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"Hot News": The Enduring Myth of Property in News

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ARTICLES

"HOT NEWS": THE ENDURING MYTH OF PROPERTY IN NEWS

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The "hot news" doctrine refers to a cause of action for the misappropriation of time-sensitive factual information that state laws afford purveyors of news against free riding by a direct competitor. Entirely the offshoot of the Supreme Court's decision in International News Service v. Associated Press*, the doctrine enables an information gatherer to prevent a competitor from free riding on its efforts at collecting and distributing timely information. Over the last few years, newsgatherers of different kinds have begun using the doctrine with increased frequency, believing it to create and protect an ownership interest in news. This Article argues that this belief misapprehends the real basis for the hot news doctrine and its unique analytical structure. Originating in the synthesis of two different areas of the common law, unfair competition and unjust enrichment, hot news is concerned principally with solving a collective action problem in the market for newsgathering. Given the enormous expenditures that newsgathering entails, its sustainability as a practice depends on newspapers cooperating with each other in different ways. In recognition of this, hot news operates as a mechanism by which to preserve the incentives of individual competitors to enter into cooperative newsgathering and sharing arrangements that raise their individual and collective profitability, while simultaneously maintaining the common pool (i.e., public domain) nature of factual news. It thus attempts to maintain a competitive equilibrium among newsgatherers through a gain-based liability framework and, in the process, emphasizes a very different distributive baseline from that inherent in the idea of property in news. Appreciating this difference and its significance is crucial to the doctrine's continuing survival and sheds light on its inherent unsuitability as a new source of revenue for the newspaper industry.*

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Introduction

The modern newspaper industry is in a state of crisis.[1] In the last three years alone, its advertising revenues have shrunk by over 43%.[2] Between 1990 and 2008, the number of daily newspapers in the country dropped by 12.6%.[3] However, almost immediately, newspapers pointed to what they believed was the principal source of their financial problems—the growth of the Internet, and with it the emergence of news aggregators, bloggers, and other "parasitic" distribution mechanisms that relay the substance of their news stories to readers around the world without compensating them for their efforts. The solution to the problem was obvious to newspapers: greater intellectual property protection.[4]

What newspapers sought was thus a regime that propertized the news once collected, by converting it into an artificially scarce resource, which could in turn be licensed to online entities for an additional source of revenue.[5] Copyright law would be of limited assistance here, since it consciously excludes facts from the scope of its coverage, and newspapers' principal concern was with entities that communicate the bare facts of a news story to audiences via the Internet.[6] They sought their answer instead in an early twentieth-century doctrine that had been developed by the Supreme Court exclusively for the newspaper industry: the common law doctrine of "hot news" misappropriation. Resurrecting this doctrine,

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1. See Philip Meyer, The Vanishing Newspaper: Saving Journalism in the Information Age 5 (2d ed. 2009) (noting decline of newspaper influence, profitability, and household penetration); Frank Ahrens, The Accelerating Decline of Newspapers, Wash. Post, Oct. 27, 2009, at A15 (describing how today's newspaper circulation numbers are lowest in history); Eric Alterman, Out of Print: The Death and Life of the American Newspaper, New Yorker, Mar. 31, 2008, at 48, 48–49 (discussing how newspapers in their current printed form are unlikely to survive).

2. Newspaper Ass'n of Am., Advertising Expenditures, at http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (on file with the *Columbia Law Review*) (last updated Mar. 2010).

3. Pew Research Ctr., Project for Excellence in Journalism, The State of the News Media 2010, Number of U.S. Daily Newspapers: Weekday and Sunday Editions, Yearly Increments, 1990–2008, at http://www.stateofthemedia.org/2010/chartland.php?msg=1&id=1312&ct=line&dir=&sort=&c1=1&c2=1&c3=1&c4=1&c5=0&c6=0&c7=0&c8=0&c9=0&c10=0&d3=0&dd3=1 (on file with the *Columbia Law Review*) (last visited Feb. 11, 2011).

4. See generally Steven Petersen & Ryan Sidlik, The Associated Press Intellectual Prop. Initiative (2009), available at http://www.bivings.com/thelab/presentations/AP_Intellectual_Property_Bivings.pdf (on file with the *Columbia Law Review*) (discussing Associated Press initiative to "crack down on sites that it claims use its intellectual property improperly").

5. See Associated Press, Protect, Point, Pay—An Associated Press Plan for Reclaiming News Content Online, available at http://www.niemanlab.org/pdfs/ProtectPointPay.pdf (on file with the *Columbia Law Review*) (last visited Feb. 11, 2011) (describing licensing market at heart of this idea).

6. See Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344–48 (1991) (observing how mere facts are excluded from copyright law, absent original expression).

they now believed, would provide them with a badly needed ownership interest in the news.[7]

The story of hot news begins with *International News Service v. Associated Press*.[8] In a largely concocted dispute between two rival news cooperatives, the Court was presented with an opportunity to recognize a time-bound property right in news.[9] Instead of taking the bait and having to decide between a full-blown property right in news or no protection at all, the majority chose to steer a middle path and in the process articulated a framework that has since remained as novel as it was controversial. This was the quasi-property doctrine of misappropriation. The Court consciously rejected the idea of a property right in news, expressing concern over the public interest consequences of such a move, and decided to frame its opinion in terms of unfair competition.[10] Starting from the proposition that it was objectionable to reap without sowing, it went on to recognize that a newsgatherer could bring an action against a competitor for free riding on its efforts when the news in question was time sensitive, and therefore of commercial value.[11]

By moving the debate away from property and toward a liability framework, the Court seemed to deny the newspaper industry a tradable ex ante entitlement in news. Yet, its framework for this move seemed to sit rather oddly with common law ideas and thinking at the time. Justice Brandeis, in a strongly worded dissent in the case, thought the majority to be masking its propertarian logic in nonproprietary terms and attempted to call the majority's bluff.[12] The Court's novel category of quasi-property was also met with little support, and eventually came to be characterized as largely meaningless.[13] These developments, coupled with the demise of federal general common law,[14] resulted in the misappropriation doctrine falling into desuetude. In due course, however, several state common law jurisdictions absorbed it into their unfair competition laws.[15] Of these, New York's hot news doctrine has since become the most prominent, owing to the Second Circuit's conscious decision to

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7. See Owning the News: Copyrighting Facts as Well as Words, Economist, June 26, 2010, at 63 (discussing proposed heightened protections for newspapers and potential impact on ability to copyright facts).

8. 248 U.S. 215 (1918).

9. See generally Douglas G. Baird, The Story of *INS v. AP*: Property, Natural Monopoly, and the Uneasy Legacy of a Concocted Controversy, *in* Intellectual Property Stories 9 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006) [hereinafter Baird, Uneasy Legacy] (discussing case background and ramifications).

10. *International News*, 248 U.S. at 236.

11. Id. at 239–40.

12. Id. at 258 (Brandeis, J., dissenting).

13. See Newman v. Sathyavaglswaran, 287 F.3d 786, 797 & n.13 (9th Cir. 2002) (describing quasi-property as a "term with little meaningful legal significance").

14. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

15. See, e.g., Standard & Poor's Corp. v. Commodity Exch., Inc., 683 F.2d 704, 710–12 (2d Cir. 1982) (New York law); Bd. of Trade v. Dow Jones & Co., 439 N.E.2d 526, 537 (Ill.

make sense of the Court's opinion in *International News*, and the industry's increased reliance on it of late.

The hot news doctrine, as formulated by the Second Circuit, takes the *International News* framework as its starting point and disaggregates it into five independent factors for analysis.[16] Under the doctrine, a plaintiff newsgatherer may recover from a defendant when: (1) the newsgathering/collection involves a significant expenditure, (2) the news/information is time sensitive, (3) the defendant free rides on the material collected by the plaintiff, (4) such free riding competes directly with the plaintiff's own market, and (5) it is likely to diminish the incentive to gather/collect the news in a timely manner.[17]

Despite its attempt to remain true to the original misappropriation framework, the hot news variant that the Second Circuit formulated deviates from the original framework in one crucial respect. Whereas *International News* had been conscious in avoiding the use of property and ownership rhetoric to frame its analysis of misappropriation, the Second Circuit's attempted reformulation superimposed on the misappropriation framework distinctively propertarian rhetoric. Noting in no uncertain terms that *International News* was "not about ethics" but "about the protection of property rights," the Second Circuit's analysis seemed directed entirely at establishing a primary market for newsgatherers to license their collections to competitors in traditional intellectual property fashion.[18] In effect, the decision reinvigorated the debate about property in news. *International News* had, until this point, been taken to be more about unfair competition and less about property rights. The Second Circuit's logic seemed to unequivocally reverse this interpretation.

This distinction initially made little difference, even after the emergence of the hot news doctrine, given the infrequency with which plaintiffs relied on it. When the newspaper industry began looking for an intellectual property solution to their problems, however, they readily seized on the propertarian approach to misappropriation.

In early 2009, the Associated Press (AP) announced that it had decided to invest heavily in efforts to prevent the misappropriation of its news on the Internet, in the belief that it needed to receive "appropriate compensation" for its newsgathering efforts, noting that it would not continue to rely on "misguided legal theories."[19] Later that year, the AP began to put together a digital news registry to tag and track every piece of

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App. Ct. 1982) (Illinois law); Columbia Broad. Sys., Inc. v. Melody Recordings, Inc., 341 A.2d 348, 353 (N.J. Super. Ct. App. Div. 1975) (New Jersey law).

16. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852–53 (2d Cir. 1997).

17. Id.

18. Id. at 853. What is ironic in all of this is that the Second Circuit ultimately denied the plaintiff's claim. Yet, its holding and analysis have spurred a robust body of case law, especially in the Second Circuit.

19. Dean Singleton, Chairman, Associated Press, Remarks at the Associated Press Annual Meeting (Apr. 6, 2009), at http://www.ap.org/pages/about/pressreleases/pr_040609c.html (on file with the *Columbia Law Review*).

news that the AP and its members publish, with the idea of charging commercial and noncommercial distributors and users of its news a licensing fee.[20] Its efforts found encouragement in the successes it had in bringing hot news actions against online news distributors who lifted facts from its published news stories.[21]

Other news and information gathering entities have also begun to invoke the hot news doctrine against online competitors, in the similar belief that doing so will result in the creation of a robust licensing market for their information services—in turn, an additional source of revenue.[22] Interestingly, it is not just the dominant or large industry incumbents who have begun to embark on this strategy. Several new, smaller, and principally online newsgatherers view the hot news doctrine as creating and protecting a full-blown, albeit temporally limited, property right in their news.[23] The effect of this has, in turn, been that courts interpreting and applying the hot news doctrine have readily inferred the existence of an ownership norm among news collectors in applying the hot news doctrine, without examining whether the norm has an independent

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20. Press Release, Associated Press, Associated Press to Build News Registry to Protect Content (July 23, 2009), available at http://www.ap.org/pages/about/pressreleases/pr_072309a.html (on file with the *Columbia Law Review*). More recently, the U.S. Department of Justice (DOJ) issued a letter supporting AP's actions, creating the registry, and noting that it was unlikely to run afoul of the antitrust laws. See Letter from Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, Antitrust Div., to William J. Baer, Esq., Arnold & Porter LLP (Mar. 31, 2010), available at http://www.justice.gov/atr/public/busreview/257318.htm (on file with the *Columbia Law Review*) ("[T]he Department has no present intention to challenge the AP's Registry proposal . . . [as it] is not likely to result in anticompetitive harm and . . . it may provide procompetitive benefits to participating content owners and users."). Of course, the DOJ's support says nothing of AP's position on the ownership of news.

21. See, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 458–61 (S.D.N.Y. 2009) ("A cause of action for misappropriation of hot news remains viable under New York law, and the Second Circuit has unambiguously held that it is not preempted by federal law.").

22. See, e.g., Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 313 (S.D.N.Y. 2010) ("The [plaintiff financial services] firms contend that their recommendations are 'hot news' and that the regular, systematic, and timely taking and redistribution of their recommendations constitutes misappropriation . . . ."); Complaint ¶ 7, Dow Jones & Co., Inc. v. Briefing.com, Inc., No. 1:10-cv-03321 (S.D.N.Y. Apr. 20, 2010) ("Briefing.com . . . unfairly competes with Dow Jones in the delivery of 'hot news' and tortiously misappropriates Dow Jones' headlines and articles from the DJN.").

23. Theflyonthewall.com, a defendant in one of the cases previously cited, had in fact commenced an action for hot news misappropriation against another small competitor, Tradethenews.com, and settled the matter before a verdict. See *Barclays Capital Inc.*, 700 F. Supp. 2d at 327–28 (explaining allegations as including misappropriation of "Fly's valuable, time-sensitive, proprietary information by broadcasting content from Fly's newsfeed on its own website within seconds of the content being posted"). The court in *Barclays* used the prior case to deny the defendant's claim that there was a strong industry-wide norm against owning news and information that was publicly distributed. Id. at 338 ("Fly's argument that its practices are in accordance with prevailing industry norms—that, in essence, no one 'owns' financial information once it is released—is further undermined by Fly's use of the hot-news misappropriation theory to sue one of its competitors, TTN.").

basis, or indeed the possibility that incumbents' mistaken reliance on the hot news doctrine may have itself influenced the development of the norm. Property in news seems to be a de facto reality today under the hot news doctrine.

The attempt to resurrect hot news misappropriation as a solution to the problems faced by newspapers reached its culmination recently, when the Federal Trade Commission (FTC) issued a discussion paper outlining a few potential policy proposals aimed at reinventing journalism.[24] Featuring rather prominently in this policy paper was the enactment of "Federal Hot News Legislation" to help address newspapers' revenue problems.[25] Centered on the rhetoric of proprietary facts, the proposal argues that federalizing the doctrine might provide newsgatherers with a necessary financial incentive to invest in newsgathering.[26] It is certainly too early to say whether this proposal will ever move forward, but it unquestionably points to recent developments having effectively resuscitated the hot news doctrine.[27]

This Article argues that these developments all rest on a flawed understanding of the misappropriation doctrine and its underlying theoretical basis.[28] Contrary to the Second Circuit's facial rhetoric and the newspaper industry's beliefs, the misappropriation doctrine (including its hot

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24. Fed. Trade Comm'n, Potential Policy Recommendations to Support the Reinvention of Journalism 5–17 (Discussion Draft 2010) [hereinafter FTC Discussion Draft], available at www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf (on file with the *Columbia Law Review*).

25. Id. at 9–11.

26. Id. at 10.

27. For some criticisms of the FTC's study in the newspaper media, see Jeremy W. Peters, Government Takes on Journalism's Next Chapter, N.Y. Times, June 14, 2010, at B7 (collecting criticisms of FTC paper from journalists, media watchdogs, and academics); Editorial, FTC Floats Drudge Tax: Journalism Can Reinvent Itself Without Government 'Help,' Wash. Times, June 4, 2010, at http://www.washingtontimes.com/news/2010/jun/4/ftc-floats-drudge-tax/ (on file with the *Columbia Law Review*) ("The Federal Trade Commission . . . is seeking ways to 'reinvent' journalism, and that's a cause for concern."). For the most substantive response to the proposals to date, see Google, Inc., Comments on Federal Trade Commission's News Media Workshop and Staff Discussion Draft on "Potential Policy Recommendations to Support the Reinvention of Journalism" 2 (2010), available at www.google.com/googleblogs/pdfs/google_ftc_news_media_comments.pdf (on file with the *Columbia Law Review*) ("Regulatory proposals that undermine the functioning of healthy marketplaces and stall the pace of change are not the solution.").

28. References in this Article to "misappropriation" and "the misappropriation doctrine" should be understood as referring to hot news misappropriation—i.e., the cause of action that is traced back to *International News* and the unique quasi-property doctrine that the Court formulated in that case. The two terms are used interchangeably throughout. It very importantly does not include the more generic idea of misappropriation, which extends beyond these situations and is often invoked in relation to trade secrets, goodwill, and other intangibles. See Richard A. Posner, Misappropriation: A Dirge, 40 Hous. L. Rev. 621, 626–41 (2003) (discussing misappropriation as stand-alone doctrine that originated in *International News*); Leo J. Raskind, The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law, 75 Minn. L. Rev. 875, 876 (1991) (referring to misappropriation as doctrine that originated in *International News*).

news variant) is incapable of creating a property interest, even in traditional intellectual property form, in news. While the doctrine is directed at deterring free riding, it does so in the context of solving a collective action problem that was and is unique to the newspaper industry, related to the practice of cooperative newsgathering.

Newspapers competing in the market for time-sensitive news face a problem. Collecting news on a regular basis in systematic fashion involves an enormous expenditure of skill and resources. No single newspaper can afford to do this by itself on a sustained basis. Since factual news is by its very nature homogeneous (rather than unique to its collector) and publicly accessible, newspapers are best off individually and collectively when they cooperate and pool their resources and efforts together to collect news. In this scenario, however, rampant free riding by a few newspapers unwilling to cooperate (or to collect the news on their own) is likely to diminish other newspapers' willingness to cooperate, thereby directly impacting the industry's collective profitability. Newspapers are thus best off when they all cooperate, but free riding by one or a few of them affects their incentives to do so.[29]

Newspapers recognized the need for cooperation amongst themselves very early on in their development, organizing themselves into formal and informal collectives, and sharing journalistic leads and tips with each other both within and outside these formations.[30] While these formations were at first sustained by informal norms against free riding, the formalization of cooperative efforts necessitated the institutionalization of these norms. The misappropriation doctrine stepped in here, and sought to raise the costs of free riding while simultaneously allowing cooperative newsgathering and informational sharing among competitors to continue. Free riding thus was not problematic for its own sake, but only because of its effects on the dynamics of the group. An individual property right granted to each news collector might deter free riding, but could potentially affect the nature of cooperation in the market.[31]

Given the prevalence of cooperation and sharing among competing newspapers in the market, a property right in the nature of a first-possession-based exclusive entitlement in the news would likely have imposed a new set of transaction and information costs on newspapers, deterred cost-effective sharing of tips and leads, and possibly also resulted in duplicative races among competitors to be the first to collect and report the news. The Court in *International News* seemed to recognize this as a distinct possibility. Intellectual property rights have, for a long time,

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29. See infra Part II.A.1 (discussing how free riding of some newspapers incentivizes free riding by most participants in market, leading to slower collection and dissemination of news).

30. See infra Part II.A.2.a–b (discussing evolution of formal and informal types of cooperation among newspapers).

31. See infra Part II.A.2.c (describing problems that arise from granting individual property right in news).

been thought to be the law's most obvious response to the problem of informational free riding.[32] Their grant of exclusivity over the intangible enables the limited internalization of positive externalities by rights holders, thereby inducing the very production of the intangible. Structurally though, such individual exclusion rights make the most sense only when the intangible is individually produced by, and therefore in some sense unique to, the right holder. When the intangible in question is not in any way unique to its purveyor, but rather produced through a collective effort, the harm from free riding lies instead in its entrenching a collective action problem. Deterring such free riding through a liability mechanism without simultaneously attaching the entitlement to the intangible, by focusing, as a normative matter, on the unfair gain to the defendant rather than on the loss to the plaintiffs, offers a more tailored, equally effective, and less problematic solution than a property mechanism.

Keeping this in mind, the framework that the Court chose instead of a property right was one of unjust enrichment, from which it created a regime of gain-based liability for the unauthorized, competitive use of the news collected by an individual or group of newspapers. Without converting the news collected into an artificially scarce resource, a free rider is held liable for the expenditure that it saves by free riding instead of collecting or cooperating.[33] It is in this crucial respect that the misappropriation doctrine differs from the idea of property in news—by only allowing for the incomplete or partial internalization of externalities.

Misappropriation is thus a framework for recovery that draws on unfair competition and unjust enrichment law, an interface that has otherwise received little scholarly attention.[34] As a body of court-developed rules, unfair competition uses ideas from different parts of the common

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32. See Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 Tex. L. Rev. 1031, 1033–46 (2005) ("Courts applying the property theory of intellectual property are seeking out and eliminating uses of a right they perceive to be free riding.").

33. See infra Part II.B (discussing interrelationship between unjust enrichment principle and misappropriation doctrine).

34. Perhaps the only scholar to recognize this connection early on was Rudolf Callmann. See Rudolf Callmann, He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition, 55 Harv. L. Rev. 595, 596–97 (1942) (noting that *INS v. AP* "in effect imported into the law of unfair competition the concept of unjust enrichment"). Yet, Callmann's analysis paid scant attention to the nuances of unjust enrichment doctrine and its structural contribution to the debate about misappropriation, focusing almost entirely on unfair competition, Callmann's principal area of interest at the time. Nearly half a century later, Wendy Gordon's work on intellectual property's "restitutionary impulse" also examined this interface in some detail. See Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 Va. L. Rev. 149, 244 (1992) [hereinafter Gordon, Restitutionary Impulse] ("[T]he restitutionary cause of action is a species of unfair competition; this competition is deemed unfair because the law recognizes the restitutionary principle. This relationship between the two doctrinal categories should not be surprising. After all . . . International News Service . . . is a case of both unfair competition and unjust enrichment."). For a recent discussion of unjust enrichment law in the European context, see Anselm Kamperman Sanders, Unfair Competition Law: The Protection of Intellectual

law to create private causes of action for behavior that is likely to harm competition in the market.[35] It closely resembles antitrust law in many respects, except that its origins are often independent of any statute, and therefore largely a matter of state and federal common law. The law of unjust enrichment is premised on the idea that there exist circumstances where a plaintiff can recover from a defendant when the latter is enriched at the expense of the former, without there having to be any wrongdoing, loss, or bargain between the parties.[36] In other words, it forms a fourth "wheel" of the common law alongside tort, contract, and property law.[37] Much like property law, the law of unjust enrichment deals with the allocation of positive externalities that intentionally or unintentionally arise and flow to strangers.[38] Yet, their similarity ends there. Whereas property law recognizes an ex ante, nonrelational interest in an owner (i.e., the ownership interest) and makes it the normative baseline around which actions are structured, the principle of unjust enrichment recognizes no such similar interest. Instead, it operates entirely as a principle of distributive justice that derives its normative basis in the incompatibility of the resulting situation with certain ideals of social morality.

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and Industrial Creativity 121–34 (1997) (examining unjust enrichment doctrine in Germany, France, the Netherlands, and the United Kingdom).

35. For early work trying to describe the area, see Charles Bunn, The National Law of Unfair Competition, 62 Harv. L. Rev. 987, 987–88 (1949) ("[W]e have a national law of unfair competition now. It is found in . . . the Federal Trade Commission Act of 1914, as amended by the Act of 1938."); Rudolf Callmann, What is Unfair Competition?, 28 Geo. L.J. 585, 607 (1940) [hereinafter Callmann, What is Unfair?] ("Only if we free the life of commercial competition from the role of a Cinderella . . . may the Law of Competition develop freely and without restraint."); Zechariah Chafee, Jr., Unfair Competition, 53 Harv. L. Rev. 1289, 1315 (1940) (explaining his theory of "Exploration" in which courts cautiously expand concept of unfair competition to include "a few new kinds of standardized wrongs"); Milton Handler, Unfair Competition, 21 Iowa L. Rev. 175, 259 (1936) ("[T]he definition of unfair competition by administrative legislation is incomparably superior to definition by administrative decision."); James Angell McLaughlin, Legal Control of Competitive Methods, 21 Iowa L. Rev. 274, 274 (1936) ("Judicial development of [unfair competition] into closely related fields has been needlessly restricted by two leading cases."); Ervin H. Pollack, A Projection for the Revaluation of Unfair Competition, 13 Ohio St. L.J. 187, 235 (1952) ("The pattern of legislative, judicial and administrative experience has been sufficiently outlined to sketch a clear legislative picture of unfair competition but its details must be completed by administrative action.").

36. See generally Hanoch Dagan, Unjust Enrichment: A Study of Private Law and Public Values 1–3 (1997) (noting components of unjust enrichment include "(i) *a benefit* (or *enrichment*); (ii) which has been received by the defendant *at the plaintiff's expense*; and (iii) the retention of which is *unjust*"); Christopher T. Wonnell, Replacing the Unitary Principle of Unjust Enrichment, 45 Emory L.J. 153, 155, 191–219 (1996) (discussing four distinct principles underlying liability based on unjust enrichment).

37. Richard A. Epstein, The Ubiquity of the Benefit Principle, 67 S. Cal. L. Rev. 1369, 1370–71 (1994) ("[T]he common law coach runs not on three substantive wheels, but on four.").

38. See Ariel Porat, Private Production of Public Goods: Liability for Unrequested Benefits, 108 Mich. L. Rev. 189, 190 (2009) (describing unjust enrichment law in terms of externalities).

In other words, it is almost always backward looking, and operates ex post.

The doctrinal apparatus of hot news misappropriation bears the indelible imprint of the instrumental goals that motivated its creation. Most of the doctrine's elements remain meaningful *only* when understood within the broader context of what it was trying to achieve. The incentives needed for cooperative newsgathering, the practice that misappropriation was directed at preserving, remain quite different from those demanded by newspapers in the digital environment. Disconnecting misappropriation from its roots in cooperative newsgathering in order to serve this alternative purpose would necessitate jettisoning key elements of the doctrine and converting it into a property interest. This is, in turn, likely to raise serious federal preemption and First Amendment concerns, thereby calling into question its very utility and survival. If hot news misappropriation is to survive as a viable doctrine, then rooting it in a theory of competitive unjust enrichment directed at solving a collective action problem seems unavoidable. Understanding that theory and its continuing relevance for newsgathering, appreciating how it differs from the traditional rationale for intellectual property, and analyzing the practical consequences that flow from it are but logical first steps in that endeavor. Hot news misappropriation did not and cannot create a property right in news. Efforts to reinvigorate newspaper journalism ought to look elsewhere for answers.

