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NATIONAL BASKETBALL ASSOCIATION v. MOTOROLA, INC.: FUTURE PROSPECTS FOR PROTECTING REAL-TIME INFORMATION

INTRODUCTION

Information is a commodity that commands pecuniary value on the open market.¹ Real-time information is no exception.² In fact, real-time information, for obvious reasons, may be the most sought after, highly prized species of information available.³ The success of countless business decisions rests solely upon timing; fortunes are often won or lost depending upon the precise moment a decision is made. The collection of such time-sensitive data by information gatherers has earned a value all its own. A recent decision by the Second Circuit Court of Appeals, however, may undermine the

¹ See generally Lester C. Thurow, *Needed: A New System of Intellectual Property Rights*, HARV. BUS. REV., Sept.-Oct. 1997, at 95-96. Thurow's thesis is that the global economic landscape has shifted due to the advent of the "information revolution." *Id.* at 96. In this post-industrial setting, it is intellectual property that "lies at the center of the modern company's economic success or failure." *Id.* at 96. For example, Thurow points out that during the peak of the industrial age, access to raw materials and the accumulation of capital was the chief determinant to a company's economic success. However, today's major companies, like Microsoft and Intel, do not trade with tangible assets. Instead, these modern corporate juggernauts trade and profit from their intangible assets, such as knowledge. Thurow looks at Bill Gates as "the perfect symbol" of the new centrality of intellectual property because, for the first time in history, the "world's wealthiest person is a knowledge worker." *Id.* Noting that "the world's major growth industries—such as microelectronics, biotechnology, designer-made materials, and telecommunications—are brainpower industries," Thurow contends that "[i]f their intellectual property can be copied easily, they will not be able to generate wealth for their owners or high wages for their employees." *Id.*

² See Thurow, *supra* note 1, at 95-96. Real-time information, in this context, is defined as transmissions of information (whether it be market quotations, weather reports, sports statistics, or otherwise) as the information changes or on a nearly continuous basis, often as frequently as once every few seconds.

³ Consider, for example, the Chicago Mercantile Exchange ("CME"). CME generates \$34.8 million each year from the sale of "time critical" information. The data is considered time critical because the information retains its value for only a very brief window of time. For instance, market information at CME is considered stale within five minutes and is worthless after twenty minutes. William J. Cook, *Court Clock Ticking On Delays of Time-Sensitive Information*, CHI. LAW., Jan. 1997, at 59.

ability of certain businesses, such as securities and commodities exchanges, to profit from the real-time information they have either generated or gathered at their own expense.⁴ Instead of allowing such businesses to enjoy the fruits of their labor, as public policy might dictate, the Second Circuit opened the door in *National Basketball Association v. Motorola, Inc.* for competitors to "free ride" on the efforts of an information-gathering party.⁵

In such case, the National Basketball Association ("NBA") brought suit against Motorola, Inc. ("Motorola") and Sports Team Analysis and Tracking Systems, Inc. ("STATS") (herein the "defendants") in connection with the defendants' commercial introduction of a paging device called SportsTrax which provides real-time information about professional basketball games.⁶ The pager displays the following real-time information on NBA games in progress: (1) the teams playing; (2) score changes; (3) the team in possession of the ball; (4) whether the team is in the free-throw bonus; (5) the quarter of the game; and (6) the time remaining in the quarter.⁷

The NBA brought six causes of action against the defendants, alleging federal copyright infringement, commercial misappropriation under New York common law, false advertising under section 43(a) of the Lanham Act, false designation of origin under section 43(a) of the Lanham Act, state and common law unfair competition by false advertising and false designation of origin, and unlawful communications under the Communications Act of 1934.⁸ Although the United States District Court for the Southern District of New York dismissed five out of the six NBA claims, the court found that Motorola's conduct violated New York's commercial misappropriation law and, accordingly, entered a permanent injunction against the defendants, prohibiting the future manufacture and marketing of the SportsTrax device.⁹

The Second Circuit reversed on appeal, ruling that New York State's common law tort of misappropriation was effectively pre-

⁴ *National Basketball Ass'n v. Motorola and Sports Team Analysis and Tracking Systems, Inc.*, 105 F.3d 841 (2d Cir. 1997) [hereinafter *NBA I*].

⁵ Free-riding, as the name implies, refers to a situation where a person can obtain a benefit (or avoid a cost) without paying for it.

⁶ *National Basketball Ass'n v. Sports Team Analysis and Tracking Systems, Inc.*, 931 F. Supp. 1124, 1127 (S.D.N.Y. 1996) [hereinafter *NBA II*].

⁷ *NBA II*, 105 F.3d at 843-44.

⁸ *Id.*

⁹ *Id.*

empted by the federal Copyright Act of 1976.¹⁰ Thus, the Second Circuit vacated the injunction against the defendants, altogether denying the NBA a remedy by holding that STATS' "transmission of 'real-time' NBA game scores and information . . . [did] not constitute a misappropriation of 'hot news' that is the property of the NBA."¹¹

This Comment illustrates that the reach of the Second Circuit's decision in *National Basketball Association v. Motorola, Inc.* may extend much further than sports statistics. In fact, the decision may affect a number of industries that have developed substantial interests in the control and protection of time sensitive information and that disseminate such information for profit. While the Second Circuit presumably only divested the NBA's control of real-time basketball game information, the court's ruling also threatens the control stock and commodity exchanges have over the dissemination of real-time market activity.¹² These industries may no longer rely on common law misappropriation to protect their intangible property. In the end, the Second Circuit's decision highlights the inadequacy of the current system of intellectual property rights.¹³

Part I of this Comment provides a brief background of commercial misappropriation under New York common law and discusses the manner in which it relates to, and is preempted by, the Copyright Act of 1976. Part II details the facts, procedural history, and legal analysis of both the district court and circuit court opinions that have been issued in the NBA decisions. Part III analyzes how the Second Circuit's narrow misappropriation ruling in *NBA II* may affect the ability of securities and commodities exchanges to protect their interests in real-time market data. Part IV of this Comment introduces two legislative models, one linking the patent and copyright clause of the Constitution with the interstate Commerce Clause and the other detailing a modified liability regime similar to the

¹⁰ *Id.* at 848; see also 17 U.S.C. § 301(a) (1994).

¹¹ *Id.* at 843.

¹² See Cook, *supra* note 3, at 59.

¹³ Fundamental shifts in technology and in the economic landscape are rapidly making the current system of intellectual property rights unworkable and ineffective. Designed more than 100 years ago to meet the simpler needs of an industrial era, today's intellectual property rights are undifferentiated, one-size-fits-all. Although treating all advances in knowledge in the same way may have worked when most patents were granted for new mechanical devices, today's brainpower industries pose challenges that are far more complex.

Thurou, *supra* note 1, at 95.

current regime articulated by section 115 of the Copyright Act of 1976. This Part illustrates how either of these legislative approaches, when applied, is narrow enough to fulfill our nation's policy of stimulating the progress of science and useful arts, yet broad enough to satisfy both the general public interest in free access and competition and the special public interest in promoting science and education. Either approach is designed to afford a remedy for businesses engaged in information product development when such development is threatened by a "second comer's" appropriation of information without permission. Finally, the Conclusion demonstrates that the Second Circuit has narrowed the "hot news" doctrine espoused in *NBA II* to the point at which it could hardly be relied on to protect intangible property of fleeting value. Thus, a new doctrinal approach must be developed to ensure adequate protection of those information products currently left unprotected by the traditional, albeit inadequate, intellectual property paradigm.

I. THE MISAPPROPRIATION DOCTRINE

Exclusive rights and protections are granted by constitutional mandate to those who create intellectual property in order to ensure that such creators have sufficient incentive to develop their works and reap reward for their efforts.¹⁴ Balanced against the interests of the creator is the public's right to benefit from the author's creation.¹⁵ The exact proper balance, however, has proven difficult to ascertain due to the complexity of the competing interests.¹⁶ State

¹⁴ See U.S. CONST. art. I, § 1, cl. 8. ("The Congress shall have power . . . [t]o 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.").

¹⁵ "Protection against the misappropriation of intangible trade values insures an incentive to invest in the creation of intangible assets and prevents the potential unjust enrichment that may result from the appropriation of an investment made by another. However, the recognition of exclusive rights in intangible trade values can impede access to valuable information and restrain competition." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b (1995) [hereinafter RESTATEMENT].

¹⁶ See RESTATEMENT, *supra* note 15. The purposes of copyright and patent law can be broken down into two basic ideas: 1) to foster the creation and dissemination of intellectual works for the public welfare and 2) to give authors and inventors the reward due them for their contribution to society. See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES: CASES AND MATERIALS 15-16 (4th ed. 1993) (citing REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW 3-6 (1961)) [hereinafter GORMAN & GINSBURG, COPYRIGHT FOR THE NINETIES]. While these two purposes are often seen as related, they are at the same time in direct conflict with each other. For instance, it is clear that many authors and inventors would not

and federal courts, wrestling with this issue for the past century, have acted by severely limiting over time what was once a fairly broad range of protection of the author's work against misappropriation by the public at large.¹⁷

The tort of misappropriation was initially fashioned as a common law remedy in an attempt to control commercial piracy.¹⁸ Specifically, the tort targeted those who stole non-protectible elements of a work of intellectual property (i.e., those elements that were not copyrightable, patentable, or covered by trademark protection). Often, such non-protectible elements constituted the most valuable portion of a work. More often still, such elements, although non-protectible, were costly to develop or compile. Upon a work's initial release to the public, competitors would typically appropriate these valuable but non-protectible elements and incorporate them into a rival work which would be released soon after the first.¹⁹ As a result of such appropriation, competitors were able

or could not devote themselves to creative works without the prospect of remuneration. By giving originators access to the economic reward afforded by the market, copyright and patent protections stimulate the creation and dissemination of intellectual work products. Similarly, copyright and patent protections encourage publishers and other distributors to invest their resources in bringing those works to the public.

On the other hand, intellectual property law provides limitations and conditions on the originator's monopoly so that the public may benefit from the originator's creation. These limitations and conditions on the originator's monopoly include limiting the rights of the intellectual property owner to certain uses of the work; limiting the term of the creator's monopoly; and in certain cases requiring some form of notice, registration and recordation. See generally GORMAN & GINSBURG, *COPYRIGHT FOR THE NINETIES*; see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest; Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

¹⁷ See *infra* note 29.

