
INTELLECTUAL PROPERTY

HOT NEWS: THE “HOT-NEWS” DOCTRINE IS HOT AGAIN! OR IS IT?

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Copyright law, like contract law, is deceptively complex. Just as the familiar elements of offer, acceptance, and consideration can give rise to endless disputes not easily resolved, the seemingly simple notion that an author has a time-limited monopoly on rights to a particular work of authorship gives rise to many questions. Given constantly-changing technology for fixing works of original expression in tangible media, ever-evolving means of copying and piracy, and repeated revisions to U.S. copyright law, both the courts and creators have had a difficult time understanding core concepts and keeping up with how the law is applied. Nowhere is this difficulty more apparent than in the Second Circuit’s attempts to keep the law of copyright straight in the area of “hot news.”

A fundamental concept of United States copyright law today is that although original expressions of ideas fixed in tangible media are copyrightable, both the ideas and the facts themselves are not.¹ Thus one may copyright a play, a song, a telephone directory, or a map, but one may not copyright words themselves, musical notes, the names in the phone book, or the jurisdictional boundaries or rivers shown on the map, each of which anyone is free to use. (The express purpose of copyright law, after all, as embodied in the Constitution’s Copyright Clause, is to promote the progress of “Science,” meaning knowledge.²)

In the same way, a newspaper, website, or blog can copyright a story (its particular original expression recounting the facts of, and opinion regarding, an event), but it can never copyright the events depicted in that story nor prevent someone else from reporting those facts—or can it? Under the “hot-news” doctrine, as it has become known, a narrow exemption for protection of certain facts may still exist, at least in the Second Circuit.

International News Service v. Associated Press

The United States Supreme Court first formulated the “hot-news” doctrine in 1918 in *International News Service v. Associated Press*.³ At that time, of course, the current Copyright Act had not yet been enacted, and the 1909 Act was still in effect. Neither radio nor television effectively existed, and the most immediate means of communication was by wire. The Associated Press (“AP”) and the International News Service (“INS”) then competed in the “wire services” market and independently employed journalists to cover news events and to generate news articles based on those events, which they then supplied to affiliated newspapers throughout the country.

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Seeing an opportunity to decrease its reporting costs and thereby increase profits, the INS began republishing and presenting as its own—without attribution—information and facts obtained from news articles that AP had originally created. AP then sued INS, seeking to enjoin its copying activities. On appeal, the United States Supreme Court found in favor of AP and granted AP’s request for an injunction. Although the Supreme Court recognized that AP’s news reports—particularly the facts reported—represented the “history of the day” and therefore were not copyrightable, the Court nonetheless found that because of the cost, skill, labor, and money involved in reporting and generating news, particularly news of the time-sensitive nature (“hot-news”), AP maintained a “quasi-property” right in its reports.⁴

To safeguard this “quasi-property” right, the Court created the “hot-news” doctrine, applicable to cases in which one party used its labor, skill, and money to follow and to report time-sensitive news. This doctrine, the Court observed, would prevent competitors “from reaping the fruits of the complainant’s efforts and expenditures” and thereby provide an incentive for parties to collect “hot-news” (in much the same way, without the Court noting it, that the Copyright Clause is intended to promote the growth of knowledge).⁵

Applying the newly-created doctrine to the facts at hand, the Court found that INS’s unpaid use of economically valuable and time-sensitive news constituted unlawful misappropriation of AP’s quasi-property. To hold otherwise, said the Court, would “essentially divert profits away from those (AP) who earn or properly deserve them and toward those (INS) who did not.”⁶ This holding, not explicitly grounded in copyright law, was essentially equitable in nature and emphasized the property rights aspect of copyright protection, effectively protecting what the Court would later, in *Feist Publications Inc. v. Rural Telephone Service Co.*, characterize as mere “sweat of the brow.”⁷

The 1976 Federal Copyright Act

Between 1918, when the Supreme Court decided *INS*, and 1976, when Congress passed the first significant revision to the Federal Copyright Act since 1909, the Federal Copyright Act did not expressly preempt state law misappropriation claims that were often based, at least loosely, on *INS*. By enacting the 1976 Copyright Act,⁸ however, Congress included a two-part test to determine whether the Copyright Act preempts a state-law claim.⁹