This Article offers a positive theory of the misappropriation doctrine independent of property and ownership, and attempts to thereby dispel the belief that it did create, or is indeed capable of creating, an ownership interest in news. It explains the dynamics of competitive newsgathering and shows how the doctrine uses the connection between unjust enrichment and unfair competition to encourage cooperative efforts in that market. Part I provides an overview of the property-based understanding of the misappropriation doctrine, documenting the main causes and consequences of this turn. Part II articulates an alternative theoretical framework for misappropriation, drawing on the interface between unjust enrichment as a structural principle and unfair competition as a set of normative ideals in the common law. Part III then explains the significance of this difference, highlighting the doctrinal, remedial, and First Amendment consequences that are likely to flow from adopting one approach over the other.

I. Delusions of Grandeur: Hot News Misappropriation as a Property Action

Arguments for owning the news date back to the mid-nineteenth century. Melville Stone, then head of the Chicago Daily News, and later President of the AP, made it his primary objective to have the law recog-

nize the idea of a property right in the news.[39] A strong utilitarian, his primary motivation for the idea arose from the acts of his competitors, who flagrantly copied the news from his newspaper on a systematic basis.[40] At the time, a property right would have enabled the Daily News to sue its competitors and presumably enjoin them preemptively from such copying. Equitable relief, in the nature of injunctive relief, was the principal result that early proponents of a property right in the news sought.[41]

This remedial conception of property as no more than a basis for injunctive relief manifested itself in early decisions grappling with the issue of property in news. In one well-known decision, the Seventh Circuit extensively elaborated on the need to recognize a property interest in news *only* for the purposes of providing injunctive relief.[42] When the matter reached the Supreme Court in *International News*, the majority, however, declined to decide the case on the basis of property.[43] Justice Holmes too, in his cryptic concurrence, refused to recognize property as forming the basis of any relief.[44] Despite this, the Court granted the plaintiff injunctive relief based on a quasi-property theory of unfair competition and unjust enrichment.[45]

If injunctive relief was all that the early controversy about a property right in the news was about, the Court's decision in *International News* might have ended the debate. It seemingly produced what the newspaper industry, led by Stone at the time, wanted: a right to have courts enjoin competitive copying. Yet, when the doctrine came to be absorbed by different state laws and resurrected as the hot news doctrine, it nonetheless came to be interpreted as actively producing a property right in the news.[46] In the intervening period between 1918 and 1992, the body of judicial and scholarly writing about intellectual property and its connection to the general idea of property had grown exponentially.[47] As an

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39. Baird, Uneasy Legacy, supra note 9, at 11 ("Melville Stone is the person most responsible for developing the idea of a property right in news.").

40. These were the McMullen brothers, who owned the Chicago Post and the Chicago Mail. Id.; see also Melville E. Stone, Fifty Years a Journalist 355–56 (1921) (describing practice of copying from newspapers without permission as "universal" and his desire to find legal remedy in the form of a property right).

41. Stone, supra note 40, at 337–38 (quoting Frederic Jennings, then General Counsel of the Associated Press).

42. Nat'l Tel. News Co. v. W. Union Tel. Co., 119 F. 294, 299–301 (7th Cir. 1902).

43. Int'l News Serv. v. Associated Press, 248 U.S. 215, 234–35 (1918).

44. Id. at 246–48 (Holmes, J., concurring).

45. Id. at 236 (majority opinion) ("Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.").

46. See, e.g., Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852–53 (2d Cir. 1997) (treating *International News* as establishing "hot-news" misappropriation claim).

47. See generally Douglas C. Baird, Common Law Intellectual Property and the Legacy of *International News Service v. Associated Press*, 50 U. Chi. L. Rev. 411 (1983)

action relating to an informational intangible (i.e., the news), it thus seemed logical to treat misappropriation as just another intellectual property doctrine, akin to copyright, trade secrets, or publicity rights. It is here that the reintroduction of property ideas and rhetoric assumes significance, but for seemingly different (or rather, additional) reasons. Thus, when the Second Circuit concluded that hot news misappropriation was not about ethics but rather about property rights, its focus was not just on injunctive relief. Indeed, the court's opinion did not even deal with the issue of remedies, since it found for the defendant on the substantive issue.[48]

A property right in an informational good, along the lines of intellectual property, now implied a different set of consequences. And surely enough, courts interpreting and applying the misappropriation doctrine took their cue from the Second Circuit's proclamation, and began moving the law in this direction. Three such interrelated moves—all of which derive from the identification of news as the basis of a property interest, and indeed themselves contributed to it—are worth describing here: (1) the recognition and validation of an ex ante licensing market for time-sensitive news; (2) the increased emphasis on the in rem or nonrelational nature of the entitlement in misappropriation; and (3) the use of injunctive relief as the default remedy in hot news cases.

A. *An Ex Ante Licensing Market*

Central to all forms of intellectual property remains an owner's ability to license others to use the subject matter of the right on exclusive or nonexclusive terms.[49] An owner can, in other words, contractually alienate his ability to exclude another from the object of the right on such terms as he deems fit. Needless to say, this provides the owner or right holder with an additional source of revenue of importance in the newspaper industry. All the same, the growth of a licensing market for the news has both been fueled by, and in itself contributed to, a propertarian vision of hot news misappropriation.

[hereinafter Baird, Common Law] (describing development of misappropriation as form of common law intellectual property); Frank H. Easterbrook, Intellectual Property Is Still Property, 13 Harv. J.L. & Pub. Pol'y 108 (1990) (linking intellectual property to traditional property); Richard A. Epstein, *International News Service v. Associated Press*: Custom and Law as Sources of Property Rights in News, 78 Va. L. Rev. 85 (1992) [hereinafter Epstein, Custom and Law] (discussing particular circumstances of *International News* and general system of property rights surrounding it); Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287 (1988) (exploring philosophical justifications for granting property rights to ideas).

48. *Nat'l Basketball Ass'n*, 105 F.3d at 853, 855.

49. See generally Mark A. Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 Calif. L. Rev. 111 (1999) (discussing ability of parties to contract over use of intellectual property while analyzing proposed change to Uniform Commercial Code); Raymond T. Nimmer, Licensing in the Contemporary Information Economy, 8 Wash. U. J.L. & Pol'y 99 (2002) (analyzing licensing of information).

For a licensing market to come into existence, it is crucial that the licensor have an identifiable right or entitlement ex ante that can form the subject matter of the license.[50] In other words, a potential licensee will most often need to know the nature and extent of a licensor's authority under the entitlement before it is adjudicated by a court. The existence of a bright-line ex ante interest is thus crucial to the success of a thick licensing market.[51] Here again, the fact that intellectual property regimes are modeled on traditional property interests means that the law recognizes an identifiable interest even before its holder attempts to enforce it in a court of law during an infringement action. For instance, the entitlement in copyright law is presumed to come into existence the moment an author creates an original work of authorship that is fixed in a tangible medium, and in patent law it commences upon a formal grant by the government. The owner's attempt to exercise the exclusivity of the right during an infringement action in court is thus merely an attempt to enforce a preexisting right.

The existence and effectiveness of such a licensing market thus depends to a large degree on the identification and demarcation of rights by the parties involved. One obvious way of achieving this is by attaching the rights directly to a discrete asset or resource, adopting what Henry Smith describes as the exclusion regime of delineating an entitlement.[52] Attaching a right to an actual or notional resource and framing it in terms of "simple on/off signals" involving the resource minimizes the various information and transaction costs involved, and consequently sim-

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50. Robert Cooter & Thomas Ulen, Law and Economics 100 (1988) (noting "[o]ne well-confirmed result in the literature on bargaining is that bargainers are more likely to cooperate when their rights are clear," which explains "why property law favors criteria for determining ownership that are clear and simple"). But see Jason Scott Johnston, Bargaining Under Rules Versus Standards, 11 J.L. Econ. & Org. 256, 257 (1995) (arguing, against conventional wisdom, that judicial ex post balancing test may result in more efficient bargaining than ex ante clearly defined rule, given existence of private information about value and harm).

51. For an analogous argument in the patent law context, see Craig Allen Nard, Certainty, Fence Building, and the Useful Arts, 74 Ind. L.J. 759, 759–60 (1999).

52. Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 972–73, 75 (2004) [hereinafter Smith, Law of Nuisance] ("Under an exclusion regime, the law uses a rough informational variable or signal—such as entry—to define the right, and thus bunches together a range of uses that juries, judges, and other officials need never measure directly." (emphasis omitted)); Henry E. Smith, Exclusion Versus Governance: Two Strategies for Delineating Property Rights, 31 J. Legal Stud. S453, S454–55 (2002) [hereinafter Smith, Two Strategies] ("In exclusion, decisions about resource use are delegated to an owner who, as gatekeeper, is responsible for deciding on and monitoring specific activities with respect to the resource."); Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719, 1755–56 (2004) [hereinafter Smith, Property Rules] ("In an exclusion strategy, the law sets up rough signals (informational variables, proxies) defining the boundaries of the asset. Within this zone of protection, owners have the choice of how to invest in or consume the asset." (emphasis omitted)).

plifies the process of licensing it to strangers.[53] This is especially so when the right relates to nonrivalrous information. A potential licensee has no way of evaluating the information/intangible until it is disclosed to him; yet, upon such disclosure he has little reason to want to pay for it.[54] Known as Arrow's information paradox, this reality is thought to lie at the root of the tendency to propertize the entitlement being transacted in, by attaching it to a discrete asset around which an exclusionary legal framework then operates, independent of any contractual agreement between the parties.[55] Robert Merges thus argues that property rights (in the nature of intellectual property entitlements) allow parties to overcome Arrow's paradox by providing licensors with a basis for recourse, independent of the actual license (which may never fructify), thereby providing for a form of precontractual liability.[56] Propertizing information thus directly facilitates contractual transactions relating to such information. Two things become central then to the effective functioning of a licensing market: (1) the ex ante characterization of the entitlement as a property right, and (2) the law's attaching it to an identifiable res, albeit a notional one.

It was only a matter of time before news purveyors sought to capitalize on the licensing opportunities that emerged from a propertarian (or commodified) vision of news. If a collector of hot news could exclude a competitor from free riding on its news (using the misappropriation doctrine), surely it could now seek to charge such competitors in return for not suing them: the very premise of licensing. This change is seen in the AP's own rhetoric surrounding the hot news doctrine. Whereas in 1918, it had categorically told the Court that it was "not asking [for] any exclusive right"[57] to communicate the news, in 2009 it would declare that it was merely seeking appropriate compensation that paid it fully and fairly for its news.[58] Its reasons for this shift are obvious. As a historical matter, the newspaper industry had relied entirely on advertising as its primary

53. Smith, Law of Nuisance, supra note 52, at 973; see, e.g., Henry E. Smith, Institutions and Indirectness in Intellectual Property, 157 U. Pa. L. Rev. 2083, 2120 (2009) ("The modular structure of exclusion-based intellectual property rights . . . makes . . . contracting more tractable.").

54. Kenneth J. Arrow, Economic Welfare and the Allocation of Resources for Invention, *in* The Rate and Direction of Inventive Activity 609, 615 (Nat'l Bureau of Econ. Research ed., 1962) ("[T]here is a fundamental paradox in the determination of demand for information; its value for the purchaser is not known until he has the information, but then he has in effect acquired it without cost.").

55. Robert P. Merges, A Transactional View of Property Rights, 20 Berkeley Tech. L.J. 1477, 1490, 1499 (2005) [hereinafter Merges, Transactional View]. For an application to trade secrets law, see Mark A. Lemley, The Surprising Virtues of Treating Trade Secrets as IP Rights, 61 Stan. L. Rev. 311, 336–37 (2008).

56. Merges, Transactional View, supra note 55, at 1489–504.

57. See Victoria Smith Ekstrand, News Piracy and the Hot News Doctrine 72 (2005) (citing Brief for Respondent at 10, Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918) (No. 221)).

58. Singleton, supra note 19.

source of revenue. As this source began to diminish, the industry began to look for new revenue-earning opportunities, and the licensing market emerged as an obvious candidate. For this to work effectively, though, misappropriation had to be understood as an ex ante legal entitlement, one with boundaries that could be identified prior to a dispute/litigation, and which preferably revolved around a discrete asset—news.

Developing and reinforcing this licensing market has been central to the newspaper industry's use of the misappropriation doctrine in recent years. In *Associated Press v. All Headline News Corp.*, the plaintiff commenced a hot news misappropriation action against a defendant with whom it had previously entered into a licensing agreement.[59] When the defendant stopped paying the plaintiff its fees under the agreement but nonetheless continued to make commercial use of its news service, the plaintiff resorted to hot news misappropriation as an independent basis of recovery. Around the same time, the AP also commenced a hot news misappropriation action against news-aggregating defendants in *Associated Press v. Moreover Technologies, Inc.*[60] In this action, the AP made no secret of its attempted propertization of the news, repeatedly referring to the subject matter of its hot news claim as proprietary.[61] Both actions were ultimately settled, and the AP's licensing market is today extremely robust as a result.[62]

The relationship between the development of a licensing market for news and the metamorphosis of hot news misappropriation into a property claim is also strongly reflexive. While a property-based understanding of the doctrine certainly facilitates the growth of licensing, the ready recourse to such licensing by competitors (and others) in their use of the news has also facilitated an understanding of hot news misappropriation as creating an ownership interest in the news. Referred to as the phenomenon of doctrinal feedback, its prevalence is well documented in the context of copyright and trademark law.[63] Courts interpreting the doctrinal scope of copyright (and trademark) law look to prevailing licensing practices among market participants, and readily infer the existence of an ex ante legal entitlement over a type of use/copying when licenses describe the entitlement in those terms. This, as scholars have noted, ignores the reality that potential licensees tend to be risk averse, preferring

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59. 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009); Complaint at 12–13, Associated Press v. All Headline News Corp., No. 08 Civ. 00323 (S.D.N.Y. Jan. 14, 2008).

60. Complaint at 1–2, 4–14, Associated Press v. Moreover Techs., Inc., No. 07 Civ. 8699 (S.D.N.Y. Oct. 9, 2007).

61. Id. at 11–12.

62. In the former action, the court ruled in favor of the plaintiff on its claims of hot news misappropriation and copyright infringement, and against the defendant's motion to dismiss. *Associated Press*, 608 F. Supp. 2d at 458–62. The AP has since asserted that the hot news doctrine that developed in such actions "was important to [its] efforts to protect its intellectual property." FTC Discussion Draft, supra note 24, at 10.

63. See James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 884–85 (2007).

to obtain a license even in situations where they remain unsure about the precise contours of a licensor's entitlement.[64] The continuing, unabated growth of a licensing market for the factual news thus runs the obvious risk of itself contributing to an expansive propertarian understanding of hot news as creating an ownership interest in the news.

B. *An In Rem Interest*

One of the characteristic features of a property right is its structure as an in rem right—operational against the world at large. This is in contrast to interests that are thought to operate against a specific individual or set of individuals, classified as in personam rights or interests.[65] Yet, the distinction between the two is not one of mere numerosity, a fact that is often ignored. In other words, an in rem right is not merely a collection of in personam rights. Property rights are in rem interests because the set of individuals against whom they operate remains indefinite at all times, unlike in personam rights that operate against a definite set of individuals.[66] The problem, however, is that between the two extremes of definite and indefinite are a number of situations that are hard to fit into one category or the other. It is here that misappropriation's status as a doctrine creating a property right becomes problematic.

In *International News*, Justice Pitney chose to characterize the right he was creating as a form of quasi-property precisely because it elided the standard in rem/in personam distinction used to identify property interests.[67] The exclusionary framework created would thus operate only between direct competitors in a market.[68] A quasi-property right holder had an interest against a class of individuals that while definite in one sense (i.e., being composed only of competitors), nonetheless remained indefinite in another, since such competitors could be perfect strangers with whom the plaintiff had had no prior interaction. The existence of the right was thus largely conditional, since it depended to a large degree on the preexisting identity of the defendant, something largely unheard

64. See, e.g., id. at 887 (observing how uncertainty exacerbates this risk aversion).

65. This distinction is usually traced back to the work of Wesley Hohfeld. See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710, 718–19 (1917) [hereinafter Hohfeld, Fundamental Conceptions] (analyzing use of legal conceptions such as "in personam" and "in rem"). For recent work explaining the distinction in terms of information costs, see generally Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773 (2001).

66. Hohfeld, Fundamental Conceptions, supra note 65, at 718; Albert Kocourek, Rights in Rem, 68 U. Pa. L. Rev. 322, 322 (1920).

67. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) ("[F]or this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.").

68. Id. at 239 ("The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves.").

of in standard intellectual property regimes at the time and now.[69] Among other things, it was this unique structural attribute of misappropriation that kept it from being just another form of property/intellectual property.

In its most recent iteration, however, courts interpreting and applying the doctrine have paid insufficient attention to the identity requirement upon which *International News* placed much emphasis. In interpreting the *International News* opinion, the Second Circuit in *National Basketball Ass'n* shifted its focus and requirement from whether the plaintiffs and defendants were competitor firms to one of whether the defendant's actions compete with a product or service offered by the plaintiffs.[70] In doing so, however, the court failed to suggest any type of test to be followed in applying this restriction. As courts invoked the doctrine outside the realm of news and factual information, those courts began paying increasingly less attention to this element, effectively distancing it from its origins as an identity-based limitation on the applicability of the doctrine.

This is not to imply that the identity-based restriction disfavors extending the doctrine to new subject matter. In contrast to the Second Circuit, in the Third Circuit courts sought to preserve the identity-based structure of the requirement in *International News* by drawing a distinction between direct and indirect competition, even when dealing with subject matter unrelated to news.[71] Direct competition is meant to represent an identity-based limit, while indirect competition represents a product-based approach. Yet, few courts have followed suit; the recent trend appears to be toward an approach that looks for some minimal level of substitutability between the products and services of the parties.[72]

The effect of relaxing this restriction has thus been to move the interest created by misappropriation in the direction of a traditional in rem right, applicable against an indefinite class of individuals, the obvious characteristic of a property right.

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69. For a similar claim alluding to this distinction, see Gordon, Restitutionary Impulse, supra note 34, at 211 (describing restitutionary interest as relational). Note that the idea of a relational interest as used by Gordon bears no connection to the well-known category made popular by tort scholar Leon Green. See Leon Green, Relational Interests, 29 Ill. L. Rev. 460, 460 (1934) (developing an independent category of relational interests in the common law).

70. See Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997) (framing competition as competitive product or service rather than competitive firm).

71. See U.S. Golf Ass'n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028, 1037–38 (3d Cir. 1984) (finding "absence of direct competition" dispositive in case).

72. See, e.g., Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 336–39 (S.D.N.Y. 2010) (condemning Fly's actions as using Barclay's work as a substitute for its own by "systematically gathering and selling the [f]irms' [r]ecommendations to investors"); X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1107–09 (C.D. Cal. 2007) (finding significant that defendant's activities will "remove X17's incentive to gather the photographs and threaten the continued existence of X17's business").

C. *Automatic Injunctions*

The idea of hot news misappropriation as creating a property right in the news, which fuels and is fueled by the licensing of news, also impacts courts' conception of remedies. As noted earlier, the ability to enjoin free-riding competitors lays at the heart of the industry's attempts to have the law recognize a property right in the news.[73] Much of this originated in the distinction that courts of equity insisted on drawing between proprietary and nonproprietary rights for the purposes of granting equitable (i.e., injunctive) relief.[74] While originally an attempt to differentiate interests in land from other kinds of interests, courts soon began stretching the idea of proprietary rights in many instances with the exclusive objective of granting plaintiffs equitable relief in accordance with this age-old distinction.[75] *International News*, in some ways, broke with that tradition by refusing to classify the interest as a property right, but nonetheless affirmed the lower court's temporary injunction in the case as a remedial matter. In the first instance then, injunctive relief motivated a property-based understanding of the hot news doctrine.

Ever since *International News*, plaintiffs succeeding on the merits in hot news cases have invariably obtained injunctive relief.[76] Indeed, an automatic injunction rule appears to have emerged,[77] under which courts do not even consider the adequacy of monetary damages before proceeding to enjoin a defendant. Since at least the seminal work of Calabresi and Melamed, the remedial conception of property rights as entitlements obtaining property rule protection regardless of their normative content has continued to dominate the legal landscape.[78] Property rights are

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73. See supra notes 39–45 and accompanying text (discussing newspapers' efforts to use property right to enjoin free riders).

74. See generally Shyamkrishna Balganesh, Demystifying the *Right* to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 Harv. J.L. & Pub. Pol'y 593, 642–43 (2008) [hereinafter Balganesh, Right to Exclude] (describing origins of this distinction in equity and its implications for property doctrine).

75. See Green, supra note 69, at 461 (documenting this phenomenon among courts).

76. See, e.g., Associated Press v. KVOS, Inc., 80 F.2d 575, 582–83 (9th Cir. 1935) (granting preliminary injunctive relief); Triangle Publ'ns, Inc. v. New Eng. Newspaper Publ'g Co., 46 F. Supp. 198, 204 (D. Mass. 1942) (granting injunctive relief to plaintiff despite defendant's request for an exception); Dior v. Milton, 155 N.Y.S.2d 443, 463 (Sup. Ct. 1956) (denying motion to dismiss complaint and injunctive relief). But see U.S. Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc., 865 S.W.2d 214, 219 (Tex. App. 1993) (observing that injunctive relief was not only remedy available in hot news cases under Texas law).

77. The Federal Circuit had developed a similar "automatic injunction" rule for patent infringement, which the Supreme Court recently abrogated. See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393–94 (2006) (eliminating automatic injunction rule and requiring courts to use traditional four-factor test in deciding whether to grant injunctive relief).

78. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1089–93 (1972) (explaining why entitlements should receive property rule protection); see also Balganesh, Right to Exclude, supra note 74, at 649–57 (discussing remedial conception of property).

thus rights where courts are willing to grant plaintiffs injunctive relief.[79] With an automatic injunction rule for hot news cases firmly in place, the tendency today is to readily assume that the doctrine is directed at creating and protecting a property right in the news.

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An important caveat is in order here. One might argue that the developments this Part identified as propertarian do not necessarily flow from the mere identification of hot news misappropriation as creating a property interest in the news. In other words, the idea of property as such might be seen as doing little to produce these consequences itself. To the extent that they do derive from property thinking, they might be seen as originating in a very particular conception of property—one that is both absolutist and essentialist.[80] Whether or not this is true, and indeed whether the idea of property has one meaning or several, remains somewhat orthogonal to the argument advanced here. The claim here is that regardless of whether the hot news doctrine can be understood as a propertarian doctrine, it should not be understood to entail the consequences associated with an absolutist conception of property, which it unquestionably has through a two-way reflexive relationship with the idea of property. Rooting its normative basis in unjust enrichment instead of property would serve to minimize this. This Part leaves for another time and place the broader question of what the idea of property does and should mean in the abstract.

II. Reconstructing Hot News Misappropriation as a Nonproprietary Interest

Having examined the gradual crystallization of misappropriation into a doctrine creating a presumptive property interest in news, this Part offers a theory of the doctrine that situates it at the interface of unjust enrichment law and the common law of unfair competition. Specifically, it describes how the synthesis of ideas and principles from both areas generates a framework for solving the collective action problem of concern in the market for newsgathering.

In *International News*, Justice Pitney made a somewhat conscious effort to avoid framing misappropriation in property terms. Given what the plaintiffs were seeking in the case and Justice Brandeis's dissent concern-

79. See Smith, Property Rules, supra note 52, at 1724 (discussing and critiquing this connection).

80. See Shyamkrishna Balganesh, Debunking Blackstonian Copyright, 118 Yale L.J. 1126, 1133 (2009) (describing property absolutism and essentialism). For criticism of unidimensional property thinking along these lines, see generally Hanoch Dagan, The Craft of Property, 91 Calif. L. Rev. 1517 (2003) (criticizing Court's opinion in *United States v. Craft* for doing this in relation to marital property); Hanoch Dagan, Property and the Public Domain, 18 Yale J.L. & Human. 84 (2006) (applying this critique to intellectual property scholarship's relationship to property ideas and concepts).

ing the inability of judges to create new property interests,[81] Justice Pitney chose to name the interest he was recognizing as a form of quasi-property, observing that it would not create a right against the world at large (i.e., in rem) like traditional property interests.[82] Later courts and scholars have since dismissed the term quasi-property as meaningless.[83] Yet, Justice Pitney may have had a purpose in using it—especially since the term quasi-contract was for long thought to be connected to the general principle of unjust enrichment.[84]

Justice Pitney, interestingly enough, was well aware of unjust enrichment as an independent basis of liability in the common law. Indeed, in an opinion he wrote around the same time as *International News*, he made express reference to the idea.[85] By framing his discussion in terms of the principle of reaping without sowing rather than theft, he was perhaps alluding to unjust enrichment as the structural basis of misappropriation, a reality that scholars have noted in the past.[86] Additionally, in describing the functioning of the entitlement, he made express reference to the norms of "unfair competition in business."[87] Quasi-property was thus meant to be an entitlement that sounded in unjust enrichment and unfair competition, both at once. Nonetheless, by failing to explicate his choice of structural vehicle for the doctrine, Justice Pitney left the extent to which it remains distinct from property (other than in nomenclature) uncertain. This Part attempts to resolve this uncertainty.

