No. 12-940

In the Supreme Court of the United States

INTERNATIONAL SECURITIES EXCHANGE, LLC,
PETITIONER,

v.

CHICAGO BOARD OPTIONS EXCHANGE, INC.;
CME GROUP INDEX SERVICES, LLC;
THE MCGRAW-HILL COMPANIES, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

BRIEF OF *AMICI CURIAE* COPYRIGHT LAW PROFESSORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The direct economic impact of the Illinois Appellate Court's decision in this case is staggering: Maintaining the Chicago Board of Options Exchange's monopoly over S&P 500 Index options alone will increase trading costs by an estimated $10 billion each year. And given the increasingly crucial role that "big data" plays in the national economy, the Illinois court's decision could set off a land grab for published, factual data that would have immense economic repercussions.

But even more troubling is the decision's significance for the United States' copyright regime. The Illinois court's ruling presents disturbing constitutional implications. There is tension between the First Amendment's guarantee of freedom of speech, see U.S. Const. amend. I, and copyright law's purpose of "promot[ing] the progress of science and useful arts," U.S. Const. art I, § 8, cl. 8. One doctrine that helps reconcile these competing ideals is the idea/expression dichotomy: An author cannot receive a copyright in pure facts or ideas, but only in a particular creative expression of those facts or ideas. See *Eldred* v. *Ashcroft*, 537 U.S. 186, 219 (2003); *Golan* v. *Holder*, 132 S. Ct. 873, 890 (2012). A manifestation of this First Amendment "safety valve" is that copyright law allows people to copy and use published factual information. The Illinois decision undermines this central

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[1] *Amici* provided notice of their intent to file this brief to counsel of record for each party at least 10 days prior to the due date for filing, and all parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person, other than the *amici* and their counsel, contributed money to its preparation or submission.

principle by allowing states to prevent the public from using published, public domain *facts* like stock index values, even when those facts are not bound up in a particular creative expression.

The decision below also threatens the uniformity of the national copyright regime. Congress passed section 301(a) of the Copyright Act, 17 U.S.C. § 301(a), to preempt state law that is inconsistent with or duplicative of federal copyright protection. Congress' goal was to override patchwork state protections for material within the subject matter of copyright, and thereby secure a single, unified federal copyright system. A state law claim for misappropriation addressed to copying or use of material from a copyrighted work is a textbook example of such a preempted claim, as "legions" of federal decisions have held. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.01[b][1][f][iii].

Although the legislative history of the Act suggests that Congress intended to exempt a narrow class of "hot news" misappropriation claims from the general rule of preemption, Congress's goal of uniformity would be frustrated if courts in different jurisdictions were allowed to override federal law based on their own idiosyncratic views of what constitutes misappropriation. The Illinois court's interpretation of misappropriation is breathtakingly broad and could overwhelm the general rule of preemption. Not only does the ruling below threaten to swallow up statutory preemption and defeat Congress' goal of national uniformity, it also stands in stark contrast to how courts in the Second, Third, and Seventh Circuits have interpreted section 301(a). This Court's review is necessary to preserve the uniformity that Congress sought to achieve.

Amici are fifteen professors who teach and write about copyright law. A list of the *amici*, with brief professional biographies, is set forth in the Appendix to this brief. *Amici* are deeply interested in maintaining the national uniformity of copyright law, as well as ensuring that copyright protection does not impinge on vital First Amendment concerns. Unless reviewed and reversed, the Illinois Appellate Court's ruling will seriously threaten both the uniformity of copyright law and the integrity of the public domain. *Amici* therefore urge this Court to grant certiorari.

SUMMARY OF ARGUMENT

I. The Illinois court's decision raises important constitutional issues. Courts have long recognized the inherent tension between copyright protection and the First Amendment's guarantee of freedom of speech. This Court has upheld copyright laws against constitutional challenges by pointing to the laws' built-in First Amendment accommodations, including the idea/expression dichotomy. This is the basic principle that, while particular creative expressions of an idea may be entitled to copyright protection, underlying facts and ideas are not. Free speech can co-exist with copyright protection because "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication." *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 789).

