

# 10-1372-cv

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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BARCLAYS CAPITAL INC., MERRILL LYNCH,  
PIERCE, FENNER & SMITH INCORPORATED, and  
MORGAN STANLEY & CO. INCORPORATED,

*Plaintiffs-Appellees,*

v.

THEFLYONTHEWALL.COM, INC.,

*Defendant-Appellant.*

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*On Appeal from the United States District Court  
for the Southern District of New York (Foley Square)*

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**BRIEF FOR *AMICI CURIAE* GOOGLE INC.  
AND TWITTER, INC. IN SUPPORT OF REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici* make the following disclosures:

1. Google Inc. (“Google”) has no parent corporation, and no publicly held corporation owns 10% or more of Google’s stock.

2. Twitter, Inc. (“Twitter”) has no parent corporation, and no publicly held corporation owns 10% or more of Twitter’s stock.

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**STATEMENT OF CONSENT TO FILING**

*Amici* are authorized to file this brief pursuant to Fed. R. App. P. 29(a), as all parties have consented to its filing.

## **STATEMENT OF INTEREST**<sup>1</sup>

Google Inc., a company headquartered in Silicon Valley, California with more than 20,000 employees, connects millions of people around the world with information every day, with a mission to organize the world's information and make it universally accessible and useful. Twitter, Inc., a company headquartered in San Francisco, California with over 200 employees, is one of the web's most popular hosts of user-generated content, allowing millions of users to instantly share information around the world. Among other things, amici provide services to help users find and discuss news-related content on the web. Such services include search engines, online publication platforms and news aggregation.<sup>2</sup>

*Amici* are interested in this case because the district court's ruling as it relates to "hot news" misappropriation could seriously impair the distribution of factual information on the Internet. The language employed by the district court is broad enough to encompass (and potentially prohibit) activities that are widely

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<sup>1</sup> Pursuant to Local Rule 29.1(b), *amici* disclose that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than *amici* contributed money intended to fund preparing or submitting the brief.

<sup>2</sup> As used herein, the terms "news aggregators" and "news aggregation" refer to services such as Google News (<http://news.google.com>) that index and provide reference (a headline and sometimes a short snippet or a thumbnail image, with attribution and a link to the source site) to news stories available elsewhere on the web. Some news aggregators, including Google News, also offer third parties' news articles pursuant to licenses. In contrast, some other online services reproduce content or create their own news stories based on information originating from other news outlets, sometimes unaccredited and without licenses.

accepted and relied upon in the online dissemination of factual content. *Amici* seek to inform the Court of the negative impact the district court’s decision might have on a wide variety of Internet services that are relied on by the public to quickly find and access relevant information.

### **SUMMARY OF ARGUMENT**

The decision below, by enjoining the publication of facts that are in the public domain, departs sharply from well-established precedent.

As recognized in *Feist Publications, Inc. v. Rural Telephone Service Co.*, “[t]he first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.” 499 U.S. 340, 347 (1991). For that reason, even competitors “remain[] free to use the facts contained in another’s publication to aid in preparing a competing work.” *Id.* at 349. Central to *Feist* is the rejection of the notion that “sweat of the brow” can itself create intellectual property rights. “The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’” *Id.* (quoting U.S. Const. art. I, § 8, cl. 8).

The so-called “hot news” misappropriation tort undermines this constitutional principle by creating state-law property rights premised impermissibly on an initial publisher’s “sweat of the brow.” Derived from the now non-binding decision of *International News Service v. Associated Press* (“*INS*”),

248 U.S. 215 (1918), “hot news” misappropriation grants a monopoly to the gatherer of “time-sensitive” news, precluding a competitor from disseminating those facts even when the same news is readily available from other sources. The tort makes actionable a defendant’s supposed “free-rid[ing] on the efforts of the plaintiff” in a way that would “reduce the incentive to produce the product or service.” *Nat’l Basketball Ass’n v. Motorola, Inc.* (“*Motorola*”), 105 F.3d 841, 845 (2d Cir. 1997). By prohibiting the publication of facts to protect a newsgatherer’s “efforts,” the “hot news” misappropriation tort attempts an end-run around the Copyright Clause that *Feist* prohibits. This Court therefore should repudiate the tort.

Important public policy concerns also support repudiation of this tort. It is longstanding industry practice for news organizations to report on other outlets’ breaking stories. For decades, television and radio news stations have broadcast information obtained from newspapers. And newspapers and Internet news organizations learn and write about events originally reported on television. Permitting “hot news” misappropriation liability would leave news outlets unsure how long they must “sit” on important factual information, depriving the public of important, time-sensitive, factual information.

