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Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting

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ARTICLES

RESTRICTING FAIR USE TO SAVE THE NEWS: A PROPOSED CHANGE IN COPYRIGHT LAW TO BRING MORE PROFIT TO NEWS REPORTING

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I. INTRODUCTION

Thirty-five years ago the news was different. Back then, newspapers earned their reputations and readership through quality journalism.¹ Readers chose which paper to read based on its reputation for top news reporting and its history of uncovering big stories. Reporters like Woodward and Bernstein could spend months putting facts together building a story that would captivate the country and put the *Washington Post* in the hands of millions for years to come. Things are different now.

Today, if the *Washington Post* uncovered a monumental story and published it on its front page, readership would not change. The story would be on every major news web site in minutes. All the twenty-four hour news stations would be reporting on the story within the hour. Even though the other media companies would give the *Post* credit for the story, the advertising revenue would not change hands. No consequential profit would fall upon the *Post* for the facts uncovered.

On the other side of the country, things are just as bad. The *LA Times* is currently laying off reporters, closing its foreign offices, and firing editors.² Media corporation investors are calling for only three national newspapers, and the industry is falling in line behind them.³ However, the future does not have to be so bleak.

1. See J.Y. Smith & Noel Epstein, *Remembering Katherine Graham*, WASH. POST CO. (July 18, 2001), available at <http://www.washpostco.com/history-kgraham-obituary02.htm>.

2. *Frontline: News War Part III, What's Happening to the News* (PBS television broadcast Feb. 27, 2007) [hereinafter *Frontline: News War*], available at <http://www.pbs.org/wgbh/pages/frontline/newswar/view/>.

3. *Id.*

With just a slight change to the current fair use doctrine, the *Washington Post* could recover its loyal readership and reap revenue once again for its top-caliber news reporting. For twenty-four hours, national news web sites could state the *Post*'s headlines with a link to the *Post*'s home page to distribute the information to readers. The same day a story breaks, evening news channels could pay to license the facts and allow the *Post* to recover more profit. The *LA Times* could reap revenue from its many reporters while newly self-employed freelance journalists could find financial success in doing what they do best—researching and writing stories.

This Article proposes a change to current copyright law to bring more profit to news reporting. The alteration centers around allowing journalists, and the companies they work for, to own 98% of the investigated and researched facts they uncover for twenty-four hours after the story is first published. Part II examines the current state of the media and the effect of the Internet on the news business. Part III summarizes the economic and public policies behind protecting information. Part IV analyzes current copyright law's protection of information while Part V does the same with misappropriation law. Part VI describes the proposed amendment to current copyright law, points out a few legal and practical obstacles to be resolved, and ultimately concludes that the benefits far outweigh the potential problems.

II. THE CURRENT STATE OF THE MEDIA AND THE INTERNET'S EFFECT ON THE NEWS BUSINESS

A. *Frontline's News War*

In February 2007, PBS's flagship public affairs show *Frontline* aired a four part series examining the challenges facing mainstream news media and the news media's reaction.⁴ *Frontline* producer and correspondent Professor Lowell Bergman⁵ drew upon more than eighty interviews with

4. *Frontline: News War Introduction* (Feb. 13, 2007) [hereinafter *News War Intro*], <http://www.pbs.org/wgbh/pages/frontline/newswar/etc/synopsis.html>.

5. Lowell Bergman, Professor of Journalism, UC Berkeley Graduate School of Journalism; former CBS News "60 Minutes" Senior Executive Producer; recipient of numerous journalism awards including numerous Emmys, five Alfred I. duPont-Columbia University silver and golden Baton awards, three Peabodys, a Polk Award, a Sidney Hillman award for labor reporting and the James Madison Freedom of Information Award for Career Achievement from The Society of Professional Journalists, <http://journalism.berkeley.edu/faculty/bergman/> (last visited Apr. 21,

key figures in the print, broadcast, and electronic media.⁶ The results of this series are staggering and demand that the law adapt to aid this “fourth branch of [U.S.] government . . .”⁷

Jeff Fager, the Executive Producer of CBS’s *60 Minutes*, stated that he is looking to the Internet for his future and that broadcast journalism is going to end up on the Internet.⁸ “[Y]ou don’t see anybody between 20 and 30 getting their news from the evening news,” Fager said, “you see them getting it online.”⁹ He continued by stating that online advertising figures are up 30% to 40% each year.¹⁰

Eric Schmidt, the CEO of Google, stated that “[b]eing online is the future.”¹¹ While many organizations have only talked about the Internet revolution, “the fact of the matter is the time is now.”¹² “People who bet against the Internet, who think that somehow this change is just a generational shift, miss that it is a fundamental reorganizing of the power of the end user.”¹³ Schmidt concluded his interview by stating that “the consumption for news is up, but the way in which people consume news has changed, and it’s affected newspapers in a business sense pretty negatively.”¹⁴

John Carroll, the former editor of the *Los Angeles Times*, estimates that “85 percent of the original reporting that gets done in America gets done by newspapers,” and that “most of the other media that provide news to people are really recycling news that’s gathered by newspapers.”¹⁵ When describing the business model of the news industry, Carroll stated that the “typical newspaper makes a 20 percent operating margin. That’s roughly double what the typical Fortune 500 company makes.”¹⁶ The problem, however, is that profits from newspapers “will vanish over the next few

2007).

6. News War Intro, *supra* note 4.

7. H.L. Fu & Richard Cullen, *Defamation Law in the People’s Republic of China*, 11 TRANSNAT’L LAW 1, 5 (1998) (citing Frederick Schauer, *Social Foundation of the Law of Defamation: A Comparative Analysis*, MEDIA L. 263, 264 (1993)).

8. Interview with Jeff Fager, Executive Producer, 60 Minutes (Nov. 29, 2006), available at <http://www.pbs.org/wgbh/frontline/newswar/interviews/Fager.html>.

9. *Id.*

10. *Id.*

11. Interview with Eric Schmidt, CEO, Google (Nov. 20, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/schmidt.html>.

12. *Id.*

13. *Id.*

14. *Id.*

15. Interview with John Carroll, Former Editor, LA Times (July 8, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/carroll.html>.

16. *Id.*

years as the major papers lose advertising dollars to the Web almost as fast as they're losing readers."¹⁷

In concluding his investigatory look at the news industry, Professor Bergman interviewed Charles Bobrinskoy, Vice Chairman of Ariel Capital Management.¹⁸ According to Bobrinskoy,

the problem is [] that the people who are writing the *LA Times* [] want to be writing about international events. They want to be writing long-term pieces about why Bush went to war in Iraq. And we're saying—and the people at the Tribune are saying—there are other people writing those stories.¹⁹

He then said “there’s a role for probably three national newspapers—*The Wall Street Journal*, *The New York Times*, and *USA Today*. Each has its own niche; all three are national newspapers. We don’t think there’s any demand for a fourth.”²⁰

B. Other Media Statistics

The Pew Research Center for the People and the Press is an independent opinion research group that studies attitudes towards the press, politics, and public policy issues.²¹ In March and April 2004, Pew, in collaboration with the Project for Excellence in Journalism and the Committee of Concerned Journalists, conducted a survey of 547 national and local reporters, editors, and media executives.²² The results of the survey indicate that “[j]ournalists are unhappy with the way things are going in their profession.”²³ Sixty-six percent of journalists at national

17. *Frontline: News War*, (PBS television broadcast Feb. 27, 2007), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/etc/script3.html>.

18. “Ariel Capital Management is a privately owned, Chicago-based money management firm . . . with more than \$15.5 billion in assets.” Ariel Capital Management, *Our History*, <http://www.arielcapital.com/content/view/101/1127> (last visited Apr. 21, 2007).

19. Interview with Charles Bobrinskoy, Vice Chairman, Ariel Capital Management (Oct. 30, 2006) [hereinafter Bobrinsky Interview], available at <http://www.pbs.org/wgbh/pages/frontline/newswar/intereviews/bobrinskay.html>.

20. *Id.*

21. Pew Research Center for the People and the Press, About the Center, <http://people-press.org/about/> (last visited Apr. 22, 2007).

22. *Pew Research Center for the People and the Press, Bottom-Line Pressures Now Hurting Coverage, Say Journalists*, May 23, 2004 [hereinafter Bottom-Line Pressures], <http://people-press.org/reports/display.php3?PageID=825>.

23. *Id.*

media outlets believe that journalism is going in the wrong direction with increased bottom line pressure “seriously hurting” the quality of news coverage.²⁴ As a comparison, when the same survey was conducted in 1995, only 41% believed bottom-line pressure was hurting news coverage.²⁵ Finally, the same survey found that there is almost universal agreement among those who worry about growing financial pressure on the media to pay less attention to complex stories.²⁶

From April to May 2006, the Pew Research Center conducted its biennial news-consumption survey among 3204 adults.²⁷ The results pertaining to the Internet indicated that nearly one-in-three Americans get their news online three or more days per week.²⁸ The results also indicated a trend in online news readership broadening as well as increasing.²⁹ In 1996, less than 2% of Americans regularly got their news online; in 2000, the number was up to 23%; and in 2004, just less than 30% of Americans read online news three or more days per week.³⁰ Further, the increase in online news readership is not concentrated in young people.³¹ In 2000, 30% of Americans between 30 and 34 years old regularly got news online.³² In 2006, the number was up to 47%.³³ For older Americans, in 2000 only 25% of people between the ages of 35 and 49 regularly got news online, and in 2006, the number was up to 37%.³⁴

The summary of Professor Bergman’s “News War” piece and the Pew research indicates that the standard business model of news gathering is in, or has gone through, a state of flux. News profits are coming from different sources, and the industry is trying to adapt. Current investors realize that news gathering as it is presently understood will not create the profits media corporations have appreciated in the past;³⁵ however, the news and its importance to society has not changed. Fewer news agencies will result in control over the types of news stories that are investigated

24. *Id.*

25. *Id.*

26. *Id.*

27. *Online Papers Modestly Boost Newspaper Readership*, Pew Research Center for the People and the Press July 30, 2006, available at <http://people-press.org/reports/display.php3?ReportID=282>.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Online Papers Modestly Boost Newspaper Readership*, *supra* note 27.