According to the new Section 301, U.S. copyright law preempts a state-law claim (i) if the claim “seeks to vindicate ‘legal or equitable rights that are equivalent’ to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. §106”¹⁰ (commonly known as the “general scope requirement”); and (2) “if the work in question is of the type of works protected by the Copyright Act under 17 U.S.C. §§102 and 103”¹¹ (commonly known as the “subject

matter requirement”).¹² At first glance, Section 301 would seem to preempt all state law misappropriation claims. If one accepts the legitimacy of legislative history, however,¹³ then the background of the 1976 Act suggests a general desire that “hot-news *INS*-like claims [survive] preemption.”¹⁴ The scope and breadth of such an exception nonetheless remain unclear, even within the Second Circuit.

Computer Associates Intern., Inc. v. Altai Inc.

In the years following the 1976 Act, the Second Circuit in particular has attempted to put teeth into the legislative history by developing an “extra element” exception to preemption. In *Computer Associates Intern., Inc. v. Altai Inc.*, it found:

if an “extra element” is “required instead of or in addition to the acts of reproduction, performance, distribution or display [four of the copyright rights granted by the 1976 Copyright Act] 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.”¹⁵

At the same time, the Second Circuit in *Altai* expressed reservations about applying the test overly broadly: the “extra element test should not be applied so as to allow state claims to survive preemption easily.”¹⁶ Other than indicating that some but not all misappropriation claims could survive preemption, however, *Altai* provided no specific guidance concerning the breadth or application of the exception.

National Basketball Association v. Motorola, Inc.

More than fifty years after the “hot-news” doctrine was first established and five years after *Altai*, the Second Circuit considered, in *National Basketball Association v. Motorola, Inc.*,¹⁷ (1) the extent to which a state-law “hot-news” misappropriation claim based on *INS* involves “extra elements” and thus survives preemption, and (2) the breadth of any surviving “hot-news” misappropriation cause of action.

Factual Background and Procedural History

At issue in *NBA* was whether the “real-time” transmission of National Basketball Association (“NBA”) scores and information tabulated from in-progress television and radio broadcasts of NBA games to a sports pager constituted an unlawful misappropriation of *INS*-type “hot-news.” The case largely centered on the Sportstrax handheld pager, manufactured and sold by Motorola and operated by Sports Team Analysis and Tracking Systems (“STATS”). The Sportstrax pager was designed to provide users with up-to-date “real time” information—*i.e.*, score, possession, quarter, time—for in-progress NBA games. STATS employed a team of reporters to collect this information, either by watching NBA games on television or listening to them on the radio, and to transmit it to STAT’s central computer, which would then compile, analyze, and format the relevant data for transmission to and display on the Sportstrax pager.

The NBA then sued Motorola and STATS, alleging that both parties had misappropriated time-sensitive NBA game information. Accordingly, the NBA sought to enjoin Motorola and STATS from selling and operating the Sportstrax pager. The district court found for the NBA on these grounds and granted the NBA’s request for a permanent injunction

against Motorola and STATS. On appeal, the Second Circuit found (1) that a narrow “hot-news” exception does survive federal preemption under the Copyright Act, but (2) that by transmitting NBA game information Motorola and STATS had not unlawfully misappropriated “hot-news” property belonging to the NBA.¹⁸

Federal Preemption

Using the two-part preemption test of Copyright Act Section 301, the Second Circuit found that federal law did not preempt the NBA’s misappropriation claim. Turning first to the “subject matter requirement,” the court noted that although the essence of the NBA’s claim involved NBA basketball games and facts associated with those games—both of which are uncopyrightable on their own—because the games and facts about those games were taken from a copyrighted NBA broadcast, the subject matter of the NBA’s claim initially “[f]ell within the ambit of copyright protection.”¹⁹ Accordingly, the court concluded that the NBA’s claim satisfied the second part of the preemption test, that of subject matter traditionally covered by copyright.