In a world of modern communications technology, where anyone with a cell phone may disseminate news throughout the world even as it is occurring, the

notion that a single media outlet should have a monopoly on time-sensitive facts is not only contrary to law, it is, as a practical matter, futile.<sup>3</sup>

Even if the Court elects not to repudiate “hot news” misappropriation in its entirety, it should reject the district court’s unjustified expansion of the tort far beyond the narrow facts of *INS*. In *INS*, the defendant and the plaintiff were in precisely the same business—wire services providing breaking news stories to subscribing newspapers. As this Court has already suggested, the tort should be limited, at most, only to situations analogous to those circumstances. *See Motorola*, 105 F.3d at 851 (describing “narrow ‘hot news’ *INS*-type claims” as surviving preemption).

Regardless of whether the Court chooses to address the scope of “hot news” misappropriation, injunctive relief such as that fashioned by the lower court violates the First Amendment as a prior restraint. The reporting of truthful information is one of the most protected forms of speech under the Constitution, and enjoining such speech is a “most extraordinary remed[y],” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976), imposed only “where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.” *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

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<sup>3</sup> *See, e.g.*, [http://www.editorsweblog.org/multimedia/2009/01/twitter\\_first\\_off\\_the\\_mark\\_with\\_hudson\\_p.php](http://www.editorsweblog.org/multimedia/2009/01/twitter_first_off_the_mark_with_hudson_p.php) (recounting how descriptions and pictures of the US Airways landing in the Hudson first appeared on Twitter and concluding that “it was definitely Twitter that broke the story first”).

The district court erred in failing to recognize a newsgatherer's interests may be protected by means less restrictive than an injunction. For example, newsgatherers may enter into confidentiality agreements with employees, and into licensing or non-disclosure agreements with authorized recipients of factual information, enforcing their rights through claims such as breach of contract, intentional interference with contractual relations, and breach of duty of loyalty. Newsgatherers also may implement technological measures to block public access to information they have gathered. Where such alternatives are readily available, enjoining media outlets that disseminate truthful information is unwarranted.

The injunction below is all the more inappropriate where the factual information at issue is readily available to the public.<sup>4</sup> While it may be more convenient for newsgatherers to seek injunctions against websites that disseminate once-confidential facts rather than ferret out those who wrongfully "leak" that information in the first place, such an approach violates a fundamental tenet of the First Amendment: Once facts are made public, they belong to the public. *See In re Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988) ("The most offensive aspect of a prior restraint is the censorship involved by forbidding the

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<sup>4</sup> The district court indicated that Appellant's role in the initial (and wrongful) dissemination of the Recommendations contributed to its ruling, but concluded that "it is not a defense to misappropriation that a Recommendation is already in the public domain by the time Fly reports it." Docket No. 137, Opinion and Order, dated March 18, 2010 ("March 18 Order") at 61. *Amici* urge the Court to reject this conclusion.

dissemination of information already known to the press and therefore public.”); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 534-35 (2001) (broadcasting of lawfully obtained telephone conversation protected by First Amendment, even if third party’s recording of conversation was illegal).

For these reasons, this Court should clarify that dissemination of factual information may not be enjoined absent a contractual or other special relationship, and vacate the injunction entered below as an unconstitutional prior restraint.

## **ARGUMENT**

### **I. “HOT NEWS” MISAPPROPRIATION RUNS AFOUL OF THE COPYRIGHT CLAUSE OF THE CONSTITUTION AND THE COPYRIGHT ACT**

#### **A. Under *Feist*, Facts Are In The Public Domain**

In *Feist*, the Supreme Court held: “That there can be no valid copyright in facts is universally understood.” 499 U.S. at 344. It clarified that “originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in ... fact-based works.” *Id.* at 359-60; *see also id.* at 364 (“copyright rewards originality, not effort”). In other words, factual information may not be copyrighted, no matter how much labor was invested in gathering and compiling it. The Court continued:

[A] subsequent compiler remains free to use the facts contained in an another’s publication to aid in preparing a competing work .... It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation.... [H]owever, this is not some unforeseen byproduct of a statutory scheme. It is, rather, the essence of copyright, *and a constitutional requirement*. The primary objective

of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8.

*Id.* at 349 (citations and quotation marks omitted, emphasis added).