33. *Id.*

34. *Id.*

35. Bobrinsky Interview, *supra* note 19.

and the way in which they are reported.³⁶ In a recent paper for Harvard University's Joan Shorenstein Center on the Press, Politics, and Public Policy, Jill Carroll³⁷ said this about the future of news reporting:

As citizens in a democracy we have the privilege and obligation to shape our policies thoughtfully and conscientiously in a direction we, after informed debate, feel is in our national interest. As a world power we have a moral obligation to use our influence responsibly and thoughtfully. This can only happen if the electorate has enough information upon which to decide what policies most closely reflect their views and the direction in which they want the country to go. The media is an important part of making that happen. The quality of the information provided by the news media determines to a large extent the quality of the national debate and resulting policies. Having many sources of good quality, in-depth, insightful, well-informed [] reporting is essential to keeping the national debate vigorous and churning. This moral argument won't hold sway in many boardrooms, but the financial incentives to produce good quality [] news should. Hopefully financial decision makers will have the foresight to realize they are drastically undervaluing [] news coverage and have the wisdom to hang onto and invest in this valuable asset.³⁸

If what Carroll says is true, the media will be forced to trust the foresight of media investors to put the bottom-line aside and do what is best for the country. If that outcome seems unlikely, then the legislature must step in and correct the problem before it erodes the electorate's knowledge and our democracy in general.

36. Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly*, 56 FED. COMM. L.J. 299, 314-18 (2004) (describing the way in which the Associated Press controlled national news and the opinions of Americans before Congress stepped in to break up the monopoly).

37. Reporter, *Christian Science Monitor*, Fall 2006 Joan Shorenstein Center on the Press, Politics and Public Policy, Cabot Fellow, http://www.hks.harvard.edu/presspol/research_publications/papers/working_papers/2007_1.pdf.

38. Jill Carroll, *Foreign News Coverage: The U.S. Media's Undervalued Asset* 13-14 (Joan Shorenstein Ctr. on the Press, Politics & Pub. Policy, Working No. 2007-1, 2007), available at http://www.ksg.harvard.edu/presspol/research_publications/papers/working_papers/2007_1.pdf (while Ms. Carroll's paper explicitly addresses the importance of foreign news coverage and the growing trend of U.S. news organizations to close foreign bureaus, the implications and suggestions parallel the growing national trend of cutting back on reporting in general).

III. THE ECONOMIC AND PUBLIC POLICIES BEHIND PROTECTING INFORMATION

A. Law and Economics on Information in General

Judge Posner³⁹ explains the unique role of intellectual property with a simple example.⁴⁰ Someone who steals the Judge's car deprives him of valuable property that costs money to acquire.⁴¹ The thief pays nothing and free-rides on the purchase and investment of the car.⁴² Likewise, if someone copies the Judge's novel, software, or new molecular entity for the treatment of disease that was created through considerable expense including money, time, and risk, the thief has reduced the income of the work and destroyed the exclusive use of the property.⁴³ But the correlations are imperfect.⁴⁴ The car thief *deprives* the Judge of his property; the copier does not—the Judge would retain it and remain free to license or sell it.⁴⁵ While copying may reduce the income from the work, because of the loss in exclusive use, the reduction may not be great.⁴⁶ “It may even be zero, if for example the person who ‘pirated’ [the] software did so only for his personal use, and not to resell it, and if in addition he could not have afforded [its] price so that . . . not . . . even a single sale” would be lost.⁴⁷

From Judge Posner's simple example, one can begin to see how information, and the protection of it, can be much more difficult to explain than traditional property rights. Information itself is not tangible.⁴⁸ It can be put in a tangible form, but recording it in a medium does not change its

39. Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School [hereinafter Judge], <http://www.law.uchicago.edu/faculty/posner-r>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Judge, *supra* note 39.

45. *Id.*

46. *Id.*

47. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 622 (2003).

48. Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U.L. REV. 365, 368 n.18 (1989) (citing 15 C.F.R. § 379.1 (1988) (“The U.S. export control regulations concerning ‘technical data’ recognize this principle. These regulations require an export control license for exchanges of technical data between U.S. citizens and foreign nationals, without regards to whether the data are in tangible form (written on paper) or in intangible form (as in oral conversations)”).

essentially intangible character.⁴⁹ Some scholars describe information as “infinitely expandable and malleable,”⁵⁰ while others characterize it as when a person or persons or tradition ascribes a particular meaning to data.⁵¹ In addition, information is inherently “leaky.”⁵² It may be shared readily by many people through virtually limitless forms and can be characterized as a public good.⁵³ A resource can be considered a public good when a current user does not lose anything as new users are added.⁵⁴ In contrast, “a private good is a commodity which once consumed by one person, cannot be consumed by another.”⁵⁵ In addition, information itself is “nonrivalrous.”⁵⁶ Because one person’s consumption diminishes another’s, ordinary commodities are “rivalrous.”⁵⁷ “However, if one person uses an idea, it remains undiminished for other users, so ideas are nonrivalrous.”⁵⁸

The public good and nonrivalrous nature of intellectual property in general, and information in particular, is what makes it such an interesting subject for economists and lawyers to debate.⁵⁹ “Excluding non-paying

49. *Id.*

50. *Id.*

51. Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103, 106 (1992) (additionally characterizing data as “signals, symbols, or at most discrete facts.”).

52. Samuelson, *supra* note 48, at 369.

53. *Id.*; Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of “Hot News” Information*, 20 U. HAW. L. REV. 421, 427 (1998) (citing William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (“A distinguishing characteristic of intellectual property is its ‘public good’ aspect”)); RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY 3 (ed., Edward Elgar Publishing 2000) (1963).

A public good is characterized by admitting more than one user, with no user’s consumption requiring any less consumption by any other user. Information in general, and intellectual property in particular, is a public good since no current user possesses any less when new users are added to the set of consumers.

Id.

54. WATT, *supra* note 53, at 3.

55. Fujichaku, *supra* note 53, at 427 n.29 (citing PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 980-81 (13th ed. 1989)).

56. ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 311 (ed., Princeton Univ. Press 2000) (orig. publication) (explicitly stating that “ideas are nonrivalrous,” however, in this context “information” is synonymous with “idea”); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 283 (2006).

57. COOTER, *supra* note 56, at 311.

58. *Id.*

59. WATT, *supra* note 53, at 3.

consumers from access to public goods by means of a legal apparatus is extremely costly” and difficult.⁶⁰ Additionally, with respect to acts of speech,⁶¹ constitutional guarantees of full freedom maximize its value, promote vigorous competition, stimulate innovation, and disseminate ideas.⁶² Conversely, free-riding on information that has taken expense to generate will eliminate any incentives to produce the information in the first place.⁶³ If all consumers were to free-ride, information producing members of society would dedicate their efforts to other better paid activities, resulting in the loss of important cultural assets of considerable social value.⁶⁴ “Somewhere between the two extremes [] lies what economists term a “social optimum,” and copyright law is the mechanism that is generally used to attempt to reach this point.”⁶⁵

The U.S. Constitution states “The Congress shall have 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.”⁶⁶ The intent behind this grant of power, further discussed later in this article, is that the restrictions on writings, discoveries, and intellectual property in general actually increase their supply.⁶⁷ When inventors, artists, and authors receive property rights in their creations, the law induces the development and exercise of their talent and avoids the underproduction of useful ideas and original forms of expression.⁶⁸ “Unfortunately, this solution may foster economic inefficiency of a different sort”—monopolies.⁶⁹

While consumers regard substitute products as imperfect, the holder of the property right will confront a downward sloping demand curve for the right of access to his work. If he wishes to maximize his profits, he will

60. *Id.*

61. Defined by *Black's Law Dictionary* as “[t]he expression or communication of thoughts or opinions in spoken words; something spoken or uttered.” BLACK’S LAW DICTIONARY (8th ed. 2004).

62. COOTER, *supra* note 56, at 311.

63. Sunder, *supra* note 56, at 283 (“Because information is assumed by its nature to be nonrivalrous and nonexcludable, free-riding will eliminate any incentives to produce information.”).

64. WATT, *supra* note 53, at 4.

65. *Id.*

66. U.S. CONST. art. 1, § 8, cl. 8.

67. COOTER, *supra* note 56, at 312 (“In the special case of intellectual property, restrictions on ideas actually increase their supply.”); Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 519 (1981).

68. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988).

69. *Id.*

continue to grant access until the point where the marginal revenue earned from the access equals the marginal cost.⁷⁰ The property owner's technique will have two economic consequences: first, he will reap monopoly profits—money, that would have remained with consumers had the work been priced where the marginal cost of producing it equaled the demand for it, will now go to the property holder; and second, consumers who value the work at more than its marginal cost, but less than its monopoly price, will not buy it.⁷¹ Subsequently, a lawmaker who wishes to maximize efficiency must determine, with respect to each type of intellectual product, “the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses.”⁷² The “gains” associated with legally granted property rights are the value to consumers of those intellectual products that would not have been generated were inventors, artists, and authors not granted those rights.⁷³ Stated more simply, “any property rights in excess of those required to stimulate creative activity are counterproductive.”⁷⁴

B. Law and Economics and the News

On copyright law in particular, “[t]here is little reason to suspect that authors of law review articles, road maps, and detective stories will respond identically to a fixed set of economic stimuli. Thus the Copyright Act discriminates among broad classes of writings.”⁷⁵ Furthermore, the Act discriminates on which works to grant property rights to at all.⁷⁶ While John Locke's theories of property state that rights can be acquired in something not already owned simply by virtue of the labor expended to gather or produce, current copyright law disagrees.⁷⁷ Gathering information can certainly require labor, and in the context of the news can be a very expensive, risky, and time consuming task—yet there is no copyright protection.