It is worth noting an important caveat before proceeding. Justice Pitney's opinion, on the face of things, lends itself to multiple theoretical justifications for the doctrine of misappropriation he developed. All the same, observations in the opinion nonetheless cut against every one of those theories—*including that of unjust enrichment*. The theoretical frame-

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81. Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) ("Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news.").

82. Id. at 236 (majority opinion).

83. See, e.g., Newman v. Sathyavaglswaran, 287 F.3d 786, 797 (9th Cir. 2002) (noting that quasi-property nomenclature has "little meaningful legal significance"); Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L.J. 1, 19–20 (2000) [hereinafter Merrill & Smith, Optimal Standardization] (criticizing doctrine of misappropriation for having "taken on a life of its own").

84. See Gordon, Restitutionary Impulse, supra note 34, at 267 (arguing that Court may have borrowed the idea of quasi-property from quasi-contract); see also Peter Birks, An Introduction to the Law of Restitution 29–39 (1985) [hereinafter Birks, Restitution] (explaining development of term "quasi-contract" and its connection to unjust enrichment in common law).

85. Schall v. Camors, 251 U.S. 239, 254 (1920) (Pitney, J.) (commenting that principle of "reaping without sowing" adds an element of unjust enrichment).

86. See, e.g., Callmann, What is Unfair?, supra note 35, at 606–07 & n.56; John P. Dawson, The Self-Serving Intermeddler, 87 Harv. L. Rev. 1409, 1415–17 (1974) (discussing *International News* in context of restitution law's rules against recovery by a self-serving intermeddler).

87. *International News*, 248 U.S. at 240.

work offered here is thus not an attempt to discern Justice Pitney's true intent, or to argue that this is the only way of making sense of the opinion. Instead, it attempts to situate the opinion within the broader context of the newspaper industry (for whom it was developed) to argue that this context left a clear impact on the structure of the doctrine that has continued in the decades since. Thus, while it looks to the opinion in *International News,* it does so in both positive and reconstructive terms.

In analyzing the common law doctrine of misappropriation, this Part begins with the functional and then moves to the structural. First, it shows how the hot news misappropriation doctrine originates in the idea of unfair competition and is directed at preventing a market-based harm different from that ordinarily associated with traditional intellectual property. Douglas Baird's illuminating account of the background to the *International News* opinion provides an important window into the various considerations that might have influenced the Court in its choice of framework.[88] Second, it argues that the framework that the doctrine of misappropriation adopts is more closely aligned with the structural precepts of unjust enrichment, rather than property, and sets out the core elements of this difference and its manifestation.

A. *Unfair Competition as the Functional Basis of Misappropriation*

Just as Justice Pitney was familiar with unjust enrichment as a structural idea, he was also well acquainted with the principle of unfair competition. In *International News*, he observed that his opinion did not originate in property ideas, but instead "turn[ed] upon the question" of unfair competition, and found that the defendant's misappropriation of the news collected by the plaintiff constituted an act of unfair competition opposed to "good conscience."[89] His use of the idea of unfair competition was not coincidental, for he had just authored several opinions addressing the idea right before *International News*, and in many of them had even spent some effort developing a taxonomy of the concept.[90] Misappropriation thus originated in the Court's use of unjust enrichment as a structural vehicle in service of the goals of unfair competition.

1. *Harm from Free Riding in the Market for Timely News.* — Analyzing the form of market-based harm that the misappropriation doctrine is di-

88. See Baird, Uneasy Legacy, supra note 9 (discussing *International News* and historical background to it).

89. *International News*, 248 U.S. at 235, 240.

90. See United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) ("The law of trade-marks is but a part of the broader law of unfair competition."); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 259 (1917) (describing facts as meriting "an injunction to restrain . . . unfair competition"); G. & C. Merriam Co. v. Saalfield & Ogilvie, 241 U.S. 22, 24 (1916) (noting that case involves "unfair competition in the business of publishing and selling dictionaries"); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916) (observing how common law of trademarks was part of broader area of unfair competition); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 256 (1916) (describing case as "one of unfair competition without trade-mark infringement").

rected at requires understanding the structure of the market for newsgathering. Newspaper content consists of two independent components from a legal point of view. The first is the actual expressive content of news stories, which forms the subject matter of copyright protection. Here, news stories obtain protection in exactly the same way as do other forms of literary works. Yet, copyright law consciously excludes both ideas and facts from its coverage, based in large part on free speech and First Amendment concerns.[91] Thus, while copyright protects the expression in news stories, it does not protect the underlying factual content which is meant to remain in the public domain, freely accessible to anyone to use or disseminate.[92]

Just because factual information is deemed ineligible for copyright protection does not mean that it is without economic value. For newspapers, facts, rather than literary expression, are often their core contribution.[93] In other words, the news is characteristically associated less with literary expression than with the communication of the bare facts of events that transpired in the immediate past. Additionally, and perhaps most importantly, these facts are valuable because of their time sensitivity. Since newspapers focus on the delivery of factual information via their news stories, their delivery needs to be as proximate as possible in time to the actual event. And if the collection of factual information entails some cost, its collection in a timely manner in order to render it newsworthy adds another huge component to that cost.

Newsworthy facts are valuable principally because of their *timeliness*; the commercial value of news diminishes over time. Audiences are clearly willing to pay more for information of recent occurrences than they are for information about events that transpired in the distant past. The principal investment that newspapers make in newsgathering is thus directed at capturing the time value of news.[94]

As a nonexcludable resource, factual information about public events is hard to contain. This is especially true with the advent of new communication technologies. Thus, if a major political event transpires

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91. See 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.11 (2010) (providing overview of protection for factual works such as news).

92. See Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1371–72 (5th Cir. 1981) (denying copyright protection to factual content of news stories).

93. Though ironically, a vastly greater percentage of their advertising revenue comes from the non-news parts of newspapers, which they use to cross-subsidize news collection. The more targeted forms of advertising that these other, special interest sections allow for explains this reality. See Hal Varian, Newspaper Economics: Online and Offline, Google Public Policy Blog (Mar. 9, 2010, 9:00 AM), at http://googlepublicpolicy.blogspot.com/2010/03/newspaper-economics-online-and-offline.html (on file with the *Columbia Law Review*) (noting most advertising revenue for newspapers comes primarily from "special interest sections" rather than from news).

94. For an excellent overview of the idea of time value in newsgathering and its emergence as a major source of competition among newspapers in the nineteenth century, see Menahem Blondheim, News over the Wires: The Telegraph and the Flow of Public Information in America, 1844–1897, at 11–29 (1994).

in a distant country and no newspaper reports it, the fact of its occurrence will nonetheless be communicated in due course, through the simple exchange and flow of information between individuals. While this would have occurred even before the arrival of digital communication, its advent has only made such dissemination immediate and multimodal. What newspapers bring to the picture then is systematic collection in a timely and accurate manner, which makes the market for news about more than just information aggregation and dissemination.

Now consider a situation of free riding in this market. One participant in the market (i.e., a newspaper) may decide to cut costs by choosing not to collect factual information independently, but instead to pick up (and report) such facts from a competitor's stories right after they are published. For this strategy to work, obviously the news needs to retain economic value for a period of time longer than the lag between the two independent instances of publication. If this were to happen, the free rider saves on the cost of collecting the information as such, which includes the added costs of collecting it when it retains time-dependent economic value. The reason for differentiating between the two, while largely conceptual, derives in turn from the effects of the free rider's actions on the collector's incentives.

If the free rider performed his actions *after* the factual elements had lost their time value, its effect on the collector's ex ante incentive would be very different. Its effect would be greatly diminished, since the major (or principal) value in news reporting derives from its timeliness. Since news collectors derive their incentive to invest in the act of collecting from the economic value inherent in the timeliness of the collection, when the free riding impacts that value it impairs the entire process of collection. The concern, from a competition point of view, is that allowing a free rider's actions to continue unabated might diminish a collector's incentive to the point where the timeliness of the news collection is compromised. If a newsgatherer invests heavily in making sure that its journalists collect news stories within minutes of their development but begins to see competitors saving enormous costs (and thus earning greater profits) by deciding to wait and free ride on the newsgatherer's efforts, the newsgatherer's most likely rational response will be to wait too, without some assurance that its efforts are not going to be taken advantage of by a competitor, or indeed several of them.

Therefore, extensive free riding by competitors is likely to result in the delay of the collection and dissemination of news, with most participants choosing to free ride or wait. Its effects will likely impact the market for the timely collection and dissemination of news as a whole. Democratic discourse and political accountability—functions historically

served by a vibrant newspaper industry—are likely to suffer in the process as the collection and dissemination of news become less timely.[95]

Understanding that the harm from free riding in the market for news collection derives from the time value of news was central to the Court's reasoning in *International News*. In his dissent, Justice Brandeis worried that the majority's approach effectively penalized all forms of free riding as a general rule.[96] Justice Pitney's opinion for the majority, though, possibly in response to the dissent, recognized the peculiar characteristics of the market for news, and focused its attention on the preservation of the time value inherent in news. Justice Pitney's opinion referred extensively to the economic value of "promptness"[97] in news collection and delivery, beginning from the premise that the "peculiar value of news is in the spreading of it while it is fresh."[98] The market-based harm that formed the basis of the misappropriation doctrine he formulated was the harm to a news collector's economic incentive to participate in the market—a harm that derived exclusively from a competitor's free riding when the news retained time sensitive economic value. The defendant's free riding, the opinion emphasized, was problematic not because it sought to reap without sowing in the abstract, but because it did so "*at the point* where the profit is to be reaped"[99]—a clear reference to the time-sensitivity that made the free riding competitively harmful. Justice Pitney's solution to the problem largely reflected this conception of harm.

2. *A Framework for Continuing Cooperation.* — The misappropriation doctrine needs to be understood against the backdrop of newsgathering practices dominant at the time of *International News*. This section argues that even though Justice Pitney's opinion merely alluded to these practices and their centrality to newspapers, in reality they had a major effect on the choice of framework around which the doctrine came to be structured. It begins by looking at two sets of such practices: collective newsgathering[100] and sharing tips among competing newspapers.[101] It then proceeds to analyze the problems that the Court might have seen in creating a simple property interest in the news,[102] and concludes by drawing

95. Borrowing a phrase from Richard Epstein, this may be characterized as the "externality of . . . ignorance." Epstein, Custom and Law, supra note 47, at 113.

96. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.")

97. Id. at 230 (majority opinion) (noting that value of news "depends upon the promptness of transmission").

98. Id. at 235.

99. Id. at 240 (emphasis added).

100. See infra Part II.A.2.a.

101. See infra Part II.A.2.b.

102. See infra Part II.A.2.c.

attention to the Court's focus on annulling a defendant's unfair advantage in its formulation of misappropriation.[103]

a. *Two Mutually Reinforcing Norms*. — The misappropriation doctrine originated in the need to develop a solution to the free rider problem in the market for time sensitive news. The answer needed to provide news collectors with a sufficient incentive to continue to invest in the process of collecting news and information with promptness. All the same, it needed to recognize and deal with the fact that news was a common pool resource, whose ultimate social value lay in its widest possible dissemination to the public.

It certainly was not the case that prior to the advent of the misappropriation doctrine, newspapers routinely adopted the strategy of free riding or waiting for others rather than collecting the news. Unlike in the standard prisoner's dilemma where parties cannot communicate (and therefore cannot cooperate), the possibility of communication, repeat interactions, and observable behavior in news collection resulted in the development of industry-wide norms among newspapers.[104] Among the first of these to develop was, most importantly, a norm against free riding.[105] Relying entirely on the efforts of a competitor without its consent was considered unethical and highly objectionable behavior. Free riding of this sort was considered especially problematic when done without crediting the original. All the same, crediting the source when the free riding was substantial entailed huge reputational consequences for a free rider, which made it rare. The norm against free riding was enforced largely through reputational sanctions. In one well-known incident in the 1830s, a national daily, whose stories were being copied without credit by a local competitor, decided to produce a version with a completely fabricated story as a hoax.[106] The free riding competitor picked up the false story and carried it, but the original newspaper immediately pulled the story and ran a denial, exposing its competitor to the public as a free rider.[107]

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103. See infra Part II.A.2.d.

104. For a discussion of this phenomenon, converting a prisoner's dilemma situation into a coordination game in other contexts, see generally Dennis Chong, Collective Action and the Civil Rights Movement 103–07 (1991); Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 146 (1979); Daniel H. Cole & Peter Z. Grossman, Institutions Matter! Why the Herder Problem Is Not a Prisoner's Dilemma, 69 Theory & Decision 219 (2008); Barry R. Weingast, The Political Foundations of Democracy and the Rule of Law, 91 Am. Pol. Sci. Rev. 245, 249 (1997).

105. For an excellent overview of how these developments occurred very shortly after the emergence of newsgathering as a commercial activity, see Victor Rosewater, History of Coöperative News-Gathering in the United States 14–20 (1930) ("[T]he *Courier* and *Enquirer* [were] bent on exposing those appropriating its news without credit . . . .").

106. Id. at 18–19.

107. Isaac Clarke Pray, Memoirs of James Gordon Bennett and His Times 135 (1855). Pray describes this incident as follows:

> The Courier and Enquirer a few days after the announcement of the fall of Warsaw, in the Polish War, in order to expose those who were guilty of

The norm against free riding was not, however, the only norm that the newspaper industry came to develop—a reality that previous discussions of the misappropriation doctrine have ignored.[108] Alongside the norm against free riding, very early on newspapers developed mechanisms of cooperation in the newsgathering exercise.[109] Much of this stemmed from the realization that competitive news collection, where each newspaper would send its own agents to collect the news, was highly duplicative and cost-ineffective. Indeed, newspapers realized this fact even when the only form of news collection entailed sending small boats (schooners and clippers) to collect the news from foreign ships that had anchored off the coast. Realizing that competing to build better and faster boats was a wasteful race, several of them decided to pool their resources into building a single, larger ship.[110] Cooperative newsgathering soon emerged as an industry-wide practice among newspapers, initially in largely informal ways. This practice drew reinforcement from the anti-free riding norm that developed alongside it.

In due course, cooperative newsgathering grew to be a formal practice among competitors. With the creation of the AP in the mid-nineteenth century and other large newsgathering cooperatives thereafter, cooperative newsgathering came to be institutionalized. By the time of *International News*, the AP had approximately 950 members,[111] and the International News Service (INS) had 400 members of its own.[112] They each had formal rules about news collection and sharing among mem-

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> appropriating news without credit, prepared a denial of the original account, and printed a small edition, prepared expressly to reach the offices of the morning journals [i.e., the free riders]. The statement purported to be gleaned from papers brought by the ship Ajax. There was no such arrival. The article was copied by several papers, and [one free riding local newspaper] sent it forth in the country edition as news which had been obtained originally by its own enterprise. . . . Other papers announced the news without giving any credit to the source of it. The hoax created much excitement among journalists; and the public, or that small portion of society, to which newspapers were familiar, enjoyed the joke.

Id. For an additional account of this event, see Frederic Hudson, Journalism in the United States, from 1690–1872, at 347 (New York, Harper Bros. 1873).

108. See, e.g., Epstein, Custom and Law, supra note 47, at 97 (describing misappropriation as having affirmed industry norm against free riding).

109. See Rosewater, supra note 105, at 14–20 (discussing cooperation in gathering "ship news in advance of docking"); Richard A. Schwarzlose, Cooperative News Gathering, *in* American Journalism: History, Principles, Practices 153, 153–62 (W. David Sloan & Lisa Mullikin Parcell eds., 2002) (examining typical forms of cooperative newsgathering). For a comprehensive history of this development, see generally id. (detailing cooperative newsgathering from its beginnings through rise of the AP). In discussing conditions in the industry around the early nineteenth century, Rosewater noted: "Because of the relative costliness of newsgathering and the extravagance of duplication, it was equally inevitable that this should lead to the initial steps for a union of effort." Rosewater, supra note 105, at 11.

110. Rosewater, supra note 105, at 19–20.

111. Associated Press v. Int'l News Serv., 245 F. 244, 245 (2d. Cir. 1917).

112. Int'l News Serv. v. Associated Press, 248 U.S. 215, 221 (1918).

bers. Yet, the norm against free riding by nonmembers remained informal, and reputational sanctions began to prove ineffective on their own.[113] Entities began to develop business models entirely around free riding on the efforts of others.[114] The worry thus became that rampant, systematic free riding could have the effect of interfering with the incentive to join these cooperative arrangements for existing newspapers, but especially among new entrants.[115] Since these arrangements allowed for a more comprehensive coverage of the news, a free rider now would have access not just to the efforts of one competitor, but also to the collective efforts of an entire set of competitors who had pooled their efforts together.

b. *Cooperating Through Tips.* — Collective newsgathering thus drew support from the norms that evolved among newspapers against noncooperative free riding on each others' efforts. Yet the problem was more complex. Even though unimpeded free riding was viewed as problematic to the cooperative exercise, a good amount of free riding was nonetheless considered integral to the very manner in which newspapers obtained their news. This included using news stories and communications of a competitor as the starting point for a newspaper's own story—i.e., as "tips."[116] Sharing through tips thus became a second form of cooperation that evolved alongside formalized collective newsgathering.

Only a very specific kind of free riding was likely to impact cooperative newsgathering. Cooperation would not be harmed by the mere commercial or competitive use of factual news collected by a competitor, but rather by a competitor doing so *without any independent effort* of its own and, by implication, without incurring any costs of its own. In addition, it was unclear what amount of effort might be sufficient to legitimize one newspaper's use of another's stories as tips. Members of the AP were themselves engaged in a practice known as double-checking, which entailed verifying the story obtained via a tip with their own independent

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113. Melville Stone notes that early in his tenure at the *Chicago Daily News*, he would lay traps to catch and expose such free riding. On one such occasion, he recalls that a competitor engaging in such free riding was "laughed to death" on exposure, and that within two years of the hoax/trap, it went out of business. Stone, supra note 40, at 63–64. Stone also notes that in due course, such traps and hoaxes, while amusing to the public, came to have little deterrent effect. Id. at 355. For a discussion of how the INS, too, was the target of such a hoax, see Baird, Uneasy Legacy, supra note 9, at 27 & n.44.

114. Stone, supra note 40, at 355 (describing practices of the *Chicago Courier* and American Press Association).

115. Recently, Wendy Gordon has argued that the Court in *International News* may have been sensitive to this concern. See Wendy J. Gordon, Harmless Use: Gleaning from Fields of Copyrighted Works, 77 Fordham L. Rev. 2411, 2422–23 (2009) (observing how Court in *International News* may have been motivated by desire to avoid harm to "each organization's internal structure" and by "thought that if it refused to enjoin the defendant's copying, no entity could collect enough fees from the small newspapers to afford to send out national and overseas correspondents").

116. See Baird, Uneasy Legacy, supra note 9, at 24 ("AP routinely monitored the bulletins of other wire services and used them as a starting point for its own stories.").

sources.[117] When confirmed as accurate, double-checking did little to alter the content of what a newspaper lifted from a competitor. Members of the INS, on the other hand, were notorious for using competitors' stories as tips and embellishing them with their own, often-fabricated additions, such as nonexistent independent correspondents and other creative variations.[118] From a functional point of view, then, differentiating the use of a competitor's stories as tips from its use directly in a news story was fraught with difficulty.

At the same time, failing to maintain this distinction ran the risk of interfering with the ubiquity of what was an otherwise efficient cooperative practice. If a good number of newspapers made their profits by merely reproducing the news stories of others on the pretext of using them as tips, the industry as a whole might become more reluctant to engage in such sharing of tips, which would in turn raise the costs of journalistic investigation within the industry as a whole.[119] Systematic free riding thus threatened not only formalized cooperation but cooperative sharing through the exchange of tips.

In *International News*, the district court encountered the issue of tips rather directly. At trial, the plaintiffs (AP) openly conceded that they used their competitors' stories as tips in creating their own stories, but argued that their use of independent investigative techniques rendered the practice legitimate.[120] Judge Hand was quick to recognize the irony of this position and observed that any test of independent investigation or verification would remain necessarily subjective, especially given the ready availability of modern communication devices.[121] He was additionally concerned that forcing such independent verification (by a newspaper) for its own sake might often be wasteful, duplicative, and therefore grotesque.[122] The only available solution was, thus, to render all free riding, whether systematically undertaken or done as part of a tip, actionable at law. Judge Hand resisted this, and denied the plaintiff's claim for an injunction.

The Second Circuit, however, believed that the distinction (and policing it) was unproblematic. Observing that there was no difficulty in

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117. Id. at 25.

118. Id. at 27; see also Oliver Carlson & Ernest Sutherland Bates, Hearst: Lord of San Simeon 54–55 (1936) (observing how William Hearst, owner of INS, had effectively invented the process of creating news to report it).

119. See Epstein, Custom and Law, supra note 47, at 102 (noting that "using tips across the board allows all the papers to lower their cost of collecting information, without destroying the initial incentive to produce information in the first place" provided that "there is independent investigation of the tip" and "information printed in the story is obtained through that investigation").

120. Associated Press v. Int'l News Serv., 240 F. 983, 991 (S.D.N.Y. 1917) (A. Hand, J.).

121. See id. ("In many cases the verification with modern telephonic communication would be so rapid that the time required for it would in no sense protect the original gatherer of the news.").

122. Id.

distinguishing tips from the "bodily appropriation" of news, it concluded that:

> As a matter of law or rule, it is impossible to say in advance what measure of investigation or verification must satisfy the censor, and the law does not seek to compel the vain or impossible. Doubtless there have been, and will be again, instances where the asserted or pretended investigation is but an excuse for appropriation, where no reasonable man would believe that any effort had been made, except to conceal the absence of original work, but no such case is before us.[123]

Believing that applying the distinction to the case at hand would pose few problems, the court concluded that, while copying through tips was "incurably journalistic," when it entailed the bodily taking of news from a competitor it remained problematic.[124] Yet, as Douglas Baird points out, this was hardly what existed in the case at hand, where the defendants were quite "content to take the essential facts of an AP story and make up the rest."[125] There was no such bodily taking to speak of, rendering the court's standard inapplicable to the defendant's very actions.

c. *Problems with Property.* — When presented with the free rider problem, the Court in *International News* could have simply chosen to create a property right in the news. Such a right would have undoubtedly had the effect of deterring harmful free riding. Yet, it would have also very likely done more.

If it were structured as a regular in rem interest, good against the world at large, the right would have generated huge social costs. Since such a right might operate to preclude *any* transmission or communication of factual news by members of the public, it would stifle free speech and the everyday dissemination of news and information. The potential social costs of monopoly that might accompany such a move clearly cautioned against its ready acceptance.

This problem could have been easily solved by relaxing the assumption about the in rem nature of the entitlement. If the property right were rendered operational *only* against competitors, the social costs of the regime would be alleviated to a large extent while preserving its deterrent effects on free riding. The traditional understanding of *International News* is that this is indeed the only move that Justice Pitney made when he created the idea of quasi-property.[126] In this understanding, misappropriation created a relational property interest, but a property interest nonetheless. Misappropriation, however, did more than this, a reality

123. Associated Press v. Int'l News Serv., 245 F. 244, 247–48 (2d Cir. 1917).

124. Id. at 247, 253.

125. Baird, Uneasy Legacy, supra note 9, at 27.

126. See Epstein, Custom and Law, supra note 47, at 113–14 ("Pitney describes the defendant's interest in its news as 'quasi property,' which is good only for a short period of time (less than a day) and then only against the direct competitor of the plaintiff . . . .").

that lies at the heart of the unfair competition analysis, which is all too often overlooked.

In the Court's understanding, free riding was problematic because it allowed a competitor to lower its costs and compete on unfair terms with a collector of the news. All the same, forcing each newspaper to collect the news individually on its own was recognized to be wasteful, duplicative, and prohibitively expensive, for all but the largest incumbents. The cooperative practice of newsgathering that had evolved in the industry thus needed to be preserved. Justice Pitney's observation at the very beginning of his discussion is telling:

> [B]y reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business.[127]

Equally important to the Court was preserving the practice of cooperative sharing independent of collective newsgathering, i.e., the use of tips. The Court readily accepted the argument that such sharing (of tips) was ubiquitous within the world of journalism. In this scenario, a property right against competitors that originated in mere first possession (i.e., vested in the first to acquire the news) would have presented intractable problems of determining in whom the rights were vested. Distinguishing between the first to collect and report a piece of news, and a competitor who scrapes the former's news instead of collecting it independently, would have been a near-impossible task given the collective newsgathering processes that were already in place. The determination would have been further complicated by the widespread practice of sharing tips.[128] A first-possession-based property right would have had to differentiate between independent collection, collection based on a tip, and factual scraping, with only the last being the basis for any liability. It might have, thus, resulted in potentially endless controversy and confusion within the industry itself, where the line between cooperation and exclusivity was (and is) somewhat unclear.

