they would in a library, but by simply entering words or phrases, seemed especially vulnerable. The creators of such systems employed no selection or arrangement, only sweat of the brow.

The first protective reaction was in the European Community, though attempts to emulate it quickly began in the United States as well.[18] U.S. efforts may make legal protection of "hot news" reports more uncertain than it already is.

Uncertain Protection Through Misappropriation Law

Since 1918, the best protection against piracy of news accounts has been the tort of misappropriation, a branch of unfair competition law. The leading misappropriation case for the news business is *International News Service v. Associated Press*, 248 U.S. 215 (1918).[19]

AP, the original plaintiff in the case, sued to prevent its competitor INS from rewriting AP's coverage of World War I.[20] INS reporters had been denied access to European combat theaters, so the news service resorted to rewriting reports from AP bulletins or from East Coast AP member newspapers and transmitting them to INS customers in western states. While the Court acknowledged that facts contained in news reports are not subject to copyright protection, it held that news companies may not crib each others' news while the facts are fresh enough to provide a competitive edge to the one who gathered them. INS, the Court said, was trying "to reap where it has not sown."[21] Thus was born the doctrine of "hot news" misappropriation, which prevented a news company from rewriting and distributing a competitor's reports while they remained fresh enough to have economic value as news.

Although the Court characterized the interest of a news gathering company in its fresh reports as "quasi property,"[22] the decision amounted to a limitation on the copying of facts, and the majority opinion was immediately controversial. Justice Louis Brandeis said in a strong dissent that the public interest in knowing all the news presumptively trumps a private economic interest in limiting news distribution.[23] In a separate concurrence, Justice Oliver Wendell Holmes wrote that AP was entitled to judgment not because INS took AP news reports but because it misrepresented them to INS customers as its own work.[24] Other courts and commentators expressed skepticism in the years that followed for what seemed like a special category of "sweat of the brow" interest in facts, in addition to whatever might be claimed under the "compilation" section of U.S. copyright law.[25]

Nevertheless, the majority opinion in *INS v. AP* prompted some states to incorporate "hot news" protection into their own unfair competition laws.[26] AP applied it against a variety of other uses of its news reports by nonsubscribers.[27] Newspapers found it useful in fending off radio competitors whose newscasts consisted of rewritten clips from the morning paper.[28]

With the enactment of the Copyright Act of 1976, however, it became more difficult to argue that *INS v. AP* was compatible with federal copyright law. Section 301 of the Act expressly preempted "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright."[29] That seemed to encompass exclusive rights to publish and distribute news reports. A consensus began forming around the idea that protection of "hot news" under state misappropriation law had become "a dead letter."[30]

The obituary was apparently premature. Although the Supreme Court has yet to revisit the subject, the Second Circuit held in *National Basketball Ass'n v. Motorola* that "hot news" claims could survive federal copyright preemption if they fit the following description extracted by the court from the *INS* decision:

> (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of the other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[31]

Where these tests are met, the court said, one could infer the presence of a claim based on rights not equivalent to any protected under copyright law and therefore not preempted.[32]

NBA v. Motorola notwithstanding, there are several reasons for news organizations to remain uncertain of their rights under misappropriation law. The *NBA* court's rationale for its conclusion that certain "hot news" claims survive preemption is open to challenge. Furthermore, some states have never recognized such claims. For claims in those states that do, the test set out in *NBA v. Motorola* is difficult. Moreover, since the *NBA* claim that gave rise to that lawsuit failed to meet some of the factors, it remains to be seen precisely what sorts of claims would succeed, or whether they would do so anywhere but in the Second Circuit. Finally, the universe of potential "hot news" plaintiffs has expanded to include market data compilers, sports leagues, movie or event listing services, and even online auctioneers.[33] Challenged to cut legal cloth to fit all such commercial claimants—some of them far less appealing from a public policy standpoint than AP—the Supreme Court might well return a different answer today than in the days when AP had dutifully delivered the lion's share of the nation's news from the World War I front.