The Illinois court's decision entirely disregards this important constitutional safety valve by prohibiting the exploitation and use of respondents' market index values—which, as the court below recognized, are "market facts" that the respondents voluntarily released into the public domain. This result raises serious First Amendment issues and calls out for this Court's intervention.

II. This Court's review is also necessary to ensure that courts uniformly construe the narrow exception to copyright preemption that the lower courts have created for the misappropriation of "hot news." While the federal courts of appeals have not interpreted the "hot news" doctrine identically, they have uniformly emphasized that any misappropriation exception to copyright preemption must be narrowly construed. The decision below, in contrast, adopts an extraordinarily broad definition of misappropriation that threatens to swallow up the general rule of preemption.

The Copyright Act was intended to replace the dual system of concurrent state and federal power over copyright with a uniform federal system. To that end, section 301(a) of the Act broadly preempts state laws which provide protections "equivalent" to federal copyright rights established by the statute.

The legislative history of the Act underscores that Congress's primary purpose was replacing the patchwork quilt of state-by-state copyright protection with a nationally uniform regime. However, the legislative history also suggests that Congress may have intended to carve out a narrow exception to preemption for "hot news" misappropriation claims in the mold of *International News Service* v. *Associated Press*, 248 U.S. 215 (1918) (*INS*).

The federal courts' formulations of "hot news" appropriation vary somewhat, but they uniformly emphasize that the doctrine must be narrowly construed in light of Congress's overriding goal of national uniformity. The decision of the Illinois Appellate Court is an extreme outlier. Its extraordinarily broad interpretation of the "hot news" doctrine not only conflicts with the federal courts, it could be used to evade section 301(a) preemption in almost every case—simply by relabeling a claim for copy-

right infringement as one for misappropriation of effort. This would have the effect of displacing federal copyright law with state tort law, and greatly weakening the uniform copyright regime envisioned by Congress.

ARGUMENT

I. By Effectively Closing The Idea/Expression Safety Valve, The Illinois Court's Decision Raises Significant First Amendment Issues.

The Illinois Appellate Court recognized that the published stock index values at issue in this case are matters of basic market fact which are globally distributed and freely copied. It even acknowledged that "the values are in the public domain and may be used by anyone." App. 14a. It nevertheless barred petitioner International Securities Exchange, LLC (ISE) from using that public domain information, holding that ISE was misappropriating the effort that went into the creation of the information, and that a tort of misappropriation of effort used in creating material within the subject matter of copyright was not preempted by the Copyright Act. This prohibition on the use of factual information which has already entered the public domain poses serious First Amendment concerns.

1. "[S]ome restriction on expression is the inherent and intended effect of every grant of copyright." *Golan*, 132 S. Ct. at 889. There is therefore tension between the First Amendment's command that "Congress shall make no law * * * abridging the freedom of speech" and copyright law's grant of limited monopolies to authors to publish and profit from their original works. See 1 Nimmer & Nimmer, *supra*, § 1.10[A] at 1-61.55–1-61.56; *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989); *United States* v. *Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002).

In addressing this tension, this Court has emphasized copyright law's "built-in First Amendment accommodations"—most significantly, the idea/expression dichotomy. *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 788). Because the Copyright Act protects only expression, not ideas, it "strike[s] a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author's expression." *Eldred*, 537 U.S. at 788–789 (quoting *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 556 (1985)).[2] Free speech is protected under copyright because "'every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication'; the author's expression alone gains copyright protection." *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 789); see also *United Video*, 890 F.2d at 1191 ("the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression"); *Hart* v. *Electronic Arts, Inc.*, 808 F. Supp. 2d 757, 777 (D.N.J. 2011) ("The idea/expression dichotomy serves as one means of alleviating the tension between copyright protection and First Amendment goals.").