Another way of understanding the effects of such a property right is in terms of the information costs it might have generated for participants. A possessory right of this form would have raised the costs of measuring the existence and scope of such rights for any newsgatherer who might come to acquire newsworthy information. Since the holder of the right is unlikely to bear these costs itself, such costs would operate as negative information externalities, the basis for the common law's reluctance to

127. Int'l News Serv. v. Associated Press, 248 U.S. 215, 231 (1918).

128. Id. at 243–44 (discussing industry practice of using tips).

create altogether new property rights where none existed before, under the numerus clausus principle.[129]

Additionally, one detects in the Court's opinion a deep concern with the effects of superimposing a regime of individual ownership on an industry that had until then governed news collection as a common pool resource. Referring to the news as a form of common property[130] among newspapers, as an item of publici juris,[131] and as stock in trade little susceptible to absolute ownership,[132] the misappropriation strategy seemed consciously directed at retaining the public domain nature of factual news. The traditional Demsetzian understanding of the evolution of property no doubt posits that such rights emerge from situations where a resource is initially held as a commons, but the possibility of internalizing greater benefits results in a gradual abandonment of this feature.[133] Elinor Ostrom, by contrast, argues that in numerous situations participants do not readily abandon holding a resource in common pool while attempting to extract value from it, but instead choose to develop governance structures to regulate and deter free riders and ensure an efficient allocation of the resource among participants.[134] In the intangible (i.e., intellectual property) context, such common pool arrangements can involve participants pooling their property rights together to minimize transaction costs and achieve organizational efficiency.[135] Alternatively, participants can pool their efforts—prior to any legal recognition of property rights in their individual contributions—to achieve an efficient outcome.[136] The latter type of pooling arrangement emerged as the common practice in the newspaper industry. The cooperation among participants that had emerged was directed at collectively producing the

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129. See Merrill & Smith, Optimal Standardization, supra note 83, at 26–34 (arguing that concern with information cost externalities lies at root of numerus clausus principle). Merrill and Smith argue that the Court in *International News* violated the numerus clausus principle by choosing to create what was in effect a property right. Id. at 19. Yet if the roots of the misappropriation doctrine are thought to lie in unjust enrichment instead, the Court did in fact adhere to the common law's numerus clausus.

130. *International News*, 248 U.S. at 235.

131. Id. at 234.

132. Id. at 236.

133. For the classic articulation of this argument, see generally Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (1967).

134. See Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 12–18 (1990) (describing governance as alternative to property-based privatization).

135. For a detailed discussion of this type of pool arrangement in the intellectual property context, described as a "private liability rule organization," see Robert P. Merges, Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 Calif. L. Rev. 1293, 1303 (1996) (internal quotation marks omitted).

136. See Yochai Benkler, The Wealth of Networks 338–44 (2006) (discussing these approaches and identifying examples); Michael J. Madison et al., Constructing Commons in the Cultural Environment, 95 Cornell L. Rev. 657, 691–92 (2010) (identifying these types of common pool arrangements of intellectual property as "solutions to collective action, coordination, or transaction cost problems").

very resource in question—timely, comprehensive news—rather than pooling together preexisting rights in an intangible resource and administering them collectively.

A driving force behind this cooperation had until this point in time been the nonexcludability of factual news, coupled with newspapers' recognition that comprehensiveness (in addition to timeliness) in coverage produced additional revenue. Cooperation was also predicated in some ways on the value of participants' individual contributions never being measured and compared inter se. A possession-based ex ante property right ran the risk of altering this practice, and with it the intricate governance mechanisms that the industry had come to develop around undifferentiated news. A property regime would impose a new set of transaction costs, which might have altered, at the very least, the structure of the cooperative arrangement among industry participants.

Finally, there was a rather obvious reason why the Court might have chosen not to adopt a first-possession-based property regime. The parties to the dispute were both news cooperatives that did not necessarily themselves collect the news that they supplied to their members.[137] They relied on news collected by individual members, which they then retransmitted to the remaining members. Strictly speaking, a possessory right might not have benefited the plaintiff in the case at all, even if it were recognized, unless a differentiation could be made between news stories (copied by the defendant) that it had collected on its own, rather than merely retransmitted.[138]

The Court's approach in *International News* was thus far from directed at reaffirming the norm against free riding by granting a property right. It did not answer the question of property in news in the affirmative, as Richard Epstein argues it did.[139] Instead, the Court chose to bypass the issue in favor of an alternative framework, which allowed the Court to situate free riding within the broader context of newsgathering and the governance regimes that newspapers had come to develop in that context as well.

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137. See By-Laws of the Associated Press of New York, art. VIII, § 4, reprinted in Rosewater, supra note 105, app. II at 403 ("[I]n places where the Corporation has no correspondent the members shall supply the news required to be furnished by them in such a manner as may be required by the Board of Directors.").

138. For an early identification of this problem, see Comment, The Associated Press Case, 28 Yale L.J. 387, 389 n.9 (1919).

139. Epstein, Custom and Law, supra note 47, at 112–13. Epstein's reading of *International News* is somewhat perplexing. At the very beginning of the majority opinion, Justice Pitney made the following observation: "We need spend no time . . . upon the . . . question of property in news matter at common law . . . . [Unfair competition] does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent . . . ." Int'l News Serv. v. Associated Press, 248 U.S. 215, 234–35 (1918). Justice Pitney thus clearly sought to avoid deciding the question of property in news, since his theory did not necessitate an answer to this question.

d. *Remedying the Unfair Competitive Advantage.* — At the substantive level, the Court in *International News* rejected a property and ownership approach to the idea of unfair competition. Yet when it moved to remedying the unfair competition, the Court rather summarily affirmed the remedy chosen by the lower court, i.e., an injunction.[140] Nowhere did it discuss the reasons for this remedy or why ordinary relief, i.e., damages, might be inadequate. Courts using the misappropriation doctrine since have presumed that no measure of damages will suffice to remedy the unfair competition, on the assumption that the Court in *International News* made a considered decision in affirming the injunction.

However, there are good reasons to believe that the Court's choice of remedy was selected without any consideration at all. As Douglas Baird has convincingly shown, the injunction that the Court affirmed had no applicability to the parties before it.[141] The injunction on appeal (albeit a preliminary injunction) merely prohibited the defendant from "bodily taking . . . the words or substance of [the] plaintiff's news," when in fact the defendant had never engaged in such taking to begin with.[142] Even though the parties eventually settled, the settlement had little effect on the defendant's practices, which it presumably viewed as the mere use of its competitors' news as tips.[143] Just as the injunction had little effect on the defendant's actions, so too would it have been of little value in deterring anyone other than uncreative newspapers who lifted their news from their competitors and did absolutely nothing to it before printing. To be effective against a competitor who purported to (even fictitiously) use it as no more than a tip, the injunction would have had to be developed into a framework by which to police this practice, which would have, in turn, extensively interfered with the industry-wide practice.[144] Discerning what remedy the Court might have chosen if it had taken its own theory seriously thus involves reconstructing a remedial framework derived directly from the Court's own logic.

If the basis of liability in misappropriation was not a property interest, but instead the principle of unfair competition, its measure of recovery should ideally be reflective of that principle as well. In some ways, this measure seems implicit in the Court's observation that the "special advan-

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140. *International News*, 248 U.S. at 245–46.

141. Baird, Uneasy Legacy, supra note 9, at 29 & n.50. Baird also notes that Justice Pitney's opinion for the majority used a hypothetical to describe a case that bore no resemblance to the facts of the actual dispute. Id. at 29.

142. Associated Press v. Int'l News Serv., 245 F. 244, 253 (2d Cir. 1917).

143. Baird, Uneasy Legacy, supra note 9, at 30. For a discussion of the defendant's continuing free riding after the decision, see Ferdinand Lundberg, Imperial Hearst: A Social Biography 209 (1936).

144. One could argue that the Court was aware of this problem. Toward the end of the opinion, it conceded that the injunction might suffer from certain infirmities, including the possibility of overbreadth. Yet, it affirmed the injunction on the assumption that the lower court would determine this question on remand. *International News*, 248 U.S. at 245–46.

tage to the defendant in the competition [is] because of the fact that it is not burdened with any part of the expense of gathering the news" and therefore a court should "not . . . hesitate long in characterizing it as unfair competition in business."[145] The unfair competition rationale of misappropriation connects a plaintiff's recovery to the amount needed to restore a competitive equilibrium (i.e., remedy the disadvantage). A defendant's liability would in this formulation be the disgorgement of any unfair cost savings it had obtained by its act of free riding. This result would achieve several things—each of which, in fact, ultimately came to pass.

First, it would deter systematic free riding by new entrants. By introducing a legal basis for recovery over and above reputational sanctions, it would impose new costs on free riders. The extent of this liability would now depend on the expenditures incurred in collecting the news copied, which would in most instances be enormous. A potential free rider would thus have every incentive to join a preexisting cooperative, where membership and the delivery of news entailed significantly lower costs.

One might argue that if deterring free riding was indeed one of the doctrine's primary purposes, limiting liability to the disgorgement of a defendant's cost savings is likely to prove inadequate. While this may be true in the abstract, the common law has long been known to be structurally imperfect when it comes to achieving deterrence, principally because of its emphasis on connecting any recovery to the actual loss or gain in a case.[146] Accident law, for instance, while attempting to deter careless behavior, is forced to tie any recovery to a plaintiff's actual injury rather than a level needed to deter a defendant, despite its commitment, at least in part, to the latter.[147] In some instances, the recovery will operate to deter future careless behavior, but in others it will not, operating in these situations as a price rather than a sanction.[148] The same is equally true with misappropriation. Concededly then, in situations where a newspaper's business model is built entirely around free riding on the news collected by others, the measure of recovery will prove to be sufficiently deterrent. At other times, the recovery will be reduced based on the magnitude of the defendant's own investment into the news collection process, thus calling into question its specific, rather than general, deterrent effect on free riding. In these latter situations, introducing an attributable profits-based measure of recovery, or allowing for the possibility of

145. Id. at 240.

146. Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 Tex. L. Rev. 1801, 1818 & nn.128–129 (1997) (describing structural tensions in tort doctrine).

147. This limitation is often referred to as the common law's (or tort law's) bipolarity constraint. See Jules L. Coleman, Risks and Wrongs 376–82 (1992) (noting disjunction between economic theories of deterrence and structure of tort law).

148. See Robert Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523, 1523 (1984) ("[E]conomists tend to view law as a set of official prices.").

punitive damages, might serve to alleviate the concern with under-deterrence.

Second, a framework that connected liability to cost savings would also give the informal process of sharing news tips some definition. It would enable a defendant to assert at trial that there was indeed no (or little) cost savings in its copying because it had expended resources of its own to independently verify the news it copied, i.e., the tips. Any framework not linked to actual cost savings would run the risk of deterring this beneficial industry practice as well.

Third, this liability framework would allow existing forms of cooperation to continue. Since no specific exclusivity would attach to an individual piece of news, newspapers would still continue to join collective gathering exercises, a practice that was beginning to become the norm within the industry.[149] To the extent that they needed to compete with each other, this liability framework would force newspapers to differentiate their content in the marketplace in order to use the copyright system for genuine exclusionary protection.[150]

* * *

In functional terms, misappropriation helped solve a collective action problem in the newspaper industry. It added a deterrent for harmful free riding and, at the same time, sought to preserve preexisting cooperative practices in the newspaper industry. The standard account of the collective action problem posits that in the absence of external incentives, self-interested wealth-maximizing actors will not find it in their interest to contribute to the production of goods that benefit the group (or society) as a whole, but will instead free ride on the contributions and efforts of others.[151] Free riding in the news collection market generates a negative externality: harm to newsgathering, a collective rather than individual harm. Misappropriation attempted to remedy that harm by negating its effects, represented in the defendant's gain. This account is different from the traditional intellectual property response to a public goods problem—that intellectual property, as an exclusionary entitlement, provides actors with an individualized incentive to create a unique public

149. This intuition also tracks arguments about when liability rules are likely to be better than property rules at inducing a bargain between parties. See Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade, 104 Yale L.J. 1027, 1065 (1995) (observing untailored damages have information-forcing quality that makes them best suited to incentivizing bargaining); Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713, 719–20 (1996) (observing that when courts are uncertain about exact magnitude of harm but impose damages based on their "best estimate" that are "correct on average," liability rules are superior to property rules in forcing a bargain).

150. Indeed, after the Court's decision in *International News*, the AP changed its practices to differentiate its content from those of its competitors. See Baird, Uneasy Legacy, supra note 9, at 31.

151. Mancur Olson, The Logic of Collective Action 1–3 (1965).

good. In traditional intellectual property (i.e., patent and copyright), the law's ability to attach the entitlement to a uniquely identifiable resource provides this individual incentive. In news collection, by contrast, the incentive is not an individual one, but a collective one. Additionally, the nature of the resource makes it nearly impossible to assign unique entitlements to it. A property right would thus result in a full-blown monopoly, with enormous social costs.[152]

This account of news collection is, by and large, just as true today as it was at the turn of the twentieth century. If anything, its significance has grown. Membership of daily newspapers in the AP, the country's leading cooperative, illustrates this. In 1918, the AP's membership consisted of about 38% of all the daily newspapers published in the country.[153] By 1945, this had increased to 68%, but by 2005 it rose to about 99–100%.[154] These numbers are no doubt partially due to the collapse of the AP's competitors,[155] yet they nonetheless point to the continuing importance of cooperative efforts in the industry.

The doctrine of misappropriation is thus rooted in the realities of the newspaper industry and arose in an effort to preserve the practices of cooperation and sharing that were characteristic of the newsgathering process. Rather than create a property right in the news, its focus was on eliminating the unfair competitive advantage a free riding newspaper obtained by lifting news stories from a competitor without incurring any expense of its own. Its structural vehicle for this task was the common law of unjust enrichment, which it used to treat a defendant's gain as a useful proxy for the harm incurred.

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152. For example, if individuals had to pay newspapers for every use of factual information, the net effect would be to deter the free dissemination of information among individuals, producing enormous inefficiencies. Though sympathetic to property rights in news, even Epstein characterizes such a result as "grotesque." Epstein, Custom and Law, supra note 47, at 113.

153. See Int'l News Serv. v. Associated Press, 248 U.S. 215, 229 (1918) (indicating AP consisted of about 950 daily newspapers in 1918); id. at 248 & n.1 (Brandeis, J., dissenting) (noting in 1918 there were 2,500 papers published in the United States).

154. See Associated Press v. United States, 326 U.S. 1, 3–4 (1945) (stating AP had over 1,200 newspapers as members in 1945); Associated Press, FAQs, at http://www.ap.org/pages/about/faq.html#2 (on file with the *Columbia Law Review*) (last visited Feb. 11, 2011) (indicating AP "serves 1,700 newspapers"); Pew Research Ctr., Project for Excellence in Journalism, Number of U.S. Daily Newspapers, 5 Year Increments, 1940–2005 (2007), at http://www.journalism.org/node/1134 (on file with the *Columbia Law Review*) (noting there were 1,749 daily newspapers in 1945 and 1,452 in 2005). In addition to the general growth of cooperative newsgathering, these numbers also reflect the growing importance of AP vis-à-vis other news cooperatives that have since ceased to exist, such as the INS and the United Press International (UPI).

155. See Schwarzlose, supra note 109, at 158–61 (describing how INS and UPI, AP's main competitors, eventually merged and then collapsed).

B. *Unjust Enrichment as the Structural Basis of Misappropriation*

Outside of tort, property, and contract law, the common law has long recognized a fourth category of entitlements that originated independent of fault, ownership, and consent. Structured around the principle of unjust enrichment, these entitlements allow a plaintiff to recover in situations where a defendant benefits at the plaintiff's expense without sufficient justification.[156] To be sure, scholars continue to debate the precise contours of the principle and its coherence as an independent organizing idea.[157] Nonetheless, the general consensus today appears to be that at the very least, it presents the common law with a basis for identifying an independent set of normative principles revolving around the idea of gain-based liability.[158] Most notably, the American Law Institute's adoption of the Restatement (Third) of Restitution and Unjust Enrichment seems to indicate the growing legitimacy of unjust enrichment as a viable and independent common law framework for certain entitlements.[159]

Unjust enrichment is commonly associated with the paradigm case of recovery for the mistaken payment of a nonexistent debt.[160] Characterized by strict liability, without any inquiry into the motives or intent of either party, the law remains concerned principally, if not exclusively, with remedying the distributive implications of the defendant's actions. Restitution of the benefit obtained is deemed the default corrective remedy, but as Birks emphasizes, restitution represents a remedial response,

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156. In England, the principle of unjust enrichment is usually traced back to the opinion of Lord Mansfield in Moses v. Macferlan, (1760) 97 Eng. Rep. 676 (K.B.), though as an idea many trace it back to Roman law. See D.J. Ibbetson, A Historical Introduction to the Law of Obligations 264 (1999) (tracing foundations of unjust enrichment to Roman law); Andrew Kull, James Barr Ames and the Early Modern History of Unjust Enrichment, 25 Oxford J. Legal Stud. 297, 310–11 (2005) (describing *Moses v. Macferlan*).

157. See, e.g., Hanoch Dagan, The Law and Ethics of Restitution 11–12 (2004) [hereinafter Dagan, Law and Ethics] (critiquing dominant role of unjust enrichment in American restitution law); Steve Hedley, Restitution: Its Division and Ordering 200 (2001) (describing "rise[ ] and fall[ ]" of unjust enrichment theory in American law); G.H.L. Fridman, Unjust Enrichment (Dis)Contented, *in* Understanding Unjust Enrichment 35, 35 (Jason W. Neyers et al. eds., 2004) ("[I]t is open to question whether the concept of unjust enrichment is indeed a venerable equitable principle." (internal quotation marks omitted)); Dennis Klimchuk, The Normative Foundations of Unjust Enrichment, *in* Philosophical Foundations of the Law of Unjust Enrichment 81, 81 (Robert Chambers et al. eds., 2009) (describing possible justifications for unjust enrichment).

158. See Dagan, Law and Ethics, supra note 157, at 26 (discussing extensive criticism of unjust enrichment and suggesting "viewing unjust enrichment as a loose framework as well as an invitation for a normative inquiry").

159. See Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b (Tentative Draft No. 7, 2010) ("The law of restitution is the law of unjust enrichment . . . .").

160. Peter Birks, Unjust Enrichment 3 (2d ed. 2005) [hereinafter Birks, Unjust Enrichment] ("The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.").

rather than the basis of liability.[161] Indeed, the Restatement appears to accept this position in large measure.[162]

Liability for unjust enrichment in the common law originates from: (1) the defendant obtaining a benefit that is (2) at the plaintiff's expense and (3) that is recognized to be unjust.[163] While it is the third of these elements that presents the concept of unjust enrichment with its biggest normative problems in the common law, this is of little concern for our discussion of misappropriation, since the unjust nature of a misappropriation originates in the law's identification of a market harm, described earlier.[164] What makes the enrichment unjust in misappropriation thus originates in the law's attempt to correct a form of economic harm peculiar to the market for news, rather than the common law's internal criteria of enrichment and loss.[165]

It is also crucial at this juncture to distinguish between instances of unjust enrichment and wrongful enrichment. Wrongful enrichment, as the phrase indicates, refers to an enrichment that a defendant obtains from an act that constitutes a wrong *independent of the enrichment*.[166] An economic gain from an independently tortious act, such as a conversion or a fraud, is an instance of a wrongful enrichment. Wrongful enrichment is thus a subcategory within the law of torts and is hardly independent of it. Whereas the causative event that triggers liability in a wrongful enrichment remains a wrong (i.e., a tort) that then gives rise to a gain, an unjust enrichment, on the other hand, is never triggered by a wrong but arises independent of it. In other words, the very enrichment of the defendant, as opposed to a wrongful action resulting in such enrichment, triggers recovery.[167] Discussions of unjust enrichment and restitution law

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161. Id. at 16.

162. See Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (Tentative Draft No. 7) ("The use of the word 'restitution' to describe the cause of action as well as the remedy is likewise inherited from the original Restatement, despite the problems this usage entails.").

163. Birks, Unjust Enrichment, supra note 160, at 39. Birks identifies two more questions, relating to the nature of the remedial right that the plaintiff acquires and possible defenses that a defendant could invoke. Id. I omit these from the analysis for now, since they go less to liability and more to the issue of response.

164. See supra Part II.A.1 (describing market harm resulting from free riding). See generally Mitchell McInnes, Resisting Temptations to Justice, *in* Philosophical Foundations of the Law of Unjust Enrichment, supra note 157, at 100, 101 ("American courts regularly have manipulated the principle of unjust enrichment in the service of 'higher' ends . . . .").

165. Indeed, even Peter Birks, an ardent defender of the internal logic of the common law's requirement that the benefit be unjust, concedes that certain instances of restitution are policy-motivated insofar as they deviate from the traditional approach to identifying an enrichment as unjust. The traditional approach bases restitution on criteria internal to the plaintiff-defendant relationship. Birks, Restitution, supra note 84, at 294.

166. See Peter Birks, Unjust Enrichment and Wrongful Enrichment, 79 Tex. L. Rev. 1767, 1783 (2001) (arguing for need to distinguish the two ideas).

167. Id. at 1789 ("Liability in unjust enrichment has in principle nothing whatsoever to do with fault.").

often fail to make this distinction. However, it remains rather important to appreciate this distinction in relation to hot news misappropriation.

The misappropriation doctrine can be understood as built around the structural principle of unjust enrichment. This section explains the central elements of this unappreciated reality. It first examines how misappropriation overcomes the common law's traditional refusal to allow recovery for a self-interested conferral of benefits on others.[168] It then proceeds to analyze how the identification of a benefit[169] and a corresponding loss,[170] both elements of the law of unjust enrichment, apply to misappropriation.

1. *Self-Interested Recovery and the Logic of Collective Action.* — Some may object that the misappropriation doctrine does not originate in the common law rules of unjust enrichment because the common law has long recognized an exception to recovery in cases that involve a self-serving conferral of a benefit. Where one party undertakes an activity in his or her own self-interest and in the process confers an incidental benefit on another, the law disallows recovery.[171] Referred to as the rule against volunteers, officiousness, self-serving, or incidental benefits, its rationale is twofold.[172] The first aspect of the rationale is that the benefit provider is always in a position to bargain with the beneficiary ex ante, and his failure to do so ought to inure to the beneficiary's benefit rather than to the benefit provider, in order to maintain the long-term market for such benefits. Under this so-called market encouragement explanation, the rule is thought to facilitate the creation of thick markets, composed of multiple active participants.[173] Allowing a provider to recover encourages participants to avoid bargaining ex ante, resulting in supercompetitive prices and, in turn, producing an inefficient allocation of resources.[174] The second aspect of the rationale is the theory of free choice—the idea that a defendant should be in control of his own affairs,

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168. See infra Part II.B.1.

169. See infra Part II.B.2.

170. See infra Part II.B.3.

171. See 2 George E. Palmer, The Law of Restitution § 10.1 (1978) ("[T]he fuller meaning of the word [volunteer] can be understood only against the background of a long-standing judicial reluctance to encourage one person to intervene in the affairs of another . . . ."); Dawson, supra note 86, at 1409 ("The antipathy . . . in our law of restitution toward intermeddlers who confer unsolicited benefits . . . is addressed almost equally to altruists and self-seekers."); John D. McCamus, The Self-Serving Intermeddler and the Law of Restitution, 16 Osgoode Hall L.J. 515, 518–19 (1978) ("[T]he restitutionary entitlement of the self-interested intermeddler has only received sporadic and precarious recognition.").

172. McCamus, supra note 171, at 518–19. Indeed, the Restatement now mentions the rule. See Restatement (Third) of Restitution and Unjust Enrichment § 23 (Tentative Draft No. 2, 2002).

173. Saul Levmore, Explaining Restitution, 71 Va. L. Rev. 65, 79–80 (1985).

174. Id.

and that forcing him to pay for a benefit that he did not have the chance to refuse impinges on his autonomy.[175]

Commercial newsgathering clearly fits the description of a self-serving activity that incidentally benefits competitors. A newspaper, in gathering the news, is indeed trying to benefit its own bottom line through sales and advertising revenue, but in so doing confers a benefit on competitors. Thus, it appears that unjust enrichment in the common law and misappropriation seem to be at odds with each other. Wendy Gordon argues that the logic underlying the common law's exception to recovery for such behavior has limited application to intellectual property.[176] According to her, the market encouragement thesis is actually better served by a rule of positive liability rather than one of no liability for self-serving benefits, when it comes to intangibles.[177] In intellectual property situations, she argues, defendants are in a better situation than plaintiffs to commence an ex ante bargain, which they would have little incentive to do in a system of no liability.[178] In such situations, a regime that allows recovery even though the benefit may be self-serving may thus facilitate thick markets, by giving differentiated defendants the incentive to negotiate with a benefit provider for uses.[179]

The original market encouragement explanation however remains premised on an important assumption. This is the belief that encouraging an ex ante market for the benefit being produced and the allocation that it results in, is unlikely to generate any independent distortionary effects and social costs that might possibly outweigh the benefits of the market-based allocation. In situations where the possibility of such distortions remains real, encouraging a market for the benefit being produced ceases to remain independently desirable. An ex ante market might thus be a poor fit for an area of activity to begin with, in which case the market encouragement idea loses much of its explanatory appeal. The Court in *International News* too seemed to be aware of this, when it decided against recognizing a first-possession-based tradable property right in the news.[180] The solution to the common law's puzzle of denying recovery

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175. Restatement (Third) of Restitution and Unjust Enrichment § 23 cmt. a (Tentative Draft No. 2) (describing this idea in terms of "transactional autonomy"); Birks, Restitution, supra note 84, at 115.

