VIEWPOINT

Saving Journalism With Copyright Reform and the Doctrine of Hot News

BY BRUCE W. SANFORD, BRUCE D. BROWN, AND LAURIE A. BABINSKI

In a workshop held December 1–2, 2009, the Federal Trade Commission was the latest government agency to ask the question: How will journalism survive the economic stresses of the Internet age?

Over the past few months, Congress has held three separate hearings seeking solutions to aid the industry. In April 2009, the House Subcommittee on Courts and Competition Policy heard testimony from newspaper executives who pleaded for an antitrust exemption to survive. A month later, the Senate Subcommittee on Communications, Technology, and the Internet conducted a hearing on the future of journalism. In late September, the House Joint Economic Committee addressed "alternative funding options" for newspapers.

Among the legislative proposals have been antitrust exemptions, tax breaks, and even nonprofit status for news media that are struggling to survive. This article examines two of the frequently proposed solutions—hot news and copyright reform—that have been offered as ways to fix the problem of news aggregators and free-riders who monetize original content created by others and pocket the profit.

Copyrighting Sweat

Stop the aggregators. It sounds so simple. But for journalism, it is the ultimate example of the old adage that "bad facts make bad law." The twenty-year-old case standing in the way of vigorous copyright protection in the online world is a decision concerning alphabetical listings in a telephone book in western Kansas.

One obvious solution for the press to stop free riders that profit from information by linking to stories on news media websites would be to have intellectual property rights not only in words and expressions—the core of copyright—but also in the effort that goes into the collecting of facts themselves. Yet when the Supreme Court considered the "sweat of the brow" theory of copyright in 1991, it was not presented with the kind of compelling facts publishers could present today about the corrosive effects of free riding.

In *Feist Publications, Inc. v. Rural Telephone Service Co. Inc.*,[1] the plaintiff was a phone company that, as a condition of its local monopoly, was required by law to publish a white pages directory. The listings were free and consisted of names, addresses, towns, and phone numbers. The phone company did not exactly struggle (or need a staff of reporters) to find "content" for its directories because households provided the information when they signed up for service.

When an upstart rolled onto the scene seeking to publish a competing directory, the phone company would not license the names and addresses. It said that Feist Publications could not copy its entries and would have to discover the same information on its own by going door-to-door or conducting surveys by phone. When Feist copied the listings, the phone company sued for copyright infringement.

Does Copyright Law Protect Compilations of Facts?

Once the case reached the U.S. Supreme Court, the issue was joined: even though individual facts themselves are not copyrightable, does copyright law protect compilations of facts because of the effort and cost that go into gathering large amounts information? The Court said no, even though, it acknowledged, that "it may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation."[2]

The trouble with *Feist* as the high noon moment for the "sweat of the brow" theory is that there just wasn't much sweat to speak of. The content at issue was virtually handed to the phone company by subscribers; there was no expensive fact gathering to be done or newsroom to fund. The company was a monopoly seeking to use its control over white page listings to create a second monopoly over yellow page advertising. The published information was purely "garden-variety" and "devoid of even the slightest trace of creativity," as the Court said.[3]

Full Impact of *Feist* Is Felt in the Digital Age

As a result of the Internet and other electronic media, only now are publishers experiencing the full impact of *Feist* because of the ease with which aggregators can tap the value out of news websites simply by linking to them, all the while drawing advertising dollars away to their own sites. While "sweat of the brow" protection had been recognized by some courts since at least the 1920s, *Feist* set the theory back—at least under current copyright law.

Though its facts are comically out of step with the realities of publishing today, *Feist* blocks any industry attempts to claim that copyrights are being violated by Internet free riders who take advantage of the hard work necessary to produce the news. Publishers can still try to assert copyright infringement in the headlines and brief snippets that aggregators often copy into their links, but the doctrine of fair use as it currently stands may well cover the duplication of small portions of text.