¹⁸ Dennis S. Karjala, *Copyright And Misappropriation*, 17 U. DAYTON L. REV. 885, 886-887 (1992). Karjala argues that the Supreme Court's rejection of the "sweat of the brow theory" (the expenditure of hard work or "sweat" is alone a sufficient basis for copyright protection in a compilation of facts) and its demanding originality requirements severely limits protection extended to valuable and desirable works which are otherwise susceptible to commercial piracy. *Id.* at 889. Karjala points out while the judiciary has correctly subscribed to the statutory formality of the Copyright Act of 1976, the result of recent decisions "runs counter to the basic social policy of providing an incentive for the creation of desirable works" that fall outside the protection of the copyright statute. *Id.* at 889. In the end, Karjala is describing an "underprotection problem" that has been "multiplied many times over" by judicial forays into this area of the law. *Id.*

¹⁹ See Karjala, *supra* note 18, at 885. Examples of products with inherent economic value which fall outside the scope of federal intellectual property protection include

to undercut prices because they incurred little or no development costs. At the same time, the original creator was denied the fruits of his labor (a satisfactory profit margin) that would justify the original investment.²⁰ Thus, in response to the danger of valuable works being under-produced because they were left unprotected from piracy by federal intellectual property law, the common law torts of misappropriation and unfair competition were created.²¹

The United States Supreme Court first recognized a cause of action for misappropriation under the federal common law in its landmark decision, *International News Service v. Associated Press* (the "INS case").²² In this oft-cited case, International News Service had, among other things, copied news stories from earlier editions of Associated Press ("AP") newspapers published on the east coast and wired the facts of such stories to its affiliated papers on the west coast that directly competed with AP's publications.²³ The Court held that although the facts of a news story are *publici juris* ("the history of the day") and, as such, remain outside the scope of copyright protection,²⁴ the appropriation of originator AP's intellectual work-product by competitor, INS, for use in direct competition with the originator was actionable as unfair competition.²⁵ Moreover, the INS case is best known for establishing the hot news doctrine. The hot news doctrine was designed to protect a news service's incentive to gather factual information that would otherwise be unprotected and open to use by others in those situations where the information would be commercially valuable for only a brief window of time.²⁶ Essentially, the Supreme Court granted

computer databases, CD-ROMS, and factual compilations, including telephone directories, stock quotations, news reports, and other works that lack the requisite creative expression required by section 102(a) of the Copyright Act of 1976. See *id.* at 886.

²⁰ See Karjala, *supra* note 18, at 885-886.

²¹ See *id.* at 887.

²² 248 U.S. 215 (1918) [hereinafter *INS*].

²³ See 248 U.S. at 231.

²⁴ See 248 U.S. at 234; see also *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (denying copyright protection to telephone directories that contain nothing more than limited subscriber information arranged alphabetically because type of compilation of facts lacks sufficient originality to warrant copyright protection); *Id.* at 344-45 (quoting *Harper & Row Publ'g Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

²⁵ See *INS*, 248 U.S. at 242.

²⁶

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles; but only postpones participation by complainant's

news services a limited monopoly over non-copyrightable material in cases where 1) the material had economic value for a very limited time, and 2) the appropriators of the information were in direct competition with the originator.²⁷

The *INS* hot news doctrine has been severely narrowed by several states over the years since it was first announced as part of the federal common law in 1918.²⁸ In fact, the misappropriation doctrine has been routinely limited to the specific facts of the *INS* case.²⁹ New York, on the other hand, is one of the few states that

competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim *sic utere tuo*, etc.

INS, 248 U.S. at 241. In the *INS* case, Justice Pitney referred to a Supreme Court case where the quotations and dealings of a board of trade were collected and distributed by the plaintiff and communicated confidentially to many people who were under contract not to make the information public. (*Board of Trade of the City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905)). The Court held that "plaintiff's collection of quotations was entitled to the protection of law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust." *INS*, 248 U.S. at 237 (citing *Christie Grain & Stock Co.*, 198 U.S. at 250.)

Justice Pitney also referred to a Seventh Circuit case that dealt with news gathered and transmitted via telegraph. *National Tel. News Co. v. Western Union Co.*, 119 F. 294 (1902). The information in such case consisted merely of a notation of current events having only a transient value, due to quick transmission and distribution. The court held that while the underlying facts behind current events are not copyrightable, the business of gathering and distributing news for profit was a "legitimate business, . . . that entitled it to the protection of a court of equity against piracy." *INS* 248 U.S. at 237-238 (citing *National Tel. News Co.*, 119 F. at 299).

²⁷ See *INS* 248 U.S. at 239-240.

²⁸ "Although the [*INS*] decision appears to rest on a rationale of unjust enrichment potentially applicable to a wide range of competitive conduct, subsequent decisions have recognized that broad application of the unjust enrichment rationale in a competitive marketplace would unreasonably restrain competition and undermine the public interest in access to valuable information." *RESTATEMENT*, *supra* note 15, § 38, at cmt. c.

²⁹ Edmund J. Sease, *Misappropriation is Seventy-Five Years Old; Should We Bury It Or Revive It?*, 70 N.D. L. Rev. 781, 790-91 (1994). In this Article, Professor Sease points out that Judge Learned Hand, writing for the Second Circuit, refused to recognize the misappropriation theory articulated by the Supreme Court, except in cases involving performance rights or news. See *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (plaintiff successfully prevented a broadcasting station from placing observers where they could see over a fence and rebroadcast Pittsburgh Pirate baseball games); see also *F.W. Dodge Corp. v. Comstock*, 140 Misc. 105, 251 N.Y.S. 172 (N.Y. Sup. Ct. 1931) (finding misappropriation when defendant used plaintiff's confidential construction news reports as leads or tips for defendant's own reporters).

has broadly adopted the misappropriation claim into its common law scheme.³⁰ For instance, a New York court has found that the activities of a defendant who received a plaintiff's radio broadcast over the airwaves and then supplied this broadcast via telephone to various subscribers constituted commercial misappropriation.³¹ In addition, New York has recognized a cause of action for misappropriation where a defendant listened to broadcasts of play-by-play descriptions of baseball games produced by a plaintiff and then sent out simultaneous teletype reports of the game to radio stations for immediate rebroadcast.³² After emphasizing the commercial value the descriptions of the sporting events possessed and the fact that the defendant "contributed nothing to the performance nor the facilities necessary to make the performance or the broadcasts or telecasts [of the performance] possible," the court ruled that the defendant engaged in unfair competition by "misappropriat[ing] descriptions from the authorized broadcasts and telecasts of plaintiff's games." ³³

³⁰ See, e.g., *Metropolitan Opera Ass'n v. Wagner-Nichols, Recorder Corp.*, 199 Misc. 786, 792, 796, 101 N.Y.S.2d 483, 488-89, 492 (N.Y. Sup. Ct. 1950) (finding misappropriation law to be broad and flexible and developed to deal with business malpractices offensive to the ethics of society).

³¹ *Mutual Broad. Co. v. Muzak Corp.*, 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941).

³² *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (Sup. Ct. N.Y. Co. 1955). In granting relief, the court held that

[p]laintiff is the owner of the professional baseball exhibitions which it produces; and its property rights, as owner of such exhibitions, include the proprietary right to sell to others, who desire to purchase and to whom plaintiff desires to sell, licenses or other rights under which the purchasers are authorized to have their representatives attend such exhibitions, prepare oral and/or pictorial descriptions of such exhibitions and transmit such descriptions for broadcast over such, but only such, radio or television station . . . or such geographical area or areas as may be agreed upon between plaintiff and such purchasers.

Id. at 777.

³³ *National Exhibition Co.*, 143 N.Y.S.2d at 777.

A. Preemption of the Misappropriation Doctrine by the Copyright Act of 1976³⁴

The enactment of the Copyright Act of 1976 effectively abolished the dual system of copyright protection that had existed under the 1909 Copyright Act.³⁵ By including section 301, Congress spe-

³⁴ Section 301 of the Copyright Act of 1976 reads as follows:

§ 301. *Preemption with respect to other laws*

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With regard to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

[Subsections (e) and (f) respectively, refer to the Berne Convention and provide for preemption of equivalent state laws regarding works of visual art that are covered by the Visual Artists Rights Act of 1990.]

17 U.S.C. § 301 (1994).

³⁵ Under the old dual system, unpublished works were protected by state statute or common law from the time of creation to the time of publication. See 75 N.Y. JUR. 2D *Literary and Artistic Property*, § 3 (1989). Upon publication of the work, state protection ceased and only federal protection was available. *Id.*

When discussing preemption of intellectual property, it is important to note the companion cases of *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) [hereinafter *Sears*] and *Compco Corp. v. Day-Brite Lighting, Inc.* 376 U.S. 234 (1964) [hereinafter *Compco*]. These cases dealt specifically with the conflict between states' right to protect their citizens' intellectual property rights and the doctrines of federal preemption and the Supremacy Clause of the U.S. Constitution. For example, in the *Sears* case, the Supreme Court held that the State of Illinois could not, under the pretext of regulating unfair competition, grant rights that were essentially the same as the rights granted under federal patent law for items not patentable under federal law. See *Sears*, 376 U.S. at 232. In

cifically intended to do away with this dual system and instead adopt a single federal system of statutory protection.³⁶ Congress considered the dual system unwieldy, especially in light of new technological developments that diminished the importance of the concept of 'publication' as the central factor determining whether federal law or common law was applicable.³⁷

Section 301 of the Copyright Act of 1976 (the "Copyright Act") mandates that any common law right that is "equivalent" to any of the exclusive rights of copyright³⁸ should no longer be recognized

the *Compco* decision, the Court denied Illinois the opportunity to provide relief for a plaintiff whose unpatentable lighting fixture had been copied by the defendant. See *Compco*, 376 U.S. at 237-38. In its now famous quote, the *Sears* Court said: "[j]ust as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." *Sears*, 376 U.S. at 231.

³⁶ As the House Report states, the preemption principles set forth in section 301 are "intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection." H.R. REP. NO. 94-1476, at 130 (1976), *reprinted in* 1976 U.S.C.A.N. 5746.

³⁷ See 75 N.Y. JUR. 2D, *supra* note 35, at 655; see also J.H. Reichman and Pamela Samuelson, *Intellectual Property Rights In Data?*, 50 VAND. L. REV. 51, 64 (1997) ("By the late 1980's, digital technologies and new telecommunications networks had combined to produce 'the greatest changes in the way information is distributed since the invention of printing by movable type in the fifteenth century.'" (citing Leslie A. Kurtz, *Copyright and the National Information Infrastructure in the United States*, 18 EUR. INTELL. PROP. REV. 120 (1996))).

Before the enactment of the Copyright Act of 1976, federal copyright protection was secured only after the work was published with sufficient notice and registered with the United States Copyright Office. This left a gap for works that were fixed in a tangible medium of expression, yet still unpublished in the technical sense of the term (i.e., manuscripts, letters, diaries, private presentations, and other unpublished material). This gap of protection was to be filled by individual states through doctrines of common law literary property sometimes called "common law copyright." ("Section 301 [of the Copyright Act of 1976] expressly obliterates 'publication' as the dividing line between federal protection under the statute and common law protection (the new dividing line being 'creation,' i.e., 'fixation'). Works are protected [under section 301] 'whether published or unpublished' and indeed whether before or after January 1, 1978." See GORMAN & GINSBURG, *supra* note 16, at 845.)

³⁸ Section 102 of the Copyright Act of 1976 provides as follows:

(A) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship includes the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovi-

by state courts.³⁹ This new section fundamentally changed the face of the nation's copyright laws. In contrast to the old dual system of protection, state level legislatures and judiciaries no longer possess the authority or jurisdiction to grant legal or equitable rights equivalent to the exclusive rights granted by the Copyright Act.⁴⁰ However, "[s]tate rules protecting interests outside the scope of copyright, such as those affording relief against deception, consumer confusion, or breaches of confidence, are not preempted as 'equivalent' to copyright."⁴¹ In other words, as long as a cause of action in a state court does not invoke any of the rights provided for in the federal copyright statute, the state court has proper subject matter jurisdiction to proceed.⁴² However, if any state claim overlaps with the federal copyright statute, that cause of action will be preempted by the federal law.