Both *Eldred* and *Golan* relied on the "built-in First Amendment accommodatio[n]" provided by the idea/expression dichotomy in upholding copyright re-

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[2] The idea/expression dichotomy is codified in section 102(b) of the Copyright Act, which provides that "[i]n no case does copyright protect[t] * * * any idea, procedure, process, system, method of operation, concept, principle, or discovery * * * described, explained, illustrated, or embodied in [the copyrighted] work." 17 U.S.C. § 102(b).

strictions against free speech challenges: the extension of copyright terms by an additional 20 years in *Eldred* and the restoration of copyright protection to certain foreign works previously in the public domain in *Golan*. As this Court recognized in *Eldred*, copyright restrictions are not "categorically immune" from First Amendment scrutiny. 537 U.S. at 221. But given the free speech safety valves provided by the idea/expression dichotomy and related doctrines, the Court concluded that "there was no call for the heightened [First Amendment] review petitioners sought." *Golan*, 132 S. Ct. at 890.

2. The Illinois Appellate Court's decision closes that safety valve in the misappropriation context.

The decision prohibits ISE from using market facts that have already passed into the public domain. The Illinois court recognized that respondents "may assert no rights in the published index values themselves, which have been held by courts to constitute 'a matter of basic market fact.' " App. 14a (citing *New York Mercantile Exchange, Inc.* v. *IntercontinentalExchange, Inc.*, 389 F. Supp. 2d 527, 542 (S.D.N.Y. 2005), *aff'd*, 497 F.3d 109 (2d Cir. 2007)). And it confirmed that the index values, which are "freely copied and distributed globally on almost a real-time basis," are "in the public domain and may be freely used by anyone." App. 13a–14a (internal quotation marks omitted).

However, the Illinois court drew a spurious distinction between "the unauthorized *copying* or the act of *distributing* the plaintiffs' information" and "the unauthorized *use* of the providers' expertise and goodwill" which went into creating the information. App. 22a–23a. But labeling a claim of property rights in published facts "misappropriation" rather than "copyright infringement" does not resolve the tension with the First Amendment

that this Court recognized in *Eldred* and *Golan*. The effect of the Illinois court's ruling is to prohibit ISE from using "basic market fact[s]," which have already been freely published and globally distributed in the public domain, in connection with ISE's own products and expression. It therefore prevents the "free communication of facts," *Eldred*, 537 U.S. at 788–789 (quoting *Harper & Row*, 471 U.S. at 556), and renders the index value information—which falls squarely on the "idea" side of the idea/expression dichotomy—unavailable "for public exploitation," *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 789).

The Illinois court's ruling thus threatens a return to the now-discredited "sweat of the brow" theory, which viewed "copyright [as] a reward for the hard work that went into compiling facts." *Feist Publications, Inc.* v. *Rural Telephone Service Co*, 499 U.S. 340, 352 (1991). The Court rejected this theory over 20 years ago on the ground that "it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves" and "thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas." *Id.* at 353. While the Illinois court's prohibition is styled as arising under state tort law rather than federal copyright law, it presents no less a threat to First Amendment-protected expression. Indeed, "most courts have taken a * * * restrictive view of the circumstances that would warrant [the] grant of copyright-like protection to data by limiting cognizable misappropriation actions to sets of facts almost identical to" those in *International News Service* v. *Associated Press*, 248 U.S. 215 (1918). John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. Rev. 1201, 1225–1226; see also *Alcatel*

USA, Inc. v. *DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir. 1999); *National Basketball Association* v. *Motorola, Inc.,* 105 F.3d 841, 853–854 (2d Cir. 1997).

By prohibiting the use and exploitation of publicly-disseminated market facts, the decision below ignores the idea/expression dichotomy and closes one of the important safety valves that this Court has relied upon to relieve the pressure created when copyright law encroaches on the First Amendment's guarantee of freedom of speech. This Court's review is necessary to ensure that this important constitutional concern is accorded proper weight.

II. The Illinois Court's Expansive Interpretation Of The Misappropriation Doctrine Undermines The Copyright Act's Fundamental Purpose Of Creating Nationally Uniform Copyright Law.