The Internet has added further layers of complexity to the picture, as it has to most aspects of information distribution. News companies now compete not

just with fellow "hot news" claimants of the sorts mentioned above but with large-scale aggregators of all kinds of data. Most such digital libraries are archival rather than time sensitive.[34] Stymied under copyright law by *Feist*, and unlikely to qualify under all the NBA factors for misappropriation protection, data vendors see possible salvation in a solution adopted in Europe—sui generis protection for databases.[35] Legal protection against piracy of "hot news" has been swept up, for better or worse, in the international debate over the appropriate level of protection for an enormous new industry.

Database Protection Could Leave "Hot News" in the Cold

Thanks to the Internet, the marketplace for information is a rich one, global in scope.[36] Technology now makes it possible and practical to store vast amounts of information in electronic form, indexed in whatever ways are appropriate to the material, so that users may quickly locate and retrieve exactly what they need. They can search from anywhere on the Internet, which is to say almost anywhere.

The ability to deliver an unlimited volume of relevant information economically, wherever and whenever it is needed, is among the greatest commercial productivity gains of the last century, however difficult the impact may be to measure.[37] Entire businesses are being built upon it, investing heavily in searchable databases and generating revenue streams from subscriber fees, royalties, or advertising.[38]

Unfortunately, the same technology that enables companies to amass valuable heaps of data also makes it easy to steal them.[39] Hackers invade even password-protected electronic archives with impunity and help themselves. Worse yet, huge chunks of data, even entire libraries, can be downloaded and sold or given away to the public. Database creators formerly looked to copyright law for one line of defense for their valuable data collections as "compilations." After *Feist* they began to look elsewhere, and in Europe they looked faster than in the United States.[40]

For several reasons, it is not surprising that Europe was quicker than the United States to react to the threat posed by the *Feist* ruling. First, in European copyright law and jurisprudence authors enjoy far more sympathetic treatment than in the United States. Under European law, for example, authors and artists have "moral rights" in their creations, including "works for hire."[41] Authors retain personal rights to acknowledgment of their authorship and to protection of their work from alteration or mutilation.[42] The law protects those rights even in copies of a work the artist has sold. In the United States, copyright law is predisposed to view authors' rights as necessary incentives for creation of works that expand the common store of useful knowledge, not as personal rights to be guarded and valued for their own sake.[43] Thus, database piracy was more likely to trigger response first in Europe.

Second, European database owners saw a competitive opportunity to steal a march on the far more highly developed U.S. database industry.[44] A database is equally accessible across a global network from wherever it happens to reside. If European law could create something resembling a safe legal haven from database piracy, presumably database builders would prefer to locate their businesses in Europe.

Third, and perhaps most critical, opposition to penalties for unauthorized extractions from databases was modest in Europe but turned out to be vigorous and politically effective in the United States. Scholars, librarians, researchers, and other advocates of the free flow of information deplored the European initiative and took steps, so far successful, to block its spread to the United States.[45]

Europe's response to *Feist* was Directive 96/9/EC of the European Parliament and of the Council of 11. Enacted in March 1996, the directive instructed EU member states to promulgate statutes by January 1, 1998, giving protection to all forms of data compilations.[46] The document specifies sweeping legal defenses that go well beyond even European copyright and misappropriation laws. The terms are preceded by no fewer than sixty numbered "whereas" clauses, but number thirty-nine best summarizes the purpose of the document:

> Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collecting the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;[47]

Traditional misappropriation claims target the acts of competitors. The directive, however, extends the range of prohibited conduct to acts by any database user if those acts cause "significant detriment, evaluated qualitatively or quantitatively"[48] to the database creator's investment. EU member nations are directed to establish a legal right for a database creator to prevent "extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."[49] As critics were quick to note, an insubstantial quantity of data might be deemed "substantial" in quality and therefore subject to penalty.[50]

The directive allows for few permissible exceptions, nothing remotely resembling the level of "fair use" tolerated under both U.S. and European copyright law. Notably absent from the listed special cases, for example, is any reference to data extractions for the purpose of news reporting. Privilege extends only to teaching or scientific research for a "noncommercial" purpose, or to extraction for "purposes of public security or an administrative or judicial procedure."[51] The facts compiled in European news databases, "hot news" or cold, thus seem absolutely safe from extraction and "reutilization" by information predators in the news business.