Section 301(b) of the Copyright Act makes it clear that nothing in the copyright statute limits the rights or remedies under state created common law doctrines or restricts the rights of the states to regulate any subject matter that is not copyrightable as defined by section 102(a) (the "subject matter requirement") of the Copyright Act.⁴³ Section 301(b) also does not apply to subject matter that is not addressed by the exclusive rights provision as defined in section 106 (the "general scope requirement") of the Copyright Act.⁴⁴

sual works; and (7) sound recordings.

(B) 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 work.

17 U.S.C. § 102 (1994).

³⁹ 17 U.S.C. § 301(a) (1994).

⁴⁰ 75 N.Y. JUR. 2D *Federal Preemption* § 4 (1989).

⁴¹ RESTATEMENT, *supra* note 15, § 38 cmt. e; see also RESTATEMENT, *supra* note 15, § 16 cmt. c; §39 cmt. c.

⁴² ("Typical of these state causes of action are breach of contract, tortious interference with contract or economic advantage, breach of trust, confidence or fiduciary duty, trade secret infringement, unfair competition, misappropriation, conversion and infringement of the rights of privacy and publicity.") Paul Dennis Connuck, *When Private Parties Try To Expand Requirements of Copyright, Patent Laws*, N.Y.L.J., August 10, 1998, (Intellectual Property Supplement S2).

⁴³ See Sease, *supra* note 29, at 798. The "subject matter requirement" includes "original works of authorship fixed in any tangible medium of expression, now known or later developed from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1994).

⁴⁴ Section 106 of the Copyright Act of 1976 provides as follows:

Subject to section 107 through 120, the owner of copyright under this

Therefore, it follows that federal preemption of a state misappropriation claim based in copyright will occur if 1) the state law claim seeks to vindicate rights equivalent to those rights defined in the general scope requirement of the Copyright Act, and 2) the work to which the state law claim is being applied is a work which falls within the subject matter requirement of the Copyright Act.⁴⁵ However, if there exists different or extra elements required to allege a state-created cause of action, then there is no federal preemption as the right does not fall within the ambit of the general scope requirement.⁴⁶ Courts have employed a so-called "extra element" test to determine whether a cause of action is equivalent to a federal copyright claim.⁴⁷ Claims requiring the pleading and proof of a qualitatively different extra element, such as the existence of a trade secret, can escape preemption, while those claims that seek merely to enforce the exclusive rights protected by the Copyright Act, such as preventing the copying or distribution of a plaintiff's material, are deemed preempted.⁴⁸

title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1996); see also Sease, *supra* note 29, at 798; ("The fundamental rights that the bill gives to copyright owners-the exclusive rights of reproduction, adaptation, publication, performance and display are stated generally in section 106.") H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5674.

⁴⁵ *NBA I*, 931 F. Supp. 1124, 1147 (S.D.N.Y. 1996) Congress intended Section 301 of the Copyright Act of 1976 to preempt and eliminate any state-created statutory or common law rule that is equivalent to federal copyright where such rule would apply to works covered by the scope of the federal copyright law. See H.R. NO. 94-1476.

⁴⁶ *NBA I*, 931 F. Supp. at 1147-48 (citing MELVILLE B. NIMMER, *THE LAW OF COPYRIGHT* §1.01 [B][3], at 1-11-12 (1984) [hereinafter NIMMER, *THE LAW OF COPYRIGHT*]).

⁴⁷ See David Goldberg and Robert J. Bernstein, *NBA and Motorola: 'Hot News' Protection*, N.Y.L.J., March 21, 1997, at 3.

⁴⁸ See Goldberg and Bernstein, *supra* note 47. Congress specifically considered the tort of misappropriation and discussed it in the House Report: "'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright, as specified by section 106 nor a right equivalent thereto." H.R. NO. 94-1476.

II. NATIONAL BASKETBALL ASSOCIATION V. MOTOROLA, INC.⁴⁹

A. *The District Court Decision*—NBA I

1. The Facts

The National Basketball Association ("NBA"), a private commercial entity, not only produces, organizes, and markets its membership of twenty-nine professional basketball teams but is further responsible for producing, organizing and marketing preseason, regular season and playoff games between its member teams.⁵⁰ By virtue of the grant of exclusive worldwide rights to market and promote NBA games, NBA Properties, Inc. controls and manages the NBA's intellectual property rights.⁵¹

The district court accepted the following as findings of fact: (1) NBA games command "vast commercial value and appeal"; (2) this "value and appeal is attributable to years of NBA's promotional investments"; (3) "NBA games achieve the apex of their value while they are in progress . . . such as from broadcasting distribution licenses and admission fees to the arena"; (4) the NBA has entered into a number of national and regional license agreements for the broadcast of live NBA games over television and radio; (5) "the NBA has a license agreement with TRZ Communications, which takes audio descriptions of games and distributes them via a 1-800 number to listeners . . . [who] are charged a fee in exchange for which they can select a game currently in progress and hear a play-by-play broadcast of the game"; and (6) in order to "preserve the value of its proprietary interest in the information,"⁵² the NBA imposes limits on the dissemination of real-time NBA game data by entering into license agreements and issuing media credentials that control and restrain how real-time NBA game data is used by the media.

Defendant Motorola, on the other hand, develops and markets paging devices which relay a variety of information "from telephone numbers to weather reports."⁵³ Motorola is responsible for manu-

⁴⁹ *NBA I*, 931 F. Supp. at 1124. The district court decision was written by Judge Loretta A. Preska.

⁵⁰ *NBA I*, 931 F. Supp. at 1128 (citing affidavit of Edwin S. Dresser, President of Television and New Media Ventures for The National Basketball Association ("NBA").

⁵¹ *NBA I*, 931 F. Supp. at 1129.

⁵² *NBA I*, 931 F. Supp. at 1129-30.

⁵³ *NBA I*, 931 F. Supp. at 1129 (citing the affidavit of Michael Marrs, President of

facturing and marketing the SportsTrax device.⁵⁴ Defendant STATS provides information about sports, "both current and historical," to the public and to various media entities such as the AP, ESPN, Fox, Turner Broadcasting, NBC Sports, and a majority of major league baseball teams.⁵⁵ STATS gathers and provides the real-time NBA game data that is broadcast via the SportsTrax paging device.⁵⁶

The SportsTrax device is marketed as a commercial entertainment product designed specifically for NBA fans to provide "up to date information on all National Basketball Association teams," in order to create a "personal viewing window . . . of Pro Basketball"⁵⁷ for consumers. STATS obtains its information from employees who watch the games on television or listen to the games on the radio.⁵⁸ Score changes, minutes remaining, and other key statistics are entered into computers and then sent via modem to STAT's host computer where the data is compiled and reformat- ted for transmission.⁵⁹ This information is then sent via satellite to various FM radio networks that broadcast the appropriate signal to the individual SportsTrax devices.⁶⁰ The SportsTrax device updates the end-user usually "within two minutes of the on-court activi- ty,"⁶¹ providing updates towards the end of a game more fre- quently than every two minutes—sometimes numerous times per minute.⁶²

Following a cease and desist request directed toward Motorola, the NBA and NBA Properties, Inc. brought an action against defen- dants STATS and Motorola before the District Court of the Southern District of New York, alleging that the "portable electronic beeper device" manufactured and distributed by the defendants constituted infringement under the Copyright Act of 1976, commercial misap- propriation under New York common law, false advertising and

SportsTrax Products, Inc.).

⁵⁴ *NBA I*, 931 F. Supp. at 1129.

⁵⁵ *NBA I*, 931 F. Supp. at 1129 (citing affidavit of John Dewan, President and Chief Executive Officer of STATS at ¶ 3).

⁵⁶ *NBA I*, 931 F. Supp. at 1129.

⁵⁷ *NBA I*, 931 F. Supp. at 1133 (quoting SportsTrax User's Guide at 2-3).

⁵⁸ *NBA I*, 931 F. Supp. at 1133 (citing testimony of STATS President and Chief Executive Officer, John Dewan, Transcript at 466, 468, 473-74).

⁵⁹ *NBA I*, 931 F. Supp. at 1133 (citing the Dewan Aff. at 473-74).

⁶⁰ *NBA II*, at 844.

⁶¹ *NBA I*, 931 F. Supp. at 1133 (quoting the SportsTrax User's Guide, at 14).

⁶² *NBA I*, 931 F. Supp. at 1133 (citing the affidavit of Michael Marrs, President of SportsTrax Products, Inc.).

false designation of origin under section 43(a) of the Lanham Act, and unlawful interception of communications under the Communications Act of 1934.⁶³

2. Legal Analysis

The district court found no violations of the Copyright Act of 1976, the Lanham Act, or the Communications Act. However, the court issued a permanent injunction prohibiting the manufacture and sale of the SportsTrax device based on its ruling that the defendants' actions constituted commercial misappropriation under New York law.⁶⁴

The district court rejected the NBA's argument that the basketball games, themselves, were copyrightable works of authorship separate and distinct from the words and images that are broadcast to viewers and listeners. The district court ruled that NBA games are not copyrightable subject matter because of the "problematic consequences" that would inevitably result.⁶⁵ For instance, the court pointed to the possibility of joint ownership of copyright that might vest in referees, coaches, "and all other participants whose creative energies contributed to the NBA game."⁶⁶ If joint ownership were to vest in this manner, it would greatly impede and unduly restrain the "potential market of the copyright proprietor since a prospective licensee would have to gain permission from each of possibly many performers who might have rights in the underlying work before he could safely use it."⁶⁷ Moreover, the district court recognized that

⁶³ *NBA I*, 931 F. Supp. at 1137-1138. The copyright infringement claim was brought under 17 U.S.C. § 501; Lanham Act claims were brought under 15 U.S.C. § 1125(a) (1995); and the unlawful interception of communications claims were brought under 47 U.S.C. § 605 (1995).

⁶⁴ See *NBA I*, 931 F. Supp. at 1150. ("Turning to the merits of NBA's misappropriation claim, I find that NBA has satisfied its burden of proof that defendants have engaged in unfair competition in violation of New York common law through their commercial misappropriation of NBA's proprietary interests in the NBA games."); *id.* at 1140, 1159, 1164.

The court also disposed of defendants' laches and prior restraint defenses at the outset. *NBA I*, 931 F. Supp. at 1138. ("[T]he NBA has not unexcusably delayed in filing and prosecuting this action." *NBA I*, 931 F. Supp. at 1140. ("[D]efendants' prior restraint argument is unavailing." *Id.*)

⁶⁵ *NBA I*, 931 F. Supp. at 1144 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.09 [F] (1996) [hereinafter NIMMER ON COPYRIGHT]).

⁶⁶ *NBA I*, 931 F. Supp. at 1144.