*Feist*'s reliance on the Copyright Clause compels two conclusions: (1) a work must be original to qualify for copyright protection; and (2) the freedom to use facts—even to “free-ride” on facts gathered by others through great effort—is *constitutionally* protected. The Copyright Clause demands that, in order to “promote the Progress of Science and useful Arts,” non-original works such as facts are available to any person to use and exploit, regardless of who discovered those facts or at what expense.<sup>5</sup> *See also Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“every ... fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication”) (citing *Feist*, 499 U.S. at 349-50).

Under *Feist*, this Court has repeatedly confirmed that facts must remain in the public domain, free from any restraint or encumbrance. *See, e.g., N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 114 (2d Cir. 2007) (“[A]ll facts—scientific, historical biographical, and *news of the day* ... may not be copyrighted and *are part of the public domain available to every*

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<sup>5</sup> Congress has the power to decide which sorts of original works receive federal copyright protection; there is no constitutional requirement that all original works be protected. *Feist* makes clear that no *non-original* works may be protected through a statutory grant of exclusive rights.

person.”) (quoting *Feist*, 499 U.S. at 348, emphases added); *Sparaco v. Lawler, Matusky, Skelly, Eng’rs LLP*, 303 F.3d 460, 466-67 (2d Cir. 2002) (“[H]istorical, scientific, or factual information belongs in the public domain, and ... allowing the first publisher to prevent others from copying such information would defeat the objectives of copyright by impeding rather than advancing the progress of knowledge.”); *Attia v. Soc’y of N.Y. Hosp.*, 201 F.3d 50, 54 (2d Cir. 1999) (recognizing that it has become “accepted as orthodox that ideas, like facts, belong in the public domain”).

**B. “Hot News” Misappropriation Violates *Feist***

The decision in *Feist* warrants reexamination of the ownership of facts permitted in *INS*, a 1918 decision issued under federal common law. In *INS*, the Supreme Court rested its decision on “the expenditure of labor, skill, and money” necessary to gather the facts. *See* 248 U.S. at 239. It reasoned that, if others were to free-ride on the newsgatherer’s efforts, the newsgatherer would have little incentive to continue. *Id.* In other words, newsgatherers may secure property rights in facts and block competitors from repeating them—the very logic rejected by the Supreme Court in *Feist*. While *INS* is no longer binding pursuant to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), this Court nonetheless gave the tort new life in *Motorola*, holding that a narrow, “hot news” claim, mirroring *INS*-type

circumstances, exists under New York state law. *See Motorola*, 105 F.3d at 852. That decision should be revisited by this Court.

**1. The Copyright Clause prohibits the removal of factual information from the public domain**

“Hot news” misappropriation is not compatible with constitutional principles enunciated in *Feist*. The Copyright Clause leaves facts in the public domain for all to freely use, precluding any claim of a property right in those facts. *See Feist*, 499 U.S. at 349 (it is a “constitutional requirement” that a competitor “remains free to use the facts contained in an another’s publication to aid in preparing a competing work”); *id.* at 350 (“[R]aw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”). In other words, the freedom to copy facts at will is an essential component of “promot[ing] the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8.

*Motorola*, however, does not address the tension between *Feist* and *INS*. The state law tort of “hot news” misappropriation is unenforceable because the Copyright Clause has been construed to ban the removal of facts from the public domain, because application of “hot news” misappropriation obstructs this constitutional mandate, and because states are precluded from implementing laws that interfere with constitutional guarantees. *See* U.S. Const. art. VI, cl. 2; *see also*

5 William F. Patry, *Patry on Copyright* §18:40 (2010) (detailing how “hot news” misappropriation is precluded by the Copyright Clause).<sup>6</sup>

**2. “Sweat of the brow” cannot justify protecting ownership in facts**

*Feist* expressly rejected “sweat of the brow” as a justification for protecting facts. “Hot news” misappropriation, however, forbids use of factual information “that constitutes free riding on the plaintiff’s efforts.” *Motorola*, 105 F.3d at 845. Thus, “hot news” misappropriation sidesteps the Copyright Clause by punishing the copying of facts to protect the gatherer’s “efforts”—creating a tort based on the very theory rejected in *Feist*.<sup>7</sup>

**3. The “extra elements” that purport to preclude preemption are the same elements rejected in *Feist***

The “extra elements” articulated by this Court in *Motorola* that are intended to save the tort of “hot news” misappropriation from preemption are the same

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<sup>6</sup> Mr. Patry is senior copyright counsel at Google. The views and most of the language employed in the treatise referenced above were contained in a different treatise published eight years before Mr. Patry joined Google. See 2 William F. Patry, *Copyright Law & Practice* 291 (BNA 1998 suppl.). The Supreme Court has cited Mr. Patry’s works five times, including in *Feist* and *Harper & Row*. This Court has cited Mr. Patry’s work at least twenty times, and appointed him an expert to the Court in *Itar-Tass Russian News Agency v. Russian Kurier*, 153 F.3d 82 (2d Cir. 1998). Almost every circuit has cited Mr. Patry’s works.