176. Wendy J. Gordon, Of Harms and Benefits: Torts, Restitution, and Intellectual Property, 21 J. Legal Stud. 449, 471–77 (1992) [hereinafter Gordon, Harms and Benefits]. Gordon builds this argument around Levmore's market encouragement idea. See id. at 453 n.12 ("[T]his article builds on, rather than repudiates, Levmore's analysis.").

177. Id. at 472 ("[I]n the intellectual-property setting, giving creators restitutionary rights tends to encourage consensual markets.").

178. Id. at 473.

179. Id. at 477.

180. Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) ("It is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (U.S. Const.

for a self-serving conferral of a benefit, as it relates to hot news misappropriation must therefore be found elsewhere.

The answer to this puzzle lies instead in looking a little deeper into the structure of the common law rule and the exceptions that have long accompanied it. One of the few exceptions commonly invoked against the general rule is the principle of shared or collective interests. A party who protects or preserves a shared interest and incurs expenses necessary to that end, without the prior consent of the others with whom the interest is shared, is nonetheless allowed to recover from them.[181] Although the exception originated in scenarios of co-ownership and co-tenancies, it has since been extended to other situations where a community of interests manifests itself in analogous fashion—such as the relationship between shareholders in a corporation or bondholders in a mutual fund, and situations involving other common funds.[182]

The logic underlying the exception derives from a collective action problem. John Dawson recognized this early on, and connected the exception to the idea of free riders and the law's recognition of the need for coercion to solve the problem of collective action.[183] In some situations, preserving a community of interests among individuals by ensuring their concerted action requires nullifying the possibility of free riders. Thus an individual in a situation of co-ownership needs to weigh the cost of an action that is likely to benefit all the owners not just against his personal benefit but also against that of the entire collective. Enabling

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art. 1, § 8, cl. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.").

181. See Restatement (Third) of Restitution and Unjust Enrichment § 24 (Tentative Draft No. 2, 2002); Dagan, Law and Ethics, supra note 157, at 125–26 (explaining justification for Restatement rule); Daniel Friedmann, Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding, 36 Loy. L.A. L. Rev. 831, 855–57 (2003) [hereinafter Friedmann, Unjust Enrichment] (explaining "community of interests" concept, where plaintiff's reimbursement "is predicated [on] the existence of a plaintiff's interest and a reasonable expenditure he made in order to protect his interest in circumstances where the expenditure must also necessarily protect the interest of others. . . . There must also be a sufficient proximity between the interests involved").

182. See, e.g., Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 163 (1939) (finding it within power of court of equity to order bondholders to reimburse litigant who brought a claim against a collapsing bank that permitted her fellow bondholders to subsequently bring their claims as well); Trustees v. Greenough, 105 U.S. 527, 532–33 (1881) ("[W]here one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement . . . ."); United Carolina Bank v. Caroprop, Ltd., 446 S.E.2d 415, 416–17 (S.C. 1994) (holding plaintiff who made mortgage payments and paid "past-due real estate taxes" on behalf of cotenant was entitled to reimbursements); Wallersteiner v. Moir (No. 2), (1975) 1 Q.B. 373, 391 (Lord Denning M.R.) (Eng.) (stating minority shareholder in derivative action entitled "to be indemnified by the company against all costs and expenses reasonably incurred by him" while acting on company's behalf). For a discussion of this extension and its logic, see Friedmann, Unjust Enrichment, supra note 181, at 857–58.

183. See Dawson, supra note 86, at 1414 (linking shared interest exception to Mancur Olson's writings on collective action problem).

him to divide up these costs on an equitable basis among all the co-owners ex post is thought to incentivize his collectively beneficial action ex ante.[184] Indeed, the Restatement too recognizes this collective action logic in similar terms, but refuses to extrapolate it into a generic principle when the interest is not shared, strictly speaking, but is nonetheless related.[185] In a situation of shared interests (i.e., a community of interests), the interconnectedness of self-interest and the conferral of benefits is also thought to be unlikely to result in a double incentive problem. Thus, it is not just the possibility of free riding that the rule addresses, but the incentives to maintain the equilibrium that preexists the expenditure.[186] In other words, when the collective benefit is threatened by free riding, the law allows recovery to ensure its continued production.[187] As a framework to overcome the collective action problem in newsgathering described earlier, misappropriation finds its basis to overcome the common law's reluctance to allow a recovery for self-interested conferral of benefits upon others.

The starting point for the analysis was the recognition that information (e.g., news) gathered by a party is at all times a part of the public domain—the information commons. This proposition was taken as a given by the Court in *International News*.[188] Nonetheless, structurally it remains a collective resource in the sense that newspapers depend entirely on it for their business. Newsgatherers thus have a community of interests amongst themselves, not in the formal ownership sense, but rather in the sense that they collectively depend on the timely and accurate collection of news, and they all have immediate access to it once it is collected and disseminated. It forms their collective stock in trade.[189] While news may be in the commons, its continuing existence and vitality as a valuable resource depends on its being gathered appropriately by

184. Consider the situation of four equal co-owners of a piece of land. Each of them earns an annual rent of $4,000 from the land. Now, assume that a situation arises where the entirety of the rental income (the total $16,000) comes under threat (for example, because of failure to fulfill a regulatory requirement), which requires one of them to act in a timely manner to save the income in its entirety for a given year. Assume that this action costs an individual co-owner $5,000. If a co-owner believes that his expenditure of this amount (the cost) is to be weighed only against his own benefit, he would have little incentive to pay that amount. On the other hand, if he knows that he can spend this money upfront and then eventually recover it from his co-owners on an equal basis, the benefits (the rental income of $4,000) exceed the prorated cost ($1,250). This incentive makes it likely that he will spend the $5,000 in order to preserve the group's total rental income of $16,000.

185. Restatement (Third) of Restitution and Unjust Enrichment § 23 cmt. b (Tentative Draft No. 2).

186. For a discussion of this phenomenon in similar incentive terms, see Dagan, Law and Ethics, supra note 157, at 131–36.

187. Id. at 133–35.

188. See supra notes 130–132 and accompanying text (noting that Court in *International News* recognized news as "common property").

189. See supra notes 130–132 and accompanying text (quoting Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918)).

those who rely on it for their commercial sustenance. Newspapers' self-interest is thus inextricably linked to their collective interest.

The proximity, or community of interests, between market participants to produce a public domain collective good—the collection of news—is thus the solution to the puzzle. It might at first seem odd to characterize the interests of marketplace competitors (i.e., newspapers) as proximate or as forming a community. Yet, if one adopts a functional approach to these categories, and recognizes that they originate in the idea of the interests being intertwined—either by legal or factual necessity—an appropriate analogy begins to emerge.[190] The inseparability of the intrinsic and incidental benefits from the process defines the functional approach, and news collection, where the resource (i.e., the news) lacks a priori exclusionary entitlement, admits rather well of this categorization.[191]

It bears emphasizing that connecting the misappropriation doctrine to the common law's logic of solving a collective action problem reveals that liability (and recovery) is triggered not by any wrongdoing, but by the very act of enriching the defendant. In other words, free riding in situations where the law seeks to solve a collective action problem through recovery is not treated by the law as an independent wrong; but rather as a distributive consequence that merits correcting ex post.

2. *The Benefit and the Problem of Subjective Devaluation.* — At first glance, the idea of a benefit seems largely self-explanatory. Situations that increase the net wealth of a defendant, or, put more abstractly, that enhance the defendant's overall welfare, may be considered situations

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190. It is worth noting that some jurisdictions adopt a strictly formalist approach to the idea of a community of interests, requiring that the obligations be interconnected by necessity of law rather than fact. Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 381 (2002) (observing that there must be "compulsion of law" for collective interests exception to apply). Even under such a regime, one might argue that the collective good element of news collection is indirectly demanded by law because the law denies private ownership of the resource and forces it to be placed in the public domain.

191. Indeed, numerous U.S. courts, unlike other common law jurisdictions, seem to have adopted this functionalist approach to the collective interests exception. See Ford v. United States, 88 F. Supp. 263, 264 (Ct. Cl. 1950) (holding U.S. entitled to reimbursement from army private for paying off money he stole from Englishman because U.S. was not "acting as a volunteer" but had "assumed liability for certain acts" of members of military in part to "preserve the safety and effectiveness of [American] forces"); Love v. Robinson, 137 So. 499, 499–500 (Miss. 1931) (holding bank superintendent entitled to reimbursement from stockholders where he advanced depositors amount owed by insolvent bank without waiting for "slow process of the collection of the stockholders' liability" because, although he was not legally required to pay, he had "active interest or concern in the nature of a definite managerial responsibility" in relation to bank's debts); Boney v. Cent. Mut. Ins. Co., 197 S.E. 122, 126 (N.C. 1938) (holding insurance broker entitled to reimbursement by insurance company where broker settled tort claim of client after insurance company wrongly claimed client's policy did not cover suit, because "payment made under a moral obligation . . . or under an erroneous impression of one's legal duty, is not a voluntary payment"); see also 2 Palmer, supra note 171, § 10.5 (discussing functionalist approach taken by *Ford*, *Love*, and *Boney*).

where a defendant obtains a benefit. All the same, identifying a benefit necessitates choosing an appropriate baseline.[192] This is especially problematic in the context of intangibles, where the benefits are nonrivalrous (i.e., they can be utilized by an unlimited number of users at the same time) and nonexcludable (i.e., users cannot be prevented from utilizing the resource). In these situations, the tendency of the law, driven by an economic approach to property, has been to characterize the failure to singularly internalize all such benefits as a harm worth remedying using a tort-like rule.[193] Unjust enrichment, by contrast, insists that the law focus not on the failure of such complete internalization by the plaintiff, but instead on the consequences of its internalization by the defendant.

The baseline problem is thus one of determining the right valuational perspective to adopt for the analysis.[194] In other words, whose perspective should the law adopt in determining whether a plaintiff's actions resulted in a benefit to the defendant? One obvious approach is an objective, reasonable person standard.[195] However, on occasion, a defendant may deny that the plaintiff's actions resulted in any independent benefit. Rather than being strategic, such a denial might legitimately originate in the defendant having adopted a different baseline from that of the plaintiff in making the assessment. This phenomenon is referred

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192. For an early identification of this problem, see Gordon, Harms and Benefits, supra note 176, at 451.

193. See, e.g., Brett M. Frischmann, Evaluating the Demsetzian Trend in Copyright Law, 3 Rev. L. & Econ. 649, 650–51 (2007) (noting copyright law confirms Demsetz's thesis that "private property rights . . . emerge to enable the internalization of externalities"); Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 Colum. L. Rev. 257, 257 (2007) ("Economists since Demsetz have viewed property rights as a way to internalize the external costs and benefits one party's action confers on another . . . [because] if a party didn't capture the full social value of her actions she wouldn't have optimal incentives to engage in those actions.").

194. Traditionally, unjust enrichment and restitution law have treated this problem as going to the very basis of liability. Intriguingly, the new Restatement treats it largely as a matter of measurement. Since the focus of this Article is largely on the justificatory structure of misappropriation, rather than on unjust enrichment doctrine as such, this right-remedy distinction is of little significance here. See Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. d (Tentative Draft No. 5, 2007) (noting although restitution formula sometimes phrased as "'subjective value to the recipient[,]' . . . [t]he word 'subjective' is potentially misleading . . . because subjective values are often values that are incapable of measurement . . . [and] [r]estitution does not . . . impose a liability in money for any enrichment that cannot be valued in money with reasonable confidence").

Echoes of the other elements discussed in this section—namely the concepts of free acceptance, incontrovertible benefit, and the like—are found in other parts of the Restatement, focusing on specific types of unjust enrichment. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 9 (Discussion Draft 2000) (discussing conferral of nonmonetary benefits by mistake).

195. See Birks, Unjust Enrichment, supra note 160, at 50 ("The courts have no choice but to deal in market value . . . ."); Graham Virgo, The Principles of the Law of Restitution 64–65 (2d ed. 2006) (giving four reasons objective test should be considered first).

to as a subjective devaluation.[196] The rationale for allowing this is that in some situations the defendant may not have even recognized that he was getting a benefit from the plaintiff. Since unjust enrichment is premised on the actual, identifiable receipt of a benefit, in situations where a defendant neither requested nor had the opportunity to refuse such a benefit, the common law avoids imposing liability to safeguard a defendant's individual autonomy.[197] In a misappropriation claim, a defendant may thus legitimately assert that he had no reason to believe that the information (i.e., news) being used was a benefit that originated with the plaintiff, as opposed to information that made its way into the public domain in the ordinary course of things.

As originally understood, the subjective devaluation problem arose out of concern for a defendant's autonomy. Peter Birks's description of the problem captures this well, when he notes that "[w]hat matters is [the defendant's] choice. The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand for it, is irrelevant to the case of any one particular individual."[198] The problem can be expressed in efficiency terms as well. In situations where the value of a good (i.e., the putative benefit) to a defendant is unknown, that defendant may face a potential loss if the imposition of liability grossly outweighs the potential benefit to a plaintiff vested with the entitlement.[199] The imposition of liability in such a scenario would be inefficient.

To overcome the problem posed by a potential subjective devaluation, the common law of unjust enrichment has over the years come to rely on a fairly well-known technique, often referred to as the incontrovertible benefit.[200] These are situations where a benefit to the defendant

196. See Birks, Restitution, supra note 84, at 109 ("[Subjective devaluation is] based on the premis[e] that benefits in kind have value to a particular individual only so far as he chooses to give them value."); Birks, Unjust Enrichment, supra note 160, at 50 (noting "subjectivity of the value of non-money benefits"); Virgo, supra note 195, at 67 (noting principle of subjective devaluation exists "because different people value different things according to their own tastes and priorities" (citation and internal quotation marks omitted)); Andrew G. Spence, In Defence of Subjective Devaluation, 43 McGill L.J. 889, 891–93 (1998) (describing and ultimately defending subjective devaluation).

197. See Falcke v. Scottish Imperial Ins. Co., (1886) 34 Ch.D. 234 at 248 (Eng.) ("The general principle is . . . that work or labour done or money expended by one man to preserve or benefit the property of another do not . . . create any obligation to repay the expenditure."); see also Virgo, supra note 195, at 68 (discussing *Falcke*).

198. Birks, Restitution, supra note 84, at 109.

199. Dagan, Law and Ethics, supra note 157, at 140 ("Utility most clearly objects to restitution where the utility loss to the defendant had she been forced to make restitution outweighs the gain to the plaintiff from the action which restitution could have facilitated.").

200. Birks, Restitution, supra note 84, at 116 (defining incontrovertible benefit as situation where "no reasonable man would say that the defendant was not enriched"); Virgo, supra note 195, at 74 (defining incontrovertible benefit as an "unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate or conjecture" (citing Reg'l Municipality of Peel v. Queen, [1992] 3 S.C.R. 762, 795 (Can.))).

is clear and manifest from the circumstances such that it can be presumed that the defendant would not have refused it even when presented with the choice.[201] Saul Levmore argues that the incontrovertible benefit exception reflects, at base, nothing more than the ease with which the benefit in question can be translated into wealth.[202] In other words, it offers no more than a test of objective fungibility. The most common situation of an incontrovertible benefit is that of the necessary expenditure: situations where what the defendant obtains saves him from incurring an expenditure, which by the operation of law or facts, he necessarily would have had to incur anyway.[203]

Emergency services rendered by a plaintiff, or the supply of necessities, are typical of this category. Much does of course turn on classifying what the defendant receives as necessary or essential.[204] The easiest cases of necessity involve those where a defendant is under a legal duty (e.g., a debt, or a duty to abate a nuisance), and the plaintiff mistakenly discharges that duty. Courts have also, however, been more than willing to look beyond the existence of a formal legal duty, especially in situations where a benefit is thought essential to the defendant's very enterprise.[205] For instance, the act of bringing the coal to the surface for a coal mine is typically considered necessary to the operation of the mine, and can form the basis of a recovery for a necessary expenditure saved on.[206]

Situations covered by the hot news misappropriation doctrine lend themselves to the distinct possibility of a subjective devaluation. In other words, an enterprise relying on information collected by another, but placed in the public domain and made publicly available, may legitimately claim that it had no reason to recognize that it was receiving a benefit from the information gatherer, rather than using publicly available information in its own communications. Indeed, in *International News*, the defendant raised the issue of a subjective devaluation, arguing that the news became the common possession of all once it was published and made accessible to the public; effectively claiming that no unique benefit as such had accrued to it, other than that which flowed to the

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201. *Reg'l Municipality of Peel*, [1992] 3 S.C.R. at 795.

202. Levmore, supra note 173, at 77–79 ("[T]he wealth-dependency problem disappears and restitution need not be denied where the nonbargained benefit is easily translated into wealth.").

203. Virgo, supra note 195, at 75–77 (noting circumstances of necessity may arise "by operation of law" or may be "factually necessary"). The Restatement also recognizes this as an independent category of recovery. Restatement (Third) of Restitution and Unjust Enrichment § 9(1)(d) (Discussion Draft 2000) (allowing recovery when plaintiff's actions have spared defendant "an otherwise necessary expense").

204. See Birks, Restitution, supra note 84, at 120–21 ("Since the necessity for the expenditure need not be absolute there is room to choose between either a strict or a liberal interpretation of the test.").

205. See Andrew Burrows et al., Cases and Materials on the Law of Restitution 91 (2d ed. 2007) ("Cases on the wrongful use of the property of another also satisfy the 'negative' enrichment aspect if the use of the property is necessary to the defendant's enterprise.").

206. Id. at 91 n.1.

general public.[207] The Court responded to this argument by identifying the defendant's gain as an incontrovertible benefit. It proceeded to characterize the activity of newsgathering, and its accompanying costs, as necessary to the enterprise of newspaper publishing.[208] Consequently, the plaintiff's actions allowed the defendant to save on an expense necessary to its enterprise, effectively rendering it an incontrovertible benefit. The Second Circuit's formulation of misappropriation as five independent elements follows a similar pattern. Its explicit recognition that the defendant's acts of free riding on the plaintiff's efforts had the effect of lowering the defendant's necessary costs similarly relied on the idea of an incontrovertible benefit.[209]

The process of identifying the defendant's benefit is also manifest in the requirement that the value of the information in question derive from its time-sensitive nature.[210] By insisting that the value of the news (or other protectable information) derive not just from its communicative function but also from its timeliness, the doctrine rather explicitly identifies the real benefit that a defendant needs to have been enriched by for the free riding to be actionable. In other words, when a defendant free rides on a plaintiff's newsgathering, the defendant's enrichment originates not just in its avoidance of the cost of collecting the news on its own, but also in its saving on the added expenditure necessary for the information to remain timely, and therefore valuable.[211]

3. *The Substantive Identification of a Nonproprietary Loss.* — In addition to there being a benefit that enriches the defendant, the benefit needs to be at the plaintiff's expense.[212] This requirement performs two functions. First, it operates as a rule of standing, enabling a party impacted by the enrichment to effect its rectification. Second, it situates the principle

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207. Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918).

208. Id. at 238–39 (noting how material used by defendant had "been acquired by complainant as the result of organization and the expenditure of labor, skill, and money" and observing that "novelty and freshness" were central to enterprise of news reporting).

209. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 854 (2d Cir. 1997) ("An indispensable element of an *INS* 'hot-news' claim is free riding by a defendant on a plaintiff's product, enabling the defendant to produce a directly competitive product for less money because it has lower costs.").

210. Id. at 852 (noting one of central elements to hot news claim is that "the value of the information is highly time-sensitive").

211. By specifying this requirement explicitly, the doctrine thus also hints at the appropriate time frame to be used in assessing the market value of the benefit—namely at or shortly after its collection, given the inverse relationship between the information's value and the elapse of time thereafter.

212. See Restatement (Third) of Restitution and Unjust Enrichment § 2 cmt. a (Discussion Draft 2000) (describing it as necessary but not sufficient condition for recovery); Birks, Restitution, supra note 84, at 132 ("[This requirement] signifies only that the plus to the defendant is a minus to the plaintiff."); Birks, Unjust Enrichment, supra note 160, at 73–74 ("[T]he real question is . . . what constitutes a sufficient connection between the would-be claimant and the enrichment he wants to claim."); Virgo, supra note 195, at 105 (noting this requires claimant to "establish a connection between the receipt on an enrichment by the defendant and the claimant's loss").

of unjust enrichment around the idea of corrective justice by connecting the plaintiff and defendant in a bilateral private law setting premised on the correlativity of normative gain and loss.[213] Very importantly, though, the identification of a loss as a substantive element of the unjust enrichment analysis is different from the calculation of restitutionary damages, an issue addressed later.[214] In other words, unjust enrichment demands the identification of a loss to establish a claim, but does not necessarily connect the consequences of such a claim to that loss, once identified.

While the identification of a loss as a substantive matter may seem simple, its importance cannot be overemphasized, since it is at this juncture that the distinction between a proprietary claim and one originating in unjust enrichment begin to bleed into one another. Keeping them distinct is an exercise that has thus far troubled both scholars of unjust enrichment and property.

Generally, there are two approaches to identifying when a benefit is at the expense of a plaintiff. The first, known as the correspondence approach, favors recognizing a direct correlation between a defendant's benefit and a plaintiff's loss in order to satisfy the requirement.[215] In other words, the recovery is contingent on the plaintiff showing a material loss either equivalent to or greater than the recovery being sought.[216] A second approach, by contrast, asks merely whether the benefit in question came from or originated with the plaintiff for the requirement to be satisfied.[217] It is this approach that most readily falls back on ownership ideas for normative traction. Birks, its leading proponent, argues that since unjust enrichment is more concerned with remedying a defendant's benefit than it is with a plaintiff's impoverishment, it suffices for the plaintiff to establish that the benefit bears some causal connection to plaintiff's actions, even if that connection is not direct or quantifiably

213. For a discussion of the corrective justice basis of unjust enrichment, see Ernest J. Weinrib, Correctively Unjust Enrichment, *in* Philosophical Foundations of the Law of Unjust Enrichment, supra note 157, at 31, 33 (arguing "the parties to liability in unjust enrichment . . . establish the correlative right and duty through the interaction in which they both participate"); Ernest J. Weinrib, The Gains and Losses of Corrective Justice, 44 Duke L.J. 277, 294–97 (1994) (applying framework of correlativity to understand normative structure of unjust enrichment law).

214. See infra Part III.B.2 (arguing ideal solution in calculating restitutionary damages would focus on annulling effects of defendant's unfair cost savings).

215. See R.B. Grantham & C.E.F. Rickett, Disgorgement for Unjust Enrichment?, 62 Cambridge L.J. 159, 166 (2003) (describing correspondence idea).

216. See, e.g., Mitchell McInnes, "At the Plaintiff's Expense": Quantifying Restitutionary Relief, 57 Cambridge L.J. 472, 473 (1998) ("As a matter of policy, it makes perfectly good sense to preclude the plaintiff in a subtractive enrichment case from recovering more than she lost . . . ."); Mitchell McInnes, The Measure of Restitution, U. Toronto L.J., Spring 2002, at 163, 172–74 ("In Canadian law, the court must be satisfied not only that the defendant received an enrichment but also that the plaintiff suffered a *corresponding deprivation*.").

217. Birks, Unjust Enrichment, supra note 160, at 75–78 (discussing sufficiency of "interceptive subtractions," where asset moving from third party to claimant is intercepted by defendant).

equal to the benefit.[218] On closer examination, though, Birks falls back on the idea of ownership to justify this position. He thus explains cases that allow a recovery where a defendant obtains a benefit by using someone else's property without depriving that person of its possession—e.g., a stowaway in a ship's cargo hold—by arguing that they can be understood as relying on the simple logic of "from my property, therefore sufficiently from me," to establish that the benefit was at the plaintiff's expense.[219]

This noncorrespondence logic thus builds on the normative structure of property law for its answers. Since property law generally presumes that any interference with an ownership interest is actionable even without a showing of actual harm (*injuria sine damno*) because of its injury to the right,[220] so too does Birks's argument for noncorrespondence. Absent this logic, his argument has little independent basis. Outsourcing the identification of a loss to property law is hardly unique to Birks though. The most recent version of the Restatement too adopts this logic in principle. In explaining why some conferrals of benefits are recoverable and others are not (i.e., why some are at the expense of the plaintiff), it notes that "[r]estitution subserves property rights" and that the benefit in question "must be something as to which the law recognizes rights of ownership, meaning something the law will protect against appropriation by others."[221] Yet, when it comes to explaining situations where it is ambiguous whether the law recognizes an ownership claim at all, it notes that "[i]n such cases, the availability *vel non* of the claim in restitution is a function of applicable property law," effectively outsourcing the normative work to the law of property.[222]

Hanoch Dagan picks up on this point and notes how this outsourcing pays little attention to the contestability of property as a normative idea and fails to engage the question of whether an ownership interest in a particular resource ought to be accorded to an individual to begin

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218. Peter Birks, "At the Expense of the Claimant": Direct and Indirect Enrichment in English Law, *in* Unjustified Enrichment 493, 525 (David Johnston & Reinhard Zimmermann eds., 2002) ("[I]t is not true to say that the defendant's enrichment must be directly from the plaintiff, whether interceptively or otherwise.").