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> Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.[52]

Parallel legislation quickly found its way into the U.S. Congress. Despite revisions intended to respond to critics in the research community, a succession of bills has been trapped committees and none shows much promise of escaping soon.[53] "Pirates still sail without fear,"[54] lamented Congressman Howard Coble, sponsor of one version, as he took the House floor in October 2000, to note the approaching end of a third congressional session without enactment of a counterpart to Europe's directive.

For news companies, it is probably just as well. Neither of the most recent bills, H.R. 354 and H.R. 1858, seems likely to make mainstream news companies safer from pirates; in fact both would arguably make news harder to protect. H.R. 354 would impose restrictions on the use of databases approaching those of the EU directive, tight enough in the view of some critics to make the proposal unconstitutional.[55] The far looser protection offered by H.R. 1858 would protect very little of interest to news companies. Both proposals would preempt whatever may be left of state misappropriation protection.

Like the EU Directive, H.R. 354 would prohibit extraction or sharing by any user of "all or a substantial part" of a database in a way that causes "material harm" to the primary market of the database creator.[56] Critics have objected that "substantial part" might be considerably less than "all" in light of other provisions of the statute, and "material harm" could be as little as the loss of a subscription fee not paid by a downstream recipient of the extracted data.[57] In other words, innocent and harmless use of a database by an individual could still be sanctioned.

The more serious criticism of H.R. 354, however, is that it may be unconstitutional. The Intellectual Property Clause of the Constitution authorizes the granting of limited rights in information to the extent that such rights are an incentive to authors and inventors to create new work.[58] In such cases as *Feist*, courts have strictly limited the granting of rights in accumulations of facts where the grant fails to serve that constitutional purpose. H.R. 354 attempts to evade the Feist court's logic by relying on the Commerce Clause. But Commerce Clause authority for action against unfair competition cannot encompass the penalties in H.R. 354 against database users who do not also compete. Any such penalties would punish what can only be seen as property rights in ordinary facts. Such rights could be conferred only under authority of the Intellectual Property Clause, which the *Feist* court has said may not be done.[59]

H.R. 1858 avoids such criticisms by confining its prohibition to creation of "duplicates" of existing databases for purposes of competing with them. A "duplicate" database is one that is substantially the same as the existing database because it was created with data extracted from the original.[60] The language governing news reporting, however, is also confined to "duplicate" databases. Although it would protect a news company against the misappropriation of an entire product or service, it appears to create no reliable barrier to the systematic plundering of individual stories. At the same time, the stronger security afforded by state misappropriation tort law would be placed out of reach by the bill's preemption clause.[61]

Also troubling is the fact that "hot news" protection is far from a central concern to backers of either bill. In earlier versions of both proposals, any extraction and distribution of facts from a database for purposes of news reporting would have been permitted. When it was noticed that this exception would effectively make one news company's "hot news" free for the taking by another, legislators belatedly added provisos to make such uses an exception to the exception.[62] News sellers' interests appear at risk of being vindicated only by afterthought, if at all, in this process.