The court next addressed the “general scope” requirement of the Section 301 test. Recognizing that the NBA’s claim for tortious behavior involved reproducing, distributing, and displaying facts taken from copyrighted broadcasts—each of which was consistent with the exclusive rights normally protected by federal copyright law—the court concluded that the NBA’s claim also satisfied the general scope requirement for preemption.

Finding the two-prong preemption test satisfied, the court could have looked to the rule that copyright law does not protect facts, including such “data and information” as basketball scores, even quarter-by-quarter or minute-by-minute, to decide the preemption question. Instead, the court then turned its attention to the “extra element” exception to preemption it had proffered in *Altai*. In doing so, the court observed that a hot-news misappropriation claim is “not the equivalent of exclusive rights under a copyright,” because misappropriation claims, for example, allegedly involve factors that are not considered central, much less peripheral, to a claim for copyright infringement, such as free-riding by a defendant.²⁰ Accordingly, the court held that a narrow “hot-news” misappropriation claim involves the extra elements necessary to survive preemption.²¹

But this explanation is problematic for at least two reasons. The first is that the Second Circuit’s finding that a hot-news misappropriation claim is “not the equivalent” of exclusive copyright rights contradicts its finding that the NBA’s claim sought to vindicate “legal or equitable rights that are equivalent” to one or more of the exclusive rights protected by copyright law under Section 106 (the “general scope requirement”). Second, protection against “free-riding” by a defendant on a plaintiff’s fact-gathering and assimilation is part of what the U.S. Supreme Court rejected in repudiating the “sweat of the brow” requirement in *Feist*. To allow such a state law misappropriation claim on the grounds that copyright law does not preempt it after first having found that the claim is preempted by copyright law disregards *Feist*.

“Hot-News” Unlawful Misappropriation Claim

Using *INS* as a guidepost (a 1918 case that the 1976 Copyright Act and *Feist* would seemingly have overturned), the Second Circuit turned next to the breadth of surviving “hot-news” claims and concocted a five-part test for an *INS*-like “hot-news” claim to succeed:

- (i) the plaintiff must generate or collect information at some cost or expense;
- (ii) the value of the information must be highly time-sensitive;
- (iii) the defendant’s use of the information must constitute free-riding on the plaintiff’s efforts to generate or to collect it;
- (iv) the defendant’s use of the information must directly compete with a product or service that the plaintiff offers;²² and
- (v) the ability of other parties to free-ride on plaintiff’s efforts would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.²³

Analysis

In creating this test, the Second Circuit seems not only to have usurped the role of the legislature in an effort to fashion its own common law of copyright but also to have ignored the Supreme Court’s *Feist* decision. Nonetheless, the court in turn applied this test to the NBA’s misappropriation claim, placing particular emphasis on elements (ii), (iv), and (v). At the outset, the court conceded that both elements (ii) and (iv) were likely met, because the information transmitted to Sportstrax, although not done in full real-time, was “nevertheless time-sensitive,” and Sportstrax was a direct competitor of the NBA’s “Gamestats” product, a service that provides play-by-play logs and box scores for each game.²⁴ The court thus turned its focus to whether the operations behind the Sportstrax product constituted “free-riding” on the NBA’s three main products: (1) generating relevant information by playing the games; (2) transmitting those games, in real-time, via copyrighted broadcasts; and (3) collecting and retransmitting facts and information for those games.

Here, the court found that Sportstrax did not have any competitive effect on the NBA’s first two products because there “is no evidence that anyone regards Sportstrax . . . as a substitute for attending NBA games or watching them on television.”²⁵ As to the third product—collecting and retransmitting facts and information—the court found that Motorola and STATS had expended their own resources (both money and time) to collect factual information generated from NBA games and to upload that information to their own network (the Sportstrax database) for eventual transmission to Sportstrax handheld pagers. (As an aside, the court did note that if STATS and Motorola were, at some point in the future, to collect facts and information from the NBA’s Gamestats product and transmit it to their Sportstrax network and pagers, this would constitute free riding.) Without evidence of such activity, however, the court concluded that Motorola and STATS had not engaged

in unlawful misappropriation of any “hot-news” that the NBA has generated.