219. Birks, Unjust Enrichment, supra note 160, at 82.

220. See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160 (Wis. 1997) ("Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. . . . The law infers some damage from every direct entry upon the land of another." (citation omitted)). A notable exception to this rule is the law of trespass to chattels in the United States. See Shyamkrishna Balganesh, Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence, 35 Common L. World Rev. 135, 142 (2006) (noting that unlike under English law, "under American law some actual damage to the chattel is necessary before the action can be maintained").

221. Restatement (Third) of Restitution and Unjust Enrichment § 2 cmt. e (Tentative Draft No. 7, 2010).

222. Id.

with.[223] It thus posits an obvious circularity by claiming that the resource ought to be recognized as a property interest in order to avoid an unjust enrichment, the very existence of which depends on the property interest to begin with.[224] Dagan's point is an excellent explanation for the crystallization of propertarian logic in the misappropriation setting, and the move from quasi-property in *International News* to property in hot news.

So, if the noncorrespondence approach depends on proprietary logic to determine a plaintiff's detriment, this leaves us with the correspondence approach, which looks for some actual (i.e., quantifiable) loss to the plaintiff to satisfy the requirement. Gordon argues that in the misappropriation doctrine, this requirement is satisfied by looking for a "competitive nexus" between the parties and asking whether the defendant's copying is in a market that the plaintiff is or will be serving shortly.[225] A loss of potential sales, manifested in this nexus requirement, is thus taken to satisfy the loss requirement, not because it represents the harm sustained by the plaintiff,[226] but because it connects the plaintiff's entitlement to the defendant's actions, making the defendant's gain directly "at the expense of" the plaintiff's revenue.[227] While this formulation no doubt follows the correspondence approach, it at the same time doesn't identify a rigid temporal baseline for the quantification of the plaintiff's expense/loss, since it effectively allows unrealized future expectancies into the calibration of the entitlement. This allowance for expectancies, in turn, renders the entitlement susceptible to being seen as perfectly compatible with an economically oriented conception of property rights in intangibles,[228] despite Gordon's conscious efforts to move the analysis away from the idea of property.[229]

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223. See Dagan, Law and Ethics, supra note 157, at 20–21 (noting "property is an essentially contested concept" and "there is no reason to presuppose that *any* gains derived from property are *necessarily* within the entitlement of the property's owner").

224. See id. ("[I]t is circular to base a right of restitution on the ground that the invaded resource is a property interest, where the basis for regarding the resource as property is that otherwise unjustified enrichment would be permitted." (citation omitted)); Daniel Friedmann, Restitution of Benefit Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 511 n.36 (1980) ("[I]t may be argued that there is a certain circularity in reasoning in finding a right of restitution on the ground that the right . . . is a property interest . . . .").

225. Gordon, Restitutionary Impulse, supra note 34, at 238–39.

226. Id. at 244 ("The competition requirement might seem to make the restitutionary right equivalent to a right against harm. That is not so.").

227. Id. at 239 ("The competition requirement works to assure that defendant's gain is at plaintiff's expense.").

228. For discussions of this conception, see Lemley, supra note 32, at 1037–40 (identifying development of property rhetoric in intellectual property and observing how it originates in logic of internalizing positive externalities that may arise in future and avoiding harmful free riding).

229. Gordon, Restitutionary Impulse, supra note 34, at 245–46 (discussing conceptions of property). Gordon defines "property" rather narrowly for the purposes of her argument. See id. at 166 n.60 ("Note that although much of the theoretical literature employs the term 'property right in information' to embrace any legal right to sue, I use

A more acceptable solution to the problem once again originates in the identification of newsgathering as a collective good. In situations where unjust enrichment allows a plaintiff to recover from a defendant in order to solve a collective action problem, its core concern is that without enabling such a recovery, future plaintiffs would be reluctant to produce the collective good, thereby reducing overall social welfare. The gain to a defendant is thus the cost saved by not participating in the production of the good. The plaintiff's loss, which needs to correspond causally to this gain when the enrichment occurs as a substantive rather than remedial principle, is thus simply the cost incurred in producing the collective good—no more, no less.

Thus, when a participant *X* in a collective fund worth $50,000 spends $1,000 to safeguard the collective's interest, and the fund eventually grows to be worth $500,000—the loss to *X* that unjust enrichment concerns itself with as a matter of substantive standing has no connection to the fund's appreciation, but is restricted to his actual expenditure, i.e., the $1,000. To allow otherwise would render the very existence of the claim (as opposed to its remedial consequences) subject to market vagaries. In other words, if *X*'s loss is identified as $500,000 when the fund grows, one should see no reason to allow the claim if the fund were to depreciate in value to $0 eventually.[230] Yet, doing so would undermine the recognition that *X* did in fact incur an expenditure (and therefore a net loss) that at one point in time enriched the members of the collective. The common law of unjust enrichment thus insists rather dogmatically that the substantive loss be determined at the point that the defendant is enriched, not before or after, and that it be determined independent of market fluctuations that are causally linked to it.[231]

For misappropriation, the inclusion of lost sales or profits in the very identification of a loss has the effect of including an unrealized expectation in the baseline, rendering the recovery substantively contingent. In focusing on the upside of such an inclusion (i.e., an appreciation in value), scholars tend to ignore the obvious possibility of its downside, effectively defeating the entire claim. Unjust enrichment resists this, consciously distinguishing itself from cases of wrongful enrichment.[232] Identifying the plaintiff's expense in terms of lost sales or profits also has the effect of unintentionally vindicating a preexisting interest, thereby effectively converting the claim into a proprietary one. In other words, restitution for lost profits (i.e., disgorgement) cannot be coherently justified

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the term 'property' here to embrace the particular set of rights associated in the common law with ownership, particularly of real property.").

230. For a fuller discussion, see Grantham & Rickett, supra note 215, at 175.

231. Id. at 165 ("The claimant's wealth entitlement is thus defined at the point of receipt.").

232. See Friedmann, Unjust Enrichment, supra note 181, at 844 (noting how exceptions have nonetheless emerged where liability for unjust enrichment is imposed for misappropriation of "something to which another person had a mere expectancy").

without an a priori basis for allocating the profits to the plaintiff. In most instances, a property right or some other control-driven interest performs this function.[233] But when a preexisting interest is absent, the idea of damages for lost profits has little basis.

Once again, on closer analysis the structure of misappropriation follows the logic of the common law, consciously deviating from a proprietary conception of loss. As the court in *National Basketball Ass'n* observed, the very first element of the doctrine requires a showing that the plaintiff collects the information "at some cost or expense."[234] Were the basis of the action proprietary, clearly no proof of quantifiable loss would be required, especially given plaintiffs' recurrent focus on equitable relief. What accounts for this element then is the doctrine's unjust enrichment framework. As noted previously, the core concern motivating misappropriation is the fact that a defendant enhances profitability by saving on this cost or expense—which represents enrichment.[235] Since at the point of enrichment (i.e., the use of the information by the defendant) this cost or expense is the only loss actually sustained by the plaintiff, misappropriation requires courts to identify it as a first step in their substantive analysis. And courts applying the doctrine do indeed take this requirement seriously.

III. Implications of a Nonproprietary Approach

The distinction between a property-based approach to misappropriation and one rooted in unjust enrichment and unfair competition is more than just academic, and has several important consequences for the interpretation, application, and extension of the doctrine. This Part addresses these implications. The nonproprietary approach (1) allows for a better appreciation of the doctrine's unique elements, some of which have thus far been viewed as mere formalities, (2) reins in courts' discretion in choosing between remedies once the substantive elements of the doctrine are satisfied, and (3) cabins the doctrine's potential speech-limiting features under the First Amendment.

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233. See Lionel D. Smith, Disgorgement of the Profits of Breach of Contract: Property, Contract, and "Efficient Breach," 24 Can. Bus. L.J. 121, 121–22 (1994) (noting availability of disgorgement for various wrongs, including breach of fiduciary obligation, breach of confidence, conversion, and trespass to land). For discussion of the argument that an interest need not be characterized as "property" for a profits baseline to be awarded under unjust enrichment, as long as the law seeks to emphasize the plaintiff's control over the revenue stream from the resource, see Dagan, Law and Ethics, supra note 157, at 242. Dagan's argument interfaces with the issue of appropriate remedial response, an issue that is discussed infra Part III.B.

234. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997).

235. See supra Part II.A.1.

A. *Making Sense of Doctrinal Anomalies*

A large part of the reason why misappropriation has survived federal preemption under the copyright laws to this day is because of its use of doctrinal requirements that supposedly cause it to function differently from traditional copyright law.[236] In identifying and emphasizing the extra elements needed for it to withstand a copyright preemption challenge, however, few have paid close attention to the structural bases of these elements and their connection to misappropriation's underlying theoretical framework.[237] Most of these elements have little connection to the dominant property-based theory, making them appear as mere formalities to overcome a preemption challenge. A theory of competitive unjust enrichment provides a better explanation for them. This section considers two such elements: the requirement of direct competition that is traced back to *International News*, and the duty to police that recent interpretations of hot news misappropriation have added to the mix.

1. *Direct Competition as Interest Homogeneity.* — Of the five elements needed to satisfy a claim for misappropriation, the one that courts continue to disagree on is direct competition. Courts expect a plaintiff in a misappropriation suit to establish that a defendant's actions put the defendant "in direct competition with a product or service offered by the plaintiff."[238] Some also interpret this requirement as necessitating that the parties compete directly in a primary market.[239] Absent such a showing, courts have routinely denied plaintiffs' recovery altogether.[240]

Despite its avowed importance, no court has to date offered a meaningful test or approach to applying the requirement. The dominant ap-

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236. Indeed, when the preemption provision of the Copyright Act was enacted, misappropriation was explicitly recognized to be exempt from its coverage. See 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, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto.").

237. *Nat'l Basketball Ass'n*, 105 F.3d at 850–53 (discussing extra elements requirement in relation to hot news misappropriation).

238. Id. at 852; see also Int'l News Serv. v. Associated Press, 248 U.S. 215, 240 (1918) (discussing why process at issue amounted to "unfair competition").

239. See Restatement (Third) of Unfair Competition § 38 cmt. c (1995) ("[I]n most . . . cases in which the misappropriation doctrine has been determinative, the defendant's appropriation . . . resulted in direct competition in the plaintiff's primary market. . . . Appeals to the misappropriation doctrine are almost always rejected when the appropriation does not intrude upon the plaintiff's primary market.").

240. See, e.g., U.S. Golf Ass'n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028, 1041 (3d Cir. 1984) (holding plaintiff had no legally protectable interest and denying injunction where there was no "direct competition"); Universal City Studios, Inc. v. Ideal Publ'g Corp., 195 U.S.P.Q. (BNA) 761, 761–62 (S.D.N.Y. 1977) (finding no actionable misappropriation where defendant produced "collateral product"); Nat'l Football League v. Governor of Del., 435 F. Supp. 1372, 1378 (D. Del. 1977) (finding no misappropriation where defendant uses information to profit from "demands for collateral services").

proach appears to involve courts adopting a largely intuitive understanding of both direct competition and the primary market that the parties operate in.[241] Most courts focus entirely on the parties' products or services being offered, and upon recognizing a minimal degree of substitutability between them, find the requirement to be satisfied. When courts use the element to deny recovery too, their analysis is largely intuitive on both the competition and market fronts.

This extensive reliance on bare intuition to analyze this requirement is somewhat perplexing, since the ideas of direct competition and primary market both bear a very strong resemblance to the market definition exercise routinely undertaken by federal courts in the antitrust context.[242] In determining whether a defendant has market power in a relevant market, courts in antitrust cases first set out the relevant market. Since the identification of market power remains their primary purpose, the tests that they employ to define the market tend to be informed in large measure by that purpose. The inquiry commonly begins by measuring the cross-elasticity of demand between the parties' products available on the market, and then adjusts for the possibilities of preexisting monopoly profits, price discrimination, and other situation-specific factors.[243]

Trademark law too, at one point, required a clear showing of direct competition between the parties and their products for a claim of infringement to be sustained.[244] In due course, however, it came to abandon this emphasis, as it began to expand the category of uses that would constitute an act of infringement.[245] At least part of the reason for this

241. See, e.g., *Nat'l Basketball Ass'n*, 105 F.3d at 854 (discussing products and market in concluding no unlawful misappropriation).

242. See United States v. Grinell Corp., 384 U.S. 563, 570–76 (1966) (defining relevant market before determining whether illegal monopoly existed); Brown Shoe Co. v. United States, 370 U.S. 294, 334–39 (1962) (defining relevant market before determining whether potential merger would lessen competition); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394–404 (1956) (defining relevant market before determining whether illegal monopoly existed).

243. See, e.g., Robert G. Harris & Thomas M. Jorde, Antitrust Market Definition: An Integrated Approach, 72 Calif. L. Rev. 1, 4–6 (1984) (discussing range of indicators of market power and complexities involved in analyzing them). For a more recent criticism of the relevant market determination in antitrust law, see generally Louis Kaplow, Why (Ever) Define Markets?, 124 Harv. L. Rev. 437 (2010) (explaining trademark law has "long been regarded as a species of the broader law of unfair competition").

244. See Mark P. McKenna, The Normative Foundations of Trademark Law, 82 Notre Dame L. Rev. 1839, 1888–89, 1899–904 (2007) (describing growth and decline of unfair competition ideas in trademark law).

245. Id. at 1900; see also Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co., 514 F.2d 665, 669 (5th Cir. 1975) ("Direct competition is not the sine qua non of trademark infringement . . . ."); Ball v. Am. Trial Lawyers Ass'n, 92 Cal. Rptr. 228, 237 (Ct. App. 1971) ("[D]irect competition between the parties is not a prerequisite to relief."); 74 Am. Jur. 2d Trademarks and Tradenames § 83 (2010) ("Direct competition between the parties is not a prerequisite to a trademark infringement action, nor is it necessary that the products involved be in direct competition.").

development, one might argue, derives from trademark law's unique status as a doctrine at the interface of unfair competition and property law. The absence of a self-contained explanatory theory for trademark law thus allowed it to expand in new directions, necessitating its abandonment of the direct competition rule (or at least its erosion as a strict prerequisite to infringement). Recent developments seem to suggest that a similar fate awaits the direct competition requirement in hot news misappropriation as well.[246] Rooting misappropriation in the principles of unjust enrichment may, however, guard against this eventuality.

The direct competition requirement of hot news misappropriation is not a mere formality; it is misappropriation's very essence. Its existence is best accounted for by the theory of competitive unjust enrichment, which views misappropriation as a solution to a collective action problem in an information collection or dissemination market. Since the doctrine was aimed at encouraging the creation and preservation of collective or cooperative efforts, the viability of such cooperation depends entirely on the parties in question having a common interest in a resource of value (i.e., news collection). In other words, if the parties depend on the resource to varying degrees in the production of their goods and services, or in structurally different ways, such cooperation is extremely unlikely, thereby diluting misappropriation of its very basis. An example is the difference in competition between two daily newspapers (e.g., *New York Times* and *Washington Post*) and between a daily newspaper and a weekly news magazine (e.g., *The Economist*). In the latter scenario, while they both rely on news stories for their content, the nature and extent of their reliance varies in great measure, rendering the possibility of their entering into a collective effort to cooperate in the newsgathering exercise less likely.

Direct competition should thus be understood as a measure of parties' likelihood of cooperating to lower input costs. Rather than eyeballing the simple substitutability of parties' final products, courts should look to the competitive input that parties rely on in producing their product or service. Factors to consider would include: (1) the nature and extent to which the parties rely on the same input to compete; (2) the manner in which they use the input to produce a product or service in the market; (3) the prevalence and likelihood of cooperative arrangements between competitors for the competitive effort in question; and (4) if the plaintiff is a member of such an arrangement, the possibility of the defendant's entry into the collective. Each of these factors goes to measuring the homogeneity of parties' interests in the valuable intangible that is the subject of controversy.

Using the idea of interest homogeneity to understand the direct competition element will result in the doctrine being invoked with less frequency against defendants that have little to gain from a cooperative

246. See infra notes 247–254 and accompanying text (describing how requirement was misapplied in recent case).

arrangement with plaintiffs. Rather than introducing an altogether new norm of no free riding in such circumstances, the analysis would recognize that there is in fact no market-based harm being corrected for, since the defendant's cost savings alone (from such free riding) has no effect on the plaintiff's profitability, the core concern in hot news misappropriation. The functioning of this approach is best illustrated by applying it to the facts of a recent decision.

In *Barclays Capital, Inc. v. Theflyonthewall.com*, the plaintiffs were firms engaged in the business of producing equity research recommendations, which they disseminated to subscribers for a fee.[247] The defendant was an online subscription newsfeed that collected and published financial news, rumors, and other market-related information exclusively on its website.[248] Among other news, the defendant website posted the financial recommendations of the plaintiff firms, principally in the form of their factual content, while crediting the firms for them.[249] The plaintiffs alleged hot news misappropriation, and the trial court agreed with them. In applying the direct competition requirement, the court undertook a detailed comparison of the parties' business models, products, and distribution channels, and deemed irrelevant the fact that the defendant merely reported news about the plaintiffs' recommendations rather than the recommendations themselves.[250] This last point was crucial, for it goes to the core of what the direct competition requirement in the competitive unjust enrichment model is trying to achieve.

Focusing on an analysis of parties' homogeneity of interests as part of the direct competition analysis would have resulted in a very different outcome. First, the parties in the case clearly rely on different inputs as part of their competitive process. The plaintiffs produce their own recommendations, which is not the same as the defendant's communication of those conclusions as factual news. In other words, the plaintiffs actively make the news that the defendants report. The analogy is thus to a newspaper summarizing a presidential speech. The President makes the news, while the newspaper merely disseminates it. Second, since their inputs are very different, it is likely that their outputs are too. Whereas the plaintiff firms derive their market from the contents of what they produce as recommendations, the defendant does so from being a conduit carrying the factual elements of what multiple firms (such as the plaintiffs) say. Timeliness is crucial to both the plaintiffs and the defendant, but this does not necessarily cut in favor of their being essentially the same product. The defendant does not merely pass the plaintiffs' recommendations off as its own, but consciously credits them as those of the plaintiffs, which is their principal source of value, as far as the defendant is con-

247. 700 F. Supp. 2d 310, 315–19 (S.D.N.Y. 2010).

248. Id. at 322–27.

249. Id. at 323.

250. Id. at 339–41.

cerned.[251] The parties' products are thus hardly identical, and very different from that seen among newspapers competing in the same market. Third, the plaintiff firms and the defendant are very unlikely to enter into a cooperative arrangement to defray the costs of their activities, since their expenditures derive from very different activities. For the plaintiffs, expenditures derive primarily from hiring skilled, knowledgeable analysts to generate recommendations, while for the defendant, expenditures derive mainly from hiring skilled reporters to summarize and organize these recommendations with accuracy and efficiency.[252] Had the court attempted to analyze direct competition through the lens of the hot news doctrine's structural purposes and the theory of competitive enrichment that it is premised on, it would have been forced to conclude that this core element was completely missing.

An interest-homogeneity approach would also caution against the ready extension of the doctrine to new uses of information, a move that would effectively convert hot news into a property interest in the news. The attempted extension of the doctrine to cover bloggers is a good example here.[253] Merely because an individual uses information collected by another, even if for commercial purposes, hardly renders him a direct competitor in the collective action sense in which the requirement emerged. In other words, a blogger is unlikely to be incentivized (by the misappropriation doctrine) to enter the enterprise of news collection—the doctrine's core objective. An action against a blogger is unlikely to result in the blogger independently collecting the news, or indeed in joining a cooperative effort for this purpose. To equate direct competition with the mere use of the same product, or indeed its effects on a collector's sales would dilute the requirement of its core significance. A competitor thus needs to be seeking profits "at the same time and in the same field," constraints that should be recognized in applying this requirement.[254]

2. *The Duty to Police and Incentive Effects.* — A second doctrinal anomaly of the hot news doctrine that property- and intellectual property-based theories have been hard pressed to account for is the requirement—

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251. The court's own observation highlights this point:

> In contrast, there is no evidence that a Recommendation by [the defendant] itself to buy, sell, or hold a particular stock would be given any weight whatsoever by any investor. Thus, it is essential to [the defendant's] misappropriation of the [plaintiffs'] research capital that it connect each Recommendation to its source.

Id. at 337.

252. Id. at 336–37.

253. See Nate Anderson, Is Permission Needed to Retweet Hot News?, ARS Technica, at http://arstechnica.com/tech-policy/news/2010/04/is-permission-needed-to-retween-hot-news.ars (on file with the *Columbia Law Review*) (last visited Feb. 11, 2011) (discussing application of hot news doctrine to aggregators and "those that simply rewrite the facts contained in the story and publish a new account in their own words").

254. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

made explicit by a recent court opinion[255]—that a defendant might be able to avoid liability by showing that the plaintiff has failed to make reasonable efforts to rein in the systematic free riding activities of other competitors (i.e., beyond the plaintiff and the defendant) in the market. While some claim that the requirement is a recent development in the law of hot news, traces of it are evident in at least one prior decision.[256]

At first blush, especially from a property point of view, the requirement may seem anomalous. No other intellectual property regime allows a defendant to avoid or reduce his liability by showing that another competitor, i.e., a third party, committed a similar action.[257] A copyright defendant can thus hardly claim as a defense that others continue to copy a plaintiff's protected work on a regular basis. The same is equally true, of course, in property law, where a plaintiff is given the absolute discretion to pick and choose from among multiple trespassers in commencing an action. Evidentiary and other strategic considerations are thought to favor vesting a plaintiff with this discretion.

The oddity, though, originates entirely from viewing copying (free riding) in the hot news context as a freestanding wrong. It is in this crucial respect, however, that hot news as a nonproprietary doctrine differs most significantly from other property and intellectual property interests, where the mere boundary crossing (i.e., trespass, use, or copying) by a defendant is made actionable.[258] Since the normative significance of free riding in misappropriation differs quite significantly from traditional in-

255. See *Barclays Capital Inc.*, 700 F. Supp. 2d at 347–48 (holding injunction will be lifted if plaintiff does not "take[ ] reasonable steps to restrain the systematic, unauthorized misappropriation of their [services]" by market participants other than defendant).

256. See Andrew L. Deutsch et al., Publishers Increasingly Invoke "Hot News" Doctrine, Nat'l L.J., May 17, 2010, at 27 (describing requirement as "novel"). For a previous use of this requirement, see, e.g., Silver v. Lavandeira, No. 08 Civ. 6522(JSR)(DF), 2009 WL 513031, at *6 (S.D.N.Y. Feb. 26, 2009) (noting how widespread availability of information sought to be protected contradicted a claim for its exclusivity under hot news).

257. See, e.g., Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 766 (C.C.P.A. 1982) ("[A]n owner is not required to act immediately against every possibly infringing use to avoid a holding of abandonment."). Trademark law comes closest to recognizing something similar, by imposing on trademark holders an affirmative duty to control the use of their mark. It thus disallows what is known as "naked licensing"—i.e., allowing a licensee to use the mark without any quality control over such use. See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 18:48 (4th ed. 2010). Such naked licensing results in a trademark owner losing the exclusive right to use the mark, with it being treated as an abandonment of sorts. Id. The logic underlying this duty of control derives largely from the communicative function of the trademark, very different from the duty imposed in relation to time-sensitive information in hot news misappropriation. See Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959) ("Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.").

258. See generally Henry E. Smith, Intellectual Property as Property: Delineating Entitlements in Information, 116 Yale L.J. 1742, 1795 (2007) [hereinafter Smith, Intellectual Property] (discussing "exclusion rights" given by patents).

tellectual property, it is tested individually in each case.[259] In other words, copyright and patent laws are presumed to be about providing authors and inventors with efficient incentives to create or invent. Yet this incentive is thought to operate at the systemic level and is never tested in individual cases to see if it actually holds true, i.e., if the copyright or patent systems actually induced the creative or inventive activity in question.[260] In misappropriation, on the other hand, the effects of the free riding in question are scrutinized in each individual case, to see if the free riding is likely to impair the incentive to continue producing the same good or service in the market, not just for the plaintiff, but for others as well. Rather than allowing these effects to be presumed from the mere fact of copying or free riding, misappropriation demands that courts undertake this scrutiny upon being presented with actual evidence.[261]

In the competitive enrichment understanding of hot news, the incentives that matter the most are the ones likely to further entrench a collective action problem. In other words, it is only when free riding in the market is so prevalent that new entrants are unlikely to either cooperate or collect on their own—putting the entire enterprise of news collection at risk—that the law cares to intervene.[262] Understood from this perspective, the duty to police imposed on plaintiffs begins to make sense. A finding that the practice of systematic free riding in the market has continued unabated for a significant period of time would thus reveal that the defendant's free riding being complained of is unlikely to adversely impact collection efforts currently in place in that very market. This could, of course, come about because of a variety of factors, including the possibility that the structure of norms underlying the collection efforts has changed over time. The duty to police thus operates principally as evidence that the defendant's free riding is indeed likely to impact the plaintiff's and other information collectors' incentives.[263]

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259. See Posner, supra note 28, at 638–39 (describing and critiquing this requirement).