This Court's guidance is also needed to rectify the Illinois Appellate Court's application of section 301(a) of the Copyright Act to state law claims of misappropriation, which stands in stark contrast to the Second, Third, and Seventh Circuits' interpretations. This Court should grant certiorari and clarify the scope of preemption as it applies to claims of misappropriation in order to resolve this inconsistency, which undermines the Act's fundamental purpose of national uniformity.

A. Congress intended section 301(a) to promote uniformity by preempting inconsistent state law.

1. The Copyright Act of 1976 replaced the then-existing "dual system" of concurrent state and federal power over copyright with a "uniform system of copyright protection" at the federal level. *Roth* v. *Pritikin,* 710 F.2d 934, 938 (2d Cir. 1983). In passing the Act, Con-

gress "intended to create a federal law of uniform, nationwide application by broadly preempting state statutory and common-law copyright regulation." *Committee for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989). To that end, section 301(a) expressly preempts state laws respecting "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(a).[3] This preemption sweeps broadly: It extends to any claim coming within the Copyright Act's subject matter, even if the material in question is not subject to copyright protection, such as published facts. See *National Basketball Association,* 105 F.3d at 849; Joseph Bauer, *Addressing the Incoherency of the Preemption Provision of the Copyright Act of 1976*, 10 Vand. J. Ent. & Tech. L. 1, 7–8 (2007).

The Act's legislative history makes clear that Congress's overriding concern was securing national uniformity:

> "One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States.

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[3] Section 106 grants a copyright holder the exclusive right to reproduce, distribute, perform, and display the copyrighted work, as well as to prepare derivative works based on the copyrighted work. 17 U.S.C. § 106.

> "The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is 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 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5745–5746; see also *Barclays Capital Inc.* v. *Theflyonthewall.com, Inc.*, 650 F.3d 876, 897 (2d Cir. 2011) ("central to the principle of preemption generally is the value of providing for legal uniformity where Congress has acted nationally").

Significantly, section 301(a)'s preemptive reach covers not only copyrightable materials, but also those materials within the "general scope" of federal copyright law to which Congress decided *not* to extend copyright protection. "The extension of rights under state law, beyond those provided for by the federal Copyright Act, would distort that federally crafted balancing of interests." Bauer, *supra*, at 14.

2. While Congress intended to broadly preempt state law to ensure national uniformity, the legislative history suggests that it may not have intended to preempt *every* state law misappropriation claim. Because misappropriation is not necessarily synonymous with copyright infringement, section 301(a) does not preempt a cause of action labeled as "misappropriation" if it is not based on a right within "the general scope of copyright as specified

by section 106" or an equivalent right. 17 U.S.C. § 103(a). As the House Report indicated,

> "state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news, whether in the traditional mold of *International News Service* v. *Associated Press*, [248 U.S. 215 (1918),] or in the newer form of data updates from scientific, business, or financial data bases."

H.R. Rep. No. 94-1476, reprinted in 1976 U.S.C.C.A.N. at 5748.

INS, cited in the House Report, involved two competing wire services. INS had lifted factual stories from AP bulletins and papers and wired them to INS papers, which republished them. 258 U.S. at 231. This Court held that INS's conduct was a common-law misappropriation of AP's property interest in its "hot news." *Id.* at 242. *INS* itself is no longer good law; since *Erie Railroad Co.* v. *Tompkins,* 308 U.S. 304 (1938), the federal courts have abandoned the kind of expansive federal common law espoused in the case. But, as the legislative history indicates, Congress may have envisioned that certain *INS*-style state-law "hot news" misappropriation claims would survive preemption by the Copyright Act. "Some seventy-five years after its death under *Erie, INS* thus maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action." *Barclays Capital*, 650 F.3d at 894.

Nevertheless, any misappropriation claim—for "hot news" or otherwise—must be evaluated in light of Congress's expressed intent to "preempt and abolish" any state law cause of action that "extend[s] to works coming

within the scope of the Federal copyright law" and to clear the legal landscape of "vague borderline areas between State and Federal protection." H.R. Rep. No. 94-1476, reprinted in 1976 U.S.C.C.A.N. at 5746. Before allowing such a claim to proceed, courts must take care that it does not threaten the national uniformity that was the purpose of the Copyright Act: "An exception to a rule should not be interpreted in a way that undermines the very purpose of the rule." *C.I.R.* v. *Clark*, 489 U.S. 726, 739 (1989) ("[i]n construing provisions * * * in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision"); see also *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within [the statute's] terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.").