As discussed in the next section, current copyright law does not protect facts or hot news.⁷⁸ Second-comers can freely utilize the information in a

70. *Id.* at 1701.

71. *Id.* at 1702.

72. *Id.* at 1703.

73. Denicola, *supra* note 67, at 519.

74. *Id.*

75. *Id.*

76. *Id.*

77. Samuelson, *supra* note 48, at 369 (citing J. LOCKE, TWO TREATISES OF GOVERNMENT §§ 27-28 (3d ed. 1698)).

78. Fujichaku, *supra* note 53, at 434.

news story with total disregard to the high initial costs.⁷⁹ While the original information gatherer incurs both the cost of gathering information plus the cost of reproduction, the second-comer only bears the cost of reproduction.⁸⁰ “Consequently second comers can sell their own products incorporating the appropriated information at a lower price than that of the products offered by the original information provider.”⁸¹ This example raises an important economic point. It is necessary to distinguish between the delivery good used to consume the intellectual property, and the informational property itself. “[A] delivery good is not, in general, a public good, and hence it is easy to establish markets for delivery goods” as opposed to the information itself.

Within the context of the news business, thirty-five years ago hot news was consumed through the delivery goods of printed newspapers, radio, and television. While many people could consume one newspaper, or listen to a single radio or television broadcast, there were still great reproduction costs involved in creating the consumable good. Additionally, time was a big factor.⁸² While radio and television news broadcasts could be created fairly quickly, consumers would generally listen or watch the broadcasts at the same time each day. Subsequently, each individual broadcast company could choose when to release their story so as not to give competitors time to repeat the broadcast during peak hours. In the same way, newspapers would keep their hot news private until it was too late for competitors to write and print in their market until the next day.⁸³ While time zone changes posed additional hurdles to this scenario, as discussed later, the news media found a solution.

The largest difference between the description of the news business thirty-five years ago and the news business today is the twenty-four hour

79. *Id.* at 428.

80. *Id.*

81. *Id.*

82. *See id.* at 429.

Just as important as the cheap cost of reproduction is the speed at which copying is done. A period of time usually exists after the publication or public dissemination of information before others can appropriate the information for their own uses. This lead time advantage is a crucial consideration to the original information provider in estimating the earnings return on its initial investment.

Id.

83. *Cf.* Fujichaku, *supra* note 53, at 429 (“An information product which has been available on the market for a significant period of time before commercial rivals are able to copy the information provided may be better able to recoup investment costs than a product which is copied soon after its public release.”).

news services. In addition to reproduction time and expense being reduced for producing delivery goods, the way in which people consume news has changed. No longer will a headline on the *Washington Post* cause profits to rise that day. People will simply consume the news on their usual arbitrarily chosen homepage, or twenty-four hour news channel, because the *Post*'s story will inevitably be rewritten and added to the competitor's feed in minutes. The reproduction costs and time for second-comers to repeat or copy information in a tangible product are beginning to approach zero.

In 1970, then Professor, now Supreme Court Justice, Stephen Breyer⁸⁴ wrote an article describing his opinion of the copyright legislation Congress was in the process of creating.⁸⁵ While overly antagonistic of any increases in copyright protection, he concluded that technological innovations were reducing the costs of copyright infringement and conceded that "[t]he copiers cost advantage is fairly large."⁸⁶ He went on to state that even without copyright protection, an initial publisher still enjoys significant "lead time" advantages over copiers.⁸⁷ "By the time a copier chooses a book, prints it, and distributes it to retailers, he may be six to eight weeks behind, by which time the initial publisher will have provided retailers with substantial inventories."⁸⁸ While very few books are currently consumed electronically, technology is still moving forward. If consumers today did not mind reading a book electronically, it is conceivable that a first publisher's lead time could be as little as only a few hours within the present state of technology. Would this outcome change Justice Breyer's opinion on copyright protections?

IV. CURRENT COPYRIGHT LAW PROTECTION OF INFORMATION

A. History and Original Intent

The Copyright Clause of the U.S. Constitution finds its roots in

84. Associate Justice, U.S. Supreme Court; former Professor of Law, Harvard Law School. The Justices of the Supreme Court, Stephen G. Breyer Biography, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> [hereinafter Breyer's Biography].

85. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

86. *Id.* at 296.

87. *Id.* at 300.

88. *Id.*

England with the Statute of Anne (enacted in 1710).⁸⁹ The goal of the statute was to encourage learning and ensure that copyright law would not be used to censor speech by granting authors, rather than printers, the monopoly on the reproduction of their works.⁹⁰ The framers of the Constitution “relied on this statute when drafting the Copyright Clause of our Constitution, which reads, ‘The Congress shall have the Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.’”⁹¹ In 1790, “Congress directly transferred the principles from the Statute of Anne into the copyright law of the United States” by passing the first American federal copyright statute.⁹²

The judicial decisions concerning the first federal copyright laws focused on labor invested in the work.⁹³ The types of work at issue in early copyright disputes were most often maps, school primers, calendars, and law books.⁹⁴ “No matter how banal the subject matter, if the author’s work resulted from original efforts, rather than from copying preexisting sources,” the author would receive copyright.⁹⁵ In an article about early American copyright law, Professor Jane Ginsburg⁹⁶ lists the subject matter of the first few thousand copyright deposits and claims as:

540 newspapers (157 newspapers for 1790-92, 383 for 1798-99), 441 titles in Political Science (207 for 1790-92, 234 for 1798-99), 302 titles in History (117 for 1790-92, 185 for 1798-99), 270 titles in Social Science (125 for 1790-92, 145 for 1798-99), and 61 Fourth of July orations for 1798-99. By contrast, the publication of novels appears fairly modest: 43 titles for 1790-92 and 119 for 1798-99.⁹⁷

89. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 (11th Cir. 2001).

90. *Id.*; Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873 n. 29 (1990) (“act is to discourage piracy and is ‘for the Encouragement of Learned Men to Compose and Write useful Books’”) (citing *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies*, 1710, 8 Anne, ch. 19) [hereinafter Ginsburg I].

91. *Suntrust Bank*, 268 F.3d at 1260-61 (citing U.S. CONST. art. I, § 8, cl. 8).

92. *Id.* at 1261.

93. Ginsburg I, *supra* note 90, at 1874.

94. *Id.* at 1873.

95. *Id.*

96. Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School.

97. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Policy in Revolutionary France and America*, 64 TUL. L. REV. 991, 1002 (1990).

The ability to copyright maps illustrates a unique aspect of early copyright law because maps are much less likely to be granted copyright today.⁹⁸ Given the historical context, a likely congressional objective in the first Copyright Act must have been to reward the labors of those who chartered unexplored territories.⁹⁹ But explorative labor was not a prerequisite for copyright, since the first Congress also extended the protection to charts and books which typically borrowed information from other sources, or demonstrates artistic labor.¹⁰⁰ For the first Copyright Act then, legislative intent was as concerned with “extending copyright protection to fact works as to works of fancy.”¹⁰¹

The original scope of copyright was not as broad as it is today. First, the original Copyright Act granted authors copyright protection for fourteen years, with the possibility of renewal for another fourteen years.¹⁰² In contrast, current copyright law allows protection for the life of the author plus seventy years after the author’s death.¹⁰³ Second, competing and derivative works as we know them today did not exist. Early copyright law might forbid a second-comer’s copying from the first publication, but the law did nothing to stop publishing of a competing work if the competitor acquired the same information from primary sources.¹⁰⁴ Copyright thus protected the first author from thieves but not against those whose investments into primary sources produced a higher

98. See *Amsterdam v. Triangle Publ’ns, Inc.*, 189 F.2d 104 (3d Cir. 1951); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978) (It should be noted that the Court of Appeals for the Ninth Circuit has taken issue with the Third Circuit’s decision in *Amsterdam*. However, even when map copyrights are sustained, protection will be rather thin. *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978)).

99. Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPY. SOC’Y U.S.A. 560, 564 (1982).

100. *Id.*

[F]irst-hand exploration and discovery could not likely have been regarded as a prerequisite to copyright protection, since the first Congress also extended copyright protection to charts and to books, and it must have been understood that charts typically borrow and recapitulate information available from other sources, and that books often recount prosaic themes in a prosaic manner.

Id.

101. *Id.*

102. Act of May 31, 1790, ch. 15, sec. 1, 1 Stat. 124.

103. 17 U.S.C. § 302(a) (1998).