260. See Shyamkrishna Balganesh, Foreseeability and Copyright Incentives, 122 Harv. L. Rev. 1569, 1588–89 (2009) (making this point in relation to copyright law); Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich. L. Rev. 1197, 1207–08, 1213–14 (1996) (discussing relationship between copyrights and incentives and noting "few efforts [have been made] to limit copyright protection to those areas in which incentives are likely to have an effect on the level of creative activity").

261. But see Posner, supra note 28, at 632 (observing how this requirement is proxy for first four elements of hot news doctrine).

262. On this point, it is telling that in *National Basketball Ass'n* the court chose to couch this requirement in terms that extended beyond both the plaintiff and the defendant. See Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) ("[T]he ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.").

263. One might argue that the duty to police imposes an undue burden on information gatherers to actually commence a legal action against every possible free rider

The policing requirement, above all else, points to misappropriation's nonproprietary origins. In the traditional property-based intellectual property context, the reason such a requirement would have no basis is because a plaintiff's interest is thought to come into existence completely independent of the defendant's actions—i.e., upon creation or invention (subject, of course, to administrative requirements). Licensing away uses of the intangible, thereby creating an ex ante market, is thus considered an integral part of the regime's utility in the first place. In this context, rampant, uncompensated copying could hardly be said to cut against recognizing an entitlement in the plaintiff. In misappropriation, by contrast, there exists no ex ante legal entitlement until the defendant is competitively enriched at the plaintiff's expense. Being entirely relational then, a preexisting market for licenses is hardly among the regime's objectives.[264]

Additionally, a showing of rampant, systematic free riding by others in the market would also seriously undermine the idea that the defendant's actions are unfair in the competitive sense. Recall that the basis of the entitlement in misappropriation is that the defendant is able to save large costs (and thereby enhance its profitability) vis-à-vis others in the

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merely to preserve their future claims, and that this is likely to ignore the various economic and strategic reasons why they might have consciously chosen not to sue. To alleviate this concern, the duty ought to be considered discharged, and the claim sufficiently preserved, whenever a plaintiff can establish some minimal amount of diligence on its part to detect and deter harmful free riding. Cease and desist letters, or other forms of self-help should be deemed sufficient in this regard.

264. One might argue that this requirement tracks the well-known trespass/nuisance distinction in tort and real property law. While the law of trespass is thought to protect property's "right to exclude," the core ownership interest inherent in the exclusivity of possession, the law of nuisance is said to concern itself with an individual's right to use and enjoy the property, independent of any exclusivity as such. See Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies 22–23 (2007) (describing nuisances as "interferences with the use and enjoyment of land caused by some activity on neighboring land"). In evaluating the very existence of a plaintiff's entitlement in nuisance, the law often imposes a requirement of unreasonableness that is only ever determined relationally, by undertaking a relative cost-benefit analysis of the parties' actions. Restatement (Second) of Torts § 826 (1979) (applying utility test to determine nuisance). Nuisance law thus hardly attempts to create a tradable entitlement up front, independent of the resource itself, whereas trespass law, one might argue, especially when viewed through the market for leases and licenses to enter real property, is consciously directed at facilitating just such a market. For scholarly work examining this divide in more detail, see Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. Legal Stud. 13, 20–26 (1985) (discussing how disparity between trespass as "mechanical entitlement-determination rule" and nuisance as "judgmental entitlement-determination rule" leads these doctrines to be applied to situations of differing transaction cost levels); Smith, Law of Nuisance, supra note 52, at 975–90 (noting "property rules . . . forc[e] anyone who wants to engage in a use to bargain with the present owner," while liability rules, associated with nuisance, "are used to fine-tune basic exclusionary regimes in high-stakes contexts"). The comparison to nuisance nonetheless breaks down somewhat because of the law of servitudes and easements, which allows landowners to buy and sell their use and enjoyment privileges, the very subject matter of nuisance claims.

market. In a situation where others in the market are engaged in the same practice as the defendant, its unfair competitive advantage is diminished significantly. Indeed, in such a scenario, to grant a plaintiff relief would be to place the defendant under an obvious competitive disadvantage.

B. *Remedial Options*

Grounding hot news misappropriation in a theory of competitive unjust enrichment is also likely to have major implications for the remedial response that a court may adopt once the substantive requirements of the doctrine are satisfied. First, it calls into question courts' thus far underscrutinized practice of awarding injunctive relief in hot news misappropriation cases *as a matter of course*. Second, it sheds light on what an alternative, restitutionary award of damages might look like.

1. *The Questionable Default of Injunctive Relief.* — In almost every successful hot news misappropriation case since *International News*, courts have awarded a remedy in the nature of an injunction.[265] The injunction usually prohibits the defendant from free riding on the plaintiff's information for a specified period of time after its publication. What is striking about this reality is that it is usually accompanied by very little discussion of *why* injunctive relief ought to be the obvious remedial choice for courts.

In *International News*, the majority made the move from substance to remedy without much reasoning at all. The logic behind the misappropriation doctrine (then and now) hardly comports with the exclusive use of injunctions as a remedial response. The basis of misappropriation lies in a defendant's obtaining an unfair competitive advantage by relying on the plaintiff's cost and time intensive information-gathering efforts. Its unfairness thus arises from the unjust enrichment provided to the defendant through cost savings. What is crucial to understand is that until this enrichment (i.e., cost savings) occurs, the plaintiff itself is vested with no primary right and correlatively, the defendant is under no primary duty.[266] Indeed, what makes unjust enrichment an independent basis of

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265. To be sure, such claims are often accompanied by ones for copyright infringement or other unfair competition causes. Yet, in cases where hot news misappropriation is the successful cause of action, the tendency is overwhelmingly in favor of granting injunctive relief. See, e.g., Int'l News Serv. v. Associated Press, 248 U.S. 215, 245–46 (1918) (upholding district court's injunction); Standard & Poor's Corp. v. Commodity Exch., Inc., 683 F.2d 704, 712 (2d Cir. 1982) (upholding preliminary injunction in case of alleged misappropriation of stock index in sale of futures contracts); Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 343–47 (S.D.N.Y. 2010) (issuing injunction for misappropriation); Bd. of Trade v. Dow Jones & Co., 456 N.E.2d 84, 90–91 (Ill. 1983) (prohibiting Chicago Board of Trade from using "Dow Jones Industrial Average as a basis of stock index futures contracts").

266. Here and elsewhere, the idea that the misappropriation doctrine (and indeed unjust enrichment more generally) does not create an ex ante entitlement should not be taken to imply that it lacks a framework for recovery from which entitlements can be

recovery in the common law is its creation of a primary obligation (of restitution) based on the defendant's actions.[267] A primary right is one whose existence is not dependent on the breach of a preexisting right or duty, unlike a secondary right that comes into existence only upon such a breach.[268] The tort of negligence, for instance, operates to create a secondary right (to compensation) for the breach of a primary duty (of care), imposed on individuals, that the defendant breached. In a similar vein, the tort of trespass creates a secondary right for the breach of a primary duty (of inviolability) that correlates with a property owner's right to exclude. In situations of unjust enrichment, however, the law does not just create a secondary right to vindicate a primary right along the lines of tort and property law, but rather recognizes a defendant's actions to create an altogether new primary duty appropriate to the circumstances. Unjust enrichment involves the legal creation of a primary obligation to *restore the benefit obtained* in a certain context; and this distinguishes it from other areas of the common law.[269]

The right created by unjust enrichment, unlike other primary rights, is also highly specified in content, thereby obviating the need for an independent secondary right.[270] Unjust enrichment thus vests a plaintiff with a right to restoration as an enforceable primary right. Now consider the choice of remedy to enforce this right. Injunctive relief is by its very nature forward looking and directed at preventing the occurrence of an action that is likely to bring about a breach of duty or the interference with a party's right. This is in contrast to damages, which are principally backward looking. On the face of things, forward looking injunctive relief might seem to make sense in cases of unjust enrichment. Why not prevent the problematic transfer (i.e., the enrichment and corresponding loss) rather than wait for it to happen and then correct it through restora-

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discerned ex ante. Being able to discern an entitlement ex ante and plan for or around its existence and enforcement is vastly different from the law's ex ante recognition of a legally enforceable entitlement. The legal basis of the entitlement, for unjust enrichment, comes into existence only after the event of enrichment has actually occurred. I thus agree with the idea, offered by some scholars, that unjust enrichment law is capable of signaling entitlements ex ante. See, e.g., Hanoch Dagan, Restitution's Realism, *in* Philosophical Foundations of the Law of Unjust Enrichment, supra note 157, at 54, 68–69 (arguing "it is important to set up the *ex ante* entitlements for [mistaken payment cases] in a way that properly addresses the autonomy and the welfare concerns of both [parties]"). I would emphasize, however, that the law does not enforce them in their ex ante status without connecting it to some other interest.

267. See Birks, Unjust Enrichment, supra note 160, at 3 (noting that law of unjust enrichment is based on "restitution [which] is a right to a gain received by the defendant").

268. See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays 101–02 (Walter Wheeler Cook ed., 1919) (discussing difference between in rem primary rights and in personam secondary rights).

269. See Grantham & Rickett, supra note 215, at 163 (describing right to restoration as primary right).

270. Id. (noting unjust enrichment "requires no secondary right to found the grant of restoration").

tion? The answer derives entirely from the fact that prior to the transfer (i.e., the enrichment), the plaintiff has no primary interest at all that the law can come to support and enforce. This is where the divergence of unjust enrichment from other parts of the common law assumes functional significance. Tort, property, and contract law each create secondary rights and duties that operate above a set of primary ones, and injunctive relief (or its equivalent, e.g., specific performance) can be understood as enforcing these primary obligations; unjust enrichment, on the other hand, has no similar equivalent. Consequently, unless injunctive relief purports to have no connection to the underlying substantive right, it remains unviable as an immediate option.

One might, however, argue that unjust enrichment in reality creates a secondary right—for the remedial enforcement of the primary obligation of restoration that the defendant has failed to discharge.[271] In other words, unjust enrichment does not just create a primary right, but instead imposes liability for the nonperformance of an obligation that the circumstances created.[272] Even if this view were accepted, it hardly cuts in favor of injunctive relief as a remedy. The effect of this secondary right approach to unjust enrichment is to blur the distinction between unjust enrichment and the law of torts, since it renders the nonfulfillment of the primary obligation (of restoration) an actionable wrong. All the same, it does little to change the internal content of the obligation itself, which remains restorative. Restoration, however, remains an affirmative duty, which sets it apart from other tort law duties that are largely negative in structure. As a preventive remedy, injunctive relief then has little connection to restoration except when tied to a preexisting interest around which to operationalize the affirmative duty (e.g., a property right). In the absence of a pre-primary interest of this kind in unjust enrichment, injunctive relief can do little by way of furthering the restorative content of the obligation in unjust enrichment, be it primary or secondary in structure.

Consider this logic in the context of hot news misappropriation. Let us start from the basic proposition that factual news is a public domain

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271. For an extensive discussion of this line of reasoning, see Kit Barker, Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right, 57 Cambridge L.J. 301, 319–27 (1998) (discussing rights and remedies in context of unjust enrichment law and advocating development of "more fully integrated remedial scheme"); Peter Birks, Rights, Wrongs, and Remedies, 20 Oxford J. Legal Stud. 1, 6–25 (2000) (advocating for language of rights, rather than remedies, for law's response to wrongs); Stephen A. Smith, The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?, 36 Loy. L.A. L. Rev. 1037, 1040 (2003) [hereinafter Smith, Structure of Unjust Enrichment] (concluding "restitutionary orders can rightly be regarded as either remedial orders or as direct enforcement orders").

272. See Smith, Structure of Unjust Enrichment, supra note 271, at 1040–41 (discussing this distinction in terms of "direct enforcement" orders and "remedial" orders). Very interestingly, Smith expressly excludes injunctions from the scope of this analysis, perhaps in recognition of their inherent incompatibility with unjust enrichment.

resource—unowned, in the commons, and freely accessible by all. This implies that even upon its cost and time intensive collection, no one, not even its collector, has an exclusionary legal entitlement over it in the abstract. It is, to use Justice Brandeis's language, "free as the air to common use."[273] Now when a competitor enters the picture and gains lawful access to this public domain resource but uses it to obtain a competitive cost advantage, the law of misappropriation seeks to nullify that advantage, which it deems an act of unfair competition. Its method of doing so entails restoring to the plaintiff the cost advantage obtained by the defendant, thereby purporting to put them on a level playing field. The defendant's competitive actions thus create a duty of restoration (and a correlative right), which like traditional unjust enrichment law originates in the circumstances and context involved. Misappropriation can be understood to generate this obligation (a primary right), or to enforce the right that the circumstances created (a secondary right). Regardless of structure, though, the obligation is one of nullifying the unfair competitive advantage. Since injunctive relief is by its very nature forward looking, it would have to be granted before the defendant's actions have occurred, and thus prior to an obligation of any kind being imposed on the defendant. Yet prior to the emergence of this obligation, the plaintiff has no individual entitlement that the injunction can vindicate, given the collective, public domain nature of the information. Thus, to speak of a duty not to misappropriate hot news (analogous to a duty not to be unjustly enriched) makes little sense, since its correlative right is never vested in an individual competitor, but is in the nature of a group or collective right that is incapable of being individually enforced.[274]

Some of this logic also resonates with tort law's general reluctance to award injunctive relief except when an identifiable property right, operating as a preexisting interest, is involved.[275] Rarely do courts award injunctions in tort claims that involve an interest identified in the abstract

273. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

274. Additionally, injunctions framed in such terms raise serious constitutional issues owing to their lack of specificity, overbreadth, and the distinct possibility of contempt proceedings for noncompliance. Often referred to as "obey the law" injunctions, courts have increasingly exhibited a general reluctance to allow their issuance, despite their having been the norm for decades in some areas of the law. See SEC v. Wash. Inv. Network, 475 F.3d 392, 407 (D.C. Cir. 2007) (finding injunction enjoining future violations of Investment Advisers Act insufficiently specific to uphold); SEC v. Smyth, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005) (refusing to enforce "'obey-the-law' injunction" because an "injunction must be framed so that those enjoined know exactly what conduct the court has prohibited" (quoting Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs., 225 F.3d 1208, 1223 (11th Cir. 2000))); SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1318–19 (D.C. Cir. 1981) (declining to enforce part of injunction that forbade engaging "in any act, practice, or course of business which operates or would operate as a fraud or deceit").

275. See John Murphy, Rethinking Injunctions in Tort Law, 27 Oxford J. Legal Stud. 509, 509–11 (2007) (arguing for expansion of availability of injunctions in tort law).

(e.g., a right not to be negligently injured). They remain willing to do so only when the interest is a property or property-like interest. The purported reason behind this is the fact that most tort claims, with the exception of property-related ones, are contingent on specific consequences accruing from a defendant's actions.[276] Thus, negligence is actionable only upon a showing of harm that was a reasonably foreseeable consequence of the defendant's actions. To intervene before these consequences develop would convert the action into a vastly different one.

Analytical reasons apart, the costs of uncertainty also favor avoiding injunctive relief in hot news cases, at least as the default remedy.[277] Injunctive relief for entitlements in information may generate costs beyond those traditionally seen in tangible property. Often, such relief is incapable of being tailored with precision in advance, so as to avoid including perfectly legitimate activities within its scope.[278] As a result, plaintiffs try to leverage their entitlements for amounts well in excess of what the entitlements are valued at ex post, producing inefficient results in the market.[279] Mark Lemley and Phil Weiser refer to this real or threatened use of litigation as the holdup strategy in intellectual property.[280] In hot news misappropriation cases, the uncertainty surrounding a plaintiff's entitlement is unavoidable. A defendant's act of lifting the factual content from a competitor's news story is rendered actionable by misappropriation, while the act of accessing and reading that content and using it as a tip to obtain the exact same information is deemed perfectly acceptable, and indeed necessary in the industry.[281] Yet the line between lifting facts from a competitor's story and using it as a tip for a newspaper's own story is perilously narrow and incapable of being policed within the remedial framework. In this scenario, relying on injunctive relief as a default remedy runs the risk of impairing the beneficial (and efficient) practice of using factual tips, resulting in a grossly inefficient duplication of efforts,

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276. For a critique of this logic, albeit in simplistic terms, see id. at 524–30.

277. For an identification of this problem and its elaboration, see Stewart E. Sterk, Property Rules, Liability Rules, and Uncertainty About Property Rights, 106 Mich. L. Rev. 1285, 1329 (2008) ("When removal costs are high, property-rule protection—awarding injunctive relief to the copy-right holder—is likely to encourage inefficient search and punish users who act efficiently.").

278. See Mark A. Lemley & Philip J. Weiser, Should Property or Liability Rules Govern Information?, 85 Tex. L. Rev. 783, 793–95 (2007) (arguing rights that cannot be clearly defined, such as patent and copyright, mean that "injunctive relief is a remedy with significant error costs").

279. Mark A. Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, 85 Tex. L. Rev. 1991, 1994–2010 (2007) (studying this phenomenon in relation to patents); Lemley & Weiser, supra note 278, at 795 ("[B]ecause rights holders know that they can obtain an injunction that disadvantages the defendant more than it benefits them, they use that knowledge to drive settlement rates well above the 'benchmark' rate . . . .").

280. Lemley & Weiser, supra note 278, at 795.

281. See Int'l News Serv. v. Associated Press, 248 U.S. 215, 243–44 (1918) ("[B]oth parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business.").

or alternatively, in the creation of an effective monopoly for information gatherers with a competitive advantage. Indeed, if the ability to obtain injunctive relief of this form had been the norm when news collection and dissemination first emerged, it is doubtful whether cooperative newsgathering among competitors of different sizes would be as prevalent as it is today.

There is also a perhaps more straightforward explanation for making damages the default remedy in hot news misappropriation cases. In *eBay Inc. v. MercExchange, L.L.C.*, the Supreme Court concluded that in choosing between remedial options to protect a substantive right, courts had to follow equity's traditional four-factor test to rule out the suitability of monetary damages before granting injunctive relief.[282] This process is mandated regardless of substantive area, and even when the substantive right involved is the right to exclude, i.e., a property right.[283] Courts in hot news misappropriation cases are thus now mandated to begin with the default of monetary relief once a substantive claim is made out, and then only upon a showing of its unsuitability can they move toward granting injunctive relief. Should courts come to recognize the central purpose of the doctrine as being about remedying an unfair cost saving by a defendant, damages will likely be deemed sufficient in an overwhelming majority of cases.

Very rarely, courts seem willing to award plaintiffs injunctive relief in unjust enrichment cases even prior to the occurrence of an actual enrichment.[284] These are usually situations where the defendant's enrichment is imminent, with the injunctions aptly referred to as "quia timet injunctions."[285] Quia timet injunctions are not, strictly speaking, restitutionary remedies, since no enrichment has yet occurred that would require restitution. All the same, these injunctions derive from the exact same logic that underlies ordinary restitutionary relief,[286] except that they are coupled with an attempt to avoid multiple lawsuits and the transaction costs likely to accompany the enrichment and its annulment. Relief of this

282. 547 U.S. 388, 390 (2006). See generally John M. Golden, Principles for Patent Remedies, 88 Tex. L. Rev. 505, 577–79 (2010) (observing how four-factor rule originated in relation to preliminary injunctions, and made its way into analysis of permanent injunctions through use of presumptions).

283. See *eBay,* 547 U.S. at 392 ("[T]he creation of a right is distinct from the provision of remedies for violations of that right.").

284. See Charles Mitchell, The Law of Contribution and Reimbursement 49–50 (2003) ("In some circumstances English law gives a claimant a remedy the purpose of which is not to reverse a defendant's unjust enrichment . . . but to prevent the . . . unjust enrichment . . . from arising in the first place."); Charlie Webb, What Is Unjust Enrichment?, 29 Oxford J. Legal Stud. 215, 234–35 (2009) (discussing instances in which a claimant demands that the "defendant . . . pay his fair share to the creditor at the outset").

285. Mitchell, supra note 284, at 50; see also Black's Law Dictionary 855 (9th ed. 2009) (defining quia timet injunction as "[a]n injunction granted to prevent an action that has been threatened but has not yet violated the plaintiff's rights").

286. Webb, supra note 284, at 234 (noting how "the law is doing the same thing here and for the same reasons").

nature is only ever granted in a narrow set of unjust enrichment cases usually involving multiple parties.[287]

In a similar vein, courts adjudicating hot news misappropriation cases should view their discretion to grant injunctive relief as limited to the extremely narrow set of cases where a defendant's enrichment is imminent, and the injunction does no more than minimize the administrative costs of allowing the enrichment to occur and then undoing it. Most importantly, in such cases, the availability of injunctive relief should not be seen as altering the normative basis or structure of the claim, which will remain restitutionary.

2. *Calculating Restitutionary Damages.* — Rejecting injunctive relief as the default remedy in hot news cases brings us to the question of computing appropriate damages. As noted earlier, remedies for misappropriation were directed at annulling gains derived by a defendant from systematic reliance on the plaintiff's efforts, whereby a defendant obtains an unfair advantage by lowering its own collection costs.[288] This formulation is crucial, since the gain is not simply the defendant's profitability, which may have come about owing to other factors, but rather its enhanced profitability due to its unfair cost savings. The ideal solution is therefore one that focuses on annulling this cost savings and its effects on the defendant.

There are two possible ways by which this solution can be achieved. In the first, called the standard of comparison approach, a defendant's actual cost savings is thought to be large enough so as to form the sole basis of damages and is directly measured. In situations where the defendant has not made a large enough profit, or where the profit is small relative to the monetary value of the advantage the defendant obtained from its acts of free riding, a plaintiff might choose to adopt this approach for computing restitutionary damages. This measure is likely to be used against defendants whose business models are built entirely around free riding.

A second alternative, the attributable profits approach, attempts to calculate a defendant's cost savings through its profits earned, and attributable to, its free riding. Here, the defendant is forced to disgorge all earnings that are causally attributable to its free riding, which are taken to represent its unfair advantage. This approach is most meaningful against a defendant who is a profitable competitor in the market, who decided to free ride to cut its own collection costs. By determining what proportion of its profits derives from its own efforts rather than its free riding, and disgorging the latter, any cost savings and related benefits can be annulled.

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287. See, e.g., Stimpson v. Smith, [1999] Ch. 340, 350 (Eng.) (finding right of contribution between co-sureties where "there is no problem in ascertaining the amount of the contribution").

288. See supra Part II.A.2.d (discussing remedy where plaintiff's recovery is linked to defendant's disgorgement of unfair cost savings derived from its free riding).

a. *The Standard of Comparison Approach.* — The standard of comparison measure is commonly used in trade secrets cases where a defendant's benefit consists primarily in the cost savings that it realizes from its actions.[289] This approach determines a defendant's gain by comparing the defendant's actual costs with the costs it would have incurred if it had not undertaken the misappropriation.[290] Originating in patent law, this measure attempts to determine the "fruits of the advantage which [the defendant] derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result."[291] The cost savings measured is in turn viewed as the equivalent of any profits that the defendant might have earned from its actions.[292]

Translating this approach into the hot news context would entail determining the newsgathering costs that a free riding defendant saves through its actions. Since the focus in hot news misappropriation cases is on systematic (as opposed to one-off) free riding over a period of time, this is unlikely to be hard to determine. Variables are likely to include a plaintiff's costs of hiring and maintaining correspondents for a specific geographic area, the costs of sending them to independently investigate a story, and the costs involved in transmitting this information back to the editorial office on a timely basis.[293] These costs are likely to vary directly with the extent of a defendant's free riding—i.e., whether it free rides on the efforts of just one newspaper or a group of them.

This measure of damages is likely to work best in situations where the defendant's business model is built entirely around free riding, or where its profits from its actions as such are not large enough to operate as a deterrent when disgorged to the plaintiff.

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289. See Salsbury Labs., Inc. v. Merieux Labs., Inc., 908 F.2d 706, 714–15 (11th Cir. 1990) (approving of lower court's use of only costs saved by defendant in calculating damages); Telex Corp. v. IBM Corp., 510 F.2d 894, 930–32 (10th Cir. 1975) (approving use of standard of comparison measure because "[n]ot to have allowed such would have been a denial to IBM of a substantial portion of the damage sustained by it"); Int'l Indus. v. Warren Petroleum Corp., 248 F.2d 696, 699 (3d Cir. 1957) (describing standard of comparison measure as "the comparison of the cost . . . by means of the use of the trade secret with a method of accomplishing the same result which would have been open to defendant had he not appropriated the trade secret"); Restatement (Third) of Unfair Competition § 45 cmt. f (1995) ("The traditional form of restitutionary relief in an action for the appropriation of a trade secret is an accounting of the defendant's profits on sales attributable to the use of the trade secret."); 1 Palmer, supra note 171, § 2.8, at 111–12 (describing goal of standard of comparison measure as "depriv[ing] the defendant of the expense saved by the wrongful use of the trade secret").

290. 1 Melvin F. Jager, Trade Secrets Law § 7:23, at 7-127 to 7-128 (2003).

291. Tilghman v. Proctor, 125 U.S. 136, 146 (1888).

292. See *International Indus.*, 248 F.2d at 702 (noting how in this process "the profits are simply measured by the savings determined" (emphasis omitted)).