This is especially true in the "hot news" context, where "[t]he broader the exemption, the greater the likelihood that protection of works within the 'general scope' of the copyright and of the type of works protected by the Act will receive disparate treatment depending on where the alleged tort occurs and which state's law is found to be applicable." *Barclays Capital*, 650 F.3d at 897; see also *Nash* v. *CBS, Inc.*, 704 F. Supp. 823, 835 (N.D. Ill. 1989) ("If all misappropriation claims escaped § 301 preemption, a plaintiff could always challenge the use of his copyrighted material under both federal copyright law and the state law tort of misappropriation. This, in turn, would emasculate § 301."), *aff'd* 899 F.3d 1537 (7th Cir. 1990).

B. The Illinois court's application of the misappropriation doctrine is extraordinarily broad and out of step with decisions from the federal courts.

1. Federal courts in different circuits have looked to different tests and factors to determine whether a misappropriation claim escapes preemption. However, a common thread runs through their holdings: In order to effectuate Congress's goal of national uniformity, the "hot news" doctrine must be narrowly construed for preemption purposes. Indeed, no federal court of appeals has held that a putative "hot news" survived preemption since the passage of the Copyright Act in 1976.

a. *Second Circuit.* The Second Circuit's analysis of misappropriation preemption under section 301(a) turns on whether the defendant was free-riding off of the plaintiff's work.

For example, in *Barclays Capital Inc.* v. *Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011), the court of appeals considered a "hot news" misappropriation claim brought by a financial services firm against an internet news aggregator which had posted summaries of the firm's stock recommendations. The Second Circuit recognized that the defendant's conduct could be viewed as a form of "commercial immorality" which could constitute misappropriation under New York law. *Id.* at 895. But it "rejected the notion that 'hot news' misappropriation cases based on the disapproval of the perceived unethical nature of a defendant's ostensibly piratical acts survive preemption." *Ibid.* Because "such concepts are virtually synonymous [with] wrongful copying and are in no meaningful fashion distinguishable from infringement of a copyright," a broad application of "hot news" misappropriation would be "the equivalent of exclusive rights in

copyright law" and thus preempted under section 301(a). *Ibid.* (quoting *National Basketball Association,* 105 F.3d at 851) (alteration in original).

The Second Circuit concluded that Barclays' misappropriation claim was preempted by section 301(a) because the defendant did not 'free ride' on the plaintiff's work product." *Id.* at 908. Rather, the defendant was "reporting financial news—factual information on Firm Recommendations—through a substantial organizational effort," *id.* at 905, and not selling the recommendations "as its own," *id.* at 903. It distinguished the facts of the case from a true *INS*-type "hot news" claims, which it characterized as "news, data, and the like, gathered and disseminated by one organization as a significant part of its business, taken by another entity and published as the latter's own in competition with the former." *Id.* at 905; see also, *e.g.*, *National Basketball Association*, 104 F.3d at 853 (preempting claim for misappropriation of basketball scores and statistics based on a "lack of any free-riding" in retransmission of "strictly factual material about the games").

b. *Third Circuit*. The Third Circuit's analysis of misappropriation turns on whether there is direct competition between the parties.

In *United States Golf Association* v. *St. Andrews Systems*, 749 F.2d 1028 (3d Cir. 1984), the Third Circuit considered a misappropriation claim against the creator of a computer program for calculating a golfer's handicap that was based on a handicap formula created for the USGA's member clubs. While the defendant sold and leased the program to member clubs and individual golfers, the USGA did not offer handicaps directly to individual golfers, and neither the association nor its member

clubs derived any revenue from their own calculation of handicaps. *Id.* at 1038.