That very question was at the center of a case filed by GateHouse Media last year. GateHouse sued the *Boston Globe*, alleging that the newspaper had infringed on its copyrights by publishing headlines and brief excerpts from GateHouse articles, as well as links to the full GateHouse material, on the Boston Globe's hyperlocal pages.[4] One theory of the case

Bruce W. Sanford and Bruce D. Brown are partners and Laurie A. Babinski is an associate in the Washington, D.C., office of Baker Hostetler.

was that aggregators are true substitutes for the originals because modern readers look only at headlines and excerpts.

The *Boston Globe* and GateHouse settled the day before trial, deferring any decision as to the pressing issue: whether copyright laws would protect links, headlines, and snippets as GateHouse had hoped or whether fair use would prevail as the Boston Globe had argued. But GateHouse's expert, UCLA law professor Douglas Gary Lichtman, was prepared to testify that the *Boston Globe*'s use of GateHouse's material could not be considered fair use.[5]

The doctrine of hot news appropriation may be gaining traction after more than ninety-one years

GateHouse was not the first to pursue such a case—the same question lay at the heart of a 2005 lawsuit filed by Agence France-Press against Google.[6] AFP had sought $17.5 million in damages claiming that Google was posting headlines, photographs, and news summaries on Google News without AFP's permission. That case also settled long before any law was made; the agreement included a deal through which Google would license the AFP's original content to be hosted on its own website (just as Google would later do with the Associated Press).

With the "sweat of the brow" theory rejected by the Supreme Court and fair use likely protecting the copying of headlines and snippets, copyright law as it stands today leaves few avenues for protection against the free riding problem plaguing publishers. But a dispute over 7,700 white page listings in rural Kansas may not be the final word on protection for sweat of the brow in the wired world.

Hot News

Another proposed solution that appears to be gaining traction is the doctrine of hot news misappropriation, which was established in the 1918 case *International News Service v. Associated Press*.[7] Hot news has the potential to protect against types of content theft that copyright laws have struggled to cover—the theft of factual information rather than words or expression.

In *INS*, the AP alleged that INS had copied AP news from early editions of newspapers and then either sold the stories wholesale or rewrote them for profit. The AP argued that INS's conduct "violate[d] the [AP]'s property right in the news and constitute[d] unfair competition in the business."[8] The Court rejected the notion that the AP had any property right in the news, which it regarded as "common property," but held that the unfair competition claim gave rise to a quasi-property right that existed between two competitors and could be protected.[9]

Writing for the majority, Justice Pitney found that

> "[s]tripped of all disguises," INS's actions constituted an "unauthorized interference with the normal operation of [the AP]'s legitimate business precisely at the point where profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not.[10]

The holding confirmed that a common law cause of action for hot news misappropriation existed to prevent one competitor from stealing another's original content, rewriting it, and "reaping the fruits of [the originator's] efforts and expenditure."[11] The holding was subject to a vigorous dissent by Justice Brandeis, who declined to "establish a new rule of law in the effort to redress a newly disclosed wrong" even though "the propriety of some remedy appear[ed] to be clear."[12] Such a decision was for the legislature, he argued, not the courts.

***Tompkins* Eliminates Federal Common Law**

In 1938, the Supreme Court's holding in *Erie R.R. Co. v. Tompkins* eliminated the federal common law and thus limited the binding precedential value of the *INS* decision.[13] The congressional action recommended by Justice Brandeis would have been one solution to the Court's decision in *Erie*, but Congress has instead taken a more passive approach. In the legislative history to the 1976 Copyright Act amendments, Congress took a small step in signaling that claims for hot news misappropriation will be allowed to survive federal copyright preemption but declined to explicitly recognize the doctrine as a separate cause of action.[14]

In the ninety-one years since the Supreme Court's *INS* decision, only five states (New York, California, Illinois, Missouri, and Pennsylvania) have explicitly recognized hot news misappropriation as a cause of action (its viability in Florida is questioned).[15] Only in Massachusetts has the doctrine been explicitly rejected as a cause of action, and then only by a federal court sitting in diversity.[16]