⁶⁷ *NBA I*, 931 F. Supp. at 1144 (quoting *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973)).

if plays devised by coaches and executed by players were subject to copyright, this would result in coaches having to defend infringement claims when accused of copying other coaches' plays.⁶⁸ The court suggested that the "more reasonable . . . construction [is] that athletic events are subject to legal protection pursuant only to the right of publicity, misappropriation, and other established legal doctrines outside the ambit of statutory copyright."⁶⁹

The district court further noted that there was congressional deliberation over the application of the Copyright Act to sporting events. According to the court, the fact that the final version of the 1976 Act did not explicitly protect sporting events was clear indication that "Congress did not intend to include NBA games within the subject matter of copyright protection."⁷⁰

Finally, although the broadcasts of NBA games are admittedly copyrightable subject matter, the district court ruled that the NBA "failed to show an infringement of its copyright in the broadcasts of NBA games."⁷¹ Because the defendants copied only the facts and ideas of the NBA game, which fall outside the ambit of protectibility as dictated by *Feist Publications, Inc. v. Rural Telephone Service*, infringement was not found to exist.⁷²

3. The Partial Preemption Doctrine

Addressing the question of whether the NBA's commercial misappropriation claim was preempted by the Copyright Act, the district court ruled for partial preemption. Specifically, the district court held that the NBA's misappropriation claim was not preempted as it related to NBA's proprietary rights in the NBA games. However, the misappropriation claim was preempted as it related to NBA's proprietary rights in the *broadcasts* of NBA games.⁷³

The district court's partial preemption doctrine was based on federal common law precedent which declares that "Section 301 [of the Copyright Act of 1976] . . . preempts only those state law rights

⁶⁸ *NBA I*, 931 F. Supp. at 1144.

⁶⁹ *NBA I*, 931 F. Supp. at 1144 (quoting NIMMER ON COPYRIGHT, *supra* note 65, § 2.09 [F], at 2-170.1).

⁷⁰ *NBA I*, 931 F. Supp. at 1145.

⁷¹ *NBA I*, 931 F. Supp. at 1145.

⁷² *NBA I*, 931 F. Supp. at 1146 (discussing *Feist Publ., Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 350 (1991)).

⁷³ *NBA I*, 931 F. Supp. at 1147.

that 'may be abridged by an act which, in and of itself, would infringe one of the exclusive rights' provided by federal copyright law."⁷⁴ However, "'if an 'extra element' is 'required instead of or in addition to the acts of the 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.'"⁷⁵

Relying on Second Circuit precedent, the district court declared that "[s]tate law rights which satisfy the extra element test — and thus avoid preemption— 'include unfair competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets.'"⁷⁶ This conclusion was reached by analyzing the legislative history of the Copyright Act which states that "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*, . . . or in the newer form of data updates from scientific, business, or financial databases."⁷⁷

In *NBA I*, the district court ruled that broadcasts of NBA games are preempted by the Copyright Act because they "fall within the 'subject matter of copyright as specified by section 102 and 103.'"⁷⁸ However, because the NBA games (as opposed to the broadcasts of the games) fall outside the ambit of copyrightable subject matter as defined by the Copyright Act, "NBA's misappropriation claim, as it relates to the NBA games, is not preempted by 17 U.S.C § 301."⁷⁹ In other words, the district court reasoned that the 1976 Act preempts any misappropriation claim relating to the broadcast of the basketball games, but the Copyright Act does not

⁷⁴ *NBA I*, 931 F. Supp. at 1147 (quoting *Computer Assocs. Int'l. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) [hereinafter *Computer Assocs.*]. Trade secret claims have an "extra element" that changes the "nature of the action so that it is qualitatively different from a copyright infringement claim." *NBA I*, 931 F. Supp. at 1148 (quoting *Computer Assocs.* 982 F.2d at 716).

⁷⁵ *NBA I*, 931 F. Supp. at 1147-48 (quoting *Computer Assocs.*, 982 F.2d at 716 (quoting NIMMER ON COPYRIGHT, *supra* note 65, at Sec. 1.01 [B])).

⁷⁶ *NBA I*, 931 F. Supp. at 1148 (quoting *Computer Assocs.*, 982 F.2d at 717).

⁷⁷ *NBA I*, 931 F. Supp. at 1148 (quoting H.R. NO. 94-1476, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748).

⁷⁸ *NBA I*, 931 F. Supp. at 1149 (quoting 17 U.S.C. § 301(a) (1994)).

⁷⁹ *NBA I*, 931 F. Supp. at 1149.

preempt NBA's commercial misappropriation claim of the *games*, themselves, because basketball games are not the type of subject matter intended for copyright protection. Therefore, the misappropriation claim was only partially preempted.⁸⁰

After tracing the lengthy history of the methods of interpretation of misappropriation,⁸¹ the district court concluded that "the quantity and contemporaneous nature of the information conveyed by SportsTrax, when viewed together with the other relevant facts . . . is sufficient to constitute commercial misappropriation" as it "erodes NBA's ability to approach other commercial entities and offer them the degree of exclusivity in real-time depictions of NBA games that it could offer in the absence of SportsTrax. Thus, SportsTrax has affected adversely the value of NBA's real-time game information."⁸² As a result of the defendants' violation of New York's commercial misappropriation laws, the district court enjoined defendants from manufacturing, marketing and distributing SportsTrax but stayed the injunction pending appeal before the circuit court.

⁸⁰ *NBA I*, 931 F. Supp. at 1146.

⁸¹ See *NBA I*, 931 F. Supp. at 1153-57. Specifically, the Second Circuit discussed the *INS* decision, 248 U.S. 215 (1918); *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D.Pa. 1938) (holding that defendant should be prevented from broadcasting play-by-play reports and descriptions of baseball games because plaintiff, owner of the professional baseball team, had property rights in such news and the right to control the use thereof for a reasonable time following the games); *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (granting a permanent injunction against defendant who listened to plaintiff's broadcasts of play-by-play descriptions of baseball games and sent out simultaneous teletype reports of the games to radio stations for immediate broadcast and emphasizing that mere playing of the games and broadcasting of the games did not destroy the property rights of plaintiff or licensees therein); *Mutual Broadcasting, Inc. v. Muzak Corp.*, 177 Misc. 489, 30 N.Y.S.2d 419 (1941) (holding that defendant be prevented from using a radio receiver to receive plaintiff's broadcast and then to transmit sound through telephone lines to defendant's customers because the plaintiff expended large sums of money and effort to obtain the exclusive right to transmit the *World Series* game); *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 A.D. 459, 7 N.Y.S.2d 845 (1st Dep't 1938) (preventing defendant from using depictions of the New York Rangers and Madison Square Garden in a motion picture because plaintiff had built up a valuable business licensing both depictions); *Twentieth Century Sporting Club, Inc. v. Transradio Press Servs., Inc.*, 165 Misc. 71, 300 N.Y.S. 159 (N.Y. Sup. Ct. 1937) (holding that defendant should be prevented from seeking to rebroadcast descriptions of a boxing exhibition based on plaintiff's broadcast because plaintiff entitled to recoupment of its expenses of producing the exhibition through the grant of exclusive broadcasting privileges). The plaintiff's business had been created with large expenditures of money and resources; therefore any use of the depictions by defendant, without express permission by plaintiff was found to be an infringement on plaintiff's property right in its good name.

⁸² *NBA I*, 931 F. Supp. at 1158.

B. The Circuit Court Decision-NBA II⁸³

1. Procedural Setting

The defendant STATS appealed from the permanent injunction against the SportsTrax device, while the plaintiffs, the NBA, cross-appealed from the district courts's dismissal of its Lanham Act false advertising claim.⁸⁴ The court decided that the only issues that needed treatment were the state law misappropriation and the Lanham Act claims.⁸⁵

2. Legal Analysis

a. The Misappropriation Claim

Judge Winter's opinion began with a summary of the relevant commercial misappropriation law. To wit: the commercial misappropriation claim originated from the facts of *International News Service v. Associated Press*⁸⁶ and "sought to apply ethical standards to the use by one party of another's transmissions of events."⁸⁷ The Second Circuit opinion noted that pursuant to congressional legislation, copyright protection was granted to simultaneously-recorded broadcasts of live events such as sporting events, but no copyright protection was afforded to the underlying events.⁸⁸ Moreover, the Second Circuit stated that "[b]ased on [the] legislative history of the 1976 amendments, it is generally agreed that a 'hot news' *INS*-like claim survives preemption. However, much of New York misappropriation law after *INS* goes well beyond 'hot news' claims and is preempted."⁸⁹

After affirming the district court's dismissal of the NBA's copyright infringement claims with regard to both the underlying games and their broadcasts,⁹⁰ the Second Circuit proceeded to discuss

⁸³ *NBA II*, 105 F.3d 841, 843 (2d Cir. 1997). The Second Circuit opinion was written by Judge Ralph K. Winter.

⁸⁴ *NBA II*, 105 F.3d at 844.

⁸⁵ *NBA II*, 105 F.3d at 844.

⁸⁶ See *INS*, 248 U.S. at 215.

⁸⁷ *NBA II*, 105 F.3d at 845.

⁸⁸ *NBA II*, 105 F.3d at 845 (citing 17 U.S.C. § 101 (1994)).

⁸⁹ *NBA II*, 105 F.3d at 845 (citing H.R. No. 94-1476, at 132 (1976), reprinted in 1976 U.S.C.C.A.N. 5748).

⁹⁰ *NBA II*, 105 F.3d at 845-847.

and overrule the district court's analysis of the common law misappropriation claim. The Second Circuit found the elements of such a claim to be as follows: (1) the plaintiff generates or collects information at some cost or expense; (2) the value of the information is highly time-sensitive; (3) the defendant's use constitutes free-riding at plaintiff's expense; (4) the defendant's use is in direct competition with the plaintiff's product or service; and (5) the ability of defendants and others to free-ride will reduce plaintiff's incentive to gather information so drastically that its incentive to continue making the information available would be substantially threatened.⁹¹

In addition, the Second Circuit rejected outright the "partial preemption" doctrine formulated by the district court, ruling that "where the challenged copying or misappropriation relates in part to the copyrighted broadcasts of the games, the subject matter requirement is met as to both the broadcasts and the games."⁹² The Second Circuit rejected "the partial preemption doctrine and its anomalous consequences that 'it is possible for a plaintiff to assert claims both for infringement of its copyright in a broadcast and misappropriation of its rights in the underlying event.'"⁹³ Further, the circuit court reasoned that the "[a]doption of a partial preemption doctrine — preemption of claims based on misappropriation of broadcasts but no preemption of claims based on misappropriation of underlying facts — would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable."⁹⁴

The Second Circuit also tightened the extra element requirement mandated to defeat preemption under section 301 of the Copyright Act. Although conceding that "[c]ourts are generally agreed that some form of such a [misappropriation] claim survives preemption,"⁹⁵ the Second Circuit noted that "the 'extra element' test should not be applied so broadly so as to allow state claims to survive preemption easily." The Second Circuit declared that "most of the broadcast cases relied upon by the NBA are simply not good law."⁹⁶ Following the reasoning the court advanced in earlier Sec-

⁹¹ *NBA II*, 105 F.3d at 845.

⁹² *NBA II*, 105 F.3d at 848.

⁹³ *NBA II*, 105 F.3d at 848 (quoting *NBA I*, 931 F. Supp. at 1150 n.24).

⁹⁴ *NBA II*, 105 F.3d at 849.

⁹⁵ *NBA II*, 105 F.3d at 850 (citing *Financial Inf., Inc. v. Moody's Investors Serv., Inc.*, 808 F.2d 204, 208 (2d Cir. 1986)) [hereinafter *FI*].