104. Ginsburg I, *supra* note 90, at 1876.

net yield.¹⁰⁵

“By the mid to late nineteenth century, however, courts and commentators began to offer a different characterization of authorship, and a correspondingly different rationale for copyright coverage.”¹⁰⁶ In two decisions, *The Trademark Cases*¹⁰⁷ and *Burrows-Giles Lithographic Co. v. Sarony*,¹⁰⁸ the Supreme Court clarified the Constitution’s terms of “authors” and “writings.”¹⁰⁹ “Authors” was defined as “he to whom anything owes its origin,”¹¹⁰ and “writings” was defined as requiring originality.¹¹¹ Further cases “viewed authorship as an emanation of the author’s personality . . . protectable because it incorporates . . . its creator’s unique individuality.”¹¹² Originality, the “*sine qua non* of copyright,”¹¹³ thus changed from centering on the independence of the author’s labors to the distinctiveness of the work’s conception.¹¹⁴ “Subjective judgment, rather than diligent collection, would be the locus of the work’s originality.”¹¹⁵ It would be misleading, however, to say that the labor oriented approach had been abandoned. The two views continued to coexist, and at times even worked together into the early twentieth century.¹¹⁶

By the late 1960s, Congress began deliberations over proposed legislative changes to the U.S. Copyright Act.¹¹⁷ There was extensive debate over how comprehensive the changes should be, especially on the subject of increased protection and duration.¹¹⁸ The debates lasted for close to a decade before the 1976 Act was passed, which controls copyright law today.

As a proponent of reducing copyright protection, Justice Stephen Breyer argued in a paper published in the Harvard Law Review that the

105. *Id.* at 1877.

106. *Id.* at 1874.

107. *Trademark Cases*, 100 U.S. 82 (1879).

108. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

109. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991).

110. *Burrows-Giles Lithographic*, 111 U.S. at 58.

111. *Trademark Cases*, 100 U.S. at 94.

112. Ginsburg I, *supra* note 90, at 1874.

113. *Feist Publ’ns*, 499 U.S. at 345.

114. Ginsburg I, *supra* note 90, at 1874.

115. *Id.*

116. *Id.* (“The two views continued to coexist; indeed, sometimes they have been collapsed: if the author did not copy the work from a prior source, the work must be “his own” and therefore original.”).

117. Breyer, *supra* note 85, at 284.

118. *Id.*

case for expanding copyright law had not been made.¹¹⁹ The paper described his research and analysis, ultimately concluding that the data did not support a benefit of copyright in books.¹²⁰ He suggested that to “abolish protection would not produce a very large or very harmful decline in . . . book production.”¹²¹ Instead, he stated that abolition of copyright “should benefit some readers by producing lower prices, eliminating the cost . . . to copy, and increasing the circulation of the vast majority of books that would continue to be produced.”¹²² Despite Professor Breyer’s opinion, however, Congress passed the Copyright Act of 1976, modifying the previous 1909 version slightly.¹²³ The modifications included: (1) an increase in the length of copyright protection; (2) removal of the copyright renewal requirements;¹²⁴ (3) codification of the previous common law concept that ideas are not copyrightable;¹²⁵ and (4) introduction of a doctrine known as “fair use,” which explicitly allowed the use of copyrighted works for “news reporting.”¹²⁶

This fourth change of the 1976 Act dates back to the years of the *Trademark Cases*, in the mid-nineteenth century, when federal courts

119. Breyer, *supra* note 85, at 284.

120. *Id.* at 321.

121. *Id.*

122. *Id.*

123. L. David McBride, *Copyright: Same Song, Different Verse: Parody as Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 48 OKLA. L. REV. 627, 629 (1995) (“The current law of copyright is controlled by the Copyright Act of 1976. . . . The 1976 version of the Act modified slightly the 1909 version.”).

124. *Id.*

125. *Miller v. Universal City Studios*, 650 F.2d 1365, 1369 (5th Cir. 1981).

The idea-expression dichotomy was given express statutory recognition in the 1976 Copyright Act. Section 102(b) provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work.”

Id. (citing 17 U.S.C. § 102(b) (2007)). Despite the fact that the idea and expression distinction was not part of the previous 1909 Copyright Act, the legislative history may indicate that Congress did not intend to change the scope of current common law copyright law. On the subject of the idea and expression provision, the legislative history states: “Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.” H.R. Rep. No. 94-1476, at 5659, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5670.

126. 17 U.S.C. § 107 (2007).

began to hold that conduct seemingly prohibited by the copyright statute did not give rise to liability.¹²⁷ In the early cases, whether the defendant's conduct constituted a "fair use" was not always differentiated from whether there was copyright infringement; however, by the mid-twentieth century, courts began to more consistently hold that "fair use" was a distinct affirmative defense to acts of copyright infringement.¹²⁸ After the doctrine was established in U.S. Copyright Code, federal courts continued to mold the law without guidance from the Supreme Court until the mid 1980s.¹²⁹

B. Current Copyright Law

Current copyright law allows original works of authorship to receive protection immediately upon their creation.¹³⁰ The basic requirements for protection are that the work must fall within the scope of copyright law, must be original, and must be fixed in a tangible medium of expression.¹³¹ Compared to patent law, the requirements are not nearly as stringent, and "the duration of copyright protection is much longer than the term of patent protection."¹³² The current objectives of copyright are: (1) to advance social utility by increasing the supply of intellectual products and facilitating their distribution; (2) to enforce the author's natural rights to recovering the fruits of his labor; (3) to protect the author's interest in portraying the way his creations are presented to the world; and (4) to align the law with society's conceptions of decent behavior.¹³³

Beyond these inherent objectives and explicit requirements is where copyright law has been molded by the opinions of federal courts. In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, the Supreme Court reviewed the history of copyright case law to better understand the intentions behind whether or not a phone book's alphabetical listings were

127. Fisher III, *supra* note 68, at 1662-63.

128. *Id.* at 1663.

129. *Id.* (explaining how the Supreme Court's equal division in the Justice's votes prevented the issuance of a Fair Use decision until the *Sony Corp. v. Universal City Studios* and *Harper & Row Publishers v. Nation Enterprises* cases).

130. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1013 (1997).

131. *Id.*

132. *Id.*

133. Fisher III, *supra* note 68, at 1668-69 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (U.S. 1984); *Harper & Row Publishers*, 471 U.S. 539 (1985) (paying attention to these underlying goals, the Supreme Court has suggested, would facilitate both the interpretation of the factors enumerated above and identification of other appropriate criteria in future cases.)).

copyrightable.¹³⁴ The Court, referencing *The Trademark Cases* and *Burrows-Giles* discussed earlier, stated the “[W]ritings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.”¹³⁵ The Court went on to conclude from these cases that “one who discovers a fact is not its ‘maker’ or ‘originator.’”¹³⁶

Oddly, the most recent Supreme Court case cited in the *Feist* opinion was *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹³⁷ in which the Court granted a biography publisher the right to recover from a magazine publisher who had printed a 300-word excerpt of facts, from the biography of President Ford, before it was released.¹³⁸ The *Harper* opinion included statements about how the monopoly created by copyright “applies equally to works of fiction and nonfiction,” and how the monopoly rights granted to the biography served their “intended purpose of inducing the creation of new material of potential historical value.”¹³⁹ While the opinion also included statements that facts are not copyrightable,¹⁴⁰ it concluded by stating “copyright assures those who write and publish factual narratives . . . that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment.”¹⁴¹

The contradictorily applied precedent in *Feist* has caused some observers to state that “[t]here is room for argument that the *Feist* court misapplied prior Supreme Court interpretations of the Patent-Copyright Clause.”¹⁴² Specifically, *The Trademark Cases*’ “intellectual labor” requirement for a “Writing” might be satisfied by the “identification and assembly of information into a compilation, without regard to the subjectivity of the selection or arrangement.”¹⁴³ Additionally, in *Burrows-Giles*, the “author” to whom a work “owes its origin,” could be the maker of a compilation of information, without regard to creativity.¹⁴⁴ Overall, however, neither of the late nineteenth century decisions address the scope

134. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991).

135. *Id.*

136. *Id.* at 347.

137. *Id.* at 345.

138. *Id.* at 340.

139. *Harper & Row Publishers*, 471 U.S. at 546.

140. *Id.* at 547.

141. *Id.* at 556-57.

142. Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protections of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 374 (1992) [hereinafter Ginsburg II].

143. *Id.*

144. *Id.*

of copyright protection, and thus should not be used to support a constitutional limitation of a copyright claim.¹⁴⁵

In addition to the older copyright cases, in *Harper* and *Feist* the Supreme Court cited the provision of the new 1976 Copyright Act that provided that ideas are not copyrightable.¹⁴⁶ This provision explicitly states that “[i]n no case does copyright protection for an original work of authorship extend to any idea . . . or discovery, regardless of the form in which it is described, illustrated, or embodied.”¹⁴⁷ While this focus on the Act is more reasonable than the Court relying on ambiguous case law from the nineteenth century, it remains unclear why if Congress intended that facts not be copyrighted, they simply would not say “in no case does copyright protection extend to facts.” The legislative history behind the new section included in the 1976 Act only adds to the confusion, because it states that the purpose of the section “is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea,” and to leave it “unchanged.”¹⁴⁸ Thus, in order to determine the legislative intent, one may look at the federal common law before 1976 as it applies to ideas, expressions, and facts.

In 1950, the Seventh Circuit held in *Toksvig v. Bruce Publishing Co.* that an author’s research into the life of Hans Christian Anderson, from almost exclusively Danish primary sources over the course of three years, should be copyrightable.¹⁴⁹ Specifically, the court found infringement when a subsequent author spent less than a year researching English sources, including plaintiff’s book, to write her own book about Anderson’s life.¹⁵⁰ While the court’s ruling could be justified on the explicit copying of twenty-four passages,¹⁵¹ the holding is much broader and clearly states that the plaintiff biographer had a protectable interest in her research.¹⁵²

145. *Id.* There is also considerable legislative precedent for expansive congressional interpretation of copyright terms based on the Plant Patent Act. *See id.* at 376-77 (discussing Congress interpreting the definitions of “Inventor” and “Discoveries” in the Patent Clause to still allow individuals to obtain patents in asexually reproducible plants they may have simply come upon).

146. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 356 (1991) (“Section 102(b) is universally understood to prohibit any copyright in facts.”); *Harper & Row Publishers*, 471 U.S. at 556.

147. 17 U.S.C. § 102(b) (2007).

148. H.R. Rep. 94-1476, at 56, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5670.

149. *Toksvig v. Bruce Publ’g Co.*, 181 F.2d 664, 668 (7th Cir. 1950).

150. *Id.* at 666-67.

151. *Id.* at 666.

152. *Id.*

In 1966, the Second Circuit rejected the Seventh Circuit's *Toksvig* holding in its *Rosemount Enterprises, Inc. v. Random House, Inc.* opinion concerning the biography of Howard Hughes.¹⁵³ The Seventh Circuit had received criticism in its holding,¹⁵⁴ but in 1981, the Fifth Circuit additionally chose to follow the Second Circuit in *Miller v. Universal City Studios, Inc.*, when deciding a case on a television film based on a non-fictional book about a kidnapping.¹⁵⁵ The Fifth Circuit stated that the "issue is not whether granting copyright protection to an author's research would be desirable or beneficial, but whether such protection is intended under the copyright law."¹⁵⁶ It is interesting that the Fifth Circuit would have made such a comment, however, because they were working under the 1976 Copyright Act, and even cited its legislative history¹⁵⁷ concerning the provision on the copyright of ideas being based on previous federal court case law which was split on this issue.¹⁵⁸

On the subject of news reporting specifically, the fair use doctrine of the 1976 Copyright Act may pose an explicit limitation on any recovery for infringement. Section 107 states "the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, *news reporting*, teaching . . . or research, is *not* an infringement of copyright."¹⁵⁹ Because of this provision, even if a court was to hold and find that the facts of a news story are copyrightable, if a subsequent news writer used them it would most likely be considered a "fair use."

To determine whether a use is fair, the Act lists four factors for courts to consider: "(1) the purpose and character of the use, including whether such use is of a commercial nature, or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . ; and (4) the effect of the use on the potential market"¹⁶⁰ When considering whether a subsequent non-researched, copied news story is a "fair use," courts may find that the reasons listed for determining fair use actually cut against a subsequent reporter. If, for example, the second user found the story online and posted a rewritten form on a large commercial site, the use would be commercial

153. *Rosemount Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966).

154. Gorman, *supra* note 99, at 588-89.

155. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (1981).

156. *Id.* at 1369.

157. *Id.* n.2.

158. *Id.*

159. 17 U.S.C. § 107 (2007) (emphasis added).

160. *Id.*

to attract web surfers to the web page thereby increasing traffic and advertising revenue, would steal the facts or “heart” of the news story, would take the whole news story as opposed to just a headline, and would decrease the web traffic on the original author’s web page. While these arguments seem probable, no plaintiff has ever brought a case for infringement of its news story, and the explicit listing in the Act that “news reporting” is allowed undercuts the argument greatly.¹⁶¹ In cases in which liability has been shrunk or limited by the fair use doctrine to produce a seemingly unfair result, some commentators have called for a “reverse fair use doctrine,” where liability would be expanded when the rationale for copyright protection is confounded by a loophole in the copyright statute.¹⁶²

In review, the more recent *NBA v. Motorola, Inc.*, Second Circuit opinion best summarizes the current national judicial opinion over the copyright of facts: “[t]he ‘fact/expression dichotomy’ is a bedrock principle of copyright law that ‘limits severely the scope of protection in fact-based works . . . [n]o author may copyright facts or ideas.’”¹⁶³ For this reason, in order to grant news reporters copyright in their researched stories for twenty-four hours, Congress would have to amend the Copyright Act. The most logical way to accomplish such a change would be to simply add a line in the fair use doctrine to clarify that the idea and expression provisions do not apply to hot news facts, and to then note that hot news stories would not be subject to the fair use provision for twenty-four hours after they are first published. Despite the previous case law concerning facts and congressional intent, “the Constitution as we know authorizes Congress to create copyright, but leaves the details to

161. Paradoxically, it should be noted that for fictional works, the only allowable fair use is one of parody or comment.

162. Posner, *supra* note 47, at 633.

We could think of liability in such a case as based on a “reverse fair use” doctrine. Fair use shrinks liability in some cases of copying; the reverse doctrine would expand liability when the rationale for copyright protection was present but a possible loophole in the copyright statute threatened to allow the defendant to avoid liability.

Id.

163. *NBA v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 356 (1991); *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 547 (1985) (listing the rule improperly by saying “fact/expression dichotomy” instead of the correct “idea/expression dichotomy”).

Congress,”¹⁶⁴ “whatever the Supreme Court’s prior interpretations of the Patent-Copyright Clause, Congress may nonetheless supply the content of that clause”¹⁶⁵ and change it as they see fit.

V. MISAPPROPRIATION AND OTHER STATE LAW PROTECTION OF INFORMATION

A. *A Brief History of Misappropriation*

In addition to the potential protection of information offered by federal copyright law, state laws may offer protection as well. The most applicable doctrine is the tort of misappropriation initially created by the Supreme Court in the now extinct federal common law.¹⁶⁶ The first case to recognize misappropriation was *International News Service (INS) v. Associated Press*.¹⁶⁷

The *INS* dispute arose during World War I between two competitors who gathered and sold news to newspapers: the Associated Press (AP) and the International News Service (INS).¹⁶⁸ During the early part of the war, William Randolph Hearst, who owned INS, sympathized with the Germans.¹⁶⁹ Because of Hearst’s sympathies, British censors prevented INS correspondents in England from sending dispatches of the war to

164. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 107 (2003).

165. Ginsburg II, *supra* note 142, at 375.

Even if Congress cannot claim ultimate authority to interpret those portions of the Constitution that bear neither on separation of powers nor on individual rights, Congress should enjoy substantial discretion in implementing its constitutional prerogative to “promote the Progress of Science.” Congress’ determination of what endeavors constitute the “Writings” of “Authors” should be viewed as an exercise of fact-finding by the body most competent to evaluate the efficacy of the means chosen to promote the constitutional goal.

Id.

166. At the time the misappropriation doctrine was recognized, federal courts sitting in diversity jurisdiction over a state law claim were free to apply, or create, federal common law to the case. However, in 1938 the Supreme Court overturned *Swift v. Tyson*, and henceforth required all federal courts sitting in diversity jurisdiction over a state law claim to apply state common law to the case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

167. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 238 (1918).

168. LANDES & POSNER, *supra* note 164, at 105.

169. *Id.*

America.¹⁷⁰ INS was subsequently forced to copy AP's dispatches when supplying its subscribers with news.¹⁷¹ While, for the most part, INS employees obtained the news in a lawful manner (generally by purchasing early editions of AP newspapers),¹⁷² there were instances of reporters clandestinely reading AP bulletin boards and copying AP dispatches verbatim.¹⁷³

There were no elements of copyright infringement raised in AP's suit against INS, however, in Justice Pitney's majority opinion in favor of AP, he stated that there was a "quasi-property" interest in the news, created by the "expenditure of labor, skill, and money," which gave AP the right to prevent a competitor from using it.¹⁷⁴ He reasoned that a "purchaser of a single newspaper [could] spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with [AP's] right to make merchandise of it . . . but to transmit that news for commercial use, in competition . . . is a very different matter."¹⁷⁵ He then stated that INS was "endeavoring to reap where it has not sown . . . and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."¹⁷⁶

The Supreme Court sustained the injunction of the lower court and allowed AP to protect its investment by preventing INS from copying news items for an undefined period, until which AP could realize its investment and all commercial value in the news had "passed away."¹⁷⁷ The Court justified its recognition of the new misappropriation law on three distinct reasons: (1) a labor theory of property; (2) commercial immorality; and (3) the preservation of the incentive to invest in information gathering.¹⁷⁸ The first justification of misappropriation has a direct link to the natural rights "sweat of the brow" rationalization for intellectual property law in general.¹⁷⁹ Despite the intangible nature of

170. *Id.*; Fujichaku, *supra* note 53, at 440.

171. LANDES & POSNER, *supra* note 164, at 105; Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 412 (1983).

172. Baird, *supra* note 171, at 412.

173. Samuelson, *supra* note 48, at 388.

174. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918).

175. *Id.*

176. *Id.*

177. *Id.* at 245-46; Fujichaku, *supra* note 53, at 441-42.

178. Fujichaku, *supra* note 53, at 442.

179. *Id.*

news, it still takes time and labor to gather and thus has value. The second justification, outlining the commercially immoral aspect of INS's tactics, "functions as a form of unfair competition law punishing the commercially immoral conduct of competitors."¹⁸⁰ Finally, the preservation of incentive to invest justification of misappropriation law, exemplifies the Court's value in news and the risks of *not* "plac[ing] the daily events of the world at the breakfast table of [] millions."¹⁸¹

No summary of the *INS* decision is complete without addressing the separate concurring opinion of Justice Holmes and the dissent of Justice Brandeis. While agreeing with the majority's decision, Holmes rejected a broad interpretation of *INS*-style misappropriation by the courts.¹⁸² He stated that the only ground of complaint that should be recognized, without legislation, is the implied misstatement of INS in not citing that its information came from AP.¹⁸³ He concluded "that within the limits recognized by the decision of the Court the defendant [INS] should be enjoined from publishing news obtained from the Associated Press for-hours after publication by the plaintiff unless it gives express credit to the Associated Press."¹⁸⁴

As for Justice Brandeis' dissent, while in agreement with the majority that INS had acted unjustly towards AP, he simply disagreed that judicial creation of a property right in news was an appropriate response.¹⁸⁵ Although the common law had in the past created new rules to deal with new situations, Justice Brandeis thought that this situation so severely affected the public interest that a judicial approach was dangerous.¹⁸⁶ He

The Court claimed a "quasi property" interest in breaking news which AP expended resources and money to procure. This interest inured to AP because of the time and resources spent by AP to gather the news which is a direct link to the labor theory of property, wherein property rights are deserved out of respect for a person's expended labor. INS therefore could not permissibly "reap where it has not sown"; the rationale for misappropriation liability thereby has a direct link to the natural rights, "sweat of the brow" justification of copyright.