<sup>7</sup> The Supreme Court had no opportunity to rule upon the validity of “hot news” misappropriation in *Feist*, as the only issue before it was copyright infringement. *Feist*, however, implicitly acknowledges the tension between the cases, recognizing that *INS* rendered judgment on “noncopyright grounds that are not relevant here.” *Feist*, 499 U.S. at 354 n.\*.

factors that were rejected in *Feist* as invalid under copyright law. For example, the extra elements of “free-riding by a defendant” and “the threat to the very existence of the product or service,” *Motorola*, 105 F.3d at 847, were explicitly rejected in *Feist* when the Court ruled that free-riding on the collection of facts, no matter the effect on the collector, is not only constitutionally permissible, but constitutionally unassailable. *See Feist*, 499 U.S. at 349. Because a “hot news” misappropriation claim is nothing more than a failed copyright claim, it is preempted by § 301(b)(1) of the Copyright Act as “com[ing] within the subject matter of copyright.”<sup>8</sup> This Court should revisit *Motorola* and repudiate the tort. *See* Richard A. Posner, *Misappropriation: A Dirge*, 40 *Hous. L. Rev* 621, 632-33 (2003) (analyzing *Motorola* and concluding that, if the publication of facts is not copyrightable, the

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<sup>8</sup> As support for “hot news” misappropriation, the district court relies on legislative history surrounding the passage of § 301(b)(3), which at one point included language stating that “hot news” misappropriation would not be preempted by the Copyright Act. The history of this language, however, does not support such reliance. In proposed revisions to the Copyright Act offered in 1967, the preemption language stated that state law could only protect unpublished works. This proposed language remained untouched until 1975, when new revisions reversed course and provided a list of illustrative nonpreempted state laws, including “misappropriation.” The committee reports accompanying these revisions included language detailing the committee’s intention to preserve “hot news” misappropriation in the mold of *INS*. The Justice Department, fearing “misappropriation” would serve as a backdoor for failed copyright claims, requested that the “misappropriation” language be removed. When the final version of the 1976 amendments came to the House floor, the illustrative examples, including misappropriation, had been stricken. The reasons for the deletion are not illuminated by colloquy between two members of the House. “The only approach to such a morass is to ignore it and to determine solely from the statute whether the claim at hand is preempted.” 5 *Patry on Copyright* § 18:8.

same reasons “weigh equally heavily against finding misappropriation” when such facts are published under the label of “hot news”).

**C. Important Practical and Public Policy Concerns Justify This Court’s Rejection of “Hot News” Misappropriation**

In an age of instantaneous, global dissemination of factual information over the Internet, cable, and satellite, a tort of “hot news” misappropriation is obsolete. We no longer face the INS/AP news duopoly of World War I; rather, factual collection and dissemination now come from a wide and expanding array of sources. The *INS* rationale was dubious even 92 years ago, *see INS*, 248 U.S. at 248-67 (Brandeis, J., dissenting), and is incompatible with the realities of today’s information marketplace.

*First*, the tort conflicts with the longstanding, widely employed and unchallenged industry practice for news outlets to report on stories that have been broken by other organizations. Cable and broadcast television news programs, as well as multitudes of other news outlets, feature constant streams of news, with or without attribution to their original sources. News reporting always has been a complex ecosystem, where what is “news” is often driven by certain influential news organizations, with others republishing or broadcasting those facts—all to the benefit of the public. The district court, however, would grant the original news source a temporary monopoly over such facts—an outcome that is inconsistent with the strong public interest in receiving important, timely news. *See, e.g.,*

*Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (recognizing the First Amendment “right of the public to receive such information and ideas as are published”).

*Second*, continued recognition of the tort will chill the lawful dissemination of important news by fostering uncertainty among news outlets as to how long they must “sit” on a story before they are free of a potential “hot news” claim. *See Bartnicki*, 532 U.S. at 534 n.22 (warning against “the ‘timidity and self-censorship’ which may result from allowing the media to be punished for publishing truthful information”) (citation omitted). Breaking news may involve a threat to public health or security, but the district court’s opinion, if affirmed, would stifle the dissemination of such crucial facts—a particularly dangerous outcome in circumstances where the time-sensitive nature of the event is the precise reason why the facts should be widely disseminated as quickly as possible.