⁹⁶ *NBA II*, 105 F.3d at 852 (citing *Metropolitan Opera Ass'n. v. Wagner-Nichols*,

ond Circuit decisions⁹⁷ which emphasized the "narrowness of state misappropriation claims that survive preemption," the circuit court went on to conclude that "only a narrow 'hot news' misappropriation claim survives preemption for actions concerning material within the realm of copyright."⁹⁸

The Second Circuit opinion next proceeded to outline the central elements to an *INS* misappropriation claim.⁹⁹ The court held that out of the five elements outlined *supra*, "the extra elements—those in addition to the elements of copyright infringement—that allow a 'hot news' claim to survive preemption are: (i) the time-sensitive value of factual information, (ii) the free riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff."¹⁰⁰

The court concluded that "Motorola and STATS have not engaged in unlawful misappropriation under the new 'hot-news' test set out above."¹⁰¹ While the court conceded that the NBA's information was time-sensitive, this was the only element that was satisfied, and, therefore, there were two critical elements missing in the NBA's attempt to assert a 'hot-news' *INS*-type claim.¹⁰²

The Second Circuit recognized that there are actually three products produced by the NBA. "The first product is generating the information by playing the games; the second product is transmitting live, full descriptions of those games; and the third product is collecting and retransmitting strictly factual information about the

Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950) and Mutual Broad., Inc. v. Muzak, 177 Misc. 489, 30 N.Y.S.2d 419; see also *supra* note 81.

⁹⁷ See *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 693 (2d Cir. 1992); *FII*, 808 F.2d at 204.

⁹⁸ *NBA II*, 105 F.3d at 852 (citing MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th. ed. 1996) § 10:69, at 10-134 (discussing cases that pre-date the 1976 amendment to the Copyright Act and concluding that after the amendment "state misappropriation law would be unnecessary and would be preempted: protection is solely under federal copyright.")).

⁹⁹ *NBA II*, 105 F.3d at 852.

¹⁰⁰ *NBA II*, 105 F.3d at 853. "By expressly holding that the defendant in a misappropriation case must 'substantially threaten' the 'very existence of the product or service provided by the plaintiff,' the Second Circuit distinguishes the type of grave market harm it considers cognizable at common-law from the presumptive damage addressed by the Copyright Act. In so doing, the court emphasizes that under § 301, misappropriation cannot be a form of de facto copyright protection for uncopyrightable material." Goldberg and Bernstein, *supra* note 47.

¹⁰¹ *NBA II*, 105 F.3d at 853.

¹⁰² *NBA II*, 105 F.3d at 853.

games."¹⁰³ The court held that the first and the second products were the NBA's primary business, and the third product was more a derivative of the first and second.¹⁰⁴ Further, in the Court's view, "the NBA has failed to show any competitive effect whatsoever from SportsTrax on the first and second products and a lack of any free-riding by SportsTrax on the third."¹⁰⁵ Because "there is no evidence that anyone regards SportsTrax or the AOL site as a substitute for attending NBA games or watching them on television . . . [the court disagreed] that SportsTrax is in any sense free-riding" off the plaintiff's product.¹⁰⁶ The Second Circuit concluded that "[f]or the foregoing reasons, the NBA has not shown any damage to any of its products based on free-riding by Motorola and STATS, and the NBA's misappropriation claim based on New York law is preempted."¹⁰⁷

Thus, the Second Circuit not only vacated the injunction entered by the district court and ordered that the NBA's claim for misappropriation be dismissed but also affirmed the district court's dismissal of the NBA's claim for false advertising under Section 43(a) of the Lanham Act.¹⁰⁸

III. EFFECT OF SECOND CIRCUIT'S MISAPPROPRIATION RULING ON REAL-TIME DATA INDUSTRY

The Second Circuit's ruling on the preemption of the misappropriation doctrine by the Copyright Act of 1976 severely checks an already weakened doctrine. This weakness is best illustrated by the Second Circuit's discussion in *NBA II* addressing the three extra elements that *must* be present in order to save a hot news misappropriation claim from preemption under section 301.¹⁰⁹ The three required elements are the time-sensitivity of the value of the information, the defendant's free-riding, and the "threat to the very existence" of the plaintiff's product.¹¹⁰ According to the Second Cir-

¹⁰³ *NBA II*, 105 F.3d at 853.

¹⁰⁴ *NBA II*, 105 F.3d at 853.

¹⁰⁵ *NBA II*, 105 F.3d at 853.

¹⁰⁶ *NBA II*, 105 F.3d at 853-854.

¹⁰⁷ *NBA II*, 105 F.3d at 854.

¹⁰⁸ *NBA II*, 105 F.3d at 863.

¹⁰⁹ See *NBA II*, 105 F.3d at 853.

¹¹⁰ See *NBA II*, 105 F.3d at 853.

cuit, the other two elements, the value of the information and the plaintiff's investment in it, are not, themselves, sufficient extra elements to warrant protection by a state created remedy.¹¹¹

The Second Circuit's misappropriation ruling in *NBA II* will clearly affect areas outside the sports industry.¹¹² For instance, if the NBA cannot protect the dissemination of real-time game data, does it necessarily follow that securities exchanges will no longer be able to protect the dissemination of real-time market data? Close scrutiny of the two industries reveals that there exists both differences and similarities as to how each has protected their information products. The most common methods are discussed below.

A. Common Law, Statutory, And Contractual Protection of Real Time Market Data

It is a fundamental principle of copyright law that mere facts are not the type of subject matter intended for copyright protection.¹¹³ However, lists of facts can be copyrighted if the data is "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."¹¹⁴ This suggests that if stock and commodity exchanges do not select, coordinate or arrange their real-time market quotations in the manner set out by section 101 of the Copyright Act, these quotations will fall outside the protection of the federal copyright statute.

The United States Supreme Court has ruled continuously that real-time quotations collected by commodities and securities exchanges is a type of property that "is entitled to the protection of the law."¹¹⁵ Moreover, circuit courts have held that real-time information, albeit mere notations of market news, sports scores, and similar factual information that has value for only a very limited time deserves protection in the courts of equity because such information is marketable commercial product.¹¹⁶ Despite such rulings, notations of raw factual data, such as lists of quotations, have been found, more often than not, to be inherently

¹¹¹ See Goldberg and Bernstein, *supra* note 47.

¹¹² See Cook, *supra* note 3, at 59.

¹¹³ See *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹¹⁴ 17 U.S.C. § 101 (1994).

¹¹⁵ *Board of Trade of the City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905).

¹¹⁶ *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294, 298 (1902).

uncopyrightable.¹¹⁷ Furthermore, both the Constitution and the Copyright Act of 1976 require that writings or work products seeking copyright protection satisfy at least a modicum of creativity and originality.¹¹⁸ Considering that lists of raw data do not fall into this original or creative category, securities exchanges have been somewhat frustrated in their attempts to rely on copyright law to protect their commercial product.¹¹⁹

Without a strong copyright leg to stand on, securities markets and exchanges have traditionally relied on contract law to ensure that their subscribers could not, without express permission, re-broadcast or retransmit their real-time market quotations to third parties, including the public.¹²⁰ The United States Supreme Court has never reversed its position that "[t]he plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."¹²¹

¹¹⁷ See *id.* at 300-01.

¹¹⁸ See *Dow Jones & Co., Inc. v. Board of Trade of the City of Chicago*, 546 F. Supp. 113 (S.D.N.Y. 1982) (lists of contents or ingredients not subject to copyright protection because they are forms of expression dictated solely by functional considerations); see also 17 U.S.C. §102(b) (1994) ("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 work."); *Sebastian Int'l, Inc. v. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909 (D.N.J. 1987) (mere listing of ingredients, simple direction, or catchy phrases deemed non-copyrightable due to lack of requisite creativity); *Magic Marketing, Inc. v. Mailing Servs. of Pittsburgh*, 634 F. Supp. 769 (W.D. Pa. 1986) (generic phrases printed on envelopes lack the minimal degree of creativity necessary for copyright protection).

¹¹⁹ Cf. 18 AM. JUR. 2D *Copyright and Literary Property* §57 (1985) (citing *Dow Jones & Co. v. Board of Trade of the City of Chicago*, 546 F. Supp. 113 (S.D.N.Y. 1982)). The *Dow Jones* court stated:

["Dow Jones Averages"] are not solely functional and are thus missing the element essential to ingredients. It appears that various academics and financial analysts are interested in the component stocks' validity as mirrors of market movement and as reflectors of the nation's industrial history. . . . Due to the effort and judgment exercised in their composition, and the non-functional purposes to which they are put, Dow's lists are copyrightable.

546 F. Supp. at 116 (footnote and citation omitted).

¹²⁰ See *Christie Grain & Stock Co.*, 198 U.S. at 250-51.

¹²¹ *Id.*

The use of contractual models for protection was, and still is, a convenient method of protecting works of information from being wrongfully appropriated and disseminated without the permission of the information compiler. The contractual model works because it conforms with the ancient free-market principles of supply and demand. For instance, brokers and traders are often more than willing to sign subscription license agreements on the proverbial dotted line in exchange for direct access to up-to-the-second market data feeds. These subscription license agreements often contain provisions that demand that the licensee acknowledge the licensor's property rights in the data.¹²² The savvy (perhaps even fortunate) utilization of raw real-time market data enables securities traders to make a great deal of money in seconds, and large premiums are often paid to assure prompt and reliable receipt of such data.¹²³ It is important, however, to be aware that the protection afforded by contract law to the information product may be incomplete.¹²⁴

The Second Circuit in its ruling in *NBA II* placed strict limitations on the kind of commercial misappropriation claim that securities markets and exchanges might have hoped to have raised in addressing third party usage for their own profit of exchanges' real-time quotations. While it is true that stock or commodity exchanges may possess valuable information and may have invested in the creation of such information, it is a stretch to argue that a competitor who appropriates this information "substantially threatens" the "very existence" of the information generated by the exchanges.

¹²² See Daniel T. Brooks, *Databases: The New Corporate Asset and Liability*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY 20-21 (PLI PRACTICE COURSE HANDBOOK NO. 9, 1992) [hereinafter *Databases*]. According to Brooks, "[a]t least as to copyright interests, [the exchanges] claim a right that does not exist in law." *Id.* at 21.

¹²³ See Daniel T. Brooks, *Rights in Data and Databases*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY 52 (PLI Practice Course Handbook No. 7, 1993) [hereinafter *Rights*].

¹²⁴ See William P. Farley, *Industry Impact of Feist*, in 'FACT' AND DATA PROTECTION AFTER *FEIST* 41, 42 (Jon A. Baumgarten ed., 1991) (arguing that "[t]here is some question about the enforceability of some forms of contract"); Jane C. Ginsburg, *No 'Sweat'? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 353 (1992) [hereinafter *No 'Sweat'*] (citing Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1918-22 (1990) (identifying shortfalls of contract and self-help remedies); Ronald S. Rauchberg, *Structuring Contracts for Fact Protection*, in 'FACT' AND DATA PROTECTION AFTER *FEIST*, *supra*, at 110-12 (discussing problems with enforcement of contracts of adhesion)); see also Reichman and Samuelson, *supra* note 37, at 137 ("Even contract law has significant limitations when mass-marketed information products are sold to persons not in privacy with the makers.").

Thus, the third element of the Second Circuit's misappropriation doctrine is not met. Although commentators have noted that in the absence of copyright protection, the doctrine of commercial misappropriation plays a role in the protection of uncopyrightable and unpatentable formulas, indexes and the like,¹²⁵ this notion seems thoroughly discredited by the Second Circuit's decision in *NBA II*.