All of this discussion, however, seems superfluous. If sufficiently original, performances, broadcasts, and the arrangement of collected facts may be copyrighted,²⁶ so as the Second Circuit’s analysis conceded by seeking an exception in the first place, all three of the NBA’s “products” at issue in *NBA* are at least potentially subject to copyright protection. Therefore, under a straightforward application of the 1976 Copyright Act—without importing any *INS*-inspired exceptions dating back to World War I—the results of *NBA* should have been the same. As the Second Circuit itself stated, Motorola and STATS plainly did not compete with the NBA in either performing, recording, or broadcasting the games, and at least since *Feist*—but under any plain understanding of the purpose and intent of the Copyright Clause—the NBA could not plausibly claim copyright in such reportable facts as the names of the players (which the NBA did not originate); which players scored, fouled out, or blocked shots; or what the score was at any given point in the game. Thus, all of *NBA*’s ruminations about a five-point “test” to determine whether a “sweat-of-the-brow” misappropriation claim otherwise preempted by copyright law should nonetheless be “excepted” from preemption were logically unnecessary to the result—hence, dicta.

Barclays Capital Inc. v. Theflyonthewall.com, Inc.

Undaunted, almost fifteen years after *NBA*, the Second Circuit has once again considered the viability and breadth of a “hot-news” misappropriation claim in *Barclays Capital Inc. v. Theflyonthewall.com*.²⁷ At issue in that case was whether Theflyonthewall.com’s publication of recommendations by Barclays Capital, Merrill Lynch, Pierce, Fenner & Smith, and Morgan Stanley (collectively, “the Brokers”), constituted an unlawful misappropriation of “hot-news” belonging to the Brokers.

Factual Background

The Brokers are major financial institutions that provide brokerage recommendations regarding buying, holding, and/or selling securities of various companies. The Brokers prepare these recommendations following extensive (both expensive and time-consuming) research about those companies, the industries in which those companies compete, and the securities markets, then distribute them to institutional clients and prospective clients such as hedge funds, private equity firms, and wealthy investors. These recommendations purportedly provide recipients with an informational advantage over non-recipients, with the idea that the recipients will profit financially from this informational advantage and that the Brokers will, in turn, profit from commissions earned as a result of purchases or sales that the recipients execute based on these recommendations.

Theflyonthewall.com (“Fly”) is a news aggregator that, on a number of occasions and through various means, timely acquired the Brokers’ recommendations and distributed them through its website and third-party distributors to paid subscribers, including individual investors, institutional investors, brokers, and day traders. Like the Brokers, Fly aimed to distribute the acquired recommendations before the U.S. securities markets opened each day.

Procedural History and District Court Opinion

The Brokers sued Fly in the United States District Court for the Southern District of New York, alleging that Fly's unauthorized acquisition and publication of the Brokers' recommendations constituted unlawful "hot-news" misappropriation of the Brokers' property. In particular, the Brokers asserted that unauthorized publication of these recommendations threatened the Brokers' financial viability because clients and prospective clients would allegedly learn of the recommendations from sources other than the Brokers, thereby reducing the Brokers' abilities to derive commission income from the significant resources needed to create the recommendations in the first place.

The district court found for the Brokers on the grounds that their misappropriation claim was not preempted and that it satisfied the elements of the "hot-news" test set forth in *NBA*.²⁸ Applying the five-factor *NBA* test, the district court found that the first two elements (that the Brokers generated or collected information at some cost or expense and that the value of the information was highly time-sensitive, which Fly did not dispute) were easily met. Regarding the third factor—whether Fly's use of the information constituted free-riding on the Broker's efforts—the district court found that because Fly "does no equity research of its own, nor . . . undertakes any original reporting or analysis," it contributes "nothing to the actual [r]ecommendations" provided by the Brokers.²⁹ Fly's activities, in the district court's opinion, thus constituted "free-riding" on the Brokers' costly efforts to generate or to collect their recommendations.