Upholding the district court’s decision also would give those who obtain news first strong incentives to block others from obtaining the same information, such as by encouraging (or even paying) sources not to cooperate with other organizations who attempt to confirm or expand on the original news organization’s reporting. There also is grave difficulty implementing any period of exclusivity. How, for example, would a court pick a time period during which facts about the recent Times Square bombing attempt would be non-reportable by others? Judges will become “super-editors,” a role the Supreme Court has rejected

in other contexts as unconstitutional. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (finding state statute to violate First Amendment “because of its intrusion into the function of editors”).

*Third*, even if “hot news” misappropriation made sense in 1918, it does not today. The modern ubiquity of multiple news platforms renders “hot news” misappropriation an anachronism, aimed at muzzling all but the most powerful media companies. In a world of citizen journalists and commentators, online news organizations, and broadcasters who compete 24 hours a day, news can no longer be contained for any meaningful amount of time. Because it would be impossible to craft and enforce a rule restricting the dissemination of readily accessible factual information, this Court should recognize that “hot news” misappropriation can no longer be practically or fairly applied.

## **II. ANY “HOT NEWS” MISAPPROPRIATION SHOULD BE EXTREMELY LIMITED, MIRRORING THE FACTS OF *INS***

Should the Court choose not to repudiate “hot news” misappropriation, *amici* respectfully request that the Court clarify that the tort is available only in a narrow set of circumstances nearly identical to those of *INS*. Such an approach would be faithful to this Court’s decision in *Motorola*, and provide needed guidance as to the boundaries of the tort.

**A. The Court Should Limit “Hot News” Misappropriation Claims To a Narrow Set of Commercial Competitors**

The *INS* dispute began when British censors barred INS, but not AP, from sending overseas cables about World War I to the United States. To compete, INS viewed publicly posted news bulletins containing AP stories, paraphrased those stories, and sent them to west-coast member newspapers by telegraph. As a result, INS was able to publish its “pirated news” simultaneously or even earlier than AP on the west coast. *INS*, 248 U.S. at 238-39.

In *Motorola*, this Court emphasized the narrowness of “hot news” misappropriation, tightly tying the tort to the facts of *INS*. See 105 F.3d at 851 (only “narrow ‘hot news’ *INS*-type claims survive preemption”); *id.* at 852 n.7 (“*INS* has long been regarded with skepticism by many courts and scholars and often confined strictly to its facts.”); *id.* at 854 n.9 (comparing plaintiffs’ “hot news” claim to the facts of *INS* and concluding that a “gulf [exists] between this case and *INS*”).

To the extent *INS* remains good law, the doctrine should be updated to incorporate the vast changes since *Motorola* in how news is disseminated online. That is, the Court should clarify that any “hot news” claim must closely track the facts in *INS*, while accounting for the way facts are disseminated in the modern world. This would be accomplished by adding the following specific extra elements to satisfy 17 U.S.C. § 301: (1) the information plaintiff seeks to protect

must have been gathered exclusively by plaintiff (2) at substantial cost or effort; (3) plaintiff must have taken steps to keep the information confidential or highly restricted until its release; (4) plaintiff's release of the information must be to a restricted audience, and not be accessible to the general public; (5) the information must have commercial value; (6) the information must be time-sensitive, and defendant's use of the information must specifically exploit its time-sensitive nature; (7) plaintiff and defendant must be direct competitors for the commercial value of the particular information in question; and (8) as a direct result of defendant's use of the time-sensitive information, plaintiff's ability to produce the product or service will be severely impaired. Such a test would hew closely to *INS* and retain the essence of the Court's holding in *Motorola*, while properly accounting for the modern reality of news dissemination.

Online services such as those offered by *amici* do not resemble *INS*'s facts, nor meet the above test. For example, "hot news" misappropriation would not apply to news aggregators, such as Google News, that enable users to find factual information readily available from other sources. In addition, because aggregators direct users to the source site of the article, they provide newsgatherers with substantial economic benefits. Likewise, hosts of user-generated content, such as Twitter, merely provide a venue for third parties to post information and commentary, and thus are not themselves in competition with newsgatherers.

Further, news aggregators do not displace the original news source, because they cannot link to stories until those stories are publicly available. Similarly, users of online services such as Twitter, who post facts or commentary regarding news stories, are relaying information already in the public domain. This is in stark contrast to *INS*, where *INS* was able to take advantage of AP-originated content because of a three-hour time difference. The Internet has no time zones—once a news article is made publicly available, it is available to all. Thus, it is consistent with the Court’s approach in *Motorola* to exclude from the tort circumstances where the ability of an online outlet to disseminate information is dependent on the public disclosure of the information.