Statutory Misappropriation Protection

If the news industry really wants a legal remedy for theft of "hot news," it clearly needs a more secure and effective strategy than waiting to see whether anything useful survives the much larger debate over database protection. One approach would be to codify misappropriation protection within its own federal statute, the very solution Justice Brandeis appeared to urge in his *INS* dissent.[63]

The *NBA v. Motorola* court distilled five factors from the majority INS opinion as the necessary elements of a "hot news" misappropriation claim.[64] The court cited three of them as the tests for surviving copyright preemption: time sensitivity of the misappropriated data, free riding on the plaintiff's efforts by the defendant, and a threat to the plaintiff's incentive to offer its product or service at all.[65] Meeting these three prerequisites supposedly identifies claims seeking rights not equivalent to any within the scope of copyright protection.

Leaving aside, briefly, the open question of whether the preemption clause is clear enough to permit such parsing of claims at all,[66] the court's attempt to apply it to *INS* misappropriation claims is mystifying and should not be permitted to find its way into a federal statute. First, the court doesn't explain why it set the three elements of its five-part *INS*-derived checklist apart from the others. The two left out are the cost incurred by the plaintiff in assembling the data and use of the data by the defendant in direct competition with the plaintiff. But if a misappropriation claim rests on a quasi-property interest, what would be a more readily available measure of that interest than the size of the investment in its subject? Leaving out direct competition makes no sense either. Free riding is on the list, and by the *NBA* court's own reasoning, the opportunity to compete directly at an advantage is what free riding is all about.[67] Also, it would seem that direct competition between the parties comes close to defining the difference between copyright claims, in which the parties may not even be in business at all, and unfair competition claims, in which the parties must be business adversaries.

Second, and more telling, it is doubtful that the element requiring a threat to the quality or existence of the plaintiff's product belongs on either the long or shortened list. The language is present in the *INS* opinion only as a rebuttal to the defendant's assertion that publication of a news report puts its facts immediately in the public domain. The *INS* court called this argument "untenable"[68] because no news business could survive if it were accepted. That court was only stating "one of the most obvi-

ous results of the defendant's theory," not setting out a requirement for a successful misappropriation claim.[69]

In transforming what amounts to a simple statement of judicial notice into an "element" of a claim, then further elevating it to a sine qua non for surviving copyright preemption, the *NBA* court significantly and unreasonably restricted the availability of "hot news" protection—significantly, because a plaintiff is now required somehow to produce real evidence to support a hypothetical, i.e., if the defendant's actions were permissible, the public would be deprived of our product; unreasonably, because competition should not have to be lethal to be unfair. Robbery is still robbery, after all, even when it is not also attempted murder.

Furthermore, the severity of the business threat from a defendant's piracy would seem to be of little real help in setting preempted misappropriation claims apart from non-preempted ones. By way of contrast, one can understand why time sensitivity might have made the NBA court's short list. A claim involving time-sensitive data certainly seems different in kind from a claim involving archived data; the bulk of the value of "hot news" is in its freshness and disappears quickly. On the other hand, a misappropriation claim alleging a mortal threat is only different in degree from a claim alleging ordinary business harm. Why should the latter be preempted and the former not? Only, it appears, because the Second Circuit thought it should.

A more persuasive argument for dismissing the *NBA* court's analysis of what qualifies a misappropriation claim as nonpreempted is that the task really defies analysis. To deny the right to copy as part of a misappropriation remedy is still denying the right to copy, a right that tops the list of rights within the scope of copyright law. The problem cannot be analyzed away. Conclusory assertion is the only tool for the job. The *INS* court, for example, distinguished copyright from misappropriation claims by asserting that the former concern the rights of an author as against the world, while the latter concern the rights of an author as against a direct competitor.[70] Are the two sets of rights therefore not "equivalent?" In 1918 the court evidently believed the question did not need answering.

Perhaps after 1978 an answer is required, but the *NBA* court looked in vain to the five supposed "elements" of *INS* misappropriation for help in sorting preempted copyright claims from nonpreempted misappropriation claims. In effect, the *INS* court simply asserted away the equivalency of rights.[71] Indeed, so did the House Report accompanying a preliminary version of the preemption section of the Copyright Act of 1978.[72] The report states that "hot news" claims are based on rights not equivalent to those within the scope of copyright law but, like the *NBA* court, fails to say what those rights are. The next appellate court to wrestle with an *NBA* or *INS* question could easily, and more forthrightly than either the House Report or the *NBA* court, acknowledge that it cannot evade the fact that state law claims against copying are exactly that—claims against copying. "Hot news" misappropriation might then go the way of "sweat of the brow" protection.