In finding that the fourth factor was present—i.e., that Fly's use of the information directly competed with a product or service offered by the Brokers—the district court relied on the fact that Fly and the Brokers were both in the business of "disseminating [r]ecommendations to investors for their use in making investment decisions" and that both companies used "similar distribution channels."³⁰ With regard to the fifth factor—whether others' ability to free-ride on the Brokers' efforts would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened—the district court found that "common sense and the circumstantial evidence about the [Brokers'] business model" supported a finding that the Brokers would have a reduced incentive to continue generating their recommendations if Fly could legally retransmit them.³¹

Having concluded that the Brokers demonstrated a valid claim for "hot-news" misappropriation, the district court promptly permanently enjoined Fly from reporting the Brokers' recommendations for periods ranging from thirty minutes to several hours following their release by the Brokers, when the "news" would no longer be "hot."

Second Circuit—Majority Opinion

On appeal, the Second Circuit reversed the district court's judgment in favor of the Brokers, holding that the Copyright Act preempts the Brokers' "hot-news" misappropriation claim.³² Applying Section 301's two-part preemption test, the court found that the Brokers' recommendations satisfy both

the "subject matter" and the "general scope" requirements. Although the facts contained in the recommendations are, themselves, not copyrightable, the recommendations constitute a work "of a type covered by section 102," namely original works of authorship.³³ Likewise, the claim fulfilled the "general scope" requirement of Section 301 because Fly's acts of reproducing and distributing the Brokers' recommendations were of the type that "would infringe one of the exclusive rights' provided by federal copyright law," namely reproduction and distribution.³⁴

Turning next to the "extra elements" exception to preemption invented in *Altai* and explained in *NBA*, the court found a noticeable absence of any significant "extra elements" that would warrant finding the Brokers' claims not preempted. In particular, the court relied heavily on its finding that Fly was not "free-riding" on the Brokers' activities. Again, as in *NBA*, the court looked to *INS* for guidance. According to the *INS* court, "hot-news" and—more particularly—"free riding" are defined as "taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money . . . and appropriating it and selling it as defendant's own."³⁵ In contrast, the court found, once Fly obtained news of a recommendation, it did not sell that recommendation "as its own" but instead sold the information with "specific attribution" to the issuing broker.³⁶ Moreover, the court found, Fly was unlikely to profit or to gain from selling that information "as its own," because "it is not the identity of Fly" but rather the identity of the financial institution that lends credibility to the recommendation.³⁷

To support its finding that Fly had not engaged in "free riding," the court also drew parallels between the case at hand and the facts in *NBA*. Like *STATS* and *Motorola* in *NBA*, the court found, Fly "has its own network and assembles and transmit[s] data itself."³⁸ Moreover, much like the *SportsTrax* service in *NBA*, which "b[ore] its own costs of collecting factual information on NBA games," Fly's news service utilized a significant amount of its resources (fourteen of twenty-eight total employees) to collect the Brokers' recommendations.³⁹ As a result, the Second Circuit found that Fly's service was not the type of *INS*-like product "that could support a non-preempted cause of action for misappropriation."⁴⁰

But just as in *NBA*, the Second Circuit's discussion in *Flyonthewall* of exceptions to preemption seems wholly unnecessary. Having already found that the Brokers' recommendations satisfy both the "subject matter" and the "general scope" requirements of Section 301, the court could easily—and properly—have reached the same result directly under federal copyright law without having to wander off into thickets of exceptions and forests of five-part tests. Instead, the Second Circuit could readily have found that U.S. copyright law provided the exclusive remedy for the Brokers (the very meaning of "preemption") and that, under *Feist*, the Brokers' sweat of the brow in researching and assembling their recommendations did not protect either the underlying information (i.e., facts about the subject companies) or the recommendations themselves, which the court could have found lacked sufficient originality under *Feist*. Either way the result would be the same, without a lot of unnecessary—and arguably unconstitutional—exposition by the court.

Second Circuit—Concurring Opinion

Although ultimately concurring with the majority in favor of the Brokers, Judge Raggi wrote separately to express her disagreement with the majority's reasoning. Like her colleagues in the majority, Judge Raggi concluded that the Brokers' claims satisfied both the "subject matter" and "general scope" requirements of Section 301; in contrast, she criticized the majority for essentially treating the five-part test from *NBA* as nothing more than "dictum."