293. In the district court case that preceded the Supreme Court's decision in *International News*, the plaintiff claimed that this exercise cost $3,500,000. Associated Press v. Int'l News Serv., 240 F. 983, 984 (S.D.N.Y. 1917).

b. *The Attributable Profits Approach.* — Another common measure of restitutionary damages involves ascertaining the defendant's net profits and then determining what portion of it is attributable to its acts of free riding.[294] This represents the effects of its cost savings on its profitability, which can then be disgorged to the plaintiff. Copyright and trade secrets law routinely allow the use of this measure, as does trademark law.[295] It enables a plaintiff to recover the defendant's profits after deducting for the defendant's own expenses and other factors that might have been causally responsible for the profits.[296]

This approach, however, focuses on a defendant's actual rather than hypothetical profits.[297] Consequently, it only makes sense in situations where the defendant has made a profit that is in large measure causally linked to its free riding. In apportioning the profits on this causal basis, courts eliminate parts that reveal little connection between the free riding and the defendant's earnings, and where it is unclear if the defendant earned anything at all specifically from the free riding.[298]

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294. 1 Palmer, supra note 171, § 2.12, at 161–62.

295. See 17 U.S.C. § 504(b) (2006) ("The copyright owner is entitled to recover . . . any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."); Restatement (Third) of Unfair Competition § 45 cmt. c (1995) (describing compensatory damages and restitution available for appropriation of trade secrets); id. § 37 cmts. g–h (discussing calculation of damages for trademark infringement); see also Clark v. Bunker, 453 F.2d 1006, 1011 (9th Cir. 1972) (holding that plaintiff had right to recover all profits of defendant from trade secret appropriation, regardless of whether it caused loss for plaintiff); Schreyer v. Casco Prods. Corp., 190 F.2d 921, 924 (2d Cir. 1951) (upholding trial court's award of damages based on accounting of profits defendant made from unfair competition practices).

296. See 4 Nimmer & Nimmer, supra note 91, § 14.03 (discussing this process in copyright law).

297. Univ. Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 536 (5th Cir. 1974) ("[T]he defendant is normally not assessed damages on wholly speculative expectations of profits."); Associated Residential Design, LLC v. Molotky, 226 F. Supp. 2d 1251, 1255 (D. Nev. 2002) ("[T]he Ninth Circuit has limited the recovery of indirect profits to those that are non-speculative and directly attributable to the infringement." (citing Mackie v. Reiser, 296 F.3d 909, 914 (9th Cir. 2002))); 4 Nimmer & Nimmer, supra note 91, § 14.03[A] (quoting Judge Posner for proposition that damages in copyright cases cannot be based on "imagine[d] fantastic success").

298. Bouchat v. Balt. Ravens Football Club, Inc., 346 F.3d 514, 520 (4th Cir. 2003) ("Once the copyright owner has established the amount of the infringer's gross revenues, the burden shifts to the infringer to prove either that part or all of those revenues are 'deductible expenses' (i.e., are not profits), or that they are 'attributable to factors other than the copyrighted work.'"); *Mackie*, 296 F.3d at 915 ("[A] district court must conduct a threshold inquiry into whether there is a legally sufficient causal link between the [copyright] infringement and subsequent indirect profits."); USM Corp. v. Marson Fastener Corp., 467 N.E.2d 1271, 1276 (Mass. 1984) ("Once a plaintiff demonstrates that a defendant made a profit from the sale of products produced by improper use of a trade secret, the burden shifts to the defendant to demonstrate those costs [were] offset against . . . the portion of its profit attributable to factors other than the trade secret." (citing Jet Spray Cooler, Inc. v. Crampton, 385 N.E.2d 1349, 1358 n.14 (Mass. 1979))); 4 Nimmer & Nimmer, supra note 91, § 14.03[B][2] ("The copyright owner is entitled to

In the hot news misappropriation context, this would commence with a court ascertaining if the defendant made any profit at all, and if so, how much it amounts to in gross. It would then allow the defendant to deduct any expenses of its own that it incurred, such as overhead, administrative, and other recurring expenses. This is likely to be significant if the defendant is an entity that collects information on its own, or through other (nonmisappropriation-based) strategies. Salient among these costs might also be the expenses incurred by a defendant in independently investigating any tips it legitimately obtained from competitors. A court would then move to determining how much of the defendant's profits can be causally linked to the information the defendant obtained through free riding.

Disgorging the defendant's gain, represented in its cost savings, would thus firmly root hot news misappropriation in the idea of competitive unjust enrichment. It would ensure that the remedial corrective courts offer comports with the reasons for the action and is neither under- nor overinclusive in coverage. Depending on the circumstances of the case and the peculiarities of the defendant's enterprise and free riding, one approach to disgorging a defendant's gain might be preferable to another, and either plaintiffs or courts should have the option of deciding between them. Most importantly, it would at the very least ensure that in hot news misappropriation cases, courts begin to engage with the question of appropriate damages—something that they have failed to do since *International News*.

C. *Clues to the First Amendment Puzzle*

Perhaps more intriguing than courts' refusal to develop a method of calculating damages in hot news misappropriation cases is the fact that, to date, no court has examined the extent to which the action remains compatible with the constitutional guarantees of free speech under the First Amendment. In *International News*, Justice Brandeis's dissent alluded to the doctrine's potential speech-limiting effects.[299] Given the lack of a robust First Amendment jurisprudence at the time, however, his analysis remained principally in the realm of rhetoric. No decision since has addressed the First Amendment implications of the hot news doctrine directly.[300] While a detailed discussion of the interaction between the First

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recover only those profits of the infringer that are attributable to the infringement." (internal quotation marks omitted)).

299. Int'l News Serv. v. Associated Press, 248 U.S. 215, 266 (1918) (Brandeis, J., dissenting).

300. In *National Basketball Ass'n v. Motorola, Inc.*, the Second Circuit refused to reach the First Amendment issue, since it ultimately found for the defendant. 105 F.3d 841, 854 n.10 (2d Cir. 1997). The district court in *National Basketball Ass'n* considered and rejected the First Amendment claim. See Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 931 F. Supp. 1124, 1138–40 (S.D.N.Y. 1996) (rejecting defendant's claim that "First Amendment . . . prohibits this Court from enjoining their dissemination of real-time information about the NBA because such an injunction would constitute an

Amendment and the common law is beyond the scope of this Article, this section illustrates how rooting hot news misappropriation in a theory of competitive unjust enrichment is likely to go some distance in rendering it compatible with the free speech protections of the First Amendment. On the face of things, the misappropriation doctrine raises at least three potential First Amendment issues.

First, the hot news doctrine deals with speech that is inherently newsworthy.[301] Given that it is only time-sensitive information that qualifies for protection, newsworthiness is in many ways central to hot news. Yet as a historical matter, liability for newsworthy information—information imbued with a public interest in its dissemination—has received very close scrutiny under the First Amendment.[302] This is especially so when such information is truthful in nature, and lawfully obtained.[303] In these instances, the Supreme Court has continued to require that the restriction serve a substantial purpose of the highest order for it to pass muster under the First Amendment.[304] While it remains unclear whether this implies that courts need to be applying strict scrutiny in such cases (as opposed to the more deferential intermediate scrutiny), at the very least it demands a cogent identification of the law's purpose, and the extent to

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unconstitutional prior restraint"), aff'd in part and vacated in part sub nom. *Nat'l Basketball Ass'n*, 105 F.3d 841.

301. Speech is taken to be newsworthy as a category when it deals with material that is of a "public concern." Bartnicki v. Vopper, 532 U.S. 514, 525 (2001).

302. See, e.g., Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574 (1977) (citing cases emphasizing "protection extended to the press by the First Amendment in defamation cases"); Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 479 (Cal. 1998) ("[N]ewsworthiness is . . . a constitutional defense to, or privilege against, liability for publication of truthful information."); Battaglieri v. Mackinac Ctr. for Pub. Policy, 680 N.W.2d 915, 919 (Mich. Ct. App. 2004) (agreeing with defendant that "use of Battaglieri's name and statement [in a fundraising letter] is protected under the First Amendment because the letter concerned a matter of legitimate public concern"). Some commentators are split on whether to afford the media broad First Amendment protection from breach of privacy torts for what they publish. Compare Anthony L. Fargo & Laurence B. Alexander, Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts, 32 Harv. J.L. & Pub. Pol'y 1093, 1141–53 (2009) (arguing for broad liability protection for the media on First Amendment grounds), with Rodney A. Smolla, Privacy and the First Amendment Right to Gather News, 67 Geo. Wash. L. Rev. 1097, 1138 (1999) (arguing against liability protection and concluding that "strong First Amendment doctrines stand in the way of many of the most meaningful privacy reforms").

303. See Fla. 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."); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) ("[I]f a newspaper 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.").

304. See cases cited supra note 303.

which the legal mechanism employed is best positioned to realize that purpose.[305]

Second, the prior restraint rule under the First Amendment cautions against the ready grant of future-looking injunctive relief in cases where courts have not undertaken a substantive examination of the speech in question.[306] Prior restraints are treated by courts with extreme suspicion under the First Amendment, since they preclude a defendant from raising a successful defense that its actions are protected against liability by the First Amendment.[307] This is especially so when the defendant is a newspaper, since the potential chilling effects that flow from the restraint are thought to pose additional burdens on the nature and scope of democratic dialogue.[308] The rule certainly does not extend to situations where a court has examined a defendant's actions (i.e., speech) and found them to fall outside the scope of the First Amendment.[309] But an injunction that operates even before the defendant undertakes its act of publi-

305. This distinction turns on whether the free speech burden is content based or content neutral. Content-based regulation generally differentiates between speech on the basis of its message or viewpoint, whereas content-neutral burdens implicate free speech interests incidentally, and do so independent of any underlying viewpoint or perspective. Within the intellectual property context, scholars continue to disagree on whether the law's effects on speech are content based or content neutral. Compare C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891, 922–33 (2002) (arguing that copyright is content based), with Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1, 47–54 (2001) (arguing that it is content neutral).

306. For an overview of the prior restraint rule, see generally Stephen R. Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539 (1977); Thomas I. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648 (1955); John Calvin Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L.J. 409 (1983); William T. Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245 (1982); Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev. 53 (1984).

307. See, e.g., Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 66–67 (1989) (condemning seizure of "obscene" materials under Indiana's RICO law and emphasizing that "State cannot escape the constitutional safeguards of our prior [First Amendment] cases by merely recategorizing a pattern of obscenity violations as 'racketeering' "); Vance v. Universal Amusement Co., 445 U.S. 308, 316–17 (1980) ("[P]rior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.").

308. See Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (noting "damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events").

309. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (noting prior restraint doctrine requires suppression of speech before determining whether it is unprotected, but holding order in question is acceptable because it will not go into effect until after final determination that actions were unprotected); Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147, 169–72 (1998) (indicating permanent injunctions issued after speech is determined to be unprotected are not constitutionally problematic).

cation—where the content of such publication remains uncertain—is thought to implicate the prior restraint rule.

Injunctive awards in misappropriation cases combine both backward- and forward-looking elements. On the one hand, they enjoin a defendant's actions based on past activities that are actually scrutinized by a court. This tracks the usual practice of courts in traditional intellectual property cases.[310] At the same time, however, hot news injunctions also enjoin a defendant's future publication (albeit of a similar nature) without the court undertaking a substantive examination of the speech directly, by focusing instead on an abstract statement of the law that would render the defendant potentially liable. In the obscenity context, some refer to these injunctions as standards injunctions, since they enjoin behavior based entirely on an abstract standard, rather than any concrete, actual behavior.[311] The injunction in *International News* is illustrative—the court enjoined the defendant from "any taking or gainfully using of the complainant's news, either bodily or in substance, from bulletins issued by the complainant or any of its members, or from editions of their newspapers, until its commercial value as news to the complainant and all of its members has passed away."[312] While this applied to news already published by the defendant, it clearly also extended to news yet to be collected, published, and taken, thereby likely implicating the prior restraint rule.

Third, in contrast to other forms of intellectual property rights, the misappropriation doctrine—in its current propertarian version—contains no internal device that allows free speech interests to be balanced against the control they afford plaintiffs. In copyright law, the fair use doctrine and idea/expression dichotomy are thought to perform this function, and other regimes contain similar mechanisms, often referred to as First Amendment safety valves.[313] Some have thus argued that the

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310. One sees this, for instance, in copyright cases involving a defendant's continued copying and dissemination of a plaintiff's (particular) protected work. See Tiffany D. Trunko, Note, Remedies for Copyright Infringement: Respecting the First Amendment, 89 Colum. L. Rev. 1940, 1943–44 (1989) (explaining copyright plaintiff can receive permanent injunction against future infringement after "show[ing] past acts of infringement and a substantial likelihood of further infringement").

311. See Doug Rendleman, Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute, 44 U. Chi. L. Rev. 509, 555 (1977) (referring to injunctions against dissemination of obscenity as "standards orders"); Steven T. Catlett, Note, Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine, 84 Colum. L. Rev. 1616, 1619 (1984) (referring to injunction against any future dissemination of obscene materials as "blanket or 'standards' injunction").

312. Int'l News Serv. v. Associated Press, 248 U.S. 215, 245 (1918) (emphasis omitted) (internal quotation marks omitted).

313. See, e.g., Neil Weinstock Netanel, Copyright's Paradox 63 (2008) [hereinafter Netanel, Copyright's Paradox] ("[C]ourts consistently hold that fair use provides a free speech safety valve within copyright law that obviates any need for external, First Amendment constraint on copyright holders' entitlements."). For a recent elaboration by the Court on the importance of these safety valves in copyright law, see Eldred v. Ashcroft,

absence of such safety valves in the misappropriation context renders misappropriation additionally problematic under the First Amendment, at least facially.[314]

Each of these problems may be overcome to some extent by situating hot news misappropriation in a theory of competitive unjust enrichment rather than property rights, a distinction that, as I have shown, is purposive, structural, and functional. To begin with, it would jettison the common myth that the misappropriation doctrine attempts to create just another form of intellectual property, premised on granting actors incentives to collect and disseminate public domain information. While the rhetoric surrounding the doctrine today mistakenly portrays misappropriation precisely along these lines, even Justice Pitney explicitly rejected this idea when originally formulating the doctrine.[315] Misappropriation's purpose and thus the interest behind its creation must instead be found in the actual newsgathering practices of newspapers, and the collective action problem that participants face when they are dealing with an undifferentiated common property resource in that setting. The multiple references to this problem in *International News* point to its being the core concern that motivated the creation of the doctrine.[316] Indeed the identification of the collective action problem inherent in the newspaper industry was hardly unique to the Court. Since then, the federal government has come to provide newspapers with numerous other important subsidies and immunities when they are engaged in the practice of cooperative newsgathering.[317] Cooperation as a solution to the prob-

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537 U.S. 186, 219 (2003) (stating "copyright law contains built-in First Amendment accommodations," such as the distinction between ideas and expression and the defense of fair use).

314. See, e.g., Brief Amici Curiae of Citizen Media Law Project et al. in Support of Neither Party at 18, Barclays Capital Inc. v. Theflyonthewall.com, Inc., No. 10-1372 (2d Cir. June 21, 2010) (arguing that "[h]ot news misappropriation, if it is allowed to survive, must incorporate the same First Amendment safeguards as other forms of intellectual property and 'quasi-intellectual property'").

315. *International News*, 248 U.S. at 234 ("It is not to be supposed that the framers of the Constitution, when they empowered Congress [under the Intellectual Property Clause of the Constitution], intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.").

316. Id. at 231 (pointing out cost of gathering and promptly distributing news, and necessity of cooperation with other competitors). For references to this problem in the lower courts' opinions, see Associated Press v. Int'l News Serv., 245 F. 244, 245 (2d Cir. 1917) ("[T]he very great expense of such acquisition and transmission of information is borne by ratable levy or assessment upon its 'members.'"); Associated Press v. Int'l News Serv., 240 F. 983, 984 (S.D.N.Y. 1917) ("[I]t is hardly necessary to say that no modern daily newspaper can afford to be without the facilities offered by a well-equipped news agency.").

317. These include the Newspaper Preservation Act of 1970 and other similar antitrust immunities. See, e.g., 15 U.S.C. § 1801 (2006) (declaring it "to be the public policy of the United States to preserve the publication of newspapers . . . where a joint operating arrangement has been . . . entered into because of economic distress"). For an elaborate discussion of the background to this Act, see generally H.R. Rep. No. 91-1193 (1970), reprinted in 1970 U.S.S.C.A.N. 3547; S. Rep. No. 91-535 (1969). For additional

lem is thus recognized to be of central importance to the survival and profitability of the newspaper industry. Accepting this purpose as the primary reason for the doctrine is thus likely to render misappropriation's speech burden content neutral rather than content based, given its focus on preserving competition within the specific industry.[318]

This leads us to the second part of the competitive unjust enrichment framework: the liability framework. Here, the unjust enrichment rationale allows a plaintiff to recover without creating an abstract ex ante entitlement in the material collected. By focusing instead on the competitive relationship between the parties, it consciously avoids attaching an exclusionary framework to the content of the speech. One might thus argue that in so doing, its burden on free speech is narrowly tailored and indeed no greater than necessary to achieve its purpose. A property-based approach, which would by contrast focus on creating a market for the information collected by attaching an exclusionary entitlement directly to it, independent of the parties and their relationship, is likely to be far more restrictive in this regard.

Moving misappropriation's remedial framework toward one of restitutionary damages is also likely to avoid any significant conflict with the First Amendment's restriction on prior restraints. Instead of censoring the publication of truthful, newsworthy material, the regime would now do no more than enable a plaintiff to insist that the defendant disgorge its cost savings, and compete on an equitable basis. While this would certainly place a price on a defendant's speech within a specific setting (albeit commercial speech), it certainly would not curtail the production of such speech altogether.[319]

Lastly, relying on unjust enrichment instead of property as the basis for the misappropriation doctrine obviates the need for an independent safety valve along the lines seen in traditional intellectual property regimes. Since traditional intellectual property regimes are premised on an analogy to real property rights, they operate by attaching an exclusionary entitlement to a fictional, yet identifiable res (e.g., the original expression, or an individual's persona). Consequently, from a free speech point

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options being considered in this vein, see Randall Mikkelsen, U.S. Law Chief Open to Antitrust Aid for Newspapers, Reuters.com (Mar. 18, 2009, 5:49 PM EDT), at http://www.reuters.com/article/idUSN1835208520090318 (on file with the *Columbia Law Review*) (describing U.S. Attorney General Eric Holder's comments regarding his commitment to modify antitrust laws if necessary to maintain U.S. print newspaper industry).

318. Such a purpose is likely to track the Court's opinion in *Turner Broadcasting System, Inc. v. FCC*, where it found the FCC's must-carry rules to be content-neutral free speech regulation, since they were directed at preventing "unfair competition" in the communications industry, and their speech effects were incidental. See 512 U.S. 622, 652 (1994) ("[T]he must-carry provisions are not designed to favor or disadvantage speech of any particular content.").

319. See Netanel, Copyright's Paradox, supra note 313, at 116 (noting that free speech does not necessarily mean costless speech).

of view, it becomes necessary to ensure that the entitlement covers no more than is absolutely necessary to further the purpose of the regime. Thus a device like fair use or the idea/expression dichotomy in copyright law ensures that the right attaches merely to original expression when used by a defendant in a manner that impacts a creator's market. The necessity for the safety valve then derives from the unique exclusion-based property strategy that the regime employs.[320] Since it creates an ex ante entitlement in the abstract, balancing it with an ex ante carve-out becomes essential. With an unjust enrichment framework, however, the very existence of the legal entitlement is determined ex post, relationally, and upon a consideration of multiple factors. Since the entitlement is never determined in the abstract, an equally abstract safety valve becomes less essential. Thus, relationally determined variables such as direct competition, free riding, and an examination of the systemic incentive effects of the defendant's actions allow courts to modulate and balance the entitlement against free speech and other concerns.

To be sure, the competitive unjust enrichment framework is unlikely to affirmatively shield hot news misappropriation from the reach of the First Amendment, and the conclusions offered here ought to be considered tentative, especially since no court has to date weighed in on the issue. Yet, comparatively speaking, an unjust enrichment framework is almost certainly more compatible with free speech interests than a property-based framework that simulates an exclusionary or monopoly interest in the news, however narrowly tailored in time or coverage.

CONCLUSION

Speaking of the hot news misappropriation doctrine and its origins in *International News*, Judge Learned Hand observed that despite the common law's attempt to speak in generalities, at times "there are cases where the occasion is at once the justification for, and the limit of, what is decided."[321] An otherwise outspoken champion of the common law method of rule development, his unwillingness to extend and apply the misappropriation doctrine to new situations has formed the subject of some criticism.[322] On closer analysis, though, there may have indeed been a good reason for his attempt to limit misappropriation to its origins

320. See Smith, Two Strategies, supra note 52, at S464–78 (discussing costs associated with exclusion and governance regimes). For an application of this difference to intangibles, see Smith, Intellectual Property, supra note 258, at 1817–19.

321. Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929). What is often ignored is that Judge Learned Hand remained willing to extend the doctrine and apply it to situations that were "substantially similar" to *International News*, in explicit recognition of the doctrine's structural constraints. Id.

322. See, e.g., U.S. Golf Ass'n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028, 1036 (3d Cir. 1984) (noting conflicting cases); Baird, Common Law, supra note 47, at 419 (discussing Judge Hand's reasoning).

in the newspaper industry; for it is only upon so doing that its theoretical and structural bases become abundantly clear.

As the hot news doctrine came to be detached from the newspaper industry and extended to new contexts, the reasons behind its creation—many of which are embodied in its unique requirements—came to be lost. Coupled with the general decline of interest in the idea of unjust enrichment that occurred in the intervening period,[323] the Court's attempt to avoid creating a property right in the news by instead developing a framework of competitive unjust enrichment has continued to receive little serious attention. And yet, the doctrine continues to thrive and is among the solutions thought likely to solve the revenue problems of the newspaper industry.

Ironic as it may seem in light of common misconceptions about the doctrine, hot news misappropriation was developed as an attempt to avoid creating an exclusionary interest in factual news. It was aimed instead at preserving the common property nature of such news, while allowing industry participants to compete on equitable terms in drawing economic value from it. Recognizing that the maintenance and sharing of this common property resource required sustaining the self-organized cooperative framework that newspapers had developed, hot news misappropriation sought to raise the costs of free riding through a private law-based liability regime. At the same time, it recognized that a regime resembling the functioning of a property-based one might have the effect of distorting the existing cooperative structures that existed at the time. It sought to rely, therefore, on the idea of unjust enrichment, which allowed a plaintiff to nullify a defendant's unfair competitive advantage without having to recognize an interest vested in the plaintiff until the defendant actually obtained such an advantage. Justice Pitney's little understood idea of quasi-property was thus more than a mere trope, and of deep practical significance.

The maintenance and upkeep of a common pool resource has long been recognized to present a collective action problem among users of that resource. Typical attempts to solve the problem look to either government regulation for coercion, or private ownership to force any externalities to be fully internalized by a user.[324] In her pioneering work in this area, Ostrom added to those solutions by showing how homogeneous communities often solved collective action problems through mecha-

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323. See James Gordley, The Common Law in the Twentieth Century: Some Unfinished Business, 88 Calif. L. Rev. 1815, 1870 (2000) ("[A] sustained effort to systematize the . . . law of restitution has begun only in the last few decades."); Chaim Saman, Restitution in America: Why the U.S. Refuses to Join the Global Restitution Party, 28 Oxford J. Legal Stud. 99, 102 (2008) ("The idea, that restitution is its own body of law with policies and principles distinct from contract and tort, has not maintained its vitality in American jurisprudence.").

324. See Garrett Hardin, The Tragedy of the Commons, 162 Science 1243, 1244–46 (1968) (analyzing resource management strategies in light of population control and suggesting ownership or government regulation as solutions).

nisms of self-governance.[325] The newspaper industry's extensive reliance on cooperative efforts to gather the news and maintain its timeliness represents one such mechanism. Hot news misappropriation was built around this reality. Creating an ownership interest in the news, the premise of arguments for a property right, might have been one way of solving the collective action problem. Beyond the obvious social costs that would have accompanied such an approach, though, a solution based on private ownership would have almost certainly also upset the dynamics of cooperation and sharing in news collection that the newspaper industry has relied on since its very beginning. The competitive unjust enrichment model that hot news misappropriation came to be modeled on was deeply sensitive to these concerns in more ways than one.

The common law is certainly a malleable beast, and no doubt capable of being adapted to new contexts, circumstances, and necessities. Yet, this adaptation must pay close attention to the logic and rationale underlying a particular rule, most of which is often masked by the generality with which the rule itself comes to be framed and structured.[326] It is indeed this reality that explains Judge Hand's reluctance to extend the doctrine—he recognized it to be a structural solution unique to the peculiarities of one industry. To the extent that the industry continues to rely on cooperative newsgathering efforts and the sharing of leads and tips amongst competitors to sustain its news-collecting operations, the hot news doctrine will continue to provide a useful legal backbone with which to deter free riding and encourage cooperation among homogeneous interests. Should the focus move away from such cooperation, however, and in the direction of propertizing the news to deter new business models and uses for the news, the utility of the doctrine will rather ironically lie in serving as a useful reminder of the common law's reasons for *rejecting* private ownership as a solution to the problem.

325. Ostrom, supra note 134, at 18–21.

326. Oliver Wendell Holmes, The Common Law 5 (1963).