B. *NBA II's Affect on Real-Time Information Providers*

In the absence of federal intellectual property protection, real-time information providers must rely upon state law for securing their work product from uncompensated proliferation by third parties. However, under section 301 of the Copyright Act, once a work is found to be a work of authorship that comes within the subject matter of copyright, states are preempted from providing protection "equivalent to any of the exclusive rights within the general scope of copyright" under the federal copyright act.¹²⁶

According to recent commentators, the Second Circuit's analysis of the second preemption requirement under section 301, namely, the "general scope" or "equivalent rights" inquiry, is the critical part of the decision handed down in *NBA II*.¹²⁷ In fact, the analysis "cuts back on the misappropriation doctrine as it has developed in the eighty years since *INS*."¹²⁸ As already discussed *supra* in Part I.A. of this Comment, courts have traditionally applied the "extra element" test to determine whether a given cause of action is "equivalent" to a claim under copyright.¹²⁹ Briefly, this test involves determining whether the cause of action instituted by a plaintiff asserts a claim invoking significant extra elements which are not equivalent to the general scope or exclusive rights covered under federal copyright law.¹³⁰

The Second Circuit moved further than previous courts have ever ventured in its discussion and subsequent limitation of the extra element test in the context of misappropriation when it stated that an *INS*-type claim must allege and prove not one but three

¹²⁵ See Gary Myers, *The Restatement's Rejection of the Misappropriation Tort: A Victory For the Public Domain*, 47 S.C. L. REV. 673, 701 (1996).

¹²⁶ See *supra* Part I.A.

¹²⁷ See Goldberg and Bernstein, *supra* note 47.

¹²⁸ *Id.*

¹²⁹ See *supra* Part I.B.

¹³⁰ See Goldberg and Bernstein, *supra* note 47.

extra elements in order to survive preemption.¹³¹ The Second Circuit recognized that this requirement imposes a heavy burden on the plaintiff and presumably makes misappropriation claims far more difficult to pursue than they have been in the past.¹³² However, the Second Circuit also noted that previous Second Circuit holdings have stood for the proposition that the "extra element test 'should not be applied so as to allow state claims to survive preemption easily'".¹³³

In the Second Circuit's view, the elements central to an INS claim are: (1) "the plaintiff generates or collects information at some cost or expense,"¹³⁴ (2) "the value of the information is highly time-sensitive,"¹³⁵ (3) "the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it,"¹³⁶ (4) "the defendant's use of the information is in direct competition with a product or service offered by the plaintiff,"¹³⁷ (5) "the ability of other parties to free-ride on the efforts of the plaintiffs would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."¹³⁸

Of the five elements detailed above, the Second Circuit in *NBA II* held that three elements (the time sensitivity of the value of the information, the free-riding of the defendant, and the threat to the very existence of the plaintiff's product or service) were *required* to be proven in order for a hot news claim to survive preemption under section 301 of the Copyright Act.¹³⁹

For example, suppose the plaintiff, a stock exchange based in New York County, compiles and transmits real-time, up-to-the-sec-

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (quoting *NBA II*, 105 F.3d 841, 851 (quoting *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992)).

¹³⁴ *NBA II*, 105 F.3d at 852 (citing *International News Serv. v. Associated Press*, 248 U.S. 215, 240 (1918); *Financial Inf. Inc. v. Moody's Investors Serv. Inc.*, 808 F.2d 204, 206 (2d Cir. 1986)).

¹³⁵ *NBA II*, 105 F.3d at 852 (citing *INS*, 248 U.S. at 231; *FII*, 808 F.2d at 209; RESTATEMENT, *supra* note 15, § 38 cmt. c.

¹³⁶ *NBA II*, 105 F.3d at 852 (citing *INS*, 248 U.S. at 239-40; *FII*, 808 F.2d at 207; *supra* note 22, at 239-40; RESTATEMENT, *supra* note 15, § 38 cmt. c.; MCCARTHY, *supra* note 98, § 10:73 at 10-139).

¹³⁷ *NBA II*, 105 F.3d at 852 (citing *INS*, 248 U.S. at 240; *FII*, 808 F.2d at 209).

¹³⁸ *NBA II*, 105 F.3d at 852 (citing *INS*, 248 U.S. at 241; *FII*, 808 F.2d at 209; RESTATEMENT, *supra* note 15, § 38 cmt. e.).

¹³⁹ See Goldberg and Bernstein, *supra* note 47 (quoting *NBA II*, 105 F.3d at 853).

and raw market data to third parties over the World Wide Web for profit. The defendant, on the other hand, is an individual seeking to develop an enterprise exploiting the up-to-the-second, raw market data obtained from the plaintiff's web-site. The defendant extracts and rearranges a substantial portion of plaintiff's data before retransmitting the data instantaneously over the web to third parties. The defendant then openly publishes his data over the web-site for free in the hopes of attracting sponsors that will pay to advertise on the site thereby providing revenue for the venture. The plaintiff objects to the defendant's plan, but the defendant feels that his actions are perfectly lawful because his counsel informs him that as long as his retransmissions consist of nothing more than mere recompiled lists of raw market data, such data is unprotectable by copyright as there is no originality in the arrangement of the plaintiff's data.

If the plaintiff were to bring a claim against the defendant in the Second Circuit for commercial misappropriation, the court would be required to apply the new extra element test to ascertain if the claim was preempted by the Copyright Act.¹⁴⁰ Therefore, in order for the plaintiff to prevail, the plaintiff has the burden to allege and prove that (1) the economic value of the securities information that it collects and transmits to third parties is linked with the information's timeliness; (2) the defendant is a second comer who is downloading the plaintiff's data and has entered the market with a competing product that free-rides on the plaintiff's investment; and (3) the defendant's real-time securities data service was such a threat to the plaintiff's real-time data service that the plaintiff involuntarily withdrew itself from the market because it was no longer possible for him to recoup his expenses in compiling the real-time data. In effect, this last element requires that the plaintiff show that but for the misappropriation doctrine, the plaintiff would be out of business due to the threat posed by the defendant.

In its analysis of the extra element test, the court will presumably recognize the value of information as being linked arm-in-arm

¹⁴⁰ Of course, the misappropriation claim would not be the plaintiff's sole cause of action against the defendant. Like the plaintiffs in *NBA II*, 105 F.3d at 841, the plaintiff in our hypothetical case would likely bring claims based on unfair competition under the Lanham Act, federal copyright infringement, breach of contract, and breach of related laws of confidentiality. See *NBA II*, 105 F.3d at 843-44. If the defendant signed a license agreement, the plaintiff would likely prevail under the contract law claim. However, it is important to note again that there are inherent limitations in contract remedies. See *supra* note 124.

with the timing of the information. As previously noted, certain types of securities data retains its economic value for only a very brief period of time.¹⁴¹ Any real-time securities data provider will have little trouble proving this element to the satisfaction of the court. However, the second and third elements of the extra element test pose a difficult, if not unsurmountable, problem for the original compiler of real-time securities market data.

For instance, if a second comer, such as the defendant in the above hypothetical, extracts data released by the original compiler and retransmits the data in a customized format, it is likely that this newly recompiled and reformatted data product will not compete in the same market as the plaintiff's data product.¹⁴² Thus, the second element of the extra element test, the inquiry as to whether the second comer has entered into the same market as the originator by free-riding off the efforts of the originator, is likely to fail.¹⁴³ If the plaintiff fails to prove the second element, such failure, alone, will defeat a misappropriation claim in the Second Circuit because all three elements are required to be proven in order for the claim to survive preemption by federal copyright law.¹⁴⁴

Furthermore, if the court goes on to examine the third element, the court will likely rule that the plaintiff cannot meet his burden of proof. In order for the third element to be satisfied, proof must be offered by the plaintiff to illustrate that the effect of a second comer's free-riding off the efforts of the plaintiff originator effectively forced the plaintiff from the market.¹⁴⁵ The plaintiff's removal from the market must be attributable to the fact that the original compiler of the raw data did not have enough lead time to recoup his investment costs because consumers are seeking out the second comer's cheaper data product.¹⁴⁶ The second comer, however, may prevail

¹⁴¹ See Cook, *supra* note 3, at 59.

¹⁴² See Reichman and Samuelson, *supra* note 37, at 69 ("Digital technology also enables second comers to extract and recombine the originator's data into value-adding products that improve on the original or that compete in different and sometimes distant market segments.").

¹⁴³ See *NBA II*, 105 F.3d at 853.

¹⁴⁴ See *supra* note 139.

¹⁴⁵ See *supra* note 139.

¹⁴⁶ The rules of free market economics strongly suggest that if all other factors are equal, consumers will naturally seek out the cheaper of two similar or closely similar products. Second comers who free-ride on the efforts of original data compilers enjoy an enormous competitive advantage over the originators because they have no costs allocated to information collecting. This allows the second comer to pass the savings on to the consumer and offer his product at a cheaper price than the original data compiler. See

if he targets his data product at a different market than that of the originator. In other words, the court will likely agree with the proposition that if the two competitors are not directly competing in the same market, the second comer's cheaper data product cannot rightfully be accused of being the primary factor that forced the plaintiff to lift his data product from plaintiff's target market.

While the New York Court of Appeals in *NBA II* adequately dealt with the issues involved in the case (interpretation of section 301 of the federal copyright law and synthesization of previous Second Circuit decisions that have ruled on the preemption issue) *NBA II* serves conspicuously to illustrate that current state and federal intellectual property statutes are somewhat deficient. Specifically, our nation's traditional intellectual property models "often fail to afford those who produce today's most . . . valuable information sufficient lead time to recoup their investments."¹⁴⁷ In other words, current intellectual property statutes tend to suppress incentives to create valuable information goods thereby leaving information goods chronically under-produced.¹⁴⁸ Clearly, under-production of information products is not in society's best interest, and the policy behind our nation's intellectual property laws ought to be reexamined. The next part of this Comment explores the possibility of instituting congressional initiatives that will better reflect the need to secure limited protection for data compilers whose information products and services are currently exposed to wholesale and/or partial uncompensated appropriation.¹⁴⁹

IV. LEGISLATIVE MODELS

Many works that are costly to create but inexpensive to copy are destined to be under-produced without some form of legal protection. Legitimate and weighty state and federal interests exist in protecting the intellectual labor of the public. For example, California and Tennessee retain strong interests in protecting tape piracy in view of the powerful economic interests that the recording industry

Reichman and Samuelson, *supra* note 37, at 56.

¹⁴⁷ See Reichman and Samuelson, *supra* note 37, at 55.

¹⁴⁸ See Reichman and Samuelson, *supra* note 37, at 55-56.

¹⁴⁹ See Reichman and Samuelson, *supra* note 37, at 138 ("A plan of action is needed to resolve the database maker's appropriability problem in a manner that yields net social benefits over time without irreparably damaging basic science and other important user community interests.").

has in those states.¹⁵⁰ Such interests are effectively thwarted by recent forays of the judiciary and its taking the position that ideas and facts are free to be copied, adapted and disseminated, and that no court is to construe the federal copyright monopoly as inhibiting that freedom.¹⁵¹

Real-time dissemination of professional sports scores and statistics is no exception. For instance, there are prohibitive economic costs associated with the production of a NBA game. The NBA takes advantage of the fact that it has invested the appropriate resources into creating a professional basketball league and is the sole producer of all league games. Moreover, the NBA is in the business of exploiting its investment to the extent that the market will bear. The fact that real-time professional score updates is a valuable commodity is not something new, and certainly the NBA has made moves to capitalize on this information product. This is clear from its licensing of live television and radio broadcast rights and also, to a lesser extent, from its plans commercially to introduce the Gamestats paging device, which was in development at the time of the litigation of *NBA II*.¹⁵²

Real-time securities data services and information products are analogous to the type of information product at issue in *NBA II*. The Second Circuit in *NBA II* ruled that real-time sports scores were left naked for appropriation by second comers who could use the information created by the NBA as long as the second comer targeted a different market than that of the NBA's primary market. Therefore, if a second comer appropriates real-time securities data from the original provider, he will escape liability by targeting a different market segment than that of the original data provider. If second comers can successfully escape liability by retargeting their market audience, then such result raises serious questions as to whether an original information provider enjoys sufficient incentives to generate new information products.