According to Judge Raggi, the majority improperly concluded that "*NBA* 'held' only that the facts presented could not establish a non-preempted 'hot news' claim," and thus dismissed the *NBA* test as "an unnecessary discussion of hypothetical circumstances giving rise to a 'hot news' claim"—hence, dictum that need not be followed.⁴¹ Instead, Judge Raggi noted, the Second Circuit in *NBA* was "required to determine the 'breadth' of the 'hot news' claim that survives preemption."⁴² In response, she said, the court "identified five factors required to state a non-preempted 'hot news' claim [the five-part *NBA* test], applied them to the facts presented, and concluded that the plaintiffs' claim failed."⁴³ Despite having her own reservations about the *NBA* test, therefore, Justice Raggi observed that because the *NBA* test was necessary to the *NBA* opinion, "it is not dictum," and thus should be applied to the facts at hand.⁴⁴

In applying that test to the facts at hand, Judge Raggi found that the Brokers' claim failed to satisfy the test and was therefore preempted. Although Judge Raggi disagreed with the majority (and agreed with the district court) that Fly's conduct was "strong evidence of free-riding . . . [because] Fly is usurping the substantial efforts and expenses of the [Brokers] to make a profit without expending any time or cost to conduct research of its own,"⁴⁵ she nonetheless found the Brokers' claim preempted based on a lack of direct competition between the Brokers' product and Fly's newsfeed containing the Brokers' recommendations.

Although the Brokers and Fly broadly share the overall goal of disseminating the Brokers' recommendations to clients and subscribers, Judge Raggi found, the Brokers and Fly do not compete directly with each other because (1) the Brokers do not collect or disseminate other Brokers' recommendations, whereas Fly collects and disseminates recommendations from over sixty-five different firms; and (2) the Brokers limit access to their recommendations and the underlying research to those clients that generate sufficient trading revenue, whereas Fly disseminates that "financial news' to anyone interested" and does not seek trading commissions of its own.⁴⁶ As a result, Judge Raggi reasoned, Fly's product was "sufficiently distinct from the [Brokers'] business model" that the Brokers and Fly did not directly compete with one another.⁴⁷ Finding the *NBA* test unmet, Judge Raggi concluded that the Copyright Act preempted the Brokers' misappropriation claim⁴⁸ and joined the majority in reversing the district court's judgment.

Conclusion

In our view, both the majority and the concurring judges have engaged in unnecessary analysis while reaching the right

result. Simply put, as the U.S. Supreme Court clarified in *Feist*, U.S. copyright law does not protect facts or ideas, no matter how carefully or cleverly arranged, but only the particular expression of those ideas if sufficiently original. Even giving credence to the dubious value of Section 301's "legislative history," it is difficult to envision a claim that (1) "seeks to vindicate 'legal or equitable rights that are equivalent' to one of the bundle of exclusive rights already protected" under Section 106⁴⁹ regarding (2) a "work . . . of the type of works protected" under Sections 102 and 103⁵⁰ and is not by those very terms preempted.

Although a cautious Congress may have acted wisely to ensure the possibility of future exceptions for hard cases it could not then envision, interpreting the statute as written, without grafting on court-made exceptions concerning which the Second Circuit cannot even agree—either over time or within its contemporaneous members—would have allowed the same judicial flexibility without the unnecessary machinations exhibited in the Second Circuit's opinions. (All it would take would be for a court to determine, on the facts of the hypothetical hard case before it, that the rights sought to be protected are not precisely equivalent to the rights that Section 106 already protects, or that the work is not "of the type . . . protected" under Sections 102 and 103.) Under our constitutional system of both delegated powers and separation of powers, such a process would be preferable to the continuing and unsatisfactory spectacle of panels of unelected judges creating federal common law on the validity and application of which they themselves apparently cannot even agree.