Id.

180. *Id.* at 442.

181. *Int'l News Serv.*, 248 U.S. at 235.

182. *Id.* at 247 (Holmes, J., dissenting).

183. *Id.* at 248.

184. *Id.* (reasoning that if INS subscribers realized INS was gathering news from the AP, they would change news services to gather the news sooner.).

185. Samuelson, *supra* note 48, at 393.

186. *Id.*; *Int'l News Serv.*, 248 U.S. at 232 (Brandeis, J., dissenting) ("Justice Brandeis simply disagreed that judicial creation of a property right in news was an appropriate response. More was

“charged that the majority opinion ignored the public’s interest in the dissemination of news,”¹⁸⁷ and that in cases like this, laws affecting new property interests must be weighed by public policy and defined by the legislature in the patent and copyright statutes.¹⁸⁸

B. Contemporary Applications of Misappropriation Law

Despite the extinguishment of federal misappropriation common law by the *Erie Doctrine* twenty years after it was created, the doctrine of misappropriation “has blossomed in state courts.”¹⁸⁹ In *Twentieth Century Sporting Club v. Transradio Press Service*,¹⁹⁰ the Supreme Court of New York cited the doctrine of misappropriation to prevent an unlicensed eavesdropper from restating the commentary of a licensed ringside announcer.¹⁹¹ In *McCord Co. v. L.A. Plotnick*,¹⁹² the California Second District Court of Appeal utilized the misappropriation doctrine to halt publication of bank credit rates, copied from a trade newspaper.¹⁹³ In *Associated Press v. KVOs, Inc.*,¹⁹⁴ the Ninth Circuit, acting in diversity jurisdiction, found a radio station liable for lifting breaking news accounts in newspapers.¹⁹⁵

The doctrine essentially remained as it was created in *AP v. INS* until the 1964 Supreme Court *Sears-Compco*¹⁹⁶ decisions, in which, the Supreme Court indicated that state law prohibitions against copying could

at stake in the case than righting an injustice. To give relief required more than the application of old rules to new facts; it required making a new rule.”).

187. *Id.* at 393-94.

188. *Id.*

“Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it,” and then only when the legislature has undertaken to define the boundaries of such rights, as in the patent and copyright statute. In Justice Brandeis’ opinion, the injustice perpetrated by *INS* should have been righted, if at all, by the legislature.

Id. (citing *Int’l News Serv.*, 248 U.S. at 250).

189. Ginsburg II, *supra* note 142, at 355.

190. 300 N.Y.S. 159 (1937).

191. *Id.* at 161.

192. 239 P.2d 32 (Cal. Ct. App. 1951).

193. *Id.*

194. 80 F.2d 575 (9th Cir. 1935), *rev’d for lack of jurisdiction*, 299 U.S. 269 (1936).

195. *Id.*

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

conflict with the constitutional and congressional intent of free access to works left unprotected by federal law.¹⁹⁷ In each case, the Court reversed a decision under state unfair competition laws that prohibited the copying of unpatentable light fixtures.¹⁹⁸ While the Court's opinion explicitly outlawed states from providing patent-like protection to unpatentable items, it stated that states were still allowed to prevent consumer deceit by imposing liability upon those who deceive the public by palming off their copies as originals.¹⁹⁹ Applied broadly, the language in *Sears-Compco* strongly suggested that protection of intellectual property under state law would be preempted whenever it conflicted, even indirectly, with the objectives of federal copyright and patent laws.²⁰⁰ Applied more narrowly to copyright law, the Court seemed to be saying that state misappropriation claims would only be allowed where competitors had not cited their source of information.

Less than ten years later, the Court addressed state copyright claims directly in *Goldstein v. California*,²⁰¹ in which, "the Court held that each individual state could have unique interests in protecting certain intellectual property under state copyright laws, as long as those state laws did not interfere with federal copyright laws."²⁰² "The Court distinguished the *Sears-Compco* line of cases on the grounds that those cases dealt with state patent protection in an area Congress had specifically decided not to regulate."²⁰³ The next year, in *Kewanee Oil Co. v. Bicron Corp.*,²⁰⁴ the Court clarified its holding in *Goldstein* and explicitly stated "that the states were free to make trade secret legislation in any area that Congress had chosen not to regulate."²⁰⁵ It concluded that "[t]he only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress."²⁰⁶ Subsequently, "*Goldstein* and *Kewanee* permit state regulation of

197. David E. Shipley & Jeffrey S. Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. REV. 125, 152 (1984).

198. *Id.* (citing *Sears*, 376 U.S. at 225-27, 233 and *Compco*, 376 U.S. at 234-35, 239).

199. *Compco*, 376 U.S. at 238.

200. Shipley & Hay, *supra* note 197, at 153.

201. 412 U.S. 546 (1973).

202. Heather Richtarsik, *Misappropriation in Massachusetts and Around the Country: How Technology will Utilize this Tort*, 35 NEW ENG. L. REV. 717, 736 (2001).

203. *Id.*

204. 416 U.S. 470 (1974).

205. Richtarsik, *supra* note 202, at 737.

206. *Kewanee*, 416 U.S. at 479.

intellectual property unless it conflicts with the objectives of federal law.”²⁰⁷

Two years after *Kewanee*, Congress passed the 1976 Copyright Act which addressed the issue of state law preemption directly.²⁰⁸ Section 301 states “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.”²⁰⁹ The Act goes on to list four specific examples where preemption should not exclude state protection.²¹⁰ While the statute does not address the issue of preemption with respect to state misappropriation claims directly, the legislative history may elucidate congressional intent.

The House committee report concerning the proposed preemption section addition to the Copyright Act stated:

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.²¹¹

While seemingly clear that the new preemption section would not apply to state misappropriation claims, this portion of the legislative history pertains to a version of the bill which specifically would have listed various “unpreempted” actions including misappropriation.²¹² The bill which actually passed deleted misappropriation as a state cause of action expressly saved from preemption.²¹³ Subsequently, the question remains

207. Shipley & Hay, *supra* note 197, at 154.

208. 17 U.S.C. § 301 (1998) (crediting Pub. L. No. 94-553, § 101, 90 Stat. 2572 (1976)).

209. 17 U.S.C. § 301(a) (1998).

210. 17 U.S.C. § 301(b) (1998) (Specific examples of unpreempted state regulations include: (1) regulations involving subject matter that does not come within the subject matter of copyright, including works of authorship not fixed in any tangible medium of expression; (2) any cause of action arising from events occurring before January 1, 1978; (3) activities violating legal and equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright; and (4) state and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8)). *Id.*

211. H.R. Rep. No. 94-1476, at 132 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5748.

212. Denicola, *supra* note 67, at 517 n.7.

213. *Id.*

whether Congress intended an *INS*-type state cause of action to be allowed, or if such a cause of action was specifically excluded.

C. Misappropriation Preemption After the Copyright Act of 1976

Section 301 of the Copyright Act requires preemption when a state regulation: (1) concerns a work of authorship that is fixed in a tangible medium of expression; (2) covers copyrightable subject matter as defined by the copyright statute; and (3) creates legal and equitable rights equivalent to those within the general scope of the Copyright Act.²¹⁴ Since the statute clearly outlines when preemption should occur, courts should be able to turn to the explicit language of the statute to determine whether a state law is preempted.²¹⁵

The first requirement, fixation in some tangible medium of expression, will almost always be satisfied by the inherent requirements of information dissemination.²¹⁶ The second condition, for a state law misappropriation claim to be preempted by federal law, would most likely be satisfied as well.²¹⁷ While academics have debated over this question at length,²¹⁸ misappropriation protection of information falls within the subject matter of copyright because works of authorship, which include ideas and facts, are mentioned as copyrightable subject matter in section 102(b).²¹⁹ “Lack of originality will cause the factual elements of an informational work to be uncopyrightable, but the informational product itself will still be considered copyright subject matter for preemption purposes.”²²⁰ Interpreting the subject matter requirement differently would allow state law protection of unoriginal and uncopyrightable works.²²¹ Some courts have held that such a result would “nullify the preemption provision itself.”²²²

214. 17 U.S.C. § 301(a).

215. Fujichaku, *supra* note 53, at 463.

216. *Id.* (“Fixation may be in print, on a web page displayed on a computer screen, or in computer media.”).

217. *Contrast* Denicola, *supra* note 67, at 542 n.7, with Fujichaku, *supra* note 53, at 463.

218. *Contrast* Denicola, *supra* note 67, at 542 n.7, with Fujichaku, *supra* note 53, at 463.

219. 17 U.S.C. § 102(b) (2007).

220. *Compare* Fujichaku, *supra* note 53, at 463, with Denicola, *supra* note 67, at 517 n.7 (“copyright does not extend to facts per se, they are outside the subject matter of copyright and thus state protection is not preempted. *See* 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.01[B][2][b] (1978).”).

221. Fujichaku, *supra* note 53, at 464.

222. *Id.* (citing *Fin. Info., Inc. v. Moody’s Investors Serv. Inc.*, 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980)).