In 1997, the Second Circuit handed down the most notable hot news case in recent memory. In *National Basketball Association v. Motorola, Inc.*,[17] the Second Circuit held that an *INS*-like claim could survive federal copyright preemption in 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.[18]

The cause of action thus remains alive and well in the five states where it is recognized. As recently as January 2008, the Associated Press filed suit against aggregator All Headline News alleging hot news misappropriation after AHN allegedly copied and rewrote AP content. The New York federal court refused to dismiss AP's hot news cause of action because it "remain[ed] viable under New York law, and the Second Circuit has unambiguously held that it is not preempted by federal law."[19] The parties settled shortly thereafter, with AHN agreeing that it "would not make competitive use of content or expression from AP stories" and acknowledging as part of the settlement that "the tort of 'hot news misappropriation' has been upheld by other courts and was ruled applicable in this case."[20]

Expanding Hot News Through Common Law

If hot news is a better substantive solution than copyright to the free riding problem, it suffers from a more limited reach. The

question becomes how to expand the applicability of the hot news doctrine to ensure that all content originators, not just those in California or New York, for example, have a remedy against those who pilfer content for their own financial gain. One answer is to push for state courts to recognize the cause of action for their common law.[21] This approach has several advantages, notably:

- It would allow states to adopt their own version of hot news misappropriation, which may or may not be similar to the cause of action set forth in *Motorola* but would allow for a dynamic body of case law that can evolve as technologies change;
- It would provide flexibility with regard to unusual factual scenarios that would then be used to define the contours of the cause of action; and
- It would allow courts to use the substantive precedent from *INS* to guide the courts toward an expansive application of the tort.

But the approach also has its drawbacks. Media companies and organizations would be required to invest considerable time and money in pursuing cases that have the potential to reach state supreme courts, an effort that could take years or decades. The cases would have to be carefully chosen so that the facts reflect inequities so fundamental that courts are prompted to look outside of recognized law for a remedy.

Furthermore, the possibility still exists that state supreme courts bow to Justice Brandeis's concern about judicially created causes of action and decline to apply the tort without a legislative enactment. Nothing about *INS*, after all, compels states to adopt the cause of action. Finally, a state-by-state effort may still require amending the Copyright Act to eliminate any uncertainty that common law hot news causes of action will survive federal copyright preemption.[22]

Federalizing the Hot News Doctrine

The alternative to a slow methodical common law approach is for Congress to federalize the doctrine of hot news appropriation. It is no secret that Congress has been openly looking for ways to save journalism, and codifying the hot news doctrine may provide one answer.[23] Among other advantages, a federal hot news statute would:

- create a cause of action for hot news misappropriation on the federal level where most attorneys prefer to litigate because federal courts are more streamlined, consistent, and efficient than state courts;
- provide for a uniform body of law nationwide on which multistate media companies can rely;
- take effect immediately. It would not be necessary for common law to develop across the country in order to gain some legal leverage against free riders;
- present an unequivocal statement from Congress, the kind of statement Justice Brandeis was waiting for in *INS*, that hot news is a cause of action that is essential to the maintenance of a free and vibrant press; and
- provide an opportunity to introduce statutory and even treble damages as a deterrent.

Perhaps the most important benefit of a federal statute is the potential leverage it would offer the industry when negotiating with aggregators and search engines. Without definitive legal redress for the economic harm free riders inflict on content originators, those interlopers that profit from the original content produced by other publishers would have no reason to negotiate.

As with the previous approach, however, potential drawbacks exist. One concern is that lobbying Congress for a federal hot news statute would be a significant task that would require the support of a broad cross-section of media companies working through a legislative processes that inherently involves political wrangling and difficult compromises.

Moreover, the simplest way to draft such a federal statute would be to codify the *Motorola* factors. But care must be taken that such factors don't constrain the ability of the law to evolve. For example, what effect should a lack of time sensitivity, one of the *Motorola* factors, have in a situation where original content is posted not on a website where the time sensitivity of material is crucial to the aggregator's profit, but instead on a topical website built around the common interests of certain readers? The doctrine must retain some flexibility if its purpose is to be fulfilled.[24]

Finally, attempting to pass a statute that might become a rigid set of rules only alterable by legislative amendment carries an inherent risk that the results might be weaker than the cause of action the courts have recognized in *INS* and *Motorola*.