**B. The District Court Improperly Expanded The “Direct Competition” Element Of *Motorola***

In addressing the “direct competition” element of “hot news” misappropriation, *Motorola*, 105 F.3d at 852—the district court offered multiple bases supporting its conclusion that Appellant and Appellees directly compete. While *amici* take no position as to most of these bases, one of the district court’s grounds is faulty as a matter of law and should be corrected.

The district court stated:

[T]o the extent that Fly argues that it does not compete with the Firms because it reports “news” about the Recommendations rather than the Recommendations itself—a theoretical distinction not borne out in reality—such an argument apparently overlooks the fact that

“news” is, in fact, the archetypal subject matter of a hot-news misappropriation claim.

March 18 Order at 69. The district court confuses “direct competition” with “competition” in general. *Amici*, for example, are not engaged in the sort of head-to-head direct competition exemplified by INS, which provided news stories to subscribing newspapers that directly competed with AP’s news stories. *See also Motorola*, 105 F.3d at 853 (recognizing that identical products providing identical services would “directly compete”). Different entities may use news in different ways, and the fact that two businesses use the same underlying subject matter does not necessarily make them competitors. Expanding “direct competition” to include all uses of news—even just short headlines or snippets of a story in the form of a bibliographic entry—would potentially bring within the “direct competition” element the dissemination of a single, small fact, thereby transforming the element beyond even plain “competition” into an exclusive right over noncopyrightable material, in violation of *Feist*.

In addition, the district court suggests that an outlet reporting facts it has gathered always directly competes with an entity discussing the outlet’s report, simply because they both trade in the general subject of news. Such an approach lumps all “news” into one mass of information without regard for the context of how such facts are developed and disseminated. Appellees developed trading recommendations for clients, and Appellant reported the fact that Appellees had

issued such opinions. What began as Appellees' advice became news because such opinions can, and often do, affect the financial markets, which have an impact on every person with a savings account. Regardless of whether Appellant and Appellees "directly" compete under a proper test, the Court should reject the wholesale proposition that all disseminators of information are direct competitors, with a right to forbid others (to whom they have no contractual or special duty) from reporting the same information.

### **III. THE SCOPE OF THE DISTRICT COURT'S INJUNCTION VIOLATES THE FIRST AMENDMENT**

Separate and independent from clarifying the existence or scope of the tort of "hot news" misappropriation, this Court should hold that the lower court's injunction against the reporting of publicly available factual information constitutes an unconstitutional prior restraint in violation of the First Amendment.<sup>9</sup>

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<sup>9</sup> In its order denying the defendant's motion for a stay or modification of the injunction, the district court suggested that Appellant waived its First Amendment defense. *See* Docket No. 187, Opinion and Order, dated May 7, 2010 ("Stay Order") at 13-14. While *amici* take no position on that issue, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Court is "more likely to exercise [its] discretion (1) where consideration of the issue is necessary to avoid manifest injustice or (2) where the issue is purely legal and there is no need for additional fact-finding." *Merrill Lynch & Co., Inc. v. C.I.R.*, 386 F.3d 464, 475 (2d Cir. 2004) (citation omitted). This case warrants such review, even if the argument was waived. *First*, affirming this injunction would chill the free and unfettered reporting of factual information by third-party news agencies. Thus, a review of the injunction is necessary to avoid a manifest

### **A. The Reporting Of Facts Cannot Be Enjoined Absent “Extraordinary Circumstances”**

News reporting is among the highest forms of protected speech, zealously safeguarded by the First Amendment. *See Nebraska Press Ass’n*, 427 U.S. at 559 (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”). An action to punish “the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979). Specifically, if a news outlet “lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” *Id.* at 103; *see also Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (“[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.”).

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injustice to public interest in receiving factual information. *Second*, the First Amendment argument raised by *amici* is a pure question of law. *See, e.g., id.* (considering new argument on appeal, even in absence of manifest injustice, because “the issue is purely legal”). Finally, the Court should employ its discretion to consider the First Amendment because “it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.” *Tornillo*, 418 U.S. at 247 n.6; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486-87 (1975) (exercising discretion to hear First Amendment argument because failure to do so “would leave the press ... operating in the shadow” of sanctions).