The third provision, requiring misappropriation claims to create legal and equitable rights equivalent to those within the Copyright Act, is easily met as well.²²³ State claims explicitly bar competitors from unfair borrowing and provide monetary damages for misappropriated information.²²⁴ These remedies and rights are equivalent to those in section 106 of the copyright statute.²²⁵

Unfortunately, while this method of statutory interpretation concerning the survival of misappropriation from preemption seems obvious, courts have routinely found it to be inadequate and confusing.²²⁶ In response to the confusion, some courts have adopted the “extra element” test.²²⁷ Under this test, if “an ‘extra element’ is ‘required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption.’”²²⁸ A more recent Second Circuit decision cited this test and questioned in *dicta* “the extent to which a ‘hot-news’ misappropriation claim based on *INS* involves extra elements and is not the equivalent of exclusive rights under a copyright.”²²⁹ In concluding that “some form of such a claim survives preemption,”²³⁰ the court improperly relied on the legislative intent and committee reports of the Copyright Act discussed earlier. Since the Supreme Court has not discussed this issue, and no court has addressed it directly in its holding, the answer is still unknown.

Two broader arguments regarding whether the Copyright Act preempts state misappropriation claims are (1) that the implicit policy of the Act reveals a federal strategy favoring free copying of information and (2) that the Patent-Copyright Clause of the Constitution implies a rejection of state authority to offer parallel protection.²³¹ With respect to the former argument, commentators have stated that by declaring facts outside the subject matter of copyright in section 102(b), Congress intended that facts are free to be copied, and that no court is to construe the federal copyright monopoly to inhibit that freedom.²³² The implication for state laws is that

223. Fujichaku, *supra* note 53, at 464.

224. *Id.*

225. *Id.*

226. *Id.* at 467.

227. *Id.*

228. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (quoting *NIMMER*, *supra* note 220, § 1.01[B], at 1-14-15).

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

230. *Id.*

231. *Ginsburg II*, *supra* note 142, at 361-62.

232. *Gorman*, *supra* note 99, at 604.

if Congress intends federal law to allow facts to be freely copied, state law cannot usurp the national policy.²³³

In summary, it seems clear that there is no standardized national policy of whether state laws concerning the misappropriation of facts are preempted by federal copyright laws. Additionally, with respect to national news specifically being misappropriated on the Internet, it is obvious that individual state misappropriation laws will not provide clear messages to large media corporations. There needs to be a uniform national statute controlling the usage of non-researched publicly available facts in second-comer news stories.

D. Other State Law Protection of Information

Other proposed state law remedies for the protection of information include the breach of an express or implied-in-fact contract. These remedies should withstand preemption but would likely pose additional problems. “A breach of contract claim must establish an agreement involving a *quid pro quo*, performance by the plaintiff of all conditions precedent, and breach of the contract by the defendant.”²³⁴ Because these elements are different from the elements of an infringement action, the contract action would not be seen as equivalent and should escape section 301 preemption.²³⁵ A contract claim could be filed in situations where authors required users to pay for the use of materials even though the facts and research were in the public domain.²³⁶ If users violated the express use of the materials, and thus the contract, users could be forced to pay penalties for the improper use or dissemination of materials.²³⁷ While this scenario seems promising, it is unclear how difficult it would be to track the millions of users on an Internet news web site, how information may be disseminated to competitors, and how to determine which state’s laws would apply.²³⁸

233. *Id.*

234. Shipley & Hay, *supra* note 197, at 171.

235. *Id.*

236. *See id.* at 171-72.

237. *Id.*

238. For a greater discussion of state contract claims used as an alternative to misappropriation for the protection of information, see Shipley & Hay, *supra* note 197, at 152.

VI. RESTRICTING FAIR USE TO SAVE THE NEWS

A. *The Proposed Change to Copyright Law*

Justice Holmes's concurrence in *AP v. INS* states that a proper remedy for the AP against INS would be to enjoin INS "from publishing news obtained from the Associated Press for-hours after publication . . . the number of hours . . . to be settled by the District Court."²³⁹ Building on this idea, this Article proposes a change in current copyright law to allow reporters and the newspapers or companies they work for to find profit in "hot news" gathering. By giving reporters the rights to a very time-limited monopoly in their stories and investigative reporting, news agencies will find additional profits in news gathering and subsequently increase the amount of news gathering and reporting overall.²⁴⁰ "In general, the law should allow restrictions on ideas that increase their supply."²⁴¹

Since federal misappropriation common law (including the *AP v. INS* decision) is now extinct,²⁴² and current state misappropriation law would be preempted if it were to overreach into federal copyright law,²⁴³ the only way to grant protection to news reporters would be an amendment to the current Copyright Act. The best place to make the change would be in section 107, the fair use provision, because it already allows "fair use of a copyrighted work . . . for purposes such as . . . news reporting."²⁴⁴ The change could be subtle, only allowing the fair use provision of the Copyright Act to include news reporting twenty-four hours after its

239. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 248 (1918) (Holmes, J., dissenting) (while Justice Holmes's concurrence discussed allowing INS to continue its use of the Associated Press stories if express credit was given, his focus was on the unfairness in the timeline of readers purchasing news from the first and most easily accessible source, and where the profits from that purchase should go).

240. See COOTER, *supra* note 56, at 312 ("copyright and patent law grant creators the right of exclusive use of their creation for a fixed period of time. Much like temporary monopoly, exclusive use-rights can create extraordinary profits.").

241. *Id.*

242. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling earlier precedent, and holding that there is no federal general common law, thus confining the federal courts to act only as interpreters of law originating elsewhere).

243. *Supra* text accompanying notes 212-231. Additionally, commentators have cited the inability of misappropriation law to deal with protection of information properly. Fujichaku, *supra* note 53, at 475 ("Common law misappropriation, because of its potential to interfere with access to public domain material, its discredited sweat of the brow theoretical justification, and its general amorphous nature, should be abolished in favor of a national statutory system which would take into account these concerns.").

244. 17 U.S.C. § 107 (2007).

original publication, or the change could be major, including a whole new section of copyright law concerning news reporting.

Either way, the amended provision should include these key points: (1) the protection would not extend to traditional news headlines—to allow third parties the ability to advertise a competitors story and link to it;²⁴⁵ (2) the protection would only last for twenty-four hours—so that after a reporter has realized a profit in his story, the story could subsequently be reproduced freely to allow the dissemination of ideas; and (3) the reporter's rights in the story could not be used to restrict a purely nonprofit organization from posting the story.²⁴⁶ As with all laws, the enforcement and refinement of their meaning must come from the courts, with clear legislative intent from Congress as a guide. The legislative intent in this case would be clear in that Congress would be legislating to encourage news reporting by allowing reporters temporary rights in their stories, yet still allowing the dissemination of ideas by making the monopoly rights temporary and not comprehensive.

The difficulty in the details of the law would be particular verbiage to determine which reporter discovered what facts, and what constitutes first publishing for a grant of twenty-four hour rights. Because of this foreseeable problem, Congress and the courts may decide that the plaintiff has the burden of proving that the story was uncovered through their inimitable research, and that they published the story first. Additionally, to reduce the risk of increased litigation precluding publishers from publishing stories that might be borderline, the maximum amount of damages could be set at the cost of litigation plus the amount of profits the defendant gained from publishing the story during the time the plaintiff had monopoly rights to it.

As a result of these constraints, the only likely impact the law would have is to prevent the rewriting and dissemination of the type of large investigative stories that are published on average less than a dozen times per year. Additionally, with the requirement that the story be researched, one could not claim rights in a matter-of-fact story like a building fire or earthquake. However, if a reporter were to research a specific rescue operation associated with a large catastrophe that was not known to another similarly situated second reporter, the first reporter could gain temporary rights to the story.

245. Thus a news web site like CNN.com could post a headline describing the story in brief, and then link readers to whatever web site has the monopoly rights to the story.

246. An example of this third scenario would include a blogger commenting on the story, or even posting it on a web page. It would not include a company like Google who makes advertising dollars to post the story on their web page.

To better understand the implications, the proposed change can be envisioned by comparing potential worlds of copyright-law-extremes on a scale. One extreme would be to have a huge fair use doctrine. Free speech would be tremendous, and individuals, companies, and news agencies could report and say whatever they wanted without any consequences or potential copyright infringement lawsuits. Under this scenario very few news stories would be written due to a lack of incentive for reporters to write if their words could simply be taken verbatim without any remedy available. In contrast, the other extreme would be a world without a fair use doctrine. Free speech would be limited, and people would be required to have licenses to use any idea, quote, or even a single fact from another's work. There would be more than enough incentive for reporters to research and write stories, but ideas would not be disseminated due to high transaction costs. Neither one of these extremes exists today, nor are they being proposed. This article merely suggests a slight tip of the scale in the second direction. The change is necessary due to a lack of top notch investigative news stories in the market, and can be applied easily by lowering transaction costs, and the ease in information being transmitted quickly in today's high-tech world.

B. *What Power Would Congress Use?*

After the Supreme Court's landmark ruling in *Feist*, clarifying that under no circumstances may facts be copyrighted,²⁴⁷ Congress may have potential constitutional limitations in enacting an amendment to the Copyright Act as described. Subsequently a review of Congress's copyright power as well as additional sources of congressional power is necessary.

The *Feist* opinion's repeated invocation of constitutional constraints on copyright protection of information has been criticized for erecting "unnecessary if not insuperable barriers to alternative sources of protection for information."²⁴⁸ Commentators have argued that the "Supreme Court[']s review of these kinds of congressional findings [] should be extremely deferential,"²⁴⁹ however, the Court has proceeded differently. In the context of the Patent-Copyright clause, the Court had previously announced considerable deference to congressional definitions of the

247. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 350 (1991).

248. *Ginsburg II*, *supra* note 142, at 341.