Endnotes

- 1 See *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).
- 2 U.S. CONST. art. I, § 8, cl. 8.
- 3 *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).
- 4 *Id.* at 234, 242.
- 5 *Id.* at 241.
- 6 *Id.* at 240.
- 7 See *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352, 359, 360 (1991) (The "sweat of the brow" doctrine refers to the "underlying notion that a copyright was a reward for the hard work that went into compiling facts. . . . [T]he 1976 revisions to the Copyright Act leave no doubt that originality, not "sweat of the brow," is the touchstone of copyright protection in directories and other fact-based works.").
- 8 1976 Copyright Act, 17 U.S.C. §§ 101-810, 18 U.S.C. § 2318, 44 U.S.C. §§ 505, 2113 (2010).
- 9 17 U.S.C. § 301.
- 10 17 U.S.C. § 106 (2010). The owner of the copyright is generally vested with the exclusive rights to "do and 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 motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

11 17 U.S.C. §§ 102-103 (2010). Sections 102 and 103 generally protect works of authorship, fixed in any tangible medium of expression, that fall into any one of 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 audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.*

12 17 U.S.C. § 301 (2010).

13 *See, e.g.*, *Zedner v. United States*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring in judgment) (“The use of legislative history is illegitimate and ill advised in the interpretation of any statute.”); *see also* *Conroy v. Aniskoff*, 507 U.S. 511, 518-528 (1993) (Scalia, J., concurring in judgment).

14 *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997); *see also* H.R. REP. NO. 94-1476, at 132 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5748 (“Misappropriation is not necessarily synonymous with copyright infringement . . . [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) constitution ‘hot news’); *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204, 208 (2d Cir. 1986) (“[M]isappropriation of hot news, under *INS*, is a branch of the unfair competition doctrine not preempted by the Copyright Act according to the House Report.”).

15 *Computer Assocs. Int’l, Inc. v. Altai Inc.*, 982 F.2d 693, 716 (2d Cir. 1992).

16 105 F.3d at 851 (citing *Altai*, 982 F.2d at 717). “An action will not be saved from preemption by elements such as awareness or intent, which alter the action’s scope but not its nature.” *Altai*, 982 F.2d at 717.

17 105 F.3d at 841.

18 *Id.*

19 105 F.3d at 848 (citing *Harper & Row, Inc. v. Nation Enter.*, 723 F.3d 195, 200 (1983), rev’d on other grounds, 471 U.S. 539 (1985)); *see also* 105 F.3d at 848-49 (“Although game broadcasts are copyrightable while the underlying games are not, the Copyright Act should be read to distinguish between the two when analyzing the preemption of a misappropriation claim based on copying or taking from the copyrightable work.”).

20 105 F.3d at 850.

21 *Id.* at 841.

22 Generally, this requires that the defendant’s use of the information results in direct competition in the plaintiffs’ primary, rather than collateral, market. *Id.* at 853.

23 *Id.*

24 *Id.*

25 *Id.*

26 *See* 17 U.S.C. § 106. The owner of the copyright is generally vested with the exclusive rights to “do and 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 motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

27 *Barclays Capital Inc. v. Theflyonthewall.com*, No. 10-1372-cv, 2011 WL 2437554 (2d Cir. June 20, 2011).

28 *Barclays Capital, Inc., v. Theflyonthewall.com*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010).

29 *Id.* at 336.

30 *Id.* at 339.

31 *Id.* at 343.

32 2011 WL 2437554, slip op. at *1.

33 *Id.* at *13 (citing 17 U.S.C. § 301 (2010)).

34 *Id.*

35 *Id.* at *22 (citing *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918)).

36 2011 WL 2437554, slip op. at *22.

37 *Id.*

38 *Id.* at *20.

39 *Id.* at *21 (citing *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 854 (2d Cir. 1997)).

40 2011 WL 2437554, slip op. at *24.

41 *Id.* at *29 (Raggi, J., concurring).

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at *31.

46 *Id.*

47 *Id.* at *32.

48 *Id.*

49 17 U.S.C. § 106 (2010).

50 17 U.S.C. §§ 102-103 (2010). Sections 102 and 103 generally protect works of authorship, fixed in any tangible medium of expression, that fall into any one of 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 audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.*