State interests justifying an injunction are extraordinarily rare—although the prohibition against prior restraints is not absolute, the gagging of news reporting has been approved only in “exceptional cases.” *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (suggesting that exceptional cases include incitement to commit violence, obstruction of military recruitment, disclosure of the movement of troops, and obscenity). As Justice Blackmun, writing as Circuit Justice in staying an injunction, explained:

Even where questions of allegedly urgent national security, *see New York Times Co. v. United States*, 403 U.S. 713 (1971), or competing constitutional interests, *Nebraska Press Ass’n*, 427 U.S. at 559, are concerned, we have imposed this “most extraordinary remed[y]” only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

*CBS*, 510 U.S. at 1317. In *CBS*, an injunction prohibiting the news reporting of an undercover videotape that would disclose the plaintiff’s trade secrets and confidential information was deemed an impermissible prior restraint, even though it was obtained through “calculated misdeeds.” *Id.* at 1318. First Amendment protection has been granted in the face of interests much stronger than the mere economic interest of Appellees. *See, e.g., Bartnicki*, 532 U.S. at 534-35 (radio broadcast of illegally intercepted telephone call about newsworthy matter protected by First Amendment); *Florida Star*, 491 U.S. at 536 (First Amendment outweighs interest in prohibiting publication of wrongfully disclosed identity of rape victim);

*Smith*, 443 U.S. at 104 (First Amendment outweighs interest in protecting identity of youths charged in juvenile court).

There are limited circumstances where courts have granted injunctions against the reporting of truthful information. For example, injunctive relief may be available if a party seeks to disclose trade secrets in violation of a confidential relationship with the owner. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). The district court, however, made no finding of a confidential relationship between Appellant and Appellees. In addition, the Supreme Court has not yet ruled out that a state might have a sufficient interest in enjoining “disclosures of trade secrets or domestic gossip or other information of purely private concern.” *Bartnicki*, 532 U.S. at 533. The Court need not answer that question here, as information subject to “hot news” misappropriation is, by definition, “newsworthy.” *Id.*

Given that the Supreme Court has rejected injunctions even when the speech involves national security, illegal wiretaps, and the privacy interests of crime victims, the district court’s injunction is certainly inconsistent with established precedent.<sup>10</sup> Here, the *only* interest that Appellees seek to protect are their

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<sup>10</sup> The district court distinguished *Bartnicki* and *Smith* on the basis that they “concerned the relationship under the First Amendment between the news media’s interest in reporting about important public events and individuals’ rights to privacy.” Stay Order at 15 n.15. Surely an individual’s right to privacy is a stronger interest than a corporation’s private economic interests. *Cf. United States*

economic interests. No court of which *amici* are aware has ever held that a plaintiff's mere economic interest was a "state interest of the highest order" sufficient to enjoin news reporting of truthful information.<sup>11</sup> *Smith*, 443 U.S. at 103; *cf. CBS*, 510 U.S. at 1318 ("If CBS has breached its state law obligations, the First Amendment requires that [plaintiff] remedy its harms through a damages proceeding rather than through suppression of protected speech.").<sup>12</sup>

**B. "Extraordinary Circumstances" Cannot Be Present When The Factual Information Is Already In The Public Domain**

"Extraordinary circumstances" can never exist when the factual information at issue is already otherwise available in the public domain. The reason is simple: injunctions are not an effective remedy to disclosure because the information may be obtained from other sources. Indeed, this Court has stated that "[t]he most offensive aspect of a prior restraint is the censorship involved by forbidding the dissemination of information already known to the press and therefore public." *In re Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988); *see also Smith*, 443 U.S. at 103 ("once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its

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*v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").

<sup>11</sup> *INS* did not address the First Amendment.

<sup>12</sup> It is of no moment that the district court's injunction is limited in time. *See United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005) ("A prior restraint is not constitutionally inoffensive merely because it is temporary.").

dissemination”) (summarizing *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977)). While *amici* take no position on whether Appellant received all of the facts at issue from the public domain, or whether Appellant violated a contractual or other special duty, an injunction offers no meaningful remedy where it prohibits dissemination of readily available facts.<sup>13</sup>

### **C. Less Intrusive Measures Are Available To Appellees**

The district court failed to sufficiently consider alternative measures that might protect the interests of Appellees that are far less intrusive than a prior restraint. *See CBS*, 510 U.S. at 1317 (prior restraint is available only “where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures”).