249. *Id.* at 375.

content and scope of the limited monopoly.²⁵⁰ In *Feist* though, the Supreme Court suggests that “the Constitution has become less ‘permissive’ as to Congress’ authority to determine the content of its power.”²⁵¹

The most recent decision concerning copyright law and congress’s power may show the Court moving away from the dicta stated in *Feist*. In *Eldred v. Ashcroft*, the Supreme Court deferred to Congress’s judgment in declaring that the Copyright Term Extension Act met the “limited times” requirement of the Copyright Clause.²⁵² While citing an earlier opinion, the Court held that “[i]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”²⁵³ The Court went on to state that Congress must have a rational basis in exercising its authority,²⁵⁴ and that the preamble of the Clause (which states that copyright protection must be to “promote the Progress of Science”) “is not a substantive limit on Congress’ legislative power.”²⁵⁵ The Court concluded its opinion in *Eldred* by stating that “the Copyright Clause empowers Congress to determine the intellectual property regimes that . . . will serve the ends of the Clause.”²⁵⁶

Even if Congress cannot use its Copyright Clause power to protect information in the manner described in this Article, it may be able to legislate under the broader Commerce Clause. While the more specific Copyright Clause would limit the more general Commerce Clause, Congress might have the power to enact a misappropriation statute if the law set forth a scheme of protection qualitatively different from a copyright regime. Trademarks, which are legislated under the Commerce Clause,²⁵⁷ supply a pertinent analogy. Since the information protection here differs substantially from current copyright protection with respect to the short time period, the legislation may not be seen as equivalent to copyright, and subsequently allowable.

250. *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (“[t]he direction of Art[icle] I is that Congress shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress.”)

251. Ginsburg II, *supra* note 142, at 376.

252. *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

253. *Id.* at 205 (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984)).

254. *Id.* at 205 n.10.

255. *Id.* at 211.

256. *Id.* at 222.

257. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5.3, at 5-6 (4th ed. 2008).

Overall, the *Eldred* holding should provide Congress with ample leeway to enact a change in copyright law to protect hot news. Nevertheless, since *Feist*, commentators have theorized on broader powers of Congress that would be available to protect information. Those theories would generally apply to the methods described here for protecting hot news.²⁵⁸

C. First Amendment Challenges

In addition to constitutional limitations restricting the power of Congress, the First Amendment may pose a hurdle as well. “Generally, copyright does not significantly interfere with first amendment values because it protects only the form of expression contained in the copyrighted work,” while allowing the author’s ideas to circulate freely.²⁵⁹ However, granting reporters a twenty-four hour monopoly on their story’s facts could stand as a major upset to First Amendment rights and may even be considered a prior restraint.

The key to protection of hot news being compatible with the First Amendment is that not-for-profit copying and disbursement of the information would be allowed, and injunctions would not be a possible remedy. The worst punishment an infringer could face is reimbursing the twenty-four hour news owner for the lost profits associated with the unlicensed use. Also, this proposed protection would in no way restrict later authors from using a previous author’s facts or work for a parody, so long as that use was not for profit.

When comparing property interests granted by the Copyright Clause to freedoms associated with the First Amendment, two considerations arise.²⁶⁰ First, one should consider whether the Copyright Clause is a limited exception to the First Amendment, or whether it is compatible. If copyright were an exception to the First Amendment, then proprietary rights in information could not coexist with the First Amendment outside the copyright scheme.²⁶¹ “If copyright does not constitute the only permissible source of information protection, then its coverage of information need not be tightly limited.”²⁶² Second, a statute to protect hot news and the First Amendment share certain goals. Both seek to protect

258. See Ginsburg II, *supra* note 142, at 369 (For a more detailed discussion of broader powers of Congress applied to protecting information).

259. Denicola, *supra* note 67, at 540.

260. Ginsburg II, *supra* note 142, at 385.

261. *Id.* (“As a result, informational subject matter outside the scope of copyright could not be protected against copying.”)

262. *Id.*

the progress of knowledge and flow of information: the statute through incentive for gathering information, and “the First Amendment through the principle of the public interest in access to information.”²⁶³ “[T]he incentive and access principles must be kept in balance.”²⁶⁴ If access were to overbear, “the resulting diminution of incentives might lead to the production of fewer works to which to gain access.”²⁶⁵

When tailoring this statute, or any statute, to attenuate First Amendment objections, the effect of limiting protection against for-profit commercial copying is key. “Imposing liability only on other compilers [of news] addresses the main economic actors,” while still allowing *free* speech over the subject matter.²⁶⁶ Another method of tailoring the statute could be to require compulsory licenses.²⁶⁷ “This device ensures other compilers access to the information, albeit for a fee. Once access is available, however, the First Amendment does not necessarily command that it be gratis.”²⁶⁸ Finally, a statute granting hot news protection might promote First Amendment interests by offering later users an incentive to disseminate to recover their licensing fee. In this respect, the First Amendment goals would certainly be accomplished as well as the inducement for gathering the news.

The Supreme Court’s depiction of the relationship between the Copyright Clause and First Amendment in *Eldred* may also shed light on how the Court would view a statute protecting hot news.²⁶⁹ In *Eldred*, the Court stated that “[t]he Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”²⁷⁰ While the court continued to state that the Act’s distinction between idea and expression “strikes a definitional balance between the First Amendment and the Copyright Act,”²⁷¹ it concluded: “when . . . Congress has not altered the traditional contours of copyright protection,

263. *Id.* at 386.

264. *Id.* (quotes authority directly).

265. *Id.*

266. Ginsburg II, *supra* note 142, at 386 (while Prof. Ginsburg is referring to compilations of facts, the parallel to news related facts can be easily drawn.).

267. *Id.*

268. *Id.* at 386-87.

269. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

270. *Eldred*, 537 U.S. at 219. Additionally, legislative intent for the first Copyright Act included protecting facts just as much as expression. Gorman, *supra* note 99, at 564.

271. *Eldred*, 537 U.S. at 219 (citing *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

further First Amendment scrutiny is unnecessary.”²⁷² The Court generally continued its post-*Feist* tradition of deferring to Congress for copyright specifics.²⁷³ If this same reasoning continues, the Court would most likely respond similarly to a new Act by Congress protecting hot news.

D. Possible Problems and Other Solutions

In addition to potential constitutional scrutiny problems associated with a statute protecting hot news, other feasibility issues may arise as well. Larry Kramer,²⁷⁴ the former president of CBS digital media and former Editor of the *San Francisco Examiner*, commented that “the press needs to feed off each other on controversial stories.”²⁷⁵ Kramer cites examples of large stories in the last fifty years, like Watergate, and states that “without that added boost [of other newspapers publishing the articles], the story could have very well died on the vine.”²⁷⁶ Kramer goes on further to address the difficulty in defining “hot news,” and states that “[e]nforcing new ‘fair use’ laws for the Internet in general is the way to go.”²⁷⁷ Professor Bergman,²⁷⁸ on the other hand, agrees that “the originators of the information have to find an economic model where they can recoup profits from their trouble,” but does not necessarily agree or disagree with this proposal.²⁷⁹ Like Kramer, he is concerned with the enforceability of the proposal, but adds that “the economic potential of the web is not going to pay for quality journalism as we know it.”²⁸⁰ Professor Bergman would like to see “rewards” for news research and development but is unsure how best to structure the process.²⁸¹

Overall, most leaders in the field of journalism, and journalists themselves, seem to agree that bottom-line pressures and profits are

272. *Id.* at 221.

273. *Id.* at 222.

274. Guest Lecturer, Harvard Business School; current advisor to CBS Interactive; former President of CBS Digital Media; former Editor, *San Francisco Examiner*; former Assistant Managing Editor, *Washington Post*. Biography of Larry Kramer, <http://www.cbsnews.com/stories/2005/10/19/utility/main954393.shtml> (last visited June 1, 2007).

275. E-mail from Larry Kramer, Advisor, CBS Interactive, to Ryan T. Holte, Student, UC Davis School of Law (May 16, 2007, 10:48:00 EST) (on file with author).

276. *Id.*

277. *Id.*

278. Bergman, *supra* note 5.

279. Interview with Lowell Bergman, Professor of Journalism, UC Berkeley Graduate School of Journalism, in Berkeley, Cal. (Apr. 10, 2007).

280. *Id.*

281. *Id.*

“seriously hurting” the quality of news coverage.²⁸² While this proposal may have minor workability issues associated with its function—which would only last for twenty-four hours—it would transform bottom-line profits from hurting news coverage to helping it. The impact would be most profound on the Internet, where the free flow of information and ease in re-posting stories within a twenty-four hour period is most prevalent. However, the enforceability of and compliance with the proposal is actually easiest on the Internet—one can simply link to the original author’s story online. In sum, the benefits outweigh the potential problems, and the risk of legislative inaction to aide this “fourth branch of government”²⁸³ is too great.

VII. CONCLUSION

The quality of journalism in the twenty-first century is declining. Only a handful of large media companies and investors own the few national newspapers left in the country, and they are demanding that profits increase. The popularity of the Internet and its effect on news gathering and local newspaper earnings has been damaging. The predicament is not improving, with the current business solution moving towards having fewer news gathering journalists.

In order to save the news and the diverse flow of information myriad reporters provide, the legislature must intervene. The government can stimulate the media directly—through direct control—or attempt to stimulate news gathering through economic means. While the proposal described in this article is not flawless, it would allow the media to generate profits and bottom-line revenues through the news. Business leaders and investors will align their companies to create the most profits, and if profits are allowed to come from top notch reporting, then that is what the future will hold.

282. Bottom-Line Pressures, *supra* note 22.

283. Fu & Cullen, *supra* note 7, at 1 n.23 (citing Schauer, *supra* note 7, at 264).