A federal statute, on the other hand, need not concern itself with preemption. It need only focus on balancing the principal values at stake: fair competition among "hot news" distributors and the least possible restriction on public access to information. It is the view of this author that a successful claim under a federal statute for "hot news" protection should require only (1) that the plaintiff have an investment in creation of its reports, (2) that the misappropriated data be highly time-sensitive, and (3) that the defendant have appropriated and used the data to obtain an advantage in competition with the plaintiff. That a given type of misappropriation might threaten the existence of its victim could strengthen the claim but should not be a prerequisite for filing it.

Conclusion

No matter how hard a news organization works to compile its reports, it has almost no remedy in copyright law against somebody who copies their facts. Misappropriation law provides some help, but the help is not available everywhere and, where it is available, cannot always be brought to bear on the problem. European style sui generis database protection as it is being considered in the United States aims to address so many agendas that the "hot news" doctrine risks being lost in the shuffle. Thus, perhaps the best legal refuge for "hot news" against piracy by news companies that don't do their own reporting is a federal misappropriation statute that targets them specifically and accurately.

Endnotes

1. *See* The Associated Press Annual Report, 1999 (on file with author).
2. *See, e.g.,* International News Serv. v. Associated Press, 248 U.S. 215 (1918).
3. *See* 17 U.S.C. § 101.
4. *See* Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information,* 15 BERKELEY TECH. L.J. 535, 558 (2000).
5. *See* 17 U.S.C. § 101.
6. *See* ROBERT A. GORMAN AND JANE C. GINSBURG, COPYRIGHT, CASES AND MATERIALS (5th ed. 1999).
7. *See, e.g.,* Andrew L. Deutsch, *Ownership of the News 2000: Copyright, Trademark, "Hot-News" and Database Protection Issues,* 605 PLI/Pat 519 (2000).
8. *See id.*
9. *See, e.g.,* Jason R. Boyarski, *The Heist of* Feist*: Protection for Collections of Information and the Possible Federalization of "Hot News,"* 21 CARDOZO L. REV. 871 (1999).
10. *See* GORMAN AND GINSBURG, *supra* note 6, at 164.
11. *See, e.g.,* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983).
12. *See* Feist Publications v. Rural Tele. Serv. Co., 499 U.S. 340, 342 (1991).
13. *See Feist,* 499 U.S. at 349.
14. *See id.* at 353.
15. *See id.* at 358.
16. *See id.* at 362.
17. *See, e.g.,* Mark Powell, *The European Union's Database Directive: An International Antidote to the Side Effects of* Feist*,?* 20 FORDHAM INT'L L.J. 1215 (1997).
18. *See* Daniel A. Tysver, *Database Legal Protection* (visited Nov. 25, 2000), *at* http://www.bitlaw.com/copyright/database.html.
19. *See* Deutsch, *supra* note 7, at 548.
20. *See INS,* 248 U.S. at 231.
21. *See id.* at 239.
22. *See id.* at 236.
23. *See id.* at 250.
24. *See id.* at 247.
25. *See* Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information,* 20 HAWAII L. REV. 421, 446 (1998) 421.
26. *See id.* at 448.
27. *See, e.g.,* Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 1935).
28. *See, e.g.,* Pottstown Daily News Pub'g

Co. v. Pottstown Broadcasting Co., 192 A.2d 657 (Pa. 1963).

29. 17 U.S.C. § 301(a).

30. *See* Deutsch, *supra* note 7, at 556.

31. *See NBA*, 105 F.3d, at 845.

32. *See id.* at 853.