¹⁵⁰ See generally Sease, *supra* note 29, at 807-08.

¹⁵¹ See generally Ginsburg, *No 'Sweat'*, *supra* note 124, at 339-41 (citing *Feist v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)).

¹⁵² See *NBA II*, 105 F.3d 841, 853 (2d Cir. 1997). The Second Circuit recognized that the NBA's Gamestats product provides information similar to that available through the SportsTrax product. The Gamestats product "provides official play-by-play game sheets and half-time and final box scores within each arena," and "[i]n the future, the NBA plans to enhance Gamestats so that it will be networked between the various arenas and will support a pager product analogous to SportsTrax. SportsTrax will of course directly compete with an enhanced Gamestats." *Id.*

This Comment takes the position that, in the face of growing judicial resistance to the misappropriation doctrine, Congress must move authoritatively in the direction of protecting works of information property. Only a rudimentary understanding of the capabilities of digital technologies is needed to realize the "vulnerabilities of publicly distributed electronic information to market-destructive appropriations."¹⁵³ Without a legislative directive from Congress extending some kind of protection to works of value that are not covered by the current intellectual property paradigm, the creators of valuable information property are faced with the unwelcome possibility that anyone can acquire a significant competitive advantage by extracting an originator's unprotected information and selling a competitive product. The logical result of the free-copying policy will no doubt reduce incentives to invest in the creation of works of true economic value that fall outside the clear ambit of intellectual property protection.¹⁵⁴

Real-time securities information enjoys enormous demand and economic value in the marketplace. In fact, recent reports point out that over \$6.5 billion is spent annually to keep the computer terminals of busy brokerage houses "plugged in" to the stock exchange servers which provide up-to-the-second prices and other data concerning stocks, bond equity and commodities prices, as well as currency values.¹⁵⁵ However, the information generated, namely the raw market data, does not meet the "originality" requirement of the U.S. Constitution,¹⁵⁶ much less the "structure, sequence and organization" test of the Copyright Act of 1976.¹⁵⁷ Because this valuable information is currently not protected by federal law, Congress must move decisively to prevent further exposure of valuable information products to uncompensated proliferation.

Consider the federal law relating to copyright. If the law, despite its constitutional purpose of promoting the progress of knowledge,¹⁵⁸ can no longer ensure adequate incentives to information

¹⁵³ Reichman and Samuelson, *supra* note 37, at 66.

¹⁵⁴ See Ginsburg, *No 'Sweat'*, *supra* note 124, at 353.

¹⁵⁵ See Kurt Eichenwald, *Memos Said to Detail Reuters Effort to Obtain Bloomberg Data*, N.Y. TIMES, Feb. 2, 1998, at D1; see also Brooks, *Rights*, *supra* note 123, at 9-10.

¹⁵⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁵⁷ Section 101 of the Copyright Act of 1976 defines a "compilation" as a "work formed by the collection and assembling of . . . data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. 101 § (1994).

¹⁵⁸ See Cook, *supra* note 3, at 59.

gathering, then it is necessary to inquire into the possibility of effective state law remedies designed to promote similar incentives. Part I of this Comment illustrated that state law misappropriation doctrines had at one time supplied a viable remedy against infringement. However, following the Second Circuit's determination in *NBA II*, federal preemption doctrine now serves to nullify most state misappropriation claims.

An examination of legislative history suggests that Congress intentionally moved to supplant the majority of state law claims that may have existed prior to the Copyright Act. For instance, the House Report to the 1976 Act states "[a]s long as a work fits within one of the general [copyright] subject matter categories . . . the [Copyright Act] prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in creativity to qualify."¹⁵⁹

Despite the above, legislative history further reveals Congress' intention to tolerate *certain* kinds of state law protection of information. The House Report to the Copyright Act goes on to state:

[S]tate 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*, or in the newer form of data updates from scientific, business, or financial databases. Likewise, a person having no trust or other relationship with the proprietor of a computerized database should not be immunized from sanctions against electronically or cryptographically breaching the proprietor's security arrangements and accessing the proprietor's data The proprietor of data displayed on the cathode ray tube of a computer terminal should be afforded protection against unauthorized printouts by third parties (with or without improper access), even if the data are not copyrightable.¹⁶⁰

This extract from the House report clearly suggests that Congress recognized the need for some type of state law protection for works of information falling outside the subject matter of copyright despite section 102(b) of the Copyright Act which supports the congressional free-copying policy.

Professor Jane C. Ginsburg has argued that when the judiciary issues general statements pointing to constitutional limitations in the area of protection of disclosed information products, these invo-

¹⁵⁹ H.R. REP. NO. 1476, at 131 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659, 5747.

¹⁶⁰ H.R. REP. NO. 1476, at 132, *reprinted* in 1976 U.S.C.C.A.N. 5748.

cations sharply reduce the debate regarding the availability and the scope of copyright protection for works of information.¹⁶¹ In fact, such statements serve to "augment the uncertainties concerning both the availability of state law protection and the authority of Congress to enact other forms of federal anticopying protection for these kinds of works."¹⁶² The real question then is how a statute might be drafted that will not only supply incentives to information gatherers but also protect the public interest in access to information. A properly drafted statute must also survive First Amendment scrutiny.¹⁶³

A. A Statute Under The Authority of The Interstate Commerce Clause¹⁶⁴

Professor Ginsburg makes the logical and cogent argument that the monopoly granted to authors and inventors by constitutional mandate clearly implicates interstate commerce. Therefore, it is possible to "assert that copyrights and patents could be legislated under the Commerce Clause as well as under the more specific grant of authority."¹⁶⁵ Professor Ginsburg concedes that Congress

¹⁶¹ See Ginsburg, *No 'Sweat'*, *supra* note 124, at 339 ("The . . . Court's sweeping declarations of constitutional limitations on Congress' copyright power put in issue the respective roles of the Court and Congress in defining not only the contours and key terms of copyright law, but also the scope of Congress' authority to provide for intellectual property protection under other constitutional sources of legislative power.").

¹⁶² Ginsburg, *No 'Sweat'*, *supra* note 124, at 339.

¹⁶³ See Alan J. Hartnick, "Unresolved First Amendment Issues In *Motorola Case*," N.Y.L.J., Oct. 17, 1997 at 5. Professor Hartnick questions whether an *INS* misappropriation injunction could be reconciled with modern concepts of the First Amendment. ("*International News Service v. Associated Press (INS)* was decided in 1918 before the notion that restrictions on speech by virtue of the First Amendment must be extremely narrow."); see also *Nothing But Internet*, 110 HARV. L. REV. 1143, 1155-60 (1997) (arguing that First Amendment concerns provide the strongest constitutional limit on the claim that sports leagues may assert in real-time game information). *But cf.* Ginsburg, *No 'Sweat'*, *supra* note 124, at 385-87 (arguing that proprietary interests in information can be supported without undue incursion on free speech interests as long as the protection granted by the proposed statute be limited to claims against commercial copying by other compilers and access to the information is assured through compulsory or voluntary licensing).

¹⁶⁴ See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have . . . [p]ower to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

¹⁶⁵ Ginsburg, *No 'Sweat'*, *supra* note 124, at 369. The text of article I, section 8, of the Constitution authorizes Congress both to "promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to

may not have the power to supplant constitutional limitations by adopting a form of statutory protection of uncopyrightable information under the Commerce Clause that is coextensive with copyright protection.¹⁶⁶ However, there is a strong argument that Congress has the power to enact a misappropriation statute under the Commerce Clause "if the statute sets forth a scheme of protection qualitatively different from a copyright regime".¹⁶⁷

The central issue to be resolved before this approach is adopted is whether Congress or the judiciary has the power to implement the terms of the patent and copyright clause. The strongly worded decisions being handed down from all levels of our nation's courts seem to indicate that the judiciary has taken the most active role in interpreting the purview of the constitutional intellectual property scheme.¹⁶⁸ However, the judiciary's forceful approach toward interpretation of the patent and copyright clause does not preclude congressional competence to be actively exerted in this area.¹⁶⁹ As Professor Ginsburg points out, Congress should have ample discretion in accomplishing its constitutional mandate of promoting the "progress of science."¹⁷⁰ Moreover, Congress' determination of which work products constitute the "writings of authors" should be treated as an exercise of fact-finding by the "body most competent

their respective Writings and Discoveries," and to "regulate Commerce . . . among the several States." U.S. CONST. art. 1, § 8. Professor Ginsburg points out in a footnote that the Semiconductor Chip Protection Act, 17 U.S.C. §§ 900-914 (1988), was enacted under both the patent and copyright clause and the Commerce Clause. *Ginsburg, 'No Sweat', supra* note 124, 388 n.146.

¹⁶⁶ See *Ginsburg, No 'Sweat', supra* note 124, at 371. Professor Ginsburg points to the Lanham Trademarks Act, 15 U.S.C. § 1051(a) (1988), as a pertinent analogy. The Lanham Act provides for the registration and protection of trademarks "used in commerce." See 15 U.S.C. § 1127 (1995) ("The word 'commerce' means all commerce which may be lawfully regulated by Congress.").

¹⁶⁷ *Ginsburg, No 'Sweat', supra* note 124, at 370-71.

¹⁶⁸ See e.g., *Feist Publications, Inc. v. Rural Tele. Serv., Co.*, 499 U.S. 340 (1991); *NBA II*, 105 F.3d 841 (2d Cir. 1997).

¹⁶⁹ See *Ginsburg, No 'Sweat', supra* note 124, at 375 (stating that Congress does not have the authority to interpret those portions of the Constitution that do not relate to the separation of powers or individual rights).

¹⁷⁰ See *Ginsburg, No 'Sweat', supra* note 124, at 375 (citing U.S. CONST. art. I, § 8, cl. 8; accord *Sony Corp. of Am., v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly . . . in order to give the public the appropriate access . . ."); cf. *South Dakota v. Dole*, Secretary of Transp., 483 U.S. 203, 207 (1987) (in exercise of Congress' Article I, Section 8 spending power, Supreme Court defers to Congress' determination of what constitutes "the general welfare").

to evaluate the efficacy of the means chosen to promote the constitutional goal."¹⁷¹ Therefore, any "Supreme Court review of these kinds of congressional findings should be extremely deferential."¹⁷²

The Lanham Act, which codifies certain unfair competition laws, serves as a useful analogy for the type of law that Professor Ginsburg advocates. For example, the purpose of the Lanham Act, which addresses trademark law, is to protect distinctive words and symbols against copying.¹⁷³ More importantly, the purpose behind preventing such copying or imitation of another proprietor's trademark is to limit marketplace confusion as to the source or origin of particular goods or services.¹⁷⁴ Therefore, because the Lanham Act is not substantively equivalent to copyright or patent protection, it is possible to argue that the Lanham Act is dependent upon the Commerce Clause. This prevents the Lanham Act from running into conflict with patent and copyright clause limitations since "federal trademark law governs conduct different from that at issue in patent and copyright laws."¹⁷⁵

Congress could follow the same technique used to pass the Lanham Act and adopt a statute that links wrongful misappropriation with the Commerce Clause.¹⁷⁶ As long as legitimate departures are made from the copyright model, such as differences in the scope of protection and duration of protection, the statute would presumably survive preemption from not only article I, section 8 of the Constitution but also from the Copyright Act of 1976.¹⁷⁷ Moreover, Con-

¹⁷¹ Ginsburg, *No 'Sweat'*, *supra* note 124, at 375.