*First*, to prevent leaks, originators of information may (and in this case did) enter confidentiality agreements with employees and licensing or non-disclosure agreements with authorized recipients of factual information. Such agreements permit enforcement of rights to control dissemination of factual information

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<sup>13</sup> The district court wrongly held that “it is not a defense to misappropriation that a Recommendation is already in the public domain by the time Fly reports it.” March 18 Order at 61. As explanation, the district court stated that “[i]n *INS*, ... AP’s news was already widespread and publicly available on the East Coast and was obtained by the defendant from public sources, and yet, the Court granted an injunction against *INS*’s further dissemination of news gained through those means.” *Id.* However, AP’s news was *not* already available on the west coast, which is where AP claimed the misappropriation took place. This distinction underscores why the tort no longer has relevance, given today’s technology.

through claims such as breach of contract, intentional interference with contractual relations, breach of confidentiality, and breach of duty. *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980) (imposing constructive trust on past profits and enjoining future publication of factual book otherwise protected by First Amendment, based on author’s breach of employment agreement and breach of fiduciary duty); *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 946 (2d Cir. 1983) (court may enjoin a party “against use or disclosure of his trade secrets, as where a party has obtained them by breaching its confidential relationship with the owner, or by procuring another to breach a confidential relationship with the owner”). Appellees’ litigation efforts are more properly aimed at those who breached a duty to retain the information in confidence. Locating the source of such leaks is far less offensive to First Amendment principles than enjoining the dissemination of truthful information obtained lawfully. To the extent the lower court failed to exclude from the injunction the dissemination of information lawfully obtained by Appellant, it is facially overbroad.

*Second*, newsgatherers can employ mechanisms to limit access to their content, including technical barriers to prevent broad access to content they make available online. For example, websites commonly use simple programming instructions known as “robots.txt” files to communicate instructions (such as

instructions not to link to material on the site) to search engines and news aggregators. Such instructions are simple to implement, widely adopted, and provide an automated way for a site to prevent search engines and aggregators from linking to a web page. In addition, websites can restrict broad access to online content by using password-protected platforms. To the extent that information is shielded by sufficient technological measures, online services will not index content from such sites.<sup>14</sup>

The ready availability of such contractual and technological measures of self-protection confirm that there are “less intrusive measures,” *CBS Inc.*, 510 U.S. at 1317, that weigh against the issuance of a prior restraint.

**D. The District Court Undervalued First Amendment Constraints On Intellectual Property Law**

Finally, the district court suggested that First Amendment interests will not be recognized in the face of an intellectual property violation. Incorrectly suggesting that cases such as *Bartnicki* have no bearing when applied to a claim of “hot news” misappropriation, the district court failed to strike the appropriate constitutional balance.

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<sup>14</sup> While *amici* take no position regarding whether Appellant wrongfully attempted to circumvent such technological measures, this is a distinct issue from whether an injunction can issue against an outlet that disseminates information that is already publicly available at the time of publication, regardless of how that information was received.

Intellectual property law does not render the First Amendment irrelevant. Copyright law to which news reporting and aggregation organizations are subject, for example, is harmonized with the First Amendment through the fair use doctrine. *See, e.g., Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74-75 (2d Cir. 1999) (holding that defendant abstract service infringed upon plaintiff’s factual news stories and recognizing that First Amendment defense to copyright infringement is “protected by and coextensive with the fair use doctrine”). Further, under copyright law, the First Amendment is sufficiently recognized because a court may not recognize a copyright in the facts that provide the basis for news articles—only in the manner of expression of those facts. *See Feist*, 499 U.S. at 348.

The district court’s citation to *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007), is misguided. *Viewfinder* never addressed an unfair competition claim, as the district court suggested. Rather, at issue was whether infringement of *copyrighted works* was protected by the First Amendment, which this Court held requires a fair use analysis that addresses free speech concerns. *See Viewfinder*, 489 F.3d at 479. The district court’s conclusion that First Amendment considerations may be ignored in intellectual property cases is unfounded.

## CONCLUSION

For the reasons discussed above, the Court should repudiate the tort of “hot news” misappropriation. If the Court declines to reject the tort, it should restrict the tort’s application to factual circumstances that mirror *INS*. As an independent basis, the Court should find that an order enjoining the dissemination of truthful facts that were lawfully obtained constitutes an impermissible prior restraint in violation of the First Amendment.

DATED: June 21, 2010  
New York, New York

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 97-2003 in 14 point Times New Roman.

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June 21, 2010  
Date

STATE OF NEW YORK            )  
COUNTY OF NEW YORK        ) SS

Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 6/21/2010 deponent caused to be served 2 copy(s) of the within

**Brief for Amici Curiae Google Inc. and Twitter, Inc. in Support of Reversal**

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**Case Name:** Barclays Capital Incorporated v.  
Theflyonthewall.com, Inc.\_(2)

**Docket/Case No** 10-1372-cv  
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