33. *See, e.g.*, Standard and Poor's Corp. v. Commodity Exchange, Inc., 683 F.2d 704 (2d Cir. 1982); NBA v. Motorola, 105 F.3d 841 (2d Cir. 1997); Wehrenberg v. Moviefone, 73 F. Supp. 2d 1044 (E.D. Mo. 1999); eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Calif. 2000).

34. *See* Michael J. Bastian, *Protection of Non-creative Databases: Harmonization of United States, Foreign and International Law*, 22 B.C. INT'L & COMP. L. REV. 425, 429 (1999).

35. *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 (1997).

36. *See, e.g.*, Debra B. Rosler, *The European Union's Proposed Directive for the Legal Protection of Databases: A New Threat to the Free Flow of Information*, 10 HIGH TECH. L.J. 105, 106 (1995).

37. *See* Yannis Bakos, *The Productivity Payoff of Computers*, SCIENCE, July, 1998.

38. *See, e.g.*, Russell G. Nelson, *Seeking Refuge from a Technology Storm: The Current Status of Database Protection Legislation*, 6 J. INTELL. PROP. L. 453 (1999).

39. *See* Note, *Standards of Protection for Databases in the European Community and the United States:* Feist *and the Myth of Creative Originality*, 27 GEO. WASH. J. INT'L L. & ECON. 457, 459 (1994).

40. *See* Catherine Sansum Kirkman, *Legal Protection of Online Databases*, *at* http://www.webtechniques.com/archives/1998/01/just/.

41. *See* LERNER AND BRESLER, *supra* note 24, at 976.

42. *See id.* at 947.

43. *See* Benkler, *supra* note 3, at 541.

44. *See* Directive 96/9/EC of the European Parliament and of the Council of 11, §§ 11-12.

45. *See* remarks of Sen. Orrin Hatch, Database Antipiracy Legislation (Senate-Jan. 19, 1999) (visited Nov. 10, 2000) <http://thomas.loc.gov/cgibin/query/D?r106:4:./temp/ ~r106TTrcHV:e45:>.

46. *See* Directive, *supra* note 46, at Ch. IV, Art. 16, § 1.

47. *See id.*, Preamble § 39.

48. *See id.*, Preamble § 42.

49. *See id.* at Ch. III, Art. 7, § 1.

50. *See* Andrew Oram, *The Sap and the Syrup of the Information Age: Coping with Database Protection Laws, at* http://www.oreilly.com/people/staff/andyo/professional/collection_law.html.

51. *See* Directive, *supra* note 46, at Ch. II, Art. 6, § 2.

52. *See id.* at Ch. III, Art. 10, § 3.

53. *See* Deutsch, *supra* note 7, at 570.

54. See remarks of Rep. Howard Coble, Database Protection Legislation (House of Representatives—Oct. 11, 2000), *at* http://thomas.loc.gov/cgibin/query/D?r106:4:./temp/~r106TTrcHV::

55. *See* Benkler, *supra* note 3, at 575.

56. *See* H.R. 354 Rep. No. 106-349, Part I, 106th Cong., 1st Sess. (1999).

57. *See* Benkler, *supra* note 3, at 580.

58. *See* U.S. CONST. art I, § 8, cl. 8.

59. *See* Benkler, *supra* note 3, at 587.

60. *See* H.R. 1858 Rep. No. 106-350, 106th Cong., 1st Sess. (1999).

61. *See id.*

62. Memorandum from George Galt, chair, Writers' Development Trust (on file with author).

63. *See INS*, 248 U.S. at 264.

64. *See NBA*, 105 F.3d at 845.

65. *See id.* at 853.

66. *See* GORMAN AND GINSBURG, *supra* note 6, at 807.

67. *See NBA*, 105 F.3d at 854.

68. *See INS*, 248 U.S. at 239.

69. *See id.*

70. *See id.* at 237.

71. *See id.*

72. *See* H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 129-33 (1976).