¹⁷² Ginsburg, *No 'Sweat'*, *supra* note 124, at 375-76 ("In the context of the Patent-Copyright Clause, the [Supreme] Court earlier announced considerable deference to congressional definition of the content and scope of the limited monopoly, stating, for example, '[t]he direction of Art[icle] I is that Congress shall have the power to promote the progress of science and useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can only come from Congress.'") (citing to *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972)); accord *Sony Corp. of Am.*, 464 U.S. at 429-31.

¹⁷³ See generally GORMAN & GINSBURG, *supra* note 16, at 65-66.

¹⁷⁴ See 15 U.S.C. §§ 1114, 1125(a) (1995); see also GORMAN AND GINSBURG, *supra* note 16, at 65 ("[A trademark] is a symbol that represents the reputation or goodwill of the manufacturer or provider, and signifies the quality of its goods or services.").

¹⁷⁵ Ginsburg, *No 'Sweat'*, *supra* note 124, at 371.

¹⁷⁶ See Ginsburg, *No 'Sweat'*, *supra* note 124, at 371 ("By the same token, one may argue that a Commerce Clause-derived statute barring misappropriation of . . . information would not conflict with the Patent-Copyright Clause as long as the protective law departs in significant ways from the copyright model.").

¹⁷⁷ See Ginsburg, *No 'Sweat'*, *supra* note 124, at 371-372. Professor Ginsburg points

gress could approach a new federal misappropriation statute by affording more, rather than less, protection than the rights that arise under the Copyright Act.¹⁷⁸ "For example, if the statute protected not only against copying information, but against remanipulating information into a different arrangement or selection, one might emphasize the distinction in acts rendered illicit by the copyright law and by a special [information protection] statute legislated under the Commerce Clause."¹⁷⁹ These proposed changes from the current copyright scheme might allow a misappropriation statute to survive federal preemption.

B. A Statute Adopting a Modified Liability Regime

Another legislative strategy might be to adopt a modified liability approach. Some commentators would like to see a new intellectual property regime that would provide those who create information products with enough artificial lead time to overcome market failure. This would be accomplished by introducing a paradigm that incorporates a choice of users' liability fees that properly allocates contributions to the costs of research and development among those users who require the information.¹⁸⁰ The users' liability fee approach would be coupled with a set of ground rules that would enable second comers, users, and original information providers to take collective action to modify and enforce the liability framework eventually adopted.¹⁸¹

out that the duration of statutory protection of information could be made considerably shorter than copyright protection, which lasts for the life of the author plus fifty years. *Id.* at 372. Further, "the scope of protection might be limited by the imposition of compulsory licenses," which would heighten "the dissimilarities between the proposed . . . information protection statute and the copyright model of 'exclusive Right[s]'.*" Id.*

¹⁷⁸ Ginsburg, *No 'Sweat'*, *supra* note 124, at 372.

¹⁷⁹ Ginsburg, *No 'Sweat'*, *supra* note 124, at 372-373. Under any proposed statute, liability would arise from copying information, regardless of whether or not the copied elements of the information are sufficiently original and creative in selection or arrangement. In this sense the proposed statute would not apply to material covered by the copyright law. See Ginsburg, *No 'Sweat'*, *supra* note 124 at 373. ("If there is no overlap in regulated conduct, perhaps the two regimes would not clash, and there would be no intra-Article I conflict.")

¹⁸⁰ See generally Reichman and Samuelson, *supra* note 37, at 145-51.

¹⁸¹ See Reichman and Samuelson, *supra* note 37, at 145; see also *id.* at 147 (recognizing that the menu of user options would need to be "vetted by the industry with user and government inputs.")

One of the mechanisms that would have to be incorporated into this approach is a "blocking period" made available to the original information product provider during which no second comer could appropriate either the whole of the contents or any component part substantial enough to represent a sufficient threat of market failure.¹⁸² This blocking period would allow the original information product provider to charge what the market will bear, "subject to public interest limitations favoring science and education."¹⁸³ However, any new regime incorporating such a mechanism must ensure that the blocking period not be so long as to prevent legitimate access to the information (a recognized public interest supported by this Comment), but on the other hand not be so short as to erect significant entry barriers to the market.¹⁸⁴

The second mechanism to be incorporated into this approach would consist of an automatic license that would be available to second comers after the initial blocking period expired.¹⁸⁵ A well-crafted, modified liability regime would oblige the original information product provider to license the data on fair and nondiscriminatory terms.¹⁸⁶ The automatic license would entitle second comers to extract or use the data at issue for any purpose, including direct competition with the original information product provider, in return for payment of reasonable compensation according to the menu of user liability options selected.¹⁸⁷

This proposed modified liability regime has been analogized to section 115 of the Copyright Act of 1976.¹⁸⁸ This section supplies a compulsory license for the use of musical works on phonorecords following their first recording.¹⁸⁹ This section also itemizes approx-

¹⁸² See Reichman and Samuelson, *supra* note 37, at 145-46.

¹⁸³ See Reichman and Samuelson, *supra* note 37, at 146.

¹⁸⁴ See Reichman and Samuelson, *supra* note 37, at 147-48 ("Because the goal of a modified liability regime is to provide artificial lead time while precluding opportunities for rent-seeking, it is preferable to adopt short rather than long blocking periods Assessing the optimum length of these periods requires further empirical and theoretical analysis, . . . and there would be no opportunity to perpetuate protection of pre-existing data.").

¹⁸⁵ See Reichman and Samuelson, *supra* note 37, at 148 (arguing that "a built-in automatic license is ideally suited to weak regimes seeking no more than a minimalist, pro-competitive cure for chronically insufficient lead time.").

¹⁸⁶ See Reichman and Samuelson, *supra* note 37, at 146.

¹⁸⁷ See Reichman and Samuelson, *supra* note 37, at 147.

¹⁸⁸ 17 U.S.C. § 115 (1995).

¹⁸⁹ See 17 U.S.C. § 115(a)(1) (1995) ("When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the

imately twenty involuntary licenses available as a result of industry negotiation.¹⁹⁰ The presence of this industry-negotiated base line allows collection societies to administer voluntary licenses for the recording of musical works.¹⁹¹

A full discussion of modified liability principles exceeds the scope of this Comment. Of Course, if Congress were to enact a statute which would allow similar types of collection societies to administer compulsory licenses for information products and services, the base line prices and rules would have to be negotiated by all parties affected by the statute.¹⁹² According to authors J.H. Reichman and Pamela Samuelson, the statute need do little more than remove any antitrust barrier that stands in the way of forming a collection society and establish a role for government representation within the society.¹⁹³ Meaningful bargaining will result as long as all parties realize that the original information provider will not be able to prevent second comers from using the information product after the initial blocking period has expired, and second comers will not be able to use the whole or a substantial part of the information product without contributing a reasonable royalty to the originator's costs of compilation and dissemination.¹⁹⁴ Working within this framework, user liability fees can be expected to realistically reflect market conditions since all parties are at the negotiating table bargaining out their respective needs.¹⁹⁵

A statute adopting the modified liability approach as outlined above may be a better choice than the Commerce Clause-based statute barring misappropriation of uncopyrightable information discussed *supra* because the modified liability approach already has a proven track record.¹⁹⁶

copyright owner, any other person may by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.").

¹⁹⁰ See Reichman and Samuelson, *supra* note 37, at 148.

¹⁹¹ See Reichman and Samuelson, *supra* note 37, at 148 (citing 17 U.S.C. § 115 (a)(1), *supra* note 189).

¹⁹² See Reichman and Samuelson, *supra* note 37, at 149 ("The task, therefore, is to bring the different constituent groups to an ongoing bargaining session within the framework of a collection society set up to implement the baseline rules of the modified liability regime.").

¹⁹³ See Reichman and Samuelson, *supra* note 37, at 149.

¹⁹⁴ See Reichman and Samuelson, *supra* note 37, at 150.

¹⁹⁵ See Reichman and Samuelson, *supra* note 37, at 150 ("The framework outlined above also lends itself to the socially important goal of stimulating value-adding uses of protected data without depriving compilers of a fair return on their investment.").

¹⁹⁶ For example, the Harry Fox Agency, the American Society of Composers, Authors

CONCLUSION

Under current federal copyright law certain information products are exposed to the risk of out-and-out copying by second comers because the traditional copyright paradigm simply does not protect these types of works. In light of this fact, several individual states moved affirmatively to protect information products authored by its citizens. Such affirmative action took the form of commercial misappropriation statutes designed and adopted to prevent unauthorized borrowing of works which, for various reasons, did not qualify for protection under the federal copyright law.

However, the Second Circuit in *NBA II* moved in the opposite direction. In fact, the Second Circuit's decision narrowed the role of state-created misappropriation statutes to the point at which these laws can rarely be relied upon again to protect information products. The court's imposition of a new, more stringent extra element test requiring that not one but three separate extra elements be alleged and proven for a hot news claim to survive preemption by the federal copyright law is a giant step backwards and serves to further weaken judicial protection of real-time information products. The result of the Second Circuit's decision risks eliminating, or at least sharply reducing, the incentives that real-time information product providers rely on when entering the market. Without limited but definite protection, such information products run the risk of being chronically under-produced.

Important policy considerations exist that mandate careful consideration before the next judicial foray into state intellectual property law. For instance, recent commentators suggest, and few would disagree, that the "information revolution" will serve as the rocket fuel for the United States' post-industrial economy.¹⁹⁷ Without adequate means to protect the products generated by the information revolution, the very back bone of the nation's economy is at considerable risk.

and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") are private entities that operate as collection societies to administer the issuance of blanket licenses and to distribute royalties on behalf of member copyright owners, based on an industry negotiated standard. See Reichman and Samuelson, *supra* note 37, at 148; see also *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 5 (1979).

¹⁹⁷ See Thurow, *supra* note 1, at 96-97.

Clearly, the onus is on Congress to prevent such risk from materializing. Congress should move to enact a carefully tailored federal anticopying statute that would incorporate some form of compulsory or voluntary collective licensing. This intellectual property paradigm would best address all of the competing interests involved. For example, this new model would ensure that the original compiler has had a sufficient time window to exploit the information product to the fullest extent that the market will bear. Balanced against the information compiler's interest would be the right of public access to the information, which would be guaranteed by the imposition of a compulsory license provision that would ensure that the information is distributed fairly and without discrimination to the general public. This new intellectual property paradigm, if enacted, has the potential to successfully and reasonably balance all competing interests, making the future prospects for protection of real-time information a present-day reality.

Louis Klein