Conclusion

For media companies to rally behind any one theory will require in-depth economic analysis of the effects of free riding on the news industry, something media companies such as the AP and start-ups such as Attributor have been studying over the last year. Media companies will have a stronger hand to play if they bring empirical support to back up claims that aggregators and free riders are contributing to the economic demise of American journalism.

Endnotes

1. 499 U.S. 340 (1991).
2. *Id.* at 349.
3. *Id.* at 362.
4. GateHouse Media Mass. I, Inc. v. New York Times Co., No. 08cv12114-WGY (D. Mass., dismissed Jan. 26, 2009).
5. *See* Motion in Limine to Exclude Expert Testimony of Law Professor Douglas Gary Lichtman, GateHouse Media Mass. I, Inc. v. New York Times Co., No. 08cv12114-WGY (motion filed Jan. 23, 2009).
6. Agence France Press v. Google, Inc., No. 1:05cv00546 (D.D.C., filed May 19, 2005).
7. 248 U.S. 215 (1918).
8. *Id.* at 232.
9. *Id.* at 234–35 ("the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day" which "may be regarded as common property.").
10. *Id.* at 240.
11. *Id.* at 241.
12. *Id.* at 267.
13. 304 U.S. 64 (1938).
14. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997); *see also* David Marburger & Dan Marburger, *The free ride that's killing the news business*, L.A. Times, Aug. 2, 2009, at A28 ("In 1976, Congress amended the copyright law to abolish all laws that function like copyright. Initially, Congress was going to make an exception for the ruling of the AP case, allowing it to remain alive. But the Justice Department objected, misreading the case as granting property rights in facts. Congress dropped the exception.").

15. *See* McKevitt v. Pallasch, 339 F.3d at 530, 334 (7th Cir. 2003) (applying Illinois law); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 94, 977 (E.D. Cal. 2000) (applying California law); Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc., 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999) (applying Missouri law); Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co., 192 A.2d 657, 663 (Pa. 1963) (applying Pennsylvania law).

16. *See* Triangle Publ'ns, Inc. v. N. Eng. Newspaper Pub. Co., 46 F. Supp. 198, 203 (D. Mass. 1942) ("Except where there has been a breach of trust or contract, it is not unfair competition in Massachusetts to use information assembled by a competitor" (citations omitted)).

17. *Motorola*, 105 F.3d at 841.

18. *Id.* at 845.

19. AP v. All Headline News Corp., 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009).

20. Joint Press Release, AP and AHN Media, AP and AHN Media Settle AP's Lawsuit against AHN Media and Individual Defendants**,** July 13, 2009 (available at http://www.ap.org/pages/about/pressreleases/pr_071309a.html) (last visited Oct. 6, 2009).

21. *See generally* Marburger & Marburger, *supra* note 14; *see also* David Marburger & Daniel Marburger, *Reviving the Economic Viability of Newspapers and Other Originators of Daily News Content*, at 45-49, *available at* http://blog.cleveland.com/pdextra/2009/07/Economic%20analysis%20as%20of%207-21-09.PDF) (last visited October 6, 2009.

22. *See* Marburger, *supra* note 14 (proposing the following addition to 17 U.S.C. § 301: "The copyright act does not abolish statutory or common-law unfair competition or unjust enrichment, regardless of whether the contested publication infringes copyright.").

23. *See* Bruce W. Sanford & Bruce D. Brown, *Laws That Could Save Journalism*, Wash. Post, May 16, 2009, at A15.

24. Some have suggested providing protection for twenty-four hours after publication, though the *INS* Court eschewed any such arbitrary limitation on the economic viability of the news. *See* Ryan T. Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. Tech. L. & Pol'y 1, 24 (June 2008).