Construing the misappropriation claim "in light of the limitations which we believe federal preemption places on the permissible scope of state-law protection for intellectual property," the court held that it did not constitute misappropriation under state law, because "such indirect competition * * * —use of information in competition with the creator outside of its primary market—falls outside of the scope of the misappropriation doctrine" and "the public interest in free access outweighs the public interest in providing an additional incentive to the creator or gatherer of information." *Id.* at 1036, 1038.

c. *Seventh Circuit.* Courts in the Seventh Circuit analyze misappropriation preemption based on whether there is bad faith, a confidential relationship, or fraud or deception.

Thus, in *Nash* v. *CBS, Inc.*, 704 F. Supp. 823 (N.D. Ill. 1989), the owners of a copyrighted story about John Dillinger brought a misappropriation claim against the producers of a television program which, they alleged, used elements of the story. The district court held that the claim was preempted because it did "not involve the 'systematic' appropriation of 'hot news' or valuable stored information" or "allege a special relationship between the parties." *Id.* at 835; compare *Wilson* v. *Electro Marine Systems, Inc.*, 915 F.2d 1110, 1119 (7th Cir. 1990) (misappropriation claim requires "that the defendant obtained access to the idea through an abuse of a fiduciary or confidential relationship with the plaintiff or via some sort of fraud or deception * * * and that the defendant's use of the idea deprived the plaintiff of the opportunity to reap its due profits on the idea").

2. As these cases reveal, the federal courts' analysis of misappropriation preemption is not entirely uniform: Courts in different circuits focus on different factors. However, they uniformly hold that state law claims of "hot news" misappropriation must be narrowly construed in light of both Congress's goal of national uniformity and the public interest in free access to information. The Illinois court's analysis of misappropriation preemption is not only inconsistent with every ruling of the federal courts of appeals, but also extraordinarily broad. Indeed, it threatens to replace Congress's goal of nationally-uniform copyright protection with a patchwork regime of state misappropriation law.

While acknowledging that the published index values at issue here "are in the public domain and may be freely used by anyone," App. 14a (internal quotation marks omitted), the Illinois Appellate Court nevertheless concluded that respondents' misappropriation claim was not preempted by section 301(a). Because respondents claimed that ISE had "appropriated information in the form of data updates from the index providers' databases," the court opined that the claim was "premised on ISE's unauthorized *use* of the research, expertise, and goodwill associated with [respondents'] product for ISE's own gain," and therefore was analogous to an *INS*-type "hot news" claim. *Id.* at 14a, 16a–18a. It concluded that, because use is not an exclusive right protected by copyright, and research and goodwill are not within the subject matter of copyright, the claim survived preemption.

This holding runs counter to that of the federal courts. As the *Barclays Capital* panel noted, federal courts have "emphasized the " 'narrowness' of the 'hot news' tort exception," lest it frustrate Congress's goal of securing a uniform copyright regime. 650 F.3d at 898 (quoting *National Basketball Association*, 105 F.3d at

843, 848, 851, 852). But the decision below embraces none of the safeguards adopted by the federal courts in order to prevent the exception from swallowing the rule of preemption. It does not require that the defendant "free ride" on the plaintiffs' information: Unlike *Barclays Capital* and *National Basketball Association*, the Illinois court held that the misappropriation claim survived even though it did not allege that ISE published the index values "as [its] own" in competition with respondents. See *Barclays Capital*, 650 F.3d at 905. It also rejected the Third Circuit's requirement of "direct competition" as inconsistent with Illinois precedent. App. 18a (citing *United States Golf Association*, 749 F.2d at 1038 n.17). And it did not apply any requirement of a confidential relationship, bad faith, or fraud.

The result is an extraordinarily broad reading of "hot news" that could be used to evade section 301(a) preemption in almost every case. Almost any copyright claim could be recast as a claim for misappropriation of the effort involved in creating the work. Applying the Illinois court's holding that research and goodwill are outside the subject matter of copyright, such claims would always avoid preemption. The result would be a return to the "sort of patchwork protection that the drafters of the Copyright Act preemption provisions sought to minimize." *Barclays Capital,* 650 F.3d at 898. This Court's review is therefore necessary to protect Congress's overriding purpose of securing national uniformity in copyright law.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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